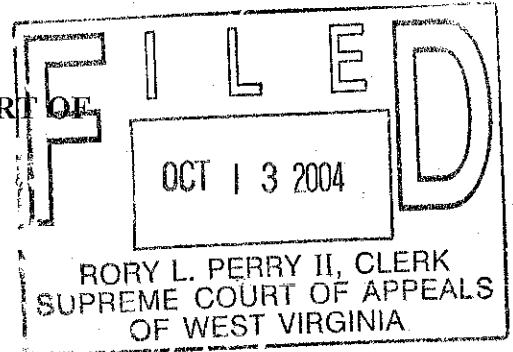


31786

IN THE STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS

At Charleston.



DANIEL JONES AND CHRISTY JONES, )

Plaintiffs/Appellees, )

v. )

~~31785~~ & 31786 )

Appeal No.:

WEST VIRGINIA STATE BOARD OF )  
EDUCATION; STATE SUPERINTENDENT )  
DAVID STEWART; MARION COUNTY )  
BOARD OF EDUCATION; MARION COUNTY )  
SUPERINTENDENT THOMAS LONG; )  
AND WEST VIRGINIA SECONDARY )  
SCHOOL ACTIVITIES COMMISSION, )

Defendants/Appellants. )

REPLY BRIEF OF APPELLANT, WEST VIRGINIA  
SECONDARY SCHOOL ACTIVITIES COMMISSION

WILLIAM R. WOOTON  
WV STATE BAR ID #4139  
THE WOOTON LAW FIRM  
P.O. BOX 2600  
BECKLEY, WEST VIRGINIA  
(304) 253-2222

*Counsel for Appellant W.Va.  
Secondary School Activities  
Commission.*

**TABLE OF CONTENTS**

**Participation in interscholastic athletics is not an available educational resource as that term is used in West Virginia Code § 18-8-1(c)(3).....2**

**The Circuit Court of Kanawha County erred in determining that the rule limiting participation in interscholastic athletics to enrolled full-time students is an unreasonable regulation .....5**

**The Circuit Court of Kanawha County erred in determining that the rule limiting participation in interscholastic athletics to enrolled full-time students is violative of the Equal Protection Provision of Article 3, §10 of the West Virginia Constitution .....8**

**Conclusion.....10**

**TABLE OF AUTHORITIES**

**CASES:**

**PAGE:**

Bailey v. Truby,

174 W.Va. 8, 321 S.E.2d 302 (1984).....3

McNatt v. Frazier School District,

C/A No. 95-0366 (W.D. Pa., unpublished decision entered

March 27, 1995, appended hereto) .....7, 10

Plyler v. Doe,

457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786  
(1981).....8

**CONSTITUTIONS:**

W.Va. Const. art. III, § 10 .....8

**STATUTES:**

W.Va. Code 18-8-1.....6

West Virginia Code § 18-8-1(c)(3). .....2, 3, 4,5

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DANIEL JONES AND CHRISTY JONES, )

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31785 & 31786 )

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SUPERINTENDENT THOMAS LONG; )

AND WEST VIRGINIA SECONDARY )

SCHOOL ACTIVITIES COMMISSION, )

Defendants/Appellants. )

**REPLY BRIEF OF APPELLANT, WEST VIRGINIA  
SECONDARY SCHOOL ACTIVITIES COMMISSION**

For reply to Appellees' brief, the Appellant West Virginia Secondary School Activities Commission adopts the arguments set forth in the brief of the Appellants West Virginia State Board of Education and State Superintendent David Stewart, the Amicus Curiae brief of the West Virginia Federation of Teachers, AFL-CIO, the Amicus Curiae brief of the West Virginia Education Association, the Amicus Curiae brief of the West Virginia School Boards Association, and the reply brief of the Appellants West Virginia State Board of Education and State Superintendent David Stewart.

In addition, the Appellant will briefly respond to Appellees' brief, in the order in which Appellees discuss the issues.

I.

**Participation in interscholastic athletics is not an available educational resource as that term is used in West Virginia Code §18-8-1(c)(3).**

The Circuit Court erred in finding that the Rules of the West Virginia State Board of Education and the WVSSAC limiting participation in interscholastic athletics to enrolled students denies home-schooled students an available educational resource in violation of West Virginia Code § 18-8-1(c)(3).

Appellees contend in Section I-A of their brief:

“Every child in West Virginia enjoys an equal entitlement to the best education we can reasonably provide.”

It is undisputed that West Virginia’s Constitution mandates a thorough and efficient system of free schools for the benefit of all citizens.

In Section I-B. of their brief, Appellees contend:

“Home schooling is a state sanctioned, supervised and supported public education alternative to the traditional classroom.”

There is no dispute that West Virginia permits parents to satisfy the truancy laws by home-schooling their children as an alternative to the traditional public school classroom.

In Section I-C of their brief, Appellees assert:

“Interscholastic athletics are a valuable component of a thorough and efficient education.”

The WVSSAC exists to promote interscholastic athletics and band activities, and therefore would not dispute that interscholastic athletics are a valuable supplement to our educational system. Nonetheless,

“Participation in non-academic extra-curricular activities, including interscholastic athletics, does not rise to the level of a fundamental or constitutional right under Article XII, §1 of the West Virginia Constitution. Therefore, its regulation need only be rationally related to a legitimate purpose.” *Bailey v. Truby*, 174 W. Va. 8, 17; 321 S.E. 2d 302 (1984).

Appellees assert in Section I-D of their brief:

“By denying home-schooled students any opportunity to participate in interscholastic athletics, Appellants are unreasonably withholding an available education resource in violation of West Virginia Code § 18-8-1(c)(3).”

This assertion amounts to a leap of faith that does not logically follow from Appellees’ arguments set forth in 1A, 1B, and 1C.

That West Virginia’s Constitution provides for a free school system, which must be “thorough and efficient”, that home-schooling is a statutorily permitted exception to the mandatory attendance laws, and that interscholastic athletics are a valuable supplement to our educational system does not lead inexorably to the conclusion that interscholastic athletics is an “available educational resource” as that term is used in West Virginia Code 18-8-1(c)(3).

The Circuit Judge below was very tentative in his conclusion that interscholastic athletics is covered by West Virginia Code 18-8-1(c)(3), holding in Conclusion of Law number 8:

“Therefore, it is *arguable* that the coaching and the facilities that are available to a student athlete *could* be considered an available educational resource within the meaning of the aforementioned statute.” (Emphasis added).

The Court below likewise made a leap of faith from the rather tentative Conclusion quoted above to Conclusions of Law numbers 9 and 10, which provide:

“9. The view that coaching and facilities are an educational resource within the meaning of West Virginia Code §18-8-1(c)(3) is supported by the fact that, as the Plaintiffs correctly note, wrestling may provide Aaron with scholarship opportunities at the college level.

10. The Defendants have breached their statutory duty under the above-quoted portion of West Virginia Code §18-8-1(c)(3) by failing to make interscholastic sports available to Aaron.”

The holding by the Circuit Court below stands alone. West Virginia Code §18-8-1(c)(3) has been the law of this State for a number of years. The pertinent portion of the statute provides:

“The county superintendent or a designee shall offer such assistance, including textbooks, other teaching materials and available resources, as may assist the person or persons providing home instruction subject to their availability. Any child receiving home instruction may upon approval of the county board exercise the option to attend any class offered by the county board as to person or persons providing home instruction may consider appropriate subject to normal registration and attendance requirements.”

That statute, and the regulations promulgated thereunder, have been consistently interpreted by the State Board of Education in a manner which does not include interscholastic athletics as an available educational resource. Appellees and others similarly situated have for a number of years attempted to persuade the Legislature to amend the statute to provide that home-schooled students would have the right to participate in

interscholastic athletics. The Legislature has consistently refused to make the change.

In summary, the executive branch agency of state government charged with the execution of public school laws has consistently interpreted the statute in question as not permitting participation in interscholastic athletics by home-schooled students. The legislative branch of government has consistently refused to amend the statute to change that interpretation. And the judicial branch of government, with the exception of the one Circuit Judge who decided this case, has likewise adhered to the plain language of the statute, the interpretation given the statute by the agency charged with its execution, and the legislative intent evidenced by the refusal of the Legislature to amend the statute.

Appellees contend that a number of other states permit home-schooled students to participate in interscholastic athletics. To argue that something could be done, or that it is done by other states, is to invite the Court to substitute its judgment for that of the State Board of Education charged with administering our system of public education. The test is not whether something can be done, and not whether other jurisdictions do something; instead, the test is whether the rule promulgated by the State Board of Education is rationally related to a legitimate purpose.

The Circuit Court erred in holding that the State Board of Education's rule limiting participation in interscholastic athletics to enrolled students violates West Virginia Code § 18-8-1(c)(3). The argument advanced by Appellees in support of the Circuit Court holding has no support in law, or in logic.

## II.

**The Circuit Court of Kanawha County erred in determining that the rule limiting participation in interscholastic athletics to enrolled full-time students is an unreasonable regulation.**

In § II-A of their brief Appellees state:

“A blanket prohibition that denies a group of students any opportunity to participate regardless of their individual academic performance or conduct is over-broad and serves no legitimate purpose.”

This proposition is best rebutted by § II-B of Appellees' Brief, which states:

“It is worth noting at the onset that the State and school officials' interest in the academic of enrolled students is different from the interest with respect to home-schooled students. School officials are vitally concerned with the academic progress of enrolled students because those students attend their schools and therefore are their responsibility. As such, school officials are free to adopt the books, curriculum, testing and athletic eligibility guidelines they believe work best for their enrolled students. Conversely, home-schooled students primarily are the responsibility of their parents who choose the curriculum and methodologies they believe work best for their children. The State's interest in a home-schooled student's academic performance is defined by the home-schooling statute found at West Virginia Code § 18-8-1. So long as a home-schooled student is in good standing with the statute, the State's interest is satisfied.”

Appellees go on to state that the relief they seek “in no way limits [Appellants] ability to continue to apply academic requirements for enrolled students.”

Enrolled students have to do more than merely remain enrolled in order to be eligible to participate in athletics. Appellees' contention that so long as a home-schooled student meets the minimum requirement for academic performance set forth in West Virginia Code § 18-8-1 that student should be eligible, clearly is an argument for different academic standards. The argument advanced by Appellees demonstrates the great difficulty, if not impossibility,

which would be encountered when trying to impose comparable academic eligibility requirements on enrolled students and students who are not enrolled in a school.

Students in a chemistry class are not representatives of a school in ~~competition with another school~~, and therefore have no impact on school spirit. Likewise, band is a co-curricular activity for which a student receives a grade. And band membership is unlimited – there is not a set number of team members. In contrast, athletic teams invariably have a set number of team members. For example, if Aaron Jones is permitted to wrestle in the 98 pound weight class, then no other student on the team can enter a match in the 98 pound weight class.

Testimony regarding the experiences of Aaron Jones are purely anecdotal, and do not constitute a sufficient evidentiary basis to support any conclusion regarding the effect participation by home-schooled students would have on school spirit or discipline.

When faced with a similar challenge in *McNatt et al. v. Frazier School District et al.*, the United States District Court for the Western District of Pennsylvania held:

“[A] Rational relationship is all that is required for the Frazier School District’s policy to pass constitutional muster, and the Court need only determine whether the school district’s policy bears a rational relationship to a legitimate state interest. In making this determination, it is not for the Court to judge the wisdom, fairness, or logic of the school’s policy. The Court’s role is limited, and we merely insure, first, that the school has a legitimate purpose it seeks to advance and, second, that the policy it adopted to advance that legitimate purpose bears some reasonable relationship to it and thus the policy is not wholly arbitrary. In other words, if there is a plausible reason for the school district’s policy, the Court’s inquiry is at an end. This is not a high standard of review, nor should it be.” (page 5 and 6, unpublished opinion of the Honorable Gary L. Lancaster appended to Brief of Appellant WVSSAC.)

The legal principles articulated by Judge Lancaster are applicable to this case. Appellees, by their choice, are not similarly situated with enrolled students. The rule in question is rationally related to the legitimate objectives of the State Board of Education and the school system of promoting academic excellence, promoting school spirit, maintaining the integrity of the interscholastic sports program, the preserving the county's financial aid through the state aid formula, and the ability to discipline student athletes.

### III.

**The Circuit Court of Kanawha County erred in determining that the rule limiting participation in interscholastic athletics to enrolled full-time students is violative of the Equal Protection Provision of Article 3, §10 of the West Virginia Constitution.**

In Footnote 42 of their brief, Appellees assert that the right to participate in interscholastic athletics is something more than a mere economic right. In support of that proposition Appellees cite *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1981) – the United States Supreme Court decision dealing with public education, and not the right to participate in interscholastic athletics. The reliance of Appellees is, at best, misplaced. *Plyler v. Doe* deals with the right to a public education; interscholastic athletics is not discussed in the entire 40 page opinion.

The language from Appellees' brief quoted in Section II above demonstrates that the relief sought will undermine the quest for academic excellence. To contend that so long as a home-schooled student meets the minimum requirement to remain a home-schooled student, that student should be permitted to participate in interscholastic athletics on par with enrolled students who meet not just the minimum requirements to remain enrolled in school, but the additional academic requirements which must be met by student athletes, is to

argue for a different, and much lower academic requirement for participation by home-schooled students.

The Circuit Court conclusion that home-school participation in interscholastic athletics would not adversely affect school spirit, limit officials' ability to maintain discipline, or significantly impact school budgets is not supported by the evidence. Although the efforts of Appellants to develop evidence on these issues were severely limited by the Circuit Court, nonetheless there is evidence that school spirit is affected when student athletes representing a school are in fact enrolled students who rub shoulders with their classmates on a daily basis. An individual who appears only to participate on an athletic team does not have the same effect on school spirit. Likewise, state funding for education in West Virginia is allocated through a formula, the principal component of which is the number of enrolled full-time students in a county. Marion County may be called upon to provide Aaron Jones with textbooks and other teaching materials, and may be called upon to permit Aaron Jones to attend any class offered by the County, including chemistry, English, band, or any other class, but Marion County will not receive any additional state funding even though it provides this assistance to Aaron Jones, because he is not an enrolled student. Clearly, the more students who opt to be home-schooled, the smaller the amount of State funding the county Board of Education will receive. While the amount of State funding allotted to a county for one student may not by itself be significant, the significance of its impact on county budgets is directly proportionate to the number of students who opt to be home-schooled, rather than enrolled students.

That the impact of one student not being enrolled on a county's budget is slight is no basis upon which the Circuit Court can conclude that permitting home-schooled students to participate in interscholastic athletics will not significantly increased the number of home-schooled students, and consequently have a significant impact on county budgets.

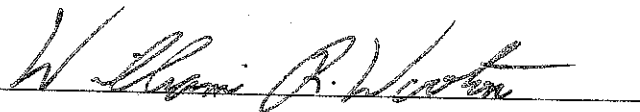
With respect to whether there is a rational basis to treat enrolled students differently than home-schooled students, Appellants would adopt the reasoning of the Honorable Gary L. Lancaster, United States District Judge for the Western District of Pennsylvania, in *McNatt v. Frazier School District, et al.*, a copy of which is appended to Appellant's brief.

### Conclusion

The Appellant West Virginia Secondary Schools Activities Commission prays that the Supreme Court of Appeals reverse the decision of the Circuit Court of Kanawha County.

WEST VIRGINIA SECONDARY ACTIVITIES COMMISSION

By Counsel



William R. Wooton  
WV STATE BAR ID #4139  
THE WOOTON LAW FIRM  
P.O. Box 2600  
Beckley, WV 25802-2600  
(304) 253-2222

**CERTIFICATE OF SERVICE**

I, William R. Wooton, hereby certify that copies of the within "Reply Brief of Appellants, West Virginia Secondary Schools Activities Commission" were served on all parties to this litigation by first class mail to their respective counsel at the following addresses, on this the 12<sup>th</sup> day of October, 2004:

Randal A. Minor, Esq.  
WVU College of Law Appalachian Center  
for Law & Public Service  
P.O. Box 6130  
Morgantown, WV 26506  
Counsel for Plaintiffs/Appellants

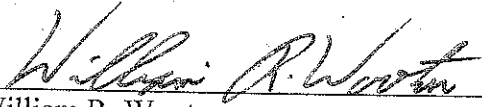
Barbara H. Allen, Esq.  
Managing Deputy Attorney General  
Office of the Attorney General  
State Capitol, Room E-26  
Charleston, WV 25305  
Counsel for West Virginia State Board  
of Education and State Superintendent  
David Stewart

Stephen Brooks, Esq.  
Flaherty, Sensobaugh & Bonasso  
7000 Hampton Center, Suite 1  
Morgantown, WV 26505  
Counsel for Marion County Board of Education  
and County Superintendent Thomas Long

Charles F. Donnelly, Esq.  
Jeffrey G. Blaydes, Esq.  
Donnelly & Carbone, P.L.L.C.  
113 Goff Mountain Road, 3<sup>rd</sup> Floor  
Charleston, WV 25313  
Counsel for Amicus Curiae, West Virginia  
Federation of Teachers

Gregory W. Bailey, Esq.  
Bowles, Rice, McDavid, Graff & Love LLP  
600 Quarrier Street  
Charleston, WV 25325-1386  
Counsel for Amicus Curiae, West Virginia  
School Boards Association

West Virginia Secondary Schools Activities Commission  
By Counsel



---

William R. Wooton  
WV State Bar ID #4139  
THE WOOTON LAW FIRM  
P.O. Box 2600  
Beckley, WV 25802-2600  
(304) 253-2222

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JEREMY McNATT, et al.,

Plaintiffs

vs.

Civil Action No. 95-0366

FRAZIER SCHOOL DISTRICT, et. al.,

Defendants

PROCEEDINGS

Transcript of Excerpts of Proceedings held on March 27,  
1995, United States District Court, Pittsburgh,  
Pennsylvania, before Honorable Gary L. Lancaster, District  
Judge.

APPEARANCES:

For the Plaintiffs:

By: Falco A. Muscante, Esq.

For the Defendants:

By: John Purcell, Esq.

Reported by:  
John Wayne Struble,  
Official Court Reporter  
1017B, U.S. Courthouse  
Pittsburgh, Pa. 15219  
(412) 391-5514

Proceedings recorded by mechanical stenography. Transcript  
produced by computer-aided transcription.

1 \* \* \* \* \*

2 THE COURT: This is an action in civil rights  
3 brought under the provisions of the Civil Rights Act of  
4 1871. It's found at Section 42, United States Code, 1983.

5 Plaintiffs are Jeremy McNatt, a minor, and his parents.  
6 The plaintiffs live within the jurisdiction of the Frazier  
7 School District; however, Jeremy does not attend classes in  
8 the district schools. Jeremy's parents have elected to  
9 teach him at home in accordance with the Pennsylvania Home  
10 Education Program which is outlined at 24 Pennsylvania  
11 Statutes 13-1327.1.

12 Plaintiffs have brought this action against the Frazier  
13 School District, it's Board of Directors and its  
14 Superintendent. Plaintiffs are challenging the school  
15 district's policy that bars home educated students, like  
16 Jeremy, from participating in the schools interscholastic  
17 athletic program.

18 Plaintiffs seek a declaratory judgment that the policy  
19 violates the Equal Protection Clause of the 14th Amendment  
20 of the United States Constitution because it denies home  
21 educated students the same rights and benefits enjoyed by  
22 those students who attend classes in the school district.

23 Plaintiffs also seek injunctive relief.

24 Defendants contend that barring home educated students  
25 from interscholastic sports does not violate plaintiffs'

1 equal protection rights because the challenged policy bears  
2 a rational relationship to a legitimate state interest.  
3 Defendants also argue that plaintiffs have no cause of  
4 action in the Pennsylvania School Code because no provision  
5 in the code requires it to admit home educated children to  
6 interscholastic athletics.

7 With the consent of the parties, the Court, in  
8 accordance with Federal Rule 65(a)(2), consolidated hearing  
9 on plaintiffs' motion for preliminary injunction with the  
10 trial of the merits. The matter was tried without a jury on  
11 March 27, 1995. For the reasons that follow, the Court  
12 finds in favor of defendant and against plaintiffs:

13 The Court has made certain written findings that will  
14 be filed with the clerk of court. These findings include  
15 background information and stipulated fact. Much of this is  
16 mostly of an undisputed nature. In the interest of time,  
17 the Court will not recite them now. The Court will,  
18 however, make additional findings in this oral presentation  
19 in context. The parties are to view all of the Court's  
20 findings, whether written or oral, as a whole.

21 In order to recover under Section 1983, plaintiffs must  
22 prove two essential elements. First, defendants deprived  
23 Jeremy of a right secured by the constitutional laws of the  
24 United States and, two, defendants deprived him of that  
25 federal right under color of state law.

1           The individual defendants in this case at all times  
2 acted in their official capacities. Moreover, the school  
3 district is a person within the meaning of Section 1983 and  
4 the policy at issue was officially adopted and promulgated  
5 by the school district's decisionmaking body, it's Board of  
6 Directors. Consequently, plaintiffs have established a  
7 requisite color of law element of a Section 1983 claim.

8           The remaining issue, however, is whether the challenged  
9 policy deprives plaintiffs of a federally secured right.  
10 Plaintiffs contend that a policy that precludes home  
11 educated students from participating in interscholastic  
12 sports denies those students equal protection of the law.  
13 The Court finds that it does not.

14           Reduced to its fundamentals, the equal protection  
15 clause is a direction that all persons similarly situated  
16 should be treated alike. Unfortunately, the clause is  
17 easier to define than it is to apply. Nonetheless, the test  
18 developed by the Supreme Court under the equal protection  
19 clause is that a different treatment of classes of persons  
20 drawn by a governmental body is valid and will be upheld if  
21 the classification is rationally related to a legitimate  
22 state interest.

23           There are two exceptions to the rational relationship  
24 test. First, when a policy classifies by race, alienage,  
25 national origin or infringes upon a fundamental

1 constitutional right, the policy must pass heightened strict  
2 scrutiny. The same is true when the policy classifies by  
3 gender or illegitimacy, the policy must pass intermediate  
4 scrutiny.

5 Neither exception to the rational relationship test  
6 applies to this case, however. First, the policy does not  
7 classify students by race, sex, illegitimacy, alienage or  
8 national origin. Nor is there any other factual basis to  
9 conclude that home educated students qualify as a suspect or  
10 quasi suspect class. Second, the policy does not infringe  
11 upon fundamental rights assured by the Constitution. The  
12 right to participate in extracurricular athletic activities  
13 is not a fundamental right guaranteed by the Constitution.  
14 To the extent that the plaintiff argues that a fundamental  
15 right is infringed by this policy, it enjoys no support in  
16 the law.

17 For these reasons, a rational relationship is all that  
18 is required for the Frazier School District's policy to pass  
19 constitutional muster, and the Court need only determine  
20 whether the school district's policy bears a rational  
21 relationship to a legitimate state interest. In making this  
22 determination, it is not for the Court to judge the wisdom,  
23 fairness, or logic of the school's policy. The Court's role  
24 is limited, and we merely insure, first, that the school has  
25 a legitimate purpose it seeks to advance and, second, that

1 the policy it adopted to advance that legitimate purpose  
2 bears some reasonable relationship to it and thus the policy  
3 is not wholly arbitrary. In other words, if there is a  
4 plausible reason for the school district's policy, the  
5 Court's inquiry is at an end. This is not a high standard  
6 of review, nor should it be.

7 In this case the school advances as its purpose for the  
8 rule that it seeks to maintain integrity of the  
9 interscholastic sports program. This is a legitimate state  
10 purpose, a purpose which could be compromised if the school  
11 allowed students to participate who do not meet the school's  
12 minimum scholastics, attendance or disciplinary  
13 requirements.

14 Specifically, eligibility is limited to students who  
15 maintain a C-minus average and who are not failing more than  
16 two core academic subjects. The school can monitor the  
17 academic eligibility of students at least who attend the  
18 school because, first, school educated students are  
19 evaluated every nine weeks by report cards issued by their  
20 teachers.

21 Additionally, during the athletic season, each student  
22 athlete receives a weekly evaluation which is turned over to  
23 the principal to insure their ongoing eligibility.

24 The nine week report card evaluates students with a  
25 traditional A through F grading system which, obviously, can

1 be averaged to determine whether or not they meet the  
2 eligibility requirements. School educated students also  
3 receive grades on in-class tests, homework, class  
4 participation, which is administered and valued by trained  
5 and experienced teachers and counselors, and the student's  
6 performance is measured against the performance of their  
7 peers.

8 In contrast, it would be difficult for the school  
9 district, if not impossible, to determine whether a home  
10 educated student has satisfied the eligibility requirements  
11 because, first, home educated students do not receive a  
12 report card every nine weeks, nor do they receive weekly  
13 evaluations. Home educated students' progress are not  
14 graded on an A through F grading system; therefore, they  
15 cannot determine what the average grade would be. Home  
16 educated students' progress is not subject to periodic tests  
17 as are the school students, and the progress is not  
18 evaluated by trained and experienced educators. The only  
19 required evaluation is an annual review of a student's  
20 portfolio of work which is not graded.

21 As to attendance, the Pennsylvania Interscholastic  
22 Athletic Association has regulations which provide, in part,  
23 that a student is ineligible if he missed 20 days of school  
24 in a semester. He will remain ineligible for 60 days after  
25 the last absence. Frazier School has also adopted a local

1 rule, in addition to the PIAA rule, that holds that an  
2 athlete who is absent or tardy can neither practice with the  
3 team nor play in a game of that same day -- scheduled for  
4 that same day. These attendance requirements are,  
5 obviously, easy to monitor with the school students. In  
6 contrast, home students are not subject to such attendance  
7 reporting requirements. The parents are not obligated to  
8 maintain records or report to the school his attendance,  
9 absenteeism, or whether he was even tardy. They're not  
10 required to maintain this, not even on an annual basis much  
11 less on a daily basis. The Court finds that this lack of  
12 accountability could lead to the type of abuse that the  
13 district seeks to avoid absent this total ban.

14 In summary, the Court finds that Frazier School  
15 District's policy of allowing only students who attend its  
16 schools to participate in its interscholastic athletic  
17 activities is rationally related to a proper state interest;  
18 that is, to assure that the students who participate meet  
19 their eligibility requirements. The policy is reasonably  
20 related to advance that policy, that interest, because due  
21 to the nature of the home education program it would be  
22 difficult, if not impossible, to monitor, with accuracy,  
23 whether home educated students have met the same scholastic  
24 attendance requirements necessary to participate in the  
25 team.

1           Therefore, we find that there is a rational basis for  
2           treating the two groups differently and the policy does not  
3           violate Equal Protection Clause of the 14th Amendment.

4           In addition to the constitutional claim, plaintiffs  
5           have also asserted a pendent state law claim based upon the  
6           Pennsylvania School Code of 1949. Plaintiffs rely on  
7           Section 13-1301 and 13-1302.

8           These sections, however, do not provide a cause of  
9           action to plaintiffs, they merely provide that resident  
10          children of a particular school district have a right to  
11          attend the areas public schools without cost. Frazier  
12          School District has not impeded the plaintiffs' right under  
13          these provisions and Jeremy is perfectly free to attend the  
14          Frazier Public School without cost if they chose to place  
15          him there. However, they chose an alternative educational  
16          experience for Jeremy. The Court finds this ingenious that  
17          plaintiffs who voluntarily elected not to exercise their  
18          statutory right to have Jeremy attend the Frazier High  
19          School because of their perceptions of the disadvantage of  
20          school attendance, yet they claim a statutory entitlement to  
21          the benefits that flow only from attendance at that same  
22          public school, benefits like representing the school in an  
23          interscholastic sports competition. Plaintiffs' statutory  
24          claim enjoys no support in law.

25          Finally, to the extent that plaintiffs contend that

1 Jeremy is entitled to participate in the school district  
2 sports program under the provisions of the home education  
3 program, such contention is equally without merit. The  
4 enabling legislation that created the home education program  
5 is silent as to whether the resident school district must  
6 afford a home education school student access to its  
7 extracurricular activities. The Court finds this silence  
8 significant, for a review of the Act shows that the  
9 legislature did affirmatively obligate the district to  
10 provide certain benefits to home education students,  
11 including the school district must provide a paid school  
12 teacher or administrator with at least two years experience  
13 to perform an annual evaluation of the home student's  
14 portfolio and progress. In the event the home education  
15 student moves to another district, the school's current  
16 superintendent must issue a letter of transfer to the new  
17 district within 30 days of the parent's request. A school  
18 district, at the request of the parent, must lend to the  
19 home education student copies of the school district's  
20 planned courses, text books and other curriculum materials  
21 appropriate to the student's age and grade level. Had the  
22 Pennsylvania legislature also intended to obligate the  
23 school district to provide the home educated student with  
24 access to the school's extracurricular activities, it could  
25 have simply said so in clear language to that effect.

1 If Pennsylvania wishes to change its statutory scheme  
2 to allow home students to take advantage of the  
3 extracurricular activities in the local public school, it is  
4 up to the Pennsylvania legislature to say so, not the  
5 federal courts.

6 Finally, I am not unsympathetic to the plaintiffs'  
7 cause; however, simply because the Court can envision a less  
8 harsh alternative to the school's policy to insure the  
9 integrity of its interscholastic sports program does not  
10 mean that the policy defendant has chosen violates the  
11 Constitution. The constitutional question is the only one  
12 the Court is authorized to answer, and based on our review  
13 of the applicable case law and full consideration of the  
14 briefs filed in support, the Court concludes that the  
15 Frazier policy does not violate any federally constitutional  
16 right nor any state statutory right of plaintiffs.

17 Therefore, we find in favor of defendant against  
18 plaintiff.

19 A written order will follow. We'll adjourn.  
20  
21  
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\* \* \* \* \*

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

*John Wayne Struble*  
John Wayne Struble,  
Official Court Reporter.

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