IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2005 Term

No. 31785

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

DANIEL JONES AND CHRISTIE JONES,
Plaintiffs Below, Appellees,

V.

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 Below,

WEST VIRGINIA STATE BOARD OF EDUCATION AND
STATE SUPERINTENDENT DAVID STEWART,
Appellants.

AND

No. 31786

DANIEL JONES AND CHRISTIE JONES,
Plaintiffs Below, Appellees,

V.

**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 Below,**

**WEST VIRGINIA SECONDARY SCHOOLS
ACTIVITIES COMMISSION,
Appellant.**

**Appeal from the Circuit Court of Kanawha County
Honorable Louis H. Bloom, Judge
Civil Action No. 02-MISC-447
REVERSED**

**Submitted: April 5, 2005
Filed: July 6, 2005**

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JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICES STARCHER AND BENJAMIN dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. Prohibiting home-schooled children from participating in interscholastic athletics does not violate equal protection under art. III, § 10 of the West Virginia Constitution.

2. "Notwithstanding the transfer of supervisory authority over interscholastic athletic events and other extracurricular activities to county boards of education and the West Virginia Secondary School Activities Commission, West Virginia Code § 18-2-25 (1994) is constitutional, since it is clear that the Legislature, in enacting said statute, only intended to permit county boards of education and the West Virginia Secondary School Activities Commission to supervise and to regulate extracurricular activities subject to the West Virginia State Board of Education's duty under Article XII, § 2 of the West Virginia Constitution to generally supervise the schools in this state." Syllabus point 6, *State ex rel. Lambert by Lambert v. West Virginia State Board of Education*, 191 W. Va. 700, 447 S.E.2d 901 (1994).

3. The West Virginia Secondary Schools Activities Commission did not violate its constitutional or statutory authority in promulgating the legislative rule found at W. Va. C.S.R. § 127-2-3.1, which requires that, to be eligible for participation in interscholastic athletics, a student must be enrolled full-time in a school participating in the

West Virginia Secondary Schools Activities Commission.

Davis, Justice:

This is an appeal from an order of the Circuit Court of Kanawha County rendered in favor of the parents of a home-schooled child with respect to their claim that their child should be permitted to participate in interscholastic athletics notwithstanding his home-schooled status. On appeal, the West Virginia State Board of Education, State Superintendent David Stewart, the Marion County Board of Education, Marion County Superintendent Thomas Long, and the West Virginia Secondary School Activity Commission (hereinafter collectively referred to as "School Officials") argue that the circuit court erred in concluding: (1) that the School Officials had breached a statutory duty by failing to make interscholastic athletics available to home-schooled children; (2) that the legislative rule prohibiting home-schooled children from participating in interscholastic athletics violates equal protection; and (3) that the School Officials breached their duty to make reasonable rules and regulations with respect to the participation of home-schooled children in interscholastic athletics. We agree with the School Officials and reverse the order of the circuit court.

I.

FACTUAL AND PROCEDURAL HISTORY

Daniel and Christy Jones (hereinafter "the Joneses"), plaintiffs below and appellees herein, are residents of Marion County, West Virginia. The Joneses have elected to home school their children, including their son Aaron. In 2002, when Aaron was

approximately eleven years old, he indicated to his parents his desire to participate on the Mannington Middle School wrestling team. Had Aaron been a student in the public school system, he would have been a sixth grade student at Mannington Middle School. The Joneses investigated the possibility of Aaron joining the Mannington Middle School wrestling team and were advised that they needed approval from the West Virginia Secondary School Activities Commission (hereinafter "the WVSSAC"). Upon contacting the WVSSAC, the Joneses were advised that, pursuant to W. Va. C.S.R. § 127-2-3.1,[1] participation in interscholastic athletic activities was limited to students who were enrolled full-time in a WVSSAC participating school. Consequently, since Aaron was not enrolled as a full-time student at Mannington Middle School, he would not be permitted to participate on the wrestling team. The Joneses received similar responses from Dave Stewart, State Superintendent of Schools, and from the Marion County Board of Education.

Thereafter, on or about December 12, 2002, the Joneses filed a complaint against the School Officials seeking, *inter alia*, declaratory, equitable and injunctive relief.

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[1]W. Va. C.S.R. § 127-2-3.1 states:

> To be eligible for participation in interscholastic athletics, a student must be enrolled full-time in a member school as described in Rule 127-2-6 on or before the eleventh instructional day of the school year. Enrollment must be continuous after the student has officially enrolled in the school.

The rule referred to in this section, found at W. Va. C.S.R. § 127-2-6, describes the criteria for being enrolled "full-time."

Along with the complaint, the Joneses filed a motion seeking a temporary restraining order and preliminary injunction. Following a preliminary hearing on December 13, 2002, the circuit court entered a preliminary injunction permitting Aaron to immediately participate on the Mannington Middle School wrestling team. At the same time, the circuit court established a briefing schedule and set the matter for a final hearing on February 13, 2003. The final hearing was held and, on September 23, 2003, the circuit court entered its "DECISION AND FINAL ORDER" ruling in favor of the Joneses and declaring that:

> 1) the defendants have breached their statutory duty under West Virginia Code section 18-8-1(c)(3) by failing to make an available educational resource available to Aaron, 2) the defendants have violated Aaron's right to equal protection, as guaranteed by Article III, section 10 of the West Virginia Constitution, because the blanket prohibition on home schooled students participating in interscholastic athletics fails the applicable rational basis test, and 3) the defendants have breached the duty to promulgate reasonable rules and regulations by implementing a total ban rather than crafting fair rules tailored to any legitimate concerns that may flow from allowing home schooled students, who are otherwise qualified, to participate on sports teams fielded by the public school they would be attending if they were not home schooled.

In addition, the circuit court granted a writ of prohibition directed to the School Officials to "prevent them from exceeding their statutory and constitutional authority by excluding otherwise qualified home schooled students from participating on sports teams fielded by public schools." Finally, the circuit court issued a writ of mandamus

> a. to compel the defendants to comply with their statutory duty to afford the plaintiffs access to available educational resources, which includes participation in interscholastic athletics;

b. to compel the defendants to afford the plaintiffs and their son the right to equal protection, as guaranteed by the West Virginia Constitution, which means that the defendants shall not give effect to the enrollment rule that excludes home schooled students from interscholastic athletics;

c. to compel the defendants to comply with their statutory duty to promulgate reasonable rules, which shall not include an enrollment rule that results in the blanket prohibition against home schooled students participating in interscholastic athletics; and

d. to compel the defendants to allow the plaintiffs' son, Aaron, to try out for and, if successful, to compete on any sports team that is being fielded by the public school Aaron would otherwise attend were he not being home schooled.

It is from this order of the circuit court that the School Officials now appeal.

II.

STANDARD OF REVIEW

In this appeal we are asked to review a final order rendered by a circuit court. We apply a three-part standard of review to such an order:

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

We are also asked to review the circuit court's award of extraordinary relief in the form of writs of mandamus and prohibition. These rulings are reviewed de novo. "The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of mandamus is de novo." Syl. pt. 1, *Staten v. Dean*, 195 W. Va. 57, 464 S.E.2d 576 (1995). *Accord* Syl. pt. 1, *Rollyson v. Jordan*, 205 W. Va. 368, 518 S.E.2d 372 (1999). "The standard of appellate review of a circuit court's order granting relief through the extraordinary writ of prohibition is *de novo*." Syl. pt. 1, *Martin v. West Virginia Div. of Labor Contractor Licensing Bd.*, 199 W. Va. 613, 486 S.E.2d 782 (1997). With regard for these standards, we proceed to address the issues herein raised.

III.

DISCUSSION

The circuit court expressed three grounds for finding that the School Officials had improperly denied the Joneses' request that their home-schooled child be allowed to participate in interscholastic athletics: (1) that the School officials had breached a statutory duty; (2) that they had violated the home-schooled student's right to equal protection; and (3) that they had breached the duty to promulgate reasonable rules and regulations. We addresses each of these issues in turn.[2]

[2]We pause to acknowledge the appearance of various amici curiae in this matter: The West Virginia Federation of Teachers, AFL-CIO; The West Virginia School Boards Association; and The West Virginia Education Association. We appreciate the (continued...)

A. Statutory Duty

The circuit court concluded that the School Officials breached a statutory duty by failing to make interscholastic athletics available to home-schooled children. To determine if the circuit court was correct in this conclusion, we first look to the language of the statute purportedly violated by the School Officials, W. Va. Code § 18-8-1(c)(3) (2003) (Repl. Vol. 2003), which states:

> This subdivision applies to both home instruction exemptions set forth in subdivisions (1) and (2) of this subsection. 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 the person or persons providing home instruction may consider appropriate subject to normal registration and attendance requirements.

(Emphasis added).[3]

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[2](...continued)
contributions of these amici, and consider their positions in connection with the arguments of the parties with whom they are aligned.

[3]An earlier version of this code section was actually in place at the time the Joneses filed their law suit, but it does not differ substantively from the current version:

> The 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 of education, exercise the option to attend any class offered by the

(continued...)

With respect to the portion of this provision that requires a county superintendent to "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," the circuit court first reasoned that

> [t]here is no dispute that participation in interscholastic athletics offers an individual student opportunities to learn important life lessons and expands the educational experience beyond the four walls of the traditional classroom. Therefore, it is arguable that the coaching and facilities that are available to a student athlete could be considered an available educational resource within the meaning of the aforementioned statute.

The court then concluded that "[t]he defendants have breached their statutory duty under the above-quoted portion of West Virginia Code section 18-8-1(c)(3) by failing to make interscholastic sports available to Aaron." This conclusion by the circuit court simply is not supported by the language contained in this statute.

Initially, we observe that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). However, "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be

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[3](...continued)
county board of education as the person or persons providing home instruction may deem appropriate subject to normal registration and attendance requirements.

W. Va. Code § 18-8-1(c) (2001) (Supp. 2001).

interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus point 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959). We find no ambiguity in the provision relied upon by the circuit court. "'"Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).' Syllabus Point 4, *Syncor International Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001)." Syl. pt. 4, *Charter Communications VI, PLLC v. Community Antenna Serv., Inc.*, 211 W. Va. 71, 561 S.E.2d 793 (2002).

In plain language, this provision refers to providing resources "as may assist *the person or persons providing home instruction.*" W. Va. Code § 18-8-1(c)(3). Clearly, this statute pertains to providing educational resources to the person or persons providing instruction, who, in this case, was Mrs. Jones. Because the statute does not address providing resources, such as interscholastic sports, to a home-schooled student, we are not at liberty to judicially add such a provision.

> "'[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted*.' *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (*citing Bullman v. D & R Lumber Company*, 195 W. Va. 129, 464 S.E.2d 771 (1995); *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994)). ([E]mphasis added). *See State ex rel. Frazier v. Meadows*, 193

> W. Va. 20, 24, 454 S.E.2d 65, 69 (1994). Moreover, '[a] statute, or an administrative rule, may not, under the guise of "interpretation," be modified, revised, amended or rewritten.' Syl. pt. 1, *Consumer Advocate Division v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989). *See Sowa v. Huffman*, 191 W. Va. 105, 111, 443 S.E.2d 262, 268 (1994)." *Williamson v. Greene*, 200 W. Va. 421, 426-27, 490 S.E.2d 23, 28-29 (1997).

Longwell v. Board of Educ. of County of Marshall, 213 W. Va. 486, 491, 583 S.E.2d 109, 114 (2003). *Accord State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 735, 474 S.E.2d 906, 915 (1996) ("'[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.'" (quoting *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991))). Therefore, we find the circuit court erred in concluding that the School Officials breached their duty under W. Va. Code § 18-8-1(c)(3).

B. Equal Protection

The circuit court concluded that, by excluding home-schooled children from participation in interscholastic athletics, the School Officials have violated the equal protection rights of home-schooled children. *See* West Virginia Const. art III, § 10. "Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. The claimed discrimination must be a product of state action as distinguished from a purely private activity." Syl. pt. 2, *Israel by Israel v. West Virginia*

Secondary Sch. Activities Comm'n, 182 W. Va. 454, 388 S.E.2d 480 (1989). Here, there is no question that the equal protection claim involves state action, so we will proceed with our analysis.

The complained of classification established by the School Officials treats home-schooled children differently from children who are enrolled in the public schools with respect to their eligibility to participate in interscholastic athletics. This Court has previously recognized that

> [p]articipation in nonacademic extracurricular 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, 23, 321 S.E.2d 302, 318 (1984). In other words, a "classification[] not affecting a fundamental right or some suspect or quasi-suspect criterion . . . will be sustained so long as it 'is rationally related to a legitimate state interest.'" *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 594, 466 S.E.2d 424, 445 (1995)(quoting *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985)) (additional citations omitted)). *See also Janasiewicz v. Board of Educ. of Kanawha County*, 171 W. Va. 423, 426, 299 S.E.2d 34, 37 (1982) ("Equal protection requires that similarly situated classes be treated alike. . . . When there is a rational basis to distinguish between groups of individuals, not based on invidious discrimination, then different treatment does not offend equal protection

provisions." (internal citations omitted)).

In a case similar to the one at bar, which addressed the issue of whether the state could refuse to provide school bus transportation to students attending parochial schools, this Court explained that

> [p]ublic and parochial school children may rationally be treated differently because they are not similarly situated. All children under sixteen years old are required to attend approved schools; but a parochial school student has chosen to reject a free public school education in favor of a privately paid education emphasizing religious beliefs and principles.

Janasiewicz v. Board of Educ. of Kanawha County, 171 W. Va. 423, 426, 299 S.E.2d 34, 37-38. The *Janasiewicz* Court went on to hold:

> The Equal Protection Clause of the Fourteenth Amendment is not violated by treating public and nonpublic school children differently in allocations of state aid and educationally-related resources. We overrule Syllabus Point 2 of *State ex rel. Hughes v. Board of Education*, 154 W. Va. 107, 174 S.E.2d 711 (1970).

Syl. pt. 2, *Id.* Having already determined that treating public and nonpublic school children differently in allocations of state aid and educationally-related resources does not offend equal protection, we have no difficulty concluding that treating public and nonpublic school children differently with respect to participation in interscholastic sports does not violate equal protection.

As with the parochial students in *Janasiewicz*, the parents of home-schooled

children have *voluntarily chosen* not to participate in the free public school system in order to educate their children at home. In making this choice, these parents have also chosen to forego the privileges incidental to a public education, one of which is the opportunity to qualify for participation in interscholastic athletics.[4]

Moreover, the School Officials have asserted numerous grounds supporting a rational basis for excluding home-schooled children from participation in interscholastic athletics. Two of these grounds we find particularly persuasive: (1) promoting academics over athletics, and (2) protecting the economic interests of the county school systems.

With respect to promoting academics over athletics, the School Officials note that the WVSSAC has, in keeping with the policies and rules of the West Virginia Board of Education, imposed grade requirements which must be met for a student to participate in interscholastic sports. In particular, on rule of the WVSSAC requires that "[i]n accordance with West Virginia Board of Education § 126-26-1 et seq., 'Participation in Extracurricular Activities' (Policy 2436.10, C-Rule),[5] students must maintain a 2.0 average to participate

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[4]To the extent that parents desire their home-schooled child to experience the many benefits of team or individual athletics, there typically are ample opportunities for such participation outside the realm of interscholastic athletics.

[5]W. Va. C.S.R. § 126-26-1 et seq. contains the State Board of Education legislative rules for participation in extracurricular activities and states, in relevant part, that "[i]n order to participate in the extracurricular activities to which this policy applies, a (continued...)

in interscholastic athletics." W. Va. C.S.R. § 127-2-6.9 (footnote added). Moreover, "[a] student is required to do passing work in the equivalent of at least 20 periods (four subjects with full credit toward graduation) per week. Failure to earn passing marks in four full credit subjects during a semester shall render a student ineligible for the following semester." W. Va. C.S.R. § 127-2-6.1.

Children who are home schooled may be taught a completely different curriculum than children in the public school system. More importantly, though, is the fact that regardless of the curriculum, home-schooled children are graded differently from those in the public school system. Instead of receiving semester grades, home-schooled children are evaluated only once yearly through either a standardized test, examination of the student's work portfolio, or by completing "an alternative academic assessment of proficiency that is mutually agreed upon by the parent or legal guardian and the county superintendent." W. Va. Code § 18-8-1(c)(2)(D)(I-iv) (2003) (Repl. Vol. 2003). The School Officials maintain that attempting to convert the progress assessments of home-schooled children into a numerical formula in order to equate it to the 2.0 average that is required for participation in interscholastic athletics would create an undue burden on the county school systems.

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[5](...continued)
student must: 3.1 Maintain a 2.0 average. . . . AND 3.2 Meet State and local attendance requirements." W. Va. C.S.R. § 126-26-3.

Furthermore, the different grading standards and methods used for home-schooled children would significantly impede the School Official's ability to maintain the academic standards that have been established for participation in interscholastic athletics. For example, the School Officials point out that allowing home-schooled children to participate in interscholastic athletics would create a risk of mischief on the part of some parents of athletically skilled, yet academically struggling, children. Specifically, a parent could withdraw an academically struggling child from the public school system in order to maintain his or her athletic-eligibility, thereby thwarting the efforts of the public school system to promote academics over athletics.

Finally, the School Officials maintain that the public schools would suffer financially from the participation of home-schooled children in interscholastic sports. They explain that county school boards receive funding for their athletic programs based upon a formula that takes into consideration their average daily attendance and enrollment numbers. *See* W. Va. Code § 18-9A-9(1) (1994) (Repl. Vol. 2003). Home-schooled children do not contribute to the average daily attendance or enrollment numbers of the public schools, thus no funds are expended to the county boards in consideration of those children. To then require counties to spend these limited funds to support the athletic participation of home-schooled students would create a financial burden.

Based upon the foregoing discussion, we now hold that prohibiting home-

schooled children from participating in interscholastic athletics does not violate equal protection under art. III, § 10 of the West Virginia Constitution.

C. Duty to Promulgate Reasonable Rules and Regulations

The circuit court concluded that

> the defendants have breached the duty to promulgate reasonable rules and regulations by implementing a total ban rather than crafting fair rules tailored to any legitimate concerns that may flow from allowing home schooled students, who are otherwise qualified, to participate on sports teams fielded by the public school they would be attending if they were not home schooled.

We disagree.

With respect to legislative rules, this Court has explained that

> "[i]t is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority." Syllabus Point 3, *Rowe v. Department of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982).

Syl. pt. 3, *Ney v. State Workmen's Comp. Comm'r*, 171 W. Va. 13, 297 S.E.2d 212 (1982). *See also Anderson & Anderson Contractors, Inc. v. Latimer*, 162 W. Va. 803, 807-08, 257 S.E.2d 878, 881 (1979) ("Although an agency may have power to promulgate rules and regulations, the rules and regulations must be reasonable and conform to the laws enacted by the Legislature." (citation omitted)).

With respect to our analysis of whether a specific legislative rule comports with its statutory authority, this Court has established that

> [j]udicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage.

Syl. pt. 3, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

The legislative rule at issue in this case directs that,

> [t]o be eligible for participation in interscholastic athletics, a student must be enrolled full-time in a member school as described in Rule 127-2-6[6] on or before the eleventh instructional day of the school year. Enrollment must be continuous after the student has officially enrolled in the school."

W. Va. C.S.R. § 127-2-3.1 (footnote added).[7] There is no accompanying statutory provision

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[6]W. Va. C.S.R. § 127-2-6 describes the criteria for being enrolled "full-time."

[7]The rules do provide for certain exceptions, but those exceptions do not apply (continued...)

that expressly excludes home-schooled children from participation in interscholastic athletics. Accordingly, we must presume that the Legislature entrusted this decision to the WVSSAC. *See Appalachian Power Co.*, 195 W. Va. 573, 589, 466 S.E.2d 424, 440 ("'[i]n the absence of . . . [legislative] direction as to what elements are to be considered in promulgating . . . [a] rule, the presumption is that . . . [the Legislature] is entrusting the decision as to what to consider to the hands of the agency in deference to the agency expertise.'" (alteration in original) (quoting *Kennedy v. Block*, 606 F. Supp. 1397, 1403 (W.D.Va.1985), *vacated on other grounds by* 784 F.2d 1220 (4th Cir.1986)).

This brings us to the second part of the analysis:

> If legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W. Va. Code, 29A-4-2 (1982).

Syl. pt. 4, *Appalachian Power*. Likewise, we have long held that "'[i]nterpretations of

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[7](...continued)
to home-schooled children. *See, e.g*, W. Va. C.S.R. § 127-2-3.2 ("Students can participate only in schools in which they are enrolled; however, an exception may be granted by the Board of Directors as follows: 3.2.1 if a feeder school does not afford students the opportunity to participate and they are otherwise eligible."); W. Va. C.S.R. § 127-2-3.5 ("[s]ixth grade students may be eligible to participate in the interscholastic sport teams except football in the middle school in which they are enrolled.").

statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syl. Pt. 4, *Security Nat'l Bank & Trust Co. v. First W. Va. Bancorp.[, Inc.]*, 166 W. Va. 775, 277 S.E.2d 613 (1981)." Syl. pt. 3, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003). *See also Board of Educ. of County of Taylor v. Board of Educ. of County of Marion*, 213 W. Va. 182, 188, 578 S.E.2d 376, 382 (2003) (same); Syl. pt. 3, *Smith v. Board of Educ. of Logan County*, 176 W. Va. 65, 341 S.E.2d 685 (1985) (same).

We will first consider whether the WVSSAC has exceeded its constitutional or statutory authority. The Legislature established the WVSSAC and gave the county boards of education the option to "delegate . . . control, supervision and regulation of interscholastic athletic events and band activities to the [WVSSAC] . . . ." W. Va. Code § 18-2-25 (1967) (Repl. Vol. 2003). This Court has previously examined this statutory provision, and found it to be Constitutional:

> Notwithstanding the transfer of supervisory authority over interscholastic athletic events and other extracurricular activities to county boards of education and the West Virginia Secondary School Activities Commission, West Virginia Code § 18-2-25 (1994) is constitutional, since it is clear that the Legislature, in enacting said statute, only intended to permit county boards of education and the West Virginia Secondary School Activities Commission to supervise and to regulate extracurricular activities subject to the West Virginia State Board of Education's duty under Article XII, § 2 of the West Virginia Constitution to generally supervise the schools in this state.

Syl. pt. 6, *State ex rel. Lambert by Lambert v. West Virginia State Bd. of Educ.*, 191 W. Va. 700, 447 S.E.2d 901 (1994). Having previously concluded that the WVSSAC's control of interscholastic athletics does not exceed constitutional authority, we must now decide whether its promulgation of governing rules has exceeded its statutory authority.

Within W. Va. Code § 18-2-25, the statute creating the WVSSAC, the Legislature has directed that the WVSSAC be "empowered to exercise the control, supervision and regulation of interscholastic athletic events and band activities of secondary schools, delegated to it pursuant to this section."[8] While this statement does not expressly grant to the WVSSAC the power to promulgate rules and regulations, a complete reading of the statue plainly indicates that this was the Legislatures intent. *See* Syl. pt. 2, *Rose ex rel. Rose v. St. Paul Fire & Marine Ins. Co.*, 215 W. Va. 250, 599 S.E.2d 673 (2004) ("'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.' Syllabus Point 1, *Smith v. State Workmen's Compensation Com'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975)."); *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 263, 465 S.E.2d 257, 263 (1995) ("'[I]n ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.' Syl. Pt. 2, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975)." (additional quotations and citations omitted)). Indeed, the very

[8]The Marion County Board of Education has elected to delegate its interscholastic athletic program to the WVSSAC.

next sentence in this statute plainly reflects the legislatures intention that the WVSSAC have the authority to promulgate rules and regulations by presupposing the existence of such rules: "The rules and regulations of the West Virginia secondary school activities commission shall contain a provision for a proper review procedure and review board and be promulgated in accordance with the provisions of chapter twenty-nine-a [§§ 29A-1-1 et seq.] of this Code . . . ." W. Va. Code § 18-2-25. This statute goes further to mandate that the WVSSAC

> shall promulgate reasonable rules and regulations providing for the control, supervision and regulation of the interscholastic athletic events and other extracurricular activities of such private and parochial secondary schools as elect to delegate to such commission such control, supervision and regulation, *upon the same terms and conditions, subject to the same regulations and requirements* and upon the payment of the same fees and charges *as those provided for public secondary schools*.

Id. (emphasis added). Thus, the Legislature has expressly directed the WVSSAC promulgate reasonable rules and regulations with respect to private and parochial secondary schools, and has mandated that those rules and regulations correspond with rules provided for public secondary schools. This demonstrates without a doubt that the Legislature intended the WVSSAC to promulgate rules to carry out its control, supervision and regulation of interscholastic athletic events with respect to the public schools in those counties electing to delegate such control to the WVSSAC.

Additionally, we note that the Legislature empowered the WVSSAC "to exercise . . . control, supervision and regulation of *interscholastic athletic events*." W. Va.

Code § 18-2-25. Primary to exercising such authority over "athletic events" is determining who is eligible to participate in such events, as the WVSSAC has done in the legislative rule at issue in this case. Therefore, we find the WVSSAC has not exceeded its statutory authority in promulgating a rule pertaining to the eligibility requirements for participating in interscholastic athletics.

The final portion of our analysis under Syllabus point 4 of *Appalachian Power* is to determine whether the legislative rule in question is arbitrary or capricious. Again, the specific legislative rule at issue requires that "[t]o be eligible for participation in interscholastic athletics, a student must be enrolled full-time in a member school as described in Rule 127-2-6[9] on or before the eleventh instructional day of the school year. Enrollment must be continuous after the student has officially enrolled in the school." W. Va. C.S.R. § 127-2-3.1. Our discussion under the "Equal Protection" portion of this opinion, Section III.B., *supra*, demonstrates that this rule is not arbitrary or capricious as it is rationally related to the legitimate state purposes of promoting academics over athletics and protecting the economic interests of the county school systems. Therefore, based upon the full discussion set out above, we now hold that the West Virginia Secondary Schools Activities Commission did not violate its constitutional or statutory authority in promulgating the legislative rule found at W. Va. C.S.R. § 127-2-3.1, which requires that, to be eligible for participation in

[9]W. Va. C.S.R. § 127-2-6 describes the criteria for being enrolled "full-time."

interscholastic athletics, a student must be enrolled full-time in a school participating in the West Virginia Secondary Schools Activities Commission.

IV.

CONCLUSION

For the reasons stated in the body of this opinion, we reverse the September 23, 2003, order of the Circuit Court of Kanawha County, including the writs of mandamus and prohibition therein granted.

Reversed.