No. 31785 – *Daniel Jones and Christie Jones 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; West Virginia State Board of Education and State Superintendent David Stewart*

and

No. 31786 – *Daniel Jones and Christie Jones 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; West Virginia Secondary Schools Activities Commission*

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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Starcher, J., dissenting:

The majority opinion strains to reach a wrong result.

There is not a shred of evidence that any home-schooled child would in any way do anything but enhance interscholastic athletics. I wish that the majority had not wanted to protect the convenience of coaches over the rights of children and parents.

I dissent, and I assert as grounds for that dissent the learned opinion by Circuit Judge Louis Bloom, who properly applied the applicable constitutional law. The reader can compare the majority opinion's reasoning with Judge Bloom's. Following is Judge Bloom's opinion in the lower court:

> On the 13th day of February 2003, came the plaintiffs, Daniel and Christie Jones, in person and by their counsel, Randal A. Minor, and came also defendants West Virginia State Board of Education and Dr. David Stewart, State Superintendent of Education, by their counsel, Barbara H. Allen, Managing Deputy Attorney General, defendant West Virginia Secondary School Activities Commission, by its counsel, William R. Wooton, and defendants Marion County Board of Education and

Thomas Long, Marion County Superintendent of Schools, by their counsel, Robert L. Coffield, for a final hearing in the above-styled action. By order entered on January 14, 2003, the court had heretofore granted the plaintiffs' motion for a preliminary injunction, thereby allowing the plaintiffs' son to join the Mannington Middle School wrestling team for the 2002-2003 school year.

By leave of court, the West Virginia Educational Association filed an *amicus* brief. Upon mature consideration of said amicus brief, the pleadings, memoranda and arguments of the parties, the pertinent law and all matters of record, the court hereby finds and concludes as follows:

FINDINGS OF FACT

1. The plaintiffs, Daniel and Christie Jones (hereafter jointly "the plaintiffs"), reside in Mannington, Marion County, West Virginia.
2. At the time this action was heard, the plaintiffs' eldest child, Aaron Jones (hereafter "Aaron"), was eleven years old and, if he attended public school, he would have been in the sixth grade at Mannington Middle School.
3. Defendant West Virginia State Board of Education, more properly called the West Virginia Board of Education (hereafter "the State Board"), is a constitutional body charged with the general supervision of West Virginia's public schools and with making rules to implement the laws and policies of the State relating to education.
4. The State Board's supervisory role encompasses extracurricular activities, including band and interscholastic athletics, such as the wrestling program at Mannington Middle School.
5. Defendant Dr. David Stewart (hereafter "Superintendent Stewart") is West Virginia's Superintendent of Schools. As such, he is the chief executive officer of the State Board and bears responsibility for the general supervision of West Virginia's public schools, county superintendents and county boards of education. W. Va. Code § 18-3-3.
6. Defendant Marion County Board of Education (hereafter "the Marion County Board") is an elected body responsible for the

supervision and control of the educational system in Marion County, which includes the Mannington Middle School. W. Va. Code §§ 18-5-1 and 18-5-13.

7. Defendant Thomas Long is the Superintendent of Schools for Marion County, West Virginia. As such, he is the chief executive officer of the Marion County Board and is charged with executing, under the direction of the State Board, all of its educational policies. W. Va. Code § 18-4-10.

8. Defendant West Virginia Secondary School Activities Commission (hereafter "WVSSAC") is a quasi-public body, established pursuant to West Virginia Code section 18-2-25, to whom county boards of education may delegate the authority to control, supervise and regulate band activities and interscholastic athletics for the secondary schools in their respective counties. W. Va. Code § 18-2-25. Such authority remains subordinate to the overriding supervisory powers of the State Board.

9. The Marion County Board has exercised the statutory option of delegating to the WVSSAC the authority to control, supervise and regulate interscholastic athletics for the public schools in Marion County.

10. West Virginia provides parents with the option of having their children home schooled, subject to certain conditions and restrictions. W. Va. Code § 18-8-1(c).[1]

11. Since the time, at age six, when Aaron became subject to the State's compulsory school attendance laws, the plaintiffs have availed themselves of the home schooling option. This choice was based on a variety of reasons, including religious and moral concerns.

12. The plaintiffs' have complied with the requirements to notify the Marion County Board or its superintendent of their intent to home school and have submitted the requisite plan of instruction.

13. The plaintiffs' children receive instruction from plaintiff

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[1]The pertinent portion of the statute was formerly W. Va. Code 18-8-1, *Exemption B.* The statutory changes took effect in March 2003, so the memoranda and the arguments of the parties refer to the earlier code section. The statutory changes do not have any substantive bearing on the disposition of this case.

Christie Jones (hereafter individually "Mrs. Jones"), who utilizes a structured Christian curriculum produced commercially by the A Beka Book Company of the Pensacola Christian College.

14. The program of instruction includes testing in each subject every nine weeks. Every nine weeks Mrs. Jones uses the A Beka program to generate a detailed progress report for each child. Mrs. Jones also maintains portfolios of each child's school work for the academic year.

15. Pursuant to West Virginia Code section 18-8-1(c)(2)(D), home schooled children must undergo an annual academic assessment and submit the results to the county superintendent. This assessment requirement may be met through several different mechanisms, which include taking a nationally normed standardized achievement test or through a portfolio review of the student's work by a state-certified teacher.

16. In general, the State's interest in the home schooled child's academic performance is satisfied if the child's score in the required subjects is in or above the fiftieth percentile[2] on the standardized test or, if below the fiftieth percentile, the result represents an improvement over the previous year. The academic standards are also met if, upon review of the child's portfolio of work, a certified teacher provides a narrative report verifying that the child's academic progress is in accordance with that child's abilities.

17. Dr. Edwina Pendarvis, who appeared as an expert for the plaintiffs, testified that a teacher conducting a portfolio review would be able to give the student a grade.

18. For the past three years, the plaintiffs have elected to satisfy the progress review requirements of the home schooling statute by having Aaron participate in standardized testing.

19. Aaron's performance on said standardized tests has remained above the fiftieth percentile.

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[2]Until the statutory amendment took effect in March 2003, the fortieth percentile was acceptable.

20. In or about the spring of 2002, Aaron decided that he would like to participate on the Mannington Middle School wrestling team. The plaintiffs supported him in this goal and made inquiries of school officials as to whether Aaron could join the team.
21. Rick Rinehart, the wrestling coach at Mannington Middle School, and Mike Hays, the school's activities director, informed the plaintiffs that they had no objection to Aaron joining the team. However, Mike Hays advised the plaintiffs that Aaron's participation on the team would have to be approved by the WVSSAC.
22. The WVSSAC refused to allow Aaron to participate on the Mannington Middle School wrestling team on the ground that Title 127, Series 2, section 3.1 of the West Virginia Code of State Regulations (hereafter "WVSSAC Rule 127-2-3.1") restricts participation in interscholastic athletic activities to students who are enrolled on a full-time basis in a WVSSAC-member school.[3]
23. The WVSSAC regulations do not reference home schooled children.
24. According to the testimony of Mike Hayden, Executive Director of the WVSSAC (hereafter "Director Hayden"), membership in the WVSSAC is not open to individuals or home schooled families.
25. The decision by the WVSSAC to refuse to allow Aaron to wrestle for Mannington Middle School because he is not enrolled in a member school was subsequently upheld, both in rationale and in result, by Superintendent Stewart.
26. By correspondence, dated September 16, 2002, the plaintiffs sought an appeal to the WVSSAC Board of Appeals to challenge the decision that Aaron was not

[3]During oral argument in an unrelated case before the Supreme Court of Appeals of West Virginia, the State Board represented to the Court "not only that secondary schools did not have to be a member of the SSAC to participate in interscholastic sports, but also that the SSAC was going to stop collecting dues charged for membership in the SSAC." *State ex rel. Lambert by Lambert v. West Virginia State Board of Education*, 447 S.E.2d 901 (W. Va. 1994). None of the parties addressed this apparent discrepancy between these representations and the practices currently in place.

eligible for the Mannington Middle School wrestling team.

27. By correspondence, dated September 23, 2002, Director Hayden advised the plaintiffs that the policies of the WVSSAC preclude the WVSSAC Board of Appeals from hearing an eligibility appeal by a student who is not enrolled in a member school. Director Hayden further informed the plaintiffs that the only way Aaron would be permitted to wrestle would be if he enrolled as a full-time student at Mannington Middle School.

28. The original purpose behind the enrollment rule was to prevent one school from recruiting athletes from another school. This purpose has no application to the facts of this case.

29. The plaintiffs ultimately filed this action and, on January 14, 2003, a preliminary injunction was granted that allowed Aaron to wrestle on the Mannington Middle School team during the season that began on December 14, 2002 and concluded on February 1, 2003.

30. Under the current policy of the WVSSAC regarding academic standards for participation in interscholastic athletics, which is set forth at Title 127, series 2, section 6 of the West Virginia Code of State Regulations, a student must do passing work in the equivalent of 20 periods (4 subjects with full credit toward graduation) per week. Failure to earn passing marks in four full-credit subjects during a semester renders a student ineligible to participate in interscholastic athletics for the following semester.

31. The WVSSAC rule, found at Title 127, series 2, section 6.9 of the West Virginia Code of State Regulations, requires "students to maintain a 2.0 average to participate in interscholastic athletics." This rule states that it is based upon "West Virginia Board of Education Policy 2436.10 'Participation in Extracurricular Activities.'"

32. Home schooled students are permitted to participate in a public school's band activities as long as those students enroll in a band class.

33. Home schooled children can participate in band activities even if they fail to satisfy the academic eligibility requirements set forth in Title 127, series 5, section 3.1

of the West Virginia Code of State Regulations. These are precisely the same as the eligibility requirements for interscholastic athletics , which are set forth at Title 127, series 2, section 6.1 of the West Virginia Code of State Regulations, *i.e.*, passing work in the equivalent of 20 periods per week.

34. No evidence was presented that the participation of home schooled children in a public school's band has had any ill effects on the school or any of the students.

35. Physical education is part of the high school curriculum. There is a one-credit requirement, according to William Cameron Walton, principal of South Charleston High School.

36. No evidence was presented that Aaron's participation on the Mannington Middle School wrestling team had any ill effects on Aaron, the school or any of the students.

37. To the contrary, Mrs. Jones testified that Aaron was aware that he would not be allowed to wrestle if his academic performance slipped. This gave him motivation to remain focused on his academic studies.

38. Aaron's father testified that, as a member of the Mannington Middle School wrestling team, Aaron 's physical conditioning improved, he made new friends and he enjoyed a team environment where the members were supportive of one another.

39. Rick Rinehart, the Mannington Middle School wrestling coach, testified that wrestling was a positive experience for Aaron, who worked hard and improved his skills. He reported that there was no reduction in the level of support for the wrestling team, nor were there any discipline problems with Aaron or other team members, as a result of Aaron's presence on the team. He also testified that he would like to see Aaron return to the team.

40. Aaron also testified and explained that his teammates did not treat him differently, that he had fun, and that he made friends on the team.

41. According to the testimony of Mike Hays, the Mannington Middle School's activities director, there are certain basics a school will have to have in place in order to field an athletic team. The costs for those basics must

be met whether or not there is a home schooled student on the team.

42. Additional money for athletics comes through gate receipts, donations and fund-raising activities.

43. Pursuant to the pertinent provisions of West Virginia Code section 18-8-1(c)(3), home schooled children may, with the approval of the county board of education, "attend any class offered by the county board[.]"

44. No evidence was presented that such *ad hoc* participation in public school classes by students who are otherwise home schooled has any adverse impact on such home schooled students, their public school classmates or the school in general.

45. According to correspondence, dated February 10, 2003 from Bob Mitts, Underwriting Manager at the Board of Risk and Insurance Management, the participation of home schooled children in school-sponsored activities does not limit the liability coverage that would otherwise apply.

46. The WVSSAC is a member of the National Federation of State High School Associations (hereafter "the Federation"), which has produced a document entitled "The Case for High School Activities." Said document argues for high school activity programs, such as interscholastic athletics, on the grounds that such activities "promote citizenship and sportsmanship . . . instill a sense of pride in community, teach lifelong lessons of teamwork and self-discipline and facilitate the physical and emotional development of our nation's youth." Citing a number of studies and reports from professional journals, the Federation makes the following three key points in support of their position:

    a. These activities "constitute an extension of a good educational program," noting that the students who engage in such activities "tend to have higher grade-point averages, better attendance records, lower dropout rates and fewer discipline problems than students generally."

    b. They are "inherently educational" in that they "provide valuable lessons for

practical situations - teamwork, sportsmanship, winning and losing, and hard work." The participants "learn self-discipline, build self-confidence and develop skills to handle competitive situations," all of which contributes to the development of "responsible adults and good citizens."

c. "Participation in high school activities is often a predictor of later success - in college, a career and becoming a contributing member of society."

47. The plaintiffs raise the following four issues:

a. By denying Aaron the right to participate in extracurricular activities, such as wrestling, the defendants are breaching Aaron's fundamental constitutional right to a thorough and efficient education and are further breaching their statutory duty to provide home schooling families with resources to assist in their home schooling efforts;

b. The defendants are violating the doctrine of unconstitutional conditions by conditioning access to a public right, benefit or privilege, *i.e.*, participation in interscholastic athletics, upon relinquishment of the plaintiffs' constitutional right to home school their children;

c. The defendants' actions in barring home schooled children from participation in interscholastic athletics violates the principles of equal protection because there is neither a compelling reason nor a rational basis for such treatment. Further, the defendants violate their statutory and regulatory duty to afford every child in West Virginia equal educational opportunities and their regulatory duty to implement extracurricular programs in an

equitable manner; and

d. The WVSSAC has breached its duty to promulgate reasonable rules and regulations, and apply same in a reasonable fashion, because the defendants attempt to justify barring home schooled students from interscholastic athletics primarily on the basis of maintaining academic standards. However, the defendants do not offer individual home schooled children the opportunity to demonstrate that their level of academic achievement is correlative to that of their public school counterparts.

CONCLUSIONS OF LAW

1. The statute that permits students to be home schooled, West Virginia Code section 18-8-1(c), neither explicitly nor implicitly grants home schooled students the right to participate in interscholastic sports. This does not conclude the inquiry.

Fundamental Right

2. There is no dispute that the provisions of Article XII, Section 1 of the West Virginia Constitution afford West Virginia's children the right to a thorough and efficient education.

3. The plaintiffs are, in effect, asking this court to expand the scope of the constitutional right to a thorough and efficient education to include a right to participate in interscholastic sports. This cannot be done under current controlling law. Admittedly, the Supreme Court of Appeals of West Virginia (hereafter "West Virginia Supreme Court") has previously stated that a "thorough and efficient system of schools . . . develops, as best the state of education expertise allows, the minds, **bodies** and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically." *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)(emphasis added). Subsequently, this definition was cited with approval in *Randolph County Board of Education v. Adams*, 467 S.E.2d 150,

158 (W. Va. 1995). Participation in interscholastic sports certainly fosters some of the stated objectives of the State Board, such as the opportunity to develop "the ability to assess self and the total environment; . . . to live a healthy lifestyle; the ability to participate in recreational activities; . . . and a sense of responsibility to facilitate compatibility with others in society." West Virginia Code of State Regulations, Title 126, series 42, section 4.

4. Despite all of the foregoing the West Virginia Supreme Court has expressly ruled 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." *Bailey v. Truby*, 174 W. Va. 8, 23, 321 S.E.2d 302, 318 (1984).

5. In light of the West Virginia Supreme Court's disposition of this issue in *Bailey*, the plaintiffs are unable to establish that Aaron has a fundamental constitutional right to participate in interscholastic sports.

Resources for Home Schooling Families

6. The plaintiffs also argue that the wrestling program at Mannington Middle School is an available educational resource and that, by denying Aaron access to same, the defendants are breaching their statutory duty under West Virginia Code section 18-8-1(c)(3).

7. In pertinent part, West Virginia Code section 18-8-1(c)(3) requires the 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."

8. There 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.

9. The view that coaching and facilities are an

educational resource within the

meaning of West Virginia Code section 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 section 18-8-1(c)(3) by failing to make interscholastic sports available to Aaron.

Doctrine of Unconstitutional Conditions

11. The plaintiffs claim that the defendants are conditioning access to a public right,

benefit or privilege upon the plaintiffs' relinquishment of their fundamental constitutional right to control Aaron's education. In other words, they have been advised that the only way Aaron will be able to participate on the Mannington Middle School wrestling team is if they abandon their home schooling efforts and allow Aaron to enroll in Mannington Middle School as a full-time student.

12. The plaintiffs argue that restrictions on their right to home school Aaron must

satisfy the compelling state interest test.

13. This argument overstates the case. Choices have consequences. The plaintiffs'

have chosen to exercise the right to home school their children. A collateral consequence is that membership on a school wrestling team is not readily available to their son, Aaron.

14. Membership on a wrestling team is not analogous to rights such as entitlement to

receive unemployment benefits. *Sherbert v. Verner*, 374 U.S. 398 (1963)(denying unemployment benefits where appellant could not work on Saturdays due to religious constraints improperly impinged on free exercise of appellant's religion). The court is unpersuaded that the cases relied upon by the plaintiffs are sufficiently on point to assist the plaintiffs in asserting the unconstitutional conditions doctrine, which is a questionable analytical tool in any event. *See, Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994)(In which Justice Stevens, writing a dissent that was joined by Justices Blackmun and Ginsberg, correctly noted, in pertinent part, that although the

doctrine has "a long history" it has "suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question.")

15. The doctrine of unconstitutional conditions does not operate to invalidate the

exclusion of home schooled children from interscholastic athletics.

Rational Basis Test for the Equal Protection Claim

16. The plaintiffs claim that the exclusion of home schooled students from

interscholastic sports teams, pursuant to WVSSAC Rule 127-2-3.1 violates the students' equal protection rights under Article III, Sections 10 and 17 of the West Virginia Constitution. This is an issue that was left unresolved by the Supreme Court of Appeals of West Virginia (hereafter "West Virginia Supreme Court") in *Gallery v. West Virginia Secondary Schools Activities Comm'n*, 205 W. Va. 364, 518 S.E.2d 368 (1999).

17. As noted above, the West Virginia Supreme Court has specifically held 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." *Bailey v. Truby*, 174 W. Va. 8, 23, 321 S.E.2d 302, 318 (1984).

18. Accordingly, the defendants are required to demonstrate only a rational basis for

excluding home schooled students from participation in public school sports programs, not a compelling interest. *Bailey v. Truby, supra*. *See also, Harris v. West Virginia Secondary School Activities Comm'n*, 679 F.2d 881 (4th Cir. 1982).

19. The defendants identify the following justifications, which they assert provide a

rational basis for WVSSAC Rule 127-2-3.1and the resultant exclusion of home schooled students from school-sponsored sports:

a. The State's interest in promoting academics over athletics;

b. Concerns over the ability of public school coaches and administrators to effectively

maintain discipline with regard to home schooled students;

c. The State's interest in allocating scarce funding formula dollars; and

d. Considerations of school community and school spirit.

Promoting Academics over Athletics

20. The defendants assert that the State's interest in promoting academics over sports

is implemented through rules that make a student's eligibility for sports contingent upon achieving certain academic standards. They argue that the academic progress of a home schooled child is only measured once a year and, as a result, the academic eligibility of home schooled students and public school students would be measured by a different yardsticks, to the potential detriment of the public school students.

21. As the plaintiffs correctly note, the defendants have not afforded any home

schooled students the opportunity to demonstrate that their level of academic achievements are comparable to their public school counterparts.

22. The different yardsticks for measuring academic achievement have not prevented

the successful involvement of home schooled students in public school bands.

23. Prioritizing academics over extracurricular sports is a legitimate State goal.

However, the magnitude of the defendants' response to the perceived inequities in the

measurement of academic eligibility between public school students and home schooled students is excessive. This court cannot conclude that the legitimate goal of prioritizing academics

provides a rational basis for the total exclusion of home schooled students from interscholastic sports that results from WVSSAC Rule 127-2-3.1.

Maintaining Discipline

24. In a similar vein, the defendants have expressed

concern that the parents of some students with poor academic performance might withdraw those students from public school and begin home schooling them as a strategic ploy to maintain their athletic eligibility. This is a sad but probably realistic assessment that some parents may prioritize sports over academic progress.

25. While preventing such manipulation of the system may well be a legitimate objective, the court again concludes that this potential problem does not provide a rational basis for the blanket prohibition that currently keeps home schooled children out of school-sponsored sports.

26. As a corollary to their concerns about maintaining academic standards, the defendants also argue that there is no avenue for disciplining a home schooled student except on the playing field. Thus the defendants concede that there are, in fact, disciplinary mechanisms at their disposal with respect to home schooled students who engage in school sports.

27. There is nothing before this court that would suggest that permitting home schooled children to participate in school sports would undermine the ability of coaches or school officials to maintain discipline among public school students.

28. There is no evidence that participation by home schooled children in band activities has impaired the ability of band directors and school officials to maintain discipline over either the home schooled students or the public school students.

29. There is no evidence that Aaron's participation on the Mannington Middle School wrestling team caused disciplinary concerns.

30. Maintaining discipline may be a legitimate objective. However, as a factual matter there does not appear to be any rational basis for barring home schooled students from school sports where the defendants have conceded the existence of disciplinary mechanisms that could be applied to any home schooled student who joins a school team.

31. The exclusion of home schooled students that

flows from WVSSAC Rule 127-2-3.1 fails the rational basis test and the court must conclude that the resultant distinction between public school students and home schooled students violates equal protection principles.

Allocating Scarce Educational Dollars

32. The defendants claim that the State's interest in allocating scarce funding formula dollars provides a rational basis for the Board's, and the WVSSAC's, decision to bar home schooled students from athletic programs. They argue that every educational dollar spent represents hard choices in these difficult times and that every dollar spent on athletics is a dollar that is not available for academics and academic enrichment programs. They correctly note that athletic programs involve, *inter alia*, costs for facilities, maintenance, coaches, officials, uniforms and equipment costs.

33. These assertions regarding the financial impact of athletic programs have no real bearing on the issue before this court because the financial commitment required of any school that offers an athletic program exists independently of whether there is any participation by home schooled students.

34. The defendants' stated concern with the cost of athletic programs provides an interesting and perhaps illuminating counterpoint to their assertions that the State's interest in promoting academics outweighs its interest in promoting athletics. While it is true that academics are, and should be, the primary mission of the State's educational system, it is also true that interscholastic sports are valuable and valued, as well. If this were not so, the money currently spent on school athletic programs each year would be devoted to more academically-oriented concerns.

35. The choice to expend limited educational dollars to develop and implement athletic programs in our public schools has already been made. The propriety of this choice is not at issue herein. However, it is disingenuous for the defendants to rationalize the exclusion of home schooled students from those programs on the basis of money.

36. The question to be answered is whether the defendants can point to a rational

basis for this exclusion of home schooled children from the on-going programs that the public schools have already decided to fund. There is no evidence before this court regarding increased costs, if any, that resulted from Aaron's participation on the Mannington Middle School wrestling team. Nor is there evidence of increased costs from the hypothetical involvement of a home schooled student on any other public school team. The financial impact of a home schooled child's involvement would be *de minimis*, at best (or worst).

37. By contrast, the plaintiffs established that 1) most, if not all, funding for

interscholastic athletics is generated through ticket sales and other fund-raising activities in which home schooling families can participate, 2) the bulk of the expenses related to fielding an athletic team, such as the costs for the facilities and the salaries for the coaching staff, are fixed at the time a school decides to field a team and will not be increased by a home schooled child's participation, and 3) home schooling families, through their federal, state and local tax dollars, make the same contribution to public education in West Virginia as does any other West Virginia taxpayer.

38. Insuring the wise expenditure of educational dollars is clearly a legitimate

governmental objective. However, there is no rational connection between this legitimate objective and the ban on home schooled students' involvement in interscholastic athletics.

39. Even if the defendants had established that there were additional costs incurred by

the school system as the result of participation by home schooled children on a public school's sports team, this court would again conclude that the blanket prohibition is an excessive response and, as such, is not rationally related to the objective.

40. Similar financial concerns have not prevented home schooled students from

participating in band, which is also an extracurricular activity. There was no evidence that the involvement of home schooled students in band has created any financial hardships for the

schools sponsoring bands. Rather, the testimony of Mary Anne Hughes, a parent from New Martinsville whose home schooled children participated in Magnolia High School band, reflected that her family had been enthusiastic supporters of the band and its activities. They were band boosters, they raised money for the band, and they chaperoned band trips.

School Spirit and Sense of Community

41. The defendants argue that considerations of school community and spirit

provide a rational basis for the restriction of athletic programs. They assert that a school's athletic programs serve not only to unify the members of its sports teams but also the whole student body. They also argue that a home schooled student has rejected membership in the school's student body and, as such, is not a logical representative of the school in athletic events.

42. There is no evidence that Aaron's participation on the Mannington Middle School

wrestling team disrupted the school's sense of community. Nor is there any evidence that the student body or his teammates failed to be supportive of Aaron's efforts on the team's behalf.

43. The testimony adduced during the February 13 hearing gives rise to concern that

the defendants' reluctance to open their sports programs to home schooled students reflects something of an insular attitude. Contrary to the defendants' assertion, the home schooled child has not rejected public education. Rather, children such as Aaron are being educated in the manner chosen by their parents and approved by the State through the appropriate county board of education. Closing the doors to their participation in sports further perpetuates the social isolation that is an obvious detriment to home schooling.

44. There is cause to question whether the defendants' refusal to embrace the

participation of home schooled students in interscholastic athletics may flow, in some degree, either consciously or unconsciously, from the insular attitude that emerged from time to time during the course of the testimony on February 13. This gives rise to questions about whether terms such as "school spirit" and "sense of community" are merely socially acceptable

terms that serve to disguise or legitimate this insular attitude.

45. In this context the court cannot conclude that the promotion of school spirit and sense of community constitutes a legitimate governmental objective.

46. Even if this were a legitimate objective in the context of this case, the court does not conclude that this provides a rational basis for excluding home schooled students from joining their public school counterparts in athletic competition. There is simply no evidence that a student body will not rally behind any member of a team wearing their school's uniform.

47. In this same vein, the defendants argue that schools rely upon members of athletic teams to provide role models and leaders for the student body. While this is a laudable sentiment it is not a legitimate governmental interest and does not provide a rational basis for excluding home schooled children from the benefits of team membership. In fact, recent history has shown us more than one example of a stellar West Virginia athlete whose behavior off the playing field has been, literally, criminal. There is nothing before this court that demonstrates that athletic prowess and leadership potential necessarily go hand in hand.

48. There is no dispute that home schooled students are allowed to participate in extracurricular band activities. There is no evidence that such participation has destroyed school spirit or disrupted the sense of community. The only cited difference between band and school sports, aside from participation *vel non* by home schooled students, is that the home schooled student must enroll in band class, which is considered an academic subject. The court finds that enrollment in a single class is a *de minimis* distinction that does not support treating home schooled students who want to participate in extracurricular sports differently from home schooled students who want to participate in extracurricular band. By extension, it does not support treating home schooled students who can qualify for participation on a school team differently from their public school counterparts.

Reasonable Rules

49. The plaintiffs argue that the WVSSAC has

breached both its duty to promulgate reasonable rules and regulations and its duty to apply the same in a reasonable fashion.

50. As an initial matter, the court will address the fact that the WVSSAC cites *Cape v. Tennessee Secondary School Athletic Association*, 563 F.2d 793, 795 (6th Cir. 1977),[4] for the proposition that the plaintiffs' "remedy, if any, should more appropriately be directed to activity within the framework of the association itself, a framework which is not shown to be inadequate to resolve issues of this sort." In this case, the framework of the WVSSAC has been shown to be inadequate to resolve the issues pending before this court. The plaintiffs are foreclosed from membership in the WVSSAC. Further, they were expressly advised that they were not entitled to bring Aaron's eligibility issue before the WVSSAC Board of Appeals. Therefore, the court rejects the WVSSAC's suggestion that 'the same philosophy [employed by in *Cape*] should be adopted here."

51. The WVSSAC cautions this court against interfering in its internal affairs. Quoting from *Shelton v. N.C.A.A.*, 539 F.2d 1197, 1198 (9th Cir. 1976), it further reminds the court "'that it is not judicial business to tell a voluntary association how best to formulate or enforce its rules.'"

52. The *Shelton* Court employed the same rational basis test that is being brought to bear on the plaintiffs' equal protection claims in this case. *Shelton*, 539 F.2d at 1198 ("[W]e must examine the rule to determine whether it rationally furthers some legitimate purpose.")

53. As noted, under equal protection analysis, the draconian WVSSAC Rule 127-2-3.1 fails to *rationally* further some legitimate purpose.

54. As the WVSSAC has conceded, any presumption

[4]Although not identified as such by the WVSSAC, this is a very brief *per curiam* opinion arising out of a challenge to the rules governing how female students played basketball.

of validity that attaches to its
rules and regulations must yield to a finding that a given rule violates constitutionally protected rights.

55. Even if the offending rule were deemed to be constitutional, the plaintiffs still
urge that it is not a reasonable rule. In so arguing they rely upon *Hamilton v. Secondary Schools Activities Commission*, 386 SE2d 656 (W. Va. 1989).

56. The *Hamilton* Court reviewed the WVSSAC's practice of determining a
student's eligibility based on the number of years of attendance. This rule is aimed at preventing the practice of "red-shirting" whereby a student is held back for a year to allow such student to develop and mature physically with an eye to improved athletic performance. The appellant in *Hamilton* had repeated ninth grade due to legitimate academic concerns. However, the WVSSAC refused to look behind the reasons for holding him back.

57. The *Hamilton* Court stated that "[w]hat makes the scheme unreasonable is the
Commission's refusal to consider the circumstances surrounding a student's being held back. There is no inquiry into actual *intent* to red-shirt." *Hamilton*, 386 S.E.2d at 658. Noting that the appellant was challenging "the substantive reasonableness of the Commission's rule," the Court determined that, in the context of the appellant's case, the Commission's rule was "not within the Commission's legitimate authority to promulgate 'reasonable' regulations for school sports." *Hamilton*, 386 S.E.2d at 659.

58. As in *Hamilton*, the WVSSAC "has cast its net too wide." *Hamilton*, 386 S.E.2d
at 658. The legitimate objectives of the WVSSAC could have been "accomplished in a more reasonable and less restrictive way." *Hamilton*, 386 S.E.2d at 659.

59. Therefore, the court must conclude that WVSSAC Rule127-2-3.1 is not a
reasonable regulation.

60. The plaintiffs also argue that the WVSSAC has created a number of exceptions to
its own eligibility rules under which students may participate in athletics at a school they do not attend. The defendants

acknowledge that there are certain exceptions but assert that the plaintiffs have overstated or misstated them. The court need not address the accuracy of the plaintiffs' assertions in this regard. Rather, it is sufficient for purposes of this analysis that the WVSSAC has been able to craft rules to meet circumstances where application of a blanket rule would be unfair. For example, exceptions from the attendance requirement are available to students at feeder schools where the feeder schools do not offer a particular sport. Title 127, series 2, section 3.2.1 of the West Virginia Code of State Regulations.

61. The significance of the foregoing is that it proves that the system has the inherent

flexibility to deal fairly with exceptional circumstances. It emphasizes the fact that the total ban at issue herein is overkill. More finely tailored rules would meet the legitimate purposes this draconian ban is meant to serve.

DECISION

For the reasons discussed above, the court concludes 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. Therefore, the defendants' policy of exclusion for home schooled children cannot continue. Each of the foregoing grounds provides an independent, distinct and alternative basis for ruling in favor of the plaintiffs.

The plaintiffs seek declaratory relief, injunctive relief and extraordinary relief in the form of writs of prohibition and mandamus. In light of the foregoing, it is hereby **ORDERED**, **ADJUDGED** and **DECREED** as follows:

1. Pursuant to West Virginia Code section 29A-4-2, a court may declare a rule invalid if it violates constitutional provisions or exceeds the statutory authority or jurisdiction of the agency or is arbitrary and capricious. Title 127, series 2, section 3.1 of the West Virginia Code of State Regulations is hereby declared invalid on any or all of the grounds that 1) it violates equal protection, 2) exceeds the statutory authority of the West Virginia Board of Education and the West Virginia Secondary Schools Activities Commission, and 3) is arbitrary and capricious in that it is overly broad.
2. The defendants are enjoined from violating the plaintiffs' statutory right of access to available educational resources, which includes participation on an existing school athletic team;
3. The defendants are enjoined from violating the equal protection provisions of the West Virginia Constitution by enforcing the enrollment rule that excludes home schooled students from interscholastic athletics;
4. The defendants are enjoined from failing and refusing to comply with their statutory duty to promulgate and enact reasonable rules for the regulation of interscholastic athletics;
5. A writ of prohibition is directed to the defendants 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;
6. The plaintiffs have met the three prerequisites for issuance of a writ of mandamus. Therefore, a writ of mandamus is issued
    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.

The objection of any party aggrieved by entry of this order is noted and preserved.

The Clerk is hereby **DIRECTED** to forward an attested copy of this Order to all counsel of record, including counsel for the *amicus*. There being nothing further, this action shall be **DISMISSED** and removed from the docket of this court.