

No. 31785     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; 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 School Activities Commission, Appellant

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SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Benjamin, Justice, dissenting:

A sunny fall afternoon at a Marion County, West Virginia public middle school. The school football field. The school football team preparing to take the field. The school band in the stands urging on the home team. Fans cheering. A scene which plays itself out countless times each year across West Virginia.

Two similarly situated 13-year olds at the game. Both are the children of parents whose taxes help fund the public schools. Both children are non-publically schooled in full accordance with West Virginia law. Both are bright, athletic and hard-working children. One attends the local private religious school. The other is home-schooled. West Virginia permits both to be in the stands cheering. West Virginia permits both to be in the school band urging on the players and the crowd. West Virginia permits one 13-year old to take the

field as a player. It forbids the other from doing the same. Different treatment? Yes. A bona fide rational basis for such different treatment? No.

That which fairness suggests, justice often requires. Facially neutral rules and procedures ought not result in the dissimilar treatment of similarly situated children. Sadly, the result in this case permits such a disparity in treatment and opportunity.

Daniel and Christy Jones, plaintiffs below and appellees herein, elected to home school their son Aaron, rather than send him to their local public middle school, Mannington Middle School in Marion County, West Virginia. In early 2002 when he was eleven years old, Aaron decided he would like to participate on the Mannington Middle School wrestling team. His parents contacted school officials who did not object to Aaron's participation so long as the West Virginia Secondary Schools Activities Commission ("WVSSAC") gave its approval. The WVSSAC, a voluntary organization, governs interscholastic athletics and band participation for its member schools. The WVSSAC refused to permit Aaron to participate on the wrestling team because he was not enrolled as a full-time student at Mannington Middle School as required by W. Va. C.S.R. § 127-2-3.1.<sup>1</sup> The WVSSAC

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<sup>1</sup>The WVSSAC is a quasi-public body, established by W. Va. Code § 18-2-25, authorized to supervise and regulate "all interscholastic athletic events, and other extracurricular activities of the students in public secondary schools, and of said schools of their respective counties" upon delegation of such authority to the WVSSAC by the county board of education. The WVSSAC is likewise authorized to regulate and control  
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likewise rejected the Jones' appeal of its decision because Aaron was not enrolled as a full-time student in a member school.

West Virginia requires all children to attend school between the ages of six and sixteen. W. Va. Code § 18-8-1(a). West Virginia permits compliance with the compulsory school attendance statute by a child's enrollment in a public school, a private school, a parochial school or other approved school.<sup>2</sup> W. Va. Code §18-8-1(a) and (b). Additionally, West Virginia permits compliance where the child receives instruction in his or her home or other place, with the approval of the county school board and superintendent, subject to certain instruction and achievement requirements. W. Va. Code §18-8-1(c). The person providing home school instruction must annually: (1) notify the county superintendent or board of his or her intent to home school a child; (2) present satisfactory evidence of possessing a high school diploma or equivalent; (3) outline a plan of instruction for the ensuing school year; and (4) obtain and submit to the county superintendent an academic

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<sup>1</sup>(...continued)

interscholastic athletic events and other extracurricular activities of private and parochial secondary schools which delegate such authority to the WVSSAC. The WVSSAC's rules governing student eligibility to participate in interscholastic athletics are contained in Title 127, Series 2 of the Code of State Rules.

<sup>2</sup> Private schools, parochial schools, church schools or schools of a religious order are required to observe the minimum instruction terms applicable to public schools, maintain immunization and attendance records, and are subject to reasonable health, fire and safety inspections. W. Va. Code § 18-28-2. Students at these schools are required to be tested annually on the subjects of English, grammar, reading, social studies, science and mathematics until the age of sixteen. W. Va. Code § 18-28-3(a).

assessment of the child for the previous school year by June 30 of each year.<sup>3</sup> W. Va. Code §18-8-1(c)(2). Further,

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.

W. Va. Code § 18-8-1(c)(3).

There is no suggestion in the record before this Court that Aaron Jones has failed to meet any statutory requirement for home schooling. In fact, all indications are that he is a very good student, that he would likely excel academically if enrolled in a public school and that he enjoyed every minute of the brief period in which he was permitted to wrestle for Mannington Middle School by virtue of a circuit court injunction. There is no evidence

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<sup>3</sup>The annual assessment must be satisfied by (1) exceeding the fiftieth percentile on a nationally standardized achievement test in the subjects of reading, language mathematics, science and social studies or, if failing to meet the fiftieth percentile, showing improvement over the previous years results; (2) participating in the testing program currently in use in the public schools, at a public school and meeting the state testing program's current guidelines of acceptable progress; (3) providing the county superintendent with a narrative prepared by a certified teacher indicating a portfolio of samples of the child's work has been reviewed and that the child has demonstrated academic progress for the year in accordance with the child's abilities in the areas of reading, language, math and social studies; or (4) the child completes an alternative academic assessment of proficiency that is mutually agreed upon by parent or legal guardian and the county superintendent. W. Va. Code § 18-8-1(c)(2)(D).

whatsoever that he disrupted the team's dynamic or had difficulty getting along with his team mates.

As expressly sanctioned by West Virginia law, Aaron's parents have opted to privately school their child. They are in full compliance with West Virginia law governing provision of a non-public education; indeed, they are in as full compliance with applicable West Virginia law for the education of a child as the parents who send their children to the local public middle school and the local private religious school, Fairmont Catholic Grade School. This Court has previously found that public and parochial school students may rationally be treated differently in the allocation of state funds because they are not similarly situated as the parochial school student has rejected a free public education. *Janasiewicz v. Board of Educ. of Kanawha County*, 171 W. Va. 423, 426, 299 S.E.2d 34, 37-38 (1982). Were Aaron simply being treated differently than publically schooled students, I would agree with the majority in this matter. However, Aaron is being treated differently than other non-publically educated students in Marion County under the WVSSAC Rules. Where both educations are expressly sanctioned under West Virginia law as acceptable non-public educations, I can find no rational basis to treat those children enrolled in private or parochial schools in Marion County differently from those children being home-schooled in Marion County so long as legitimate academic concerns can be met – as they easily can for both non-public school students.

There is no constitutional right to participate in public school athletics inherent in the law. *See Bailey v. Truby*, 174 W. Va. 8, 23, 321 S.E.2d 302, 318 (1984) (noting “[p]articipation in nonacademic extracurricular activities, including interscholastic athletics, does not rise to the level of a fundamental or constitutional right” under the West Virginia Constitution). *See, also, Hart v. National Collegiate Athletic Association*, 209 W. Va. 543, 550 S.E.2d 79 (2001). Thus, while the importance of participation for a home-schooled child in public school athletics requires scrutiny as a matter of common law, such participation “does not rise to the level of a fundamental or constitutional right under Article XII, § 1 of the West Virginia Constitution.” *Bailey*, 174 W. Va. at 23, 321 S.E.2d at 318. Nor does it implicate a liberty interest. Participating in athletics is a privilege. Petitioners herein may, and should, develop appropriate rules and procedures to condition the exercise of this privilege so long as such rules and procedures have a rational basis. *Bailey, supra*. *See Harris v. West Virginia Secondary School Activities Comm’n.*, 679 F.2d 881 (4<sup>th</sup> Cir. 1982).

The ultimate issue herein is not whether a home-schooled child has a right to participate in public school athletics. It is instead whether one non-publically educated child has the right to the same treatment as another similarly situated non-publically educated child under the statutes, rules and procedures of this State. Whether the statutes, rules or procedures involve athletics or some other matter, justice requires that we not discriminate in favor of one child over another.

Here, without a compelling interest, much less a veritable rational basis, West Virginia has created a disparity in the treatment of such children by enacting rules which allow certain non-public school students to participate on public school athletic teams. *See Bailey, supra*. Under the WVSSAC “feeder school” rules, W. Va. C.S.R. § 127-2-3.2<sup>4</sup>, students

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<sup>4</sup>W. Va. C.S.R. § 127-2-3.2 provides:

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.

3.2.2. for students from the WV Schools for the Deaf and the Blind (WVSD&B) to participate at Hampshire High School or Romney Middle School (only in sports not available at WVSD&B).

3.2.3. if member schools containing grades 6 and/or 7 and/or 8 and/or 9 may combine students from two or more schools within the county to form one interscholastic team in a sport. Requests for permission to combine students from two or more schools in the same non-public or public school system must be submitted annually to the West Virginia Secondary School Activities Commission (WVSSAC) in writing by the superintendent of the non-public or public school system. Schools which are combining to form one team must be feeder schools for the same high school and at least one school does not have sufficient numbers for a team. If more than two schools are involved, principals are to evaluate the number of available participants in each school and shall combine schools to provide as many teams that sufficient numbers will allow. Sufficient numbers will be defined as the number of a starting line-up plus 50% (for odd number line-ups, round up).

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enrolled in a non-public or private/parochial school, may participate on a public school team where the non-public or private/parochial school and the public school are both feeder schools to the same public high school. Thus, if a sixth grade student, such as Aaron, were enrolled in a parochial school which opted into the WVSSAC and which is located in a county where there is no parochial high school which is also a WVSSAC member, West Virginia permits the parochial school student to play on the local public school athletic team. The only conditions necessary for the parochial school student to participate is that he or she maintain a requisite 2.00 grade point average and that the parochial school not field a team in the sport in which the student wishes to participate. In Marion County, a sixth grade student at Fairmont Catholic Grade School is eligible to compete on the Mannington Middle

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<sup>4</sup>(...continued)

3.2.4. Students enrolled in the ninth grade of a four, five or six year high school may participate on the high school team. Also, ninth graders of a feeder school may participate on their high school team and sixth grade students of a K-6 elementary feeder school may participate on their junior high team if granted permission by the county board of education or governing body of a private/parochial school and the school principals involved. Once a ninth grade student becomes a member of the high school team said student will be ineligible for the junior high team in that sport.

3.2.5. Students at a junior high or middle feeder school who are not provided the opportunity to participate because of age may move up to their high school if granted permission by the county board of education or governing body of a private/parochial school and the school principals involved.



School's wrestling team - a privilege now denied to Aaron. West Virginia law provides to one non-publically educated student in Marion County what it denies to another.

West Virginia statutory law does not qualitatively distinguish between the non-public education of home schooling and the non-public education of enrolling in a private or parochial school. It is something which, subject to quality standards being met, provides West Virginians with a choice of education. Both non-publically educated students being similarly situated, and West Virginia having chosen to extend to one the privilege of competing, West Virginia must extend the same privilege to the other absent a clear and compelling rational basis not to do so. Otherwise, the majority has attached to the choice of education which this State gives to parents a penalty not otherwise provided by West Virginia law and, I think, not anticipated by the Legislature.<sup>5</sup>

The claimed rational bases set forth to this Court for denying a home-schooled student the same privilege to participate in middle school athletics as other non-publically educated children are unpersuasive. The argument that the enrollment requirement ensures academics standards are maintained for participation is a valid and important concern. It is however, not the enrollment which should justify the disparate treatment herein, but rather the ability

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<sup>5</sup>The concept of home-schooling is one of controversy. That issue is not before this Court. The Legislature, being the appropriate forum to debate the pros and cons of home-schooling, has determined home-schooling to meet the educational requirements of West Virginia.

or inability of Aaron to meet academic standards which should be a bona fide rational basis.<sup>6</sup>

The mechanism used by the WVSSAC to ensure academic standards being met by an athlete, by its application, automatically excludes home-schooled children from participation, regardless of the actual academic ability of the child. In other words, it has more to do with arbitrarily treating similarly situated children differently than it does with ensuring a requisite educational level being maintained. W. Va. Code § 18-8-1(c)(2)(D) provides for objective bases, i.e., nationally standardized achievement tests, among other tests, to be used to assess a home-schooled child's academic progress. Requiring a home-schooled athlete to take and obtain a certain score on such a test meets the important need for academic standards with little, if any, difficulty for the WVSSAC. Arguing, as the WVSSAC has done, that athletes with bad grades could avoid participation restrictions by opting for home-schooling is implausible and speculative. Such situations are easily subject to identification and exclusion just as they would be if the athlete instead opted to move from a public school to a parochial school. Adequate passing of the objective home school or public school test meets this restriction. Moreover, the argument that a home schooled child is not graded on a 4.00 scale fails to recognize that a 2.00 at the local public school may be, and probably is, different

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<sup>6</sup> The record demonstrates that Aaron receives testing in each required subject every nine weeks. He has also participated in and successfully passed annual nationally standardized testing. Furthermore, the record demonstrates that, according to the expert testimony, Aaron's work could be given an grade equivalent to the 4.00 grade point formula by review of a public school teacher.

from the 2.00 at the local parochial school.<sup>7</sup> It is ironic that home-schooled children can participate in public school 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. As noted by Judge Bloom below, these are the same requirements 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 also do not place credence in the purported rational basis for permitting participation by one Marion County non-publically educated student and not another under the so-called “feeder rule.” This rule holds that the non-publically schooled students who are permitted to participate on the public middle school team will eventually be classmates with their public school teammates when they reach high school. As applied to individuals, it is speculative at best. There is no certainty that a Fairmont Catholic Grade School athlete participating on a public middle school athletic team will attend the same Marion County high school as his teammates. It is just as likely that the Fairmont Catholic Grade School athlete will continue his or her education at the Catholic high school in neighboring Harrison County, as there is no Catholic high school in Marion County for he or she to “feed” into.

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<sup>7</sup>Likewise, the 2.00 grade point average standard cannot be realistically relied upon as an objective statewide standard unless the criteria which support the 2.00 grade point average are uniform from school to school. Absent a statewide test for athletes as a prerequisite to competing, which is apparently not preferred by the WVSSAC, the 2.00 grade point average requirement should not be erected as a bar to Aaron.

Absent more, a home schooled student and a student at Fairmont Catholic Grade School in Marion County may both be considered possible candidates for the public high school. Both non-public educations may constitute feeder possibilities for the public high school.<sup>8</sup>

There is also no rational basis that I can see for treating a home schooled child differently with respect to activities at the public school in which the home schooled child may participate. The home schooled child is permitted to enroll in band class at the local public school. As such, the home schooled child is also eligible to participate in the school's band and participate when the band plays at athletic events, concerts and competitions. The WVSSAC attempts to justify the distinction by arguing that band is a co-curricular, rather than an extra-curricular, activity. The argument goes that participation in band is linked to participation in a specific class offered by the public school. The basis of this argument is a distinction without a difference. Both the band and the athletic endeavors receive public funding, so obviously the decision has been made that both are of importance to the educational experience. Why distinguish between the two with respect to eligibility? What if the home-schooled student took a physical education class at the local public school? Neither the WVSSAC nor the State School Board have put forth a rational response to justify

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<sup>8</sup>One might just as easily speculate that a home schooled student who plays athletics at the public middle school may be more likely to enroll at the public high school in order to continue his athletic eligibility once he or she surpasses the feeder school's maximum grade level since he or she has no other alternative which permits the athlete to continue both academics and sports.

the purported distinction between co-curricular and extra-curricular activities in determining a home-schooled student's eligibility to participate.

Every argument raised by the WVSSAC as a basis for treating the two non-publically educated students differently fails to meet the requirement of being a bona fide rational basis for the different treatment of similarly situated children. They are pretexts. Neither non-publically educated student has an inherent right to play sports at the public middle school. However, where, as here, the State has chosen to extend to one non-publically educated student the privilege to play sports, it must do so for the other. Each child is entitled to equal protection and treatment under the rules and procedures applicable herein. The allowances and changes needed to effect this ability to play and uphold the principles which underlie the conditions for playing, such as academics, are easily met. The barriers relied upon by the State and accepted by the majority as rational bases to prevent an equal opportunity for both non-publically educated students focus unfortunately on inflexible procedures rather than the important policies which underlie them. I therefore dissent.<sup>9</sup>

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<sup>9</sup> While I agree with Justice Starcher's dissent that Judge Bloom's decision below is as learned as it is comprehensive, I cannot join my fellow Justice's dissent. I do not agree that the ability to participate in public school athletics rises to the level of "rights of children and parents."