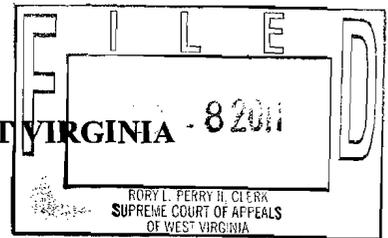


No. 11-0243

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA - 8 2011



**BOARDS OF EDUCATION OF THE COUNTIES OF:  
BARBOUR, BERKELEY, BOONE, BRAXTON,  
BROOKE, CABELL, CALHOUN, CLAY, DODDRIDGE,  
FAYETTE, GILMER, GREENBRIER, HAMPSHIRE,  
HANCOCK, HARDY, HARRISON, JACKSON,  
JEFFERSON, KANAWHA, LEWIS, LINCOLN,  
LOGAN, MARION, MARSHALL, MASON, McDOWELL,  
MERCER, MINERAL, MONONGALIA, MONROE,  
MORGAN, NICHOLAS, PENDLETON, PLEASANTS,  
POCAHONTAS, PUTNAM, RALEIGH, RANDOLPH,  
RITCHIE, ROANE, SUMMERS, TAYLOR, TUCKER,  
TYLER, UPSHUR, WEBSTER, WETZEL,  
WIRT, WOOD, and WYOMING,**

**Plaintiffs Below, Appellants,**

**v.**

**PUBLIC EMPLOYEES INSURANCE AGENCY,  
PUBLIC EMPLOYEES INSURANCE AGENCY  
FINANCE BOARD, and WEST VIRGINIA  
STATE AUDITOR,**

**Defendants Below, Appellees.**

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**AMICUS BRIEF OF THE WEST VIRGINIA STATE BOARD OF  
EDUCATION AND THREE COUNTY SCHOOL DISTRICTS**

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**Defendants Below, Appellees.**

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**AMICUS BRIEF OF THE WEST VIRGINIA STATE BOARD OF  
EDUCATION AND THREE COUNTY SCHOOL DISTRICTS**

---

**I.**

**INTERESTS OF THE AMICI**

This brief is filed on behalf of the West Virginia Board of Education (“State Board”) and three county school systems currently being administered by the State Board, those being Grant,

Mingo, and Preston County schools.<sup>1</sup> West Virginia Constitution, art. 12, § 2, vests in the State Board the “general supervision of the free schools of the State.” The Legislature has implemented this provision by granting broad authority to the State Board, including the power to establish uniform systems of school district budgeting and accounting (Code §§ 18-9B-5 and -9), to approve the annual budgets of the county boards (Code § 18-9B-6), and to compute the “local share” and “total foundation allowance” for each school district pursuant to the statutory Public School Support Plan (PSSP) for the purposes of: 1) preparing the annual budget request for State-aid-to-schools and 2) requisitioning appropriated funds for each district (Code §§ 18-9A-11, -12, -17 and -18). The State Board and DOE endeavor to exercise this considerable authority in a manner that promotes efficiency, predictability, sound fiscal policy and the overall welfare of the State’s schools, all in furtherance of “a thorough and efficient system of free schools.” W. Va. Const. art. 12, § 1.

The State Board’s discretion and rule-making authority with respect to all of the above functions has been severely curtailed by the principal statute at issue in this litigation – W. Va. Code § 5-16D-6. That statute effectively created a mandate that each county board of education report as an expense the cost of pre-funding the health benefits to which its current employees will be entitled upon retirement; i.e., accruing the expense of these benefits as they are earned rather than when the benefits are eventually paid. However, neither that statute nor any other provided *any*

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<sup>1</sup> The State Board assumed administrative control of these school districts pursuant to Code § 18-2E-5(p)(4)(C), which authorizes the State Board of Education to “declare a state of emergency in the school system” and, if not rectified, to “intervene in the operation of the school system.” The State Board has delegated to the State Superintendent authority over, *inter alia*, the expenditure of these school districts funds, the employment and dismissal of personnel, the establishment and operation of the school calendar, and the establishment of instructional programs and rules. The decision to include these three school districts as amici was made jointly by the State Board and the State Superintendent of Schools.

mechanism for the county boards to alter those benefits or to obtain revenues to pre-fund them. Consequently, each county school district must carry, perforce, a massive and rapidly increasing liability for which it bears no responsibility.<sup>2</sup> As explained in the Statement of Facts, there is no accounting principle, including GASB Statement 45, that requires this liability to be recognized at the county board level.

Because the PSSP allowance to each county board for health benefits (Code § 18-9A-24) provides no funds whatsoever to fund post-employment benefits as they are earned, the State Board is precluded from including that expense in its preparation of the annual State-aid-to-schools budget request and is, likewise, precluded from requisitioning State aid to pay that expense. Like the school boards that it supervises and supports, the State Board has been rendered impotent with respect to the management of this burgeoning “OPEB”<sup>3</sup> liability, and it is unfair and misleading to suggest otherwise by requiring said county boards to report liabilities for which they are not responsible.<sup>4</sup>

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<sup>2</sup>As of June 30, 2010, the 55 county school districts had reported OPEB liabilities of more than \$261 million attributable to PEIA’s billings for the cost of pre-funding post-employment health benefits for employees included in the PSSP foundation formula. (Exh. 1.) This liability exceeded 10% of their combined annual budgets of \$2.4 billion (Exh. 2). The county boards also reported an additional \$41 million in OPEB liabilities for employees that are funded with non-PSSP revenues, such as federal grants and local “excess levies,” for a total OPEB liability of about \$302 million. (Exh. 1.) It is estimated that this liability will grow to nearly \$850 million by June 30, 2012, about \$730 million of which is attributable to PSSP-funded employees. (Exh. 6.)

<sup>3</sup>Other Post-Employment Benefits.

<sup>4</sup>Judge Recht, in his 1982 opinion holding that the State’s then-existing formula for funding public schools violated the State Constitution, found that the Legislature could not legitimately delegate its duty to provide for a “thorough and efficient system of schools” to county boards of education unless it also provided them with sufficient resources to do so. Otherwise, they would be “rendered impotent to carry out [their] delegated responsibility.” (*The Recht Decision, Extracts from the Recht Decision of May 1982*, W. Va. Dept. Of Culture and History, available online at <http://www.wvculture.org/history/education/recht01.html>.) The situation presented here is analogous in that respect.

Further, the DOE's supervision of the local school district budget process has been frustrated by the requirement that county boards record a liability that they cannot pay. Because the PSSP foundation allowance makes no provision for the OPEB expenses billed by the PEIA, the DOE has advised the counties that they need not (and, indeed, should not) pay this expense or include it in their annual budgets. (Exh. 3 at ¶ 23.) However, per the challenged statute, that unpaid amount must, nonetheless, be shown as a liability on their audited financial statements. (Exh. 3 at ¶¶ 6, 21.) Because there is no mechanism for the county boards to fund this liability, the DOE excludes it from its calculation of whether the counties' budgets are prepared so as to maintain a 3% unreserved general fund balance at year's end, as recommended by the DOE. (Exh. 2.) These difficult supervisory decisions were necessitated by the challenged statutory scheme and run counter to the State Board's general policy that the county boards may not incur expenses or liabilities they cannot pay.

The three other amici – Grant, Mingo and Preston county school systems – have the same interest as the school boards that are Appellants herein. All are required to report as an expense the cost of funding their employees' post-employment health care benefits as they are earned, an expense over which they have no control and no funds to pay. Perforce, their financial statements show unwieldy deficit balances inhibiting their ability to engage in any long-range planning and threatening their already established plans. As of June 30, 2010, the combined liability of these three counties to fund their PSSP-funded employees' post-employment benefits exceeded \$10 million, leaving each with a deficit fund balance.<sup>5</sup> By the close of this fiscal year (FY 2012), it is

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<sup>5</sup> Exhs. 1 and 2. Mason and Preston Counties are the only counties in the State that would have had a deficit balance on June 30, 2010 independently of the new reporting requirements imposed by W. Va. Code § 5-16D-6. (Exh. 2.) As of that date, 40 other counties reported deficit balances attributable *solely* to those reporting requirements. (*Id.*)

expected that these liabilities will exceed \$26 million. (See footnotes 2 and 8.) The 'parade of horrors' to which these county boards are thereby exposed (in particular, their bond ratings) is well-articulated in Appellants' brief at 12-14.

## II.

### STATEMENT OF FACTS

#### A. The Statutory Scheme.

Code § 5-16D-6<sup>6</sup> has two pertinent requirements, only one of which is at issue here. First,

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<sup>6</sup>Code §5-16D-6, entitled "Mandatory employer contributions," is set forth below with italicized explanatory comments:

(a) The [PEIA Finance] board shall annually set the total annual required contribution sufficient to maintain the [Retiree Health Benefits Trust] fund in an actuarially sound manner in accordance with generally accepted accounting principles [GAAP]. [*GASB Statement 43 governs GAAP principals applicable to reporting by post-employment health benefit plans, and Statement 45 governs reporting by employers, such as county boards of education, that provide post-employment health benefits.*]

(b) The board shall annually allocate to the respective employers [*including county boards of education, which are mandatory participants in the Public Employees Insurance Program*] the employer's portion of the annual required contribution, which allocated amount is the "employer annual required contribution".

(c) The board may apportion the annual required contribution into various components. These components may include the amortized unfunded actuarial accrued liability [*the UAAL roughly approximates the present value of future benefits already earned less assets of the trust*], the total normal cost [*the cost of prefunding benefits earned in the current fiscal year*], the employer annual required contribution [*an amount sufficient to pay the current year's normal costs plus the current year's cost of amortizing the UAAL over 30 years*] and the lesser included minimum annual employer payment, . . . [*See subsection (d) below.*]

(d) Employers shall make annual contributions to the fund in, at least, the amount of the minimum annual employer payment rates established by the board. [*Comment: These minimum annual employer payment rates have been set by the PEIA Finance Board so as to "pay as you go" the otherwise unfunded cost of retiree health care*]

subsection (d) of the statute provides funding for PEIA plan members that have already retired. It requires participating employers (including county boards of education) to pay their allocated share of the otherwise unfunded cost of providing PEIA health care coverage to retirees in the current fiscal year. This is the “pay as you go” portion of PEIA’s invoices. This obligation pre-existed the enactment of Code § 5-16D-6 and is not at issue here because the county school boards have long been provided with funding to pay that expense via the Public School Support Plan (PSSP).<sup>7</sup>

Subsection (e) is the provision at issue. It *fails* to provide for “prefunding” the future benefits of active employees that have *not* yet retired. Although it requires the PEIA to bill participating employers (including county boards of education) for their proportionate share of the otherwise unfunded cost of these post-employment health benefits as they are earned, any amount so billed need not actually be paid. However, any amount *not* paid “shall remain the liability of that employer until fully paid.” Code § 5-16D-6. With respect to county boards of education, this

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*expenses to be paid in the current fiscal year.]*

(e) The Public Employees Insurance Agency shall bill each employer for the employer annual required contribution and the included minimum annual employer payment. The Public Employees Insurance Agency shall annually collect the minimum annual employer payment. The Public Employees Insurance Agency shall, in addition to the minimum annual employer payment, collect any amounts the employer elects to pay toward the employer annual required contribution. Any employer annual required contribution amount not satisfied by the respective employer shall remain the liability of that employer until fully paid. [*This last sentence is the crux of the problem presented to this Court, and is not required by GASB Statements 43 or 45.*]

<sup>7</sup>Code § 18-9A-24(a) includes an allowance for each county to pay its “proportionate share of [the] retirees subsidy established by the [PEIA] finance board.” Code § 5-16-5(c), in turn, grants to the PEIA Finance Board discretionary authority to establish below-cost premium rates for retirees and to “allocate a portion of the premium costs charged to participating employers to subsidize the cost of coverage for participating retired employees, . . .”

portion of the PEIA's bills is *not* funded by the PSSP nor has any other funding mechanism been provided.

The disputed and unfunded portion of the PEIA's billing is far larger than the "pay as you go" portion. For FY 2012, participating employers are being billed a total of \$150 million for the "pay as you go" portion, but a whopping \$714 million for pre-funding the benefits of their active employees. (Exh. 4.) Virtually none of that \$714 million will actually be paid, but instead will be added to the already-existing liabilities reported by participating employers, including county boards of education.<sup>8</sup>

**B. The Self-Defeating Features of The Current Statutory Treatment of OPEB Obligations.**

It is generally accepted that funding post-employment benefits (including pensions and retiree health care) when they are earned rather than when they are paid is highly advantageous for several reasons, including the predictability/stability of annual costs, the avoidance of shifting to future generations the costs of current government services, and determining the sustainability of the benefit package.<sup>9</sup> Further, investment of the assets created by funding these benefits as earned

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<sup>8</sup>Mingo County Schools, for instance, like all other participating employers, is being billed and will pay \$167 per month per employee to subsidize the health care costs of retired PEIA members in FY 2012. It is also being billed, and cannot pay, an additional \$794 per month per employee to pre-fund those employees' post-employment health care benefits. Just for the month of August 2011, the portion that Mingo County cannot pay is \$378,932. For the entire year, it will be billed about \$4.5 million that it cannot pay. Consequently, at the close of FY 2012, it will add that amount to its already existing liability for unpaid PEIA billings (about \$9.5 million) for a total OPEB liability of \$14 million accumulated over only 5 years. (About 80% of each of these figures is attributable to employees funded via the PSSP.) This anticipated OPEB liability is equivalent to about 30% of Mingo County Schools' annual budget. Mingo County is not atypical.

<sup>9</sup>See Anastopoulos, Sofia, Fiscal First Aid Quick Reference, Underfunding Accrued Liabilities Such as Pensions, Government Finance Officers Association, available online [http://www.gfoa.org/downloads/GFOA\\_FFAD36UnderfundAccruedLiabilitieslikePensions.pdf](http://www.gfoa.org/downloads/GFOA_FFAD36UnderfundAccruedLiabilitieslikePensions.pdf).

will reduce their overall cost as well as the reported liabilities of employers or their benefit plans. (*Id.*) Unfortunately, the current situation in West Virginia provides strong *disincentives* to fund this liability, despite the advantages of doing so, even for a school board that has discretionary funds that it might otherwise wisely devote to such a purpose.

First, under the current scheme, if a county board chooses to voluntarily pay the amounts billed, the payments will *not* reduce that county's future billings except to the extent that *all* employers' bills may eventually be impacted by the increase in the assets of the RHBT trust. (Exh. 3 at ¶ 20.) Second, although such a payment *would* reduce the liability the county would otherwise have to disclose (*id.*), such payments would require a reduction in expenditures elsewhere that would be hard to justify given the expectation that judicial or Legislative action will eventually lead to a resolution of this liability independently of the county school district. (This expectation arises from the obvious flaw in a statutory scheme that requires a county board to incur and report a liability it did not create, that it has no control over, and that it cannot pay.) Moneys paid to the RHBT in the meantime will not be recoverable because it is an irrevocable trust. The counties, thus, have nothing concrete to gain from pre-funding their employees' post-employment health benefits and plenty to lose.

Third, because the State has provided no funding for this expense as to employees funded by the PSSP, the DOE has recommended that county boards *not* attempt to draw-down federal funds to pay this expense as to employees funded by federal grants. This recommendation results in part from the anti-discrimination provisions of OMB Circular A-87 and similar grant conditions that preclude a grantee from charging federal grants for employee-costs that the grantee has not paid as to non-federally funded employees (Exh. 3 ¶¶ 13 and 25). If federal funds are drawn down for this

purpose in violation of the grant, the county may suffer a disallowance and be required to reimburse the federal government with scarce local funds while not being able to recover the federal funds already remitted to the RHBT. (*Id.*)<sup>10</sup>

Thus, as can readily be seen, the statutory requirement that county school boards incur a liability they cannot pay has resulted in compelling disincentives to fund post-employment benefits as they are earned, thereby defeating the sound policies that underlie GASB 45 and the creation of the RHBT. This undermines the efforts of the State Board and the DOE to promote sound fiscal policy and operates to the disadvantage of the Statewide school system.

**C. It Is the Challenged Statutory Scheme, Not GASB Statement 45, That Requires the Cost of Benefits to Be Billed to County Boards and Reported as Their Liability.**

As noted in the other parties' briefs, the Board of Education and the Auditor's Chief Inspector's Division require all local school boards to follow GAAP principles in their financial reporting, including those enunciated in GASB Statement 45, *Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions* (GASB 45, provided as Exh. 5). However, these accounting principles, with which the State Board agrees, would *not* require the county boards of education to report PEIA's billings as expenses or liabilities absent the requirement in Code § 5-16D-6 that they do so.

Per GASB 45, governmental employers that operate their own post-employment benefit plan must calculate the actuarial cost thereof and report as an expense the "Annual Required Contribution" (ARC), which is the amount needed to prefund the benefits earned that year by active

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<sup>10</sup>Nonetheless, the county boards must accrue a liability for the post-employment benefits of their federally funded employees despite not drawing-down federal funds to pay it. (Exh. 1 at ¶¶ 26 and 27.)

employees (“normal costs”) plus one year’s payment towards the unfunded actuarial accrued liability amortized over 30 years. (Exh. 5 at pp. 2-3) When such an employer fails to actually contribute the ARC, it must report the deficiency as a liability. (*Id.*)

West Virginia Code § 5-16D-6 mimics these provisions of GASB 45, thereby imposing on county boards and other participating employers the duty to carry unpaid contributions toward the ARC as liabilities. However, this mimicry was inappropriate. The parallel provisions of GASB 45 *do not apply* to West Virginia’s county boards of education (or any other PEIA participating employer) because these employers all participate in a qualifying cost-sharing multi-employer plan – the Public Employees Insurance Program. Per GASB 45, such participating employers are relieved of the highly burdensome and expensive responsibilities of calculating and reporting the actuarial cost of prefunding post-employment benefits, calculating an ARC, and of many other responsibilities as well, *including the duty to report an expense or liability equal to their allocated share of the ARC.*<sup>11</sup> As to county boards of education, that duty arises only from Code § 5-16D-6.

Rather, per GASB 45, an employer in a multi-employer plan must report as an expense (or liability) only the employer’s “contractually required contribution,” a term that is undefined in GASB 45. However, GASB 45 recognizes that the amount of the “contractually required contribution” may be “determined by statute or contract or on an actuarially determined basis.” (Exh. 5 at pp. 3-4.) In addition, GASB 45 recognizes that a contractually required contribution need not be equal to the ARC.<sup>12</sup> In short, that the “contractually required contribution” is, as to county

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<sup>11</sup>Instead, most of these duties, including the calculation of a planwide ARC, are imposed by GASB 43 on the plan administrator. (*See* Exh. 5 at ¶¶ 144-147.)

<sup>12</sup>GASB 45 (Exh. 5 at ¶ 145) states,

boards of education, equal to their allocated share of the planwide ARC is an artifact of the challenged statute, not GASB 45. The Legislature could have chosen otherwise. For instance, it could have limited the “contractually required contribution” (a term not used in the statute) to the “pay as you go” amount funded by the PSSP. This would not, of course, relieve the plan administrator of calculating a planwide ARC and reporting any shortfalls in its funding as required by GASB 43, but neither GASB 43 nor 45 require shortfalls in funding of the ARC to be reported as an expense or liability of a participating employer. Only Code § 5-16D-6 so requires.<sup>13</sup>

The county boards of education are thereby required to suffer adverse consequences that are totally unnecessary under GASB 43, GASB 45 or any other accounting principle. The only colorable justification for requiring them to report OPEB liabilities is to make it appear that the shortfall in funding post-employment benefits is an artifact of local rather than State policy. This is obviously not the case and is damaging to the counties. For instance, credit rating agencies may be misled.. The county boards have only those revenues allowed to them by statute. The shortfall

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[I]n a cost-sharing plan, all assets and benefit obligations are pooled, all risks and costs are shared, one actuarial valuation is performed, and the same contribution rate(s) applies to all participating employers. The contribution rate or amount charged to an individual employer may be higher or lower than the amounts that would result from a calculation based on the projected benefits of only that employer's employees. Moreover, the obligation or commitment for benefits is not directly attributable to any individual participating employer. For these reasons, the obligation of cost-sharing employers generally is limited to payment of their contractually required contributions, and the employers have little or no control over the amount of the required contributions or how they are determined.

<sup>13</sup>Query: The reporting requirements for pension obligations are governed by GASB Statements 25 and 27, the provisions of which parallel GASB Statements 43 and 45. All of these Statements require the calculation of an ARC and the reporting of any shortfalls in contributions towards the ARC. If GASB requires participating employers to report said liabilities (rather than the plan sponsor – the State), then why aren't the pension obligations associated with the Teacher's Retirement System reported by county boards of education?

in funding, whether sound policy or otherwise, is under the exclusive control of the State, not the counties.

### III.

#### ARGUMENT

The Court below turned this last observation on its head, using the State Legislature's creation of the problem as justification for the court's refusal to correct it. The primary line of reasoning of the court below, both in its "political question" discussion and its refusal to exercise declaratory judgment jurisdiction, was that the problem lay with the statutory scheme rather than the named defendants, and that *one* solution would be to fund the OPEB liabilities, a power vested exclusively within the Legislative branch. Of course, the above observations are often true in actions seeking a declaration that a statute is unconstitutional: An amendment can always cure the problem, and neither the courts nor the administrators named as defendants have that power. Further, a declaration that the existing scheme is unconstitutional will be "disrespectful" of the Legislature. These attributes do not render such cases nonjusticiable:

But disrespect, in the sense the Government uses the term, cannot be sufficient to create a political question. If it were, every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible. Congress often explicitly considers whether bills violate constitutional provisions. [Internal citations omitted.] . . . Yet such congressional consideration of constitutional questions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has the duty to review the constitutionality of congressional enactments. As we have said in rejecting a claim identical to the one the Government makes here: "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 486, 549, 89 S.Ct. 1944, 1978, 23 L.Ed.2d 491 (1969).

*U.S. v. Munoz-Flores*, 495 U.S. 385, 390-391, 110 S.Ct. 1964, 1968-1969 (1990).

The lower court's discussion is reminiscent of Justice Neely's dissent in *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979), in which this Court determined that the question of whether the State's school system satisfied the "thorough and efficient" and equal protection guarantees of the State constitution could be litigated in a declaratory judgment action. Justice Neely's dissent presented the opposing view, that to delve into the question of how the State should direct its limited resources in this context was a "political question." For instance, like the lower court's discussion at pages 20-21 of its Final Order, Justice Neely decried judicial interference with the priorities of the Legislature vis-a-vis the funding of State services:

State supported public education is an area where the other agencies of government are actively working while taking cognizance of other compelling yet competing imperatives, among which are included an appropriate level of taxation, help for the aged, infirm, mentally ill, and destitute along with the more mundane demands upon the public treasury such as roads, sewers, fire protection and police protection.

*Pauley* at 744-745, 255 S.E.2d at 898.

The United States Supreme Court expressed similar sentiments when it refused to apply the strict scrutiny standard to an equal protection challenge to the Texas school finance statutes:

Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.' *Dandridge v. Williams*, 397 U.S., at 487, 90 S.Ct. at 1163. The very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect. *Jefferson v. Hackney*, 406 U.S., at 546-547, 92 S.Ct., at 1731.

*San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 1301-1302 (1973).

Of course, this Court's majority opinion in *Pauley* implicitly rejected Justice Neely's dissent, and expressly rejected the quoted discussion of the United States Supreme Court, holding instead

that this State's constitution afforded greater protection to education than did the Constitution of the United States. *Pauley* at 678, 255 S.E.2d at 863-864. The Court has since made manifestly clear that the funding of the State's education system MUST be prioritized above the other services it provides, absent a clearly articulated "compelling State interest," thereby bluntly injecting the judiciary into the budgetary and funding concerns that the lower court and Justice Neely found to be "political." "[T]here is no need for a prolonged discussion of the constitutionally favored status of public education in this State." *State ex rel. Bd. of Ed., Kanawha County v. Rockefeller*, 167 W.Va. 72, 75, 281 S.E.2d 131, 133 (1981).

In all these cases, the "textual commitment" of the "provision of a thorough and efficient system of free schools" to the Legislature (Const. art. 12, § 1), as well as the funding therefor via the Modern Budget Amendment (art. 6, § 1) and the Power of Taxation Clause (art. 10, § 5), were not construed to divest the judiciary of the authority to provide a remedy in the context of education funding issues, and did not prevent this Court from ensuring that the State's education system is not compromised by statutes that interfere with its constitutional priority. Indeed, these same provisions were *relied* upon as justification for a judicial decree that education was entitled to funding priority. "In the final analysis, we conclude that the provisions of Article XII, Section 1 *et seq.*, as well as Article X, Section 5 of our Constitution, when construed in the light of our prior cases, gives a constitutionally preferred status to public education in this State." *Rockefeller*, at 78-79, 281 S.E.2d at 135 (1981).

But this case is not nearly so complex as those cited above. To afford relief to the county boards of education from reporting OPEB liabilities they cannot pay does not require an appropriation of funds, a shifting of the State's funding priorities, or an alteration of the mechanisms

in place for handling PEIA related OPEB liabilities. While it is true, as the lower court observed, that the Legislature has the power to moot this case by exercising its own funding authority, that is *not* the relief needed from this Court (or the court below), nor does it provide an excuse for the judiciary to avoid an otherwise justiciable controversy.<sup>14</sup>

Affording meaningful relief to the county boards does *not* require a declaration that either the RHBT or its funding mechanisms are invalid. This Court need not even strike the offending statutory provision (Code § 5-16D-6(e)), but need only declare that it may not be constitutionally applied so as to require county boards of education to report OPEB liabilities associated with their PSSP-funded personnel *except* to the extent that funding has been provided within the PSSP.<sup>15</sup> Indeed, such relief would be consistent with the manner in which county boards are otherwise

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<sup>14</sup>That Legislators are working on this problem cannot logically constitute a “contingent event” for purposes of declining to exercise declaratory judgment jurisdiction. Otherwise, the mere possibility that a controversy could *become* moot would render it nonjusticiable despite the *present* existence of a live controversy. Rather, if the court is convinced that there is a significant possibility that the controversy will be made moot by proposed legislation, the appropriate course would be to stay or continue the action for a reasonable time to allow the Legislature to act.

<sup>15</sup>An accurate summary of the difference between a facial and an as-applied challenge to a statute appears in *Dehne v. Avaino*, 219 F.Supp.2d 1096, 1102 -1103 (D.Nev. 2001), *aff’d* 30 F.3d 1115 (9<sup>th</sup> Cir. 1994):

Facial and as applied arguments are two separate bases for challenging the constitutionality of a statute, and the litigant must specify whether they wish to challenge the statute on either or both of these grounds. There are two ways an ordinance may be argued as facially unconstitutional: (1) as unconstitutional in every conceivable application, or (2) as unconstitutionally overbroad. A finding that a statute is facially unconstitutional results in invalidation of the law itself. *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9<sup>th</sup> Cir.1998). In contrast to a facial challenge, “[a]n as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular . . . activity, even though the law may be capable of valid application to others.” *Id.* If the litigant is successful in their challenge, the law itself is not struck but only the particular application of the law in the litigant's case. *Id.*

treated in the PEIA insurance program.<sup>16</sup>

Such a minimal intrusion into the prerogatives of the Legislature cannot be justified by invocation of justiciability doctrines. “When a court avoids a truly justiciable question arising from a constitutional provision, and that constitutional provision illuminates a moral imperative, the “political question” doctrine becomes nothing more than the means for a flight from responsibility.” *Killen v. Logan County Com'n*, 170 W.Va. 602, 624, 295 S.E.2d 689, 711 (1982).

#### IV.

#### CONCLUSION

By the end of this fiscal year, the 55 county boards of education will be reporting OPEB liabilities totaling more than 25% of their annual budgets, liabilities for which they bear no responsibility and can exercise no control. No one can reasonably argue that this arbitrary and

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<sup>16</sup>Like State spending units, county boards of education are mandatory participants in the PEIA insurance program. Code § 5-16-22. On the other hand, cities, towns, counties, and government-funded nonprofit agencies may, but need not, participate. (*Id.*) The division of the premium costs between employer and employee for State spending units and county boards of education is determined by State law, and provided for by statute and the State’s budget. Code §§ 5-16-5(g) and -18(a) and (b). As to cities, towns, counties, and nonprofits, however, the division of premium costs between employee and employer is determined by the employer, as is the mechanism for funding them. Code § 5-16-18(d).

Like the county boards of education (via the PSSP), State spending units are provided sufficient funds in their budgets to pay only the “pay as you go” portion of the PEIA’s OPEB billings. The remaining unfunded portion is reported as a government-wide liability that is generally *not* attributed to any particular spending unit. Thus, it would make sense that the unfunded portion of the county board’s OPEB liability be treated the same way because the liability in both cases arises in exactly the same manner – it is directly determined by State policy and funding mechanisms.

As to cities, towns, counties, and nonprofits, however, their participation in PEIA is voluntary, and they *do* have control over the amount of their employer premiums and the funding to pay them. Their liability is *not* determined by State policy and consequently should be reported directly by the voluntarily participating employer.

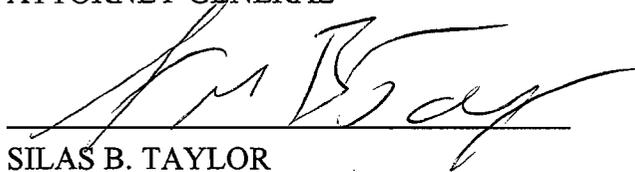
irrational reporting requirement will not significantly impair their ability to deliver a thorough and efficient system of schools. There is no "compelling state interest" that can justify it.

Respectfully submitted,

WEST VIRGINIA STATE BOARD OF  
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**EXHIBITS**

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