

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Supreme Court Docket No. 11-0243  
Civil Action No. 10-C-327 (Circuit Court of Kanawha County)**

**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,  
MONROE, MORGAN, NICHOLAS, PENDLETON,  
PLEASANTS, POCAHONTAS, PUTNAM,  
RALEIGH, RANDOLPH, RITCHIE, ROANE, SUMMERS,  
TAYLOR, TUCKER, TYLER, UPSHUR, WEBSTER, WETZEL,  
WIRT, WOOD, AND WYOMING,**

**Petitioners,**

**v.**

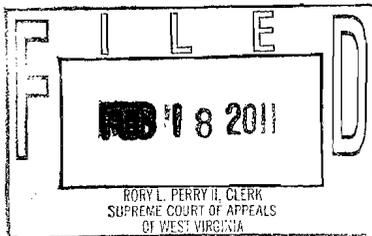
**PUBLIC EMPLOYEES INSURANCE AGENCY,  
PUBLIC EMPLOYEES INSURANCE AGENCY  
FINANCE BOARD, and WEST VIRGINIA STATE AUDITOR,**

**Respondents.**

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**RESPONSE TO PETITION FOR APPEAL**

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**RESPONSE TO PETITION FOR APPEAL**

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**I. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

At the heart of this dispute is an issue that is nation-wide in scope. For decades, state and local governments have been promising their employees that upon their retirement, they would receive pensions and other post-employment benefits (“OPEB”). At issue here are health insurance premiums for some (but not all) of the retirees who are or were employed by the Petitioners, who are forty-nine of the fifty -five county boards of education in West Virginia. This matter does not involve pension payments.

That the accrued liability for OPEBs is a huge problem nationwide for state and local governments was underscored by an article in the New York Times published Feb. 11, 2011<sup>1</sup>, which reported that “[t]he nation’s governors face a daunting \$555 billion in unfunded liabilities to finance retiree health coverage. The Pew Center on the States calculated those long-term obligations last year, saying New Jersey had the largest amount, \$68.9 billion, with California second, at \$62.5 billion”.

Like many state and local governments, West Virginia has promised government employees that it would pay a share of the cost of their health insurance premiums then they retire. Historically, governmental entities, West Virginia entities included, have accounted for their cost of retiree health care on a “pay-as-you-go” basis and have recognized the cost of those benefits only when it is paid. As a result, the financial reporting of those entities generally failed to (1) recognize the cost of benefits in periods when the related services are received by the employer, (2) provide information about the actuarial accrued liabilities for promised benefits associated with past services and whether and to what extent those benefits have been funded, and (3) provide information useful in assessing potential demands on the employer’s future cash flows.<sup>2</sup> In other words, financing OPEB on a pay-as-you-go basis has tended to give the false impression that OPEB are less costly than they actually are (much like a 30-year mortgage might

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<sup>1</sup> Available at: [http://www.nytimes.com/2011/02/14/business/14retirees.html?pagewanted=2&\\_r=1&sq=benefits&st=cse&scp=4](http://www.nytimes.com/2011/02/14/business/14retirees.html?pagewanted=2&_r=1&sq=benefits&st=cse&scp=4); last viewed February 16, 2011.

<sup>2</sup> See Summary of Statement No. 45, *Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions* (Issued 6/04), available at <http://www.gasb.org/st/summary/gstsm45.html>; last viewed February 16, 2011.

easily appear less costly to the unsuspecting eye than a 15-year mortgage, based on monthly payments alone).<sup>3</sup>

In order to improve the relevance and usefulness of financial reporting, the Government Accounting Standards Board (GASB), which is recognized as the official source of generally accepted accounting principles (“GAAP”) for state and local governments, in July 2004 issued Statement No. 45 which established accounting and reporting standards for other post-employment benefits offered by state and local governments. OPEB are now to be reported or recognized much like defined benefit pension plans. The amounts of all outstanding obligations and commitments related to OPEB are to be produced by actuarial valuations performed in accordance with parameters established by GASB. The “pay-as-you-go” basis is no longer acceptable. Employers, including the Petitioners, must now recognize the costs when the employees render their services and the benefits are earned. Financial reports now are required to include a systematic, accrual-basis measurement and recognition of OPEB cost (expense) over a period that approximates employees’ years of service and to provide information about actuarial accrued liabilities associated with OPEB and whether and to what extent progress is being made in funding the plan.<sup>4</sup>

It is important to realize that GASB Statement No. 45 does not so much create a problem as disclose one that has been around for a long time, just under the surface. The real challenge, of course, is not so much accounting for OPEB as dealing with their budgetary implications,

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<sup>3</sup> See Gauthier, Stephen J.; *OPEB in Perspective: GASB Statement No. 45 Four Years Later*, Government Finance Review, February 2008 at 10; available at [http://www.gfoa.org/downloads/OPEB\\_Overview\\_GFR\\_feb08.pdf](http://www.gfoa.org/downloads/OPEB_Overview_GFR_feb08.pdf); last viewed February 16, 2011.

<sup>4</sup> See Summary of Statement No. 45, Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions (Issued 6/04), *supra*.

especially as baby boomers begin to retire in an environment of spiraling healthcare costs.<sup>5</sup> One option, of course, for addressing the OPEB liability is to prefund some or all of the retiree health benefits before employees retire. By prefunding, governments can reduce the unfunded liability reported in their financial statements, take advantage of the compounding effects of investment returns on plan assets, and provide greater benefit stability for employees and retirees. To reduce a government's liability, funds must be deposited into a trust or equivalent arrangement, as GASB Statement No. 45 only considers funds in such an arrangement as assets. ... While prefunding is generally more cost effective for a government in the long term, in the short term it will require a higher level of government contribution.<sup>6</sup>

It is critical to understand that the new OPEB standards, as announced in Statement No. 45, address accounting and financial reporting issues only. Neither they nor the implementing legislation change who is liable for the cost of these benefits. Rather, GASB Statement No. 45 simply requires the entire liability to be recognized and reported by the state and local government employers, so the real scope of the problem is visible to all. And in West Virginia, it appears that GASB Statement No. 45 is having its intended effect. According to a study in 2006<sup>7</sup>, Pew Research reported that “[h]aving experienced the bitter toll that underfunded pensions take on a state budget, West Virginia was one of the states that moved most rapidly to deal with a \$7.8 billion unfunded liability for its other post-employment benefits. Among other things, the state increased retiree co-payments, set up an irrevocable trust for funding and shifted

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<sup>5</sup> See Gauthier, Stephen J., *supra*.

<sup>6</sup> See Report to the Chairman, Special Committee on Aging, U.S. Senate, *State and Local Government Retiree Health Benefits: Liabilities Are Largely Unfunded, but Some Governments Are Taking Action* at 7; available at <http://www.gao.gov/new.items/d1061.pdf>; last viewed February 16, 2011.

<sup>7</sup> See *Promises with a Price: Public Sector Retirement Benefits*, Pew Center on the States, available at <http://www.pewcenteronthestates.org/uploadedfiles/Promises%20with%20a%20Price.pdf>; last viewed February 16, 2011.

retirees to a Medicare advantage prescription drug plan”<sup>8</sup>. This irrevocable trust was created in 2006 when the West Virginia Legislature created the West Virginia Retiree Health Benefit Trust Fund (“Fund”) for the purpose of providing for and administering retiree post-employment health care benefits, and the respective revenues and costs of those benefits.

In fact, as the Court below found, the Legislature has proactively taken additional steps, including directing that at the close of any fiscal year in which the balance in the PEIA reserve fund established by W. Va. Code § 5-16-25 exceeds the recommended reserve amount by fifteen percent, the executive director shall transfer that amount to the West Virginia Retiree Health Benefit Trust Fund (RHBT) created by W. Va. Code § 5-16D-2. See Acts 2007, c. 208, amending W. Va. Code § 5-16-25, effective July 1, 2007.<sup>9</sup> In addition, the Court took judicial notice that, according to the *West Virginia Comprehensive Annual Financial Report (CAFR) for the Fiscal Year Ended June 30, 2008*<sup>10</sup>, “In FY 2008, \$108.2 million of prior year’s excess reserve funds were transferred to the RHBT”.<sup>11</sup> The Court also took judicial notice that West Virginia Senate President Earl Ray Tomblin has appointed a special study group chaired by Senator Brooks McCabe to address the issue of the liability for OPEB for all state employees<sup>12</sup>.

Moreover, the Legislature continues to both recognize that the OPEB unfunded liability is a real problem, and continues to work on solving the problem. The Charleston Gazette

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<sup>8</sup> *Id.* at 54.

<sup>9</sup> Finding of Fact No. 29, Opinion at 10.

<sup>10</sup> Available at <http://www.wvfinance.state.wv.us/FARS/cafr/cafr2008/cafr2008.pdf>; ; last viewed February 16, 2011; see page 146).

<sup>11</sup> Finding of Fact No. 30, Opinion at 10.

<sup>12</sup> Finding of Fact No. 31, *id.* See Press Release dated January 29, 2010 available at [http://www.legis.state.wv.us/News\\_release/newsrelease\\_RecordView1.cfm?RecordID=313](http://www.legis.state.wv.us/News_release/newsrelease_RecordView1.cfm?RecordID=313); last viewed February 16, 2011.

reported on February 17, 2011<sup>13</sup> that “legislation to help the state begin to pay down a massive \$8 billion unfunded liability for future health-care benefits for public school and state employees will be introduced in the House and the Senate by the end of the week”. The proposed bills cap the State’s liability for those benefits, rely on an increase in the tax on tobacco products, and “would make it financially difficult for teachers, school service personnel and other public employees to retire before age 65”, and thus reflect the difficult trade-offs that will be necessary to balance in order to solve this problem.

Despite the steps then taken by the Legislature to at least begin dealing with the issue of the unfunded liability for state and local government employees, the Petitioners filed in the Circuit Court of Kanawha County a declaratory judgment action<sup>14</sup> brought pursuant to the Uniform Declaratory Judgments Act, W. Va. Code § 5-13-1, *et seq.* The Petitioners sought, *inter alia*, declarations from the Court below that “[t]he State of West Virginia is obligated legally to fund the OPEB liability on behalf of those employees of West Virginia county boards of education at whatever time such funding is required under the law”, Compl. Demand No. 1(l), and “West Virginia Code Section 18-9A-24(a) must be revised to provide funding for the total OPEB liability billed by the PEIA to county boards of education for those employees of county boards of education”, Compl. Demand No. 1(o).

As the Petitioners explained, the PEIA, Finance Board and State Auditor (hereinafter the “Respondents”) answered the complaint and then moved to dismiss the action, arguing that the complaint raised a political question and that it did not satisfy the factors relevant to determining whether a court should hear a declaratory judgment action. Following briefing on the motion to

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<sup>13</sup> See Kabler, Phil; *Lawmakers to Propose Retiree Health Care Fix*; Charleston Gazette; February 17, 2011; available at: <http://www.wvgazette.com/News/201102161162>; last viewed February 17, 2011.

<sup>14</sup> As the Petitioners noted in their Petition, the Monongalia County Board of Education was a plaintiff in the action below but is not a petitioner in this appeal. See Pet. at 1 n. 1.

dismiss, the Circuit Court held a hearing on the motion and then invited the parties to submit proposed findings of fact and conclusions of law in support of their respective positions. On September 23, 2010, the Circuit Court adopted Respondents' proposed findings and conclusions in their entirety and dismissed the action. The Circuit Court concluded in its order that Petitioners raised a nonjusticiable political question and found that it had the discretion to decline to hear this declaratory judgment action. It is from this order that Petitioners appeal.

## **II. STATEMENT OF FACTS**

### **A. Respondents**

Respondent Public Employees Insurance Agency ("PEIA) is a state agency responsible for establishing a group major medical insurance plan for eligible employees who regularly work full-time in the employ of the State of West Virginia and other employees made eligible by statute, including those of the Petitioners.

Respondent Finance Board is charged with obtaining a professional actuary to determine the financial requirements of the PEIA for each fiscal year. All financial plans created by the PEIA Finance Board must establish levels of premium costs to participating employers, including Plaintiffs, and the types and levels of cost to participating employees and retired employees.

W. Va. Code § 6-9-11 appoints Respondent West Virginia State Auditor as the chief inspector and supervisor of local government offices, including county boards of education. The West Virginia State Auditor, or a private accounting firm approved by him, is required by statute to annually examine the annual financial statements prepared by Petitioners. Pursuant to a joint letter issued by the State Auditor and the State Superintendent of Schools, all county boards of

education are required to follow generally accepted accounting principles for fiscal years ending June 30, 2007 and later.

**B. The PEIA Health Plans**

Chapter 5, Article 16 of the West Virginia Code defines the makeup and functions of the PEIA. County boards of education are considered to be “employers” for the purpose of the Code and must participate in the health insurance plans offered by PEIA.<sup>15</sup> The costs of any group hospital and surgical insurance, group major medical insurance, group prescription drug insurance, group life and accidental death insurance benefit plan or plans shall be paid by the employer, including Petitioners, and the employee, including retired employees.<sup>16</sup> All retirees under the provisions of Chapter 5, Article 13 of the West Virginia Code, including those defined in W. Va. Code § 5-16-2; those retiring prior to April 21, 1972; and those hereafter retiring are eligible to obtain health insurance coverage.<sup>17</sup> The employer and employee premiums must be set at a level sufficient to cover both program and administrative costs for each fiscal year.<sup>18</sup>

**C. The West Virginia Public School Support Plan**

Chapter 18 Article 9A of the West Virginia Code, applicable to county boards of education, codifies a plan of support for the public schools known as the West Virginia Public School Support Plan (PSSP), which statutorily fixes both state and county responsibility for the financing of public schools. Beginning the first day of July, 1995, and every year thereafter, an allowance to the PEIA for school employees has been made in accordance with the formula

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<sup>15</sup> Under the provisions of W. Va. Code § 5-16-22, “[a]ny person, including an elected officer, who works regularly full time in the service of a county board of education” is eligible to be covered by insurance offered by PEIA.

<sup>16</sup> W. Va. Code § 5-16-13.

<sup>17</sup> W. Va. Code § 5-16-13(i).

<sup>18</sup> W. Va. Code § 5-16-5.

found in W. Va. Code § 18-9A-24. The allowance to the PEIA for active school employees includes a subsidy to retired employees who were hired prior to July 2010.

The PSSP formula provides an allowance for OPEB premiums for those employees funded by the PSSP pursuant to a statutory formula; however, not all employees of Petitioners are funded by the PSSP, and no allowance for OPEB premiums is allocated to Petitioners for those employees not funded by the PSSP.

**D. The West Virginia OPEB Plan**

The West Virginia OPEB Plan enacted by the legislature in 2006 and codified at Chapter 5, Article 16D of the West Virginia Code mirrors the provisions of the document published by GASB titled “Other Postemployment Benefits: A Plain-Language Summary of GASB Statements No. 43 and No. 45”.<sup>19</sup> The Court below found that “[w]ith the enactment of Chapter 5 Article 16D of the West Virginia Code, the West Virginia Legislature created the West Virginia Retiree Health Benefit Trust Fund (“RHBT”). According to the provisions of W. Va. Code § 5-16D-2, the RHBT was created for the purpose of providing for and administering retiree post-employment health care benefits, and the respective revenues and costs of those benefits as a cost sharing multiple employer plan.”<sup>20</sup>

PEIA is responsible for the day-to-day operation of the RHBT and collects all moneys due to the RHBT.<sup>21</sup> PEIA pays current post-employment healthcare costs and any administrative expenses necessary and appropriate for the operation of the RHBT from the RHBT.<sup>22</sup>

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<sup>19</sup> Available at [http://www.gasb.org/project\\_pages/opec\\_summary.pdf](http://www.gasb.org/project_pages/opec_summary.pdf); last viewed February 16, 2011.

<sup>20</sup> Finding of Fact No. 28, Final Order Granting Motion to Dismiss with Prejudice (“Order”) at 10.

<sup>21</sup> W. Va. Code § 5-16D-3(j).

<sup>22</sup> *Id.*

The Finance Board “shall determine the annual required contribution rates sufficient to maintain the RHBT in accordance with the state plan for other post-employment benefits”.<sup>23</sup>

The Finance Board annually sets the total annual required contribution (“ARC”) sufficient to maintain the RHBT in an actuarially sound manner in accordance with generally accepted accounting principles.<sup>24</sup> The ARC is defined as “the amount employers must contribute in a given year to fully fund the trust, as determined by the actuarial valuation in accordance with requirements of generally accepted accounting principles. This amount shall represent a level of funding that if paid on an ongoing basis is projected to cover the normal cost each year and amortize any unfunded actuarial liabilities of the plan over a period not to exceed thirty years”.<sup>25</sup> The Finance Board annually allocates to the respective employers the employer's portion of the annual required contribution, which allocated amount is the “Employer Annual Required Contribution”.<sup>26</sup> W. Va. Code § 5-16D-6(e) requires the PEIA to bill each employer for the employer annual required contribution and the included minimum annual employer payment. The “Minimum Annual Employer Payment” (“MAEP”) means the annual amount paid by employers which, when combined with the retirees' contributions on their premiums that year, provide sufficient funds such that the annual finance plan of the Finance Board will cover all projected retiree covered health care expenses and related administrative costs for that year.<sup>27</sup>

PEIA collects the MAEP each fiscal year, as well as any amount an employer may choose to pay voluntarily toward the remainder of that employer's ARC.<sup>28</sup> GASB Statement No.

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<sup>23</sup> W. Va. Code § 5-16D-3(c).

<sup>24</sup> W. Va. Code § 5-16D-6(a).

<sup>25</sup> W. Va. Code § 5-16D-1(h).

<sup>26</sup> W. Va. Code § 5-16D-6(b).

<sup>27</sup> W. Va. Code § 5-16D-1(q).

<sup>28</sup> W. Va. Code § 5-16D-6(e).

45, as well as W. Va. Code §5-16D-6(e), provide that any employer ARC amount not paid remains the liability of that employer until fully paid.

The “Local Government Implementation and Accounting Guide for Other Post-Employment Benefits” prepared by the State Auditor stated that pursuant to GASB Technical Bulletin 2004-02, the entire unpaid Annual Required Contribution (ARC) balance be a contractually required contribution and therefore a “current obligation”, and that, based on guidance from GASB, the entire liability must be reflected as a current liability at the RHBT level in order to comply with generally accepted accounting principles.

In addition, only the Minimum Annual Employer Payment has been funded in part by Legislative appropriations made pursuant to the requirements of W. Va. Code § 18-9A-24(a) (the PSSP allowance for PEIA premiums). If (1) the Petitioners pay only the Minimum Annual Employer Payment for all active and retired employees, (2) the funding mechanism identified in W. Va. Code § 5-16-25 does not yield sufficient funds, and (3) the Legislature does not appropriate additional funds, the total liability for Other Post Employment Benefits (OPEB) for each Petitioner is expected to grow each fiscal year; however, it is not accurate to describe that growth as being “exponential”.

**E. The Government Accounting Standards Board (GASB)**

GASB is a private, nonpartisan, nonprofit organization that works to create and improve the rules U.S. state and local governments follow when accounting for their finances and reporting them to the public. It was founded in 1984 under the auspices of the Financial Accounting Foundation which also oversees the GASB’s counterpart for the private companies and not-for-profit organizations, the Financial Accounting Standards Board. The mission of the GASB is to establish and improve standards of state and local governmental accounting and

financial reporting that will (1) result in useful information for users of financial reports, and (2) guide and educate the public, including issuers, auditors, and users of those financial reports.

**F. GASB Statement No. 45**

“Implementation of the OPEB reporting standards [under GASB Statement No. 45] [was] phased in over a 3-year period, with the largest governments—governments with total annual revenues of \$100 million or more—to report their liabilities generally beginning in their fiscal year 2008 financial statements and apply other requirements of the standard.<sup>29</sup> The West Virginia State Auditor published a document titled “Local Government Implementation and Accounting Guide for Other Post-Employment Benefits” in November 2008 in which the Chief Inspector stated that, pursuant to his responsibilities under W. Va. Code Chapter 6, Article 9, those local governments participating in PEIA were encouraged to comply with the requirements of GASB 45 for the fiscal year ending June 30, 2008, and that they were required to comply with those requirements for the fiscal year ending June 30, 2009.

The State Auditor, or a private accounting firm approved by him, is required by statute to annually render an opinion (or disclaimer of opinion) as to whether the financial statements of Petitioners are presented fairly in all material respects in conformity with generally accepted accounting principles, including GASB Statement No. 45 and GASB Technical Bulletin 2004-02. State and local governments are required to follow GASB standards to receive an unqualified, or “clean,” audit opinion on financial statements prepared in conformity with U.S. generally accepted accounting principles. Additionally, many state laws require local

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<sup>29</sup> See Report to the Chairman, Special Committee on Aging, U.S. Senate, *State and Local Government Retiree Health Benefits: Liabilities Are Largely Unfunded, but Some Governments Are Taking Action*, *supra* at 7.

governments to follow GASB standards, and bond raters consider whether GASB standards are followed when assessing the fiscal health of state and local governments”.<sup>30</sup>

Petitioners assert that “the State Auditor treats this total OPEB liability as a current liability, causing Petitioners’ annual financial statements to reflect a major deficit. Compl. at ¶ 89(w). In fact, the evidence would show that all fifty-five county boards of education will reflect a deficit in the near future. Importantly, such deficits by local fiscal bodies are forbidden by law in West Virginia. W. Va. Code § 11-8-26.<sup>31</sup>

This assertion is incorrect. W. Va. Code § 11-8-26 was modified in the 2009 regular session of the Legislature (Acts 2009, c. 206, eff. April 11, 2009) to provide:

§11-8-26. Unlawful expenditures by local fiscal body.

(a) Except as provided in sections fourteen-b, twenty-five-a and twenty-six-a of this article, a local fiscal body shall not expend money or incur obligations:

- (1) In an unauthorized manner;
- (2) For an unauthorized purpose;
- (3) In excess of the amount allocated to the fund in the levy Order ; or
- (4) In excess of the funds available for current expenses.

(b) Notwithstanding the foregoing and any other provision of law to the contrary, a local fiscal body or its duly authorized officials may not be penalized for a casual deficit which does not exceed its approved levy estimate by more than three percent: Provided, That such casual deficit is satisfied in the levy estimate for the succeeding fiscal year: *Provided, however, That in calculating a deficit for purposes of this section, account shall not be taken of any amount for which the local fiscal body may be liable for the unfunded actuarial accrued liability of the West Virginia Retiree Health Benefit Trust Fund or any amount allocated to the local fiscal body as an employer annual required contribution that exceeds the minimum annual employer payment component of the contribution, all as provided under article sixteen-d, chapter five of this code* (emphasis added).

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<sup>30</sup> *Id.*

<sup>31</sup> Pet. at 11-12.

While it is true the local BOEs will face deficit fund balances if the government does not fund the liability, the assertion that it is “forbidden by law” is not true since there is a specific exemption within the statute relating to the unfunded actuarial accrued liability of the WV Retiree Health Benefit Trust Fund.

### III. RESPONSE TO ASSIGNMENTS OF ERROR

**A. The Circuit Court did not err in concluding that Petitioners’ complaint raised a nonjusticiable political question.**

1. The Circuit Court did not err in concluding that the funding of the OPEB liability was an issue raised in the complaint.
2. The Circuit Court did not err in refusing to hear Petitioners’ constitutional challenge to the imposition of the total OPEB liability.

**B. The Circuit Court did not err in concluding that the complaint did not satisfy the factors relevant to determining whether a court should entertain a declaratory judgment action.**

1. The Circuit Court did not err in concluding that the controversy at issue involves uncertain and contingent events.
2. The Circuit Court did not err in concluding that there is not a substantial controversy among adverse parties.
3. The Circuit Court did not err in concluding that allowing the case to proceed would not serve a useful purpose and would not settle the underlying controversy.

### IV. STANDARD OF REVIEW

Respondents endorse the standard of review urged by the Petitioners<sup>32</sup> and respectfully request that the Court conduct an independent review of the Circuit Court’s order such as that suggested by Justice Cleckley in the his concurring opinion in *Cox v. Amick*<sup>33</sup>.

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<sup>32</sup> See *Pet.* at 16-17.

<sup>33</sup> 195 W.Va. 608, 618, 466 S.E.2d 459, 469 (1995).

## V. DISCUSSION OF LAW

### A. **The Circuit Court did not err in concluding that Petitioners' complaint raised a nonjusticiable political question.**

In *Robertson v. Hatcher*<sup>34</sup> the West Virginia Supreme Court of Appeals held that a justiciable controversy must exist before a court can acquire jurisdiction in a declaratory judgment action:

Notwithstanding the apparent wide latitude of jurisdiction conferred by the above cited and quoted act, and even though the act does not in express terms require the existence of a justiciable controversy, this Court consistently has held that such controversy must exist before a court can acquire jurisdiction<sup>35</sup>.

In *Baker v. Carr*<sup>36</sup> the United State Supreme Court held that the separation of powers doctrine renders a case nonjusticiable and renders such a case inappropriate for a court to consider if it presents a political question. There, the Court established several criteria for determining when a political question is presented:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to (1) involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

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<sup>34</sup> 148 W.Va. 239, 135 S.E.2d 675 (1964).

<sup>35</sup> *Id.*, 148 W.Va. at 246, 135 S.E.2d at 680-681 (citations omitted); see also *Crank v. McLaughlin*, 125 W.Va. 126, 23 S.E.2d 56 (1942). *Joseph v. National Bank of West Virginia*, 124 W.Va. 500, 21 S.E.2d 141 (1942).

<sup>36</sup> 369 U.S. 186 (1962).

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.<sup>37</sup>

The Court below carefully considered the *Baker* criteria, and concluded that the Petitioners raised a nonjusticiable political question

**1. The Circuit Court did not err in concluding that the funding of the OPEB liability was an issue raised in the complaint.**

Plaintiffs assert that “[t]he Circuit Court erred in concluding that the funding of the OPEB liability was an issue raised in the complaint.”<sup>38</sup> They assert that the Court below made “the erroneous assumption that at issue in the complaint was how to fund the total OPEB liability”<sup>39</sup> and assert that “Petitioners consistently have maintained that the funding issues associated with the OPEB liability are not at issue in this matter and are completely separate from the real issues of the case”.<sup>40</sup> They also assert that “... notwithstanding the fact that *this case is not about the funding of OPEB*, but rather the legal liability for such benefits. . .”<sup>41</sup> and “[t]he Circuit Court’s conclusion that Petitioners raised a political question is based on the *faulty premise that how to pay for the total OPEB liability is at the heart of the matter*.”<sup>42</sup>

As the Court below recognized, however,

the declaratory relief requested by the Plaintiffs disputes these assertions. Specifically, they ask this court to declare that “West Virginia Code Section 18-9A-24(a) must be revised to provide funding for the total OPEB liability billed by the PEIA to county boards of education for those employees of county boards of education.” (Demand for Declaration ¶ o). In addition, Plaintiffs’ demand that the

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<sup>37</sup> *Id.*, 369 U.S. at 218 (enumeration added).

<sup>38</sup> Assignment of Error A(1), *Petition for Appeal on Behalf of Forty-Nine of the County Boards of Education of West Virginia* (“Pet.”) at 15, 18.

<sup>39</sup> Pet. at 18.

<sup>40</sup> *Id.*

<sup>41</sup> Pet. at 21.

<sup>42</sup> Pet. at 22.

Court declare that “[t]he State of West Virginia is obligated legally to fund the OPEB liability on behalf of those employees of West Virginia county boards of education at whatever time such funding is required under the law” (Demand for Declaration ¶ 1).<sup>43</sup>

The Petitioners implicitly recognize in their petition that funding of the OPEB benefits is, in fact, at the heart of the matter. First, they assert that “[t]he PEIA and the PEIA Finance Board, seeing that the change in accounting standards prompted by Statement No. 45 would saddle the State with the staggering obligation to report the total OPEB liability associated with all employees and retirees of the county boards of education and potentially jeopardize the health plan itself, determined that they would begin to bill Petitioners for the total OPEB liability associated with such employees so that Petitioners, and not the State, would have to record the liability on their books”.<sup>44</sup> Notwithstanding the disingenuous nature of this argument (since it was the Legislature, not PEIA and the Finance Board, that made this determination, *see* W. Va. Code § 5-16D-6(e))<sup>45</sup>, it is inconsistent to argue that funding is not an issue in the case while simultaneously arguing that the health plan itself would be jeopardized had the Respondents not acted as they did. Such inconsistency is also quite apparent from the Petitioners’ statement that “notwithstanding the fact that funding is not an issue in this action, the Circuit Court is absolutely correct when it states that Petitioners are asserting that they should enjoy a “higher funding priority ... in the name of a ‘thorough and efficient’ education.”<sup>46</sup>

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<sup>43</sup> Conclusion of Law No. 9, Order at 19.

<sup>44</sup> Pet. at 10.

<sup>45</sup> See Conclusion of Law 4(g), Opinion at 16.

<sup>46</sup> Pet. at 20.

**2. The Circuit Court did not err in refusing to hear Petitioners' constitutional challenge to the imposition of the total OPEB liability.**

Despite Petitioner's claim that "[w]hen, whether and how to fund the admittedly enormous OPEB liability is not Petitioners' concern", Pet. at 18, under current accounting standards, the unfunded liability has to be reported by someone. Petitioners recognize that if the reporting requirement is shifted from them to the State, it would "potentially jeopardize the health plan itself", but fail to identify any of the other potential adverse effects such a shift would undoubtedly entail.

Therefore, the Court below was entirely correct in concluding that "[t]he Plaintiffs assert that their OPEB liability should enjoy a higher funding priority by the Legislature in the name of a 'thorough and efficient' education. In doing so, they are not concerned with how the Legislature should prioritize funding for the OPEB liability for employees of county boards of education not reimbursed by the PSSP, for local government entities that are not involved with education, nor with how the Legislature should prioritize funding for other citizens of West Virginia with a myriad of other legitimate and pressing issues. Those other citizens are not before this Honorable Court, and this Court has no mechanism with which to evaluate and prioritize their issues. Manifestly, there is a 'lack of judicially discoverable and manageable standards for resolving' competing budget priorities by this Court as contemplated by the second prong of the *Baker v. Carr*, 369 U.S. 186 (1962)] test, and it would be impossible for this Court to undertake independent resolution of these prioritization issues without expressing lack of the respect due coordinate branches of government as contemplated by the fourth prong of the *Baker* test. Conclusion of Law No, 13, Opinion at 20-21.

As the Court also concluded, "there clearly exists in the Constitution of West Virginia a 'textually demonstrable constitutional commitment of the issue' of the level of funding required

to provide a thorough and efficient education generally, and of how and when to fund the total OPEB liability generally, ‘to a coordinate political department’, that is, the Legislature, as contemplated by the first prong in *Baker [v. Carr, 369 U.S. 186 (1962)]*’.<sup>47</sup> Accordingly, the Court below was correct to conclude that “the funding issues raised in this matter, as well as by Plaintiffs’ complaint that ‘no additional funding has been provided to Plaintiffs to pay for such liability’ (presumably by the Legislature), (see Plaintiffs’ Response to Defendants’ Motion to Dismiss at 2), constitute a nonjusticiable political question”.<sup>48</sup>

**B. The Circuit Court did not err in concluding that the complaint did not satisfy the factors relevant to determining whether a court should entertain a declaratory judgment action.**

In *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*<sup>49</sup> this Court reviewed the circumstances under which it is proper for a circuit court to grant relief in a declaratory judgment action:

Before a circuit court can grant declaratory relief pursuant to the provisions of the Uniform Declaratory Judgment Act (“Act”), West Virginia Code §§ 55-13-1 to -16 (1994), there must be an actual, existing controversy. *See Cox v. Amick*, 195 W.Va. 608, 618, 466 S.E.2d 459, 469 (1995) (Cleckley, J., concurring); *Mongold v. Mayle*, 192 W.Va. 353, 358, 452 S.E.2d 444, 449 (1994). “To be clear, if there is no ‘case’ in the constitutional sense of the word, then a circuit court lacks the power to issue a declaratory judgment.” *Cox*, 195 W.Va. at 618, 466 S.E.2d at 469. The rationale behind the justiciable controversy requirement is that the Act is “is designed to enable litigants to clarify legal rights and obligations before acting upon them.” *Id.*

*Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. at 61, 475 S.E.2d at 61.

In *Hustead*, the Court summarized the four factors Justice Cleckley articulated in *Cox* in his concurring opinion:

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<sup>47</sup> Conclusion of Law No. 13, Opinion at 20.

<sup>48</sup> Conclusion of Law No. 14, Opinion 21.

<sup>49</sup> 197 W.Va. 55, 475 S.E.2d 55 (1996).

Consequently, in deciding whether a justiciable controversy exists sufficient to confer jurisdiction for purposes of the Act, a circuit court should consider the following four factors in ascertaining whether a declaratory judgment action should be heard: (1) whether the claim involves uncertain and contingent events that may not occur at all; (2) whether the claim is dependent upon the facts; (3) whether there is adverseness among the parties; and (4) whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest. *See Cox*, 195 W.Va. at 619, 466 S.E.2d at 470.

*Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. at 62, 475 S.E.2d at 62 and

Syllabus Point 4.

Examining the Petitioners' Assignments of Error in a different order, however, it can be demonstrated that the Court below properly applied the *Cox* factors and properly concluded that a justiciable controversy does not exist in this case.

**1. The Circuit Court Did Not Err in Concluding that There Is Not a Substantial Controversy Among Adverse Parties.**

***a. Contrary to the Petitioners' assertions, they have always been and remain responsible for paying the premiums for the health insurance of their retirees.***

Plaintiffs assert in their Petition for Appeal that “[w]hat Petitioners requested in the action below was a declaration that, as a matter of law, the total OPEB liability is not Petitioners’ liability in the first place because, *inter alia*, they have *never been responsible for payment of premiums associated with a majority of retiree health benefits other than to pass funds between the State and the PEIA; and the effort to shift to Petitioners a liability that was never theirs to begin with* unconstitutionally frustrates and interferes with the fundamental right to a thorough and efficient system of free schools. Pet. at 19 (emphasis added). See also Pet. at 24-25 (“Likewise, Petitioners challenge the actions of Respondents on the basis that public education enjoys a preferred status and, thus, county boards of education are not subject to the imposition of the total OPEB liability for which they have never been liable in the past”).

The Court below made several findings of fact that clearly demonstrate that the assertion that Petitioners have never been responsible for payment of premiums associated with a majority of retiree health benefits is false:

3. Since at least 1986 (see Acts 1986 c. 141), the W. Va. Code has made *employers and employees* responsible for paying the costs of health and other insurance premiums. W. Va. Code § 5-16-13(a) now provides that “[t]he [PEIA] director shall provide under any contract or contracts entered into under the provisions of this article that the costs of any group hospital and surgical insurance, group major medical insurance, group prescription drug insurance, group life and accidental death insurance benefit plan or plans *shall be paid by the employer and employee*” (emphasis added).

4. Since at least 1990 (Acts 1990, 3rd Ex. Sess., c. 7), W. Va. Code § 5-16-5(a) has provided that the purpose of the PEIA Finance Board is “to bring fiscal stability to the Public Employees Insurance Agency through development of annual financial plans and long-range plans designed to meet the agency's estimated total financial requirements, taking into account all revenues projected to be made available to the agency and *apportioning necessary costs equitably among participating employers, employees and retired employees and providers of health care services*” (emphasis added).

5. Since at least 1973 (Acts 1973, 1st Ex. Sess., c. 26), W. Va. Code § 5-16-2 has explicitly defined a county Board of Education as an “employer”.

Based on these facts, the Court below concluded that “The basic structure of the insurance plans offered by PEIA makes the costs of those plans the responsibility of employees and their employers. This structure has been in place since at least 1986, and most likely since the PEIA was created in 1971”.<sup>50</sup>

While retirees and their spouses and dependants have long been eligible to participate in the health insurance plans offered by PEIA, it is only recently that the State has required active

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<sup>50</sup> Conclusion of Law No. 4(d)(i), Order at 14, citing (citing Findings of Fact Nos. 4 and 5). The Court also concluded that “[s]ince at least 1973 the Legislature has explicitly defined a county Board of Education to be an employer” Conclusion of Law No. 4(d)(ii), Order at 14; see also Finding of Fact No. 5 Order at 3. Note that Conclusion of Law No. 4(d)(ii) erroneously cites Finding of Fact No. 6 instead of Finding of Fact No. 5.

employees to subsidize their premiums. For example, in 1987, W. Va. Code § 5-16-12 contained these provisions:

*Any employee who retired prior to the twenty-first of April, one thousand nine hundred seventy-two, and who also otherwise meets the conditions of the “retired employee” definition in section two [§ 5-16-2] of this article, shall be eligible for insurance coverage under the same terms and provisions of this article. The premium cost for any such coverage shall be borne by the retired employee and the rates for such coverage shall accurately reflect the total cost of such coverage and shall not be subsidized by the rate structure for any other insurance programs administered pursuant to the West Virginia public employees insurance act.*

All retirees under the provisions of this article, including those defined in section two [§ 5-16-2] of this article; those retiring prior to the twenty-first day of April, one thousand nine hundred seventy-two; and those hereafter retiring, shall be eligible for and permitted to obtain health insurance coverage, *upon payment of the full premium cost thereof*, separately, without also being required to obtain any life insurance coverage hereunder: Provided, That any requirement heretofore established to prevent the subsidizing of any separate class by the rate structure of any other program administered hereunder shall continue.

Acts 1986 c. 141 (emphasis added). As the emphasized language indicates, however, the retirees and their spouses and dependents at that time were required to bear the full cost of their health insurance.

Acts 1992, c. 105 deleted the provision that “[t]he premium cost for any such coverage ... shall be borne by such retired employee”.<sup>51</sup> Acts 1992, c. 105 also added a provision permitting the finance board to subsidize a portion of the premium cost to retired employees by active employees. W. Va. Code § 5-16-5(c)(4) now provides, in part, that, “the finance board may

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<sup>51</sup> See Conclusion of Law No. 4(d)(iii), Order at 14 (“While retirees of the Plaintiffs have long been eligible to participate in the health insurance plans offered by PEIA, before 1992 the retirees were required by statute to pay for the full cost of their participation (see Finding of Fact Nos. 10 and 11)”; see also Finding of Fact No. 14, *id.* at 5.

allocate a portion of the premium costs charged to participating employers to subsidize the cost of coverage for participating retired employees”.<sup>52</sup>

In fact, the current system whereby premiums for active employees subsidize those for retired employees, and whereby the State provides an allowance for the premiums for active employees through the PSSP, didn't go into effect until 1995.<sup>53</sup> As the Court correctly observed, however, “this allowance covers only those employees of the Plaintiffs for whom a salary allowance is made under the school aid formula or PSSP. Under the provisions of Chapter 5 Article 16, the Plaintiffs *remain* responsible for paying the cost of the insurance for their employees for whom a salary allowance is not made under the school aid formula or PSSP. See Finding of Fact Nos. 15 and 16”.<sup>54</sup> The Court correctly concluded that “Plaintiffs have always been responsible for paying the premiums for health coverage under the PEIA plan for those employees and retirees NOT covered by the PSSP.”<sup>55</sup> When the allowance for PEIA premiums for retirees was added to the PSSP, the Court below found that “Acts 1994, 1st Ex. Sess., c. 24 amended W. Va. Code § 5-16-18 to define that payments for county boards of education to PEIA shall be determined ‘by the method set forth in section twenty-four, article nine-a, chapter eighteen of this code’. Subsection (b) now provides that ‘The amount of the payments for county boards of education shall be determined by the method set forth in section twenty-four, article nine-a, chapter eighteen of this code: Provided, That local excess levy funds shall be used

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<sup>52</sup> See Conclusion of Law No. 4(d)(iv), Order at 14 (“In 1992, the Legislature granted to the PEIA Finance Board the discretion to ‘allocate a portion of the premium costs charged to participating employers to subsidize the cost of coverage for participating retired employees’. See Finding of Fact No. 13.”)

<sup>53</sup> See Conclusion of Law No. 4(d) (v) in part, Order at 14-15, (“In 1995, the Legislature explicitly began funding an allowance to cover the cost of the PEIA coverage for active employees of the Plaintiffs”); see also Findings of Fact Nos. 15-16, *id.* at 5-6.

<sup>54</sup> Conclusion of Law No. 4(d)(v), Order at 14-15.

<sup>55</sup> *Id.* (emphasis added).

only for the purposes for which they were raised: Provided, however, That after approval of its annual financial plan, but in no event later than the thirty-first day of December of each year, the finance board shall notify the Legislature and county boards of education of the maximum amount of employer premiums that *the county boards of education shall pay* for covered employees during the following fiscal year’ (emphasis added)<sup>56</sup>, and concluded that “[t]his provision makes it clear that the Plaintiffs *remain responsible for paying for the employers’ share of the cost of PEIA insurance*; the PSSP reimburses the Plaintiffs for these costs.<sup>57</sup>

Thus, consistent with the basic structure of the insurance plans offered by PEIA as described above, and contrary to the Petitioners’ assertions, the Court below was correct to conclude that Plaintiffs have *always* been ultimately responsible for paying the premiums for health coverage under the PEIA plan for *all of their* employees.<sup>58</sup> In fact, this requirement was imposed by the Legislature in W. Va. Code § 5-16D-6(e) (see Finding of Fact No. 20), and *this requirement is consistent with the long-standing structure of the insurance plans created by the Legislature by which the cost of PEIA insurance be paid by the employer and employee. See supra.*)<sup>59</sup>

The Court also observed that when the Legislature enacted chapter 5 Article 16D of the West Virginia Code that created the West Virginia Retirement Health Benefit Trust Fund, “W. Va. Code § 5-16D-1(l) provides that “[e]mployer” means any employer as defined by section two, article sixteen of this chapter which has or will have retired employees in any Public

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<sup>56</sup> Finding of Fact No. 17, Order at 6.

<sup>57</sup> *Id.* (emphasis added).

<sup>58</sup> Conclusion of Law No. 4(e), Order at 16 (“Plaintiffs assert that ‘the PEIA now seeks to charge Plaintiffs for the total OPEB liability’ (See *Plaintiffs’ Response to Defendants’ Motion to Dismiss* at 2)”).

<sup>59</sup> *Id.* (emphasis added).

Employees Insurance Agency health plan”<sup>60</sup> and concluded that “[t]his language makes it clear that the Legislature did not intend to modify the basic structure of chapter 5 article 16 when it enacted chapter 5 article 16D of the Code”.<sup>61</sup>

Not only was the Court below correct in concluding that the Petitioners have always been and remain responsible for the health insurance premiums of their retirees, the Petitioners themselves explicitly admitted as much in their Petition when they asserted that they “historically have been responsible for paying the “minimum annual employer payment” with respect to the premiums associated with their employees’ *and retirees’* participation in the PEIA plan”.<sup>62</sup> Therefore, the Petitioners’ claim that “[s]uddenly, Petitioners’ role as a conduit through which funds passed from the State to the PEIA for what are essentially state-provided benefits has morphed into a role akin to that of a traditional plan sponsor of a private health plan, only one with no discretionary decision-making authority with respect to the administration of the plan”<sup>63</sup> is clearly factually inaccurate; rather, the Petitioners have always been ultimately responsible for the health care premiums here at issue. In addition, their claim that “[t]he Circuit Court does not dispute that Petitioners had never before been responsible for payment of the total OPEB liability with respect to county board employees covered by the PSSP”<sup>64</sup> is flatly contradicted by the Court’s decision as discussed above.

In reality, then, the Petitioners have always been and remain responsible for the health insurance premiums for their employees and retirees. Neither GASB Statement No. 45 nor any Legislative enactment including Chapter 5, Article 16D of the West Virginia Code or any action

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<sup>60</sup> Finding of Fact No. 6, Order at 6.

<sup>61</sup> *Id.*

<sup>62</sup> Pet. at 4 (emphasis added).

<sup>63</sup> Pet. at 31.

<sup>64</sup> Pet. at 29.

by any of the Respondents has changed that fact, and the Court below correctly concluded that the Petitioners' demand "that the Court declare that they are not liable for the total OPEB liability as a matter of law ... would be directly contrary to the provisions of W. Va. Code § 5-16D-6(e)".<sup>65</sup>

**b. *GASB Statement No. 45 Paragraph 32 Does Not Relieve the Petitioners from the Responsibility for Reporting the Unfunded Liability on their Financial Statements***

The fact that Petitioners are wrong in their assertion that, as a matter of law, the total OPEB liability is not their liability in the first place because they have never been responsible for payment of premiums for their employees covered by the PSSP is fatal to another of their claims. The Petitioners assert that "[w]ith respect to reporting, the [GASB] Statement [No. 45] provides that in a special funding situation where a state government legally is responsible for the entirety of contributions to OPEB plans for the covered employees of another governmental entity such as a county board of education, it is the state government, and not the county boards of education, that should comply with all applicable provisions of Statement No. 45. See Statement No. 45 of the Governmental Accounting Standards Board, Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions at ¶ 32 (June 2004)".<sup>66</sup>

In fact, GASB Statement No. 45, ¶ 32 states:

**Special Funding Situations**

Some governmental entities are *legally responsible* for contributions to OPEB plans that cover the employees of another governmental entity or entities. For example, a state government may be *legally responsible* for the annual "employer" contributions to an OPEB plan that covers employees of school districts within the state. In those cases, the entity that is legally responsible for the contributions should comply with all applicable provisions of this Statement

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<sup>65</sup> Conclusion of Law No. 4(a), Opinion at 12, citing Finding of Fact No. 20.

<sup>66</sup> Pet. at 7.

for measurement and recognition of expense/ expenditures, liabilities, assets, note disclosures, and RSI. (emphasis added).

Since, as demonstrated above, it is the Petitioners, not the State that is “legally responsible for contributions to OPEB plans”, the special funding situation contemplated by GASB Statement No. 45, ¶ 32 does not exist and GASB Statement No. 45 does not relieve the Petitioners from the requirement that they include this liability on their financial statements.

***c. The Petitioners’ Complaint Lies with the Legislature, Not with the Respondents***

The Petitioners complain of multiple actions of the Respondents in this matter. However, the Court below quite rightly concluded that “every aspect of the funding of the premiums for the retired employees of the Plaintiffs is the direct result of an act of the Legislature save one – the decision left to Defendant PEIA Finance Board of whether a portion of the cost of the premiums for said retired employees will be subsidized with the premiums paid by active employees – has been dictated by the Legislature, not the Defendants.<sup>67</sup> As for the one aspect of funding that had been left to the discretion of the Finance Board, the Court took judicial notice that “on July 30, 2009, the PEIA Finance Board approved eliminating the retiree subsidy for new employees hired on or after July 1, 2010”.<sup>68</sup>

In fact, with the single exception discussed above, *every* action that the Petitioners attributed to one or more of the Respondents was taken in response to specific Legislative authorization and did not represent the application of discretionary authority on the part of the Respondents.<sup>69</sup> Accordingly, the Court quite correctly concluded that “there is no adverseness among the parties to this suit; because (with a single exception ..., it is the Legislature that has

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<sup>67</sup> Conclusion of Law No. 4(d), Opinion at 15.

<sup>68</sup> Conclusion of Law No. 4(d)(vi), Opinion at 15.

<sup>69</sup> See Conclusions of Law (4)(b), 4(c), 4(f), and 4(g), Opinion at 12-16.

created the circumstances with which the Plaintiffs take issue” and that “the required adverseness between the parties named in this suit required to present a justiciable controversy does not exist in this case”.<sup>70</sup> Rather, the Petitioners’ complaint lies with the Legislature, not with the Respondents, who have done everything within their discretionary power to reduce Petitioners’ unfunded liability.

**2. The Circuit Court did not err in concluding that the controversy at issue involves uncertain and contingent events.**

In *Cox, supra*, Justice Cleckley stated that “[t]he first critical factor [in order for a suit to be justiciable] is whether the claim involves uncertain and contingent events that may not occur at all”.<sup>71</sup> This is not a new requirement; the Court has long stated that “[u]nder the Uniform Declaratory Judgments Act, a declaration of rights will not be based on a future contingency”.<sup>72</sup>

The Court below found that Plaintiff’s assertions and claims were uncertain and contingent in several respects. First, the Court observed that “Plaintiffs assert that ‘the State of West Virginia historically has funded the premiums charged by PEIA for most of Plaintiffs’ employees and retirees” but that “[t]hey fail, however, to assert that the State has discontinued or will discontinue funding the “minimum annual employer payment” or pay-as-you-go payment in the future”.<sup>73</sup>

In fact, the fact that the Legislature will consider bills in the current Legislative session strongly suggests that the Legislature accepts the responsibility for addressing this unfunded

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<sup>70</sup> Conclusion of Law No. 4, Opinion at 17.

<sup>71</sup> *Cox v. Amick*, 195 W.Va. at 619, 466 S.E.2d at 470.

<sup>72</sup> *Town of South Charleston v. Board of Ed. of Kanawha County*, 132 W.Va. 77, 50 S.E.2d 880 (1948); see also *Chesapeake & Potomac Tel. Co. of W. Va. v. City of Morgantown*, 144 W.Va. 149, 107 S.E.2d 489 (1959). (“The rights, status, and legal relations of parties to a proceeding under the Uniform Declaratory Judgments Act depend upon facts existing at the time the proceeding is commenced, and future and contingent events will not be considered”).

<sup>73</sup> Conclusion of Law No. 19, Opinion at 22.

liability, not only for the Petitioners, but also for employees of the State as well. It was therefore correct for the Court to conclude that “it is clear that if the Legislature is successful in identifying and implementing a long term funding solution, all of the issues raised by the Plaintiffs will be resolved”<sup>74</sup> and that “Plaintiffs allege that ‘the provisions of West Virginia Code Section 5-16D-6 are unconstitutional as applied to county boards of education in that such provisions frustrate and interfere with the constitutionally guaranteed provision of a thorough and efficient system of free schools, and constitute an unfunded mandate’ and also allege that ‘the PSSP formula is inconsistent and irreconcilable with the requirement that they remain liable for the total OPEB liability, and that, in light of section 5-16D-6(e), the PSSP is unconstitutional as it currently reads because it operates to prevent Plaintiffs from meeting their obligation to provide a thorough and efficient system of free schools’. These allegations will likewise be rendered moot if the Legislature is successful in identifying and implementing a long term funding solution to the OPEB liability”.<sup>75</sup>

The Court also observed that “Plaintiffs assert that they ‘cannot be expected to sit idly by and hope that the PEIA will not ultimately collect on the liability when West Virginia law says the liability remains with them until it is fully paid’ ... and that they ‘must prepare to satisfy it at whatever time the Defendants determine it should become due’...” and concluded that “[t]hese assertions highlight the contingent and uncertain nature of the harms that may occur at some undefined time in the future”.<sup>76</sup>

In addition, the Court also observed that “[a]s stated above, on July 30, 2009, the PEIA Finance Board approved eliminating the retiree subsidy for new employees hired on or after July

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<sup>74</sup> Conclusion of Law No. 20, Opinion at 22.

<sup>75</sup> Conclusion of Law No. 21, Opinion at 22-23.

<sup>76</sup> Conclusion of Law No. 22, Opinion at 23.

1, 2010. The Plaintiffs also have not disputed Defendants' assertion that if the state continues to provide an allowance under terms substantially the same as those in the current version of §18-9A-24, the effect of the decision of the Board to eliminate the retiree subsidy will gradually reduce, and ultimately eliminate, the OPEB liability" and concluded that it could not be demonstrated that any "of the Plaintiffs will be required to provide any funding for benefits for any retirees beyond those which it was always responsible; that is, for those employees not funded through the PSSP".<sup>77</sup>

Finally, the Court observed that "[t]he potential of harm to the Plaintiffs is made even more uncertain by (a) the Legislature's decision to dedicate excess funds in the PEIA reserve account to the Trust Fund (*see* Finding of Fact No. 29), (b) the Legislature's ongoing efforts to deal with the long term OPEB funding issue (as evidenced by the creation of the Senate President's special study group discussed above) (*see* Finding of Fact No. 31), and the unknown effects of the recently enacted federal health care reform bill, which is likely to substantially affect the future cost of providing health care for retired employees and their dependants, and thus will affect the unfunded liability to an unknown extent".<sup>78</sup>

Based on these findings and conclusions, it is clear that the Court correctly concluded "that the Plaintiffs' claim involves uncertain and contingent events" and that, for that reason, that claim "does not present a real and currently justiciable controversy" are required by the *Cox* factors.<sup>79</sup>

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<sup>77</sup> Conclusion of Law No. 23, Opinion at 23.

<sup>78</sup> Conclusion of Law No. 24, Opinion at 24.

<sup>79</sup> Conclusion of Law No. 25, Opinion at 24.

**3. The Circuit Court did not err in concluding that allowing the case to proceed would not serve a useful purpose and would not settle the underlying controversy.**

Justice Cleckley framed the fourth factor in *Cox* as follows:

“[a] circuit court should always ask whether granting the relief would serve a useful purpose, or put another way, whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest. Thus, the factors discussed above must be not be applied mechanically but, rather, with flexibility. In granting declaratory relief, a circuit court should be reasonably convinced that allowing the case to proceed, here and now, would serve a useful purpose and would be of great practical assistance to all concerned. Not only should the utility of the decree be obvious, but the utility should have special force in the challenged and underlying action”.<sup>80</sup>

The Court below concluded that “[b]ased on the Conclusions of Law above, there is a single issue of which the Plaintiffs complain that is within the discretion of the Defendants in this matter: the issue as to the extent to which the premiums of retirees will be subsidized by the premiums of active employees. Having taken judicial notice that the Finance Board has eliminated this subsidy for new employees, the Court further concludes that [Defendants] have already taken the single step available to them to address the Plaintiffs’ complaints”.<sup>81</sup> The Court then concluded that “[a]s to these Defendants, then, the Court is not at all convinced that ‘allowing the case to proceed, here and now, would serve a useful purpose and would be of great practical assistance to all concerned’ and that ‘the sought after declarations would be of no practical assistance in setting the underlying controversy to rest, and for this reason too concludes that a justiciable controversy does not exist in this case’”.<sup>82</sup>

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<sup>80</sup> *Cox v. Amick*, 195 W.Va. at 619, 466 S.E.2d at 470 (footnote omitted).

<sup>81</sup> Conclusion of Law No. 6, Opinion at 17.

<sup>82</sup> *Id.*, Opinion at 17-18.

In *Cox*, Justice Cleckley underscored the discretionary nature of declaratory judgments:

The Declaratory Judgment Act, W.Va.Code, 55-13-1 (1941), empowers a circuit court to grant declaratory relief in a case of actual controversy. *See generally Mongold v. Mayle*, 192 W.Va. 353, 452 S.E.2d 444 (1994). To be clear, if there is no “case” in the constitutional sense of the word, then a circuit court lacks the power to issue a declaratory judgment. A declaratory judgment may not be used to secure a judicial determination of moot questions or where no controversy exists.

The Act does not itself mandate that circuit courts entertain declaratory judgments; rather, the Act makes available an added anodyne for disputes that come within the circuit courts' jurisdiction. It serves a valuable purpose. It is designed to enable litigants to clarify legal rights and obligations before acting upon them. Because the Act offers a window of opportunity, not a guarantee of access, the courts, not the litigants, ultimately must determine when declaratory judgments are appropriate and when they are not. Consequently, circuit courts retain substantial discretion in deciding whether to grant declaratory relief. As we have stated in other contexts, the Declaratory Judgment Act neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants an entitlement to litigants to demand declaratory remedies.<sup>83</sup>

He also articulated compelling reasons for limiting the use of declaratory judgments:

I believe that limiting the use of declaratory judgment actions serves important policies such as avoiding rendering opinions based on purely hypothetical factual scenarios, discouraging forum shopping, encouraging parties to pursue the most appropriate remedy for their grievances, preserving precious judicial resources, and promoting comity.<sup>84</sup>

Here, considerations of encouraging parties to pursue the most appropriate remedy for their grievances and of preserving precious judicial resources strongly suggest that the Circuit Court's determination a justiciable controversy does not exist in this case was just and proper.

## VI. CONCLUSION

The liability of local government entities for pension and OPEB is a serious problem nationwide. Before any problem can be solved, the scope of that problem must be understood.

The mandates that both the Petitioners and the Respondents adhere to GAAP, including GASB

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<sup>83</sup> *Cox, supra*, 195 W.Va. at 618, 466 S.E.2d at 469.

<sup>84</sup> *Id.*, 195 W.Va. at 619, 466 S.E.2d at 470.

Statement No. 45 and GASB Technical Bulletin 2004-02, facilitates the recognition and open understanding of the scope of the problem. In reality, the Governor and the Legislature have made great strides in reducing the unfunded liability of pensions plans for state and local government employees over the last several years. The Governor, the Legislature, and the Respondents have likewise taken steps to begin to address the OPEB problem, including but not limited to the Finance Board's decision to eliminate retiree subsidies for employees hired after July, 2010, the enactment of Chapter 5 Article 16D of the West Virginia Code creating the West Virginia Retiree Health Benefit Trust Fund, and the dedication of funds to that Fund by the provision found at W. Va. Code § 5-16-25 and other appropriations. While these steps have not yet completely eliminated all problems related to OPEB in West Virginia, the Legislature clearly recognizes that a significant problem still exists and continues to address it in the current session.

The Legislature and the Executive branches are charged with the responsibility of prioritizing the issues facing the state and allocating the state's finite resources to those issues as recently as this week. The underlying controversy here is simply an assertion by the Petitioners that the particular issue with which they are concerned should enjoy a higher priority than other issues, which are not identified and with which the concerned parties are not before this Court.

The Judicial Branch is simply unsuited to deal with the type of broad policy issue underlying this action; in any case, pending Legislative action would clearly present a moving target. Respondents were correct in asserting that the complaint raised a political question and that it did not satisfy the factors relevant to determining whether a court should hear a declaratory judgment action, and the Court's concurrence with these assertions does not warrant review.

**Respectfully submitted,**

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
INSURANCE AGENCY**

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
INSURANCE AGENCY FINANCE BOARD**

**THE WEST VIRGINIA STATE AUDITOR**

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Dated: February 18, 2011

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Supreme Court Docket No. 11-0243  
Civil Action No. 10-C-327 (Circuit Court of Kanawha County)**

**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,  
MONROE, MORGAN, NICHOLAS, PENDLETON,  
PLEASANTS, POCAHONTAS, PUTNAM,  
RALEIGH, RANDOLPH, RITCHIE, ROANE, SUMMERS,  
TAYLOR, TUCKER, TYLER, UPSHUR, WEBSTER, WETZEL,  
WIRT, WOOD, AND WYOMING,**

**Petitioners,**

**v.**

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

**Respondents.**

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**CERTIFICATE OF SERVICE**

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I, Steven R. Broadwater, hereby certify that on February 18, 2011, I caused to be served a copy of Respondents' "*Response to Petition for Appeal*" by mailing a true and exact copy thereof to:

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in properly stamped and addressed envelopes, postage prepaid, and deposited in the United States mail.

  
Steven R. Broadwater  
(WVSB No. 462)