

11-1224 -11-1486

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2011 JUL 28 PM 4:21

CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

**THE BOARD OF EDUCATION OF
THE COUNTY OF KANAWHA,
a public corporation,**

Plaintiff,

v.

**CIVIL ACTION NO. 08-C-2020
Judge Paul Zakaib, Jr.**

**WEST VIRGINIA BOARD OF
EDUCATION, a public corporation;
DR. STEVEN L. PAINE, in his official
capacity as Superintendent of Schools
of the State of West Virginia, and KANAWHA
COUNTY PUBLIC LIBRARY BOARD, a
public corporation,**

Defendants.

**FINAL ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND INJUNCTIVE RELIEF**

On August 5, 2010, this matter came before the Court pursuant to a hearing on Plaintiff's Motion for Summary Judgment and Injunctive Relief. The plaintiff, The Board of Education of the County of Kanawha (the "Kanawha Board"), was represented by counsel, Albert F. Sebok and Jonathan L. Anderson. Defendants West Virginia Board of Education (the "State Board") and Dr. Steven L. Paine were represented by counsel, Barbara H. Allen. Defendant Kanawha County Public Library Board ("Library Board") was represented by counsel, Christopher J. Winton.

The Court has considered the instant motion, all responses, arguments of counsel, and all relevant legal authority and hereby **GRANTS** the Motion for Summary Judgment and Injunctive Relief based upon the following findings and conclusions:

FINDINGS OF FACT

A. Prior Litigation: Board of Education I

1. West Virginia's public education financing system contemplates a shared responsibility between the State and individual counties. The State's public education financing system consists of three items: a county's "basic foundation program," a county's "local share," and the "state share" provided to each county by the State.

2. The Supreme Court of Appeals has described the State public education financing system as follows:

W. Va. Code, 18-9A-1, et seq., sets out the State's public school support plan, popularly known as the school financing formula. The formula contemplates a shared responsibility of education costs to be borne by the State and individual counties.

Very broadly, the operation of the formula may be described as follows: First, a county's estimated level of need, or "basic foundation program," is determined. The basic foundation program is the total sum required for each of seven categories of need, viz., professional educators, service personnel, fixed costs, transportation costs, administrative costs, other current expenses and substitute employees, and improvement of instructional programs.

Secondly, the county's "local share" must be computed. Local share is the amount of tax revenue which will be produced by levies at specified rates, on all real property situate in the county. Local share thus represents the county's contribution to education costs on the basis of the value of its real property. State funding is provided to the county in an amount equal to the difference between the basic foundation program and the local share.

State ex rel. The Boards of Education of the Counties of Upshur, et al. v. Chafin, 180 W.Va. 219, 221-22, 376 S.E.2d 113, 115-16 (1988) (citations omitted).

3. In 1957, the Legislature enacted Chapter 178 of the Acts of the Legislature, Regular Session, 1957 (the "Kanawha Special Act"). The Kanawha Special Act mandates the Kanawha Board to divert a portion of its regular levy tax receipts for the support of the Kanawha County Public Library (the "Kanawha Library"). The Legislature has passed similar special acts for eight other county boards of education.¹ Forty-six county boards of education have no mandated library funding obligation.

4. In recent years, the amounts of regular levy receipts the Kanawha Board has been mandated to divert for the support of the Kanawha Library exceed \$2,000,000.00 annually. In fiscal year 2007-2008, the amount diverted for the support of the Kanawha Board exceeded \$2,500,000.00.

5. Section 18-9A-12 of the Code identifies certain adjustments that can be made to a county's "local share," which in turn results in more state share funding. For example, if a county "is under a final court order to refund or credit property taxes paid in prior years, the allocated state aid share shall be the county's basic foundation program, minus the local share . . . plus the amount of property tax the county is unable to collect or must refund due to the final court order." W.Va. Code § 18-9A-12(b)(1).

6. In computing the Kanawha Board's local share, and the corresponding amount of state share funding that would be provided, the State Board did not take into account the portion of the Kanawha Board's regular tax levy receipts that it was required to divert to the

¹ See Berkley County - Chapter 83, Acts of the Legislature, Regular Session, 1970; Hardy County - Chapter 223, Acts of the Legislature, Regular Session, 1981; Harrison County - Chapter 150, Acts of the Legislature, Regular Session, 1987; Ohio County - Chapter 118, Acts of the Legislature, 1st Ext. Session, 1933; Raleigh County - Chapter 161, Acts of the Legislature, Regular Session, 1969; Tyler County - Chapter 200k Acts of the Legislature, Regular Session, 1953; Upshur County - Chapter 189, Acts of the Legislature, Regular Session, 1994; Wood County - Chapter 156, Acts of the Legislature, Regular Session, 1987.

Kanawha Library as a result of the Kanawha Special Act.

7. In 2003, the Kanawha Board commenced an action in the Circuit Court of Kanawha County against the State Board, Civil Action No. 03-C-2955. The Kanawha Board sought a declaration that the Kanawha Special Act's mandate requiring the Kanawha Board to distribute a portion of its regular tax levy receipts for the support of the Kanawha Library violated equal protection under the West Virginia Constitution.

8. The Honorable Charles E. King granted summary judgment in favor of the State Board. The lower court held that the discriminatory treatment against the Kanawha Board, as compared to the forty-six other county boards of education with no mandated library funding obligation, did not present an enforceable denial of equal protection by the Kanawha Board.

9. The lower court found that the Kanawha Board was providing a thorough and efficient education to its students. (Order at p.3, attached as Exhibit A to Plaintiff's Motion for Summary Judgment and Injunctive Relief). In addition to providing a thorough and efficient education to its students, the lower court found that the Kanawha Board was also able to carry over a surplus every fiscal year ranging from of \$6,000,000.00 to \$13,000,000.00. (*Id.*).

10. In addition to its excess levy revenues, the lower court found that the Kanawha Board's surplus was the result of an extra "sock" of money resulting from the fact that Kanawha County's rate of uncollectible regular levy receipts was lower than the statutory 5% deduction. (Order at pp. 4, 10).

11. Specifically, in computing a county's local share, the law assumes that 5% of a county's regular levy receipts will be uncollectible. *See* W.Va. Code § 18-9A-11(a)(1)

("The state board shall then apply these rates to the assessed taxable value of property in each classification in the county . . . and shall deduct therefrom five percent as an allowance for the usual losses in collections due to discounts, exonerations, delinquencies and the like."). Because Kanawha County's rate of uncollectibles was lower than 5%, the lower court found that this resulted in an extra "sock" or surplus of money for the Kanawha Board. (Order at pp. 4,10).

12. As a result of the above, the lower court found the discriminatory classification against the Kanawha Board presented a "purely economic issue" subject only to rational basis review. (Order at p. 9). The lower court held there was a rational basis for the Kanawha Special Act's library funding mandate. (See Order at p.10 ("[T]he Legislature has acted reasonably in spending the state's educational dollars where they are most needed.")).

13. On appeal, the Supreme Court of Appeals reversed. First, the court determined the appropriate level of review to be applied. The court held that strict scrutiny review, not rational basis, should have been applied. *See Board of Educ. of the County of Kanawha v. West Virginia Bd. of Educ.*, 219 W.Va. 801, 807, 639 S.E.2d 893, 899 (2006) ("First, we agree with the County school board that the circuit court erred in applying the rational basis test instead of the strict scrutiny test in this case. As we explained in *Cimino*, the strict scrutiny test is required when the law or governmental action at issue impinges upon a fundamental right. It is well settled that the right to an education is a fundamental right under our State Constitution").

14. Citing *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979), the court then went on to hold as follows:

Finally, this Court has indicated, and we now hold, that a statute that creates a lack of uniformity in the State's educational financing system is subject to strict scrutiny, and this discrimination will be upheld only if necessary to further a compelling state interest.

Board of Educ. of the County of Kanawha, 219 W.Va. at 807, 639 S.E.2d at 899 (internal quotations and citation omitted).

15. Next, the court determined whether a compelling state interest was present to justify the discriminatory treatment of the Kanawha Board:

When we apply the strict scrutiny test to the present facts, we can find no compelling reasons that justifies treating those school boards differently that are charged by law with applying a portion of their local share to support a non-school purpose such as a public library. Clearly, the end result of such unequal treatment is that county school boards charged by law with diverting a portion of their local shares to support non-school purposes have less funds from regular tax levies to expend directly on public schools. Simply put, the more than 2.2 million dollars directed each year to the support of the library is money taken from the support of school children in the classrooms of Kanawha County schools. This, in turn, potentially impinges on a school board's ability to provide a thorough and efficient education to its students.

Id. at 807-08, 639 S.E.2d at 899-900.

16. The court specifically held that Section 18-9A-12 of the Code was unconstitutional to the extent that, in computing a county's local share and corresponding state share funding, it failed to account for the county's special act library funding obligation:

W.Va.Code § 18-9A-12 (1993), to the extent that it fails to provide that a county school board's allocated state aid share shall be adjusted to account for the fact that a portion of the county school board's local share is required by law to be used to support a non-school purpose, violates equal protection principles because it operates to treat county school boards required by law to provide financial support to non-school purposes less favorably than county school boards with no such

requirement.

Id. at syl. pt. 6.

17. The court then extended the Legislature an opportunity to cure the constitutional deficiency it found:

Having found that W. Va. Code § 18-9A-12 is deficient, we believe that the Legislature must take corrective action by amending the applicable statutes as provided in this opinion. However, because this Court believes that a period of time will be necessary for the Legislature to take necessary steps to amend the statute, we will . . . defer entry of a final order to accommodate a legislative solution. Therefore, the effect of this decision will be stayed until the beginning of the next fiscal year on July 1, 2007.

Id. at 808, 639 S.E.2d at 900.

B. The Legislative Response

18. In response to the Supreme Court of Appeals' decision in Board of Education I, the Legislature did not amend Section 18-9A-12 of the Code. Instead, the Legislature amended Section 18-9A-11 of the Code.

19. Specifically, the Legislature amended the Code to provide that any library funding obligation would only come from those amounts by which the Kanawha Board's regular tax levies exceeded its computed local share:

For the purposes of any computation made in accordance with the provisions of this section, the library funding obligation on the regular school board levies which is created by a special act and is due and payable from the levy revenues to a library shall be paid from the county school board's discretionary retainage, which is hereby defined as the amount by which the regular school board levies exceeds the local share.

W.Va. Code § 18-9A-11(f).

20. The statute then provides that "[a]ny excess of the discretionary retainage over

the library funding obligation shall be available for expenditure by the county board in its discretion for its properly budgeted purposes." *Id.* If the library funding obligation greater than the "discretionary retainage," then the library funding obligation "is amended and reduced to the amount of the discretionary retainage." *Id.*

21. As further part of its amendments of Section 18-9A-11, the Legislature provided an option to the Kanawha Board, and the eight other counties subject to a library funding obligation, whereby the Kanawha Board could transfer its library funding obligation from the "discretionary retainage" of its regular school levy revenues to its excess levy revenues:

Notwithstanding any provision of any special act to the contrary, the county board of any county with a special act creating a library obligation out of the county's regular school levy revenues may transfer that library obligation so that it becomes a continuing obligation of its excess levy revenues instead of an obligation of its regular school levy revenues.

Id. § 18-9A-11(h).

22. If the Kanawha Board elects to transfer its library funding obligation to its excess levy revenues, the statute mandates that the Kanawha Board include the library funding obligation as a specifically described line item of the excess levy. *See id.* § 18-9A-11(h)(2). If the excess levy fails to pass and/or passes and thereafter expires, the Kanawha Board must include the funding obligation to the Kanawha Library as a line item in any subsequent excess levies. *Id.*

C. The Current Litigation

23. On October 14, 2008, the Kanawha Board filed its Complaint for Declaratory Judgment and Injunctive Relief against the State Board and Dr. Steven L. Paine in his official capacity as Superintendent of Schools of the State of West Virginia.

24. Count I of the Complaint alleges that Section 18-9A-11 of the West Virginia Code, in combination with the Kanawha Special Act, did not correct, but perpetuates, the unconstitutional discriminatory classification identified in Board of Education I. Count II of the Complaint alleges that Section 18-9A-11 also constitutes an unconstitutional intrusion on the Kanawha Board's excess levy powers.

25. On January 30, 2009, the Library Board filed the Motion to Intervene of Kanawha County Public Library Board. The Library Board sought to intervene as a matter of right and be joined as a party defendant.

26. By Agreed Order entered March 2, 2009, the Library Board's Motion to Intervene was granted and the Library Board was joined as a party defendant.

27. On November 12, 2009, the Kanawha Board filed Plaintiff's Motion for Summary Judgment and Injunctive Relief.

CONCLUSIONS OF LAW

A. Legal Standard

1. Rule 56 of the West Virginia Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions of file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. Pro. 56(c) (2010).

2. Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial," if in essence there is no real dispute as to salient facts or if only a question of law is involved . . . When a motion for summary judgment is mature for consideration and is properly documented with such clarity as

to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion.

Painter v. Peavy, 192 W. Va. 189, 192 n.5 (1994) (citations omitted).

B. Section 18-9A-11 of the Code, in Combination With the Kanawha Special Act, Violates the Equal Protection Clause of Article III of the West Virginia Constitution.

3. In this case, there is a discriminatory classification of the Kanawha Board within the public education financing system.

4. Pursuant to the Kanawha Special Act and Section 18-9A-11, the Kanawha Board is mandated to divert a portion of its regular levy receipts for the support of a public library, a mandate that forty-six other county board of education do not have. There is no dispute that the annual amount of the Kanawha Board's mandated library funding obligations exceeds two million dollars.

5. The fact that the library funding obligation is to be paid out of the Kanawha Board's "discretionary retainage" is of no matter. Under Pauley, "any discriminatory classification found in the State's educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification." Syl. pt. 4, *Pauley v. Kelly*, 162 W. Va. at 672, 255 S.E.2d at 859 (emphasis added); *see also* syl. pt. 4, *Board of Educ. of the County of Kanawha*, 219 W. Va. at 807, 639 S.E.2d at 899 ("A statute that creates a lack of uniformity in the State's educational financing system is subject to strict scrutiny, and this discrimination will be upheld only if necessary to further a compelling state interest.").

6. Here, if the Kanawha Board's regular levy receipts exceed its local share, it is mandated to pay all or a portion of those receipts to the Kanawha Library, while forty-six other counties could use any such funds how they see fit in the education of their students.

7. Indeed, in amending Section 18-9A-11 and requiring the Kanawha Board's library funding obligation to be paid out of its "discretionary retainage," the Legislature appears to be following the same logic that the Supreme Court of Appeals rejected in *Board of Education I*.

8. Under Section 18-9A-11, the term "discretionary retainage" is statutorily defined as "the amount by which regular school board levies exceeds the local share" W.Va. Code § 18-9A-11(f). Essentially, a county school board's "discretionary" retainage is a surplus of regular levy receipts over and above the county's computed local share.

9. In *Board of Education I*, the lower court applied a "rational basis" review and held that the discriminatory treatment against the Kanawha Board was constitutional because the fact that the Kanawha Board was running a surplus. The Kanawha Board's surplus was, in part, because its rate of uncollectibles on its regular levy receipts was lower than the statutory 5% deduction. (Order at p.10). In other words, in *Board of Education I*, the Kanawha Board's regular levy receipts were higher than its computed local share, which is exactly what constitutes a "discretionary retainage" under the 2007 amendments to Section 18-9A-11. Nonetheless, the Supreme Court of Appeals still applied strict scrutiny and held the financing scheme unconstitutional.

10. Similarly, the fact that the Kanawha Board has an option of transferring its mandated library funding obligation to its excess levy revenues also does not change the analysis.

11. If the Kanawha Board chooses not to pay its library funding obligation out of its regular levy receipts, it is mandated to transfer the library funding obligation to its excess levy. W.Va. Code § 18-9A-11(h). If the excess levy fails or expires, the Kanawha Board is mandated to include the library funding obligation in any subsequent excess levies. *Id.* However, there is no such mandate for forty-six other county boards of education. Unlike the Kanawha Board, these forty-six other county boards of education are free to maximize their excess levy revenues for school purposes.² Likewise, unlike the Kanawha Board, these forty-six other county boards of education are not subject to the risk of voters rejecting their excess levies due to the including of a multi-million dollar library funding obligation.

12. The Kanawha Special Act and Section 18-9A-11 clearly create a lack of uniformity in the public education financing scheme as there is unequal treatment of the Kanawha Board as compared to forty-six other county boards of education. As a result, in light of Pauley and Board of Education I, the Court FINDS that the lack of uniformity and unequal treatment created by the Kanawha Special Act and Section 18-9A-11 is subject to strict scrutiny review and is unconstitutional unless the unequal treatment is justified by some compelling State interest. This point is not disputed by the parties. (See Library Board Response at p.4 ("[T]he question to be litigated is whether the unequal treatment created by the statute as alleged by the School Board serves some compelling State interest.")).

13. Accordingly, the issue to be decided is whether the unequal treatment of the Kanawha Board as compared to forty-six other county board of education is justified by a compelling State interest.

² Article 10, § 10 of the West Virginia Constitution limits a county school board's excess levy revenues to 100% of its regular levy receipts.

14. Because the Kanawha Special Act and Section 18-9A-11 infringe on a fundamental constitutional right, there is a "presumption of unconstitutionality." *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 694 n.14, 408 S.E.2d 634, 644 n.14 (1991). The State bears the burden of proving the unequal treatment of the Kanawha Board is necessary because of a compelling State interest. See *Phillip Leon M. v. Greenbrier County Bd. of Educ.*, 199 W.Va. 400, 404, 484 S.E.2d 909, 913 (1996) ("It is beyond cavil that when a state acts to the disadvantage of some suspect class or to impinge upon a fundamental right explicitly or implicitly protected by the West Virginia Constitution, strict scrutiny will apply, and the state will have to prove that its action is necessary because of a compelling government interest.").

15. Less than four years ago, in *Board of Education I*, the Supreme Court of Appeals held there was no compelling State interest to justify the unequal treatment of the Kanawha Board and the eight other county boards of education subject to a special act library funding obligation:

When we apply the strict scrutiny test to the present facts, we can find no compelling reasons that justifies treating those school boards differently that are charged by law with applying a portion of their local share to support a non-school purpose such as a public library. Clearly, the end result of such unequal treatment is that county school boards charged by law with diverting a portion of their local shares to support non-school purposes have less funds from regular tax levies to expend directly on public schools. Simply put, the more than 2.2 million dollars directed each year to the support of the library is money taken from the support of school children in the classrooms of Kanawha County schools. This, in turn, potentially impinges on a school board's ability to provide a thorough and efficient education to its students.

Board of Educ. of the County of Kanawha, 219 W.Va. at 807-08, 639 S.E.2d at 899-900.

16. In its response brief, the State Board does not identify any compelling State interest. The State Board simply asserts that any equal protection problem is eliminated by the fact that the Kanawha Board has the option of transferring its library funding obligation to its excess levy revenues. (State Board Response at pp.3-4). However, as stated above, even with this option, there is still a lack of uniformity in the public education financing scheme as there is unequal treatment of the Kanawha Board as compared to forty-six other county boards of education. The State must still prove a compelling State interest.

17. In its response brief, the Library Board argues that the library funding obligation of the Kanawha Special Act and Section 18-9A-11 are constitutional because libraries serve a compelling State interest. However, this argument misses the point of equal protection analysis.

18. "Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner." Syl. pt. 2, *Israel by Israel v. West Virginia Secondary Schools Activities Comm'n*, 182 W.Va. 454, 388 S.E.2d 480 (1989); see also *Kyriazis v. University of West Virginia*, 192 W.Va. 60, 67, 50 S.E.2d 649, 656 (1994) ("[E]qual protection means the State cannot treat similarly situated people differently unless circumstances justify the disparate treatment.").

19. As held in *Pauley*, "any discriminatory classification found in the State's educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification." Syl. pt. 4, *Pauley v. Kelly*, 162 W.Va. at 672, 255 S.E.2d at 859 (emphasis added).

20. Thus, the issue is not whether libraries serve some important or compelling State interest. The issue is whether there is a compelling State interest to justify the unequal

treatment of the Kanawha Board as compared to forty-six other county boards of education.

21. Indeed, in *Board of Education I*, arguments were made concerning the benefits public libraries serve. The lower court found that libraries were an aid to education. *Board of Educ. of the County of Kanawha*, 219 W.Va. at 806, 639 S.E.2d at 898. Justice Albright, in his dissenting opinion, stated:

There is simply no end to the benefits that a public library offers to the citizens of this state, initially extended at the pre-school level, continuing through the school years, and enduring throughout adulthood. Without question, the public library enhances every community in which it is situated through services that are both cultural and educational in nature.

Id. at 809, 639 S.E.2d at 901 (Albright, J., dissenting). Justice Starcher argued, "[S]ince public libraries are an integral part of any sound educational system providing educational monies for their support is educationally sound." *Id.* at 810, 639 S.E.2d at 902 (Starcher, J., dissenting).

22. However, as pointed out by Justice Davis in her concurring opinion, the issue was not the benefits served by or viability of public libraries. *See id.* at 811, 639 S.E.2d at 903 ("The viability of public libraries, however, is neither the issue presented for resolution in this case nor the reason for or result of the decision reached by the majority of the Court.") (Davis, J., concurring). The issue was, again, whether a compelling State interest justified the unequal treatment of the Kanawha Board. *See id.* ("Applying the test enunciated by this Court nearly thirty years ago in *Pauley*, the majority determined that, in the absence of a compelling reason for this differentiation in funding, the schoolchildren of these nine counties should be receiving the same educational opportunities as those enjoyed by the schoolchildren in the State's other forty-six counties.") (Davis, J., concurring).

23. The amendments to Section 18-9A-11 were enacted in 2007. If there was a compelling State interest to justify the unequal treatment of the Kanawha Board, it presumably would and should have existed at that time. However, there has been no compelling State interest advanced to justify the unequal treatment of the Kanawha Board and the eight other county boards of education subject to a special act library funding obligation.

24. Just as in *Board of Education I*, the Court FINDS no compelling State interest exists to justify the unequal treatment of the Kanawha Board as compared to the forty-six other county board of education with no special act library funding obligation.

25. Lastly, in its response brief, the Library Board and the State have taken the position that summary judgment is premature because there is necessary discovery to be conducted on the issue of whether libraries serve a compelling State interest. First, as set forth above, the importance of or benefits libraries serve is not relevant to the equal protection analysis, but whether a compelling State interest justifies the unequal treatment of the Kanawha Board. Moreover, as set forth above, the amendments to Section 18-9A-11 were passed in 2007. If there was a compelling State interest for the unequal treatment of the Kanawha Board, it should have existed at that time. No such compelling State interest has been advanced.

26. The Library Board has not tendered an affidavit pursuant to Rule 56(f) that additional discovery is necessary. See *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 702, 474 S.E.2d 872, 882 (1996) ("We, like the Fourth Circuit, place great weight on the Rule 56(f) affidavit, believing that [a] party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when

it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in the affidavit.") (internal quotations and citation omitted). Similarly, the Library Board has not identified in writing the specific facts they believe discovery will reveal that will somehow change the previous result reached by the Supreme Court of Appeals. In *Powderidge*, the court held:

An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Id. at syl. pt. 1.

27. If discovery was truly necessary, the Library Board has had more than ample time to conduct the same. "The party seeking a continuance must show due diligence both in pursuing discovery before the summary judgment initiative surfaced and in pursuing an extension of time thereafter." Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* at 1144-45 (3d ed. 2008); *see also Crain v. Lightner*, 178 W.Va. 765, 771 (1987) ("These facts disclose that the appellant may have had about ten months (from the May, 1983 order dismissing the media defendants to the March, 1984 order granting the appellees' summary judgment motion) to conduct discovery in order to develop his case

against the appellees. This would appear to be adequate time for discovery to resist a motion for summary judgment.").

28. This case has been pending since October 2008. The Library Board has been a party defendant since March 2, 2009. The Kanawha Board's Motion for Summary Judgment and Injunctive Relief has been pending since November 2009. During this time, the Library Board has conducted no discovery. It is not sufficient for the Library Board to assert for the first time in its response brief that discovery was necessary. *See Powderidge Unit Owners Ass'n*, 196 W.Va. at 702, 196 W.Va., 474 S.E.2d at 882 ("a party may not simply assert in its brief that discovery was necessary").

29. Similarly, the State Board argues summary judgment is premature because a scheduling order has not been entered pursuant to Rule 16. Rule 56 specifically allows for a plaintiff to file a motion for summary judgment "at any time after the expiration of 30 days from the commencement of the action" W.Va. R. Civ. P. 56(a). The case law cited by the State Board does not hold that a scheduling order is mandatory in every case before a motion for summary judgment can be considered, particularly in circumstances such as this where resolution of the matter presents a pure question of law and the parties, if they so desired, had adequate time to conduct discovery.

C. Section 18-9A-11 of the Code Violates Article X of the West Virginia Constitution.

30. Article XII, § 5 of the West Virginia Constitution gives the Legislature the authority to raise monies for the support of free schools. The Legislature may provide for the support of free schools by "general taxation of persons or property or otherwise." W.Va. Const. art. XII, § 5. However, Article XII, § 5 provides that this must be done by general law:

[The Legislature] shall also provide for raising in each county or district, by the authority of the people thereof, such a proportion of the amount required for the support of free schools therein as shall be prescribed by general laws.

W.Va. Const. art. XII, § 5.

31. Article X, § 10 provides for local school districts, such as the Kanawha Board, to seek excess levy tax revenues over and above the regular school levy revenues:

[T]he maximum rates authorized and allocated by law for tax levies on the several classes of property for the support of public schools may be increased in any school district for a period not to exceed five years, and in an amount not to exceed one hundred percent of such maximum rates, if such increase is approved, in the manner provided by law, by at least a majority of the votes cast for and against the same.

32. Article X, § 1b, titled "Levies for Free Schools," was later added to the West Virginia Constitution in 1982. It empowers the Legislature to enact, by general law, a statewide excess levy to supersede and replace local school district excess levies:

Within the limits of the maximum levies permitted for excess levies for schools or better schools in sections one and ten of this article, the Legislature may, in lieu of the exercise of such powers by the local school districts as heretofore provided, submit to the voters, by general law, a statewide excess levy, and if it be approved by the required number of voters, impose such levy, subject however to all the limitations and requirements for the approval of such levies as in the case of a district levy.

W.Va. Const. art. X, § 1b (emphasis added).

33. The Legislature has attempted to enact a statewide excess levy in the past, but it was disapproved by the voters. *See State ex rel. Boards of Educ. of the County of Upshur v. Chafin*, 180 W.Va. 219, 222-23 (1988).

34. The West Virginia Constitution expressly recognizes the "powers" of the local school districts with respect to their excess levy revenues. 'The Legislature, in lieu of the

powers of the local school districts, has an option, subject to voter approval, to enact a statewide excess levy by general law. However, Article XII, § 5 and Article X, § 1b prohibit the Legislature from enacting special legislation with respect to a local school districts excess levy.

35. Similarly, excess levies revenues represent a voluntary consent by the voters of a particular county to pay additional taxes to provide additional educational opportunities in their county's schools. *See, e.g., Pauley*, 162 W.Va. at 712 n.37, 255 S.E.2d at 880 n.37 ("Courts, as well as educators, have recognized that in any well-devised educational system there should be some local initiative, such that if a group of citizens is willing to vote for additional taxes to provide additional educational advantages."). With its amendments to Section 18-9A-11, the Legislature has also infringed upon the initiative of the voters of Kanawha County. If the mandated library funding obligation is transferred to the Kanawha Board's excess levy revenues, the Legislature has given Kanawha County voters an all or nothing proposition. In order to exercise their "local initiative" and tax themselves for additional educational funds in their county, Kanawha County voters are forced to also tax themselves for the support of a non-school purpose, which is the support of a public library

36. Accordingly, the Court **FINDS** that the mandate of Section 18-9A-11(h) requiring the Kanawha Board to transfer its library funding obligation to the extent not paid out of its regular levy revenues violates Article XII, § 5 and Article X, § 1b of the West Virginia Constitution.

CONCLUSION AND ORDERS

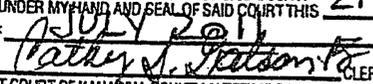
WHEREFORE, based upon the foregoing findings and conclusions, Plaintiff's Motion for Summary Judgment and Injunctive Relief is hereby **GRANTED**. It is **ORDERED** that

the Kanawha Special Act and Section 18-9A-11 of the Code, to the extent they require the Kanawha Board to divert a portion of its regular levy receipts for the support of the Kanawha Library, or to transfer the Kanawha Board's library funding obligation to its excess levy revenues, be and hereby are null and void and of no force and effect. It is **ORDERED** that the State and the Library Board be and hereby are enjoined from enforcing, or seeking to enforce, the requirements of Kanawha Special Act and Section 18-9A-11 of the Code as they pertain to the Kanawha Board's library funding obligation to the Kanawha Library. It is further **ORDERED** that this matter be stricken from the Court's active docket.

The Court notes the objection of any party aggrieved by this Order. The Clerk is directed to send certified copies of this order to counsel of record and any unrepresented party.

Entered this 28th day of July, 2011.


Honorable Paul Zakaib, Jr., Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 29TH
DAY OF JULY 2011

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

11-1486

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2011 SEP 27 AM 11:26

CATHY S. GARDNER, CLERK
KANAWHA COUNTY CIRCUIT COURT

**THE BOARD OF EDUCATION OF
THE COUNTY OF KANAWHA,
a public corporation,**

Plaintiff,

v.

**CIVIL ACTION NO. 08-C-2020
Judge Zakaib**

**WEST VIRGINIA BOARD OF
EDUCATION, a public corporation;
DR. JOREA MARPLE, in her official
capacity as Superintendent of Schools
of the State of West Virginia, and KANAWHA
COUNTY PUBLIC LIBRARY BOARD, a
public corporation,**

Defendants.

**ORDER DENYING LIBRARY BOARD'S
MOTION FOR RECONSIDERATION, ALTERATION, OR AMENDMENT**

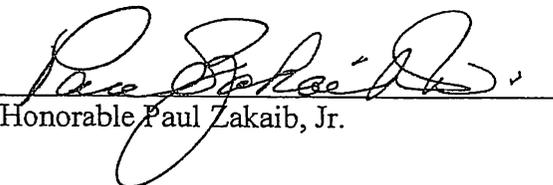
On September 14, 2011, this matter came before the Court pursuant to the Motion for Reconsideration, Alteration, or Amendment filed by the Kanawha County Public Library Board ("Library Board"). The plaintiff, The Board of Education of the County of Kanawha ("Kanawha Board"), was represented by counsel, Albert F. Sebok and Jonathan L. Anderson. Defendant Library Board was represented by counsel, Christopher J. Winton and Larry L. Rowe. Defendants West Virginia Board of Education ("State Board") and Dr. Jorea Marple were represented by counsel, Barbara H. Allen.

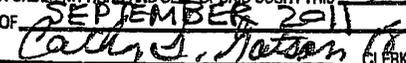
The Court has considered the instant motion, all responses and replies, arguments of counsel, and all relevant legal authority and hereby **DENIES** the Motion for Reconsideration, Alteration, or Amendment.

It is further **ORDERED** that the Verification of Alan Engelbert attached to the Motion for Reconsideration, Alteration, or Amendment, and any facts that are the subject thereof, be stricken from the record. The Verification was not submitted prior to the Court's ruling on the Plaintiff's Motion for Summary Judgment and Injunctive Relief and is, therefore, untimely. *See Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 700 (1996) ("Although our review of the record from a summary judgment proceeding is *de novo*, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling."); *Cleckley, et al., Litigation Handbook on West Virginia Civil Procedure* 1179 (3d edition 2008) ("A motion under Rule 59(e) is not appropriate for presenting new issues or evidence that could have been previously litigated. . . Rule 59(e) is not a vehicle for a party to undo his/her own procedural failures or to advance argument that could and should have been presented to the trial court prior to judgment.").

The Court notes the objection of any party aggrieved by this Order. The Clerk is directed to send certified copies of this order to counsel of record and any unrepresented party.

Entered this 27th day of Sep 8, 2011.


Honorable Paul Zakaib, Jr.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 27TH
DAY OF SEPTEMBER 2011

CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PRESENTED BY:



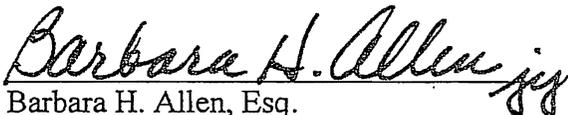
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