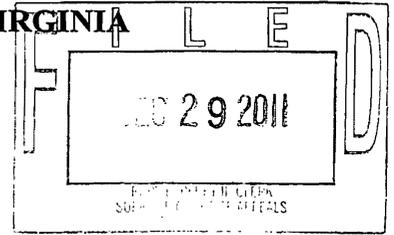


---

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NOS. 11-1224 and 11-1486



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

*Petitioners,*

v.

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

*Respondent.*

---

**BRIEF OF PETITIONERS IN NO. 11-1224,**  
**WEST VIRGINIA BOARD OF EDUCATION AND DR. JOREA MARPLE**

---

**DARRELL V. McGRAW, JR.**  
**ATTORNEY GENERAL**

**BARBARA H. ALLEN**  
**MANAGING DEPUTY ATTORNEY GENERAL**  
**State Capitol, Room E-26**  
**Charleston, West Virginia 25305**  
**Telephone 304-558-2021**  
**State Bar ID No. 1220**  
**mistrial1@aol.com**

*Counsel for Petitioners West Virginia Board  
of Education and Dr. Jorea Marple*

---

---

**TABLE OF CONTENTS**

	Page
I. ASSIGNMENTS OF ERROR .....	1
II. STATEMENT OF THE CASE .....	2
A. THE PREDECESSOR LITIGATION .....	2
B. THE INSTANT CASE .....	4
III. SUMMARY OF ARGUMENT .....	8
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	12
V. ARGUMENT .....	12
A. THE COURT BELOW ERRED IN CONCLUDING THAT PURSUANT TO <i>BOARD OF EDUCATION OF THE COUNTY OF KANAWHA v. WEST VIRGINIA BOARD OF EDUCATION</i> , 219 W. VA. 801, 639 S.E.2d 893 (2006), THE PROVISIONS OF WEST VIRGINIA CODE § 18-9A-11, IN COMBINATION WITH THE KANAWHA SPECIAL ACT, CHAPTER 178 OF THE ACTS OF THE LEGISLATURE REGULAR SESSION, 1957, VIOLATE THE EQUAL PROTECTION GUARANTEE OF ARTICLE III, § 14 OF THE WEST VIRGINIA CONSTITUTION .....	12
B. THE COURT BELOW ERRED IN CONCLUDING THAT WEST VIRGINIA CODE § 18-9A-11 VIOLATES THE SPECIAL LEGISLATION PROHIBITION OF ARTICLE XII, § 5 AND ARTICLE X, § 1b OF THE WEST VIRGINIA CONSTITUTION .....	17
C. THE COURT BELOW ERRED IN CONCLUDING THAT SUMMARY JUDGMENT WAS APPROPRIATE NOTWITHSTANDING THE FACT THAT NO SCHEDULING ORDER HAD EVER BEEN ENTERED IN THE CASE .....	20
D. STATEMENT OF ADOPTION .....	22
VI. CONCLUSION .....	23

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Board of Education of the County of Kanawha v. West Virginia Board of Education (Board of Education I)</i> , 219 W. Va. 801, 639 S.E.2d 893 (2006) .....	<i>passim</i>
<i>Byrd v. Board of Education of Mercer County</i> , 196 W. Va. 1, 467 S.E.2d 142 (1995) .....	20
<i>Caruso v. Pearce</i> , 223 W. Va. 544, 678 S.E.2d 50 (2009) .....	11, 21
<i>Elliott v. Schoolcraft</i> , 213 W. Va. 69, 576 S.E.2d 796 (2002) .....	11, 21
<i>Hedrick v. County Court of Raleigh County</i> , 153 W. Va. 660, 172 S.E.2d 312 (1970) .....	2, 10, 15
<i>Kanawha County Public Library v. The County Court of Kanawha County</i> , 143 W. Va. 385, 102 S.E.2d 712 (1958) .....	2, 10, 15
<i>State ex rel. Dilley v. West Virginia Public Employees Retirement System</i> , 180 W. Va. 24, 375 S.E.2d 202 (1988) .....	10, 20
<i>State ex rel. Boards of Educations of the Counties of Upshur v. Chafin</i> , 180 W. Va. 219, 376 S.E.2d 113 (1988) .....	10, 16, 17, 18
<i>State ex rel. Pritt v. Vickers</i> , 214 W. Va. 221, 588 S.E.2d 210 (2003) .....	11, 21
<b>CONSTITUTIONAL PROVISIONS</b>	
W. Va. Const. art. III, § 14 .....	2, 7, 12
W. Va. Const. art. III, § 10 .....	16
W. Va. Const. art. XII, § 1 .....	14
W. Va. Const. art. XII, § 5 .....	<i>passim</i>
W. Va. Const. art. X, § 1b .....	<i>passim</i>
W. Va. Const. art. X, §10 .....	18, 19

**TABLE OF AUTHORITIES (Cont'd)**

	Page
<b>STATUTES</b>	
W. Va. Code § 10-1-2 .....	11, 20
W. Va. Code § 11-8-16 .....	20
W. Va. Code § 18-9A-1 <i>et seq.</i> (Public School Support) .....	14, 18
W. Va. Code § 18-9A-11 .....	<i>passim</i>
W. Va. Code § 18-9A-11(f) .....	9, 12, 13, 15
W. Va. Code § 18-9A-11(f)-(h) .....	4-6
W. Va. Code § 18-9A-11(h) .....	<i>passim</i>
W. Va. Code § 18-9A-12(b)(1)-(3) .....	2, 3, 12-13
<b>OTHER</b>	
1994 W. Va. Acts ch. 189 (Reg. Sess.) (Upshur Co.) .....	3
1987 W. Va. Acts ch. 150 (Reg. Sess.) (Harrison Co.) .....	3
1987 W. Va. Acts ch. 156 (Reg. Sess.) (Wood Co.) .....	3
1981 W. Va. Acts ch. 223 (Reg. Sess.) (Hardy Co.) .....	3
1970 W. Va. Acts ch. 83 (Reg. Sess.) (Berkeley Co.) .....	3
1969 W. Va. Acts ch. 161 (Reg. Sess.) (Raleigh Co.) .....	3
1957 W. Va. Acts ch. 178 (Reg. Sess.) (Kanawha Special Act) .....	<i>passim</i>
1953 W. Va. Acts. ch. 200k (Reg. Sess.) (Tyler Co.) .....	3
1933 W. Va. Acts ch. 118 (1st Ext. Sess.) (Ohio Co.) .....	3
Enr. Comm. Sub. for Comm. Sub. for S.B. 541, 2007 W. Va. Acts .....	4, 6, 17
W. Va. R. Civ. P. 59 .....	8

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

**NOS. 11-1224 and 11-1486**

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

*Petitioners,*

v.

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

*Respondent.*

**BRIEF OF PETITIONERS IN NO. 11-1224,  
WEST VIRGINIA BOARD OF EDUCATION AND DR. JOREA MARPLE**

Come now the Petitioners, West Virginia Board of Education and Dr. Jorea Marple, and file this Brief in No. 11-1224, consolidated for briefing and argument by Order of this Court with No. 11-1486. Along with the arguments made herein, the Petitioners adopt all arguments made by the Petitioner Kanawha County Public Library Board in the consolidated case.

**I.**

**ASSIGNMENTS OF ERROR**

1. The court below erred in concluding that pursuant to *Board of Education of the County of Kanawha v. West Virginia Board of Education*, 219 W. Va. 801, 639 S.E.2d 893 (2006), the provisions of West Virginia Code § 18-9A-11, in combination with the Kanawha Special Act,

Chapter 178 of the Acts of the Legislature Regular Session, 1957, violate the equal protection guarantee of article III, § 14 of the West Virginia Constitution.

2. The court below erred in concluding that the provisions of West Virginia Code § 18-9A-11 violate the special legislation prohibition of article XII, § 5 and article X, § 1b of the West Virginia Constitution.

3. The court below erred in concluding that summary judgment was appropriate notwithstanding the fact that no scheduling order had ever been entered in the case.

## II.

### STATEMENT OF THE CASE

#### A. THE PREDECESSOR LITIGATION.

The instant case had its genesis in predecessor litigation filed by the Respondent, Civil Action No. 03-C-2955, challenging the constitutionality of two statutes contained in the “school funding formula,” then-West Virginia Code §§ 18-9A-11 and 18-9A-12(b)(1)-(3).

The Kanawha Special Act, Chapter 178 of the Acts of the Legislature, Regular Session, 1957, mandates the diversion of some regular tax levy receipts of Kanawha County for support of the Kanawha County Public Library. The Act has been upheld by this Court against constitutional challenge, *Kanawha County Public Library v. The County Court of Kanawha County*, 143 W. Va. 385, 102 S.E.2d 712 (1958), as has the Raleigh Special Act. *Hedrick v. County Court of Raleigh County*, 153 W. Va. 660, 172 S.E.2d 312 (1970). Both before and after passage of the Kanawha Special Act and the Raleigh Special Act, similar legislation was enacted for Berkeley (1970), Hardy

(1981), Harrison (1987), Ohio (1933), Raleigh (1969), Tyler (1953), Upshur (1994) and Wood (1987) counties.<sup>1</sup>

Under the statutes at issue in the predecessor litigation, W. Va. Code §§ 18-9A-11 and 18-9A-12(b)(1)-(3), in the school funding formula the nine Special Act counties did not receive a setoff, credit or any other sort of adjustment to the calculation of their local share, to reflect the amounts of money diverted to support the counties' respective public libraries.

Although the Circuit Court of Kanawha County upheld the statutes against constitutional attack, finding that the State had a rational basis for their enactment, this Court reversed. *Board of Education of the County of Kanawha v. West Virginia Board of Education*, 219 W. Va. 801, 639 S.E.2d 893 (2006) (hereinafter "*Board of Education I*").

Specifically, the Court first held that the applicable test for equal protection review of the statutes is strict scrutiny, not rational basis:

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.

*Id.*, 219 W. Va. at 807, 639 S.E.2d at 899 (internal quotations and citation omitted).

The Court then concluded that the State had failed to demonstrate a compelling state interest for treating the Special Act counties differently from non-Special Act counties, holding that:

---

<sup>1</sup>Berkeley 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.

[T]o the extent that [the statute] 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, [it] 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.*, 219 W. Va. at 808, 639 S.E.2d at 900.

Finally, the Court deferred entry of a final order, and stayed the effect of its decision, "for the Legislature to take necessary steps to amend the statute . . . ." *Id.*

## **B. THE INSTANT CASE.**

In response, on March 20, 2007, the Legislature enacted "Enrolled Committee Substitute for Committee Substitute for Senate Bill No. 541," enacting West Virginia Code §§ 18-9A-11(f)-(h).

(f) The Legislature finds that public school systems throughout the state provide support in varying degrees to public libraries through a variety of means including budgeted allocations, excess levy funds and portions of their regular school board levies as may be provided by special act. A number of public libraries are situated on the campuses of public schools and several are within public school buildings serving both the students and public patrons. To the extent that public schools recognize and choose to avail the resources of public libraries toward developing within their students such legally recognized elements of a thorough and efficient education as literacy, interests in literature, knowledge of government and the world around them and preparation for advanced academic training, work and citizenship, public libraries serve a legitimate school purpose and may do so economically. 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 as determined hereinunder. If the library funding obligation which is created by a special act and is due and payable to a library is greater than the county school board's discretionary retainage, the library funding obligation created by the special act is amended and is reduced to the amount of the discretionary retainage, notwithstanding any provisions of the special act to the contrary. Any excess of the discretionary retainage over the library funding obligations shall be available for expenditure by the county board in its discretion for its properly budgeted purposes.

(g) It is the intent of the legislature that whenever a provision of subsection (f) of this section is contrary to any special act of the Legislature which has been or may in the future be enacted by the Legislature that creates a library funding obligation on the regular school board levy of a county, subsection (f) of this section controls over the special act. Specifically, the special acts which are subject to said subsection upon the enactment of this section during the two thousand seven regular session of the Legislature include:

\* \* \* \*

(4) Enrolled House Bill No. 161, passed on the sixth day of March, one thousand nine hundred fifty-seven, applicable to the Kanawha County Board of Education;

\* \* \* \*

(h) Notwithstanding any provision of any special act set forth in subsection (g) of this section 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 revenues, subject to the following:

(1) If a county board chooses to transfer the library obligation pursuant to this subsection, the library funding obligation shall remain an obligation of the regular school levy revenues until the fiscal year in which the excess levy is effective or would have been effective if it had been passed by the voters.

(2) If a county board chooses to transfer the library obligation pursuant to this subsection, the county board shall include the funding of the public library obligation in the same amount as its library funding obligation which exists or had existed on its regular levy revenues as one of the purposes for the excess levy to be voted on as a specifically described line item of the excess levy; *Provided*, That if the county board has transferred the library obligation to the excess levy and the excess levy fails to be passed by the voters or the excess levy passes and thereafter expires upon the time limit for continuation as set forth in section sixteen, article eight, chapter eleven of this code, then in any subsequent excess levy which the county board thereafter submits to the voters the library funding obligation again shall be included as one of the purposes of the subsequent excess levy as a specifically described line item of the excess levy;

(3) If a county board chooses to transfer the library obligation pursuant to this subsection, regardless of whether or not the excess levy passes, effective the fiscal year in which the excess levy is effective or would have been effective if it had

been passed by the voters, a county's library obligation on its regular levy revenues is void notwithstanding any provision of the special acts set forth in subsection (g) of this section to the contrary; and

(4) Nothing in subdivision (3) of this subsection prohibits a county board from funding its public library obligation voluntarily.

The new legislation was effective July 1, 2007.

In response to the new legislation, the Respondent Board of Education of the County of Kanawha paid its library funding obligation from its discretionary retainage,<sup>2</sup> electing not to include funding obligation on its excess levy. Instead, on October 14, 2008, the Respondent filed a Complaint for Declaratory Judgment and Injunctive Relief in the Circuit Court of Kanawha County, No. 08-C-2020. (App. 0034.) The Petitioners filed a timely Answer. (App. 0049.)

Thereafter, on January 30, 2009, the Kanawha County Public Library Board (Petitioners in No. 11-1486) filed a motion to intervene as a party defendant, which motion was granted on March 2, 2009, by agreed order. (App. 0056, 0074.) Thereafter, the Library Board filed an Answer to the Complaint. (App. 0076.)

On November 12, 2009, the Respondent filed a motion for summary judgment and injunctive relief. (App. 0083.) Significantly, the Respondent did not append an affidavit or any other evidentiary material thereto. (*Id.*) Thereafter, on December 3, 2010, the Library Board filed a motion for a status conference. (App. 0112.) On January 13, 2010, the Library Board filed a motion to dismiss the equal protection claims alleged in the Complaint (App. 0115) and then, on

---

<sup>2</sup>The Respondent's Complaint recites, in ¶ 12, that it believed the State Board of Education would disapprove its budget if it did not include the library funding obligation in its discretionary retainage. It is unknown whether there was sufficient retainage in any of the years following passage of S.B. 541 to cover the entirety of the Respondent's library funding obligation, as the court below resolved the case without any evidentiary development. *See* Argument C, *infra*.

February 2, 2010, a notice of scheduling conference. (App. 0192.) The scheduling conference was never held, as a result of disqualification proceedings set forth hereinafter.

The case was originally assigned to Judge Berger; following her retirement, on or about December 28, 2009, the case was reassigned to Judge Webster. On January 27, 2010, the Respondent Kanawha County Board of Education filed a motion to disqualify Judge Webster (App. 0115), to which the Library Board filed a response in opposition. (App. 0195.) Following an exchange of correspondence between Judge Webster and then-Chief Justice Davis (App. 0205, 0207), on or about March 15, 2010 the case was reassigned to Judge Zakaib.

On April 16, 2010, Judge Zakaib issued a letter to counsel setting a status conference. (App. 0208.) Said status conference was never held for reasons that are not apparent on the face of the record but presumably because on May 4, 2010, the Kanawha County Public Library Board filed a notice of hearing on its motion for summary judgment. (App. 0210.)

All Petitioners filed responses to the Respondent's motion for summary judgment, and the Library Board filed a counter-motion for summary judgment. (App. 0213, 0262.) Following oral argument on all motions held on August 5, 2010, all parties filed proposed findings of fact and conclusions of law with the court below.

By Order entered on July 28, 2011 (App. 0010), the court below granted the Respondent's motion for summary judgment, holding that:

(A) West Virginia Code § 18-9A-11, in combination with the Kanawha Special Act, Chapter 178 of the Acts of the Legislature Regular Session, 1957, violates the equal protection clause of article III, § 14 of the West Virginia Constitution;

(B) West Virginia Code § 18-9A-11 violates the special legislation prohibition of article XII, § 5 and article X, § 1b of the West Virginia Constitution; and

(C) Summary judgment was appropriate notwithstanding the fact that no scheduling order had ever been entered in the case, because “resolution of the matter presents a pure question of law and the parties, if they so desired, had adequate time to conduct discovery.”<sup>3</sup>

By Order entered August 15, 2011 (App. 0397), the court stayed its order. On August 24, 2011, these Petitioners filed their Notice of Appeal. (App. 0368.)

On August 11, 2011, the Kanawha County Public Library Board filed a motion for reconsideration, alteration, or amendment, W. Va. R. Civ. P. 59. (App. 0310.) Following a hearing, by Order entered September 27, 2011, the court denied the motion (App. 0031). On October 24, 2011, the Library Board filed its Notice of Appeal. (App. 0425.)

### III.

#### SUMMARY OF ARGUMENT

1. The court below erred in concluding that West Virginia Code § 18-9A-11, in combination with the Kanawha Special Act, Chapter 178 of the Acts of the Legislature Regular Session, 1957, violates the equal protection clause of article III of the West Virginia Constitution.

Subsection (f) permits a board of education in a Special Act county to pay its share of public library funding from the “county school board’s discretionary retainage, which is hereby defined as

---

<sup>3</sup>By Order entered the same day, July 28, 2011, the court denied the Library Board’s motion to dismiss the equal protection claims. (App. 0001.)

the amount by which the regular school board levies exceeds the local share as determined hereinunder.” The court below held that this violated equal protection, relying on this Court’s decision in *Board of Education I*, 219 W. Va. at 808, 639 S.E.2d at 900, wherein the Court held that funding of public libraries is funding for “a non-school purpose.”

The court below failed to appreciate that the Legislature overruled this Court’s “non-school purpose” holding by enacting West Virginia Code §18-9A-11(f), which specifically finds that where “public schools recognize and choose to avail the resources of public libraries toward developing within their students such legally recognized elements of a thorough and efficient education as literacy, interests in literature, knowledge of government and the world around them and preparation for advanced academic training, work and citizenship, *public libraries serve a legitimate school purpose* and may do so economically.” (Emphasis supplied.)

In this case, the Respondent Kanawha County Board of Education provided no evidence whatsoever to support its claim that it does not “recognize and choose to avail the resources of public libraries” in providing a thorough and efficient education. Therefore, the Respondent failed to prove its case, and the court erred in granting summary judgment.

Subsection (h) permits a board of education to “include the funding of the public library obligation in the same amount as its library funding obligation on its regular levy revenues as the purpose or one of the purposes for the excess levy to be voted on . . .;” thereafter, whether or not the excess levy passes, “a county’s library obligation on its regular levy revenues is void notwithstanding any provisions of the special acts . . . .”

This Court has expressly held that “[t]he authority of the residents of a county to vote for and approve an excess levy for the support of public schools in the county, pursuant to article X, § 10

of the West Virginia Constitution, is not subject to equal protection principles.” Syl. Pt. 3, *State ex rel. Boards of Educations of the Counties of Upshur v. Chafin*, 180 W. Va. 219, 376 S.E.2d 113 (1988).

Further, although this Court’s decision in *Board of Education I* may be said to have brought the constitutionality of the Kanawha County Special Act into some question, the Court specifically did not overrule its earlier decision upholding the Act. *Kanawha County Public Library v. The County Court of Kanawha County*, 143 W. Va. 385, 102 S.E.2d 712 (1958). *See also Hedrick v. County Court of Raleigh County*, 153 W. Va. 660, 172 S.E.2d 312 (1970) (upholding constitutionality of Raleigh County Special Act). The court below did not have the authority to overrule precedent from the Supreme Court of Appeals of West Virginia.

Finally, the court below overruled the Kanawha County Special Act despite the fact that the plaintiff did not raise this issue and none of the parties briefed it. *See Issue C, infra*.

2. The court below erred in concluding that West Virginia Code § 18-9A-11 violates the special legislation prohibition of article XII, § 5 and article X, § 1b of the West Virginia Constitution. The plaintiff’s rights under these constitutional provisions are not plenary; this Court has written that a county board of education’s authority to levy taxes for the support of the county’s public schools is exercised “within constitutional *and statutory* limits.” *State ex rel. Dilley v. West Virginia Public Employees Retirement System*, 180 W. Va. 24, 26, 375 S.E.2d 202, 204 (1988) (emphasis supplied). In that regard, there exists a statutory grant of authority, W. Va. Code § 10-1-2, allowing libraries to be established, maintained or supported by, inter alia, “the imposition of an excess levy for library purposes, in accordance with the provisions of section sixteen, article eight, chapter eleven of this code.”

3. The court below erred in concluding that summary judgment was appropriate notwithstanding the fact that no scheduling order had ever been entered in the case. The circumstances of this case were unusual; it was originally assigned to Judge Berger, then after Judge Berger's resignation from the bench it was assigned to Judge Webster, and then after Judge Webster's disqualification it was remanded to the Thirteenth Judicial Circuit "for the next judge in random rotation to be assigned . . . ." As a result of this dizzying game of judicial chairs, there was never a scheduling order entered in the case, and thus summary judgment was not appropriate. *See Elliott v. Schoolcraft*, 213 W. Va. 69, 73 n. 5, 576 S.E.2d 796, 800 n. 5 (2002); *State ex rel. Pritt v. Vickers*, 214 W. Va. 221, 226, 588 S.E.2d 210, 215 (2003); Syl. Pt. 2, *Caruso v. Pearce*, 223 W. Va. 544, 678 S.E.2d 50 (2009) ("Rule 16(b) of the West Virginia Rules of Civil Procedure [1998] requires active judicial management of a case, and *mandates* that a trial court 'shall . . . enter a scheduling order' . . .") (emphasis supplied).

Additionally, as set forth in Issue A, *infra*, as one result of the lack of active judicial management of this case, the court below found the Kanawha County Special Act to be unconstitutional despite the fact that the plaintiff had not raised this issue and none of the parties had briefed it. Further, the court did not permit any evidentiary development of the record, which could have showed that the Kanawha County Board of Education *does* "recognize and choose to avail the resources of public libraries" in providing a thorough and efficient education, which would bring it within the Legislative finding that public libraries serve a legitimate school purpose.

#### IV.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners believe that these consolidated cases are appropriate for oral argument on the Court's Rule 20 docket, as they involving issues of fundamental public importance, and involve constitutional questions regarding the validity of statutes. The court below held several pieces of legislation to be unconstitutional, including a Special Act that has been "on the books" for fifty-four years and has been previously upheld by this Court against constitutional challenge.

#### V.

#### ARGUMENT

- A. THE COURT BELOW ERRED IN CONCLUDING THAT PURSUANT TO *BOARD OF EDUCATION OF THE COUNTY OF KANAWHA v. WEST VIRGINIA BOARD OF EDUCATION*, 219 W. VA. 801, 639 S.E.2d 893 (2006), THE PROVISIONS OF WEST VIRGINIA CODE § 18-9A-11, IN COMBINATION WITH THE KANAWHA SPECIAL ACT, CHAPTER 178 OF THE ACTS OF THE LEGISLATURE REGULAR SESSION, 1957, VIOLATE THE EQUAL PROTECTION GUARANTEE OF ARTICLE III, § 14 OF THE WEST VIRGINIA CONSTITUTION.**

Pursuant to West Virginia Code § 18-9A-11(f), Special Act counties must use their discretionary retainage to fund their public libraries (if they do not choose to put the library funding on an excess levy ballot), while non-Special Act counties may continue to use their discretionary retainage for any educational purposes their respective school boards deem appropriate.

In *Board of Education I*, 219 W. Va. at 808, 639 S.E.2d at 900 (2006), this Court flatly held, in construing the predecessor statutes, W. Va. Code §§ 18-9A-11 and 18-9A-12(b)(1)-(3), that:

[T]o the extent that [the statute] 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, [it] 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.*

(Emphasis supplied.)

The West Virginia Legislature disagreed with this Court’s conclusion that funding for public libraries is funding for a non-school purpose. In response to *Board of Education I*, the Legislature enacted W. Va. Code §18-9A-11, finding in subsection (f) that where “public schools recognize and choose to avail the resources of public libraries toward developing within their students such legally recognized elements of a thorough and efficient education as literacy, interests in literature, knowledge of government and the world around them and preparation for advanced academic training, work and citizenship, *public libraries serve a legitimate school purpose* and may do so economically.” (Emphasis supplied.)<sup>4</sup>

Thus, in order for a county board of education to mount an equal protection challenge to the new provisions of the public school support formula, it must allege, *and prove*, that it does not recognize and choose to avail the resources of its public libraries in providing a thorough and efficient education to the county’s K-12 students. Here, the Respondent Board of Education of the County of Kanawha did not put on one scintilla of evidence to prove this material – indeed, critical – fact. It simply relied on the holding of *Board of Education I*, as did the court below, without

---

<sup>4</sup>At this juncture, it should be noted that the Petitioners believe that West Virginia’s public libraries are an important partner in the task of providing a thorough and efficient education to the state’s K-12 students. Indeed, the Special Acts evince longstanding legislative acknowledgment of this fact, and the Legislative findings in West Virginia Code § 18-9A-11(f) reinforce that acknowledgment by specifically finding that libraries do serve a “legitimate school purpose” where the public schools recognize and choose to avail the resources of the libraries.

analyzing the critical language of the successor legislation, and the specific findings of the Legislature.<sup>5</sup>

Additionally, neither the Respondent nor the court below addressed the fundamental dichotomy between the broad language of *Board of Education I* and the relief granted by the Court in that case, specifically, staying its ruling in order to allow the Legislature to amend the public school support plan. Simply put, there is *no* public school support formula mechanism by which the Legislature could fund public libraries in Special Act counties *if said funding is not for a school purpose*. By its express statement of purpose, the school support formula is intended to “provide for a fair and adequate pay scale for teachers sufficient to ensure teacher excellence, as well as adequate financial support for the public schools generally;[and] upon an economic base which ensures level of revenue sufficient to fund the public schools . . . .” W. Va. Code § 18-9A-1.

In short, the formula is not intended to, and indeed cannot, provide funding for non-school purposes. Absent a legislative finding that public libraries serve a school purpose, the Legislature would have to find a wholly different funding stream for public libraries – and, in the process, repeal or amend the Special Acts.

---

<sup>5</sup>At this juncture it must be noted that in this case, as in *Board of Education I*, the Respondent also did not claim, and did not attempt to prove, that it has been unable to provide a thorough and efficient education as a result of the legislation at issue. However, this Court squarely held in *Board of Education I* that any issues involving the school funding formula are issues arising under article XII, § 1 of the West Virginia Constitution as they “*potentially impinge[]* on a school board’s ability to provide a thorough and efficient education to its students.” *Board of Education I*, 219 W. Va. at 808 & n.4, 639 S.E.2d at 900 & n.4 (emphasis supplied). The successor statutes do not appear to overrule, modify or otherwise affect this holding.

By enacting West Virginia Code § 18-9A-11(f), the Legislature provided the only possible solution to the dichotomy created by *Board of Education I*, short of repealing or amending the Special Acts, by finding that public libraries do serve a legitimate school purpose.

As previously noted and as will be further developed in Argument C, *infra*, the court below granted summary judgment to the Respondent without entering a scheduling order and in the complete absence of any evidence of record. Petitioners believe that evidence developed on remand will demonstrate that Kanawha County's public libraries are indeed partners in K-12 education in Kanawha County. If that is shown to be the case, the legislative findings contained in West Virginia Code § 18-9A-11(f) mandate a different result than the result that the court below arrived at by mechanical application of *Board of Education I*. Because the Legislature has found that public libraries serve a legitimate school purpose, there can be no valid equal protection challenge to the discretionary retainage provision of § 18-9A-11(f) by counties that "recognize and choose to avail the resources of public libraries." This is so because there is no "lack of uniformity in the State's educational financing system . . .," *Board of Education I*, 219 W. Va. at 807, 639 S.E.2d at 899; each county in West Virginia is treated equally in education funding and no formula funds are diverted to a "non school purpose."

Significantly, this Court has upheld the constitutionality of Special Acts on two occasions, *Kanawha County Public Library v. The County Court of Kanawha County*, 143 W. Va. 385, 102 S.E.2d 712 (1958). *See also Hedrick v. County Court of Raleigh County*, 153 W. Va. 660, 172 S.E.2d 312 (1970). Both the majority and dissenting opinions in *Board of Education I* acknowledge this fact, *Board of Education I*, 219 W. Va. at 805 & n.3, 809 & n.5, 639 S.E.2d at 897 & n.3, 901

& n.5; and there is no indication that this Court was backing away from or otherwise reexamining its precedents, let alone overruling them, with regard to the constitutionality of the Special Acts.

The issue that the lower court attempted to finesse with its “in combination with” language is this: if West Virginia Code § 18-9A-11(h) is unconstitutional, then the Kanawha Special Act, Chapter 178 of the Acts of the Legislature, Regular Session, 1957, *must* be deemed to be unconstitutional as well. Again, there is no mechanism by which the Legislature could fund public libraries in nine counties through the public school support formula, through recalculation of those counties’ local share or otherwise, without running afoul of this Court’s “less favorable treatment” language in *Board of Education I*. What about those forty-six counties left to their own devices? As Justice Albright noted in dissent in *Board of Education I*, “those forty-six counties will indirectly be paying for the library systems in the nine counties where education funds are diverted by law to public libraries.” *Board of Education I*, 219 W. Va. at 808 & n.3, 639 S.E.2d at 897 & n.3. *Cf. State ex rel. Boards of Education v. Chafin*, 180 W. Va. 219, 376 S.E.2d 113 (1988) (invalidating court order withholding a proportion of school funding from counties with excess levies, and distributing the sums withheld to other counties).

West Virginia Code § 18-9A-11(h), the “fall-back” legislative response to *Board of Education I* for those Special Act counties that do not wish to use their discretionary retainage, does not violate the equal protection guarantee of the West Virginia Constitution, art. III, §10. Rather, it represents a well-crafted legislative solution to the problem created by the existence of the Special Acts. The statute permits a Special Act county to bail out of its regular levy library obligation via an “escape hatch”: by putting the obligation on its excess levy, the county can then void its regular levy obligation if the excess levy fails and/or upon the excess levy’s expiration if it passes. This

creates a possible political problem for the Special Act county – no one wants to be publicly against libraries – but not an equal protection problem.<sup>6</sup> Under this Court’s precedents, “the authority of the residents of a county to vote for and approve an excess levy for the support of public schools in the county, pursuant to W. Va. Const. Art. X, §10, is not subject to equal protection principles.” *State ex rel. Boards of Education v. Chafin*, 180 W. Va. at 226, 376 S.E.2d at 120.

Prior to the effective date of S.B. 541, forty-six counties had differing strategies for funding their public libraries (if they fund them at all) while the nine Special Act counties, including Kanawha County, were required to utilize regular levy funds for this purpose. With the passage of the new legislation, and particularly West Virginia Code §§ 18-9A-11(h), the Special Act counties may now join the other forty-six counties and all will be on the same footing with respect to funding of their respective public libraries if the voters fail to pass an excess levy.

**B. THE COURT BELOW ERRED IN CONCLUDING THAT WEST VIRGINIA CODE § 18-9A-11 VIOLATES THE SPECIAL LEGISLATION PROHIBITION OF ARTICLE XII, § 5 AND ARTICLE X, § 1b OF THE WEST VIRGINIA CONSTITUTION.**

Once again, the fundamental problem with the lower court’s analysis of the special legislation issue is that if public libraries do not serve a school purpose, as this Court held in *Board of Education I*, then there is literally no way in which the Legislature can constitutionally “fix” the school funding formula other than to repeal all nine Special Acts. If public libraries do not serve a school purpose, then reimbursement by *any* means of a county’s public library funding has no

---

<sup>6</sup>It was represented to the court below by counsel that the Respondent elected not to include its Special Act obligation on its excess levy because the Board feared that this would cause the excess levy to fail. As noted in this brief, there is no evidence in the record to this effect, as the court below decided this case solely on the pleadings and the arguments of counsel.

place in the formula, which is contained in West Virginia Code § 18-9A-1 *et seq.*, titled “Public School Support.” (Emphasis supplied.)

Yet this Court in *Board of Education I* issued an invitation to the Legislature to fix the formula, which the Legislature attempted to do by giving Special Act counties the opportunity to allow voters to exercise their local initiative, W. Va. Const. art. X, §10, to determine whether public libraries are important enough to them to merit their support in the provision of education in their respective counties. Significantly, if the voters reject an excess levy call for library support, or if the excess levy expires, then the obligations of Special Act counties’ school boards are void.

As set forth in Argument A, *infra*, this Court has held that “the authority of the residents of a county to vote for and approve an excess levy for the support of public schools in the county, pursuant to W. Va. Const. Art. X, §10, is not subject to equal protection principles.” *State ex rel. Boards of Education v. Chafin*, 180 W. Va. at 226, 376 S.E.2d at \_\_\_\_\_. Therefore, the legislative “fix” of West Virginia Code § 18-9A-11(h) survives an equal protection challenge, but the question remains: is the authority of the residents of the county to vote for and approve an excess levy subject to constitutional attack on the ground that the grant of authority constitutes “special legislation” prohibited by article XII, § 5 and article X, § 1b of the West Virginia Constitution?

The lower court’s analysis makes three points:

West Virginia Constitution article X, §10, authorizes local school districts to seek excess levy tax revenues over and above the regular school levy revenues;

The Legislature’s attempt to supercede and replace local excess levies by enacting a statewide excess levy, authority for which is contained in the article X, § 1b of the West Virginia Constitution was disapproved by the voters; and

If the mandatory funding obligation of the Kanawha Special Act is transferred to the Respondent's excess levy call, as authorized by West Virginia Code § 18-9A-11(h), then the county's voters are faced with an "all or nothing proposition," to-wit: "[i]n 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."

First, the failure of the statewide excess levy seems to be completely irrelevant to the court's ultimate conclusion that § 18-9A-11(h) is special legislation. Had the statewide levy passed, the voters would have completely lost their 'local initiative' and would have been required to take what the State gives them for the support of their schools, period. From that point on, the only question would have been whether the formula was adequate to provide a thorough and efficient education in West Virginia, not whether it was equitable from county to county.

Second, the court apparently believed that this Court's determination that funding for public libraries is funding for a non-school purpose insofar as the school funding formula is concerned, forecloses county residents from determining that in *their* counties the libraries *do* serve a critical educational purpose. The whole purpose of an excess levy is to allow voters to decide whether to tax themselves for educational "extras" over and above those provided by the school support formula, i.e., salary enhancements for teachers, funds for extracurricular activities, and the like. Surely the voters of a county should be permitted to exercise this 'local initiative' right to determine whether they deem maintenance and support of their public libraries to be, at the least, an educational enhancement for which they are willing to tax themselves.

Third, the Respondent's rights under article XII, § 5, and article X, § 1b of the West Virginia Constitution are not plenary; this Court has written that a county board of education's authority to levy taxes for the support of the county's public schools is exercised "within constitutional *and* statutory limits." *State ex rel. Dilley v. West Virginia Public Employees Retirement System*, 180 W. Va. at 26, 375 S.E.2d at 204 (emphasis supplied). In that regard, there exists a statutory grant of authority, W. Va. Code § 10-1-2, allowing libraries to be established, maintained or supported by, inter alia, "the imposition of an excess levy for library purposes, in accordance with the provisions of section sixteen, article eight, chapter eleven of this code." As is apparent from the facts set forth in *Byrd v. Board of Education of Mercer County*, 196 W. Va. 1, 467 S.E.2d 142 (1995), at least one non-Special Act county board of education has utilized its excess levy as a way of funding the county's public libraries.<sup>7</sup> (It is unknown how many non-Special Act county boards have done the same, as the court below foreclosed evidentiary development of the record sought by the Kanawha County Public Library Board and decided this case as a bare issue of law. *See* Issue C, *infra*.)

**C. THE COURT BELOW ERRED IN CONCLUDING THAT SUMMARY JUDGMENT WAS APPROPRIATE NOTWITHSTANDING THE FACT THAT NO SCHEDULING ORDER HAD EVER BEEN ENTERED IN THE CASE.**

Although the underlying case was filed in 2008, as a result of peculiar procedural developments it was still in its developmental infancy and had been pending before the lower court for only four months at the time the Respondent filed its motion for summary judgment.

---

<sup>7</sup>The excess levy ballot in the *Byrd* case included, at ¶(B)(3), "[f]or continuing support of public libraries, health services for students and employees, [and] 4-H activities . . ." The issue in *Byrd* was whether the excess levy ballot, which listed a panoply of disparate purposes but did not put a separate dollar figure on each, comported with West Virginia Code § 11-8-16.

Specifically, the case was originally assigned to Judge Berger; after Judge Berger's resignation from the bench, it was assigned to Judge Webster; and after Judge Webster's disqualification (on the Respondent's motion), it was remanded to the Thirteenth Judicial Circuit "for the next judge in random rotation to be assigned. . . ," who turned out to be Judge Zakaib.

As a result of these unique circumstances, there was never a scheduling order entered in the case as it rotated on the judicial carousel. Significantly, a status conference was sought on one occasion (App. 0112) and a scheduling conference was set on another (App. 0208), but the Respondent's motion to disqualify Judge Webster derailed the first conference (App. 0182) and the Petitioner Library Board's notice of hearing on its motion to dismiss derailed the second (App. 0210).

In Syl. Pt. 2, *Caruso v. Pearce, supra*, this Court held that:

Rule 16(b) of the West Virginia Rules of Civil Procedure [1998] requires active judicial management of a case, and *mandates* that a trial court '*shall* . . . enter a scheduling order' establishing time frames for the joinder of parties, the amendment of pleadings, the completion of discovery, the filing of dispositive motions, and generally guiding the parties toward a prompt, fair and cost-effective resolution of the case. (Emphasis supplied.)

*See also State ex rel. Pritt v. Vickers*, 214 W. Va. at 226, 588 S.E.2d at 215 (it is mandatory that trial courts enter a scheduling order that limits the time to join parties, amend pleadings, file and hear motions, and complete discovery); *Elliott v. Schoolcraft*, 213 W. Va. at 73 n.5, 576 S.E.2d at 800 n.5 (the circuit court should have entered a scheduling order before considering the motions for summary judgment).

Therefore, under the clear precedent established by this Court, the court below should not have entertained the Respondent's motion for summary judgment without entering a scheduling

order and permitting the parties to fully develop the case as they deemed necessary.<sup>8</sup> In this regard, the excellent *amicus* brief submitted by the West Virginia Library Association provides a wealth of relevant and material information concerning the role of public libraries in educating both students and their parents; in working with teachers to provide reading lists; in ensuring that students continue to study and learn during the summer months; in helping poor and minority students, who may not have ready access to books and computers, TO bridge the gap between them and their more fortunate counterparts; in providing programs (free to everyone) ranging from nutrition and exercise education, playgroups and storytimes, craft programs, theater events, “Shakespeare for Kids,” and West Virginia education programs; and the like.

This critical information must be considered in determining whether Kanawha County “recognize[s] and choose[s] to avail the resources of public libraries toward developing within their students such legally recognized elements of a thorough and efficient education as literacy, interests in literature, knowledge of government and the world around them and preparation for advanced academic training, work and citizenship.” The constitutionality of the legislation at issue in this case, W. Va. Code §18-9A-11, cannot be fairly determined in the absence of this evidence.

#### **D. STATEMENT OF ADOPTION**

These Petitioners incorporate and adopt all arguments made by the Petitioner Kanawha County Public Library Board in its brief filed in the companion case, No. 11-1486, and in all *amici* briefs filed in support of the Library Board. As set forth *infra*, these Petitioners believe that West

---

<sup>8</sup>In candor to the Court, in the proceedings below these Petitioners did not assert the need to do any specific discovery. However, the Kanawha County Public Library Board, which had been made a party to the case on its motion to intervene and which will suffer a catastrophic loss in funding in the event the judgment of the court below is affirmed, *did* assert such need and should have been permitted to develop the record.

Virginia's public libraries are an important partner in the task of providing a thorough and efficient education to the state's K-12 students.

**VI.**

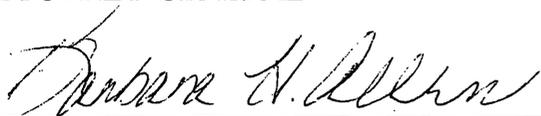
**CONCLUSION**

For all of the reasons set forth in this Brief and in the Brief of the Petitioner Kanawha County Public Library Board, and all of the reasons apparent on the face of the record, the judgment of the Circuit Court of Kanawha County should be reversed.

WEST VIRGINIA BOARD OF EDUCATION and  
DR. JOREA MARPLE,  
*Petitioners,*

By Counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL



---

BARBARA H. ALLEN  
MANAGING DEPUTY ATTORNEY GENERAL  
State Capitol, Room E-26  
Charleston, West Virginia 25305  
Telephone 304-558-2021  
State Bar ID No. 1220  
[mistrial1@aol.com](mailto:mistrial1@aol.com)

CERTIFICATE OF SERVICE

I, Barbara H. Allen, Managing Deputy Attorney General and counsel for Petitioners West Virginia Board of Education and Dr. Jorea Marple, do hereby certify that a true and accurate copy of the foregoing "Brief of Petitioners in No. 11-1486, West Virginia Board of Education and Dr. Jorea Marple" was served upon counsel of record by depositing the same in the United States Mail, first class postage prepaid, this 29th day of December, 2011, addressed as follows:

Larry L. Rowe, Esq.  
4200 Malden Drive  
Charleston, WV 25306  
*Counsel for Kanawha County Public Library Board*

Christopher J. Winton, Esq.  
Ray, Winton & Kelley, PLLC  
109 Capitol Street, Suite 700  
Charleston, WV 25301  
*Counsel for the Kanawha County Public Library Board*

Jonathan L. Anderson, Esq.  
Jackson Kelly PLLC  
P.O. Box 553  
Charleston, WV 25322  
*Counsel for the Board of Education  
of the County of Kanawha*

  
BARBARA H. ALLEN