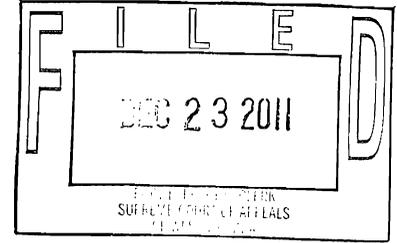


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case 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, Defendants Below,



Petitioners,

v.

Appeal from Final Orders
of the Circuit Court of
Kanawha County (08-C-2020)

BOARD OF EDUCATION OF THE COUNTY
OF KANAWHA, a public corporation, Plaintiff Below,

Respondent.

**BRIEF OF PETITIONER
KANAWHA COUNTY PUBLIC LIBRARY BOARD**

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II. ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT COMMITTED ERROR BY RULING THAT THE LIBRARY SPECIAL ACT IS NULL AND VOID. THE LIBRARY SPECIAL ACT IS SEPARATE AND DISTINCT AND CONSTITUTIONAL.
- B. THE CIRCUIT COURT COMMITTED ERROR BY RULING THAT THE STATE SCHOOL AID FORMULA STATUTE IS UNCONSTITUTIONAL.
 - 1. WEST VIRGINIA CODE § 18-9A-11 IS CONSTITUTIONAL AND DOES NOT VIOLATE EQUAL PROTECTION.
 - 2. THE SCHOOL BOARD IS NOT A PERSON WITH STANDING TO MAKE A CONSTITUTIONAL CLAIM, AND THE LIBRARY'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED.
 - 3. WEST VIRGINIA CODE § 18-9A-11 DOES NOT VIOLATE ANY PROVISION OF THE WEST VIRGINIA CONSTITUTION CONCERNING THE EXCESS LEVY.

III. STATEMENT OF THE CASE

A. The Kanawha County Public Library and Special Act Libraries.

Petitioner Kanawha County Public Library Board (hereinafter, the “Library”) is a West Virginia public corporation that operates the largest public library system in the State of West Virginia. (Appendix Record A0056-7; hereinafter cited as “A.R.”) The Library was created by House Bill 161, a Special Act of the West Virginia Legislature passed on March 6, 1957. Chapter 178, Acts of 1957, Reg. Sess. The Special Act provides funding for the Library from the Kanawha County Board of Education, the County Commission of Kanawha County, and the City of Charleston, a municipal corporation, as a joint endeavor of the three governmental authorities.

Specifically, Section 5 of the 1957 Special Act provides that the three supporting governmental authorities are required to raise an annual, regular levy of *ad valorem* real property taxes of a certain fixed assessment and pay the levy so raised to the Library as the library funding

obligation. In the fiscal year 2007-8, the Kanawha County School Board paid to the Library \$2,516,030 in regular levy taxes. (A.R. A0100.) The payment of the library funding obligation constitutes only about 1% of the School Board's budget but is about 40% of the Library's budget. (A.R. A0100, A0311, A0321.)

There are eight other public libraries located in other West Virginia counties which are also organized by special acts of the Legislature and which require contributions from the regular levies of the local county school boards (Ohio County, Berkeley County (Martinsburg), Hardy County, Harrison County (Clarksburg), Raleigh County, Tyler County, Upshur County, and Wood County (Parkersburg)). (A.R. A0099.)¹ There are two other public libraries which are organized by special acts of the Legislature but which receive funding from the excess levies of the local county school boards (Cabell County and Lincoln County (Hamlin)). See H.B. 801 (1967), S.B. 20 (1986). Collectively, these public libraries are known as "special act libraries." The West Virginia Supreme Court of Appeals has previously held that the Kanawha County Public Library Special Act is valid and constitutional. Kanawha County Public Library Board v. County Court of Kanawha County, 143 W. Va. 385, 102 S.E.2d 712 (1958). The Supreme Court has also held that the Raleigh County Public Library Special Act is valid and constitutional. Hedrick v. County Court of Raleigh County, 153 W. Va. 660, 172 S.E.2d 312 (1970).

B. Kanawha County School Board I Case (2003-2006).

The controversy in the present case involves the constitutionality of the West Virginia state school aid formula statute which appears in West Virginia Code § 18-9A-1, *et seq.* In general, the statute provides state funds to supplement the local financial resources of the county

¹ Upon information and belief of the Petitioner, in accordance with the provisions of W. Va. Code § 18-9A-11(h), the funding for the Parkersburg-Wood County Public library was moved by the Wood County Board of Education to the excess levy in 2008.

school boards in West Virginia. In 2003, Respondent Board of Education of the County of Kanawha (hereinafter, the “School Board”) filed a civil action in the Circuit Court of Kanawha County, West Virginia (Civil Action No. 03-C-2955) seeking a declaration and relief against Petitioner West Virginia Board of Education and the State Superintendent of Schools (hereinafter, collectively referred to as the “State Board”). The School Board challenged the state school aid formula statute, claiming that it is unconstitutional and violates the School Board’s right of equal protection because the state formula does not provide an adjustment to the calculated state aid paid to the School Board in light of the local regular tax levies it is required to pay under the 1957 Special Act to the Kanawha County Public Library. Basically, the School Board claimed that it was shortchanged of state funds. The Library was not joined as a party to that litigation.

By order entered on December 9, 2005, the Honorable Charles E. King, Jr., Kanawha County Circuit Judge, granted summary judgment in favor of the State Board, finding no constitutional violation in the state school aid formula as it relates to the library funding obligation. In 2006, the School Board timely appealed the Circuit Court’s order to the West Virginia Supreme Court of Appeals (Case No. 33081). On December 4, 2006, a divided Supreme Court upon vote of three-to-two rendered a decision in favor of the Kanawha County School Board and reversed the order of the Kanawha County Circuit Court. Board of Education of the County of Kanawha v. West Virginia Board of Education, 219 W. Va. 801, 639 S.E.2d 893 (2006).

In the majority decision written by Justice Maynard and joined in by Justice Davis and Justice Benjamin, the Supreme Court applied strict scrutiny analysis because education is a

fundamental right under the West Virginia Constitution. The Supreme Court then specifically held that:

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 [library funding], 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*.

After making this holding, the Supreme Court stayed its decision to give the West Virginia Legislature an opportunity to amend the state school aid formula statute in order to make a legislative correction. The Supreme Court wrote:

Having found that W. Va. Code § 18-9A-12 is constitutionally 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 the necessary steps to amend the statute, we will do as the State school board suggests and 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.

639 S.E.2d at 900.

C. West Virginia Legislature's Response in 2007 and 2008.

During the period of the stay, the West Virginia Legislature enacted legislation that addressed the Supreme Court's ruling and corrected the state school aid formula statute. During the 2007 Regular Session, the Legislature passed Senate Bill 541 on March 10, 2007 (effective on July 1, 2007), amending West Virginia Code § 18-9A-12. Among other things, Senate Bill 541 funded library obligations through discretionary monies, provided additional state funding to county school boards, and permitted school boards to move library funding obligations from the

regular levy to the excess levy. See generally W. Va. Code § 18-9A-11. The Legislature also made significant and specific findings of fact on libraries:

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.

W. Va. Code § 18-9A-11(f) (Emphasis added.)

During the 2008 Regular Session, the Legislature passed Senate Bill 593 on March 8, 2008 (effective on passage) which further revised, clarified, and adjusted the state school aid formula statute.

All of these actions of the Legislature fully and fairly addressed the Supreme Court's order for a legislative solution.

D. Present Civil Action: Kanawha County School Board II Case (2008-2011).

Objecting to the Legislature's corrections, Respondent Kanawha County School Board filed the present civil action on October 14, 2008, in the Circuit Court of Kanawha County, West Virginia (C.A. No. 08-C-2020). Naming as defendants the West Virginia Board of Education and the Superintendent of Schools of the State of West Virginia (then Dr. Steven L. Payne; now Dr. Jorea Marple), the School Board's Complaint sought declaratory and injunctive relief to invalidate the provisions of the state school aid formula statute in West Virginia Code § 18-9A-11 as modified by Senate Bill 541 and Senate Bill 593. (A.R. A0034.) The case was assigned to Honorable Irene Berger, Circuit Judge. The Kanawha County Public Library Board was not

joined as a defendant in the civil action but filed a motion to intervene on February 2, 2009. (A.R. A0056.) By Order entered on March 2, 2009, the Circuit Court allowed the Library to intervene as an interested party defendant. (A.R. A0074.)

Review of the Respondent's Complaint is important. It contains two separate and distinct counts. In Count I, the School Board contends that the state school aid funding statute, as modified by the Legislature, still violates the County School Board's constitutional right of equal protection by making a "discriminatory classification of the Kanawha Board in comparison to the forty-six other county boards of education that have no library funding obligation." (A.R. A0040-42.) In Count II of its Complaint, the School Board claims that the statute is unconstitutional under the West Virginia Constitution because it violates the "excess levy powers given to local school districts." (A.R. A0042-43.) The Complaint does not allege that the 1957 Kanawha Special Act is unconstitutional. (A.R. A0036-44.)

Judge Berger was elevated to the Federal bench, and the case was assigned to her successor, Honorable Carrie Webster, Circuit Judge. On November 12, 2009, the County School Board filed a Motion for Summary Judgment, praying for a ruling that the new statute violated both equal protection and Article X of the West Virginia Constitution. (A.R. A0083.) No affidavit, deposition, or other evidence was tendered with the County School Board's motion, no discovery had been done in the case, and no scheduling order had been entered. On December 4, 2009, the Library filed a Motion for Status Conference in order to set a scheduling order. (A.R. A0112.)

On January 13, 2010, the Library filed a Motion to Dismiss Equal Protection Count, asking the Court to dismiss Count I of the Complaint on grounds that the County School Board was not a "person," possessed no constitutional rights, and lacked standing. (A.R. A0115.) Two

weeks later, on January 27, 2010, the County School Board filed a Motion for Disqualification to require the recusal of Judge Webster because of her service as a legislator when Senate Bill 541 and Senate Bill 593 were passed. (A.R. A0182.) By Administrative Order entered on March 18, 2010, the Supreme Court of Appeals found Judge Webster to be disqualified (A.R. A0207), and the case was reassigned in rotation to Honorable Paul Zakaib, Jr.

No action was taken by Judge Zakaib to set a scheduling order, but a hearing was scheduled on the County School Board's motion for summary judgment and the Library's motion to dismiss. (A.R. A0201.) Thereafter, cross-motions for summary judgment and responsive briefs were filed by the parties. (A.R. A0213, A0234, A0262, A0267, A0279.) A hearing was held on August 5, 2010, at which the parties argued their motions before the Circuit Judge, who took the matter under advisement.

Eleven months later, on July 28, 2011, the Circuit Court entered an Order Denying Kanawha County Public Library Board's Motion to Dismiss Equal Protection Count (A.R. A0001) and a Final Order Granting Plaintiff's Motion for Summary Judgment and Injunctive Relief. (A.R. A0010.) The Circuit Court accepted all of the School Board's arguments and essentially ruled on equal protection grounds and on West Virginia state constitutional grounds that the state school aid funding statute is unconstitutional and the 1957 Special Act creating the Kanawha County Public Library in combination therewith is also unconstitutional.

The Library and the State Board filed motions with the Circuit Court for a stay. (A.R. A0292, A0301.) Additionally, the Library filed a motion under West Virginia Rules of Civil Procedure Rule 59 for reconsideration, alteration, or amendment. (A.R. A0310.) Because of the significance of the issues involved and the disruption to Library funding and state education funding as a whole, the Circuit Court granted a stay by Order entered on August 25, 2011. (A.R.

A0397.) The State Board of Education timely filed its Notice of Appeal to the Circuit Court's orders on August 24, 2011. (A.R. A0368.) A hearing was held on the Library's Rule 59 motion, and the motion was denied by the Circuit Court by order entered on September 27, 2011. (A.R. A0031.) On October 24, 2011, the Library timely filed its Notice of Appeal with the West Virginia Supreme Court of Appeals. (A.R. A0425.)

By Order of the Supreme Court entered on November 16, 2011, the appeal by the State Board (No. 11-1224) and the appeal by the Library (No. 11-1486) were consolidated and are now before this Court.

IV. SUMMARY OF ARGUMENT

A. The Library Special Act is Separate and Distinct and Constitutional.

The Circuit Court committed clear error by ruling that the Kanawha County Public Library Special Act was null, void, and of no force or effect and by enjoining its enforcement. The sole and proper issue before the Circuit Court was the validity of the state school aid formula, and not the Library's Special Act. The Supreme Court of Appeals has previously and expressly ruled that the Kanawha Special Act is constitutional. The School Board's Complaint only challenged the state school aid formula statute which the Legislature revised in 2007 and 2008. The relief which could have been granted by the Circuit Court should have been limited to the School Board's challenge of the state school aid formula statute. The Special Act should remain intact and unaffected, allowing the Library to be funded and to operate as intended by the Legislature.

B. The State School Aid Formula Statute is Constitutional.

1. West Virginia Code § 18-9A-11 is constitutional and does not violate equal protection.

The Legislature properly made the legislative finding of fact that libraries serve “a legitimate school purpose,” and the Circuit Court improperly granted summary judgment with no factual basis to disprove the legislative finding. The state school aid formula statute does not create unequal treatment but treats county school boards equally when education is budgeted and delivered through the medium of the Library. The Legislature has plenary authority to fund the education system through “two pockets,” one being the budget of the County School Board and the other being the budget of the Library under the Special Act. It was the burden of the School Board to present evidence to show that the Library’s funding was a diversion of funds to a “non-school purpose.” Summary judgment was improper because no scheduling order had been entered by the Circuit Court, no discovery had been made, and the key facts had not been developed.

2. The School Board is not a “person” with standing to make a constitutional claim, and the Library’s Motion to Dismiss should have been granted.

The County School Board is not a “person” under the meaning of the West Virginia and United States constitutions, possesses no constitutional rights, and has no standing to sue the Legislature, which is its creator, for more funding. The School Board is a non-constitutional, legislatively-created, subordinate division of government. Students and their parents and guardians are “persons” protected by the Constitution who possess standing to vindicate their own constitutional rights of equal protection and an education. The School Board, however, does not possess the right of equal protection for its budget and has no standing to pursue a claim of a violation of equal protection to require the Legislature to increase the School Board’s budget.

The School Board does not have representational standing under West Virginia law to make a claim on behalf of “students” who may act of their own accord. Standing prevents county school boards from expending taxpayer money in litigation to increase their budgets against the Legislature’s authority.

3. West Virginia Code § 18-9A-11 does not violate any provision of the West Virginia Constitution concerning the excess levy.

County school boards are not constitutional bodies in West Virginia and are subject to the plenary power of the Legislature. The Legislature has responsibility and authority for education under the West Virginia Constitution and also has authority over the excess levy. The School Board has no vested right in a local excess levy under the West Virginia Constitution, and the Legislature may statutorily modify the conditions of the excess levy in accordance with the Constitution. Nothing in West Virginia Code § 18-9A-11 conflicts with the specific constitutional limitations on the excess levy.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner Kanawha County Public Library Board believes that oral argument is necessary in this case and that argument under Rule 20 of the West Virginia Revised Rules of Appellate Procedure should be granted. The case at bar raises issues of first impression and fundamental public importance and involves the constitutionality of state statutes.

VI. ARGUMENT

- A. The Library Special Act is Separate and Distinct and Constitutional.

In its Final Order, the Circuit Court ruled that:

. . . [T]he 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.

(A.R. A0030.)

The Circuit Court held not one but two statutes to be unconstitutional, although only the state school aid formula statute was at issue. This ruling is overbroad and clear error. The two statutes are separate and distinct, and any relief granted should have been limited solely to the state school aid formula statute, which is what the School Board was challenging in its Complaint. The Special Act funding the Library should have been left alone and confirmed to be constitutional as the Supreme Court has previously held. The constitutionality of the Library's Special Act has been addressed three times before the Supreme Court, and in each of these decisions, the Supreme Court has found the Special Act to be constitutional. Despite the limited relief sought by the School Board, these prior rulings upholding the Special Act, and the Circuit Court's duty to follow the precedents of the Supreme Court, the Circuit Court improperly invalidated the 1957 Special Act.

Three reported cases validate special library acts. First, in 1958, the West Virginia Supreme Court of Appeals expressly held that the Library's Special Act was constitutional in the case of Kanawha County Public Library Board v. County Court of Kanawha County, 143 W. Va. 385, 102 S.E.2d 712 (1958). There, the Court held that "public libraries are a matter of concern to the people of this State, and that it is a matter of public policy that their creation and maintenance be encouraged." 143 W. Va. at 404, 102 S.E.2d at 723. Second, in 1970, the Supreme Court addressed and upheld the constitutionality of the Raleigh County Public Library special act, which is similar to the Kanawha Special Act. See Hedrick v. County Court of Raleigh County, 153 W. Va. 660, 172 S.E.2d 312 (1970). Specifically, the Supreme Court

rejected the claim that the Raleigh Special Act violated the equal protection rights of the citizens of the county (“persons” who have constitutional rights). 153 W. Va. at 664. Third, in 2006, in the prior litigation commenced by the School Board, the Supreme Court again commented on and validated the Library’s Special Act. In Board of Education of the County of Kanawha v. West Virginia Board of Education, the Supreme Court noted that “This Court upheld the constitutionality of this Special Act in *Kanawha County Public Library v. County Court*. . . .” 219 W. Va. 801, 639 S.E.2d 893, 897 n.3 (2006)(hereinafter cited as *Board I*). In *Board I*, the Supreme Court could have addressed the Library’s Special Act, but it did not do so and focused only on the School Board’s challenge to the state school aid formula statute.

The Supreme Court has long held that there is a strong presumption of constitutionality of enactments of the West Virginia Legislature:

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.²

Here, the Circuit Court ignored all of the prior rulings of the Supreme Court on the validity of the Kanawha Special Act as well as the well-established presumption of constitutionality. In 2006 in *Board I*, the West Virginia Supreme Court held that the state school aid formula statute appearing in the West Virginia Code was unconstitutional, not the Kanawha

² *Syllabus Point 1*, State ex rel. Appalachian Power Co. v. Gainer, 149 W. Va. 740, 143 S.E.2d 351 (1965); *Syllabus Point 1*, MacDonald v. City Hospital, 715 S.E.2d 405 (W. Va. 2011). See also Syllabus Point 3, Willis v. O’Brien, 151 W. Va. 628, 153 S.E.2d 178 (1967); Kanawha County Public Library, 102 S.E.2d at 716; Hedrick, 153 W. Va. at 668; 17 M.J. Statutes, § 29 n.7 (2006)(in excess of three pages of citations).

County Public Library Special Act. In 2006 in *Board I*, the Supreme Court properly validated and left the Special Act alone. The Circuit Court should have done the same in the present case.

Similarly, in *Board I*, Justice Davis clearly stated that the issue of the Library's funding was not a matter for adjudication when she wrote that: "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. The question that was brought for our consideration and decision was, simply, whether W. Va. Code § 18-9A-12 is constitutional. . . ." 639 S.E.2d at 903.

The Supreme Court in its ruling in *Board I* gave strong guidance on how the state school aid formula statute should be resolved. The Supreme Court stated that the problem with the statute was 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." *Board I* at *Syl. pt. 6*. The proper correction then would be an adjustment to the state school aid formula statute. Nothing needs to be done to the Library's Special Act. It is not the Special Act which presents a constitutional question. It is only the formula provided in the state school aid formula statute. The Circuit Court clearly erred in ruling that the Special Act, previously held to be constitutional three times, is now unconstitutional because of claimed defects in the separate and distinct state school aid formula statute.

The Special Act and the state school aid formula statute are, and should be treated as, separate and distinct. The validity of the Special Act was never an issue in the pleadings before the Circuit Court. On its face, the Complaint filed by the School Board attacked the constitutionality of the state school aid formula statute, not the Kanawha County Public Library

Special Act. (A.R. A0036-44.) The relief granted by the Circuit Court accordingly exceeds the scope of the pleadings and improperly goes on to invalidate the Kanawha County Public Library Special Act and its funding, which in turn endangers the funding of all of the other special act libraries in West Virginia. It is error for a court to grant relief beyond the scope of the pleadings, and the Circuit Court should have left the Special Act alone.

The School Board’s Complaint attacked West Virginia Code § 18-9A-11 on equal protection grounds. In Count I, the School Board made allegations only against the state school aid formula statute and made no allegations against the validity of the Special Act. (A.R. A0040-42, at ¶¶ 18-24.) Specifically, the School Board alleged that “W. Va. Code § 18-9A-11, as amended, continues the discriminatory classification of the Kanawha Board in comparison to the forty-six other county boards of education that have no library funding obligation.” (A.R. A0041, at ¶ 20.) The specific relief prayed for by the School Board was likewise limited to the state school aid formula statute.³

The “defendants” in the case as originally filed were only the West Virginia Board of Education and the State Superintendent of Schools. (A.R. A0034, A0036-7.) The Kanawha County Public Library Board was not named as a defendant in the lawsuit by the School Board.

³ The School Board prayed for an order:

1. Declaring that W. Va. Code § 18-9A-11 and related provisions of the West Virginia Code, as interpreted and applied by the defendants, in combination with the Special Act, creates a discriminatory classification of the Kanawha Board within the public school financing system in plain violation of the equal protection provisions of Article III, § 10 of the West Virginia Constitution;

2. Declaring that W. Va. Code § 18-9A-11 and related provisions of the West Virginia Code, as interpreted and applied by the defendants, in combination with the Special Act, is unconstitutional in that it denies the Kanawha Board the rights to utilize excess levy tax receipts as provided by Article X, § 10 of the West Virginia Constitution;

3. Enjoining the defendants from requiring any part of the regular tax levy receipts of the Kanawha Board or any part of the funds of the state allocated by the State Board to the Kanawha Board pursuant to Code § 18-9A-12 to be expended for the benefit of the Kanawha Library; . . . (A.R. A0043.)

Id. The Library moved to intervene and was later joined in the case. (A.R. A0056.) Any civil action attacking the validity of the 1957 Special Act creating the Library would have required the Library to be joined as an indispensable party. See W. Va. R. Civ. P. Rule 19; Pauley v. Gainer, 177 W. Va. 464, 353 S.E.2d 318 (1986). The failure of the School Board to join the Library shows that the Special Act was not being challenged.⁴

A court cannot give relief beyond the scope of the pleadings. Donahoe v. Fackler, 8 W. Va. 249 (1875); Waldron v. Harvey, 54 W. Va. 608, 46 S.E. 603 (1904). Where an initial pleading contemplates, and the prayer asks for specific relief, the court cannot grant relief inconsistent therewith, under the clause in the prayer for general relief. Blue v. Blue, 92 W. Va. 574, 116 S.E. 134 (1922); Brown v. Wylie, 2 W. Va. 502 (1868); Pickens v. Knisely, 29 W. Va. 1, 11 S.E. 932 (1886); Vance Shoe Co. v. Haught, 41 W. Va. 275, 23 S.E. 553 (1895); Crummett v. Crummett, 102 W. Va. 151, 135 S.E. 16 (1926).

In holding the 1957 Special Act to be unconstitutional, the Circuit Court acted beyond the scope of the pleadings and committed error. The Circuit Court should have left the Special Act untouched and dealt solely with the state school aid formula statute which was the true and sole issue for adjudication.

B. The State School Aid Formula Statute is Constitutional.

1. West Virginia Code § 18-9A-11 is constitutional and does not violate equal protection.

The state school aid formula statute in West Virginia Code § 18-9A-11 is constitutional because libraries are education, as the Legislature has properly found. Counties are treated equally in West Virginia for the totality of their education funding because under the statute the

⁴ The Complaint was never amended to add any new count against the 1957 Special Act.

revenues paid to a special act library are still paid for and delivered to education in the county. The Legislature has plenary authority to use libraries as a medium for education in the educational system. The Circuit Court erred in ruling otherwise.

- a. The Legislature has validly made findings of fact that libraries are education and that special act library funding is for a “school purpose.”

The Supreme Court in *Board I* concluded that the state school aid formula statute in its prior version violated equal protection only because “a portion of the county school board’s local share is required by law to be used to support a *non-school purpose*.” *Syl. pt. 6* (Emphasis supplied.) The “non-school purpose” was the library funding obligation that is paid to a special act library such as the Kanawha County Public Library. In other words, the rationale for the Supreme Court’s ruling was that education dollars in Kanawha County were “diverted” from education to a non-education purpose (the Library), causing inequality of funding among county school boards. The Legislature, however, answered the Supreme Court’s concerns by finding that special act library funding is a “legitimate school purpose.”

Because the Legislature has made findings of fact that libraries are a school purpose (“education”), there can be no equal protection or other constitutional violation. Because libraries are education and their funding is a school purpose, there is no “lack of uniformity in the State’s educational financing system.” 219 W. Va. at 807, 639 S.E.2d at 899. Under the Legislature’s revisions to the statute, each county is treated equally in education funding because education is delivered through the medium of the library. There is no diversion from education.

Here, the Circuit Court never addressed the issue of whether libraries are education. The Circuit Court merely concluded that “there is a discriminatory classification of the Kanawha Board within the public education financing system . . . [because] 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.” (A.R. A0019). The court below ignored the Legislature’s findings that the Library is a legitimate school purpose and is education. While levy receipts are “paid” to the Library, they are not “diverted” from education because the Library performs a legitimate school purpose and is education.

In revising the state school aid formula statute in Senate Bill 541, the Legislature made important findings of fact on libraries:

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.

W. Va. Code § 18-9A-11(f) (Emphasis added.)

The West Virginia Legislature has properly found that “public libraries serve a legitimate school purpose.” Libraries are part of the *system* of education. The sole responsibility for education belongs to the Legislature: “The Legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. Va. Const. art. XII, § 1. Education is not the exclusive province of the county school board. The county school board is merely one of the means, methods, or subordinate bodies created by the Legislature to deliver education in a system. Education under the Constitution can be and is delivered by the Legislature through a system of created governmental bodies including the county school board and the special act library. The Library is a medium of education and can be funded by the Legislature.

In speaking about county commissions when the Kanawha Special Act was challenged in 1958, the Supreme Court stated that: “The relation which counties bear to the state must not be overlooked. The state is the sovereign, and counties are mere territorial subdivisions for purposes of convenience. Whatever of power is had by county courts was delegated by the state.” Kanawha County Public Library Board, 143 W. Va. at 399, 102 S.E.2d at 720, *quoting State Road Commission v. County Court of Kanawha County*, 112 W. Va. 98, 163 S.E. 815, 818 (1932). Similarly, in the relation between the School Board and the Legislature, the Legislature is sovereign. The Legislature may delegate power for education to the School Board and it may delegate it to the Library, as it sees fit.

It clearly is within the prerogative of the Legislature to establish and fund libraries in the education system and to make the express finding that “libraries serve a legitimate school purpose.” In addition to the presumption of the constitutionality of legislation, MacDonald v. City Hospital, 715 S.E.2d 405 (W. Va. 2011), legislative findings are entitled to respect and deference by the judicial branch. “Many decisions we have reviewed reflect affirmation of judicial deference to legislative plenary power over education, and then judicially approve legislation as being within that power.” Pauley v. Kelly, 162 W. Va. 672, 693, 255 S.E.2d 859 (1979). “And we emphasize that great weight will be given to legislatively[-]established standards, because the people have reposed in that department of government ‘plenary, if not absolute’ authority and responsibility for the school system.” 162 W. Va. at 708.

The fact that libraries are education and serve a legitimate school purpose was never disputed by the Circuit Court below. This fact is not new or novel. The history of libraries in West Virginia in general and the history of the Kanawha County Public Library in particular show it to be true. (A.R. A0223-233.) The Legislature has previously made the same educational

finding of fact concerning libraries. In 1969, in amending West Virginia Code § 10-1-20 providing for aid to libraries by the West Virginia Library Commission, the Legislature “determined that the development and support of such libraries will further the education of the people of the state as a whole and will thereby aid in the discharge of the responsibility of the state to encourage and foster education.”

In Pauley v. Kelly, the landmark case which created this area of equal protection jurisprudence in education funding, the Supreme Court pronounced an exhaustive definition of “education”:

We may synthesize a definition of education from the cases, encyclopedias (28 C.J.S. Education, for example), and dictionaries: It is the development of mind, body and social morality (ethics) to prepare persons for useful and happy occupations, recreation and citizenship.

We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.

162 W. Va. at 705-6, 255 S.E.2d at 877 (footnote omitted).

With no exceptions, all of these elements of education as defined in Pauley are delivered by the Kanawha County Public Library. The Library is education, and the Legislature may direct

its subordinate, the legislatively-created entity called the “County School Board,” to produce education through a funding mechanism which includes the funding of a special act library.

- b. There is no diversion from education or unequal treatment among counties when two budgets are used by the Legislature to fund education.

Contrary to the decision of the Circuit Court, the Legislature has not created any “diversion” from education by funding the Library. There is no “unequal treatment” when the Legislature uses the Library as one of its means for education in its statewide system. The West Virginia Constitution does not require that “school purposes” be funded and paid only through the budget of the County Board of Education. School purposes may also be funded and paid, as directed by the Legislature in its plenary power, through the budget of a special act library as the medium because the Library is education and serves as a legitimate school purpose.

The Circuit Court in its decision essentially holds that equal protection requires all county school board *budgets* to be funded on an equal basis under the state school aid formula statute. Equal protection, however, does not mean that all county school board budgets must be equal. Equal protection means that students in the county must receive the same basic support through the total expenditure for education in the county. See State ex rel. Board of Education v. Chafin, 180 W. Va. 219, 376 S.E.2d 113 (1988). The Circuit Court ignores the fact that, under the education system for a county, payments can be made to the county school board and also to another educational entity in the county which serves “a legitimate school purpose,” namely the special act library. The Circuit Court’s error is that equality among counties is to be measured on the totality of the education budget for the county. It is irrelevant whether the total expenditure for education in the county is paid out of only “one pocket” budgeted solely in the County School Board or out of “two pockets,” one pocket being the School Board’s budget and the second pocket being the Library’s budget. Equal protection is fully satisfied when the total

education budget for the county is spent for education (“a legitimate school purpose”), whether made through the budget of only one educational body or the budgets of two educational bodies. The Legislature is free to direct, and possesses plenary authority to direct, the expenditure for education in the county to be made through an entity such as a special act library. Moreover, the Library in this case is an entity controlled by the School Board.⁵

“Two pockets” in Kanawha County receive the same allocation under the state school aid formula as any other county in the state which merely has “one pocket.” Placing the bulk of the education money in one pocket (the School Board’s budget) and a smaller amount of money in another pocket (the Library’s budget) does not create a “diversion” away from education or inequality. Both pockets work together, as designed by the Legislature, in paying for education in Kanawha County at a level equal to that of other counties in the State. The use of two pockets in Kanawha County (the School Board’s budget and the Library’s budget) does not mean less money for education in the County. It just means that the same money is split between, and spent from, the two pockets for the same purpose (education). Equal protection does not require the Legislature to create only one School Board to write the checks for education in the County; the Constitution only requires that the checks be made payable for “education.”

The Legislature knew all about special act libraries, equal protection, and the Supreme Court’s decision when it revised the state school aid formula statute. The Legislature acknowledged that special act libraries are successful and have a direct educational value and use for public school students and teachers. This relieves the School Board of an educational cost

⁵ The Kanawha County Public Library is essentially a controlled affiliate or subsidiary of the Kanawha County Board of Education. Under the 1957 Special Act, the School Board appoints all directors of the Library Board. House Bill 161, at section 2. The School Board has in fact appointed its treasurer and its attorney to the Library Board. The School Board is also the Library’s fiscal agent, and all expenditure checks of the Library Board are literally checks of the Kanawha County Board of Education signed by the School Board’s officer. (A.R. A0057, A0316-7.)

which it would otherwise be paying under its own budget, inefficiently dividing resources. Now, the Kanawha County School Board is relieved and may use fewer funds to support its school libraries because it can rely on the educational purpose of the Kanawha County Public Library, a full-service, county-wide library. This is efficiency, which is created by the Legislature in achieving its constitutional mandate of a “thorough and efficient” educational system.

Here, the Kanawha County School Board is only complaining of a mere financing disparity in its own budget, not the failure of funding of the totality of the education budget in the County. The Supreme Court has made it clear that mere financing disparities in education funding do not trigger equal protection violations. The Supreme Court in State ex rel. Board of Education v. Chafin, 180 W. Va. 219, 227, 376 S.E.2d 113, 121 (1988), stated that:

We deem it appropriate, in view of our decision today, to offer guidance for further development of the Pauley case. As discussed more fully above, the focus of equal protection is not merely on the existence of financing disparities. Local excess levies will undoubtedly promote some disparities between counties. These disparities are expressly countenanced by W. Va. Const. art. X, § 10. They represent the initiative of individual counties whose residents are willing to tax themselves to improve the level of local education.

We find the true focus of Pauley to be whether the State has complied with its constitutional duty to provide school financing in a manner, and at a level, that is thorough and efficient. This requires an examination of the school financing formula, without consideration of excess levy revenues. There are two pertinent inquiries. First, the formula must be scrutinized facially. Is the basic foundation program, the minimum level of funding guaranteed by the State, constitutionally sufficient to meet the county's education needs? Second, the formula must be examined as it is applied. Is the total funding actually received by the county, including the local share from its regular levy, constitutionally sufficient to meet the county's education needs?

The Circuit Court ignored all of this guidance. Using the proper test from Chafin, it is clear that both pertinent inquiries of equal protection for school financing are fulfilled by the Legislature in its revisions to the state school aid formula statute.

Under the first inquiry from Chafin, the basic foundation program, the minimum level of funding guaranteed by the State, is constitutionally sufficient to meet Kanawha County's education needs.⁶ A thorough and efficient education system has not failed in Kanawha County because 1% of the School Board's budget is provided to the budget of the largest public library system in the State which provides services the Legislature has found and defined to be education. There is no proof in the record, or even argument made by the School Board, that Kanawha County students are being denied a thorough and efficient education because of the funding of the Library.

In validating the 1957 Kanawha Special Act against the challenge of the County Commission, the Supreme Court stated that:

It is clear from the record in this case that the [special library] act in question does not deprive the County of Kanawha of funds necessary to meet the expenses of these mandatory functions of government. The respondent expresses apprehension of what the Legislature may do in the future to affect its affairs, even though this act may not do so. “* * * a court will not anticipate prospective conditions which may never arise, in order to declare a law unconstitutional; and a statute is not to be upset on hypothetical and unreal possibilities if it is valid according to the facts as they exist.”

Kanawha County Public Library Board, 143 W. Va. at 399, 102 S.E.2d at 720, *quoting* 12 C.J. Constitutional Law, § 219; 16 C.J.S. Constitutional Law, § 97.

This reasoning likewise applies to the School Board. The Legislature in funding the Library has not “deprived” the School Board of funds to meet the expenses of education. The Library is education. Any argument to the contrary can only be based on “hypothetical and unreal possibilities.”

Under the second inquiry from Chafin, the total funding actually received by Kanawha County, including the local share from its regular levy, is constitutionally sufficient to meet

⁶ The School Board as plaintiff submitted no evidence before the Circuit Court that challenged the Legislature's findings of fact on the school purpose of the library or that the minimum level of funding is insufficient or the total funding actually received is insufficient.

Kanawha County's education needs. The Supreme Court in Chafin has expressed this in terms of "the total funding actually received." Total funding must include what is spent on education through the Kanawha School Board's budget and the budget of its controlled entity, the second pocket known as the Library. The School Board cannot say that students are "deprived of an education" because the Legislature in its plenary power through the statute and the Special Act has provided them with the largest public library system in the State.

The state school aid formula statute, as revised in 2007 and 2008, was designed by the Legislature to assure equal protection among county boards of education. Kanawha County gets a levy-supported special act library but gets a slightly lower share of state school aid. Another county board of education does not get a levy-supported special act library but gets a larger share of state school aid. Both counties are treated equally. Under the statute, a county is treated in one of two ways: 1). it gets a levy-supported special act library which provides education but less state funding in the school board's budget or 2). it gets no levy-supported special act library with its education benefits but greater state funding in the school board's budget. The values of both treatments are equal because the library is education. It is merely a legislatively-created medium for education in the county.

If the Circuit Court's ruling should be allowed to stand, then inequality will be created. The Kanawha County School Board would get a levy-supported library and greater state funding. In that case, counties without special act libraries would then be able to claim violation of their "equal protection rights" because they do not also have special act libraries and thereby cannot deliver a thorough and efficient education as constitutionally required.

- c. Summary judgment was premature, and the plaintiff failed in its proof to overcome the Legislature's findings of fact.

The Circuit Court committed error by granting summary judgment to the School Board

when the essential facts were never presented. The facts were not developed in this case because three judges were assigned to it.

The judge initially assigned (Judge Irene Berger) was elevated to the federal bench. Judge Berger was replaced by Judge Carrie Webster. (A.R. A0183.) Upon motion filed by the Plaintiff, Judge Webster was deemed disqualified by the Supreme Court and was replaced by the third and current judge (Judge Zakaib). (A.R. A 0207.) Prior to the filing of the motion by the Plaintiff to disqualify Judge Webster, the Library with the support of the State Board had filed a motion for a status conference, specifically asking for the Court to enter a scheduling order. (A.R. A0112.) With the disqualification of Judge Webster and the assignment of the case to Judge Zakaib, no discovery was done, and no scheduling order was entered by the Circuit Court.

“[A] decision for summary judgment before discovery has been completed must be viewed as precipitous.” Board of Education of Ohio County v. Van Buren and Firestone, Architects, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980). Summary judgment is appropriate only after there has been adequate time for discovery, and the party opposing the motion has had a reasonable opportunity to discover information that is essential to its opposition. Powderidge Unit Owners Association v. Highland Properties, Ltd., 196 W. Va. 692, 474 S.E.2d 872 (1996).

The Plaintiff in the case, the School Board, was required to prove by facts in evidence that there is a discriminatory classification, contrary to the Legislature’s findings of fact. The School Board presented no evidence whatsoever to show discrimination (for example, by showing the dollar figure of funding disparities between county boards of education). The School Board filed no affidavits, depositions, or answers to discovery showing any facts supporting summary judgment. See Aluise v. Nationwide Mutual Fire Insurance Co., 218 W. Va. 498, 625 S.E.2d 260 (2005). As plaintiff, the School Board bore the burden of proof and in moving for

summary judgment had the burden to show that there was no genuine issue of fact. Mountain Lodge Association v. Crum & Forster Indemnity Co., 210 W. Va. 536, 558 S.E.2d 336 (2001). Any doubt as to the existence of an issue is to be resolved against the movant. Id.; Taylor v. Culloden Public Service District, 214 W. Va. 639, 591 S.E.2d 197 (2003).

The School Board failed to present evidence to counter the Legislature's finding of fact that libraries serve "a legitimate school purpose." The School Board also failed in its burden to present evidence to show that the library funding was a "diversion" of funds to a "non-school purpose" causing a deprivation of the "right to an education." Finally, the School Board failed in its burden to present evidence that it does not or cannot produce a thorough and efficient education because the Library is funded. The Circuit Court committed clear error in entering summary judgment, especially in light of the presumption of the constitutionality of legislation and the plenary power of the Legislature to provide education in a system.

2. The School Board is not a "person" with standing to make a constitutional claim, and the Library's Motion to Dismiss should have been granted.

The Circuit Court denied the Library's motion to dismiss which was based on the grounds that the School Board is not a "person" possessed of any constitutional right and has no standing to pursue its claim. (A.R. A0115.) Specifically, the Circuit Court held that the Kanawha County Board of Education "is a 'person' within the meaning of Article III, § 10 of the West Virginia Constitution, and, therefore, does have standing to bring an equal protection claim." (A.R. A0004.) This direct ruling is one of first impression in West Virginia. It is a dangerous and illogical extension of constitutional jurisprudence, giving governmental subdivisions a right to claim more funding or other benefits against the sovereign will of the Legislature. This ruling should be reversed by the Supreme Court.

The School Board is a non-constitutional, legislatively-created, subordinate subdivision of government. It is not a “person” having the constitutional “right to an education” and has no standing to challenge the funding system directed by the Legislature, which is its creator. The Circuit Court should have granted the Library’s motion to dismiss.

a. Constitutional rights protect persons from the government.

Under the Constitution, the right of equal protection is secured to the individual (a “person”) who is guaranteed protection from the state. The *individual* is protected by the constitutional right of equal protection from depredations committed by the *government*. Here, the ruling of the Circuit Court greatly expands and completely disrupts proper equal protection jurisprudence because a local branch of government, the County School Board, now can claim that it has a constitutional right of equal protection which is being violated by another and superior branch of government, the West Virginia Legislature. Standing to pursue litigation requires “an invasion of a legally protected right.” *Syl. pt. 5, Findley v. State Farm Mutual Automobile Insurance Company*, 213 W. Va. 80, 576 S.E.2d 807 (2002).⁷ Under basic equal protection law, the Kanawha County School Board is not a person, possesses no right of equal protection which can be invaded, and therefore has no standing to pursue a constitutional claim.

“Constitutional challenges relating to a statute are reviewed pursuant to a de novo standard of review.” *Morris v. Crown Equip. Corp.*, 219 W. Va. 347, 352, 633 S.E.2d 292, 297 (2006); *MacDonald v. City Hospital*, 715 S.E.2d 405 (W. Va. 2011). In this case, the School Board is not a person and has no constitutional rights, and the Circuit Court erred in ruling otherwise.

⁷ *Findley* involves *first party standing* to pursue a claim in the plaintiff’s own right and name. *Affiliated Construction Trades Foundation v. West Virginia Department of Transportation*, ___ W. Va. ___, ___ S.E.2d ___ (No. 35742 June 22, 2011). *Representative standing* concerns an entity making claim through others who are not parties to the lawsuit. *Id.*

b. The right of equal protection applies only to persons.

The federal right of equal protection comes from the 14th Amendment to the United States Constitution which provides that “No state shall . . . deny to any *person* within its jurisdiction the equal protection of the laws.” (Emphasis supplied.) Although there is no similar clause in the West Virginia Constitution, the West Virginia Supreme Court of Appeals has “found” equal protection principles to be implicit in the state constitution because of the general language of other rights.⁸

The right of equal protection, however, applies only to “persons.” Natural persons (human beings) are entitled to equal protection. *Q.v.*, Black’s Law Dictionary p. 1178 (8th ed. 2004)(first definition). Undocumented aliens are persons entitled to equal protection. Plyer v. Doe, 457 U.S. 202 (1982); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Private, business corporations are also persons possessing the right of equal protection. Grosjean v. American Press Co., 297 U.S. 233 (1936); Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933); Pierce v. Society of Sisters, 268 U.S. 510 (1925). The government with its subdivisions, however, is not a person.

c. The fundamental right to an education belongs to individual students and their parents or guardians and not to the government and its agencies.

The West Virginia Supreme Court has held that education is a fundamental right in West Virginia. Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979). Fundamental rights, like the

⁸ *Syl. pt. 4*, Israel by Israel v. West Virginia Secondary Schools Activities Commission, 182 W. Va. 454, 388 S.E.2d 480 (1989); State ex rel. Board of Education v. Chafin, 180 W. Va. 219, 227, 376 S.E.2d 113, 121 (1988); Thomas v. Rutledge, 167 W. Va. 487, 280 S.E.2d 123 (1981); State ex rel. Piccirillo v. City of Follansbee, 160 W. Va. 329, 233 S.E.2d 419 (1977); State ex rel. Payne v. Walden, 156 W. Va. 60, 190 S.E.2d 770 (1972). West Virginia Constitution Article III, § 10 provides: “No *person* shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” (Emphasis supplied.) West Virginia Constitution Article III, § 17 states: “The courts of this State shall be open, and every *person*, for an injury done to him, in his person, property or reputation, shall have remedy

right to an education, however, still only belong to *persons*.

West Virginia Constitution Article III, § 10 provides: “No *person* shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” (Emphasis supplied.) West Virginia Constitution Article III, § 17 states: “The courts of this State shall be open, and every *person*, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.” (Emphasis supplied).

The West Virginia Supreme Court of Appeals has clearly recognized the individual or personal basis of the right to an education:

[I]f the State takes some action which denies or infringes upon *a person's fundamental right to an education*, then strict scrutiny will apply and the State must prove that its action is necessary to serve some compelling State interest.⁹

A review of the reported West Virginia cases involving equal protection claims for the violation of the fundamental right to an education shows that claims are properly filed by aggrieved individuals who are persons.¹⁰ Plaintiffs seeking vindication of the right to an

by due course of law; and justice shall be administered without sale, denial or delay.” (Emphasis supplied).

⁹ Phillip Leon M. v. Greenbrier County Board of Education, 199 W. Va. 400, 409, 484 S.E.2d 909, 918 (1996); *Syl pt. 2*, Cathe A. v. Doddridge County Board of Education, 200 W. Va. 521, 490 S.E.2d 340 (1997); *Syl pt. 4*, Pendleton Citizens for Community Schools v. Marokie, 203 W. Va. 310, 507 S.E.2d 673 (1998)(Emphasis supplied). See also Randolph County Board of Education v. Adams, 196 W. Va. 9, 467 S.E.2d 150, 159 (1995)(“[S]tudents need not fear that a fee will be charged for exercising their basic rights to an education.”).

¹⁰ Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979)(parents of five children attending public schools in Lincoln County challenged the constitutionality of the entirety of the education financing system being based solely on local property values); Janasiewicz v. Board of Education of Kanawha County, 171 W. Va. 423, 299 S.E.2d 34 (1982)(parents of children attending Catholic schools brought an action to require the school board to provide transportation to and from parochial schools); Kennedy v. Board of Education of McDowell County, 175 W. Va. 668, 337 S.E.2d 905 (1985)(parents of handicapped children filed a petition seeking a writ of mandamus to compel a county board of education to provide transportation to their children to and from the public schools); State ex rel. Board of Education v. Chafin, 180 W. Va. 219, 376 S.E.2d 113 (1988)(case which validates excess levies is a continuation of the Pauley case, and the plaintiffs were parents of school children); Randolph County Board of Education v. Adams, 196 W. Va. 9, 467 S.E.2d 150 (1995)(parents of students

education are students and their parents or guardians. The fundamental right to an education is personal, meaning that it belongs to persons. It does not belong to the government. It does not belong to the County School Board. It belongs only to people.

Despite all of this basic jurisprudence on “personhood,” the Circuit Court improperly held that a county school board as a subordinate division of government is a “person” possessing “the right to an education.” (A.R. A0004.) The Circuit Court cited only three cases in support of the School Board’s standing as a “person.” (A.R. A0005-6.) The cases of State ex rel. Board of Education of the County of Grant v. Manchin, 179 W. Va. 235, 366 S.E.2d 743 (1988), and State ex rel. Board of Education of the County of Randolph v. Bailey, 192 W. Va. 534, 453 S.E.2d 368 (1994), involve county boards of education bringing equal protection claims concerning teacher and service personnel salaries under the state school aid formula statute. Neither of these cases, however, directly addresses the basic, constitutional issue of whether a subdivision of government is a “person” which possesses the “right” of equal protection. The word “standing” nowhere appears in either Grant County v. Manchin or Randolph County v. Bailey. Neither case discusses the concept of constitutional rights being vested in a “person.” The last cited case is *Board I*, and again the Supreme Court did not address the significant, threshold question of whether a county board of education possesses the right of equal protection which can be

challenged the county board of education charging a school book user fee); State ex rel. Cooper v. Board of Education of Summers County, 197 W. Va. 668, 478 S.E.2d 341 (1996)(parent and taxpayer sued to compel the county school board to provide school bus transportation to allow his child to attend a private religious school); Phillip Leon M. v. Greenbrier County Board of Education, 199 W. Va. 400, 484 S.E.2d 909 (1996)(student who was expelled for bringing a firearm onto school property petitioned for a writ of mandamus seeking an alternative form of education from the county school board); Pendleton Citizens for Community Schools v. Marokie, 203 W. Va. 310, 507 S.E.2d 673 (1998)(high school students, their parents, and a nonprofit organization dedicated to preservation of a school building sued county and state education agencies and officials, challenging the decision to close a high school); Jones v. West Virginia State Board of Education, 218 W. Va. 52, 622 S.E.2d 289 (2005)(plaintiffs who were the parents of home-schooled children attacked the regulation prohibiting their children from participating in interscholastic athletics).

violated by the Legislature.

- d. A subdivision of government, like a county board of education, is not a person and has no right of equal protection.

The government, or more precisely a subdivision of government, is not a person possessing the right of equal protection. The equal protection clause of the 14th Amendment “protect[s] people, not States.” Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976). “A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.” Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933). “In none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the Contract Clause or the Fourteenth Amendment. This court has never held that these subdivisions may invoke such restraints upon the power of the state.” City of Trenton v. New Jersey, 262 U.S. 182, 188 (1923).

“Generally, a municipality does not have due process or equal protection rights which can be protected by challenging allegedly unconstitutional statutes.” Town of Northville v. Village of Sheridan, 655 N.E.2d 22, 274 Ill. App. 3d 784 (Ct. App. Ill. 1995). In litigation, a government subdivision “lacks standing because it does not have any constitutional right which would be protected through its challenge to the legislative classification.” Id. Although a private corporation is a “person” within the scope of the Equal Protection Clause, “a municipal corporation, which is merely a subdivision of the State, is not a ‘person’ guaranteed equal protection of the laws.” Board of Commissioners of Howard County v. Kokomo City Planning Commission, 263 Ind. 282, 293, 330 N.E.2d 92 (1975). “We conceive [the State Constitution] as guaranteeing civil and political rights to all the human inhabitants of the state and declaring that such private persons are the source of the authority of government. The county has no political or

civil rights which this provision would protect against infringement by the state.” 263 Ind. at 294.

Neither states, nor municipalities, nor political subdivisions are persons possessing constitutional rights. Likewise, the Kanawha County School Board is a mere governmental subdivision, is not a person, and has no right to equal protection. In West Virginia, a county board of education is a mere statutory creature of the Legislature; it is not created by the State Constitution. “[C]ounty boards of education are granted authority by statute and not by the Constitution.” Randolph County Board of Education v. Adams, 196 W. Va. 9, 467 S.E.2d 150, 156 n.7 (1995). County boards of education are created by the Legislature by general law. State ex rel. Dilley v. West Virginia Public Employees Retirement System, 180 W. Va. 24, 375 S.E.2d 202 (1988); Herald v. Board of Education, 65 W. Va. 765, 65 S.E. 112 (1909); see W. Va. Code § 18-5-5. County boards of education are merely political subdivisions of the State exercising a governmental function. Boggs v. Board of Education of Clay County, 161 W. Va. 471, 244 S.E.2d 799 (1978). The county board of education is fully subordinate to the Legislature.

Nothing in statutory law or the West Virginia Constitution grants to county school boards a fundamental right to an education or the right of equal protection. Constitutional jurisprudence is turned on its head if a subordinate division of government is deemed to possess a “constitutional right” against another and superior branch of government (the Legislature).

- e. Other jurisdictions have held that a county board of education has no constitutional rights or standing.

The issue of personhood and standing has been specifically addressed by the courts of other states, which have rejected the constitutional claims and standing of local school boards.

In Stubaus v. Whitman, 339 N.J. Super. 38, 770 A.2d 1222 (App. Div. 2001), *cert. den.* 171 N.J. 442, 794 A.2d 181 (2002), seven individual homeowners and taxpayers and forty-two school districts sued the Governor, President of the Senate, Speaker of the Assembly, Commissioner of the Department of Education, and State Treasurer, challenging the public school funding system. The New Jersey Appellate Court held that:

With respect to plaintiffs' equal protection claims, courts generally recognize that political subdivisions of the State, including municipalities and local boards of education, lack the legal capacity to challenge State action based on equal protection grounds. A local school board is accorded only those rights provided by statute. Because school districts are "creatures of the State," no school district can be the "subject of discriminatory practice by the State."

770 A.2d at 1227-8 (citations omitted).¹¹

In Bismarck Public School District No. 1 v. State By and Through North Dakota Legislative Assembly, 511 N.W.2d 247, 251 (N.D. 1994), the Supreme Court of North Dakota found that "school districts, as political subdivisions, do not have standing to challenge the constitutionality of the statutory method for distributing funding for public education . . . because a county is a creature of the constitution and is not a person or private party under the applicable constitutional provisions."

Applying Arizona law, it was held in Indian Oasis-Baboquivari Unified School District No. 40 of Pima County v. Kirk, 91 F.3d 1240 (9th Cir. 1996), *reh'g en banc granted* 102 F.3d 999 (9th Cir. 1996), *reh'g en banc* 109 F.3d 634 (9th Cir. 1997), that the political subdivision standing doctrine prohibits a political subdivision such as a school district from bringing suit against the state of which it is a part. Likewise, the Federal Circuit Court of Appeals held in

¹¹ The constitution of the State of New Jersey contains a "thorough and efficient" education clause similar to that contained in the West Virginia Constitution, and the West Virginia Supreme Court relied heavily on New Jersey law in invalidating the prior school funding system and in analyzing the West Virginia right of education in the Pauley case. See 255 S.E.2d at 864.

Okanogan School District No. 105 v. Superintendent of Public Instruction for State of Washington, 291 F.3d 1161 (9th Cir. 2002), *cert. den.* 123 S. Ct. 1253, 154 L. Ed. 2d 1018 (2003), that under Washington law, school districts are political subdivisions of the state and may not challenge the validity of a state statute in federal court.

These holdings are well-reasoned and persuasive, comport with existing West Virginia law, and should be followed by the West Virginia Supreme Court. The Circuit Court erred in finding that the School Board is a “person,” is entitled to “the right to an education,” has the right of “equal protection,” and has standing to challenge the will of its creator, the West Virginia Legislature.

- f. A county board of education does not have representative standing on behalf of students.

In addition to declaring the School Board to be a constitutional person having first-party standing, the Circuit Court also held that “the Kanawha Board also has standing to pursue the equal protection claims in Count I of the Complaint on behalf of adversely affected students of Kanawha County schools.” (A.R. A0009.) This holding involves *representative standing* and is an important issue of first impression in West Virginia concerning the powers of governmental bodies.

When a litigant seeks to assert the rights of a third party, it is called *jus tertii* standing. See State ex rel. Abraham Linc Corp. v. Bedell, 216 W. Va. 99, 602 S.E.2d 542, 555 (2004)(J. Davis concurring). “[C]ourts have been reluctant to allow persons to claim standing to vindicate the rights of a third party on the grounds that third parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary adjudication of rights which the holder either does not wish to assert or will be able to enjoy regardless of the outcome of the case.” Snyder v. Callaghan, 168 W. Va. 265, 279, 284 S.E.2d 241, 250 (1981).

The United States Supreme Court has adopted a three-prong test for third party or representative standing: “[t]he litigant must have suffered an injury in fact . . .; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.” Powers v. Ohio, 499 U.S. 400, 411 (1991); see also Abraham Linc Corp, 602 S.E.2d at 556.

Here, the Circuit Court improperly found, with no analysis whatsoever, that the School Board had third-party standing to make a claim on behalf of county students. Under the three-prong test, the School Board lacks any standing. First, there is no proof of any injury to the right of students to an education suffered because the Library is funded; the Library is education and well serves students. Second, the School Board as litigant does not have a close relation to students to allow it to sue to vindicate the students’ right; generally, it is the School Board which is sued for violating students’ rights. Third, there is no hindrance at all to students to protect their own interests; they can and frequently do sue when they feel that they have been deprived of an education.

In the context of equal protection in education funding, the courts in other states have rejected the argument of representative standing of the school board. In Stubaus v. Whitman, the New Jersey court specifically rejected the argument made by the plaintiff school districts that they had standing to mount a constitutional challenge “as advocates of their respective taxpaying constituencies.” 770 A.2d at 1227. The reasoning was that “[a] local school board is accorded only those rights provided by statute” and “[b]ecause school districts are ‘creatures of the State,’ no school district can be the ‘subject of discriminatory practice by the State.’” Stubaus 770 A.2d at 1228 (citing Durgin v. Brown, 37 N.J. 189, 199 (1962); Borough of Glassboro v. Byrne, 141 N.J. Super. 19, 23 (App. Div.), *cert. den.* 71 N.J. 518-19 (1976)).

The Missouri Supreme Court held likewise, giving the same rationale: “School districts and their representative organizations lack standing to assert that the alleged inadequacy of school funding violates their equal protection rights. . . . Political subdivisions established by the State are not ‘persons’ within the protection of the due process and equal protection clauses.” Committee for Educational Equality v. State, 294 S.W.3d 477 (Mo. en banc. 2009)(citing City of Chesterfield v. Director of Revenue, 811 S.W.2d 375, 377 (Mo. en banc 1991)).

The North Dakota Supreme Court ruled that same way in County of Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985), stating that:

A political subdivision, as an agency of the state in the exercise of governmental powers, generally has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of the State. In this instance the County, rather than a private person, is the party asserting a violation of its constitutional rights. Stutsman County may not successfully assert a violation of those constitutional rights because it is not a person or private party within the context of those provisions. If Stutsman County has a serious complaint about the burdens placed upon it by this [legislation], the County must take it to the Legislature which controls the County's fate in matters such as this.

These case decisions are consistent with West Virginia law and are persuasive authority that the Kanawha County School Board, in addition not to being a person possessing the right to an education, does not have representative standing to make a claim through its students.

3. West Virginia Code § 18-9A-11 does not violate any provision of the West Virginia Constitution concerning the excess levy.

In attacking the library funding, the Kanawha School Board raised an alternate state constitutional theory. In Count II of the Complaint, it argued that the state school aid formula statute also violates a “right” or “power” newly found in Article X of the Constitution. (A.R. A0042-3.) The Circuit Court accepted this creative argument and ruled that West Virginia Code § 18-9A-11 violates both Article XII, § 5 and Article X, § 1b of the West Virginia Constitution.

(A.R. A0027-29.) This ruling is clear error. The Legislature has plenary power to provide education funding, and as a subordinate governmental body the county school board does not possess any unalterable right or power in an excess levy.

The specific provision which the Circuit Court found to create a “power” (A.R. A0028) is a parenthetical which appears in Article X in the Property Tax Limitation and Homestead Exemption Amendment of 1982:

Within the limits of the maximum levies permitted for excess levies for schools or better schools in sections one and ten of this article [X], 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.*

Art. X, § 1b, subsection E (Emphasis supplied.)

The School Board argued, and the Circuit Court agreed, that since this provision allows the Legislature to direct a state-wide excess levy through an election before the voters and if the Legislature does not direct such a levy election (and it has not done so), then the local school district (being the Kanawha County Board of Education) must have some “power” in the local excess levy. (A.R. A0028-9.) Without citation to any authority or any further analysis, the Circuit Court simply and broadly found that “Article XII, § 5 and Article X, § 1b prohibit the Legislature from enacting special legislation with respect to a local school districts [sic] excess levy.” (A.R. A0029.) In light of the Legislature’s plenary and almost unlimited constitutional authority over taxing bodies, this ruling is plainly wrong.

The Legislature has responsibility and authority for education under the West Virginia Constitution. “The Legislature shall provide, by general law, for a thorough and efficient system of free schools.” Art. XII, § 1. Under this constitutional grant of power, the Legislature passes

education legislation (like West Virginia Code § 18-9A-11) and directs and controls a county school board. County school boards are not constitutional bodies in West Virginia, are created by the Legislature, and are subject to the plenary power of the Legislature. Randolph County Board of Education v. Adams, 196 W. Va. 9, 467 S.E.2d 150, 156 n.7 (1995); W. Va. Code § 18-5-1, et seq. In fact, county boards of education were only first created in 1933 when they replaced local, independent school districts. Acts 1933, Ex. Sess., c. 8.

Subject to specific constitutional limitations, the West Virginia Legislature has plenary power over taxation for education. “The power of taxation of the Legislature shall extend to provisions for . . . the support of free schools.” W. Va. Const. art. X, § 5. As to the excess levy, there are three specific constitutional restrictions: maximum rates, maximum duration, and the consent of the taxpayers in an election. W. Va. Const. art. X, §§ 1, 10. Beyond that, the Constitution does not grant or vest any rights or powers concerning the excess levy in a county school board, a non-constitutional and legislatively-created subdivision of government. Moreover, the Constitution expressly grants authority to the Legislature concerning the excess levy. The Legislature is to implement it by passing a general law, and it has done so. W. Va. Const. art. X, § 1; see W. Va. Code § 11-8-1, *et seq.*

The county board of education is not a constitutional body; it has no unalterable excess levy power; and the Legislature has full constitutional authority to modify the funding system for education as it deems “thorough and efficient.” See Leonhart v. Board of Education of Charleston Independent School District, 114 W. Va. 9, 170 S.E. 418 (1933). The Legislature is primary and above all school boards, which are subordinate creations and mere subdivisions of government. The School Board has no “power” to be violated, and the Legislature can act, and has validly acted, in passing West Virginia Code § 18-9A-11.

It is clear that the Legislature has constitutional responsibility for education and constitutional power to tax for education. In part, the Legislature has done so by creating the county boards of education in 1933. Now, the Legislature has seen fit to pass West Virginia Code § 18-9A-11, a statute which generally governs tax support of public libraries (“a legitimate school purpose”) as a part of the education system. There is no violation of any provision of the West Virginia Constitution by this statute. The School Board is a subordinate body created by the Legislature and has no “power” in an excess levy, granted expressly or impliedly by the Constitution. The Circuit Court’s ruling to the contrary is error and should be overruled by the Supreme Court.

VII. CONCLUSION

This Appeal raises significant legal issues which this Court should address. For the foregoing reasons, Petitioner Kanawha County Public Library Board respectfully requests that the Supreme Court grant this Appeal and ultimately reverse the decision of the Circuit Court of Kanawha County by ruling that the Kanawha County Public Library Special Act and West Virginia Code § 18-9A-11 are valid and constitutional.

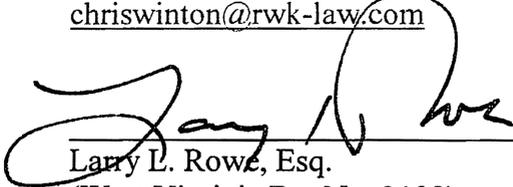
Respectfully submitted this 23rd day of December, 2011.

KANAWHA COUNTY PUBLIC
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corporation

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CERTIFICATE OF SERVICE

I, Christopher J. Winton, Esq., counsel for Petitioner Kanawha County Public Library Board, hereby state that on December 23, 2011, I served true and correct copies of the *Brief of Petitioner Kanawha County Public Library Board* on the parties hereto via hand-delivery, with the *Joint Appendix* previously mailed in electronic format on December 8, 2011 as agreed by the parties, addressed as follows:

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