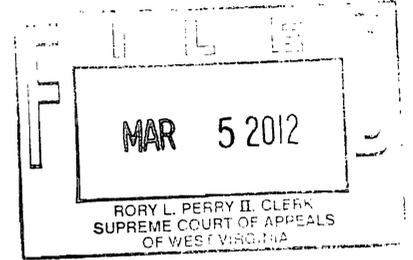


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

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

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II. REPLY ARGUMENT

- A. The Circuit Court exceeded the relief noticed in the Complaint and should have left unaffected the Library Special Act.

The Complaint filed by the School Board did not attack the Library Special Act and did not even join the Library as an indispensable party under Rule 19 of the West Virginia Rules of Civil Procedure. Yet, the Circuit Court invalidated the Special Act, despite the prior rulings of the Supreme Court finding it to be constitutional. Kanawha County Public Library Board v. County Court of Kanawha County, 143 W. Va. 385, 102 S.E.2d 712 (1958); Hedrick v. County Court of Raleigh County, 153 W. Va. 660, 172 S.E.2d 312 (1970); Board of Education of the County of Kanawha v. West Virginia Board of Education, 219 W. Va. 801, 639 S.E.2d 893, 897 n.3 (2006)(hereinafter cited as *Board I*).

The School Board argues that constitutional challenges to a statute do not require the joinder of every individual or entity that “could possibly have rights under the statute.” *Brief of Respondent* at p. 14. The Kanawha County Public Library is not merely one of its individual county residents who is a loyal Library patron. The Library itself has a much higher degree of standing than “could possibly have rights” when it comes to the validity of its organic charter passed by the West Virginia Legislature in 1957 as H.B. 161. In Pauley v. Gainer, 177 W. Va. 464, 353 S.E.2d 318 (1986), the Supreme Court held that the Governor was an indispensable party to a challenge to the Governor’s veto authority. Likewise, if the School Board was truly challenging the Library’s Special Act, the Library was not only an indispensable party but a critical party. If the Library is to be executed, then it should at least have the benefit of notice from a clear, written death warrant.

Here, the School Board confined its pleadings to the state school aid formula statute, and in doing so it would not have needed to name the Library as a party defendant. It sued only the West Virginia State Board of Education and its Superintendent after the Legislature revised the state school aid formula statute, making specific allegations only against the statute and praying for relief against the statute. While the Rules of Civil Procedure have done away with the technical intricacies of common-law pleadings, the Rules are “rooted in fair notice.” State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995). Under the doctrine of fair notice, the Rules have not abolished the common law rule that 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). The relief sought by the School Board was at the very least vague and was not fair notice of a direct attack upon the Kanawha County Public Library Special Act. Especially in light of the presumption of constitutionality, *Syllabus Point 1*, MacDonald v. City Hospital, 715 S.E.2d 405 (W. Va. 2011), the Circuit Court should have left the Special Act untouched and dealt solely with the issue concerning the state school aid formula statute, which was the true and sole issue for adjudication.

- B. There can be no discrimination by the West Virginia Legislature against a subordinate body it created known as the county board of education, and education in the state is not harmed because public libraries are funded.

The crux of this case is that the West Virginia Legislature alone has express authority for education under the Constitution. Art. XII, § 1. The Supreme Court has affirmed the “legislative plenary power over education.” Pauley v. Kelley. 162 W. Va. 672, 693, 255 S.E.2d 859 (1979). Policy choices of the Legislature concerning education are not judicial functions. In exercise of its power and as a means to deliver education, the Legislature created county boards of education “out of whole cloth” starting in 1933, replacing the old independent school districts. 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 Leonhart v. Board of Education of Charleston Independent School District, 114 W. Va. 9, 170 S.E. 418 (1933), the Supreme Court upheld the constitutionality of the Legislature's abolition of the independent school districts and the creation of county school boards. There, the Court analyzed the Legislature's plenary power over education as follows:

In view of the broad powers enjoyed by the legislature in the absence of constitutional restrictions, as well as the specific provision of section 1 of the article [XII] on education that body has the right to make change in the educational system as it may see fit, subject, of course, to constitutional limitations. . . . [T]he power to create in section 1 carries with it the power to destroy and re-create. . . . School districts are mere governmental sub-divisions of the state, which, subject to constitutional limitation, may be created, amended, consolidated or abolished at the will of the legislature. Herald v. McQueen, 71 W. Va. 43, 75 S.E. 313 [(1912)]; Board v. Board, 30 W. Va. 424, 4 S.E. 640 [(1887)].

170 S.E. at 421.

From this basic premise of legislative power and legislative creation, there is nothing unconstitutional in the Legislature providing for education by directing its subordinate created body called the county school board to expend education monies in a certain manner, namely through a Special Act Library. The Legislature under the Constitution cannot be charged with "discriminating" against a mere agency which it has created. The county school board does not direct and command the Legislature; the Legislature directs and commands the county school board.

The constitutional right which the West Virginia Supreme Court has recognized is the right to an education. Pauley v. Kelley. The fundamental right of education belongs to persons, meaning students and their parents and guardians. It does not belong to the subordinate governmental agency created by the Legislature as a means to provide education. In order for a person to receive an education, public funding (and generally major public funding) is required.

The basic statement of the right of equal protection is that similarly situated persons are to be treated equally. The Supreme Court in Pauley v. Kelley held that the educational financing system then existing was unconstitutional and violated equal protection because local funding varied so greatly from county to county that students were not treated equally and suffered an injury to their right to an education. The present case does not involve unequal *funding* of the educational financing among counties. It only involves differences in *spending* of the educational financing among counties.

The state school aid formula financing statute provides the same and proper total educational funding to all West Virginia county boards of education. In essence, the only thing that the statute does in relation to counties which have Special Act Libraries is to direct the *spending* of some of the educational funding in a particular manner. The Legislature has merely directed that county boards which have Special Act Libraries shall spend a certain amount on the library because the library is a “legitimate school purpose.” The amount of mandated spending on the Kanawha County Public Library amounts to about 1% of the Kanawha County Board of Education’s total budget. (A.R. A0100, A0311, A0321.) For the other counties which have Special Act Libraries, the mandated library spending is less than 1%, and for most counties is generally less than one-tenth of 1%. See Amicus Curiae Brief of the Ohio County Public Library and Other Interested West Virginia Public Libraries in Support of Petitioners and Urging Reversal at p. 17.

The Circuit Court erroneously concluded that there was an overall *funding* disparity between counties with Special Act Libraries and those without such libraries. All counties are in fact treated equally in the totality of the funding of public money used for educational purposes under the state school aid formula statute. There is merely a *spending* discrepancy among

counties with Special Act Libraries. Some county boards have been granted discretion by the Legislature, their creator, in deciding to spend education monies on libraries, and other county boards have not been granted discretion but have been directed by the Legislature to spend a small portion of education monies on libraries which have been created by Special Act. This situation is merely a legislative policy choice and is fully within the constitutional prerogative of the Legislature over education. There is no injury to students' right to education when libraries are funded, and in fact, education is enhanced as the Legislature has so determined by a specific finding of fact.

The present case is not truly an equal protection case. It is a case concerning who decides. The Legislature has responsibility for education under the Constitution. It has plenary power to create a system for education and has done so, including by creating county school boards. The Legislature is free to decide to grant to its subordinate created body discretion in spending public funds to produce education, and the Legislature is also free to direct its subordinate created body to spend public funds in a particular manner to produce education (namely, to the companion educational body called the public library). Whether the Legislature gives discretion or direction to the county school board is up to the Legislature. It is not up to the subordinate created body to decide. The Legislature decides.

If this Court accepts under the guise of equal protection the argument of the School Board that it is a person, that it has standing and equal protection and other constitutional rights, and that the Legislature, its creator, cannot discriminate against it by directing it to spend educational monies in a particular manner, then this Court has destroyed the Legislature's constitutional power and responsibility over education. The Court will then be assuming a new constitutional function. The Court will also have confirmed the salient observation of Chief

Justice Burger in Lemon v. Kurtzman, 403 U.S. 602, 624 (1971), that “modern governmental programs have self-perpetuating and self-expanding propensities.” Moreover, this also highlights why, under a constitutional system, governmental bodies do not have and should not have “rights” as persons because it encourages bureaucracies to litigate to aggrandize their own programs against the will of the Legislature and to the injury of the general public, citizens, taxpayers, and real persons.

C. Libraries are education, and such a fact is controlling in this case.

It seems inconceivable that any conscientious school board would dispute that libraries are education and a school purpose, but that is exactly the position advocated by the Kanawha County Board of Education in its *Brief*. The state school aid formula statute in West Virginia Code § 18-9A-11 is constitutional because libraries are education. There is no “diversion” of educational funding to an unrelated purpose injuring students’ right to education when the Legislature uses its plenary authority to fund libraries as a medium for education in the educational system.

The basis for the Supreme Court’s decision in *Board I* was that the statute as then written diverted educational funding “to support a non-school purpose.” *Syl. Pt. 6*. In revising the statute, the Legislature made an express finding of fact that “public libraries serve a legitimate school purpose.” W. Va. Code § 18-9A-11(f). The School Board contests the right of the West Virginia Legislature to make such a finding. As a co-equal branch of government, the Legislature has the right to make the finding.

“A legislative finding of fact should be accepted by courts unless there is strong reason for rejecting it.” Glover v. Sims, 121 W. Va. 407, 3 S.E.2d 612 (1939). “This Court reviews legislative findings with great deference.” State ex rel. Cities of Charleston, Huntington and its

Counties of Ohio and Kanawha v. West Virginia Economic Development Authority, 214 W. Va. 277, 291, 588 S.E.2d 655, 669 (2003). “A legislative declaration of fact, if not arbitrary, is final.” *Syl. Pt. 4, Lemon v. Rumsey*, 108 W. Va. 242, 150 S.E. 725 (1929). “A fact determined by a legislative body and made the basis for legislative action is not thereafter open to judicial investigation.” New York Central R.R. v. Town of Glasgow, 142 W. Va. 291, 297, 95 S.E.2d 420, 424 (1956).

In State ex rel. Lippert v. Gainer, 146 W. Va. 840, 845-6, 122 S.E.2d 618, 621 (1961), the Supreme Court explained the basis of the law respecting legislative findings:

The previous holdings, as well as the present conclusions, relating to the weight to be given to a legislative declaration of the existence of such a moral obligation, are legally and eminently justifiable. That co-ordinate branch of the government, acting on a matter clearly within its powers, under the same constitutional provisions as this Court, charged with the same duties and responsibilities as regards such provisions, except that its functions are legislative rather than juristic, is possessed of powers and means of investigating and determining such questions not possessed by courts. In such circumstances, there can be no serious question that its findings should be given “weight and serious consideration”.

The United States Supreme Court recognizes the same constitutional principal involved: “We are not at liberty to substitute our [judicial] judgment for the reasonable conclusion of a legislative body.” Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 212 (1997).

If libraries are a legitimate school purpose and are education, then there can be no diversion which creates “inequality” in the education financing system or otherwise impairs a student’s right to an education. The School Board failed to put on any evidence before the Circuit Court to contradict the finding of fact made by the Legislature. The connection between libraries and education is so obvious that the Court may take judicial notice of the fact. The Court clearly cannot take notice of any contrary fact on this record. The Legislature’s finding is by no means arbitrary, and there is no reason, let alone a strong reason, to reject it.

The *amicus curiae* briefs filed in this case by the West Virginia Library Association and the Ohio County Public Library and other interested public libraries are replete with facts supporting the finding that libraries are education.

If libraries are not education and are not a legitimate school purpose, then:

1. Why has the Kanawha County School Board donated and deeded to the Kanawha County Public Library land next to its schools at Cross Lanes and Sissonville for the building of the branch libraries located there?
2. Why has the Kanawha County School Board built and leased to the Kanawha County Public Library the branch library facility at Riverside High School which is actually located inside Riverside High School?
3. Why has the Kanawha County School Board requested the Kanawha County Public Library to integrate 42 of its school libraries with KCPL's online library catalog?
4. Why do school teachers in their curricula routinely require students to obtain "outside" resources in their research projects by going to the public library?

The premier treatise on the history of education in West Virginia is *A History of Education in West Virginia: From Early Colonial Times to 1949* (1951) which was written by Dr. Charles H. Ambler, Ph.D., Professor Emeritus of West Virginia University. This Court has cited Dr. Ambler's work in the Pauley decision. In his treatise in each chapter for each period or phase of West Virginia education history, Dr. Ambler saw fit to include specific subchapters discussing libraries. *Q.v.* at pp. 224, 441, 666. This fact shows the historic strength and intimate connection between education and libraries.

The funding of Special Act Libraries goes directly to education. Other institutions serve public purposes but Libraries are uniquely educational. The funding at issue does not go to the Clay Center for Arts and Sciences, although the Clay Center is a worthy institution and serves many students. Neither does the funding of Special Act Libraries go to build better public roads, or combat drug addiction, or regulate energy production, or attract business investment in West Virginia, all of which are worthy and legitimate issues which the Legislature should address.

Libraries are uniquely education, and the Legislature found them to be education and has directed that these education dollars be spent on libraries. There is no diversion of funding from education to other unrelated public purposes.

The West Virginia Legislature's finding that libraries are education and a legitimate school purpose is within the authority of the Legislature and is objectively true and valid. It was not contradicted or even addressed by the School Board before the Circuit Court. The record is void on this subject. The Legislative finding should be accepted by this Court and is controlling on the issues involved in this appeal. Since libraries are education, the Legislature has full authority to direct their funding in the education financing system, and there is no constitutional violation of any sort under the revised statute.

D. The relief ordered by the Circuit Court is unclear and not narrowly tailored.

The Circuit Court ordered that “the Kanawha Special Act and Section 18-9A-11 of the Code, to the extent they require the Kanawha Board to divert a portion of its regular levy receipts for the support of the Kanawha Library, or to transfer the Kanawha Board's library funding obligation to its excess levy revenues, be and hereby are null and void and of no force and effect.” (A.R. A0010.) This relief is vague and unclear. Both the West Virginia State Board of Education and the Library interpret this decision as setting aside the Library Special Act. Among other things, the Library filed with the Circuit Court a Motion for Reconsideration, Alteration, or Amendment in order to get clarification on the meaning of the ruling. (A.R. A0310.) The Circuit Court, however, rejected the motion, giving no additional guidance. (A.R. A0031.) Consistent with the presumption of constitutionality and the separation of powers, when a court finds a law to be unconstitutional, in its relief it should act like a surgeon, narrowly and precisely excising

the diseased flesh and leaving the healthy. Here, the Circuit Court did not do so, wielding an axe instead of a scalpel.

E. Government agencies do not having standing to make equal protection claims against the will of the Legislature which created them.

The Library's *Brief* provides extensive citation and analysis on the point that the School Board 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 School Board is merely a non-constitutional, legislatively-created, subordinate division of government, and government does not possess the rights of human citizens who are persons.

The School Board in its *Brief* finds no reported decision on this issue in our state case law. It cites only three West Virginia cases for the proposition of governmental personhood and standing. State ex rel. Board of Education of the County of Grant v. Manchin, 179 W. Va. 235, 366 S.E.2d 743 (1988); State ex rel. Board of Education of the County of Randolph v. Bailey, 192 W. Va. 534, 453 S.E.2d 368 (1994); and *Board I*. None of these cases, however, directly addresses the issue of governmental personhood and standing. It is true that a trial court should address *sua sponte* the standing of a party. State ex rel. Abraham Linc Corp. v. Bedell, 216 W. Va. 99, 602 S.E.2d 542 (2004). However, the important constitutional issue as presented in this case should not be deemed indirectly decided by the silence of the court in failing to address the issue. Constitutional law should not be lightly created by mere *obiter* ("by the way"). Proper jurisprudence and a fulfillment of its duty require that the Court should directly address and pronounce a ruling on the subject.

The School Board has pointed out limited case law from other jurisdictions which supports governmental personhood and standing. The weight of authority, however, is to the contrary. The Library stands by the cases cited in its *Brief* as being well reasoned and consistent

with West Virginia jurisprudence.¹ “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.’” Stubaus v. Whitman, 339 N.J. Super. 38, 770 A.2d 1222, 1227-8 (App. Div. 2001), *cert. den.* 171 N.J. 442, 794 A.2d 181 (2002).

F. There is no “right” of a school board in the excess levy which the Legislature can violate.

The School Board’s *Brief* presents no new law or argument on the Circuit Court’s ruling finding that West Virginia Code § 18-9A-11 violates Article XII, § 5 and Article X, § 1b of the West Virginia Constitution concerning the “right” of the School Board in an excess levy. The dearth of treatment on the issue shows that the School Board has little faith in its position.

Succinctly stated, the county school board as a subordinate governmental body does not possess any unalterable right or power in an excess levy, and the West Virginia Legislature has plenary

¹ Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976); Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933); City of Trenton v. New Jersey, 262 U.S. 182, 188 (1923); Town of Northville v. Village of Sheridan, 655 N.E.2d 22, 274 Ill. App. 3d 784 (Ct. App. Ill. 1995); Board of Commissioners of Howard County v. Kokomo City Planning Commission, 263 Ind. 282, 293, 330 N.E.2d 92 (1975); 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); Bismarck Public School District No. 1 v. State By and Through North Dakota Legislative Assembly, 511 N.W.2d 247, 251 (N.D. 1994); 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); 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); County of Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985); 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)).

power to provide education funding in the manner it has crafted. The statute revised by the Legislature does not violate any of the three specific constitutional restrictions on excess levies (maximum rates, maximum duration, and the consent of the taxpayers in an election). W. Va. Const. art. X, §§ 1, 10. Instead of limiting the School Board, the Legislature provided an additional right to the School Board in the statute, allowing the School Board in its discretion to move the special act library funding obligation to the excess levy if the School Board so desires.

G. The Circuit Court ruled on an important case without any proper evidentiary development.

The School Board argues that the Library should have opposed the motion for summary judgment by filing affidavits or other evidence in opposition. However, in the present case, the Circuit Court granted summary judgment on an important constitutional issue without any affidavits or other evidence filed by the School Board. The Supreme Court has held that “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). Here, no discovery was done, and the Circuit Court failed to enter a scheduling order, despite the motion of the Library requesting one. (A.R. A0112, A0192.) The School Board simply presented no facts concerning “discrimination” of the Legislature against the Kanawha County Board of Education (or any other issues in the lawsuit for that matter) upon which summary judgment could be based. If the statute is being challenged “as applied” and not merely “on its face,” then facts were needed for a decision to be made by the Circuit Court.

H. An injunction against the Kanawha County Public Library Special Act is not the appropriate relief.

For its relief, the School Board is praying for a broad and vague injunction preventing enforcement of both West Virginia Code § 18-9A-11 and the Kanawha County Public Library Special Act. The Library has provided in its *Brief* and in this *Reply Brief* extensive reasons why the Circuit Court erred and the statute as revised by the Legislature is valid and constitutional. Assuming *arguendo* that the Supreme Court accepts the School Board' arguments, the proper relief is not an injunction which would defund and destroy the Kanawha County Public Library as the School Board seeks. In accordance with the guidance given by the Supreme Court in its ruling in *Board I*, the proper and limited correction which would be appropriate would be an adjustment to the state school aid formula statute, giving the School Board a credit in the funding formula which would be payable by the West Virginia State Board of Education. See Syl. pt. 6. Nothing needs to be done to the Library's Special Act, which can and should be left intact as designed by the Legislature in 1957 to provide the innumerable educational benefits of the Library.

III. CONCLUSION

For the foregoing reasons and the reasons presented in the *Petitioner's Brief* previously filed, 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.

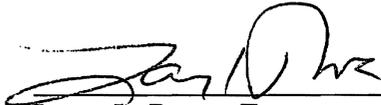
Respectfully submitted this 5th day of March, 2012.

KANAWHA COUNTY PUBLIC
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CERTIFICATE OF SERVICE

I, Christopher J. Winton, Esq., counsel for Petitioner Kanawha County Public Library Board, hereby state that on March 5, 2012, I served true and correct copies of the *Reply Brief of Petitioner Kanawha County Public Library Board* on the parties hereto by United States mail, postage prepaid, addressed as follows:

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