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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NOS. 11-1224 and 11-1486

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

Petitioners,

v.

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

Respondent.

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

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WEST VIRGINIA BOARD OF EDUCATION AND DR. JOREA MARPLE

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

I.

ASSIGNMENTS OF ERROR

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

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

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

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

II.

ARGUMENT

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

1. The Respondent argues that the Legislature had no authority to overrule this Court's finding, made in *Board of Education of the County of Kanawha v. West Virginia Board of Education*, 219 W. Va. 801, 808, 639 S.E.2d 893, 900 (2006) (hereinafter "*Board of Education I*"), that funding of public libraries is funding for "a non-school purpose." There are two problems with this argument.

First, there was no evidentiary record before this Court in *Board of Education I* from which the Court could have concluded, as a matter of law, that public libraries do not *and cannot* serve a legitimate school purpose. Rather, the Court's finding was a matter of fact, based on the

development (or non-development) of the record in *Board of Education I* on that issue. This is why the Legislature, in response to the Court's stay order which was specifically granted in order to give legislators time to fix the school funding formula, set forth a factual test for determining "legitimate school purpose" in West Virginia Code § 18-9A-11(f):

> [where] public schools recognize and choose to avail the resources of public libraries toward developing within their students such legally recognized elements of a thorough and efficient education as literacy, interests in literature, knowledge of government and the world around them and preparation for advanced academic training, work and citizenship, public libraries serve a legitimate school purpose and may do so economically.

In the instant case, the Respondent, which had the burden of proof, did not put on one scintilla of evidence to establish that in Kanawha County, it (the Respondent) does not recognize or choose to avail the resources of the county's public libraries for any of the purposes set forth in the statute.

Second, and fundamentally, if public libraries do not serve a legitimate school purpose as a matter of law, then there is *no* public school support formula mechanism by which the Legislature could fund public libraries in Special Act counties, through recalculation of those counties' local share or otherwise. The formula is not intended to, and indeed cannot, provide funding for non-school purposes.[1] Absent a legislative finding that public libraries serve a school purpose, the Legislature would have to (a) repeal or amend the Special Acts, and (b) leave all counties to their own devices or find a wholly different funding stream for public libraries.

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[1]By its express statement of purpose, the school support formula is intended to "provide for a fair and adequate pay scale for teachers sufficient to ensure teacher excellence, as well as adequate financial support for the *public schools* generally;[and] upon an economic base which ensures level of revenue sufficient to fund the *public schools* . . . ." W. Va. Code § 18-9A-1 (emphasis supplied).

In this latter regard, no matter how diligently the court below attempted to finesse the Special Act issue with its "in combination with" language, it is indisputable that if West Virginia Code § 18-9A-11(h) is unconstitutional – if the Legislature was bound by this Court's finding in *Board of Education I* that libraries do not serve a school purpose – then the Kanawha Special Act, Chapter 178 of the Acts of the Legislature, Regular Session, 1957, must be deemed to be unconstitutional as well, as well as all other Special Acts.

In short, following the logic of the Respondent, there is no way that the Legislature can amend the school funding formula to solve the problem presented in this case. If public libraries do not serve a school purpose as a matter of law, then funding therefor cannot be addressed in the formula, and the Special Acts must be struck down.

2. With respect to the applicability of *State ex rel. Boards of Education v. Chafin*, 180 W. Va. 219, 376 S.E.2d 113 (1988), the Respondent contends that the case stands only for the proposition that the school funding inequality between counties that have excess levy revenues and counties that do not, is not subject to equal protection challenge. The Petitioner believes that this reading of *Chafin* is crabbed, to say the least.

In *Chafin*, the lower court order under review required that a certain percentage of each county's excess levy revenues would be withheld from state school funding and thereafter distributed to other counties on an equitable basis prescribed by the court. This Court reversed, holding that "[t]he authority of the residents of a county to vote for and approve an excess levy for the support of public schools in the county, pursuant to W. Va. Const., art. X, §10, is not subject to equal protection principles." *Id.* at 226, 376 S.E.2d at 113. That is a broad statement of law, founded on a rule of constitutional construction: that a specific constitutional provision, here, West Virginia

Constitution, article X, § 10, cannot be "tempered" by a broad, non-specific, implicit principle (equal protection) found in the general language of another constitutional provision, here, West Virginia Constitution, article III, § 10.

In short, the Court's holding in *Chafin* was not anchored to funding inequalities created by excess levies; rather, the opinion presents a scholarly analysis of constitutional construction in cases where constitutional provisions seemingly clash.[2]

3. The Respondent argues in this Court, as it did in the court below, that West Virginia Code § 18-9A-11 violates equal protection principles in that the statute perpetuates the "less favorable treatment" of Special Act counties condemned in *Board of Education I*.[3] What the Respondent fails to address is the fact that the remedy it seeks – having its library funding obligation paid through the school support funding formula – would necessarily violate equal protection principles as well. As noted by then-Justice Albright in dissent in *Board of Education I*, "those forty-six counties [which do not have Special Acts] will indirectly be paying for the library systems in the nine counties where education funds are diverted by law to public libraries." *Board of Education I, supra*, 219 W. Va. at 808 & n.3, 639 S.E.2d at 897 & n.3. This result – 46 counties pay, and 9 counties benefit – is functionally indistinguishable from the redistribution plan invalidated in

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[2] The Court explained that "a broad constitutional precept [will] be tempered by a more specific one . . . ," and that "a more recent constitutional amendment will prevail over a prior constitutional provision that is in conflict therewith." *Id.* at 225, 376 S.E.2d at 112.

[3] [T]o the extent that [the statute] fails to provide that a county school board's allocated state aid share shall be adjusted to account for the fact that a portion of the county school board's local share is required by law to be used to support a non-school purpose, [it] violates equal protection principles because it operates to treat county school boards required by law to provide financial support to non-school purposes less favorably than county school boards with no such requirement. *Board of Education I, supra*, 219 W. Va. at 808, 639 S.E.2d at 900.

State ex rel. Boards of Education v. Chafin, supra, and vividly illustrates the concern expressed by the Court in that case:

> The equal protection mandates of these various provisions of our Constitution are broad and, literally construed, would reach innumerable objects. Thus, they fall with *Lawson's [Lawson v. Kanawha County Court*, 80 W. Va. 612, 92 S.E. 786 (1917)*]* teaching that requires a broad constitutional precept to be tempered by a more specific one.

Id., 180 W. Va. at 225, 376 S.E.2d at 112.

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

One way or the other it will be up to the voters, who will determine whether or not they want "to approve by a majority vote the imposition of higher taxes on property in the county for the support of the county's public schools . . . ." *State ex rel. Boards of Education v. Chafin, supra,* 219 W. Va. at 226, 376 S.E.2d at 113.

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

The Respondent's argument on this issue is cursory, to say the least. It doesn't even mention West Virginia Constitution, article XII, § 5. With respect to West Virginia Constitution, article X,

§ 1b, the Respondent simply sets forth the text of the provision, notes that it is "clear and unambiguous," and states, without citation of authority or any analysis, that "the Legislature has no authority to mandate the specific content of the excess levy of specific school districts . . . ." Finally, the Respondent restates the Petitioners' argument in *reductio ad absurdum* fashion, as follows: "The Legislature can simply do whatever it wants whenever it wants and everyone just apparently has to 'live with it.'" (Respondent's Brief, pp. 34-36.)

The Petitioners' actual argument, to which no substantive response was made by the Respondent, was a little more complex than that.

First, the failure of the statewide excess levy is irrelevant to determining whether West Virginia Code § 18-9A-11(h) is special legislation; had the statewide levy passed, the voters would have completely lost their "local initiative" and would have been required to take what the State gives them for the support of their schools, period.

Second, as set forth in the preceding argument, the Petitioners contend that this Court's "non school purpose" determination in *Board of Education I* does not foreclose county residents from determining that in *their* counties the libraries *do* serve a critical educational purpose. The whole purpose of an excess levy is to allow voters to decide whether to tax themselves for educational "extras" over and above those provided by the school support formula, i.e., salary enhancements for teachers, funds for extracurricular activities, and the like.

Third, the Respondent's rights under article XII, § 5, and article X, § 1b of the West Virginia Constitution are not plenary; a county board of education's authority to levy taxes for the support of the county's public schools is exercised "within constitutional *and statutory* limits." *State ex rel. Dilley v. West Virginia Public Employees Retirement System*, 180 W. Va. at 26, 375 S.E.2d at 204

(emphasis supplied). In that regard, there exists a statutory grant of authority, W. Va. Code § 10-1-2, allowing libraries to be established, maintained or supported by, *inter alia*, "the imposition of an excess levy for library purposes, in accordance with the provisions of section sixteen, article eight, chapter eleven of this code." *See Byrd v. Board of Education of Mercer County*, 196 W. Va. 1, 467 S.E.2d 142 (1995) (county board of education utilized its excess levy as a way of funding the county's public libraries).

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

The Respondent adroitly ducks this issue by attempting to re-frame it as follows: "The Kanawha Library had adequate time and opportunity to conduct any necessary discovery." (Respondent's Brief, p. 36.) In so doing, the Respondent has totally and completely failed to address the foundational question raised by these Petitioners: whether summary judgment was appropriate notwithstanding the fact that *no scheduling order had ever been entered in the case*.

There was no judicial management of this case, as required by Rule 16(b) of the West Virginia Rules of Civil Procedure; rather, the case was managed by the attorneys, who did a pretty poor job of it. After the case lurched its way through three different judges, none of whom ever entered a scheduling order, it was heard and decided on a motion for summary judgment. Along the way there had been two attempts by the parties to set a scheduling conference, but the first conference was derailed by a motion to disqualify the judge and the second was derailed by a hearing on a motion to dismiss.

Significantly, the lack of judicial management of this case led to a situation where neither these Petitioners nor the Petitioner Library Board even realized, until it was too late, that the constitutionality of the Kanawha Special Act, Chapter 178 of the Acts of the Legislature, Regular Session, 1957, was at issue.[4] After all, the Act has previously been upheld by this Court, *Kanawha County Public Library v. The County Court of Kanawha County*, 143 W. Va. 385, 102 S.E.2d 712 (1958), as has the Raleigh Special Act, *Hedrick v. County Court of Raleigh County*, 153 W. Va. 660, 172 S.E.2d 312 (1970). All told, Special Acts have been enacted for nine counties over a period of sixty years, from 1933 (Ohio County) through 1994 (Upshur County).

With respect to the scheduling order issue, it is noteworthy that Respondent does not even cite, let alone discuss or attempt to distinguish, the cases upon which we rely: *Elliott v. Schoolcraft*, 213 W. Va. 69, 576 S.E.2d 796 (2002); *State ex rel. Pritt v. Vickers*, 214 W. Va. 221, 588 S.E.2d 210 (2003); and *Caruso v. Pearce*, 223 W. Va. 544, 678 S.E.2d 50 (2009). In *Caruso*, the Court went a step further than it had in *Elliott* and *Pritt*, by clarifying the law in a syllabus point:

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

Syl. Pt. 2, *Caruso v. Pearce, supra.*

In summary, in its brief the Respondent does not mention the scheduling order issue, does not discuss or distinguish the cases cited by the Petitioners, and does not discuss the problems

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[4]Had these Petitioners realized that the Special Act was being challenged, they would have moved to dismiss on the ground that they were not the proper parties to defend the constitutionality of the Act, which mandates the diversion of some regular tax levy receipts of Kanawha County for support of the Kanawha County Public Library.

resulting from the lack of active judicial management of the case (other than to blame all problems on the Petitioners' attorneys, who were apparently too dumb to realize what was in the Complaint and lacked the initiative to get discovery completed despite the lack of any time frame set by the court below for completion thereof).

Rule 10(d) of the Revised Rules of Appellate Procedure provides, in relevant part, that "[i]f the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." Here, since the Respondent failed to respond to the scheduling order issue raised by these Petitioners, this Court should deem the Respondent to be in agreement that the lower court erred in failing to enter a scheduling order prior to deciding the merits of the case.

III.

CONCLUSION

For all of the reasons set forth in the Petitioners' briefs in No. 11-1224 and the briefs of the Petitioner Kanawha County Public Library Board in No. 11-1486, and all of the reasons apparent on the face of the record, the judgment of the Circuit Court of Kanawha County should be reversed.

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

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CERTIFICATE OF SERVICE

I, Barbara H. Allen, Managing Deputy Attorney General and counsel for Petitioners West Virginia Board of Education and Dr. Jorea Marple, do hereby certify that a true and accurate copy of the foregoing "Reply Brief of Petitioners in No. 11-1486, West Virginia Board of Education and Dr. Jorea Marple" was served upon counsel of record by depositing the same in the United States Mail, first class postage prepaid, this 2nd day of March, 2012, addressed as follows:

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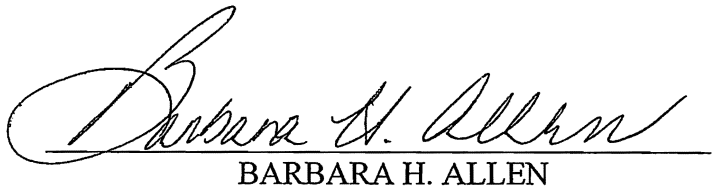

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