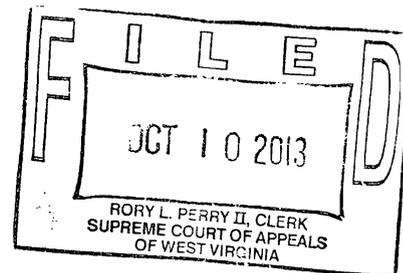


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0572



**BETH BENNETT,**

*Petitioner,*

v.

**STATE OF WEST VIRGINIA,**

*Respondent.*

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**SUMMARY RESPONSE**

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**RESPONDENT'S BRIEF**

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On August, 26, 2013, Beth Bennett (“the Petitioner”), by counsel, filed a timely notice of appeal from a Sentencing Order entered by the Kanawha County Circuit Court on April 24, 2013, and an Order entered by the Kanawha County Circuit Court denying the Petitioner’s Motion for Reconsideration of Sentence. (Case No. 13-M-2476). On June 6, 2013, this Court entered an order directing the respondent to file a response. Comes now the State of West Virginia, by counsel, Julie A. Warren, Assistant Attorney General, and files this Summary Response to the petition for appeal.

**I.**

**STATEMENT OF THE CASE**

On October 8, 2012, pursuant to West Virginia Code § 18-8-4(b), the Assistant Director of Attendance for the Kanawha County Schools, Jennifer Lilly, sent the Petitioner a Notice of Unexcused Absence from School, whereby the Petitioner was notified that her minor son, who was in the first grade at Anne Bailey Elementary School, had accumulated 5.5 unexcused absences. (App. at 1.) The Petitioner alleges that she sent Ms. Lilly a letter dated October 22,

2012, claiming that her son had missed school on October 1 and 2 due to a fever, but he was not seen by a doctor until October 7, and he also missed school on October 8 and 9 due to illness. (*Id.* at 2.) She further claimed he missed a half day on October 18 due to a “regular check-up with his pediatrician.” (*Id.*) On November 19, 2012, Ms. Lilly sent another written correspondence to the Petitioner informing her that her minor child now had 9 days of unexcused absences, and she confirmed a meeting with the Petitioner to discuss the matter with her and the Prosecuting Attorney on November 26, 2012. (*Id.* at 22.) In the letter, the Petitioner was also warned that failure to appear at this meeting would result in truancy charges being filed. (*Id.*)

The Petitioner presents handwritten documents that she claims amount to excused absence requests, but are signed by her not a medical professional. The first reflects an absence on August 22, 2012, and does not state a cause for said absence, and the remaining two reflect absences on August 28, 2012 and October 3, 2012 due to illness. (*Id.* at 3-5.) The Petitioner did present a letter from Dr. Carol J. Frail, of ABC Pediatrics, excusing the minor from school “beginning October 18, 2012 through October 18, 2012” due to a medical condition. (*Id.* at 6.)

On March 21, 2013, a criminal complaint was filed against the Petitioner, alleging that the minor had 15.5 unexcused absences on the following days: August 22, 2012, August 28, 2012, October 3, 2012, October 8, 2012, November 5, 2012, November 16, 2012, December 4, 2012, December 11-13, 2012, January 4, 2013, January 10, 2013, and February 7, 2013, and half days on September 25, 2012, November 2, 2012, December 14, 2012, February 6, 2013, and March 7, 2013. (*Id.* at 7.) A hearing on the complaint commenced before Judge Bloom of the Kanawha County Circuit Court on April 24, 2013. (*Id.* at 8.) During her truancy hearing, the Petitioner appeared *pro se* and entered a plea of guilty. (*Id.* at 27.) Ms. Lilly and the Petitioner

testified that the Petitioner had turned in doctor's excuses and parental excuses since the complaint was filed but they both confirmed there were still 5 unexcused absences remaining. (*Id.* at 60-61.)

The Petitioner signed a guilty plea that set forth the proper statutory authority and language under which she was being charged with truancy, W. Va. Code § 18-8-2, and confirmed that the court had informed her of the statutory penalty for conviction under W. Va. Code § 18-8-2, and she confirmed with her initials that she understood the charge, the penalties under the statute, the consequence for repeat offense under the statute, and her legal rights. (*Id.* at 9-10.)

Upon acceptance of the Petitioner's guilty plea, the court entered a Sentencing Order, which required the Petitioner be placed on probation for 90 days, perform 5 days of community service, and pay a \$50 fine and \$160.80 in court costs. (*Id.* at 12.)

The Petitioner then brought a Motion for Reconsideration of the Sentence, wherein she moved to withdraw her guilty plea, or alternatively, to reconsider the penalty set forth in the Sentencing Order. (*Id.* at 13-14.) In the motion, the Petitioner claimed the following: she was not represented by counsel, she did not understand her rights, that the school board did not follow proper procedures before filing the complaint against her, policy permits 5 unexcused absences, and the sentence imposed was not proper. (*Id.* at 13-15.) The Court denied said motion on May 13, 2013. (*Id.* at 76.) On May 28, 2013, the Petitioner moved the court for a stay of the execution of the sentence pending appeal, but the court denied this request. (*Id.* at 77-80.)

## II.

### ARGUMENT

#### A. Standard of Review.

The West Virginia Supreme Court has set forth the standard of review for an appeal of a lower court's order and its supporting findings of fact:

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 2, *Walker v. W. Va. Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

#### B. The Court properly accepted Petitioner's truancy plea based on the 5 unexcused absences.

The circuit court did not abuse its discretion by accepting the Petitioner's guilty plea to the misdemeanor truancy charge pursuant to West Virginia Code § 18-8-2. The Petitioner's argument that 5 unexcused absences from school is permitted fails as a matter of law.

Here, the court established a clear factual basis during the hearing for entering a judgment on the Petitioner's guilty plea, pursuant to Rule 11(f) of the W. Va. Rules of Criminal Procedure. First, the Petitioner expressly admitted to the court during her hearing that her son had accumulated 5 unexcused absences. The court asked the Petitioner, "why is your child not going to school?" (*Id.* at 28.) The Petitioner responded "I have turned in doctor's notes and the rest of my parent's notes that I was able to use, and we have it down to five unexcused absences. Ms. Lilly can tell you that, as well." (*Id.* at 27-28.) The court then inquired in the cause of the absences, to which she responded, claiming the minor had been ill. (*Id.* at 60.) At no time during the hearing, or in this appeal for that matter, did the Petitioner produce written statements

from a medical provider to support her claim that the cause of the 5 unexcused absences were due to illness as required under W. Va. Code § 18-8-1(d), which states “...the written statement of a licensed physician or authorized school nurse is required.” Instead, the Petitioner admitted to the court that these 5 absences were unexcused.

The Assistant Director of Attendance for the Kanawha County Schools, Jennifer Lilly, also appeared and upon inquiry from the court, confirmed the Petitioner’s minor son had accumulated 5 unexcused absences, and that he had not missed any school since March 7, 2013. (*Id.* at 28.) The court asked the Petitioner if she had a criminal record and if she was employed before accepting the Petitioner’s guilty plea and issuing a sentence. (*Id.*) Therefore, the court exercised due diligence and established, through the Petitioner’s admissions and the testimony of the school official, that the Petitioner was indeed guilty of truancy, pursuant to W. Va. Code § 18-8-2.

The Petitioner contends that 5 unexcused absences is permitted, which is contrary to the statutory authority and supporting case law. In fact, this Court in *In re J.S.* dealt with the very issue presented by the Petitioner here, in the context of adjudicating a minor as a status offender due to habitual truancy. *In re J.S.*, 12-0567, 2013 WL 500166 at 1 (W. Va. Feb. 11, 2013). There, the minor’s mother asserted the same argument as this Petitioner, that the minor “only had five total unexcused absences,” and that “she was not contacted by the school regarding the absences.” (*Id.*) In response, the State contended “that any notice issues are irrelevant on appeal and that the only relevant issue on appeal is whether the child was properly found to be a status offender.” (*Id.*) This Court did not find the lack of notice compelling, and held that the State had presented sufficient evidence that the minor had 8 unexcused absences, but further held that

“assuming petitioner’s contention that the child only missed five days is true, the circuit court did not err in finding that the minor child was truant.” (*Id.*)

The Petitioner does not contest the fact that her son had at least 5 unexcused absences from school. Instead, she claims that 5 unexcused absences are allowed and do not render her son truant, or at the least there is confusion as to how many unexcused absences a student is permitted to accumulate. The Petitioner’s argument is contrary to the rule of law, and based upon allegations of unsubstantiated verbal hearsay from her son’s principal, Ms. Lilly, and the WV State Board of Education, that 5 unexcused absences were permitted. (Pet’r’s Br. at 6.) The Petitioner mentions that this policy is reflected in Kanawha County School Board handouts, but she fails to include said handouts in her Appendix. (*Id.* at 7.)

The supporting record is clear. Upon the accrual of 15 unexcused absences a complaint was filed against the Petitioner pursuant to West Virginia Code § 18-8-4, outlining the unexcused absences accrued by the minor in violation of West Virginia Code § 18-8-2. The Petitioner admitted to the court, and she admits in her appeal, that she caused her minor child to accrue 5 unexcused absences in violation of West Virginia Code § 18-8-2. During her hearing on the substance of allegations set forth in the complaint, the Petitioner entered a plea of guilty upon a knowing and fully informed guilty plea as evidenced by guilty plea signed by the Petitioner. Therefore, in accordance with the plea, Petitioner was guilty of a misdemeanor, and she plead guilty to said misdemeanor, and the court properly accepted her guilty plea.

### **C. Statutory Sentence.**

The Petitioner argues that the sentence imposed upon her by the court, which included a a \$50.00 fine and \$160.80 in court costs, 90 days probation and 5 days community service, is an illegal sentence and should be overturned by this Court.

W. Va. Code §18-8-2 states in part:

Any person who, after receiving due notice, shall fail to cause a child or children under eighteen years of age in that person's legal or actual charge to attend school in violation of the provisions of this article or without just cause, shall be guilty of a misdemeanor, and shall, upon conviction of a first offense, be fined not less than fifty nor more than one hundred dollars together with the costs of prosecution, or required to accompany the child to school and remain through the school day for so long as the magistrate or judge may determine is appropriate. The magistrate or judge, upon conviction and pronouncing sentence, may delay the sentence for a period of sixty school days provided the child is in attendance everyday during said sixty-day period. Following the sixty-day period, if said child was present at school for every school day, the delayed sentence may be suspended and not enacted. ....

Although W. Va. Code § 18-8-2 does not specifically include probation as an expressed penalty under the statute, one might surmise that the Court exercised its discretion pursuant to the general probationary statute, W. Va. Code § 62-12-1, which states that “[a]ny circuit court of this State shall have authority as provided in this article to place on probation any person convicted of a crime.”

Since this Court has stayed the lower court's Sentencing Order at the Petitioner's request, then, assuming the Petitioner has not paid the imposed fine and/or court costs or served any of the probationary and/or service portion of her sentence, this matter may be remanded to the magistrate court for the purpose of re-evaluating the Petitioner's sentence as provided in W. Va. Code § 18-8-2, which is either a fine, or a requirement that the Petitioner attend school with her minor child for a period of time to be determined by the court.

**D. The Petitioner was provided proper notice of her child's unexcused absences.**

The Petitioner's argument that the Kanawha County Board of Education failed to provide her with “due notice” is irrelevant to the fact that she has admittedly caused her minor child to accrue 5 unexcused absences from school. However, for the sake of argument, the Petitioner's

claim that she did not receive notice of her child's truancy is simply untrue as set forth in the record.

*In re J.S.* the parent of the truant minor argued that "she was not contacted by the school regarding the absences," and this Court held that "[p]ursuant to West Virginia Code § 18-8-4(b), once a child misses five or more days of school with unexcused absences, a complaint is made to the local magistrate." *In re J.S.*, 2013 WL 500166 at 1. The Court did not find the absence of notice to the Petitioner a compelling argument on appeal, and focused its attention on the fact that a complaint is properly filed once a child has 5 or more unexcused absences from school. (*Id.*) In the instant case, the child had accrued 15 unexcused absences by the time the complaint was filed with the magistrate, and it was only upon receiving the summons for said complaint that the Petitioner tendered the remaining doctor and parental excuses, and even still, the Petitioner admits her child still had 5 unexcused absences remaining.

Regardless of the relevancy of notice to this appeal, the fact is the Petitioner was repeatedly notified, in writing, of her child's truancy from school. On October 8, 2012, Jennifer Lilly, Assistant Director of Attendance for the Kanawha County Schools, sent the Petitioner a Notice of Unexcused Absence from School, informing her of her child's 5.5 unexcused absences. (App. at 1.) Ms. Lilly then sent the Petitioner another notice on November 19, 2012 informing the Petitioner that her child had accrued a total 9 unexcused absences. (*Id.* at 22.) Despite these two written notices, the Petitioner continued to cause her minor child to be absent from school without a proper excuse. In fact, after the November 19, 2012 letter from Ms. Lilly, the child accrued an additional 8.5 unexcused absences between December 4, 2012 and March 7, 2013. (*Id.* at 32.) At the time the complaint was against the Petitioner for truancy the Petitioner's child had 15 unexcused absences. (*Id.*) It is apparent from the hearing transcript

and the Petitioner's brief, that it was not until the complaint was filed that the Petitioner made an effort to provide Ms. Lilly with doctor and parental excuses that reduced the number of unexcused absences to 5. (*Id.* at 60-61; Pet'r's Br. at 11.)

Therefore, the Petitioner's argument that she did not receive "due notice" must fail, because she had actual knowledge from the school of her child's excessive absences.

**III.**

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court dismiss the petition and deny any and all relief requested by the Petitioner.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Respondent,*

By Counsel

PATRICK MORRISEY  
ATTORNEY GENERAL

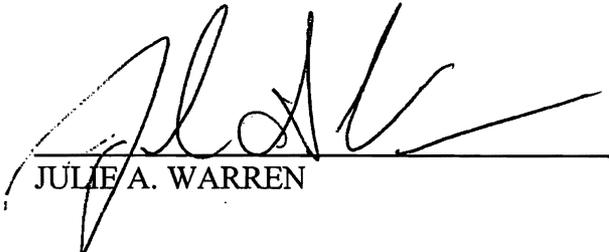


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**CERTIFICATE OF SERVICE**

I, Julie Warren, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the herein *Summary Reseponse* upon the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 10th day of October, 2013, addressed as follows:

G. Wayne Van Bibber, Esq.  
Maggie K. Wall, Esq.  
The Law Offices of G. Wayne Van Bibber  
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