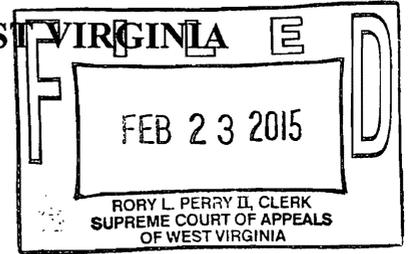


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 14-1213



CABELL COUNTY BOARD OF
EDUCATION,

Petitioner,

vs.)

LENNIE DALE ADKINS,

Respondent.

Appeal from a final order of the
Circuit Court of Kanawha County,
West Virginia, Civil Action No.
12-AA-60

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. The Circuit Court of Kanawha County erred in ruling that the Board of Education's suspension of the respondent was not authorized. Pursuant to Article XII, § 1 of the Constitution of West Virginia, W. Va. Code Chapters 18 and 18A, and the implied duties and powers vested in the Board of Education, the Board of Education was authorized to suspend the respondent based upon the eleven felony complaints relating to possession of child pornography and the employment or use of a minor to produce or assist in doing sexually explicit conduct, pending resolution of those criminal charges.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The respondent, Lennie Dale Adkins, was employed as a teacher by the Cabell County Board of Education (the "Board" or the "Board of Education"). Appendix 4. By letter from Superintendent William Smith dated May 26, 2011, the respondent was placed on paid administrative leave after he informed school authorities that he was soon to be arrested by the West Virginia State Police following an investigation of alleged possession of child pornography. App. 38.

On July 18, 2011, the Board accepted the Superintendent's recommendations, ratifying the respondent's paid administrative leave and unpaid suspension, and extending the respondent's unpaid suspension until such time as the felony criminal charges against him were finally resolved. App. 6; App. 43.

Thereafter, the respondent requested under W. Va. Code § 18A-2-8(c) a level three hearing before the West Virginia Public Employees Grievance Board (the "Grievance Board"). He asked the Grievance Board to overturn his unpaid suspension and to order that he either be

placed on paid administrative leave or, in the alternative, assigned to work in a position where he would have no contact with students. App 1.

On November 1, 2011, the Grievance Board's administrative law judge held a level three hearing pursuant to W. Va. Code § 6C-2-4(c). App. 2. In its subsequent written decision, containing findings of fact and conclusions of law, the Grievance Board denied relief to the respondent. App. 14. In support of its decision, the Grievance Board cited a number of its prior opinions for the rule that a county board of education may indefinitely suspend an employee without pay while felony criminal proceedings are conducted, provided that some particular event will eventually bring a conclusion to the suspension (such as completion of a criminal trial). App. 12-13.

The respondent then appealed to the Kanawha County Circuit Court pursuant to W. Va. Code § 6C-2-5(b). The Circuit Court, by order dated October 21, 2014, reversed and remanded the decision of the Grievance Board, ruling that the Board of Education was not authorized to suspend the grievant based upon the felony complaint. App. 37. The Board of Education, petitioner herein, then appealed to this Court.¹

B. STATEMENT OF THE FACTS

The respondent, Lennie Dale Adkins, was employed as a teacher by the Board of Education (the "Board" or the "Board of Education"). App. 4. By letter from Superintendent William Smith dated May 26, 2011, the respondent was placed on paid administrative leave after

¹ Although it is not applicable to the issue before this Court, following the disposition of the criminal proceedings, the Respondent was later terminated from his employment with the Board of Education. Thereafter the respondent voluntarily suspended his teaching license. A related, separate case involving the termination of the respondent is before this Court.

he informed school authorities that he was soon to be arrested by the West Virginia State Police following an investigation of alleged possession of child pornography. App. 38.

On May 27, 2011, eleven felony criminal complaints were filed against the respondent in the Magistrate Court of Cabell County. The complaints bore the oath or affirmation of a West Virginia State Police officer. App. 45-57.

Each of the criminal complaints states that the State Police officer had received information that the respondent

had been soliciting minors via computer by instant messaging inappropriate conversations, suggesting pornography sites, questioning their sexual orientation and making homosexual suggestions.

App. 45-57

Each of the criminal complaints also state that the State Police officer had executed a search warrant on the respondent's residence, seizing various forms of media including "computer hard drives, cell phones, ipods, etc.," and that the seized media were submitted to the West Virginia State Police Digital Forensic Lab for analysis. App. 45-57.

The first eight criminal complaints each charged the respondent with a felony under W. Va. Code § 61-8C-3, "Distribution and Exhibiting of Material Depicting Minors Engaged in Sexually Explicit Conduct." App. 45-52. Taken together, these criminal complaints state that the State Police officer examined all of the Digital Forensic Lab evidence and discovered that the respondent had possession of:

- a. two pictures taken in 2008 of a then-16-year-old nude male Cabell Midland High School student with erect genitals, and that the pictures had been emailed to the respondent at the respondent's request; and

b. six pictures taken in 2009 of a then-17-year-old nude male Cabell Midland High School student (whom the respondent had taught) with erect genitals, and that the pictures had been emailed to the respondent at the respondent's request.

App. 45-52.

The ninth criminal complaint charged the respondent with a felony under W. Va. Code § 61-8A-5, "Employment or Use of Minor to Produce Obscene Matter or Assist in Doing Sexually Explicit Conduct." App. 53. The complaint states that the State Police officer examined all of the Digital Forensic Lab evidence and discovered that the respondent:

a. in October of 2010, chatted through instant messaging with an unidentified male, in the company of that male's fifteen- and nine-year-old male cousins, about having sexual intercourse with the minors; had asked the male to have sexual intercourse with the fifteen-year-old, take pictures, and send them to the respondent; and had urged the male to take a picture of the nine-year-old performing oral sex on the male with the fifteen-year-old joining in; and

b. in November of 2010, chatted through instant messaging with the same unidentified male about the male having sex with the fifteen-year-old male cousin, asking specific questions about the sexual acts and cautioning the male to be careful because the cousins were juveniles.

App. 53.

A Cabell County Magistrate found probable cause from the facts stated in the complaint, thus, initiating a criminal proceeding as to each of the felony criminal complaints. App. 4-5. The parties stipulated that, at the time of the level three hearing, nine of the criminal complaints were pending against the respondent. App. 4.

The respondent was arrested on the eleven felony charges related to the distribution and exhibiting of material depicting minors engaged in sexually explicit conduct. By letter dated July 8, 2011, the Superintendent, recognizing the gravity of these alleged crimes, and in accordance with extensive Grievance Board precedent, suspended the respondent's contract, without pay, based upon the pending felony charges. App. 41.

In the same letter, the Superintendent notified the respondent that the Board would be asked at its regular July meeting to ratify the Superintendent's actions and extend the suspension of the respondent's contract, without pay, until all the felony charges then pending against him were finally resolved. The Superintendent also informed the respondent of his right to appear at the Board meeting to be heard. App. 41.

The respondent did not exercise his right to appear at the meeting to be heard. App. 6. On July 18, 2011, the Board accepted the Superintendent's recommendations, ratifying the respondent's paid administrative leave and unpaid suspension, and extending the respondent's unpaid suspension until such time as the felony criminal charges against him were resolved. App. 43.

SUMMARY OF THE ARGUMENT

The Board of Education acted within the scope of its authority in suspending the respondent, based upon the felony complaint and charges, pending resolution of the multiple felony charges against him. The Board of Education's authority to do so, predicated on its authority and responsibility to protect the safety and welfare of school children, is multifaceted.

West Virginia Code § 18A-2-8 sets forth a list of causes upon which a suspension may be based, insofar as the alleged actions have a rational nexus with the employee's ability to perform his job duties. However, § 18A-2-8 does not control those extremely limited situations in which the alleged actions of a school employee have a rational nexus with, and pose great danger to, the Board of Education's duty to provide a safe and secure school environment. Rather, in the latter extremely-limited instance, the Board of Education's power to suspend an employee is based upon the express constitutional duty, and necessarily implied authority, to provide a safe and secure environment to the school children.

The Board of Education, on behalf of the State of West Virginia, is constitutionally mandated to provide a thorough and efficient school system, which, as this Court has consistently and unequivocally ruled, requires the Board to provide a safe and secure environment for school children. *Cathe A. v. Doddridge County Bd. of Educ.*, 490 S.E.2d 340, 347, 200 W.Va. 521, 528 (W.Va.,1997); § 1. Education, WV CONST Art. 12, § 1. By necessary implication, the Board of Education has the authority, and indeed the responsibility, to effect the Constitution's guarantee to students of a safe and secure school environment. Accordingly, in extremely limited situations, such that the safety of students is compromised by the circumstances, the Board of Education must take actions to protect the school children of this State.

Moreover, the Board of Education's authority in the case at bar, although founded in the Constitution, is statutorily mandated. Section 18A-5-1 of the West Virginia Code dictates that professional educators must stand in the place of parents, guardians, or custodians. In other words, pursuant to Constitutional mandate, the Legislature has directed school personnel to stand *in locos parentis*. Thus, in this case, the Principal and the Superintendent, acting pursuant to this constitutionally-based statutory mandate, took the necessary action to protect the students of the Cabell County school system by suspending an individual who was charged with multiple felonies, including possession and distribution of child pornography and use of a minor to produce obscene matter or assist in doing sexually explicit conduct. App. 45-53.

The Board of Education's inherent authority to suspend the respondent under the peculiar circumstances of this case, although founded in the constitution and required by statute, is also in accord with case law from other jurisdictions. Other courts have held, in related contexts, that statutory limitations do not divest school boards of their implied authority to suspend school

personnel accused of serious misconduct, within the constraints of due process. *See Burger v. Board of School Directors of McGuffey School Dist.*, 839 A.2d 1055, 1061, 576 Pa. 574, 584 (Pa.,2003). This case presented an extremely limited situation to the Board of Education: a teacher, charged with multiple felony crimes that have a patent nexus with, not only the teacher's ability to effectively perform his job functions, but the Board of Education's inherent authority to provide a safe and secure school environment.

When presented with these facts, the Board of Education had limited options. It could base the suspension on immorality, which in turn, would require it to churn over the criminal evidence, thus, interfering with the criminal investigation. Civil proceedings that churn over the same evidentiary material constitute improper interference with criminal proceedings. *Peden v. U. S.*, 512 F.2d 1099, 1103, 206 Ct.Cl. 329, 338 (Ct.Cl. 1975).

Further such action would have required it to present the testimony of the children of the school in which the respondent worked. That, in turn, would interfere with the Board's duty to provide those affected children with the educational environment promised to them by the Constitution.

Prudently, the Board of Education based the temporary suspension on the felony complaint alone, pending resolution of the criminal charges. In doing so, the Board of Education relied upon precedent of the Supreme Court of the United States, the Constitution, a concomitant statutory duty, established precedent of this Court, and a long line of Grievance Board precedent confirmed by other circuit courts. For these reasons, this Court should hold that the Board of Education was authorized to suspend the respondent under the peculiar circumstances of this case, and reverse the order of the Circuit Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in the present case because the issue before the Court involves a novel question of the constitutional, statutory, and implied authority of the Board of Education to take actions necessary to provide a safe and secure school environment. Moreover, the precise issue before this Court is one of first impression. Further, because the issue involves the authority of the Board to take actions necessary to provide a safe and secure school environment, a compelling interest in this State, the case involves an issue of fundamental public importance. Finally, the issue before this Court involves an interpretation of the Constitution's mandates relating to education. Therefore, pursuant to the West Virginia Rules of Appellate Procedure, oral argument under Rule 20 is necessary.

ARGUMENT

I. Standard of Review

In cases involving administrative agency decisions, this Court reviews questions of law *de novo*. *Powell v. Paine*, 221 W. Va. 458, 461-62, 655 S.E.2d 204, 207-08 (2007). Pursuant to W. Va. Code § 29A-5-4, findings of fact by the administrative law judge are accorded deference unless the reviewing court believes the findings are clearly wrong or arbitrary and capricious. *Id* at 462. A finding is clearly erroneous if there is no substantial evidence in the record supporting it or, where there is evidence to support the finding, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Bd. of Educ. of County of Mercer v. Wirt*, 192 W.Va. 568, 579 n. 14, 453 S.E.2d 402, 413 n. 14 (1994).

II. The Board of Education was constitutionally required, statutorily mandated, and inherently authorized to suspend the respondent based upon the felony criminal complaint, pending resolution of the criminal charges.

Article XII, § 1 of the Constitution of West Virginia requires the State to provide “for a thorough and efficient system of free schools.” § 1. Education, WV CONST Art. 12, § 1. Further, “providing a safe and secure environment wherein our children can learn is implicit in the constitutional guarantee of a ‘thorough and efficient school system.’” *Cathe A. v. Doddridge County Bd. of Educ.*, 490 S.E.2d 340, 347, 200 W.Va. 521, 528 (W.Va.,1997) (citing Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 910, 199 W.Va. 400, 401 (W.Va.,1996)). The Bill of Rights and Responsibilities for Students and School Personnel gives students the “right to attend a school and ride a bus that is safe....” W. Va. Code Ann. § 18A-5-1c(b)(1) (West). Moreover, § 18A-5-1 of the West Virginia Code dictates that principals stand *in locos parentis*: “[professional educators] shall stand in the place of the parent(s), guardians or custodians in exercising authority over the school....” W. Va. Code Ann. § 18A-5-1 (West). Therefore, to protect the safety of students, and only in appropriate, limited circumstances, when faced with serious allegations of school personnel misconduct, a board of education may suspend an employee based upon a felony complaint, pending resolution of the criminal charges. *See Burger v. Bd. of Sch. Directors of McGuffey Sch. Dist.*, 576 Pa. 574, 585, 839 A.2d 1055, 1062 (2003) (suspension of school official authorized based upon sexual harassment charges).

A. The Board of Education, pursuant to the Constitution, was required to take necessary action to protect the safety and security of the school children.

The State of West Virginia is required to provide a safe and secure environment in which children may learn. *Cathe A.*, 200 W. Va. at 528, 490 S.E.2d at 347 (1997). Without this “safe and secure environment, a school is unable to fulfill its basic purpose of providing an education.”

Id. No statutory language can trump this constitutional right. Indeed, the West Virginia Legislature has set forth this constitutional right in statutory form. West Virginia Code § 18A-5-1c(b)(1) declares that students have a right to attend a school that is safe. Further, Article XII of the Constitution gives the Legislature the authority to provide for county and superintendents and other officers as may be necessary to carry out the objects of Article XII. W. Va. Const. art. XII, § 3. Moreover, the county superintendents, along with the boards of education, are granted the authority required by the State Board or such other duties prescribed by law. W. Va. Code Ann. § 18-4-10 (West); W. Va. Code Ann. § 18-5-34 (West). Such authority and duties include the mandate to provide a safe and secure school environment as prescribed by Article XII, § 1.

Accordingly, in the case at bar, the Board of Education was required to take necessary actions to protect the safety and welfare of the students. The Circuit Court presumed that its hands were tied, dismissed the inherent authority vested in the Board of Education, and held that the Board of Education, in all circumstances, is limited to the authority in West Virginia Code § 18A-2-8. Section 18A-2-8(a) states that a board may suspend or dismiss any person in its employment for, among other things, immorality, incompetency, cruelty, or the conviction of a felony, or guilty plea or a plea of *nolo contendere* to a felony charge. This Court has stated that a teacher's suspension is reasonable if it is based upon the causes found in § 18A-2-8. *Graham v. Putnam Cnty. Bd. Of Educ.*, 212 W. Va. 524, 529, 575 S.E.2d 134, 139 (2002).

1. **W. Va. Code § 18A-2-8 does not control those situations in which the Board of Education takes necessary actions to protect the safety and security of the school children.**

This Court has not held, and the statute does not dictate, that § 18A-2-8 divests a board of education of all other powers and duties, including, and especially, those required by the

Constitution. In other words, § 18A-2-8 is not a talisman to all other authority and duties of the Board of Education. The Board of Education's ultimate goal, policy, and mandate, as prescribed by the Constitution, is to provide a safe and secure environment in which students may learn and prosper. Section 18A-2-8, on the other hand, is limited in its scope. It prescribes the Board's authority to suspend a teacher, but only insofar as the teacher's alleged actions affect the teacher's ability to perform his job duties. However, in limited circumstances, the Board is required to exercise its inherent and constitutional authority to protect the safety and welfare of its students. In other words, § 18A-2-8 governs the Board's authority to suspend an employee when that employee's alleged actions affect his ability to perform his job functions. However, when the employee's alleged conduct affects the safety of the school environment, the Board of Education's authority is based upon Article XII, § 1 of the Constitution.

The Board of Education was presented with a situation in which one of its teachers, the respondent, was charged with eleven counts of possession of child pornography, involving students from the school in which the respondent taught. App. 45-52. The specific dangers, relating to the safety of the involved students and other students in the school, in addition to the nexus between those charges and the teacher's inability to perform his educational duties, were inextricable. In that regard, § 18A-2-8 and its bases for suspension were applicable, but only inasmuch as the respondent's ability to effectively perform his job was effected.

- 2. Article XII, § 1 provides the Board of Education's authority to suspend a school employee where an employee's alleged actions affect the Board's duty to provide a safe and secure school environment.**

To the extent that the respondents alleged actions directly affected the safety of the school environment, § 18A-2-8 is not dispositive. Rather, the Board of Education's constitutional duty and inherent authority, pursuant to Article XII, § 1, to protect its students, provided the

authority for the Board of Education's actions. As such, the Board of Education's authority was based upon the constitution, and limited only by the constitutional due process rights of the respondent. Thus, because the respondent was given ample opportunity to be heard and present evidence, his due process rights were not violated.

Here, the Board was authorized, without question, to take necessary actions to protect the school children. Again, the respondent was charged with eleven felonies relating to possession of child pornography and the employment or use of a minor to perform sexually explicit conduct. App. 45-57. Moreover, certain of the children involved attended the school at which the respondent worked, thus, confounding the safety of the school children. App. 45-52. Such allegations, if true, are unquestionably inconsistent with a safe school environment. Therefore, in accord with its constitutional duty, the Board was inherently authorized and required to suspend the respondent based upon the felony charges.

In summary, when a school employee's actions affect the employee's ability to perform his jobs functions, § 18A-2-8, and its specific bases for suspension govern the authority of a board of education. However, where, as in this case, the employee is charged with serious misconduct, such that the employee's presence at the school threatens the students' constitutional right to a safe and secure school environment, the Board of Education's authority is based upon its duty to provide a safe and secure school environment under Article XII, § 1 of the Constitution. Therefore, because the respondent's eleven felony charges, relating to possession of child pornography and the use of a minor to assist in doing sexually explicit conduct, directly affected the safety and security of the school environment, the Board of Education was authorized to suspend the respondent, pending resolution of those charges. Although the Board of Education's authority is based upon its authority and duty to provide a safe and secure school

environment for students under Article XII, § 1, the same authority is likewise derived from the education code of West Virginia.

B. The Board of Education was authorized pursuant to West Virginia Code Chapters 18 through 18A to suspend the respondent pending resolution of the eleven felony charges.

In addition to the constitutional authority provided by Article XII, § 1, the legislature has, via statute, set forth the policy of this State to provide a safe and secure environment for school children, and has statutorily prescribed that professional educators must stand *in loco parentis*. Therefore, although a board of education is constitutionally authorized and required to protect the safety and security of school children, notwithstanding anything contrary, even if § 18A-2-8 did apply, other statutory authority is provided to the Board of Education to protect the safety and security of school children.

Section 18A-5-1(a) requires school administrators to stand *in loco parentis*: administrators “stand in the place of the parent(s), guardian(s) or custodian(s) in exercising authority over the school...” *Cobb v. W. Virginia Human Rights Comm'n*, 217 W. Va. 761, 764, 619 S.E.2d 274, 277 (2005). In other words, the Board of Education must take on “all or some of the responsibilities of a parent.” Black's Law Dictionary (10th ed. 2014). Necessarily implied within that duty is the authority to take necessary actions to protect the safety and security of the students.

Moreover, the legislature has set forth the ultimate policy of the State: “[t]he public education system will maintain and promote the health and safety of all students...” W. Va. Code Ann. § 18-1-4(e) (West) (emphasis added). Further, “[e]ach school should create an environment” where students know they are safe. *Id* at (f)5.

This Court has held that Chapter 18 and Chapter 18A “should be considered *in pari materia*, and, therefore, they should be read and considered together.” *Smith v. Siders*, 155 W. Va. 193, 201, 183 S.E.2d 433, 437 (1971); *Harmon v. Fayette Cnty. Bd. of Educ.*, 205 W. Va. 125, 516 S.E.2d 748 (1999). Thus, even assuming the applicability of § 18A-2-8 to the extremely limited circumstances of this case, § 18A-2-8 and the remainder of the statute, when read and harmonized together, indicate that while § 18A-2-8 may authorize suspensions based upon those causes specifically enumerated, the statutes also authorize the Board of Education to take actions that are necessary to protect the safety and security of the students.

However, the Circuit Court overlooked the Board’s paramount authority (i) in protecting the safety of its students and (ii) to stand *in loco parentis* to those children. Moreover, the Circuit Court disregarded (1) the long line of Grievance Board precedent affirming the Board of Education’s authority to suspend a school employee based upon a criminal complaint, pending resolution of the charges; and (2) precedent from the Kanawha County Circuit Court affirming the Board of Education’s authority. *See Hicks v. Monongalia County Bd. of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004), *aff’d*, Circuit Court of Kanawha County (No. 04-AA-113, Jan. 18, 2005). In doing so, the Circuit Court relied on this Court’s statement in *Beverlin v. Bd. of Educ.*, 158 W. Va. 1067, 216 S.E.2d 554 (1975): “[t]he authority of a board of education to dismiss a teacher under W. Va. Code 1931, 18A-2-8, as amended, must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously. (emphasis added). However, *Beverlin* is inapposite for two reasons.

First, in the case at bar, the Board of Education’s authority to suspend the respondent did not arise “under W. Va. Code 1931, 18A-2-8.” Rather, the Board of Education’s authority to suspend the respondent was predicated upon its inherent authority under the Constitution and its

concomitant statutory authority to protect the safety and welfare of Cabell County students. Secondly, *Beverlin* must be applied within its appropriate context. This Court has not considered a situation in which the teacher's suspension was based upon the teacher's alleged dangerous and criminal conduct toward students in the school, to the extent of the danger presented in this case. Instead, *Beverlin* addressed the much more ordinary situation in which the teacher's conduct had a rational nexus only with the teacher's ability to perform his job functions.

In *Beverlin*, the school principal and superintendent suspended a school teacher for insubordination and willful neglect of duty, after the teacher missed the first day of classes to attend registration at a university. *Beverlin*, 158 W. Va. at 1076. This Court reasoned that the teacher tried to contact the principal on many occasions to advise the principal of the university registration, but the teacher was unable to reach the principal. *Id.* The court noted that while the teacher made an error in judgment, his actions did not harm his students and were excusable. *Id.* Thus, the Court held that the board of education acted arbitrarily and capriciously in suspending the teacher because the teacher's actions did not constitute insubordination or willful neglect of duty. *Id.*

The facts of *Beverlin* are unrelated to the situation presented here: (i) a teacher in the school, (ii) charged with multiple felony counts of possession and solicitation of child pornography, (iii) relating to certain students in the school. App.6-7. In *Beverlin*, the actions of the teacher pertained to the rational nexus between the charged acts and his ability to perform his job functions. Here, the respondent's actions pertain to the patent rational nexus between the alleged actions and the safety and security of the children in the school. As such, *Beverlin*, placed in its appropriate factual context, is inapposite.

In addition to *Beverlin* being inapposite to the case at bar, § 18A-2-8, on its face, does not divest the Board of Education of its authority to suspend an employee, based upon multiple felony charges, pending resolution of those charges, where the allegations relating to those charges pose a grave risk to the safety and security of school children. Rather, § 18A-2-8(c) merely states that “[a]n employee charged with the commission of a felony may be reassigned to duties which do not involve direct interaction with pupils pending final disposition of the charges.” W. Va. Code Ann. § 18A-2-8(c) (West). The discretionary nature of § 18A-2-8(c) anticipates that there may be other situations in which the Board of Education must act to protect the safety and security of students. In a case such as this, the Board of Education would not be able to place a school teacher who was charged with multiple felony counts of possession of child pornography in another position that would not pose a risk to the safety and security of school children. Reading § 18A-2-8(c) *in pari materia* with Chapter 18, the remainder of Chapter 18A, and Article XII, § 1 of the Constitution, the Board of Education is authorized to suspend an employee, based upon felony charges, where those charges, if true, pose a grave risk to the safety and security of the school environment.

Finally, there are few, if any, cases in which this Court has addressed a situation in which a teacher has been suspended based upon his or her alleged criminal actions posing a direct, extremely dangerous threat to the safety, security and welfare of a student. *See Golden v. Bd. of Educ. of Harrison Cnty.*, 169 W. Va. 63, 64, 285 S.E.2d 665, 666 (1981) (suspension for petty theft); *Powell v. Paine*, 221 W. Va. 458, 465, 655 S.E.2d 204, 211 (2007) (teacher license suspended due to teacher physically disciplining his own child); *Rogliano v. Fayette Cnty. Bd. of Educ.*, 176 W. Va. 700, 701, 347 S.E.2d 220, 222 (1986) (teacher charged with possession of marijuana); *Kanawha Cnty. Bd. of Educ. v. Kimble*, No. 13-0810, 2014 WL 2404322 (W. Va.

May 30, 2014) (female cheerleading coach found to be insubordinate for taking team to cabin when she was told not to do so); *Bledsoe v. Wyoming Cnty. Bd. of Educ.*, 183 W. Va. 190, 191, 394 S.E.2d 885, 886 (1990) (suspension based upon extortion); *Waugh v. Bd. of Educ. of Cabell Cnty.*, 177 W. Va. 16, 18, 350 S.E.2d 17, 18 (1986) (custodian suspended for taking, among other things, a radio and food). In the case at bar, the respondent's suspension was based upon alleged conduct, found in the criminal complaint, in which the respondent sent messages to students, some of whom were in the respondent's school, asking the boys to perform sexual acts. App. 45-53. The dangers posed by child pornography and related offences are acute and lead to tragic consequences. When presented with such circumstances, the Board of Education has a constitutional duty, which is statutorily prescribed, to protect those specific students and the student body as a whole.

C. The Board of Education had the implied authority to suspend the respondent pending resolution of the criminal charges.

This Court has not had occasion to consider the certain implied authority vested in a board of education to carry out those acts set forth in statute or that arise under the Constitution. The Supreme Court of Pennsylvania, however, has addressed the situation under facts, statutory language, and a constitutional mandate paralleling those presented here.

In *Burger v. Bd. of Sch. Directors of McGuffey Sch. Dist.*, 576 Pa. 574, 839 A.2d 1055 (2003), the Supreme Court of Pennsylvania confronted an employee-removal statute to determine whether suspension of a superintendent of a school district was authorized. The superintendent was accused of inappropriate sexual behavior culminating in charges of sexual harassment brought by an assistant to the superintendent. *Id* at 578. After a preliminary investigation, the board decided to suspend the superintendent without pay or benefits, subject to

a later, formal dismissal hearing. *Id.* The superintendent filed a complaint in mandamus, claiming that, under the school code, superintendents may only be “removed from office, after a hearing, by a majority vote of the board of school directors of the district, for neglect of duty, incompetency, intemperance, or immorality....” *Id.*

First, the court reasoned that the school code did not specifically allow for suspension of a superintendent but, rather, allowed only for removal of a superintendent. *Id.* at 584. However, the “the express purpose of the School Code is to establish a thorough and efficient system of public education, to which every child has a right.” *Id.* (internal citations omitted) (emphasis added). As such, the court noted, “the School Code vests school districts...with all necessary powers to enable them to carry out the [School Code’s] provisions.” *Id.* at 585 (citing 24 P. S. § 2-211) (brackets in original). Accordingly, “while school districts are created by statute and, as such, have no power except that which is conferred by statutory grant and necessary implication....Section 211 of the School Code reflects the General Assembly’s explicit and open-ended confirmation of implied powers in furtherance of school districts’ essential functions.” *Id.* Therefore, the court held that the “School Code’s removal provision pertaining to superintendents does not divest school boards of their implied authority to suspend such officials accused of serious misconduct, even without pay and benefits, within the constraints of procedural due process.” *Id.* at 584.

The central reasoning, applicable statutes, constitutional provisions, and salient facts of *Burger* instruct that, in limited cases such as the one *sub judice*, a school board is vested with certain inherent powers that necessarily arise under the broader statutory directives to a board of education. First, in *Burger*, the court was interpreting a constitutional mandate identical to the one before this Court. *See Pauley v. Kelly*, 162 W. Va. 672, 681, 255 S.E.2d 859, 865 (1979)

(analyzing the various state constitutional mandates relating to education and holding that the West Virginia and Pennsylvania “thorough and efficient” education clauses are identical).

Moreover, here, like in *Burger*, the respondent contends that the Board of Education was not authorized to suspend him because, on its face, the suspension clause of Chapter 18A does not specifically mention being charged with multiple felony counts as grounds for suspension. That perspective of the school code, however, (1) overlooks the broader directives of our State’s education law, (2) ignores the myriad of situations presented to the school board in its paramount goal of, and compelling interest in, protecting the students’ constitutional rights to a safe and secure school environment, and (3) fails to account for those powers necessarily implied by the express terms of the Constitution. *See Lewis County Bd. of Educ. V. Holden*, No. 14-0045 (W. Va. Feb. 5, 2015) (holding “that which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect, according to their nature and ordinary meaning, is as much a part of it as if it had been declared in express terms.”) Accordingly, under its implied authority pursuant to Chapters 18 and 18A, *et seq.*, and Article XII, § 1 of the Constitution, the Board of Education was authorized to suspend the respondent, based upon the multiple felony counts of child pornography alone, pending resolution of the criminal charges.

III. The Board of Education’s Suspension of the Respondent based upon the felony charges alone was necessary under the circumstances of this case.

In addition to being statutorily, constitutionally, and impliedly authorized to suspend the respondent based upon the felony complaint, the Board of Education’s actions were necessary to avoid interference with a pending criminal investigation. A criminal complaint and felony charges establish reasonable cause to believe that the underlying felonious act was committed. *Gilbert v. Homar*, 520 U.S. 924, 934, 117 S. Ct. 1807, 1814, 138 L. Ed. 2d 120 (1997). Basing

the suspension on the felony charge alone, the Board of Education makes no assertion about the employee's guilt or innocence. *Brown v. Dep't of Justice*, 715 F.2d 662 (D.C. Cir. 1983). The only alternative to allowing suspension on the basis of the criminal charge is to require the Board of Education to base the suspension on the employee's allegedly unlawful conduct and to independently prove that the conduct actually occurred. *Id.* That would require the Board of Education to "conduct a mini-trial in order to justify its actions against the employee." *Id.* at 668. In turn, churning over the same evidentiary material as the criminal prosecution constitutes improper interference with the criminal proceedings. *Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975).

A. The felony criminal complaint provided reasonable cause to believe that the respondent committed the underlying felonious acts.

A felony criminal complaint, like an indictment, assures that the Board's suspension was not arbitrary or capricious, but rather, based upon reasonable cause. *See Gilbert*, 520 U.S. at 934; *Cf. Hicks v. Monongalia County Bd. of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004), *aff'd*, Circuit Court of Kanawha County (No. 04-AA-113, Jan. 18, 2005) (explaining that the difference between a criminal complaint and felony indictment is not dispositive).

In *Gilbert v. Homer*, the petitioner, a police officer, contended that the university police force had violated his Fourteenth Amendment due process rights by suspending him without pay pending the outcome of criminal charges against him for possession of marijuana. *Gilbert*, 520 U.S. at 928. The Supreme Court of the United States held that the university did not violate the due process clause because the suspension followed an arrest and formal criminal charges. *Id.* at 934.

Pertinently, the Court noted that the purpose of a pre-suspension hearing is to assure “that there are reasonable grounds to support the suspension without pay.” *Id* at 934. Furthermore, the Court reasoned that an “‘ex parte finding of probable cause’ such as a grand jury indictment provides adequate assurance that the suspension is justified.” *Id* at 934 (quoting *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 238, 108 S. Ct. 1780, 1787, 100 L. Ed. 2d 265 (1988)). “[A]s with an indictment, the arrest and formal charges imposed upon respondent ‘by an independent body demonstrat[e] that the suspension is not arbitrary.’” *Gilbert*, 520 U.S. at 934 (quoting *Mallen*, *supra* at 244-45). “[L]ike an indictment, the imposition of felony charges itself is an objective fact that in most cases raise serious public concern.” *Gilbert*, 520 U.S. at 934. As such, the court ruled that the “arrest and charge [gave] reason enough, [and] serve[d] to assure that the state employer’s decision to suspend the employee [was] not baseless or unwarranted” because an independent party determined that there was reasonable cause to believe the employee had committed a serious crime. *Id*.

Here, like in *Gilbert*, the respondent was suspended pending the outcome of the felony charges against him. The criminal complaint setting forth those charges established reasonable cause to fear that the respondent committed the felonious acts. Rather than attempt to prove those charges, the Board presented the criminal complaint as an “objective fact” of those charges.

Moreover, as in *Gilbert*, felony charges against a public school teacher raise serious public concerns. In *Gilbert*, the Court held that the “[s]tate ha[d] a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers.” *Id* at 933.

The same is true here: the Board of Education, like the Supreme Court dictated in *Gilbert*, has a significant interest in maintaining the integrity of the school system. Serious felony

charges against teachers threaten public confidence in the Board of Education. Moreover, as this Court has consistently held, the Board of Education also has a compelling interest in providing a safe and secure school environment. *See Cathe A. v. Doddridge Cnty. Bd. of Educ.*, 200 W. Va. 521, 529, 490 S.E.2d 340, 348 (1997) (“the State has a compelling interest in providing a safe and secure environment to the school children of this State pursuant to W.Va. Const. art. XII, section 1”).

Multiple felony child-pornography charges against a school employee threaten the Board of Education’s compelling interest in providing a safe and secure school environment. Because the felony charges established reasonable cause to believe that the underlying felonious acts were committed, the Board of Education acted reasonably in suspending the respondent based upon the criminal complaint, pending resolution of the charges. In doing so, the Board of Education acted pursuant to its significant interest in maintaining the integrity of the school system and its compelling interest in providing a safe and secure environment for the school children.

B. A rational nexus exists between the felony charges and the Board of Education’s ability to provide a safe and secure school environment and the respondent’s ability to perform his job functions.

“In order to dismiss a school board employee for acts performed at a time and place separate from employment, the Board must demonstrate a ‘rational nexus’ between the conduct performed outside of the job and the duties the employee is to perform.” Syllabus Point 2, *Golden v. Bd. of Educ.*, 169 W.Va. 63, 285 S.E.2d 665 (1981). *Rogliano v. Fayette County Bd. of Educ.*, 176 W. Va. 700, 703, 347 S.E.2d 220, 224 (1986).

Unquestionably, a rational nexus exists between the pending criminal charges against the respondent and his duties as a teacher of children in public schools. Eight of the criminal complaints allege that (1) two minor boys were shown naked, with erections, in pictures that the

respondent allegedly solicited and possessed; (2) the boys were enrolled in one of the Board's schools; and (3) one of them was actually a student in the respondent's classroom. App 6; App. 45-53. The felony charges, establishing reasonable cause to believe that the respondent committed the acts, are inherently inconsistent with a teacher's position. *Cf. Hurley v. Logan County Bd. of Educ.*, Docket No. 97-23-024 (Apr. 14, 1997). *Brown v. Dep't of Justice*, 715 F.2d 662 (D.C. Cir. 1983) (nexus exists where agents were conspiring to defraud the government); *W. Va. Dept. of Corr. v. Lemasters*, 173 W. Va. 159, 161, 313 S.E.2d 436, 437 (1984) (nexus existed where employee of the Department of Corrections sold firearms to felon); *Giannini v. Firemen's Civil Serv. Comm'n of City of Huntington*, 220 W. Va. 59, 65, 640 S.E.2d 122, 128 (2006) (nexus existed where firefighter was charged with possession of cocaine).

Although the rational nexus test is traditionally used by this Court to determine whether the employee's alleged conduct will affect the employee's ability to perform his job functions, the test is likewise applicable to determine, such as in this case, whether the respondent's conduct will affect the Board of Education's duty to provide a safe and secure school environment.

In this case, that nexus is clear. Although the Board took no stance with regard to the truth of the allegations contained within the complaint, as noted above, the felony complaint did provide reasonable cause for the Board of Education to believe that the acts were committed. Thus, the nexus between those alleged acts and a safe and secure school environment is twofold. First, the complaint alleged that certain of the subjects of the child pornography were children in the school. App. 6. Accordingly, the safety of those children was already compromised. The Board did not even have to go through a logical progression to determine that a safe and secure school environment was compromised. However, the respondent's alleged actions also posed the

risk of future endangerment of other children in the school. Therefore, based upon the rational nexus between the alleged acts and the safety and security of the school environment, the Board of Education was required to act in order to (1) protect the children who were already affected by the respondent's alleged actions, and (2) protect the future safety and security of other school children.

C. The Board of Education was required to suspend the respondent based upon the felony criminal charges in order to avoid interfering with the pending criminal investigation.

Again, the Board of Education was required to suspend the respondent to protect the safety and security of the school environment. More specifically, however, the Board of Education was required to do so based upon the criminal complaint alone, pending resolution of the criminal charges, in order to avoid interfering with the pending criminal investigation. Upon learning of the felony complaint, the Board faced three alternatives: (1) elect not to act, (2) independently prove that the respondent committed the alleged felony or (3) base the suspension upon the fact of the felony complaint alone.

Under the second alternative, the Board, as the respondent concedes, could have sought suspension under immorality. However, to do so, the Board would have been required to prove that the respondent had committed the felonies with which he was charged. Alternatively, the Board could have not acted. However, the criminal complaint was a matter of public record. The public was well aware that a school employee had been charged with multiple felonies. Allowing a teacher who has been charged with a felony to continue teaching would erode the public's confidence in the Board. *See Lemery v. Monongalia County Bd. of Educ.*, Docket No. 91-30-477 (Apr. 30, 1992); *Kitzmilller v. Harrison County Bd. of Educ.*, Docket No. 13-88-189 (Mar. 31, 1989). Moreover, taking no action would be contrary to the Board's constitutional authority and

duty to provide a safe and secure school environment. Accordingly, the Board of Education elected to suspend the respondent based upon the felony complaint.

The Board of Education's authority to do so is based upon a long line of Grievance Board precedent, which, in turn, is predicated on United States Supreme Court and federal court precedent. *Lemery v. Monongalia County Bd. of Educ.*, Docket No. 91-30-477 (Apr. 30, 1992); *Kitzmilller v. Harrison County Bd. of Educ.*, Docket No. 13-88-189 (Mar. 31, 1989); *Clark v. Kanawha County Bd. of Educ.*, Docket No. 2011-0997-KanEd (Aug. 17, 2011); *Hicks v. Monongalia County Bd. of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004), *aff'd*, Circuit Court of Kanawha County (No. 04-AA-113, Jan. 18, 2005). Accordingly, the Board of Education and Grievance Board has consistently recognized and followed the reasoning of *Brown v. Dep't of Justice*, 715 F.2d 662 (D.C. Cir. 1983).

In *Brown*, two agents were indicted for conspiring to defraud the government. The United States Border Patrol suspended the agents pending the outcome of the indictment. The agents appealed the suspensions, arguing that the Border Patrol could not suspend them solely on their indictments because the Board merely presented the indictment, which could not satisfy the "cause" and "nexus" necessary to suspend an employee for his actions. *Id* at 666. The court rejected the agents' arguments. *Id*.

The court reasoned that in "suspending an employee solely on the basis of his or her indictment, the agency is making no assertion about the employee's guilt or innocence; rather, the suspension is merely a means of safeguarding the legitimate concerns of the agency." *Id* at 667. Allowing suspension based upon the indictment was a necessary alternative because

[w]hen an employee is targeted by the criminal justice system, the administrative requirements of the agency are implicated. An indictment is a public record, and public knowledge that an

individual formally accused of job-related crimes is still on duty would undoubtedly erode public confidence in the agency.

Id at 667.

The court, then, was presented with the same issue as here: “[t]he only alternative to allowing suspension on the basis of a job-related indictment is to require the agency to base the suspension on the employee’s allegedly unlawful conduct and to prove independently that the conduct actually occurred.” *Id* at 668. This would require the agency “to conduct a mini-trial in order to justify its action against the employee.” *Id*.

However, “administrative hearings that precede trial on the criminal charges . . . ‘constitute improper interference with the criminal proceedings if they churn over the same evidentiary material.’” *Id*. (quoting *Peden v. United States*, 512 F.2d 1099, 1103 (Ct.Cl. 1975)). Thus, the court concluded that the interests of both the employee and the public are better protected by allowing suspension based upon the fact of the indictment alone, rather than requiring administrative inquiry into the unlawful conduct alleged in the indictment. *Id*.

Accordingly, here, as in *Brown*, the Board was faced with the decision to (1) suspend Respondent based upon the fact of the felony charges alone; (2) suspend Respondent based upon one of the other causes in West Virginia Code § 18A-2-8, which would require the Board to interfere with criminal proceedings; or (3) do nothing, which would fail to protect the interests of the school and the school children.

Accordingly, like in *Brown*, the Board sought to protect the interests of both the public and the respondent by suspending him, pending the outcome of the criminal proceedings. In doing so, the Board made no assertion regarding the respondent’s guilt or innocence.

On the other hand, if the Board would have based the suspension on immorality or one of the other causes listed in § 18A-2-8, the Board would have been required to present evidence that could interfere with criminal proceedings, including, no doubt, the evidence possessed by the State Police and the testimony of the students involved. If the Board would have based the suspension on immorality, it would have been necessary to present the testimony of the school children involved in the respondent's alleged felonious acts. That, in turn, would present multiple issues. First, testimony of the children would have likely been necessary for the criminal investigation. As such, requiring the children to testify for the administrative hearing could, at least, expose the substance of that testimony. At the most, such testimony could negatively affect the school children's willingness to even testify at the criminal proceeding. Prudently, the Board sought to avoid this conflict by basing the suspension on the criminal complaint.

In doing so, the Board followed prior precedent and multiple federal cases. *See Peden v. U.S.*, 206 Ct.Cl. 329 (1975) (“[I]t has long been the practice to “freeze” civil proceedings when a criminal prosecution involving the same facts is warming up or under way.”); *Polcover v. Secretary of Treasury*, 477 F.2d 1223 (D.C.Cir.), *cert. denied*, 414 U.S. 1001, 94 S.Ct. 356, 38 L.Ed.2d 237 (1973); *see also United States v. LaSalle National Bank*, 437 U.S. 298, 312, 98 S.Ct. 2357, 2365, 57 L.Ed.2d 221 (1978) (noting the policy interest against broadening the Justice Department's right of criminal discovery and against infringing on the role of the grand jury as the principal tool of criminal accusation); *accord Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1207 (Fed. Cir. 1987) (holding that a court has discretion to stay criminal proceedings); *Balis v. Braxton County Bd. of Educ.*, Docket No. 98-04-094 (Jan. 22, 1999); *Hoover v. Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994); *Lemery v. Monongalia County Bd. of Educ.*, Docket No. 91-30-477 (Apr. 30, 1992); *Kitzmilller v. Harrison*

County Bd. of Educ., Docket No. 13-88-189 (Mar. 31, 1989); *Brown v. Dep't of Justice*, 715 F.2d 662 (D.C. Cir. 1983).

However, the peculiar facts of this case presented an additional, related issue: requiring the children to testify at the administrative hearing would require them to bear the consequences of a multitude of legal hearings. Again, the testimony of the children would be necessary for the criminal investigation and trial. Requiring those same children to testify at an administrative hearing would, based upon no fault of the children, drag them through a barrage of legal issues, which, in turn, would negatively affect the mental health of those children. Rather than subject the school children—the victims of the alleged felonious acts of the respondent—to such a process, it is reasonable, undoubtedly prudent, and required that the Board of Education temporarily suspend the respondent pending resolution of the criminal proceedings.

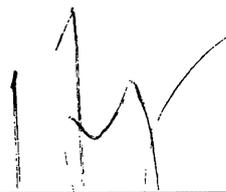
In summary, the Board of Education's authority to suspend an employee is twofold. First, W. Va. Code § 18A-2-8, authorizes the Board of Education to suspend an employee for the causes listed therein where the employee's alleged actions have a rational nexus with the employee's ability to for his job duties. However, under extremely limited circumstances, the Board is constitutionally required and statutorily authorized to temporarily suspend an employee based upon dangerous felony charges, where a rational nexus exists between the alleged dangerous felony charges and the Board of Education's duty to provide a safe and secure school environment. Therefore, in this case, where the respondent was charged with multiple felony counts of possession of child pornography, the Board of Education was authorized to temporarily suspend the respondent, pending resolution of the felony charges, due to the patent nexus between the respondent's alleged felonious actions and the Board's constitutional duty to provide a safe and secure environment to the school children.

CONCLUSION

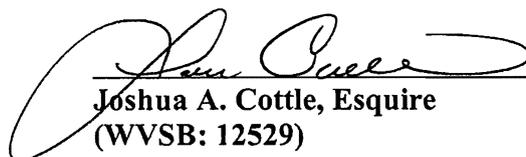
Therefore, based upon the foregoing, the Board of Education respectfully asks this Court to hold that the Board of Education acted within the scope of its authority in suspending the respondent and, therefore, reverse the decision of the Circuit Court.

Respectfully submitted,

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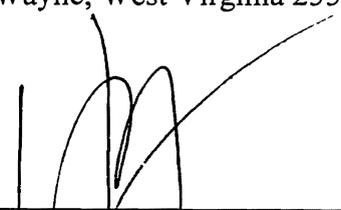
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CERTIFICATE OF SERVICE

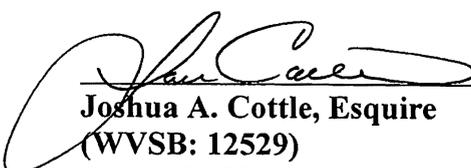
The undersigned hereby certify that on February 23, 2015, we served the foregoing *PETITIONER'S BRIEF* on counsel for the Respondent by depositing a true copy thereof in the United States Mail, addressed as follows:

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