No. 33081 - *The Board of Education of the County of Kanawha, a public corporation v. West Virginia Board of Education, a public corporation, and Dr. David Stewart, as Superintendent of Schools of the State of West Virginia*

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Davis, C.J., concurring:

One of the most fundamental rights granted to the children of this State is the right to an education. To this end, the West Virginia Constitution specifically directs that "[t]he legislature shall provide, by general law, for a thorough and efficient system of free schools." W. Va. Const. art. XII, § 1. *See also* Majority opinion, at Syl. pt. 2 ("'The mandatory requirements of "a thorough and efficient system of free schools" found in Article XII, Section 1 of the West Virginia Constitution, make education a fundamental, constitutional right in this State.' Syllabus Point 3, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979)."). Consequently, the Legislature must facilitate the delivery of educational services to this State's schoolchildren through its acts of legislation and may not enact laws which interfere therewith absent some compelling justification. *See* Majority opinion, at Syl. pt. 3 ("'Because education is a fundamental, constitutional right in this State, under our Equal Protection Clause any discriminatory classification found in the State's educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.' Syllabus Point 4, *Pauley v. Kelly*, 162

W. Va. 672, 255 S.E.2d 859 (1979).”). *See also* Majority opinion, at Syl. pt. 5 (“‘“[I]f the State takes some action which denies or infringes upon a person’s fundamental right to an education, then strict scrutiny will apply and the State must prove that its action is necessary to serve some compelling State interest. Furthermore, any denial or infringement of the fundamental right to an education for a compelling State interest must be narrowly tailored.” *Phillip Leon M. v. Greenbrier County Board of Education*, 199 W. Va. 400, 409, 484 S.E.2d 909, 918 (1996) (McHugh, J., concurring, in part, and dissenting, in part) (citations omitted). *W. Va. Const.* art. XII, section 1.’ Syllabus Point 2, *Cathe A. v. Doddridge County Bd. of Educ.*, 200 W. Va. 521, 490 S.E.2d 340 (1997).”). The statutory law at issue in this case simply does not pass this constitutional test and, thus, must receive a failing grade. The majority has astutely recognized this aberration; the dissenters have not.

In their dissenting opinions, my colleagues stray from the question brought before the Court, writing treatises which attack the alleged effect the majority’s opinion will have on public libraries statewide instead of appreciating the hindrance to fundamental constitutional educational opportunities that would undoubtedly continue if the majority had, as hoped by the dissenters, left well enough alone. The viability of public libraries, however, is neither the issue presented for resolution in this case nor the reason for or result of the decision reached by the majority of the Court. The question that was brought for our consideration and decision was, simply, whether W. Va. Code § 18-9A-12 (1993) (Repl. Vol. 2003) is constitutional when a county school board that is legislatively required to use a

portion of its local share funding to support a non-school purpose does not receive a corresponding adjustment of its allocated state aid share to account for such mandatory non-school expenditure. In short, the majority concluded that because the schools attended by children in the Counties of Kanawha, Berkeley, Hardy, Harrison, Ohio, Raleigh, Tyler, Upshur, and Wood did not receive the full amount of educational dollars to which they were entitled, because a portion of said monies had been legislatively diverted to fund the public libraries in those locales, the pupils in those counties were not receiving the education that had been constitutionally guaranteed to them. Applying the test enunciated by this Court nearly thirty years ago in *Pauley*, the majority determined that, in the absence of a compelling reason for this differentiation in funding, the schoolchildren of these nine counties should be receiving the same educational opportunities as those enjoyed by the schoolchildren in the State's other forty-six counties. Because the majority has correctly interpreted and applied the law to safeguard the fundamental constitutional right to an education of *every* child in this State, I concur with the opinion of the Court.