

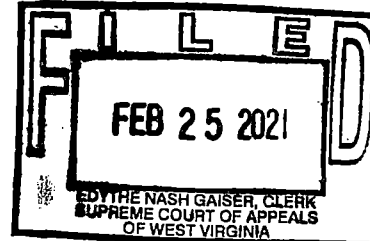
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IN THE

Supreme Court of Appeals of West Virginia

DOCKET NO. ~~21-097~~ 21-0097



STATE OF WEST VIRGINIA EX REL. WEST VIRGINIA ACADEMY, LTD.,

Petitioner,

v.

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondent,

And

BOARD OF EDUCATION OF THE COUNTY OF MONONGALIA,

Intervening Respondent.

On Petition for Writ of Mandamus

INTERVENING RESPONDENT

**BOARD OF EDUCATION OF THE COUNTY OF MONONGALIA'S BRIEF
IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS**

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QUESTION PRESENTED

Petitioner has identified the following Question Presented:

Whether the charter school application of Petitioner, West Virginia Academy, Ltd., is deemed approved by operation of W. Va. Code § 18-5G-6(d) and, therefore, Respondent, West Virginia Department of Education, has the mandatory, non-discretionary duty to accept the Application as approved under W. Va. Code § 18-5G-6(e) and to authorize Petitioner's charter.

STATEMENT OF THE CASE

The Board of Education of the County of Monongalia ("the Board") will not rehash all of the facts as stated in Petitioner's Petition. However, the Board would like to point out the timeline of the enactment of the statutes and rules that governed the consideration of Petitioner's application to establish a charter school.

The Legislature passed House Bill 206 during a special session in 2019, enacting a new Article 5G of Chapter 18 of the West Virginia Code. W. VA. CODE § 18-5G-1 through -12 (2019). The Code sections became effective immediately. Article 5G established, for the first time, a process by which West Virginia would permit public charter schools, if authorized by a county board of education.

As discussed in more detail below, Article 5G required the State Board of Education to promulgate certain rules with respect to Article 5G and permitted it to promulgate certain rules interpreting and expanding upon Article 5G's requirements. The rules promulgated by the State Board were filed February 13, 2020, and became effective March 16, 2020. *See* W. VA. CODE R. § 126-79-1 (2020) (hereinafter referred to as "Policy 3300"). Policy 3300 did interpret and expand upon Article 5G in a number of ways, the importance of which is discussed below.

However, among its provisions, Policy 3300 confirmed that the State Department of Education would adopt a standard form charter school application, which county boards of education were required to use. W. VA. CODE R. § 126-79-4.2 (2020). The State Department did adopt a standard form and made it available on its website. *See* “West Virginia Standard Public Charter School Application”, available at: <http://wvde.state.wv.us/policies/p3300-Charter-School-Application.pdf> (last accessed: February 24, 2021). Policy 3300 permitted county boards of education to create addenda to the standard form so long as the combined materials contained at least those requirements of Policy 3300 and did not contradict Article 5G or Policy 3300. W. VA. CODE R. § 126-79-4.2 (2020).

On May 26, 2020, during a regular meeting, the Board passed its required Policy 3-15, which provided specific information demonstrating how the Board specifically would consider a charter school application. (Pet. App. 866). The Board did not adopt an addendum to the standard form but did spell out through its Policy 3-15 the specific members of its administrative team who would review a charter school application and additional details of how such review would be conducted. *Id.*

Other than these facts or any additional facts explained below, the Board incorporates Petitioner’s or the State Department’s Statements of the Case.

SUMMARY OF ARGUMENT

This Court should decline to issue the writ of mandamus requested by the Petitioner. First, Petitioner has inexcusably and unreasonably delayed filing its Petition for Writ of Mandamus. Petitioner argues in its brief that its application was deemed approved by operation of law on October 22, 2020, but Petitioner did not file its Petition until February 11, 2021 – nearly four months later. The delay is not explained by Petitioner, and it prejudices the Board,

given that the Petition was not filed until just nineteen days before Policy 3300 would require the parties to have negotiated a contract. As such, the Court should determine that the Petition is barred by laches.

Second, Petitioner cannot show that the requested writ of mandamus is legally justified. Before granting a petition for writ of mandamus, this Court must find: the existence of a clear right in Petitioner to the relief sought, a legal duty on the part of the Respondent to do what the Petition seeks to compel, and the absence of an adequate remedy at law. Petitioner's Petition fails, because Petitioner cannot meet the first two requirements.

Petitioner cannot show that there is a legal duty on the part of the State Department of Education to perform any legal duty with respect to Petitioner's charter school application. Article 5G does not require – or even authorize – the State Department to approve Petitioner's application. As such, no matter whether the Petitioner can show that it is entitled to the relief sought, Petitioner cannot point to any legal duty on the part of the State Department to take any action with respect to Petitioner's application.

But even if it could, Petitioner cannot show that it is entitled to the relief sought for four reasons. First, the Board timely considered the Petitioner's application, and as such, Petitioner's argument that the application is deemed approved by default is wrong. Second, the Board was not required to combine with the Preston County Board of Education to determine whether to approve Petitioner's application, as Petitioner argues. Third, the Board was not prohibited by any statute or rule from delegating review of Petitioner's application to its employees, since the ultimate decision to reject the application was made by the Board. Finally, the Board did not violate Petitioner's due process rights in the consideration of Petitioner's application.

For those reasons, this Court should decline to issue the requested writ of mandamus and dismiss Petitioner's Petition.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Board agrees with the Petitioner's assertion that this case is suitable for consideration under Rule 20, as it involves issues of first impression and issues of fundamental public importance.

ARGUMENT

This Court should reject the Petitioner's Petition for Writ of Mandamus, because Petitioner cannot meet two of the three requirements to issue a writ. "[T]he primary purpose or function of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created or imposed by law." *State ex rel. Bronaugh v. Parkersburg*, 148 W. Va. 568, 572, 136 S.E.2d 783, 785-86 (1964); *see also, State ex rel. Bd. of Educ. v. Johnson*, Syl. Pt. 1, 156 W. Va. 39, 190 S.E.2d 483 (1972). "The general rule in West Virginia is that a writ of mandamus will not issue unless three elements coexist-- (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy at law." *Hickman v. Epstein*, 192 W. Va. 42, 44, 450 S.E.2d 406, 408 (1994).

Petitioner's Petition fails for three reasons. First, Petitioner's Petition should be rejected on the basis of laches. Second, Petitioner cannot show that the State Department of Education has a legal duty to do anything with respect to Petitioner's application. Third, even if there is some legal duty that can be compelled, Petitioner cannot show that it is entitled to the relief sought for any of the three reasons that Petitioner poses for challenging the Board's decision.¹

¹ Petitioner has objected to the Board's review of its application literally at every stage of this process -- including when submitting the application itself. *See e.g.*, Pet. App. 2, 382-83, 601-02, 703, 709. And while Petitioner

A. Petitioner's Petition Is Barred By Laches.

First, because Petitioner waited nearly four months to petition this Court for a writ of mandamus without explanation, this Court should decline to issue the writ on the basis of laches. This Court has held, “Mandamus may be refused where relator has unreasonably delayed his application therefor, by reason whereof the rights of respondent or innocent third parties will be prejudiced by issuance of the writ.” *State ex rel. Waller Chems. v. McNutt*, 152 W. Va. 186, 193, 160 S.E.2d 170, 175 (1968). “The extraordinary remedy of mandamus, though on the law side of the Court, is limited as to time by the equitable doctrine of laches.” *State ex rel. Kay v. Steinmetz*, Syl. Pt. 1, 144 W. Va. 802, 111 S.E.2d 27 (1959). “The burden of showing sufficient excuse for what appears from the record to be an unreasonable delay in the assertion of a clear legal right through the remedy of mandamus rests upon the person asserting such right.” *Id.* at Syl. Pt. 2.

Whether a delay is unreasonable, of course, depends on the facts and circumstances of the case, but this Court's decision in *Waller Chems* is instructive. There, an unsuccessful bidder to the State Director of Purchasing for the purchase of certain floor maintenance products sought a writ of mandamus to invalidate the contract with the successful bidder and re-award the contract to itself. *Waller Chems.*, 152 W. Va. at 188-90, 160 S.E.2d at 170-73. The contract had been awarded October 17, 1967 but the mandamus action was not filed until February 1968. *Id.* at 192, 160 S.E.2d at 175. The Court held that “[i]n determining what constitutes such unreasonable delay justifying invocation of the equitable doctrine of laches, the circumstances which justified

makes several arguments about the process, it is clear that Petitioner cannot challenge the substance of the Board's decision to reject the application, as that would have been an exercise of discretion. *See State ex rel. Waller Chems. v. McNutt*, 152 W. Va. 186, 192, 160 S.E.2d 170, 175 (1968) (mandamus does not lie to control the exercise of discretion, absent fraud, collusion, or “palpable abuse of discretion”); *State ex rel. Summerfield v. Maxwell*, 148 W. Va. 535, 540, 135 S.E.2d 741, 745 (1964) (mandamus does not lie to direct the exercise of discretion). The Board notes none of these reasons have been cited in the Petitioner's Brief.

delay, the character of the case, situation of the parties, nature of relief demanded, and whether the rights of third parties have been innocently acquired, should be considered.” *Id.* at 193, 160 S.E.2d at 175. The Court noted that three months had passed since the contract had been signed, and no reason was given for the delay, and as a result, the writ was barred by laches. *Id.*

The similarity in the timing between the circumstances of the *Waller Chems.* decision and this case is obvious. The delay in that case ran from October 17, 1967 to February 1968. The delay in this case – if Petitioner’s argument is to be believed – is October 22, 2020 to February 11, 2021. Considering nearly an identical time period, with no reason given for the delay, this Court held that a petition was barred by laches, and it should do so again here.² Petitioner had even warned the Board **two months** before it actually filed the Petition that it was preparing to do so. (Pet. App. 826-27).³ Why it chose not to file a petition for writ of mandamus compelling the Board to act – as it said it was preparing to do – and instead filed this action against the State Department two months later is entirely unexplained. Regardless, there is no reason it should have waited, and its Petition should be barred.

This delay is also highly prejudicial to the Board. Petitioner waited to file until nineteen days before the parties are to have finalized a charter school contract. W. VA. CODE R. § 126-79-5.5.g (2020). It then filed a request for “emergency” relief, citing precisely that deadline as justification for the emergency but providing no explanation whatsoever why it waited so long to file. Notably, that deadline is the second business day after this very brief is filed, virtually ensuring that however this Court acts, it will not have acted before the contract negotiation

² Even if Petitioner would argue that it was waiting until the Board’s final decision (November 30, 2020), the delay is still more than two months and just nineteen days before the contract negotiation deadline.

³ Petitioner’s notice was both to the State and to the Board. (Pet. App. 826-27). There is no requirement under West Virginia law that the Petitioner have waited any amount of time or provide any pre-suit notice before filing a petition for writ of mandamus against the Board. Any pre-suit notice required to the State is no excuse for the Petitioner to have waited to seek to overturn the Board’s decision for two additional months.

deadline has passed. And the delay would mean that even if this Court is inclined to grant the writ, it would be doing so just over five months before the school is to begin accepting students, at a time when the parties have not even begun to discuss a contract that governs the terms of their relationship.

In short, the delay in this case is unexplained and is prejudicial to the Board. For those reasons, this Court should decline to issue the writ, because the Petition is barred by laches.

B. The State Department Of Education Has No Legal Duty To Act With Respect To Petitioner's Application.

Petitioner fails to establish that the State Department of Education is actually mandated to do anything that this Court could order through a mandamus action. "The function of a writ of mandamus is to enforce the performance of official duties arising from the discharge of some public function, or imposed by statute." *Hickman v. Epstein*, 192 W. Va. 42, 44, 450 S.E.2d 406, 408 (1994). In other words, there must be some legal requirement to act on the part of the party to be ordered.

Here, there is no such requirement. Code Sections 18-5G-1 through -12 do require the State Department act with respect to charter schools in certain respects, but authorizing a charter school in this circumstance is not one. Indeed, the State Department serves as an authorizer only in two limited circumstances: when the local board of education approves an application for a charter school and requests the State Board to perform the duties of an authorizer, or when the application is made to a county in which the State Board has intervened pursuant to W. Va. Code § 18-2E-5. W. VA. CODE § 18-5G-4(c) (2019). There is no other provision within Article 5G that requires or permits the State Department to authorize a charter school.

Article 5G also makes clear that the State Department's oversight of charter schools is limited. W. VA. CODE § 18-5G-6(1) (2019). The State Board is required to establish best practices

for charter schools, provide application forms, provide training programs for applicants and administrators, receive and disburse gifts, grants, and donations, apply for federal funds, establish reporting requirements, and submit an annual report to the Governor and the Legislature regarding charter school authorizations. W. VA. CODE § 18-5G-4 (2019). The State Board is obligated to promulgate rules with respect to funding of charter schools and may promulgate other rules regarding funding oversight. W. VA. CODE § 18-5G-5 (2019). The State Department's authority is otherwise limited.

In short, the State Department has absolutely no legal obligation to act in this circumstance. No provision of Article 5G requires the State Department to take any action with respect to Petitioner's application. Simply put, there is no statutory or administrative duty to act, which this Court can enforce by issuing the writ. For that reason, the Court should refuse to issue the writ.

C. Petitioner Cannot Show That It Is Entitled To The Relief Sought.

For several reasons, Petitioner cannot show that it is entitled to the relief sought. First, the Board timely responded to the Petition according to the deadlines set by the State Department. Second, Petitioner's designation of its primary recruitment area as including both Monongalia and Preston Counties did not require the Boards of Education in Monongalia and Preston Counties to combine. Third, Petitioner's argument that the Board could not delegate responsibility for review of Petitioner's application to its employees is simply unsupported by any West Virginia law. Finally, the Board did not violate Petitioner's due process rights. For those reasons, Petitioner cannot show that it is entitled to the relief sought, and the Court should not issue the writ.

1. The Board Timely Considered Petitioner’s Application.

Petitioner’s primary argument – that the Board failed to timely respond to Petitioner’s Application – lacks merit. The Legislature established the process for the creation of public charter schools in 2019. *See* W. VA. CODE § 18-5G-1, *et seq.* (2019). As to the initial round of charter school applications, the Legislature provided certain basic requirements but also required the State Board of Education to promulgate “a rule in accordance with § 29A-3B-1 *et seq.* of [the West Virginia] code to clarify, if necessary, the requirements of this article and address any unforeseen issues that might arise relating to the implementation of the requirements of this article.” W. VA. CODE § 18-5G-5(e) (2019).

For example, the Legislature required that the State Board “[p]rovide forms to promote the quality and ease of use for authorizers to solicit applications for public charter schools, for applicants to complete applications, and for establishing quality charter contracts that include a framework for performance standards.” W. VA. CODE § 18-5G-4(b)(1) (2019). The Board was required to provide those forms no later than the beginning of February 2020. *Id.* And the forms were to provide an “application deadline of August 2020 for any charter school proposing to begin operation for the 2021-22 school year.” *Id.* The Legislature provided that an authorizer – the local board of education – must approve or deny the application within ninety days. W. VA. CODE § 18-5G-6(d) (2019). That review must consist of a thorough review process, an in-person interview with the applicant, a public forum for local residents to provide input and learn about the charter application, a detailed analysis of the application provided to the applicant or applicants, a reasonable time for the applicant to provide additional materials and amendments to its application to address any identified deficiencies, and a decision to approve or deny the application. W. VA. CODE § 18-5G-6(b) (2019). Finally, the authorizer and applicant must

negotiate a charter school contract within ninety days after an application has been approved. W. VA. CODE § 18-5G-9(a) (2019).

The State Board of Education did promulgate rules that governed all aspects of the charter school application and the application process. W. VA. CODE R. § 126-79-1, *et seq.* (2020). Regarding the application process, Policy 3300 provides a structure to the requirements that the Legislature imposed. Specifically, Policy 3300 required that for the initial application round, the application was to be filed by August 31, 2020. W. VA. CODE R. § 126-79-5.5.c (2020). The authorizer was to identify deficiencies to the applicant by October 31, 2020. W. VA. CODE R. § 126-79-5.5.d (2020). The applicant then had until November 15, 2020 to provide revisions to the application or responses to the authorizer's noted deficiencies. W. VA. CODE R. § 126-79-5.5.e (2020). And the authorizer had until November 30, 2020 to issue a decision conditionally approving or denying the application. W. VA. CODE R. § 126-79-5.5.f (2020). Policy 3300 provided – as did Article 5G – that failure to issue a decision by November 30, 2020 would be deemed a conditional approval. W. VA. CODE R. § 126-79-5.5.f.4 (2020). Because fewer than three applications were received statewide, the parties then had until March 1, 2021 to negotiate a charter contract. W. VA. CODE R. § 126-79-5.5.g (2020). In years following the initial year, the deadlines are moved to the spring. W. VA. CODE R. § 126-79-5.6 (2020).

To be clear, Policy 3300 incorporates exactly what the Legislature required. An initial deadline of August 31, 2020 and a conditional approval or denial deadline of November 30, 2020, meets Article 5G's requirement that a decision be made within ninety days after the application is submitted.⁴ A contract negotiation deadline of March 1, 2021 is ninety days after November 30, 2020.

⁴ November 30, 2020 is ninety-one days after August 31, 2020, but November 29, 2020 was a Sunday. Thus, the decision deadline falls on the first calendar day ninety days after the initial application deadline.

It also matters that applications to establish charter schools in West Virginia are considered on similar timelines. That is because the Legislature required that only three charter schools could be authorized until July 1, 2023. W. VA. CODE § 18-5G-1 (2019). Thus, Policy 3300's process ensures that during the initial round, all of the applications were reviewed on the same timeline and given the opportunity to negotiate a contract. If it were necessary to review more than three applications, Policy 3300 created a process whereby the submitted applications could be ranked by a neutral impartial panel. W. VA. CODE R. § 126-79-5.7.a (2020). If the State did not have this process, merely by filing early, a proposed charter school could ensure that it was among the initial three and avoid this ranking process. In other words, Policy 3300 does not conflict with Article 5G; it provides a process consistent with what Article 5G required.

Petitioner's argument, then, requires the Court to read only Article 5G and ignore the rules promulgated pursuant to Article 5G. Petitioner's application was dated July 24, 2020. (Pet. App. 2). In other words, Petitioner submitted its application earlier than the August 31 deadline established by the rules. It did so, even though it is clear Petitioner had received and reviewed Policy 3300, and presumably knew that the deadline was August 31, 2020. (Pet. App. 830, 833). The Board's decision was made on November 30, 2020 and communicated to Petitioner the same day. (Pet. App. 811). Petitioner now seeks to establish the first public charter school in West Virginia by default on the basis that the Board followed Policy 3300 but did not respond within ninety days.

The Board, though, has followed every requirement of the Code and Policy 3300. It conducted a thorough review of the application, which included an interview with seven of the Board's administrators, including the Superintendent, the Director of Exceptional Student Education, the Director of Assessment, Accountability, and School Counseling, the Associate

Superintendent for Curriculum, the Coordinator of Psychological Services, the Treasurer and Chief School Business Official, and the Board's Legal Counsel. (Pet. App. 377). The Board also attended training by representatives of the National Charter Schools Institute and consulted individually with those representatives. *See West Virginia Charter School Application Process*, available at: <https://wvde.us/wp-content/uploads/2020/06/WV-Webinar-Application-and-Evaluation-FINAL-6.23.2020.pdf> (last accessed February 23, 2021). The Board conducted a public forum at which members of the public commented both in favor of and opposed to the charter school application. (Pet. App. 594-697).

On October 29, 2020 – two days prior to the deadline established by Policy 3300 – the Board sent notice of the deficiencies in the Petitioner's application to the Petitioner. (Pet. App. 698). Petitioner responded to that notice of deficiencies on November 13, 2020. (Pet. App. 713). And at a meeting on November 30, 2020, the Board considered all of the above, and rejected the application. (Pet. App. 811-21). The Board met each of the deadlines established by Policy 3300, thoroughly reviewed the application, and timely rejected it.

It is interesting to note too, that despite arguing that it seemingly does not apply, even Petitioner relies on Policy 3300 when it is convenient to do so. If, as Petitioner asserts, the application was deemed approved by default on October 22, 2020, the parties were required to negotiate a contract by January 20, 2021 – ninety days after October 22, 2020. W. VA. CODE § 18-5G-9(a) (2019). Petitioner did not even file its “emergency” Petition until February 11, 2021, or twenty-two days after that deadline. Curiously, though, part of the “emergency” Petitioner cited in requesting expedited relief was that Policy 3300 required a contract to be negotiated by March 1, 2021. (Pet. Br. 39) (citing W. VA. CODE R. § 126-79-5.5.g (2020)). Apparently, Petitioner accepts Policy 3300's deadline of March 1, 2021 to negotiate a contract – and

therefore asserts that its Petition must be considered quickly – but it does not accept Policy 3300’s deadline of November 30, 2020 to respond to an application.

The Board timely considered the Petitioner’s application according to Policy 3300, and this Court cannot enter a writ of mandamus requiring the State Department of Education to authorize Petitioner’s proposed school.

2. The Board Was Not Required To Combine With The Preston County Board Of Education To Determine Whether To Authorize Petitioner’s School.

Petitioner’s designation of the primary recruitment area of its proposed school as including Preston County as well as Monongalia County did not require the Boards of Education of those two counties to combine. When the Legislature enacted Article 5G, it anticipated that some charter schools may draw from more than one county for its recruiting efforts. Thus, Article 5G includes within the definition of “Authorizer” this possibility. “Authorizers include: . . . (B) Two or more county school boards when the charter school or application to form a charter school includes a primary recruitment area that encompasses territory in the two or more counties over which the respective boards have jurisdiction” W. VA. CODE § 18-5G-2(2)(B) (2019). Other than this reference, Article 5G does not discuss how two Boards serve together as an Authorizer.

Policy 3300 does, however, provide additional detail concerning this cooperation. According to Policy 3300, “[w]hen two or more county boards of education act together as authorizer, they collectively hold all the roles and responsibilities of an authorizer outlined in this policy, as well as state and federal law.” W. VA. CODE R. § 126-79-9.2.a.1.A (2020). Policy 3300 permits – but does not require – the two Boards to form a cooperating county charter authorizing board. W. VA. CODE R. § 126-79-9.2.a.1.B (2020). If the boards elect to form a cooperating

county charter authorizing board, Policy 3300 indicates that that board would act as the authorizer for all purposes, “except those relating to charter school application approvals and charter contract renewals.” *Id.* “For these decisions, **the individual county boards of education must approve applications or renewal applications, though charter schools may submit a single set of materials.**” *Id.* (emphasis added).

In other words, Policy 3300 dictates that while the boards may form one cooperating county charter authorizing board, they are certainly not required to. And even if they do form a cooperating county charter authorizing board, whether to approve a new application or approve a renewal always remains a decision that each individual board must make. Thus the Boards of Education for Monongalia and Preston Counties still decide whether a charter school will be authorized in their own Counties, but then, they cooperate in oversight of the charter school.

This is the only way that this process makes any sense either. Monongalia County should be permitted to decide for itself whether a charter school that desires to recruit from students in Monongalia County will meet the needs of Monongalia County students and satisfies Article 5G and Policy 3300. Likewise, Preston County should be able to make the same decision. If both agree that the charter school should be approved, they can then work together to perform all of the other duties of the Authorizer. But if either believes that the school should not be approved, the board for that county is not required to convince the other board of that before individually voting not to approve the school.

Nothing in the statute or Policy 3300 requires that the two boards meet together to review an application, and for that reason, the Board properly considered the application individually. Petitioner again has failed to show that it is entitled to the relief sought.

3. Petitioner's Argument That The Board Cannot Delegate Review Of A Charter School Application To Its Own Employees Is Plainly Wrong.

Petitioner's argument that the Board was not permitted to delegate review of Petitioner's own employees lacks any merit whatsoever. Petitioner's argument seems to be that because Article 5G and Policy 3300 state that Authorizer is the Board, any act done to review the application not by the Board but by one of its employees would violate Article 5G or Policy 3300. Petitioner also argues that delegating to its employees would also violate what Petitioner terms to be "transparency rules", which appear to be a single statement in each of Article 5G and Policy 3300 that require the Authorizer to conduct a review in a transparent manner.

To address the "transparency rules" first, Petitioner's argument is mistaken. To be clear, Petitioner can point to no case, statute, or rule that supports the notion that when a board of education acts through its employees, it is not being transparent. But even further, the Board posted Petitioner's application on its website for all Monongalia County residents to review.⁵ The Board identified seven committee members who would review the application, and those seven committee members conducted the interview with Petitioner. (Pet. App. 375). The Board even retained a court reporter to transcribe that interview – a step that is not required anywhere in Article 5G or Policy 3300. *Id.* The Board conducted a public forum on October 22, 2020 and again, retained a court reporter to transcribe the public forum. (Pet. App. 594). The public forum was also live-streamed, so that anyone who could not attend in person could view it remotely. Both transcripts were provided to Board members for their consideration before the November 30, 2020 meeting. (Pet. App. 821). To characterize the Board as being anything but transparent is

⁵ The link to the application is available under the "Board of Education" tab on the Monongalia County Schools website: <https://boe.mono.k12.wv.us/>. The Board has not pasted the URL here, only because the URL is extremely lengthy.

nothing short of insulting, and in the very least, fails to credit the Board with actions it took to ensure this process was fair to Petitioner.

As to Petitioner's argument that the Board was not permitted to delegate any of its review to its own employees, it is plainly wrong. The Board first notes that not a single one of the several times that the Petitioner asserts the Board's duties are non-delegable is followed by any kind of cite to any statute, rule, policy, or case. (Pet. Br. 23-28). The best that Petitioner can do is point to the fact that when the primary recruitment area includes two counties, the Boards may form a cooperating county charter authorizing board, from which the Petitioner makes the logical leap to the argument that the Board cannot rely on its own employees.

First, as a basic point, the Board can find no instance where this Court has ever held that when a public entity has a non-delegable duty, that entity is somehow precluded from relying on its own employees. Simple principles of agency would instruct that the Board acts through its employees, and no case suggests that the Board cannot fulfill a non-delegable duty by relying on its employees. *See e.g., Bd. of Educ. v. Harvey*, 70 W. Va. 480, 482, 74 S.E. 507, 508 (1912) ("A board of education, like any other corporation, may act through its agent, and if the act be one the board itself can lawfully perform, and the agent do not exceed the limits of that power delegated to him, in performing it, he thereby binds his principal.").

Moreover, even if a duty is "non-delegable", it means that if the duty is delegated to a third party, the principal remains responsible for its performance. *See BLACK'S LAW DICTIONARY* 522 (7th ed. 1999). It does not mean that individuals other than the Board members themselves are not legally allowed to perform the duty.

Indeed, a rule that prohibited a public body from relying on its employees to fulfill a duty would be foolish. The Board employs a superintendent, who is the chief executive officer of the

Board, who serves as the Board's secretary, and who is responsible for executing the Board's education policies. W. VA. CODE § 18-4-10 (2020). The superintendent recommends other professionals to the Board for hire who have particular knowledge, skill, and experience in certain areas needed to direct those education policies. For example, the seven employees who interviewed the Petitioner were the Director of Exceptional Student Education, the Director of Assessment, Accountability, and School Counseling, the Associate Superintendent for Curriculum, the Coordinator of Psychological Services, the Treasurer and Chief School Business Official, and the Board's Legal Counsel. (Pet. App. 377). Each is employed to advise the superintendent regarding education policy or other Board operations, and each holds a degree of knowledge and experience that the superintendent may not have.⁶ To hold that the Board cannot rely on these employees' knowledge, skill, and experience in carrying out the Board's education policy (or in this case, review of the first charter school application in West Virginia) would be outrageous.

As stated above, no provision of Article 5G or Policy 3300 prohibited the delegation of review of the application to its own employees. The Board's decision to do so merely placed initial review of the application in the hands of the professionals it employs to execute its policies and carry on its operations. The Board still made the decision to reject the application on the recommendation of the superintendent, and no part of that process violated Article 5G or Policy 3300. For those reasons, the Petitioner cannot show that it is entitled to the relief requested, and the Court should decline to issue the writ.

⁶ The Board notes also that its members are not required to have any such knowledge either. W. VA. CODE § 18-5-1a(c) (2020) (requiring that to be eligible, members of the Board must have a high school diploma or GED).

4. The Board Did Not Violate Petitioner's Due Process Rights.

Finally, Petitioner's argument that the Board violated its due process rights is unsupported by law or fact. It is notable that in its entire due process argument, Petitioner does not actually cite a due process clause or any case interpreting it nor does it argue what process is due. Instead, it repeats its other arguments (the decision was not timely, the decision was not made in a transparent manner, and the review was conducted by the superintendent and his staff), and seems to assert that those reasons also qualify as a "due process violation." For the reasons given above, those reasons lack merit.

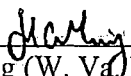
The only other argument given with respect to the Monongalia County Board of Education seems to be the manner in which the Board voted to deny the application. (Pet. Br. 33). To be clear, though, the Board followed Article 5G, Policy 3300, and its own policy by issuing its notice of deficiencies on October 29, 2020, and issuing its final decision in writing to Petitioner on November 30, 2020, as stated above. The written list of reasons why the Board rejected the application is included in Petitioner's Appendix at pages 811-21. Among the more notable, Petitioner had not identified a proposed location for its school, failed to properly address students with exceptionalities, failed to complete all of the policies required by Policy 3300, failed to show experience in running a non-profit entity or leading a school, and failed to submit a budget that showed an understanding of school operations. (Pet. App. 811-21). The superintendent's recommendation, the transcripts of the interview and public forum, the notice of deficiencies, Petitioner's response, and the review panel's summary of its recommendations all were considered, and the Board made an informed decision to deny the application. No part of that process violated Petitioner's due process rights.

For those reasons, the Petitioner fails to show that it is entitled to the relief sought, and as such, its Petition should be denied.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court decline to issue the writ of mandamus, and this Court dismiss the Petition.

BOARD OF EDUCATION OF THE COUNTY OF
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By Counsel,



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VERIFICATION

COUNTY OF MONONGALIA)
STATE OF WEST VIRGINIA) SS:

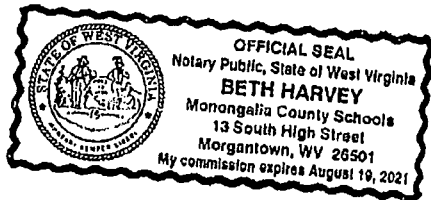
I, MR. EDDIE R. CAMPBELL, JR., being first duly sworn, state that I have read the foregoing *Intervening Respondent Board of Education of the County of Monongalia's Brief in Opposition to Petition for Writ of Mandamus*. I am signing this Verification as a corporate representative of the Board of Education of the County of Monongalia. The facts as stated within the Brief are not all within my personal knowledge or the personal knowledge of any one individual. The facts and information contained therein have been gathered from several sources and are true to the best of my knowledge and belief based upon the information available.

E. R. Campbell, Jr.

State of WV
County of Monongalia

Sworn before me this 25th day of February, 2021, by Eddie R. Campbell, Jr.,
Superintendent of Monongalia County Schools.

Beth Harvey

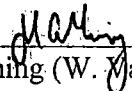


CERTIFICATE OF SERVICE

I, Jacob A. Manning, counsel for the Intervening Respondent, do hereby certify that on this the 25th day of February 2021, I served a true and correct copy of the foregoing upon the following by email and by depositing said copies in the United States Mail, postage prepaid, addressed as follows:

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