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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0097

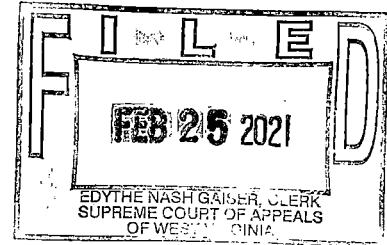
**STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA ACADEMY, LTD.**

Petitioner,

v.

**WEST VIRGINIA DEPARTMENT
OF EDUCATION,**

Respondent.



**RESPONSE TO PETITIONER'S VERIFIED
PETITION FOR EMERGENCY WRIT OF MANDAMUS**

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Comes now the Respondent, West Virginia Department of Education, by counsel, Kelli D. Talbott, Senior Deputy Attorney General, and responds in opposition to Petitioner's Verified Petition for Emergency Writ of Mandamus.

I.

QUESTION PRESENTED

The Petitioner asserts that the question presented in this matter is whether the West Virginia Department of Education has a mandatory, non-discretionary duty to accept its charter school application "as approved under W. Va. Code § 18-5G-6(e)" and to "authorize" its charter. (Pet. at 1.) Although the Petitioner claims that the Department has such a duty, it plainly does not.

West Virginia Code § 18-5G-6(e) does not command the Respondent to do what the Petitioner says it does. The code section merely states that when the “authorizer” approves a charter school application, the approval “shall be submitted to the West Virginia Department of Education.” In this case, the Petitioner’s application was denied by the authorizer county boards of education to whom the Petitioner submitted an application and, therefore no approval was submitted by the authorizer to the Department.

If it had been approved and submitted to the Department, then further action at the Department level would have been triggered only if the statewide number of approved charter schools exceeded the statutory limit of three until July 1, 2023. *See* West Virginia Code § 18-15G-1(g). In such a scenario, the Department would have been required to assemble an impartial panel to rank the applications based upon merit and the student population to be served. *See* 126 W. Va. C.S.R. 9, § 5.5.g.1. (State Board Policy 3300). Thereafter, the top three applications would have been authorized to commence charter contract negotiations with their authorizers. *Id.* In this case, Petitioner’s application was the only charter school application submitted statewide. (*See* Pet. at 1.) Therefore, even it had been approved at the county level, no action by the Department would have been necessary.

The Petitioner claims that its application should be “deemed approved” by default due to untimely action by the county boards of education. As will be discussed in this response, the Respondent does not believe that the county boards acted untimely. Nonetheless, the Petitioner cites no statute that would authorize the Department of Education to reach down into local decision-making; insert itself into a disputed claim of untimeliness; wrest the application from local control; declare a default approval; and, authorize Petitioner’s charter school. The Public

Charter Schools Act, West Virginia Code §§ 18-5G-1 *et seq.*, is an Act that vests authorization of charter schools at the local level in the hands of county boards of education. Indeed, the Act specifies that regulation of public charter schools by the West Virginia Board of Education¹ is limited and general in nature and must be consistent with the provisions of the Act. West Virginia Code § 18-5G-6(1).

The only circumstances in which the West Virginia Board of Education is tasked with functioning as an authorizer is: 1) when it has taken over the operations of a county school system or, 2) when a county board has approved a charter application but has affirmatively forwarded the approved application with a request that the State Board perform the authorizer function. West Virginia Code §§ 18-5G-2(2)(C) and 18-5G-4(c). Neither of these circumstances exist in this case. In addition, there is no statute that provides that the Department of Education may function as an authorizer.

The West Virginia Legislature expressly defined the role of the West Virginia Board of Education and the West Virginia Department of Education with regard to charter schools. As will be discussed herein, nothing that occurred with regard to Petitioner's charter school application imposes a legal duty upon the Department to act, as the Petitioner claims.

¹ Of course, the West Virginia Board of Education is not named as a Respondent in this matter. It is the body charged with general supervision of the public schools pursuant to Article XII, § 2 of the West Virginia Constitution. The Respondent named by the Petitioner, the Department of Education, is a statutory agency that the State Superintendent of Schools is required to maintain in order to carry out the implementation of the school law in this State. West Virginia Code § 18-3-9. Simply put, the State Board and the Department are two different entities with separate responsibilities. Both the State Board and the Department are referenced in the Public Charter Schools Act. However, they are not referred to interchangeably and each have distinct roles. Neither of them, however, have a duty to do what the Petitioner seeks to have this Court compel.

II.

STATEMENT OF THE CASE

The Petition contains a labyrinth of factual and procedural allegations about what occurred with respect to Petitioner's application at the county board of education level. Whether all of those allegations are accurate are not within the direct knowledge of the Respondent inasmuch as the application process played out at the local level as specified by the Public Charter Schools Act.

The Public Charter School Act went into effect on June 24, 2019. 2019 W. Va. Acts, 1st Ex. Sess., c. 31. The Act and State Board Policy 3300 govern the application process. The requirements for an application are detailed. *See* West Virginia Code 18-5G-8; State Board Policy 3300, § 4.3.

The evaluation process for charter school applications is also detailed and involved. Pursuant to West Virginia Code § 18-5G-6(b) and State Board Policy 3300 § 5.3.b., an authorizer who receives a charter school application is not only required to thoroughly review the written application, it is also required to conduct an in-person interview with the applicant and provide an opportunity in a public forum for local residents and stakeholders to provide input and receive information. Unless the application is substantially incomplete or grossly deficient, the authorizer is required to identify deficiencies in the application and allow the applicant fifteen days to address them. State Board Policy 3300 § 5.3.b.4.

In the Public Charter Schools Act, the Legislature granted broad rule-making authority to the West Virginia Board of Education to promulgate rules, pursuant to West Virginia Code §§ 29A-3B-1 *et seq.*, to set requirements for charter school funding; to ensure charter school and

authorizer accountability; and, “to clarify” the requirements of the Act and to “address any unforeseen issues that might arise relating to the implementation” of the Act. West Virginia § 18-5G-5(e).

As a result, the State Board promulgated 126 W. Va. C.S.R. 79 (State Board Policy 3300) which went into effect on March 16, 2020. Part of the State Board’s rule sets forth an “Initial Application Timeline” applicable to charter school applications submitted in 2020, the first year of the implementation of the charter school legislation. State Board Policy 3300 § 5.5.

Petitioner’s application was and is subject to § 5.5 of the rule since it was submitted in the first year, 2020. (Pet. at 1.) Specifically, the rule established an August 31, 2020 deadline for charter school applications to be submitted to authorizers in the first year. State Board Policy 3300, § 5.5.c. Further, the rule established a deadline ninety days thereafter, November 30, 2020, for authorizers to approve or deny applications. State Board Policy 3300 § 5.5.f. While West Virginia Code § 18-5G-6(d) states that charter school applications shall be approved or denied no later than ninety days “following the filing” of the same, and states that a failure to act within the specified time is deemed an approval by the authorizer, State Board Policy 3300 clarifies and addresses the issue of “filing” and the ninety time frame for action. State Board Policy 3300 sets a specific, universal *filing* deadline or date for all applications and prescribes that the ninety day period for action runs from that universal filing date.² Consistent with the statute, the rule then provides that if a charter school application is not approved or denied by the

² Although not applicable in this case, the rule also sets a universal filing date for charter school applications that applies to applications *after* the first year of 2020. That deadline is April 30 in the calendar year prior to opening. State Board Policy 3300 § 5.6.d. The ninety day deadline for approval or denial is then July 31 in the calendar year prior to opening. State Board Policy 3300 § 5.6.g. A different timeline was necessary for the initial application cycle in 2020 in order to get the program up and running as soon as possible.

November 30, 2020 deadline, then the application is deemed approved and subject to negotiations for the execution of a charter contract. State Board Policy § 5.5.f.4.

The underlying public education policy supporting this rule is to prevent a scenario in which the first charter school applications in the door get acted upon merely because they beat everyone else to the punch on the calendar. Because the express legislative intent and purpose of the Public Charter School Act is to allow the creation of innovative schools with high standards for student performance (*see* West Virginia Code § 18-5G-1), the State Board's rule fosters a level playing field for all charter school applicants and establishes a situation in which boards of education can act upon all timely charter school applications within a ninety day period following the same, universal filing date. (WV Academy App. at 712.) Accordingly, the rule supports the idea that the review and evaluation of charter school applications is not predicated on a race to be first, but is predicated on approving the most meritorius applications in any given cycle inasmuch as the Legislature has placed a statutory cap on the number of charter schools that are permitted to operate. (*Id.*)

On November 9, 2020, the Petitioner's President sent a letter to the State Superintendent of Schools indicating that he was submitting the Petitioner's charter school application to the Department of Education as "conditionally approved" because of the alleged inaction of the county board authorizers. (WV Academy App. Vol. 3 at 709-711.) The county boards of education were copied on the letter. (*Id.*) The letter stated that the Petitioner had previously notified the county boards of education that it considered them in default on the application, and that it had requested that they recognize the default approval and submit the approved application

to the West Virginia Department of Education. (*Id.* at 710.) The Petitioner's President stated that the county boards had failed to do as Petitioner requested. (*Id.* at 711)

The Petitioner's letter recounts, however, that its governing board had been invited for and participated in an October 20, 2020 interview with the Monongalia County Superintendent of Schools and a committee of Monongalia County school district employees regarding its application. (*Id.* at 710.) Further, the letter recounted that the Petitioner was invited to and participated in an October 22, 2020 public forum organized by the Monongalia County Superintendent at which two members of the Monongalia County Board were in attendance. (*Id.*) The letter also stated that on October 29, 2020, the Petitioner received a letter from the Monongalia County Superintendent identifying deficiencies with the application and requesting that the deficiencies be addressed and the application re-submitted. (*Id.*) While the letter contained complaints about how this process was conducted, the upshot of the letter was to submit Petitioner's charter school application and ask that the Department of Education determine it to be approved by default. (*Id.*)

On November 12, 2020, the State Superintendent responded to the letter and advised the Petitioner that pursuant to State Board Policy 3300 § 5.5., potential authorizers had until November 30, 2020 to take action on applications submitted in the first cycle. (*Id.* at 712.) The State Superintendent explained the public policy reasons for the rule and noted that the application of the rule to the Petitioner did not diminish or prejudice its opportunity to have its application appropriately reviewed. (*Id.*) The State Superintendent acknowledged that Petitioner's application was the first to be considered in the State and expressed hope that all

parties involved would approach the process in good faith. (*Id.*) The county superintendents were copied on the letter. (*Id.*)

Thereafter, the Monongalia County Board of Education and the Preston County Board of Education each voted to disapprove Petitioner's charter school application on November 30, 2020. (Pet. at 32-34.)

On December 1, 2020, Petitioner's President sent a letter to the State Superintendent entitled "Final Request for Action on Charter Application and Notice of Intent to File Petition for Writ of Mandamus." (WV Academy App. Vol. 3 at 822.) The letter was received by the State Superintendent on December 3, 2020. (*Id.* at 825.) In the letter, the Petitioner's President again asserted his allegation that the county boards of education had acted upon the charter application in an untimely manner and that the boards had otherwise failed to comply with the Public Charter Schools Act. (*Id.* at 822-824.) The Petitioner's President stated that it was the Petitioner's conclusion that the county boards' alleged failure to act in a timely manner had resulted in an approval of Petitioner's application by default. (*Id.*) The letter further stated that "[t]he Application thus respectfully asks the WVDE to certify or determine the same and to forthwith proceed with the application of the Public Charter Schools Act to the circumstances." (*Id.* at 824.) The Petitioner claimed that time was of the essence due to upcoming charter deadlines and also stated that its letter constituted pre-suit notice to the Department of Education under West Virginia Code § 55-17-3. (*Id.*)

On December 7, 2020, the State Superintendent responded to the Petitioner's President and advised him that the Department of Education had no authority to "certify" the approval of Petitioner's charter school application or to deem it approved as a matter of law. (*Id.* at 825.)

Therefore, the State Superintendent informed the Petitioner that the Department had no statutory authority to act as Petitioner requested. (*Id.*) The Petitioner was informed that the next filing deadline for charter school applications is April 30, 2021 and was invited to work with the county boards to address the deficiencies that resulted in the application denial so that the application could be re-submitted. (*Id.*) Despite the State Superintendent's and the Department's lack of authority to act upon the matter, the State Superintendent offered to provide assistance, as appropriate. (*Id.*)

Thereafter, the next event that transpired was Petitioner's filing of the Petition in this case on February 11, 2021. The Petitioner claims in its Petition that it was not required to provide pre-suit notice pursuant to West Virginia Code § 55-17-3 due to the immediate harm involved. (Pet. at 16, 37.) Further, the Petitioner seeks expedited and emergency relief from this Court due to claims of immediate and irreparable harm.

The Petitioner points to various pending charter school deadlines for applications that were submitted and approved in the first cycle, including a March 1, 2021 deadline set forth in State Board of Education Policy 3300 § 5.5.g. for approved charter schools to have a charter contract executed with the authorizing county board of education. The Petitioner does not explain, however, why it waited until February 11, 2021 to file this action. Moreover, the Petitioner provides no explanation for its failure to bring legal action against the county boards of education who it claims failed to act timely; failed to recognize the "default" approval it asserts to have occurred; and, failed to submit the alleged default approved application to the Department of Education pursuant to West Virginia Code § 18-5G-6(e), the code section cited as imposing a mandatory duty subject to mandamus.

Because the Petitioner has put forth its Petition as an “emergency,” it is important to a full understanding of this case to note that the applicable deadline for approved charter schools seeking to operate in 2021-2022 to execute a charter contract with their authorizer is March 1, 2021. State Board Policy 3300 § 5.5.g. A charter contract is not merely a mechanical paper shuffle of stock, form documents. A charter contract must contain many, granular details pertaining to various standards of operation that are imposed upon charter schools. *See* State Board Policy 3300 § 6. For example, a charter contract is required to address the charter school’s plan to serve special education students. State Board Policy § 6.2.i. Not only must the parties to the charter contract agree to this plan, but it also must satisfy the stringent requirements of applicable federal law. *Id.* Failure to ensure that such critical details are sufficiently and appropriately outlined in the charter contract could give rise to legal and financial consequences to both the applicant and the authorizer. Therefore, as a practical matter, given the time frame on the calendar, there is insufficient time for a meaningful contract to be negotiated with the Petitioner by March 1, 2021, should Petitioner prevail in this case.

For unknown reasons, the Petitioner sat on its rights and did nothing to bring its claims to the courts for redress. Under a scenario in which this Court would rule favorably to the Petitioner, a charter contract could not be executed by March 1, 2021 – which would mean that by operation of law, it could not open its charter school until the 2022-2023 school year. State Board Policy 3300 § 5.5.g.2. That is assuming that a satisfactory charter contract could be successfully negotiated prior to the start date for students in the 2022-2023 school year. *See* State Board Policy 3300 § 5.5.g.3.

Moreover, Petitioner is free to re-submit its application on or before the April 30, 2021 deadline for the current year application cycle. Based upon these circumstances, it is difficult to see how Petitioner's circumstances constitute an "emergency."

III.

SUMMARY OF ARGUMENT

The Petitioner has no clear legal right to the relief sought and the Respondent has no clear legal duty to accept its charter school application "as approved under W. Va. Code § 18-5G-6(e)" and to "authorize" its charter. Therefore, the elements of mandamus cannot be met by the Petitioner and mandamus does not lie in this matter. As a result, this Court should decline to issue a rule to show cause and dismiss this matter from the docket of the Court.

Further, the provisions of State Board Policy 3300 pertaining to the specific, universal filing date for charter school applications is squarely within the State Board's statutory grant of rulemaking authority in the Public Charter Schools Act. And, it is otherwise within the scope of the broad grant of constitutional rulemaking authority given by the people of this State to the State Board in Article XII, § 2 of the Constitution.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent asserts that oral argument is not necessary in this case inasmuch as it involves the plain application of settled mandamus law to the question of whether the Respondent has a clear statutory duty to effectively declare the Petitioner's charter school application approved by default and authorize its charter. Clearly, there is no such duty. As a result, this Court should decline to issue a rule to show cause.

V.

ARGUMENT

THE PETITIONER DOES NOT HAVE A CLEAR LEGAL RIGHT TO THE RELIEF SOUGHT NOR DOES THE RESPONDENT HAVE A CLEAR LEGAL DUTY TO DECLARE PETITIONER'S CHARTER SCHOOL APPLICATION APPROVED BY DEFAULT AND AUTHORIZE ITS CHARTER.

The only legal authority that the Petitioner cites in support of its argument that the Respondent has a duty to “certify” its charter school application “as approved” and to “authorize” its charter is West Virginia Code § 18-5G-6(e). (Pet. at 1.) That code section, however, simply doesn’t compel the Respondent to do anything. The code section merely states that when the “authorizer” approves a charter school application, the approval “shall be submitted to the West Virginia Department of Education.” Moreover, State Board Policy 3300 § 5.5.f.3., further expands upon this submission requirement by providing that written decisions affirmatively approving or denying an application, or “charter school applications conditionally approved by virtue of lack of action by the authorizer, shall promptly be provided to the applicant and the WVDE.”

Petitioner represents, and the Respondent does not dispute, that the authorizer county boards of education did not submit its application to the Respondent as an application conditionally approved by virtue of lack of action. And, while the Respondent does not believe that Petitioner’s application was approved by virtue of lack of action, the fact remains that if the Petitioner believed that to be the case, then it had every opportunity to seek redress in the courts to compel the county boards to submit the application to the Department.

According to the Petition, the application was physically delivered to the two county boards of education on July 24, 2020. (Pet. at 7.) The Petitioner alleges that the county boards had until October 22, 2020 to approve or reject its application, and failed to do so. (Pet. at 28.) The Petitioner further alleges that although it requested that the county boards recognize their failure to act by October 22, 2020 and, that it requested that the boards submit the application to the West Virginia Department of Education as conditionally approved by default, the boards did not do as it requested. (Pet. at 29.) The obvious question, then, is why this matter was filed in this Court on February 11, 2021 with the Department of Education named as the sole responding party?

The alleged mandatory duty to submit the application as approved by default is that of the county board authorizers. The Department of Education is obviously the recipient of such a submission. However, the Department has no duty or authority to reach down into a locally controlled decision and elevate an application to the state level – and to simply declare it approved and authorized. Not only would such an intervention be contrary to the law, it would be in excess of the statutory authority specified by the Legislature in the Public Charter Schools Act. There simply is no mechanism in the Act that would allow the Respondent to do what the Petitioner seeks to compel.

It is noteworthy that in a bill currently pending in the West Virginia Legislature, the Legislature is considering an amendment to the Act which would allow a charter applicant to appeal a decision of an authorizer to the West Virginia Board of Education within thirty days of

the authorizer's decision. *See* Eng. Comm. Sub for H.B. 2012, 2021 Reg. Sess. at 25.³ If passed, the amendments to the Act would allow the State Board to remand an authorizer's decision back to the authorizer if the rights of the applicant have been prejudiced by a violation of constitutional or statutory provisions or State Board Policy; by actions in excess of the authorizer's authority; by unlawful procedures; by other error of law; by actions that are clearly wrong; or, by actions that are arbitrary and capricious. *Id.* In essence, that is what the Petitioner seeks to compel the Respondent to do – accept its letters to the State Superintendent as an “appeal” and, ultimately find that the authorizers violated applicable statutory provisions. Obviously, however, the proposed amended language is not in the Act now and the Respondent cannot simply read such language into it.

This Court has repeatedly held 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 remedy at law. Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 170 S.E.2d 367 (W. Va. 1969). Petitioner cannot satisfy the primary elements of a clear legal right and the existence of a clear legal duty. The statutory language is plain and no matter how the Petitioner seeks to bend it to come up with a claim that the Respondent has the duty to intervene and approve its charter application, it simply has no such clear legal duty.

The Petitioner obviously takes issue with State Board Policy 3300 § 5.5 insofar as it sets a specific, universal *filing* deadline or date for all charter applications and prescribes that the ninety

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http://www.wvlegislature.gov/Bill_Text_HTML/2021_SESSIONS/RS/bills/HB2012%20SUB%20ENG.pdf

day period for action by county boards of education runs from that universal filing date. The Petitioner claims that the Policy conflicts with West Virginia Code § 18-5G-6(d) and that the State Board of Education essentially had no authority to promulgate it. However, there is nothing in § 5.5. that conflicts with the Code and clearly, the State Board had the authority to promulgate the rule.

As noted above, the Public Charter Schools Act plainly granted broad rule-making authority to the State Board to set requirements for charter school funding; to ensure charter school and authorizer accountability; and, “to clarify” the requirements of the Act and to “address any unforeseen issues that might arise relating to the implementation” of the Act. West Virginia § 18-5G-5(e). The State Board’s “filing” rule is squarely within the rulemaking authority granted in the Public Charter Schools Act. Such rule does not conflict with West Virginia Code § 18-5G-6(d) which generally states that charter school applications shall be approved or denied no later than ninety days “following the filing” of the same. It is squarely within the scope of the State Board’s express statutory grant of rulemaking authority to specifically address and clarify what “filing” means and to promulgate a rule that establishes a definite, universal filing date from which the ninety day period runs. Nothing about the State Board’s rule, diminishes, prejudices or adversely impacts the rights of charter school applicants, including the Petitioner, to have their applications thoroughly reviewed and acted upon.

Further, this Court has held that the State Board’s rulemaking is within the “general supervision” of the state’s schools vested in the Board by the people of this State under Article XII, § 2 of the West Virginia Constitution. Syl. Pt. 2, *West Virginia Board of Education v. Hechler*, 376 S.E.2d. 839 (W. Va. 1988); Syl. Pt. 6, *West Virginia Board of Education v. Board*

of Education of the County of Nicholas, 806 S.E.2d 136 (W. Va. 2017); Syl. Pt. 5, *State ex rel. Lambert by Lambert v. West Virginia State Board of Education*, 447 S.E.2d 901 (W. Va. 1994); Syl. Pt. 2, *Board of Education of County of Kanawha v. West Virginia Board of Education*, 399 S.E.2d 31 (W. Va. 1990); Syl Pt. 1, *Bailey v. Truby*, 321 S.E.2d 302 (W. Va. 1984). Therefore, given the State Board’s broad constitutional grant of rulemaking authority, there is no question that the rule is within the scope of the State Board’s powers.

As outlined above, the rule adopted by the State Board is backed with important public education policy considerations related to ensuring that charter school applicants have a level playing field upon which they are judged and approved on the merits, and not based upon a race to be the first to file an application. The competitive environment that is an important goal of the Public Charters Schools Act is better served by approving the best charter schools in any given application cycle, not by approving those who get their applications in the door first.

This Court has held that the determination of educational policies for the public schools is vested in the West Virginia Board of Education and unless unreasonable or arbitrary, its actions relating to such policies shall not be controlled by the courts. Syl. Pt. 1, *Detch v. Board of Education*, 117 S.E.2d 138 (W. Va. 1960); Syl. Pt. 3, *Board of Education of County of Kanawha*, *supra*. There is nothing unreasonable or arbitrary about the educational policy decision embodied in the State Board rule in question. In fact, the educational policies embodied in the rule are consistent with the State Board’s charge to ensure the complete executive delivery and maintenance of a thorough and efficient system of free schools. *See* Syl Pt. 1, *Pauley v. Bailey*, 324 S.E.2d 128 (W. Va. 1984).

VI.

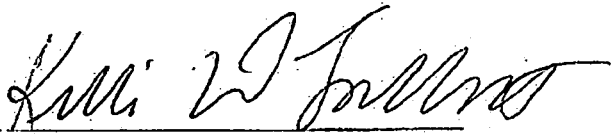
CONCLUSION

WHEREFORE, based upon the foregoing, this Court should decline to issue a rule to show cause and **DISMISS** this matter from the docket of the Court.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF EDUCATION
By Counsel

PATRICK MORRISEY
ATTORNEY GENERAL

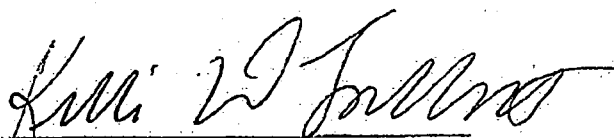
A handwritten signature in cursive script, appearing to read "Kelli D. Talbott", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Kelli D. Talbott, Senior Deputy Attorney General, counsel for Respondent, West Virginia Department of Education, do hereby certify that a true and exact copy of the foregoing *Response to Petitioner's Verified Petition for Emergency Writ of Mandamus* was served by electronic mail on this 25th day of February, 2021, as follows:

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