

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-616

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STATE OF WEST VIRGINIA,

Petitioner,

and

KATIE SWITZER AND JENNIFER COMPTON,

Petitioners,

v.

**TRAVIS BEAVER, WENDY PETERS,
DAVID L. ROACH, STATE SUPERINTENDENT
OF SCHOOLS, AND L. PAUL HARDESTY, PRESIDENT
OF THE WEST VIRGINIA BOARD OF EDUCATION,**

Respondents.

**RESPONDENTS DAVID L. ROACH AND L. PAUL HARDESTY'S RESPONSE TO
PETITIONERS' APPEAL**

Intermediate Court of Appeals of West Virginia
No. 22-ICA-1 (consolidated with 22-ICA-3)

Circuit Court of Kanawha County
Case Nos. 22-P-24, 22-P-26

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PETITIONERS' ASSIGNMENTS OF ERROR¹

Petitioners collectively assert nine assignments of error. Respondents David L. Roach and L. Paul Hardesty (collectively hereinafter “BOE Respondents”) summarize the Petitioners’ nine assignments of error as error in the substantive findings by the Circuit Court, as well as procedural errors in how the Circuit Court arrived at its substantive findings. More specifically, Petitioners assign error to the Circuit Court’s holding that the Hope Scholarship defunds public education while usurping the State Board of Education’s authority, thus violating the State of West Virginia’s Constitution. Additionally, Petitioners assert various procedural arguments regarding the issuance of the injunction by the Circuit Court. As will be explained below, the Circuit Court did not err in its findings regarding the constitutionality of the Hope Scholarship and further, the procedure upon which it did so was sound. In other words, Petitioners’ various assignments of error are without merit.

STATEMENT OF THE CASE

A. Background on public education in West Virginia and the State Board of Education’s role.

The West Virginia Constitution mandates that the “legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. Va. Const. Art. XII, § 1. “The general supervision of the free schools of the State shall be vested in the West Virginia board of education. . .” W. Va. Const. Art. XII, § 2. The West Virginia Constitution also mandates that the Legislature shall provide for the support of free schools and the State Board of Education (“State BOE”) is tasked with the general supervision of the funding. W. Va. Const. Art. XII, § 5. Article XII, section 4 of the West Virginia Constitution also establishes a “school fund” to be “applied to

¹ Pursuant to Rule 10(d) of the *West Virginia Rules of Appellate Procedure*, a respondent “need not specifically restate [Petitioners’] assignments of error.”

the support of free schools throughout the State, and to no other purpose whatever.” W. Va. Const. Art. XII, § 4. Dating back to West Virginia’s founding, the idea of public education has been paramount. This is due in part to “Virginia’s failure to provide a system of free public education[.]” *Randolph County Bd. Of Educ. v. Adams*, 196 W. Va. 9, 15 (1995)(quoting Robert M. Bastress, *The West Virginia Constitution - A Reference Guide* 271 (1995)). “[W]hen the convention met in 1861 to create West Virginia’s first constitution, the framers gave high priority to public education (1863 Const. Art. X). The 1872 convention delegates, for all their conservative leanings, actually strengthened the education article . . . [giving] a constitutionally preferred status to public education in this State.” *Id.* (internal citations omitted). “Our Constitution manifests, throughout, the people’s clear mandate to the Legislature, that public education is a *prime* function of our State government.” *Pauley v. Bailey*, 174 W. Va. 167, 174, 324 S.E.2d 128, 134 (1984)(citing *Pauley v. Kelly*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979)(emphasis in original).

Generally, public schools in West Virginia are funded by local property taxes, federal revenue, and State revenue. JA Vol. 4, at 557. State revenue sources primarily consist of funding through the West Virginia Public School Support Program (“PSSP”), which is calculated for each public school district by the West Virginia Department of Education. JA Vol. 4, at 557; *see also* W. Va. Code § 18-9A-1, *et seq.* The purpose of this plan is “[t]o effect a basic foundation support plan that shall provide for program growth which will assure more equitable educational opportunity for all children and youth irrespective of where they may live.” W. Va. Code § 18-9A-1. “The West Virginia Board of Education and the State Superintendent of Schools, pursuant to their general supervisory powers over education in West Virginia under W. Va. Const. art. XII, § 2, and their specific duties to establish, implement and enforce high quality educational standards for all facets of education . . . have a duty to ensure the complete executive delivery and

maintenance of a ‘thorough and efficient system of free schools’ in West Virginia” Syl. Pt. 1, *Pauley v. Bailey*, 174 W. Va. 167, 169, 324 S.E.2d 128, 129 (1984)(in part).

B. West Virginia’s school funding formula.

As stated above, West Virginia public education is financed primarily by the West Virginia Public School Support Plan (“PSSP”), which is codified in *West Virginia Code* § 18-9A-1, *et seq.* While the calculations behind the PSSP are complex, including the calculation of the “local share,” an intricate knowledge of the PSSP is unnecessary to understand the issues involved herein. The purpose of the PSSP is to calculate the financial cost, in the aggregate, for each county to fund “thorough and efficient” public education under the West Virginia Constitution. JA Vol. 4, at 557; *see also* W. Va. Code § 18-9A-1. In calculating the aggregate cost for each county, the PSSP is a multi-step analysis which considers the following categories of allowances:

1. Allowance for professional educators;
2. Allowance for service personnel;
3. Allowance for fixed charges (such as employer’s cost of Social Security matching contributions);
4. Allowance for transportation costs;
5. Allowance for administrative costs;
6. Allowance for other current expense and substitute employees; and
7. Allowance to improve instructional programs.

JA Vol. 4, at 557; *see also* W. Va. Code § 18-9A-1, *et seq.* To calculate a number of these costs, a county’s “net enrollment” for the prior year is a primary basis for the computation. JA Vol. 4, at 557. “Net enrollment” means “the number of pupils enrolled in special education programs, kindergarten programs, and grades one to 12, inclusive, of the public schools of the county.” W. Va. Code § 18-9A-2(i). The enrollment figures are then used in the PSSP calculation for the following year. JA Vol. 4, at 557-558. Critically, “net enrollment” of students factors into the financial calculation for the following:

1. Allowance for professional educators – *see* W. Va. Code § 18-9A-4;

2. Allowance for service personnel – *see* W. Va. Code § 18-9A-5;
3. Allowance for administrative costs – *see e.g.* W. Va. Code § 18-9A-9; and
4. Allowance for other current expense and substitute employees - *see e.g.* W. Va. Code § 18-9A-9.

In other words, a significant majority of the funding formula is attributable directly or indirectly to enrollment figures from the prior year. JA Vol. 4, at 557.

C. Background on Voucher Law.

The voucher law, formerly HB 2013, was enacted during the 2021 legislative session and created the Hope Scholarship Program and established the West Virginia Hope Scholarship Board to administer the program. W. Va. Code § 18-31-4. Under the Hope Scholarship Program, a child is eligible to receive funding or a voucher for use of qualifying education expenses if the child is a West Virginia resident and is either enrolled full-time and attending a public elementary or secondary school program in West Virginia for at least 45 calendar days during an instructional term at the time of application, or is enrolled full-time in a public elementary or secondary school program in this state for the entire instructional term the previous year, or is eligible at the time of application to enroll in a kindergarten program in this state. W. Va. Code § 18-31-2(5)(B). Funding under the voucher law can be used so that a qualifying child can pursue an education in a private school or homeschool setting as an alternative to receiving a public education. Qualifying education expenses in which the voucher may be used include tuition for private school, tuition for online learning, private tutoring, homeschooling, tuition for alternative education programs, education services and therapies, and fees for transportation paid to a fee-for-service transportation provider. W. Va. Code § 18-31-7(a).

The funds are deposited into a qualifying recipient student’s personal education savings account (“ESA”), to be used for qualifying education expenses. W. Va. Code § 18-31-5(b). Parents can apply for the voucher and so long as certain minimum requirements are met the West

Virginia Hope Scholarship Board “shall” approve of the application. W. Va. Code § 18-31-5(d). However, the voucher law has only minimal academic testing requirements to ensure that a private or homeschooled student is progressing and meeting educational standards. The statute simply requires the student’s parent to ‘promise’ to do the following:

- (A) To provide an education for the eligible recipient in at least the subjects of reading, language, mathematics, science, and social studies;
- (B) To use the Hope Scholarship funds exclusively for qualifying expenses as provided for in §18-31-7 of this code;
- (C) To comply with the rules and requirements of the Hope Scholarship program; and
- (D) To afford the Hope Scholarship student opportunities for educational enrichment such as organized athletics, art, music, or literature

W. Va. Code § 18-31-5(A)-(D).

Indeed, private entities and parents can use the funding from the voucher law and are not required to show that any academic progress is being made. Moreover, the law limits oversight from the State or the State BOE in that “[e]ducation service providers shall be given maximum freedom to provide for the educational needs of Hope Scholarship students without governmental control.” W. Va. Code § 18-31-11(c). The law does not expand “the regulatory authority of the state, its officers, or any school district to impose any additional regulation of education service providers beyond those necessary to enforce the requirements of the program.” W. Va. Code § 18-31-11(e). The West Virginia Hope Scholarship Board is also limited in its ability to audit education service providers who accept payments from Hope Scholarship accounts to instances where the West Virginia Hope Scholarship Board determines that that education service provider has “(1) Intentionally and substantially misrepresented information or failed to refund any overpayments in a timely manner; or (2) Routinely failed to provide students with promised educational goods or services.” W. Va. Code § 18-31-10(c). Finally, Hope Scholarship recipients

may receive educational services from a public school, but for a cost determined by the West Virginia Hope Scholarship Board. JA Vol. 4, at 559-560.

In order to fund the voucher law, a special revenue fund was created to be administered by the West Virginia Hope Scholarship Board and consists of funds transferred from the West Virginia Department of Education. W. Va. Code § 18-31-6(a). “The amount of Hope Scholarship funds made available to an eligible recipient on a yearly basis shall be equal to 100 percent of the prior year’s statewide average net state aid share allotted per pupil based on net enrollment adjusted for state aid purposes[.]” W. Va. Code § 18-31-6(b). The funds from the voucher law must be renewed by an eligible student’s parent on an annual basis. W. Va. Code § 18-31-8(a). The West Virginia Hope Scholarship Board established a deadline of May 15, 2022, for applications for the Hope Scholarship. JA Vol. 4, at 562. As of June 13, 2022, the total number of students to receive the Hope Scholarship recorded in the West Virginia Education Information System (“WVEIS”) is 2,195. JA Vol. 4, at 562-563. Of this amount 994 students are incoming kindergarten students, and there are 96 students who were only enrolled in a West Virginia public school for the minimum 45-day calendar period. JA Vol. 4, at 562-563; *see also* JA Vol. 4, at 569-570. On or about May 31, 2022, the West Virginia Treasurer’s Office publicly announced that the West Virginia Hope Scholarship Board has approved 3,010 Hope Scholarship applications for the 2022-2023 school year and that there are 470 timely applications that have not yet been acted upon. JA Vol. 4, at 563.²

² It is unknown why there is a discrepancy between the number of students designated as receiving the Hope Scholarship in WVEIS and the number of applications that the West Virginia Hope Scholarship Board has reportedly approved. JA Vol. 4, at 563. Based upon information and belief the West Virginia Treasurer’s Office will be providing information to allow for a process to reconcile the discrepancies. JA Vol. 4, at 563.

SUMMARY OF ARGUMENT

Public education is a fundamental right guaranteed by the West Virginia Constitution. As such, the State of West Virginia is legally mandated to fund public education and to provide for a thorough and efficient system of free schools. Any action by the State seeking to reduce or divert funding for public education must be met with strict scrutiny. The Hope Scholarship Program, also referred to as the voucher law, will only serve to divert funding away from public schools in this State which will directly harm West Virginia's public-school students.

The Hope Scholarship Program is a voucher law that provides students in West Virginia a financial incentive to depart from the State's public education system. The funds from the voucher law are public funds that can be used by a recipient student at a private school or for homeschooling. This will result in a reduction of students who are enrolled in public school. Under the public-school support plan used for funding public education in West Virginia, a reduction in enrolled public-school students equals a reduction in funding for public schools in general. The voucher law threatens the fundamental rights of students across this State to a sufficiently funded public education. Therefore, the State of West Virginia's action in implementing the voucher law and specifically diverting public funds away from public education to non-public education is subject to strict scrutiny.

The State of West Virginia does not have a compelling governmental interest in using public funds to subsidize homeschooling, private schools, and alternative forms of education existing outside of the public school system. The State's sole mandate in its Constitution is to provide "for a thorough and efficient system of free schools." Moreover, the voucher law is not narrowly tailored. Funds from the voucher law are available to the vast majority of public-school students in West Virginia, regardless of their need. The voucher law also expressly limits the State

Board of Education’s ability to oversee and supervise the use of these public funds. Very simply, the voucher law does not survive strict scrutiny.

More importantly, the voucher law usurps the State Board of Education’s constitutional exercise of rule-making and supervisory authority over public funding for education occurring in the State. The voucher law unlawfully creates a separate board which oversees and supervises the public’s funds that are to be used for educational purposes. Moreover, the law requires the State Board of Education to transfer these funds to the separate board that administers the Hope Scholarship Program resulting in the State Board of Education having no supervisory authority over these public funds. Consequently, the voucher law is unlawful and will only serve to harm public education in the State of West Virginia.

STATEMENT ON ORAL ARGUMENT AND DECISION

The Court scheduled this consolidated appeal for oral argument on October 4, 2022, under Rule 20 of the *West Virginia Rules of Appellate Procedure*.

STANDARD OF REVIEW

This Court will review the issuance of a permanent injunction under an abuse of discretion standard. Syl. pt. 1, *Chapman v. Catron*, 220 W. Va. 393, 647 S.E.2d 829 (2007). When “reviewing challenges to [the underlying] findings and rulings,” the Court considers “factual findings under a clearly erroneous standard,” and “[q]uestions of law are subject to a de novo review.” Syl. pt. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000). The Court reviews a declaratory judgment de novo. *Orville Young, LLC v. Bonacci*, 246 W. Va. 26, ___, 866 S.E.2d 91, 96 (2021).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY FOUND THAT THE HOPE SCHOLARSHIP IS UNCONSTITUTIONAL

Both Petitioners assert, through various assignments of error, that the Circuit Court erred in various aspects of its ruling that ultimately concluded in the Circuit Court holding that the Hope Scholarship is unconstitutional. *See* Petitioner State of WV’s Assignments of Error 2 & 3; *see also* Petitioners Switzer and Compton’s Assignments of Error 2, 3, 4 & 5. However, the Circuit Court was correct in concluding that the Hope Scholarship incentivizes students to flee the State’s public schools which directly infringes on the fundamental right to a public education as provided for under the West Virginia Constitution and therefore, usurps the constitutional authority of the State BOE.

A. It was appropriate for the Circuit Court to find that legislative incentivization resulting in a decrease of funding to public education would violate the State Constitution.

The Circuit Court correctly found that the Hope Scholarship cannot withstand strict scrutiny, as it infringes upon the fundamental right to a public education. JA Vol. 1, at 15-16. Petitioners’ assignments of error essentially assert that incentivization to flee public education, directly correlating to reduction of funds for public education, is not an infringement upon the fundamental right to public education. *See* State’s Brief at pg. 1 and 28. This argument is without merit.

1. There is no error in the Circuit Court’s finding that public education is a fundamental right in West Virginia subject to strict scrutiny.

“The Legislature shall provide, by general law, for a thorough and efficient system of free schools.” W.Va. Const. Art. 12, § 1. “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.” Syl. Pt. 3, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979); Syl. Pt. 1, *Cathe A. v. Doddridge County Bd. of Educ.*, 200 W. Va. 521, 525, 490 S.E.2d 340, 344 (1997). “Our Constitution manifests, throughout, the people’s clear

mandate to the Legislature, that public education is a *prime* function of our State government. We must not allow that command to be unheeded.” *Pauley v. Kelly*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979).

The constitutional requirement of a thorough and efficient system of free schools is not some vague notion or ideal. This Court has defined various aspects of what constitutes a thorough and efficient system of free schools. Implicit in the definition of a thorough and efficient system of free schools are “supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.” *Pauley v. Kelly*, 162 W. Va. 672, 706, 255 S.E.2d 859, 877 (1979). Further, a requirement of a thorough and efficient system of free schools is financing. “The financing of education is, among mandated public services, the first constitutional priority.” *West Va. Educ. Ass’n v. Legislature of W. Va.*, 179 W. Va. 381, 382, 369 S.E.2d 454, 455 (1988). “Our basic law makes education’s funding second in priority only to payment of the State debt, and ahead of every other State function.” *Pauley v. Kelly*, 162 W. Va. 672, 719, 255 S.E.2d 859, 884 (1979).

Because the Legislature has been commanded by the people, through the Constitution, to make public education a prime function of our State, any infringement upon this prime function is subject to strict scrutiny. “If 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.” Syl. Pt. 2, *Cathe A. v. Doddridge County Bd. of Educ.*, 200 W. Va. 521, 525, 490 S.E.2d 340, 344 (1997)(in part). Up to this point, it appears that the parties agree. See State’s Brief at pg. 22-23. The disagreement occurs with whether the Hope Scholarship “infringes” upon the right to public education. The Circuit Court

properly found that the Hope Scholarship infringes upon the fundamental right to a public education based on the constitutional history in this State.

2. A legislative incentivized reduction in funding for public education directly infringes upon the right to a public education, as reiterated by the Circuit Court.

While Petitioners argue that under the Hope Scholarship public funding will not be diminished by the voucher law because a special revenue fund for the voucher law was created by the statute, there is no real dispute among the parties that the Hope Scholarship will result in less funding for school districts. *See e.g.* State’s Brief at pg. 26 (“Some districts will lose money if students leave their public school”). Despite the undeniable fact that money for public education will be diminished, Petitioners argue that this loss of funds does not constitute an infringement to the right to public education because schools will only lose *some* money, *Id.* at pg. 24-25, and there is no evidence that the loss of money will result in harm to the schools. *Id.* at pg. 26-27. Both arguments are without merit.

As it relates to the loss of money, Petitioners attempt to distract the Court from the loss of funding by discussing fixed costs. While certain fixed costs are directly paid without regard to the net enrollment numbers, the *vast majority* of the funding is tied directly or indirectly to the “net enrollment” number. JA Vol. 4, at 557. This includes operational and maintenance expenses, as well as personnel and other expenses to operate a school. As stated above, adequate funding is implicit in the definition of a thorough and efficient system of public schools to provide for good physical facilities, instructional materials and personnel. *Pauley v. Kelly*, 162 W. Va. 672, 706, 255 S.E.2d 859, 877 (1979). The fact that these fixed costs will be paid are irrelevant to funding for good physical facilities, instructional materials and personnel.

This is because the majority of the factors to determine public education financing relates to “net enrollment” of students. *See* Factual Background, *supra*. For example, “net enrollment”

directly effects the allocation of improvements to instructional programs, as funds are made proportional to “the average of each county’s average daily attendance for the preceding year and the county’s second month net enrollment.” W. Va. Code § 18-9A-10(a)(1)(B). “Net enrollment” only includes individuals enrolled in public school. W. Va. Code § 18-9A-2(i). If a county’s “net enrollment” decreases, so too does its share of money for improvements to instructional programs. Similarly, “net enrollment” is used to calculate an average cost for operations and maintenance. W. Va. Code § 18-9A-9(a)(C). If a county’s “net enrollment” decreases, so does its budget for operations and maintenance. Any school district with students who leave public schools to receive funding under the voucher law *will* experience a budgetary impact. JA Vol. 4, at 558; *see also* JA Vol. 4, at 578.

Having established that public school enrollment directly relates to the funding of public school, establishing that the voucher law diminishes public school attendance simply requires a review of the eligibility requirements for the Hope Scholarship. Specifically, eligibility to receive a voucher under the Hope Scholarship Program requires, *inter alia*, full-time enrollment and attendance at a public elementary or secondary school program in the state for at least 45 calendar days during the current instructional term. W. Va. Code § 18-31-2(5)(B). In other words, the voucher law specifically pulls students from public education into state-funded private education, as students who do not have at least 45 days of public education³ are not eligible. The net effect of this is a reduction of the net enrollment numbers, which, as explained above, directly reduces the amount of funding for public schools. The West Virginia Treasurer’s Office indicated that the West Virginia Hope Scholarship Board approved 3,010 Hope Scholarship applications for the

³ Students who are entering kindergarten, who would otherwise first be entering public education, are also eligible. W. Va. Code § 18-31-2(5)(B).

2022-2023 school year and that there were 470 timely applications that had not yet been acted upon as of July 1, 2022. JA Vol. 4, at 563. Each of these students leaving public education due to a legislatively incentivized program *will* absolutely impact funding for public schools in West Virginia.

To further illustrate this point, there are a number of smaller counties with students applying for funding under the voucher law such as Fayette County (87 students), Greenbrier County (86 students), Logan County (123 students), and Ohio County (124 students). JA Vol. 4, at 558-559; *see also* JA Vol. 4, at 565. The impact of each student who exits those public schools will be significant on the budgets of those districts. JA Vol. 4, at 558-559. For example, Ohio County reported 5,023 full-time equivalent students for State Aid funding in the 2021-22 school year. JA Vol. 4, at 558-559. According to the figures compiled in the WVEIS, 124 students from Ohio County have applied for funding under the voucher law. JA Vol. 4, at 565. This will amount to approximately \$675,500.00 taken from the school district budget for the 2023-24 school year. JA Vol. 4, at 558-559. It is also true that the amount of public-school funding necessary to provide students with a full educational experience does not decrease proportionately with each student who exits the public school system to receive funding under the voucher law. JA Vol. 4, at 559; *see also* JA Vol. 4, at 578. There are certain fixed costs associated with educating students that are calculated by the State Aid formula based upon “net enrollment.” For example, there are 297 Kanawha County students who have applied for funding under the voucher law. JA Vol. 4, at 565. These students are spread out across the county, making it extremely unlikely Kanawha County administrators could close or consolidate schools, eliminate bus routes, or decrease their bus fleet to save costs proportionate to the lost revenue for those 297 students. JA Vol. 4, at 559. Moreover, other fixed costs for staffing (each school must have a principal, cooks, custodian, teachers, etc.),

building maintenance, grounds, internet, water, telephone, security, supplies, software, equipment and other services may increase on a per-pupil basis, making it even more expensive to educate the students remaining in the district. JA Vol. 4, at 578. Again, these costs are calculated by “net enrollment” figures. Therefore, to argue that a financial incentivization to flee public education by the Legislature does not *directly* result in reduced funding for public education is disingenuous and not supported by the law.

Very simply, the Circuit Court was correct in finding that the voucher law will *directly* diminish public funds that could be used to facilitate a thorough and efficient system of public schools in favor of subsidizing private schools and homeschooling. This is because the voucher law creates a financial incentive for students to leave the public school system in favor of receiving a voucher. Furthermore, the funds can be used by a parent or a private education service provider with minimal oversight and minimal assurances of the student’s academic achievement. W. Va. Code § 18-31-5(A)-(D). Finally, this voucher law may concentrate the most vulnerable and costly to educate students in public schools who may be unable to exit the public school system due to a lack of special services available to them in a private school or homeschool setting. JA Vol. 4, at 559; *see also* JA Vol. 4, at 579. The Circuit Court agreed that the voucher law is in direct conflict with the constitutional mandates regarding public education as set forth in the State Constitution.

Recognizing that there will be a significant reduction in funding, Petitioners argue that there is a “safety valve” in the formula, so therefore, all is fine. *See* State’s Brief at pg. 26. The purported “safety valve” only effects schools whose “net enrollment” drops under 1,400 students. *See* W. Va. Code § 18-9A-2(i)(5). This does nothing to affect large school systems, whose funding is derived from an economy of scale. JA Vol. 4, at 559 and 578-579. In such a system, the

incentivized reduction of hundreds of students results in a funding shortfall. JA Vol. 4, at 578-579.

Moreover, Petitioners assert that any diversion of funding is an indirect result of the Hope Scholarship, not a direct result. In support Petitioners assert slippery slope arguments that now every decision that *may* influence educational funding will be subject to scrutiny by a Court. However, this argument is disingenuous, at best. The Legislature created a funding scheme for public schools based in large part on “net enrollment.” The Legislature then passed a law, the Hope Scholarship, designed to *directly* influence “net enrollment” by *incentivizing* the fleeing from public education. This *directly* results in less funding for public schools. In fact, as Petitioners point out, in passing the Hope Scholarship, the Legislature *expressly* acknowledged that funds would be shifted away from public education and then *directly* gave those funds to private citizens. *See e.g.* State’s Brief pg. 3 (“Each annual scholarship equals ‘the prior year’s statewide average net aid share allotted per pupil’ in a public school, ‘based on net enrollment adjusted for state aid purposes,’ and ‘prorated’ if students are not in the program the entire fiscal year.”) (*citing* W. Va. Code § 18-31-6(b)). There is simply nothing indirect about the purpose of the law, the intent of the law and the effect of the law. Ultimately, however, the distinction between indirect and direct is essentially meritless because a violation of a constitutional right is still a violation of a constitutional right, and the Legislature cannot indirectly do what it cannot directly do. *See State ex rel. Balt. & O. R.R. v. Sims*, 132 W. Va. 13, 20, 53 S.E.2d 505, 508 (1948) (“What the Legislature cannot do directly, cannot be done by indirect methods.”); *see also Loden v. Miss. Pub. Serv. Com.*, 279 So. 2d 636, 639 (Miss. 1973) (“This Court has declared void legislation which was held to be indirect violation of the constitutional provision in Mississippi Constitution”); *Hous. & T. C. R. Co. v. State*, 41 S.W. 157, 163 (Tex. Civ. App. 1897) (“Such methods

of indirect violation of the constitution should receive no more sanction than is the case when it has been expressly violated.”)

Even though there is a clear reduction in funding, Petitioners assert there is no evidence that the reduction in funding will result in harm. The Circuit Court was not persuaded by this argument as it simply is not true. Factually, evidence was developed that reduction in funding results in the elimination of, among other things, teacher resources and professional development programs which are critical to improving instruction at the schools. *See e.g.* JA Vol. 1, at 8-10. In fact, Petitioners submitted no evidence to counter the harm caused by a reduction in funding. As this harm was found based upon the factual record, this is a factual finding of the Circuit Court subject to a clearly erroneous standard. JA Vol. 1, at 8-10.

The evidence of harm presented is sufficient to constitute an infringement under this Court’s precedent. This Court has previously disapproved of reducing state expenditures for public education as part of a pro rata reduction in the overall budget due to an anticipated revenue shortfall. *West Va. Educ. Ass’n v. Legislature of W. Va.*, 179 W. Va. 381, 382, 369 S.E.2d 454, 455 (1988)(discussing *State ex rel. Board of Educ. v. Rockefeller*, 167 W. Va. 72, 81, 281 S.E.2d 131, 136 (1981)) (“We, therefore, conclude that because of public education’s constitutionally preferred status in this State, expenditures for public education cannot be reduced under W. Va. Code, 5A-2-23, in the absence of a compelling factual record to demonstrate the necessity therefor.”). Here, the voucher law goes one step further in diverting funds that would have gone to public education to be used to further the interest of private schools and homeschooling. In addition to divesting funds from public education, the voucher law will require an increase in funds and time expenditures by the State BOE, as well as county boards of education that would not otherwise be expended without the Hope Scholarship. JA Vol. 4, at 560.

It was appropriate for the Circuit Court to analyze other court rulings over similar voucher laws and to note that other Courts have struck down or cautioned against voucher schemes that would negatively impact public school funding. For example, in *Bush v. Holmes*, 919 So. 2d 392, 412 (Fla. 2006), the Florida Supreme Court struck down a voucher program because it diverted public funds to private education and permitted students within the state to receive a publicly funded education through an alternative system of private schools that were not subject to the uniformity requirements of the public school system. *Id.* The scholarship program in that case allowed a student who attended or was assigned to attend a failing public school the opportunity to attend a higher performing public school or use a scholarship provided by the state to attend a participating private school. *Id.* at 400. The Florida Supreme Court found it problematic that the scholarship program “diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children.” *Id.* at 408-409. The Florida Supreme Court also found it problematic that the scholarship program and legislation regulating it made no provision to ensure that the private school alternative to the public school system meets the criterion of uniformity. *Id.* at 408. The Court further stated that in the “provision directing the Department of Education to establish and maintain a database of private schools, the Legislature expressly states that it does not intend ‘to regulate, control, approve, or accredit private educational institutions.’” *Id.* at 409 (*citing* § 1002.42(2)(h), Fla. Stat. (2005)).

Similar to the West Virginia Constitution, the Ohio Constitution mandates “a thorough and efficient system of common schools.” OHIO CONST. art. VI, § 2. The Ohio Supreme Court in *Simmons-Harris v. Goff*, rejected a challenge to a much less expansive voucher program that was available to students in a singular school district because the restrictive nature of the program did

not “undermine[] the state’s obligation to public education.” *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 11, 711 N.E.2d 203, 212 (1999). However, the Court also stated that “[i]t is possible that a greatly expanded School Voucher Program or similar program could damage public education. Such a program could be subject to a renewed constitutional challenge.” *Id.*, at n. 2. West Virginia’s voucher law is much more expansive than the Ohio voucher law and for the reasons stated above will damage public education in the State. Moreover, there can be no serious dispute that the voucher law will reduce the amount of funding for public education.

Having established that the Legislature has directly infringed upon the right to a public education, the law at issue must pass scrutiny. Petitioners make no argument that the law does, in fact, survive strict scrutiny. Therefore, the Circuit Court’s finding regarding the same stands. JA Vol. 1, at 15-16.

In sum, there can be no dispute that the Hope Scholarship incentivizes public students to exit the public school system and directly defunds West Virginia’s public schools. As established above, the Hope Scholarship’s effect of defunding public schools is in direct conflict with the Legislature’s constitutional duty to provide for a thorough and efficient system of public schools. West Virginia’s public school students’ fundamental right to a thorough and efficient education is infringed when public schools are being defunded in favor of private school students or home-schooled students. The Hope Scholarship cannot survive strict scrutiny because Petitioners have not demonstrated that funding private school or homeschool students to the detriment of public school students meets a compelling governmental interest. Moreover, Petitioners have not even attempted to argue that the Hope Scholarship is narrowly tailored. As such, the Circuit Court’s finding that the Hope Scholarship does not survive strict scrutiny must be affirmed.

B. The Circuit Court properly found that the Hope Scholarship statute unconstitutionally usurps the State Board of Education’s powers.

The Circuit Court held the Hope Scholarship violates Article 12, Section 2 of the Constitution by “usurp[ing] the constitutional authority of the State BOE. Petitioners Switzer and Compton assign error in this finding. However, the Circuit Court correctly found that the State BOE’s power was unconstitutionally usurped by the Hope Scholarship.

Under the Constitution, the Legislature is required to provide for a thorough and efficient system of free schools and is also required to provide for the support of free schools. W. Va. Const. Art. VII, § 1, § 5. The West Virginia Constitution also discusses funding for public schools and states that the “School Fund” shall be used to support “free schools throughout the State, and to no other purpose whatever.” W. Va. Const. Art. XII, § 4. In establishing the voucher law, the Legislature has attempted to create a publicly funded system of private education which is governed and administered by a separate board. As such, the constitutional authority of the State BOE has been usurped by the voucher law. “The West Virginia Board of Education and the State Superintendent of Schools, pursuant to their general supervisory powers over education in West Virginia under *W.Va. Const.* art. XII, § 2, and their specific duties to establish, implement and enforce high quality educational standards for all facets of education under the provisions of Chapter 18 of the West Virginia Code, have a duty to ensure the complete executive delivery and maintenance of a ‘thorough and efficient system of free schools’ in West Virginia[.]” Syl. Pt. 5, *W. Va. Bd. of Educ. v. Bd. of Educ.*, 239 W. Va. 705, 707, 806 S.E.2d 136, 139 (2017)(citing Syl. Pt. 1, in part, *Pauley v. Bailey*, 174 W. Va. 167, 324 S.E.2d 128 (1984)). The West Virginia Code has tasked the State BOE with carrying into effect the laws and policies of the state relating to education. W. Va. Code § 18-2-5(a). “Rule-making by the State Board of Education is within the meaning of ‘general supervision’ of state schools pursuant to art. XII, § 2 of the West Virginia Constitution, and any statutory provision that interferes with such rule-making is

unconstitutional.” Syl. Pt. 6, *W. Va. Bd. of Educ. v. Bd. of Educ.*, 239 W. Va. 705, 707, 806 S.E.2d 136, 139 (2017)(citing Syl. Pt. 2, in part, *W. Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 3376 S.E.2d 839 (1988)).

The Circuit Court was correct that establishing the Hope Scholarship Program and the corresponding legislation, the State BOE has been impermissibly stripped of its supervisory and rule-making authority over public funding for education occurring in the State. JA Vol. 1 at 14. The Hope Scholarship Program is administered by a separate board, the West Virginia Hope Scholarship Board. W. Va. Code § 18-31-3(a). The West Virginia Hope Scholarship Board is granted its own rulemaking authority, separate and apart from the authority of the State BOE, with respect to public funds to be used for education in the State. W. Va. Code § 18-31-4. Moreover, it supervises where these public funds are spent. *Id.* Thus, the voucher law unlawfully prevents the State BOE from exercising its supervisory and rulemaking authority to supervise the public funding of education in the State. Worse yet, the State BOE is prevented from supervising these funds due to the voucher law mandating the State BOE to transfer these public funds to the West Virginia Hope Scholarship Board. W. Va. Code § 18-31-6(a). Despite not having any supervisory authority of the Hope Scholarship funds, the voucher law requires the West Virginia Department of Education to include funding for the program in its annual budget request for the purposes of transferring the funding to the West Virginia Hope Scholarship Board. W. Va. Code § 18-31-6(b). Moreover, it permits the Hope Scholarship Board to set the fees associated with *public* education. JA Vol. 4, at 559-560; *see also* W.Va. Code § 18-31-8(f). The Circuit Court properly found that the stripping of power is clearly beyond the Legislature’s powers. JA Vol. 1 at 14. Therefore, it is abundantly clear that the voucher law and impermissibly usurps the State BOE’s authority over public funding for education in the State, and that the Circuit Court’s holding must be affirmed.

II. REMAINING ASSIGNMENTS OF ERROR

The BOE Respondents join in the response of Respondents Beaver and Peters as it relates to all remaining assignments of error not specifically addressed herein.

CONCLUSION

For the foregoing reasons, the BOE Respondents respectfully request this Court affirm the decision of the Circuit Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing “**RESPONDENTS DAVID L. ROACH AND L. PAUL HARDESTY’S RESPONSE TO PETITIONERS’ APPEAL**” was served upon the following parties via the Court’s e-filing system on this day, September 23, 2022:

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