

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

THE CABELL COUNTY PUBLIC LIBRARY
and THE GREATER HUNTINGTON PARK
AND RECREATION DISTRICT,

Petitioners,

v.

Case No. 23-C-339
Hon. Gregory L. Howard

THE BOARD OF EDUCATION OF CABELL
COUNTY, WEST VIRGINIA,

Respondent.

**FINAL ORDER GRANTING PETITION FOR WRIT OF MANDAMUS AND
GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS**

This matter is before the Court on a Verified Petition for Writ of Mandamus (“Petition”) filed by the Cabell County Public Library (“Public Library”) and the Greater Huntington Park and Recreation District (“Park District”) on September 14, 2023, seeking to require the Board of Education of Cabell County, West Virginia (“Cabell BOE”) to comply with two Special Acts of the West Virginia Legislature related to excess levy funding.

On October 5, 2023, Cabell BOE filed Respondent’s Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and a Memorandum in Support, arguing that under the Supreme Court of Appeals of West Virginia’s holding in *Kanawha County Public Library Board v. Board of Education of the County of Kanawha*, 231 W. Va. 386, 745 S.E.2d 424 (2013) (“*Board I*”),¹ the Special Acts relied upon by the Petitioners are unconstitutional. Petitioners filed a Response in Opposition to Respondent’s Motion to Dismiss and Motion for

¹ As discussed more fully *infra*, the West Virginia Supreme Court of Appeals has decided two cases concerning Special Acts involving the Kanawha County Public Library. The first case, *Board of Education of the County of Kanawha v. West Virginia Board of Education*, 219 W. Va. 801, 639 S.E.2d 893 (2006) (“*Board I*”), provides some historical background for the current dispute; however, the parties to this case agree that *Board II* is the determinative case in this matter.

Judgment on the Pleadings on October 30, 2023. The Court heard oral argument on the Motions on November 14, 2023, and the Motions are therefore ripe for adjudication. Accordingly, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Two Special Acts of the West Virginia Legislature are at issue in this case: Chapter 207 of the 1967 Acts of the West Virginia Legislature (the “Public Library Special Act”) and Chapter 194 of the 1983 Acts of the West Virginia Legislature (the “Park District Special Act”). The Park District Special Act was reenacted in 2011 in Chapter 187 of the Acts of the West Virginia Legislature.

2. These Special Acts provide for the creation and funding of the Public Library and the Park District.

3. The Public Library Special Act, passed on March 9, 1967, provides that the Public Library, “shall be supported by the [Cabell BOE] and the county court [now commission] of Cabell County, as a joint endeavor of the two governing authorities in the manner hereinafter prescribed.” 1967 W. Va. Acts 1245 (Public Library Special Act, § 1).

4. The Library Special Act goes on to provide for the following levies for support, maintenance, and operation of the Cabell County Public Library:

§ 5. Levies for support, maintenance and operation.

In order to provide for the support, maintenance and operation of the public library hereby created and any and all branches thereof the said supporting governing authorities shall, upon written request by the board of directors of the public library, levy annually as follows within the respective taxing districts of the governing authorities, on each one hundred dollars of assessed valuation of the property taxable in the area served by it according to the last assessment for state and county purposes, amounts not exceeding the following amounts for the fiscal year beginning July first, one thousand nine hundred sixty-seven:

. . . .

B. The board of education of the county of Cabell shall provide funds available to the board through special and excess levies . . . as follows: Class one, one and four-tenths cents; class two, two and eight-tenths cents; class three, five and six-tenths cents; class four, five and six-tenths cents.

In addition to the aforesaid amounts which, upon written request by said board, the governing authorities shall levy, each such governing authority may support the public library with any other general or special revenues or excess levies. All income realized by the operation of the public library from any sources other than the above levies shall be used by the board of directors for support of the public library.

Id. at 1247–48.

5. Similarly, the Park District Special Act states that the purpose of the Park District “is to establish, own, develop, and operate a park system for the benefit, health, safety, welfare, pleasure and relaxation of the inhabitants” of the Greater Huntington Park and Recreation District. 2011 W. Va. Acts 1896–97 (Park District Special Act, § 2(a)).

6. The provision of the Park District Special Act governing funding provides in pertinent part:

§ 7. Charges, revenues, fees, levies, assessments and bonds for the support, maintenance and operation of parks.

. . . .

(b) In order to ensure adequate support for the maintenance and operation of the Park District, the following governing authorities shall, upon written request by the Park Board, levy annually as follows within the respective taxing districts of the governing authorities, on each \$100 of assessed valuation of the property taxable in the area served by it according to the last assessment for state and county purposes, amounts not exceeding the following amounts for fiscal year beginning July 1, 1983:

. . . .

(3) the board of education of the county of Cabell shall provide funds available to the board through special and excess levies for the first year of the act and annually thereafter: Class I, 0.433c; Class II 0.866c; Class III and Class IV, 1.73c.

2011 W. Va. Acts 1911 (Park District Special Act § 7(b)).

7. At the primary election held on May 8, 2018, Cabell County voters approved an excess levy submitted by the Cabell BOE covering expenditures in fiscal years 2021 to 2025.

8. The 2021–2025 Excess Levy Order stated:

After full consideration thereof, The Board of Education of the County of Cabell, being of the opinion that the maximum levies for current expenses authorized by Article 8, Chapter 11 of the Code of West Virginia, 1931, as amended, will not provide sufficient funds for the payment of the current expenses of schools in Cabell County, including expenditures for the purposes hereinafter stated, during the fiscal years beginning July 1, 2020, July 1, 2021, July 1, 2022, July 1, 2023 and July 1, 2024, and have ascertained that the amounts hereinafter shown in excess of the amounts raised by regular levies will be needed by the Board of Education of the County of Cabell during each of said five (5) fiscal years and that an election should be held to increase such levies, in conformity with law

9. The 2021–2025 Excess Levy Order listed twelve purposes for which the Cabell BOE indicated additional funds were needed, which included the Public Library and the Park District as follows:

[Public Library] – <i>The operation of the [Public Library] as required by Section 5 [of the Public Library Special Act].</i>	\$1,471,869.00
[Park District] – <i>The operation of the [Park District] as required by Section 7 [of the Park District Special Act].</i>	\$455,229.00

10. For the twelve purposes, the 2021–2025 Excess Levy Order stated, “The approximate amount considered necessary for said purposes in said five (5) fiscal years i[s] the

sum of \$24,128,149.00 annually.” This approximated amount was determined using the “valuation of each class of taxable property within the Cabell County School District for the assessment year ending June 30, 2018,” and the maximum allowable rate permissible under West Virginia Code § 11-8-16.

11. The 2021–2025 Excess Levy Order further stated:

The [Cabell BOE] is hereby authorized and empowered to expend, during the term of this levy, the surplus, if any, accruing in excess of the above amounts needed for any of the above stated purposes, plus excess collections due to increased assessed valuations for the enrichment, supplementation, operation, and improvement of educational services and/or facilities in the public schools of the County of Cabell.

12. Historically, the Cabell BOE provided the estimated amounts approved by the voters to Petitioners, which were based on the estimates at the time the levy was passed, and then would provide the remainder of the owed amounts reflecting property taxes as actually collected later in the year. The parties refer to the payments above and beyond the line-item estimated amounts described in the 2021–2025 Excess Levy Order as “equalization payments.”

13. In 2023, the Cabell BOE faced financial pressures resulting from declining enrollment, inflation, and the cessation of short term federal COVID-19 relief funding. The Superintendent of Cabell County Schools, Dr. Ryan S. Saxe, explained that the Cabell BOE “found that needs identified for excess levy funding exceeded the district’s maximum levying capacity of \$29 million by nearly \$10 million,” which necessitated eliminating \$10 million dollars of expenditures from the Cabell BOE’s budget.

14. In an attempt to balance its budget, the Cabell BOE decided that, in its 2026–2030 Excess Levy Proposal, it would reduce the amount of funding that it would provide to the Public Library to \$195,089, which is an amount lower than the amount mandated by the Public Library

Special Act. Further, the Cabell BOE decided to exclude all funding for the Park District from the 2026–2030 Excess Levy Proposal, despite the Park District Special Act’s requirement that the Cabell BOE provide a certain minimum level of funding to the Park District when, as here, the Park District requests that it be placed on the excess levy.

15. An affidavit executed by the Executive Director of the Public Library, Breana Bowen, states, “Based on the fiscal year 2021 through 2023 operating budgets, the proposed cut represents approximately 37% to 39% of the Public Library’s operating budget.” An affidavit executed by the Executive Director of the Park District, Kathy McKenna, states, “The proposed funding reduction represents more than 16% of the Park District’s operating budget.”

16. The Cabell BOE has made no equalization payments for fiscal year 2023. Ms. Bowen’s affidavit indicates that the equalization payment amount for the Public Library for fiscal year 2023 would be approximately \$100,000.00. Ms. McKenna’s affidavit indicates that the equalization payment amount for the Park District for fiscal year 2023 would be approximately \$31,000.00.

17. Regarding the harm anticipated to result from the Cabell BOE’s decisions, Ms. Bowen’s affidavit avers,

The decision of the [Cabell BOE] to drastically reduce funding to the Public Library will have devastating and irreparable effects upon the operation of the Public Library. If the Public Library does not receive from the [Cabell BOE] the funding required by the [Public Library] Special Act and Excess Levies and received by the Public Library for the past 50 years, the Public Library may be forced to close branches, lay off staff, and reduce its services to the public. The most likely scenario will involve closure of the majority of the branch libraries and scale back of the main library’s services.

18. Similarly, Ms. McKenna’s affidavit affirms:

The refusal of the [Cabell BOE] to provide any funding to the Park District will have devastating and irreparable effects upon the operation of the Park District. If the Park District does not receive the funding required by the Special Act and Excess Levies and long received by the Park District, the Park District will be forced to discontinue many of its services, including reducing staff and seasonal workers, reducing educational programming, and scaling back maintenance and other operations.

19. In reaching these decisions concerning funding for Petitioners, the Cabell BOE relied on *Board II*—which was decided more than ten years prior—to declare that it was not obligated to comply with the Public Library Special Act and Park District Special Act because the Acts were unconstitutional. The Cabell BOE reasoned that, because it believed the Special Acts were unconstitutional, it had no obligation to place Petitioners on its excess levies or to provide funding to Petitioners through excess levies.

20. In a public meeting held on August 1, 2023, the Cabell BOE voted to approve the 2026–2030 Excess Levy Proposal.

21. The Cabell BOE made its decision to exclude Petitioners from its excess levy for fiscal years 2026 through 2030 (based on its determination as to the constitutionality of the Special Acts) without seeking a declaration from the Court on the matter and within only nine months of intending to seek a vote on its 2026–2030 Excess Levy Proposal. *See Bd. of Educ. of the Cnty. of Kanawha v. West Virginia Bd. of Educ.*, 219 W. Va. 801, 803, 639 S.E.2d 893, 895 (2006) (“*Board I*”) (stating that the appeal arose from the action filed in circuit court by the Kanawha County Board of Education “seeking a declaration that the [West Virginia Board of Education’s] method of financing the Kanawha County school system violates the equal protection clause of the State Constitution”); *Board II*, 231 W. Va. at 393, 745 S.E.2d at 431 (stating that the appeal arose from the action filed in circuit court by the Kanawha County Board of Education requesting that the court declare a particular statutory provision unconstitutional).

22. The Cabell BOE has taken the position that it is not obligated to include Petitioners on future excess levy ballots despite language in the Special Acts mandating Petitioners' inclusion on excess levy ballots when Petitioners request inclusion.

23. The Cabell BOE has also taken the position that the Cabell BOE will not be making future equalization payments.

24. The parties do not dispute that, from 1967 through the approval of the 2021–2025 Excess Levy Order—a period of more than fifty years—the Cabell BOE complied with the provisions of the Public Library Special Act. Furthermore, they do not dispute that from 1983 through the approval of the 2021–2025 Excess Levy Order—a period of more than thirty years—the Cabell BOE complied with the provisions of the Park District Special Act.

25. Moreover, from the time *Board II* was decided until the approval of the 2026–2030 Excess Levy Proposal—a period of more than ten years—the Cabell BOE has complied with the mandates of the Special Acts by including Petitioners on their excess levies, with funding in the amounts required by the Special Acts, and by making equalization payments to Petitioners.

26. On September 14, 2023, Petitioners filed a Petition for a Writ of Mandamus and request for declaratory judgment alleging, *inter alia*, that the Cabell BOE is required to follow the Public Library Special Act and Park District Special Act and provide funding to Petitioners as approved by the voters through excess levies.

27. The Parties agree that, because all the conduct at issue in this matter took place in Cabell County, this Court properly has jurisdiction over this matter and that venue in this Court is appropriate pursuant to West Virginia Code §§ 55-13-1, 53-1-2, and 53-5-3. These issues were raised by Petitioners and not challenged either in the Motion to Dismiss, the Reply in Support of the Motion to Dismiss, or during oral argument.

28. The Parties further agree that resolution of this matter should be expedited to ensure that a finalized excess levy ballot or ballots can be submitted in advance of the 2024 excess levy vote.

29. The Parties do not dispute the facts at all—the only dispute in this matter is whether the holding of *Board II*, extends to the Public Library Special Act and the Park District Special Act.

30. The Parties agree that no discovery is necessary to resolve the purely legal issue before the Court.

CONCLUSIONS OF LAW

Expedited Relief

31. The Parties and the Court agree that this matter should be resolved expeditiously to accommodate time for appellate review and so excess levy ballots can be printed and delivered in time for the May 14, 2024, primary election.

Applicable governing standards

32. Three elements must exist for proper issuance of a writ of mandamus: (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 the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law. Syl. Pt. 3, *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781 (1981).

33. The West Virginia Uniform Declaratory Judgments Act found in W. Va. Code §55-13-1 et seq., gives this Court the authority to “declare rights, status and other legal relations whether or not further relief is or could be claimed.”

34. Rule 12(b)(6) of the West Virginia Rules of Civil Procedure requires that a complaint be dismissed, in whole or in part, when it “fail[s] to state a claim upon which relief can be granted.” The purpose of a Rule 12(b)(6) motion is “to test the sufficiency of the complaint” and “to weed out unfounded suits” and claims. *Hill v. Stowers*, 224 W.Va. 51, 54, 680 S.E.2d 66, 69 (2009); *Williamson v. Harden*, 214 W.Va. 77, 79, 585 S.E.2d 369, 371 (2003).

35. A circuit court, viewing all the facts in a light most favorable to the nonmoving party, may grant a motion for judgment on the pleadings when it appears beyond doubt that the nonmoving party can prove no set of facts in support of his or her claim or defense. *Copley v. Mingo Cnty. Bd. of Educ.*, 195 W. Va. 480, 484, 466 S.E.2d 139, 143 (1995). Dismissal under West Virginia Rule of Civil Procedure 12(c) is analogous to that under Rule 12(b)(6) for failure to state a claim. Dismissal under either is appropriate if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations contained within the pleadings. *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Constitutionality of the Special Acts

36. The Motion to Dismiss asserts that the Public Library and Park District are not entitled to relief in mandamus, or to any relief at all, because the Special Acts relied upon by the Public Library and the Park District are unconstitutional. Specifically, the Board of Education claims that the Special Acts are unconstitutional under *Board II*.

37. *Board I* and *Board II* both involved the examination of Special Acts for nine county boards of education—Berkeley, Hardy, Harrison, Kanawha, Ohio, Raleigh, Tyler, Upshur, and Wood (the “nine Special Act counties”)—that required them to divert a portion of their regular

levy receipts to support their local public libraries. *Board II*, 231 W. Va. at 390-91, 391 n.2, 745 S.E.2d at 428-29, 429 n.2.

38. In *Board I*, the Kanawha County Board of Education (“Kanawha BOE”) asserted that “the requirement that it divert a portion of its regular levy receipts to the [Kanawha County Public Library Board] violated equal protection” because the Kanawha BOE “was being denied a portion of its ‘basic foundation program,’” which “creat[ed] an inequality in school funding in Kanawha County.” *Board II*, 231 W. Va. at 391, 745 S.E.2d at 429.

39. The “basic foundation program” is “funded by a ‘local share’—paid from the estimated tax revenue produced by levies . . . —and a ‘State share.’” *Board II*, 231 W. Va. at 391, 745 S.E.2d at 429. “After the basic foundation program sum is determined, the county’s local share is calculated and deducted from the basic foundation program total, leaving the amount due from the State for its share pursuant to W. Va. Code § 18-9A-12.” *Board II*, 231 W. Va. at 391, 745 S.E.2d at 429.

40. The Supreme Court agreed with the Kanawha BOE, deciding that a public library was a “non-school purpose” and that “to the extent that the state share of the basic education program was not increased to accommodate the Kanawha [] BOE’s required diversion of the local share, it was being treated unequally.” *Id.* at 391-392, 745 S.E.2d at 429-30.

41. The *Board I* court observed that “education is a fundamental, constitutional right in this State.” 219 W. Va. at 807, 639 S.E.2d at 899 (quoting Syl. Pt. 3, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979)). The Supreme Court continued, “The Legislature’s constitutional mandate to provide a thorough and efficient education includes, at a minimum, the requirement that the State’s formula for funding county school systems be applied in an equal or uniform manner.” *Id.*

42. The Supreme Court found no compelling state interest justified the unequal treatment in *Board I*. *Id.*² The Supreme Court reasoned:

Clearly, the end result of such unequal treatment is that county school boards charged by law with diverting a portion of their local shares to support non-school purposes have less funds from regular tax levies to expend directly on public schools. Simply put, the more than 2.2 million dollars directed each year to the support of the library is money taken from the support of school children in the classrooms of Kanawha County schools. This, in turn, potentially impinges on a school board's ability to provide a thorough and efficient education to its students.

Id. at 808, 639 S.E.2d at 900.

43. Accordingly, the Court held in *Board I*:

W.Va.Code § 18-9A-12 (1993), to the extent that it fails to provide that a county school board's allocated state aid share shall be adjusted to account for the fact that a portion of the county school board's local share is required by law to be used to support a non-school purpose, violates equal protection principles because it operates to treat county school boards required by law to provide financial support to non-school purposes less favorably than county school boards with no such requirement.

Syl. Pt. 6, *id.*

44. Following the Supreme Court's decision in *Board I*, the Legislature amended West Virginia Code § 18-9A-11, which governed calculation of a county's local share, to recognize that libraries serve a "legitimate school purpose." The amended statute also placed the library funding obligation in the nine Special Act counties—as created by their respective Special Acts—upon their "discretionary retainage" resulting from the regular levy receipts. *Board II*, 231 W. Va. at

² In Syllabus Point 4 of *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979), the Supreme Court held, "Because education is a fundamental, constitutional right in this State, under our Equal Protection Clause any discriminatory classification found in the State's educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification."

392, 745 S.E.2d at 430. West Virginia Code § 18-9A-11(f) (2008) defined the “discretionary retainage” as “the amount by which the regular school board levies exceed[] the local share.” *Board II*, 231 W. Va. at 392, 745 S.E.2d at 430. The statute also provided that the nine Special Act counties were permitted to transfer their funding obligations to their excess levies, provided that any such excess levy included a specific line item for the library funding obligation. *Id.* at 393, 745 S.E.2d at 431.

45. Thereafter, the Kanawha BOE filed an action in the Circuit Court of Kanawha County asking that court to declare West Virginia Code § 18-9A-11 (2008), as applied in combination with Chapter 178 of the Acts of the Legislature, Regular Session, 1957 (the “Kanawha Special Act”), unconstitutional. *Board II*, 231 W. Va. at 393, 745 S.E.2d at 431. The Kanawha BOE took the position that it was “being treated differently than forty-six non-Special Act county boards of education which are free to utilize their discretionary retainage as they see fit and/or whose excess levies are unencumbered by a library obligation.” *Id.* at 403, 745 S.E.2d at 441.

46. The circuit court ruled in favor of the Kanawha BOE, finding that West Virginia Code § 18-9A-11 (2008) subjected the Kanawha BOE to unequal treatment. *Id.* at 432, 745 S.E.2d at 432. The circuit court decided that that no compelling state interest existed to justify the unequal treatment and that, consequently, the statute was unconstitutional. *Id.*

47. On appeal, the Supreme Court agreed with the circuit court, stating:

[T]his Court finds that the fact that the Kanawha County BOE is being treated differently than forty-six other counties by virtue of its mandatory library funding obligation is fairly manifest, notwithstanding the Legislative amendments. The non-Special Act counties may utilize their discretionary retainage for any purpose which they see fit and proper; Kanawha County’s discretionary retainage is encumbered to the extent of the funding obligation. Moreover, the option of transferring the obligation to the excess levy

does nothing' to alleviate the disparate treatment. The non-Special Act counties are not set with the Hobson's choice of choosing to deplete their discretionary retainage to satisfy the library funding obligation or risking the failure of their excess levy and the educational "extras" it affords by placing a large library funding line item on the ballot.

Id. at 404, 745 S.E.2d at 442.

48. The *Board II* court continued:

The West Virginia BOE contends that the concern that the excess levy will fail because of the inclusion of the library funding merely creates a "political problem" rather than an "equal protection" problem. Although a clever spin on the inescapable political implications of the issues presented, we find that making critical excess levy funds the potential "sacrificial lamb" only further illustrates the disparate treatment between Kanawha and non-Special Act counties.

Id. at 404 n.23, 745 S.E.2d at 442 n.23.

49. The *Board II* court then examined whether a compelling state interest existed to justify the disparate treatment. The Supreme Court focused on the nine Special Act counties, asking, "Why . . . are forty-six other counties not required to divert funds in support of their libraries?" *Id.* at 406, 745 S.E.2d at 444. The Supreme Court continued, "[T]his Court is still awaiting an articulable justification as to why these particular nine counties are being treated differently and why such disparate treatment is necessary to further a compelling state interest."

Id.

50. The Supreme Court held:

W. Va.Code § 18-9A-11 (2008), as amended, to the extent that it creates a lack of uniformity in the educational financing system by requiring counties set forth in W. Va.Code § 18-9A-11(g)(1) through (9) to pay their respective "Special Act" mandatory library funding obligations from their discretionary retainage or transfer the obligation to their excess levies, violates equal protection and is therefore, unconstitutional and unenforceable.

Syl. Pt. 12, *id.*

51. The Supreme Court then went on to examine whether the Kanawha Special Act was, itself, unconstitutional. The Court found determined that the circuit court's order "render[ed] unconstitutional and unenforceable the interdependent portions of the Kanawha Special Act and W. Va.Code § 18-9A-11 'to the extent' of the Kanawha County BOE's library funding obligation." *Id.* at 407, 745 S.E.2d at 445. The Supreme Court found "no error in the language of the order of the circuit court," and held that the Kanawha Special Act, "insofar only as pertains to the obligation of the Kanawha County Board of Education to divert a portion of its regular or excess levy receipts to the Kanawha County Public Library Board, is unconstitutional and unenforceable." *Id.* at 408, 745 S.E.2d at 446.

52. The Cabell BOE argues that, pursuant to the Supreme Court's opinion in *Board II*, the Public Library Special Act and the Park District Special Act are unconstitutional because they burden the Cabell BOE's excess levy without a compelling state interest for doing so. This Court disagrees.

53. In *Board II*, the Supreme Court specifically identified the nine Special Act counties affected by its decision. As noted above, each of those counties' Special Acts required diversion of their regular levy receipts to support their local public libraries, and West Virginia Code § 18-9A-11 (2008) placed those obligations upon the discretionary retainage with the option to transfer the obligation to the excess levy.

54. In sharp contrast, the Public Library Special Act and the Park District Special Act do not burden the Cabell BOE's regular levy receipts or its discretionary retainage, and the Cabell BOE is not required to make a "Hobson's choice." Rather, the Cabell BOE's funding obligation for Petitioners begins and ends with the excess levy. The Cabell County Special Acts only require

funding out of an excess levy if passed by the voters. *See* 1967 W. Va. Acts 1247 (Cabell County Public Library Special Act, § 5(B)); 2011 W. Va. Acts 1911 (Park District Special Act, § 7(b)(3)).

55. Additionally, unlike the nine Special Act counties, the money collected pursuant to excess levies in Cabell County for Petitioners never becomes part of the Cabell BOE's budget or enters its accounts. In contrast, the Kanawha Special Act provides that funds be deposited in the Kanawha BOE's account prior to disbursement to public libraries.

56. The Court notes that, as enacted, the Public Library Special Act and the Park District Special Act, unlike the Special Acts of the nine Special Act counties identified in *Board II*, do not infringe upon the fundamental right of the children of Cabell County to an education. *See* Syl. Pt. 3, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979) ("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."). Neither the Public Library Special Act nor the Park District Special Act affects the funding that satisfies the requirement that the children of Cabell County receive a constitutionally adequate education.

57. The Supreme Court's decision in *State ex rel. Boards of Education of the Counties of Upshur et al. v. Chafin*, 180 W. Va. 219, 376 S.E.2d 113 (1988), is instructive here.

58. In *Chafin*, the Supreme Court examined whether the excess levy provisions of Article X, § 10 of the West Virginia Constitution violate equal protection principles.³

³ Article X, § 10 of the West Virginia Constitution provides, in part:

Notwithstanding any other provision of the Constitution to the contrary, the maximum rates authorized and allocated by law for tax levies on the several classes of property for the support of public schools may be increased in any school district for a period not to exceed five years, and in an amount not to exceed one hundred

59. The lower court in *Chafin* determined that the constitution provision violated equal protection principles, finding “that dependence on county funds, particularly excess levies, promoted unequal treatment for students in poor and wealthy counties.” *Chafin*, 180 W. Va. at 221, 376 S.E.2d at 115. The lower court ordered that a proportion of State school funding from counties with excess levies be withheld from those counties and distributed equitably to the other counties. *Id.*

60. The Supreme Court reversed the lower court’s decision, determining that

W.Va. Const. art. X, § 10, in plain words, authorizes the residents of any county to approve by a majority vote the imposition of higher taxes on property in the county for the support of the county’s public schools. This authority may be exercised “[n]otwithstanding any other provision of the constitution to the contrary[.]” To the extent that the equal protection mandates of our Constitution would dictate otherwise, they must be deemed to be superseded by W.Va. Const. art. X, § 10, as the last word from the people.

Id. at 226, 376 S.E.2d at 120; *see also Pauley*, 162 W. Va. at 712, 255 S.E.2d at 880 (“The violation of the equal protection standard usually arises from state action; that is, the act of a legislative body in setting, by some statute or ordinance, an arbitrary classification. Here, these excess levies are determined by the vote of the people.” (citations omitted)).

61. Thus, pursuant to *Chafin*, while excess levies may result in a disparity of funding between counties, such excess levies are not entitled to equal protection attack because of an “absence of State action, which foreclose[s] the funding disparities from an equal protection challenge.” *Board II*, 231 W. Va. at 404, 745 S.E.2d at 442; *see also Pauley*, 162 W. Va. at 712, 255 S.E.2d at 880 (“The exemption of excess levy funds from equal protection standards may not prevent them from being counted as available for the thorough and efficient standard. But certainly

percent of such maximum rates, if such increase is approved, in the manner provided by law, by at least a majority of the votes cast for and against the same.

there are limits to the amount of reliance that can be placed on this source of funds, considering the State government's constitutional responsibility to assure a thorough and efficient system of schools.").

62. *Board II* simply holds that an encumbrance on a discretionary retainage and regular levies cannot escape equal protection scrutiny because of an *option* to obtain the money through an excess levy. The *Board II* court did not hold that pure excess levies like those funding Petitioners were subject to equal protection attack.

63. Critically, the *amici curiae* brief filed in *Board II* identified Cabell County as a Special Act county with "a significant interest in the outcome of [the] appeal"; however, *Board II* did not extend its decision to the Public Library Special Act and the Park District Special Act. Given the Supreme Court's prior decision in *Chafin*, this Court believes the exclusion of any discussion in *Board II* of Cabell County or the Special Acts at issue in this case was no mere oversight.⁴

64. Because the Public Library Special Act and the Park District Special Act only require funding out of the excess levy, the holding from *Board II* does not apply to render the Special Acts at issue unconstitutional.

65. The Supreme Court recently held:

"In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to

⁴ One other county in West Virginia has a Special Act like the Public Library Special Act at issue in this case: Lincoln County. As with Cabell County's Public Library Special Act, the Supreme Court did not extend its holding to Lincoln County's Special Act.

legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.” Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965).

Syl. Pt. 5, *State v. Beaver*, 248 W. Va. 177, 887 S.E.2d 610 (2022).

66. “Courts will not hold an act of the legislature to be contrary to the constitution without great caution, and unless it be manifestly and beyond doubt unconstitutional.” *Kanawha Cnty. Pub. Libr. v. Cnty. Ct. of Kanawha Cnty.*, 143 W. Va. 385, 403, 102 S.E.2d 712, 722–23 (1958) (quoting *Town of S. Morgantown v. City of Morgantown*, 49 W. Va. 729, 40 S.E. 15 (1901)).

67. This Court cannot say, in light of the foregoing, that the Public Library Special Act and the Park District Special Act are manifestly and beyond doubt unconstitutional.

68. Because the Cabell County Special Acts burden only excess levies, and not regular levies or discretionary retainage, they are not subject to equal protection challenge pursuant to *Board II, Chafin*, and the other precedent cited by Petitioners. The Special Acts are not unconstitutional, and the levies approved by the voters are not subject to equal protection scrutiny.

69. Having found that the Special Acts are not unconstitutional, the Court will turn its attention to the Cabell BOE’s obligations under the Special Acts.

***Placement of the Public Library and Park District
on excess levy ballots***

70. The Cabell BOE’s obligations to place Petitioners on excess levy ballots arise from the Public Library Special Act and the Park District Special Act.

71. The Public Library Special Act states that “[i]n order to provide for the support, maintenance and operation of the public library hereby created and any and all branches thereof the said governing authorities shall, upon written request by the board of directors of the public

library, levy annually as follows....” 1967 W. Va. Acts 1247 (Cabell County Public Library Special Act, § 5(B)).

72. Similarly, the Park District Special Act, in its most recent enactment, states that “[i]n order to ensure adequate support for the maintenance and operation of the Park District, the following governing authorities shall, upon written request by the Park Board, levy annually as follows....” 2011 W. Va. Acts 1911 (Park District Special Act, § 7(b)(3)).

73. Like the Public Library Special Act, the Park District Special Act expressly establishes that funding shall be provided out of money “available to the board through special and excess levies[.]” *Id.*

74. Furthermore, the Special Acts require that the Cabell County Board of Education include the Public Library and Park District on an excess levy ballot if requested by the boards of directors of those entities.

75. Therefore, the Public Library and the Park District have a clear right to the relief sought in their Verified Petition for Writ of Mandamus—inclusion on future excess levy ballots—and the first element from *Cooper* is satisfied.

76. The second *Cooper* element has been met as well. As established above, the Special Acts are not unconstitutional and are not discretionary. The Cabell BOE has a legal duty to comply with the Special Acts.

77. Finally, the third *Cooper* element is also met. As set forth in affidavits of Ms. Bowen and Ms. McKenna, both the Public Library and Park District will be devastatingly and irreparably harmed by exclusion from future excess levies. The Cabell BOE did not dispute the harm element in their briefing or at oral argument.

78. Neither the Public Library nor the Park District have any other adequate remedy at law, as no other legal mechanism exists to require a public entity like the Cabell BOE to comply with Acts of the Legislature aside from a writ of mandamus.

79. Therefore, a writ of mandamus is appropriate to compel the Cabell BOE to include the Public Library and the Park District on its excess levies as required by the Public Library Special Act and the Park District Special Act.

Equalization payments

80. The Public Library Special Act and the Part District Special Act include the precise manner and amount in which tax revenues are to be segregated for the benefit of the Public Library and the Park District.

81. The Public Library Special Act expressly states that this funding is to be provided from “funds available to the board through special and excess levies[.]” *Id.*

82. Pursuant to the Public Library Special Act, the Public Library is entitled to receive, if duly passed by the voters, per one hundred dollars of assessed property valuation: 1.4¢ for Class I properties, 2.8¢ for Class II properties, and 5.6¢ for Class III and IV properties. *Id.*

83. Pursuant to the Park District Special Act, the Park District is entitled to receive, if duly passed by the voters, per one hundred dollars of assessed property valuation: 0.433¢ for Class I properties, 0.866¢ for Class II properties, and 1.73¢ for Class III and IV properties. *Id.*

84. The plain language of the Public Library Special Act and the Park District Special Act do not limit the amounts due to the Public Library and the Park District to the estimates included on the levy ballots. Instead, the amounts due are the actual taxes assessed and collected. Under the language of the Special Acts, the payment of these amounts is not discretionary.

85. The 2021–2025 Excess Levy Order and the associated ballot provided to the voters referenced the controlling Special Acts.

86. The Cabell BOE argues that the equalization payments represent a “surplus” and that the language of the 2021–2025 Excess Levy Order authorizing and empowering the Cabell BOE to spend its “surplus” means that it is not required to make equalization payments to Petitioners. This Court disagrees.

87. The amounts collected pursuant to the two Special Acts above and beyond the estimates set forth in the 2021–2025 Excess Levy Order are not “surplus” under the plain language of the Public Library Special Act and the Park District Special Act. The amounts above the estimates are simply part of funding obligation as set forth in the Special Acts.

88. To the extent that the Cabell BOE argues that it is not required to make equalization payments because the Special Acts at issue are unconstitutional in that they require that Petitioners be placed on the excess levy, the Court disagrees with this position.

89. First, for the reasons discussed above, the two Special Acts are not unconstitutional as suggested by the Cabell BOE.

90. Second, the constitutionality of the Special Acts has only been questioned to the extent that they require the Cabell BOE to include Petitioners on the excess levy. The Cabell BOE has not challenged the constitutionality of the equalization payments themselves.

91. Third, even if the Supreme Court were to decide that the Special Acts are unconstitutional to the extent that they mandate inclusion of Petitioners on excess levies, the fact remains that the Cabell BOE included Petitioners on the excess levy at issue, and the citizens of Cabell County approved the excess levy.

92. Accordingly, pursuant to the 2021–2025 Excess Levy Order, as approved by the voters, the Cabell BOE must make equalization payments to comply with their funding obligations under the relevant Special Acts.

93. Therefore, Petitioners have a clear right to the relief sought in their Verified Petition for Writ of Mandamus—the equalization payments—and the first element of *Cooper* is satisfied.

94. The second element of *Cooper* is also satisfied because, as established above, the Special Acts are not unconstitutional and are not discretionary. The Cabell BOE has a legal duty to provide the equalization payments under the Special Acts.

95. The third element of *Cooper* is also met because, as established by the affidavits discussed above, nonpayment of the equalization payments will cause irreparable harm to Petitioners. The Cabell BOE did not dispute the existence of this harm in their briefing or during its oral argument.

96. Neither Petitioner has any other adequate remedy at law to compel the Cabell BOE to make the equalization payments.

97. Accordingly, a writ of mandamus is appropriate to compel the Cabell BOE to make the equalization payments.

For the foregoing reasons, the Court **GRANTS** the Cabell BOE’s Motion for Expedited Consideration; Petitioners’ writ of mandamus, as molded; Petitioners’ Motion for Judgment on the Pleadings; and the request for declaratory judgment in the Petition.

For the same reasons, the Court hereby **DENIES** the Cabell BOE’s Motion to Dismiss.

The Court **ORDERS** that the Cabell County Board of Education is hereby compelled, if requested, to include the Public Library and the Park District in future excess levies and to provide funding to the Public Library and Park District as set forth in the Special Acts.


Because the Court has determined that the Public Library and Park District are entitled to mandamus relief, their request for injunctive relief is hereby denied as **MOOT**.

This Order is intended to be a **FINAL ORDER** on all the legal issues in dispute between these parties, except for any requests for attorney's fees and costs, which shall be determined upon motion of a party.

The objections and exceptions of the Cabell BOE to the rulings contained in this Order are noted and preserved.

The Clerk is instructed to send a certified copy of this Order to counsel of record.

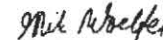
Entered this 1st day of December, 2023.


Chief Judge Gregory L. Howard, Jr.

STATE OF WEST VIRGINIA
COUNTY OF CABELL

I, MICHAEL J. WOELFEL, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON DEC - 1 2023

GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS DEC - 1 2023

 CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA