

No. 21-0097

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

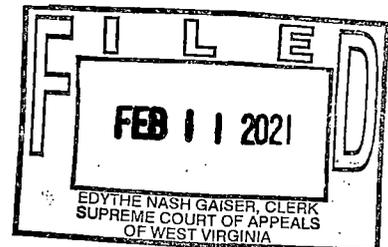
v.

WEST VIRGINIA
DEPARTMENT OF EDUCATION,

Respondent.

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VERIFIED PETITION FOR EMERGENCY WRIT OF MANDAMUS

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I. QUESTION PRESENTED

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

SUGGESTED ANSWER: Yes.

II. STATEMENT OF THE CASE

On exactly July 24, 2020, Petitioner, West Virginia Academy, Ltd., formally applied to become what could be West Virginia's first and only authorized public Charter school under the Public Charter Schools Act, codified in W. Va. Code §§ 18-5G-1 *et seq.* (the "Act"). Petitioner desires to run a public charter school to serve children who live in adjoining parts of Monongalia County and Preston County, West Virginia. To that end, Petitioner submitted a 371-page Application (the "Application") to the combined boards of education of Monongalia County and Preston County thus by operation of W. Va. Code 18-5G-2(2)(B)¹ designating them as Petitioner's Authorizer (the "Authorizer"²) to review and either approve or reject the Application.

After Petitioner submitted the Application, the Authorizer and Respondent West Virginia Department of Education ("Respondent" or "WVDE"), manifested their institutional opposition to public charter schools by stonewalling Petitioner and frustrating the Application process under the Act. The Authorizer and Respondent failed to perform even the most fundamental duties that the Act imposes on them to review and either approve or reject the Application and, especially in

¹ "Authorizers include . . . [t]wo or more county school boards when the charter school or application to form a charter school includes a primary recruitment area the encompasses territory in the two or more counties over which the respective boards have jurisdiction". W. Va. Code § 18-5G-2(2)(B).

² " 'Authorizer' means the entity empowered under this article to review applications, decide whether to approve or reject applications, enter into charter contracts with applicants, oversee public charter schools, and decide whether to renew, not renew, or revoke charter contracts." *Id.*

Respondent's case, to deem the Application as approved when the Authorizer defiantly refused to. Because of their misdirection and inaction Petitioner's objective to obtain a Charter might have been foiled but for the operation of a savings provision codified in W. Va. Code § 18-5G-6(d) under the Act that anticipates and squarely redresses the contingency of an authorizer that drags its feet:

Any failure to act on a charter application within the time specified shall be deemed an approval by the authorizer.

Under W. Va. Code § 18-5G-6(d), "any failure" suffices to trigger the outcome irrespective the desire, intention or competence of the authorizer. In the instant proceeding, and as explained further *infra*, the Authorizer "failed to act" on the Application in accordance with the Act "within the time" specified in the Act in three distinct ways:

1. The Authorizer, that is, the combined boards of education of Monongalia and Preston Counties, West Virginia, neither acted nor assembled as a single body constituting the Authorizer as the Act expressly requires; instead, each board of education behaved as if Petitioner had two authorizers and thus acted as two distinct, separate and independent bodies.

2. Whether or not the Authorizer was duly constituted, the Authorizer nonetheless failed to review the Application "no later than 90 days" following July 24, 2020, or the date on which Petitioner submitted the Application, as W. Va. Code § 18-5G-6(d) requires. Representatives of the two boards of education and Respondent acknowledged to Petitioner that they would not complete their duties to approve or reject the Application by October 22, 2020. Indeed, by their own admission, they did not complete their duties by October 22, 2020.

3. The Authorizer failed to perform a host of procedural and substantive duties imposed on it under the Act that inured to Petitioner.

These three classes of defects are, in the same order, (1) constitutive, (2) jurisdictional, and (3) procedural. The West Virginia Legislature mandated that “the provisions of [the Act] shall be interpreted liberally to support the purpose and intent of this section and to advance a renewed commitment by the state to the mission, goals and diversity of public education.” W. Va. Code § 18-5G-1(d). Because the Authorizer did not constitute itself or assemble as the Act contemplates, then no act feigned to reject the Application is effective. And, assuming that the Authorizer was duly constituted, it nonetheless failed to act on the Application by October 22, 2020, or within 90 days of its filing, ending its jurisdiction over the task. Finally, the Authorizer failed to follow the review process as the Act requires, thus, denying Petitioner its right to that process under the Act.

For any one of these reasons, or all of them, the Application is deemed as approved by operation of W. Va. Code § 18-5G-6(d) for the Authorizer’s “failure to act”. If the Application is deemed approved, then all that is left for WVDE is to deem it as approved and, because Petitioner filed what is believed to be the State’s lone application this year, to declare to Petitioner and the Authorizer that Petitioner’s Charter is authorized as the Act defines that term.

Petitioner made two written requests asking Respondent to fulfill its duty to acknowledge that the Application had been deemed approved and then to authorize Petitioner’s Charter. Respondent refused. Petitioner has landed in the Supreme Court of Appeals of West Virginia invoking its original jurisdiction under Section 3 of Article VIII of the West Virginia Constitution and W. Va. Code § 53-1-2. With this Petition, West Virginia Academy, Ltd. seeks a Writ of Mandamus against Respondent under W. Va. Code § 18-5G-6(e)³ to perform its mandatory, non-discretionary duty to authorize Petitioner’s public school Charter under the Act.

³ West Virginia Code § 18-5G-6(e) provides: “An authorizer’s charter application shall be submitted to the West Virginia Department of Education”.

Thus, with this Verified Petition for an Emergency Writ of Mandamus, Petitioner now seeks extraordinary and immediate relief under West Virginia law in relation to Petitioner's now-vested right to be authorized under the Act. Time is of the essence because statutory deadlines have come and gone, or are looming, to organize a Charter school, hire teachers and enroll pupils for its first academic term in Fall 2021. Only three pilot public charter schools can be authorized before July 1, 2023 under W. Va. Code § 18-5G-1(g) and key deadlines that will each harm Petitioner's ability to open its school either on time or at all will pass on March 1, 2021, April 15, 2021, April 30, 2021 and August 15, 2021, respectively.⁴ Hence, if this writ is not promptly decided and issued on an emergency basis then Petitioner will face ongoing, additional and irrevocable harm and there is no alternative under the law for providing redress for such harms. On this basis, Petitioner requests that this Court address this Petition on an expedited basis.

III. SUMMARY OF ARGUMENT

Petitioner's argument in this emergency proceeding in mandamus is based on a single legal issue as to whether Respondent must declare the Application as authorized, within the initial charter school application approval cycle under W. Va. Code § 18-5G-1(g), because the Application was "deemed approved" under W. Va. Code § 18-5G-6(d) based on multiple "failure[s] to act" by the Authorizer of the Application.

Respondent fails to acknowledge Petitioner's approval by operation of law and refuses to fulfill its non-discretionary duty to certify the Application as authorized in accordance with the

⁴ Specifically, (i) March 1, 2021 is the deadline for negotiating Petitioner's Charter contract with its Authorizer under Policy 3300 section 5.5.g and failure to do so pushes Petitioner's opening date back a full year to the 2022-2023 school year under Policy 3300 section 5.5.g.2; (ii) April 15, 2021 is the deadline for completing student enrollment applications for the Fall 2021 school year under Policy 3300 section 9.3.b.2; (iii) April 30, 2021 is the deadline for filing an application in the subsequent review period under Policy 3300 section 5.6.d; and (iv) August 15, 2021 is the deadline for Respondent to complete its ranking of conditionally approved applicants in the second review cycle to determine which Charter schools are authorized under Policy 3300 section 5.7.b.

Act as W. Va. Code § 18-5G-1(g) requires. This failure harms Petitioner as it is not able to prepare to open its charter school even as critical deadlines fast approach. This Court should direct Respondent, WVDE, to certify the Application as authorized as of the end of the initial review cycle under W. Va. Code § 18-5G-1(g).

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner asks for oral argument on an emergency and expedited basis under Rule 20 of the West Virginia Rules of Appellate Procedure because this case involves issues of first impression and fundamental public importance requiring immediate attention by this Court.

V. ARGUMENT

A. Factual Background

1. In its 2019 General Session, the Legislature passed the Act with the stated purpose of empowering “new, innovative, and more flexible ways of educating all children within the public system” in order to achieve improved student outcomes and expanded opportunities for students attending public school. W. Va. Code §18-5G-1(b). A clearly defined approval process was established so that authorizers of charter schools would “[s]olicit applications and guide the development of high-quality public charter school applications.” W. Va. Code §18-5G-6(3). The Act permits only three pilot charter schools State-wide in the first three-year window and then three more charter schools during each three-year period thereafter. W. Va. Code §18-5G-1(g).

2. Respondent issued Policy 3300 as an interpretive rule to implement provisions of the charter law as directed in W. Va. Code § 18-5G-5(e), which authorized the promulgation of a rule to “clarify” the charter school law and “address any unforeseen issues that might arise related to the implementation of the requirements” of the law.

3. Petitioner is a West Virginia non-profit corporation founded in December 2019 and qualifies as a Section 501(c)(3) public charity, WV Academy Vol 1-000260, with the objectives of founding a charter school or schools, developing and deploying curriculum and scalable college-readiness programs, and providing training for instructors of primary education throughout West Virginia. WV Academy Vol 1-000243-000244.

4. Petitioner funded and conducted a survey of parents and students to assess areas of need in public education and demand for a charter school in parts of Monongalia and Preston Counties in April and May 2020. WV Academy Vol 1-000211; WV Academy Vol 1-000222.

5. On May 12, 2020, in a Monongalia County board of education meeting, the superintendent for Monongalia County, Eddie Campbell, proposed Monongalia Policy 3-15 and, with help from its legal counsel, recommended approval of such policy, which policy appointed a review committee if a charter application is submitted and, after discussion, the Monongalia County board of education directed that the policy be submitted for immediate public comment and then a vote in the following meeting. WV Academy Vol 4-000862.

6. Policy 3-15 delegates several duties and responsibilities of the Monongalia County board of education to a panel of the superintendent and several district administrators to operate as a review panel, and the following responsibilities were explicitly delegated to this review panel to: (i) “conduct a public forum for local residents and stakeholders to provide input and learn about the proposed charter school described in the charter school application as required in Policy 3300 at Section 5.3.b.3” to be conducted at the discretion of the superintendent, (ii) “provide feedback to the applicant and identify deficiencies, as described in Policy 3300 at section 5.3.b.4” and (iii) “make a recommendation” to the Monongalia County board of education “at a regular or special meeting as to whether to approve the application.” WV Academy Vol 4-000871-000872.

7. On May 26, 2020, the Monongalia County board of education adopted Policy 3-15 in its board meeting and the minutes do not reflect any discussion of the policy or any public comments received. WV Academy Vol 4-000867.

8. Petitioner completed a review process with the International Baccalaureate Organization (IBO) as part of its process for adopting the first IB Middle Years program in West Virginia and, after successfully completing this process, Petitioner was issued a letter of support for its Charter Application by the IBO on July 8, 2020. WV Academy Vol 1-000266.

9. The Application includes a primary recruitment area that encompasses areas in both Preston County and Monongalia County. WV Academy Vol 1-000098.

10. Petitioner submitted its Charter Application, which was 371 pages in length, on July 24, 2020, by common carrier to both the board of education for both Preston County and the board of education for Monongalia County, who collectively serve as its Authorizer under the Act, and delivery was signed for on the following business day at both locations. WV Academy Vol 1-000002.

11. Petitioner objected on page 1 in the cover letter to its Charter Application to the Monongalia charter review policy based on, among other things, the fact that Policy 3-15 did not contemplate a review of a Charter Application to multiple counties and Petitioner also requested that the combined boards contact its president, John S. Treu, to set up the in-person interview. WV Academy Vol 1-000002.

12. The Preston County Superintendent Wotring informed the Preston County board of education of the Application in a board meeting on August 11, 2020, and this communication was recorded in the minutes to the meeting as part of the Superintendent's report stating "a charter application has been received in conjunction with a Monongalia County request."

13. On August 24, 2020, the Preston County board of education adopted Policy 1:21 Charter Schools Policy, which put “state procedures in place for meeting the requirements of code for accepting and reviewing charter school applications” as stated in the official meeting minutes and On October 20, 2020 Preston County Superintendent Steve Wotring confirmed that the Preston County Policy “added nothing” and “took [its policy] off of the State policies.” WV Academy Vol 4-000888; WV Academy Vol 2-000557.

14. On Monday October 12, 2020, Superintendent Campbell, with the Monongalia County board of education contacted Mr. Treu to schedule an in-person interview with Petitioner’s board, which was set for October 20, 2020, as well as a public forum, which was set for October 22, 2020. *Affidavit of John S. Treu* at WV Academy Vol 4-000897.

15. The first instance on record in which Superintendent Campbell told his board of education and the public about the Application during a public board meeting occurred on October 13, 2020, or nearly three months after Petitioner filed the Application. WV Academy Vol 4-000877. During that meeting, Superintendent Campbell indicated that he and his “team” had been meeting together for many weeks to review the application and further indicated that his team would: (i) conduct an interview at 1pm on October 20, 2020 and that no board members should be present at the interview, (ii) host a public forum with Petitioner on October 22, 2020 at 6 pm that no more than two board members should attend in person, (iii) submit a notice of deficiencies on the Application, and then (iv) present a recommendation to the Monongalia County board of education on whether to accept or reject the Application. WV Academy Vol 4-000880.

16. Although not reflected in the official minutes, during the October 13, 2020, Monongalia County board meeting that Mr. Treu attended by live stream, Superintendent Campbell, with the assistance of district legal counsel, Jennifer Caradine, told the board of

education that the board should not attend the in-person interview and avoid having more than two board members present at the open forum, or any other event in relation to the review of the Application, to avoid a quorum of the board of education ever being present and Superintendent Campbell specifically stated that the “state folks” recommended avoiding having more than two board members at any meeting. *Affidavit of John S. Treu* at WV Academy Vol 4-000897.

17. On October 20, 2020, a majority of the members of Petitioner’s governing board attended an in-person interview with the superintendents and district employees for Monongalia and Preston counties and, upon discovering that no members of the boards of education for either Monongalia or Preston counties were present, Petitioner immediately objected to the meeting on the same basis that was raised in the Application and noted that Petitioner’s participation in the meeting was under protest and did not constitute a waiver of Petitioner’s objection to the manner in which the review process was being conducted. WV Academy Vol 2-000383.

18. During the October 20, 2020 interview, Superintendent Campbell stated that he ran the interview process by Respondent and that Respondent “had no objections to it” and then when asked by Mr. Treu specifically who at WVDE vetted this process, Superintendent Campbell indicated that he had spoken with Sarah Stewart, who is legal counsel for Respondent, with responsibilities over charter school regulations. WV Academy Vol 2-000384.

19. Also during the October 20, 2020, interview, Mr. Treu asked Superintendent Campbell why no members of the board of education were present at the interview and he responded “[b]ecause we did not want them to have a predisposed concept before it was presented to them and recommended to them.” WV Academy Vol 2-000565.

20. The official advertised notice for the open forum on October 22, 2020, only stated that the meeting began at 6 pm and made no mention of the requirement to arrive 10 minutes early

to make a comment in the meeting as the cutoff time for sign-ups was only provided to the public in the Monongalia County board meeting. *Affidavit of John S. Treu*; WV Academy Vol 4-000899.

21. Notice of the open forum was not provided in any Preston County board of education meeting and Petitioner is unaware of any advertisement to the residents of Preston County in any manner. *Id.*

22. Two members of the Monongalia County board of education, Nancy Walker and Ron Lytle, as well as Superintendent Campbell were present at the open forum on October 22, 2020, and Petitioner again objected to the meeting on the basis stated in its initial Application and again noted that its participation in the meeting should not be deemed of waiver of its objection. WV Academy Vol 3-000596 to 000597; WV Academy Vol 3-000602.

23. No members of the Preston County board of education were present at the open forum on October 22, 2020, nor was Superintendent Wotring, from Preston County present. WV Academy Vol 3-000596 to 000597; *Affidavit of John S. Treu* at WV Academy Vol 4-000898.

24. On October 27, 2020, the Monongalia board of education held a regular board meeting and the minutes reflect Superintendent Campbell's discussion of the deficiency letter and stating that the board of education "is charged through Superintendent Campbell as their agent to identify deficiencies in the Application and inform the applicant" and Superintendent Campbell further indicated he would be completing the letter and submitting it to Petitioner that upcoming Thursday. WV Academy Vol 4-000884.

25. On Thursday October 29, 2020, Superintendent Campbell submitted a deficiency letter to Petitioner. Superintendent Campbell submitted the deficiency letter on Monongalia County board of education letterhead and omits any mention of Preston County. WV Academy Vol 3-000698.

26. On November 2, 2020, Petitioner submitted a demand letter to the Monongalia and Preston County boards of education requesting that the combined boards as Authorizer call a meeting within seven days to recognize that the 90-day review period since the Application was filed had expired and that the combined boards as Authorizer had never met to conduct any business related to the Application and so, on these bases, the Application was deemed approved and should be submitted to Respondent as conditionally approved. WV Academy Vol 3-000703.

27. The combined boards of education for Monongalia county and Preston County never responded to Petitioner's November 2, 2020, demand letter and did not call a joint meeting at any time between July 24, 2020, and November 30, 2020, in fact, the Monongalia County board of education refused to meet jointly with the Preston County board of education with respect to the Application. *Affidavit of John S. Treu* at WV Academy WV 4-000899 –902.

28. On November 9, 2020, Petitioner submitted its Application to Respondent with a letter explaining why the Application was “deemed approved” by inaction of its Authorizer and requesting that Respondent confirm receipt and act on its Application at the appropriate time. WV Academy Vol 3-000709.

29. On November 9, 2020, Superintendent Wotring proposed in a Preston County board of education Meeting a motion that the board defer any decision upon the Application to the decision of the Monongalia County School board with respect to Petitioner's Charter Application, although the board moved that any “action be tabled” until the November 30, 2020 meeting. WV Academy Vol 3-000887.

30. On November 12, 2020, several days after the regulatory deadlines for issuing any feedback had passed, and just one day prior to the deadline Monongalia County had imposed for Petitioner to respond to its deficiency letter, Superintendent Wotring emailed Petitioner suggesting

that the deficiency letter was “representative” of the efforts of both Monongalia and Preston Counties, which had each “worked independently on the review.” (WV Academy Vol 4-000857). Superintendent Wotring further acknowledged that he did not attend the Open Forum and the only participation he identified from Preston County was from “some Preston County residents.” WV Academy Vol 4-000857.

31. On November 12, 2020, the West Virginia Superintendent of Schools, W. Clayton Burch, mailed a letter to Petitioner and the superintendents for Monongalia and Preston counties stating Respondent believed that “potential authorizers have until November 30, 2020, to take action on a charter school application submitted during this application cycle” based on Policy 3300 and further indicating that the altered timeline in Policy 3300 was “to provide an even playing field to all potential applicants and to ensure county boards of education do not run afoul of the statutory cap.” WV Academy Vol 3-000712.

32. On November 13, 2020, Superintendent Wotring notified the Preston County board of education via email that the Monongalia County board of education was “not interested” in conducting a joint meeting of the two boards of education with respect to Petitioner’s Charter Application and, further, that Superintendent Wotring had been advised by Respondent to have the Preston County board of education defer to the Monongalia County board of education’s decision in an apparent effort to cure the obvious defects in the deficiency letter that did not include Preston County. WV Academy Vol 4-000875.

33. On November 13, 2020, Petitioner submitted a response to Superintendent Campbell’s deficiency letter via email and common carrier and, at the beginning of the response letter, Petitioner again objected to the charter review process that was not being properly conducted by the Authorizer under the Act. WV Academy Vol 3-000713.

34. At noon on November 30, 2020, the Monongalia County board of education held a special meeting to hear a report on the Application by the Monongalia Charter Review Committee, to discuss the Application and, to take action on the Application. WV Academy Vol 4-000869.

35. The Monongalia County board of education barred Petitioner from attending the special meeting because of COVID-19 and so Petitioner was unable to respond to assertions made by the Monongalia Charter Review Committee in the meeting before the vote of the Monongalia County board of education's vote. *Affidavit of John S. Treu* at WV Academy Vol 4-000901.

36. Each member of the Monongalia County board of education discussed specific concerns about the Application, most of which were not included in the Monongalia Deficiency Letter and so Petitioner did not have any opportunity to clarify or respond to such concerns before the board vote. WV Academy Vol 4-000869; WV Academy Vol 3-000698.

37. At this special meeting on November 30, 2020, the Monongalia County board of education voted to reject the Application following the recommendation of Superintendent Campbell. WV Academy Vol 3-000698.

38. Following the special board meeting on November 30, 2020, Superintendent Campbell submitted to Petitioner the report his committee had prepared with respect to Petitioner, which had been signed by the Monongalia County Board President with a box checked indicating the Application had been denied. WV Academy Vol 3-000821.

39. At 5 pm on November 30, 2020, the Preston County board of education held a regular board meeting and Superintendent Wotring again proposed as an action item on the agenda that the Preston County board "defer to and adopt the decision of the Monongalia County Board of Education regarding the approval status" of the Application, an action that was specifically

recommended to Preston County by Respondent to cure an obvious defect in the review process, but this motion did not pass. WV Academy Vol 4-000890.

40. During this regular meeting on November 30, 2020, the Preston County board of education indicated that they were not aware of the outcome of the Monongalia County board of education vote with respect to the Application until a member of the public in attendance stated that Monongalia County had rejected the Application. *Id.*

41. At this regular board meeting on November 30, 2020, the Preston County board of education voted to deny the Application but did not state any reasons for the denial and did not submit the decision to Petitioner in writing. *Id.*

42. On December 1, 2020, Petitioner submitted a letter via email to Respondent requesting that it proceed with the Application as deemed approved by the end of that same day as required under state law on the basis that the combined boards of education of Preston and Monongalia Counties never held a single meeting where a quorum of the Authorizer was present to take any action whatsoever with respect to the Application and both the statutory deadlines as well as all deadlines in Policy 3300 had passed for any such actions and Petitioner further indicated that any failure by Respondent to act by the end of the day would result in Petitioner's immediate filing of a petition seeking a writ of mandamus to compel such required action. Petitioner further stated that it was providing its required thirty-day notice under W.Va. Code § 55-17-3. WV Academy Vol 3-000822.

43. On December 7, 2020, Respondent refused Petitioner's request to certify the Application as having been approved and the authorized under the Act, claiming that WVDE lacked statutory authority to do so. WV Academy Vol 3-000825.

B. Standard for Mandamus

The Supreme Court of Appeals of West Virginia has original jurisdiction to issue a writ of mandamus under Section 3 of Article VIII of the West Virginia Constitution and W. Va. Code § 53-1-2; *State ex rel. McLaughlin v. W. Virginia Court of Claims*, 209 W. Va. 412, 415, 549 S.E.2d 286, 289 (2001). “Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.” Syl. Pt. 2, *State ex rel. McLaughlin v. W. Virginia Court of Claims*, 209 W. Va. 412, 549 S.E.2d 286 (internal citations omitted).

The standard for a writ of mandamus in this State is well-settled:

"A writ of mandamus will not issue unless three elements co-exist- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969); Syl. Pt. 1, *State ex rel. Brown v. Corporation of Bolivar*, 217 W. Va. 72, 614 S.E.2d 719 (2005); *see also* Syl. Pt. 1, *State ex rel. Dickerson v. City of Logan*, 221 W. Va. 1, 650 S.E.2d 100 (2006); Syl. Pt. 1, *Graf v. Frame*, 177 W. Va. 282, 352 S.E.2d 31 (1986).

A writ of mandamus will issue to require the discharge by a public official of a nondiscretionary duty. *State v. Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963); *State v. Battle*, 147 W. Va. 841, 131 S.E.2d 730 (1963); *State ex rel. Cassinelli v. Bassett*, 148 W. Va. 697, 137 S.E.2d 232 (1964); *Reed v. Hansbarger*, 173 W. Va. 258, 314 S.E.2d 616 (1984). A fuller statement of this rule is that mandamus will lie where there is a clear legal right to the performance of a particular act or duty at the hands of the respondent and such act or duty is of a ministerial nature, rather than one involving the exercise of discretion. *State v. Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963); *State v. Battle*, 147 W. Va. 841, 131 S.E.2d 730 (1963); *State ex rel. Cassinelli v. Bassett*, 148 W. Va. 697, 137 S.E.2d 232 (1964); *Reed v. Hansbarger*, 173 W. Va. 258, 314 S.E.2d 616 (1984).

Mandamus will issue to compel performance of a nondiscretionary duty of an administrative officer though another remedy exists, where it appears that the official, under misapprehension of law, refuses to recognize the nature and scope of his duty and proceeds on the belief that he has discretion to do or not to do the thing demanded of him. *Walter v. Ritchie*, 156 W. Va. 98, 191 S.E.2d 275 (1972); *Potomac Edison Co. v. Jefferson County Planning & Zoning Comm'n*, 204 W. Va. 319, 512 S.E.2d 576 (1998).

This Court has original jurisdiction over this matter under Rule 16 of the Rules of Appellate Procedure under Section 1 of Article XII of the West Virginia Constitution. On December 1, 2020, Petitioner served Respondent with a Notice of Intent to Sue under W. Va. Code § 55-17-3 (WV Academy Vol 3-000824) even though Petitioner is entitled to seek a Writ of Mandamus without first serving a Notice of Intent to Sue under W. Va. Code § 55-17-3 because of the nature of the extraordinary relief, which requires immediate relief in the form of mandamus to avoid irrevocable harm to Petitioner.

C. Elements for Mandamus Have Been Met

By the record evidence and the affidavit of its representative, John Treu, Petitioner has met the three elements to entitle Petitioner to a Writ of Mandamus against Respondent for the specific relief it seeks: (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner wants to compel; and (3) the absence of another adequate remedy. Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969); accord Syl. Pt. 2, *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996); Syl. Pt. 1, *Hickman v. Epstein*, 192 W. Va. 42, 450 S.E.2d 406 (1994); Syl. Pt. 1, *State ex rel. McGraw v. West Virginia Ethics Comm'n*, 200 W. Va. 723, 490 S.E.2d 812 (1997).

D. Authorizer's Powers And Duties

Under the Act, W. Va. Code § 18-5G-6(l) is careful to limit “[r]egulation of public charter schools by the state board and a county board . . . to those powers and duties of authorizers prescribed in this article and general supervision consistent with the spirit and intent of this article”. Under W. Va. Code § 18-5G-6(a), “[e]ach authorizing authority is responsible for exercising in accordance with this article the following powers and duties with respect to the oversight and authorization of public charter schools”:

(1) Demonstrate public accountability and transparency in all matters concerning its charter-authorizing practices, decisions, and expenditures;

(2) Establish and maintain policies and practices consistent with the principles and professional standards for authorizers of public charter schools, including standards relating to:

(A) Organizational capacity and infrastructure;

(B) Evaluating applications;

(C) Ongoing public charter school oversight and evaluation;
and

(D) Charter approval, renewal, and revocation decision-making.

(3) Solicit applications and guide the development of high-quality public charter school applications;

(4) Approve new charter applications that meet the requirements of this article and on the basis of their application satisfying all requirements of § 18-5G-8 of this code, that demonstrate the ability to operate the school in an educationally and fiscally sound manner, and that are likely to improve student achievement through the program detailed in the charter application;

(5) Decline to approve charter applications that fail to meet the requirements of §18-5G-8 of this code;

(6) Negotiate and execute in good faith a charter contract with each public charter school it authorizes;

(7) Monitor the performance and compliance of public charter schools according to the terms of the charter contract; and

(8) Determine whether each charter contract it authorizes merits renewal or revocation.

(b) After an applicant submits a written application to establish a public charter school, the authorizer shall:

(1) Complete a thorough review process;

(2) Conduct an in-person interview with the applicant;

(3) Provide an opportunity in a public forum for local residents to provide input and learn about the charter application;

(4) Provide a detailed analysis of the application to the applicant or applicants;

(5) Allow an applicant a reasonable time to provide additional materials and amendments to its application to address any identified deficiencies; and

(6) Approve or deny a charter application based on established objective criteria or request additional information.

(d) No later than 90 days following the filing of the charter application, the authorizer shall approve or deny the charter application. The authorizer shall provide its decision in writing, including an explanation stating the reasons for approval or denial of its decision during an open meeting. Any failure to act on a charter application within the time specified shall be deemed an approval by the authorizer.

(e) An authorizer's charter application approval shall be submitted to the West Virginia Department of Education.

(f) An authorizer shall conduct or require oversight activities that enable it to fulfill its responsibilities under this article, including conducting appropriate inquiries and investigations, so long as those activities are consistent with the intent of this article, adhere to the terms of the charter contract and do not unduly inhibit the autonomy granted to charter schools. In the event that a public charter school's performance or legal compliance appears unsatisfactory, the authorizer shall promptly notify in writing the public charter school governing board of perceived problems and provide reasonable

opportunity for the school to remedy the problems: Provided, That if the problem warrants revocation, the revocation time frames will apply;

(g) An authorizer shall take appropriate corrective actions or exercise sanctions in response to apparent deficiencies in a charter school's performance or legal compliance. If warranted, the actions or sanctions may include requiring a charter school to develop and execute a corrective action plan within a specified time frame;

(h) An authorizer may require each charter school it oversees to submit an annual report to assist the authorizer in gathering complete information about each school, consistent with the performance framework.

(i) To cover authorizer costs for overseeing public charter schools, each public charter school shall remit to its respective authorizer an oversight fee drawn from and calculated as a uniform percentage of the per student operational funding allocated to each public charter school as established by the state board by rule pursuant to §18-5G-5 of this code.

(j) An authorizer may receive and expend appropriate gifts, grants and donations of any kind from any public or private entity to carry out the purposes of this act, subject to all lawful terms and conditions under which the gifts, grants or donations are given, and may apply for any federal funds that may be available for the implementation of public charter school programs;

(k) Notwithstanding any provision of this code to the contrary, no civil liability shall attach to an authorizer or to any of its members or employees for any acts or omissions of the public charter school. Neither the county board of education nor the State of West Virginia shall be liable for the debts or financial obligations of a public charter school or any person or entity that operates a public charter school.

Powers are one thing. Duties, less glammers, are another thing. Given these powers and distinctly separate duties, Petitioner has a clear right to a declaration that its Application is approved by operation of law. Central to Petitioner's clear right under the Act is that its Authorizer — the combined boards of education of Monongalia and Preston Counties — failed "to act" in

accordance with W. Va. Code § 18-5G-6(a) to perform its duty under W. Va. Code § 18-5G-6(d) to “approve or reject” the Application in any one of three ways:

1. Authorizer Failed to Constitute and Assemble

On July 24, 2020, Petitioner filed the Application with the boards of education of Monongalia and Preston Counties (referred to collectively hereinafter as the “Authorizer”). (WV Academy Vol 1-000002). By applying for a Charter to operate a school whose primary recruitment area encompasses territory in Monongalia and Preston Counties, by operation of the Act the concomitant Authorizer for Petitioner comprises the combined members of the boards of education for those counties. W. Va. Code § 18-5G-2(2)(B). By operation of the Act, on that day, the 10 members of the boards of education of Monongalia and Preston County by virtue of their offices thus became the governing body of the Authorizer for Petitioner’s Charter.

The governing body of the Authorizer never constituted itself. It never assembled as a single body. It never met as a single body. It implicitly and improperly delegated the non-delegable duties that the Act imposes on the Authorizer to the employees of the Monongalia County board of education. To this day, the 10 members of the Authorizer not once have assembled physically or, during this extraordinary era of COVID-19, virtually, by means of an on-line platform designed for that purpose.

The review process that followed the Application, however, was never begun, conducted nor concluded by the combined boards of education assembled as the Authorizer. The Authorizer never adopted parliamentary procedure for its proceedings, never called a single combined meeting to conduct the review of the Application and never took a single action as either a combined or

assembled body at any time during Petitioner’s review process.⁵ *Affidavit of John S. Treu* at WV Academy Vol 4-000901 – 902.

The Authorizer, as the combined body of the 10 members of the Monongalia and Preston County boards of education, never held a single meeting to conduct any aspect of the review of The Application. *Affidavit of John S. Treu* at WV Academy Vol 4-000902. A simple majority of any public governing body must meet in order to constitute a quorum under W. Va. Code § 6-9A-2(8) and boards of education are governing bodies for purposes of this statute. *McComas v. Board of Educ.*, 197 W. Va. 188, 475 S.E.2d 280 (1996). Policy 3300 directs that an “authorizer to a charter contract” should conduct its business in a manner that is “consistent with the rules for conducting other business of county boards of education in West Virginia.” Policy 3300, Section 7.1.b.1. Governing bodies are precluded from taking any official action without holding a meeting with a quorum of the members of such body present. W. Va. Code § 6-9A-2(5). Because the Authorizer never held a single meeting with a quorum present, the Authorizer never conducted any official action with respect to the Application.

The Authorizer’s failure ever to combine or assemble to conduct the review process for the Application is not only constitutive under the Act, it is also critical from a parliamentary view. Because the five members of any one of the boards of education make up less than a majority of the 10 members that constitute the Authorizer, there was no possible way that any of the presumed actions were effective or valid. Under the West Virginia Open Governmental Proceedings Act, a simple majority of members is required to conduct any business as a quorum. W. Va. Code § 6-

⁵ All actions taken with respect to the Application whatsoever were conducted either in separate meetings of the two boards that constitute the Authorizer following completely different and independent processes or by district employees of one or both counties, as discussed more specifically below.

9A-2(8). Thus, the independent actions of one county board of education or the other, including any agent of either, cannot constitute valid actions of the Authorizer itself.

The Monongalia County superintendent conducted a public forum on October 22, 2020. WV Academy Vol 3-000594. Only two members of the board of education for Monongalia County were present at the open forum, WV Academy Vol 3-000597, and no members of the Preston County board of education were present.⁶ Public notice for the open forum was advertised on electronic billboards in Monongalia County and posted to the Monongalia County schools twitter account, but Petitioner is unaware of any notice of the meeting being provided on the Preston County schools website or to Preston County residents, so residents from only one of the two counties ever received notice of that meeting.⁷ *Affidavit of John S. Treu* at WV Academy Vol 4-000899. The Preston County superintendent confirmed that he did not attend the open forum as he had a conflict that evening and the only representation at all from Preston County was evidently by "some Preston County residents." WV Academy Vol 4-000857. Petitioner's board was never contacted by any other individual from either Preston County or Monongalia County to participate in any other public open forum to provide information about the Application. Accordingly, Preston County residents were never given an opportunity to learn about the Application as W. Va. Code § 18-5G-6(b)(3) requires.

The references throughout the statutes and Policy 3300 to an Authorizer are almost exclusively in the singular tense. W. Va. Code §§ 18-5G-1 *et seq.* So, it is both explicitly as well

⁶ In the meeting of the Monongalia County board of education the week before the public forum, the board discussed having some members watch the open forum live by Zoom, suggesting that some or all of the other members of the Monongalia County board of education may have watched the event online, but such viewing, to Petitioner's knowledge, was not included in any official record of the event.

⁷ The official notice indicated that the meeting would begin at 6 p.m. and did not indicate that delegations to speak in the meeting would be cut off 10 minutes before the beginning of the meeting, although, the cutoff for providing comments was discussed in the Monongalia County board of education meeting the prior week.

as implicitly stated in the law that the combined boards of education for Monongalia and Preston counties must function as a single body when taking any action upon the Application and not as fragmented independent groups. Petitioner requested on the first page of its application that the combined boards of education contact Petitioner for purposes of proceeding with the review process and Petitioner objected to the process being conducted on multiple occasions during the review process to request that Authorizer comply with the law. WV Academy Vol 1-000002, Vol 2-000383 and Vol 3-000602. Yet, over Petitioner's objections, the review of the Application underwent completely divergent and inconsistent paths by the two county boards that constitute the Authorizer. Petitioner was not given a fair or consistent review of its charter application because different members of the Authorizer engaged in completely different and inconsistent processes that prevented Petitioner from responding to the actual concerns of the Authorizer in the manner contemplated in the Act.

That the Authorizer never constituted itself nor met as an assembled body suffices as "any failure to act" and, thus, by operation of W. Va. Code § 18-5G-6(d) must lead inexorably to the legal conclusion that the Application is "deemed approved". But even if the two boards of education are allowed to act independently, neither board's independent actions fulfilled the duties of the Authorizer. The boards of education eschewed most of their responsibilities to act as the Authorizer for the Application by relying on their respective superintendents and district employees to fill several non-delegable review functions, including conducting the in-person interview, WV Academy Vol 2-000377, the public forum, WV Academy Vol 3-000596, and submitting feedback to Petitioner, WV Academy Vol 3-000698.

The actions that must be taken by the Authorizer under W. Va. Code § 18-5G-6(b) in reviewing a charter application are non-delegable. Any effort to delegate these key responsibilities

in the charter review process to a county superintendent or a group of district employees is invalid as a matter of law because such delegation violates the transparency rules and is wholly inconsistent with the overall regulatory framework. The law indicates that the Authorizer shall “[f]ollow charter-granting policies and practices that are transparent, based on merit, and avoid conflicts of interest.” (W. Va. Code §18-5G-6(c)(3).) Policy 3300 Section 7.1.b.1 specifically indicates that any meetings or business of an authorizer to a charter contract should be conducted in a “transparent manner consistent with the rules for conducting other business of county boards of education in West Virginia.” Thus, delegating key duties of the Authorizer to a superintendent or district employees to be conducted in non-public meetings violates the transparency rules as such individuals are not able to call or hold a public board of education meetings. W. Va. Code § 6-9A-2(5).

Policy 3300 reinforces this by stating that when “two or more county boards of education act together as authorizer, they collectively hold all the roles and responsibilities of an authorizer outlined in this policy, as well as state and federal law.” Policy 3300 Sec. 9.2.a.1.A. In terms of delegation, Policy 3300 only permits an authorizer that is comprised of two or more county boards of education the option of forming a “cooperating county charter authorizing board” to conduct some activities of the authorizer. Policy 3300 Sec. 9.2.a.1.B. However, a cooperating county charter authorizing board must include at least two members of the board of education from each county board that makes up the authorizer and it cannot make the final decision on approval or renewal of a charter application. Policy 3300 Sec. 9.2.a.1.B. As such, the power for an authorizer to delegate its responsibilities and duties is both extremely limited and narrowly defined under the applicable regulatory framework.

None of the 10 individuals who comprise the Authorizer for the Application even attended Petitioner’s in-person interview, WV Academy Vol 2-000377, or signed the written feedback to Petitioner. WV Academy Vol 3-000698. Only two members of the Monongalia County board of education attended the public forum on the Application. WV Academy Vol 3-000597. Hence, three of the official acts that are required by law to be conducted during the review of a charter application by the authorizer were delegated to district employees and were not conducted by the Authorizer itself. Inasmuch as these official actions represent non-delegable responsibilities of the Authorizer under the Act, the in-person interview and Monongalia Deficiency Letter are without any legal effect. These represent multiple failures to act by the Authorizer with respect to the Application and so would be “deemed approved” on this basis alone. W. Va. Code § 18-5G-6(d).

The improper delegation of key acts of the Authorizer largely followed Monongalia County Policy 3-15 (hereinafter “Policy 3-15”), a charter school review policy that was adopted only in Monongalia County and not in Preston County.⁸ The policy directs that a committee of the superintendent and several district employees (the “Monongalia Charter Review Committee”) would conduct the in-person interview, host the public forum, provide feedback to the applicant identifying deficiencies, and then make a recommendation to the Monongalia County board of education on whether to approve or deny any charter application. WV Academy Vol 4-000871-000872. The exclusive action by the board of education under Policy 3-15 is to either accept or reject the charter application based solely on the superintendent’s recommendation.

⁸ On May 12, 2020, the superintendent for Monongalia County proposed Policy 3-15 that appointed himself as well as several district administrators to a committee to conduct substantially all of the charter review process for any charter application submitted in Monongalia County. WV Academy Vol 4-000862. Based on representations by the superintendent and legal counsel for Monongalia County schools that the policy was required under the law, the Monongalia County board of education adopted the policy in its next meeting on May 26, 2020. WV Academy Vol 4-000867.

Also, if an Authorizer could simply delegate its responsibilities to any district-level employee of its own county or another county, then the stated limitations on delegation of authority as stated in Policy 3300 would have no effect and would serve no purpose. Hence, any delegation to the superintendent or district employees, whether by local policy or *sua sponte*, is without legal effect and actions taken by such agents are void as a matter of law. Policy 3-15, which attempted to delegate key functions of the review process to a subcommittee comprised of the Monongalia County superintendent and district employees, is inconsistent with the regulatory regime for charter application reviews and actions taken under such policy and actions taken in accordance with this policy fail to fulfill the Authorizer's responsibilities under the Act.

Recognizing that Preston County never adopted Policy 3-15 and, therefore, the combined boards could not properly review the application under this policy, Petitioner proactively objected on the first page of its application to any review under the procedures set forth in Policy 3-15. WV Academy Vol 1-000002. Petitioner noted that the Monongalia County policy does not contemplate a multi-county review and objected on this basis, among others, and further encouraged the "combined boards to comply with the specific provisions in the law and regulations with respect to the review and approval of [Petitioner's] charter application." WV Academy Vol 1-000002. Petitioner's pleas to each of the boards of education to follow the Act and to assemble as a combined body were ignored.

The formal actions that an authorizer is required to take in reviewing a charter application under W. Va. Code § 18-5G-6(b) are non-delegable, except in very limited and narrowly-defined circumstances. Policy 3300 indicates that in instances where more than one county school board functions as an authorizer, the boards of education may delegate some functions to a "cooperating county charter authorizing board" — not to its employees — that must include at least two

members from each county school board. Policy 3300 Sec. 9.2.a.1.B. The cooperating county charter authorizing board can only serve certain limited functions and cannot either approve or renew a charter application on its own. Further, Policy 3300, Section 7.1.b.1 specifically indicates that any meetings or business of an authorizer to a charter contract should be conducted in a “transparent manner consistent with the rules for conducting other business of county boards of education in West Virginia.” As such, any effort to delegate the key responsibilities of the authorizer in the charter review process to a county superintendent or a group of district employees is inconsistent with the overall regulatory and statutory framework and also clearly violates the transparency rules. Policy 3-15 sought to accomplish just that by delegating key functions of the authorizer to the superintendent and district employees to conduct various actions outside the public eye.

Notwithstanding Petitioner’s objections, the Monongalia County board of education largely followed Monongalia Policy 3-15, whereas the Preston County board of education engaged in very little, if any, process whatsoever.

The superintendents of Monongalia and Preston Counties along with certain district employees conducted the only in-person interview of Petitioner’s governing board on October 20, 2020. WV Academy Vol 2-000375 to WV Academy Vol 2-000565. The interview was not conducted in a public meeting and no members of the boards of education for either Preston County or Monongalia County attended or participated in any way in the interview. WV Academy Vol 2-000377. At the onset of the interview, upon discovering that none of the members of either board of education were present, Petitioner renewed its objection to the proceedings and specifically noted that its participation in the interview was not to be construed as a waiver of its ongoing objection to the process being followed. WV Academy Vol 2-000382 to WV Academy Vol 2-

000383. The Monongalia County Superintendent said he had been in direct contact with Respondent’s government affairs counsel, Sarah Stewart, and that WVDE had vetted the interview process ahead of time. WV Academy Vol 2-000384. Petitioner specifically asked why the Monongalia County Superintendent had advised the members of the Monongalia County board of education to not attend the interview and he responded that “we did not want them to have a predisposed concept before it was presented to them and recommended to them.” WV Academy Vol 2-000565.

2. *Approval or Rejection of Application Did Not Occur Within 90 Days*

Even if the Authorizer was validly constituted, nonetheless, no public body purporting to act on the Application — that is, either the Authorizer or each county board of education — in fact approved or rejected the Application within 90 days of its submission. W. Va. Code § 18-5G-6(d) provides that “[a]ny failure to act on a charter application within the time specified shall be deemed an approval by the authorizer.” The deadline makes the Authorizer’s action on approval or rejection jurisdiction. Failure to approve or reject an application by operation of law precludes the Authorizer’s further delay or inaction. The Authorizer did not accept or approve the Application on or before October 22, 2020, when the statutory 90-day period expired under the Act and so the Application was “deemed” approved, effective as of that date.

Underlying the statutory deadline are other non-statutory deadlines added under Policy 3300, Section 5.5 that establish specific dates for key steps in the review process for the initial review cycle within a 90-day review period starting on August 31, 2020, the deadline for submission of all charter applications statewide as enacted in W. Va. Code § 18-5G-4(b)(1). Specifically, Section 5.5 of Policy 3300 states that an authorizer must provide feedback on deficiencies by October 31, 2020, applicants must provide a response and any amendments by

November 15, 2020, and a conditional approval or denial must be issued no later than November 30, 2020.

When Petitioner asked that the Authorizer submit the Application as conditionally approved to WVDE after the expiry of the 90-day deadline, WV Academy Vol 3-000703, and then submitted the Application to Respondent when the Authorizer failed to do so, WV Academy Vol 3-000709, Respondent improperly indicated to Petitioner and the Authorizer that the review period had not expired based on Policy 3300 Section 5.5. WV Academy Vol 3-000712.

The additional deadlines in Policy 3300 can be understood one of two ways. First, the Policy 3300 deadlines can be understood as fixing the final deadlines for all charter applications statewide beginning with the final due date for all such applications thereby establishing a timeline within any 90-day review period running from the date an application is filed. This understanding harmonizes with the statutory text that starts the clock on the 90-day period at the time a charter application is filed while honoring the specified application deadline of August 31, 2020 fixed in Policy 3300. Alternatively, the deadlines in Policy 3300 can be understood in the manner described by Respondent as supplanting the plain language of the statute so that the 90 day review period runs from the date of the “application deadline” and not from the date of the “filing of the application” as clearly stated in W. Va. Code § 18-5G-6(d).

The latter understanding would be untenable. It is premised that Section 5.5 of Policy 3300 — an interpretive regulation — supersedes a statutory expression. Rather than harmonizing with W. Va. Code § 18-5G-6(d), this understanding would modify the statutory deadline to permit a deadline that could fall outside of the 90-day period that the Legislature mandated.⁹ This also

⁹ This Court should note that Policy 330 is an interpretive rule and not a legislative rule. As such, to the extent Policy 3300 and its provisions regarding the 90 day deadline may be deemed in conflict with W.Va. Code § 18-5G-6(d), it should be considered void. *See Lovas v. Consolidation Coal Co.*, 222 W.Va. 91, 662 S.E.2d 645 (2008)(holding that

would grant the Authorizer for the Application a substantial extension of time to delay its charter application review in a cycle where time is of the essence given that any approved charter applicant would be seeking to open its doors less than a year later. For these reasons, Policy 3300 Section 5.5 should not be interpreted as supplanting the statutory 90-day review period that begins on the date an application is filed and the Application should be deemed approved.

The Act provides “[a]ny failure to act on a charter application within the time specified shall be deemed an approval by the authorizer.” W. Va. Code § 18-5G-6(d). The statutory “time specified” is 90 days from the date of the Application, which would have been October 20, 2020. As such, the Application was “deemed” approved because of Authorizer’s failure to approve or deny the Application by October 22, 2020.¹⁰

3. Authorizer Violated Petitioner’s Due Process Under the Act

The review processes conducted independently by the two counties that constitute the Authorizer violated several critical requirements under the law and regulations and no one process was appropriate even on its own. Petitioner objected to the fragmented and inconsistent processes being followed by the two counties on multiple occasions during the Application review. WV Academy Vol 2-000382 to WV Academy Vol 2-000383. Respondent was not only aware of the independent and inconsistent processes being followed by the Authorizer, but was directly

“[t]here is no question that when the rules of an agency come into conflict with a statute that the statute must control[.]” citing to *Repass v. Workers' Compensation Division*, 212 W.Va. 86,102, 569 S.E.2d 162, 178 (2002); and, *Boley v. Miller*, 187 W.Va. 242, 246, 418 S.E.2d 352, 356 (1992) (recognizing that agency’s statutory interpretation is inapplicable where such interpretation “is unduly restricted and in conflict with the legislative intent”) (citing Syl. Pt. 5, in part, *Hodge v. Ginsberg*, 172 W.Va. 17, 303 S.E.2d 245 (1983)).

¹⁰ Even if Respondent’s interpretation of the regulation were adopted, Policy 3300 Section 5.5.f.4 indicates that “failure to render a decision on a charter school application by the November 30, 2020, deadline is statutorily deemed a conditional approval of the application.” Therefore, the Application was “deemed” approved by the Authorizer on November 30, 2020 when the time for reviewing the Application stated in the regulation expired without the Authorizer’s once holding, at the minimum, a meeting.

advising the Authorizer and signing off at each step along the way. WV Academy Vol 2-000384; WV Academy Vol 4-000892 – 893; *Affidavit of John S. Treu* at WV Academy Vol 4-000900.

The two county boards that constitute the Authorizer followed two completely different and inconsistent paths in the review of The Application. In fact, the only step in the process that was even arguably conducted by both counties in a consistent manner was the in-person interview because the superintendents and district employees from both Monongalia and Preston County attended, although that interview suffered from other procedural defects.¹¹ Only Monongalia County, primarily through its superintendent and district employees, conducted an open forum, issued written feedback identifying deficiencies in the Application, and submitted a copy of its decision on the Application in writing.¹² W. Va. Code §18-5G-6(b). Neither the members of the Preston County board of education nor the Preston County Superintendent completed any of these actions, which is an obvious violation of Petitioner’s due process rights under the law. Even assuming separate processes were permissible, because Preston County did not communicate any feedback to Petitioner prior to the deadline for doing so and never provided a written decision on the Application, the law presumes that the application was “deemed” approved by Preston County.

However, the actions of the Monongalia County portion of the Authorizer, even when viewed on their own, were inconsistent with key provisions and the overall intent of the charter law. As stated above, many of the functions of the Authorizer were improperly conducted by Superintendent Campbell and not the members of the Monongalia County board of education. One important requirement to protect charter applicants is that authorizers “[a]llow an applicant a

¹¹ We note that none of the members of the Monongalia or Preston County board of education were in attendance at the in-person interview and the interview was not conducted as part of a public meeting, which both violate other provisions of the Act.

¹² It being noted that each of these processes were themselves deficient for various reasons.

reasonable time to provide additional materials and amendments to its application to address any identified deficiencies.” W. Va. Code §18-5G-6(b)(5).

On October 28, 2020, after the expiration of the statutory 90-day review period, Superintendent Campbell submitted a letter to Petitioner identifying deficiencies in the Application (the “Monongalia Deficiency Letter”) and requested that Petitioner submit amendments to its application back to the Monongalia County Superintendent by November 13, 2020. WV Academy Vol 3-000698 to WV Academy Vol 3-000702.¹³ On November 13, 2020, Petitioner provided a detailed response to the Monongalia Deficiency Letter, again objecting to the superintendent’s involvement in the process and the lack of any coordinated effort between the counties that constitute the Authorizer. WV Academy Vol 3-000713.

On November 30, 2020 at noon, the Monongalia County board of education held a board meeting in order to render a decision on the Application. Petitioner was neither invited nor even permitted to attend that meeting and could only watch using a live feed online. WV Academy Vol 4-000901. A representative speaking on behalf of the Monongalia Charter Review Committee indicated in the meeting that the review committee had made various findings that the Application did not meet the requirements of the WVDE review criteria and recommended rejection of the charter application. This representative provided a written document that was dramatically more

¹³ The Monongalia Deficiency Letter made no mention of any involvement whatsoever by the Preston County board of education or even the Preston County superintendent. WV Academy Vol 3-000698. On November 12, 2020, one day prior to the deadline suggested by Superintendent Campbell for Petitioner’s response to the Monongalia Deficiency Letter, Superintendent Wotring emailed Petitioner indicating that the Monongalia Deficiency Letter was “representative of both [counties’] efforts,” and further confirmed that “[e]ach county worked independently on the review.” WV Academy Vol 4-000857. Even accepting this statement as true, the deficiency letter itself did not indicate it was from Preston County, WV Academy Vol 3-000698, and the email was sent just the day before Petitioner’s response was due and so Petitioner was not given 15 days from the date Petitioner became aware of any potential involvement by Preston County superintendent to respond to the Monongalia Deficiency Letter as required under Policy 3300 Section 5.5.e.

detailed and extensive in identifying deficiencies than the Monongalia Deficiency Letter. *Compare* WV Academy Vol-3-000811-000821 to WV Academy Vol-3-000698-000702. For example, the committee report was eleven pages in length whereas the identification of deficiencies in the Monongalia Deficiency Letter was only three and a half pages in length.

After the report was read in the meeting, each individual member of the Monongalia County School Board then verbally communicated various reasons why they decided to vote to reject the Application, many of which were not ever identified in the Monongalia Deficiency Letter. WV Academy Vol 3-000698. Petitioner was not provided the opportunity to respond to either the committee's more extensive and detailed deficiency findings or the new deficiencies that the members of the Monongalia County board of education raised for the first time just prior to holding the vote. In fact, Petitioner was never given the opportunity to meet any member of the Monongalia County board of education at any time to discuss the Application and so the November 30, 2020 meeting was the procedural equivalent of an ambush. *Affidavit of John S. Treu* at WV Academy Vol 4-000901. Because new deficiencies were identified for the first time on November 30, 2020 without giving Petitioner any opportunity respond and then used as the basis for denying the Application, the Monongalia County process, on its own, clearly violated W. Va. Code § 18-5G-6(b)(4) and (5).

After each board member discussed their own views of deficiencies in the Application, the Monongalia County board of education then unanimously voted to follow the Monongalia Charter Review Committee's recommendation and deny the Application. A written document with findings as to the Application that was prepared by the Monongalia Charter Review Committee and signed by the president of the Monongalia County board of education was delivered to

Petitioner that same day via electronic mail and a hard copy was mailed to Petitioner. WV Academy Vol 3-000811.

In a separate meeting scheduled at 5 pm on November 30, 2020, the Preston County board of education voted down Superintendent Wotring's proposal to defer to the decision of Monongalia County's Board on the Application and instead voted to deny the Application outright. WV Academy Vol 4-000890. The Preston County Board and did not provide any basis for its decision. Additionally, the members of the Preston County board of education apparently had not even communicated with the members of the Monongalia County school board and were unaware of the outcome of the Monongalia County school board's vote on the Application until a member of the public in attendance communicated the decision in the meeting. WV Academy Vol 4-000890. As such, the combined boards of education as Authorizer did not act as a single body in voting to reject the Application and followed completely different and independent processes, neither of which complied with the requirements under the law. These procedural defects directly harmed Petitioner and were obvious "failure[s] to act" by the authorizer that result in the Application being "deemed" approved by operation W. Va. Code § 18-5G-6(d).

VI. RESPONDENT HAS MANDATORY, NONDISCRETIONARY DUTY TO AUTHORIZE PETITIONER BY OPERATION OF

By mandate under the Act, after a charter application in the initial review cycle is approved — whether by an authorizer's affirmative acts or operation of the Act — the application is supposed to be submitted to WVDE. Policy 3300, Section 5.6.g.4. The Act requires WVDE to determine whether there are more than three conditionally approved applications State-wide in the initial review cycle. Policy 3300, Section 5.7 states that if the number of conditionally approved charter schools exceeds the statutory limit of three in the first three years during the initial review

cycle, then WVDE then rank the applicants by December 15, 2020, and the three highest ranked applicants are approved and may proceed to open charter schools.

But if three or fewer conditionally approved applications are submitted to WVDE in the initial cycle, then no review process ensues and WVDE merely certifies all conditionally approved applications on December 1, 2020 as approved. On information and belief, no other applications were approved by any local authorizer throughout West Virginia in the initial review cycle. As such, the Application should have been confirmed as approved by WVDE on December 1, 2020. *Affidavit of John S. Treu at WV Academy Vol 4-000902.*

On November 2, 2020, following the expiry of Petitioner's 90-day review period, Petitioner submitted a letter to the Authorizer demanding that the Authorizer call a combined meeting of the boards of education for Monongalia and Preston Counties to officially submit the Application to WVDE as "deemed" approved on the basis that the review period had expired or, alternatively, on the basis that the combined boards had never met or acted in any manner upon the Application. WV Academy Vol 3-000703. The Authorizer failed to respond to Petitioner's letter, call a joint meeting, or take any action as requested by Petitioner in its letter. As such, on November 9, 2020, Petitioner submitted the Application to WVDE with a letter describing the facts and explaining that the application had been conditionally approved by operation of law. WV Academy Vol 3-000709.

The State Superintendent replied in a November 12, 2020 letter dated stating that "[p]ursuant to Section 5.5 of Policy 3300, I believe potential authorizers have until November 30, 2020, to take action on a charter school application submitted during this application cycle." WV Academy Vol 3-000712. WVDE further stated that revising these deadlines was appropriate "[t]o provide an even playing field to all potential applicants and to ensure county boards of education

do not run afoul to the statutory cap” of three charter schools every three years. WV Academy Vol 3-000712. The State Superintendent’s justification for extending the 90-day review period for the authorizer beyond 90 days is improper because the 90-day period applies to the authorizer and not to WVDE that enforces the statutory cap. The State Superintendent did not address the various other defects raised with respect to the review process conducted by the Authorizer. The State Superintendent had no authority to extend Petitioner’s 90-day review period.

After an authorizer approves a charter application during the initial review cycle, whether affirmatively approved or deemed approved, the application is submitted to WVDE. Policy 3300, Section 5.6.g.4. WVDE is tasked with granting final authorization of conditionally approved applications by determining whether there are more than three conditionally approved applications statewide in the initial review cycle. Policy 3300, Section 5.7 indicates that if the number of conditionally approved charter schools exceeds the statutory limit of three in the first three years during the initial review cycle, then WVDE must put together a panel to rank the applications. WVDE must provide notice of the outcome of such ranking by December 15, 2020, and the three highest ranked applications are approved. If fewer than three conditionally approved applications are submitted to WVDE in the initial cycle, then no review process ensues and WVDE merely certifies all conditionally approved applications as authorized as of December 1, 2020. Based on information and belief, no other applications were approved by any local authorizer throughout West Virginia in the initial review cycle. As such, the Application should have been certified as authorized by WVDE on December 1, 2020.

On November 2, 2020, following the expiration of the 90-day review period, Petitioner submitted a letter to the Authorizer demanding that the Authorizer call a combined meeting of the boards of education for Monongalia and Preston Counties to officially submit the Application to

WVDE as “deemed” approved on the basis that the review period had expired or, alternatively, because the combined boards had never met nor acted in any manner on the Application. WV Academy Vol 3-000703. The Authorizer failed to respond to Petitioner’s letter, never called a meeting and never took any action as Petitioner had asked. On November 9, 2020, Petitioner submitted the Application directly to WVDE with a letter describing the facts and explaining that the Application had been approved by operation of law. WV Academy Vol 3-000709. The State Superintendent of Schools replied on behalf of WVDE in a letter dated November 12, 2020, stating that “[p]ursuant to Section 5.5 of Policy 3300, I believe potential authorizers have until November 30, 2020, to take action on a charter school application submitted during this application cycle.” WV Academy Vol 3-000712. His letter further stated that revising these deadlines was appropriate “[t]o provide an even playing field to all potential applicants and to ensure county boards of education do not run afoul to [sic] the statutory cap” of three charter schools every three years. WV Academy Vol 3-000712. The State Superintendent’s justification for extending the 90-day review period for the Authorizer beyond 90 days was unlawful because the 90-day period for each applicant does not affect WVDE’s process for certifying charter applications as authorized, a process that would have been conducted in December 2020 under the initial review cycle. WVDE did not address the various other procedural defects raised in Petitioner’s letter about the Authorizer’s review of the Application.

On December 1, 2020, Petitioner again submitted a letter to WVDE that identified various procedural defects in the Authorizer’s process and asked that WVDE certify the Application as authorized. WV Academy Vol 3-000822. Petitioner’s letter also gave formal notice of its intention to file a petition for a Writ of Mandamus against WVDE if its request was denied. (WV Academy Vol 3-000824). In its response on December 7, 2020, WVDE refused to acknowledge that the

Application was “deemed” approved by operation of law and further stated that it lacked the statutory authority to act on Petitioner’s request. WV Academy Vol 3-000825.

After the authorizer approves an application and WVDE certifies and authorizes it, charter applicants and authorizers then must finalize and enter into a charter contract within 90 days and before March 1, 2021. Policy 3300 Sec. 5.5.g. The applicant is supposed to proceed with enrollment in April 2021 for the 2021-2022 school year. If the charter contract is not executed before March 1, 2020, then “the charter school cannot open until the 2022-2023 school year” even if approved as part of the initial application cycle. Policy 3300 Section 5.5.g.2.

VII. PETITIONER HAS NO ADEQUATE REMEDY BUT MANDAMUS

Respondent’s failure to acknowledge the Application as deemed approved and certify Petitioner’s Charter as authorized, as required by law, may likely unlawfully delayed Petitioner’s charter school opening by at least a year because Petitioner has not been able to negotiate a final contract with the Authorizer or engage in various other activities that would otherwise be permitted if the Application were authorized by Respondent. If unchecked by this court, Respondent’s refusal to certify the Application as approved may preclude Petitioner from opening its school at all in spite of have been deemed approved by operation of the Act. If Petitioner follows WVDE’s recommendation to seek a charter in the future, Petitioner will suffer substantial damages time, money and resources and might face greater competition and fewer available slots because the Act permits only three charter schools during the first three years. If this Court does not issue a writ of mandamus on an expedited basis, then Respondent will have irredeemably violated Petitioner’s rights and irreversibly harmed Petitioner’s mission and purpose.

On November 1, 2020, Petitioner gave Respondent notice of its imminent mandamus petition if Respondent continued to fail to act on the Application as deemed approved. (WV

Academy Vol 3-000824) Hence, WVDE was given an opportunity to proceed with the Application as “deemed approved” and failed to do so.

VIII. EMERGENCY PROCEEDING NECESSARY TO PREVENT IRREPARABLE HARM

A proceeding on Petitioner’s request for a Writ of Mandamus on an emergency, expedited basis is needed because Petitioner has no adequate remedy at law to redress WVDE’s refusal to certify the Application as authorized. Without a judicial remedy, Petitioner is unable to negotiate a charter contract with the Authorizer. Time is of the essence because the Act specifies that within 90 days of the approval of a charter application, the governing board of the charter applicant and its authorizer shall enter into a charter contract. W. Va. Code § 18-5G-9(a). As such, Petitioner is required to negotiate and enter its charter contract by March 1, 2021 to open for school by Fall 2021. Policy 3300 § 5.5.g.1. Policy 3300 does permit negotiations to extend beyond the March 1, 2021 deadline, but if a charter contract is not struck by March 1, 2021, then Petitioner’s charter school’s opening date is pushed back a year to Fall 2022. (Policy 3300 § 5.5.g.2).

Also, if Petitioner is not given mandamus relief then the three available slots for pilot public charter schools under W. Va. Code § 18-5G-1(g) may fill up in the second charter review cycle, which is underway. Specifically, active solicitations for charter applicants from authorizers were to have already gone out on January 1, 2021, Policy 3300 § 5.6.c; the charter application deadline is April 30, 2021, Policy 3300 § 5.6.d; conditional acceptances or denials are due from authorizers by July 31, 2021, Policy 3300 § 5.6.g and WVDE ranking and authorizations are due by August 15, 2021, Policy 3300 § 5.7.b. If this Court does not direct Respondent to authorize the Application, then all three slots might be filled by others and there will be no adequate relief at law or in equity that would make Petitioner whole or satisfied.

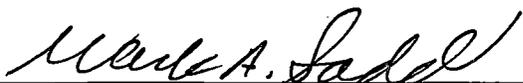
IX. CONCLUSION

Petitioner respectfully prays that the Supreme Court of Appeals of West Virginia on an emergency and expedited basis:

- A. Issue a rule to show cause against Respondent on the relief Petitioner seeks;
- B. Issue a writ of mandamus against Respondent to require the West Virginia Department of Education to certify the Application as having been “deemed approved” by the Authorizer by operation of W. Va. Code § 18-5G-6(d) and other state law;
- C. Issue a Writ of Mandamus against Respondent to authorize Petitioner based on the Application as submitted under the Act;
- D. Give and award Petitioner its attorney fees and costs for bringing this Petition; and
- E. Give Petitioner such other relief at law or in equity as it deems proper and just.

WEST VIRGINIA ACADEMY, LTD.

By its counsel



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Mark A. Sadd (WVSB 6005)

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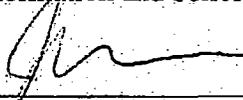
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msadd@lewisglasser.com

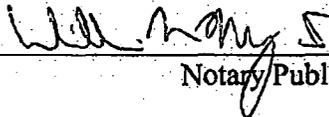
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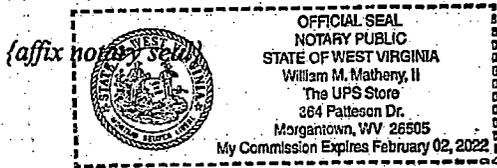
STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, to-wit:

John Treu, the president of West Virginia Academy, Ltd., a West Virginia nonprofit corporation, after being first duly sworn, says that the statements and allegations contained in the foregoing are true, except insofar as they are therein stated to be upon information and belief, and insofar as they are therein stated to be upon information and belief, it believes them to be true.

By: 
John Treu

Taken, subscribed and sworn before me this 01st day of February, 2021.
My commission expires: 2-2-2022


Notary Public



No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

**WEST VIRGINIA
DEPARTMENT OF EDUCATION,**

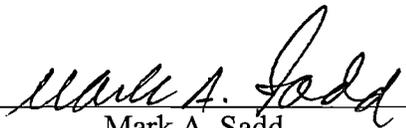
Respondent.

CERTIFICATE OF SERVICE

I, Mark A. Sadd, Petitioner's counsel, do certify that a true copy of the foregoing VERIFIED PETITION FOR AN EMERGENCY WRIT OF MANDAMUS together with MOTION TO EXPEDITE was duly served by hand-delivering a copy of the same, on February 11, 2021, in an envelope addressed to:

The Honorable Patrick Morrissey
Attorney General of the State of West Virginia
State Capitol, Room E-26
1900 Kanawha Boulevard East
Charleston, West Virginia 25305

Heather Hutchens, General Counsel
West Virginia Department of Education
Building 6, Room 362
1900 Kanawha Boulevard East
Charleston, West Virginia 25305-0330


Mark A. Sadd