

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case no. 22-616

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STATE OF WEST VIRGINIA,

Petitioner,

and

KATIE SWITZER and JENNIFER COMPTON,

Petitioners,

v.

TRAVIS BEAVER, WENDY PETERS,
DAVID L. ROACH, State Superintendent of Schools; and
L. PAUL HARDESTY, President of the West Virginia Board of Education,

Respondents.

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

Circuit Court of Kanawha County, West Virginia
Civil Action nos. 22-P-24, 22-P-26

BRIEF OF *AMICI CURIAE* CARDINAL INSTITUTE FOR WEST VIRGINIA POLICY, INC.
AND CATHOLIC EDUCATION PARTNERS FOUNDATION
IN SUPPORT OF THE STATE OF WEST VIRGINIA AND REVERSAL

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IDENTITIES AND INTERESTS OF *AMICI CURIAE* AND AUTHORITY TO FILE¹

¹ No counsel for any party in this case authored the brief in whole or in part. No party gave money to fund the preparation or submission of the brief. No one other than the *amici curiae* gave money to fund the preparation or submission of the brief.

It ought to be a universal ideal to have well-educated children. All forms of education in West Virginia, whether in its public schools or outside of them, ought to aim to educate children well. All forms of education for children to that end accordingly are worthy of support principally through the choices of their parents. All forms of education for children to that end are not the same. They exist in diverse kinds, available to be chosen. The *amici curiae*, Cardinal Institute for West Virginia Policy, Inc.² and Catholic Education Partners Foundation (CEP),³ have special interests in this case because they have advocated policies in support of choice in education for West Virginia children and their families and have encouraged West Virginia lawmakers to enact education savings accounts (ESAs) in the form of the Hope Scholarship Program.

Cardinal Institute has developed research, participated in debates, published opinion, and worked to educate West Virginians about ESAs and the broader benefits of education choice especially for children on the margins. CEP works nationally for education choice policies to enable all families, Catholic and non-Catholic alike, to freely and joyfully choose education that best fits their children's needs. In 2016 Cardinal Institute introduced the concept of ESAs to West Virginia when it published its first research paper on the topic. CEP, with a national focus, early on collaborated with Cardinal Institute to explain ESAs to State policy- and lawmakers. The *amici curiae* note that in launching the Hope Scholarship Program West Virginia instantly became a leader in empowering parents and others, especially those leading underserved and marginalized families, to choose education that best suits the children in their charge.

II. ARGUMENT

² Cardinal Institute, of Charleston, W. Va., is a Section 501(c)(3) non-profit think tank whose mission is to research and communicate public policies that will benefit West Virginians.

³ CEP, of Minneapolis, Minn., is a Section 501(c)(3) non-profit organization whose mission is to advance policy in the United States that empowers families to access Catholic education.

The Circuit Court of Kanawha County in its Order⁴ incorrectly ruled that judicial review of the lawfulness of the Hope Scholarship Act, sometimes referred to H.B. 2013⁵ must be undertaken according to a standard of “strict scrutiny”. Applying strict scrutiny to HB 2013, the lower court ultimately ordered that the “State of West Virginia is PRELIMINARILY AND PERMANENTLY ENJOINED from implementing House Bill 2013 (W. Va. Code § 18-13-1 *et seq.*), and declaratory relief is GRANTED as to the unconstitutionality of the statute.

To reach its conclusion, the Circuit Court crafted the Order below laden with largely baseless factual findings and conclusory rulings that the Hope Scholarship Act and legislative appropriations to the Hope Scholarship Program “impinge” on children’s “constitutional right to a public education” “without a compelling interest in doing so.” ¶ 76, Order at 16. The Circuit Court found, again incorrectly, that the Hope Scholarship Act reduces funds available to public schools through the state-incentivized reduction in public school enrollment.” ¶ 74, Order at 14. First, the record below is devoid of evidence, outside of the mere speculation of Plaintiffs, that appropriations to the Hope Scholarship Program reduce funds available to public schools. Second, the factual premise is false. Appropriations to the Hope Scholarship Program do not reduce funds

⁴ On July 22, 2022, the lower court entered its final Order in the civil action styled *Travis Beaver and Wendy Peters v. Riley Moore, in his Official Capacity as State Treasurer of West Virginia; W. Clayton Burch, in his Official Capacity as State Superintendent of West Virginia; Miller L. Hall, in his Official Capacity as President of West Virginia’s Board of Education; Craig Blair, in his Official Capacity as the President of the West Virginia Senate; Roger Hanshaw, in his Official Capacity as the Speaker of the West Virginia House of Delegates; Jim Justice, in his Official Capacity as Governor of West Virginia; and the State of West Virginia; Katie Switzer and Jennifer Compton* (Kanawha County Civil Action nos. 22-P-24 and 22-P-26).

⁵ H.B. 2013 was introduced in the House of Delegates on February 10, 2021 and was enacted on March 17, 2021. It took effect 90 days after passage on June 15, 2021. Perhaps to mischaracterize the program, Plaintiffs in pleadings below often refer to H.B. 2013 as the Voucher Law despite that no voucher is authorized. The Hope Scholarship Board is empowered to “[i]mplement the program through the use of financial organizations as account depositories and managers.” W. Va. Code § 18-31-4(3). Public funds are allocated to a parent or parents of an eligible Hope Scholarship recipient to pay for “qualifying expenses” to an “educational service provider” in exchange for “educational goods and services to Hope Scholarship students.” *See generally* W. Va. Code § 18-31-2 and W. Va. Code § 18-31-7.

available to public schools because the authorizing law does not reduce funds available to public schools. Nonetheless, the lower court on these false premises improperly reviewed H.B. 2013 according to a standard of “strict scrutiny” as this Court’s decisional law would have required had the program truly “impinged” on public school funds.

In a stretch of language, the Circuit Court ruled, again incorrectly, that “HB 2013 also trades a student’s fundamental right to a public education for a sum of money.” ¶ 75, Order at 14. That finding also is baseless. No student or her family is compelled to participate in the Hope Scholarship Program. Her family is free not to seek a Hope scholarship and to attend a public school that the West Virginia Board of Education manages according to its Constitutional obligation to do so.

A. *The ‘Preferred Status’ of the System of Free Schools*

The *amici curiae* acknowledge that West Virginia’s public schools are a case apart from virtually every other public good that the State provides to its citizens. “The provisions of Article XII, Section 1, *et seq.*, as well as Article X, Section 5 of the West Virginia Constitution, when construed in the light of our prior cases, gives a constitutionally preferred status to public education in this State.” Syl. pt. 1, *State ex rel. Board of Educ. v. Rockefeller*, 167 W. Va. 72, 281 S.E.2d 131 (1981). “Because of public education’s constitutionally preferred status in this State, expenditures for public education cannot be reduced under W. Va. Code, 5A-2-23, in the absence of a compelling factual record to demonstrate the necessity therefor.” *Id.* at Syl. pt. 2.

B. *Hope scholarship appropriations do not impinge public school appropriations*

The Hope Scholarship Act and legislative appropriations under it do not reduce expenditures for public schools. There is no nexus between the State’s funding the Hope Scholarship Program and its Constitutional duty to fund public schools. The record below contains

no evidence whatsoever that the Hope Scholarship Program reduces funds to public schools. The Circuit Court based its finding to the contrary on the mere speculation (or perhaps claim) of Plaintiffs. Intervenor/Defendants below, Katie Switzer and Jennifer Compton, correctly stated below that the State’s constitutional duty to provide for public schools does not, explicitly or implicitly, preclude the legislature from “providing for *additional* educational opportunities . . .” *see Memorandum in Support of Parent-Intervenor’s Motion for Judgment of the Pleadings* at p. 3. The Legislature, in fact, appropriated funds from the State’s general revenues to the Hope Scholarship Program funds expressly “in addition to all other amounts required by” the public schools.” W. Va. Code § 18-9A-25(a).

C. *The School Fund has no role in funding Hope Scholarships*

The Circuit Court notes that “Article XII, Section [of the Constitution] states that the ‘School Fund’ shall be dedicated to support ‘free schools throughout the State, and to no other purpose whatever.’ W. VA. CONST. art. XII, § 4.” ¶ 83, Order at 16. There is no evidence in the record that the Hope Scholarship Program draws from the School Fund. Indeed, the lower court in its Order did not go so far as to claim or rule that the Hope Scholarship Program draws from the School Fund. In fact, the Hope Scholarship Fund does not draw from the School Fund.

Moreover, the Circuit Court, in a stretch of judicial imagination to divine Founders’ intent, finds that because the School Fund “was the original funding mechanism for public education in the Constitution” this fact “makes patent that the Framers intended public funds only be used for public education.” ¶ 79, Order at 17. The lower court’s claim is wholly unfounded. Rather, it is patent within the text of the West Virginia Constitution itself that the Framers envisioned the School Fund as only one of at least three sources of funding for public schools. The falsity of the lower court’s finding on the Framers’ intent is belied in that our Constitution separately mandates

that the “Legislature shall provide for the support of free schools . . . by general taxation of persons and property . . .” W. VA. CONST. art. XII, § 5. “The power of taxation of the Legislature shall extend to provisions for the payment of the state debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the state . . .” W. VA. CONST. art. V, § 5. Further, if the State’s fiscal revenues do not meet its fiscal obligations, the Legislature has the Constitutional duty to “levy a tax for the ensuing year, sufficient with the other sources of income, to meet such deficiency . . .” W. VA. CONST. art. V, § 5; *see Rockefeller*, 167 W. Va. at 88; 281 S.E.2d 131 ** (1981).

In short, the School Fund is a classic red herring, one that has nothing to do the Hope Scholarship Program and nothing to do with this case.

D. *Other incorrect factual findings*

The *amici curiae* pause to underscore concerns expressed elsewhere that the Circuit Court entered final judgments in the Order despite the complete absence of a genuine record of facts and fact-finding below. Nonetheless, the Order is hyperbolic throughout, stating extraordinary legal conclusions without textual basis in the Constitution or the statutes. The Circuit Court writes that “HB 2013 *unconstitutionally* interferes with the Board of Education’s supervisory and rule-making authority over public funds spent to educate the state’s children by creating a separate Hope Scholarship Board to supervise spending of public funds for vouchers.” ¶ 85, Order at 18 (emphasis supplied). The premise of this conclusion is that HB 2013, in fact, gives the Hope Scholarship Board power, authority or supervision of public schools or public school funds. The most generous reading of HB 2013 discloses no such grant or power, authority or supervision of public schools to the Hope Scholarship Board. Such a ruling is unsustainable.

Also, the Circuit Court implies that the Board of Education has exclusive jurisdiction over all systems of education in West Virginia. If affirmed, this would be dangerous ground. There is no expression in the West Virginia Constitution that confers on the Board of Education exclusive jurisdiction over systems of education in West Virginia that are not the system of free schools. The Board of Education has no such power over the Legislature.

And then the Circuit Court pulled out of thin air its ruling that the State may “raise revenue for, fund, and maintain *only* a thorough and efficient system of free schools supervised by the WVBOE.” ¶ 67, Order at p. 14 (emphasis original). To get there, the Circuit Court improperly conflates the State’s fundamental obligation under Article XII, Section 1 of the West Virginia Constitution to fund, operate and “provide, by general law, for a thorough and efficient system of free schools” and the plenary power of the West Virginia Legislature to enact laws and to spend public dollars for purposes other than the system of free schools. Yet, the State can both perform its duty to provide for free schools and also to exercise its nearly plenary power to spend public dollars on the Hope Scholarship Program without impinging on Article XII, Section 1 of the West Virginia Constitution.

In *State ex rel. Board of Educ. v. Rockefeller*, this Court declined to sanction the executive branch’s attempt to impose across-the-board cuts in all departments including public schools without showing a “compelling interest.” 167 W. Va. 72, 80, 281 S.E.2d 131, 136-37 (1981). This Court found that the State made “no such compelling factual record.” *Id.* There is no such factual record below much less a “compelling factual record” to sustain the Circuit Court on this point.

E. *‘Strict Scrutiny’ review inapplicable*

Thus, the Legislature’s enactment of and appropriations to the Hope Scholarship Program do not impinge on public education as a “constitutional right.” ¶ 73, Order at p. 15; *see W. Va.*

Educ. Ass'n v. Legislature of the State of West Virginia, 179 W. Va. 381, 382 (1988). These actions, including H.B. 2013, are not reviewed according to a standard of “strict scrutiny”. Further, the State need not “demonstrate that such actions meet a compelling state interest and are narrowly tailored to achieve that compelling interest.” *Id.* There is nothing in or about H.B. 2013 that affects the State’s financing or operating its system of free schools that would trigger “strict scrutiny”. *see Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979).

In the absence of standard of strict scrutiny, accordingly, this Court must conclude only that the Circuit Court’s stated rationales for striking down H.B. 2013 and the Hope Scholarship Program constitute a breach of the division of powers in Article V, Section 1 of the West Virginia Constitution that “the legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others . . .” W. VA. CONST. art. V, § 1. As this Court has held time and again, it is not the province of the judicial branch to invade the Legislature’s role to set public policy that does not conflict with the West Virginia Constitution. Yet, the Circuit Court repeatedly breaches the division of powers in its Order, where it substitutes its judgment for that of the Legislature:

There is no limitation on eligibility based on geography, family income, school performance, or the particular educational needs of the student, and no cap on limit on the number of voucher that can be given out. HB 2013 offers a voucher to every child starting kindergarten without regard to whether their family can already afford private school or homeschooling. In three years, the voucher program can be available to every child in the State, and it will definitely be available to all such students when fully implemented because each new class of kindergarten students can start with a voucher that is paid out every year of their school career. HB 2013 does not require private schools or homeschooling parents to meet educational quality or other standards and offers insufficient accountability for those using the funds.

¶ 77, Order at 16.

Arguendo that the Circuit Court’s factual findings in ¶ 77 are true, which the *amici curiae* do not concede, it is not the business of the judicial branch to review the policies of the legislative branch manifested in its enactments. The courts, including this one, must pursue every possible means to affirm the constitutionality of a legislative enactment. As recently as in 2021, Justice Walker writing for this Court explained that:

[i]n 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 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.

Justice v. W. Va. AFL-CIO, 866 S.E.2d 613, 620-21 (W. Va. 2021).

Since its founding, the State’s interest in the education and welfare of its children has been paramount and thus, always exceeding its Constitutional duty to finance, operate and provide for its system of free schools. The State has a legitimate and compelling interest in the education and welfare of all children, including children who are not enrolled in its system of free schools. Concomitant with this legitimate and compelling interest, the Legislature has broad power under the West Virginia Constitution to tax for its general purposes including for the education and welfare of children who are not in its system of free schools.

H.B. 2013 is constitutional because its purpose, structure and effects serve the legislative policy of the enactment.

F. *Executive powers to implement H.B. 2013 are constitutional*

The Executive Branch comprises both the State Board of Education, as created by and required under Article XII, Section 2⁶ of the West Virginia Constitution and its Department of Education. The distinction between the Board and the Department, and their sometimes overlapping and sometimes distinct roles, is relevant to the lower court's ruling that "HB 2013 improperly usurps the constitutional authority of the WVBOE, which is vested 'general supervision of the free schools of the State.' W. VA. CONST. art. XII, § 2" and that "[t]he West Virginia code confirms the proper interpretation of Article XII, Section 2 as imposing upon the WVBOE the duty to 'carry[] into effect the laws and policies of the state relating to education.' W. Va. Code § 18-2-5." ¶ 87, Order at 17. The Circuit Court in a great leap of logic then stated "[w]hen the Legislature passes laws that 'interfere[]' with the Board of Education's constitutional authority, those laws are 'unconstitutional.'" ¶ 87, Order at 17-18 (citing *West Virginia Bd. of Educ. v. Hechler*, 180 W. Va. 451, 454 (1988).)

The Circuit Court crosses a bridge too far. The West Virginia Constitution and the West Virginia Legislature by general law have implemented and empowered the Board of Education to operate the system of free schools. The Legislature, in a valid exercise of its powers, also created the Department of Education to assist the Board of Education to execute its mandate while also executing other laws and programs related to education but unrelated to its mandate to finance and operate the system of free schools. It appears that the Legislature by "general law" first created the "State Department of Education" in 1919, still codified in W. Va. Code § 18-3-9: "*State Department of Education*. For carrying into effect the provisions of this chapter, the state

⁶ "Supervision of Free Schools. §2. The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law. W. VA. CONST. art. XII, § 2.

Superintendent of Schools shall maintain a Department of Education at his office at the state Capitol, and he shall have authority to employ assistants and such other employees as may be necessary. [First enacted in 1919, c. 2, § 25; Code 1923, c. 45, § 25; 1929, c. 89, § 94; 1945, C. 54; 1967, c. 60]. At the same time, the Legislature conferred on the state Superintendent “other powers and duties” in W. Va. Code § 18-3-10: “The State Superintendent of Schools shall exercise such other powers and discharge such other duties as are herein assigned to him or as may from time to time be assigned to him by the Legislature and by the state Board of Education.”⁷

These additional duties (and the corresponding powers to exercise them) are not founded on the State’s mandate under Thorough and Efficient Clause⁸ to finance and operate free schools but rather on the Legislature’s general powers to authorize actions and to appropriate funds for general purposes unrelated. In 1919, this was perhaps best illustrated in that the Department of Education (and not the Board of Education) “as to educational matters other than those relating to the West Virginia University, the board of Governors of West Virginia University as to educational matters relating to said university, and the state commissioner of public institutions, as to financial and business matters, as provided by law, are authorized and empowered to carry out the provisions of the original and supplemental acts of Congress mentioned or referred to in this article, and of any subsequent act or acts of Congress making appropriations to this state for educational purposes.” W. Va. Code 18-10-9 (1919). Under W. Va. Code § 18-10-9, the Legislature authorized the Department of Education (and not the Board of Education) to receive moneys from the United States and to manage and disburse for the education or benefit of all children irrespective that they are enrolled in public schools.

⁷ The Superintendent and the Board of Education once supervised the State’s normal schools for the training of teachers and other programs that the Legislature later removed from their jurisdiction and control

⁸ Article XII, Section 1 states: “The legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. VA. CONST. art. XII, § 1.

The conduct of the Department of Education in these matters does not implicate the Thorough and Efficient Clause, nor the State’s Constitutional mandate to finance and operate a system of free schools. Similarly, under its general powers, the Legislature has enacted laws and appropriated funds from its general revenues for the costs of educating children other than public school children that, if reviewed subject to a standard of strict scrutiny as the lower court applied to the Hope Scholarship Program, would be declared unconstitutional under Article X. They include, for example, the following:

- *Authority of county boards to regulate athletic and other extracurricular activities of secondary schools; delegation of authority of commission; approval of rules by state board; incorporation; funds; participation by private and parochial schools and by home-schooled students* (regulating interscholastic activities of public, private and parochial schools and home-schooled students W. Va. Code § 18-2-25.
- *West Virginia virtual schools.* (developing policy for making internet courses available to home-schooled children) W. Va. Code § 18-2E-9(3)(E).
- *Advanced career education.* (mandating ACE programs to be equally available to “public, nonpublic, and homeschool students) W. Va. Code § 18-2E-11(c).
- *Vocational education classes for homeschooled and private schooled students.* (requiring county boards of education to permit private and home-schooled children to enroll in vocational schools) W. Va. Code § 18-5-15(g).
- *Compulsory pre-enrollment hearing vision and speech and language testing; developmental screening for children under compulsory school age.* (authorizing county boards of education to test all children entering nonpublic school for vision or hearing impairments or speech and language disabilities) W. Va. Code § 18-5-17(a).
- *Kindergarten programs.* (authorizing county boards of education to provide kindergarten programs in children’s homes) W. Va. Code § 18-5-17(e).
- *Textbooks may be furnished to pupils in private schools whose parents are unable to provide same.* (authorizing county boards of education to give textbooks to private school students whose parents are unable to buy) W. Va. Code § 18-5-21b.

Added to these is now the Department of Education’s role to properly calculate and disburse the 2022 legislative appropriation for the Hope Scholarship Program for the benefit and use of the

hundreds of families of more than 3,300 children who have freely chosen to use those funds. The Legislature could just as easily — and constitutionally — but perhaps not as conveniently directed another agency of the executive branch to have run the program.

The judicial branch has no province to thwart the executive branch from exercising the legislative will to fund and operate the Hope Scholarship Program.

III. CONCLUSION

For these reasons, the decisions of the Circuit Court contained in the Order should be reversed or, in the alternative, this case should be remanded to the Circuit Court with this Court's clear instructions on the proper and applicable law under the West Virginia Constitution.

CARDINAL INSTITUTE
FOR WEST VIRGINIA POLICY, INC.,

and

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