IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. _____
Civil Action No. 10-C-327 (Circuit Court of Kanawha County)

BOARDS OF EDUCATION OF THE COUNTIES OF:

BARBOUR, BERKELEY, BOONE, BRAXTON, BROOKE, CABELL, CALHOUN, CLAY, DODDRIDGE, FAYETTE, GILMER, GREENBRIER, HAMPSHIRE, HANCOCK, HARDY, HARRISON, JACKSON, JEFFERSON, KANAWHA, LEWIS, LINCOLN, LOGAN, MARION, MARSHALL, MASON, MCDOWELL, MERCER, MINERAL, MONROE, MORGAN, NICHOLAS, PENDLETON, PLEASANTS, POCAHONTAS, PUTNAM, RALEIGH, RANDOLPH, RITCHIE, ROANE, SUMMERS, TAYLOR, TUCKER, TYLER, UPSHUR, WEBSTER, WETZEL, WIRT, WOOD, AND WYOMING,

Petitioners,

v.

PUBLIC EMPLOYEES INSURANCE AGENCY, PUBLIC EMPLOYEES INSURANCE AGENCY FINANCE BOARD, and WEST VIRGINIA STATE AUDITOR,

Respondents.

PETITION FOR APPEAL ON BEHALF OF FORTY-NINE OF THE COUNTY BOARDS OF EDUCATION OF WEST VIRGINIA

Submitted by:

Andrew G. Fusco, Esq. (WVSB 1317)
Gregory W. Bailey, Esq. (WVSB 206)
Bowles Rice McDavid Graff & Love LLP
7000 Hampton Center
Morgantown, West Virginia 26505
(304) 285-2500

Howard E. Seufer, Esq. (WVSB 3342)
Jill E. Hall, Esq. (WVSB 8812)
Bowles Rice McDavid Graff & Love LLP
Post Office Box 1386
Charleston, West Virginia 25325
(304) 347-1100

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PETITION FOR APPEAL ON BEHALF OF FORTY-NINE OF THE COUNTY BOARDS OF EDUCATION OF WEST VIRGINIA

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This action is an appeal by forty-nine West Virginia county boards of education[1] (hereinafter referred to collectively as "Petitioners") challenging an Order entered by the Circuit Court of Kanawha County on September 23, 2010, dismissing their declaratory

[1] The Monongalia County Board of Education was a plaintiff in the action below but is not a petitioner in this appeal.

judgment action. Petitioners asserted in the action below that the following acts by the Respondents unconstitutionally interfere with and frustrate the right to a thorough and efficient system of free schools in violation of Article XII, Section 1 of the West Virginia Constitution:

- the application of West Virginia Code Section 5-16D-6(e) to county boards of education by the Public Employees Insurance Agency ("PEIA") and the Public Employees Insurance Agency Finance Board;
- the assessment and billing by the PEIA and the PEIA Finance Board of the total liability for other postemployment benefits ("OPEB"); and
- the requirement by the West Virginia State Auditor that Petitioners recognize the total OPEB liability as a current liability on their annual financial statements.

In sum, Petitioners are mandatory participants in a health plan sponsored by the PEIA. The PEIA permits Petitioners' employees and retirees to participate in the health plan. The State of West Virginia historically has provided funding for the premiums charged by the PEIA with respect to most of Petitioners' employees and retirees through the Public School Support Plan, otherwise known as the State Aid Formula. The PEIA and the Finance Board now seek to charge Petitioners for the full cost of present and future participation in the health plan, effectively raising premiums exponentially, when no additional funding has been provided to county boards to pay for such liability. The imposition of this liability effectively robs county boards of education of funds intended to educate the children of West Virginia. Respondents' actions seriously frustrate and interfere with Petitioners' ability to provide a thorough and efficient system of free schools in West Virginia. Petitioners filed a declaratory

judgment action pursuant to the Uniform Declaratory Judgments Act, West Virginia Code Section 5-13-1, *et seq.*, in the Circuit Court of Kanawha County, West Virginia, on February 22, 2010, seeking multiple declarations, including that Petitioners are not legally liable for the debt associated with the cost of participation in the PEIA health plan. The PEIA, Finance Board and State Auditor (hereinafter collectively referred to as "Respondents") answered the complaint and then moved to dismiss the action, arguing that the complaint raised a political question and that it did not satisfy the factors relevant to determining whether a court should hear a declaratory judgment action. Following briefing on the motion to dismiss, the Circuit Court held a hearing on the motion and then invited the parties to submit proposed findings of fact and conclusions of law in support of their respective positions. On September 23, 2010, the Circuit Court adopted Respondents' proposed findings and conclusions in their entirety and dismissed the action. The Circuit Court did not consider the merits of Petitioners' case. Rather, the Court concluded in its order that Petitioners raised a nonjusticiable political question and found that it had the discretion to decline to hear this declaratory judgment action. It is from this order that Petitioners appeal.

At stake in this appeal is nothing less than the future of children educated in this State's public schools. Petitioners are charged with providing the education to which our children are entitled under the West Virginia Constitution. This Court is charged with safeguarding the precious right to a thorough and efficient system of free schools as guaranteed by the Constitution, and the lack of ample resources in no way excuses the infringement of this fundamental right. We must ensure that the potential of our children is realized and that our citizens are well-educated and thus productive members of the society of which we are all a part. Respondents' actions threaten this common goal, and Petitioners ask that this Court take

all steps necessary to thwart such actions in the name of all West Virginia children educated in our public schools.

II. STATEMENT OF FACTS

A. The PEIA Health Plan

Petitioners are forty-nine county boards of education in West Virginia. Petitioners all are mandatory participants in the health plan or plans sponsored by Respondent, the Public Employees Insurance Agency ("PEIA"). W. VA. CODE §§ 5-16-2, 5-16-22. The PEIA provides for group major medical insurance for certain employees, including retired employees of county boards of education, and it is responsible for adopting rules and regulations prescribing the conditions under which retired employees may elect to participate in the plan or plans established by the PEIA. W. VA. CODE § 5-16-3(c).

Petitioners historically have been responsible for paying the "minimum annual employer payment" with respect to the premiums associated with their employees' and retirees' participation in the PEIA plan. Compl. at ¶ 5. The minimum annual employer payment essentially covers the current year's cost of participation in the health plan for current retirees, less employee contributions. Compl. at ¶¶ 37, 60. In recent years, in reaction to a new accounting standard associated with the cost of providing health benefits to retirees (discussed in detail below), the PEIA began invoicing the total cost of each Petitioner's share of the liability associated with the health plan. Compl. at ¶ 85.

The right to participate in the PEIA health plan as a retiree is considered an "other postemployment benefit." ("OPEB"). Compl. at ¶ 35. OPEB are benefits earned during employment other than pensions and may include health plans, life insurance, disability

insurance and the like. Compl. at ¶ 34. In this case, the OPEB liability at issue concerns the cost of participation in the PEIA health plan. The total cost of all OPEB liability (hereinafter referred to as "total OPEB liability") now billed to each Petitioner grossly exceeds the minimum annual employer payment for which they have been billed in the past. Compl. at ¶¶ 5-9.

Currently, all Petitioner county boards of education receive bills for the total OPEB liability as opposed to the minimum annual employer payment. Compl. at ¶ 6. As alleged in the complaint below, the total OPEB liability associated with those PEIA insureds which are funded by the State through the State Aid Formula for the fiscal year ended June 30, 2009, ranged from $35,918 to $1,139,541 per county board of education. Compl. at ¶ 7. The evidence would show that the estimated total OPEB liability for the fiscal year ended June 30, 2010, ranged from $792,746 to $24,561,987 per county board of education for those PEIA insureds funded by the State Aid Formula. Collectively, the estimated total OPEB liability for all Petitioners for the 2010-2011 year totals $212,418,104. The numbers continue to grow exponentially. Compl. at ¶ 9.

B. The Public School Support Plan

Historically, for a majority of employees and retirees of county boards of education, funding for the PEIA health plan premiums has been provided by the State of West Virginia through the Public School Support Plan ("PSSP"), commonly known as the State Aid Formula and codified at West Virginia Code Section 18-9A-1, *et seq.*[2] Compl. at ¶¶ 5, 74. In establishing the PSSP, the legislature declared that the future of education in West Virginia is

[2] The complaint sought no relief with respect to those employees and retirees not covered by the PSSP.

dependent upon a plan of financial support for the public schools founded on an economic base that "ensures levels of revenue sufficient to fund the public schools." *Id.*

Among other things, the PSSP provides an allowance to pay Petitioners' share of premiums for employees and retirees participating in the PEIA plan. Compl. at ¶ 76. The allowance is calculated by multiplying the number of professional educators and service personnel allowed to be funded under the PSSP formula by the average premium rate for all county board of education employees as established by the PEIA Finance Board. *See* W. VA. CODE § 18-9A-24(a). In the past, this allowance equaled the minimum annual employer payment sufficient to cover the PEIA's invoices to Petitioners.

C. GASB Statement No. 45

In June 2004, the Governmental Accounting Standards Board ("GASB") issued Statement No. 45 which established accounting and reporting standards for other postemployment benefits offered by state and local governments. Compl. at ¶ 33. The retiree health benefits provided through the PEIA plan constitute other postemployment benefits subject to Statement No. 45. GASB Statement No. 45 changed the method used by state and local governments to account for and report OPEB. Compl. at ¶ 38. Accordingly, rather than report the benefits when actually distributed to retirees (otherwise known as the pay-as-you-go method), Statement No. 45 now requires that the state or local government responsible for the payment of such benefits report them when earned. *Id.* Even though retiree health benefits are received at retirement, they are earned during active employment. *Id.* Rather than recording the cost of health benefits for current retirees as those benefits are paid out, state and local governments responsible for funding the benefits now must report the amounts of benefits earned by current retirees as well as future benefit amounts for all active employees who will

one day be entitled to other postemployment benefits. Compl. at ¶ 39. Consequently, this change in accounting methods caused the amounts reported for such benefits to increase greatly.

GASB Statement No. 45 addresses accounting and financial reporting issues only. Compl. at ¶ 42. Importantly, Statement No. 45 in no way changes or even addresses the liability for ultimate payment of such benefits. Compl. at ¶ 43. With respect to reporting, the Statement provides that in a special funding situation where a state government *legally* is responsible for contributions to OPEB plans for the covered employees of another governmental entity such as a county board of education, it is the state government, and not the county boards of education, that should comply with all applicable provisions of Statement No. 45. *See* Statement No. 45 of the Governmental Accounting Standards Board, *Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions* at ¶ 32 (June 2004).

The amounts of all outstanding obligations and commitments related to OPEB are to be produced by actuarial valuations performed in accordance with parameters established by GASB. Compl. at ¶ 45. In a cost-sharing multiple-employer plan such as that established by the PEIA, a single actuarial valuation typically is conducted for all of the employees of the participating governments combined. Compl. at ¶ 46. The actuarial calculations for OPEB liability are required to take into account benefits expected to be earned by employees in the future ("future normal costs"), as well as benefits employees already have earned. Compl. at ¶ 47. The portion of actuarial value allocated to prior years of employment and not provided for by future normal costs is referred to as the actuarial accrued liability. Compl. at ¶ 48. The value of an OPEB plan's resources is referred to as the actuarial value of assets. Compl. at ¶

50. The excess of the actuarial accrued liability over the actuarial value of assets constitutes the OPEB plan's unfunded actuarial accrued liability ("unfunded liability"). Compl. at ¶ 51.

Pursuant to Statement No. 45, the unfunded liability can be spread over a period of up to thirty years in either level dollar amounts or as a level percentage of projected payroll. Compl. at ¶ 52. The normal costs and the portion of the unfunded liability to be amortized in the current fiscal year together make up the annual required contribution ("ARC") of the employer for the period. Compl. at ¶ 53. If paid on an ongoing basis, the ARC amount is expected to provide sufficient resources to fund both the normal cost for each year and the amortized unfunded liability for future years. Compl. at ¶ 54.

GASB Statement No. 45 provides that, for a governmental entity participating in a cost-sharing multiple-employer plan such as the plan at issue here, the annual OPEB expense to be recognized is an employer's "contractually required contribution." *See* Statement No. 45 of the Governmental Accounting Standards Board, *Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions* at Summary of Standards; Compl. at ¶ 56. The contractually required contribution may or may not equal the full ARC. Compl. at ¶ 57. In the case of the PEIA plan, the Petitioners contend that the contractually required contribution with respect to county boards of education does not equal the ARC. Compl. at ¶ 58. Rather, the contractually required contribution for Petitioners is the minimum annual employer payment which is funded by the PSSP. *Id.* Petitioners allege that it is this amount, and no more, that can be billed to county boards of education by the PEIA, and it is only this amount that can be required to be reflected on Petitioners' annual financial statements.

D. Respondents

The PEIA is a state agency responsible for establishing the group major medical plan at issue. The Director of the PEIA is responsible for promulgating rules for the administration of the plan. The PEIA Finance Board ("Finance Board") was created "to bring fiscal stability to the Public Employees Insurance Agency through development of annual financial plans and long-range plans designed to meet [PEIA's] estimated total financial requirements taking into account all revenues projected to be made available to [PEIA] and apportioning necessary costs equitably among participating employers, employees and retired employees and providers of health care services." W. VA. CODE § 5-16-5(a). Such financial plans establish the levels of premium costs to participating employers, including Petitioners, and the types and levels of costs to participating employees and retired employees. *Id.*

The West Virginia Retiree Health Benefit Trust Fund ("Trust Fund") was created in 2006 to provide for and administer retiree postemployment health benefits and the associated revenues and costs of such benefits. W. VA. CODE § 5-16D-2. The Finance Board is responsible for the operation of the Trust Fund, and the PEIA collects all monies owed to the Trust Fund. W. VA. CODE §§ 5-16D-3(c) and 5-16D-3(j). The PEIA has sole operational control over the Trust Fund. W. VA. CODE §§ 5-16D-3(g) and 5-16D-5.

The Finance Board annually sets the ARC sufficient to maintain the Trust Fund. W. VA. CODE § 5-16D-6(a). The Finance Board also annually allocates to each participating employer its portion of the ARC ("Employer ARC"). W. VA. CODE § 5-16D-6(b). Components of the ARC, as determined by the PEIA and the Finance Board, include the normal cost (benefits expected to be earned), the unfunded liability (the excess of the value allocated to prior years of employment not provided by normal costs over the value of a plan's

resources), the Employer ARC (normal costs and the portion of unfunded liability to be amortized in the current fiscal year) and the lesser included minimum annual employer payment (collectively, "total OPEB liability"). W. VA. CODE § 5-16D-6(c).

The minimum annual employer payment is the annual amount paid by participating employers which, when combined with retirees' contributions, provides sufficient funds to cover all projected retiree health care expenses and related administrative costs for that fiscal year. W. VA. CODE § 5-16D-1(q). It is this amount that has been collected by the PEIA from Petitioners in the past, and this amount has been funded through the PSSP with respect to employees and retirees of county boards of education covered by the State Aid Formula. Compl. at ¶ 5. The Finance Board develops the minimum annual employer payment each fiscal year. *See* W. VA. CODE § 5-16D-1(q). The PEIA collects the minimum annual employer payment each year as well as any amount a participating employer may choose to pay voluntarily toward the Employer ARC. W. VA. CODE § 5-16D-6(e). Significantly, West Virginia law dictates that any Employer ARC amount (the total OPEB liability) not paid remains the liability of that employer, including county boards of education, until fully paid. *Id.*

E. Petitioners' Claims

The PEIA and the PEIA Finance Board, seeing that the change in accounting standards prompted by Statement No. 45 would saddle the State with the staggering obligation to report the total OPEB liability associated with all employees and retirees of the county boards of education and potentially jeopardize the health plan itself, determined that they would begin to bill Petitioners for the total OPEB liability associated with such employees so that Petitioners, and not the State, would have to record the liability on their books. In furtherance

of this objective, West Virginia Code Section 5-16D-6(e) was enacted to ensure that the total OPEB liability remains the liability of county boards of education until fully paid. These devastating actions were taken despite the fact that Petitioners never have been responsible for paying the cost of health coverage under the PEIA plan for those employees and retirees covered by the PSSP.

It is the total OPEB liability which the PEIA bills to all county boards of education each year, and it is the imposition of this liability Petitioners seek to be declared unconstitutional. This amount billed to the Petitioners grossly exceeds the minimum annual employer payment portion collected by the PEIA in the past, and grossly exceeds the amount of funding provided by the PSSP for PEIA premiums attributed to county board of education employees and retirees. Although presently Petitioners are required to pay only the minimum annual employer payment portion of the total OPEB liability, they are billed for the total liability, and West Virginia law makes clear that the total OPEB liability remains the liability of the county boards of education until fully paid. W. VA. CODE § 5-16D-6(e).

Further, the West Virginia State Auditor ("Auditor"), who is responsible for the annual audits of all county boards of education, requires each Petitioner to report on its annual financial statement its total OPEB liability as a current liability. Compl. at ¶ 26. The State Auditor determines whether each Petitioner's annual financial statement is free from material misstatement and accurately reflects the financial position of each Petitioner. Compl. at ¶ 24. Failure by any Petitioner to report its total OPEB liability could result in an adverse opinion from the State Auditor. Compl. at ¶ 25. Although not required by GASB Statement No. 45, the State Auditor treats this total OPEB liability as a current liability, causing Petitioners' annual financial statements to reflect a major deficit. Compl. at ¶ 89(w). In fact, the evidence

would show that all fifty-five county boards of education will reflect a deficit in the near future. Importantly, such deficits by local fiscal bodies are forbidden by law in West Virginia. W. VA. CODE § 11-8-26.

Because the PSSP does not provide funding for the total OPEB liability, Petitioners must plan for the worst. Petitioners, as fiscal stewards of the county school systems, have no choice but to take steps to ensure that, when the total OPEB liability comes due, which presumably can happen at any time, they have funding capable of satisfying such debt. As a matter of simple accounting, Petitioners must make provisions for this ongoing liability. Some Petitioners have set aside funds that would otherwise be used to pay for teacher salaries, student instruction materials, student programs and activities, and countless other essential educational expenditures. Compl. at ¶ 89. Others generally are unable to engage in any kind of long-range planning in anticipation of required payment for the total OPEB liability for which they have already been billed. *Id.* The following is a list of consequences resulting from the imposition of the total OPEB liability which Petitioners alleged in the complaint have been suffered by the county boards of education or which are under consideration by the boards:

a. reductions in staff;

b. delay in staffing decisions until it is determined whether or not Petitioners ultimately are responsible for the funding of the total OPEB liability;

c. elimination of educational programs;

d. elimination and/or reduction of reserves;

e. delay or cancellation of facility renovation and construction projects;

f. reductions in availability of matching funds for School Building Authority grants;

g. reductions in student transportation;

h. reductions in expenditures for dental and/or optical plans and potential elimination of these plans;

i. reductions in building maintenance;

j. elimination of ability to engage in long-term planning;

k. greater difficulty in garnering support for levies as the result of increased lack of public confidence in boards' fiscal responsibility;

l. impairment of ability to recruit personnel because of fear on the part of potential recruits of long-term financial instability;

m. elimination or furlough of all but essential personnel;

n. inability to provide updated technology equipment in classrooms;

o. alteration of HVAC service levels;

p. inability to pay vendors;

q. elimination of Title I and other federal positions;

r. elimination of after-school and summer programs;

s. increase in class sizes where legal to do so;

t. reduction of classroom materials and supplies;

u. elimination of extracurricular activities;

v. further deterioration of public confidence in fiscal responsibility of school boards;

w. reflection of a deficit on annual financial statements; and

x. adverse bond ratings when annual audit reports show a current liability for total OPEB costs.

Id.

The setting aside of funds to satisfy the OPEB debt, which for some counties are scarce enough even without the imposition of this crushing new liability, as well as the inability to engage in long-range planning, frustrates and interferes with Petitioners' obligation to provide a thorough and efficient system of free schools as guaranteed by the West Virginia Constitution.

Petitioners filed their declaratory judgment action pursuant to the Uniform Declaratory Judgments Act (or "Act"). West Virginia Code § 5-13-1, *et seq.* Petitioners asked the Court to make various declarations, including a declaration that the West Virginia county

boards of education are not liable to the PEIA for the funding of their retirees' health benefits in any amount in excess of the minimum annual employer payment, which amount currently is funded through the PSSP. Petitioners alleged that Respondents' actions, including their application of the provisions of West Virginia Code Section 5-16D-6(e) to the county boards of education, the assessment and billing of the total OPEB liability and the requirement that they report the total OPEB liability on their annual financial statements as a current liability, are unconstitutional in that such acts frustrate and interfere with the constitutionally guaranteed provision of a thorough and efficient system of free schools which Petitioners are obliged to provide to the students in their respective counties. The Circuit Court did not address the merits of any of Petitioners' allegations. Instead, the Circuit Court dismissed the action prior to any factual or legal development of the issues.

III. ASSIGNMENTS OF ERROR

A. The Circuit Court erred in concluding that Petitioners' complaint raised a nonjusticiable political question.

1. The Circuit Court erred in concluding that the funding of the OPEB liability was an issue raised in the complaint.

2. The Circuit Court erred in refusing to hear Petitioners' constitutional challenge to the imposition of the total OPEB liability.

B. The Circuit Court erred in concluding that the complaint did not satisfy the factors relevant to determining whether a court should entertain a declaratory judgment action.

1. The Circuit Court erred in concluding that the controversy at issue involves uncertain and contingent events.

2. The Circuit Court erred in concluding that there does not exist a substantial controversy among adverse parties.

3. The Circuit Court erred in concluding that allowing the case to proceed would not serve a useful purpose and would not settle the underlying controversy.

IV. STANDARD OF REVIEW

The Circuit Court's conclusion that Petitioners' complaint raised a nonjusticiable political question is a legal conclusion and is subject to a *de novo* standard of review. *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996). The standard of review applicable to the Circuit Court's factual finding that the complaint raised issues of funding with respect to OPEB is the clearly erroneous rule. *Id.*

The standard of review applicable to the Circuit Court's refusal to entertain Petitioners' declaratory judgment action is more problematic. Petitioners acknowledge that courts have some discretion in determining whether to hear a declaratory judgment action. *See Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). Petitioners assert, however, that Justice Cleckley's concurring opinion in *Cox* should instruct the standard of review in this case. Justice Cleckley made the following remarks in his concurring opinion in *Cox*,

> Although I recognize that circuit courts have some discretion to grant or withhold declaratory relief, and that this discretion must be exercised cautiously when matters of either public or constitutional dimension are implicated, the decision ultimately must be based on a careful balancing of efficiency, fairness, and the interests of both the public and the litigants. As to whether to grant or withhold declaratory relief, our review must offer a blend of deference and independence. While appellate courts may review a circuit court's exercise of this wise judicial administration only for abuse of discretion, this review must be meaningful.
>
> . . .
>
> I believe we should capture a middle ground [between abuse of discretion standard and plenary review], expressing our preference for a standard of independent review when passing upon a circuit court's decision to eschew declaratory relief. This standard encourages the exercise of independent appellate judgment if it appears that a mistake has been made. . . . Thus, independent review invokes a standard more rigorous than abuse of discretion but less open-ended than *de novo* review.

Id. at 619-20, 466 S.E.2d at 470-71 (Cleckley, J., concurring).

Petitioners posit that the Circuit Court's decision not to entertain their declaratory judgment action warrants the kind of independent review discussed by Justice Cleckley in *Cox*. As discussed throughout this brief, at issue is the fundamental constitutional right to a thorough and efficient system of education, a right that, since its inception, has been safeguarded by the courts of West Virginia. The possibility that the Circuit Court did make a mistake in the context of such a gravely important constitutional issue dictates that the Court provide more than an abuse of discretion standard when reviewing the decision below.

In fact, Petitioners believe the Circuit Court itself desires a closer review of its decision than that afforded by the abuse of discretion standard. At the hearing on Respondents' motion to dismiss, the Circuit Court clearly acknowledged the importance of this Court's review of this matter, stating that "I think it . . . truly needs to be reviewed." Transcript of 8/18/10 Hearing at 53. The Circuit Court was cognizant of the gravity of the issue before it, and its call for a review by this Court indicates a desire for more than an abuse of discretion review.

In the case below, Petitioners sought a declaration that the actions taken by Respondents interfered with and frustrated a fundamental constitutional right. Given the importance of the constitutional issue that was before the court below, Petitioners believe that the Circuit Court's refusal even to hear their case requires more than a review for abuse of discretion. For these reasons, Petitioners respectfully request that the Court conduct an independent review of the Circuit Court's order such as that suggested by Justice Cleckley in the *Cox* concurring opinion.

V. DISCUSSION OF LAW

A. The Circuit Court erred in concluding that Petitioners' complaint raised a nonjusticiable political question.

1. The Circuit Court erred in concluding that the funding of the OPEB liability was an issue raised in the complaint.

The Circuit Court clearly erred in concluding that the complaint raised a political question and that it lacked jurisdiction to hear Petitioners' case. The Circuit Court agreed with Respondents' argument that the "funding issues" raised in the complaint constitute a nonjusticiable political question. Order at § 15. The Circuit Court's order is based in large part on the erroneous assumption that at issue in the complaint was how to fund the total OPEB liability. The Circuit Court concluded that it could not grant the relief Petitioners sought without prioritizing various budget concerns of other citizens of West Virginia which it could not do without having such concerns before the Court. *Id.* at ¶ 14. Not only do Petitioners not raise the issue of funding with respect to OPEB, but, contrary to the Circuit Court's conclusion, funding for public education in this State does in fact enjoy priority status over other budgetary concerns as discussed herein.

First, Petitioners consistently have maintained that the funding issues associated with the OPEB liability are not at issue in this matter and are completely separate from the real issues of the case. The complaint clearly alleges that it is the imposition upon Petitioners of the *liability* associated with OPEB, and not how ultimately to pay for the liability, that is challenged by them. The ultimate funding of the total OPEB liability simply is not at issue in this case. When, whether and how to fund the admittedly enormous OPEB liability is not Petitioners' concern.

What Petitioners requested in the action below was a declaration that, as a matter of law, the total OPEB liability is not Petitioners' liability in the first place because: they are mandatory participants in the PEIA plan; they have not promised retiree health benefits under the PEIA health plan to their employees; they have never been responsible for payment of premiums associated with a majority of retiree health benefits other than to pass funds between the State and the PEIA; and the effort to shift to Petitioners a liability that was never theirs to begin with unconstitutionally frustrates and interferes with the fundamental right to a thorough and efficient system of free schools.

Historically, our courts have held that this is exactly the type of legal issue into which courts should insert themselves. "The basic task of the judicial branch is to determine whether the means used by the executive and legislative branches are within the reasonable scope and contemplation of our Constitution." *Randolph County Board of Education v. Adams*, 196 W. Va. 9, 23, 467 S.E.2d 150, 164 (1995). Although recognizing that judicial deference should be given to the legislature and state administrative bodies, Justice Cleckley has written that:

> . . . it does not follow, however, that in every instance this Court lacks authority and responsibility to review legislative and administrative attempts to alter what are alleged as constitutional mandates. This case has required us to consider our place in the design of state government and to appreciate the significance of judicial review in the whole structure of our Constitution. It cannot be denied that of the various structural elements in the Constitution, judicial review allows the judiciary to play a role maintaining the design contemplated by the framers. To be sure, the resolution of specific cases, such as this one, has proved difficult, but judicial review has been established beyond question, and, although we may differ in applying its principles, its legitimacy is undoubted.

Id. at 24, 467 S.E.2d at 165.

Second, notwithstanding the fact that funding is not an issue in this action, the Circuit Court is absolutely correct when it states that Petitioners are asserting that they should enjoy a "higher funding priority . . . in the name of a 'thorough and efficient' education." Order at ¶ 14. Indeed, this Court has held that public education does enjoy a constitutionally preferred status in West Virginia. *Pauley v. Kelly*, 162 W. Va. 272, 707, 255 S.E.2d 859, 878 (1979) ("the mandatory requirement of 'a thorough and efficient system of free schools,' found in Article XII, Section 1 of our Constitution, demonstrates that *education is a fundamental constitutional right in this State.*") (emphasis added)); see also *State ex rel. The Board of Education, County of Kanawha v. Hon. John D. Rockefeller, IV, Governor, et al.*, 167 W. Va. 72, 281 S.E.2d 131 (1981). As acknowledged in the Circuit Court's Order:

> "[o]ur basic law makes education's funding second in priority only to payment of the State debt, *and ahead of every other State function.* Our Constitution manifests, throughout, the people's clear mandate to the Legislature, that public education is a Prime function of our State government. We must not allow that command to be unheeded."

Pauley at 719, 255 S.E.2d at 884 (emphasis added).

With specific regard to the payment of health plan premiums for county board of education employees and retirees, the legislature, in codifying the PSSP, declared that the future of education in West Virginia is dependent upon a plan of financial support for the public schools based on an economic base that "ensures levels of revenue sufficient to fund the public schools." W. VA. CODE § 18-9A-1. The PSSP provides funds to the county boards of education to satisfy the minimum annual employer payment portion of the ARC billed by the

PEIA to Petitioners. Until recently, such funds were sufficient to satisfy the total liability owed to the PEIA by the county boards of education.

Obviously, in providing as part of this formula funding for health plan premiums for employees and retirees of county boards of education, the legislature considered funding for such premiums part of the necessary funding of public schools. This notion was confirmed by the Circuit Court of Kanawha County in *Pauley v. Bailey*:

> [a] high quality program consistent with Article XII, Section 1 of the West Virginia Constitution requires that all direct and indirect costs of the educational programs must be fully included in the state financing structure, i.e., curriculum costs, instructional, support and administrative staff salaries, *benefits*, supplies and equipment costs, and facility costs.

Pauley v. Bailey, Civil Action No. 75-1268, *Opinion, Findings of Fact and Conclusions of Law and Order* at 215 (Cir. Ct. Kanawha County, W. Va. May 11, 1982) (emphasis added).

Further, notwithstanding the fact that this case is not about the funding of OPEB, but rather the legal liability for such benefits, a shortage of State funds does not excuse the impairment of the constitutional right to a thorough and efficient system of free schools. The Circuit Court concluded that there exist other citizens of West Virginia who were not before the court with "a myriad of other legitimate and pressing issues" and that it could not evaluate and prioritize their issues. Order at ¶ 14. While Petitioners do not dispute that such other "legitimate and pressing issues" abound, our courts and our Constitution make clear that "financial hardship is an insufficient basis for ignoring the West Virginia Constitution." *Adams,* 196 W. Va. at 23, 467 S.E.2d at 164. Importantly, from its earliest days, this Court has acknowledged that it is plain from Article XII, Section 1 of our Constitution that "the people intended that the 'thoroughness' and 'efficiency' of the system of free schools . . . should in no

wise be prejudiced by the want of ample means." *Kuhn v. Board of Education of Wellsburg*, 4 W. Va. 499, 509 (1871).

Petitioners' complaint in no way raised a political question. Rather, Petitioners asked the Circuit Court to declare, as a matter of law, that the assignment of the total OPEB liability, as well as the billing of that liability and the requirement that Petitioners report that liability on their annual financial statements, unconstitutionally frustrates and interferes with the provision of the fundamental right to a thorough and efficient system of free schools. While these issues undoubtedly are difficult, "[t]he imposition of these difficult choices is an inevitable and unavoidable attribute that emanates from our Constitution." *Adams*, 196 W. Va. at 23, 467 S.E.2d at 164.

The Circuit Court erred in concluding that Petitioners' complaint raised a nonjusticiable political question. The Circuit Court's conclusion that Petitioners raised a political question is based on the faulty premise that how to pay for the total OPEB liability is at the heart of the matter. It is clear from the complaint, however, as well as from the briefing relevant to Respondents' motion to dismiss below, that the complaint sought a declaration that county boards of education are not legally liable for the total OPEB liability. It is not for Petitioners -- nor was it for the court below -- to determine how this liability is to be funded once a declaration is made that the liability is not theirs. Petitioners do not dispute that the funding of the total OPEB liability is a matter for the legislature. It simply is not the issue at hand, and it was an error for the Circuit Court to base its decision on this faulty premise.

2. The Circuit Court erred in refusing to hear Petitioners' constitutional challenge to the imposition of the total OPEB liability.

The Circuit Court committed clear error when it refused to entertain the constitutional challenges presented by Petitioners below. The issues raised in Petitioners' complaint center around the notion that state agencies and administrative bodies cannot create rules and apply legislation in a manner that interferes with and violates a fundamental constitutional right. In this case, the application of Section 5-16D-6(e) by the Respondents to the county boards of education, as well as the billing of the total OPEB liability and the requirement that county boards report such liability on their annual financial statements as a current liability, undoubtedly interfere with Petitioners' ability to provide the thorough and efficient system of free schools which is guaranteed by our Constitution. The justiciability of such issues is apparent from a review of this Court's decisions affirming and reaffirming, time and time again, this most fundamental right.

This Court historically has safeguarded the right to a thorough and efficient system of free schools without hesitation when its protections have been threatened. For example, this Court previously has adjudicated, under the Thorough and Efficient Clause of the Constitution, a dispute between the legislative and executive branches with respect to school funding. *State ex rel. Brotherton v. Blankenship*, 157, W. Va. 100, 207 S.E.2d 421 (1973). The Court in *Blankenship* noted that it is

> the will of the people, through the basic law enacted by them, that a thorough and efficient system of free schools is of paramount importance in a free society and that *neither the Legislature nor the executive branch of government may perform any act which would result in the elimination of this safeguard.*

Id. at 125, 207 S.E.2d at 436 (emphasis added). Following the logic of the Circuit Court's order, arguably, a dispute between the governor and the legislature about the method of funding

schools is a quintessential political question; however, this Court found the dispute to be justiciable in *Blankenship*.

In *Pauley v. Kelly*, parents of school children alleged that the state's system for financing public schools violated the Constitution by denying them a thorough and efficient education. 162 W. Va. 272, 255 S.E.2d 859 (1979). The Court ruled that the Thorough and Efficient Clause is embodied in the Constitution as "the people's clear mandate to the Legislature, that public education is a *prime* function of our State government." *Id.* at 719, 255 S.E.2d at 884. Upon recognition that safeguarding the Clause's mandate is its duty, the Court cautioned, "We must not allow that command to be unheeded." *Id.*

The *Kelly* Court referred to precedent from many other states that also guarantee the right to a thorough and efficient education system. In so doing, the Court found that "courts have made for themselves guidelines for testing legislation against the clause." *Id.* at 690, 255 S.E.2d at 869; see also *id.* at 699, 255 S.E.2d at 874 ("[L]egislation has been declared unconstitutional because it failed the mandate."). Further, the Court cited its long history of safeguarding the Clause's guarantee, dating to the 1871 decision of *Kuhn, 4 W. Va. 499.*

In *Rockefeller,* this Court did not hesitate to entertain a challenge by the Kanawha County Board of Education and the State Board of Education to then-Governor Rockefeller's budgetary cutback on education expenditures. 167 W. Va. 72, 281 S.E.2d 131. In *Rockefeller*, the boards of education challenged the cutback on the basis that our Constitution gives public education a preferred status, and the justiciability of the issue was not even raised by the Court. Likewise, Petitioners challenge the actions of Respondents on the basis that public education enjoys a preferred status and, thus, county boards of education are

not subject to the imposition of the total OPEB liability for which they have never been liable in the past.

In a later case, two county boards of education challenged a statute "implemented to assist the State in achieving salary equity among the teachers and service personnel of all counties statewide . . . ." *State ex rel. Bd. of Educ. for County of Grant v. Manchin*, 179 W. Va. 235, 366 S.E.2d 743 (1988). The Court found that a "thorough and efficient system of free schools" is a fundamental, constitutional right in West Virginia. *Id.* at 240, 366 S.E.2d at 748. In finding the statute's equity funding formula at issue unconstitutional, partially on equal protection grounds, the Court ruled that "the legislature has the duty to take corrective action to amend the statute." *Id.* at 242, 366 S.E.2d at 750. Again, the Court adjudicated the constitutionality of legislative action under the Clause.

Our courts have consistently held that matters are justiciable when the controversy concerns whether the legislature had authority to act even outside the context of the Thorough and Efficient Clause of the Constitution. "[T]he principle was long ago established that the determination of whether a legislative act was in conflict with a constitutional provision was a question to be determined by the judicial branch of the government." *Kanawha County Pub. Library v. County Court of Kanawha County*, 143 W. Va. 385, 391, 102 S.E.2d 712, 716 (1958) (citing *Marbury v. Madison*, 5 U.S. 137 (1803); see also, *State ex rel. Armbrecht v. Thornburg*, 137 W. Va. 60, 72, 70 S.E.2d 73, 79-80 (1952) ("While this Court must accord to the Legislature, a co-ordinate branch of the government, every constitutional power or right possessed by it, the fact must not be overlooked that the Court is charged with the solemn duty of determining what acts of the Legislature are constitutional, and what acts have been passed

by the Legislature in conformity with the demands of the Constitution, when such questions are properly presented to the Court.").

The cases cited above reveal that the courts have a duty to enforce the Constitution's guarantees and "may not . . . ignore the plain mandates [of the Constitution]." *State ex rel. Bagley v. Blankenship*, 161 W. Va. 630, 643, 246 S.E.2d 99, 107 (1978); see also, *Pauley*, 162 W. Va. at 719, 255 S.E.2d at 884 ("the thorough and efficient clause is a "mandate to the Legislature."). Our courts are the protectors of the Constitution and the rights guaranteed thereunder. Our courts have not hesitated to step in to protect such guaranteed rights, especially when the right to a thorough and efficient system of free schools is threatened. The Circuit Court erred in ignoring the mandate imposed by the Thorough and Efficient Clause and concluding that the Petitioners' case does not present a justiciable controversy. Its Order should be reversed.

B. The Circuit Court erred in concluding that the complaint did not satisfy the factors relevant to determining whether a court should entertain a declaratory judgment action.

The Circuit Court abused its discretion in concluding that the complaint did not satisfy the factors relevant to determining whether a justiciable controversy exists sufficient to confer jurisdiction for purposes of the Uniform Declaratory Judgments Act ("Act"). The Circuit Court adopted all of Respondents' arguments in this regard, finding that the complaint satisfied none of the factors addressed in the Order. Petitioners assert that the Circuit Court erred in its assessment of all of the factors at issue, and it was an abuse of discretion for the Circuit Court to find that Petitioners did not present a justiciable controversy.

"A declaratory judgment action is a proper procedural means for adjudicating the legal rights of parties to an existing controversy that involves the construction and

application of a statute." *City of Bridgeport v. Matheny*, 223 W. Va. 445, 450, 675 S.E.2d 921, 926 (2009). West Virginia Code Section 55-13-1 provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Furthermore, "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder. W. VA. CODE § 55-13-2. The Act "is designed to enable litigants to clarify legal rights and obligations before acting upon them." *Cox v. Amick*, 195 W. Va. 608, 618, 466 S.E.2d 459, 469 (1995) (Cleckley, J., concurring). It is well-settled that the Act is to be "liberally construed and administered." W. VA. CODE § 5-13-12. Significantly, the *"purpose of a declaratory judgment proceeding . . . is to anticipate the actual accrual of causes for equitable relief or rights of action by anticipatory orders which adjudicate real controversies before violation or breach results in loss to one or the other of the persons involved."* *Board of Education of Wyoming Co. v. Board of Public Works*, 144 W. Va. 593, 599, 109 S.E.2d 552, 556 (1959) (emphasis added)); see also *West Virginia-Pittsburgh Coal Co. v. Strong*, 129 W. Va. 832, 42 S.E.2d 46 (1947).

In *Cox v. Amick*, Justice Cleckley set forth a range of factors relevant for the determination of whether a declaratory judgment action should be heard and decided -- that is, whether the claim or claims underlying the complaint are justiciable and thus appropriately

postured for declaratory relief. 195 W. Va. at 618, 466 S.E.2d at 469-71 (Cleckley, J., concurring). The four factors later were incorporated into law and include: (1) whether the claim at issue involves uncertain and contingent events that may not occur at all; (2) the extent to which the claims are dependent on facts; (3) whether the facts alleged show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment; and (4) whether the declaration sought will put the controversy to rest. *See* Syl. Pt. 4, *Hustead v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55 (1996).

The Circuit Court addressed factors (1), (3) and (4) in its Order. Because the court below did not address the second *Cox* factor, it is not addressed in this brief.[3]

1. The Circuit Court erred in concluding that the controversy at issue involves uncertain and contingent events.

The first factor asks whether the claim at issue "involves uncertain and contingent events that may not occur at all." *Cox*, 195 W. Va. at 619, 466 S.E.2d at 470 (Cleckley, J., concurring). In analyzing this factor in a declaratory judgment action where the plaintiff filed suit concerning a statute prior to its effective date, this Court stated that "[t]he controversy between the plaintiff and the defendant is actual, existing and justiciable in the sense that the defendant has made evident his purpose to enforce provisions of the statute and that such enforcement will directly and materially affect the rights of the plaintiff . . . ." *Farley v. Graney*, 146 W. Va. 22, 30, 119 S.E.2d 833, 839 (1960).

[3] Petitioners note that it cannot be seriously argued that the second *Cox* factor is not satisfied. At issue are purely legal questions.

With respect to this factor, the Circuit Court reasoned that it is uncertain whether Petitioners ever will have to pay the total OPEB liability for which they continue to be billed. The Circuit Court also noted that the Respondents and the legislature have taken or may take steps to reduce or ultimately eliminate the OPEB liability. Thus, the Circuit Court concluded, Petitioners' claims involve uncertain events that may not occur at all.

The Circuit Court clearly erred in its assessment of the contingent nature of Petitioners' claims. The billing for the total OPEB liability already has occurred, and the Respondents continue to assess and bill the county boards for the total OPEB liability. The Circuit Court does not dispute that Petitioners had never before been responsible for payment of the total OPEB liability with respect to county board employees covered by the PSSP, but concludes that Petitioners did not assert that the State has discontinued or will discontinue funding the minimum annual employer payment in the future. *See* Order at ¶ 19. With all due respect to the Circuit Court, how to fund the minimum annual employer payment is not at issue in this action as discussed above.

Moreover, there are two reasons why the claims raised in Petitioners' complaint do not involve uncertain and contingent events. The first is that Respondents, the PEIA and the PEIA Finance Board, already have assessed, billed and are continuing to bill county boards of education for the total OPEB liability which grossly exceeds the minimum annual employer payment funded by the PSSP. The PEIA Finance Board is tasked with allocating the Employer ARC to each participating employer annually. The Finance Board and the PEIA continue to determine the components of the ARC and continue to bill Petitioners for the total OPEB liability. Petitioners have asserted that they are responsible only for the minimum annual employer payment previously collected by the PEIA and funded through the PSSP pursuant to

GASB Statement No. 45. Moreover, the State Auditor already has required Petitioners to record the total OPEB liability as a current liability on their annual financial statements. There is a detrimental effect to county boards of education at the very moment at which the total OPEB liability is recorded as a current liability on their annual financial statements. The actions already taken by Respondents are certain events which already have occurred.

The second reason why Petitioners' claims do not involve uncertain or contingent events is that the total OPEB liability has been legally declared Petitioners' liability "until fully paid." W. VA. CODE § 5-16D-6 (e). The adoption of this state statute and the application of the statute to county boards by Respondents via the setting of the ARC and the billing of the total OPEB liability removes all doubt that Petitioners' claims are in any way uncertain or contingent. The code section makes clear that the damage has been done. The total OPEB liability has been assigned to Petitioners as a matter of law. Consequently, it is a certainty that, under West Virginia law, the total OPEB liability belongs to Petitioners at present, and it is the imposition of this liability by Respondents which Petitioners asked the Circuit Court to declare unconstitutional.

The Circuit Court also found that Petitioners' claims are uncertain and contingent because the harms which they allege are speculative and "may occur at some undefined time in the future." Order at ¶ 22. On the contrary, the harms alleged in the complaint are very real and are currently suffered or threatened to be suffered by the Petitioners. Presently, Petitioners are faced with the very real threats of adverse bond and credit ratings. Some Petitioners have earmarked and set aside funds to satisfy the total OPEB liability billed to them. These funds should be used to hire teachers, purchase classroom materials, sponsor after-school enrichment activities and to otherwise provide the thorough and

efficient education guaranteed by the Constitution. All Petitioners have found it impossible to engage in long-range planning as a result of the looming OPEB liability. Petitioners cannot plan for long-term building improvements, land purchases, school construction and the like, all because of the financial restraints placed on them by an overwhelming and unexpected debt over which they have no control.

Petitioners did not plan for this liability, nor would they have had any reason to do so. Petitioners did not choose to participate in the PEIA plan. They have no say in eligibility requirements, benefits or premium rates under the plan. Petitioners have no influence over or role in approving the contributions assessed against participants in the plan. Petitioners have merely been billed the minimum annual employer payment, and they have received funding from the State to satisfy such bills. Suddenly, Petitioners' role as a conduit through which funds passed from the State to the PEIA for what are essentially state-provided benefits has morphed into a role akin to that of a traditional plan sponsor of a private health plan, only one with no discretionary decision-making authority with respect to the administration of the plan.

Notwithstanding Petitioners' position that they already have suffered, and continue to suffer, great harm as a result of the imposition of the total OPEB liability, this Court has stated that the design of the Uniform Declaratory Judgments Act was "to anticipate the actual accrual of causes of equitable relief or rights of action, by anticipatory order which adjudicate real controversies *before* violation or breach results in loss to one or the other persons involved." *Board of Education of Wyoming County*, 144 W. Va. 593, 599, 109 S.E.2d 552, 556 (1959) (emphasis added). This is exactly the kind of case the Court envisioned when making this statement. It is clear that this case which is about the Petitioners' obligation to

provide the fundamental constitutional right to a thorough and efficient system of free schools clearly requires and deserves an adjudication on its merits before even greater loss results to the county boards of education and the students they serve.

The timing of the collection of the total OPEB liability is the only uncertain event at issue. Petitioners, however, cannot be expected to sit idly by and hope that the PEIA will not ultimately collect on the liability when West Virginia law says the liability remains with them until it is fully paid and when Respondents continue to assess and bill Petitioners the total OPEB liability. The enormity of this liability is such that Petitioners would be seriously derelict in their duties as administrators of the county school systems should they allow the liability to accumulate while doing nothing to pay for it. Petitioners have a duty to maintain financially stable school systems capable of providing the thorough and efficient system of free schools to which the students of West Virginia are entitled.

Finally, the Circuit Court's order is full of speculation about what might or might not happen to prevent Petitioners from ultimately having to fund the total OPEB liability. The Circuit Court's order, however, does not address the fact that the total OPEB liability already billed to Petitioners exceeds $45,000,000 and the latest estimates total more than $200,000,000. Whatever strides Respondents or others make to reduce the liability in the future are not likely to alter or reduce the liability that already has been billed to the county boards of education. Unlike the harms already suffered by Petitioners, the hope that the total OPEB liability will one day magically disappear is entirely speculative and cannot serve as a basis for concluding that Petitioners do not present a justiciable controversy.

It is clear that the total OPEB liability already has been assigned to Petitioners as a matter of law. The reality of this liability is that Petitioners must prepare to satisfy it at whatever time the Respondents determine it should become due. Such preparation has seriously harmed, and continues to harm, the county boards of education as alleged in the complaint. Respondents have "made evident [their] purpose to enforce provisions of the statute and . . . such enforcement will directly and materially affect the rights of the [Petitioners] . . . ." *Farley*, 146 W. Va. at 30, 119 S.E.2d at 838. Accordingly, the Circuit Court clearly erred in finding that Petitioners' claims involve uncertain or contingent events.

2. The Circuit Court erred in concluding that there does not exist a substantial controversy among adverse parties.

The third *Cox* factor requires this Court to ask "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Cox*, 195 W. Va. at 619, 466 S.E.2d at 470 (Cleckley, J., concurring) (citing *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). "An actual controversy susceptible of judicial determination . . . exists when a legal right is claimed by one party and denied by another party to a declaratory judgment proceeding." *Board of Education of Wyoming Co.*, 144 W. Va. at 601, 109 S.E.2d at 557.

The Circuit Court concluded that there is no adverseness among the parties to this action "because (with a single exception . . .), it is the Legislature that has created the circumstances with which the [Petitioners] take issue." Order at ¶ 4. Effectively, the Circuit Court concluded that the Respondents were not proper defendants in the action below. It did so without any argument in this regard raised in the briefing relevant to the motion to dismiss filed

below. Respondents' motion to dismiss did not argue that they were improper parties to the action, and Petitioners had no opportunity to argue this issue before the Circuit Court. In fact, the issue was first raised in Respondents' proposed findings of fact and conclusions of law which Petitioners received after it had filed its own proposed order. Upon learning that Respondents' proposed order raised the issue of whether they were proper defendants, Petitioners filed a motion to supplement its own proposed order to address the argument. Unfortunately, the Circuit Court entered Respondents' proposed order before it had an opportunity to rule on the motion to supplement.

The parties to this action truly are adverse. Not only are Respondents proper defendants in this action by virtue of acts performed by them outside the scope of the directive of the legislation at issue, but they also are proper defendants in this action challenging the constitutionality of the statute which Respondents are charged with implementing. First, Petitioners challenge acts taken by Respondents outside the scope of the statute at issue. As alleged in Petitioners' Complaint, the assessment of the ARC and billing to Petitioners of the total OPEB liability, the requirement that they record the total OPEB liability on their annual financial statements, and the imposition of the total OPEB liability above and beyond the minimum annual employer payment which is funded through the PSSP, all have frustrated and interfered with the fundamental, constitutional right to a thorough and efficient system of free schools.

The PEIA is responsible for administering the health plan at issue. It has set the rules permitting retirees of county boards of education to participate in the health plan. The Finance Board is responsible for administering the Trust Fund and, in so doing, determines how funds are to be used to pay for the PEIA plan. The Finance Board annually sets the ARC and

allocates to each participating employer its portion of the ARC. Although the Finance Board has the authority to set the ARC by statute, it and the PEIA determine the components of the ARC, and Petitioners challenge those very components. The PEIA bills the ARC to Petitioners and collects payment from Petitioners. All of these actions have been undertaken by Respondents, and Petitioners' ability to provide the fundamental right of education to students across West Virginia has been seriously harmed by these actions. The Circuit Court thus erred in finding that the legislature has created the circumstances at issue. Respondents' actions taken outside the scope of the statute truly have created adversity among the parties to this action.

Second, even if Respondents only have acted in furtherance of the legislative directive found in Section 5-16D-6, federal courts routinely rule that the agency responsible for enforcing a statute is the proper defendant in a suit to declare that statute unconstitutional. The Southern District of Ohio has stated that "[i]t is well-settled that when a plaintiff seeks to challenge the constitutionality of a state statute, the proper defendant for that suit is the state official or agency that enforced the allegedly unconstitutional statute against the plaintiff." *Putnam v. Davies*, 169 F.R.D. 89, 98 (S.D. Ohio 1996) (citing *Ex Parte Young*, 209 U.S. 123 (1908)). *Accord Reguli v. Guffee*, 2009 WL 910885 (M.D. Tenn. 2009); *Carey v. Wolnitzek*, 2006 WL 2916814 (E.D. Ky. 2006).

Although Petitioners have located no opinions from this Court explicitly holding that an implementing agency is the proper defendant in a case challenging a statute's constitutionality, a procedurally analogous case lends support. In *Winkler v. State School Building Authority*, the plaintiffs sued a state agency for an allegedly unconstitutional bond offering. 189 W. Va. 748, 434 S.E.2d 420 (1993). The plaintiffs sought a declaration that the

School Building Authority's ("SBA") proposed bond offering was unconstitutional under Article X, Section 4 of the state Constitution, which prohibits state debt. *Id.*

The legislature authorized the bond offering at issue in *Winkler* by enacting the School Building Authority Act, W. VA. CODE § 18-9D-1, *et seq.* The Court found that although an offering could be structured so as not to violate the Constitution, the legislature failed to place appropriate restrictions and controls in the statute. *Winkler*, 189 W. Va. at 758, 434 S.E.2d at 430. The Court held that the bond offering authorized under the Act constituted a violation of the West Virginia Constitution. *Id.* at 764, 434 S.E.2d at 436.

The import of the *Winkler* decision is that when the legislature enacts a law, and a state agency violates the Constitution in acting pursuant to that enactment, one may sue the agency for declaratory relief. Similarly here, the legislature enacted OPEB legislation, and the Respondents violate the Thorough and Efficient Clause when they set the ARC, send invoices to the county boards for the total OPEB liability and require them to include the total OPEB liability as a current liability on their annual financial statements. Just as the SBA's bond offering was the unconstitutional act in *Winkler*, the Respondents' acts are what violate the Constitution in this case. The proper defendant in such a declaratory judgment action is the agency whose conduct violates the Constitution.

In addition, it may very well be that West Virginia Code Section 5-16D-6(e) is constitutional as applied to other "employers" participating in the PEIA health plan, as defined in the Code. It is possible that no one in the legislature considered the constitutionality of the code section as it applies specifically to county boards of education. Regardless, Respondents have unconstitutionally applied the relevant code section to Petitioners specifically.

Petitioners are in a position in which few if any other employers would find themselves. First, unlike some other employers that participate in the plan, Petitioners are mandatory participants in the PEIA plan. They cannot avoid this liability by exiting the PEIA plan and shopping for other health benefits for their employees and retirees because the PEIA and the State have decided that county boards of education must participate in their Plan. *See* W. VA. CODE § 5-16-22. Second, unlike other PEIA participating employers, Petitioners are charged with providing a fundamental right to the students of West Virginia, and they must manage and prioritize the budgets they are provided to carry out that charge. Finally, Petitioners always have received the funding necessary to pay for the PEIA premiums associated with those employees and retirees covered by the PSSP and are now being told that they are responsible for a liability greatly exceeding such funding. Clearly, Petitioners are uniquely situated with respect to the issues involved in this action.

Respondents have applied West Virginia Code Section 5-16D-6 to county boards of education, and such application unconstitutionally interferes with and frustrates the Petitioners' ability to fulfill their obligation to provide a thorough and efficient system of free schools to students throughout West Virginia. As the entities responsible for applying the relevant code section to Petitioners, Respondents are the properly named defendants in the action below. The Circuit Court thus erred in concluding that there is not sufficient adverseness among the parties based on the notion that the legislature is the party responsible for drafting the statute at issue.

3. The Circuit Court erred in concluding that allowing the case to proceed would not serve a useful purpose and would not settle the underlying controversy.

The fourth and final factor to be considered in the context of determining whether a declaratory judgment action should be heard is whether granting the requested relief will serve a useful purpose, or whether the declaratory relief Petitioners seek "would be of practical assistance in setting the underlying controversy to rest." *Cox*, 195 W. Va. at 619, 466 S.E.2d at 470 (Cleckley, J., concurring).

In addition to the arguments made herein, the useful purpose and practical assistance that will be achieved by the Circuit Court granting the requested relief is that the county boards of education will be able to operate knowing that they are not faced with an enormous liability that was never meant to be theirs in the first place. Rather than planning around the looming debt posed by the OPEB liability, Petitioners can once again focus on the functions they are charged with carrying out, including educating students, recruiting and hiring teachers and staff, purchasing classroom supplies and materials, engaging in long-range planning, achieving favorable bond ratings, and countless other things that will provide the thorough and efficient system of free schools mandated by the West Virginia Constitution. Petitioners will again be able to engage in strategic planning without fear that the Respondents will seek to collect on this liability. In short, the declaration Petitioners seek will put this matter to rest.

V. RELIEF REQUESTED

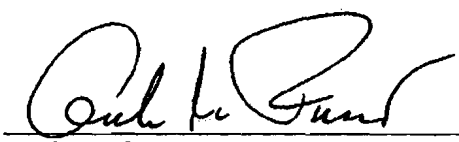
For nearly a century and a half, our courts have not hesitated to weigh in and rectify violations of the fundamental right to a thorough and efficient system of free schools as guaranteed by the West Virginia Constitution. This Court should not permit the Circuit Court to sit idly by while politicians and the arms of State government effectively bankrupt our

county boards of education. Doing so harms not only every child educated in our public schools but our entire State as well. Well-educated citizens undoubtedly are a precious and incomparable resource in this and every State, and one that we cannot afford to squander.

WHEREFORE, Petitioners respectfully request that this Honorable Court accept their Petition for Appeal and thereafter reverse the decision of the Circuit Court of Kanawha County, and remand the matter to the Circuit Court for further proceedings on the merits of Petitioners' claims.

Respectfully Submitted

PETITIONERS,
By Counsel



Andrew G. Fusco, Esq. (WVSB 1317)
Gregory W. Bailey, Esq. (WVSB 206)
Bowles Rice McDavid Graff & Love LLP
7000 Hampton Center
Morgantown, West Virginia 26505
(304) 285-2500

Howard E. Seufer, Esq. (WVSB 3342)
Jill E. Hall, Esq. (WVSB 8812)
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325
(304) 347-1100

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BOARDS OF EDUCATION OF THE COUNTIES OF:

BARBOUR, BERKELEY, BOONE, BRAXTON, BROOKE, CABELL, CALHOUN, CLAY, DODDRIDGE, FAYETTE, GILMER, GREENBRIER, HAMPSHIRE, HANCOCK, HARDY, HARRISON, JACKSON, JEFFERSON, KANAWHA, LEWIS, LINCOLN, LOGAN, MARION, MARSHALL, MASON, MCDOWELL, MERCER, MINERAL, MONROE, MORGAN, NICHOLAS, PENDLETON, PLEASANTS, POCAHONTAS, PUTNAM, RALEIGH, RANDOLPH, RITCHIE, ROANE, SUMMERS, TAYLOR, TUCKER, TYLER, UPSHUR, WEBSTER, WETZEL, WIRT, WOOD, AND WYOMING,

Petitioners,

v.

No. _____
From the Circuit Court of
Kanawha County, West Virginia,
Civil Action No. 10-C-327

PUBLIC EMPLOYEES INSURANCE AGENCY, PUBLIC EMPLOYEES INSURANCE AGENCY FINANCE BOARD, and WEST VIRGINIA STATE AUDITOR,

Respondents.

CERTIFICATE OF SERVICE

I, Andrew G. Fusco, counsel for Petitioners, Forty-Nine County Boards of Education of West Virginia, hereby certify that I have served the foregoing ***"Docketing Statement" and accompanying "Petition for Appeal on Behalf of Forty-Nine of the County Boards of Education of West Virginia"*** upon the Respondents by mailing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 19th day of January 2011, addressed as follows:

Herschel H. Rose III, Esq.
Steven R. Broadwater, Esq.
Rose Law Office
300 Summers Street, Suite 1440
P.O. Box 3502
Charleston, West Virginia 25335

Andrew G. Fusco, Esq.