IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

GLORIA TOMBLIN, CHRISTIE TOMBLIN
AND TOMOTHY TOMBLIN, BY GLORIA TOMBLIN
THEIR PARENT, ET AL;, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED; JOHN PERDUE, TREASURER OF
THE STATE OF WEST VIRGINIA, AND THE
WEST VIRGINIA EDUCATION ASSOCIATION,

Plaintiffs,

v. CIVIL ACTION NO. 75-1268

WEST VIRGINIA STATE BOARD OF EDUCATION,
a Statutory Corporation; J.D. MORRIS,
PRESIDENT OF THE WEST VIRGINIA STATE
BOARD OF EDUCATION; JIM L MCNIGHT, VICE
PRESIDENT OF THE WEST VIRGINIA STATE
BOARD OF EDUCATION; SANDRA M CHAPMAN,
SECRETARY OF THE WEST VIRGINIA STATE
BOARD OF EDUCATION; SHEILA M. HAMILTON,
JAMES J. MACCALLUM, CLEO P. MATTHEWS,
PAUL J. MORRIS, RONALD B. SPENCER, AND
GARY G. WHITE, MEMBERS OF THE WEST
VIRGINIA STATE BOARD OF EDUCATION;
DR. DAVID STEWART, STATE SUPERINTENDENT
OF SCHOOLS; ROBIN CAPEHART, TAX
COMMISSIONER THE STATE OF WEST VIRGINIA;
BOARD OF EDUCATION OF THE COUNTY OF
LINCOLN, a Statutory Corporation;
WILLIAM GRIZZELL, LINCOLN COUNTY
SUPERINTENDENT OF SCHOOLS; COUNTY
COMMISSION OF LINCOLN COUNTY; JERRY
A. WEAVER, LINCOLN COUNTY ASSESSOR; AND
CECIL UNDERWOOD, AS GOVERNOR OF THE
STATE OF WEST VIRGINIA,

Defendants.

MEMORANDUM OF OPINION AND FINAL ORDER

I

HISTORICAL PERSPECTIVE

It is the intention of this Court to address, with a degree of finality, all of the remaining issues in this class action filed in the Circuit Court of Kanawha County in 1975, *sub nomine*, Pauley v. Kelly, Civil Action No. 75-1268.

The original contention of the plaintiff class was that as a result of a discriminatory mechanism for financing the educational system in West Virginia, public school children were denied a thorough and efficient system of free schools as guaranteed in W. Va. Const. art. XII, '1[1].

The West Virginia Supreme Court of Appeals reversed the dismissal of the original complaint in Pauley v. Kelly, 162 W.Va. 672, 255 S.E. 2d 859 (1979), by concluding that the Thorough and Efficient clause of W.Va. Const. art. XII, '1, endowed public education as a fundamental constitutional right. Building on that postulate, the Supreme Court reasoned that any discriminatory classification found in the State=s educational financing system cannot endure unless the State can demonstrate some compelling State interest to justify the unequal classification. Syllabus Pt. 5, Pauley v. Kelly, Supra.

After the publication of Pauley v. Kelly, this Court conducted a protracted evidentiary hearing beginning August 10, 1981 and ending on January 10, 1982. On May 11, 1982, this Court issued a

[1]W.Va.Const. art. XII, '1 provides in full AThe Legislature shall provide, by general law, for a thorough and efficient system of free schools@.

two hundred forty-four (244) page Opinion, Findings of Fact and Conclusions of Law and Order, concluding that within the boundaries formulated in Pauley v. Kelly, there were broad and comprehensive constitutional infirmities in the structure and composition of the extant educational system in West Virginia, as well as constitutional deficiencies in the financial mechanism that supported that system.

Following the publication of the Memorandum of Opinion, this Court directed the formulation of a Master Plan for Public Education, which, if approved, would establish a constitutionally acceptable baseline to guide the Legislative and Executive Branches in the delivery of a thorough and efficient system of free schools as mandated by W.Va. Const. art. XII, '1, as interpreted and defined in Pauley v. Kelly.

The Master Plan for Public Education (herein the Master Plan) was approved by this Court in a final order entered on March 4, 1983. The Master Plan is an extensive compilation of detailed concepts and standards that defines the educational role of the various state and local agencies; sets forth specific elements of educational programs; annunciates considerations for educational facilities, and proposes changes in the educational financing system. See Pauley v. Bailey, Supra, 324 S.E. 2d at 128, 132 (1984).

The Master Plan became the definitive constitutional model for public education which was to be enforced until such time as it was either altered or modified by the West Virginia Supreme Court or this Court. Syllabus Pt. 1, Pauley v. Bailey, Supra.

A critical component of the final order approving the Master Plan was the recognition that this Court retain continuous jurisdiction to monitor the implementation of either the Master Plan or a functional equivalent or improvement of the Master Plan as conceived and enacted by the Executive and Legislative Branches of government.

Twelve years passed without any challenge that the Master Plan was not being implemented. In January 1995, the plaintiff class filed a Petition in this Court seeking the complete enforcement of the Master Plan contending that sufficient time had elapsed since the adoption of the Master Plan and because full implementation was lacking, an appropriate remedy should be fashioned to accomplish the full implementation of the terms and conditions of the Master Plan.

II

WEST VIRGINIA CODE '18-2E-5
(Judge Robinson=s Order of April 2, 1997)

After the Petition seeking enforcement of the Master Plan was filed by the plaintiff class in 1995 the matter was assigned to the Honorable Dan C. Robinson, Senior Judge, as Special Judge of the

Circuit Court of Kanawha County. Judge Robinson entered an Order on April 2, 1997 which specifically found that the State=s Public School Support Plan, properly known as the foundation formula (herein the Formula) as embraced within West Virginia Code '18-9A-1, et seq., was constitutionally deficient.[2]

At the time Judge Robinson found the Formula to be constitutionally infirm, the legislature had not enacted West Virginia Code '18-2E-5 which this Court finds is nothing less than a long overdue legislative educational epiphany. On March 13, 1998, West Virginia Code '18-2E-5 became the legislature=s response to the Master Plan which has, in effect, changed the paradigm of public education in West Virginia from a *resource*-to-a-*performance* model.

The West Virginia legislature has addressed the underpinnings of an adequate and equal education opportunity by establishing educational standards and performance measures as well as the method of assessing that performance in terms of its success and/or failure, with the understanding that if there are deficiencies and failures, resources will then be targeted specifically to correct those deficiencies and failures.

[2]Following the entry of this Order, and certainly not because of it, Judge Robinson was replaced by this Judge.

The performance-based accountability approach is designed to spend and allocate resources where they are most needed, instead of allocating resources at the beginning of the education cycle with the hopeful expectation that the results will achieve the highest quality standard of education. This Afront-end@ approach was the underlying premise of the Master Plan only because clear and convincing evidence submitted during hearings between August 1981 and January 1982 allowed no other conclusion.[3]

The best expression of the scope of West Virginia Code '18-2E-5 is found in '18-2E-5(a):

> A**(a) *Legislative Intent* - the purpose of this section is to establish a process for improving education that includes standards, assessment, accountability, and capacity building to provide assurances that a thorough and efficient system of schools is being provided for all West Virginia public school students on an equal education opportunity basis and that high quality standards are, at minimum, being met.**@

What is the effect of the passage of West Virginia Code '18-2E-5, *vis-a-vis* Judge Robinson=s decision of April 2, 1997 invalidating the Formula?

---

[3]This Court can only speculate why the overwhelming weight of the evidence supported the conclusion that the allocation of sufficient resources would be a predictor of improved performance. The easy answer is that apparently much has changed in terms of how to address the inadequacies and inequality of public education funding. There may be others, but they are not germane to this opinion.

One circuit judge is always reluctant to alter an opinion of a predecessor judge in the same case. However, Judge Robinson=s decision to invalidate the entire Formula as unconstitutional, must be examined within the historical context of the enactment of the performance model embraced within '18-2E-5 after the decision of April 2, 1997. When Judge Robinson=s decision is analyzed within that context, there is little doubt that it must be vacated so that the entire public education financing composition and structure can be measured within the boundaries of the newly enacted performance model. The legislature has determined, and this Court agrees, that a performance-based approach should be given a chance to succeed. The only way that can be accomplished is to give the West Virginia State Board of Education and the West Virginia State Superintendent of Schools, as well as the various county superintendents and boards of education, an opportunity to identify specific deficiencies as contemplated by West Virginia Code '18-2E-5, as well as the Amended Agreed Order entered by this Court on September 12, 2000, (a copy of the Amended Agreed Order is attached to this Memorandum of Opinion and incorporated by reference herein).

Following the adoption of the new performance model defined within West Virginia Code '18-2E-5, there remained some lingering issues relating to certain aspects of the Formula as well as the excess levy as an essential part of school financing. By Memorandum of Opinion and Order entered on December 3, 2001, this Court addressed the excess levy issue, (the Opinion and Order

entered on December 3, 2001 is attached to this Memorandum of Opinion and is incorporated by reference herein).

Accordingly, the only remaining issue is whether or not there needs to be any immediate revision of certain provisions of the Formula, specifically Steps 1 and 2 of the Foundation Allowance by removing the net enrollment caps stipulated in those provisions, as well as utilization of a density mileage factor to provide additional service personnel to rural counties experiencing shortages because of their disproportionate need to use service personnel as bus operators.

III

ELIMINATION OF NET ENROLLMENT CAP FROM THE STATE FOUNDATION ALLOWANCE AND INCLUSION DENSITY MILEAGE FACTOR

During the course of the hearings held on November 18-19, 2002, the plaintiff class offered evidence that an immediate removal of the net enrollment cap from the State Foundation Allowance and the inclusion of a density mileage factor (hereinafter Formula Adjustment) would substantially relieve the financial burden on many West Virginia counties. Many of the State=s county superintendents testified that the Formula Adjustment would provide a method of addressing budget shortfalls which would assist in providing the opportunity of a Ahigh quality education@ to each student. This same view was also expressed by Dr. David Stewart, State Superintendent of Schools.

The plaintiff class contends that this Court should compel the legislature to appropriate sufficient funds that would result from the Formula Adjustment. This, of course, raises the question as to the authority that this Court has to fashion a remedy ordering the legislature to enact specific legislation which would have the effect of circumventing the appropriation mechanism expressed in W.Va. Const. art. VI '51, sometimes referred to as the Modern Budget Amendment.

The evidence received during the hearings on November 18 - 19, 2002, established that the costs associated with the Formula Adjustment would be in excess of 43 million dollars. What the evidence did not establish, however, is that while the Formula Adjustment would infuse much needed financial resources to each county, the failure to effect the Formula Adjustment would not result in the inability to provide a thorough and efficient system of public education as required by W.Va. Const. art. XII '1.

This Court accepts the plaintiff class=s contention that budget shortfalls in most counties would be significantly reduced if there were a Formula Adjustment. However, this Court cannot accept that a corollary to the failure to enact a Formula Adjustment is that the immediate inaction of the legislature would cause a deprivation of the constitutional right of each student to the opportunity of a thorough and efficient system of public education as defined by the West Virginia Supreme Court of Appeals in Pauley v. Kelly in 1979.

This Court concludes that because the Formula Adjustment may provide short-term relief to many counties does not mean that the constitutionally valid performance model should not be given an opportunity to provide more permanent long-term solutions.

The plaintiff class is asking this Court to mandate a particular action by the legislature, i.e. the removal of the net enrollment cap and the use of a mileage density factor, which could only be ordered, if at all, by concluding that the legislature cannot exercise its discretion not to act and that the inaction impairs a discrete constitutional right. The plaintiff=s remedy has been characterized as a Alegislative injunction@, which has been used by some courts as an antidote to counteract unconstitutional legislative inaction. See Robert A. Schapiro, Note The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction, 99 Yale L.J. 231 (1989).

The judicial branch has become accustomed to nullifying unconstitutional legislative action through the mechanism of judicial review since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Martin v. Hunter=s Lessee, 14 U.S. (1 Wheat) 304 (1816). Conversely, a Alegislative injunction@ has been the remedy for counteracting unconstitutional legislative inaction. The latter requires significantly greater circumspection because it involves a potentially greater trespass on the legislative prerogative.

Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).[4]

[4]Typically, the Alegislative injunction@ is a device utilized to seek improvement in prison conditions, reform mental hospitals, or desegregate schools, because these structural remedies inevitably involve increased spending and historically the appropriation power has deep constitutional ties to the legislative and executive branches of government. See Comment, Liddell v. Missouri; Financing the Ancillary Costs of Public School Desegregation Through a Court-Ordered Tax Increase, 42 Wash. & Lee L.Rev. 269 (1985). The exclusive rationale for the judicial trespass in traditionally legislative and executive authority is that legislative and executive inaction will cause a specific deprivation of constitutional rights.

Even if a Alegislative injunction@ is in the judicial arsenal to mandate the appropriation of funds to remedy a discrete constitutional violation, this Court does not find that there is a factual basis to warrant any intrusion upon the legislative and executive prerogative of spending public monies as contemplated by the Modern Budget Amendment.[5]

IV

CONTINUING JURISDICTION

This Court has previously recognized that with the enactment of West Virginia Code '18-2E-5, the legislature has provided the oxygen for a thorough and efficient system of public schools sufficient to satisfy the requirements of W.Va. Const. art. XII '1. Further, this Court believes that the performance model contemplated by '18-2E-5 must be allowed sufficient time to be nurtured within the boundaries of '18-2E-5 as implemented by the Amended Agreed Order entered by this Court on September 12, 2000. Sufficient time has not elapsed for this Court to conclude that the

[5]The Legislature obviously also recognizes that some adjustment must be made in the Foundation Allowance. West Virginia Code '18-9A-5(b) appropriates specific amounts to increase the ratios of professional and service personnel in net enrollment. The plaintiff contends that the amounts and length of time contemplated in '18-9A-5(b) are both too little and too long. While this Court might agree with that characterization in terms of the testimony offered during the recent hearings, this Court still does not believe that there is sufficient justification to judicially force the Legislature to accelerate the process of adjusting the Foundation Formula.

Formula Adjustment is the only method for the implementation of '18-2E-5.

Accordingly, this Court further finds that with the enactment of '18-2E-5 this Court should no longer maintain continuing jurisdiction of this case. There may be those who contend that this Court should not have retained continuing jurisdiction as it has since the entry of the Order in May 1983, and others who will argue with equal vigor that terminating continuing jurisdiction will condemn any newly enacted statutory scheme expressed as the Aperformance model@ to failure from its inception.

The only response to these competing positions, is that if it were not for the continuing jurisdiction designed to shepherd the implementation of the Master Plan since 1983, the enactment of a Aperformance model@ in 1998 would have been unlikely. It is curious that it was not until the plaintiff class filed a petition in January 1995 seeking complete implementation of the Master Plan that the Legislature formulated the ingredients of the Aperformance model@ in 1998.

Conversely, if this Court were to continue jurisdiction of this case after the enactment of a constitutionally acceptable statutory scheme, that would cynically suggest that the legislative and executive branches have no intention of fulfilling the destiny of public education endorsed in '18-2E-5(a):

> **A(a) *Legislative Intent* - the purpose of this section is to establish a process for improving education that**

includes standards, assessment, accountability, and capacity building to provide assurances that a thorough and efficient system of schools is being provided for all West Virginia public school students on an equal education opportunity basis and that high quality standards are, at minimum, being met.@

This Court believes that the legislative and executive branches have every intention of doing what each says they are going to do. Prior to 1998, there was no such Legislative and Executive commitment. Such a structure is now in place, therefore the legislative and executive branches not only have a moral commitment to the delivery of a thorough and efficient system of public education, but there is now also a legal commitment that should meet all of the jurisdictional prerequisites for the issuance of a Writ of Mandamus.[6]

This Court can now safely conclude that the enactment of West Virginia Code '18-2E-5 provides a statutory constitutional infrastructure to support the delivery of a durable thorough and efficient system of free schools as required by W. Va. Const. art. XII '1. The durability of the delivery of this system of public education as contemplated in West Virginia Code '18-2E-5 is dependent upon the legislative and executive branches of government

[6]Writ of Mandamus will not issue unless three elements co-exist: (1) clear legal right in petitioner to relief sought; (2) legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) absence of another adequate remedy. Syllabus Pt. 2; State ex rel. Kucera v. City of Wheeling, 153 W.Va. 538, 170 S.E.2d 367 (1969).

fully implementing not only the letter but the spirit of '18-2E-5, a process which began with the entry of the Amended Agreed Order of September 12, 2000 and the AUpdate of the Master Plan for Public Education@ adopted by the West Virginia Board of Education on February 13, 1998 (identified as AProcess for Improving Education C Update of the Master Plan for Pubic Education@, and admitted as Exhibit 1 during the hearing in December 1999).

From this day forward, unless this matter is properly returned to this Court, decisions regarding the classroom are out of the courtroom and into the halls and offices of the legislative and executive branches of government. This court will not hesitate to intervene in the future, if it becomes necessary to assure that children of West Virginia are afforded their constitutional and statutory rights.

Accordingly, for the reasons recited herein:

1. The plaintiff class=s request to compel the West Virginia Legislature to remove the net enrollment caps in Steps 1 and 2 of the Foundation Allowance to provide additional professional and service personnel of the county as embraced within West Virginia Code '18-9A-1, et seq., and the use of a density mileage factor within the Foundation Allowance is hereby DENIED.

2. The decision of the Honorable Dan C. Robinson that the School Financing Formula as embraced within West Virginia Code '18-9A-1, et seq. was constitutionally deficient is hereby vacated and held for naught; and

3. West Virginia Code '18-2E-5 is specifically found to satisfy the requirements of W.Va. Const. art. XII '1 to the extent that the Legislature has provided, by public law, for a thorough and efficient system of free schools.

4. There being no further need to maintain continuing jurisdiction in this matter, this case shall be dismissed and dropped from the active docket of this Court, to all of which action all parties= objection is hereby preserved.

It is so ORDERED.

Entered this 3rd day of January, 2003.

_____

ARTHUR M. RECHT, SPECIAL JUDGE
CIRCUIT COURT OF KANAWHA COUNTY

A copy of this Memorandum of Opinion and Final Order has been sent by United States Mail to the following counsel of record:

Daniel F. Hedges, Esquire
Mountain State Justice
922 Quarrier St. Ste 525
Charleston, WV 25301
Counsel for Plaintiffs

Katherine L. Dooley, Esq.
Bldg 6, Room B358
State Capitol
1900 Washington St., East
Charleston, WV 25305
Counsel for State School Superintendent

Michael J. Farrell, Esq.
Farrell Farrell & Farrell
P.O. Box 6457
Huntington WV 25772-6457
Counsel for WV State Board of Education

Diana Stout, Esquire
Special Asst Attorney General
Treasurer=s Office
State Capitol Room E-145
Charleston, WV 25305
Counsel for State Treasurer

William B. McGinley, Esquire
WV Education Association
1558 Quarrier Street
Charleston, WV 25301
Counsel for WV Education Association

John Poffenbarger, Esquire
Special Asst Attorney General
Governor=s Office
State Capitol
Charleston, WV 25305
Counsel for Governor Bob Wise

Robert Hoffman, Esquire
Special Asst Attorney General
State Tax Commissioner=s Office
Building 1 Room 300 W
Charleston, WV 25305
Counsel for State Tax Commissioner

Rebecca A. Baitty, Esquire
800 Ben Franklin Drive #211
Sarasota, FL 43236

Mark W. McOwen, Esquire
West Virginia Senate
Building 1, Room M-450
1900 Kanawha Boulevard East
Charleston, WV 25305
Counsel for Earl Ray Tomblin, President
WV Senate and Robert S. Kiss,
Speaker of WV House of Delegates

J.W. Stevens, II, Esquire
Lincoln County Prosecuting Attorney
Lincoln County Courthouse
Hamlin WV 25523
Counsel for Lincoln County Commissioner
& Lincoln County Assessor

Sean N. McGinley, Esquire
DiTrapano Barrett and Dipiero
604 Virginia Street East
Charleston WV 25301
Counsel for WV Attorney General

James W. Gabehart, Esquire
Box 580
Hamlin WV 25523
Counsel for Lincoln County Board of Education