

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BOARD OF EDUCATION OF THE  
COUNTY OF NICHOLAS, WEST VIRGINIA  
Petitioner,

v.

WEST VIRGINIA BOARD OF EDUCATION,  
and STEVEN L. PAINE, Ed.D., in his capacity as  
the State Superintendent of Schools,  
Respondents.

Civil Action No. 17-P-232  
Judge Louis H. Bloom

2017 AUG 18 PM 3:50  
KATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

FILED  


FINAL ORDER GRANTING WRIT OF MANDAMUS

On July 11, 2017, came the Petitioner, the Board of Education of the County of Nicholas, West Virginia (“NCBOE” or “Nicholas Co. BOE”), by counsel, Kenneth E. Webb, Jr. and Rebecca M. Tinder, and Respondents, the West Virginia Board of Education (“WVBE” or “State Board”) and the State Superintendent of Schools, Steven L. Paine, Ed.D., by counsel, Kelli D. Talbott, Senior Deputy Attorney General, for hearing on the *Rule to Show Cause Order* entered on June 28, 2017. The *Rule to Show Cause Order* directed the Respondents to show cause why a writ of mandamus and injunctive relief should not issue to compel the WVBE to approve the NCBOE’s Comprehensive Educational Facilities Plan (“CEFP”) amendment, which closes Richwood Middle School, Richwood High School, Summersville Middle School, Nicholas County High School, and the Career and Technical Center and consolidates those schools into a comprehensive education facility to be located at Glade Creek Business Park.

After reviewing the parties’ briefs, hearing testimony and their oral arguments, and having also considered the briefs of *amici curiae* Richwood High School Alumni Association and the West Virginia School Board Association, the Court finds and concludes as follows.

## INTRODUCTION

The Court must determine whether the WVBE lawfully rejected the NCBOE's CEFPA amendment. In doing so, the Court will analyze whether the WVBE's stated reasons for rejecting the CEFPA amendment were arbitrary and capricious. The Petitioner argues that the WVBE relied upon criteria that the West Virginia Legislature did not intend them to consider under W. Va. Code § 18-5-13, § 18-5-13a, or Policy 6204. As such, Petitioner asserts, the WVBE's rejection of the CEFPA amendment was arbitrary and capricious. On the other hand, the Respondents contend that Article XII, §2 of the West Virginia Constitution provides the WVBE the authority, through its general supervisory powers, to reject CEFPA amendments even where the local county board of education fully complies with statutory and regulatory requirements.

As a preliminary matter, the Court notes the passion, conflicting viewpoints of affected communities, and heart-wrenching nature associated with decisions to close or consolidate local schools. As pointed out by the *amici curiae*, these decisions are never easy, and the decision at bar is no different. The Court further notes that it expresses no opinion regarding the merits of the consolidation plan and only reviews the WVBE's justifications for rejecting the CEFPA amendment to determine whether its actions were arbitrary.

## FINDINGS OF FACT

1. Petitioner, NCBOE, is a West Virginia statutory corporation, pursuant to W. Va. Code § 18-5-5, with the responsibility to supervise, control and manage the public schools in Nicholas County, West Virginia.<sup>1</sup>
2. Respondent, the WVBE, is a West Virginia corporation created pursuant to West Virginia Constitution Article XII, § 2 and West Virginia Code § 18-2-1 with the responsibility to exercise

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<sup>1</sup> See *Verified Petition for Writ of Mandamus and Injunctive Relief* ("*Verified Petition*") at ¶ 1; *Answer* at ¶ 1.

general supervision of the public schools of West Virginia including, but not limited to, the public schools in Nicholas County, West Virginia.<sup>2</sup>

3. Respondent, Steven L. Paine, Ed.D (“State Superintendent”), is the State Superintendent of Schools for West Virginia.<sup>3</sup>

4. On June 23, 2016, Richwood Middle School and Richwood High School (“Richwood Schools”) sustained devastating flood damage caused by overflow of the Cherry River in Richwood, West Virginia.<sup>4</sup> Summersville Middle School was also substantially damaged by the June 23, 2016 flooding. On June 26, 2016, then President Barack Obama declared a state of emergency for parts of West Virginia, including Nicholas County, and authorized federal disaster relief for the affected areas.<sup>5</sup>

5. Thereafter, the damaged schools in Nicholas County became eligible for Federal Emergency Management Agency (FEMA) monies. Pursuant to West Virginia Code § 18-9D-15(a), the School Building Authority (SBA)<sup>6</sup> is charged with administering all federal funds provided for the construction and improvement of school facilities in the State.

6. Shortly thereafter, Superintendent of the Nicholas County Schools, Donna Burge-Tetrick (“Superintendent Burge-Tetrick”), and members of the NCBOE began to assess the flood damage to the Richwood Schools.<sup>7</sup> The NCBOE secured temporary spaces so that modular units could be constructed and house students for an extended period of time.<sup>8</sup>

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<sup>2</sup> See *Verified Petition* at ¶ 2; *Answer* at ¶ 2.

<sup>3</sup> *Id.* at ¶ 3; *Id.* at ¶ 3.

<sup>4</sup> *Id.* at ¶ 19; *Id.* at ¶ 19.

<sup>5</sup> *Id.* at ¶ 20; *Id.* at ¶ 20.

<sup>6</sup> The State Superintendent of Schools, ex officio, and three members of the WVBE, elected by the WVBE, are voting members of the SBA. West Virginia Code § 18-9D-1(a). The Governor or his designee is also a member and the chair. West Virginia Code § 18-9D-1(a) and (b).

<sup>7</sup> June 13, 2017 Hr’g Tr. at 134-135; See also *Nicholas County Board of Education Proposed CEFP Amendment PPT* at pg. 2.

<sup>8</sup> July 10, 2017 Hr’g Tr. at 70; June 13, 2017 Hr’g Tr. at 135.

7. Upon discussing plans with FEMA officials, the NCBOE learned that the Richwood Schools could not be rebuilt on the existing sites and be eligible for FEMA funds because the schools are located in the floodway.<sup>9</sup> Instead, these schools are eligible for “directed relocation” FEMA funds to allow the schools to be relocated.<sup>10</sup> Summersville Middle School is not in the floodway and is therefore eligible for “replacement” FEMA funds.<sup>11</sup> After further discussion with FEMA officials, the NCBOE became aware of FEMA’s “428” program, which allows grantees to consolidate FEMA grant funds; put them into one pot; and, utilize them for a different project or projects.<sup>12</sup>

8. Prior to this tragic event, the NCBOE had expressed no intent or desire to close or consolidate schools in the Richwood attendance area. All indication was that the Richwood area schools were academically sound, widely supported by the community, and achieving excellent results for their students.<sup>13</sup> Moreover, in 2014, Nicholas County voters supported a special levy to provide monies for renovations at Richwood High School and Nicholas County High School during the 2017-2018 school year and renovations at Summersville Middle School and Richwood Middle School in 2018-2019.<sup>14</sup>

9. Throughout the remainder of 2016, the NCBOE considered numerous site locations in Nicholas County. Those locations included: Milltown, Richwood; Laurel Creek Saw Mill, Richwood; Collins Hardwood, Richwood; Fenwick Mountain, Richwood area; Hinkle Mountain, Richwood area; Dillard Farm, Richwood area; Career Center, Craigsville; Craigsville Drive In,

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<sup>9</sup> *Id.* at 135.

<sup>10</sup> *Id.* at 160.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 160-161.

<sup>13</sup> July 10, 2017 Hr’g Tr. at 168-174.

<sup>14</sup> July 10, 2017 Hr’g Tr. at 168-172.

Craigsville; Callahan Farm, Craigsville; Glade Creek Business Park, Glade Creek; and NCHS, Summersville.<sup>15</sup>

10. On January 9, 2017, after exploring numerous site locations within Nicholas County, Superintendent Burge-Tetrick made a recommendation to the NCBOE to move forward with the closures and consolidations of (1) Richwood High School, Nicholas County High School and the Career Technical Education Facility and (2) Richwood Middle School and Summersville Middle School (“NCBOE Consolidation Plan”).<sup>16</sup> After publishing the proper notice and conducting the required public hearings, the NCBOE unanimously voted on March 7, 2017 to close and consolidate the subject schools.<sup>17</sup>

11. After considering numerous site locations in Nicholas County, the NCBOE selected Glade Creek Business Park, near Summersville, for the proposed consolidation site.<sup>18</sup> The Glade Creek Business Park is owned by the Nicholas County Commission and has not been purchased by the NCBOE and/or its agents.<sup>19</sup>

12. In accordance with Policy 6204, the NCBOE prepared written closure documents that considered and evaluated six (6) factors required by WVBE policy: Enrollment, Facilities, Finance, Personnel, Transportation and Education Program.<sup>20</sup>

13. With respect to enrollment, the NCBOE found and concluded that closure and consolidation was warranted because over the last five (5) years, student enrollment had declined by 1.09% per year in Nicholas County and, since the 2000 census, the overall population of Nicholas County had declined by almost 1,000 people.<sup>21</sup>

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<sup>15</sup> *Nicholas County Board of Education Proposed CEFPA Amendment PPT* at pg. 13-24.

<sup>16</sup> July 11, 2017 Hr’g Tr. at 280, 307.

<sup>17</sup> *Id.* at 308.

<sup>18</sup> *Id.* at 25, 145.

<sup>19</sup> June 13, 2017 Hr’g Tr. at 220-221.

<sup>20</sup> See *generally* Closure Documents Vols. 1-5.

<sup>21</sup> See Closure Documents at §2.2, enrollment and population.

14. With respect to facilities, the NCBOE found and concluded that closure and consolidation was warranted because:

- (a) FEMA had funds available to the NCBOE to construct new school buildings, provided the construction occurs outside a floodway;
- (b) The Glade Creek Business Park met the criteria set forth by the SBA, State Board Policy 6200<sup>22</sup> and FEMA regulations and timelines;
- (c) Consolidation of the schools in Nicholas County promoted the important policy of economies of scale;
- (d) Consolidation allowed the consolidated Middle School and Comprehensive High School to be centrally located in the Glade Creek Business Park along with the Career and Technical Center; and
- (e) The proposed new consolidated schools would possess outside amenities, promote extracurricular activities, meet current ADA codes, possess a clinic and meet the current “safe school” design guidelines, which the current facilities did not meet.<sup>23</sup>

15. With respect to finances, the NCBOE found and concluded that closure and consolidation was warranted because:

- (a) Costs to repair the damaged Richwood Schools exceeded 92% of the replacement costs of a new facility;
- (b) The new comprehensive campus facility would cost One Hundred Thirty Million Dollars (\$130,000,000.00);
- (c) Nicholas County could expect cost savings on utilities of about twenty-five percent (25%) from the comprehensive campus facility; and
- (d) Costs savings on personnel equated to potentially Two Hundred Thirty-One Thousand Dollars (\$231,000.00) for the new consolidated middle school and Two Hundred Sixty-Six Thousand Dollars (\$266,000.00) for the new consolidated high school per year.<sup>24</sup>

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<sup>22</sup> C.S.R. 172 “Handbook on Planning School Facilities (6200)” (hereinafter Policy 6200), requires all county boards of education to develop a ten-year CEFP. CEFPs are to be updated annually, if needed, and rewritten every ten years beginning with plans submitted in 1990. Policy 6200, § 100.

<sup>23</sup> See Closure Documents at §2.2.2 facilities.

<sup>24</sup> *Id.* at § 2.2.3, finance.

16. With respect to personnel, the NCBOE found and concluded that closure and consolidation was warranted because, while consolidation presented potential new employment opportunities, some service personnel reductions would be expected due to the elimination of duplicate positions. Consolidation would also increase the likelihood of sufficiently staffing the facilities with fully qualified personnel.<sup>25</sup>

17. With respect to transportation, the NCBOE found and concluded that closure and consolidation was warranted because most of the students attending the Richwood Schools live outside the City of Richwood and closer to the proposed location at the Glade Creek Business Park, therefore the length of bus runs would be reduced overall and travel to the Career and Technical Center in Craigsville from the Nicholas County high schools would be eliminated.<sup>26</sup>

18. With respect to the educational program, the NCBOE found and concluded that closure and consolidation was warranted because consolidation allowed for enhanced learning facilities, a greater likelihood of attracting certified teachers, a more varied selection of class offerings and more opportunities to engage and consider technical education programs.<sup>27</sup> As the Closure Documents demonstrate, the NCBOE supported all its findings and conclusions with data and evidence, as required by West Virginia Code § 18-5-13a and the State Board in Policy 6204.

19. As required by Policy 6204, the NCBOE held five (5) public hearings between February 24, 2017 and March 6, 2017, at the affected schools where members of the public spoke in favor of and against the proposed closures and consolidation.<sup>2829</sup> After the conclusion of all required hearings, the NCBOE voted unanimously to amend its CEFP and close and consolidate the five

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<sup>25</sup> *Id.* at § 2.2.4, personnel.

<sup>26</sup> *Id.* at § 2.2.5, transportation

<sup>27</sup> *Id.* at § 2.2.6, educational program.

<sup>28</sup> *See* Closure Documents Vol. 2 of 5.

<sup>29</sup> The NCBOE also made its closure documents available for public viewing by leaving copies of the closure documents at the affected schools thirty (30) days prior to any public hearings. *See* June 13, 2017 Hr'g Tr. at 136.

schools to build a comprehensive education facility on the property of Glade Creek Business Park.<sup>30</sup>

20. After the NCBOE voted to pursue the Consolidation Plan, it was sued in the Circuit Court of Nicholas County by interested parties who sought to enjoin the NCBOE from closing and consolidating the relevant schools on the basis of alleged Open Governmental Proceedings Act violations.<sup>31</sup> That litigation was pending in the Circuit Court from approximately early March 2017 until June 2, 2017, when Circuit Court Judge James J. Rowe entered an order denying the injunction.<sup>32</sup>

21. State Board President Tom Campbell delayed putting the NCBOE CEFP amendment on the agenda until the above-described litigation was resolved.<sup>33</sup> On June 13, 2017, seven business days after Judge Rowe declined to issue an injunction against the NCBOE, the State Board held a special meeting at which the NCBOE CEFP amendment was the only item on the agenda.<sup>34</sup> At its meeting, lasting several hours, the WVBE heard a presentation by the Nicholas County Superintendent of Schools, a presentation of pertinent information from the State Superintendent of Schools and Scott Raines, Director of School Planning from the SBA, and heard from multiple interested parties both in support of and against the CEFP amendment.<sup>35</sup>

22. During the meeting, Dr. Paine informed the WVBE that the NCBOE “followed all of the proper procedures and complied with our closure policy, Policy 6204.”<sup>36</sup> Dr. Paine also informed the State Board that the Nicholas County school system was one of the most financially sound in West Virginia with the highest percentage of budgetary carryover funds of any county board of

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<sup>30</sup> *Id.*

<sup>31</sup> July 11, 2017 Hr’g Tr. at 281.

<sup>32</sup> *Id.* at 283-284.

<sup>33</sup> *Id.* at 91, 148-149.

<sup>34</sup> *Id.* at 92.

<sup>35</sup> *See generally* June 13, 2017 Hr’g Tr.

<sup>36</sup> *Id.* at 150:5-7.



education in West Virginia.<sup>37</sup> Dr. Paine further discussed the FEMA deadline for application for the "428" funds which was scheduled to fall on the one year anniversary of the President's natural disaster declaration, June 26, 2017.<sup>38</sup>

23. Dr. Paine noted that he had made inquiry regarding the State's and/or the SBA's pending request for a six month extension of that deadline and that he had been assured it was virtually certain that the extension would be granted.<sup>39</sup> In fact, the six month extension was granted by FEMA on June 20, 2017.<sup>40</sup> Dr. Paine further informed the WVBE that if "428" funds were not pursued, traditional FEMA grant funds would still be available without the time constraints associated with the "428" funds.<sup>41</sup>

24. During the meeting, members of the WVBE asked multiple, detailed questions of speakers regarding various topics including, but not limited to, site selection and site availability for school construction, increased travel times to the proposed consolidated schools, availability of extracurricular activities, plans for dealing with possible student behavioral and attendance problems, impact on the affected communities, the availability of FEMA monies for various options and the issues and deadlines associated with the FEMA monies, teaching personnel, and the impact on students.<sup>42</sup>

25. Additionally, at the State Board hearing on June 13, 2017, State Superintendent Paine stated that an alternative plan existed that the NCBOE never considered, which allowed Richwood to have a consolidated high school and middle school in the Richwood attendance area and also allowed Summersville to have a new consolidated middle school and high school in the

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<sup>37</sup> *Id.* at 151.

<sup>38</sup> *Id.* at 152.

<sup>39</sup> *Id.* at 151-152.

<sup>40</sup> July 11, 2017 Hr'g, Ex. 14.

<sup>41</sup> June 13, 2017 Hr'g Tr. at 153. Traditional FEMA grant funds cannot be utilized, however, to construct consolidated schools. *Id.*

<sup>42</sup> *Id.* at 175-267.

Summersville attendance area, potentially at Glade Creek.<sup>43</sup> After discussion by the State Board, Mr. Perry, Vice President of the State Board, moved that the State Board reject the NCBOE's CEFP amendment "because [he] believe[d] sufficient alternatives and possibilities have not been explored to be assured this plan is in the best interest of the students of Nicholas County, and specifically of those in the current Richwood Middle and Richwood High Schools areas."<sup>44</sup> In the vote that followed, the State Board rejected the NCBOE's CEFP amendment 7-1.<sup>45</sup>

26. The Respondents concede that most proposed CEFP amendments have historically been approved by the WVBE, although there have been occasions where the State Board has not approved the same.<sup>46</sup> Specifically, CEFP amendments for Fayette County, Randolph County, Greenbrier County and Kanawha County have not been approved.<sup>47</sup>

27. Following the State Board's rejection of the NCBOE's CEFP amendment, the NCBOE filed the instant action seeking a writ of mandamus and injunctive relief. In this action, the NCBOE seeks to compel the WVBE to approve the CEFP amendment based upon allegations that the State Board acted arbitrarily, capriciously, in a passionate and partial manner and because of ulterior and improper motives in denying the NCBOE's CEFP amendment. A rule to show cause was issued that was returnable on July 11, 2017.

28. On July 10, 2017, the WVBE convened an "emergency" meeting – on the eve of the July 11, 2017 hearing on the rule to show cause -- to again consider and act upon the NCBOE CEFP amendment. Again, delegations spoke in favor of and against the closure and consolidation proposal contained in the CEFP amendment. Superintendent Burge-Tetrick and the NCBOE were

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<sup>43</sup> *Id.* at 157, 161-166, July 11, 2017 Hr'g, Ex. 5, pgs. 2-3 "Alternative Option "A").

<sup>44</sup> *Id.* at 267-268.

<sup>45</sup> *Id.* at 271.

<sup>46</sup> July 11, 2017 Hr'g Tr. at 37.

<sup>47</sup> *Id.* at 37-38, 43-44, 115-116, 150-151, 248, 253-257. It should be noted that Fayette County was under WVBE control at that time.

given an opportunity to present the merits of their closure and consolidation proposal. At the end of the meeting, Mr. Perry again made a motion to reject the Nicholas Co. BOE's CEFPP amendment. This time Mr. Perry gave a variety of different reasons for rejecting the CEFPP amendment.<sup>48</sup> At the conclusion of the meeting, Vice President Perry spoke:

VICE PRESIDENT PERRY: Mr. President, I would make a motion at this time. At the last meeting I made a motion which certainly explained why I moved to reject the proposed CEFPP. My motion would be the same today, but I will articulate different reasons for a conclusion. To date I still have not seen evidence of a meaningful dialogue between the citizens of Richwood High School attendance area and the Nicholas County Board of Education concerning the future of the school system and the needs of the students.

Sufficient FEMA funding options exist to allow Nicholas County to rebuild the damaged schools without removing both Richwood High School and Richwood Middle School from the Richwood High School attendance area. Even under the more flexible 428 FEMA option, money can be used for various school configurations, other than the proposed comprehensive consolidation plan that the county has currently offered.

The FEMA time line for use of 428 funding is sufficient to allow the Nicholas County Board of Education to pursue funding options other than the plan presented today if the county began pursuing those options and ceases the pursuit of alternative paths.

Though the county presented evidence showing that it is unlikely that a parcel of land in Richwood city limits is suitable for a countywide consolidated high school, there is evidence that there are parcels of land in the Richwood attendance area that would be suitable for a consolidated Richwood High School/Middle School, or a single Richwood Middle School or configuration apart from a single consolidated school.

It appears in examining population trends that the declining population in the Nicholas County High School attendance area has been greater than the percentage of decline in the Richwood High School area.

The Nicholas County Board of Education has [the] opinion that a currently proposed consolidation plan will save personnel positions, resulting in overall financial savings for the county. However, the utilization of technology newly available virtual school options will offer personnel savings to the county, while preserving the availability of diverse course offerings to students, thus making

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<sup>48</sup> Importantly, none of the reasons given by Mr. Perry are mentioned in State Board Policy 6204.

school consolidation other than a comprehensive consolidation feasible and financially beneficial.

Likewise, the use of technology virtual school options and embedded credits will alleviate travel constraints for students wishing to attend the career technical center.

Finally, and perhaps most significantly, student achievement data shows that Richwood High School, which is just over half the size of Nicholas County High School has a much higher percentage of needy students, is doing a comparable job educating students and is out-performing the state on five of eight measured metrics: four year graduation rate, dropout rate, reading proficiency, rate percentage of students taking advanced placement courses, and percentage of teachers that are highly qualified.

Further, both Nicholas County High School and Richwood High School out-perform the state average in most measured metrics. That is my motion and I ask for the yeas and nays, Mr. President.<sup>49</sup>

29. The State Board voted 6-1 to reject the NCBOE's CEFPP amendment.<sup>50</sup>

30. On July 11, 2017, the NCBOE proceeded with the rule to show cause hearing and presented testimony in support of its request for a writ of mandamus and injunctive relief.

31. At the July 11, 2017 evidentiary hearing, members of the State Board were each asked why they voted to reject the NCBOE CEFPP amendment after being told by the State Superintendent that the Nicholas Co. BOE's CEFPP amendment complied with State Board Policy 6204.<sup>51</sup> Each State Board member gave varied and different reasons for their vote to reject the Nicholas Co. BOE's CEFPP amendment:

(1) Thomas Campbell, President of the State Board, testified that he voted to reject the Nicholas Co. BOE's CEFPP amendment because of a lack of community outreach and collaboration even though he conceded that Policy 6204 did not expressly require community outreach and collaboration.<sup>5253</sup> Importantly, Mr. Campbell also conceded

<sup>49</sup> July 10, 2017 Hr'g Tr. at 260-260; July 11, 2017 Hr'g Ex. 7.

<sup>50</sup> *Id.* at 264-265.

<sup>51</sup> *See, generally*, July 11, 2017, Hrg. Tr. at pp. 96-238.

<sup>52</sup> *See*, July 11, 2017, Hrg. Tr. at pp. 106-109, 112.

<sup>53</sup> A review of the transcripts of the public hearings held at the affected schools as required by Policy 6204 – submitted to the Court as a joint exhibit -- reveals that a total of 187 individuals spoke at the public hearings. Superintendent Burge-Tetrick addressed questions and concerns raised by the speakers. At the public hearing held on March 1, 2017 for Richwood Middle School, Ms. Christy Hall proposed for the county board's consideration combining Richwood

that local school boards are in a better position than the State Board to understand what the local community wants and needs.<sup>54</sup>

- (2) David Perry, Vice President of the State Board, testified that he believed he could consider “criteria” other than that contained in Policy 6204 and that he voted to reject the Nicholas Co. BOE’s CEFPA amendment because of the lack of “meaningful dialogue” and other factors not mentioned in Policy 6204 like where the money is coming from, specific site considerations and the benefits of community schools.<sup>55</sup>
- (3) State Board member Debra K. Sullivan did not believe, based upon her reading of public hearing transcripts, that the Nicholas Co. BOE considered the views of citizens, and that the Nicholas Co. BOE did not consider in detail the impact of consolidation on extracurricular activities.<sup>56</sup> Mrs. Sullivan was also concerned about “parent involvement” and was in favor of smaller community schools.<sup>57</sup> *See*, July 11, 2017, Hrg. Tr. at pp. 187, 196.
- (4) State Board member Frank Vitale did not believe that the Nicholas Co. BOE did “enough” to solicit input from their community.<sup>58</sup>
- (5) State Board member Jeff Flanagan did not believe that the Nicholas Co. BOE provided enough detail about potential sites or funding even though he conceded that he did not know if Policy 6204 required the county board of education to provide details about sites and funding.<sup>59</sup> Mr. Flanagan further testified that he did not completely read the NCBOE closure documents.<sup>60</sup>
- (6) State Board member Miller L. Hall believed that the Nicholas Co. BOE should have considered how consolidation impacts student discipline even though he admitted that discipline is not a factor contained in Policy 6204.<sup>61</sup>
- (7) State Board member Frank Scott Rotruck wanted the Nicholas Co. BOE to consider other community school type options.<sup>62</sup>

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High School and Richwood Middle School in Richwood. In response, Superintendent Burge-Tetrick explained that this alternative did not address the duplication of service issues, did not address Career and Technical Education utilization issues and did not address travel time issues. *See*, Notebook Volume 2, Tab 33 at pp. 68-71.

<sup>54</sup> *See*, July 11, 2017, Hrg. Tr. at pg. 133.

<sup>55</sup> *See*, July 11, 2017, Hrg. Tr. at pp. 155-176.

<sup>56</sup> *See*, July 11, 2017, Hrg. Tr. at pp. 181, 185.

<sup>57</sup> *See*, July 11, 2017, Hrg. Tr. at pp. 187, 196.

<sup>58</sup> *See*, July 11, 2017, Hrg. Tr. at pg. 212.

<sup>59</sup> *See*, July 11, 2017, Hrg. Tr. at pp. 220-221.

<sup>60</sup> *Id.* at 221

<sup>61</sup> *Id.* at 228.

<sup>62</sup> *Id.* at 235.

32. Based on the following, the Court finds that the WVBE acted arbitrarily in rejecting the NCBOE's CEFPA amendment so that mandamus lies to compel that State Board to approve the same.

### STANDARD OF REVIEW

"To entitle one to a writ of mandamus, the party seeking the writ must show a clear legal right thereto and a corresponding duty on the respondent to perform the act demanded."<sup>63</sup> "A writ of mandamus will not issue unless three elements coexist – (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy."<sup>64</sup>

### DISCUSSION & CONCLUSIONS OF LAW

33. As a preliminary matter, the Court must address the Respondents' contention that the Court lacks jurisdiction because (1) Respondents were not served with a Summons pursuant to Rule 4 of the West Virginia Rules of Civil Procedure and (2) the Petitioner failed to provide the Respondents with the jurisdictional thirty day pre-suit notice required by W. Va. Code § 55-17-3(a).

34. Under Rule 4.1(a) of the West Virginia Rules of Civil Procedure, "[w]henver an order of court provides for service of a rule, or of an order in lieu of summons or a rule, upon a party, service shall be made in the manner provided in Rule 4(d), unless the order prescribes a different mode of service." Moreover, the Petitioner cites to Justice Cleckley's Litigation Handbook, which explains the relationship between Rule 4.1 and rule to show cause procedure as follows: "Rule 4.1 addresses the method of serving a rule to show cause or other court order; and make process, orders

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<sup>63</sup> Syl. pt. 4, *State ex rel. Withers v. Bd. of Educ. of Mason Cnty.*, 153 W. Va. 867, 172 S.E.2d 796 (1970).

<sup>64</sup> Syl. pt. 1, *Justice v. Bd. of Educ. of the Cnty. of Monongalia*, 208 W. Va. 270, 539 S.E.2d 777 (2000).

and notices a part of the record.”<sup>65</sup> Further, “[i]n the context of Rule 4 service of process means summons and complaint. In the context of Rule 4.1(a) service of process takes on the meaning of service of a rule to show cause or other court order.”<sup>66</sup> Accordingly, the West Virginia Rules of Civil Procedure allow service of a Verified Petition seeking an extraordinary writ with an accompanying rule to show cause. Here, the Petitioner served its Verified Petition and Rule to Show Cause on the Respondents. Consequently, Respondents’ *Motion to Dismiss* for insufficiency of service of process lacks any basis in law.

35. Next, the Respondents assert this Court lacks jurisdiction because the Petitioner failed to provide thirty day pre-suit notice pursuant to W. Va. Code § 55-17-3(a). Generally, W. Va. Code § 55-17-3 requires that the complaining party provide the government agency and Attorney General thirty (30) days’ notice prior to the institution of an action.<sup>67</sup> However, the thirty (30) days’ notice provision does not apply to “actions seeking injunctive relief where the court finds that irreparable harm would have occurred if the institution of the action was delayed by the provisions of this subsection.”<sup>68</sup>

36. Here, the Respondents assert that “while the FEMA funding issue presents time sensitivities, there is no immediate or imminent danger of jeopardizing FEMA funds.”<sup>69</sup> Although FEMA granted the NCBOE a six (6) month extension – until the end of December, 2017, the Court finds and concludes failure to take immediate action jeopardizes the NCBOE’s and SBA’s receipt of approximately One Hundred Thirty Million Dollars (\$130,000,000.00) in FEMA funding.<sup>70</sup> The

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<sup>65</sup> See Franklin D. Cleckley, Robin Jean Davis and Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* §4.1[1], 141 (4<sup>th</sup> ed. 2012 and Com. Supp. 2016).

<sup>66</sup> *Id.* at fn. 27.

<sup>67</sup> See W. Va. Code § 55-17-3(a); Syl. Pt. 5, *Motto v. CSX Transp., Inc.*, 230 W. Va. 412 (2007).

<sup>68</sup> W. Va. Code § 55-17-3(a).

<sup>69</sup> See Respondents’ *Motion to Dismiss and Motion to Vacate Rule to Show Cause*, July 7, 2017 (Ln. 7).

<sup>70</sup> Nicholas County Board of Education June 14, 2017 Hr’g Tr. at 51. (Ex. A to *Petitioner’s Response in Opposition to Respondents’ Motion to Dismiss and Motion to Vacate Rule to Show Cause*).

testimony elicited at the July 11, 2017 hearing, demonstrates the arduous process required to finalize project information, which typically takes anywhere from nine (9) months to one (1) year.<sup>71</sup> Further, the Court notes the irreparable harm of the students of Nicholas County. Each day that students are taught in temporary classrooms poses the risk of irreparable harm—there is no replacement for permanency in the classroom setting. Consequently, the Court finds that delaying the instant matter by thirty (30) days would cause substantial irreparable harm.

37. Moreover, the instant-action is clearly injunctive in nature—Petitioner seeks to compel the Respondents to accept the NCBOE CEFPP amendment. Accordingly, based on the forgoing, the Court finds and concludes that the exception to the thirty (30) days’ notice provision applies; therefore, the Respondents’ argument is without merit. As such, this Court has jurisdiction to decide the above-styled matter.

38. Chapter 18, Article 5 of the West Virginia Code governs county boards of education. In W. Va. Code § 18-5-13(c) and (d), the Legislature gave county boards of education the authority to close and consolidate schools.<sup>72</sup> In W. Va. Code § 18-5-13a, the Legislature set out a specific procedure that county boards of education must follow to close and consolidate schools. Subsection (a) of W. Va. Code § 18-5-13a provides, in relevant part, that “. . . prior to any final decision of a county board on any proposal to close or consolidate any school . . . the county board shall . . . (1) prepare and reduce to writing its reasons and supporting data regarding the school

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<sup>71</sup> July 11, 2017 Hr’g Tr. at 306:1-15.

<sup>72</sup> In West Virginia, county board of education members are elected and they must be a citizen and resident of the county in which he or she serves or seeks to serve. *See*, W. Va. Code § 18-5-1a. In his testimony at the July 11, 2017 hearing, the State Superintendent testified that the county boards of education are in a better position to know the needs of their county than the State Board. *See*, July 11, 2017, Hrg. Tr. at pg. 33.



closing and consolidation<sup>73</sup> . . . (2) provide notice for public hearing . . . and (3) provide for how the public hearing is to be conducted.”

39. In subsection (b) and (c) of W. Va. Code § 18-5-13a, the Legislature directed the State Board to promulgate regulations further governing school closures and consolidations. In W. Va. Code § 18-5-13a(b), the State Board is required to promulgate rules “ . . . detailing the type of supporting data a county board shall include as part of its written statement of reason required by this section for school closing or consolidation.” In W. Va. Code § 18-5-13a(c), the State Board is required to promulgate rules “. . . that establishes the procedure to be followed by county boards when conducting a public hearing on the issues of school consolidation and closing.”

40. Pursuant to the Legislature’s direction in subsection (b) and (c) of W. Va. Code § 18-5-13a, the State Board promulgated Policy 6204 – codified at 126 C.S.R. § 176 – and entitled “School Closings or Consolidations (6204)” in 2002 and amended the policy in 2005.<sup>74</sup> In its initial paragraph on “Scope” -- § 126-176-1.1 -- Policy 6204 explains that: “This policy sets the *requirements* for county boards of education *in proceeding with* a potential school closing or consolidation . . . .” In § 126-176-2, Policy 6204 then sets out the specific requirements that the county boards must meet in order to gain approval of its proposed closure or consolidation from the State Board.

41. Policy 6204 specifically directs the county board to gather information deemed material by the Legislature and State Board to a closure and consolidation decision and to reduce the information to a writing that includes the reasons for and data supporting the proposed school closure and consolidation. The reasons and supporting data must include an analysis of how the

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<sup>73</sup> Subsection (a)(1) of W. Va. Code § 18-5-13a also requires that the written reasons be made available for public inspection at least thirty (30) days prior to any required public hearing and that copies be delivered to principals and the chair of any local school improvement council of any affected school.

<sup>74</sup> The 2005 version of the policy is currently in effect.

closure and consolidation is warranted based on enrollment, facilities, finance, personnel, transportation and educational program.<sup>75</sup> Policy 6204 then directs the county board hold public hearings and details how those hearings are to be conducted.<sup>76</sup> Under § 126-176-2.5.2, the county board may formally vote on a motion to close and consolidate schools only after all of the forgoing requirements have been met and after the last public hearing.

42. If the county board votes in favor of the motion to close and consolidate schools, the county board must request “. . . an amendment of it’s [sic] CEFPP with the WVBE [State Board] for approval . . . .” Under § 126-176-2.6 of Policy 6204, the approval request must:

- (1) include a signed writing from the county superintendent giving the date of the action approving the closure and consolidation proposal by the county board;
- (2) contain assurances that the county board met the requirements of West Virginia Code §§ 18-5-13 and 18-5-13a and met the requirements of Policies 6200 and 6204;
- (3) contain justification for the proposed consolidation or school closing supported by data and information pertinent to enrollment, facilities, finance, personnel, transportation and educational programs; and
- (4) contain documentation of all hearings, motions, public comments, and other actions concerning the proposed school closings and consolidations.<sup>77</sup>

43. In 1990, the Supreme Court of Appeals of West Virginia decided the seminal case regarding the West Virginia Board of Education’s power to overrule local county board’s closure and consolidation plans. In *Kanawha County Board of Education v. West Virginia Board of Education*, the Supreme Court of Appeals of West Virginia held,

County boards of education do not have unlimited power to make the final decisions with respect to school closings and consolidations. The plain language of W. Va. Code, 18-5-13 (1990) and W. Va. Code, 18-5-13a reflects that such decisions may be rejected where they fail to comply with statutory provisions or West Virginia Board of Education regulations.<sup>78</sup>

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<sup>75</sup> See, e.g., C.S.R. § 126-176-2.2.1 through 2.2.6.

<sup>76</sup> *Id.* at § 126-176-2.3 through 2.5.

<sup>77</sup> see, e.g., § 126-176-2.6.1-§ 126-176-2.6.4

<sup>78</sup> Syl. Pt. 1, *Kanawha County Board of Education v. West Virginia Board of Education*, 184 W. Va. 1, 399 S.E.2d 31 (1990).

The Supreme Court further explained that:

The State Board need not rely entirely on statutory authority, however, Article XII, Section 2 of the West Virginia Constitution provides, in pertinent part: “The general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law.” Article XII, Section 1 of the Constitution provides: “The legislature shall provide, by general law, for a thorough and efficient system of free schools.”<sup>79</sup>

44. Notably, when the *Kanawha County* case was decided in 1990, Policy 6200 contained a provision, quoted by the Supreme Court, that provided that the WVBE would not “overrule” a county board closure/consolidation decision if the plan complied with educational and facility requirements established by the WVBE and if there was compliance with the procedural requirements of statute and WVBE policy.<sup>80</sup> The Supreme Court noted in the *Kanawha County* case that the WVBE was bound to exercise its discretion in conformance with its own policy. Because the record below did not reflect that the WVBE had specified the reason for its non-approval of the South Charleston Junior High plan, the Supreme Court did not determine whether or not the WVBE had complied with its own policy or acted arbitrarily or capriciously.

45. The “overrule” language quoted above in the 1985 version of Policy 6200, was taken out of the policy by the WVBE in 1991 when the policy was revised. And, since that time, such language has been absent from every iteration of Policy 6200 up to the present version. Furthermore, such language is absent from Policy 6204 in the current, 2005 version, introduced as Exhibit 1 at the July 11, 2017 hearing before this Court. The 2005 version is controlling and applicable to the NCBOE proposal in this matter.

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<sup>79</sup> *Id.* at 3,33.

<sup>80</sup> *Id.* at 5;35. As quoted in *Kanawha County*, “The West Virginia Board of Education will not overrule a county board of education on a school closing or consolidation matter, unless the proposal does not comply with the educational and facility standards established by the State Board or the county board has not complied with procedural requirements of 18-5-13, 18-5-13a, and State Board Policy.”

46. The WVBOE argues that it more than adequately articulated its reasons for rejecting the NCBOE Consolidation Plan at its June 13, 2017 and July 10, 2017 meetings in compliance with the *Kanawha County Board of Education* decision. Those reasons are as follows: (1) that public hearings and public engagement was perfunctory and did not allow for proper dialogue required by W. Va. Code § 18-5-13(a)(3)(B); (2) the need to explore other closure/consolidation options for which the FEMA “428” funds could be used to possibly preserve a school or schools in the Richwood attendance area; and (3) the need to consider the use of technology to save funds and expand curriculum. Moreover, the WVBOE argues that its broad general supervisory powers under the West Virginia Constitution grant the authority to substantively review consolidation plans beyond what is contained in statutes and regulations governing closure/consolidation.

47. On the other hand, the NCBOE argues that the State Board did not follow its own rules and procedures set forth in Policy 6204, and rejected the NCBOE Consolidation Plan based upon multiple factors, none of which are contained in WVBE’s policies or regulations.

48. Under West Virginia law, the WVBOE has discretion to reject or amend a school closure or consolidation plan. As noted by the Supreme Court,

“The determination of the educational policies of the public schools of the State is vested in the West Virginia Board of Education, and, *unless unreasonable or arbitrary*, its actions relating to such policies will not be controlled by the courts.”<sup>81</sup>

49. Under the arbitrary and capricious standard of review, “the task of the circuit court is to determine ‘whether the [agency’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’”<sup>82</sup> The “clearly wrong” and the “arbitrary

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<sup>81</sup> Syl. Pt. 1, *Detch v. Board of Education*, 145 W. Va. 722, 117 S.E.2d 138 (1960) (*emphasis added*).

<sup>82</sup> *Frymier-Halloran v. Paige*, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995) (brackets in original) (*emphasis added*) (*citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136, 153 (1971)).

and capricious” standards of review are deferential ones which presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.”<sup>83</sup>

50. In this case, the State Board did not follow its own rules and procedures set forth in Policy 6204, and rejected the NCBOE Consolidation Plan based upon multiple factors, none of which are contained in Policy 6204. The very first section of Policy 6204 states the following: “This policy sets the *requirements* for county boards of education *in proceeding with* a potential school closing or consolidation . . . .”<sup>84</sup> § Thus, Policy 6204 states that “this policy” contains all of the requirements that a county board must meet to proceed with a decision to close and consolidate a school.

51. There is no dispute in this case whether the Nicholas Co. BOE’s CEFP amendment met all of the requirements of W. Va. Code § 18-5-13, § 18-5-13a and State Board Policy 6204. The State Superintendent confirmed the same at the June 13, 2017 State Board meeting where the Nicholas Co. BOE’s CEFP amendment was first considered:

SUPERINTENDENT PAINE: They [the Nicholas Co. BOE] have followed all of the proper procedures and complied with our closure policy, Policy 6204. They’ve – to the letter of the law. So that’s – I think that’s important for you to know. There – as I mentioned, a few inconsistencies in the square footage data, but nothing really that would affect change.

And I will say that, too, your staff, Mary Catherine Tuckwiller and myself, others – have looked at the documents very carefully, too, as – as you all have. And they’re good. They’re accurate. There’s nothing wrong with that and that’s important, I think, to establish, for you as a Board to know that they’ve done their job as a local Board in presenting the information to you.<sup>85</sup>

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<sup>83</sup> *Paige*, 193 W. Va. at 695, 458 S.E.2d at 780.

<sup>84</sup> § 126-176-1.1 (*emphasis added*).

<sup>85</sup> June 13, 2017 Hr’g Tr. at pg. 150.

At the July 11, 2017 hearing, the State Superintendent reiterated that the Nicholas Co. BOE “dotted their i’s and crossed their t’s in accordance with Policy 6204.”<sup>86</sup> In other words, the NCBOE followed the duly promulgated rules of the State Board for school consolidations and closings. However, the State Board rejected the CEFPP amendment based upon various, subjective factors not set forth in Policy 6204.<sup>87</sup>

52. Upon reviewing the stated reasons proffered by the State Board at the June 13, 2017 hearing, July 10, 2017 hearing, and the evidentiary hearing held on July 11, 2017, the Court finds and concludes, for the following reasons, that members of the State Board relied upon arbitrary criteria that the Legislature did not intend them to consider under W. Va. Code § 18-5-13, § 18-5-13a or Policy 6204.

53. At the July 10, 2017 emergency WVBE meeting, Mr. Perry’s motion to reject the CEFPP amendment was based on arbitrary factors and contrary to the NCBOE closure documents. In addition to stating that sufficient alternatives had not been explored in the Richwood attendance area, the WVBE gave several additional reasons for rejecting the CEFPP amendment.

54. First, the WVBE cited the lack of “meaningful dialogue” between the citizens of the Richwood High School attendance area and the NCBOE regarding the future of the school system. Here, the Court is confounded as to how the WVBOE concluded that no meaningful dialogue occurred. The NCBOE held all required public meetings and heard the viewpoints of proponents and opponents to the Consolidation Plan. The WVBE’s subjective reliance on what constitutes “meaningful dialogue” arbitrarily reaches beyond the requirements of W. Va. Code § 18-5-13, § 15-5-13a, and Policy 6204.

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<sup>86</sup> See, July 11, 2017, Hrg. Tr. at pg. 48.

<sup>87</sup> The State Superintendent testified at the July 11, 2017 hearing that he believed there needed to be more community engagement at the outset of the closure and consolidation process. When pressed, he acknowledged that Policy 6204 did not currently contain any such requirement. See, July 11, 2017, Hrg. Tr. at pp. 49-55.

55. Second, the WVBE stated that sufficient FEMA funding options exist to allow school configurations, other than that proposed by the NCBOE, to be placed in the Richwood attendance area. Here, the Court finds that directing a specific school configuration is outside the realm of the WVBE's general supervisory authority. Further, such consideration is clearly outside the scope of Policy 6204.

56. Third, the WVBE asserted that although "the county presented evidence showing that it is unlikely that a parcel of land in Richwood city limits is suitable for a countywide consolidated high school, there is evidence that there are parcels of land in the Richwood attendance area that would be suitable for a consolidated Richwood High School/Middle School, or a single Richwood Middle School . . . ." <sup>88</sup> Here, once more, the WVBE usurped the NCBOE's judgment regarding school configurations. At a public hearing on March 1, 2017 for Richwood Middle School, an individual proposed, for the NCBOE's consideration, a plan to combine Richwood High School and Richwood Middle School in Richwood. In response thereto, Superintendent Burge-Tetrick explained that this alternative did not address duplication of service issues, did not address Career and Technical Education utilization issues, and did not address travel time issues. <sup>89</sup> As shown by record, the NCBOE clearly considered consolidating the Richwood Schools in the Richwood area. Despite the NCBOE's determination that consolidation of Richwood Schools was not feasible, the WVBE directed that such configuration was in the best interest of Nicholas County. Consequently, the WVBE arbitrarily substituted its judgment for that of the NCBOE.

57. Fourth, the WVBE argued that the declining population in the Nicholas County High School attendance area has been greater than the percentage of decline in the Richwood High School area. However, according to the Closure Documents, Richwood has experienced a 17.2%

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<sup>88</sup> July 10, 2017 Hr'g Tr. at 260.

<sup>89</sup> See Closure Documents, Vol. 2 of 5, Tab 35 at pp. 68-71.

decline in population between the 2000 Census and 2010 Census.<sup>90</sup> Meanwhile, Summersville, the location of Nicholas County High School, experienced an 8.44% increase in population during that same time period.<sup>92</sup> Despite these findings, the WVBE concluded exactly the opposite.

58. Fifth, the WVBE reasoned that the utilization of newly available technology will offer personnel savings to Nicholas County while preserving the availability of diverse course offerings, making school consolidation, other than the Consolidation Plan, feasible. The utilization of newly available technology and the accompanied hypothetical cost savings resulting therefrom is yet another example of an arbitrary, pre-textual justification to deny the CEFP amendment. Once again, the consideration of virtual school options is an arbitrary factor not set forth in any WVBE policy or regulation.

59. Lastly, the WVBE found that Richwood High School, which has a much higher percentage of needy students than Nicholas County High School, is doing a comparable job educating students and is out-performing the state on several metrics, including: four-year graduation rate, dropout rate, reading proficiency, rate percentage of students taking advanced placement courses, and percentage of teachers that are highly qualified. Nicholas County High School also outperforms the state average on most measured metrics. Because each school does exceedingly well and outperforms the state on numerous metrics it is arbitrary for the WVBE to deny the NCBOE CEFP amendment on this basis.

60. Collectively, the WVBE clearly acted arbitrarily and capriciously when it reacted to Richwood area residents, whom had the opportunity to express views to the NCBOE. Moreover, it is clear from the testimony, the WVBE directed the NCBOE to look at other sites and

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<sup>90</sup> Closure Documents, Vol. 1 of 5, § 2.2.1 Enrollment, pg. 32.

<sup>91</sup> The population of Craigsville, West Virginia, remained relatively flat, increasing by .41% during the relevant time period. *Id.* at pg. 33.

<sup>92</sup> *Id.* at pg. 33.



configurations in order to direct a specific result – placement of schools in the Richwood area – despite the NCBOE considering nine (9) site locations in the Richwood/Craigsville area and determining that those locations were unfit. As admitted by the WVBE, the NCBOE is better equipped to make such determinations. The WVBE’s rejection of the NCBOE’s CEFP amendment was pre-textual and an abuse of power. By directing a specific result, the WVBE usurped the NCBOE’s authority and rendered WVBE policies and regulations useless.

61. Individually, the WVBE members also relied on arbitrary considerations in rejecting the CEFP amendment. Based on testimony from the July 11, 2017 evidentiary hearing, WVBE members’ reasons for rejecting the CEFP amendment can be categorized as follows: (1) lack of community outreach and collaboration; (2) student discipline issues; (3) and the lack of alternative site considerations and configurations in the Richwood area.

62. As indicated above, the majority of the WVBE members relied on the lack of meaningful dialogue, community outreach, and collaboration, in deciding to reject the CEFP amendment. The WVBE members attempted to rely on transcripts produced from the public comment period in determining that the NCBOE failed to consider the views of residents in Nicholas County. Such reliance on cold, sterile transcripts is entirely subjective and unjustified. Notably, “meaningful dialogue”, which is nearly impossible to define, is nowhere to be found in any WVBE policy, regulation, or statute governing the closure and consolidation process.

63. Further, as admitted by WVBE member Miller L. Hall, the impact of consolidation on student discipline is not a factor contained in Policy 6204.

64. As it relates to the lack of alternative site considerations and configurations in the Richwood area, the record indicates that the NCBOE specifically considered consolidating the

Richwood Schools.<sup>93</sup> After hearing and considering the views of residents in Nicholas County, reviewing site locations and funding options, the NCBOE determined that the Consolidation Plan presented the best opportunity for students of Nicholas County. Accordingly, the WVBE acted arbitrarily by directing a specific result and commandeering the local elected officials' authority to determine the best plan for Nicholas County.

65. Moreover, testimony from the July 11, 2017 hearing, indicated that the State Superintendent knew from the Governor's State of the State address that the Governor wanted a school in Richwood.<sup>94</sup> Board President Campbell knew that the Governor's heart was in community schools.<sup>95</sup> Board Vice President Perry told a friend weeks before the Nicholas Co. BOE's CEFP amendment was even considered by the State Board that "Nicholas was going to lose" because "[t]hat's what the Governor wants."<sup>96</sup> Such testimony lends support to the Petitioner's theory – WVBE members constructed arbitrary and pre-textual justifications to deny the NCBOE CEFP amendment.

66. Consequently, because the Nicholas Co. BOE's CEFP amendment met the requirements of W. Va. Code § 18-5-13, § 18-5-13a and Policy 6204 and because a majority of the members of the State Board considered criteria other than the criteria contained in the same, the State Board's actions are arbitrary and mandamus will lie to compel the State Board to approve the Nicholas Co. BOE's CEFP amendment.

67. A meticulous reading of the West Virginia Constitution and West Virginia Supreme Court of Appeals' precedent compels this conclusion.

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<sup>93</sup> See, July 11, 2017 Hr'g Tr. at pg. 279-280.

<sup>94</sup> See, July 11, 2017, Hrg. Tr. at pg. 78.

<sup>95</sup> See, July 11, 2017, Hrg. Tr. at pg. 129.

<sup>96</sup> See, July 11, 2017, Hrg. Tr. at pg. 267.

68. The Constitution of West Virginia charges the Legislature, rather than the State Board of Education or any other body, with providing for a thorough and efficient free school system: “The Legislature shall provide, by general law, for a thorough and efficient system of free schools.”<sup>97</sup> The legislature has “plenary authority to determine the bounds of [a] thorough, efficient education.”<sup>98</sup> Thus, the legislature’s power and duty to provide for a “thorough and efficient” school system is limited only by constraints specifically set forth in the Constitution.

69. The Supreme Court of Appeals has sought to define the legislature’s duty and authority to provide for a thorough and efficient system of free schools:

We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.<sup>99</sup>

Further, implicit in the definition of a “thorough and efficient” system of free schools, are “support services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.”<sup>100</sup> Thus, as the Court held in *Pauley*, the legislature is specifically charged with providing, by statute, an economical school system, together with good physical facilities, that allow school children to maximize their learning potential -- all of which is compatible with statutes governing school consolidations.

70. Pursuant to its constitutional mandate to provide for a thorough and efficient school system, the legislature provided, first in W. Va. Code § 18-5-13, that each county board may, among other

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<sup>97</sup> W. Va. Const. art. XII, § 1.

<sup>98</sup> *Pauley v. Kelly*, 162 W. Va. 672, 692, 255 S.E.2d 859, 870 (1979) (brackets in original); see also Syl. Pt. 1, *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 728, 474 S.E.2d 906, 908 (1996) (The “powers of the legislature within constitutional limits, are almost plenary.”)

<sup>99</sup> *Pauley v. Kelly*, 162 W. Va. 672, 705, 255 S.E.2d 859, 877 (1979).

<sup>100</sup> *Id.* at 877, 255 S.E.2d at 706

things, “consolidate schools.” Then, in W. Va. Code § 18-5-13a, the legislature provided the substantive and procedural rules that a county board must follow before a county board can make a final decision to consolidate schools. Among other things, W. Va. Code § 18-5-13a states that a county board shall, (i) prepare and reduce to writing its reasons and supporting data for the school closing or consolidation, (ii) provide notice for a public hearing, (iii) conduct a public hearing meeting multiple requirements, and (iv) follow the rules “promulgate[d]” by the State Board.<sup>101</sup>

71. Thus, W. Va. Code § 18-5-13a clearly dictates that if a county board follows the requirements set forth therein and any duly promulgated rules of the State Board, then it may make a final decision consolidating a school.<sup>102</sup> In this case, there is no contention that the Nicholas Co. BOE failed to follow the requirements of W. Va. Code § 18-5-13a or any promulgated, written rule of the State Board. Rather, the only contention by the Respondents is that the State Board may, because of their constitutional role, consider other factors not set forth in W. Va. Code § 18-5-13a or State Board Policy 6204 and reject the Nicholas Co. BOE’s CEFPP amendment.

72. Exercising its duty to provide for a thorough and efficient school system, the Legislature delegated to county boards the authority to consolidate schools and set forth the rules that it must follow in doing so. Any contention by the State Board that it can, without first promulgating a rule, reject a county board’s consolidation plan is directly repugnant to the legislature’s authority to provide for a thorough and efficient school system.<sup>103</sup>

73. Article XII, § 2 of the Constitution provides that “[t]he general supervision of the free schools of the State shall be vested in the West Virginia board of education *which shall perform*

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<sup>101</sup> W. Va. Code § 18-5-13a (1)-(4).

<sup>102</sup> See *City of Benwood v. Bd. of Educ., Cty. of Marshall*, 212 W.Va. 436, 438, 573 S.E.2d 347, 349 (2002) (“W. Va. Code § 18-5-13a sets forth the procedure school boards must follow before making a final decision to close or consolidate a school.”).

<sup>103</sup> W. Va. Code § 18-5-13a; State Board Policy 6204.

*such duties as may be prescribed by law.*”<sup>104</sup> The ultimate inquiry is how to reconcile the legislature’s authority and duty to provide for a “thorough and efficient” school system, and the State Board’s authority to generally supervise the school system. The very text of Article XII, § 2 and precedent of the West Virginia Supreme Court of Appeals answers that question.

74. First, Article XII, § 2 provides that the “general supervision” of schools is vested in the State Board, but that it “shall perform such duties as may be prescribed by law.” “The phrases, ‘prescribed by law’ and ‘provided by law,’ when used in Constitutions, generally mean prescribed or provided by statutes.”<sup>105</sup> The historical context of Article XII, § 2 sheds light on the significance of the clause, “as prescribed by law.” Prior to 1958, the State Board was a statutory body.<sup>106</sup> Originally, the authority to supervise the schools was vested in the State Superintendent of Schools. In 1958, the Constitution was amended, and the general supervision of free schools was vested in the State Board.<sup>107</sup> The 1958 amendment, which is the current text of Article XII, § 2, placed the authority to supervise the school system in the State Board, but limited that supervision to that which the Legislature might set forth by statute.<sup>108</sup>

75. In other words, the very text of the Constitution dictates that the State Board may only perform duties that are set forth in statute. The State Board may not simply take actions that are beyond any statutory mandate or promulgated rule, including, as in this case, rejecting a county board’s school consolidation plan based upon factors not set forth in W. Va. Code § 18-5-13a or rules promulgated pursuant thereto.

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<sup>104</sup> W. Va. Const. art. XII, § 2 (emphasis added).

<sup>105</sup> *Lawson v. Kanawha Cty. Court*, 80 W.Va. 612, 92 S.E. 786, 789 (1917).

<sup>106</sup> *See* 51 W. Va. Op. Att’y Gen. 852 (1966).

<sup>107</sup> *Id.* at \*10.

<sup>108</sup> *See Id.* (“The gist of Article XII’s Section 2, as amended in 1958, was to take from the State Superintendent of Free Schools and to place the authority to supervise the free school system in the West Virginia Board of Education, but that in such supervision by the West Virginia Board of Education, the Legislature might by statute (hence, “prescribed by law”) clarify the duties to be performed by the West Virginia Board of Education.”).

76. In addition to being contrary to the plain and unambiguous Constitutional text, the State Board's actions are inconsistent with decisions of the Supreme Court of Appeals, and its analysis of the Legislature's and the State Board's relative authority under the Constitution. In *Detch v. Bd. of Ed. of Greenbrier Cty.*,<sup>109</sup> the petitioner challenged a rule promulgated by the State Board that a child must turn six years of age before November 1 of the current school year in order to attend schools in West Virginia. The State Board promulgated the rule based on West Virginia Code § 18-5-15, which provided that schools of the State shall be open "to youths between the ages of six and twenty-one for the full school term."<sup>110</sup> Because of the rule, the county board denied admission to the petitioner because her birthday fell after November 1. In determining whether the State Board's rule was valid, the Court analyzed the relationship between the constitutional and statutory framework of education law in West Virginia.

77. First, the Court reasoned that Article XII, § 1 of the Constitution vested the legislature with power and duty to provide, by general law, for a thorough and efficient school system.<sup>111</sup> Pursuant to Article XII, Section 2, the court reasoned that, "the West Virginia Board of Education is created and vested with '[t]he general supervision of the free schools of the State, and it is required to perform such duties as may be prescribed by law.'"<sup>112</sup> In turn, the Legislature provided, pursuant to West Virginia Code § 18-2-5, that the West Virginia Board of Education shall make rules governing school attendance.<sup>113</sup>

78. Holding that the West Virginia Board of Education's school attendance rule was valid, the Court reasoned that the Legislature is "expressly commanded to provide [a thorough and efficient]

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<sup>109</sup> 145 W.Va. 722, 117 S.E.2d 138 (1960)

<sup>110</sup> *Id.* at 724, 117 S.E.2d at 140.

<sup>111</sup> *Id.* at 723, 117 S.E.2d at 140.

<sup>112</sup> *Id.* at 724, 117 S.E.2d at 140-141 (*emphasis added*).

<sup>113</sup> *Id.* at 724, 117 S.E.2d at 141.

system by general law.”<sup>114</sup> The legislature attempted to do so by directing the State Board to “make rules governing school attendance.”<sup>115</sup> The Court then noted the limitations on the State Board’s authority:

*Of course, it cannot be contended that the granting of such authority to the state board empowers it to promulgate rules contrary to clearly expressed legislative enactments within constitutional limitations, but the wide discretion vested in the state board makes it the duty of the courts to attempt to reconcile the intended meaning of such a resolution with existing legislative provisions, where to do so would not violate a valid, clearly expressed legislative enactment.*<sup>116</sup>

Accordingly, as the Court’s holding dictates, while the State Board may promulgate rules pursuant to the authority vested in it by the legislature, it cannot take actions that are contrary to express statutory requirements and regulations promulgated thereunder.

79. That is precisely what the State Board has done in this case. W. Va. Code § 18-5-13a provides the rules and procedures a county board must follow in consolidating and closing schools. This section, which governs school closures and consolidations, pertains directly to matters that are “thorough and efficient.” As the Supreme Court held in *Pauley v. Kelly*, a “thorough and efficient system of schools” encompasses whether the school system is being administered economically.<sup>117</sup> Further, “implicit in the definition” of “thorough and efficient” are, among other things, “good physical facilities,” and “careful state and local supervision to prevent waste.”<sup>118</sup> The definition of “thorough and efficient” thus comports with the very purpose of school

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<sup>114</sup> *Id.* at 728-29, 117 S.E.2d at 142.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (*emphasis added*).

<sup>117</sup> *Pauley*, 162 W.Va. at 705, 255 S.E.2d at 877.

<sup>118</sup> *Id.* at 877, 255 S.E.2d at 706; *see also DeRolph v. State*, 78 Ohio St. 3d 193, 213, 677 N.E.2d 733, 747 (1997) (“A thorough and efficient system of common schools includes facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner, in compliance with all local, state, and federal mandates.”).

consolidations, which are necessary to efficiently and effectively deliver to school students, good physical facilities, materials and supplies.<sup>119</sup> Therefore, because consolidation is within the purview of the “thorough and efficient” clause, the State Board is subject to the rules and requirements set forth in West Virginia Code § 18-3-13a.

80. Recognizing that county boards, which are composed of locally elected individuals, are better able to determine the specific needs of their individual counties, the legislature delegated the authority to local school boards to close and consolidate schools. The legislature then saw fit that the State Board, having general supervisory powers, should review, or in other words supervise, school consolidations to determine whether the county boards are following the requirements set forth in W. Va. Code § 18-3-13a. That section then directs that the State Board “shall promulgate a rule . . . detailing the type of supporting data a county board shall include as part of its written statement of reason required by this section for closing or consolidation.” The State Board promulgated rules in Policy 6204 that set forth the details that must be included in a county board’s written statement in support of its consolidation.<sup>120</sup>

81. In fact, the prefatory text of W. Va. Code § 18-5-13 (c) and (d) expressly makes a county board’s decision to close or consolidate a school “[s]ubject to the provisions of this chapter and the rules of the state board . . .” As such, in W. Va. Code § 18-5-13(c) and (d), the legislature expressly authorized a county board to close and consolidate schools conditioned only upon “the

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<sup>119</sup> In W. Va. Code § 18-9D-19, the Legislature recognized statewide difficulties with student enrollment, which has necessitated consolidations and the need for comprehensive schools: “The decline in student enrollment over the last twenty years has necessitated consolidation of schools in many counties . . . . The new consolidated school buildings now being built across the state provide an opportunity for communities to have comprehensive high schools that include space for vocational-technical courses . . . .” W. Va. Code § 18-9D-19. The legislature thus recognized that consolidation and the creation of comprehensive schools is necessary to deliver good physical facilities, which as the Court held in *Pauley*, is included within the purview of the “thorough and efficient” clause. The School Board’s CEFPA amendment includes the creation of such a comprehensive school.

<sup>120</sup> See, 126 C.S.R. § 176-1, *et seq.*



provisions of this chapter” and “the rules of the state board.” Accordingly, in considering a county board’s closure and consolidation proposal, the legislature did not authorize the State Board to impose additional conditions on county boards not found in state law or State Board policy.

82. W. Va. Code § 18-3-13a espouses the very model of education set forth in the Constitution -- with the legislature, through its “thorough and efficient” powers, delegating authority to local county boards, and the State Board supervising compliance with the legislature’s statute. In spite of the detailed list of factors in Policy 6204 and the statutory requirements in W. Va. Code § 18-5-13a, the State Board in this case went beyond its rules and required the county board to do something more. The State Board’s “general supervision” powers do not give it free reign to go outside statutes, rules, and regulations, because it may only take actions that are constitutionally “prescribed by law.”

83. Based on the foregoing, the Court finds and concludes that in considering a CEFP amendment to close and/or consolidate local schools, the State Board does not have unfettered discretion to simply substitute its judgment for that of a local county school board or consider arbitrary criteria not contained in WVBE policies or regulations.

84. Moreover, the Court further finds it patently unfair to arbitrarily change closure/consolidation requirements after a local school board has expended considerable time, effort and resources to comply with promulgated State Board policies. Such departure from WVBE policy and regulations is the textbook description of arbitrary conduct, as it results in disparate, inconsistent treatment of similarly situated parties by setting different standards for similar situations.<sup>121</sup>

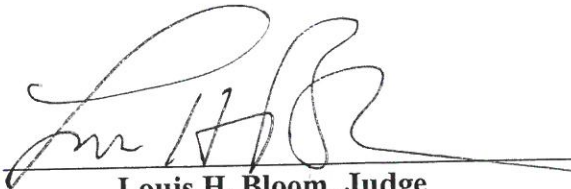
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<sup>121</sup> See *State ex rel. White v Parsons*, 199 W. Va. 1, 11, 483 S.E.2d 1, 11 (1996).

**DECISION**

Accordingly, the Court does hereby **GRANT** the Petitioner's request for the issuance of a writ of mandamus. The Petitioner has a clear legal right to the requested relief, therefore the Respondents are compelled to approve the Nicholas County Board of Education CEFP amendment, as Petitioner has no other remedy at law. There being nothing further, the Court does **ORDER** that the above-styled appeal be **DISMISSED** and **STRICKEN** from the docket of this Court. The Clerk is **DIRECTED** to send a certified copy of this *Final Order* to the parties and counsel of record.

ENTERED this 18<sup>th</sup> day of August 2017.

  
Louis H. Bloom, Judge

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 18  
DAY OF Aug 2017  
Cathy S. Gatson CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
B. M. D. O. U. L.