

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
CA
2021 SEP 29 PM 4:03
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

SAM BRUNETT and ROBERT
McCLOUD,

Petitioners/Plaintiffs,

v.

Civil Action No. 21-P-3410
21-P-341

CRAIG BLAIR, in his Official Capacity as
President of the West Virginia Senate,
ROGER HANSHAW, in his Official
Capacity as Speaker of the West Virginia
House of Delegates, JIM JUSTICE, in his
Official Capacity as Governor of West
Virginia

Respondents/Defendants.

VERIFIED COMPLAINT AND PETITION
FOR WRIT OF MANDAMUS AND INJUNCTIVE RELIEF

INTRODUCTION

1. A defining democratic virtue of public schools is that the people get to vote on matters relating to their operation—in school board elections, on proposed school levies, for state office holders and referenda, and, importantly, the constitution itself.

2. In 1872, the people of West Virginia safeguarded their right to vote on public school matters in the West Virginia Constitution, ratifying article 12, section 10, which prohibits the creation of independent school organizations absent the consent of county voters.

3. In 2021, the Legislature and Governor disregarded this clear legal right and their legal duty by enacting H.B. 2012, authorizing the creation of certain charter schools as independent school organizations without the consent of county voters.

4. This resulting action is brought by West Virginia citizen-parent-educators to compel state lawmakers to comply with the West Virginia Constitution.

JURISDICTION

5. This Court has jurisdiction pursuant to W. Va. Const. art. 8, § 6 and W. Va. Code §§ 53-1-2, 53-5-4, & 55-13-1.

6. Venue is proper in this Court pursuant to W. Va. Code § 14-2-2.

PARTIES

7. Sam Brunett, a resident of Marion County, is a parent of children enrolled in Marion County Schools and Harrison County Schools. Brunett is also public school teacher at Morgantown High School in Monongalia County Schools, where he also serves as president of the Monongalia County chapter of the American Federation of Teachers. As citizen, parent, and educator, Brunett wants the opportunity to vote on the creation of any charter schools the Professional Charter School Board may authorize in Marion County. H.B. 2012 affords him no such opportunity.

8. Robert D. McCloud is a resident of Kanawha County, parent of child enrolled in the Kanawha County Schools, and a public school teacher at Riverside High School. As citizen, parent, and educator, McCloud wants the opportunity to vote on the creation of any charter schools the Professional Charter School Board may authorize in Kanawha County. H.B. 2012 affords him no such opportunity.

9. Craig Blair is the President of the West Virginia Senate, who was acting in such official capacity during the passage of H.B. 2012. H.B. 2012 requires the advice and consent of the Senate for the five voting members of the West Virginia Professional Charter School Board appointed by the Governor.

10. Roger Hanshaw is the Speaker of the West Virginia House of Delegates, who was acting in such official capacity during the passage of H.B. 2012.

11. Jim Justice is the Governor of the State of West Virginia, who, in his official capacity, signed into law H.B. 2012. H.B. 2012 authorizes Governor Justice to appoint five voting members of the West Virginia Professional Charter School Board. Members of that Board are subject to removal by Governor Justice.

FACTS

W.VA. CONST. ART. 12, § 10

12. Article 12, section 10 of the West Virginia Constitution states: “No independent free school district, or organization shall hereafter be created, except with the consent of the school district or districts out of which the same is to be created, expressed by a majority of the voters voting on the question.”

H.B. 2012

13. H.B. 2012’s constitutional infirmity is the product of legislative maneuvering that predates the 2021 regular session. During the 2019 regular session, an education omnibus bill, S.B. 451, would have authorized the establishment of charter schools in West Virginia. S.B. 451 defined a “Public charter school” by reference to its organizational independence: “a public corporate body, exercising public power through its governing board” as having “autonomy over decisions relating to finance, personnel, scheduling, curriculum, and instruction,” and as “independent of a county board.”¹

14. S.B. 451 further required any application to establish a charter school to include a

¹ Engrossed Committee Substitute for Senate Bill 451, 27:40–47 (Reported on Jan. 31, 2019), http://www.wvlegislature.gov/Bill_Text_HTML/2019_SESSIONS/RS/bills/SB451%20SUB1%20ENG.pdf.

“proposed governance structure of the school, including . . . the organizational structure of the school that clearly presents lines of authority and reporting” with, among other entities, “any external organizations that will play a role in managing the school.” Charter authorizers would have had to also ensure “professional standards” regarding “Organizational capacity and infrastructure.”²

15. Some senators objected to S.B. 451 on the ground that it allowed for the creation of *independent* school *organizations* without the consent of a majority of voters in the county in which the charter school would operate—in violation of article 12, section 10 of the West Virginia Constitution. S.B. 451 narrowly passed the Senate.³

16. When it returned to the Senate following significant House amendments, however, a strike-and-insert version was introduced with “language declaring that a public charter school is considered a part of the school district in which it’s located,” and not—as the prior versions had stipulated—“independent” of such county school districts.⁴

17. This new strike-and-insert version of S.B. 451 again narrowly passed the Senate but it was ultimately defeated by a motion to postpone indefinitely adopted in the House.

18. All relevant versions of the defeated S.B. 451 would have approved the creation of a “West Virginia Public Charter School Commission” as a charter school authorizer. The proposed

² *Id.* 34:19–24, 37:16–18.

³ See Ryan Quinn, *By Slimmest Margin, WV Senate Sends Education Bill to House*, CHARLESTON GAZETTE-MAIL (Feb. 4, 2019), https://www.wvgazette.com/news/education/by-slimmest-margin-wv-senate-sends-education-bill-to-house/article_a73b6a55-de2b-5219-8ac0-7c54f708e8fe.html.

⁴ See Brad McElhinny, *West Virginia Teachers Unions Call Strike as Senate Brings Back Charters, ESAs*, WV METRO NEWS (Feb. 18, 2019), <https://wvmetronews.com/2019/02/18/with-discussions-continuing-senate-puts-off-action-on-big-education-bill/>; SB 451 SFA #1 RUCKER 2–18 (Feb. 18, 2019), https://www.wvlegislature.gov/legisdocs/chamber/2019/RS/floor_amends/SB451%20SFA%20_1%20RUCKER%202-18%20ADOPTED.htm.

commission was to “report directly to and be responsible to the state board, separate from the Department of Education,” and “subject to the general supervision of the state board solely for the purposes of accountability for meeting the standards for student performance.” Questions and concerns, however, were raised about the proposed Commission’s role and authority.⁵

19. Following S.B. 451’s defeat, Governor Justice called a special legislative session on education matters. In the interim, the West Virginia Department of Education held a series of “public forums as part of a statewide listening tour,” seeking input from the public and key stakeholders on issues raised by S.B. 451 in advance of the special session.⁶

20. The Department of Education thereafter released a report, “West Virginia’s Voice” identifying four “top priorities” based on its analysis of the feedback it received:

- “Provide a pay raise to all school employees;”
- “Increase funding for social emotional supports with local flexibility;”
- “Incentivize high-performing schools by providing additional flexibility;” and
- “Fund a supplement to strengthen teachers’ skills in shortage areas with an initial focus on math.”⁷

21. “Most participants reported opposition to the creation of charter schools.” Indeed, “88% disagreed with creating charter schools,” among the 690 who submitted comment cards. Accordingly, the report concluded: “If the Legislature intends to authorize the establishment of public charter schools, it is suggested they be limited in number and subject to certain statutory

⁵ See Jeff Morris, Bob Aaron, Kennie Bass, *West Virginia Senate Reviewing Controversial Education Reform Bill*, WCHSTV (Jan. 30, 2019), <https://wchstv.com/news/local/west-virginia-senate-to-discuss-controversial-education-reform-bill-wednesday>.

⁶ See Jeff Morris, *Six Public Forums to be Hosted in W.Va. to Discuss Possible Education Reform*, WCHSTV (Mar. 11, 2019), <https://wchstv.com/news/local/six-public-forums-to-be-hosted-in-wva-to-discuss-possible-education-reform>.

⁷ WEST VIRGINIA DEPARTMENT OF EDUCATION, *WEST VIRGINIA’S VOICE FINAL REPORT*, 4 (May 2019) (WEST VIRGINIA’S VOICE), <https://wvde.us/wp-content/uploads/2019/05/Education-Forum-Final-Report.pdf>.

protections.” The report made the following recommendations:⁸

Recommendations

- 3.4.1. Implement the following requirements if a limited number of charter schools are authorized:
 - a. Place oversight/authorization responsibility with the West Virginia Board of Education and local boards of education;
 - b. Prohibit for-profit schools and management companies, and virtual charter schools;
 - c. Report Balanced Scorecard results for charter schools;
 - d. Require use of random lottery for oversubscribed schools to ensure open access to all students;
 - e. Require public charter schools to provide services to students with disabilities, English language learners and other high-needs students;
 - f. Develop minimum level of qualifications for charter school educators; and
 - g. Evaluate successes of pilot charter schools for potential extension of the same flexibilities to traditional public schools.

22. S.B. 451, resurrected in the special session as H.B. 206, heeded some of these recommendations. Most relevant here, H.B. 206 followed the Department of Education’s recommendation to “Place oversight/authorization responsibility with the West Virginia Board of Education and local boards of education” through the following changes:

- H.B. 206 specified that “All public charter schools established under this article are public schools and are *part of the state’s public education system*.”⁹ S.B. 451 included no such explicit provision.
- Whereas S.B. 451 defined “Public charter school” as “a *public corporate board*, exercising public power through its governing board,” with “autonomy over decisions,” H.B. 206 defined “Public charter school” as “a *public school or program* within a public school [that] meets the general criteria, governance structure and statutory compliance requirements [contained in the statute].”¹⁰
- Unlike S.B. 451, H.B. 206 clarified that “The *school district* in which the public charter

⁸ *Id.* at 20.

⁹ Enrolled House Bill 206, 42:22–23 (Passed June 24, 2019), https://www.wvlegislature.gov/Bill_Text_HTML/2019_SESSIONS/1X/signed_bills/house/HB206%20ENR_signed.pdf, codified at W. Va. Code § 18–5G–3(a)(1) (emphasis added).

¹⁰ *Id.* at 45:51–54, codified at W. Va. Code § 18-5G-2(11) (emphasis added).

school is located remains the local educational agency for all public charter schools authorized by the county board and the public charter school is a school *within* that local educational agency except that the public charter school is treated as a local educational agency for purposes of applying for competitive federal grants.”¹¹

- Unlike S.B. 451, H.B. 206 contained no provision authorizing the creation of a “West Virginia Public Charter School Commission.”

23. H.B. 206 passed both the House and Senate and was signed into law by Governor Justice in June 2019. National charter school proponents promptly voiced their displeasure with the new charter school law, disapproving that it limited charter school authorizers to county boards of education (and the state board in a few instances).¹²

24. “Superintendent Steven Paine said...that the National Alliance for Public Charter Schools [was] so displeased with West Virginia’s law, they wouldn’t provide assistance in designing the state’s new charter school policy.”¹³ Charter school advocates were also dissatisfied with the cap of the pilot program—limited to no more than three charter schools in the 2021–2022 school year and an additional three charter schools after July 1, 2023. ““They don’t think it’s going to work,’ [Paine] said.”¹⁴ ““They’re used to dealing with private companies that try to make money off of charter schools,’ Paine said. ‘There are many diverse authorizers that are out there and they

¹¹ *Id.* at 53:27–54:29–33.

¹² See Glynis Board, *Q&A: National Charter School Proponent Weighs in on W.Va.’s Education Bill*, WV PUBLIC BROADCASTING (Jul. 19, 2019), <https://www.wvpublic.org/news/2019-07-19/q-a-national-charter-school-proponent-weighs-in-on-w-va-s-education-bill>;

¹³ See Erin Beck, *Charter School Advocates “Perturbed,”* THE REGISTER-HERALD (Aug. 17, 2019), https://www.register-herald.com/news/charter-school-advocates-perturbed/article_57624bab-074f-59af-9482-993cf68262b4.html.

¹⁴ *Id.*

think the more the merrier.”¹⁵

25. On July 24, 2020, West Virginia Academy submitted the first and only application for a charter school to the boards of education for Monongalia County and Preston County. The Monongalia County Board of Education unanimously voted to deny that application on November 30, 2020.¹⁶

26. Shortly thereafter, commenting on the upcoming 2021 regular legislative session, a lead sponsor of school choice legislation, Senator Patricia Rucker, emphasized the need to make changes to the charter school law, most notably to “establish an authorizing body for approving [charter] schools,” addressing the prior complaints of national charter school advocates. “Rucker noted she planned to push changes before the local boards’ decisions,” contending that “local education leaders will reject charter schools, as they perceive the institutions as competition to public institutions.”¹⁷

27. Sure enough, H.B. 2012 reversed key provisions of the 2019 statute that previously subjected charter schools to the oversight of state and county boards of education. Among the changes making charter schools more independent are the following:

- Striking language from the 2019 statute maintaining the county school district as the “local educational agency,” H.B. 2012 provides instead that “Any public charter school

¹⁵ *Id.*

¹⁶ See Matt Harvey, *Supreme Court Sides with Mon County on Charter School Application*, WV NEWS (Jun. 22, 2021), https://www.wvnews.com/supreme-court-sides-with-mon-county-on-charter-school-application/article_3496463c-0495-5448-bed0-1b13d9e5556a.html. In a subsequent legal challenge to the denial of West Virginia Academy’s charter school application, the Supreme Court of Appeals of West Virginia unanimously ruled that the Department of Education was not required to approve West Virginia Academy’s application, observing that the “2019 version” of the charter school law did not empower the Department to “serve as an appellate tribunal to decide whether a county board of education authorizer properly and timely conducted its application review.” *State ex rel. WV Acad., LTD v. West Virginia Dep’t of Educ.*, No. 21-0097, 2021 WL 2435876, at *4 (W. Va. June 15, 2021).

¹⁷ MetroNews Staff, *Rucker Hopeful to Change Charter School Law*, METRONews (Dec. 6, 2020), <https://wvmetronews.com/2020/12/06/rucker-hopeful-to-change-charter-school-law/>.

authorized pursuant to this article shall be treated and act as its *own* local education agency for all purposes.”¹⁸

- H.B. 2012 also strikes language from the 2019 statute that required the charter contract to include “The specific commitments of the authorizer relating to its obligations to oversee, monitor the progress of, and supervise the public charter school.”
- H.B. 2012 permits a charter applicant to appeal the decision of a county board of education denying the application.¹⁹ It further permits such an appeal when a county board of education fails to renew a charter contract.²⁰
- Most significantly, H.B. 2012 establishes the “West Virginia Professional Charter School Board” (PCSB) as a charter authorizer, S.B. 451’s “Commission” by another name. Although H.B. 2012 states that PCSB “shall report directly to and be responsible to the state board separate from the Department of Education,” it is subject to the state board’s supervision “solely for the purposes of accountability for meeting the standards for student performance.” In all other respects, the PCSB is independent of school districts and the state board in that PCSB is appointed by the Governor; confirmed by the Senate; permitted to appoint an executive director and staff; authorized to create, renew, nonrenew, or revoke charter schools; entitled to civil liability immunity; afforded discretion to audit PCSB-authorized charter schools; and empowered to “take corrective actions or exercise sanctions” for charter school law violations.²¹

¹⁸ Enrolled H.B. 2012, 10:27–29 (Passed Mar. 3, 2021), codified at W. Va. Code § 18-5G-5(c) (emphasis added).

¹⁹ *Id.* at 25, codified at W. Va. Code § 18-5G-13.

²⁰ *Id.* at 19:45–46, codified at W. Va. Code § 18-5G-10.

²¹ *See id.* at 29–32, codified at W. Va. Code § 18-5G-15.

- H.B. 2012 deprives county boards of education “management and control” over PCSB-authorized charter schools.²² Except on the issue of “student performance,” H.B. 2012 also deprives the state board of general supervision over PCSB-authorized charter schools.²³

28. H.B. 2012 passed the House and Senate and was signed into law by Governor Justice on March 11, 2021.

29. On July 2, 2021, Governor Justice appointed five individuals to the PCSB and, as of this writing, are awaiting confirmation by the state Senate.

30. As of September 7, 2021, seven applicants have sought to have PCSB authorize charter schools, including “three statewide online” charter schools, two of which operated by publicly traded companies, a third operated by ACCEL Schools, “part of a private international company Pansophic Learning.” ACCEL has also proposed to operate a “brick-and-mortar” charter school, “Nitro Preparatory Academy, which would draw students from Kanawha and Putnam, with “plans to serve 600 students in K-8 at full capacity.” Two additional brick-and-mortar charters have sought authorization—“The Shepherd Aviation Academy, seeking to draw up to 360 9th- to 12th-grade students from Jefferson and Berkeley counties, and the West Virginia Academy, a K-12 school that would be in the Cheat Lake community near Morgantown.”²⁴

31. The earliest deadline for the PCSB to consider a charter school application is November 17, 2021, which, on information and belief, is ninety (90) days from the submission of

²² See *id.* at 5:41–43, codified at W. Va. Code § 18-5G-2(6).

²³ See *id.* at 29:1–9, codified at W. Va. Code § 18-5G-15(a).

²⁴ See Ryan Quinn, *7 Charter Schools Seeking to Open in WV Online and in Nitro, Cheat Lake, Eastern Panhandle* CHARLESTON GAZETTE-MAIL (Sept 7, 2021), https://www.wvgazette.com/news/education/7-charter-schools-seeking-to-open-in-wv-online-and-in-nitro-cheat-lake-eastern/article_2f3a6b44-70ae-51ae-bae8-b5adbc412963.html.

West Virginia Academy's charter school application.²⁵ The charter school law provides that "No later than 90 days following the filing of the charter application, the authorizer shall approve or deny the charter application [otherwise] failure to act on a charter application within the time specified shall be deemed an approval by the authorizer." W. Va. Code § 18-5G-6.

COUNT I

Violation of W. Va. Const. art. 12, § 10

32. H.B. 2012, codified at W. Va. Code § 18-5G-1 *et seq.*, mandates PCSB-authorized charter schools to be self-operated as their own local education agencies subject only to PCSB's limited supervision.

33. H.B. 2012 deprives county school boards and superintendents of oversight over PCSB-authorized charter schools.

34. PCSB-authorized charter schools are subject to the state board's indirect supervision through PCSB only with respect to student performance—they are not subject to the state board's "general supervision," as required under W. Va. Const. art. 12, § 2.

35. PCSB-authorized charter schools are otherwise exempt from most statutes, regulations, and policies governing public schools.

36. H.B. 2012 thus enables PCSB and its authorized charter schools to function outside the public education system.

37. Petitioners Burnett and McCloud want the opportunity to vote on the creation of any charter schools which PCSB may authorized in their respective counties, a clear legal right that article 12, section 10 of the West Virginia Constitution affords them, but H.B. 2012 denies

²⁵ See Ryan Quinn, *WV Ed. Dept. Giving State Charter Board \$200K; Public Hearings Start Soon On Proposed Schools*, CHARLESTON GAZETTE-MAIL (Sept 20, 2021), https://www.wvgazette.com/news/education/wv-ed-dept-giving-state-charter-board-200k-public-hearings-start-soon-on-proposed-schools/article_7b3b8e04-95ef-5624-9780-4b03fe436a17.html

them.

38. Accordingly, H.B. 2012 approves the creation of PCSB-authorized charter schools—*independent free school organizations*—without the consent of a majority of voters in the county or counties in which PCSB-authorized charter schools operate. H.B. 2012 therefore violates article 12, section 10 of the West Virginia Constitution.

39. Respondents have a legal duty to comply with W. Va. Const. art. 12, §1 and permit Petitioners the opportunity to first vote on the creation of any PCSB authorized charter school.

40. Petitioners have no adequate remedy at law to cure the constitutional violations inherent in W. Va. Code § 18-5G-1 *et seq.*

41. Petitioners will suffer irreparable harm if PCSB-authorized charter schools—*independent free school organizations*—are created without the consent of a majority of voters in the county or counties in which PCSB-authorized charter schools operate.

42. The public interest is served by permitting voters in the county or counties in which PCSB-authorized charter schools operate to vote on the establishment of such PCSB-authorized charter schools—*independent free school organizations*—consistent with W. Va. Const. art. 12, § 1.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Court:

- A. Issue a rule in mandamus directing Respondents to show cause why this Court should not order Respondents to comply with the clear legal right and duty of W. Va. Const. art. 12, §10 to permit county residents the opportunity to vote on the creation of any PCSB-authorized charter schools;

- B. In the alternative, enjoin the creation of any PCSB-authorized charter schools absent a vote of county residents consistent with W. Va. Const. art. 12, § 10;
- C. Declare that W. Va. Code § 18-5G-1 et seq. is unconstitutional in violation of W. Va. Const. art. 12, § 1;
- D. Award Petitioners reasonable attorney fees and costs in bringing this action to enforce provisions of the West Virginia Constitution; and
- E. Issue such other relief as the Court deems equitable and just.

**PETITIONERS
By Counsel**

Joshua E. Weishart (State Bar No. 12639)
P.O. Box 1295
Morgantown WV 26507-1295
(510) 295-8837
Joshua.Weishart@gmail.com
Counsel for Petitioners

Jeffrey G. Blaydes (State Bar No. 6473)
Blaydes Law, PLLC
2442 Kanawha Blvd., E.
Charleston, WV 25311
(304) 342-3650
(304) 342-3650 (fax)
wvjustice@aol.com
Counsel for Petitioners


Bren J. Pomponio (State Bar No. 7774)
Mountain State Justice, Inc.
1217 Quarrier Street
Charleston, WV 23501
(304) 344-3144
(304) 344-3145 (fax)
bren@msjlaw.org
Counsel for Petitioners

Lydia C. Milnes (State Bar No. 10598)
Mountain State Justice, Inc.
1029 University Ave., Suite 101
Morgantown, WV 26505
(304) 326-0188
(304) 326-0189 (fax)
lydia@msjlaw.org
Counsel for Petitioners