

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 22-616

STATE OF WEST VIRGINIA,

Petitioner,

and

**KATIE SWITZER AND
JENNIFER COMPTON,**

Petitioners,

v.

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

Respondents.

From the Circuit Court of Kanawha County
Civ. Act. Nos. 22-P-24 & 22-P-26
and
Intermediate Court of Appeals of West Virginia
No. 22-ICA-1 (Consolidated with 22-ICA-3)

***AMICUS CURIAE* BRIEF OF THE ARC OF WEST VIRGINIA,
ASTRIVE ADVOCACY, INC., MOUNTAIN STATE JUSTICE, INC.,
WEST VIRGINIA CENTER FOR BUDGET AND POLICY, AND
WEST VIRGINIA STATEWIDE INDEPENDENT LIVING COUNCIL
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

INTEREST OF <i>AMICI CURIAE</i> AND AUTHORITY TO FILE.....	1
INTRODUCTION.....	3
ARGUMENT.....	4
I. THE BENEFITS OF THE VOUCHER PROGRAM ARE LARGELY LIMITED TO ALREADY ADVANTAGED FAMILIES WHILE ACTIVELY HURTING RURAL FAMILIES AND COMMUNITIES.....	4
A. The “Choice” for Rural Students is an Illusory One.....	4
1. Physical Access.....	4
2. Availability of Transportation.....	6
3. The Digital Divide & Virtual Schools.....	6
4. Homeschooling.....	7
B. There are No Safeguards to Protect Free Public Schools in Rural Areas.....	8
1. No Income or Enrollments Limits.....	8
2. The Hidden Community Cost.....	10
II. THE WEST VIRGINIA VOUCHER PROGRAM HARMS THE MOST VULNERABLE STUDENTS—THOSE WITH SIGNIFICANT DISABILITIES— AND FACILITATES DISCRIMINATION AGAINST THEM.....	10
A. The Voucher Program Will Not Provide School Choice to West Virginia Students with Disabilities, Especially Those with the Most Significant Disabilities.....	12
B. The Cost of Education for Students with Disabilities Far Exceeds the Funding Provided by the Voucher Program.....	13
C. Students with Disabilities Who Do Find a Way to Take Advantage of the Voucher Program Must Give Up Their Federal Right to Special Education.....	14
D. The Voucher Program Promotes Discrimination Against and Segregation of Students with Disabilities.....	15
E. Students with Disabilities will be Disproportionately Harmed by Reduced Public School Funding.....	16
CONCLUSION.....	17

TABLE OF AUTHORITIES

CASES

Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).....10

STATUTES

29 U.S.C. § 794.....15

33 U.S.C. § 1400.....11, 14, 15

33 U.S.C. § 1414.....11

42 U.S.C. 12131.....15

W. VA. CONST. art. XII.....3

W. Va. Code § 18-1-4.....3

W. Va. Code § 18-31-11.....11

W. Va. Code R. 126-136-3.....7

OTHER AUTHORITIES

Allen, Kelly, *Hope Scholarship Would Be Nation’s Broadest, Likely Most Costly ESA Program Despite Lack of Evidence of Equitable Education Outcomes*, W. VA. CTR. ON BUDGET AND POL’Y (Feb. 19, 2021), <https://wvpolicy.org/hope-scholarship-would-be-nations-broadest-likely-most-costly-esa-program-despite-lack-of-evidence-of-equitable-education-outcomes/> (last visited Sept. 22, 2022).....8, 9

Baffour, Perpetual, et al., *Workin’ 9 to 5*, CENTER FOR AMERICAN PROGRESS (Oct. 11, 2016) <https://www.americanprogress.org/article/workin-9-to-5-2/>.....6

Brief for Petitioner, *State of West Virginia v. Beaver, et al*, No. 22-616 (2022).....8

Brown, Catherine and Campbell, Neil, *Vouchers Are Not a Viable Solution for Vast Swaths of America*, CENTER FOR AMERICAN PROGRESS (Mar. 3, 2017), <https://www.americanprogress.org/article/vouchers-are-not-a-viable-solution-for-vast-swaths-of-america/>.....9

EDCHOICE, *West Virginia Hope Scholarship Program*, <https://www.edchoice.org/school-choice/programs/hope-scholarship-program/#:~:text=West%20Virginia%20Hope%20Scholarships%20are,public%20school%20per%2Dstudent%20spending>.....10

EDUC. MKT. ASSIST., <i>Hope Scholarship Parent Handbook</i> , (pub. Mar. 1, 2022), https://www.hopescholarshipwv.com/Portals/hopescholarshipwv/content/Documents/2022-23%20WV%20Hope%20Parent%20Handbook%20FINAL_AW.pdf	14
Hodousek, Carrie, <i>Teacher Shortage ‘Significant’ in WV as Students Prepare to Head Back to School</i> , W. VA. METRONNEWS (Aug. 5, 2022), https://wvmetronews.com/2022/08/05/teacher-shortage-significant-in-wv-as-students-prepare-to-head-back-to-school/	16
Johnson, Michael, et al., <i>Portfolio of Choice: School Choice in Rural Communities</i> , National Comprehensive Center (2020), https://compcenternetnetwork.org/sites/default/files/Portfolio%20of%20Choice%20Rural%20School%20Choice.pdf	4, 10
Kamenetz, Anya, <i>For Families with Special Needs, Vouchers Bring Choices, Not Guarantees</i> , NPR (May 17, 2017), https://tinyurl.com/y554h985	13
McElhinny, Brad, <i>More than 3000 Students Awarded Scholarship to Support Costs After Leaving Public Schools</i> , W. Va. METRONNEWS (June 1, 2022), https://wvmetronews.com/2022/06/01/more-than-3000-students-awarded-new-scholarship-to-support-costs-after-leaving-public-school/	5
McCormick, Liz, <i>Student Enrollment is Down in W. Va. K-12 Schools This Year</i> , W. VA. PUBLIC BROADCASTING (Nov. 12, 2021), https://www.wvpublic.org/section/education/2021-11-12/student-enrollment-is-down-in-w-va-k-12-schools-this-year	14
NAT’L COAL. FOR PUB. EDUC., <i>Voucher Facts</i> , https://www.ncpecoalition.org/students-with-disabilities	12
NAT’L COAL. FOR PUB. EDUC., <i>Vouchers Don’t Work in Rural Areas</i> , https://www.ncpecoalition.org/ruralvouchers	9, 10
NAT’L COUNCIL ON DISABILITY, <i>School Choice Series: Choice and Vouchers Implications for Students with Disabilities</i> , https://www.ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf	11
PRIVATE SCHOOL REVIEW, <i>Best West Virginia Private Schools</i> , https://www.privateschoolreview.com/west-virginia	5, 8
PRIVATE SCHOOL REVIEW, <i>Feed My Sheep Christian School</i> , https://www.privateschoolreview.com/feed-my-sheep-christian-school-profile	5
SCHOOL CHOICE DEMONSTRATION NETWORK, <i>Special Education and the Milwaukee Parental Choice Program</i> (Feb. 2012), ED530070.pdf.....	12
Taglang, Kevin, <i>Capital Projects Fund Aids West Virginia’s Billion Dollar Broadband Strategy</i> , BENTON INSTITUTE FOR BROADBAND SOCIETY (June 9, 2022), https://www.benton.org/blog/capital-projects-fund-aids-west-virginias-billion-dollar-broadband-strategy	7

W. VA. DEPT. OF EDUC., <i>Accredited and Registered Non-Public Schools</i> , https://wvde.us/nonpublic-school-information/accruited-and-registered-non-public-schools/	15
W. VA. DEP’T. OF EDUC., <i>IDEA Child Count and Educational Environment Snap-shot</i> , https://wvde.us/wp-content/uploads/2021/07/2020-21-Child-Count-and-Educational-Environment-Public-Snapshot.pdf	14
W. VA. DEP’T. OF EDUC., <i>Executive Summary: Assuring the Quality of Education: Digital Equity</i> (2020), https://wvde.us/wp-content/uploads/2020/03/PSSP-21-Executive-Summary-Final-Comps.pdf	6, 7
W. VA. DEP’T. OF EDUC., <i>Executive Summary: Final Computations Public School Support Program for the 2021-22 Year</i> (2021), https://wvde.us/wp-content/uploads/2021/04/COMPS22.pdf	17
W. VA. DEP’T. OF EDUC., <i>Final Computations Public School Support Program for the 2021-22 Year</i> (2021), https://wvde.us/wp-content/uploads/2021/04/COMPS22.pdf	4, 5
W. VA. DEP’T. OF EDUC., <i>Fiscal Note Summary</i> , (Feb. 19, 2021), https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152	9
W. VA. DEP’T. OF EDUC., <i>High Cost Expenditure/High Acuity Fund For Reimbursement of Expenses for Students with Disabilities for FY2022</i> , https://wvde.us/wp-content/uploads/2022/04/FY-2022-State-Plan-HCHA-002.pdf	13
W. VA. DEP’T. OF EDUC., <i>West Virginia Students with Disabilities in Out-of-State Facilities</i> (2020), https://wvde.us/wp-content/uploads/2021/05/21759-WV-Students-with-Disabilities-in-Out-of-State-Facilities-Report-FY20-v3.pdf	13
U.S. DEPT. OF AGRIC., <i>Rural Education</i> (last updated April 23, 2021), https://www.ers.usda.gov/topics/rural-economy-population/employment-education/rural-education/	7
U.S. DEPT OF EDUC., <i>Evaluation of the DC Opportunity Scholarship Program</i> , https://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf	12

INTEREST OF *AMICI CURIAE*

The Arc of West Virginia is an advocacy organization supporting the rights of people with cognitive, intellectual, and related developmental disabilities throughout the state. The Arc administers the People First of West Virginia grant and our mission is, “To promote self-advocacy by speaking and acting on behalf of the rights and responsibilities of all people with developmental disabilities.” Education, housing, and employment are the top three requests for advocacy and support. We strongly believe that a free and appropriate education is a basic right of every child in West Virginia and are concerned that the diversion of funding to schools through the WV Hope Scholarship voucher program will result in discriminatory and harmful practices against students with disabilities. Further, limited funding will be stretched thin, negatively impacting children with developmental disabilities as their needs will go unmet.¹

Astrive Advocacy, Inc. is a 501c3 non-profit organization that is committed to improving the lives of children and adults with disabilities and their families by serving as a resource for training and support for individuals, families, employers, policymakers, and members of the community. One key area of focus for these initiatives is special education. The executive director, who is also the parent of a child with a developmental disability, has more than 20 years of experience leading non-profit disability advocacy agencies in West Virginia. With assistance for the development and implementation of effective Individualized Education Plans, lack of appropriate assessments and evaluations, inappropriate disciplinary actions and lack of positive behavior supports, and schools and districts not providing accommodations or modifications needed for the student to be successful being the primary reason for referral calls to these agencies, she has personally assisted hundreds of families and

¹ No party, party’s counsel, individual or organization other than *amici* authored any part of this brief or contributed funds for its preparation or submission.

adult students navigating the special education system to access appropriate educational supports and services. In addition, she has advocated on local, state, and federal levels for the rights of students to be included in the public school system and has strongly expressed significant concern about private schools in West Virginia not accepting students with disabilities.

Mountain State Justice, Inc. is a non-profit legal services firm dedicated to redressing entrenched and emerging systemic social, political, and economic imbalances of power for underserved West Virginians through legal advocacy and community empowerment. Through class actions, individual cases, and policy advocacy, Mountain State Justice has assisted thousands of individuals fighting to protect their families, their homes, their health and safety, their right to education, and their livelihoods. Mountain State Justice has represented numerous West Virginia families of students with disabilities who receive special education services in the public school system and has first-hand knowledge about the scarcity of private schools in West Virginia that will accept students with disabilities.

The West Virginia Center on Budget and Policy is a non-profit organization that conducts research and analysis on public policy issues to advance the well-being of West Virginia of families and communities and support the essential role of government in improving the quality of life for all residents. In addition to research on tax and budget issues and family economic security, the WVCBP often focuses on the state's public education system and analyzes legislative education proposals. Our analysis of the Hope Scholarship during its consideration outlined its likely harms to low-income and rural students and school districts.

The West Virginia Statewide Independent Living Council (WVSILC) is a non-profit, 501(c)(3) organization governed by a 31-member council, appointed by the Governor, to represent persons with disabilities throughout the state. The mission of the WVSILC is to promote the value,

equality, full-inclusion, and freedom of choice of all West Virginians with disabilities. The WVSILC formed an Education Task Force which developed a report on education issues for students with disabilities in West Virginia. This report identified significant issues and developed recommendations to address those issues to improve public education for students with disabilities.

INTRODUCTION

Article XII of the West Virginia Constitution states that “the Legislature shall provide, by general law, for a thorough and efficient system of free schools.” W. Va. Const. art. XII. The West Virginia Legislature expanded on the purpose of public education in W. Va. Code § 18-1-4 by setting forth specific goals including, but not limited to, that “the public education system will maintain and promote the health and safety of *all* students and will develop and promote responsibility, citizenship and strong character in all students; and the public education system will provide equitable education opportunity to all students.” W. Va. Code § 18-1-4(e) (emphasis added).

The West Virginia Hope Scholarship voucher program (the “Voucher Program”), by contrast, will provide educational opportunities only to those students who are already at an advantage—students who come from higher-income families, live in areas with access to private schools or other service providers (such as border counties or urban centers), have access to reliable transportation and broadband internet, and those who do not have disabilities that would bar their access to private schools. In other words, the Voucher Program provides public funds to already advantaged students, while leaving behind the students that need the most assistance.

ARGUMENT

I. THE BENEFITS OF THE VOUCHER PROGRAM ARE LARGELY LIMITED TO ALREADY ADVANTAGED FAMILIES WHILE ACTIVELY HURTING RURAL FAMILIES AND COMMUNITIES.

The Voucher Program, and other voucher programs like it, *may*² enhance the prospects of certain already advantaged students, but those purported advantages do not often extend to rural communities, their students, and schools. Because of their oft-remote locations³, lack of widely available transportation⁴ and broadband internet⁵, as well as a disproportionate lack of home instructor certification requirements⁶, rural communities and families without substantial economic means face unique and substantial barriers to accessing the purported benefits of policies like the Voucher Program. By virtue of being unable to utilize the Program, they will be actively harmed by it.

A. The “Choice” for Rural Students is an Illusory One.

1. Physical Access

Where there are few, if any, private schools to choose from, students in rural—sparsely populated—educational areas will not be able to take advantage of the Voucher Program like those living in more densely populated areas. Of the fifty-five counties in West Virginia, 35 counties—roughly 64 percent—have either a “sparse” or “low” student population density within their school districts.⁷ In contrast, seven counties have a “medium” population density of students and 13 have

² See Michael Johnson, et al., *Portfolio of Choice: School Choice in Rural Communities*, NAT’L COMPREHENSIVE CTR., 17 (2020), <https://compcenternetwork.org/sites/default/files/Portfolio%20of%20Choice%20Rural%20School%20Choice.pdf> (“On average, the test scores of students attending virtual schools lag far behind their peers in brick-and-mortar schools, regardless of students’ race, ethnicity, socioeconomic status, or prior achievement.”) [hereinafter *Portfolio*].

³ Section I(A)(1).

⁴ Section I(A)(2).

⁵ Section I(A)(3).

⁶ Section I(A)(4).

⁷ *Final Computations Public School Support Program for the 2021-22 Year*, W. VA. DEP’T. OF EDUC., (2021) <https://wvde.us/wp-content/uploads/2021/04/COMPS22.pdf> [hereinafter *Final Computations*].

a “high” density of students.⁸ The majority of the state then, is made up of mostly rural school districts, with a handful of concentrated population centers.

Concurrently, West Virginia has 118 private schools, of which 37 are located in the 5 most populous⁹ school districts.¹⁰ Of the remaining 81 private schools, only 35 are located in the 35 school districts with sparse or low population densities, and 25 of those are within four districts alone.¹¹ In fact, eighteen of West Virginia’s most rural counties have no private schools, thereby severely limiting the options of students in those counties to utilize the Voucher Program.¹² Even within those select counties that have private schools, many only serve discreet grade levels.¹³ Less than half of the State’s counties’ private schools can offer a full K-12 experience.¹⁴

Indeed, the reality is that nearly all students who are outside of the most concentrated pockets in the state simply do not have access to either any or unabridged private school alternatives.¹⁵

⁸ *Id.*

⁹ Kanawha, Berkley, Cabell, Wood, and Monongalia counties. *See id.*

¹⁰ *Final Computations*, *supra* note 7.

¹¹ Fayette, Ohio, Mingo, and Randolph counties. *See id.*

¹² *Final Computations*, *supra* note 7.

¹³ As an example, Feed My Sheep Christian School in Barbour County—a district with low population density—is the only available private school in the county and serves only PK-8 students. High school students have no viable in-county private school option. *See Feed My Sheep Christian School*, PRIVATE SCHOOL REVIEW, <https://www.privateschoolreview.com/feed-my-sheep-christian-school-profile> (last visited Sept. 22, 2022).

¹⁴ Only one county (Ohio) can provide non-religious students both a K-12 and secular private school experience. *See generally, Best West Virginia Private Schools*, PRIVATE SCHOOL REVIEW (2022), <https://www.privateschoolreview.com/west-virginia> (last visited Sept. 22, 2022).

¹⁵ Evaluation of the initial Voucher Program approvals validates this reality. Nearly two-thirds of the over three thousand vouchers for the 2022-2023 school year that were approved came from the most densely geographic areas including Kanawha (404), Berkeley (280), Raleigh (171), Ohio (164), Monongalia (157), Jefferson (142), Wood (140), Logan (137), Putnam (123), Mercer (122), and Cabell (121) counties. *See Brad McElhinny, More than 3000 Students Awarded Scholarship to Support Costs After Leaving Public Schools*, W. VA. METRONews (June 1, 2022), (June 1, 2022) <https://wvmetronews.com/2022/06/01/more-than-3000-students-awarded-new-scholarship-to-support-costs-after-leaving-public-school/>.

2. Availability of Transportation

Geographic isolation is a hallmark of rural communities, making independent transportation of students to non-neighborhood educational facilities inconvenient at best and a non-option at worst. In West Virginia, the public school systems provide transportation to students, no matter how remote they are. Private schools do not have to guarantee transportation for any student, no less than most rural. For those students without a neighborhood option (most of them, then), their ability to utilize vouchers to attend non-public educational services most often depends upon students and families to secure transportation. Most parents, however, are unable to drive students long distances to private placements due to misaligned works schedules (and the lack of before or after school care), unreliable transportation, and the high cost of gasoline.¹⁶ As a result, families without significant advantages will typically lack the ability to transport their students to a distant private school (so again, most of them).

3. The Digital Divide & Virtual Schools

Virtual alternatives—potential options the Voucher Program—fare little better in terms of equitable solutions for rural families. Public schools are well equipped to integrate technology into schooling—but only its schools.¹⁷ While virtual options can largely bypass proximity and transportation issues, rural communities frequently lack the broadband internet access necessary to take advantage of virtual schooling options.

According to Federal Communications Commission data, at least 30 percent of West Virginia’s rural homes and businesses currently lack adequate broadband access, leaving the state

¹⁶ Perpetual Baffour, et al., *Workin’ 9 to 5*, CENTER FOR AMERICAN PROGRESS (Oct. 11, 2016), <https://www.americanprogress.org/article/workin-9-to-5-2/> (last visited Sept. 22, 2022).

¹⁷ Executive Summary, *Assuring the Quality of Education: Digital Equity*, W. VA. DEP’T OF EDUC., (2020) https://wvde.state.wv.us/policies/new-data-digital-eq-202010/NewData_TechnologyAccess_Proposal_Sept2020.pdf [hereinafter *Digital Equity*].

with one of the nation’s lowest broadband connectivity rates.¹⁸ Following the mixed success of moving to remote learning due to the Coronavirus pandemic, the West Virginia Department of Education noted the distinct “digital divide”:

The transition to remote learning in the spring of 2020 [...] revealed in stark terms that in West Virginia a digital divide exists that separates the technological haves and have-nots. The inequities in access to high-speed internet and appropriate devices on which school work—including remote and virtual learning—can be done, and teachers’ limited knowledge about students’ technological circumstances in the home and their consequent ability to complete work virtually, present significant challenges to providing equal and equitable opportunities to learn.¹⁹

For most rural families, using the Voucher Program to attend virtual school is simply not an option.

4. Homeschooling

Defenders of the Voucher Program contend that homeschooling is a viable alternative for rural students who lack access to physical and digital private schools. While access to transportation and broadband internet are not required for homeschooling, having the capacity to homeschool children typically requires that at least one adult in a family is not working outside the home. Accordingly, homeschooling is limited to those families that can afford to (voluntarily) give up a traditional full-time job.²⁰ Thus, while homeschooling programs may work for families with sufficient means to have a stay-at-home parent, maintaining that the Voucher Program

¹⁸ Kevin Taglang, *Capital Projects Fund Aids West Virginia’s Billion Dollar Broadband Strategy*, BENTON INSTITUTE FOR BROADBAND SOCIETY, (June 9, 2022) <https://www.benton.org/blog/capital-projects-fund-aids-west-virginias-billion-dollar-broadband-strategy> (last visited Sept. 22, 2022).

¹⁹ *Digital Equity*, *supra* note 17; the letter goes on to say “[i]n addition to the impediment to remote and virtual learning, these inequities limited the ability to identify and provide services to support the well-being of students and their families.

²⁰ Moreover, to demonstrate that teachers “have the necessary knowledge and skills to meet the responsibilities of their professional assignments in instruction, student support, administration, and any other areas of responsibility,” most public school teachers are required to obtain certification by meeting various requirements, including holding a bachelor’s degree. See W. Va. Code R. 126-136-3. Rural adults, however, are statistically less likely to have those degrees—including teacher preparation programs—than their urban peers. *Rural Education*, U.S. DEPT. OF AGRIC. (last updated April 23, 2021), <https://www.ers.usda.gov/topics/rural-economy-population/employment-education/rural-education/> (last visited Sept. 22, 2022).

reaches more than the most advantaged students is misleading and irresponsible. The program favors of the few while creating a large class of “have nots” unable to utilize it.

B. There are No Safeguards to Protect Free Public Schools in Rural Areas

Given that the Program is unusable for so many students, the most that many can *hope* for is that the Voucher Program will simply not affect them. Taken to its logical endpoints though, most rural districts will be significantly injured by a program unusable for many of its own students.

1. No Income or Enrollments Limits

Unlike most similar programs, the Voucher Program contains no safeguards to ensure that vouchers will benefit the students most in need—including those who are poor or from rural areas. In fact, the average annual private school cost in West Virginia (\$6,315 for elementary schools and \$6,903 for high schools²¹) is well in excess of the maximum ESA allotment during the same period (about \$4,600²²). Thus, not only does the Program fail to reach some of the most in-need students, it effectively subsidizes the tuition for those few families already able to pay thousands of dollars out-of-pocket, ensuring again that the gap between the “haves” and the “have nots” only widens.

Additionally, proponents of the Voucher Program continuously push the idea that the program is not funded from dollars taken from the free public-school budget.²³ This is a false

²¹ *Best West Virginia Private Schools*, PRIVATE SCHOOL REVIEW, <https://www.privateschoolreview.com/west-virginia> (last visited Sept. 22, 2022).

²² Kelly Allen, *Hope Scholarship Would Be Nation’s Broadest, Likely Most Costly ESA Program Despite Lack of Evidence of Equitable Education Outcomes*, W. VA. CTR. ON BUDGET AND POL’Y (Feb. 19, 2021), <https://wvpolicy.org/hope-scholarship-would-be-nations-broadest-likely-most-costly-esa-program-despite-lack-of-evidence-of-equitable-education-outcomes/> (last visited Sept. 22, 2022) [hereinafter *Hope Scholarship*].

²³ Pet’r’s Opening Br., 32, 33.

proclamation that relies on little but semantics.²⁴ Even with only around one percent of the total student population awarded school vouchers for this school year, the program will divert nearly 13-million dollars away from West Virginia public schools—money those schools would otherwise receive.²⁵ As it stands, the program is conservatively estimated to divert between \$22 million and \$33.5 million from the state’s free public schools.²⁶ The West Virginia Department of Education projects the annual cost of the Voucher Program to actually exceed \$120 million once fully implemented.²⁷

Even after having tens of thousands of dollars siphoned away, public schools must continue to provide the same level of services to the remaining students. To survive, those schools must spread the smaller revenue stream to cover the cost of facilities, transportation, administration, and instruction.²⁸ The financial impact of every student leaving the public school system becomes particularly acute as districts get less populated. While an urban, populous county such as Kanawha or Cabell may be able to lessen the damage of the loss of per-pupil dollars because of the density of remaining students, in a rural school district, even just a handful of students exiting the public schools would present difficult decisions such as reducing class offerings, cutting sports and arts programs, and reducing student supports.²⁹ The Voucher Program is touted as the nation’s “most expansive” as if it were

²⁴ While the program may not withdraw money directly from existing public school finance accounts, when students exit the public, so do the thousands of dollars that come with their continued enrollment. Notably, West Virginia already provides over \$2,000 less per-pupil than the US average. See *Hope Scholarship*, *supra* note 22.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Fiscal Note Summary*, W. VA. DEPT. OF EDUC. (Feb. 19, 2021), [https://www.wvlegislature.gov/Fiscalnotes/FN\(2\)/fnsubmit_recordview1.cfm?RecordID=799856152](https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152) (last visited Sept. 23, 2022).

²⁸ *Vouchers Don’t Work in Rural Areas*, NAT’L COAL. FOR PUB. EDUC., <https://www.ncpecoalition.org/ruralvouchers> (last visited Sept. 22, 2022) [hereinafter *Vouchers Don’t Work*].

²⁹ Catherine Brown and Neil Campbell, *Vouchers Are Not a Viable Solution for Vast Swaths of America*, CENTER FOR AMERICAN PROGRESS (Mar. 3, 2017), <https://www.americanprogress.org/article/vouchers-are-not-a-viable-solution-for-vast-swaths-of-america/> (last visited Sept. 22, 2022).

something to be proud of.³⁰ Instead, that lack of thoughtful consideration opens the floodgates for an indefinite number of students to exit the public school system, potentially leaving rural school districts without the necessary funding to provide an adequate free and public education to those left behind.

2. The Hidden Community Cost

While the lack of access and financial impact of the Voucher Program is relatively predictable, the unknown cost is what it may take away from the rural communities in West Virginia. Public schools often play a critical role in rural communities, as both major employers and as important community institutions.³¹ In addition to providing community entertainment through sports, music, and other school—related events, public schools in rural communities offer healthcare for children and adults, community food pantries, night classes, and valuable breakfast and lunch programs.³² Every student that exits the public school in their district through receipt of a voucher remains a part of the community, but that school loses valuable resources to provide both educational and non-educational benefits to the community.

II. THE WEST VIRGINIA VOUCHER PROGRAM HARMS THE MOST VULNERABLE STUDENTS—THOSE WITH SIGNIFICANT DISABILITIES—AND FACILITATES DISCRIMINATION AGAINST THEM

From the time of *Brown v. Board of Education*³³, equity has been central to the nation’s laws that govern education. Where the state has undertaken to provide education, “it is a right which must be available to all on equal terms.” “The promise of equity is also at the core of the

³⁰ *West Virginia Hope Scholarship Program*, EDCHOICE, <https://www.edchoice.org/school-choice/programs/hope-scholarship-program/#:~:text=West%20Virginia%20Hope%20Scholarships%20are,public%20school%20per%2Dstudent%20spending> (last visited Sept. 22, 2022).

³¹ See *Portfolio*, *supra* note 2 at 19.

³² *Vouchers Don’t Work*, *supra* note 28.

³³ *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

nation’s laws to protect students with disabilities.”³⁴ The Individuals with Disabilities Education Act (IDEA) has as one of its central findings that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 33 U.S.C. §1400(c)(1). It works to guarantee equity by ensuring that parents are meaningful partners in their child’s education; that educational programs are specifically designed to meet each child’s unique needs; and that children with disabilities make progress in the general education curriculum alongside peers without disabilities.”³⁵ The value placed on equity in education has been echoed by the West Virginia Legislature.

Under the terms of the Voucher Program, however, private providers of education do not need to admit students with disabilities, nor do they have to provide needed supports to these students if they do admit them. The Voucher Program explicitly states that any participating school is “not required to alter its creed, practices, hiring policy, admissions policy, or curriculum,” and that the program does not expand the regulatory authority of the state to “police against such discrimination.” W. Va. Code § 18-31-11(d), (e). Instead of promoting equitable educational opportunity, the West Virginia voucher law will facilitate discrimination and perpetuate and exacerbate the disadvantages experienced by the students with the most significant needs by draining resources from the public school system.

³⁴ *School Choice Series: Choice and Vouchers Implications for Students with Disabilities*, NAT’L COUNCIL ON DISABILITY, 19, https://www.ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf.

³⁵ See 33 U.S.C. §1400 et seq and § 1414; *Choice Series: Choice and Vouchers Implications for Students with Disabilities*, NAT’L COUNCIL ON DISABILITY, *School*, https://www.ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf.

A. The Voucher Program Will Not Provide School Choice to West Virginia Students with Disabilities, Especially Those with the Most Significant Disabilities.

Other states' experiences have shown that students with disabilities are, in practice, unable to make use of voucher programs. For instance, a study found that most private schools in the Milwaukee voucher program "lack the full complement of educational programs that students with disabilities are entitled to if they receive their education in the public sector," and as a result, students with disabilities have been discouraged or excluded from participating.³⁶ The United States Department of Education report on the Washington, DC voucher program found that for parents who received a voucher but did not participate in the program, one of the main reasons was that they were unable to find a participating school with services for their learning or physical disability or other special needs. Over twenty percent of parents who rejected a voucher that was offered to their child did so because the private school lacked the special needs services that their child needed, and another 12.3% of the parents who accepted a voucher for their child ended up leaving the program due to the lack of special needs services at the school they had chosen.³⁷

This pattern has been repeated in state after state, including in states like Florida that provide a specific voucher for students with special needs *that can be as much as \$22,000*, far greater than the approximately \$4,300 offered in West Virginia. "When it comes to vouchers for special ed, the problem, say legal experts, is twofold: not enough rights and

³⁶ *Voucher Facts*, NAT'L COAL. FOR PUB. EDUC., <https://www.ncpecoalition.org/students-with-disabilities> (last visited September 20, 2022); *Special Education and the Milwaukee Parental Choice Program*, SCHOOL CHOICE DEMONSTRATION NETWORK (Feb. 2012), [ED530070.pdf](#) ("Most of the MPCP school personnel we interviewed said that their school lacks the resources and programs to serve the needs of students with severe physical, emotional, or learning disabilities. Almost all of their enrollees who would be classified as special education if in MPS have disabilities within the range of mild-to-moderate in severity, with the exceptions noted above. The fact that the voucher amount of \$6,442 per student must cover all of the costs of educating each MPCP student was cited by principals as the main reason why students with severe disabilities do not seek enrollment in their schools and could not be served effectively if they did so.").

³⁷ *Evaluation of the DC Opportunity Scholarship Program*, U.S. DEPT. OF EDUC., <https://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf> (last visited Sept. 20, 2022).

not enough money... Florida families . . . have transferred again and again, among public, private, home school, virtual and charter schools, following a road of hope and disappointment. A parent in Florida could not find a private school within driving distance willing to accept her son, who has autism, ADHD, and a seizure disorder.³⁸

B. The Cost of Education for Students with Disabilities Far Exceeds the Funding Provided by the Voucher Program.

Even if a student with a disability gained acceptance to a private school, the voucher—which would have been approximately \$4,300 for the 2022-2023—school year would not cover the educational costs for students with disabilities, particularly for those students with the most significant disabilities. The cost of finding a private school that is willing to admit and who can properly support these students often costs more than \$80,000 a year. As of 2021, five West Virginia counties had students placed in out-of-state private schools as part of a decision made by a student’s IEP team.³⁹ Each of these counties are located close to other states with access to a wider variety of private schools who can serve students with more significant disabilities. These placements cost between a minimum of \$14,000 per semester to over \$140,000 per semester.⁴⁰ For those students with disabilities who are educated in the public school system, in 2022, it cost over \$39,000 a year to educate those students with the most significant needs.⁴¹ This is three times the average per pupil

³⁸ Kamenetz, Anya, *For Families with Special Needs, Vouchers Bring Choices, Not Guarantees*, NPR (May 17, 2017), <https://tinyurl.com/y554h985> (last visited Sept. 23, 2022).

³⁹ Because these were not parent placements but instead were decisions made by an IEP team, these students did not give up their rights under IDEA and are still entitled to a free and appropriate public education; *See West Virginia Students with Disabilities in Out-of-State Facilities*, W. VA. DEP’T. OF EDUC., (2020), <https://wvde.us/wp-content/uploads/2021/05/21759-WV-Students-with-Disabilities-in-Out-of-State-Facilities-Report-FY20-v3.pdf> (last visited Sept. 23, 2022).

⁴⁰ *Id.*

⁴¹ *High Cost Expenditure/High Acuity Fund For Reimbursement of Expenses for Students with Disabilities for FY2022*, W. VA. DEP’T. OF EDUC., <https://wvde.us/wp-content/uploads/2022/04/FY-2022-State-Plan-HCHA-002.pdf>

expenditure. Yet, the Voucher Program provides no extra money to students with disabilities who may want to take advantage of “school choice.”

Therefore, the students with the most significant disabilities are left with no choice in this school choice program.

C. Students with Disabilities Who Do Find a Way to Take Advantage of the Voucher Program Must Give Up Their Federal Right to Special Education.

More than one in six students in West Virginia public schools receives special education services.⁴² These students rely on federal protections that guarantee them the right to a free and appropriate public education that is free from discrimination. The Individuals with Disabilities Education Act, 20 U.S.C. 1400, *et seq.* (IDEA), guarantees students with disabilities the right to a free and appropriate public education, including an individualized education program, in the least restrictive environment.

The application for the West Virginia voucher program requires parents to explicitly acknowledge that they are waiving the protections of the IDEA when they enroll in the program and that they are releasing the public school system from its obligation to provide the student a free and appropriate public education.⁴³ Unsurprisingly, many parents of students with disabilities, particularly those with significant needs, are unable and/or unwilling to give up their child’s federal protections, and thus forego the purported “opportunities” offered by the Voucher Program.

⁴² See *IDEA Child Count and Educational Environment Snap-shot*, W. VA. DEP’T. OF EDUC., <https://wvde.us/wp-content/uploads/2021/07/2020-21-Child-Count-and-Educational-Environment-Public-Snapshot.pdf> (total of 42,753 students with disabilities enrolled in West Virginia Public Schools as of December 1, 2020); Liz McCormick, *Student Enrollment is Down in W. Va. K-12 Schools This Year*, W. VA. PUB. BROAD. (Nov. 12, 2021), <https://www.wvpublic.org/section/education/2021-11-12/student-enrollment-is-down-in-w-va-k-12-schools-this-year> (last visited Sept. 23, 2023)

(approximately 250,000 students enrolled in West Virginia public schools for the 2021-2022 school year).

⁴³ *Hope Scholarship Parent Handbook*, EDUC. MKT. ASSIST., (pub. Mar. 1, 2022), https://www.hopescholarshipwv.com/Portals/hopescholarshipwv/content/Documents/2022-23%20WV%20Hope%20Parent%20Handbook%20FINAL_AW.pdf (last visited on Sept. 20, 2022).

D. The Voucher Program Promotes Discrimination Against and Segregation of Students with Disabilities.

Not only do students with disabilities who enroll in private schools under the voucher program lose the protections of the IDEA, they further give up the protections of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (Section 504); and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 et seq. (ADA Title II)—both of which prohibit public schools from discriminating against students based on their disability. Together, IDEA, Section 504, and the ADA work in concert to ensure that students with disabilities who attend public schools are treated with dignity and respect, have access to all school events and programs, and receive specialized education so that they make academic progress. In West Virginia, however, the overwhelming majority of private schools are Christian or Catholic schools.⁴⁴ Not only are those schools not subject to the requirements of the IDEA, they are also not covered by Title II or III of the Americans with Disabilities Act or the West Virginia Human Rights Act, enabling them to discriminate at will with no legal repercussion.⁴⁵

By eliminating these protections, the Voucher Program gives public tax dollars to private schools that can discriminate against students with disabilities in any manner of ways. While the capacity for discrimination is endless, it is easy to imagine a school refusing to provide wheelchair ramps, elevators, or handicap accessible bathrooms, thereby refusing access to a child with a physical disability. Likewise, private schools may suspend or expel children for behaviors that are caused by their disability; for example, a school could suspend a child with Tourette syndrome for making obnoxious noises, despite such utterances being caused by a tic outside that child's control.

⁴⁴ *Accredited and Registered Non-Public Schools*, W. VA. DEPT. OF EDUC., <https://wvde.us/nonpublic-school-information/accruited-and-registered-non-public-schools/> (last visited Sept. 23, 2022).

⁴⁵ The West Virginia Human Rights Act excludes from its definition of public accommodations “any accommodations which are by their nature private.”

Similarly, private schools could refuse to allow a child with cognitive disability to attend a field trip, because it would be too much work for the staff. Ultimately, however, the most likely form of discrimination will occur before the child with a disability ever enters the private school facility; specifically, most children with disabilities will simply never be admitted to the vast majority of private schools in the state.

For these reasons, students with disabilities will be effectively unable to use the Voucher Program to subsidize private school placements.⁴⁶ As a result, private schools will remain segregated institutions; in other words, unlike public schools which educate students of all abilities, private schools can and do exclude students with disabilities, creating unnatural settings in which students never see, engage with, or learn from students who are different from them. By funding the Voucher Program, the state of West Virginia will not only be sanctioning segregated schools, but will, in fact, be funding such institutions.

E. Students with Disabilities will be Disproportionately Harmed by Reduced Public School Funding.

Not only are students with disabilities unable to access the benefits of the Voucher Program, they will also suffer disproportionate harm in the reduction of funding to public schools that will occur as a result of the Voucher Program.

Students with disabilities require more services to meet their educational needs. West Virginia is already facing a teacher shortage, with many districts unable to fill special education teaching positions.⁴⁷ A decline in public school funding will only exacerbate this crisis. As public school funding diminishes under the Voucher Program and enrollment decreases, public schools

⁴⁶ Most students with disabilities likewise need academic instruction or other accommodations not available through one-size-fits all virtual learning programs.

⁴⁷ Hodousek, Carrie, *Teacher Shortage 'Significant' in WV as Students Prepare to Head Back to School*, W. VA. METRONews (Aug. 5, 2022), <https://wvmetronews.com/2022/08/05/teacher-shortage-significant-in-wv-as-students-prepare-to-head-back-to-school/> (last visited Sept. 23, 2022).

will have fewer funds available to staff needed positions including speech therapists, occupational therapists, physical therapists, psychologists, behavior specialists, and highly qualified teachers. The number of personnel funded under West Virginia’s formula is directly linked to net enrollment.⁴⁸ Therefore, decreased enrollment results in fewer positions at public schools, and students who may need small group instruction, paraprofessional assistance, access to school nurses, psychologists, and other therapies are left behind.

There is little surprise, therefore, that in states with voucher programs, students with disabilities—and especially those with more significant disabilities—are unable to take advantage of these programs that purport to offer school choice for all. Instead, these programs entrench advantages for some while draining resources from the students with the highest levels of need.

CONCLUSION

If implemented, the Voucher Program will not benefit rural, financially disadvantaged children, or children with disabilities, but will decrease the resources available to the public school programs those same children rely upon. Indeed, the idea that the program might provide some benefit to West Virginia’s most disadvantaged students is, in large part, a false promise; those students will be largely unable to utilize vouchers because of the lack of existing resources, including transportation, internet access, money, and time, or because no private school will admit them due to a disability. In addition, the result of even a small number of rural students exiting the public school system because they—unlike most of their poor, rural, and/or disabled peers—have access to money to pay tuition costs, transportation, high-speed internet, or stay-at-home caregivers who can provide homeschool options, will inevitably lead to a significant burden on

⁴⁸ *Executive Summary: Assuring the Quality of Education: Digital Equity*, W. VA. DEP’T. OF EDUC., (2020), <https://wvde.us/wp-content/uploads/2020/03/PSSP-21-Executive-Summary-Final-Comps.pdf> (last visited September 22, 2022).

local public schools that are already under-funded. The Voucher Program is, in practicality, little more than a reverse Robin Hood scheme—a program designed to rob from the masses in-need and give to the handful of already advantaged students in the state.

For the foregoing reasons, amici—a collection of West Virginia non-profit, public interest organizations who are concerned with providing an education to *all* West Virginia children—respectfully request that this Court affirm the order of the Circuit Court of Kanawha County and remand this matter for trial on the merits.

Respectfully submitted,

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