

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TRAVIS BEAVER, KAREN KALAR and
WENDY PETERS,

Petitioners/Plaintiffs,

v.

RILEY MOORE, in his Official Capacity as
State Treasurer of West Virginia; W.
CLAYTON BURCH, in his Official
Capacity as State Superintendent of West
Virginia; MILLER L. HALL, in his Official
Capacity as President of West Virginia's
Board of Education; CRAIG BLAIR, in his
Official Capacity as the President of the
West Virginia Senate; ROGER
HANSHAW, in his Official Capacity as the
Speaker of the West Virginia House of
Delegates; and JIM JUSTICE, in his
Official Capacity as Governor of West
Virginia,

Respondents/Defendants.

COMPLAINT

INTRODUCTION

1. Public education is a fundamental right in West Virginia. The State's founding leaders enshrined the importance of public education in the State Constitution from the outset. Under Article XII (the "Education Article"), the Legislature has a duty to provide a "thorough and efficient system of free schools"—that is, public schools—for the children of West Virginia. The Legislature can take no action that would exceed or frustrate this affirmative constitutional obligation. Likewise, funding public education is considered West Virginia's highest

Civil Action No. 22-P-24 Judge Bloom
Civil Action No. 22-P-25 Judge Wechsler
Civil Action No. 22-P-26 Judge Bailey

constitutional priority along with the State's obligation to repay its debt. Any action that depletes the funding to public schools is subject to strict scrutiny—the most exacting judicial review.

2. The Legislature has violated its constitutional duties to public education and West Virginia's children. In 2021, the Legislature enacted, and the Governor signed, House Bill 2013 ("H.B. 2013" or "the Voucher Law"), codified as W. Va. Code § 18-31-1 *et seq.* H.B. 2013 uses public funds to pay for vouchers for private education and homeschooling expenses and will siphon millions of dollars of public money away from public education. Ultimately, the State will be subsidizing private schools and homeschooling at the cost of over \$100 million dollars every year.¹

3. The Voucher Law cannot stand. First, under the explicit terms of the Constitution's Education Article, the Legislature can *only* provide for a system of free *public* schools. It cannot support a separate system of private schooling and homeschooling. Nor can the Legislature take actions that undermine public schools by diverting public funds that could otherwise be used for public education or by incentivizing conduct that negatively impacts attendance at, and thus funding of, public schools. Parents are free to choose whatever type of education they want for their children. But the State's founders made explicit in the Constitution that the State must—and may only—fund and support a system of *public* schools. Anything that exceeds or frustrates this mandate is unconstitutional.

4. Second, the Voucher Law violates the Legislature's first constitutional obligation to fund public schools. Because actions that negatively impact public school funding are subject

¹ W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021), [https://www.wvlegislature.gov/Fiscalnotes/FN\(2\)/fnsubmit_recordview1.cfm?RecordID=799669695](https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799669695); W. VA. DEP'T OF EDUC., H.B. 2013 FISCAL NOTE (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).

to strict scrutiny, the Legislature can only reduce the funds available for public education for a compelling purpose, and such legislation must be narrowly tailored to that purpose. The program authorized by the Voucher Law satisfies neither criterion. Subsidizing non-public education is not a compelling government interest. Indeed, non-public education is of no constitutional interest to the State. That interest is expressly confined to the provision of “a system of free schools.” Nor is the voucher program narrowly tailored. The program has no enrollment cap. It is neither need- nor means-based. It imposes no educational standards on non-public education providers. It is simply a give-away of state funds to subsidize private school tuition, private education services, and homeschooling expenses with no accountability to the taxpayers or the public. This open-ended program does not withstand strict scrutiny and is thus unconstitutional.

5. Third, the West Virginia Constitution unambiguously mandates that the State’s “School Fund” only be used for public schools and “no other purpose whatever.”² Certain state revenues are expressly designated in the Constitution for the School Fund, including “general taxation of persons and property or otherwise.”³ As mandated by the Education Article, the Legislature appropriates these funds to the public school system. The Education Article prohibits using such funds for any “other purpose,” which would include private school vouchers for tuition, private education services, or homeschooling.

6. Fourth, the Voucher Law usurps the West Virginia Board of Education’s (“Board of Education” or “WVBOE”) constitutional authority. The West Virginia Constitution places authority over state-funded K-12 education in the WVBOE.⁴ But the Voucher Law creates a new

² W. VA. CONST. art. XII, § 4.

³ W. VA. CONST. art. XII, § 5.

⁴ W. VA. CONST. art. XII, § 2 (“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.”).

and separate board, the Hope Scholarship Board, to administer the expenditure of public funds on vouchers, and it expressly restricts the Board of Education's ability to exercise academic or financial oversight over the use of these public funds being spent on education.

7. Fifth, the West Virginia Constitution has a strong presumption against laws that treat people differently, i.e., "special laws."⁵ The Voucher Law expressly excludes students receiving publicly funded vouchers from critical antidiscrimination protections afforded to public school students. Specifically, under the Voucher Law, students participating in the program may be discriminated against on the basis of characteristics such as religion, gender identity, sexual orientation, and disability, while students in public schools may not. Where public funds are used for education, the State cannot set up two regimes: one allowing discrimination and the other forbidding it.

8. Because the Voucher Law is unconstitutional on multiple grounds, it must be permanently enjoined.

PARTIES

9. Plaintiffs are parents of students enrolled in West Virginia public schools.

10. Plaintiff Travis Beaver is a resident of Putnam County, West Virginia. He has two children in West Virginia public schools. Mr. Beaver's son, S.B. is in the sixth grade. S.B. is a straight-A student who loves school. Mr. Beaver's daughter, J.B., is in the fifth grade. J.B. has been diagnosed with nonverbal/preverbal autism and ADD/ADHD. J.B. has an individualized education program ("IEP") to address her need for special education and related services. To his knowledge, there are no private schools near Mr. Beaver's home that would educate his daughter

⁵ W. VA. CONST. art. VI, § 39.

and address her specific needs. Indeed, there are no private schools in West Virginia that offer the type of speech, occupational, and one-on-one therapy that J.B. requires.

11. Plaintiff Karen Kalar is a resident of Upshur County, West Virginia. She has two school-age children with disabilities, who also identify as LGBTQ+, in West Virginia public schools. Ms. Kalar's daughter, V.L., is in the ninth grade. Ms. Kalar's younger daughter, T.L., is in the eighth grade. Both students have IEPs. To Ms. Kalar's knowledge, there are no private schools in Upshur County that have the necessary programs and services to meet her children's needs or that would allow her children to attend given that they identify as LGBTQ+.

12. Plaintiff Wendy Peters is a resident of Raleigh County, West Virginia and teaches sixth grade in the Raleigh County School District. Ms. Peters has been an educator for twenty years. Her child, M.P., is in third grade and has autism. M.P. has an IEP. To Ms. Peters' knowledge, there are no private schools near her home that would be able to provide the services M.P. needs.

13. Defendant Riley Moore is the West Virginia State Treasurer. West Virginia Code § 18-31-6 compels the State Treasurer's Office to administer the public funds transferred by the West Virginia Department of Education ("WVDOE") to the West Virginia Hope Scholarship Program Fund for the voucher program.

14. Defendant W. Clayton Burch is the West Virginia State Superintendent. Mr. Burch, in his official capacity, is in charge of management and administration of the WVDOE. Under the Voucher Law, funding for the voucher program is appropriated by the Legislature to the WVDOE and then transferred by the WVDOE to the Hope Scholarship Board.⁶

⁶ W. Va. Code § 18-9A-25.

15. Defendant Miller L. Hall is the President of the WVBOE. The WVBOE is responsible for oversight of the WVDOE and W. Clayton Burch, West Virginia's State Superintendent.

16. Defendant Craig Blair is the President of the West Virginia Senate, who was acting in such official capacity during the passage of W. Va. Code § 18-31-1 *et seq.* Mr. Blair, in his official capacity as President of the West Virginia Senate, appropriates funds to the voucher program pursuant to W. Va. Code § 18-9A-25 and with the advice and consent of the Senate appoints members to the Hope Scholarship Board overseeing the voucher program.

17. Defendant Roger Hanshaw is the Speaker of the West Virginia House of Delegates, who was acting in such official capacity during the passage of W. Va. Code § 18-31-1 *et seq.* Mr. Hanshaw, in his official capacity as Speaker of the House of Delegates, appropriates funds to the voucher program pursuant to W. Va. Code § 18-9A-25.

18. Defendant Jim Justice is the Governor of the State of West Virginia, who, in his official capacity, signed into law W. Va. Code § 18-31-1 *et seq.*

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction pursuant to Article VIII, Section 6 of the West Virginia Constitution, and West Virginia Code §§ 53-5-3, 53-5-4, and 55-13-1, which vest original jurisdiction over "all civil cases in equity" in the circuit courts.

20. Venue is proper in this Court pursuant to West Virginia Code § 14-2-2. The present cause of action arises in Charleston, which is in Kanawha County, and Defendants are State officers.

FACTUAL ALLEGATIONS

A. The West Virginia Constitution's Public Education Mandate

21. Article XII, Section 1 of West Virginia's Constitution requires the Legislature to "provide, by general law, for a thorough and efficient system of free schools."⁷ Section 2 vests "general supervision" of free schools in the WVBOE.⁸ Section 4 creates a "School Fund" that must be "applied to the support of free schools throughout the State, and to no other purpose whatever."⁹ In addition to the School Fund, Section 5 directs the Legislature to "provide for the support of free schools," through School Fund interest, all forfeitures and fines, and "by general taxation of persons and property or otherwise."¹⁰

22. The importance the State places on public education goes back to its very founding. At the First Constitutional Convention in 1861, drafters acknowledged and underscored the importance of *public* education. Delegates to the convention stated that the "virtue and general intelligence among the people . . . is the only sure foundation on which Republican governments can rest"¹¹ and therefore mandated that "[t]he legislature shall as soon as conveniently may be, provide by law for the establishment of a system of public free schools throughout the State, in such manner as to make education as nearly universal as possible."¹² Another drafter added, "the highest and most binding duty of any community is to provide for the education of its children [T]he State owes it as a duty to the children themselves who are to become its future

⁷ W. VA. CONST. art. XII, § 1.

⁸ W. VA. CONST. art. XII, § 2.

⁹ W. VA. CONST. art. XII, § 4.

¹⁰ W. VA. CONST. art. XII, § 5.

¹¹ Granville Parker, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 2, 1861), <https://archive.wvculture.org/history/statehood/cc120261.html>.

¹² W. E. Stevenson, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 2, 1861), <https://archive.wvculture.org/history/statehood/cc120261.html>.

citizens.”¹³ A third drafter explained the requests he heard from his constituents: “I well recollect when talking to my people on the subject of a new State that one of their great hopes was that we would get a good free school system.”¹⁴ A fourth drafter summed it up this way: “All Money [directed to fund education] . . . shall . . . be sacredly devoted and applied to the support of primary education in common schools [that is, public schools] throughout the State, *and to no other purpose whatever*.”¹⁵

23. It is important to understand the context of the drafters’ emphasis on the primacy of public education. Prior to West Virginia becoming a separate state, “Virginia’s failure to provide a system of free public education had long rankled the western counties” that seceded to form West Virginia.¹⁶ As the Supreme Court of Appeals acknowledged, “[t]he framers of our Constitution lived among the ruins of a system that virtually ignored public education and its significance to a free people.”¹⁷ As a result, when the convention met in 1861 to create West Virginia’s first constitution, the framers gave high priority to public education.¹⁸ Likewise, the 1872 convention delegates “*strengthened* the education article.”¹⁹ In doing so, the delegates cemented public education as a sacrosanct constitutional right in West Virginia.

¹³ P.G. Van Winkle, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862), <https://archive.wvculture.org/history/statehood/cc012762.html>.

¹⁴ Robert Hagar, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862), <https://archive.wvculture.org/history/statehood/cc012762.html>.

¹⁵ Rev. Gordon Battelle, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 19, 1861) (emphasis added), <https://archive.wvculture.org/history/statehood/cc121961.html>.

¹⁶ *Randolph Cty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 15, 467 S.E.2d 150, 156 (1995) (quoting ROBERT M. BASTRESS, THE W. VA. STATE CONST.—A REFERENCE GUIDE 271 (1995)).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added). Further, the delegates to the 1872 convention did not alter, change, or otherwise revise the foundational point that all money directed to fund education be devoted to public schools, and to “no other purpose whatever.” W. VA. CONST. art. XII, § 4.

24. Because the provisions of Article XII of the West Virginia Constitution “give a constitutionally *preferred* status to public education in this State,”²⁰ the Supreme Court of Appeals has held that the funding of public education is “second in priority only to payment of the State debt, and *ahead of every other State function*.”²¹ As the Supreme Court stated: the “Constitution manifests, throughout, the people’s clear mandate to the Legislature, that public education is a Prime function of our State government.”²² Courts “must not allow that command to be unheeded.”²³

25. In short, the text and history of West Virginia’s Constitution, as well as case law interpreting its provisions, create a mandate of the highest priority: the Legislature must provide for a system of thorough and efficient *public* schools. This duty cannot be abridged.

B. The West Virginia Voucher Law

26. On March 17, 2021, the Legislature enacted H.B. 2013, W. Va. Code § 18-31-1 *et seq.*, and on March 27, 2021, the Governor signed it into law.

27. The Voucher Law requires the WVDOE to take funds appropriated by the Legislature to the WVDOE and transfer them to a new entity created by the Voucher Law called the Hope Scholarship Board. The Voucher Law tasks the Hope Scholarship Board with disbursing the funds into private “education savings accounts” (“ESAs” and/or “vouchers”) for use on a wide variety of non-public education expenses.

²⁰ *W. Va. Educ. Ass’n v. Legislature of the State of W. Va.*, 179 W. Va. 381, 381–82, 369 S.E.2d 454, 455 (1988) (emphasis added).

²¹ *Pauley v. Kelly*, 162 W. Va. 672, 719 (1979) (emphasis added).

²² *Id.*

²³ *Id.*

28. Under the Voucher Law, nearly every student in the State can obtain an ESA voucher. There is no income limit, need- or means-based eligibility requirement, or enrollment cap. During the first two years of the program, applicants need only be enrolled in a public school for 45 days at the time of application, have been enrolled in a public school for the previous year, or be eligible for enrollment in a kindergarten program.²⁴ If, on July 1, 2026, the participation rate for the voucher program is less than five percent of public school enrollment for the previous school year, then any West Virginia child of public school age becomes eligible for the program.²⁵ Even if voucher eligibility does not expand to every student in 2026, the same result of universal eligibility will occur over time, as each year every student newly eligible for kindergarten also becomes eligible to receive vouchers for the duration of their elementary and secondary education. As a result, in as little as four years and a maximum of twelve years, the State will be subsidizing the private education of every West Virginia student who attends private school or is homeschooled, regardless of family income or any other criterion.

29. Pursuant to the Voucher Law, the WVDOE must transfer to the Hope Scholarship Board,²⁶ to be deposited into each ESA voucher account, an amount “equal to 100 percent of the prior year’s statewide average net state aid share allotted per [public school] pupil based on net enrollment adjusted for state aid purposes[.]”²⁷ According to the State Treasurer, students

²⁴ W. Va. Code § 18-31-2(5).

²⁵ W. Va. Code § 18-31-2(5)(B).

²⁶ W. Va. Code § 18-9A-25.

²⁷ W. Va. Code § 18-31-6(b).

participating in the voucher program each would receive approximately \$4,600 in fiscal year 2023 under the current School Aid Formula.²⁸

30. The Voucher Law allows voucher funds to be used for a wide array of private education and homeschool expenditures, including: private school tuition or fees; tutoring services; fees for standardized tests; tuition for online non-public learning programs; transportation fees; curriculum materials; and summer or after-school programs.²⁹

31. There are no qualification requirements for private schools, other private education services providers, or homeschool parents to receive voucher funds. The statute also expressly limits governmental oversight of their conduct: “Education service providers [which include both private schools and parents who homeschool³⁰] shall be given maximum freedom to provide for the educational needs of [voucher] students without governmental control.”³¹ The statute further provides: “This article does not expand the regulatory authority of the state, its officers, or any school district to impose any additional regulation of education service providers beyond those necessary to enforce the requirements of the program.”³²

32. The financial impact of the Voucher Law will be substantial. Indeed, a fiscal note prepared by the Legislative Auditor for H.B. 2013 projects over \$100 million in *annual* costs to fund the voucher program once eligibility extends to all private school students in as little as four

²⁸ W. VA. STATE TREAS., HOPE SCHOLARSHIP PROGRAM, FAQ, <https://hopescholarshipwv.com/FAQs#1225205-how-much-money-could-i-receive> (last visited Jan. 14, 2022).

²⁹ W. Va. Code § 18-31-7(a).

³⁰ “Education service providers” are defined as “a person or organization that receives payments from Hope Scholarship accounts to provide educational goods and services to Hope Scholarship students.” W. Va. Code § 18-31-2(4).

³¹ W. Va. Code § 18-31-11(c).

³² W. Va. Code § 18-31-11(e).

years.³³ The WVDOE's own fiscal note projects that the cost of funding the voucher program will exceed \$120 million annually by fiscal school year 2027.³⁴ Even before voucher funding reaches over \$100 million, the impact will be deeply felt. West Virginia's public schools are already underfunded and any transfer of funds away from public education to private vouchers will have a negative effect on students.³⁵

33. The Voucher Law also affirmatively incentivizes families of students currently enrolled in the public school system to leave that system, wreaking havoc on public school resourcing. Because state funding for public education is based in large part on student enrollment, the Voucher Law will result in a significant reduction in public school funding. This reduction in funding will occur without a reduction in fixed costs—libraries, administration, maintenance, and numerous other expenses that do not decrease with each individual student who takes a voucher. Moreover, because private schools generally cost more than the voucher amount, they will be used by more affluent families. And, because private schools are frequently unwilling and/or unable to serve students with disabilities, these students largely will not use the vouchers. As a result, the public schools will have fewer funds to educate a higher proportion of students with the most significant needs—including students from low-income families and students with disabilities—who are among the most expensive to educate.

³³ W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021), *supra* note 1.

³⁴ W. VA. DEP'T OF EDUC., H.B. 2013 FISCAL NOTE (2021), *supra* note 1.

³⁵ EDUCATION LAW CENTER, MAKING THE GRADE: HOW FAIR IS SCHOOL FUNDING IN YOUR STATE? 8-9 (2021), https://edlawcenter.org/assets/MTG%202021/2021_ELC_MakingTheGrade_Report_Dec2021.pdf.

34. Nor are there any academic standards, reporting mandates, or accountability requirements for private schools or other private education providers that receive voucher funds.³⁶ The Voucher Law does not require eligible providers to show that voucher students are making academic progress, nor does it set any curriculum standards or teacher certification requirements. The Voucher Law also provides only the feeblest of mechanisms for fiscal accountability of private education providers.³⁷ Private schools will emerge or expand to take state dollars without any promise of, or reliable ability to deliver, quality education in return. Thus, the opportunity for abuse by private education providers is significant. This is precisely the type of unregulated, unaccountable private education that the Constitution prohibits the State from supporting.³⁸

35. The Voucher Law also specifically excludes the antidiscrimination provisions that protect public school students and families from discrimination on the basis of characteristics such as religion, gender identity, sexual orientation, or disability. Under the Voucher Law, private schools that accept voucher funds can discriminate on all of these grounds. Such discrimination may take the form of refusing admission; failing to provide services students need to access their education, such as special education; or disciplinary practices, including expulsion, based on discriminatory criteria.

³⁶ The statute asks that parents merely *promise* to provide education in reading, language, mathematics, science and social studies, without any curriculum requirements or guidance. *See* W. Va. Code § 18-31-5.

³⁷ *See* W. Va. Code § 18-31-10.

³⁸ Parents with severely limited means may also be lured by the ~\$5,000 yearly payments per child in order to make ends meet without a reliable ability to educate—unfairly pitting a family’s basic needs against the educational needs of their children.

C. The Legislature Must Provide for a Thorough and Efficient System of Public Schools and Cannot Do Anything That Exceeds or Frustrates This Mandate

36. The State's constitutional obligation with respect to education is clear: it must "provide, by general law, for a thorough and efficient system of free schools."³⁹ In cases that are "simply overwhelming in number," West Virginia courts have applied the doctrine of *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of the other") to interpret constitutional and statutory provisions.⁴⁰ The *expressio unius* doctrine holds that the express provisions of the West Virginia Constitution implicitly prohibit actions that exceed or frustrate express constitutional mandates.⁴¹

37. The doctrine of *expressio unius*, as consistently applied by West Virginia courts, dictates that the State must provide only for a "thorough and efficient system of free schools." The State cannot provide for non-public education and it cannot take actions that frustrate its obligation to provide for a system of thorough and efficient public schools.

38. The Voucher Law improperly does both. It funds private education, which it cannot do, and it undermines the system of free schools the State is constitutionally mandated to maintain by siphoning off over \$100 million annually that would otherwise be available for those public schools. It also incentivizes more affluent students and those without special or elevated needs to leave the public schools, meaning the highest need and most expensive to educate students would remain in the public schools without sufficient funding and resources.

³⁹ W. VA. CONST. art. XII, § 1.

⁴⁰ *State ex rel. Downey v. Sims*, 125 W.Va. 627, 633, 26 S.E.2d 161, 163 (1943).

⁴¹ *Id.*

39. The State cannot exceed its mandate to provide a system of free schools and it cannot frustrate its obligation to provide thorough and efficient schools by subsidizing private education. The Voucher Law is unconstitutional on these grounds and must be enjoined.

D. Public Education Is a Fundamental Right of First Priority in West Virginia and the Voucher Law Reduces Funds to Public Education by Means That Fail Strict Scrutiny

40. In West Virginia, the constitutional guarantee of public education is sacrosanct. Public education is an “essential constitutional right” and the financing of that education “is, among mandated public services, the first constitutional priority.”⁴²

41. Because “education is a constitutionally derived right in this State, the more demanding strict scrutiny equal protection standard is thrust upon the State.”⁴³ “[I]f the state takes some action which denies or infringes upon a person’s fundamental right to an education, then strict scrutiny will apply and the State must prove that its action is necessary to serve some compelling State interest. Furthermore, any denial or infringement of the fundamental right to an education for a compelling State interest must be narrowly tailored.”⁴⁴

42. The Voucher Law directly infringes on the fundamental right to public education by siphoning off funds that could be used for public education—and that are critically needed by the State’s underfunded public school system—and diverting those funds to private education

⁴² *W. Va. Educ. Ass’n v. Legislature of W. Va.*, 179 W. Va. at 382, 369 S.E.2d at 455 (citation omitted); see also *Pauley*, 162 W. Va. at 707, 255 S.E.2d at 878 (“Certainly, the mandatory requirement of ‘a thorough and efficient system of free schools,’ found in Article XII, Section 1 of our Constitution, demonstrates that education is a fundamental constitutional right in this State.”).

⁴³ *Pauley*, 162 W. Va. at 708, 255 S.E.2d at 878.

⁴⁴ *Cathe A. v. Doddridge Cty. Bd. of Educ.*, 200 W. Va. 521, 527–28, 490 S.E.2d 340, 346–47 (1997) (quoting *Phillip Leon M. v. Greenbrier Cty. Bd. of Educ.*, 199 W. Va. 400, 409, 484 S.E.2d 909, 918 (1996) (McHugh, J., concurring in part and dissenting in part)).

expenditures. Every penny that is spent on vouchers harms public schools and diverts public money that could be allocated to the public schools.

43. The Voucher Law reduces the funding available to public schools in additional ways. The law will reduce the amount of state spending on public education by incentivizing students to leave, and future students to opt out of, the public school system in favor of private schools or homeschooling, thereby reducing state funding of public education, which is based in significant part on school enrollment.⁴⁵

44. Additionally, the vouchers are essentially unavailable to students in poverty and students with disabilities, among others. The voucher amount of approximately \$5,000 will not be enough to pay for tuition at many private schools—let alone the other expenses, such as food and transportation, that are covered in public schools—meaning the vouchers will serve largely as a subsidy to families that can afford to bridge the gap. Students from low-income families cannot do so. Private schools also frequently refuse to admit students with disabilities, and when they do, often fail to provide them with the programs, services, and accommodations necessary to meet their needs. Indeed, there are virtually no private schools in West Virginia prepared to serve students with disabilities. As a result, the State’s public schools will be tasked with serving an elevated concentration of high-need students who are most expensive to educate, with insufficient funds to do so, while the State’s tax dollars are used to subsidize the education of students from families who can already afford private schools.

45. Because the Voucher Law negatively affects public school economics, it therefore must pass strict scrutiny to survive. It cannot do so. First, the Voucher Law does not serve a

⁴⁵ See STATE OF W. VA., EXECUTIVE SUMMARY OF THE PUBLIC SCHOOL SUPPORT PROGRAM BASED ON THE FINAL COMPUTATIONS FOR THE 2020-21 YEAR, <https://wvde.us/wp-content/uploads/2020/03/PSSP-21-Executive-Summary-Final-Comps.pdf> (last visited Jan. 14, 2022).

compelling state interest, or indeed any State interest at all. The State is tasked exclusively with providing for a thorough and efficient system of free public schools. Thus, West Virginia has *no interest*—much less a compelling one—in subsidizing the education of private and homeschooled students, especially at the expense of the students in public schools. The Voucher Law represents a deliberate dereliction of “the fundamental constitutional command that the Legislature provide for a thorough and efficient system of *public* education.”⁴⁶

46. Second, the Voucher Law is not narrowly tailored. It is not targeted in any way. All students entering kindergarten can claim a voucher starting in kindergarten and for the rest of their K-12 education. Any student who attends 45 days in a public school can obtain a voucher. After four years, if enrollment in the voucher program has not reached a certain threshold, eligibility expands to every student in the State. Even without that provision, because all private and homeschooled students can start with a voucher in kindergarten and claim it all the way through their education, all students in the State will be eligible within twelve years. From the outset, the Voucher Law will result in millions of dollars being siphoned away from public education every year to pay for private schools and homeschooling.

47. Because the Voucher Law works against West Virginia’s compelling interest in public education and functions as a yearly budget cut to public funding for public schools, it fails strict scrutiny and must be enjoined.

E. The School Fund and Other Public Funds for Education Can Only Be Used to Fund Public Schools

48. To fund K-12 education in the State, Article XII, Section 4 of the West Virginia Constitution establishes the “School Fund,” consisting of various sources of revenue designated

⁴⁶ *W. Va. Educ. Ass’n v. Legislature of W. Va.*, 179 W.Va. at 382, 369 S.E.2d at 455 (emphasis added).

therein. Article XII, Section 4 states that the “School Fund” shall support “free schools throughout the state, and . . . no other purpose whatever.” West Virginia courts recognize that “[i]f the language of a constitutional provision is plain and unambiguous it is not subject to judicial interpretation[.]”⁴⁷ Article XII, Section 4 plainly states that School Fund monies may only be used for public schools—not for private education vouchers.⁴⁸

49. Likewise, the State Constitution provides that to augment the School Fund, the Legislature shall raise additional funds through taxation and other means, but only “for the support of free schools.”⁴⁹ Taken together, these provisions of the Constitution do not allow public funds to be used for K-12 education other than for public education. The Voucher Law violates this proscription.

F. The Voucher Law Usurps the Constitutional Powers of the West Virginia Board of Education

50. Article XII, Section 2 provides that the West Virginia Board of Education is responsible for the “general supervision of the free schools.”⁵⁰ The courts have interpreted this provision to include the duty to “carry[] into effect the laws and policies of the state relating to education.”⁵¹ Statutory provisions that “interfere[]” with the Board of Education’s constitutional

⁴⁷ *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973).

⁴⁸ In 1902, West Virginia ratified the Irreducible School Fund Amendment. It amended Article 12, Section 4 by incorporating the “School Fund” into a new “general school fund” and continuing to mandate that the funds be used for the “free schools of this State.” CONST. AMEND. THE IRREDUCIBLE SCHOOL FUND AMENDMENT, CONST. OF W. VA. (1872).

⁴⁹ W. VA. CONST. art. XII, § 5.

⁵⁰ W. VA. CONST. art. XII, § 2 (“The general supervision of the free schools of the State shall be vested in the West Virginia Board of Education, which shall perform duties as such may be prescribed by law.”); *see also* W. Va. Code § 18-2-5 (“[T]he State Board of Education shall exercise general supervision of the public schools of the state, and shall promulgate rules...for carrying into effect the laws and policies of the state relating to education.”).

⁵¹ W. VA. CONST. art. XII, § 2; *see also W. Va. Bd. of Educ. v. Bd. of Educ. of the Cty of Nicholas*, 239 W. Va. 705, 714, 806 S.E.2d 136, 145 (2017) (“[T]he WVBOE is statutorily recognized as having the

rulemaking authority over state funded education are unconstitutional.⁵² Establishing a separate and independent Hope Scholarship Board to implement the voucher program “interferes” with the Board of Education’s supervision and rulemaking authority over publicly funded education.

51. The Voucher Law interferes with the Board of Education’s powers by severely limiting government oversight of public funds spent on education—funds which are first appropriated to the WVDOE. Under the Voucher Law, private schools and homeschoolers receiving voucher funds are given “maximum freedom to provide for the educational needs of [voucher] students *without governmental control*.”⁵³

52. Similarly, the Voucher Law eliminates any oversight—let alone the ability to ensure delivery of constitutionally adequate and equitable education—by the Board of Education regarding the academic efficacy of the expenditure of public funds for education. There is no testing requirement for students using vouchers to measure whether their private or home schooling is effective. There are likewise no curriculum standards or teacher certification requirements. Parents of voucher applicants need only sign an agreement promising:

- a. To provide an education for the eligible recipient in at least the subjects of reading, language, mathematics, science, and social studies;
- b. To use the [voucher] funds exclusively for qualifying expenses as provided for in § 18-31-7 of this code;
- c. To comply with the rules and requirements of the [voucher] program; and

authority to make rules for carrying into effect the laws and policies of the State relating to education.”) (internal quotation marks and citation omitted).

⁵² See *W. Va. Bd. of Educ. v. Hechler*, 180 W. Va. 451, 455, 376 S.E.2d 839, 843 (1988) (concluding that a law requiring the Board of Education to submit rules to a legislative oversight commission for review was unconstitutional because “any statutory provision that interferes” with the Board of Education’s constitutional rule-making authority is unconstitutional).

⁵³ W. Va. Code § 18-31-11(c) (emphasis added).

- d. To afford the [voucher] student opportunities for educational enrichment such as organized athletics, art, music, or literature.⁵⁴

53. Enforcement of even this anemic set of requirements is nearly nonexistent and does not sit with the Board of Education. The Voucher Law only states that the Hope Scholarship Board *may* provide for random audits of parents of voucher recipients on an “as needed” basis.⁵⁵ Further, the Hope Scholarship Board *may* audit education service providers, and only if it first meets the burden of determining that the provider has “[i]ntentionally and substantially misrepresented information or failed to refund any overpayments in a timely manner” or “[r]outinely failed to provide students with promised educational goods or services.”⁵⁶ Even these audits are only permitted; they are not required under the statute. Thus, the Board of Education has no authority to identify and remedy ineffective use of public funds, fraud, or abuse.

54. The Board of Education, and only the Board of Education, is constitutionally tasked with carrying into effect the laws and policies of the state relating to publicly funded education. The Voucher Law fully usurps the Board of Education’s power to oversee the expenditure of public funds for education and to monitor and ensure positive educational outcomes as a result of that expenditure of funds.

G. The West Virginia Voucher Law Is a Constitutionally Impermissible Special Law

55. The West Virginia Constitution has a strong presumption against laws that treat similarly situated people differently, i.e., “special laws.” Generally applicable laws are preferred.

56. At the First Constitutional Convention, the framers discussed the reason for requiring general laws in lieu of special laws:

⁵⁴ W. Va. Code § 18-31-5(d)(3).

⁵⁵ W. Va. Code § 18-31-10(a).

⁵⁶ W. Va. Code § 18-31-10(c)(1)-(2).

Your attention, however, is called to the fact, that in all practicable cases, the legislature is required to act by general laws. This obviates, to a great extent, the necessity for special legislation, and discourages that private solicitation of the members, the tendency of which is to introduce corruption and bribery as elements of legislation The confinement of the action of the legislature to general laws in reference to those practical matters which concern every citizen and every section of the State, gives assurance that, if not at first, yet speedily, those laws will receive that form which is most in accordance with the united wisdom and experience of the whole population. This illustrates the true theory and object of representative government.⁵⁷

57. The West Virginia Constitution therefore mandates that the “Legislature shall provide, by general laws for the foregoing and all other cases for which provision can so be made; and in no case shall a special act be passed, where a general law would be proper[.]”⁵⁸

58. The Voucher Law excludes antidiscrimination protections otherwise provided and deemed proper under general laws respecting education, including those afforded under the West Virginia Human Rights Act.⁵⁹ Under West Virginia law, county boards of education and public schools may not discriminate—including by refusing privileges or services—on the basis of race, religion, color, national origin, ancestry, sex, age, blindness or disability.⁶⁰ The Voucher Law circumscribes its discrimination safeguards to limited federal antidiscrimination protections under 42 U.S.C. § 1981—which covers only racial discrimination—and otherwise expressly states that any education service provider that accepts voucher funds need not “alter its creed, practices, admission policy, hiring policy, or curriculum” to accept vouchers.⁶¹

⁵⁷ *State ex rel. Taxpayers Protective Ass’n of Raleigh Cty v. Hanks*, 157 W. Va. 350, 353, 201 S.E.2d 304, 306 (1973) (citing Vol. III, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA., 831–33).

⁵⁸ W. VA. CONST. art. VI, § 39.

⁵⁹ W. Va. Code § 5-11-9(6).

⁶⁰ *Id.*; see also *Bd. of Educ. of Cty. of Lewis v. W. Va. Hum. Rts. Comm’n*, 182 W. Va. 41, 45, 385 S.E.2d 637, 641 (1989) (applying antidiscrimination protections under W. Va. Code § 5-11-1 *et seq.* to public school system).

⁶¹ W. Va. Code § 18-31-11(d).

59. By excluding antidiscrimination protections, the Voucher Law treats students receiving publicly funded education through vouchers differently than students receiving publicly funded education in public schools. Stated more plainly, under the Voucher Law, students using vouchers can be discriminated against on the basis of religion, gender identity, sexual orientation, and disability whereas public school students cannot. The Voucher Law's exclusion of antidiscrimination protections places the State's imprimatur on arbitrary, discriminatory, and unreasonable treatment inconsistent with the general laws respecting publicly funded education.

60. This is not an idle concern. Seventeen percent of students in West Virginia public schools are classified as students with disabilities eligible to receive special education and related services.⁶² There is only one private institution in the entire state that serves students with disabilities—a kindergarten through third grade program for students with autism, with approximately ten total enrollees.⁶³ The overwhelming majority of West Virginia students with disabilities could not be served by the voucher program.

61. Likewise, private schools in West Virginia may discriminate on the basis of religion, gender identity, and sexual orientation. Many West Virginia private schools require parents and guardians seeking admission to accept and adhere to rules and religious doctrines

⁶² In School Year 2020-2021, West Virginia served 42,753 students with disabilities, with 98% of those students in public school (1% parentally placed in private school and 1% homebound or in hospital). W. VA. DEP'T OF EDUC., IDEA CHILD COUNT AND EDUCATIONAL ENVIRONMENT SNAP-SHOT, 2, 10 (2021), <https://wvde.us/wp-content/uploads/2021/07/2020-21-Child-Count-and-Educational-Environment-Public-Snapshot.pdf>. That same year, 252,357 students were enrolled in West Virginia public schools. Liz McCormick, *Enrollment Is Down In W.Va. K-12 Schools This Year*, 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>. In total, 16.6% of West Virginia public school students received special education and related services.

⁶³ *Augusta Levy Learning Ctr.*, PRIVATE SCH. REV., <https://www.privateschoolreview.com/augusta-levy-learning-center-profile> (last visited Jan. 14, 2022).

professed by the schools. These often include discriminatory policies based on gender identity and sexual orientation.

62. Because students in public schools cannot be discriminated against on the basis of religion, gender identity, sexual orientation, and disability, the Legislature—through the Voucher Law—cannot allow students using publicly funded vouchers to be subject to this type of discrimination. The Voucher Law thus constitutes an impermissible special law in violation of Article VI, Section 39.

CLAIMS FOR RELIEF

COUNT I

Violation of Article XII, Sections 1, 4 and 5 of the West Virginia Constitution – Exceeding and Frustrating the Legislature’s Constitutional Obligation to Provide for a Thorough and Efficient System of Free Schools

63. The allegations in the preceding paragraphs are realleged and incorporated herein by reference.

64. Under the well-established doctrine of *expressio unius est exclusio alterius*, express constitutional obligations placed upon the State carry implied prohibitions on actions that exceed or frustrate such obligations.⁶⁴

65. The Legislature’s obligation to provide for a thorough and efficient system of free schools prohibits it from also funding a large and unregulated private school voucher program.

66. Likewise, the Legislature’s obligation to provide for a thorough and efficient system of free schools prohibits it from frustrating that obligation by siphoning off millions of dollars of public funds to private education and homeschooling to the detriment of the students in public schools.

⁶⁴ *Downey*, 125 W. Va. at 633, 26 S.E.2d at 163.

67. The Voucher Law violates Article XII, Sections 1, 4 and 5 of the West Virginia Constitution by using public funds to subsidize non-public schooling in a manner that exceeds and competes with the Legislature's obligation to provide for a thorough and efficient system of free schools.

COUNT II

Violation of Article XII, Sections 1 and 5 of the West Virginia Constitution – The Voucher Law Does Not Satisfy Strict Scrutiny

68. The allegations in the preceding paragraphs are realleged and incorporated herein by reference.

69. The Supreme Court of Appeals has affirmed that public education is a fundamental constitutional right in West Virginia and funding of public education is a first priority.⁶⁵

70. Any diminishment in funding to public education must satisfy strict scrutiny—it can only be done to meet a compelling state interest and must be narrowly tailored.⁶⁶

71. The Voucher Law violates Article XII, Sections 1 and 5 of the West Virginia Constitution by reducing funding to public education without a compelling state interest or narrow tailoring. The Voucher Law therefore does not satisfy strict scrutiny and must be enjoined.

Count III

Violation of Article XII, Sections 4 and 5 of the West Virginia Constitution – The School Fund Can Only Be Used for Public Schools and No Other Purpose Whatever

72. The allegations in the preceding paragraphs are realleged and incorporated herein by reference.

⁶⁵ *Pauley*, 162 W. Va. at 707, 255 S.E.2d at 878.

⁶⁶ *Doddridge Cty. Bd. of Educ.*, 200 W. Va. at 527–28, 490 S.E.2d at 346–47.

73. The West Virginia Constitution provides that the public monies in the School Fund can only be used to support “free schools throughout the state, and . . . no other purpose whatever.”⁶⁷

74. Likewise, the Constitution requires that additional monies raised to supplement the School Fund are also used for the “support of the free schools.”⁶⁸

75. Using public funds for vouchers to pay for private education and homeschooling is not in support of free schools.

Count IV

Violation of Article XII, Section 2 of the West Virginia Constitution – The Voucher Law Impermissibly Usurps the Authority of the Board of Education

76. The allegations in the preceding paragraphs are realleged and incorporated herein by reference.

77. Article XII, Section 2 of the West Virginia Constitution provides that “the general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform duties as such may be prescribed by law.”

78. The Legislature has codified in W. Va. Code § 18-2-5 that the State Board of Education “shall exercise general supervision of the public schools of the state, and shall promulgate rules . . . for carrying into effect the laws and policies of the state relating to education.” West Virginia courts confirm this authority.⁶⁹

⁶⁷ W. VA. CONST. art. XII, § 4.

⁶⁸ W. VA. CONST. art. XII, § 5.

⁶⁹ See *W. Va. Bd. of Educ. v. Bd. of Educ. of the Cty. of Nicholas*, 239 W. Va. 705, 714, 806 S.E.2d 136, 145 (2017) (“[T]he WVBOE is statutorily recognized as having the authority to make rules for carrying into effect the laws and policies of the State relating to education.”); *Hechler*, 180 W. Va. at 455, 376 S.E.2d at 843 (finding that “any statutory provision that interferes” with the Board of Education’s constitutional rule-making authority is unconstitutional.).

79. The Voucher Law creates the “Hope Scholarship Board” to oversee and administer the voucher program.⁷⁰

80. This violates the plain text of Article XII, Section 2 by divesting oversight and administration of certain public funds appropriated to the WVDOE to a separate and independent board.

COUNT V

Violation of Article VI, Section 39 of the West Virginia Constitution – The Voucher Law Is an Impermissible Special Law Excluding Voucher Students from Anti-Discrimination Protections

81. The allegations in the preceding paragraphs are realleged and incorporated herein by reference.

82. Article VI, Section 39 of the West Virginia Constitution states that the “Legislature shall provide, by general laws for the foregoing and all other cases for which provision can so be made; and in no case shall a special act be passed, where a general law would be proper”

83. The Voucher Law’s exemption of non-public schools and educational service providers from the general anti-discrimination requirements imposed on public schools—aside from discrimination on the basis of race and alienage—means public school students are protected from discrimination but voucher students are not. Private schools and other private education providers remain free to discriminate in areas such as admissions and discipline on grounds including religion, gender identity, sexual orientation, or disability.

84. The Voucher Law is a special law that violates Article VI, Section 39 because it treats students receiving public funds for vouchers differently than those in public schools with respect to crucial anti-discrimination protections.

⁷⁰ See W. Va. Code § 18-31-3.

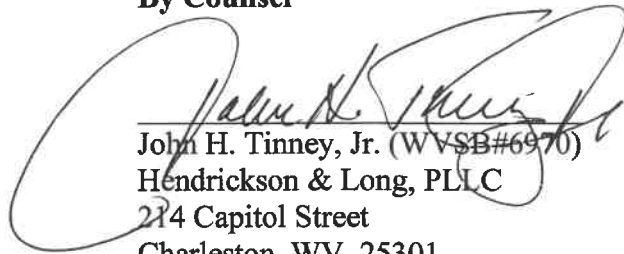
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

- A. For a declaratory judgment that H.B. 2013 violates Article XII, Sections 1, 2, 4 and 5 and Article VI, Section 39 of the West Virginia Constitution and is thereby null and void;
- B. For preliminary and permanent injunctive relief enjoining the State from implementing the H.B. 2013;
- C. For plaintiffs' costs pursuant to W. Va. Code Rule 54;
- D. For any further legal and equitable relief as this Court deems necessary, just, and proper.

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