# The Legislature

West Virginia School Boards Association

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## *Is Jackson favorite?*
## Rumors Swirl About Wise

Today's issue of the *Charleston Gazette* reports that Governor Bob Wise has called persistent rumors that he may resign "unfounded" and "absurd."

That line of thinking has evolved since the Republican Party, on Wednesday, issued a press release saying Wise had told cabinet members that he would not run for re-election and that Democrats would "anoint" former Senate Education Chairman Lloyd G. Jackson II to succeed him. GOP officials issued another release Thursday standing by its claims.

Wise, in remarks about the various rumors, has said that he will announce his plans in the fall.

According to the state Constitution, if Wise were to resign, he would be replaced by Sen. President Earl Ray Tomblin (D-Logan), until a special gubernatorial election were held to fill the vacancy.

Jackson's name first appeared in the news August 4 when *Charleston Gazette* reporter Phil Kabler discussed recent rumors that Jackson had engaged political consultant Larry LaCorte to aid in a campaign, and that he was ready to file candidacy papers.

Jackson is quoted as telling Kabler, "I support Bob Wise, and if he runs again next year, I'm going to support Bob Wise. Should he choose not to run, I'll strongly, actively and expeditiously consider a run for governor."

The former Lincoln County senator is vice president of the W. Va. Board of Education.

## O V E R V I E W

### STATS

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|---|---|
| 2003 Regular Session: | *Adjourned Sine Die* |
| Days Until 2003 Regular Session: | 159 |
| Interim Meetings Remaining: | September - January 2004 |

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### QUOTE

"I don't know whether it's the media or speculators, or if it's just a slow August…"—*Gov. Bob Wise quoted in the* Charleston Gazette *in reference to various rumors that he might not seek re-election as governor or that he might resign before his term is up in January 2005.*

## *'Unfunded mandate?'*
## NCLB Talk Turns Partisan

According to Deputy State Superintendent of Schools Dr. Stephen Paine, a National Education Association official will appear before the state Board of Education next week to discuss NEA's pending legal challenge to the federal No Child Left Behind Act.

The litigation, which NEA announced at its national convention last month, was discussed in several contexts during August interim legislative meetings. An NEA lawsuit, according to various reports, could be undertaken by a coalition of states claiming NCLB amounts to an "unfunded mandate."

Whether or not individual education associations such as the state School Boards Association, the state Association of School Administrators, or school employee associations could join the suit has not yet been made clear, although there has been some discussion that the organizations could file *amicus curiae* or friend of the court briefs, or possibly support the litigation effort by providing funding and publicity.

Tom Lange, W. Va. Education Association president, was quoted in August legislative interim meetings as saying the suit doesn't fault President Bush's education reform bill in concept—a position educational association officials and legislators are careful to make in discussing the litigation. Rather, the lawsuit says that the federal government isn't providing the funding to carry out NCLB's goals.

**Partisan Lines**

Support for possible litigation regarding NCLB appears to fall along partisan lines, with some Republican lawmakers urging caution and saying, as Sen. Steve Harrison (R-Kanawha), did at a Sunday, August 3, interim meeting, litigation would raise a "red flag." He also said the matter could be handled by "other means."

In the Tuesday, August 5, LOCEA meeting, Sen. Donna J. Boley (R-Pleasants) contended that the Bush administration had increased public education funding, including dollars for NCLB, based on a U.S. Department of Education press release distributed at that meeting. Several legislators, however, questioned the increase in dollars, with the LOCEA leadership directing the state Department of Education to provide a breakdown as to federal moneys received. Boley also criticized what she characterized as state Department of Education concurrence that NCLB funding was inadequate when SDE representatives who attended the meeting couldn't provide a breakdown on dollars needed.

"How can you talk about how much more (funding) you need when you don't know how much you've got?" asked Boley.

Paine, in answer to Boley, contended that funding needed for NCLB could "exponentially" become "more difficult" during NCLB's second year, although precise funding figures are not known by the SDE, he said. Boley contends SDE officials, before making such pronouncements, should be armed with figures and data when

*Please see* **NEA SUIT** *on page 6*

## *Senator says state resisted lowering standards*

# Legislators Respond to NCLB Results

by Jason B. Keeling

State officials continue to grapple with the federal No Child Left Behind Act, a Bush administration initiative that has created a stir in legislative halls across the country and has become the focus of pending litigation by the National Education Association (*see front page story*).

Last week state Superintendent of Schools David Stewart released the results of this year's round of NCLB testing, which identified 326 West Virginia public schools as failing to meet the mandate's adequate yearly progress (AYP) requirement.

Tuesday (Aug. 5) legislators took advantage of their first opportunity to comment on the results publicly during a Legislative Oversight Commission on Education Accountability meeting. Several committee members, including the chairmen, supported the federal law's intent, but chided Congress and the president for placing additional requirements on state school systems without attaching requisite funding.

Forty two of the flagged schools failed to meet AYP for a second year. Seven of the 42 receive federal Title I moneys, and must now use a percentage of those funds for services that provide parents the choice of sending their children to another school. Four schools must offer supplemental education services and two schools must offer corrective action, according to Deputy State Superintendent of Schools Steven Paine.

In school year 2002-2003 there were 36 focus areas (9 subgroups, 4 indicators) assessed under NCLB and some legislators, including Senate Education Chairman Robert Plymale (D-Wayne), expressed frustration that even if a school falls short within only one area—such as 95 percent test participation—they fail to meet the AYP requirements. Paine said 30 schools didn't make AYP because of the test participation rate, pointing out that state schools met AYP in 71 percent of the focus area cells.

Plymale said West Virginia legislators resisted lowering testing standards in order to make NCLB's impact lesser, which several states throughout the country, such as Texas, chose to do. (Refer to July 21 issue of *The Legislature*.)

House Education Chairman Jerry Mezzatesta (D-Hampshire) said there are contradictions in the law's testing requirements, given that 95 percent of students must be tested, but the federal government also says parents allow their children not to be tested. State Department of Education officials pointed out that the number of parents exercising the "opt-out" option currently is "insignificant." Some legislators fear the numbers could grow once more parents know about the provision, especially in schools that are marginal in terms of NCLB performance, although SDE officials say 98 percent of students participated in the state's testing effort last spring.

Paine said the SDE has a strategy to bring the schools in need of improvement up to standard, but acknowledged that problems could "increase exponentially" if a significant number of the 284 schools that didn't make AYP for the first year fail to meet the standard again in 2004.

NCLB requires schools to identify their students according to race, disability, limited English proficiency, and low socio-economic status, but there must be more than 50 students within any of the respective categories in order for the school to be held accountable. The following was compiled from information provided by the SDE:

Of the 557 schools who meet the above criteria for students categorized as low socio-economic status, performance varied across elementary, middle, and high schools, with 75 percent of those elementary schools, 55 percent of those middle schools, and 22 percent of those high schools making AYP.

Of the 235 schools held accountable for students with disabilities, only 22 percent failed to meet AYP; of the 35 schools held accountable for African-American students, 60 percent failed to meet AYP.

—*Keeling is WVSBA executive assistant.*

**The Legislature** provides county boards of education members, state policymakers, school administrators, and others information, opinion and commentary regarding West Virginia legislative issues. This publication does not necessarily reflect the official views, opinions or policies of the WVSBA, unless specifically stated.

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FEATURE STORY: This week refer to WVSBA.ORG's front page *Association Briefs* for Jason Keeling's report on legislative interim discussion regarding the LIBARY SERVICE NEEDS of the state's rural areas.

*'Level IV is stacked against employees'*

# Employees Want Grievance Law Changes

Analysis/Commentary by Howard M. O'Cull, Ed.D.

*"We cannot get justice at Level IV. The current system simply doesn't work for employees."*—Perry L. Bryant, Government Relations Director for the W. Va. Education Association, regarding the Education and State Employees Grievance Board.

"*(The Education and State Employees Grievance Board) has an attitude and philosophy that leans toward administrators*."—Kenneth C. Legg, executive director of the state School Service Personnel Association.

Anyone attending an August 4 interim legislative meeting who was not familiar with the state Education and State Employees Grievance Board would reach this conclusion: School employee groups say it becomes futile when employee grievances are appealed to Grievance Board administrative law judges. The reason: There's an 80 percent chance that the employer-county boards will prevail, according to the Grievance Board's figures.

That was the refrain in Tuesday's session—déjà vu of a previous, albeit shortened debate, that occurred during the 2003 regular legislative session.

Billed as a "discussion of grievance process for public school employees," the Tuesday session drew the players from the education community, each extolling their own formulations for what they would term as a successful grievance process.

Here's a recap of the presentations in the order given:

### WVASA

W. Va. Association of School Administrators. Dr. Martha Dean, executive director of the state School Administrators Association, told the committee the grievance process is one that "needs to be taken a look at," and that the process must be fair to both parties in all instances. She said school administrators must be both leaders and mangers, and that, as managers, they deal with complex areas of personnel law—for which they may have received little formal collegiate training. Due to the complexity of both school employee laws and due process timelines, Dean says administrators must be cognizant of timelines and other procedural and process provisions in order not to lose grievances because of technicalities. She also argued, as did WVASA during the regular session, that the "loser" in grievances should pay court costs, primarily as a means to encourage more "discernment" about appeals. The approach, she said, would "lead to better choices about issues taken to (grievance process) Level IV (hearing examiners) or (to) circuit court." Dean, too, called for streamlining the grievance process, essentially by combining "lower" steps and by eliminating hearings before county boards of education (Level III). In a question from Sen. Edwin Bowman (D-Hancock), Dean said county boards would have difficulty finding the funds to employ a county labor relations specialist. Bowman is a former labor lawyer.

### WVSBA

W. Va. School Boards Association. Fayette County Board of Education member Steve Pilato delivered WVSBA 's remarks. He, too, said the process is "one that may require additional work and thought from all parties involved…" Pilato specifically called for more school administrator training in personnel laws and the grievance procedure, saying "…county boards are, in many ways, captive to the information from the (school administration)…" Along these lines, he also called for more board training in regard to hearings. Pilato, echoing WVSBA's legislative agenda, called for an emphasis on mediation, but said not all grievances can or should be mediated—a point also made by Dean. Another point he made was for a "cutoff" in terms of appeal of grievances, some means to discourage appeal after a certain level, saying WVSBA would "entertain (making)…the Level IV decision final and binding." In that case, an employee or employer who appeals beyond Level IV would do so at their "own peril" if the grievance is lost, the party then being "required to pay court costs." WVSBA, he said, does not support employees having to pay courts costs "under the current arrangement. Our proposal would kick-in only if Level IV is seen as the ultimate place of appeal…" Pilato, also reiterating association legislative recommendations called for a study of grievance issues decided at Level IV to see, if there were trends or issues that boards should address such as hiring procedures, dismissal proceedings or the like. While not calling for the elimination of Level III, Pilato said the association would appreciate a "sincere discussion" about its elimination. He, too, outlined an expedited grievance process similar to that offered by Dean. Finally, Pilato asked all parties to enter into "sincere" discussions about the process, saying WVSBA "wants to be broad-minded" about the issues raised by various education interests.

### WVDE

W.Va. Department of Education. Deputy State Superintendent of Schools Dr. Stephen Paine termed the grievance process as "complex business." He said, in terms of the costs of grievances, that the federal No Child Left Behind Act will commandeer additional county board dollars. He also said that effective school administrators may take a posture of "try(ing) to head them (grievances) off" in part by consulting with employee group representatives and others and by having a close working relationship with employees in the county. He said the number of grievances appealed might be lessened if legal fees were borne by the party losing the grievance, but stopped short of endorsing that concept. Heather Deskins, a state Department of Education attorney, also appeared with Paine in representing the SDE. She reiterated the complexity of school personnel laws.

### WVEA

W. Va. Education Association. Long-time government relations specialist Perry Bryant represented WVEA. His contention—reiterated by other employee group representatives—is that Grievance Board Level IV is "stacked against employees." Based on Grievance Board information, Bryant said 80 percent of Level IV employee grievances are denied. Bryant based his remarks on the 1979 state Supreme Court case of *Morgan v. Pizzino* (163 W. Va. 454, 256 S.E.2d 592) In that case, the high court said school employee laws are to be "strictly construed" in favor of employees—a matter that has been "lost" by Grievance Board administrative law judges, with statutes being "strictly construed in favor of boards of education," according to Perry. Because of the "losses" at Level IV, Bryant said school

employees had "lost confidence" in the Grievance Board, with more grievances being appealed to circuit court, although fewer grievances are being filed. "Grievances are down dramatically," he said. According to Bryant, WVEA is asking that lawyers be extricated from the process except for employees in employee dismissal cases. WVEA also supports binding arbitration. In that the state Federation of Teachers and the state School Service Personnel Association oppose binding arbitration, Bryant's remarks appear to make arbitration an option in addition to Level IV. Under the proposal, he said there would be "very limited ability (for a party) to appeal to circuit court." WVEA opposes the losing party to a grievance having to pay court costs and attorney fees, with Bryant saying, parties shouldn't be "required to pay for a bankrupt system." The teachers' organization also opposes elimination of Level III hearings. Except for binding arbitration, Bryant called for no additional grievance process changes, but reiterated removal of attorneys from the process.

## WV/AFT

W.Va. American Federation of Teachers, AFL-CIO. Jennifer Wood, a WV/AFT staff member represented President Judy Hale. She said WV/AFT is calling for an expansion in the number of Grievance Board members to better represent constituent groups. She also referred to an AFT study, released during the regular session, showing that county boards had spent $7 million in legal fees during a three-year period. She said WV/AFT opposed binding arbitration, calling it a "very expensive process." According to Wood, the average arbitrated settlement could cost up to $3,000, and the process could be a lengthy one. She said the federation had "no position" on the number of steps in the process. As for Level III, she said, "Sometimes you do need that public forum (county board meeting) so that local boards need to know what is going on…" Wood also reiterated support for more training of county board members and administrators, and she said the WV/AFT opposed the "loser pays system," adding that "public funds shouldn't be spent fighting employees."

## WVSSPA

W. Va. School Service Personnel Association. Represented by Executive Director Kenneth C. Legg. Legg, the last speaker, was required to contract his remarks. He, however, reiterated that "better employer/employee" relations would result in fewer grievances. As in the regular session, he also questioned if employees "are wrong 80 percent of the time," in reference to Level IV decisions. Legg contends that the Grievance Board is "flawed" in that it projects "an attitude and philosophy that leans toward administrators." Reiterating a WV/AFT suggestion, Legg supports expanding the Grievance Board, adding employee representatives who then would select administrative law judges. "You're gonna see a change in what the employees are upset about" if that happens, he said. A long-time opponent of public employee collective bargaining, WVSSPA opposes binding arbitration for grievances, according to Legg.

## 'Out on the balcony'

This isn't the first—or likely last—time the Legislature will visit the grievance process. Just 20 years ago, grievances "beyond" the county level were appealed to the State Superintendent of Schools for resolution. A few years prior to that, each county board had "its own" grievance process, the processes being standardized by the Legislature in 1985. Since that time—county boards predicted that the sky and worse would fall—the grievance process was "adjusted" in the mid-1990s; tinkered with since then.

None of the concepts outlined in Tuesday's meeting are new: Binding arbitration, part and parcel of public employee bargaining, was called for in the 1980s, and, in fact, was adopted by one house of the Legislature, dying in the other. It was revisited in 1993.

With this bit of history, let's go out 'on the balcony' as Ronald A. Heifetz and Marty Linsky say in their book, *Leadership on the Line: Staying Alive Through the Dangers of Leadership* (Harvard Business School Press, 2002). The metaphor is based on one dancing in a big ballroom with a balcony up above. The band is playing and people swirl all around you to the music, filling up your view, with most of your attention being devoted to your partner, as you reserve whatever left to let your self get carried away by the music, your partner and the moment.

The authors then say, "…If you had gone up to the balcony and looked down on the dance floor, you might have seen a different picture. You would have noticed all sorts of patterns...Achieving a balcony perspective means taking yourself out of the dance, in your mind, even if only for a moment. The only way you can gain both a clearer picture is by distancing yourself from the fray. Otherwise, you are likely to misperceive the situation and make the wrong diagnosis, leading you to misguided decisions about whether and how to proceed." (p. 53).

## 'Changing rules'

Thus, consider these points:

· Some county board members and superintendents see grievance process "revisions" as an attempt to "change the rules" because county boards are "successful" in grievances, especially at Level IV. (It's a shame there are no statistics about how many grievances are settled at lower levels.) Of course, you "can" read things that way, but you may be wrong: Grievances are about "people." Since grievances are about "people," the Legislature may conclude that the process has lost its "people touch." In other words, to use Bryant's analogy, employee relations are being construed, at least by virtue of the grievance process, more in line with administrative law and processes—and, arguably, the people touch has been lost, or is being lost—a point Legg makes as well.

· Secondly, within the Legislature's milieu, that 80 percent of the Level IV grievances are decided against employees isn't going to win any p.r. accolades, precisely because it would appear that process has triumphed over people. In fact, the 1992 and 1993 grievance revisions resulted from that context—how to make the process one in which the "little people" had a better chance in that county boards were seen as having more a largess of money and wherewithal to battle grievances—precisely why Bryant refers to *Morgan v. Pizzino*, a case brought by WVEA, in the nascent era of personnel statutory revisions, litigation, and grievances—all designed to denude the school employment process from politics, nepotism and the like.

· Thirdly, county boards and superintendents, in stepping out on the balcony, must realize that any grievance procedure changes they pose—not matter how rational or legitimate—will be seen by most legislators within the above contexts. This doesn't mean changes can be presented or made, but it means the so-called 'level playing field' that everyone wants tilts, to some degree or to a great degree, toward the "humane" aspects of the process. In other words, seeing the process from an employee vantage. Why? Debbie Phillips (Putnam) reminded me the other day of that point: School board members—and certainly school administrators—often take a "managerial approach" to issues that legislators and the public may per-

ceive as more people-sensitive: If county board members aren't careful in how we approach grievance process issues, we may end up coming across as, well, managerial and process-oriented. Legislators, ever sensitive to people (especially organized groups such as teachers and service personnel), find it easier to side with employees. It's not that they "oppose" county boards. Rather, isn't it because employees and employee groups command a more compelling "people" response? Along these lines, shouldn't elected members of county boards of education, as elected officials, take a stance similar to legislators? This leads me to my fourth point:

**Back to the 'dance floor'**

· Yes, we're up in the balcony, but we must return to the dance floor to "affect what is happening" (p. 53). Now we can talk ideals: Let's resolve to be humane as possible while also proposing incremental revisions to the grievance process. Again, peruse Mr. Pilato's recommendations. History tells us Legislatures are incremental bodies. And yes, as to the nature of the dance, we need to be able to dance to the music, namely that wholesale changes probably won't be made in the grievance procedure. Binding arbitration, due to its connotations to collective bargaining, is hard to sell; expanding the grievance board may be a 50/50 proposition at best. Some changes that may make it: Reducing the grievance steps—although we should be wary about excising Step III—and somehow barring attorneys at Levels I and II. Trying to develop a "no fly zone" Level of appeal, or appeal at one's own peril may work if it's couched in a sense that's definitive but not too punitive for employees—hence, WVEA's reliance on arbitration, but with the circuit court option, albeit limited, or retention of the current Level IV for employees who don't want that option. We must argue that county administrators should at least be able to consult attorneys, in some fashion, for Levels I and II, although these hearings could be held without the "physical" presence of attorneys. Read more administrative training. While we may want to resist some structural changes to the process (some as bad public policy), we can—and should—offer suggestions, clarifications and modifications that will benefit *both* employees and boards. For instance binding arbitration doesn't build case law, meaning there could be variances between and among counties. This means that the Legislature would be seen as the arbiter of the variances (as it is now with some decisions that have been unfavorable to school service personnel). We have to pose the question or whether this approach is good public policy in that Grievance Board decisions are based on emergent case law since 1985.

This grievance issue is complicated. Yet, within its legislative context, we'll be on the losing end if we come across as advocates of process rather than advocates of people, the latter legislators perceive as progressiveness. (We, however, are not absolved of advocating changes—even wholesale changes—in some school personnel laws because, in this case, the issue is more about process than grievances, with grievances arising out of managerial interpretation of processes, rather than their development per se.) Indeed, it's all in how you look at it. As Mr. Pilato said, let's be broadminded: In framing our solutions, let's go up on the balcony as I've outlined above; let's have a careful, incremental package of revisions; and let's react to other suggestions with two competing ideologies in mind: That of people and that of process. Let's operate from a medium whereby we become advocates *both* for employees and county boards.

—*O'Cull is WVSBA executive director*.

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## *Coordination needed, local official says*

# Technology Strides Made in State's Schools

by Jason B. Keeling

Many of today's state high school students are better prepared than a decade ago in terms of technology usage, according to J.P. Mowery, Pendleton County Schools treasurer/technology director. There are still focus areas that should be addressed to strengthen technology instruction across the state, he told members of a legislative technology subcommittee (Aug. 3).

The Pendleton school system made strides in terms integrating technology within its curriculum, he said. By collaborating with Marshall University's June Harless Center for Rural Educational Research & Development, the county has been able to offer distance learning courses in subjects rural counties sometimes have difficulty offering, such as psychology, Spanish, and French.

The system has also worked with the state Virtual School to offer Internet-based courses, he said.

Through a Verizon grant, Pendleton Schools has been able to conduct several virtual field trips, to places such as the Bronx Zoo and Ocean Institute, Calif., giving students the opportunity to speak with experts face to face, he said.

Mowery says the state has done an excellent job of providing technological infrastructure, but challenges exist in terms of maximizing its potential.

At the local level, he said confusion can arise due to varying technology components within state mandated plans, such as the Comprehensive County Technology Plan, Unified County Improvement Plan, and Unified School Improvement Plan, and within federal Title I and E-rate plans.

Regional Education Service Agencies are improving their technology services to member counties, but some rural counties such as Pendleton have found it difficult to obtain assistance due to fixed amounts of time and resources within RESAs, he said.

Assistance is imperative for teachers to commit to using technology, given the responsibilities associated with providing instruction, he said.

Sen. John Unger (D-Morgan) asked Mowery how the state could better coordinate technology usage across the state.

Mowery said the various state entities with expertise in technology on the higher education and K-12 levels should establish dialogue among themselves in order to arrive at a common vision and to delegate responsibilities accordingly.

Brenda Williams, executive director of the state Office of Instructional Technology, said the secretary of education and the arts has recommended the P-20 Council to be that entity.

Unger challenged officials to "institutionalize" a plan.

—*Keeling is WVSBA executive assistant*.

## NEA SUIT

*continued from page 1*

attending legislative meetings.

Several other legislators pointed out that the press release said the president's funding plan provides $63.5 million more in funding for the Mountain State than "when the President took office."

### Washington press releases

"I don't believe press releases out of Washington," said Senate Education Chairman Robert L. Plymale (D-Wayne). Plymale also contends that the state and federal funding years differ and that the federal education department document was based on projected funding, not final congressional authorizations. Additionally, some lawmakers say the federal government may approach NCLB like they argue it has with special education—not fully funding the program despite federal assurances to the contrary.

Others joining the discussion, including House Education Chairman Jerry L. Mezzatesta (D-Hampshire), claimed NCLB was an unfunded mandate, with the lawmaker adding state taxes may have to be raised to "pay for an unfunded mandate from another level." He said legislators, over the past few years, had decided not to pass unfunded mandates on to county school boards, but that the federal government effectively was engaging in that practice.

### No 'vanilla' approach

The funding situation becomes grave, according to some legislators, when it affects schools that aren't federal Title I schools. "There's no money for other schools outside Title I," said one delegate, creating a burden on the county board to provide possible transportation services and other interventions for schools that are deemed deficient through NCLB regulations. Plymale and Mezzatesta said that's because NCLB requires one statewide accountability model for "all schools." By the state not resorting to a "vanilla approach" to accountability and standards, funding does become more of an issue, said Plymale. "We raised our standards," said the Wayne County lawmaker, adding, "We believe in accountability," both of which require additional funds, he said.

In regard to the NEA lawsuit, Paine said the matter would be decided by the state Board of Education. "The (SDE) obviously hasn't taken a position (regarding the litigation)," he said.

### WVSBA response

W. Va. School Boards Association Executive Director Howard M. O'Cull, Ed.D., said he thinks WVSBA members would "lean toward" the NEA suit, but says he'd recommend the association support the litigation only in the most "narrow of terms." "I think NCLB will be good for West Virginia, and is certainly strong in terms of merit and philosophy. When I make my recommendation to the Association Executive Board in September, if it's a recommendation to support the NEA effort, it will be based on the narrow proposition of funding—not to slam NCLB. At this point, I'm waiting until I get more information about NEA's goals and intent. I'll have that information by the (WVSBA) Delegate Assembly meeting Sept. 12," O'Cull said.

See NEA press release online at http://www.nea.org/newsreleases/2003/nr030702.html

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