



## Teachers get across-the-board pay raise

### Legislation will gradually close ‘gaps’ in increment steps

Refer to **Legislators review School Aid Formula**, page 4.

**Senate Bill 4008** gives teachers and school service personnel salary increases during the current school year.

Under the terms of **SB4008**, teachers will receive an annual \$1,350 across-the-board pay raise beginning the first day of the second quarter of the employment term. For most teachers, this means the annual salary increase will become effective Nov. 1. Because the increase is not effective during the entire employment term this first year, teachers will receive 75 percent of the \$1,350 or \$1,012.50 during this first year.

The bill also provides school service personnel a \$90 per month across-the-board salary increase beginning the first day of the second quarter of the employment term. As with the salary increase for teachers, for most service personnel, this means the annual salary increase will begin Nov 1.

For service personnel employed for a 200-day employment term, the \$90 per month increase equates to a \$900 annual salary increase. Because the increase is not effective during the entire employment term this first year, service personnel with 200-day employment terms will receive 75 percent of the \$900 or \$600 this first year.

This year and during the next three fiscal years, the legislation will gradually close the “gaps” in increment steps in the teachers’ salary schedule. This means that effective July 1, 2008, teachers will receive salary increments annually during each of the first 35 years of service. Currently, there are gaps in the years of service for which salary increments are provided.

As a result of bill’s provisions, the number of increment “years” is increased for all degree levels. According to various estimates, some teachers could see increases of up to \$9,000 or \$10,000 over the next few years, although that isn’t the norm.

Teachers are paid based on both degree levels – from a bachelor’s degree to doctorates – and years of experience. This does not include local supplements, many of which are provided through county excess levies.

In seeking to close the increment gaps, Gov. Joe Manchin and legislators are accomplishing an objective promoted by both major teachers’ organizations the past few years.

Additionally, some state policymakers are seeking to increase entry-level teacher pay, largely to reward new teachers entering the system so the state can better compete with districts outside West Virginia.

See **TEACHER RAISE** on page 2

## Overview

### STATS

2005 Regular Session: Adjourned Sine Die  
Days Until 2006 Regular Session: 102  
Interim Meetings Remaining: October 2005-January 2006

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### QUOTE

“I’m not for starting to build a school (proposed Mingo County consolidated high school) if the road (proposed King Coal Highway) hasn’t been funded yet. There’s no point in putting a school over there...” – *School Building Authority of West Virginia member Connie Perry discussing Mingo County’s SBA plans.*

## WVSBA revamps focus of overall legislative efforts

The West Virginia School Boards Association Executive Board will revamp and revitalize its legislative efforts partly through creation of a scaled-down legislative committee.

While each county board will appoint a Committee of 55 member, that committee will serve as a pre- and post-legislative session informational body for a smaller legislative committee that will be active during the session. The Committee of 55, under this arrangement, will be polled concerning legislative issues facing them and will be asked to evaluate WVSBA’s overall legislative effort.

The Committee on Legislation will comprise two county board members from each region as well as WVSBA executive officers and will provide guidance to WVSBA Executive Director Howard M. O’Cull, Ed.D., during legislative sessions. County board members in each region will elect COL members through mail-in ballots. WVSBA President Debbie Thompson said that mailing will go out late next week, with ballots due 14 days later. Persons who will appear on the ballots were selected at the WVSBA Delegate Assembly earlier in the month.

For more information, please contact O’Cull, [hocull@wvsba.org](mailto:hocull@wvsba.org).

# TEACHER RAISE

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According to West Virginia Department of Education officials, the average beginning teacher's salary (bachelor's degree with no years of experience) is \$23,990. That figure does not include "equity pay." When equity pay is included, the salary is \$26,350. Both figures omit local salary supplements and were current prior to the passage of **SB4008**.

## Locality pay lacked leadership's support

The salary bill does not provide locality pay or a housing allowance for teachers, although these were discussed by several Eastern Panhandle lawmakers, including Del. Bob Tabb, D-Jefferson, and other Jefferson County and Berkeley County legislators.

Those proposals didn't have full support of a majority of the House and Senate leadership. House Finance Committee Chairman Harold Michael, D-Hardy, earlier said House officials spent "about 32 seconds" discussing the notion before rejecting it outright at August interim meetings held in Morgantown.

Several Eastern Panhandle county boards of education members criticized the locality pay notion and housing allowance as "premature" and "not well-researched," according to Lori Stillely, Ph.D., president of the Jefferson County Board of Education.

Stillely, however, praised the Jefferson and Morgan legislative delegation for "helping initiate" the discussion on both issues and said county board members will continue to push for locality pay.

She also said she urges the West Virginia School Boards Association's Committee on Legislation (COL) to endorse these measures.

**The Legislature** provides county board 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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## Food tax reduced despite controversy

In other special session-related issues, the Legislature adopted Manchin's proposal to begin eliminating the sales tax on food, with a 1 percent reduction beginning Jan. 1.

That measure was controversial, generating a pre-session advertising campaign financed by Massey Energy CEO Don Blankenship and a failed state Supreme Court challenge by Sen. Majority Leader Vic Sprouse, R-Kanawha, to declare the Manchin proposal unconstitutional.

Sprouse, along with some GOP legislators and legal scholars argued the governor's special session call, which essentially limited legislative consideration of the tax reduction to 1 percent of the 6 percent sales tax on food, constrained legislators in their ability to amend Manchin's proposal.

The Supreme Court, however, said Sprouse's challenge was "premature" because the court's precedence has been to consider challenges to passage of legislation after the measures have become law — not prospectively.

After that ruling, legislators voted to uphold the "constitutionality" of the Manchin proposal by a party-line vote in each house. Del. Tom Louisos, D-Fayette, joined House Republicans in supporting attempts to amend the Manchin legislation.

Sprouse did not say whether he will make another challenge regarding adoption of the legislation.

Besides the advertising campaign, the food tax debate also included an appearance by Massey Energy CEO Don Blankenship at a Senate GOP caucus, although House GOP members rebuffed him in his request to meet with them, according to news articles.

## State employees gain raise, lose holiday

In other action, state employees generally received a \$900 pay increase as did higher education employees although, as with teacher salaries, the amounts may vary considerably depending on positions and years of experience.

Although legislation was introduced establishing the method of distributing the money for higher education employee salary increases, the legislation did not pass. Only classified employees have a codified salary schedule, and it is not mandatory as the salary schedules are for teachers and service personnel.

The Legislature also adopted a proposal that combines state holidays for Washington and Lincoln's birthdays into a single Presidents' Day.

The measure received considerable opposition from GOP legislators, though it easily passed.

Manchin Administration officials and legislators said the holiday consolidation brings West Virginia in line with other states and that it will save the state \$4.6 million per year — the cost of one day's pay to state workers.

Most public education employees didn't receive the holiday unless it was provided through local school calendars, according to West Virginia Department of Education school finance officials.

The legislation also makes the Friday after Thanksgiving an official state holiday. For the last several years, governors have given that day as a paid holiday to state workers, with public school employees having that holiday as well, based on local school calendars.

The September Special Session — referred to as the Legislature's Fourth Extraordinary Session — began Tuesday, Sept. 7, and ended Tuesday, Sept. 13.

*See TEACHER RAISE on page 3*

# SBA may cut \$10 million in needs projects

## Authority members watching Mingo consolidation, Hancock bond

Rising construction costs likely will force the School Building Authority of West Virginia (SBA) to cut the number of needs projects it funds this year by about \$10 million, according to SBA officials.

Higher steel, gas and other building prices, combined with previously approved multi-year projects, leave the SBA with about \$38 million for the 2007 funding cycle, which begins later this year.

In the last fiscal year, no needs projects were funded – a first in the SBA's 15-year history – largely due to the Legislature slashing the authority's excess lottery funding by \$19 million.

Some of the \$38 million may be placed in a contingency fund, which is a welcome move for counties, but it would reduce the actual amount of SBA money for project awards.

County board needs project proposals must be submitted by Oct. 3, with project presentations made in November and the SBA awards announced in December.

The SBA in its Sept. 26 meeting also increased the square footage allowances for new schools and allocated an additional \$3.9 million to counties that do not have enough money to finish existing projects that already have received SBA dollars. Officials blamed

high construction costs for the shortfalls.

SBA board members said they will keep a close watch on the delayed consolidated high school in Mingo County as well as an upcoming \$34 million bond election in Hancock County.

A Kanawha County Circuit Court injunction prevents contractors from commencing work on the Mingo County site.

Long-time SBA member Connie Perry in a *Charleston Gazette*

article questioned future funding for the project because the coal company mining the future school site still has to reclaim it before they donate the land to the state. She also noted that a highway to provide access to the school also must be built.

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***"I'm not for starting to build a school if the road hasn't been funded yet. There's no point in putting a school over there."***  
– ***Connie Perry, School Building Authority member***

school over there," Perry said.

In Hancock County, a Nov. 5 election lets voters there decide whether to support the bond proposal. With \$16 million from the SBA, the bond would pay for a new consolidated high school along with reconfigured middle and elementary schools.

The SBA last year voted to delay consideration of the project due to the economy in the Northern Panhandle.

## TEACHER RAISE

*continued from page 2*

West Virginia recently was cited by *Governing* magazine for having a large number of extraordinary sessions. Based on an Ogden newspapers calculation, West Virginia lawmakers have spent 13 extra days in Charleston this year with an estimated cost of \$40,000 a day. "This amounts to an extra cost of \$520,000 to state taxpayers in 2005," according to an article in the *Wheeling Intelligencer*.

### County officials won't see increase

In its deliberations, legislators rejected a proposed 20 percent salary increases for county officials and also nixed plans to increase pay for top Manchin administrative appointees.

The county officials' pay bill died in the House Finance Committee after passing in the state Senate. Some county officials, including Kanawha County Commissioner Kent Carper, openly opposed the increase in county officials' pay.

The increase was first proposed by the County Commissioners' Association of West Virginia then incorporated into a bill encompassing all county officials whose pay was last increased in 2002, according to Patti Hamilton, executive director of the West Virginia Association of Counties.

While the governor included the county officials' pay increase in his 16-item special session call, he did not introduce specific

legislation. The WVACO provided the draft legislation, according to Hamilton.

Legislators who wanted table games legislation to be considered were disappointed when that item didn't appear on the legislative call, especially because it appeared the House of Delegates, which has been reluctant to consider the measure, reportedly was more receptive to the legislation than in past sessions.

According to Speaker Bob Kiss, D-Raleigh, the measure may be taken up in the 2006 regular session.

A spokesperson for the Governor's Office told the *Charleston Gazette* that Manchin does not plan to call the Legislature back into special session this year.

Gaming industry spokesman John Cavacini said the racetracks need to be able to offer table games to stabilize and maintain the customer base they may otherwise lose to gaming facilities in Pennsylvania.

For a copy of SB4008, please contact WVSBA or the state Office of School Finance.

*Sources: WVSBA reporting; The Charleston Gazette and Charleston Daily Mail newspapers; The Wheeling Intelligencer; The Associated Press; Hank Hager, counsel, Senate Education Committee and Joe Panetta, executive director of the state Department of Education's Office of School Finance.*

# Legislators review school aid formula

## *Professional development study a 'work in progress'*

By Jason B. Keeling

Legislators continued to review intricacies of the state school aid formula on Sept. 11, in cooperation with Dr. Calvin Kent of Marshall University and Dr. Tom Witt of West Virginia University. Most of Education Subcommittee C's discussion focused on the formula's first step, which is dedicated to personnel salaries.

Witt previously indicated that a means of determining regional cost-of-living differences would be difficult to establish in a manner that would be accepted as constitutional. But he recently discovered the Florida Education Finance Program, which is used as an adjustment factor for school personnel cost differentials, and has withstood the scrutiny of the Florida Supreme Court. He suggested looking at this model for further guidance.

Kent said average teacher salaries per county may not be accurate, given that more senior teacher salaries tend to increase the average. Sen. Robert Plymale, D-Wayne, concurred, stressing the importance of focusing on the average beginning teacher salary.

Currently, state appropriations are calculated based upon a county's student population. Rapid demographic changes in areas that experienced growth or decline were at times funded based on inaccurate numbers, said Kent, who then highlighted the West Virginia Board of Education's August-approved Policy 8224 as an improvement, given its adjustments in the way student populations are identified. Kent said he and his colleagues would continue to focus on how to best factor funding based on demographic changes.

Some discussion also occurred on county excess levies, with Del. Larry Williams, D-Preston, saying that school systems may want to consider running "cafeteria style" levy calls, in which voters could approve or disapprove select portions of a call, versus accepting or rejecting them in their entirety. Cities and county commissions sometimes use this method, according to Williams.

### **PD tied to teacher license renewal**

In other legislative action, Stephanie Hirsh, Ph. D., deputy executive director of the National Staff Development Council, presented a preliminary report regarding the state's professional development efforts.

A final report will be presented at next week's interim meetings, according to House and Senate education committee staff members.

Shortly after the 2005 regular legislative session, the Legislature contracted with NSCD to complete the study.

In the 102-page preliminary report, which members of the Legislative Oversight Commission on Education Accountability (LOCEA) were briefed on in August, Hirsh outlined recommendations primarily aimed at "school-embedded" professional development as the chief emphasis.

In her remarks, she also stressed the importance of seeing staff development as a "school-wide," collaborative endeavor, especially in schools that have difficulty with student achievement.

One specific recommendation is ensuring the "accessibility and utility of student achievement data at all levels in the system to assist professional development planning at the team, school, system, regional and state levels."

To further assist in this endeavor, NSDC suggests use of professional development providers to offer "content" academies tied to student learning standards to ensure a highly qualified teaching force."

Hirsh termed these as "subject-based networks" for teachers who would "convene" as "learning communities...(for acquiring professional development)."

She also suggested that professional development participation be tied in some way to teacher certification renewal and that the emphasis for professional development be "results-driven."

### **PD should produce results**

One of the more sweeping NSDC recommendations would require completion of a study relating to an "evaluation of the state's professional development investment. An evaluation tied specifically to resources and results will allow state leaders to identify those investments that have produced the most significant results and areas where resources may have been squandered."

Along these lines, Hirsh recommends that professional development providers submit "substantive evaluations" of their efforts.

In terms of results-based professional development, the report states, "Currently, much of the professional development in the state is based on a traditional training model approach that does not provide for the kind of in-depth, job-embedded learning requested by teachers and administrators to address the daily challenges they face in schools...."

The report, in one of its most sweeping recommendations, calls for "(reassessment) of the governance and operational structures needed to enhance the professional development system," with part of that study to focus on "realigning" various entities' professional development goals with "results from all levels...used to evaluate the impact of the initiative."

Another of the recommendations in this area includes development of specific professional development standards that will "guide professional development planning, implementation, and evaluation...at all levels of the system...."

Additionally, the report calls for development of a "comprehensive, results-oriented vision, goal and plan" regarding professional development. This plan should be developed by a broad-based group of policymakers and stakeholders, according to the report.

See SAF REVIEWED on page 5

# SAF REVIEWED

continued from page 4

For professional development to be effective at the county level, Hirsh's group recommends that county staff development councils "plan for district-wide and school-based professional development based on state and county priorities for school improvement, using relevant student performance and program evaluation data...."

In regard to this recommendation, the report says "The planning entities need to be aligned through strong communication and accountability links to ensure that they are all working toward the same goals...."

## State has too many advisory councils

The report also notes that West Virginia has "many advisory bodies with similar and sometimes overlapping functions," including county professional development councils, county school improvement councils, and faculty senates.

According to the report, "(This array of advisory bodies means) consideration should be given to consolidation of some of these bodies at all levels of the system. Such a change could help to promote a clear focus on systemic school improvement and student achievement."

To bolster this recommendation, the report suggests policymakers consider providing the state Center for Professional Development a "more deliberate role."

In terms of teacher licensure, the report recommends that the state review "current strategies for leveraging the application of teaching standards. Consider aligning them more closely with national models such as those of the National Board for Professional Teaching Standards and The Interstate New Teacher Assessment Consortium...currently embedded in the NCATE standards."

The report also calls for strong professional development for school administrators, especially to "focus school leader pre-service training and professional development on the knowledge and skills needed by today's school leaders."

The report suggests "(re-examining) the entire relicensure and annual professional development requirements. Consider a philosophy of relicensing teachers according to knowledge and skills as well as competency in teaching."

This recommendation also calls for consideration of "(restructuring) the separate 18-hour requirement to create incentives for teachers to complete in teams at school sites. Consider waivers for schools that submit plans for school improvement/staff development that exceed the 18-hour requirements and align with the new state vision and standards."

In another of its recommendations relating to teacher certification, the report calls for revisiting the "connections between teacher relicensure, teacher evaluation and the improvement planning cycle. Consider limiting requirements for individual plans to teachers who are new to the profession, new to a school, or require a growth

plan."

## Report calls for funding review

The report also calls for a comprehensive review of "existing funding" for professional development, including various local, state and federal funding streams, with the goal of "reallocating significant funds toward the implementation of a system that prioritizes school-based learning."

Other recommendations include a study regarding the feasibility of "allocating more professional development resources directly to school districts to support local decision-making for the purchases of services from external providers. Allowing districts the authority to make such decisions could result in external providers considering more carefully the services it offers to districts."

A final recommendation relates to prioritizing state professional development funding to districts and schools with "greatest needs."

Although LOCEA members did not enter into great discussion regarding the preliminary report, Del. David Perry, D-Fayette, was concerned about a report recommendation about use of teachers' non-instructional days for professional development.

In answer to Perry's question, Hirsh said NSDC researchers had failed to note that even though teachers have a 200-day contract, there are few days "left" for staff development.

NSDC officials had presumed 20 days were available, comparing the 180-day school instructional term to the 200-day teacher contractual term.

Other legislators echoed Williams' comment that the study is a "work in progress."

In a related development, the Sept. 29 inaugural meeting of the reconstituted CPD was canceled because the meeting notice was not filed at least two weeks earlier as required by law. That information was provided by WVDE officials.

LOCEA also received a report about the state's college-going rate which, according to former Higher Education Policy Commission Chancellor Mike Mullen, Ph.D., continues to increase, although the higher education completion rate is still of concern, he said.

Mullen's report shows that George Washington High School (Charleston) had the highest college-going rate.

*The writer is a public relations consultant and owner of Keeling Strategic Communications. West Virginia School Boards Association Executive Director Howard M. O'Cull, Ed.D., contributed to this story.*

***"Currently, much of the professional development in the state is based on a traditional training model approach that does not provide for the kind of in-depth, job-embedded learning requested by teachers and administrators to address the daily challenges they face in schools...."***  
— National Staff Development Council report .

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# Ethics complaint proceeding against state Senator Billy Wayne Bailey

According to news media accounts, the West Virginia Ethics Commission will investigate a complaint filed against Sen. Billy Wayne Bailey over his involvement with a southern West Virginia senior citizen agency accused of mispending millions of dollars in government funds.

Earlier this year, Bailey, D-Wyoming, requested \$55,000 of budget digest funds for a roofing project at a senior center owned by the Wyoming County Council on Aging.

State Senate leaders vowed last year not to funnel any money to the Wyoming County-based agency and executive director Bob Graham until investigations into spending were concluded. But the latest round of budget digest awards includes the grant.

Graham, who earned about \$457,872 in salary and other benefits in 2003, has been investigated for improperly using the agen-

cies' resources, taking all-expense paid trips and getting a host of lavish perks.

Bailey said he earned \$25,000 from the program last year as a contract employee. He also has done catering work for the agency.

The watchdog group West Virginia Wants to Know filed the complaint last month. The Ethics Commission Probable Cause Review Board said that if the complaint is true, it violates the ethics act, according to a Sept. 22 letter from Ethics Commission Executive Director Lew Brewer to West Virginia Wants to Know, according to the *Charleston Gazette*.

The Ethics Commission will now investigate the substance of the complaint, according to the *Gazette*.

Sources: *The Associated Press and Charleston Gazette*.

## State board to discuss Mingo appeal today

### *County to fight Mercer judge's decision in favor of state takeover*

See related articles in *Guest Perspective*, page 10, and *Last Word*, page 13

The state Board of Education will meet at 2 p.m. Sept. 30 to consider the Mingo County Board of Education's appeal of a hearing examiner's decision to uphold the February takeover of the Mingo system.

The Mingo board voted Sept. 15 to appeal retired Mercer County Circuit Judge David Knight's Sept. 9 ruling that the state board was obligated to act after receiving complaints about the school system from county residents, among other parties that includes two school board members.

Knight also said three county board members who challenged the takeover failed to prove claims that the board acted arbitrarily and capriciously when it ordered an audit of Mingo County schools, stripped the county of its accreditation and seized control of its schools.

"The arbitrary and capricious standard is not met by merely demonstrating that one disagrees with the state board's actions or that one dislikes the state board's actions," Knight's ruling said.

The ruling, issued earlier in the month, followed a four-day administrative hearing in August on a petition filed by Mingo County board members William Duty, Mitchell Chapman and Mike Carter. The petition claimed that the state's motive was to push forward a consolidation plan a former county school board had backed.

Duty, who is the board's president, and Chapman were elected in May 2004. Carter was elected in 2002.

Their case was set to go to trial in July but instead the two sides agreed to allow Knight to conduct an administrative hearing first.

"I'm pleased with his decision. I think it vindicated the state," Deputy Attorney General Kelli Talbott, who represents the state board, said Monday.

Jim Lees, a Charleston attorney representing the petitioners, in an Associated Press article said he was not surprised by the ruling because Knight was "a designee for the state board" in the administrative proceeding.

"I've always thought that the relief we get, if we get it, will come from the circuit court or (state) Supreme Court," Lees said.

In 2003, Mingo County won \$17.4 million from the School Building Authority to consolidate Williamson, Burch and Matewan high schools into a new Mingo South High School, as outlined in the county's 10-year Comprehensive Education Facilities Plan. That plan was developed in 2000 by residents and approved by both the county board and state board.

Duty and Chapman's election in 2004 gave the county board an anti-consolidation majority that later voted 3-2 to "freeze" the facilities plan and halt work on the consolidation.

The vote prompted Mingo County board member J.W. Endicott, who is now in the minority with board member Dee Kapourales, to request state board intervention. Several county residents made a similar request, alleging low test scores and inadequate curriculum.

"Not only had such official complaints alleged serious impairments in the quality of curriculum and achievement, but they also raised issues as to whether or not the Mingo County Board of Education was adhering to State Board of Education Policy regarding Comprehensive Educational Facilities Plans," Knight's ruling said.

After receiving the complaints, the state board voted in December 2004 to order a countywide audit. The resulting review by the Office of Education Performance Audits found problems with curriculum, facilities, finance, leadership and compliance. Financial irregularities and unstable leadership also have caused problems, auditors found.

See **MINGO APPEAL** on page 8

# Efforts continue to oust board members

## *Hampshire County may face lawsuit, budget deficit*

Lawyers for Hampshire County Schools Superintendent David Friend are considering action against the Hampshire County Board of Education for not “negotiating in good faith” on a proposed buyout of Friends’ contract, according to board president Brenda Pyles.

The buyout had been secured in negotiations between Norwood Bentley, the Hampshire board’s attorney, and Wesley Matheney, Friend’s attorney, Pyles said.

It is the latest in a series of developments since the Hampshire Board met Sept. 21 to consider the Friend buyout proposal.

Moreover, the development comes shortly after Candy Canan, president of Citizens for Quality Education in Hampshire County, said last week her organization will continue to seek to remove Pyles and fellow board member Helen Heatwole.

Canan’s comments were made in response to Matheney, regarding the special meeting in which board members unanimously voted against buying out Friend’s contract.

Matheney said, “It seems apparent that some sort of deal had been cut,” referring to the citizens’ group and board members during their deliberations about the proposed contract buyout, according to an article in *The Hampshire Review*.

Matheney made the comment after he said he had read a West Virginia MetroNews article in which Canan said her citizens’ group “may no longer seek the removal of (the) two board members from office due to their (Sept. 21) vote.”

Canan later told the *Hampshire Review* her comments may have been premature because she hadn’t discussed the proposal with other members of the citizens’ group. However, she said she stood by her “decision to be open and honest with my intentions,” although her group on Sept. 22 voted to continue with efforts to remove the two members.

According to the *Hampshire Review*, Canan said she was “astounded to find that the board had initiated the negotiation to buy out Friend’s contract, especially after the unanimous result of the (Sept. 21) vote.”

Further, she said, “At no time was I aware of what the vote would be, nor did I or any of our members enter into any negotiations to sway the votes of the board to reflect our views.... This insinuation by Mr. Matheney is absurd and reflects poorly on those representing Mr. Friend.”

Matheney also said the board’s action not to buy out Friend’s contract for \$275,000 was “perplexing.” He also alleged that the board hadn’t negotiated in “good faith,” and that the board failed to tell the public at the Sept. 21 meeting that the buyout was all “part of

weeks of negotiations at the board’s request.”

The Morgantown attorney said he was “disappointed” that HCBOE members “sat in silence” as members of the citizens’ group “attacked Mr. Friend.”

He told the Romney newspaper, “They (county board members) did not even respond and tell them (CQEHC) that we had negotiated – with their input....It’s obvious that one small group of citizens is running the county.”

Matheney also said the board didn’t “negotiate in good faith, so we’ll move from here.”

He said Friend is a victim of a “witch hunt” initiated by the demise of Jerry Mezzatesta, former Hampshire County school employee and state delegate.

***“At no time was I aware of what the vote would be, nor did I or any of our members enter into any negotiations to sway the votes of the board to reflect our views.”***

— Candy Canan, president of Citizens for Quality Education in Hampshire County

Pyles told *The Legislature* the board had initiated the buyout through Bentley.

She said county board members wanted to be “united” and that she had no comment regarding Canan’s or Matheney’s comments.

In another Hampshire County matter, school finance director Denise Hott said it already appears that Hampshire County schools could go into the 2005-2006 school year facing a deficit,

according to the *Review*.

Hott said the school board had a nearly \$900,000 carryover to take into the next year.

However, she said that money, collected from previous years of savings, has already been eaten up by added expenses: \$244,480 is needed to cover shortfalls in the original budget, as well as \$100,000 for funding deficits on a middle school project, Hott said.

And, she said \$94,346 has been designated for contingencies, which could quickly be eaten up by legal fees or a grievance filed by many of the county’s principals.

Hott told the county board they had been granted \$590,000 for Capon Bridge Middle School, on top of the original \$7.2 million for the new facility, which Hott said would allow for construction of the main building.

Mezzatesta sued the board, protesting dismissal from his central office position as “community specialist.” That dismissal was upheld by an administrative law judge representing the State and School Employees Grievance Board.

According to news articles, Mezzatesta has filed for retirement. He would be able to collect \$28,000 yearly in retirement benefits.

The removal case is scheduled to go to trial in early December. According to Pyles, Friend’s sick leave expires Dec. 31. He has been on sick leave since early last fall.

Mezzatesta served nine terms in the House of Delegates and was House Education Committee chairman for eight years.

## Teacher of the Year.

Bridget Call, an English teacher at Matewan High School in Mingo County, has been named West Virginia's teacher of the year for 2006. According to West Virginia Department of Education officials, Call was chosen from 50 nominees. Call said she strives to be a role model for her students, including her belief that "no insignificant person was ever born." She will receive an educational technology package valued at about \$14,300 from the Smarter Kids Foundation, according to WVDE officials. She also will represent the state in the national teacher competition.

## Mullen steps down today.

J. Michael Mullen, Ph.D., will step down today as chancellor of the state's Higher Education Policy Commission (HEPC). Mullen, who announced his resignation last month, originally said he would resign Jan. 30. HEPC members, according to news articles, said Mullen will continue to be employed by the commission until the end of January as he completes "special projects" for the HEPC governing board. He will have the title "chancellor emeritus." Bruce Flack, a long-time HEPC administrator, was appointed interim chancellor. State Secretary of Education and the Arts officials said Mullen will develop a report about the commission's accomplishments the past five years and study how West Virginia higher education programs can be made more competitive internationally. The *Charleston Gazette* reports that higher education commission members hope to hire a new chancellor within the "next 15 weeks."

## Coal severance legality.

In what some statehouse watchers call the \$500 million case, the state Supreme Court of Appeals last week met at Marshall University to hear a case that ostensibly relates to when or if the state's coal severance tax is illegal because, in the opinion of coal company litigants, the U.S. Constitution's "import/export clause" prohibits state governments from imposing any "imports or duties on imports or exports." In the hearing, justices asked coal company attorneys how one would determine whether those mining or handling mined coal would know its ultimate destination, thus making it virtually impossible to know which mined coal would be exported. Coal company officials stuck with their argument that once coal is loaded onto trains for export, it can no longer be subject to severance tax. State Tax Department officials said that an "adverse" ruling could cost the state between \$400 and \$500 million for taxes paid since 1997, plus interest. The state's tax collections are beginning to show signs that the growth in West Virginia's economy for the current budget year is slowing, according to Mark Muchow of the state Department of Tax and Revenue. Current estimates are 6.9 percent above projected revenue collections – well below the 13 percent growth in the tax collections the state enjoyed in the FY05 budget year. Muchow also noted potential effects of Hurricanes Katrina and Rita, especially on fuel prices. Increasing fuel costs already have been blamed for a decrease in student field trips, including trips to the Charleston's Clay Center for the Arts and Sciences.

## 10 pounds of bologna.

A group of Coal River Valley residents recently delivered a 10-pound roll of bologna to Gov. Joe Manchin, saying the luncheon meat symbolizes the results of the investigation Manchin ordered

into concerns about the safety of Marsh Fork Elementary School in Raleigh County. Raleigh County board officials opened the school after the Manchin administration, based on a state Department of Education study, assured them that the site, which is adjacent to a Massey Energy coal-processing facility and slurry impoundment, is safe. WVDE officials later said they did not test the air quality inside the building. Some Raleigh County residents claim that coal dust and chemical emissions from the Goals Coal facility are endangering Marsh Fork students. Manchin ordered an investigation of the site in July. According to news articles, the state Department of Environmental Protection (DEP) recently renewed permits for the impoundment and approved construction of the second of two new silos at the site.

## State SAT scores down.

The 2005 West Virginia average SAT scores dropped three points in the mathematics section and one point in the verbal section compared 2004. Despite the drop, state high school students scored six points above the national average on the college entrance exam this year, according to the College Board, a New York-based nonprofit that owns the Scholastic Aptitude Test. According to the College Board, state students scored 523 on the verbal section, 15 points above the national average. But in math, they scored nine points below the national average at 511 in mathematics. According to WVDE officials, about 20 percent of last year's high school students took the SAT, including both public and private high school students. African-American students showed the most improvement in the verbal and math sections, according to WVDE officials.

## State sets election contribution limits.

West Virginia has taken the lead in regulating "527 groups" which increasingly influence elections, although some legal scholars and others say the legislation – enacted in the September special legislative session – may be unconstitutional. West Virginia becomes the first state to limit the contributions such groups can raise, setting the limit at \$2,000 per election cycle. Last year, "527 groups" spent \$5.6 million on the state Supreme Court race alone, with \$2.5 million of that coming from one person, Massey Energy CEO Don Blankenship. Another \$1.4 million came from the Consumer Attorneys of West Virginia. The bill passed the Senate 33-0 and 91-4 in the House of Delegates.

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## MINGO APPEAL

*continued from page 6*

The state board voted in February to intervene in the county system. The takeover, the second for Mingo County in less than a decade and one of only four statewide, stripped the local board of nearly all decision-making powers.

The next step in the case would be an administrative hearing before the state board.

The case is being heard by Kanawha Circuit Court Judge Paul Zakaib.

# AEL changes name to reflect wider goals

Appalachia Educational Laboratory Inc., which for nearly 40 years has provided research, evaluation, professional development and consulting to schools, on Sept. 1 changed its name to Edvantia Inc. to “more accurately reflect the organization’s focus and to better support its growth,” according to Patricia Cahape Hammer, director of communications for the company.

“Combining the concepts of ‘education’ and ‘advantage’ into our new name captures the essence of the organization’s core mission,” said President and CEO Doris Redfield. “As of today, we are Edvantia, a nationally focused organization dedicated to improving educational outcomes by providing our clients with the highest quality, most objective research, development, and evaluation services,” she added.

Appalachia Educational Laboratory was created in 1966 as a nonprofit corporation and one of the original federally funded Regional Educational Laboratories. The company focused exclusively on the Appalachian counties in a multi-state region, which later was revised to include all of Kentucky, Tennessee, Virginia, and West Virginia.

The organization began to operate other regional programs for the U.S. Department of Education and the National Science Foundation, including the Region IV Comprehensive Center, the Eisenhower Regional Consortium for Mathematics and Science Education, and the Coalfield Rural Systemic Initiative. It offers a range of education products and services to public school systems, government and nonprofit agencies, and corporations nationwide.

“Appalachia Educational Laboratory” was shortened to “AEL” in recognition of the organization’s broader focus and growth.

“Today, Edvantia is proud to still hold the Regional Educational Laboratory and Comprehensive Center contracts, and we will continue to respond to regional needs, but we want to signal to any organization that shares our passion for successful educational outcomes, regardless of its location or mission, that we are ready to put our expertise and our insights to work,” said Carolyn Jones, chairwoman of Edvantia’s Board of Directors.

The organization’s Web site is [www.edvantia.org](http://www.edvantia.org).

# Phi Delta Kappa seeking new members

The Kanawha Valley West Virginia Chapter of Phi Delta Kappa (#1234 Region E) is restructuring. As part of that restructuring, the Chapter is seeking to attract educators from throughout the state who are not part of the Huntington, Martinsburg or Morgantown Chapters.

According to Charleston Chapter President Howard M. O’Cull, Ed.D., the chapter will meet every other month, with meetings to include a presenter or presenters.

Grant County Schools Superintendent Marsha Carr-Lambert, D.M., provided the opening presentation for the Charleston Chapter, discussing the effectiveness of state intervention in school districts, based on her dissertation study of the early 1990s state board of education takeover of Logan County Schools.

In her presentation, Carr-Lambert discussed how findings from the Logan intervention, considered to be one of the few successful state takeovers in the nation, succeeded largely due to the effectiveness of the superintendent the state assigned to the troubled school system. He provided differing but appropriate styles of leadership which, combined with locally supported initiatives, changed the culture of the system that largely was focused on politics, she said.

PDK members urged her to make the same presentation to the state superintendent of schools and state school board in light of three districts still under state takeover.

If you would like to join the Phi Delta Kappa’s West Virginia chapter, please contact O’Cull at [hocull@wvsba.org](mailto:hocull@wvsba.org). Meetings will be announced well in advance, and each session will last less than 75 minutes and include light refreshments.

The chapter will meet at the Kanawha County Schools Central Office. Meetings begin promptly at 4:45 p.m.

Phi Delta Kappa International has more than 65,000 members worldwide, representing all levels of the education profession and includes educators from preschool through higher education. Un-

dergraduate students, community leaders, parents, and institutions also may join.

Through its resources, PDK International members can increase their knowledge of education issues and access publications, programs and services. The organization allows members professional affiliation with colleagues.

PDK International publishes the Kappan Magazine, a professional educational journal dedicated to research, best practices in education and coverage of educational news.

## In Memoriam

*William D. “Bill” Dodd  
Ritchie County*

**November 29, 1958 –  
September 1, 2005**

**“That Man Lives Twice Who Lives The First  
Life Well.”**

# Mingo County affair illustrates historic tension between state-local officials

By Bob Bastress

School closures and consolidation have once again generated controversy and litigation in West Virginia. This time, the venue is in Mingo County, and the legal and policy issues are a blend of the new and the old.

In 1998, the State Board of Education exercised its power under West Virginia Code § 18-2E-5(l)(4)(C) and took over the Mingo County School System, declaring it in a state of emergency. Four years later, the state restored full local control. Meanwhile, the county board prepared, submitted to the state board, and had approved its Comprehensive Educational Facilities Plan (“CEFP”) for 2000-10. That plan called for the closure of three of the county’s four high schools – Williamson, Matewan, and Burch – and their consolidation into a new school.

The remaining high school, at Gilbert, was not to be included in the consolidation until completion of an I-73 corridor that would facilitate students’ transportation. Pursuant to that CEFP, the Mingo County Board of Education applied for a grant from the School Building Authority (SBA) to finance construction of the proposed consolidated high school. In December 2003, the SBA announced that it was awarding Mingo County \$6.3 million as the first installment in a package that would ultimately provide the county with \$17.4 million for the high school’s construction.

During the first half of 2004, the Mingo County Board of Education proceeded through the local hearings and the procedures required by law for the closure of the Williamson, Matewan, and Burch high schools. While that was occurring, opposition to the closures and the consolidation had formed in the county and led to the election of two new board members. When they took office on July 1, 2004, they combined with a holdover board member to form a three-member majority that soon voted to suspend the consolidated high school project to gather additional information. Subsequent votes extended the suspension until at least March 3, 2005.

The plot thickened when Donald Nicewonder, president of Nicewonder Contracting Inc., memorialized in a letter dated Sept. 24, 2004, an offer that he previously made to the Mingo County Board of Education. He proposed to donate to the board a 60-acre site upon which to build the proposed high school. (The site was a strip mine, and he needed a post-mining use of the land to satisfy federal statutory requirements.)

Nicewonder also offered to excavate the site, at no charge, to render it suitable for the new high school. He did not, however, convey the property to the board. Without title to the property, the Mingo board could not draw down on the SBA money and remain in

compliance with its SBA contract.

At its Dec. 16, 2004, meeting, the state board of education voted to direct the Office of Education Performance Audits to conduct a performance audit of the Mingo system and also voted to direct its counsel and the state superintendent to take actions to cause the implementation of previously approved Mingo County CEFP. The audit of the Mingo schools began Jan. 10, 2005, and continued through Jan. 14. The audit team’s subsequently filed report concluded that Mingo’s high schools were not providing an appropriate curriculum, were lacking in academic rigor, and were producing poor student achievement results.

On Feb. 9, 2005, citing the report from the Office of Education

Performance Audits, the state board of education declared a state of emergency in the Mingo County school system and assigned it non-approval status. The following week, meeting in an emergency session, the state board voted to intervene once again in the operations of the Mingo County

***Judge Knight’s ruling sustained the board’s takeover actions and strongly endorsed the authority of the state Board of Education to control the state’s schools.***

schools and to assert its full powers under West Virginia Code § 18-2E-5(l).

Because the board had concluded its prior intervention within the previous five years, W.V.C.S.R. § 126-13-13.6.4 (Board of Education Policy 2320) authorized the board to act immediately to intervene without providing for an improvement period. The board’s intervention order assigned broad powers to the state superintendent to administer the Mingo schools, including the authority to take the steps necessary for school closures and consolidation. A separate motion again directed the state superintendent to see to the implementation of the previously adopted CEFP.

On March 4, 2005, the three members of the Mingo County board who had voted to suspend the school closing and consolidation plan, joined by two Mingo County voters who had voted for those board members, filed a petition for certiorari in the Kanawha Circuit Court seeking to set aside the state board’s decision to intervene as arbitrary and capricious.<sup>1</sup> *Duty v. West Virginia Board of Education*, Civ. Action No. 05-AA-22.

Following a March 23, 2005, hearing, Kanawha Circuit Judge Paul Zakaib enjoined the West Virginia Board of Education and state superintendent of schools from taking further action with regard to the design or construction of the new Mingo high school, pending completion of the litigation. The defendants filed an interlocutory appeal to the Supreme Court of Appeals, which declined to hear the case.

The next volley came June 15, 2005, when several Mingo County residents, including the two members of the county board of educa-

See **MINGO AFFAIR** on page 11

*continued from page 10*

tion who had been voting in the post-July 2004 minority on proceeding with the new high school construction,<sup>2</sup> filed in Kanawha Circuit Court a petition for a writ of mandamus that would order the West Virginia and Mingo Boards of Education to comply with and implement the previously adopted CEFP and its plan to close and consolidate the county's high schools. *Endicott v. Board of Education of the County of Mingo*, Civ. Action No. 05-Misc-271.

The petition relied on general duties created by the West Virginia Constitution to deliver a quality education to all children and on the more specific obligations in the law relating to CEFP's. In addition, the petition invoked a 1992 precedent (discussed below) that found a school board's reversal of a prior board's decision to close and consolidate schools to be arbitrary and capricious and therefore voidable.

The state board responded to the petition that it was barred from taking the requested actions because it had been enjoined by Judge Zakaib from doing those very acts, and the three remaining members of the Mingo board said the case would undermine Judge Zakaib's jurisdiction. The latter moved to dismiss the case, their motion has been argued, and a decision is pending.

Meanwhile, the parties in the certiorari case agreed to follow the procedures in W.V.C.S.R. § 126-13-14 (Policy 2320) and the matter was remanded to the Department of Education. Under that section, a county board that has been subjected to state intervention can appeal the decision, with three steps in the process: (1) review by the department's Office of Education Performance Audits; (2) a hearing before the director of that office or his designee; and (3) review on the hearing record by the state Board of Education. The parties agreed to skip level 1, and the director then designated retired Mercer county circuit judge David Knight to hear and decide the matter. He conducted the hearing the week of August 15 and rendered his decision Sept. 12.

Judge Knight's ruling sustained the board's takeover actions and strongly endorsed the authority of the state Board of Education to control the state's schools. Citing the board's responsibility under Article XII, § 2 of the West Virginia Constitution for "the general supervision of free schools" and its powers under § 18-2E-5, Knight concluded that the board properly exercised its discretion when it investigated complaints it had received about the Mingo school system, ordered the performance audit, and intervened in the operation of Mingo's schools.

The decision emphasized the findings of the performance audit and the failure of the local board to either follow its CEFP or take steps to develop a revised one. On Sept. 15, the Mingo County board voted to appeal the case, to request the state board to waive

Level III, and to seek immediate review in the Kanawha Circuit Court.

Hovering over these various proceedings, of course, are longstanding tensions between state educational officials who want to implement their programs and local officials and families who want to control and set the values for their communities' most valued institutions. Inexorably linked with those tensions are the passions roused by decisions over closure and consolidation of schools. Although the motivation for the litigation is repeatedly grounded in those tensions and passions, they rarely form part of the legal bases for attacking consolidation decisions, with litigants relying instead on technical legal arguments.<sup>3</sup> To a large extent, resolution of such arguments will likely form the basis for ending the Mingo County affair.

Ultimately, the Kanawha Circuit Court will have to determine whether the decisions of the state board to order the audit of the Mingo County schools and to intervene in that system were arbitrary and capricious. The court's rendering on those issues must be based on the hearing transcript and on the findings of Judge Knight.

***Hovering over these various proceedings are longstanding tensions between state educational officials who want to implement their programs and local officials and families who want to control and set the values for their communities' most valued institutions.***

If the court decides they were arbitrary and capricious, then it would be necessary to resolve the issue raised by the *Endicott* litigation, *i.e.*, whether the Mingo board's actions in halting the school closures and in abandoning its CEFP were arbitrary and capricious. The plaintiffs in that case argue that the Mingo affair is much the same as that which occurred in *Pell v. Board of Education of Monroe County*, 188 W.Va. 718, 426 S.E.2d 510 (1992), a case in which a school board election changed the composition of the board from a majority for consolidation to a

majority against it.

In 1990, the Monroe County Board adopted and received approval for a new CEFP, which called for school closures and a countywide, consolidated high school. In 1991, the SBA awarded the board \$7.8 million to finance the construction of the consolidated school, and the board set out to implement the CEFP. In doing so, it incurred expenses of \$181,000.

The following May's election then changed the board, effective July 1, and the new one soon took steps to halt the consolidation. The board eventually submitted a new proposal to the SBA, but the agency refused to approve it. Litigation to overturn the board's retreat from consolidation ensued and eventually led to a Supreme Court decision that the board's actions were arbitrary and capricious and, therefore, unlawful.

The *Pell* decision is an affront to democracy. As Justice Neely's brief but emphatic dissent pointed out, "The school board was changed by the voters of Monroe County at a regularly scheduled election to torpedo consolidation, which is what elected poli-  
*See MINGO AFFAIR on page 12*

*continued from page 11*

tics is all about.” More substantively, he added, “(in) a democracy, no political coalition is expected to be permanent – indeed, that almost is a precondition of democracy. In this case, (the board) simply implemented the voters’ will in a system where government should come from the people instead of coming at the people.”

Perhaps sensing the rather extreme anti-majoritarian character of its decision, the *Pell* majority phrased its holding very narrowly, bracketing it with the precise facts of its case:

If a comprehensive educational facilities plan has been developed by a county board of education, approved by the state board of education, submitted to a regional educational services agency, granted approval for funding on a priority basis by the state school building authority, satisfied all requirements for approval, notice, and hearing pursuant to West Virginia Code, 18-5-13a [1991], and contracts have been entered into to begin implementation of such plan, then it is arbitrary and capricious for a county board of education, with no articulated reasons, to take action that would cause the plan to not be implemented or to replace such plan with an alternative plan, where such action would place in jeopardy the possibility of obtaining the approved funding.

Whether the Mingo process had proceeded as far as it had in *Pell*, whether the Mingo board articulated reasons for its actions, and whether *Pell* should remain good law would be the issues should the *Endicott* litigation proceed.

*Bastress is professor of constitutional law at West Virginia University. He has written several recent articles for The Legislature.*

<sup>1</sup> According to counsel for those petitioners, when the state had previously returned the Mingo system to local control, one of the high schools was seriously impaired and three were only provisionally accredited. When the state board intervened in February, all five were accredited. *See* W. Va. Code 18-2e-5(1)(1). The state Department of Education’s Web site’s latest report on compliance with the No Child Left Behind Act states that all five of the county’s high schools met their “adequate yearly progress” toward educational excellence standards. <http://wvde.state.wv.us/> (last visited 9/12/05). Thirteen of the county’s 17 schools met their adequate yearly progress goals. *Id.* The state Department of Education maintains that those determinations were based on standards that do not reflect the schools’ performance as accurately as those applied by the audit team.

<sup>2</sup> Those two members also moved to intervene as individual parties in the *Duty* litigation. The court granted their motion.

<sup>3</sup> *See* Robert M. Bastress, *The Impact of Litigation on Rural Students: From Free Textbooks to School Consolidation*, 82 NEB. L. REV. 9, 29-32 (2003). A rare exception is *Pendleton Citizens for Community Schools*, 203 W.Va. 310, 507 S.E.2d 673 (1998), which directly challenged through constitutional arguments state officials’ authority to pressure local boards into consolidations and further sought to invalidate policies that had that effect and to force recognition of the value of community schools. The West Virginia Supreme Court rejected the arguments. Recent litigation in McDowell and Lincoln Circuit Courts have also made direct assaults on the State’s intervention powers. The challengers lost in both instances.

## Famous archer, past board member dies

### *Pastor was known around the world for bow-and-arrow prowess*

The Rev. Stacy Groscup, one of the state’s most popular ministers and showmen, died recently at Ruby Memorial Hospital in Morgantown after suffering a cerebral hemorrhage. Earlier this summer, Groscup underwent heart bypass surgery and had been struggling with his health. He was 84.

Groscup served on the Monongalia County Board of Education for 20 years. He was a retired Methodist minister and in retirement served 23 years as pastor of a Baptist church in Monongalia County.

Groscup was known worldwide for his close ties to the Native-American culture and his prowess with bow and arrow. He performed shooting demonstrations throughout the world, including at halftime of NFL games. During his demonstrations, Groscup would intertwine messages of faith and Native-American culture, while encouraging children to stay away from drugs.

He was named a distinguished West Virginian in 2000 by Gov. Cecil Underwood, and that same year was inducted into the Archery Hall of Fame.

Groscup was a Lincoln County native and he said he and boyhood friend Chuck Yeager learned to shoot by hunting rabbits with slingshots while growing up on Mud River.

He began demonstrating his abilities after he was spotted with a handful of squirrels and his bow near the campus of his alma mater, Duke University. Groscup said people were intrigued he could kill squirrels with a bow. He showed them on the spot by piercing an oil

can tossed into the air.

He continued to put on demonstrations the rest of his life, often performing before Native-American tribes, presidents, and world leaders, along with thousands of school-age children. His appearances were a staple of fairs and festivals across West Virginia.

His shows included shooting targets – sometimes three at a time — tossed into the air. His most famous demonstration was shooting an aspirin out of the air. He said his most difficult demonstration was on a South Dakota Indian reservation, during which he hit an aspirin on seven consecutive shots despite high winds.

*Credits: Monongalia County Board of Education and West Virginia MetroNews.*

## Wisdom

***“Leadership is action,  
not position.”***

*– Donald H. McGannon.*

## Public education: The duties imposed by the Constitution, statutes and court order

By Michael J. Farrell

The West Virginia Constitution imposes the responsibility upon the state to make public education its highest priority. This constitutional mandate has driven the budgetary agenda of successive governors and legislatures for as long as the state has existed.

During the last quarter century, the judiciary in general and particularly Judge Arthur M. Recht have had the opportunity to explore and define the parameters of the state's constitutional supervisory and fiscal obligation to public education.

The West Virginia Constitution expressly recognizes the state Board of Education as the entity that has the responsibility to provide a "thorough and efficient education" to the public school students.<sup>1</sup> The state board selects the superintendent who is deemed the "chief school officer of the state."<sup>2</sup>

In 1998, the Legislature acknowledged the respective differences in the scope of the duties imposed on the state Board of Education vis-à-vis those imposed on it. The operative vocabulary is "accountability" and "capacity." The state Board of Education is accountable for the performance of all of the schools in West Virginia. The Legislature is responsible for providing the monetary resources to build capacity so that schools can succeed.

The Legislature further finds that as the constitutional body charged with the general supervision of schools as provided by general law, the state board has the authority and responsibility to establish the standards, assess the performance and progress of students against the standards, hold schools and school systems accountable, and assist schools and school systems to build capacity and improve efficiency so that the standards are met, including, when necessary, seeking additional resources in consultation with the Legislature and governor.<sup>3</sup>

The Legislature also finds as the constitutional body charged with providing for a thorough and efficient system of schools, the Legislature has the authority and the responsibility to establish and be engaged constructively in the determination of the things that students should know and be able to do as the result of a thorough and efficient education. This determination is made by using the process for improving education to determine when school improvement is needed, by evaluating the results and the efficiency of the system of schools, by ensuring

accountability and by providing for the necessary capacity and its efficient use.<sup>4</sup>

The powers granted to the state superintendent and state Board of Education, as enumerated in West Virginia Code § 18-2E-5, are pervasive with respect to assessing, evaluating and assuming management of individual county boards of education. Equally broad powers were statutorily assigned to the Office of Education Performance Audits (OPEA). OPEA is managed by and reports to the state Board of Education. When the 1998 statute was passed, the assessment responsibility was separated from the management function handled by the state superintendent. Dr. Kenna Seal has managed OPEA's assessment activities since its inception.

*The powers granted to the state superintendent and state Board of Education are pervasive with respect to assessing, evaluating and assuming management of individual county boards of education. Equally broad powers were statutorily assigned to the Office of Education Performance Audits.*

In the intervening years between 1998 and 2004, the scope of the educational oversight of county boards was comprehensively defined by the Legislature. They now include responsibility for publishing and enforcing high quality standards related to curriculum, workplace readiness skills, finance, transportation, special education, facilities, administrative practices, training of

county board members and administrators, personnel qualifications, professional development and education, student performance and progress, school and school system performance and progress, a code of conduct for students and employees, indicators of efficiency and any other areas determined by the state board.<sup>5</sup>

By statute, OPEA must evaluate every school system in the state on a rotational basis regarding "work-based learning, use of advisory councils, program accreditation and student credentials, student transition plans, graduate assessment forms, casual deficit, accounting practices, transportation services, special education services, safe, healthy and accessible facilities, health services, attendance director, business community partnerships, pupil-teacher ratio, split-grade classes, local school improvement council, faculty senate, student assistance team and curriculum team, planning and lunch periods, skill improvement program, certificate of proficiency, training of county board members, staff development and preventative discipline, character education and student and parental involvement."<sup>6</sup>

The interesting story behind the statute involves discussion of the realities and myths that surround the "Recht Decision" and the efforts of many who brought closure to this longest-pending case in West Virginia history and contributed to the enactment of West Virginia Code § 18-2E-5.<sup>7</sup>

The management and financing of public education in West  
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Virginia was challenged in 1975 when litigation instituted a class action against the State Board of Education and others based on conditions that existed in Lincoln County.<sup>8</sup> Following a lengthy trial, Judge Recht entered an order on May 11, 1982 that held that West Virginia's education system and its financing mechanism were unconstitutional. The order provided that the state had the duty to eliminate the effects of the unconstitutionality. On March 4, 1983, Judge Recht published a final order that laid out the Master Plan for Public Education.

During the 12 years that followed the publication of the final order, the respective governors and legislatures addressed the management and financing of public education but not to the satisfaction of the plaintiffs who instituted the original 1975 litigation. By the terms of the 1983 final order, the Circuit Court of Kanawha County maintained jurisdiction to monitor the implementation of the opinion and master plan "until and unless the plan is judicially altered or modified." During the dozen years, the executive and legislative branches were thwarted, in part, by the failure of the electorate to pass a statewide levy that would have eliminated the funding disparities that existed because the taxpayers in some counties were willing to tax themselves to improve the level of education in their respective counties.

While this impasse existed, a shift in educational theory developed throughout the country that was contrary to the underpinnings of Judge Recht's master plan. Based substantially on the testimony of Henry "Hank" Marockie, the master plan was based on the premise that the quality of educational outcomes was based on the amount of financial support provided to the county system.<sup>9</sup> Contrary to many who criticized the foundational theory of the 1983 final order master plan, Judge Recht did not snatch it out of the air. Rather, Judge Recht merely accepted the uncontested evidence presented by the plaintiffs through Hank Marockie. None of the defendants presented any direct evidence to contradict the "front end" theme of the final order that the allocation of sufficient resources would be a predictor of improved academic performance.

By January 1995, with Judge Recht then sitting as a member of the West Virginia Supreme Court of Appeals, the plaintiffs filed a motion to implement the 1983 final order. Senior Judge Dan Robinson was appointed to serve as the judge. In April 1997, without taking any evidence from individual counties or their respective boards of education, Judge Robinson held that the state system of financing public education was unconstitutional.

The Legislature responded in the 1998 session when it adopted the current set of statutes based on an "outputs model" of measuring performance. With the passage of West Virginia Code § 18-2E-5, the paradigm of public education changed from a resource to a performance model. Sen. Lloyd Jackson, chairman of the Senate Education Committee, was the architect of this fresh educational

approach.

Notwithstanding the legislative action, plaintiffs pushed forward because of their distrust that an outputs performance model could or would succeed. Judge Recht returned as presiding judge in 1999 and convened hearings to evaluate the efficacy of the new educational statutes. In this process, he urged all participants in the case to engage in "constructive collaboration" to achieve meaningful educational opportunities for the students of West Virginia.

Judge Recht recognized the good faith of the Legislature and acknowledged that it had "addressed the underpinnings of an adequate and equal education opportunity by establishing standards and performance measures as well as the method of assessing that performance in terms of its successes and/or failure, with the understanding that if there are deficiencies and failures, resources then will be targeted specifically to correct those deficiencies and failures."<sup>10</sup>

The state board, with significant consultations with the executive and legislative branches of government, consummated an agreed order with the plaintiff class in September 2000. This agreed order became the foundation for the resolution of the case. Judge Recht concluded that the legislative enactment of West Virginia Code § 18-2E-5, its implementation by the state superintendent, OPEA and ultimately the state Board of Education had met the constitutional obligations.

Significant credit for the closure of this educational chapter in the history of West Virginia belongs to former Sen. Lloyd Jackson, D-Lincoln; former State Superintendent David B. Stewart, Ed.D.; his deputy William J. Luff and OPEA Executive Director Kenna Seal, Ed.D.

*Editor's Note: Farrell is an attorney with Farrell, Farrell & Farrell, L.C. of Huntington, He served as the special assistant attorney when he represented the State Board of Education in the Tomlin v. Gainer litigation. He recently was Interim president of Marshall University.*

<sup>1</sup> Article XII, § 2 of the West Virginia Constitution.

<sup>2</sup> Article XII, § 2 of the West Virginia Constitution.

<sup>3</sup> W.Va. Code § 18-2E-5(a)(2)

<sup>4</sup> W.Va. Code § 18-2E-5(a)(3)

<sup>5</sup> W.Va. Code § 18-2E-5(c)(1-15) (As amended, 2004)

<sup>6</sup> W.Va. Code § 18-2E-5(j)(8)(A-V) (As amended, 2004)

<sup>7</sup> The case was filed in 1975 and dismissed in 2004.

<sup>8</sup> The case was originally style *Pauley v. Gainer* and ended as *Tomlin v. Gainer*, Civil Action No. 75-C-1268, Circuit Court of Kanawha County, West Virginia.

<sup>9</sup> Marockie later became state superintendent. He was added as a defendant when the litigation revived in 1995. Even though he was the architect of the final order master plan, the plaintiff class now accused their former expert witness of failing to implement the master plan.

<sup>10</sup> *Tomlin v. Gainer*, Civil Action No. 75-1268, Memorandum Opinion and Order, December 3, 2001, p. 4.



## **Make plans now to attend:**

### *Presidents Retreat '05*

October 7/8, 2005  
Stonewall Resort, Roanoke

### *The November Workshop: School Aid Formula & School Law*

November 5, 2005  
Stonewall Resort, Roanoke

### *WVSBA Winter Conference '06*

February 17/18, 2006  
Marriott Hotel, Charleston

### *Orientation '06*

June 14-16, 2006  
Stonewall Resort, Roanoke

### *Fall Conference '06*

September 23-23, 2006  
Marriott Hotel, Charleston

## Sound Bites

**“It’s going to play in the papers that the West Virginia Legislature has just re-assassinated President Lincoln.”**

– *Sen. Russ Weeks, R-Raleigh, expressing opposition to a measure creating a single Presidents’ Day holiday for state workers. Most Republican legislators opposed the measure.*

**“Not really. It’s pretty much the same old thing. I hear the words, I just don’t see the action...”**

– *Massey Energy CEO’s comments regarding a recent business summit attended by prominent state leaders.*

**“The list is long.”**

– *Challenge West Virginia Executive Director Linda Martin in remarks concerning the West Virginia Department of Education and what she terms “scandals” such as those she said involved former assistant schools superintendent G.A. McClung who served during the administration of state superintendent David Stewart. McClung is now serving a prison term for profiting illegally from sales of equipment for flooded schools in Southern West Virginia.*

**“Teachers won’t be replaced by computers.”**

– *First Lady Gayle Manchin, a strong proponent of using technology in schools, at a recent state Technology Council Summit.*

## Meanwhile in Missouri . . .

A plan to give the Missouri governor more direct oversight of public education could politicize the classroom, triggering divisive battles over issues such as evolution, sex education and vouchers, according to the Missouri education policy analysts quoted in a *St. Louis Post-Dispatch* article.

The article says, however, that supporters of the plan envision a public education system that’s more responsive to Missouri taxpayers, and a governor who’ll have little excuse for failure. “What no one is disputing is that a plan backed by a task force last week would significantly change the way the state has overseen its 524 school districts for the past 60 years. At issue is whether the state’s highest-ranking education official should be picked directly by the governor, or if that job should continue to be under the command of the state school board....”

*From the St. Louis Post-Dispatch, Jefferson City Bureau, Sept. 25, 2005*



## The Legislature

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