

LEGAL FOUNDATIONS FOR
WEST VIRGINIA SCHOOL BOARD
BUSINESS MANAGEMENT POLICIES

by

Paul D. Rothrock

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APPROVED:

K. E. Underwood, Co-chairman

W. M. Worner, Co-chairman

S. R. Parson

B. D. Friedman

R. G. Salmon

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DEDICATION

To Dorothy, Patty, Pam, Rich (my "go-fer" at the law library) and to "Doctor Rusty" (my studyin' buddy at home), I dedicate this study. Without all of them it would have been unbearable.

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During most of the time consumed by this study

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, Dr. S. R. Parson, Dr. K. E. Underwood and

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Chapter 1

INTRODUCTION

Policies for boards of education are the rules by which each board wishes to be governed. Many school districts do not have formal policy manuals; even when they do, it is not uncommon for such manuals to be out-of-date.

Schools and school personnel increasingly find themselves being brought into the courts for many and varied reasons. The existence of current, legally-based policies could help educators and members of boards of education to avoid suit. In the event that appearances in the courts are required, the presence of such policies may result in the schools being more successful when law suits do occur.

Policymaking is the fundamental task for a board of education. The American Association of School Administrators' official statement regarding boards of education and policy states that, "All questions of educational policy are within their powers in most states and should be delegated to them in all states."¹ In order for a board of education (or its administration) to be in a more defensible position if questioned in the courts, the board should develop written policies to govern the operations of its school district.

It is the duty of each school superintendent to administer the school district in an efficient and judicious manner under the policies adopted by the board of education. The development

of workable school board policies (and their accompanying administrative regulations) has become a necessity if the school administrator and the board of education are to maintain an orderly and efficient school system.

Policies must, out of necessity, be statements which are consistent with the laws of the state or nation. They must also be consistent with pertinent rules and regulations of regulatory agencies and opinions which may have been issued by jurisdictional governmental officers. In order to insure that a board's policy statements meet this criteria, each local school board should ascertain that every reasonable effort is made to adopt policies which accurately state the board's position on each specific subject and are based on a firm, legal foundation.

PROBLEM OF THE STUDY

The problem of this study was to analyze and categorize information about statutory law (both legislative and administrative), case law, attorney general opinions, and state superintendent interpretations into a single source available to West Virginia public school administrators and their boards of education.

NEED FOR THE STUDY

Reutter and Hamilton report that boards of education have ". . . implied power to make and enforce reasonable rules and regulations for the efficient conduct of the schools . . ." ² and they are faced with the very real possibilities of being forced

into the courts to defend their actions or, in some cases, their inactions. It is of vital importance that boards of education adopt the best possible policy positions to guide themselves and their administrators. It is important that these policies be written in the context of the legal framework established by the following sources:

1. laws of the State of West Virginia;
2. policies, rules and regulations of the State Board of Education;
3. interpretations of school law issued by the State Superintendent of Schools;
4. opinions issued by the State Attorney General regarding public school education; and,
5. case law precedents and decisions affecting West Virginia public education as handed down by:
 - 5.1 the West Virginia Supreme Court of Appeals,
 - 5.2 the Federal District Courts for the Northern and Southern districts of West Virginia,
 - 5.3 the United States Court of Appeals for the Fourth Circuit, and
 - 5.4 the Supreme Court of the United States.

A board of education should be in a position to adopt policy statements fully consistent with the several sources of law enumerated above. It is highly desirable that the capability for ready reference be made available for all such materials at any time a board of education is considering a policy statement on a particular subject.

Generally, this type of information has not been available without the exertion of considerable effort on the part of the

administrative staff of the school district. Many small school districts in West Virginia do not have sufficient staff or funds to allow for such informational searches.

In West Virginia, historically, the county prosecuting attorney has been the legal advisor to all agencies of county government, including the school system. In 1971, however, legislation was enacted to permit the expenditure of public funds for legal assistance from sources other than the prosecutor's office.³ Even in 1977, nevertheless, fully 90 percent of the fifty-five county school systems still utilize the free services of the prosecutor as their main source of legal assistance. Some school systems do purchase other legal services in certain specialized instances, but almost 70 percent of them (thirty-seven out of fifty-five) receive no legal advice from any source other than their prosecutor's office.⁴ This means that on a regular basis 70 percent of West Virginia's school districts receive little if any specialized legal assistance in policy formulation.

In an attempt to obtain more definitive information regarding legal assistance in policy writing throughout West Virginia, the researcher conducted a survey on the matter in 1975. Slightly more than 60 percent of the county school superintendents responding (thirty-five out of the fifty-four reporting) indicated that they regularly consulted their legal advisor on matters pertaining to the formulation of school board policies.⁵

The study emphasized the general recognition that all policy-related materials should be thoroughly researched prior

to formulating any board policy statement.

According to Dickinson:

Before policy proposals are presented to the board for action, they must be researched, checked for legality, rendered into clear English prose, assigned an access code for inclusion into the district's policy manual and typed up neatly according to an established style.⁶

In addition, Vlaanderen has observed:

Of assistance to researchers is the index to be found in the education code of some states. Even where it is included, however, it frequently is not exhaustive. The researcher must engage in a time-consuming task if he does not find the particular subject in which he is interested listed in the index. Even when the subject he is pursuing is indexed, he may wish to examine other germane portions of the law. Some state statutes list powers and duties of superintendents in a specific section or sections of the code. The scholar may not rely on this listing as a complete one, however. For instance, the section in question may not list any powers or duties of the superintendent regarding enforcement of the compulsory attendance law. The researcher must then turn to another portion of the law, that part dealing with compulsory attendance. Here he may find specific actions which the superintendent is mandated to perform or certain powers which the superintendent may exercise.

In recent years it has been brought to the attention of boards of education and school administrators that education is going through a period in which the "legality" of their actions is of prime concern. Each board and/or administrator should be prepared to defend in a court of law the rationale for all actions taken in the management and operation of the schools for which they are responsible.

The local school board, made up of lay people who empower a superintendent with the necessary authority to administer a school district according to policy and not whim, is getting a "helping hand" in the management of the school system from the

legislatures and the courts. Increasingly, these bodies are becoming involved in the administration of the educational enterprise, by enacting new laws and by handing down decisions and opinions relating to education.

In 1973, more than 4,600 pieces of legislation which in some way affected education were introduced into the state legislatures throughout the county.⁸ This number is more than triple that of the year before. To be sure, not all proposals became law, but the level of activity indicates the magnitude of the current problem. The school administrator and the board of education somehow must face the problem of keeping abreast of the legalities and technicalities which are involved in the operations of today's schools. This is no simple task for lay people. As noted by Justice Lewis F. Powell, Jr. of the Supreme Court of the United States (and a former school board chairman of the Richmond, Virginia, school system), "Most . . . school board members are popularly elected, drawn from the citizenry at large, and possess no unique competency in divining the law."⁹ He further stated: "Few school boards and school officials have ready access to (legal) counsel or indeed have deemed it necessary to consult counsel on the countless decisions that necessarily must be made in the operation of our public schools."¹⁰

At present, no consolidated legal reference resource is available to the school administrator or board member in West Virginia engaged in deliberations on policy formulation. Yet there is a need to bring together pertinent information derived from the

various legal foundations cited previously (supra, page 3). The results of this study sought to provide just such a resource document.

A survey of West Virginia school board members in 1974 indicated that 98.2 percent of those who responded agreed that a reference manual, organized to incorporate the above-referenced information, would be a useful tool in the policy development process.¹¹ The West Virginia School Boards Association has officially expressed its opinion through its executive secretary that such a manual would be an invaluable aid to board members. (See Appendix A)

The State Department of Education, in a letter received by the writer from Dr. Daniel B. Taylor, State Superintendent of Schools for West Virginia, expressed concurrence in the worth of such a ready-reference manual. (See Appendix A) In addition, the Southern Region School Boards Research and Training Center, Inc., an organization of state school board associations, has also expressed its desire to see the completion of such a manual. (See Appendix A)

A similar expression of need for the development of this type of manual to be used in policy development was also evidenced by the results of a survey conducted by the researcher and referred to previously (supra, page 4). Fully 100 percent of fifty-four respondents, out of fifty-five surveyed, said "yes" when questioned about whether such a manual would be useful to them.¹²

OBJECTIVE OF THE STUDY

The objective of this study was to synthesize the legal requirements applicable to West Virginia boards of education in their development of policy statements. Knowledge of the legal foundations is necessary both in writing new policy and in the revision of existing policy statements in the areas which are selected for this research.

The result of the study was to be a manual that makes available to the school leadership of West Virginia basic legal data, and thereby assists them in efforts to formulate policies appropriate under contemporary conditions. It is hoped that such a document will help fill a void, given that the majority of West Virginia school systems lack the staff or legal assistance they need for policy research and development.

DELIMITATION OF THE STUDY

Due to the broad base of contributing data which must be researched in order to complete a legal reference manual for use as resource material in the policy-making process, it was necessary to limit the content of the manual. Thus, only those laws, policies and regulations, interpretations, opinions and passages of case law which were pertinent to, or issued for, the public schools of the State of West Virginia, and, which refer only to the fiscal and business management functions of a board of education, were researched.

METHODOLOGY

In order to accomplish the objective set forth for this study, it was necessary to identify all sources which would contain pertinent information. It was necessary to read, analyze, and categorize all data related to the selected outline. The resulting detail was reported by the use of statements categorized by specific policy topics and was designed to readily and concisely provide the reader with the minimum legal requirements which should be met by a board of education policy statement.

Much of the legal research and analysis required was based on statutes previously enacted by the legislature and decisions previously handed down by the various courts. In addition to these, for the purpose of this study, the policies and regulations previously adopted by the West Virginia Department of Education, the opinions issued by the State Attorney General and the interpretations of school law rendered by the State Superintendent of Schools were also reviewed to determine their affect on the study.

Due to the large number of court cases, it was necessary to consult the systems of case digests currently available. The American Digest System and the National Reporter System were relied upon by the researcher for their appropriate legal topical classification and cross-referencing to the actual cases. Shepard's Citations was also consulted for appropriate case references.

Other references utilized include the Corpus Juris Secundum; American Jurisprudence; American Law Reports, Annotated; West Virginia

Citations, Cases and Statutes; West Virginia Reports; Virginia and West Virginia Digest; West Virginia and Southeastern Digest; and, the Index to Legal Periodicals. In addition, the looseleaf services NOLPE School Law Reporter and the Southern School Law Digest were valuable for current information regarding court cases of interest to this study.

Invaluable assistance was given this researcher by Roalfe's How to Find the Law, Rezny's A Schoolman in the Law Library, and Pepe's A Guide for Understanding School Law. Much technical assistance was made available to the researcher by Mr. Forrest Bowman, administrator of the West Virginia Supreme Court of Appeals, and the members of the staff of the Supreme Court Law Library, Charleston, West Virginia.

FOOTNOTES--CHAPTER 1

¹American Association of School Administrators, School Boards in Action, Twenty-fourth Yearbook, (Washington, D. C.: National Education Association, 1946), p. 171.

²E. Edmund Reutter, Jr., and Robert R. Hamilton, The Law of Public Education: (Mineola, New York: The Foundation Press, Inc., 1970), p. 122.

³W Va Code Ann., sec. 18-5-3 (10).

⁴W Va Department of School Finance, State Department of Education, counties' annual reports for 1974-1975.

⁵Paul D. Rothrock, unpublished survey, August, 1975.

⁶William E. Dickinson, The School Administrator's Guide to the EPS/NSBA Policy Development System, (Evanston, Illinois: The National School Boards Association, 1974), p. 1.

⁷Russell B. Vlaanderen, Law and the School Superintendent; (Cincinnati, Ohio: The W. H. Anderson Company, 1971), pp. 18-19.

⁸Education Commission of the States, 1973 State Education Legislation and Activity, Research Brief Vol. 2, No. 3 Denver, Colorado, April, 1974. (ERIC ED 089-473)

⁹Wood v Strickland, 420 US 308, 95 S Ct 992, 43 L Ed 2d 214 (1975).

¹⁰Ibid.

¹¹Paul D. Rothrock, unpublished survey, January, 1975.

¹²Paul D. Rothrock, unpublished survey, August, 1975.

Chapter 2

BACKGROUND

The legal foundations upon which county school districts in West Virginia are to build their policies are enactments of legislative and supervisory bodies, decisions issued by public officials empowered to pronounce such opinions and interpretations, and from the courts. In the State of West Virginia such a foundation may be visualized as a triangle which has been sub-divided into various parts, or layers. Each higher layer builds upon those beneath. For example, the policies, rules and regulations of the State Board of Education, the opinions of the Attorney General, and the interpretations of the State Superintendent of Schools stem from legislation within the West Virginia Code, 1931 as amended, which expressly grants to each of them the authority to perform in this manner.

In addition, the various courts, both state and federal, then may perform their respective functions. These courts review actions taken by county boards of education, by the agency and public officials indicated above, as well as the decisions of lower courts.

SOURCES OF SCHOOL LAW

The sources of school law may be identified as:

1. constitutional law--both state and federal;
2. statute law--both state and federal;
 - a. legislative law;

- b. administrative law;
- 3. judicial law (common law)--both state and federal;
- 4. opinions of the Attorney General--state; and,
- 5. interpretations of the State Superintendent of Schools--state.

Constitutional Law

Under the Tenth Amendment to the Constitution of the United States, any powers not specifically delegated to the federal government, nor specially prohibited by the Constitution to the states, are therefore reserved to the states themselves.¹ The constitution of every state makes provisions for a system of free public schools. These range from specific provisions to a simple mandate of funding for the support of a public school system.² Consequently the states, through their own constitutional and statutory provisions, regulate and control public education.³

The Constitution of the State of West Virginia states that "the legislature shall provide, by general law, for a thorough and efficient system of free schools."⁴ The Constitution also provides that "the general supervision of the free schools of the State shall be vested in the West Virginia Board of Education. . .";⁵ that "the legislature may provide for county superintendents . . .",⁶ as well as for taxation powers for the support of such free schools and for the construction of school buildings and facilities.⁷ (See Appendix B)

Statute Law

There are two types of statute law--legislative and adminis-

trative. These are set forth individually below.

Legislative. Since the United States Constitution permits by omission the legislatures to establish school systems, the public schools are governed by statutes enacted by the respective state legislatures. Therefore, the schools, according to Alexander, et al: ". . . have no inherent powers and the authority to operate them must be found in either express or implied terms of statute . . ."8

Under the provisions of the state Constitution which pertain to the establishment of a school system for the State of West Virginia, the legislature at various times has enacted provisions for the legal operation of such schools. Chapters 18 and 18A of the West Virginia Code, 1931 as amended, contain the vast majority of all the legislation relating to the supervision and control of education within the state although some provisions in other chapters of the code also have pertinence to education and/or its officials.

Chapter 18, article 2 calls for the creation of a state board of education and specifies its powers and duties. Additionally, Chapter 18, article 3, sections 3 through 11, establishes the office of the State Superintendent of Schools and lists the duties of this office. The office of the county superintendent is defined in Chapter 18, article 4, and his duties are enumerated therein.⁹ The county board of education is created under the provisions of Chapter 18, article 5.

In West Virginia, the law provides that each local school district be coterminous with one of the fifty-five counties within the

State. It also establishes the composition of the local board as well as the manner for selection of its' members.¹⁰ This statute provides:

Each county school district shall be under the supervision and control of a county board of education, which shall be composed of five members, nominated and elected by the voters of the respective counties without reference to political party affiliation. No more than two members shall be elected from the same magisterial district.¹¹

According to statements made by William Dickinson, Director of the Educational Policy Service, before a policy clinic session at a National School Boards Association convention, "Perhaps as much as 90 percent of what school boards do is predetermined by (a) state law; (b) federal guidelines; (c) negotiated agreements; (d) budget limitations."¹² Dickinson also stated that:

State (laws) . . . often detail the how, whom, where, and when, as well as the what and the why. Yet such edicts are, in effect, mandated policies, and they should be acknowledged as such in local board policy manuals.¹³

Administrative. An additional source of education law is that which comes from governmental agencies which are set up by legislative bodies. According to Alexander, et al, "Rules and regulations of both state and local boards of education fall within the category of statutory sources of law."¹⁴ Additionally:

As a general rule, the legislature cannot delegate its legislative powers to govern the schools to a subordinate agency or official. Boards of education must, in devising rules and regulations for the administration of the schools, do so within the limits defined by the legislature and cannot exercise legislative authority. However, the legislature may through statute expressly or impliedly confer administrative duties upon an agency or official.¹⁵

Reutter and Hamilton concurred when they commented:

The limits of the authority and responsibility of these departments are to be found in the respective state constitutions and statutes.¹⁶

They also reported that, "In general, the state boards are charged with policy making for education, one level below the legislature in the hierarchy."¹⁷

In the State of West Virginia an agency is referred to as ". . . any state board, commission, department or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches."¹⁸ The West Virginia Board of Education was established by the legislature with the power to deal with the operation of public elementary and secondary schools in the state.¹⁹

The State Board of Education's policies, rules and regulations have the effect of law. This power is established by the following statute:

Subject to and in conformity with the Constitution and laws of this State, the state board of education shall determine the educational policies of the State . . . and shall make rules for carrying into effect the laws and policies of the State relating to education . . .²⁰

The courts have upheld the authority of the state education agency. However, the State Board's actions must not be unreasonable or arbitrary.²¹

Judicial Law

The third source of law relating to education is judicial law--also known as case law or common law. "The terms 'case law'

and 'common law' are used to distinguish rules of law which have originated in the courts from those which have originated in legislative bodies."²² According to Reutter and Hamilton:

. . . common law is 'discovered' law in contrast to the enacted law of constitutions and statutes. Common law is the law that emerges from the case decisions--'case law.'²³

Lee O. Garber, a professor of education at Illinois State University, concluded:

In the first place, it must be remembered that not all law is made by the legislative branch of government. The judicial branch is also the source of law. The courts, in ruling on the legality of acts of educational authorities and the constitutionality of educational legislation, are constantly enunciating general principles of law that, in the absence of statutes to the contrary, are just as binding on school authorities and the public as are statutes resulting from the deliberations of the legislative arm of government.²⁴

Opinions of the Attorney General

The fourth source of law is derived from opinions issued by the attorney general of the state. The attorneys general of the various states issue opinions very similar in form and purpose to those issued by the Attorney General of the United States. They are usually written in response to specific inquiries from other governmental officials.²⁵ It should be understood that such opinions are strictly advisory and are not as binding as the statutes in West Virginia. There are no provisions for anything other than ". . . written opinion(s) and advice upon questions of law . . ." referred to along with the listing of specific duties of the office.²⁶

In State v Conley,²⁷ the court said that an opinion of the attorney general could not let board members escape the personal

liability of actions which are contrary to statute and constitution.

In another case the court stated that "Opinions of Attorney General are not considered to be followed by Supreme Court of Appeals."²⁸

Also, in Walter v Ritchie²⁹ the court said that:

Although an opinion of Attorney General is not binding upon Supreme Court of Appeals, it is persuasive when it is issued rather contemporaneous with the adoption of statute being considered.

Interpretations of the State Superintendent of Schools

The fifth and final source of education law can come from the interpretations issued by the state superintendent of schools. Such an office is provided for in the West Virginia Constitution³⁰ and the State Superintendent's authority concerning the interpretation of school law and rules of the state board of education is set forth within the enactments of the legislature where it states:

At the request in writing of any citizen, teacher, school official, county or state officer, the state superintendent of schools shall give his interpretation of the meaning of any part of the school law or of the rules of the state board of education.³¹

Sources of Law Summary

Alexander summarized that, "The combination of constitutions, statutes (both legislative and administrative), and court or case law form the primary legal foundation on which the public schools are based."³² These, in conjunction with the opinions and interpretations issued by the state and constitutional officers, form the whole foundation of school law and serve also as a base for completely legal-referenced board of education policies.

The question has been raised as to whether an opinion of the Attorney General or an interpretation of the State Superintendent of Schools should take precedence in the event that they differ. In this regard the Attorney General has stated:

. . . there can be no conflict between "interpretations" of the Superintendent of Schools and formal, legal "opinions" of the Attorney General, because the former are merely what they are designated to be--lay interpretations of policies--while the latter are legal conclusions reached, prepared and approved by the State's chief legal officer.³³

THE COURT SYSTEM

Function of the Courts

The courts of this country, when handling cases involving the public schools, have three basic functions:³⁴

1. to settle controversies by applying appropriate laws or principles of law to a specific set of facts;
2. to construe or interpret enactments of the legislature; and,
3. to determine the constitutionality of enactments of the legislature.

The Federal Courts

The Federal court system contains three levels:³⁵

1. the Supreme Court of the United States--the highest court in the land;
2. the Circuit Courts of Appeals--intermediate courts serving eleven geographic regions of the country; and,
3. the District Courts--circuit sub-courts, eighty-eight in number.

The Constitution of the United States provides that there shall be a supreme court as well as other "inferior courts" that the

Congress may decide to establish as it may deem necessary.³⁶ Therefore, the Supreme Court is a creature of the Constitution and the two lower sets of courts are legislative in origin.³⁷

The West Virginia Courts

The system of courts in the State of West Virginia has recently gone through a change in organizational structure due to a judicial reorganization amendment to the State Constitution approved by the voters in 1974.³⁸ The net effect of the passage of this amendment brought about the rewriting of the former judicial article of the Constitution, making the provision that the State, effective January 1, 1977, would have the following courts:³⁹

1. a supreme court of appeals--the highest court in the State;
2. circuit courts--serving thirty-one geographic regions of the state with fifty-eight judges and of general jurisdiction; and,
3. such intermediate appellate courts and magistrate courts as the legislature may establish.

As of this writing the legislature has not seen fit to establish any intermediate appellate courts. However, it has established magistrate courts in each county of the state with limited jurisdiction. The jurisdiction of these courts is limited to (1) civil suits with a maximum of \$1,500 and (2) to misdemeanors in criminal actions.

The Court System Summary

With two systems of courts throughout the country, it should be noted that most suits contesting or challenging the actions of

school officials under the United States Constitution or federal statutes, will be filed in the federal courts. Conversely, suits brought about under the state Constitution provisions or state statutes will normally be filed in the state court system.

The courts are charged to strictly apply the intent of the statutes as written or the intent of the legislature which enacted it. In this regard the courts should not inflict their own terms on the discretionary acts of a local board of education.

Construction of the Statutes

The expressed intent of the statutes, as well as the legislative intent behind each statute, must be adhered to in the application thereof. A general rule of statutory construction in Corpus Juris Secundum is stated:

Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.⁴⁰

Another applicable rule is stated in Statutes:

An unambiguous statute must be given effect according to its plain and obvious meaning, and such unambiguous statute cannot be extended beyond its plain and obvious meaning, or restricted to, or confined in operation within, narrow limits or bounds than manifestly intended by the legislature . . . In construing a statute expressed in reasonably clear language, the court should neither read in nor read out; and where a law is plain, unambiguous, and explicit in its terms, the exceptions are few indeed that authorize a court to read something into it that the law writers did not themselves put therein.⁴¹

Also, in American Jurisprudence construction of the statutes is further delineated:

A statute is not open to construction as a matter of course. It is open to construction only where the language used in the

statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning, that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. . . . A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity.⁴²

The court in State v Epperly referred to the statutory meaning with this statement:

When a statute is clear and unambiguous, and legislative intent is plain, statute should not be interpreted by courts, and in such case duty of court is to apply statute, and in so doing, its words should be given their ordinary acceptance and significance and meaning commonly attributed to them.⁴³

In Layne v Hayes the court determined that in the interpretation of a statute, the expressed mention of one thing necessarily implies the exclusion of another.⁴⁴ This was followed by another similar statement by the court in Garney v Sims where it was determined that the intention of the Legislature is the first rule of construction and that full effect should be given to all parts of the Act, if possible. In arriving at legislative intent, the court concluded that each section of the Act must be construed together.⁴⁵

In Detch v Board of Education the court held that a county school board may not promulgate rules and regulations contrary to clear, express legislative enactments and that the courts have a duty to attempt to reconcile the intended meaning of a resolution with existing legislative provisions.⁴⁶ The court further determined in West Virginia Sanitary Engineering Corporation v Kurish that:

A statute, limiting a thing to be done in a particular

manner, or by a prescribed person or tribunal, implies that it shall not be done otherwise, or by a different person or tribunal. Expressio unius est exclusio alterius . . .⁴⁷

The Legislature itself has also set rules for the construction of its statutes, and has enacted them into the code.⁴⁸ In so doing, it additionally allowed for an exception in the event that a legislative intent different from that construction contained in the specified rules be apparent.

THE IMPORTANCE OF SCHOOL BOARD POLICIES

Legally-based school board policies form the basis of fair and consistent daily operations of the school district. The National School Boards Association assessed the need for written policies when it said. "Written and continuously updated policies are essential mechanisms of a soundly organized and efficiently operated school board."⁴⁹ In addition, the association pointed out that:

1. written policies show everyone that the board is running a businesslike operation
2. they inform everyone about the board's intent, goals, and aspirations
3. they give credence to board actions
4. they establish a legal record (emphasis supplied)
5. they are impersonal and make whimsical administration difficult
6. they foster stability and continuity even though board members and administrative staff members may change from time time
7. they give the public a means to evaluate board performance
8. they contribute to the board's efficiency

9. they clarify board-superintendent functions

10. they help to disarm unfounded criticism of board actions when there are written policies available which are clearcut and timely and that reflect thorough research, sound judgement, and careful planning⁵⁰

In a paper presented at the 1969 annual meeting of the NSBA, Kermit M. Stover, Superintendent of Schools in Newtown Square, Pennsylvania, referred to the need for "constant legal advice for the development and implementation of such regulations which jointly sustain individual rights and the welfare of the school without a great amount of risk for litigation."⁵¹ He also stated that "Boards and administrators will constantly need to be assured that their policies and regulations are in accord with the basic principles of our democratic system of government and our constitution."⁵² In addition, Stover commented:

No longer are decisions, regulations and policies enacted by school boards, administrators, or staff members readily accepted as final by pupils, parents, taxpayers, or employees. Such policies are constantly under attack from the standpoint of their constitutionality or legality.⁵³

Thomas A. Shannon, school attorney to the San Diego (CA) City Schools and Community Colleges and a past chairman of the Council of School Board Attorneys, has stated that board policies have the full force and effect of law. This is because the courts apply to them the usual tests of validity of any ordinance or statute.⁵⁴

According to the EPS Utilization Advisory,⁵⁵ the Peoria (IL) Board of Education might have lost a student suspension case had there not been a written policy. In the case in point, a Federal judge agreed with the plaintiff that the statutory standard for suspension

or expulsion from school was vague; however imprecise the statute might be, the judge held that it was a sufficient guideline to enable local school boards to draft specific rules of conduct which, he noted, the school board had properly done. The case was dismissed⁵⁶ and certiorari was subsequently denied.⁵⁷

The Supreme Court of Errors of Connecticut, in a decision handed down in 1964, decreed that boards of education could not adopt policies which would alter state adopted legislation.⁵⁸

Vlaanderen, in his Law and the School Superintendent, reiterates that:

State statutes along with rules and regulations adopted by agencies created by statute are the most prolific source of school law. They are also the most powerful source. Despite the seeming plethora of court cases involving educational matters, the educational policy of a state is expressed in its education code. A court will not substitute its own discretion for that of . . . a local board . . . where local boards are acting within the scope of power delegated to them by constitution and statute and where no other elements of civil or criminal law have been violated. . . . The source of school law, then, is to be found primarily⁵⁹ in the statutes and board policies, not in court decisions.

Speaking as an attorney and as a school board member as well, William Maready of Winston-Salem, North Carolina, told the 1971 annual convention of the National School Boards Association (NSBA):

The lesson to be learned from . . . decisions is (that) the first amendment rights of free speech are paramount until they interfere with something else. School board policies should therefore be designed to apply at that point where conduct begins to interfere with something else--the educational program or the rights of others.⁶⁰

In addition, Maready also pointed out that:

. . . the question usually presented to the court is whether the policy or action of the board is valid under the constitution--not the more classical judicial function of interpreting

what the policy means. This is the area of litigation in which there has been a vast and dramatic increase in just the past decade--and there is promise of more to come unless school boards can learn to cope with the problem.⁶¹

Writing in the EPS/NSBA publication Updating School Board Policies, Dr. E. Edmund Reutter, Jr., professor of education at Teachers College, Columbia University, expressed wonder as to why school boards continually go to court to defend "indefensible policies". "The present American preoccupation with 'taking the matter to court'. . ." is suggested by Reutter as an indication that increasing numbers of cases covering all phases of student activity control are to be expected.⁶² "Legally," he continued, "who wins the case is not nearly as crucial as why the decision was made."⁶³

In many respects, each case that goes to the courts may set precedents for other actions to follow. Again, the references seem to imply that adopting policies consistent with legal emphasis will tend to keep the schools and the educational leaders out of the courts or that good policies may help them to be in a more defensible position if they should be brought into the courts.

In this same vein, a publication of the National School Boards Association, edited by Harold V. Webb, has stated that:

. . . too many school boards are being hauled into court because their policies are out-of-step with the times and the law. These are dangerous kinds of situations. When the machinery of school governance creaks, sputters, and mis-fires, the cause we all cherish--the improvement of educational opportunities for all children--suffers.⁶⁴

FOOTNOTES--CHAPTER 2

¹U. S. Constitution, amendment X.

²Kern Alexander, Ray Corns and Walter McCann, Public School Law: (St. Paul: West Publishing Company, 1969) p. 2.

³Ibid, p. 19.

⁴W Va Constitution, article XII, section 1.

⁵W Va Constitution, article XII, section 2.

⁶W Va Constitution, article XII, section 3.

⁷W Va Constitution, article X, sections 5 and 10.

⁸Alexander, op. cit., p. 3.

⁹W Va Code Ann., sec. 18-4-10, 18-4-11.

¹⁰W Va Code Ann., sec. 18-5-1.

¹¹Ibid.

¹²W. E. Dickinson, "How To Develop Workable School Board Policies," National School Boards Association convention, Clinic No. 30, San Francisco, April, 1972.

¹³Ibid.

¹⁴Alexander, op. cit., p. 3.

¹⁵Ibid.

¹⁶Reutter, op. cit., p. 68.

¹⁷Ibid.

¹⁸W Va Code Ann., sec. 29A-1-1.

¹⁹W Va Constitution, article XII, section 2.

²⁰W Va Code Ann., sec. 18-2-5.

²¹Detch v Board of Education, 145 WV 722, 117 SE 2d 138 (1961).

²²Alexander, op. cit., p. 3.

²³Reutter, op. cit., p. 1.

²⁴Lee O. Garber, "Recent Innovations in Judicial Pronouncements Relating to Education", Research & Information Services for Education (RISE) conference, April, 1968. (ERIC EDO 30 198)

²⁵William R. Roalfe, et al, How to Find the Law, 6th edition; (St. Paul, Minnesota: West Publishing Co., 1965), p. 171.

²⁶W Va Code Ann., sec. 5-3-1.

²⁷State v Conley, 118 WV 508, 190 SE 908 (1937).

²⁸State v Wassick, WV , 191 SE 2d 283 (1972).

²⁹Walter v Ritchie, WV , 191 SE 2d 275 (1972).

³⁰W Va Constitution, article XII, section 2.

³¹W Va Code Ann., sec. 18-3-6.

³²Alexander, op. cit., p. 2.

³³Op. Att'y. Gen. 6-26-74.

³⁴Alexander, op. cit., p. 6.

³⁵E. Allen Farnsworth, An Introduction to the Legal System of the United States, (New York: Oceana Publishing Co., 1963, p. 37.

³⁶U. S. Constitution, article III, section 1.

³⁷Henry J. Abraham, The Judiciary, 3rd edition, (Boston: Allyn and Bacon, 1973), p. 10.

³⁸Judicial reorganization amendment, ratified November 5, 1974.

³⁹W Va Constitution, article VIII, section 1.

⁴⁰82 C. J. S. Statutes, section 322, p. 577.

⁴¹Statutes, op. cit., p. 583.

⁴²50 American Jurisprudence, Statutes, section 225, pp. 204-207.

⁴³State v Epperly, 135 WV 877, 65 SE 2d 488 (1951).

⁴⁴Layne v Hayes, 141 WV 289, 90 SE 2d 270 (1955).

⁴⁵Garney v Sims, 144 WV 72, 105 SE 2d 886 (1958).

⁴⁶Detch v Board of Education, supra (1961).

⁴⁷West Virginia Sanitary Engineering Corp. v Kurish, 137 WV 856, 74 SE 2d 596 (1953).

⁴⁸W Va Code Ann., sec. 2-2-10.

⁴⁹School Board Policy Development for the '70's, (Evanston, Illinois: National School Boards Association, 1970), p. 1.

⁵⁰Ibid.

⁵¹Kermit A. Stover, "School Board Attorney: Friend In Need," National School Boards Association annual convention proceedings, April, 1969. (ERIC 029 389)

⁵²Ibid.

⁵³Ibid.

⁵⁴Thomas A. Shannon, "The Effectiveness of Written School Board Policies," Educational Policy Service/National School Boards Association seminar, Chicago, Illinois, March, 1972.

⁵⁵EPS Utilization Advisory, (Evanston, Illinois: Educational Policy Service/National School Boards Association), October, 1973.

⁵⁶Linwood v Board of Education, 463 Fed. 2d 763 (1972).

⁵⁷Linwood v Board of Education, 409 US 1027, 93 S Ct 475, 34 L Ed 2d 320 (1972).

⁵⁸Herzig v Board of Education, 152 Conn. 144, 204 A 2d 827 (1964).

⁵⁹Vlaanderen, op. cit., p. 7.

⁶⁰William F. Maready. "The Courts as Educational Policy Makers," National School Boards Association annual convention proceedings, April, 1971. (ERIC ED 051 574)

⁶¹Ibid.

⁶²E. Edmund Reutter, Jr., "Why Do School Boards Go To Court To Defend Indefensible Policies?," Updating School Board Policies, (Evanston, Illinois: National School Boards Association), March, 1972.

⁶³Ibid.

64EPS Utilization Advisory, (Evanston, Illinois: Educational Policy Service/National School Boards Association), January, 1972.

Chapter 3

FINANCIAL OPERATIONS

This chapter will cover those areas relating to the financing of public schools. The concept of finance has been categorized into the following areas: revenues; limitations on taxes; types of funds maintained; the procedures of handling such funds; expenditures and payment schedules; and, auditing and reporting.

The revenues of county school districts in West Virginia are received from local, state and federal sources. The number of dollars received in each of these categories varies from county to county.

The majority of financial support for education is distributed to the counties on the basis of a legislated formula. This formula is based mainly on the numbers of professional educators employed in each county. It also contains a provision for reduction of state funds depending upon the local tax amounts received. The entire State Aid Formula is discussed in detail in this chapter.

Counties that have a high tax-paying ability receive less state aid, distributed through the foundation program, than counties with less tax-paying ability. The amount of funds received from federal sources will tend to follow in the same inverse manner for most counties, but will not necessarily always adhere to the inverse proportion rationale. Many federal allocations are based on numbers of students deemed to be economically deprived rather than on the actual tax base of the county.

However, in most cases, a high incidence of economic deprivation on the part of students may also have a major effect on the amount of a county-wide total tax base. Johns and Morphet indicate that states move toward equalization of financial resources when they do the following:

1. increase the percent of school revenue provided from state sources,
2. apportion the state funds available in inverse proportion to the taxpaying ability of local school districts, or
3. make allowances in their apportionment formula for the necessary variations in costs per unit of educational needs.¹

According to figures supplied by the State Department of Education for 1975-76, West Virginia ranked thirty-ninth nationally in the average amount of local funds used to finance county boards of education, eleventh in state funding, and tenth in the amount of federal funds received for educational purposes.² The average county in West Virginia operated with approximately 31 percent local funds, 56 percent state funds, and 12 percent federal funds. The national average for the same 1975-76 fiscal period was approximately 48 percent local funds, 44 percent state funds, and 8 percent federal.³

It is interesting to note that the State of West Virginia ranks quite high in the areas of state and federal support to the individual school district budget, and correspondingly low in the area of local financial support to its schools. It can generally be considered that a high level of state support indicates a greater degree of equalization. This is illustrated by the data contained in Table 1 which ranks variations in expenditures per pupil for each state. A total of seven of the top eleven states with a high percentage of state support

TABLE 1

VARIATION IN EXPENDITURE PER PUPIL
 AMONG DISTRICTS WITHIN A STATE, RANKED IN EQUITY

	<u>High and Low Index</u>
Hawaii (State System)	1.00
West Virginia	1.43
South Carolina	1.53
North Carolina	1.56
Maryland	1.63
Delaware	1.70
Florida	1.78
Louisiana	1.84
Iowa	1.97
Alabama	1.97
Georgia	2.01
Nevada	2.24
Rhode Island	2.27
Tennessee	2.45
New Mexico	2.48
Mississippi	2.57
Kentucky	2.57
Indiana	2.57
Virginia	2.62
Connecticut	2.62
Utah	2.84
Michigan	3.11
Kansas	3.21
Wisconsin	3.40
Arkansas	3.41
Alaska	3.77
Minnesota	4.00
Ohio	4.08
Vermont	4.24
New Hampshire	4.84
North Dakota	5.63
Illinois	5.88
New Jersey	5.94
Colorado	6.30
Idaho	6.56
Arizona	7.07
Pennsylvania	7.90
California	7.92
Oklahoma	8.30
Missouri	9.05
Maine	9.14
Washington	9.22
Massachusetts	9.34
New York	11.43
Oregon	11.44
Nebraska	12.47
Montana	18.23
Wyoming	23.58
South Dakota	34.35
Texas	56.32

Source: Adapted from President's Commission
 on School Finance

on Table 1 are also ranked somewhere in the top twelve states having high state support (e.g., Hawaii, West Virginia, South Carolina, North Carolina, Louisiana, Alabama, and Georgia).⁴

Local Property Tax and Taxation

The property tax serves as the most plentiful local source of revenues for the school districts. On the average, 70.5 percent of all local property taxes collected in West Virginia currently goes to the schools.⁵ A school district may levy⁶ a tax upon the various classes of property, within prescribed statutory limits.⁷

The classes of property, for levy purposes, as stated in the code are:

- Class I. All tangible personal property employed exclusively in agriculture, including horticulture and grazing;
All products of agriculture (including livestock) while owned by the producer;
All notes, bond, bills and accounts receivable, stocks and any other intangible personal property;
- Class II. All property owned, used and occupied by the owner exclusively for residential purposes;
All farms, including land used for horticulture and grazing, occupied and cultivated by their owners or bona fide tenants;
- Class III. All real and personal property situated outside of municipalities, exclusive of Classes I and II;
- Class IV. All real and personal property situated inside of municipalities, exclusive of Classes I and II.⁸

The West Virginia code identifies "personal property" as set apart from real property, as:

. . . fixtures attached to land, if not included in the valuation of such land entered in the proper land book; all things of value, movable and tangible, which are the subjects of ownership; all chattels, real and personal; all notes, bonds, and accounts receivable, stocks and other intangible property.

In Kuhn v Board of Education the court said:

. . . money is levied for the 'board of education' elected by the voters who are thus constituted the authority of the people in the district for that purpose. Therefore the laying of tax levies for school purposes is covered by the West Virginia Constitution, article X, section 1.¹⁰

All taxable persons and property are subject to school taxes, even though such person or property derive no direct benefit from same.

An opinion issued by the State Attorney General states:

There are many parents residing in West Virginia who send their children to parochial or nonpublic schools. Nevertheless, they are not exempt from the payment of taxes which go to the support of the free school system in the State of West Virginia.¹¹

Exemptions from property taxation. Not all property located within the state is subject to property taxes. The West Virginia Constitution lists these exemptions from taxation:

. . . property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including livestock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation.¹²

Forest lands in contract with the State for planting, cultivation, protection, and harvesting.¹³ . . . bank deposits, money and household goods and personal effects . . .¹⁴

Even more specifically, there are exemptions from taxation spelled out in passages of the West Virginia code. Exemptions are based mainly, either on the ownership or the use of particular pieces

of property.¹⁵ Exempted property by reason of ownership includes any parcels of land owned by:

1. the United States of America;
2. the State of West Virginia; or any county, district, city, village or town within the State;
3. any city, town, village, county or any other political sub-division of another state (if used for public purposes);
4. county development, local housing and urban renewal authorities, armories, hospital and medical service corporations;
5. any public institution for the education of the deaf, dumb or blind;
6. any hospital not for profit; and,
7. lodge homes and/or asylums for orphans, widows, disabled and aged indigents.

Exemptions from property taxation which are based on property useage include that used exclusively for:

1. divine worship (including parsonages);
2. colleges, seminaries, academies, free schools, and libraries;
3. charitable, area economic development or benevolent purposes;
4. homes of refuge, lunatic or orphan asylums for children, the aged, friendless or infirm;
5. the meetings of fire companies;
6. the subsistence of livestock; and
7. public school purposes.

Additional exemptions are also granted by the statutes. These include household goods (up to the value of two hundred dollars); bank deposits and money; and dead victuals laid away for family use.¹⁶

Assessment of tax levies. The court has held that there are four elements necessary to the imposition of an ad valorem property tax.

These are:

1. a taxpayer;
2. taxable property;
3. an assessment of its value; and,
4. a rate on the unit of valuation.¹⁷

Before a tax is actually levied the school board must meet certain statutory procedure requirements. They must meet between March 7 and March 28 each year to approve the budget and tax levy estimate. This meeting is then adjourned until the third Tuesday of April.¹⁸ During this period of adjournment, the board may convene itself in either regular or special sessions to conduct matters of other concern to the school district. On the date of the March meeting and the statutory third Tuesday of April meeting, the board may convene for other business before or after the mandatory sessions.

Immediately after the meeting held in March, the secretary of the board shall forward a copy of the certified Levy Estimate to the Tax Commissioner¹⁹ and to the West Virginia Board of Education. Two copies of the budget are also to be included to the state board. These documents shall be postmarked no later than midnight, March 28; unless the 28th falls on a Saturday or a Sunday, in which case the board may have until the following Monday to discharge these duties.²⁰

In addition, the board must publish "forthwith" after the meeting held between March 7 and March 28 a copy of the Levy Estimate. It is to be printed twice (once in each of two successive weeks) in

two county newspapers of general circulation which are registered as representing the views of opposite political parties.²¹ If two qualified newspapers are not available, or if they refuse to publish at the legally approved rate for this type of advertisement, then the board shall cause the legal notice to be posted in at least three public places, one of which shall be the county courthouse.²²

When the board reconvenes in April it shall:

1. receive the approval of the preliminary budget from the West Virginia Board of Education;

2. receive the approval of the Levy Estimate form as submitted to the State Tax Commissioner;²³ and,

3. formally approve the budget document and the necessary levy rates to fund the budget--but only after having heard any objections to the proposed levy rates as voiced by any citizen who seeks to appear before the board for that purpose.²⁴

Within three days after approval of the budget and tax rates, the secretary of the board shall forward certified copies of the Levy Order to the Tax Commissioner.²⁵ A notice of approved rates shall be forwarded to the following officers: (1) clerk of the county court; (2) county tax assessor; (3) State Superintendent of Schools; and, (4) State Auditor.²⁶

When these events have all transpired, the local taxes will then be levied and subsequently collected by the sheriff to be made available for the use of the school district.²⁷

The West Virginia Constitution provides that:

. . . taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value . . .²⁸

In in re National Bank the court held that:

. . . the ultimate goal is 'equal and uniform taxation',
 . . . Uniformity, however, must be used in a somewhat relative
 sense, for no method has been devised, and probably can not be,
 whereby exact uniformity of taxation results to each taxpayer
 (There is a) constitutional mandate that taxes be
 equal and uniform.²⁹

Also, the court in In re Assessment determined that:

. . . the legislature has the power and the duty to design-
 ate the manner in which the actual value of different kinds
 or 'species' of property may be ascertained, but when such
 value has been ascertained, all species of property must be
 taxed equally in proportion to its value.³⁰

In addition, the court gave this example of equal taxation in
 proportion to value:

A horse used wholly for farm purposes and a share of bank
 stock are both placed in Class I for rate purposes. If the
 actual value and the assessed value of each is four hundred
 dollars, no one would seriously contend that the farmer could
 be required to pay the maximum rate of fifty cents on his
 horse while the owner of the share of bank stock paid only
 twenty-five cents on his property. Nor could the same dis-
 crimination be practiced upon the farmer by assessing his
 horse at its actual value of four hundred dollars while the
 share of stock was assessed at two hundred dollars. But if
 both the horse and the share of stock were assessed at one-
 half of their actual value, and the maximum rate of fifty
 cents a hundred was placed on each, the amount of tax money
 derived would be exactly the same as if both were assessed
 at their actual value and a rate of twenty-five cents a
 hundred was imposed upon both Whether one taxpayer
 is taxed twice as much as the other by virtue of the impo-
 sition of a rate twice as high as the other, or by assess-
 ment twice as high as the other, it is forbidden by Section 1,
 Article X, of the Constitution.³¹

All property is to be assessed as of the first day of July each
 year,³² and such assessment is to be "at its true and actual value."³³
 Each value is to be ascertained basically as the price at which an owner
 would be willing to sell in the event he was not forced or compelled to
 do so for any reason whatsoever, and with the consideration of the

conditions of the locality in which the property is situated.³⁴

The code specifies that the total assessed valuation in each of the four classes of property³⁵ of the county shall not be less than 50 percent of the appraised value of each said class of property, nor more than 100 percent.³⁶ In the event that in any year the assessor of the county fails, or refuses, to set the assessed values at least at the required 50 percent for each class of property, the county court (commissioners) shall allocate to the county board of education for that year a portion of its authorized tax levy sufficient to provide a sum of money equal to the amount of taxes lost by the board of education due to such reduction in assessments.³⁷ If the county court (commissioners) fails to reallocate the necessary levies, the county board shall have the right to enforce the code by mandamus action.³⁸

In Backus v Abbot the court said:

Though an assessor, in the discharge of his duties relating to the entry on the land books and the assessment of land for taxation, ascertain facts and exercises judgment, he³⁹ may not exercise such judgment arbitrarily or capriciously.

According to the State Tax Commissioner:

The total assessed valuation in each of the four classes of property is required to be not less than 50 percent nor more than 100 percent of the appraised valuation of each class of property. Since, by law, both the assessed and appraised value of property is to be based upon the same concept--true and actual value--this has the effect of allowing a 50 percent tolerance between the assessor's and appraiser's⁴⁰ judgment as to the actual value of each individual property.

Tax Limitations

The courts have ruled that a board of education has only the authorities provided by law to levy taxes. One such decision was

rendered in Winter v Brown.⁴¹ Also, in State Board of Education v Board of Education the court held that the laws authorize a ". . . board of education . . . to lay a levy . . . sufficient for all purposes to conduct the schools of said . . . school districts in which . . . schools are maintained."⁴²

Local school districts are limited by the statutes as to the rate of taxation they can levy for the general current expense fund. Boards of education are also limited in the amount of total debt they can amass. In this respect there is not a tax rate limit, but a total dollar limit equal to 5 percent of the county assessed valuation; thus indirectly setting a tax limitation.

General current expense limitations. In levying local property taxes, the county boards of education are limited by statute in the maximum levy they may impose without a vote of the citizenry on each class of property within the county for the purposes of general current expenses, permanent improvement funding and/or the payment of interest and sinking fund requirements. The maximum that the school districts are limited to is a total of twenty-two and ninety-five one hundredths cents on Class I properties; forty-five and nine tenths cents on Class II properties; and ninety-one and eight tenths cents on both Class III and IV properties⁴³ on each one hundred dollars evaluation. The tax levy rate for Class II is double that of Class I, and Class III and IV rates are each double the rate of Class II.⁴⁴

The maximum levy on all classes of property may be allocated, if a county board so desires, to also cover an amount for permanent

improvements, and a small amount for debt purposes. If the board chooses to allocate, one and five tenths cents of the levy on Class I property may be directed to the permanent improvement fund; and, thirty-five one hundredths of one cent of the Class I levy can be directed to debt retirement. The rate of allocation for Class II property is double that for Class I. Class III and IV allocation is then double that of Class II. In the event that the board does not choose to allocate for either one or both of the purposes available to them, the county board may apply its entire tax levy toward the general current expense fund, after having received the prior written approval of the State Board of Education.⁴⁵ In addition, if the board does not require all of its allotted levy for current expense purposes, it may levy the portion unused for current expenses for the purpose of debt service.⁴⁶ This would then be in addition to the rate available for apportionment as set forth above.

Excess levy. If a board of education finds that the amount of income to be brought in by its current expense levy is insufficient to fund its educational goals within the existing limitations of the tax rates by class, it may submit to the voters a proposal to increase said tax rates by no more than 100 percent.⁴⁷ Such a proposal must receive at least a 60 percent affirmative vote by those voters who cast their ballot.⁴⁸ In Sale v Board of Education the court held that the determination to increase taxes under the constitution can only be done by submitting the question to the vote of the citizens of the taxing unit.⁴⁹

The 60 percent requirement was the subject of several court actions over the past three-quarters of a century. Early court decisions grappled with the interpretation as to whether the statute intended for it to be a bona-fide election in which fully 60 percent of the registered voters had to cast an affirmative ballot. In Davis v Brown the court set the meaning that such was not intended when it said:

Where voters do not come to the polls at all, they need not be inquired after; they do not exist, no matter how many there may be. This is so, though the law require the assent of a majority of the voters of a county or district to elect an officer or approve a measure This is settled by many authorities.⁵⁰

The court again concurred with the Davis decision in Warden v County Court some three-and-one-half decades later.⁵¹ However, in Lance v Board of Education the West Virginia Supreme Court of Appeals held that the 60 percent approval requirement was unconstitutional.⁵² This decision was appealed to the Supreme Court of the United States which granted certiorari, and then reversed the judgment of the lower court. The high court found that even though any departure from strict majority rule gives disproportionate power to the minority, the requirement that 60 percent of the voters in a referendum election must approve bonded indebtedness or tax increases does not violate equal protection under the Fourteenth Amendment. The court held that merely because votes of those who do favor issuance of bonds have a proportionately smaller impact on the election than votes of those who oppose such an issue, the requirement is not unconstitutional. The same requirement applies to all bond referenda of city, school or

other governmental units and therefore is not discriminatory against any one of them.⁵³

If an affirmative vote of 60 percent is realized, the increased tax rates approved shall be in effect for a period of five years. This additional levy is commonly referred to as an "excess levy" or a "special levy"; and the election to approve such a levy may be held in a specially-called election, or may be submitted to the voters at a regular State or general election; however, the question must be on a separate ballot.⁵⁴

In the notice for such special levy election the board shall specify the purpose for which the levy is to be expended.⁵⁵ When approved by the voters, the expenditure of funds realized from the special levy must be directed in accordance with the purposes stated, or it would constitute an unlawful diversion of funds.⁵⁶ In Cook v Lawson the court held that funds from special levies for particular purposes, even if directed by error to other projects, must be restored to the original purpose.⁵⁷

Transfer of tax rate from the county commissioners. The county commissioners (court) of each county constitute a tax-levying body with a set allocation to levy for its operations. If the county court determines that it does not need to levy its entire allocation, any unused amount of the levy may be transferred to the use of the county board of education by the county court. Before a transfer of tax rate may be effective, however, it is necessary to receive the approval of the State Tax Commissioner.⁵⁸

Debt service limitations. In the case of debt service limitations, the tax rates are not limited. However, there is a statutory limit on the total debt a school district can incur. It is an amount equal to 5 percent of the valuation on all classes of property in the district as ascertained by the last assessment for state and county tax purposes.⁵⁹

In County Court v Partlow the court held that any bonds of a political subdivision in excess of the debt limitations are null and void.⁶⁰ In the instant case the outstanding debt, which in reality exceeded the debt limits, was misrepresented to the voters.

Other Local Sources of Revenue

Investments. County boards of education are allowed by the statutes to place funds, collected and on hand in advance of the time of actual need, into interest-bearing investments.⁶¹ In this endeavor the board can derive additional funds for the operation of its school system. Such funds can serve to supplement the more usual revenues at no cost or obligation to the taxpayers. In a recent national survey it was determined that an average yield for school district investments of general current expense monies could approximate .8 of one percent of the total current expense budget.⁶²

When depositing money, the board of education must act in accordance with the statutes. The board of education has the right to any interest earned thereon. In Board of Education v Johnson the court said that:

. . . Code, 1931, as amended, is clear and unambiguous and imposes a mandatory duty upon the sheriff to allocate the interest earned under the provisions thereof to the fiscal bodies whose funds were on deposit in time deposit accounts, such allocation to be made in the manner prescribed by the statute.⁶³

It is the responsibility of the board's treasurer to determine where to invest such funds;⁶⁴ for what periods of time, and in what dollar amounts.⁶⁵ Investments of public funds made by the treasurer are limited to securities guaranteed by the United States government, or in general obligation bonds with state guarantees.⁶⁶ In addition, funds may be invested through the State Sinking Fund Commission.⁶⁷ All earnings through the investment of available funds shall be credited to the fund from which the monies were taken for investment purposes.⁶⁸

Miscellaneous. Other forms of income from local sources, which a county board of education may receive in its general current expense revenues, include several types of tuition for educational services: from a student residing out-of-state;⁶⁹ from another county;⁷⁰ from special classes for war veterans;⁷¹ from adult education classes for those over the age of twenty-one;⁷² and, for summer school classes.⁷³

Another form of local income to the district, although generally in relatively minor amounts, is the receipt of rentals on leases of school properties. When board-owned land and/or buildings are not needed for school purposes for immediate periods of time, they may be leased to others. The proceeds from such leases are to go into the funds of the school district and are to be used by the board of education exclusively for school purposes.⁷⁴

In Madachy v Huntington Horse Show the court concluded that the board has reasonable discretion to lease school property pending the time when it will be used for school purposes.⁷⁵ Rental charges are imposed by many boards of education to help defray additional costs of custodial and maintenance care and for utility costs incurred in the after-school-hours use of board facilities by community groups, as allowed by statute.⁷⁶

Another source of miscellaneous local revenue that districts will only on occasional bases realize is that of fees and fines. Whenever the board accepts a suggestee execution (garnishment) or renewal thereof on the salary or wages of an employee, there is to be received a filing fee of one dollar which is to go to the credit of the general fund of the district.⁷⁷ Any fines received by the sheriff of the county as a result of abuses of the compulsory attendance laws, and turned-over to him monthly by the justice or other official, are to be placed in the school funds.⁷⁸

The school district is also permitted to receive gifts, grants and bequeaths of funds for educational purposes.⁷⁹ In addition, the board may also choose to copyright certain materials developed by its employees.⁸⁰ If done, it would seem evident that the board may receive some royalty fees from others who may wish to utilize said materials for their own use.

Prohibited incomes. There are two sources of income on a local level that are specifically prohibited. One, which has been curtailed by the courts, is the charging of instructional fees to students in courses

required under guidelines of the State Board of Education.⁸¹ It is permissible, however, to charge class fees for non-required courses; but the board may not make an enrollment charge for students to enter school.⁸² Under the system of "free" schools in the state, the courts have held that such charges would be improper and unlawful. In the case of Vandevander v Cassell the West Virginia Supreme Court of Appeals held that:

. . . (as) has been presented and resolved by the highest courts in other states with constitutional provisions relating to 'free' schools similar to West Virginia's . . . those courts determined . . . that textbooks and materials necessary for the completion of the required school curriculum should be provided without charge . . . and . . . fees should not be charged for any activities in connection with the required curriculum.⁸³

The other prohibited income is those profits derived from the sale of non-nutritional foods (e.g., candy, soft drinks, chewing gum and flavored ice bars) to school children during the school day, as set forth in a regulation of the State Board of Education.⁸⁴ The sale of other food items is therefore permitted in the schools.

Revenues from State Sources

State aid formula. The general state school support aid for local districts in West Virginia is distributed to the counties based upon a formula which is designed ". . . to fix statutorily both state and county responsibility for financing . . ." education in the state.⁸⁵ The formula encompasses several steps in a computation process which in the aggregate was intended to be the sum of a total basic foundation educational program for any year.⁸⁶ Approximately 79 percent of the total State money is allocated through this basic formula.⁸⁷

The steps in the process are:

1. allowance for professional educators⁸⁸--the amounts of money required to pay the state minimum salaries of each county's professional educators, up to a limit of fifty-five for each one thousand students in adjusted enrollment;
2. allowance for other personnel⁸⁹--an amount equal to 14 percent of the total determined for step 1 above, distributed in proportion to the adjusted enrollment of each county school system to the total state adjusted enrollment; and, an amount equal to 6 percent of the total determined in step 1 above, distributed in proportion to the number of full-time bus drivers in each county to the total in the state;
3. allowance for fixed charges⁹⁰--an amount equal to the sums of amounts determined in steps 1 and 2 above multiplied by the combination of the current social security rate for employers, plus 2 percent; and distributed to the counties in the same manner as in step 2 above;
4. allowance for transportation costs⁹¹--an amount equal to 80 percent of all transportation costs less salaries and insurance premiums, plus 100 percent of insurance premiums for transportation if purchased through competitive bidding procedures; plus, an amount equal to 10 percent of the current replacement value of the bus fleet of each county (to be used only for the purpose of buying replacement buses); plus, aid in lieu of transportation equal to the average cost in the state per student of those receiving such aid and distributed for each student who received in lieu payments from the counties;
5. allowance for administrative costs⁹²--an amount equal to 1 percent of the total computation in step 1 above, distributed equally to all fifty-five counties;
6. allowance for other current expenses⁹³--an amount equal to 10 percent of the total computations in steps 1 and 2 above, distributed to the county districts in proportion to the adjusted enrollments of each county to the state's total;
7. allowance toward national average attainment⁹⁴--an amount distributed to the counties proportional to adjusted enrollment which is derived from funds which accrue due to an increase in the calculation of total local share from all counties (which results in a corresponding reduction in required monies for total State funding),⁹⁵ balances in the general school fund,⁹⁶ or from special appropriations for same by the legislature;

8. computation of local share⁹⁷--there will be a calculation of an amount to be considered as local effort which each county shall in effect be credited as its local share toward the basic foundation school program; such share to be computed by applying the levies for general current expenses on each one hundred dollars of valuation (Class I, 19.6 cents; Class II, 39.2 cents; and, Class III and Class IV, 78.4 cents)⁹⁸ as if levied against 100 percent⁹⁹ of the appraised value of all properties of the four classes and then:

A. applying 97.5 percent of the amount ascertained from the total assessed public utility values in each class; and,

B. then applying these same tax rates (see above) to the remaining property valuations in each of the classes, less 5 percent for delinquencies; and,

C. then adding 50 percent of the amount determined in B. above to the amount determined in A. above to equal the total local share for each county school district.

Table 2 shows appraised and tax assessment information for the largest county in the State for the 1976 tax year. Table 3 indicates the calculation of local share for the same county (Kanawha) for the 1977-78 fiscal year utilizing the data contained in Table 2.

9. county basic foundation allowance¹⁰⁰--the sum of amounts determined in steps 1 through 7 above, less that amount determined in step 8 above, shall be the allowance of basic state aid for each county school system.

In addition, counties may qualify for some funds over and above those calculated above due to program improvement incentives,¹⁰¹ increased enrollments,¹⁰² and from the general school fund.¹⁰³

Each county school system must annually file with the State Department of Education a request schedule for payments of state aid as determined through the steps of the formula.¹⁰⁴ The state may alter the request as long as any deviation from the requested schedule would not harm the local county program. In addition, the State Board of Education may withhold the funds due any county as a penalty for non-compliance with regulations of the state board, or if the local board

TABLE 2
APPRAISAL AND ASSESSMENT OF PROPERTY
FOR AD VALOREM TAX PURPOSES

KANAWHA COUNTY

	(1) 1976 Assessed Valuation ¹	(2) Assessed Valuation Totals ²	(3) Taxes General Current ³	(4) Tax Totals Assessed ⁴	(5) Appraised Totals by Class ⁵	(6) Tax Totals 100% ⁶	(7) ** Percent Assessed to Appraised ⁷
<u>Class 1</u>							
Personal Property	\$161,344,516	\$ 161,344,516	\$ 316,235	\$ 316,235	\$ 279,518,310	\$ 547,855	57.72%
*Public Utility		* 4,793,000	* 9,395	* 9,395			
<u>Class 2</u>							
Real Estate	367,288,414	367,288,414	1,439,770	1,439,770	662,848,020	2,598,365	55.41%
<u>Class 3</u>							
Real Estate	94,098,899		737,735				
Personal Property	168,125,328	262,224,227	1,318,100	2,055,835	462,231,640	3,623,895	56.73%
*Public Utility		* 103,550,100	* 811,830	* 811,830			
<u>Class 4</u>							
Real Estate	229,799,812		1,801,630				
Personal Property	211,741,042	441,540,854	1,650,050	3,461,680	818,601,290	6,417,835	53.93%
*Public Utility		* 105,117,400	* 824,120	* 824,120			
TOTALS		<u>\$1,232,393,011</u>		<u>\$7,273,520</u>	<u>\$2,223,199,260</u>	<u>\$13,137,950</u>	
*PUBLIC UTILITY PROPERTY TOTALS		* \$ 213,460,500		* \$1,645,345			

Tax Rates on each \$100.00 Valuation: Class 1 - 19.6¢; Class 2 - 39.2¢; Classes 3 and 4 - 78.4¢.

*Public Utility Property

**Ratio of Assessed Valuation Totals to Appraised Valuation Totals

¹ These amounts indicate the assessed valuation of each type of property in each type of property in each of the four classes.

² The total assessed valuation by class for non-utility and, where applicable, public utility property.

³ The amount of revenue that would be produced through application of the levies for general expense purposes, as outlined above, against the assessed valuation of each type of property in each of the four classes.

⁴ The amount of revenue that would be produced in each class for non-utility and, where applicable, public utility property through application of the levies for general expense purposes against total assessed valuations.

⁵ The total appraised valuation in each of the four classes of non-utility property for the 1976 year.

⁶ The amount of revenue that would be produced in each class through application of the levies for general expense purposes against the total appraised value of non-utility property.

⁷ The ratio of total assessed valuations to total appraised valuations in each class of property.

TABLE 3

CALCULATION OF LOCAL SHARE
KANAWHA COUNTY - 1977-1978

A. Public Utility Property Taxes -

Total Assessed	\$ 1,645,345	
	<u> X 97.5%</u>	\$1,604,211

B. Appraised Totals by Class (non-public utility)

Class I	\$279,518,310	
	<u> X 19.6¢</u>	\$ 547,855
Class II.	\$662,848,020	
	<u> X 39.2¢</u>	\$ 2,598,365
Class III	\$462,231,640	
	<u> X 78.4¢</u>	\$ 3,623,895
Class IV.	\$818,601,290	
	<u> X 78.4¢</u>	\$ 6,417,835
Tax Totals.	\$13,187,950	
Less 5% Delinquency	<u> - 659,398</u>	
Net.	\$12,528,552	

C. Net Tax Totals (non-public utility)

from B. above	\$12,528,552	
	<u> X 50%</u>	<u>6,264,276</u>
Total Local Share		<u>\$7,868,487</u>

may have made expenditures not authorized by law.¹⁰⁵ State funds due any county school district may also be withheld if the district fails to promptly pay costs assessed to it by the State Tax Commissioner's office as costs incurred for audits of the books and records of the county.¹⁰⁶

Miscellaneous state revenues. Other revenues from state sources will generally be received by most counties in a greater or lesser proportion as said counties participate in the specific activity required by the state to receive such specially granted funds. Examples of such funds are: secondary driver education;¹⁰⁷ early childhood;¹⁰⁸ state school building funds;¹⁰⁹ Federal vocational education programs;¹¹⁰ services to exceptional children;¹¹¹ and other special allocations of funds such as those for salaries and other appropriations from the legislature.¹¹²

Revenues from Federal Sources

The county school districts shall be eligible for various categorical Federal funds which may accrue to the State Department of Education.¹¹³ In addition there will generally be available specific funding for such programs as: vocational education;¹¹⁴ war veteran education;¹¹⁵ adult education classes; ¹¹⁶ community action programs;¹¹⁷ and, nutritional lunch programs.¹¹⁸

TYPES OF FUNDS

A "fund" is a separate grouping of all receipts and expenditures for a specific type of activity, separately accounted for and

with a separate bank account. Where it is required that separateness and distinctness be maintained, a fund should be established.

Statute prescribes that each county board of education shall set up the following funds as needed:¹¹⁹ general current expense fund; permanent improvement fund; bond construction fund; and debt service fund. At least one demand checking account must be maintained in a depository bank for each fund.¹²⁰ If desired, a fund may have more than one checking account in one or more banking institutions, but each checking account shall be identified functionally and utilized only for the purpose identified.

General Current Expense Fund

The General Current Expense Fund is a separate and distinct fund and is used for all general operating purposes except for revenues and expenditures that are contained in:

1. permanent improvement funds;
2. bond construction fund; and,
3. debt services fund.

Revenues for the General Current Expense Fund generally come from:

1. general and special levy taxes;
2. other local or miscellaneous revenues;
3. state aid to counties for restricted (e.g., special education, driver training, vocational education, cooks salaries, etc.) and unrestricted (e.g., regular foundation support) purposes, and
4. federal aid direct or through the State, usually categorical or restricted (e.g., ESEA I, Headstart, vocational education, etc.).

Revenues and expenditures are to be classified in terms of valid budget codes which are based on an adaption of "Handbook II, Financial Accounting for Local and State School Systems," issued by the United States Office of Education, Washington, D. C.

Permanent Improvement Fund¹²¹

The Permanent Improvement Fund is a separate and distinct fund which may be used only for the support of building and permanent improvement projects. Revenues consist of:

1. proceeds of the tax levy allocated by the board;
2. unexpended balances of other funds transferred to the Fund;
3. any other monies authorized by law to be used for the purposes of the Fund; and,
4. interest on investments, if any.

Expenditures for the Permanent Improvement Fund are classified in terms of budget codes which are authorized by the State Department of Education. Transfers of unexpended balances of other funds to the Permanent Improvement Fund require prior approval by the State Board of Education. Transfers from the Sheriff's (Treasurer's) bank account of the tax collections to the State Sinking Fund Commission for investment as Permanent Improvement Fund monies also requires prior approval of the State Board of Education.

Bond Construction Fund¹²²

The Bond Construction Fund is a separate and distinct fund used for revenues from the sale of local bonds authorized by a special election, from state school building funds and from special monies that are categorically identified and authorized to supplement local bond

proceeds or state school building funds. Expenditures from this fund are restricted to capital outlay purposes by the bond election call, and by special funding agreements of the Federal government covering projects that it advances funds for or by the State Board of Education in approving specific building projects.

Debt Service Fund

This fund is also a separate and distinct fund and is used only as an "Interest and Sinking Fund" to meet the demands of maturing bonds and bond interest coupons as they mature.

The collection of Debt Service Fund taxes levied on real and personal property is made by the Sheriff, while the collection of Debt Services Fund taxes levied on public utility property is made by the State Auditor. Collection of these taxes is transferred periodically to the State Sinking Fund Commission by the sheriff. The State Sinking Fund Commission, in turn, disburses funds to meet payment of bonds and the bond interest coupons, as well as authorized commissions for banks which may handle the transactions. From time to time, the State Sinking Fund invests Debt Services Funds that are immediately in excess of payment schedules and credits the interest income to the account.

Other Authorized Funds

Special funds. Certain county boards of education receive and disburse monies, as may be required by special act legislation. An example of this would be for a county library board, which receives revenues from various sources, usually including the county board of education as one of the sources.

In such a situation, the affected board of education serves as fiscal agent for the library board and performs all of the usual bookkeeping and accounting functions of the library. A separate checking account and investments will be maintained by the board of education on behalf of the library.

Individual school funds. The bookkeeping systems within the individual school buildings of the district shall have two funds established: a general fund and a school lunch fund.¹²³ In such situations a separate demand checking account for each of these funds is to be maintained by the school. All transactions involving each of them are to be recorded separately in the books and records of the school, and under no circumstances is there to be any co-mingling of monies from one of the funds with those of the other. Purchases for each fund are to be invoiced distinctly in order that this separateness be easily and adequately maintained.

The general fund may be sub-divided into various accounts as needed (e.g., general account, band account, athletic account, library account, club or organization accounts, etc.) within the books and ledgers of the individual school's bookkeeping system.

HANDLING OF FUNDS

Treasurer

Until recently, the sheriff of each county, who serves as ex-officio county treasurer, mandatorily served as the treasurer¹²⁴ of the county board of education. In 1973 a new section was added to the code

which allowed each board of education to appoint a treasurer other than the sheriff, if they desired to do so.¹²⁵

Under terms of the code, each county board of education must select a treasurer each year on or before the first Monday in May. Such treasurer may be the sheriff or it may be "an employee commonly designated as the person in charge of the financial affairs of the county board."¹²⁶ If the sheriff is not named, the board must understand that it cannot ever rename the sheriff in the capacity of treasurer.¹²⁷

A county board may decide that it is desirable to have as its treasurer someone other than the sheriff. When the sheriff does serve as the board's treasurer, it is much more difficult for the board to have adequate, accurate financial data on hand from which to make financially sound decisions because all receipts and records are not readily available. However, if the board names a treasurer other than the sheriff, day-to-day bank balances would be known, and cash flow analyses and revenue forecasts could be developed for financial management.¹²⁸

The position of treasurer of the board of education carries with it great responsibilities. It is the duty of the treasurer to maintain sufficient cash balances to meet operational cash demands; reconcile end-of-the-month bank statements; maintain cash ledgers; and determine if there are at any times excess monies on hand available for investment. The treasurer must protect the cash assets of the county board of education by making certain that checking account balances and investments are properly secured by adequate bonding or other collateral.¹²⁹

The statute approving the treasurer¹³⁰ was effective on July 13, 1973, ninety days after passage. This date was thirteen days after the beginning of a new fiscal year and more than two months beyond the requirement contained therein that the treasurer be named "on or before the first Monday in May."¹³¹ The court held that, since the counties could not comply with this specific requirement, a treasurer other than the sheriff could not be appointed until the 1974-75 school year. In Board of Education v Melton the court held that a statute may not become operative immediately upon its enactment, but the time of its going into effect may be postponed until a later date. The effective date of the statute may be set in the statutory language or by a general constitutional provision.¹³² The constitutional provision in West Virginia is that, unless stated otherwise, a new piece of legislation will be effective ninety days from passage.¹³³

Five counties that had elected to appoint a treasurer other than the sheriff (e.g., Hancock, Kanawha, Mercer, Ohio, and Wyoming) had to revert back to working with the sheriff for the balance of the 1973-74 fiscal year. A total of nineteen counties out of the fifty-five have thus far appointed a treasurer other than the sheriff.

The movement to get permissive legislation for the counties to name a treasurer other than the county sheriff was no doubt aided by the court decision in Board of Education v Johnson. In the instant case the court said that boards of education were rightfully entitled to the interest from investments of school funds made by the sheriff when it was proven that interest funds, derived from investments of

board of education monies, were being credited to the county court (commissioners) rather than to the school board. Because of this ruling, approximately four hundred thousand dollars was awarded to the plaintiff Kanawha County Board of Education. This amount constituted the interest from investments of school funds that had been withheld from the board by the incumbent sheriff.¹³⁴

The State Attorney General has rendered an opinion that the ultimate fiscal power of the county remains with the sheriff, even though a county appoints another treasurer.¹³⁵ He indicated that it was not the intent of the legislature, when it enacted section 18-9-6 of the West Virginia code, to create a dual system with each having equal powers over the fiscal matters of county agencies. Therefore, the legislature simply carved the limited powers of a school board treasurer from the broad jurisdiction held by the sheriff.¹³⁶

In the event that the sheriff of the county is named by the board of education to be its treasurer, he retains the duties and authorities of the sheriff as ex-officio treasurer of the county.¹³⁷ In addition, he is also under the direction of the county board of education when it relates to the investment of board funds.¹³⁸

As a treasurer of the county board of education, the person appointed to such an office shall: receive monies in the name of the board;¹³⁹ meet with the county court and the sheriff for an annual settlement of all school monies received;¹⁴⁰ pay monies out only upon order of the board;¹⁴¹ properly handle "no fund" orders (where there is no cash in checking accounts to honor them);¹⁴² manage the cash of the board of education to insure that adequate balances are on hand to

meet operating requirements, control the accounting of all issued checks, issue written receipts for all cash received, make daily bank deposits of such receipts, and report monthly balances of all demand and investment accounts;¹⁴³ invest any available funds in guaranteed certificates of deposit or other investments guaranteed by Federal or state authorities;¹⁴⁴ and, be able to inspect at any time the account book on tax collections of the county in the office of the sheriff.¹⁴⁵

The treasurer may officially sign checks in advance of the date of said checks, provided that they are not distributed until the date appearing on them;¹⁴⁶ but, he may not pay any judgment rendered against the district without proper order from the board to do so, as determined in Smith v Hall.¹⁴⁷

In Smith the court held that a judgment against a school district by a court having proper jurisdiction, though unable to be legally paid by the board's treasurer without the specific order from the board to do so, may be forced by mandamus action. If forced by an action in mandamus to act and pay the judgment, the board must approve it for payment even if the payment would deplete the fund in question so that others could not be paid properly.¹⁴⁸

Depositories. Upon appointing a treasurer, it is necessary for the board to also select a depository (bank) or depositories for district funds. A member of the local board who has a pecuniary interest in a bank within the county shall not participate in the selection of such depository.¹⁴⁹

More than one depository may be selected, but a controlling depository must be utilized to receive all initial deposits. The use of additional depositories may be utilized by the transferring of funds from the controlling depository to any other banking institution which might be selected. The State Department of Education, in its Treasurers Handbook,¹⁵⁰ states that all selected demand depositories must be within the county and that the services offered by each one should be given considerable consideration when the selection is being made. They also suggest that the use of any one depository not be for less than one fiscal year in order to simplify accounting procedures.

A bank selected by the county board of education as a demand depository must provide bond to cover the maximum amount to be deposited at any one time. All selected demand depositories must provide written notice of bond to the treasurer before deposits are made and it is the responsibility of the treasurer to see that balances never exceed the bonded maximum.

Security, bond or guarantees for investments may be covered in a demand depository's bond, but must be specifically stated in the demand depository's written bond. A determination that an investment is properly and fully guaranteed or secured is required at the instance of the investment.¹⁵¹

The security, bond or guarantees are extremely important since it is the responsibility of the one who has custody of school funds to always be able to turn them over to a successor on demand, even if the successor is himself. It is a breach of his trust and obligation if he cannot do so, even though such failure is due to the insolvency or failure of the bank in which funds were properly deposited.¹⁵² However, when school funds are required to be deposited in a bank, an officer, making such deposits in good faith and with reasonable prudence in

selecting the bank, is not liable for a loss resulting from the failure or insolvency of the bank.¹⁵³

The treasurer of the board, according to the State Superintendent of Schools, has the authority to determine where to deposit board funds for the purpose of earning interest. In an interpretive statement, the state's chief school officer said that the selection of the banks for deposits ". . . would be up to the treasurer . . ."154

Authorized signatures. In the construction of the statutes, when the signature of any person is required by the word "shall" therein, it must be in his own handwriting, or "X".¹⁵⁵ For check signing purposes a board of education may use a mechanical or electrical device for the making of signatures required,¹⁵⁶ but the use of a rubber stamp is improper.¹⁵⁷

The authorized signatories for all board of education warrants (checks) are the president and secretary¹⁵⁸ and the sheriff as treasurer,¹⁵⁹ or the appointed treasurer if other than the sheriff.¹⁶⁰ If the county board elects to use a mechanical or electrical signing device, it is required that the facsimile signature plates shall be safely kept so that no one except the president, secretary, treasurer and their respective employees may be authorized to have access to them.¹⁶¹

Petty cash accounts. The use of petty cash accounts for small and/or emergency purchases is specifically approved for the individual schools only, and then only in the amount of fifty dollars.¹⁶²

Generally speaking, the use of petty cash accounts by county boards of education has been deemed improper because of restrictive interpretations which have been placed upon the code where it states, "The treasurer of the board of education shall pay money only upon the order of the board."¹⁶³ However, a local board of education, which may wish to consider use of a petty cash fund, should consult its attorney on the ramifications of the decision of the court in Wysong v Walden. Here it was held by the court that the board may approve after-the-fact, lawful payments for things that the board would have approved anyway and which were issued with the approval of the superintendent. In the instant case the court said:

Ordinarily, a county board of education may ratify such acts of a county superintendent as it could have authorized in advance.¹⁶⁴

BUDGETARY REQUIREMENTS, METHODS AND PROCEDURES

All budgetary actions and activities for each county board of education are to be centered around a fiscal year which is to run from the first day of July through the thirtieth day of June of the year following.¹⁶⁵ Almost the entire budget-building project of the local board is hampered by a lack of factual data. According to an opinion of the Attorney General on the subject:

The budget-making process for county school boards begins on March 7 of each year (Code 11-8-9). Local school boards, in building their respective budgets, are from the very inception greatly handicapped by a lack of definite information regarding existing balances and anticipated receipts. The most definite figure available to a local school board is the total property valuations furnished by February 1 by the county assessor to the Board of Equalization and Review--the county

court (Code 11-3-19). Board authorities must estimate sheriffs' balances of school funds. The State Board of School Finance, relying on legislative appropriations, supplies to each county board, during mid, or late March, a schedule of "Preliminary Computations of State Aid", as allocated to each local school board. . . . Not until the middle of July of each year is each county board of education furnished with a final computation of each county board of education's share of State Aid. Later, usually between August and September of each year, each county board of education is advised of adjustments in its budget, based upon reported final sheriffs' balances (Code 6-8-7). All of this built-in uncertainty indicates that much of the adopted budget of each county board of education, when on the third Tuesday of April (Code 11-8-12a) each school board formally adopts its fiscal budget and lays its annual levy to produce its share of ad valorem taxes, is based upon many assumptions and educated estimates.¹⁶⁶

The annual operating budget of each West Virginia governmental agency is required to be based upon reasonable, accurate information about revenues from all possible sources. This premise was set forth by the courts when it was held in Baldwin v Martinsburg:

. . . that there should not be expenditures in excess of revenues from whatever source derived. . . . So it is that for more than forty years, the Legislature of this State has required, in specific language, the filing of an estimate of receipts and expenditures, from all sources, . . . for each fiscal year . . .¹⁶⁷

All budgeting by each local board of education is to follow the uniform system of budgeting as prescribed by the State Board of Education.¹⁶⁸ The West Virginia Board of Education, given the powers and duties previously set out in the West Virginia Code for the Board of School Finance,¹⁶⁹ is given authority to direct and carry out all statutory requirements relating to local board of education budgets.

In planning the budget for a succeeding fiscal year, it is a requirement of the State Board of Education that the number of children in the county who reside more than two miles from a school or bus route, and who are not attending any school as allowed by the code,¹⁷⁰

be determined. When this number has been settled upon, the county board of education shall include sufficient funds in its budget to provide educational services and facilities to such children.¹⁷¹

The budget must encompass a term to at least equal the instructional term and is defined as ten months.¹⁷² Any budgeting for less than the employment term can be approved by the State Board of Education only if the local board can show in a petition that the best interests of the county schools can be served by such action.¹⁷³

A time table, or budget calendar, as prescribed by the State Board of Education shall be adhered to in the budget adoption process and the budget adopted under this calendar must be approved by the state board. Also, definite actions, as outlined earlier in the section entitled "Local Property Tax and Taxation," must be taken by the local board in receiving approval from the State Tax Commissioner as to the levy rates and tax estimates for each fiscal year.¹⁷⁴

Even though the State Board of Education does exercise limited powers over the financial affairs of a county board of education,¹⁷⁵ it may not inject or substitute its judgment and discretion in place of that of the local board as long as that board is operating in a lawful manner.¹⁷⁶ However, if the county board does not meet certain specific obligations (e.g., the standard school term, budget, and expenditure schedule), the state board may require legal action, as it deems best, to put the county financial affairs in a proper and lawful order.¹⁷⁷

The county boards of education shall authorize the expenditure of funds, and the incurring of obligations only in the manner set out

by the budget and the expenditure schedule.¹⁷⁸ Once a budget is made and approved, the board is bound by it; however, there may be supplemental appropriations made when it becomes evident that revenues are to be received in excess of those planned at the time the budget was adopted. Transfers between line items within the approved budget may also be made upon written approval from the State Board of Education.¹⁷⁹ Emergency appropriations can be provided by either a transfer of funds from one regular item, or by a supplemental appropriation from actually collected excess funds.¹⁸⁰ The board of education may be required to provide the funds necessary (by either transfer or supplemental appropriation) to meet obligations contracted for when there had been funds available at the time of inception of an obligation, but which were subsequently used for other purposes. In Doss v O'Tolle the court held that:

Where a board of education enters into a contract the obligation of which . . . is not in excess of funds available at the time . . . (and) . . . if such board subsequently use such . . . funds for other purpose, . . . such board may be required to provide other funds to meet the obligations . . .¹⁸¹

It has been imposed by the courts that if there be any excesses or balances (surpluses) remaining at the end of any fiscal year, they must be brought forward into the new year into the proper funds.¹⁸²

EXPENDITURES AND PAYMENT SCHEDULES (BUDGET IMPLEMENTATION)

It is a fundamental fact that a county board of education is a creature of the legislature charged with the duty to expend public funds, and can only disburse public monies where such an expenditure is

either expressly or impliedly authorized by the statutes.¹⁸³ Public funds which are raised by a local board of education can only be used for the support of the public schools of that county and for no other purpose.¹⁸⁴ In Power Company v County Court this premise was utilized by the court when it held that the Better Schools Amendment¹⁸⁵ did not extend to levies for purposes other than the support of public elementary and secondary schools.¹⁸⁶ In the instant case the court determined that the Better Schools Amendment was exactly as its name implied, and that the taxation authorities contained therein were open only to county boards of education. The court also held that the defendant county court (commissioners) could not sell bonds under this amendment for the purpose of airport improvements.

The West Virginia Code 1931, as amended, which provides that funds may be spent only for the purpose raised and in a lawful manner, are very far-reaching in their purpose.¹⁸⁷ The intent is to preserve local self-government and to protect the financial integrity of such local fiscal bodies by the requiring of sound financial management practices. In Davis v Board of Education the court said:

The plain and commendable purpose of the provision (now Code 11-8-26) is to make the available funds of each year pay the demands of that year, and to protect the taxpayers from the indebtedness beyond what each year's means will pay.¹⁸⁸

In Lawson the court stressed the two sections of the code¹⁸⁹ which say that funds are not to be used improperly,¹⁹⁰ and that future taxes cannot be pledged in advance. The board cannot make any contract or incur any obligation which would involve the expenditure of future tax levies.¹⁹¹ The courts have repeatedly upheld this premise. In

Davis the court determined a contract could not be allowed when it said:

. . . the contract (entered into by the board) created a debt reaching beyond the current year, and binding the district in the future . . .¹⁹²

Many other subsequent cases have arrived at the same conclusions,¹⁹³ and several opinions issued by the State Attorney General have also supported this concept.¹⁹⁴ In each of these cases there was an attempt by a local board of education to buy or build something and have at least a portion of the cost involved come due in a succeeding fiscal year from current expense fund revenues. To do deeds such as this is in direct violation of the statutes, though contracts for the construction of buildings or major renovations which are to be paid from construction monies covered by a voter-approved debt services tax levy, do not come under this prohibition. A debt tax rate is levied over a number of years to pay off bonds which have been sold to obtain the construction monies. In this way the construction itself, even though it may take several years to complete a project, is not in violation of statute.

The requirement in the code, that no obligations be entered into in one fiscal year which affect the money of a subsequent fiscal year, has been upheld by the court. In United States v Charleston the court said, "Neither necessity nor inconvenience will justify the bending or breaking of this statute."¹⁹⁵

The contracting of employees is an exception to the prohibition about incurring obligations prior to a new fiscal year.¹⁹⁶ It is mandatory that staff appointments for auxiliary and service personnel be made by the first day of April,¹⁹⁷ the superintendent is to be

elected to a contract by the board on or before the first day of May,¹⁹⁸ and "teachers and other employees" being considered by the board for a transfer of assignment are to be listed on or before the first Monday in May, or they are considered to be reassigned in their current position or job assignment.¹⁹⁹ In Campe v Board of Education the court held that the issuance of personnel contracts in advance of July 1 was a proper action by a board of education.²⁰⁰

In Post v Board of Education the court held that in a question as to what particular expenditures of school funds may be legally made depends largely upon the construction of statutes specifying the use of such funds.²⁰¹ The court also determined in Speeden v Board of Education that:

. . . so long as a public governing body acts within the limits of its legal powers and jurisdiction, the exercise of its judgment and discretion is not subject to review or control by the courts at the instance of citizens, tax-payers or other interested persons, in the absence of a statute authorizing it.²⁰²

Under terms of statute it is accepted that a county board of education cannot expend its funds, or incur obligations as follows:

1. in an unauthorized manner;
2. for an unauthorized purpose;
3. in excess of the amount allocated to the fund in the levy order;
4. in excess of the funds available for current expenses.²⁰³

The same statutory statement²⁰⁴ also allows for a "casual deficit" of not more than 3 percent of the approved levy estimate. In the event that such a deficit does occur, it is to be made up in the levy estimate of the next fiscal year.²⁰⁵ This was approved by the

court in Evans v Hutchinson when it was held that:

The computation of a casual deficit, . . . when considered in pari materia with Code 1931, 18-9B-2, as amended, and other pertinent sections of Chapters 11 and 18 of the Code, is calculated by computing the amount of the deficit incurred to the total budgeted school requirements expended by a board of education in a fiscal year.²⁰⁶

In this regard it is then proper to look closely at the authorities vested in a local county board of education by expressions of statute. It must be accepted that if the power to perform (or to do) a certain act is given, it then follows that the power to compensate for the act is implied by the statute.

It is unlawful to expend monies in a manner not expressly authorized by law. A taxpayer suit against individual board members may be entered into to recover any such money illegally spent. In the case of Luzzador v Brown, where board of education monies were spent for transportation of students, when in fact the students involved were not transported, the court ordered return of the illegally spent monies by the board members.²⁰⁷

Even the "threatened diversion of funds" on the part of a local board of education may prompt a taxpayer suit against the board.²⁰⁸ In the instant case the board of education entered an order into its minute record that it intended to shift monies, voted by the citizenry in two separate bonding elections for particular projects, to a different building and remodeling schedule from that listed in the successful elections. Two projects not on the original bonding lists were added, and two projects previously included were dropped. A suit was entered into against the board, and the court

held, "That action, if carried into effect, would constitute a diversion of the fund which the law forbids . . ."209

It was also construed as an illegal expenditure when payments are in willful disregard of that which is provided for by statute and will form the basis for the removal of board members from office.²¹⁰ However, as long as the total expenditures made from the current expense fund did not exceed the funds which were available for that fund for the particular year in question, any expenditure made for an authorized purpose is appropriate.²¹¹

An almost limitless number of individual situations and circumstances can come up, and many do, which require the good judgment and proper interpretation of the school board members and the staff. In attempting to determine the proper direction for school district actions it is necessary to be aware of the various allowances and limitations pertinent to the situation at hand. Specific references to such occurrences are presented here to provide information.

Educational Expenditures

A West Virginia county board of education is charged with the expenditure responsibility to spend for each child throughout the district an amount which would not exceed that child's proportion if all funds were distributed on a per capita basis.²¹² Also, in Brown v Board of Education the court said:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, it is a right which must be made available to all on equal terms.²¹³

In the absence of statute or any conflicting regulations of the State Board of Education, each county board of education is charged with the responsibility of providing for the teaching of such subjects as it deems best.²¹⁴ In so doing, local boards are required to establish schools, preschool through high school (including vocational schools),²¹⁵ which are to be open to all pupils residing within the school district whether or not it is the legal domicile of parents or guardian of such students.²¹⁶ In addition, boards have the authority to institute post high school instruction;²¹⁷ and, they are allowed to establish, operate and maintain vocational rehabilitation facilities for disabled person, in conjunction with other counties or municipalities.²¹⁸ However, they may not join together in the approval of levies to develop, maintain and operate such combined activities. Each must pay its own share. The county in which the joint facility is located will be the proprietor.²¹⁹ Boards of education also may operate canneries.²²⁰ They may establish and conduct a self-supporting dormitory for the accommodation of the pupils attending a high school, participating in a post high school program, and for persons employed to teach therein.²²¹ Each local county school board is also allowed to financially support night schools and school houses and their equipment.²²² Additionally, boards are allowed to: purchase athletic equipment;²²³ provide school libraries and books;²²⁴ and, to provide free textbooks to all students whose parents cannot otherwise afford them.²²⁵ In the case of Vandevander v Cassell the court had this to say about textbooks used in courses required for graduation:

It can readily be seen that under the constitution and laws of this state textbooks must be provided free where the parents are unable to provide them in order that all students in the public schools will have the textbooks that are required to be used . . .

.....

Textbooks, workbooks, and materials necessary for use in the required curriculum in the public schools of this state must be provided without charge for needy students in order that all students have the necessary . . . materials to successfully complete their public school education.²²⁶

Even more recently the courts have again upheld the premise of free textbooks and related materials for needy public school students when in In re Distribution of Educational Books and Materials²²⁷ the court held that the code requires ". . . distribution and care of free textbooks by the county boards of education . . ."²²⁸ and further provides in another passage of the code that school children whose parents cannot afford them shall be given free textbooks.²²⁹ In the instant case the court held:

Although education is not a fundamental right explicitly guaranteed by the United States Constitution, equal access to education is a right guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution where a state has created a right to a free education by its own Constitution and laws.

.....

In the case before us it is clear that to deprive poor children of access to education . . . defeats the equalizing principles which are the foundation of a public school system The failure of a child to obtain basic skills haunts him throughout life and hinders his ability to exercise the very rights of citizenship.²³⁰

The court then ordered that all named and unnamed needy pupils in the state be supplied fully free of charge with individual copies of all textbooks, workbooks and other related materials for any subject required for graduation credits.²³¹

In the area of special education, boards of education are to establish services for all exceptional children, ages five to twenty-three.²³² According to the State Superintendent, they can assign board-employed teachers of exceptional children to a public or private institutional work assignment²³³ in order to more effectively fulfill the mandate for such services to the exceptional child; however, the board cannot pay the tuition or support of a mentally retarded child in an institution outside the state.²³⁴

Other educational programs and procedures in which boards may opt to participate include: summer school;²³⁵ "community education" activities for both adult and school age citizens;²³⁶ and, facilities for medical and dental clinics and services.²³⁷ The board cannot, however, pay fees for a private physician's services to students,²³⁸ nor may it contribute to a scholarship fund for its high school graduates.²³⁹

Other educational services which the counties are responsible to provide include driver education in the high schools²⁴⁰ and instruction to school age youth confined in correctional institutions within the county.²⁴¹ They may also maintain a ". . . school or department of observation and practice and in theory, art of teaching . . ." as determined by the court in Speeden v Board of Education.²⁴²

Participatory Operations

Boards of education are allowed to contribute to the costs of a duly recognized community action program, either in financial or in-kind services;²⁴³ to contribute to the costs of a library commission;²⁴⁴

and, to contribute to the costs and support of the county extension services.²⁴⁵ They may also pay reasonable tuition fees for students transferred to another county by act of the board or by operation of law.²⁴⁶

However, in the important area of participating along with a private or parochial school in regard to tuition, textbooks and materials, county boards of education cannot contribute or provide funds to a parochial board of education. In an opinion issued by the State Attorney General, and based to a great degree on the court's decision in Appalachian Power Co. v County Court,²⁴⁷ he said:

It is obvious, therefore, that public funds raised by a county board of education can only be used for the support of the free public school system and for no other purpose. This, too, should stand as a bar to a county board of education granting direct financial aid to a nonpublic school. . . . These school systems serve a most worthy cause, and their contributions to the educational process in this State cannot be adequately measured. Perhaps constitutional amendments or favorable court decisions in the future may serve to alleviate this problem . . .²⁴⁸

Salaries and Salary Schedules

In the area of expenditures for salaries to both members and officers of the board itself, as well as the employees of the board, there have been enumerated various standards of which the board should be cognizant. For an in-depth discussion of the salaries paid to members of the board of education, see the section entitled "Board Member Compensation and Expenses" in this chapter.

The county superintendent of schools is a "public officer" in the same fashion as is the board member and not merely an "employee" of the board.²⁴⁹ He is, therefore, subject to the same constitutional

restrictions regarding salary increases during his term of office that affect board members.²⁵⁰ The superintendent is elected to the position by the members of the board of education for a period of from one to four years.²⁵¹ If the board wishes to increase the salary of a county superintendent of schools, it can only do so in the terms of a subsequent contract. Even though the superintendent of schools is a public officer and also an "officer of the county board of education (serving as its secretary),²⁵² he is not a "county officer."²⁵³

Assistant county superintendents are neither public officers nor board of education officers, and therefore are employees of the board. They and the board could renegotiate their contracts and enter into new contracts during the course of the fiscal year (upon the recommendation of the county superintendent) for additional duties in consideration for salary increases.²⁵⁴

Concerning salaries and salary schedules for other employees of the board of education, it is permissible to establish local salary schedules which are in excess of the minimum state mandated scales.²⁵⁵ Boards may also increase these duly adopted salary schedules,²⁵⁶ even during the contract term, if monies are available to do so,²⁵⁷ except for the superintendent and board members as stated above.

In setting salary schedules for the service and auxiliary jobs available within the operation of a school district, and covered by the statutory job descriptions,²⁵⁸ the board of education should pay particular attention to the requirements of a "normal working day" as referred to in the code (18A-4-8). Definite information relative to the

interpretation of the term has been given and should be closely adhered to.²⁵⁹ The Attorney General in 1974 said:

Code 18A-4-8, of necessity, requires each county board of education to review each position to be filled by auxiliary and service personnel and find for each such position the normal working day therefor; each school board, in finding the number of hours normally, usually and customarily required for the performance of duties in each position for auxiliary and service personnel, should be guided largely by the number of hours which have historically been required in past years to perform the duties required in each of such positions; no school board would be justified in adjusting downward the number of hours for each position in order to evade the monthly pay scale established by Code 18A-4-8 for auxiliary and service personnel in the school system; No county school board would be justified in arbitrarily establishing as a general rule a fixed eight hours as the normal working day for each and every specific job position to be filled by auxiliary and service personnel;²⁶⁰

The 1976 session of the West Virginia Legislature amended the code²⁶¹ to include the provision that boards of education are to be responsible for court costs and reasonable attorney fees of service and auxiliary employees who successfully challenge their individual placement on the salary and job classification scale required by the state for such employees. In such cases the employees would need to resort to mandamus action to force compliance by the board in meeting the intentions of the salary schedule included in the statute.²⁶²

All employees may be compensated during periods of: personal leave;²⁶³ extended time vacations;²⁶⁴ time served in training, or on active duty with the National Guard or other branches of the armed forces.²⁶⁵ An employee may be compensated by the board while serving on jury duty²⁶⁶ but not if participating in a trial as a witness, even though under a subpoena²⁶⁷ (unless the employee leaves work under the terms of "personal leave" as allowed for in the code).²⁶⁸ Also, the

board may pay the salary of a non-certified teacher for a period of up to three months if, upon his initial employment, it was sincerely anticipated that certification would be granted.²⁶⁹ The board, however, cannot pay the salary of a teacher who has not been appointed to his position in accordance with law.²⁷⁰ A county board cannot contract with an employee for a salary in excess of that authorized by legally adopted salary schedules. The court in Campe has held that the statutes do authorize ". . . suit by the board to recover back money paid by it on such (an) illegal contract."²⁷¹ Nor can a board compensate an employee who is unable to perform his duties,²⁷² except as allowed under the code where it states the terms under which boards of education may extend vacation and personal leave provisions.²⁷³

Authorized Personnel

The board of education shall employ a county superintendent;²⁷⁴ and upon recommendation of the county superintendent, a limited number of assistant superintendents,²⁷⁵ such general and special supervisors or directors as may be deemed necessary,²⁷⁶ teachers,²⁷⁷ substitute teachers,²⁷⁸ an attendance director and assistant directors,²⁷⁹ librarians,²⁸⁰ school nurses,²⁸¹ clerical assistants for the superintendent's office,²⁸² and other non-teaching personnel.²⁸³ Service and auxiliary personnel may be employed; however there are conflicting statutes setting forth the procedure for this action. In two passages of the code the recommendation of the county superintendent is required to properly employ service personnel,²⁸⁴ but the later enactments of the legislature specify that employment of auxiliary and service personnel may be by the board.²⁸⁵ The Attorney General has rendered an opinion that now

the board itself can, without the nomination or recommendation of the superintendent of schools, employ service and auxiliary personnel.²⁸⁶ This is inconsistent with the provision of the code that specifies that professional personnel hired by a board of education must be recommended by the county superintendent.²⁸⁷

The State Superintendent of Schools has determined that school systems cannot employ school crossing-guard police.²⁸⁸ Under terms of statute, an assignment of this type is the responsibility of the municipalities.²⁸⁹

Fringe Benefits

A local school board is limited in the fringe benefits that it can provide its employees. Board of education are required by statute to contribute to the state workmen's compensation fund²⁹⁰ since county boards of education have been determined by the courts as coming under the coverage.²⁹¹ They are also permitted to set up pension payments to retired teachers,²⁹² but not for non-teaching employees who retire.²⁹³

Provisions for personal leave, or as commonly referred to as "sick leave", are to be established for all employees,²⁹⁴ though local boards cannot pay any portion of any type of personal insurance program for the benefit of employees.²⁹⁵ The board can, however, bear the cost of any required medical examinations for employees, or those who become employees.²⁹⁶

Holiday pay for employees of boards of education is also set by statute. Any employee normally scheduled to work over a period of a specified holiday shall receive remuneration in the same manner as if

he had worked on that day. If, for whatever reason, an employee is required to work on a legal holiday or more than forty-two hours in a work week, he is to be compensated additionally for his efforts²⁹⁷ as required under the West Virginia Minimum Wage and Maximum Hours Standards.²⁹⁸

Taxes and Other Assessments
Against Boards of Education

The West Virginia code specifies that all properties of the public school which are used for school purposes shall be free of any lien for taxes or levies of any municipal, county or state nature.²⁹⁹ However, certain types of assessments made by municipalities against all properties affected may be paid by boards of education. One such assessment is that charged by a municipality to property owners as a fee for fire protection.³⁰⁰ The courts have determined that the board has a "strong moral obligation" to pay³⁰¹ such an assessment, which is a charge for service rendered and therefore not a tax.³⁰² In the case of Charleston v Board of Education the court said:

. . . if the fire service fee is not a tax the statute (code 8-13-13) would not have to specifically name the Board of Education in order for the City to charge a fire protection fee to the Board of Education.

However, the question of collection the fee for fire protection is another matter and it may be contended that there is no enforceable legal obligation to pay for such fire protection; in any event, there is a strong moral obligation to do so.

.....

It would appear from the authorities that the statute authorizing the City to charge the fee for fire protection to property owners who are the users of such service gives the City power and authority to make such charges against the Board of Education . . . because such fee is not a tax and whether or

not it is collectible from the Board of Education does not relieve the Board of a moral obligation to pay for such protection or service.³⁰³

In the absence of such an assessment the board may pay reasonable costs for actual fire services received.³⁰⁴ But, it may not contribute funds directly to any volunteer fire protection group.³⁰⁵

Other municipal charges which the board of education must pay are assessments made against all affected property owners for such things as paving of streets, installation of sewers or water lines, and the construction of sidewalks, curbing or gutters.³⁰⁶ However, the board cannot reimburse a municipality for expenses incurred by the city because of the failure of the board as a property owner to maintain a sidewalk along its property, as determined by the court. In Maxey v Bluefield it held that:

We find nothing in the statutes or (city) charter . . . which expressly, or by necessary implication, authorizes the City of Bluefield to require an abutting property owner to indemnify or reimburse the city for all "loss . . . damage, cost, or expenses that may be imposed upon it by reason of the failure of the property owner . . . "to keep the sidewalk adjacent to his property in good repair . . ."307

Even though the board-owned properties are not subject to taxes, there are several types of taxation that are specifically referred to in relation to boards of education. Boards are required to pay state gasoline taxes,³⁰⁸ and the Attorney General has rendered an opinion that boards must pay business and occupation (B & O) taxes³⁰⁹ levied against a public utility and which in turn increase its charges for services to the school district because of the tax.³¹⁰ In this regard, he said:

In summary, therefore, it is concluded that a public utility subject to a municipal business and occupation tax

furnishing services to a county unit located within the municipality may include in its billing for services rendered to county agencies the municipal business and occupation tax which is a legitimate expense of its rate structure.³¹¹

However, a board of education need not pay an excise tax on the transferring of real property when the other party is the United States government,³¹² nor the 3 percent state consumers sales tax.³¹³ The sale of textbooks used in all of the schools of the State are also specifically exempt from the sales tax.³¹⁴

There are other taxes imposed on the operations of a school district by those that do business with it. The examples listed here serve only to show that even public school districts, which are supported largely by taxation, cannot completely escape taxes and assessments themselves.

Insurance

Specific references to the various insurance coverages that a board of education may carry include: liability insurance against the negligence of bus operators,³¹⁵ public liability insurance generally covering the operations of the school district,³¹⁶ and automobile insurance for its driver education program in the secondary schools of the county.³¹⁷ The entire area of school board insurance and liability involving torts is covered in detail in Chapter 5.

The board is required to bond its officers and certain other employees³¹⁸ However, it may secure bond coverage on all employees if it so desires.³¹⁹

Miscellaneous

The purchase of lands for school sites has been upheld by the courts.³²⁰ The operation of athletic facilities is allowed by the statutes³²¹ and by an opinion of the State Attorney General,³²² including the authority to pay rental charges for the use of an athletic establishment³²³ or to operate recreational facilities jointly with one or more other governing bodies.³²⁴

There are additional statutory approvals for educational expenditures. These include authority to make necessary improvements to school lands,³²⁵ to transport students to and from school as well as to and from both curricular and extra-curricular activities,³²⁶ and to provide and maintain foot bridges where necessary for safe travel of students to schools or buses.³²⁷ Boards may offer rewards in regard to damage or destruction of school property,³²⁸ pay the costs for the required audit services from the office of the State Tax Commissioner when received,³²⁹ and bear the costs of auditing the accounts of the individual schools.³³⁰ They may purchase and display the flag of the United States,³³¹ employ legal counsel,³³² and reimburse board members and/or employees for all reasonable and necessary travel expenses.³³³ Boards may also pay annual membership dues to the West Virginia School Boards Association,³³⁴ the West Virginia Secondary Schools Activities Commission,³³⁵ and participate in the governance and activities of a Regional Education Service Agency (RESA).³³⁶

Boards of education cannot erect bus shelters to be financed by fees for advertising to be placed thereon,³³⁷ cannot use funds from any additional levies for projects other than originally specified,³³⁸ and

cannot pay expenses for a board of education election held at a primary election.³³⁹ A board of education also may not loan public funds to a non-profit corporation (e.g., school booster group, etc.) for use in purchasing items for the school.³⁴⁰

Payment Procedures

Monies in payment of lawful debts and obligations of a board of education shall be paid by the treasurer of said board only upon the order of the board.³⁴¹ Payments authorized by the county superintendent in advance of specific board action are allowable in that such action can be ratified after-the-fact by the board as an action that the board would have authorized in advance.³⁴²

In Wysong, the court determined that even though the county superintendent of schools had caused orders (checks) for payment of bills to be written and delivered prior to formal authorization by the board, this was not cause to unseat the board members as was sought in the suit. The court said:

. . . that (even though) respondents (had) permitted orders to be drawn, delivered and paid before there was any action of said board authorizing the drawing and payment thereof; and that after the same were drawn and paid, that the same were ratified by the respondents, constituting a majority of the board. A board of education of a school district may, like other public officers, ratify such acts by an agent or committee as it could have authorized in advance; and acts so ratify such acts by an agent or committee as it could have authorized in advance; and acts so ratified and adopted are binding upon the board.³⁴³

No payment for any claim against funds of the board of education (e.g., invoice for goods and/or services) is to be made unless it is itemized in detail as to nature of services and/or materials

furnished. The invoice must also be duly approved and signed by the president.³⁴⁴

The board must issue all payroll, service and/or material orders (checks) to those lawfully entitled.³⁴⁵ A board of education is not to pay to a company, or a third person, an amount obligated or owed by another (e.g., transportation costs for an employee paid directly to a travel agency).

When a contractor has completed work on a project authorized by the board, the board must withhold its final payment to the contractor until it received proof that all taxes levied against him have been paid. Such proof must come from the State Tax Commissioner and/or the appropriate official of any county or municipality due business and occupation taxes from the contractor.³⁴⁶

Cash payments of any sort, except as allowed for the individual schools of a district which operate with a petty cash account,³⁴⁷ are against the procedures outlined by the statutes³⁴⁸ as well as the premise of proper financial management for public fiscal agencies. As a matter of proper financial procedures, the prompt payment of invoices on which cash discounts accrue to the benefit of the district is an item that the auditors look for in the process of their examination of the books and records of a county board of education. Such payments would seem to be allowed under Wysong v Walden.³⁴⁹

Payday Schedules and Payroll Procedures

The number of paydays that local board of education employees enjoy is at the discretion of the local board and even through the

summer if they wish,³⁵⁰ but the legislature's intent is that everyone be paid at least monthly - a work month being no less than twenty days employment for ten-month personnel, and a calendar month for those employed on an annual contract.³⁵¹ However, in setting the payday schedules for its employees, the board should consider the statutory requirement that all persons, firms, or corporations doing business in West Virginia (except railroad companies) shall settle at least once in every two weeks with employees in lawful month of the United States.³⁵² The board may elect to pay employees for more than the normal employment term of 200 days, as long as salaries paid to affected employees shall be uniform in regard to experience, qualifications and duties.³⁵³

Teacher pay checks are negotiable instruments. The board's treasurer may sign these checks in advance of the check date only on the proviso that the checks are not distributed to employees until the actual date of the check.³⁵⁴ If distributed prior to the actual date, they could be passed through the bank and it would be possible that funds would not be available at that time, hence causing an overdraft. The check is to be made payable only to the person entitled, through his services to receive same, and be distributed only to him.³⁵⁵

Employees who earn special remuneration from funds collected at the individual schools (e.g., selling or taking tickets at school athletic contests, officiating at such events, etc.) shall be paid through the board's normal payroll procedure. The county may then require reimbursement from the school for the total of such payment plus appropriate employer's taxes.³⁵⁶

In the event that an employee draws payment for personal leave days to a number more than the total he has accumulated on a monthly basis, he shall be required to reimburse the board of education for any such overage if he should leave his employment before earning enough additional monthly accumulation to clear the record.³⁵⁷

Concerning the payment of remuneration for vacation,³⁵⁸ all such pay shall be paid to an employee in return for his utilization of the days allowed to him. He cannot be paid for any accumulation of such days, either upon his death (unless the local board's program is specifically designed to do so),³⁵⁹ or without actually having been away from his job, as such would constitute double pay and would be considered as a gift of public money not allowed by the West Virginia Constitution.³⁶⁰

The board may withhold the pay of any employee until he has met all requirements of the board or state superintendent for reports due from him.³⁶¹

Another situation that a board of education should consider in its payroll procedures is that of handling the worker who does one type of work for a period of time (e.g., either for a few hours each day or until a particular assignment runs out, such as a construction project) and then works on another type of assignment for a different rate of pay. Under West Virginia law there is allowance for a multi-class type of non-certified employee³⁶² and this permits a varied salary schedule.³⁶³ The West Virginia Minimum Wage and Maximum Hours law states that at least the minimum wage for forty-two hours in a week and one and one-half times that rate for hours above forty-two in a

single work week must be paid.³⁶⁴ In regard to summer, or off-season employment for service or auxiliary personnel, they may be employed for a short-term basis for a period of less than 200 days and paid in conjunction with the salary schedules in the code.³⁶⁵

Substitutes for absent certified employees³⁶⁶ shall be paid according to the approved salary schedule of the county for the job in question, except for the first five consecutive days or less in one teaching assignment. For these days they shall be paid the minimum salary in effect in the county by which employed.³⁶⁷

Legislative amendments in both 1975 and 1976 have added a new dimension to county board of education and their service and auxiliary non-certified employees. Such additions as half-day/whole day pay structures and legislated job classifications and descriptions,³⁶⁸ have tended to cause confusion among boards of education and administrators over what is the proper route to follow in this very important employee relations sector. Extreme care should be taken in any dealings falling under the jurisdiction of this section of the code.

Included in the code, as well as the job classifications and descriptions, is a monthly minimum salary schedule for the service and auxiliary jobs.³⁶⁹ This schedule calls for an employment term of ten twenty-day months; the beginning and ending of which shall not exceed forty-three weeks. In addition, no service or auxiliary personnel is to have his annual salary reduced as a result of the legislative enactment of the section in question, and no county school system can reduce the amount of local money allocated for service and auxiliary salaries from that so allocated from the inception of the code mandate (July 1, 1969).³⁷⁰

Several opinions on this subject have been rendered³⁷¹ and should be considered thoroughly before any policy action or procedure, affecting relationships with non-certified employees, is undertaken by a local board of education. The statute has presented many questions that remain unanswered legally at this time. Until further information about the status of this law is available, it must be recommended that a local board exercise its best judgment possible in any operations concerning the employment and job assignments of service and auxiliary personnel.

Payroll deductions. As in any organization which employs several persons there will be the necessity of payroll deductions. Such mandatory deductions as: the employees' contributions to social security up to the limits set forth by the Federal government; Federal and State income taxes;³⁷² and, contributions to the State Teachers Retirement System³⁷³ must be withheld from pay checks.

The area of voluntary deductions³⁷⁴ and those ordered by the courts (e.g., magistrate, small claims, etc.) or the United States Internal Revenue Code,³⁷⁵ can create problems for employers. Voluntary deductions for specific items, such as group health insurance, require that at least a majority of employees must authorize such deductions in order for it to be legally permissible for the board of education to make such deductions.³⁷⁶

Other voluntary deductions covered include: tax sheltered annuities;³⁷⁷ savings bonds;³⁷⁸ employees' credit union memberships;³⁷⁹ repayment of loans from the State Teachers Retirement Fund;³⁸⁰ fees for

any hospital or medical service corporation;³⁸¹ optional group life insurance from the West Virginia Employees Insurance Board;³⁸² and, the assignment of earnings³⁸³ (which cannot be for more than 25 percent of the monthly salary). These are limited to only one year's duration and the board is not required to accept them.³⁸⁴

A suggestee execution (garnishment) issued by a court, either a court of record or one not of record, shall be accepted by the board but such suggestee execution shall only apply to the salary and wages of an employee over twenty dollars per week.³⁸⁵ In the event such a suggestion on the wages of an employee does take place, the board has no authority to further penalize such employee by making a charge against him for the special handling and inconvenience caused by this action.³⁸⁶

The whole realm of payroll deductions in today's employment situation has changed considerably from that of many years ago. Previously, the court had taken a rather restricted view of such practices when it held that permitting public officers to assign wages was against public policy. In Stevenson v Kyle the court said:

Where would its complications end? If such an assignment is tolerated, we must tolerate it for fractions, and compel the county treasurer to pay part to one, parts to others. Of course, this would never do. Public policy and the orderly dispatch of public business would forbid this.³⁸⁷

To some degree, this point of view is still held in the statutes in the requirement that a majority of employees must sign up for a voluntary deduction in order for it to be acceptable.³⁸⁸ Other references are to the fact that administrative costs from the handling of such deductions shall not become a burden on the board³⁸⁹ and that the

board of education should give much consideration to the total demands of deductions, requested by employees, before it is determined whether the board may render such services.³⁹⁰

Board Member Compensation
and Expenses

The compensation of all members of county boards of education in the State of West Virginia is set at a rate which cannot exceed forty dollars per meeting attended. In addition, there is a maximum of thirty-six meetings per fiscal year that they may be paid for.³⁹¹

There is a West Virginia constitutional prohibition which provides in part: ". . . Nor shall the salary of any public officer be increased or diminished during his term of office . . ." ³⁹²

This applies to all members who began their term of office prior to the effective date of the change incorporated into code 18-5-4 which raised the rate of compensation from twenty-five dollars to the rate stated above.³⁹³ The raising of the salary of an elected official during his term of office would constitute a gift of public money and therefore prohibited.³⁹⁴ Therefore, at this time, there may be some board members who are still receiving the old rate of twenty-five dollars per meeting.

In a previous opinion issued by the Attorney General which concerned a change in the total amount of compensation a board member can receive, it was determined that raising the limit on the maximum number of meetings allowed per fiscal year did not violate the constitutional prohibition referred to above.³⁹⁵ In such an instance it was considered that the rate of pay remained constant (e.g., the number of

dollars per meeting), and that the variable number of meetings (e.g., from one to thirty-six) therefore rendered total compensation to be an uncertain and indefinite figure.

It was determined by the West Virginia Supreme Court of Appeals that a board of education cannot compensate members by employing them in some other capacity, such as a custodian or other position, for pay.³⁹⁶

The reimbursement of "all necessary traveling expenses" for board members is allowed under a passage of the statutes.³⁹⁷ Such traveling is determined to be inclusive of not only that involved on official business of the board, but also to and from all authorized meetings. In order to receive such reimbursement, it is necessary that the member shall submit an itemized, sworn statement of such costs incurred.

AUDITING AND REPORTING

Since each county board of education is a public agency supported by tax monies, the office of the State Tax Commissioner is charged with the responsibility to perform audits of their financial records and accounts.³⁹⁸ These audits become public records and are subject to inspection by the citizenry. This service should be performed "at least once each year, if practicable"³⁹⁹ and at a cost to be borne by the individual board of education for such "expense of the service performed, including transportation, hotel, meals, materials, per diem compensation of deputies, assistants, clerical help and other such costs as may be necessary."⁴⁰⁰

At the time of an audit the inspector should also verify the methods of accounting utilized, the accuracy of the accounts, and such other matters of audit and accounting as the chief inspector (the tax commissioner) may prescribe.⁴⁰¹ The State Board of Education may also make selective audits of any matter or practice subject to state board regulation and the county board shall comply with any recommendations.⁴⁰²

While the State Tax Commissioner is the chief inspector over the financial records of the county system as a whole, each board of education is, in effect, the "chief inspector" in relation to the books and records of each individual school unit within the county system. In this capacity it is the board's responsibility to audit such records,⁴⁰³ and it is the responsibility of the principal of a school to hold his records available for audit at all times.⁴⁰⁴ The State Attorney General has rendered an opinion that the local board has the authority to hire the services of auditors other than those from the tax commissioner's office for this service.⁴⁰⁵

Under the terms of statute⁴⁰⁶ each county board of education is to annually prepare a statement, in the form prescribed by the State Tax Commissioner and the State Superintendent of Schools, of its receipts and expenditures. Such statement, due to be prepared within four weeks after the close of each fiscal year, shall also include the names and amounts of money paid to each firm, corporation, or person (except instructional personnel) who received more than fifty dollars from the board of education during the fiscal year. This financial

statement shall also include all details as to the indebtedness and interest costs incurred for the district.⁴⁰⁷

The statement is to be published as a Class I-0 legal advertisement⁴⁰⁸ in newspapers covering the county. Copies of the published statement are to be filed with the State Tax Commissioner and the State Superintendent of Schools.⁴⁰⁹ The county board of education is also to make available to any county resident who requests one, a copy of the published statement, complete with the names of all instructional personnel and the salaries paid to them. In addition, the Attorney General has rendered an opinion that the names and salaries of all personnel employed by the board shall be included in the publication, unless clearly excluded by the law.⁴¹⁰

School audits are to be performed annually and do become public information; however, the board does not have an obligation to perform audit services at the insistence of a citizen or citizens' group⁴¹¹ unless it appears that there is some element of good to be attained by so doing. As pointed out above, the books and records of a school should always be held in readiness for an audit even though one would normally be performed on an annual basis.

In addition to the financial records of a school, the board has the authority to require that outside organizations, established for the benefit of the school system (e.g., P.T.A.'s, booster groups, etc.), keep their records in accordance with the uniform accounting system required of the county school district by 18-9B-9 of the Code. The board has the legal authority to require annual financial statements from such groups and to set organizational priorities for them.⁴¹²

The funds of these school-related organizations are called quasi-public funds⁴¹³ and are different from general school funds in that they remain in the control of the organization, subject to any control measures (including audit as referred to above) that the local board, may deem advisable to officially establish.⁴¹⁴ Since these groups operate in behalf of the schools, they are school interests and activities as defined in the school code.⁴¹⁵ Therefore, the board may monitor, audit, and control the flow and use of such funds, if it is inclined to do so.⁴¹⁶

The board should be mindful of the fact that the code makes it unlawful for any member of a county board of education, a county superintendent, any other school district officer, a principal, or a teacher to become pecuniarily interested, directly or indirectly, in any school business over which he has a voice, influence or control.⁴¹⁷ A violation of this statute could result in removal from office, termination of employment, fine, and/or imprisonment.⁴¹⁸ (For a more detailed discussion on the subject of pecuniary interest see the section "Purchasing procedures" in Chapter 5).

Additionally, the local board reports to the citizenry through the official minute record of the proceedings of all official meetings of the county board of education. These records must be open to public inspection.⁴¹⁹ In Pennsylvania Lightning Rod Co. v Board of Education the court had this to say about the minutes of the board:

. . . and record all their official proceedings in a book to be kept for that purpose, . . .; and the same shall at all reasonable times be open to the inspection of any person interested . . .⁴²⁰

Any person who is a citizen of the United States has the legal right to examine the official minute record⁴²¹ except where such information relates to a person's reputation or character. Generally speaking, the examination of any minute record on the part of the public should probably be delayed until they actually become official minutes (e.g., after approval by the board at a subsequent meeting and certified as so approved and signed by the board's president and secretary).⁴²² In this manner, the record then becomes "official" to anyone reading same; whereas it is conceivable that some stenographic error, which will be corrected when the minutes are presented for formal board approval, could give the reader some false impressions as to what actually transpired during the meeting in question.

In 1975 the legislature enacted a "sunshine law" which decreed "that all proceedings of public bodies be conducted in an open and public manner."⁴²³ In an effort to allow some privacy for matters of a delicate, or executive nature, the code allows for executive sessions for these types of deliberations on the part of boards of education:

1. matters of personnel;
2. discipline, suspension or expulsion of a student; and,
3. matters of land acquisition or sale.⁴²⁴

The 1977 session of the legislature enacted a totally new chapter to the code pertaining to public records and freedom of information for the citizens of the State. In this regard the code defines a county school district as a "public body".⁴²⁵ The public records of this governmental unit are to be open for the inspection and/or copying of any person.⁴²⁶ The code does exempt from open inspection

trade secrets, personal files (except from the person himself), test questions and scoring keys for examinations, law-enforcement agency records, items specifically exempted by statute, reports of financial institutions' regulatory agencies, and internal memoranda or letters.⁴²⁷ Any person deprived of the right to inspect or copy such public records may complain to the circuit court of the county where the public record is kept,⁴²⁸ and any custodian of public records who willfully violates the code will be guilty of a misdemeanor. Conviction on such a charge will carry punishment of a fine, imprisonment, or both.⁴²⁹

SUMMARY

The county school systems of West Virginia receive their operating funds from local, state, and federal sources. Currently, on the local level an average of approximately 70.5 percent of the tax monies collected in the county are for the educational system. The tax rates that may be levied locally are set by statute on each one hundred dollars of property valuation. The valuation of a piece of property at a given percent of the appraised value is set for all property by the county assessor, except that owned by public utilities. The State Tax Commissioner assesses the property owned by the utilities. An option for the laying of an additional (or excess, or special) levy is open to county taxpayers. In such a case, the local tax rates may be increased up to as much as 100 percent, but only upon the approval of at least 60 percent of the voters in a special election.

In the area of state financing for education in the counties, the legislature has enacted a formula for the distribution of the

majority of funds it contributes. This formula is based mainly on teacher units, with a local share calculation based on property valuation and regular tax levy rates, and has been acclaimed as one of the best formulas in the nation in regard to equalization of state support to education. In addition to the funds distributed through the formula, other state support for staff salaries, driver education, early childhood education, school building funds, special education and vocational education, etc., is also made available in various manners to the county boards of education.

Federal monies are available mainly in the areas of categorical programs, with a great amount of this support being dependent upon the status of economically deprived students within the county. Other federal monies come into the school systems for vocational and adult education, and lunch programs.

All monies handled by county school districts must be segregated as to the intent and usage for each dollar. Presently there are the following four types of school district funds: general current expense, permanent improvement, bond construction, and debt services. The monies for each of these funds are to be accounted for separately and are not commingled.

All monies received by the school districts are to be under the control and supervision of the treasurer of the board of education. Until recently the sheriff of each county, as county treasurer, served as the ex-officio treasurer of the board of education. Legislation changes allowed for the selection of an official treasurer for the 1974-75 fiscal year. The vast majority of the county systems opted

to retain the sheriff by appointing that county officer as their treasurer. Through June of 1977, nineteen school systems had appointed someone other than the sheriff as their treasurer. This move allows complete financial control within the board offices of its revenues and expenditures, and allows for timely investing of board funds to bring in additional revenues from earnings of interest.

In setting up a school district budget for its fiscal operations there are specific legislated procedures each board must follow. Unfortunately, much of the effort of budget-building (in order to meet the required legal time table) must be done without the advantage of definite financial data being available. Therefore, the board must formally adopt a budget, lay the necessary tax levies to fund such budget, and do so based on many assumptions and educated estimates. However, it is necessary that all revenues, from all possible sources, be properly considered in this process.

In expending budgeted funds a board of education is bound by the statutes. State laws do not allow the incurring of obligations during one fiscal year which are to be paid from funds of the next fiscal year. In addition, it is unlawful to expend more monies than are available during the fiscal year; although a tacit deficit of up to 3 percent of the budget is allowed. If a minor deficit does occur, it must be made up in the next year's budget. Expenditures of public school funds are to be made in accordance with what is specifically covered by statute, or by the necessary implication thereof. Unlawful use of board monies may become the basis for taxpayers suits against the board, and may cause the removal from office of members who willfully

disregard their responsibilities to operate the school district in a lawful manner.

Annually the books and records of each county board of education are to be audited for accuracy and adherence to legal requirements by the State Tax Commissioner's office. Copies of such audits are to be made available to the prosecuting attorney of the respective county, and are a matter of public record. Additionally, boards of education report to their publics through the minute record of their meetings. These records become public information and are open to inspection by any citizen.

FOOTNOTES--CHAPTER 3

¹Roe L. Johns, and Edgar L. Morphet, The Economics and Financing of Education (3rd Ed.), (Englewood Cliffs, New Jersey: Prentice-Hall Inc., 1975), p. 224.

²Trends in School Finance 1976, West Virginia Department of Education, Charleston, West Virginia: 1976, p. 4.

³Ibid, p. 5.

⁴Ibid, p. 4.

⁵Study of Property Valuations, State Tax Commissioner, 1975, p. vii.

⁶W Va Code Ann., sec. 11-8-9, 11-8-12, 11-8-12a, 11-8-13, 11-8-32.

⁷Ibid, 11-8-5.

⁸Ibid.

⁹Ibid, 11-5-3.

¹⁰Kuhn v Board of Education, 4 WV 499 (1871).

¹¹Op. Att'y. Gen., 12-22-69.

¹²W Va Constitution, article X, section 1.

¹³Ibid, article VI, section 53.

¹⁴Ibid, article X, section 1a.

¹⁵W Va Code Ann., sec. 7-12-10, 11-3-9, 15-6-18, 16-15-14, 16-18-15, 18-5-5, 33-24-4, 35-3-1.

¹⁶Ibid, 11-3-9.

¹⁷In re Assessment of Shares of Stock of Kanawha Valley Bank, 144 WV 234, 109 SE 2d 649 (1959).

¹⁸W Va Code Ann., sec. 11-8-9.

¹⁹Ibid, 11-8-12.

²⁰Ibid, 2-2-2.

²¹Ibid, 11-8-32.

²²Ibid, 59-3-2.

²³Ibid, 11-8-12a.

²⁴Ibid, 11-8-10a.

²⁵Ibid, 11-8-13.

²⁶Ibid.

²⁷Ibid, 11-8-11.

²⁸W Va Constitution, article X, section 1.

²⁹In re National Bank, 137 WV 673, 73 SE 2d 655 (1952).

³⁰In re Assessment of Shares of Stock of Kanawha Valley Bank,
supra (1959).

³¹Ibid, (1959).

³²W Va Code Ann., sec. 11-3-1.

³³Ibid, 11-3-1, 11-6-11.

³⁴Ibid, 11-3-1.

³⁵Ibid, 11-8-5.

³⁶Ibid, 19-9A-11.

³⁷Ibid.

³⁸Ibid.

³⁹Backus v Abbot, 136 WV 891, 69 SE 2d 48 (1952).

⁴⁰Study of Property Valuations, op. cit., p. 1.

⁴¹Winter v Brown, 143 WV 716, 103 SE 2d 892 (1958).

⁴²State Board of Education v Board of Education, 68 WV 40,
69 SE 378 (1910).

⁴³W Va Constitution, article X, section 7; W Va Code Ann., sec.
11-8-6c.

⁴⁴W Va Code Ann., sec. 11-8-6c.

⁴⁵Ibid.

⁴⁶Ibid, 11-8-20.

⁴⁷Ibid, 11-8-16, 18-5-15.

⁴⁸W Va Constitution, article X, sections 1, 7 and 8; W Va Code Ann., sec. 11-8-16, 13-1-4, 13-1-14, 18-5-15.

⁴⁹Sale v Board of Education, 119 WV 193, 192 SE 173 (1937).

⁵⁰Davis v Brown, 46 WV 716, 34 SE 839 (1899).

⁵¹Warden v County Court, 116 WV 695, 183 SE 39 (1935).

⁵²Lance v Board of Education, 153 WV 559, 170 SE 2d 783 (1971).

⁵³Gordon v Lance, 403 US 1, 91 S Ct 1889, 29 LE 2d 783 (1971).

⁵⁴47 Op. Att'y. Gen, 43, 1956.

⁵⁵W Va Code Ann., sec. 11-8-16.

⁵⁶Ibid, 11-8-25, 11-8-26.

⁵⁷Cook v Lawson, 110 WV 258, 157 SE 589 (1931).

⁵⁸W Va Code Ann., sec. 11-8-6b, 11-8-6c.

⁵⁹W Va Constitution, article X, section 8; W Va Code Ann., sec. 11-8-6c, 13-1-3.

⁶⁰County Court v Partlow, 130 WV 777, 45 SE 2d 506 (1947).

⁶¹W Va Code Ann., sec. 18-9-2d, 18-9-6, 18-9B-16.

⁶²West Virginia Association of School Business Officials, unpublished survey on investments, 1972.

⁶³Board of Education v Johnson, WV , 190 SE 2d 483 (1972).

⁶⁴SSI 7-26-72.

⁶⁵SBE 8352.

⁶⁶W Va Code Ann., sec. 18-9-6; SBE 1224.1.

⁶⁷W Va Code Ann., sec. 18-9-6.

⁶⁸Ibid.

⁶⁹Op. Att'y. Gen. 1-4-65, Op. Att'y. Gen. 12-22-69.

⁷⁰W Va Code Ann., sec. 18-5-16a, 18-20-2.

⁷¹Ibid, 18-5-19a.

⁷²Ibid, 18-5-19b.

⁷³Ibid, 18-5-39.

⁷⁴Op. Att'y. Gen. 437, 1953.

⁷⁵Madachy v Huntington Horse Show, 119 WV 54, 192 SE 128 (1937);
SSI 12-19-72, SSI 5-30-74.

⁷⁶W Va Code Ann., sec. 18-5-19.

⁷⁷Ibid, 38-5B-8; SSI 7-2-71.

⁷⁸W Va Code Ann., sec. 18-8-9.

⁷⁹Ibid, 18-5-5.

⁸⁰SSI 7-25-72.

⁸¹Vandevander v Cassell, WV , 208 SE 2d 436 (1974).

⁸²Ibid.

⁸³Ibid.

⁸⁴SBE 4321.1.

⁸⁵W Va Code Ann., sec. 18-9A-1.

⁸⁶Ibid, 18-9A-3.

⁸⁷Public School Finance Programs 1975-76, Compiled & Edited by
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⁸⁸W Va Code Ann., sec. 18-9A-4.

⁸⁹Ibid, 18-9A-5.

⁹⁰Ibid, 18-9A-6.

⁹¹Ibid, 18-9A-7.

⁹²Ibid, 18-9A-8.

⁹³Ibid, 18-9A-9.

- ⁹⁴Ibid, 18-9A-10.
- ⁹⁵Ibid, 18-9A-11.
- ⁹⁶Ibid, 18-9-5, 18-9A-16.
- ⁹⁷Ibid, 18-9A-11.
- ⁹⁸Ibid, 18-9A-2.
- ⁹⁹Ibid, 11-8-5.
- ¹⁰⁰Ibid, 18-9A-12.
- ¹⁰¹Ibid, 18-9A-14.
- ¹⁰²Ibid, 18-9A-15.
- ¹⁰³Ibid, 18-9A-16.
- ¹⁰⁴Ibid, 18-9A-19.
- ¹⁰⁵Ibid, 18-9B-19; 45 Op. Att'y. Gen. 603, 1954.
- ¹⁰⁶W Va Code Ann., sec. 6-9-8.
- ¹⁰⁷Ibid, 18-6-6.
- ¹⁰⁸Ibid, 18-5-18.
- ¹⁰⁹Ibid, 18-9C-4.
- ¹¹⁰Ibid, 18-10-5.
- ¹¹¹Ibid, 18-20-5.
- ¹¹²Ibid, 18A-4-2a.
- ¹¹³Ibid, 18-10-8.
- ¹¹⁴Ibid, 18-10-5.
- ¹¹⁵Ibid, 18-5-19a.
- ¹¹⁶Ibid, 18-5-19b.
- ¹¹⁷Ibid, 7-13-6, 7-13-6a.
- ¹¹⁸Ibid, 18-10-8.
- ¹¹⁹SBE 8352.

120 Ibid.

121 W Va Code Ann., sec., 18-9B-14, 18-9B-15.

122 Ibid, 18-9B-14a.

123 SBE 1224.1.

124 W Va Code Ann., sec. 7-5-1.

125 Ibid, 18-9-6.

126 Ibid.

127 Ibid.

128 Treasurers Handbook. West Virginia Board of Education:
Charleston, West Virginia, 1974.

129 Ibid.

130 W Va Code Ann., sec. 18-9-6.

131 Ibid.

132 Board of Education v Melton, Wv , 198 SE 2d 130 (1973).

133 W Va Constitution, article VI, section 30.

134 Board of Education v Johnson, supra (1972).

135 Op. Att'y. Gen. 5-21-75.

136 Ibid.

137 W Va Code Ann., sec. 7-5-1 and other statutes related to
duties of the county sheriff.

138 Op. Att'y. Gen. 11-7-74; SSI 7-26-72.

139 W Va Code Ann., sec. 6-8-10, 11A-1-15, 18-9-3, 18-9-6.

140 Ibid, 6-8-7, 6-8-10.

141 Ibid, 18-9-3.

142 Ibid, 18-9-4.

143 SBE 8352.

¹⁴⁴W Va Code Ann., sec. 18-9-2d, 18-9-6, 18-9B-16; Op. Att'y. Gen. 11-7-74; SSI 7-26-72; SBE 8352; Board of Education v Johnson, supra (1972).

¹⁴⁵W Va Code Ann., sec. 11A-1-13.

¹⁴⁶49 Op. Att'y. Gen. 100, 1961.

¹⁴⁷Smith v Hall, 94 WV 400, 119 SE 166 (1923).

¹⁴⁸Ibid, (1923).

¹⁴⁹W Va Code Ann., sec. 18-9-6; Op. Att'y. Gen. 11-7-74.

¹⁵⁰Treasurers Handbook, op. cit.

¹⁵¹Ibid.

¹⁵²78 C.J.S. 926.

¹⁵³Ibid,

¹⁵⁴SSI 7-26-72.

¹⁵⁵W Va Code Ann., sec. 2-2-10; State v Burnette, 118 WV 501, 190 SE 905 (1937); 50 Op. Att'y. Gen. 465, 1963.

¹⁵⁶W Va Code Ann., sec. 18-9-3,

¹⁵⁷50 Op. Att'y. Gen. 465, 1963.

¹⁵⁸W Va Code Ann., sec. 18-9-3, 18A-4-9.

¹⁵⁹Ibid, 7-6-4.

¹⁶⁰SBE 8352.

¹⁶¹W Va Code Ann., sec. 18-9-3.

¹⁶²SBE 1224.1.

¹⁶³W Va Code Ann., sec. 18-9-3.

¹⁶⁴Wysong v Walden, WV , 52 SE 2d 392 (1949).

¹⁶⁵W Va Code Ann., sec. 11-8-33, 18-1-2.

¹⁶⁶Op. Att'y. Gen. 2-24-71.

¹⁶⁷Baldwin v Martinsburg, 133 WV 513, 56 SE 2d 886 (1950).

- 168 W Va Code Ann., sec. 18-9B-5.
- 169 Ibid, 18-9A-17.
- 170 Ibid, 18-8-1.
- 171 SBE 4333.
- 172 W Va Code Ann., sec. 18-9A-2.
- 173 Ibid, 18-9B-7.
- 174 Ibid, 18-9B-6.
- 175 Ibid, 18-9A-17, 18-9B-17, 18-9B-20.
- 176 Ibid, 18-9B-4.
- 177 Ibid.
- 178 Ibid, 18-9B-10.
- 179 Ibid, 18-9B-10, 18-9B-11; Board of Education v Simms, 143 WV 269, 101 SE 2d 190 (1957); Op. Att'y. Gen. 2-24-71,
- 180 W Va Code Ann., sec. 18-9B-11.
- 181 Doss v O'Tolle, 80 WV 46, 92 SE 139 (1917).
- 182 Ireland v Board of Education, 115 WV 614, 177 SE 452 (1935).
- 183 Post v Board of Education, 71 WV 52, 76 SE 127 (1912); 51 Op. Att'y. Gen. 590, 1964.
- 184 W Va Code Ann., sec. 11-8-25; Op. Att'y. Gen. 12-5-69.
- 185 W Va Constitution, article X, section 10. This amendment, ratified on November 4, 1958, authorizes excess levies for school purposes of up to 100 percent and for not longer than a five-year period. It also provides that the entire allowable tax levy may be used for current expense purposes and that additional levies may be laid for bonded indebtedness up to a maximum of 5 percent of the value of taxable property in the county.
- 186 Appalachian Power Co. v County Court, 146 WV 118, 118 SE 2d 531 (1961).
- 187 W Va Code Ann., sec. 11-8-25, 11-8-26.
- 188 Davis v Brown, 38 WV 382, 18 SE 588 (1893).

189^{W Va Code Ann., sec. 11-8-25, 11-8-26.}

190^{Cook v Lawson, supra (1931).}

191^{W Va Code Ann., sec. 11-8-27.}

192^{Davis v Board of Education, supra (1893).}

193^{Honaker v Board of Education, 42 WV 170, 24 SE 544 (1896); Coberly v Gainer, 69 WV 699, 72 SE 790 (1911); Sprague v County Court, 93 WV 481, 117 SE 135 (1923); Shonk Land Co. v Joachim, 96 WV 703, 123 SE 444 (1924); Ireland v Board of Education, supra (1935); Sessler v Partlow, 126 WV 232, 27 SE 2d 829 (1943); Jarrell v Board of Education, 131 WV 702, 50 SE 2d 442 (1948); Wysong v Walden, supra (1949); United States v Charleston, 149 F. Supp. 866, S.D.W.Va (1957); Edwards v Hylbert, 146 WV 1, 118 SE 2d 347 (1960); West Virginia Board of Education v Miller, 153 WV 414, 168 SE 2d 820 (1969); Hedrick v County Court, 153 WV 660, 172 SE 2d 312 (1970).}

194^{47 Op. Att'y. Gen. 7, 1956; 47 Op. Att'y. Gen. 137, 1957; 50 Op. Att'y. Gen. 26, 1962; 50 Op. Att'y. Gen. 107, 1962; 50 Op. Att'y. Gen. 458, 1963; 50 Op. Att'y. Gen. 512, 1963; 51 Op. Att'y. Gen. 47, 1964; 51 Op. Att'y. Gen. 101, 1964; Op. Att'y. Gen. 8-27-64; Op. Att'y. Gen. 4-11-74.}

195^{United States v Charleston, supra (1957).}

196^{Op. Att'y. Gen. 2-24-71.}

197^{W Va Code Ann., sec. 18A-2-6.}

198^{Ibid, 18-41-1.}

199^{Ibid, 18-5-4, 18A-2-7.}

200^{Campe v Board of Education, 94 WV 408, 118 SE 877 (1923).}

201^{Post v Board of Education, supra (1912).}

202^{Speeden v Board of Education, 74 WV 181, 81 SE 724 (1914).}

203^{W Va Code Ann., sec. 11-8-26.}

204^{Ibid.}

205^{Ibid; Op. Att'y. Gen. 2-24-71.}

206^{Evans v Hutchinson, WV , 214 SE 2d 453 (1975).}

207^{Luzzador v Brown, 99 WV 332, 128 SE 654 (1925).}

- 208 Jarrell v Board of Education, supra (1948).
- 209 Ibid, (1948).
- 210 Hamrick v McCutcheon, 101 WV 485, 133 SE 127 (1926).
- 211 47 Op. Att'y. Gen. 7, 1956.
- 212 W Va Code Ann., sec. 18-5-13.
- 213 Brown v Board of Education, 347 US 483, 74 S Ct 687, 98 L Ed 873 (1954).
- 214 West Virginia Secondary Schools Activities Commission v Oakley, 152 WV 533, 164 SE 2d 775 (1968).
- 215 W Va Code Ann., sec. 18-5-13.
- 216 I. O. O. F. v Board of Education, 90 WV 8, 110 SE 440 (1922).
- 217 W Va Code Ann., sec. 18-5-19, 18-5-19a, 18-5-19b.
- 218 W Va Code Ann., sec. 18-5-11, 18-10B-3; 50 Op. Att'y. Gen. 166, 1963; SBE 3232.
- 219 50 Op. Att'y. Gen. 166, 1963.
- 220 45 Op. Att'y. Gen. 380, 1953.
- 221 W Va Code Ann., sec. 18-5-13.
- 222 Ibid, 18-5-19.
- 223 Wysong v Walden, supra (1949); SSI 12-6-74.
- 224 W Va Code Ann., sec. 18-5-20.
- 225 Ibid, 18-5-21, 18-5-21a, 18-5-21b, 18-5-21d; Vandevander v Cassell, supra (1974); SSI 5-2-74; 44 Op. Att'y. Gen. 283, 1951.
- 226 Vandevander v Cassell, supra (1974).
- 227 In re Distribution of Educational Books and Materials, F. Supp. , N.D.W.Va (1977).
- 228 W Va Code Ann., sec. 18-2-5.
- 229 Ibid, 18-5-21.
- 230 In re Distribution of Educational Books and Materials, supra (1977).

²³¹Ibid.

²³²W Va Code Ann., sec. 18-8-10, 18-20-1; SBE 2310; SSI 2-13-73;
Op. Att'y. Gen. 10-29-75.

²³³SSI 2-13-73.

²³⁴SSI 12-9-71.

²³⁵W Va Code Ann., sec. 18-5-39.

²³⁶Ibid, 18-5-19a, 18-2D-1; 50 Op. Att'y. Gen. 205, 1963;
SBE 2418.

²³⁷W Va Code Ann., sec. 18-5-19, 18-5-22, 18-5-23; Jarrett v
Goodall, 113 WV 478, 168 SE 763 (1933).

²³⁸Jarrett v Goodall, supra (1933).

²³⁹SSI 4-26-76.

²⁴⁰W Va Code Ann., sec. 18-6-6.

²⁴¹Op. Att'y. Gen. 1-7-76.

²⁴²Speeden v Board of Education, supra (1914).

²⁴³W Va Code Ann., sec. 7-13-6, 7-13-6a, 7-13-8, 7-13-9; SSI
9-4-74; 52 Op. Att'y. Gen. 529, 1967; Op. Att'y. Gen. 6-7-74.

²⁴⁴W Va Code Ann., sec. 10-1-1, 10-1-2, 10-1A-1, 10-1A-2;
Kanawha County Public Library v County Court, 143 WV 385, 102 SE 2d
712 (1958).

²⁴⁵W Va Code Ann., sec. 19-8-1; 49 Op. Att'y. Gen. 174, 1961.

²⁴⁶W Va Code Ann., sec. 18-5-16, 18-5-16a.

²⁴⁷Appalachian Power Co. v County Court, supra (1961).

²⁴⁸Op. Att'y. Gen. 12-5-69.

²⁴⁹Rogers v Board of Education, 125 WV 579, 25 SE 2d 537 (1943).

²⁵⁰W Va Constitution, article VI, section 38; Jackson v Board
of Education, 128 WV 154, 35 SE 2d 852 (1945); 50 Op. Att'y. Gen. 363,
1963; 51 Op. Att'y. Gen. 313, 1965; SSI 7-31-74.

²⁵¹W Va Code Ann., sec. 18-4-1.

²⁵²Ibid, 18-4-10.

- 253 County Court v Nicely, 121 WV 767, 6 SE 2d 485 (1939).
- 254 50 Op. Att'y. Gen. 363, 1963.
- 255 W Va Code Ann., sec. 18-5-33, 18A-4-2, 18A-4-3, 18A-4-5, 18A-4-8; SBE 5630.
- 256 47 Op. Att'y. Gen. 64, 1956.
- 257 41 Op. Att'y. Gen. 60, 1944; 51 Op. Att'y. Gen. 523, 1965; Op. Att'y. Gen. 2-12-76.
- 258 W Va Code Ann., sec. 18A-4-8.
- 259 52 Op. Att'y. Gen. 7, 1966; Op. Att'y. Gen. 1-7-74; Op. Att'y. Gen. 10-7-75; SSI 6-21-73; SBE 5610.
- 260 Op. Att'y. Gen. 1-17-74.
- 261 W Va Code Ann., sec. 18A-4-8.
- 262 Ibid.
- 263 W Va Code Ann., sec. 18-4-10, 18A-4-10; SSI 2-21-74; SSI 7-7-74.
- 264 W Va Code Ann., sec. 18A-5-2.
- 265 Ibid, 15-1F-1; SSI 3-20-72, SSI 10-8-74.
- 266 W Va Code Ann., sec. 18A-5-3.
- 267 Ealy v Ice Cream Co., 108 WV 184, 150 SE 539 (1929); 50 Op. Att'y. Gen. 590, 1964; SSI 1-20-72, SSI 4-18-72, SSI 4-23-74.
- 268 W Va Code Ann., sec. 18A-4-10; SSI 11-17-75.
- 269 W Va Code Ann., sec. 18A-3-1.
- 270 45 Op. Att'y. Gen. 656, 1954; 46 Op. Att'y. Gen. 75, 1954.
- 271 Campe v Board of Education, 95 WV 536, 121 SE 735 (1924); SSI 1-7-75.
- 272 45 Op. Att'y. Gen. 456, 1953.
- 273 W Va Code Ann., sec. 18A-4-10, 18A-5-2.
- 274 W Va Constitution, article XII, section 3; W Va Code Ann., sec. 18-4-1.

- 275 W Va Code Ann., sec. 18-5-32.
- 276 Ibid.
- 277 Ibid, 18-5-4, 18A-2-1.
- 278 Ibid, 18A-2-3, 18A-4-7.
- 279 Ibid, 18-8-3.
- 280 Ibid, 18-5-20.
- 281 Ibid, 18-5-22.
- 282 Ibid, 18-4-8.
- 283 SSI 11-21-75.
- 284 W Va Code Ann., sec. 18-4-10, 18-5-31.
- 285 Ibid, 18A-2-4, 18A-2-5.
- 286 Op. Att'y. Gen. 8-28-69.
- 287 W Va Code Ann., sec. 18A-2-1.
- 288 SSI 3-21-73.
- 289 W Va Code Ann., sec. 8-14-5.
- 290 Ibid, 23-2-1.
- 291 Webster v Board of Education, 116 WV 395, 180 SE 438 (1935).
- 292 W Va Code Ann., sec. 18-2-5; SBE 5630.
- 293 45 Op. Att'y. Gen. 490, 1953.
- 294 W Va Code Ann., sec. 18-4-10, 18A-4-10; SSI 2-21-74,
SSI 7-7-74.
- 295 SSI 4-17-74.
- 296 W Va Code Ann., sec. 18A-2-10; 45 Op. Att'y. Gen. 412, 1953;
SSI 5-9-75.
- 297 W Va Code Ann., sec, 18A-5-2; SSI 10-31-73.
- 298 W Va Code Ann., sec. 21-5C-2, 21-5C-3.
- 299 Ibid, 11-3-9, 18-5-5.

³⁰⁰Ibid, 8-13-13.

³⁰¹Charleston v Board of Education, WV , 209 SE 2d 55 (1974).

³⁰²Duling Bros. Co. v Huntington, 120 WV 85, 196 SE 552 (1938); Charleston v Board of Education, supra (1974); 52 Op. Att'y. Gen. 186, 1967.

³⁰³Charleston v Board of Education, supra (1974).

³⁰⁴W Va Code Ann., sec. 18-5-36.

³⁰⁵49 Op. Att'y. Gen. 154, 1961; Op. Att'y. Gen. 4-3-68.

³⁰⁶W Va Code Ann., sec. 8-18-1, 8-18-9, 11-8-8, 18-5-5; Beckley v Hatcher, 136 WV 169, 67 SE 2d 20 (1951); Sturn v St. Albans, 138 WV 911, 78 SE 2d 462 (1953); 40 Op. Att'y. Gen. 23, 1960; 51 Op. Att'y. Gen. 13, 1964; 51 Op. Att'y. Gen. 588, 1965; SSI 2-24-75.

³⁰⁷Maxey v Bluefield, 151 WV 302, 151 SE 2d 689 (1966).

³⁰⁸SSI 11-4-71.

³⁰⁹W Va Code Ann., sec. 11-13-1.

³¹⁰Op. Att'y. Gen. 9-10-71.

³¹¹Ibid.

³¹²W Va Code Ann., sec. 11-22-1; 49 Op. Att'y. Gen. 137, 1961.

³¹³W Va Code Ann., sec. 11-15-9.

³¹⁴Ibid.

³¹⁵Ibid, 18-5-13.

³¹⁶Ibid.

³¹⁷Ibid, 18-6-6.

³¹⁸Ibid, 6-2-10, 6-2-20, 11A-1-15, 18-9-6; SBE 8352.

³¹⁹W Va Code Ann., sec. 6-2-19; Daughety v Ellis, 142 WV 340, 97 SE 2d 33 (1956); 50 Op. Att'y. Gen. 110, 1962; SBE 1224.1.

³²⁰W Va Code Ann., sec. 1-5-3, 18-5-8, 18-5-9; Post v Board of Education, supra (1912).

321^W Va Code Ann., sec. 10-2A-1, 10-2A-2, 10-2A-2a, 10-2A-3, 10-2A-4, 10-2A-20.

322⁵⁰ Op. Att'y. Gen. 107, 1962.

323^W Va Code Ann., sec. 10-2A-19; 45 Op. Att'y. Gen. 645, 1954.

324^W Va Code Ann., sec. 10-2-3, 10-2-4.

325^{Ibid}, 18-5-8.

326^{Ibid}, 18-5-13, 18-5-16, 18-5-16a.

327^{Ibid}, 18-8-1.

328^{Ibid}, 18-5-36a.

329^{Ibid}, 6-9-8.

330^{SBE} 1224.1.

331^W Va Code Ann., sec. 18-5-24.

332^{Ibid}, 18-5-13; *Mollohan v Cavender*, 75 WV 36, 83 SE 78 (1914).

333^W Va Code Ann., sec. 18-4-9, 18-5-4, 18-8-3, 18A-5-4; SSI 6-13-72, SSI 1-15-74; 45 Op. Att'y. 103 1952; 45 Op. Att'y. Gen. 452, 1953; 51 Op. Att'y. Gen. 523, 1965; Op. Att'y Gen. 6-24-66; SSI 2-20-74.

334^W Va Code Ann., sec. 18-5-4.

335^{Ibid}, 18-2-25.

336^{SBE} 3233.

337⁴⁰ Op. Att'y. Gen. 229, 1961.

338^W Va Code Ann., sec. 11-8-12; *Jarrell v Board of Education*, *supra* (1948).

339⁴⁹ Op. Att'y. Gen. 351, 1962; 50 Op. Att'y. Gen. 738, 1964.

340⁵¹ Op. Att'y. Gen. 99, 1964.

341^W Va Code Ann., sec. 18-9-3.

342^{Ibid}, 6-6-1, *Wysong v Walden*, *supra* (1949).

343^{Wysong v Walden}, *supra* (1949).

344^W Va Code Ann., sec. 12-3-18.

- 345 Ibid, 12-3-19.
- 346 Ibid, 11-13-16.
- 347 SBE 1224.1.
- 348 W Va Code Ann., sec. 18-9-3.
- 349 Wysong v Walden, supra (1949).
- 350 W Va Code Ann., sec. 18A-4-9; SSI 9-15-69, SSI 12-8-71.
- 351 W Va Code Ann., sec. 18-5-15; SSI 10-5-73.
- 352 W Va Code Ann., sec. 21-5-3.
- 353 SSI 12-8-71.
- 354 49 Op. Att'y. Gen. 100, 1961.
- 355 W Va Code Ann., sec. 12-3-19.
- 356 SBE 1224.1.
- 357 W Va Code Ann., sec. 18A-4-10.
- 358 Ibid.
- 359 SSI 6-7-74.
- 360 Ibid, 7-10-74; W Va Constitution, article X, section 6.
- 361 W Va Code Ann., sec. 18A-4-9.
- 362 Ibid, 18A-4-8.
- 363 SSI 9-13-74.
- 364 W Va Code Ann., sec. 21-5C-3.
- 365 Ibid, 18A-4-8.
- 366 Ibid, 18A-2-3; SSI 11-21-75.
- 367 W Va Code Ann., sec. 18A-4-7.
- 368 Ibid, 18A-4-8.
- 369 Ibid.
- 370 Ibid.

³⁷¹Op. Att'y. Gen. 1-17-74, Op. Att'y. Gen. 10-7-75; SSI 11-17-75, SSI 5-20-76.

³⁷²W Va Code Ann., sec. 11-21-71.

³⁷³Ibid, 18A-7-1.

³⁷⁴Op. Att'y. Gen. 2-25-74.

³⁷⁵46 Op. Att'y. Gen. 164, 1955.

³⁷⁶W Va Code Ann., sec. 18-5-35, 18A-4-11; 45 Op. Att'y. Gen. 19, 1952; 51 Op. Att'y. Gen. 187, 1965; SSI 1-24-75, SSI 12-22-75.

³⁷⁷W Va Code Ann., sec. 18-25-1, 18A-4-12; 51 Op. Att'y. Gen. 174, 1965.

³⁷⁸SSI 7-31-72.

³⁷⁹Ibid, 9-13-71.

³⁸⁰W Va Code Ann., sec. 18A-7-34; 47 Op. Att'y. Gen. 286, 1957.

³⁸¹W Va Code Ann., sec. 33-24-9.

³⁸²Ibid, 5-16-7.

³⁸³Ibid, 21-5-3, 46A-2-116, 47-7A-17.

³⁸⁴48 Op. Att'y. Gen. 78, 1959.

³⁸⁵W Va Code Ann., sec. 18-5B-2, 38-5B-3.

³⁸⁶45 Op. Att'y. Gen. 632, 1954.

³⁸⁷Stevenson v Kyle, 42 WV 229, 24 SE 886 (1896).

³⁸⁸W Va Code Ann., sec. 18-5-35, 18A-4-11.

³⁸⁹SSI 9-13-71, SSI 7-31-72.

³⁹⁰51 Op. Att'y. Gen. 174, 1965.

³⁹¹W Va Code Ann., sec. 18-5-4.

³⁹²W Va Constitution, article VI, section 38.

³⁹³Op. Att'y. Gen. 1-29-73.

³⁹⁴W Va Constitution, article X, section 6; SSI 7-31-74.

395 Op. Att'y. Gen. 6-11-69.

396 DeBell v Goodall, 111 WV 589, 161 SE 612 (1931).

397 W Va Code Ann., sec. 18-5-4.

398 Ibid, sec. 6-9-7.

399 Ibid.

400 Ibid, 6-9-8.

401 Ibid, 6-9-7.

402 Ibid, 18-9B-13.

403 Ibid, 18-5-13.

404 SBE 1224.1.

405 44 Op. Att'y. Gen. 201, 1951.

406 W Va Code Ann., sec. 18-9-3a.

407 Ibid.

408 Code 59-3-2 lists this requirement for a Class I-0 advertisement: ". . . be published once in two qualified newspapers of opposite politics published in the publication area . . ."

409 W Va Code Ann., sec. 18-9-3a.

410 52 Op. Att'y. Gen. 473, 1967.

411 SSI 6-29-72, SSI 5-30-75.

412 SSI 6-29-72, SSI 3-6-73, SSI 12-7-71, SSI 11-14-75.

413 W Va Code Ann., sec. 18-5-13.

414 SSI 3-6-73.

415 W Va Code Ann., sec. 18-5-13.

416 Ibid.

417 Ibid, 61-10-15.

418 SSI 3-6-73.

419 49 Op. Att'y. Gen. 361, 1962.

⁴²⁰Pennsylvania Lightning Rod Co. v Board of Education, 20 WV
360 (1882).

⁴²¹W Va Code Ann., sec. 6-9A-5.

⁴²²SSI 5-13-74.

⁴²³W Va Code Ann., sec. 6-9A-1.

⁴²⁴Ibid, 6-9A-4.

⁴²⁵Ibid, 29B-1-2.

⁴²⁶Ibid, 29B-1-3.

⁴²⁷Ibid, 29B-1-4.

⁴²⁸Ibid, 29B-1-5.

⁴²⁹Ibid, 29B-1-6.

Chapter 4

BONDING, SITE ACQUISITION, CONSTRUCTION CONTRACTS, BUILDINGS AND GROUNDS MANAGEMENT, AND PROPERTY DISPOSAL PROCEDURES

BONDING

A great deal of capital is required to establish a facilities program for a modern school system. This capital can be raised by issuing bonds on the part of the county board of education.¹ If a board determines that it wishes to issue bonds for capital improvements, there are many legal requirements which must be taken into consideration. These legal requirements are addressed in this chapter.

Uses of Bond Proceeds

Of primary concern is the question as to the legal purposes for which bond funds can be used. The West Virginia code states that a board of education may incur a debt and issue bonds for:

. . . the purpose of acquiring, constructing and erecting, enlarging, extending, reconstructing or improving any building, work, utility or undertaking, or for furnishing, equipping and acquiring or procuring the necessary apparatus for any building, work, improvement or department, . . . or a building or structure for educational purposes . . .²

In Shinn v Board of Education the court held that funds of this type could be used:

. . . to provide schoolhouses and grounds, furniture, fixtures and appliances, and to keep the same in good order and repair . . .³

Bond proceeds may also be used for such expenditures as the

cost of issuing the bonds, engineering and inspection costs (even if by the engineering staff of the district), and the acquisition of the necessary lands, sites, rights-of-way for the projects and interest during the construction period,⁴ as well as to pay the costs incurred in the endorsement of the bonds by the attorney general.⁵

Conversely, there are specific prohibitions against using bond funds for ". . . the purpose of providing funds for . . . current expenses . . ."⁶ including the purchase of textbooks,⁷ the construction of a cannery (if such is to be used entirely by the public for that purpose),⁸ unless the cannery is to be used for any school purpose at all, and then the board may lawfully lease it out for community organization purposes.⁹

In the event that all funds collected for the retirement of debt and interest are not needed, the funds remaining can be used in the school current expense fund.¹⁰ However, before these funds may be used for current expenses, the State Sinking Fund Commission must certify that all obligations have been met.

Any funds generated from investments which may remain after all projects have been completed, and which have not been specifically allocated in the order for a bond election, may be used for "other purposes."¹¹ If the projects named in the order cannot be constructed, carried out, or completed, the funds either so allocated, or remaining unused after completion of any other project, may be directed, at the discretion of the board of education, to any other remaining project of the order, providing a provision for such action is included in the order itself.¹²

The acquisition of the land on which to build a schoolhouse has been interpreted by the courts to be allowed under statutes which authorize the erection of a "schoolhouse",¹³ even if such enabling legislation did not specifically mention site acquisition. If such were not the case, it would seriously hamper any facility construction plans since the board would have to depend upon gifts of land on which to build. As the court said in Post, "You cannot build a schoolhouse without land on which to build it."¹⁴

Length of Bond Issue and Installment Schedule

The maximum length of time which a board of education may legally propose for a bond issue to be repaid is thirty-four years;¹⁵ however, it may set the first installment to be due no later than two years after the date of issue.¹⁶ It is mandatory that each installment of principle and interest shall be as nearly equal as practicable; with an allowance of up to 3 percent of the total issue between the highest total payment and the lowest total payment.¹⁷ A board of education must give careful consideration to the establishment of its proposed repayment schedule because of the above restrictions.

Another legal requirement, of which the board should be cognizant, is that the interest rate may not exceed 8 percent per annum.¹⁸ Therefore, the board must be able to construct annual installments over a predetermined number of years so that the maximum annual interest rate will not make the annual payments (highest to lowest) vary by more than 3 percent. Rates of interest may vary throughout the life of an issue.¹⁹ They will not necessarily to a constant percent for each year.

Existing indebtedness payments should be considered in setting a repayment schedule. If an already approved debt issue is about to terminate, it is conceivable that by adjusting the proposed installment schedule to be within the framework of having greater principle payments coming due in the years after the current issue pays out, the board may take advantage of a lesser tax rate increase in the initial years. This structuring of total indebtedness, which is limited to not more than 5 percent of the assessed valuation of the district²⁰ allows for a more constant tax levy rate throughout the span of the total indebtedness of the district.

Special Election

The issuing of bonds cannot be undertaken by the board without first receiving the approval of a minimum of 60 percent of the voters in an election.²¹ As previously stated, this is the same requirement as for an excess operating tax levy to be approved. The court in Lawson v County Court has said that the creation of any indebtedness without first having submitted ". . . all questions connected with the same . . ." to a vote of the people for a three-fifths majority, is not valid.²²

An election may be called for as a specific action by the board, or citizens may force an election by filing petitions signed by a number of qualified voters equal to at least 20 percent of the total votes cast in the last election for school board members.²³ The special election may be held in conjunction with any primary or general election normally scheduled,²⁴ or it may be held at a time specially

designated by the board.²⁵ If the election comes about through petition to the board by an adequate number of qualified voters,²⁶ it must be held even if the board does not feel it wants an election. In Elliott v Adams the court held that a mandamus action would lie in order to force the city council of Wheeling to hold an election on a civic center question. The council had refused to honor the citizen expression for a special election.²⁷ In the event of an election forced by citizen petition, it must be held within sixty days from the date of filing such petition.²⁸ If the special election is held on a day that school would normally be in session, classes are to be dismissed as a holiday.²⁹

Since it is a special election, the board must appoint the election commissioners³⁰ and publish their names.³¹ The same precincts will be established at those designated for the election of board of education members.³² The conduct of such election shall be under the provisions of the general election laws of West Virginia,³³ except that the board itself may sit as a board of canvassers over the results thereof.³⁴

Teachers or other board employees may serve as election commissioners at such levy elections.³⁵ They are not prohibited from so doing by the statutes.³⁶ Such employees are citizens and are not required to work at their regular job for the school system since an election day is a holiday.³⁷

As in the case of a special levy election for operating expenses the notice of a pending bonding election must be published

within fourteen days of the election.³⁸ Such publication to be as a Class II-0³⁹ legal advertisement⁴⁰ subject to the same exceptions as the special operating levy advertisement.⁴¹

The form of the ballot is set forth by statute;⁴² in Sexton v Lee the court determined that as long as the ballot used clearly indicated the intention of the voter to express himself as to the proposition submitted, it need not be exactly as prescribed.⁴³ In the instant case the court said:

The validity of bond issues should be sustained if possible. Unless it is reasonably clear that the rights of the electorate have been prejudiced, the courts are not quick to declare such elections void. . . . Informalities which do not affect the result of a . . . bond election or its fairness, will not necessarily render the election invalid.⁴⁴

A recount of the ballots in any special school bond or excess levy election may be petitioned.⁴⁵ However, as in Baumgarner v County Court, the court has determined that the request for such a recount must be given before the result of the election in question is officially certified by the board of canvassers.⁴⁶

Limitations on Bonded Indebtedness

If a school district determines that it is in need of funds for capital expansion or improvements, it must do so within the limits of its bonding potential, or indebtedness potential, as set forth within the constitution⁴⁷ and the statutes.⁴⁸ The Constitution of the State of West Virginia has this to say about bonded indebtedness of school districts:

No . . . school district . . . shall hereafter be allowed to become indebted, in any manner, or for any purpose to an

amount . . . exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to incurring such indebtedness: . . .⁴⁹

The statutes, in two separate passages relating to the bonded indebtedness for county school boards, are as follows:

. . . a county board of education shall be required to levy outside the levy rates hereinabove provided sufficient to pay the principal and interest requirements on bonds now or hereafter issued by any school district not exceeding in the aggregate five per centum of the assessed value of all taxable property in the county school district, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness, . . .⁵⁰

and,

Provided, however, that no county board of education authorized by this article to issue bonds, shall, by any bond issue, become indebted, in any manner, or for any purpose, to an amount, including all other indebtedness, in the aggregate, exceeding five percent on the value of the taxable property therein, in the county school district to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness, . . .⁵¹

The court in Sanders v County Court determined that the indebtedness of school districts and municipal corporations are independent of any indebtedness of the county governmental unit. Their obligations are treated as distinct from those of the county, the court held.⁵²

Election Order

Such order shall state:

(a) The necessity for issuing the bonds, or, if a petition has been filed as provided herein, that such petition has been filed: . . .

(c) Purpose or purposes for which the proceeds of bonds are to be expended;

(d) Valuation of the taxable property as shown by the last assessment thereof for state and county purposes;

(e) Indebtedness, bonded or otherwise;

- (f) Amount of the proposed bond issue;
- (g) Maximum term of bond series;
- (h) Maximum rate of interest;
- (i) Date of election;
- (j) If a special election, names of commissioners for holding same;
- (k) If registration of voters is necessary, notice of the time, place and manner of making same;
- (l) That the levying body is authorized to lay a sufficient levy annually to provide funds for the payment of the interest upon the bonds and the principal at maturity, and the approximate rate of levy necessary for this purpose;
- (m) In the case of school bonds, that such bonds, together with all existing bonded indebtedness, will not exceed in the aggregate five percent of the value of the taxable property in such school district ascertained in accordance with section 8, article X of the Constitution; and that such bonds will be payable from a direct annual tax levied and collected in each year on all taxable property in such school district sufficient to pay the principal and the interest maturing on such bonds in such year, together with any deficiencies for prior years, within, and not exceeding thirty-four years, which tax levies will be laid separate and apart and in addition to the maximum rates provided for tax levies by school districts on the several classes of property in section 1, article X of the constitution, but in the same proportions as such maximum rates are levied on the several classes of property; and said tax may be levied outside the limits fixed by section 1, article X of the Constitution.⁵³

In addition to the above information, the order for an election may also include "Any other provision which does not violate any provision of law, or transgress any principle of public policy . . ."54

In satisfying the needs of the order calling for a bond election, it is mandatory that all information stated shall present a true and accurate picture of the conditions surrounding such issue. For example, an election order cannot state an amount of present indebtedness which is less than that actually incurred in order to show that the new debt would appear not to exceed the legal maximum.

In Sessler v Partlow the court held that:

Our laws have wisely limited the amount of a debt which even the voters themselves may create, and it has laid down certain rules which must be complied with to legally create such indebtedness. One of these requirements is that people shall be informed of the amount of any existing indebtedness, when they are asked to create an additional one. That is a most vital matter. We think sound public policy, aside from the imperative terms of the statute, requires that it be considered a mandatory requirement of the first order. We cannot bring ourselves to believe that where it is clear that such requirement has not been complied with, as in the present case, a bond issue, based upon such a violation of law, should be allowed to stand.⁵⁵

The estimated rate of levy necessary to cover the principle and interest thereon shall be substantially complied with. Whereas in actual practice there are factors which do have an effect on the required levy (e.g., the final valuation figures of each year at a time, and the rate of interest for each year), it is necessary to state a reasonable, approximate rate of levy in the order. In Baxa v Partlow it was determined by the court that:

Code, 13-1-4 requires that an order submitting the approval or disapproval of a bond issue to a vote of the people state the approximate rate of levy necessary to meet the sinking fund requirements. That rate of levy must be substantially complied with.⁵⁶

In satisfying the requirement of listing the purpose for which bonds are to be issued, it is not necessary to specify the exact amount of the proceeds which is to be used for each individual site, building, improvement, etc.⁵⁷ An election order may be made for more than one purpose, and groupings of like construction, improvement, or equipping can be considered as one purpose.⁵⁸ However, it is not allowed for the board to direct that such proceeds be used in a substantially different

manner than was approved by the voters.⁵⁹ In Davenport v Meadows, where court held that the intended useage of the bond issue proceeds was not in agreement with the amounts specified for each of the three city improvement projects on the ballot, the court said:

This substantial variance between the ordinance (order) and the ballot affects not only these two items to the extent indicated but so complicates the situation as to render the whole matter enmeshed in complexity of calculation and uncertain of delimitation. A condition results which is far different from that required by the statutes respecting plurality of subjects embraced in one bond issue, namely, that the ordinance proposing the issue shall make plain the amount of bond money to be expended for each separate project.⁶⁰

After the Election--If successful

In the event that the voters approve the proposed bond issue, the board is faced with many logistical tasks.⁶¹ These include official board action to:

1. authorize the issuance of such bonds;
2. set denominations thereof in multiples of one hundred dollars;
3. set the date of the bonds and the interest rate applicable, which in no case shall be more than that included in the election order, nor more than the state maximum of 8 percent; prescribe the medium with which payable;
4. specify the office of the state treasurer and such other places as the board may designate as where such bonds shall be payable;
5. provide for a tax levy sufficiently within that estimate voted upon to cover principle and interest thereon;
6. officially set the term, or length of the bond issue; and,
7. prescribe a form for executing the bonds so authorized.

Upon approval of the voters, the board shall secure the endorsement of the State Attorney General as to the validity of the

bond issue.⁶² In this regard, it is the duty of the Attorney General to verify that the bond issue is valid and that the proceedings which have taken place in furtherance of the issue are in substantial compliance with all the statutes.⁶³

Once the endorsement of the Attorney General has been received⁶⁴ and advertised as required by statute,⁶⁵ there is a ten-day period during which a citizen or taxpayer may file a petition against the approval or disapproval of the Attorney General.⁶⁶ If no petition is filed with the West Virginia Supreme Court of Appeals within the time limit set forth, no contest of the issue may subsequently be made in any court or in any action or proceeding as to the validity or regularity of the obligation;⁶⁷ subject only to reversal by the Supreme Court of Appeals in reviewing the actions of the Attorney General in either approving or disapproving the proposed issue.⁶⁸ In Allen v England the court held that the opinion of the Attorney General becomes final and not subject to further question after the ten day limit for filing a protest action.⁶⁹ It should be noted here that it is entirely possible that the school board itself might wish to file a petition against the actions of the Attorney General, if he had disapproved of their proposed issue.⁷⁰

Revenue bonds are not utilized for school building purposes. All bonds sold by school districts are general obligation bonds of the school district to be paid off in the manner specified from the levy of taxes for that purpose.⁷¹ Only the legislature and not a vote of the people, can approve the issuance of revenue bonds wherein indebtedness would be relieved by proceeds of "revenue" taken in by the use

of the improvement or facility gained from the sale of such bonds.⁷²

The bonds themselves shall be signed by both the president and secretary of the board of education,⁷³ and they shall be offered for sale, in writing, at par value, to any governmental agencies of the state authorized to purchase such bonds.⁷⁴ If no state agency purchases the bonds within ten days the board may offer the bonds for sale to the public through advertisements⁷⁵ in newspapers of either Chicago or New York City, and in a West Virginia city with a population of at least twenty thousand persons.⁷⁶

COMPLETING THE MANDATE OF THE BONDING

In its endeavors to fulfil the purposes for which the board of education placed a bonding proposal before the public, the board is bound by the mandates contained therein. In other words, the funds derived from the sale of such bonds must be utilized in the manner and for the projects set forth in the order for the election. The court said in Lawson v County Court:

Such debts are grants of money for public purposes, voluntarily made by the people themselves, and not funds raised either by local taxing authorities or the legislature. Mark the vast difference between the character of funds of this class and that of others. For current expenses of the state, counties, districts and municipal corporations, the legislature and local police and fiscal authorities may raise funds by taxation, without the assent of the people. The power is absolute and unconditional. Correlatively, the authority and dominion over the fund are absolute within the limitations prescribed by law, and the duty and responsibility of the taxing authorities are co-extensive with their dominion and power. The proceeds of a bond issue do not come in that way. Authority to raise such a fund is in the people only. They may grant it or not, as they please, and may give it for one purpose and refuse it for another. The taxing power can never

raise it without their consent expressed in a certain, definite and orderly way. Recognizing the immense difference between public expenses and public debts, the framers of the constitution committed to the legislature and its subordinate agencies and instrumentalities, the controlling power and authority as to the former, and to the people of the counties, districts and municipal corporations, as to the latter.⁷⁷

The intent of the board of education in one instance was to abandon two of the original projects, shift varying amounts of monies between the remaining projects and add two projects not on the original ballot. The decision of the court in the instant case was that the allocation of funds derived from special levies for only some of the projects specified in the orders of the special election and for new projects not mentioned, to the exclusion of other projects, would constitute an unlawful diversion of funds.⁷⁸

The board of education has the prerogative of determining the priority of need as to which projects should be first commenced and first completed, within the amounts set forth for them. However, if there was a priority of projects so specified in the election order, the board is bound by the order.⁷⁹

At times there may be unforeseen circumstances which arise and which serve to make certain specifics about a project impossible to complete. For example, the subsequent routing of a highway or other public improvement may render the site previously selected for a school building unusable. In such and similar cases, the board would have the leeway to select a second appropriate site and not be chargeable with not fulfilling the levy order.⁸⁰ On this subject, the attorney general has rendered this opinion:

Where it has become impossible to construct a school building

on the site set forth in the bond issue, a new site that will serve the same purpose may be selected by the board of education.⁸¹

Whenever the board determines that certain projects are to be undertaken, and in what manner, it must be mindful that contracts for school buildings and repairs are not to exceed the funds available.

In Swiger v Board of Education the court held that a board of education could not contract for a foundation, roof and walls, thereby exhausting the availability of funds from one year and necessarily implicating levies of a succeeding year to complete the project;⁸² a contract thus incurring a debt to be paid from school money of subsequent years is null and void.⁸³ In Shonk Land Co. v Joachim the court held that construction contracts can be entered into only so far as funds have been appropriated and provided for in the current year;⁸⁴ and,

The statute would be entirely emasculated if the board could, by putting off the time of payment under an illegal contract made void and prohibited as a misdemeanor by law, vivify the contract by the issuance of an order in the next year, or then providing for its payment.⁸⁵

In addition, along that line of reasoning, the court in Davis v County Court had previously stated:

A transaction entered into with the fatal infirmity of being in violation of law cannot be purged of its infirmity by means of an estoppel; and no ratification can make good the act of a corporation or of an individual which is prohibited by law; for the act being void in its inception is incapable of ratification.⁸⁶

However, in Hamrick v McCutcheon the court determined that the overspending of building funds was not cause for removal from office of board members, if such event was not willful or negligent on their part.⁸⁷

INVOLVEMENT OF STATE BOARD OF EDUCATION

By statute the State Board of Education may require that all county boards of education submit new construction plans for its approval in meeting all requirements of law.⁸⁸ In order for any county school district to qualify to receive its just share of state monies available under the "Better School Buildings Amendment" of 1972,⁸⁹ the board shall submit a comprehensive school facilities plan for State Board approval.⁹⁰

The state board may make whatever rules and regulations it deems necessary to insure implementation of its powers and duties.⁹¹ One such regulation covers the comprehensive building plan which shall encompass these priorities as set forth by state board regulation:

1. safe and healthful housing of all students
2. provide for all mandated educational programs
3. elimination of inadequate facilities
4. provide for all essential specialized facilities
5. consider future enrollments
6. needed renovations and remodeling
7. reduction in maintenance costs⁹²

The plan also is required to include in its planning stages these minimum criteria:

1. community analysis
2. population and enrollment study
3. educational plan
4. evaluation of existing facilities

5. translate projections and educational plan into facility needs

6. financing plan

Other regulations of the State Board of Education require that it may set minimum standards for schoolhouse construction,⁹³ and that each county board must submit any plans and specifications to the State Board for approval on any building projects in excess of five hundred dollars.⁹⁴ These plans and specifications then are subject to the State Board's procedure which call for "program approval," "preliminary approval" and "final approval."⁹⁵

In addition the State Board also has other regulations such as the use of athletic facilities by boys and girls;⁹⁶ facility and space requirements for early childhood education;⁹⁷ and, measures to conserve energy.⁹⁸

The local board of education, as determined by the courts in the Oakley case, has the authority ". . . to provide for the teaching of such branches as they deem best . . .," subject to any higher authority and statute.⁹⁹ Therefore, the county board must take the necessary steps to provide adequate and safe school buildings for such purposes.¹⁰⁰

CONSTRUCTION CONTRACTS

Under terms of statute a county board of education, as a political subdivision of the state, is a "public authority"¹⁰¹ and as such its expenditures for construction of a public improvement shall be governed by passages of the West Virginia Code.¹⁰² However,

work "not let to contract," as well as "temporary or emergency repairs," are excluded from coverage under the code.¹⁰³ Also excluded are "regular or temporary" employees of a public authority who are engaged in construction work.¹⁰⁴

Competitive Bidding

In relation to the letting of a construction contract for school building purposes, the statutes specify that county boards of education must base on competitive bids the awarding of any contract of over five thousand dollars.¹⁰⁵ Under this figure, the board may enter into such contracts on the open market. In the event that an emergency situation arises, or that only one bid, or no bid, is received the board is not bound by the statute. The board need not put out to bids work to be done by its own employees.¹⁰⁶

Wage Provisions of Construction Contracts

Before advertising for bids on any project, the board should ascertain the fair minimum rate of wages being paid in the locality of the state, and such wage schedule shall be attached to and made a part of the specifications for construction.¹⁰⁷ In all such cases, the resulting contract between the board and the successful bidder shall require said bidder and his subcontractors to pay not less than this wage schedule.¹⁰⁸

Liquidated Damages Provisions In Construction Contracts

Contracts for construction can include an amount of "liquidated

damages" for failure to complete performance within a specified time, as in Charleston Lumber Co. v Friedman.¹⁰⁹ In the instant case the court differentiated between "liquidated damages" from that of a "penalty," by saying:

A contract for a penalty is an agreement to pay a stipulated sum in case of default, intended to coerce performance, to punish default, or to secure payment of the actual damages. A contract for liquidated damages is a contract by which the parties in advance of breach fix the amount of damages which will result therefrom, and agree upon its payment.

.....

There are two excellent rules given for inferring that the parties intended the sum as liquidated damages: (1) Where the damages are uncertain and not capable of being ascertained by any satisfactory or known rule, whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case; or (2) where from the nature of the case and the tenor of the agreement, it is apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties.

.....

If a penalty, equity will not enforce it; if damages liquidated by the contract, equity will enforce it.¹¹⁰

Such liquidated damages, however, shall be of an amount so as not to be construed as penalties; but it may not include a bonus for early completion of the project.¹¹¹ This would raise the final cost of the project and could make the completed price go beyond that of the next lowest bidder, if put out for bid, so that no longer would the successful bidder necessarily be the lowest.¹¹²

Municipal Building Permits

In beginning the construction work, it is not necessary that a board of education obtain a municipal building (or use) permit.¹¹³ The board is also a governmental agency and is subject to the legis-

lature as well as the State Board of Education's regulations and rules. Thus, it should not also be subject to local municipal standards.¹¹⁴

Contractor's Bond

Each contract entered into with a responsible contractor, where the contract exceeds the sum of one hundred dollars, shall require a bond in the amount of the contract price.¹¹⁵ No provision shall be included in the contractor's bond which would limit a right-of-action to only the obligee. In Tug River Lumber Co. v Smithey, where there was dispute over what specific elements were covered by the contractor's bond, the court determined that the bond was given, as required by statute, to specifically ". . . protect those furnishing labor and material in all buildings of a public nature." Since ". . . there is no right of lien (mechanics' lien) against the school building, this bond if only for the protection of the board, and not for the protection of laborers and materialmen, would be meaningless." The court held that if any clause similar in nature to this were to be included in a bond, it would be null and void.¹¹⁶

SITE ACQUISITION PROCEDURES

By terms of statute, a county board of education has the authority to acquire land necessary for its needs. The code provides in pertinent part:

The board shall purchase by condemnation or otherwise, the land necessary for school buildings, playgrounds, athletic

fields, experiments in agriculture, warehouses, bus garages, and other educational purposes, and may make necessary expenditures for the improvement of the land.¹¹⁷

In another passage of the code, the legislature has provided:

Any public body is hereby authorized and empowered to acquire by purchase, transfer or exchange any real property owned by any other public body, and any public body is hereby authorized and empowered to dispose of by sale, transfer or exchange to or with any other public body any real property owned by it, any such acquisition or disposition to be upon such terms and conditions as may be agreed upon by and between the public bodies, taking into consideration (1) the lack of need for such property by the public body holding title thereto; (2) the need for such property by the public body desiring to acquire title thereto; and (3) the benefits to be derived by the public as a result of such acquisition or disposition: Provided, that any acquisition or disposition by the State, or any agency, department, board of commission thereof, must first be approved in writing by the board of public works. All conveyances of any such real property shall be by deed or deeds, as the case may be, in the manner provided by law for the conveyance of real property.¹¹⁸

The Attorney General has indicated in an opinion that since the school board is empowered by statute to purchase land for educational purposes, that there arises by necessary implication a right to contract for, or enter into an option for the purchase of land.¹¹⁹ Also, the state superintendent has interpreted that the board may purchase land on which to construct a home built by a building trades class as an instructional project.¹²⁰

The Attorney General has rendered an opinion specifying ways that a board may acquire property by condemnation for the purpose of athletic or playground purposes, as well as for the servicing and parking of school buses.¹²¹ However, it cannot purchase land from one of its members, even though brought about by condemnation proceedings.¹²²

According to the State Superintendent of Schools, and the

statutes, the board may even condemn the property of any other public agency since the board has the same condemnation authority as the state.¹²³ The state's authority to do so was confirmed in State Road Commission v Board of Park Commissioners where the court held that the state could claim by eminent domain the land of the Board of Park Commissioners of the City of Huntington. In its syllabus, the court determined the question of just compensation for land acquired by condemnation from one public agency by another in this manner:

Ordinarily, fair market value of the land taken in an eminent domain proceeding is the basis for the ascertainment of just compensation to its owner; but when the land of a governmental agency already devoted to public use by such agency is taken by another governmental agency for public use unrelated to its former use and the land so taken as previously used, has no market value, the cost of providing an equivalent substitute or necessary replacement which will place the landowner in the same position he would have been in if his land had not been taken becomes the basis for the ascertainment of just compensation to which such landowner is entitled.¹²⁴

In another passage of statute referring to the ownership of property, the board is entitled to receive title, to hold, and to dispose of, any gift, grant or bequest.¹²⁵ Such gifts, grants or bequests could be in the form of property suitable for school or playground sites. Even a member of the board may present land or other property to the board as a gift.¹²⁶

The West Virginia Supreme Court of Appeals, in Dooley v Board of Education, held:

. . . The board of education of a school district is a corporation created by statute with functions of a public nature expressly given and no other. It can exercise no power not expressly conferred or fairly arising by necessary implication and in no other mode than that prescribed or authorized by the statute.¹²⁷

A board of education can only acquire property in the various manners (e.g., purchase, transfer, exchange, gift, grant or bequest) as set forth in the statutes and enumerated above. The Attorney General, however, has rendered an opinion that local boards of education have the authority to obtain, by lease, property for use as an athletic field.¹²⁸

BUILDINGS AND GROUNDS MANAGEMENT

School grounds include the land on which a school is built, together with such other land used by students for play, recreation or athletic events while attending school.¹²⁹

Inspections

Under terms of statute, the local county board of education is charged with the supervision and control of the school district,¹³⁰ including even private or parochial schools within the district. An interpretation issued by the State Superintendent stated:

A county board of education does appear to have the authority to withdraw its approval of a non-public school because it is charged under School Law, 18-5-1, with the supervision and control of the school district, and the board's power to approve presumably includes the power to withdraw approval for a reasonable cause.¹³¹

The code also gives the county superintendent the authority to temporarily close "a school when conditions are detrimental to the health, safety or welfare of the pupils, . . ."¹³² with this authority also goes the right to make inspections in order to determine when conditions in any school may not meet proper standards.

In addition, the office of the State Fire Marshall has

responsibilities for the inspection of all school buildings.¹³³ His office can order the closing down of such buildings if they are found to be unsafe, and are not corrected by the board after due notice.¹³⁴

Maintenance and Custodial Services

Various building and grounds maintenance requirements are prescribed in the statutes:

The board shall provide:

.....

(3) for the health and cleanliness of the pupils;

(4) for the repair and good order of the school grounds, buildings and equipment¹³⁵

The State Board of Education specifies minimum sanitary requirements that schools must meet in order for an individual school to be properly classified by the State Department of Education.¹³⁶ Each county board of education is allowed by statute to employ the necessary service personnel, as defined in code,¹³⁷ required to perform the duties and assignments to fulfill the responsibilities of the board as stated above.¹³⁸

Athletic Facilities

A local board of education may, on its own, or in concert with a county court (commission) or municipal corporation, establish and conduct an athletic facility.¹³⁹ Such facilities may be for athletics of all types, and may include stadiums, gymnasiums, field houses and all other types of athletic establishments capable of

producing revenue.¹⁴⁰

If the board of education works in concert with another governmental agency on such a facility, the board has the authority to place all management details under a committee by adopting a resolution approving that action.¹⁴¹ The committee so appointed shall have authority over the entire operation as set out in the code,¹⁴² provided that any contracts to be entered into by the committee concerning the construction, acquisition, improvement or extension of the facilities must be approved by the board.¹⁴³ Even though a board of education has the authority to lease property on its own or jointly as an athletic field, according to the Attorney General, the expenditure of public funds for the maintenance of a football field owned by a private corporation would be improper.¹⁴⁴

Temporary School Facilities

The State Board of Education has established that a local county board may lease facilities in which to run an early childhood program.¹⁴⁵ In some cases a board may also acquire facilities on a "temporary" basis under a lease/purchase agreement.¹⁴⁶ In this way it is possible for a board to exercise a specified number of yearly leases which only bind the board for one year at a time, and still end up with the deed to the property. Here, then, the annual rental payments apply as credits against the cost price of the property.¹⁴⁷

Miscellaneous

There can be no license granted to anyone for the sale of non-intoxicating beer within three hundred feet of any school

building.¹⁴⁸ This distance is to be measured front-door-to-front-door from each establishment,¹⁴⁹ and does not include an athletic field or playground as a "school."¹⁵⁰

For counties which border on the Ohio River, West Virginia property has been determined to go under the river to the low water mark on the Ohio side.¹⁵¹ This is significant to a county board of education which owns river bank property in that there are times when the river bottom is dredged in order to keep water transportation channels open.

The property owner generally receives a sum of money for each ton of sand moved. In Union Sand and Gravel Co. v Northcott the court defined the low water mark as:

Low water mark within the intendment of our law as related to the Ohio River, is the point to which the water recedes at its lowest stage.¹⁵²

"Traffic passing . . . a school building or the grounds thereof . . ." shall be slowed to fifteen miles per hour when children are present,¹⁵³ and the board may post it and have warning lights installed. The attorney general has rendered an opinion that a school building need not "front" on a highway in order to declare a "school zone."¹⁵⁴

The statutes prohibit persons from smoking in any school building, lot or grounds while same are occupied or used for school purposes¹⁵⁵ and from loitering in or about any school, school building or school grounds in violation of posted rules or regulations.¹⁵⁶ In addition, the statutes allow for boards of education to offer rewards for information leading to the arrest and/or conviction of anyone who

damages or destroys school property, or threatens, offers, or attempts to do so.¹⁵⁷

The Attorney General has issued an opinion that boards of education, being under a duty to exercise reasonable discretion and diligence to protect the public property of the board, may carry a blanket bond on employees for the protection of property.¹⁵⁸ In Daugherty v Ellis the principle of duty in protecting public property was enunciated when the court said:

It was the plain duty of the defendant, as a commissioner of the county court and as such the representative of the people of the county, to exercise due diligence and reasonable care to protect and preserve the property held by the county court against loss and injury and to safeguard the rights of the county and its citizens and inhabitants in such property.¹⁵⁹

COMMUNITY USE OF SCHOOL FACILITIES

The physical plant and other facilities belonging to a county board of education are also typically used for various other meetings and gatherings during the after-school hours. In allowing such uses of their buildings and grounds, boards should be aware of the restrictions placed on them in this regard.

The only legislative expression concerning the extra-educational use of school property is found in the code where it states:

The board of education shall have authority . . . to provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities.¹⁶⁰

According to the Attorney General, this statute "envisions the use of school property to promote activities of a public rather

than a private nature."¹⁶¹ Such activities are to be closely associated with the public schools or of a community nature¹⁶² and not for the promotion or sponsorship of an activity operated for the profit of those using the premises.¹⁶³ Parent-teacher associations, service clubs and other such community organizations are interpreted to be included within the realm of community activities, especially since proceeds derived from such activities many times inure to the benefit of the schools; and in cases where such is not true, said proceeds go to support various civic and charitable activities.¹⁶⁴

There is a specific restraint against the renting or leasing of school properties to profit-making organizations.¹⁶⁵ The Attorney General has prohibited renting to private kindergartens in particular.¹⁶⁶ It is permissible, however, for the board to establish Headstart programs using public school facilities to do so¹⁶⁷ in the realm of community action programs.¹⁶⁸ The board may also extend the use of its facilities in the development and operation of a Community Education Program,¹⁶⁹ and to an independent community basketball league.¹⁷⁰

It is in the area of the use of school facilities for religious purposes that perhaps the most confusion arises. The United States Constitution forbids the granting of governmental support to religion,¹⁷¹ yet it also mandates religious freedom to the people.¹⁷² The difference between these two ideals is not always clear.¹⁷³ In a decision related to the use of school facilities for religious purposes, the United States District Court for Southern West

Virginia said:

. . . I would seriously question whether the Board of Education presently has any authority whatsoever (under Code 18-5-19) to permit the use of its school facilities for the conduct of any meetings or assembly of a religious nature, and in any event, it is clear that the Board in the exercise of its administrative discretion has the right to prohibit the use of its school facilities for all religious activities.

.....

. . . This position of official "neutrality" evidenced by the regulation of the Board of Education here in question¹⁷⁴ does not bespeak government hostility toward the religious beliefs of any individuals, including the plaintiffs herein, but is merely consistent with the well-established constitutional principle of the separation of Church and State.¹⁷⁵

The State Superintendent of Schools has issued several interpretations on this subject. In some regards these interpretations may appear to be confusing in that they are all issued after the Hunt decision, and, during a period of two and one-half years in which there were no changes in the statutes or subsequent case law decisions. Yet, the prohibitions included therein appear to become progressively lessened.

In an interpretation about using school facilities for religious programs, and issued only about two weeks after one in which the State Superintendent had determined that school facilities should not be used for religious fund raising activities,¹⁷⁶ the State Superintendent said:

While a county board of education has authority '. . . to provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities . . .,' a board does not have the authority to allow a public school building to be used for religious purposes. While it is true many people in a community may feel religious services are a "community activity," which no doubt they are, at the same time such activity is proscribed

when public monies and facilities are used.

There is ample authority for such proscription. The United States Constitution, the West Virginia Constitution, various court cases, the Attorney General's Opinion of September 12, 1963, and the former interpretations of this office are consistent in denying such usage. Specifically, our legislature omitted in 1919 that part of 18-5-19 which, early in our state's history, did allow local boards the discretion to permit religious activity in the schools.

Therefore, in West Virginia, as well as in the United States, there is ample authority for protecting the separation of church and state as mandated originally in the federal constitution; West Virginia gives even further authority since the legislature has specifically omitted authority which once was permissible.¹⁷⁷

These pronouncements are clear and unambiguous, leaving little room for further interpretation. In response to an inquiry as to whether or not churches may "conduct 'chapel services' in a public school during the school day;" and, if "a church could use the public school after the school day . . . to show a religious film," the State Superintendent referred to the decision rendered in Hunt and he said this about the first portion of the question:

From this it appears that a county board of education has the authority to forbid the use of school property for religious purposes and that it is questionable whether school facilities may be used for holding any meeting or assembly of a religious nature.

.....

Therefore, it appears that the request for permission to hold chapel services in the public schools of your school district may not be granted.¹⁷⁸

He further supported his decision by referring to the United States Supreme Courts' decision in McCullum:

As long ago as 1947, the Supreme Court of the United States has held: '(U)tilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith . . . falls squarely under the bank of (e.g., is prohibited by) the First Amendment.'

People ex rel. McCollum v Board of Education , 333 U. S. 203 (1947). ¹⁷⁹

In response to the second portion of the inquiry, which inquired about the use of school property after the school day to show a religious film, the State Superintendent said this:

The answer to the second question is more a matter of discretion for the school board or superintendent. West Virginia Constitution, Article XII, Section 12, provides in part: 'The legislature shall foster and encourage, (sic) moral, intellectual, scientific and agriculture improvement . . .'

And School law, 18-5-19, provides in part:

The board of education of any district . . . shall have authority to provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities . . .

Therefore, if the school board or superintendent should decide that the showing of the movie would be a form of religious proselyting, then the movie may not be permitted to be shown on school property, but if the school board or superintendent should decide that the showing of this movie would merely be a form of celebration of a State holiday, then the movie could be permitted to be shown. ¹⁸⁰

The premise in the above interpretation follows that of former interpretations of the State Superintendent. However, in a response only six months later to an inquiry concerning the leasing of school buildings to church groups for religious services, he approved the religious use of school property on an "occasional" basis when he said:

With respect to your question about the legality of leasing school property to church groups for religious services: Property is purchased by a board of education on the presumption that the property will be used for school purposes; however, a board may lease property from year to year or for a lesser period when it does not have an immediate use for it. Madachy v Huntington Horse Show, 119 W. Va. 54 (1937); West Virginia Constitution, Article X, Section 4; School Law, 18-1-2.

At one time the West Virginia Code expressly provided that school property could be used routinely for religious purposes (e.g., Sunday School); however, this express authority was ended by Act of the Legislature in 1919. Please see Hunt v Board of Education, 321 F. Supp. 1263 (1971) and also School Law, 18-5-19, which is the pertinent statute written.

.....

A county board of education may exercise only such authority as is expressly granted by statute or which may reasonably be implied from statute. . . . Since express authority for use of school property for religious purposes not only does not exist but that which once existed has been ended by the Legislature, and since the United State Supreme Court has found that public schools should not be used for purposes of religion, it appears that school property should not be leased for religious services on a routine basis. Occasional leases for religious rallies apparently are not unconstitutional because some public bodies do make such leases. Whether or not such leases would be beyond the implied statutory authority of a county board of education, however, is not clear.

Therefore, it appears that a county board of education should not lease school property for the holding of religious services on a routine basis for such a use of school property appears to be beyond the implied authority granted by School Law, 18-5-19. On the other hand, it appears that a county board of education may lease school property for occasional religious services, providing, of course, that the board treats all religions of the school district the same.¹⁸¹

The State Superintendent, when subsequently asked to compare and elaborate on these latter two interpretations (e.g., SSI 12-10-73 and SSI 5-30-74) had this to say:

The difference between these Interpretations is this: That of December 10, 1973 means that a church may not hold religious services for public school pupils on public school property during the time the pupils are compelled by state law to attend school, while that of May 30, 1974 says that, although the use of public school property for any religious purpose may be a violation of the First and Fourteenth Amendments to the Constitution of the United States, and although there is no express statutory authority any more--although there once was--for allowing the use of public school property for religious purposes, nevertheless, the law is not really clear on this matter and so a county board of education--treating all establishments of religion with the same regard--may allow

the use of public school property by churches at times when pupils are not in compulsory attendance; however, boards of education are cautioned to not allow any church the routine use of its property because of the possibility of a violation of the Constitution.¹⁸²

This latest interpretation on the subject of use of school properties for religious purposes appears inconsistent with that of 5-30-74, as well as various case law precedents, where it is referred to that boards have only the authorities granted or necessarily implied by the statutes. The matter of occasional, non-routine useage of school property as approved in the interpretation of 5-30-74 and also 12-10-74 seems quite possibly to be in opposition to the courts' decision in Hunt and the apparent construction of the current statute¹⁸³ where it has no mention (as it once did) of approved religious use of school property.

PROPERTIES DISPOSAL PROCEDURES

Retirement of Facilities

The statutes provide two methods by which a school board may legally discontinue the use of school buildings. The first applies when the superintendent recommends condemnation of buildings as unfit for use,¹⁸⁴ while the second provides the school board authority to close and/or consolidate schools provided it is done before the first Monday in May (in order to give proper notice of transfer or dismissal to the employees therein) or because of attendance being less than twenty students for two successive months.¹⁸⁵

Disposal of Property

Under terms of statute a board of education may sell or otherwise dispose of property not deemed to be needed for future school purposes. The board may sell, dismantle, remove or relocate any buildings and sell the land at public auction to the highest responsible bidder.¹⁸⁶

Over the years there has been much concern as to the proper methods to be used by which a county board of education may dispose of unused or surplus property belonging to the board. This fact has been evidenced by the myriad of court actions, opinions issued by the Attorney General, and interpretations of the State Superintendent concerning the disposal of public school property.

The court determined in McVean v Elkins that the statute is to be strictly construed and therefore a board of education can be enjoined from disposing of any of its property in a manner other than that provided for by law.¹⁸⁷ In Lane v Board of Education the court also held that public property can be disposed of only by expressed authority, and then only if not needed for public school use.¹⁸⁸

Along the same line, the State Superintendent of Schools issued various interpretations concerning the disposal of property. He has stated that once property has been determined to be surplus, the board has an obligation to dispose of it.¹⁸⁹

Sale of Property. Sale of surplus school property must be by public auction to the highest responsible bidder,¹⁹⁰ unless the state or a

political subdivision desires to purchase the property. However, before offering for sale any piece of property in rural settings the board should verify if there is a need to comply with the statutes. (See section entitled Restrictions, etc., on page 156).

The code states:

But in rural communities the grantor of the lands, his heirs or assigns, shall have the right to purchase at the sale, the land, exclusive of the buildings thereon, and the mineral rights, at the same price for which it was originally sold.¹⁹¹

The Attorney General has defined "rural" as being ". . . in a farming area . . ."¹⁹²

The courts, in Dooley v Board of Education, determined that a board may dispose of unneeded property; but such disposal must be according to the requirements of the statutes. In Dooley they said:

The fact that the legislature has in such detail prescribed the method of disposing of . . . property, and the further fact that a clear legislative intent was shown by the amendment of 1908 to further limit the authority of boards of education in this regard, convince us that it was the legislative purpose that . . . (the) statute should be substantially complied with in order to be a valid sale on disposition of school property.¹⁹³

In the statutes the legislature has provided that:

(p) The word 'land' or 'lands' and the words 'real estate' or 'real property' include lands, tenements and hereditaments, and all rights thereto and interests therein except chattel interests;¹⁹⁴

The court in Kennedy v Ohio Fuel Oil Co. determined that oil and other minerals are included in the general term "land."¹⁹⁵ Also, coal has been determined by the court to be included in "land."¹⁹⁶

In an opinion issued in 1970, the Attorney General determined that the board of education has authority to sell real property and

the rights to any minerals which may be thereon separately. In this regard he said:

. . . to remove the buildings and sell the land is on a permissive rather than a mandatory basis, as Code 18-5-7 states that the board "may" sell, etc., the school buildings and sell the land on which they are located at public auction. Further, it is provided that such sale may be "on such terms" as the school board orders. If this governmental body has the option to sell the land and to prescribe the terms of sale, it stands to reason that a school board could sell the surface and the minerals separately. It is conceivable that such separate sales might be more advantageous in some situations than would be the selling of both the surface and the minerals together. The latitude this statute affords, we submit, should enable a school board legally to dispose of the minerals separately if it should so choose.

.....

Unless otherwise specified any land sold by a school board would include the minerals. However, in our opinion a school board has the authority to sell them separately and at different sales, subject, however, to the right of the grantor, etc., in a rural community at the time of the sale to purchase not only the surface but the minerals, too.¹⁹⁷

The Attorney General has issued many opinions concerning the sale of public school property. In these he has included standards for constituting the "proper notice" (as called for in the code)¹⁹⁸ of a pending sale of property,¹⁹⁹ and the fact that if proper notice is not given, the board has no authority to sell as planned.²⁰⁰ He determined "proper notice" to be "proper legal notice" when he said:

Although Code 18-5-7 refers to "proper notice", we regard it as meaning "proper legal notice", and we believe that an advertisement containing all of the foregoing information (complete terms of sale) will meet the most stringent requirements of "legal notice". Our conclusion in this regard is predicated, in part, upon language in Garrett v Board of Education, 109 WV 714, 156 SE 115, stating that "it (the statute) directs that a lease of school lands for oil and gas be made 'by the same method prescribed for the sale of school buildings and lands.' This obviously implies that the lease be awarded at public auction, after legal notice, to the responsible person offering the most advantageous terms (emphasis supplied); and

upon statutory requirements for legal notice in other type sales such as are contained in Code 38-4-20 and Code 55-12-2.²⁰¹

In Maxwell v Burbridge the court determined that a description of the property to be sold had to be included in the notice of sale.²⁰² The court in Dooley also held that "notice" must include the time, the place and the terms of sale.²⁰³

The State Superintendent has rendered interpretations pertaining to the sale of school property which have indicated that the board should ". . . insure getting as near as possible the approximate cash value of the property; . . .,"²⁰⁴ but that "the necessity of getting the best possible price for the land is not as great when the board deals with another branch of government . . ."²⁰⁵ According to statute, the board of education may direct that the proceeds from sales of property shall be credited to any fund or funds that it deems desirable.²⁰⁶

Restrictions on sale of school property--reconveyance. As previously noted (see section entitled Sale of property, page 153) property disposal procedure in a rural setting is different from other property of the board.²⁰⁷ The statute provides that any owner of rural property who conveys such property to a board of education, his heirs or assigns, shall have the right to the reconveyance back from the board if it is determined by the board that the property is no longer needed for school purposes.

This right of reconveyance requires that the board must first offer the land, exclusive of buildings, and mineral rights to the grantor, his heirs or assigns, at the same price for which

it was originally sold. The Attorney General has rendered an opinion that the right of reconveyance has no effect unless and until the board of education actually offers the specific property for sale.²⁰⁸ At that time, it is up to the person intending to exercise his reconveyance right to accept the burden of doing so.²⁰⁹

The Attorney General has decreed that school land located in a farming area is within a "rural community,"²¹⁰ and he has also said that if the nature of the community has changed to the point that it can no longer be considered rural at the time of intended disposal of the property, then the grantor's rights to reconveyance as well as those of his heirs, are lost.²¹¹ If there is a question as to the appropriate designation of property as being rural as opposed to non-rural, the Attorney General has given an opinion that it is advisable for the board of education to obtain a quitclaim deed from the grantor or heirs if one can be secured for a nominal consideration. In this way the board may then safely sell at public auction.²¹²

The Attorney General had previously specified that persons who are neither grantors, heirs or assigns of grantors have no rights to purchase school lands for the original purchase price.²¹³ The court in Lane v Board of Education determined that "heirs do not constitute heirs of the son of a grantor unless living at the death of the grantor, and that therefore they have no right to demand a reconveyance of a school site."²¹⁴

The court in Lane also decided that the statute applicable to any reconveyance situation would be the one which was in effect

at the time the conveyance of property to the board was made.²¹⁵ This was also the condition in Cavendish v Blume Coal & Coke Co. when the court upheld the statute which was in effect at the time of original conveyance to the board, and not the statute in effect at the time of the case.²¹⁶ The Attorney General followed this same line of reasoning in an opinion concerning the reconveyance of school land when he said:

. . . we believe that the law at the time of the conveyance and not at the time of the demanded reconveyance should apply as to the kind of area or community to which the reconveyance would be limited; but that whether such area or community is of that kind should be determined as of the abandonment of the property for school purposes and the demand for repurchase and reconveyance.²¹⁷

Also, the Attorney General, in a lengthy opinion concerning the disposal of property, came to these conclusions:

1. The statute in effect at the time of the conveyance to the board of education will govern the claimant's right to reconveyance except as to the nature of the community. If such community is no longer rural, then the grantor's and his heirs' right to reconveyance are lost.
2. If there were no statute authorizing a reconveyance at the time of the grant to the board of education, then there would be no right to a reconveyance.
3. The right of reconveyance under the 1881 statute exists only in favor of the grantor or his heirs (who live and have that status) at the time of his decease and excludes all persons having a different status.²¹⁸

The right of reconveyance was determined by the court in Carper v Cook to be as follows:

. . . This is a concession of the law to those living in farming communities, that a small portion of a farm may not be taken for school purposes and then be allowed to pass into the hands of a stranger, to the damage of the residue of the land. . . .²¹⁹

Restrictions on sale of school property--reversion. Another restriction (or limitation) to the public sale of surplus school property is the fact that a "reverter clause" may be included in the deed of a piece of property owned by the board. A reverter clause is a stipulation placed in the deed when conveyed to the new owner that sets certain restrictions as to the uses to which the property may be placed, or the title to the property will revert back to the original grantor. The Attorney General has rendered an opinion that a landowner may legally include such a clause in a deed and that it is not necessary for any compensation to change hands in the land deal.²²⁰

In Allemannia Fire Insurance Co. v Winding Gulf Collieries

the court held that:

Under deed conveying land to board of education for school purposes only with provision that when land ceased to be so used land should automatically revert to grantor, if land ceased to be used for school purposes it would immediately revert to grantor, his successors or assigns in fee simple and all improvements to land and particularly all buildings thereon would revert as part of the realty.²²¹

The Attorney General has stated in an opinion concerning the reversionary clause in a deed that it should be given effect according to the statute in existence at the time of the conveyance of the property.²²² This is much the same procedure as we have previously seen as to a reconveyance. However, in the same opinion, the Attorney General also took an opposite view from that of the court in Allemannia when he indicated the board may sell any buildings on the land separately.²²³ He subsequently reversed himself on the matter of the disposition of any buildings when he rendered an opinion in

which he held that school buildings become a part of the realty upon which they are located and are therefore subject to any reversionary clause affecting the real estate involved.²²⁴

The court in Herald v Board of Education held that generally mere statements in a deed that the property is conveyed for school purposes, or is to remain used for such purposes, are not construed as conditions or limitations of the grant of the property to the board.²²⁵ In several cases the court had this to say concerning the placing of restrictions on the property deed:

. . . restrictive covenants are to be strictly construed against the person seeking to enforce them and all doubts must be resolved in favor of natural rights and a free use of property and against restrictions.²²⁶

In Garrett v Board of Education the court determined that:

. . . limitation on the use of a piece of property are not favored. The terms of restraint must be clear and concise and strictly construed against one seeking to enforce them.²²⁷

According to the Attorney General there can be a temporary cessation of the continued use of property which carries a reverter clause in its deed and the board can still maintain control over the property. He determined that as long as the board of education has plans to use the property as conditions permit, a lapse of even three or four years will not affect the board's control of the property.²²⁸ However, in a case where the deed creates a fee (right to hold such land) to be determined by the cessation of the school use of the property, the Attorney General has said that title reverts to the grantor or his heirs the moment such use by the school ceases.²²⁹

When the board of education has a piece of property in which

a reverter clause appears in the deed, and that land is taken by another public body in condemnation proceedings, the reverter clause does not accrue to the previous grantor any proceeds of the sale, as long as the board would have otherwise retained the land for school purposes.²³⁰

Restriction on sale of school property--miscellaneous. The State Superintendent has said, in relation to a board member or board employee purchasing property at a public sale:

School Law, 61-10-15, and public policy would appear to bar a member of the board of education, the superintendent of schools, and any board employee who had any influence over 'whether to sell or not to sell' from purchasing the house. Since one may not lawfully do indirectly what one may not lawfully do directly, any person barred from purchasing the house at the public sale also would be barred from buying it from a third person.²³¹

Transfer and/or Exchange
of Board Property

The board, by virtue of the fact that it is a public body, may acquire, transfer to (make a gift of or sell) or exchange with any other state public body any real estate;²³² however, a transfer or exchange of this type must have the written approval of the Board of Public Works,²³³ unless the other public agency be another county board of education.²³⁴ The State Superintendent has rendered an opinion related to transfers of board property which says that a local board may not enter into a real property agreement with the United States Government.²³⁵

The statutes specify that the board may transfer real property (as well as equipment, machinery and other goods) to a duly

recognized community action program.²³⁶ The Attorney General has listed the opinion that land may not be traded (except with another governmental agency of the State), but only sold at public auction as specified by the statute.²³⁷

Disposal of Property Other
Than Real Estate

The Attorney General has said that there are no specific requirements to advertise legally the sale of surplus school buses or other excess school property as is required for real estate sales under the code.²³⁸ However, he does suggest in the same opinion that sales of this type of property, which has a value of \$200 or more, may come under requirements in State Department of Education regulations dated 6-23-39 and 10-20-45 which require competitive bids and that two notices be placed one week apart in general circulation newspapers.²³⁹

In Edwards v Hylbert, where there was an exchange of four used, city-owned, automobiles for four new automobiles, the court made an utterance in behalf of this type of "trade-in" transfer of public property. Even though the court had to nullify the transaction (due to the particular transaction having created an illegal debt) it did approve of the trade-in method of transferring property.²⁴⁰ In this regard, boards of education have utilized the trade-in manner for a number of years, when buying equipment and motor vehicles.

SUMMARY

The assumption of a long-term debt for the purposes of improvement of physical facilities in a county school district can only be accomplished with the approval of the voters. Such approval requires an affirmative vote from 60 percent of those voting on the question. This proposal can be placed before the public at either a regularly scheduled primary or general election or at a specially called election for this purpose only.

Before such an election can be held, the board must pass a resolution and publish an official order for the election stating the necessity, purpose(s), latest assessments, present indebtedness, length of the proposed issue, maximum rate of interest, date of the election, approximate rate of levy required, and other general election information if required for a special election. All information supplied to the voters must be true and accurate.

Boards of education are not allowed to have indebtedness in excess of 5 percent of the assessed valuation of property within the district. They cannot issue bonds at a rate of interest in excess of 8 percent per annum, nor for a period of time longer than thirty-four years. Annual payments of principle and interest cannot vary more than 3 percent of the total issue from the amount of the highest payment to that of the lowest payment.

When voters have approved the bonding proposal placed before them, the board must then secure the endorsement of the State Attorney General as to the validity of the bonds. Once this is

received, and the voter appeal period of ten days has passed, such endorsement becomes final and not subject to further question from the voters.

The proceeds of a bond issue can only be used for the purpose(s) intended and cannot be utilized in any way for current operating expenses. In so doing, however, the board cannot expend more than the funds available and thus implicate the levy of a subsequent year.

The State Board of Education, as approved by terms of statute, sets rules and regulations to which local boards must adhere when such local board is planning new buildings or the renovation of older ones. In order to receive a county's share of building funds available under the Better School Buildings Amendment of 1972, each county must file a comprehensive building plan with the State Board. This plan, in order to receive the approval of the said State Board, must identify and offer solutions for the educational needs of the county.

Construction work must be put out for bid by a public authority, but it is not necessary for the county board of education to follow bidding procedures for any work of a temporary or emergency nature, or if the cost is to be \$5,000 or less. The board may utilize its own employees and provide the materials for a construction project; and, such undertaking shall not be a "public improvement" which would require that it be "let to contract."

A board of education, being a public agency, has the right of condemnation, if necessary, in the acquisition of property required by the board for its purposes. The board may also buy

property in the usual manner; and may receive gifts, grants or bequests. Such receipts by a board of education could conceivably include property of any description.

Since boards of education have the responsibility for supervision and control of all the schools, they must maintain them in such a way as to provide for the health and cleanliness of the students, and for the good repair and conditioning of the school grounds, buildings and equipment.

In the area of community use of school physical facilities, boards of education have the authority to provide space for meetings of a public rather than a private nature. However, such use shall not include religious activities, at least not on a regular basis.

If a board of education determines that it has surplus property, it may dispose of such unneeded land and buildings. Unless it is determined that an exchange or transfer of properties with another public agency is possible, such property must be sold at public auction to the highest responsible bidder. Once a board has determined that it does have surplus property, it has an obligation to dispose of it in a proper manner as specified in the statutes. Boards of education have only the powers and authorities given them by the statutes, or by the necessary implication of them. Therefore, in the acquisition of property, disposal of property, or allowing use of their properties by others, they can only operate in the manner set forth by the laws of the state.

FOOTNOTES--CHAPTER 4

¹W Va Code Ann., sec. 13-1-1, 13-1-2.

²Ibid, 13-1-2.

³Shinn v Board of Education, 39 WV 497, 20 SE 604 (1894).

⁴W Va Code Ann., sec. 13-1-2.

⁵Ibid, 13-1-29.

⁶Ibid.

⁷51 Op. Att'y. Gen. 323, 1965.

⁸45 Op. Att'y. Gen. 486, 1953.

⁹Ibid.

¹⁰W Va Code Ann., sec. 18-9-2c.

¹¹SSI 6-29-72.

¹²W Va Code Ann., sec. 13-1-6a.

¹³Post v Board of Education, supra (1912).

¹⁴Ibid.

¹⁵W Va Code Ann., sec. 13-1-14.

¹⁶Ibid, 13-1-15.

¹⁷Ibid.

¹⁸W Va Code Ann., sec. 13-1-14.

¹⁹45 Op. Att'y. Gen. 303, 1953.

²⁰W Va Constitution, article X, section 8; W Va Code Ann., sec. 11-8-6c, 13-1-3.

²¹W Va Constitution, article X, section 8; W Va Code Ann., sec. 11-8-16, 13-1-4, 13-1-14; Gordon v Lance, supra (1971).

²²Lawson v County Court, 80 WV 612, 92 SE 786 (1917).

²³W Va Code Ann., sec. 13-1-4.

²⁴W Va Code Ann., sec. 13-1-7.

²⁵Ibid.

²⁶Ibid, 13-1-4.

²⁷Elliott v Adams, WV , 181 SE 2d 276 (1971).

²⁸W Va Code Ann., sec. 13-1-7.

²⁹Ibid, 18A-5-2.

³⁰47 Op. Att'y. Gen. 158, 1957.

³¹W Va Code Ann., sec. 13-1-4.

³²Ibid, 13-1-10.

³³Ibid, 13-1-11.

³⁴Ibid, 13-1-13; 47 Op. Att'y. Gen. 158, 1957.

³⁵47 Op. Att'y. Gen. 158, 1957.

³⁶Ibid.

³⁷W Va Code Ann., sec. 18A-5-2.

³⁸Ibid, 13-1-8.

³⁹Code 59-3-2 lists this requirement for a Class II-0 advertisement: ". . . be published once a week for two successive weeks in two qualified newspapers of opposite politics published in the publication area . . ."

⁴⁰Ibid.

⁴¹Ibid, 59-3-1.

⁴²Ibid, 13-1-12.

⁴³Sexton v Lee, 100 WV 389, 130 SE 437 (1925).

⁴⁴Ibid.

⁴⁵W Va Code Ann., sec. 3-5-17, 3-6-9.

⁴⁶Baumgarner v County Court, 147 WV 52, 125 SE 2d 883 (1962).

⁴⁷W Va Constitution, article X, section 8.

- ⁴⁸W Va Code Ann., sec. 11-8-6c, 13-1-3.
- ⁴⁹W Va Constitution, article X, section 8.
- ⁵⁰W Va Code Ann., sec. 11-8-6c.
- ⁵¹Ibid, 13-1-3.
- ⁵²Sanders v County Court, 115 WV 187, 174 SE 878 (1934).
- ⁵³W Va Code Ann., sec. 13-1-4.
- ⁵⁴Ibid.
- ⁵⁵Sessler v Partlow, supra (1943).
- ⁵⁶Baxa v Partlow, 132 WV 859, 54 SE 2d 825 (1949).
- ⁵⁷W Va Code Ann., sec. 13-1-6.
- ⁵⁸Ibid.
- ⁵⁹Ibid, 13-1-22; Cook v Lawson, supra (1931).
- ⁶⁰Davenport v Meadows, 120 WV 602, 199 SE 883 (1938).
- ⁶¹W Va Code Ann., sec. 13-1-14, 13-1-20, 13-1-34.
- ⁶²Ibid, 13-1-25, 13-1-28.
- ⁶³Davenport v Meadows, supra (1938).
- ⁶⁴Ibid, 13-1-16.
- ⁶⁵Ibid, 13-1-25.
- ⁶⁶Ibid, 13-1-26.
- ⁶⁷Ibid, 13-1-16, 13-1-27.
- ⁶⁸Sessler v Partlow, supra (1943).
- ⁶⁹Allen v England, 86 WV 508, 103 SE 400 (1920).
- ⁷⁰W Va Code Ann., sec. 13-1-26.
- ⁷¹46 Op. Att'y. Gen. 337, 1955.
- ⁷²Ibid; 52 Op. Att'y. Gen. 247, 1967.
- ⁷³W Va Code Ann., sec. 13-1-19.

- ⁷⁴Ibid, 13-1-21.
- ⁷⁵Ibid, 13-1-21, 59-3-1.
- ⁷⁶Ibid, 13-1-21.
- ⁷⁷Lawson v County Court, supra (1917).
- ⁷⁸Jarrell v Board of Education, supra (1948).
- ⁷⁹Ibid.
- ⁸⁰Ward v Board of Education, 80 WV 541, 92 SE 741 (1917).
- ⁸¹45 Op. Att'y. Gen. 638, 1954.
- ⁸²Swiger v Board of Education, 107 WV 173, 147 SE 708 (1929).
- ⁸³Shinn v Board of Education, supra (1894).
- ⁸⁴Shonk Land Co. v Joachim, supra (1924).
- ⁸⁵Ibid (1924).
- ⁸⁶Davis v County Court, 28 WV 273 (1886).
- ⁸⁷Hamrick v McCutheon, supra (1926).
- ⁸⁸W Va Code Ann., sec. 18-5-10.
- ⁸⁹W Va Constitution, Better School Buildings Amendment, passed November 7, 1972.
- ⁹⁰W Va Code Ann., sec. 18-2-23, 18-9C-3.
- ⁹¹Ibid, 18-9C-3.
- ⁹²SBE 6220.
- ⁹³Ibid.
- ⁹⁴Ibid.
- ⁹⁵Ibid.
- ⁹⁶Ibid, 4200.
- ⁹⁷Ibid, 2310, 2412.
- ⁹⁸Ibid, 6100.

⁹⁹West Virginia Secondary Schools' Activities Commission v Oakley, supra (1968).

¹⁰⁰W Va Code Ann., sec. 18-5-9.

¹⁰¹W Va Code Ann., sec. 21-5A-1.

¹⁰²Ibid, 21-5A-1 thru 11.

¹⁰³Op. Att'y. Gen. 1-7-69.

¹⁰⁴Ibid; 50 Op. Att'y. Gen. 753, 1964.

¹⁰⁵W Va Code Ann., sec. 18-5-12a.

¹⁰⁶Ibid.

¹⁰⁷Ibid, 21-5A-3.

¹⁰⁸Ibid, 21-5A-6; 44 Op. Att'y. Gen. 376, 1952.

¹⁰⁹Charleston Lumber Co. v Friedman, 64 WV 151, 61 SE 815 (1908).

¹¹⁰Ibid (1908).

¹¹¹51 Op. Att'y. Gen. 690, 1966.

¹¹²Ibid.

¹¹³Charleston v Southeastern Construction Co., 134 WV 666, 64 SE 2d 676 (1950).

¹¹⁴51 Op. Att'y. Gen. 150, 1964.

¹¹⁵W Va Code Ann., sec. 18-5-12.

¹¹⁶Tug River Lumber Co. v Smithey, 107 WV 482, 148 SE 850 (1929); 45 Op. Att'y. Gen. 66, 1952.

¹¹⁷W Va Code Ann., sec. 18-5-8.

¹¹⁸Ibid, 1-5-3.

¹¹⁹46 Op. Att'y. Gen. 384, 1956.

¹²⁰SSI 7-3-73.

¹²¹45 Op. Att'y. Gen. 136, 1952.

¹²²44 Op. Att'y. Gen. 25, 1950.

- 123 SSI 2-21-75; W Va Code Ann., sec. 18-5-8.
- 124 State Road Commission v Board of Park Commissioners,
154 WV 159, 173 SE 2d 919 (1970).
- 125 W Va Code Ann., sec. 18-5-5.
- 126 44 Op. Att'y. Gen. 25, 1950.
- 127 Dooley v Board of Education, 80 WV 648, 93 SE 766 (1917).
- 128 50 Op. Att'y. Gen. 107, 1962.
- 129 W Va Code Ann., sec. 17C-1-55.
- 130 Ibid, sec. 18-5-1.
- 131 SSI 2-17-76.
- 132 W Va Code Ann., sec. 18-4-10.
- 133 Ibid, 29-3-4a, 29-3-4d, 29-3-16.
- 134 Ibid, 29-3-4b.
- 135 Ibid, 18-5-9.
- 136 SRE 2310.
- 137 W Va Code Ann., sec. 18A-1-1.
- 138 Ibid, 18-5-31, 18A-2-5.
- 139 Ibid, 10-2A-2a.
- 140 Ibid, 10-2A-1.
- 141 Ibid, 10-2A-3.
- 142 Ibid, article 10-2A.
- 143 Ibid, 10-2A-4.
- 144 50 Op. Att'y. Gen. 107, 1962.
- 145 SBE 2412.
- 146 Op. Att'y. Gen. 5-26-67; SSI 10-6-71.
- 147 Ibid.

- 148^{W Va Code Ann., sec. 11-16-12.}
- 149^{Musiak v Davis, 148 WV 125, 133 SE 2d 265 (1963).}
- 150^{Thacker v Crow, 141 WV 361, 90 SE 2d 199 (1955).}
- 151^{49 Op. Att'y. Gen. 403, 1962.}
- 152^{Union Sand & Gravel Co. v Northcott, 102 WV 519, 135 SE 589 (1926).}
- 153^{W Va Code Ann., sec. 17C-6-1.}
- 154^{50 Op. Att'y. Gen. 40, 1962.}
- 155^{W Va Code Ann., sec. 16-9-7.}
- 156^{Ibid, 61-6-14a.}
- 157^{Ibid, 18-5-36a.}
- 158^{50 Op. Att'y. Gen. 110, 1962.}
- 159^{Daugherty v Ellis, supra (1956).}
- 160^{W Va Code Ann., sec. 18-5-19.}
- 161^{50 Op. Att'y. Gen. 205, 1963.}
- 162^{Ibid.}
- 163^{Evans v Hutchinson, supra (1975).}
- 164^{50 Op. Att'y. Gen. 205, 1963.}
- 165^{49 Op. Att'y. Gen. 114, 1961; SSI 5-9-74.}
- 166^{49 Op. Att'y. Gen. 220, 1961.}
- 167^{52 Op. Att'y. Gen. 529, 1967.}
- 168^{W Va Code Ann., sec. 7-13-6.}
- 169^{SBE 2418; W Va Code Ann., sec. 18-2D-1.}
- 170^{SSI 11-23-71.}
- 171^{U. S. Constitution, amendment I.}
- 172^{Ibid.}

173 SSI 12-10-74.

174 The Board of Education policy (#11.212) said in pertinent part: "Requests for the use of school buildings for religious purposes shall not be granted."

175 Hunt v Board of Education, 321 F. Supp. 1263 (1971).

176 SSI 6-29-72.

177 SSI 7-13-72.

178 SSI 12-10-73.

179 Ibid.

180 Ibid.

181 SSI 5-30-74.

182 SSI 12-10-74.

183 W Va Code Ann., sec. 18-5-19.

184 Ibid, 18-4-11.

185 Ibid, 18-15-13.

186 W Va Code Ann., sec. 18-5-7.

187 McVean v Elkins, 127 WV 225, 32 SE 2d 233 (1944).

188 Lane v Board of Education, 147 WV 737, 131 SE 2d 165 (1963).

189 SSI 7-25-72.

190 Ibid, 18-5-7; 45 Op. Att'y. Gen. 102, 1952.

191 W Va Code Ann., sec. 18-5-7.

192 45 Op. Att'y. Gen. 229, 1953.

193 Dooley v Board of Education, supra (1917).

194 W Va Code Ann., sec. 2-2-10.

195 Kennedy v Ohio Fuel Co., 84 WV 585, 101 SE 159 (1919).

196 Reynolds v Whitescarver, 66 WV 388, 66 SE 518 (1909);
Selvey v Grafton Coal Co., 72 WV 680, 79 SE 656 (1913).

- 197^{Op. Att'y. Gen. 3-31-70.}
- 198^{W Va Code Ann., sec. 18-5-7.}
- 199^{Op. Att'y. Gen. 4-11-69.}
- 200^{46 Op. Att'y. Gen. 424, 1956.}
- 201^{Op. Att'y. Gen. 4-11-69.}
- 202^{Maxwell v Burbridge, 44 WV 248, 28 SE 702 (1897).}
- 203^{Dooley v Board of Education, supra (1917).}
- 204^{SSI 1-18-72.}
- 205^{SSI 7-25-72.}
- 206^{W Va Code Ann., sec. 18-5-7.}
- 207^{Ibid.}
- 208^{Op. Att'y. Gen. 4-11-69.}
- 209^{Ibid.}
- 210^{45 Op. Att'y. Gen. 229, 1953.}
- 211^{51 Op. Att'y. Gen. 20, 1964.}
- 212^{44 Op. Att'y. Gen. 418, 1952.}
- 213^{45 Op. Att'y. Gen. 547, 1953.}
- 214^{Lane v Board of Education, supra (1963).}
- 215^{Ibid (1963).}
- 216<sup>Cavendish v Blume Coal & Coke Co., 72 WV 643, 78 SE 794
(1913).</sup>
- 217^{Op. Att'y. Gen. 11-6-69.}
- 218^{51 Op. Att'y. Gen. 20, 1964.}
- 219^{Carper v Cook, 39 WV 346, 19 SE 379 (1894).}
- 220^{44 Op. Att'y. Gen. 130, 1951.}
- 221<sup>Allemannia Fire Insurance Co. v Winding Gulf Collieries,
60 F. Supp. 65, S.D.W. Va. (1945).</sup>

- 222⁴⁴ Op. Att'y. Gen. 107, 1951.
- 223^{Ibid.}
- 224⁴⁵ Op. Att'y. Gen. 294, 1953.
- 225^{Hearld v Board of Education 65 WV 765, 65 SE 102 (1909).}
- 226^{Cole v Seamonds, 87 WV 19, 104 SE 747 (1920); Cohen v Securities Co., 96 WV 676, 123 SE 793 (1924); Neekamp v Chamber of Commerce, 99 WV 388, 129 SE 314 (1925).}
- 227^{Garrett v Board of Education, 109 WV 714, 156 SE 115 (1930).}
- 228⁴⁴ Op. Att'y. Gen. 259, 1951.
- 229⁵¹ Op. Att'y. Gen. 445, 1965.
- 230^{Op. Att'y. Gen. 7-22-69.}
- 231^{SSI 7-3-75.}
- 232^{W Va Code Ann., sec. 1-5-3; SSI 5-7-73.}
- 233^{W Va Code Ann., sec. 1-5-3.}
- 234^{SSI 7-24-74.}
- 235^{SSI 11-14-75.}
- 236^{W Va Code Ann., sec. 7-13-8.}
- 237^{Ibid, 18-5-7; 45 Op. Att'y. Gen., 623, 1954.}
- 238^{W Va Code Ann., sec. 18-5-7.}
- 239⁴⁴ Op. Att'y. Gen. 105, 1951.
- 240^{Edwards v Hylbert, supra (1960).}

Chapter 5

PURCHASING, STUDENT TRANSPORTATION, LIABILITY AND INSURANCE, AND FOOD SERVICES

PURCHASING

Purchasing Authority

Statutory law provides each board of education with the necessary authority to support their expenditures of public funds for the goods, services, and properties needed by the modern school system. It is specified in the West Virginia Code that a board of education shall provide:

1. by purchase, lease, building or otherwise, a sufficient number of suitable schoolhouses and other buildings to meet the educational needs of its district;
2. the necessary furniture, fixtures, apparatus, fuel and all necessary supplies for the schools;
3. for the health and cleanliness of the pupils;
4. for the repair and good order of the school grounds, buildings, and equipment.¹

By necessary implication, the West Virginia Constitution also grants purchasing authority when it prohibits the pecuniary interest of any "person connected with the free school system of the State . . . in the sale, proceeds or profits of any book or other thing used therein . . ."2

The court in Honaker v Board of Education specified that boards can bind the school district in the purchase of only such school appliances and equipment as are reasonably necessary and useful. In the instant case the court defined educational appliances as items that

are necessary or useful to enable the teacher to instruct the school children more efficiently in the subject matter required to be taught.³

Purchasing Procedures

Each day brings a new and different challenge to the purchasing function. The many differences in enrollment, geographic location, size of county and staff, transportation and warehouse facilities, all have a definite effect on the manner in which each board of education handles its purchases.

Dependent upon the size of the county school system, the number of individuals performing purchasing duties may vary; however, sound business practices dictate that a division of functions between the classifications of purchasing and accounts payable is extremely desirable. This section covers only the purchasing function and will not deal with the accounts payable aspect. That phase of the school business management operation has been discussed in Chapter 3.

The West Virginia State Board of Education, under the provisions of the code which allows them to ". . . formulate the requirements of fiscal administration to be followed by county school district,"⁴ is, at this writing, preparing a regulation which will ". . . formulate the requirement of adequate practices of fiscal administration to be followed by county boards of education for purchasing . . . functions."⁵

It has been pointed out previously in Chapter 3 that, under the terms of statute, it is improper to make a purchase in one fiscal year which is to be paid for from funds of a succeeding fiscal year. This restriction has been discussed in Chapter 3 under the section headed "Expenditures and Payment Schedules."

All persons or firms who do business with a board of education are assumed to be aware of the restrictions placed upon the business operations of county boards.⁶ In Honaker the court said:

All who deal with the board of education are charged with notice of the scope of their authority, and that they can bind their districts only to the extent and by such contracts as are expressly authorized by law.⁷

In Pennsylvania Lightning Rod Co., in which one board member contracted for goods, the court determined that individual members of a board of education cannot make any contract for goods or services to be paid for by the board.⁸ In order to be an enforceable contract, it must be duly approved at a meeting of the board convened for the transaction of business in order to bind them as a corporation. Anything less would create an illegal debt which the taxpayers cannot be compelled to pay because, as the court specified in Ward v Board of Education, ". . . (the board) cannot transact official business except when legally assembled as a board . . ."⁹

However the court in Rudman v Board of Education did determine that even though not in a duly convened meeting, the board may, by individual negotiation, determine the elements of a contract to be entered into by the board. However, the acceptance of which must be in an official meeting to be legal and binding.¹⁰

Purchasing of school buses. The State Board of Education in 1973 set forth rules and regulations to be followed in the purchase of school buses.¹¹ The State Board must grant approval for the county bus purchases before the counties can actually place their orders with the chassis and body dealers.¹² Each chassis and body purchase must meet

the Minimum Standards for Design and Equipment of School Buses.¹³

These standards specify that they are not retroactive and are intended to apply to newly purchased buses.

In addition, there are restrictions placed on the advertising for bids, as well as the handling of all bids once received. There is also a requirement that the approval of both the Division of School Finance and the Division of School Transportation of the State Department of Education must adequately judge the bids and the procedures utilized by the county board of education in the bidding process.¹⁴ For additional information concerning the bidding of school bus purchases see the discussion in the sub-section entitled, "Bidding in the purchase of school buses."

In order to receive State Department of Education approval for the purchase of buses, the local board must: allocate sufficient funds in the budget for the purchase; and submit a copy of the published advertisement, a copy of the bid invitation, and a copy of the bid invitation and specifications. The local board must also submit the original copies of each bid received, a copy of the bid tabulation, as well as justification for any intended purchase of any other than the low bid.¹⁵

The State Board of Education, through the statutes concerning the state aid formula, have advocated the retirement of school buses every ten years. This can be accomplished through the state funding equal to 10 percent of the current replacement value of the bus fleet of each county board of education which is built into the State Aid Formula. This provision in the formula carries the stipulation that

such monies received must be spent for replacement school buses only.¹⁶

Purchasing by the Individual
Schools

In regard to purchasing procedures to be utilized by principals in the individual schools within a county school district, the State Board of Education has set specific standards.¹⁷ Under its rules and regulations it is specified that purchases which would obligate the income of a subsequent year, or which would encumber a fund or account beyond the available resources of such fund or account, may not be made.¹⁸ Also covered in such regulation is the manner in which purchase approval for ordering, completing the necessary paperwork, and method for payment should be handled.¹⁹

Pecuniary Interests in
Purchasing

There have been various protestations concerning the board of education buying from employers of board members, relatives of board members, and even from members of other county boards of education. The West Virginia Constitution prohibits a public official from having a personal interest in any sales or dealings with the board on which he serves, or for which he may work.²⁰ The statutes also contain similar prohibitions where it states in pertinent part:

It shall be unlawful for any member of . . . a board of education, supervisor or superintendent . . . to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service, or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member . . . he may have any voice, influence or control . . . ²¹

In Alexander the court said that such restrictions are:

. . . to protect public funds, and give official recognition to the fact that a person can not properly represent the public in transacting business with himself. To permit such conduct would open the door to fraud. The statute is designed to remove from public officers any and all temptation for personal advantage.²²

In the instant case, the court determined that even though the board member's business concern furnished services to the board at cost and no profit was made from the transaction, it was no defense to charges brought against him under the state's pecuniary interest law.²³ The court also held that it is not necessary that a corrupt or immoral act be performed for a board member to be adjudged guilty under the code.²⁴

Perhaps the most far-reaching case involving the board's purchases from one of its members is Jordan v McCourt.²⁵ In this case the board of education operated school buses manufactured by the Ford Motor Company. Therefore, the board purchased supplies and services for the buses from a company that was the principal agent in the county for that manufacturer. One of the board members was not only president of that company, but also was a major stockholder. The court said:

. . . that the board of education was compelled to buy supplies and services for Ford motor vehicles, and that such supplies, parts, and materials could not be purchased elsewhere in Webster County is not a defense. The statute makes no exception. Dealers in Ford parts, materials and supplies in neighboring counties could well have furnished these supplies to the board in such quantities that a supply could have been kept on hand. Code, 61-10-15, as amended, admits of no exception, and, being for a proper and salutary public purpose, should be rigidly enforced.²⁶

In Alexander v Ritchie, the court determined that even the sale of merchandise or supplies of any kind to a board of education by a firm owned by a member of the board, and the subsequent payment therefor, constitute a contract. The court held this to be true even though such purchases were made, by a teacher, janitor, or maintenance superintendent, without prior knowledge or consent of the board. The court held that the other board members should have known, by the name of the firm involved being on the lists of bills to be paid, that they were approving illegal purchases. In the instant case the members of the board were unseated for having performed in opposition to the law against pecuniary interest of public officials²⁷ in the West Virginia Code.²⁸

In another pertinent decision also coming from Jordan, the court held that purchases made by a board from a company, prior to the president of that company becoming a board member, and paid for after he assumed office, did not constitute a conflict.²⁹ In such a situation, it was determined that the payment was only the settlement of legal debts of the board entered into prior to the new members having any voice in the purchase.

Another pertinent factor in the decisions of Jordan was that it was proven that the board's chief mechanic had made numerous purchases of parts from the dealership, and even though made in his name, the court held that the president of the auto company should have known that such parts were being bought for the use of the board of education. The circumstances surrounding the purchases were such that they constituted no defense in the case.³⁰

The Attorney General noted in an opinion about the subject of pecuniary interest:

Members of the county board of education have been removed from office in this state under the provisions of this statute (Code 61-10-15) where they have had pecuniary interest in the contracts with the school board for furnishing labor, building materials, groceries, construction work, and for the sale of car parts to said boards In these cases, the contracts with the county board of education were entered into voluntarily, with an alternate choice available, by members of the board of education who had a voice, influence or control in the payment by the boards for such materials, labor and supplies furnished by companies in which a board member was interested. However, the materials, supplies, etc., could have been obtained elsewhere.³¹

However, in Dials & Smith v Blair the court ruled that a conflict involving a board member who also had an interest in a water company serving the schools, did not constitute a violation of the code. In this regard the court held that water services, not available elsewhere as are most materials and supplies, do not come within the purview of the statutes. Schools are required by law to furnish water; utilities are under the jurisdiction of the Public Service Commission of the State of West Virginia. Therefore, the court said:

Under the circumstances of this case, it would appear that Blair had no discretion in the matters involved, either in the furnishing of the water to the schools or for the payment of the bills rendered for such water. It is mandatory for the water companies to furnish the services and for the Board to pay for same. It was not intended for such a case to come within the meaning of the provisions of the statutes relied on here for the removal of Blair . . .³²

An attorney general's opinion dealing with this topic, issued in 1952, reinforced the constitutional prohibition on doing business with a firm of which a board member is an officer.³³ In this instance the purchasing of goods and services from a firm which may employ board

members as "mere employees" and not as officers, would not necessarily create a conflict with the statutes, but it was stressed that making such purchases elsewhere would be more desirable.³⁴

Another opinion, issued a year earlier, actually went so far as to say that the county board may not purchase at all from a concern which employs a member of the board.³⁵ This opinion would be overshadowed by the later thought on the subject mentioned above. However, the 1951 opinion also contained comments about purchasing from relatives of board members. In this regard the Attorney General found that the purchasing of goods or services from relatives of board members, such as brothers, etc., while not specifically limited, are indirect pecuniary interest matters and probably should be avoided in order to save possible hardships if such purchases should ever be declared by the courts to be in violation of statute.³⁶

In another opinion concerning doing business with relatives of board members, it was determined that a board could make purchases from a business concern owned by the son of its members if the son is sui juris (legally competent to handle one's own affairs).³⁷ However, a board of education cannot purchase materials from a company in which the spouse of a board member owns stock.³⁸

The Attorney General, in this regard said:

. . . It would be extremely naive to think that a board member would never benefit financially from a contract between the board and a company in which the board member's wife held stock. One must keep in mind that no showing of bad faith, corruption or evil intent is required under Code 61-10-15, for the conduct proscribed by this statute is unlawful precisely because it is forbidden by statute, not because it is inherently evil, corrupt or immoral.³⁹

The court had this to say on the subject of husband and wife business relationships in Haislip v White:

. . . the broad principle that there is still a relation existing between husband and wife, and mutual liabilities growing out of the family relation, which creates, on the part of each, an interest in the contracts of the other, out of which compensation arises, and the proceeds of which are used directly or indirectly within the family circle.⁴⁰

In a similar vein, in Arbogast v Shields the court ruled that a member of a city water board must be removed from office because it was said he had a pecuniary interest in a contract between the water board and an insurance agency in which he held a small stock ownership, the agency being substantially owned by his wife. The court deemed of no moment the fact that the board contracted, not with the member, Shields, himself, but with a corporation in which he was a stockholder. The court said:

. . . The circumstances that the insurance was handled through a corporation mitigates the evil not at all. Shields, as a stockholder in the Shields Insurance Company, at least indirectly, shared in the profits which that company derived from the handling of this insurance. True, it is shown that no dividends were paid by the corporation while these policies were carried. This is clearly immaterial. The profits went into the company; the company's finances were benefited thereby, and, whether it resulted in dividends or not, and whether these commissions increased a surplus or merely decreased a deficit, there was a direct benefit from the insurance contracts to all holders of stock in the Shields Insurance Company.⁴¹

Purchasing goods or services from a member of the board of education of another county in the state or from a firm in which such board member held an interest would be prohibited by an opinion issued in 1960.⁴² The Attorney General stressed that such sales would be prohibited under the West Virginia Constitution where it specifies that no one connected with the school systems of the state may engage in any

sales, proceeds or profits of anything used in the schools.⁴³ However, the Attorney General also determined in the same opinion that even if such sales were entered into it would not be in violation of the penal statute on pecuniary interest⁴⁴ and would not be grounds for the unseating of a board member. A later opinion also carried the prohibition of sales of textbooks and workbooks to the parents of school children by members of a board of education or their business firms.⁴⁵

In the case of Hunt v Allen the court spelled out that a member of a county board of education who has any, direct or indirect, pecuniary interest in any contract with the board, is guilty of a criminal offense under the code.⁴⁶ The court also determined in the instant case that such is true even if the board is spending monies that are not local tax revenues (e.g., federal funds, food services monies). A member of a county board of education may, however, sell products to such groups as school athletic associations in his own county as long as such purchases made by them do not go through the county board of education's books and records.⁴⁷

The Attorney General has said that it is permissible for boards of education to make purchases from a retired teacher, even though such teacher may be a member of the Teachers Retirement System.⁴⁸ The husband of a central office clerical employee is allowed to do business with a board of education since his wife, in her position, has no voice in decision making for the board.⁴⁹

Bidding Requirements

There are really very few actual requirements for the proper bidding procedures of a county school board's purchasing operations.

The statutes contain a bidding requirement in order for a county board of education to be reimbursed for 100 percent of the cost of transportation insurance coverage;⁵⁰ and, construction projects for a public improvement by a public authority are to be advertised for bids, under another passage of statute.⁵¹ However, the Attorney General had this to say about bidding:

While the Legislature of West Virginia has not required competitive bidding for the contracts of local units of government to safeguard public monies, it has laid down mandatory guidelines for the expenditure of funds which produce very similar results.⁵²

The "guidelines" referred to here by the Attorney General are statutory in nature⁵³ and are covered in some detail in Chapter 3 in the section entitled, "Expenditures and Payment Schedules".

The court in Wysong v Walden determined that it may be considered fraud and corrupt to accept a high bid. In Wysong, where it was charged that the board had accepted a bid for coal which was higher than the lowest bid received, the court said:

Where, however, the lowest bidder is responsible and, through fraud and corruption, the bid is rejected, such rejection constitutes a violation of official duties, justifying removal of the officers guilty thereof . . . a responsible bidder embraces both financial and moral responsibility.⁵⁴

Bidding in the purchase of school buses. Even though the statutes are practically silent on the requiring of competitive bidding, the State Board of Education and the State Superintendent of Schools have issued reference materials regarding the bidding of school bus purchases.

Restrictions listed by the State Board on the advertising for bus bids specify that the county board will advertise in one or more

newspapers of general circulation throughout the county at least ten days prior to the bid opening, giving the date of accepting and opening of bids, and the seating capacity required for the buses. In addition, the advertisement must notify prospective bidders where bid sheets and any other pertinent data can be obtained.⁵⁵

In the handling of bids, the State Board requires that: all the prospective bidders receive a bid invitation, the proper bid offer sheets, and a copy of the minimum standards for design and equipment at least one week prior to the bid closing date; and that bids are to be submitted on a competitive basis, on approved forms, in sealed envelopes, and dated upon receipt. Also, bids are to be requested from at least three firms; and, be opened publicly and then considered at an official session of the county board of education.⁵⁶ The State Superintendent of Schools has rendered an interpretation, that in submitting bids for school buses, the board may not limit only to dealers within the county because no law gives the authority for such a restriction in seeking bids.⁵⁷

STUDENT TRANSPORTATION

Permissive legislation in the West Virginia Code, 1931 as amended, allows for the transporting of students to and from school on buses owned by a county board of education.⁵⁸ The same passage of the code sets up eligibility standards for students to qualify for this transportation service. Therefore, it is recognized by the legislature, and by state education officials that the transportation of school children, whether they are in cities, towns, or rural areas, is an

integral service in a comprehensive educational program. The laws of the state thus provide a legal basis, as well as the basic conditions, for transporting students of school age to and from school and other places of educational opportunity, such as may be visited by students on field trips, etc.

The lack of understanding or ignorance of any school law or motor vehicle law does not exonerate school transportation personnel from the blame for the infraction of same. It is therefore imperative that school transportation administrators and school bus operators become familiar with all laws pertinent to school transportation.

Transporting Parochial Students

In the event that a county board of education does determine that it will provide a transportation system for school children, it has been determined that such service must be made available to all students of school age regardless of whether they go to public or parochial schools.⁵⁹ The Attorney General has said:

The broad language of the pupil transportation statutes, persisting through two extensive revisions of our school code with opinions and court decisions rendered affecting similar and analogous statutes being rendered and becoming well-known to the public can lead to no other reasonable conclusion than that the Legislature intended no limitation with respect to pupil transportation.

.....

. . . you are advised that our State statute as it is presently written provides that county boards of education shall have authority to provide adequate means of transportation for all children of school age. This means exactly what it says and if a county board of education, under reasonable rules and regulations, provides any transportation at all for students to attend public school, then transportation should

be and must legally be provided, under the same rules and regulations, for children to attend parochial schools.⁶⁰

The court in Hughes v Board of Education made several major determinations as to the effect of the statutes in relation to student transportation.⁶¹ These include:

1. transportation of parochial students on county-owned buses does not constitute public funds for private purposes, and therefore not in violation of the West Virginia Constitution;
2. such actions do not violate the First Amendment of the Constitution of the United States;
3. phrase "all children of school age" in the statute (18-5-13) is clear and unambiguous;
4. when boards determine to transport school children, they are not at liberty to arbitrarily or capriciously discriminate among children of school age;
5. the refusal to provide transportation to parochial students when it does transport public students is a denial of their rights to religious freedom under the First Amendment; and,
6. such refusal also denies their equal protection under the laws as provided by the Fourteenth Amendment.

These conclusions in Hughes are consistent with those reached by the Supreme Court of the United States in Everson v Board of Education where the court used the "child benefit theory", in which the children and their parents, and not the parochial schools, gain the benefits of the act of the transportation itself.⁶² The United States Supreme Court denied certiorari on the Hughes decision and thus upheld the lower court.⁶³

Other Statutory Provisions
Concerning Transportation

The statutes, in addition to authorizing permissive transportation, also set many standards for the operation of a transportation system. One of major import to any county public school transportation program is that if any students are transported all children of school age living more than two miles away from school, as measured by the nearest available road, are to be transported.⁶⁴ The court, in Nangle v Board of Education, determined that the two mile mark from school should be measured over the shortest traveled road or path, unless to do so would result in a hardship to the student.⁶⁵

The statutes also contain other provisions which concern student transportation. These are: providing transportation for school children participating in board-approved curricular and extracurricular activities,⁶⁶ and that boards of education have authority to enter into agreements with other county boards of education for the transporting of school children across county lines.⁶⁷ The use of school buses for board-approved curricular and extracurricular trips is covered in the section of this chapter entitled "Special Use of Buses." In regard to the making of agreements with another county board of education for busing across county lines, the code is silent as to what circumstances would prompt such contrasts, and no ruling or decision from any other source has been made.

The statutes also specify required bus conditions. These include: the placement and size of the words "school bus;"⁶⁸ a

school bus shall not be more than forty feet in length;⁶⁹ no vehicle is to be operated on West Virginia highways unless all equipment thereon shall be in good working order and the vehicle itself is in good mechanical condition;⁷⁰ any authorized school bus driver must be at least eighteen years of age, possess a chauffeur's license and have at least one year of driving experience;⁷¹ and, only persons regularly employed by the board shall drive or otherwise operate board-owned buses or equipment.⁷²

Certain actions are also required of the bus operators by terms of statute. These are: each driver must stop his bus at all railroad crossings (between fifteen and fifty feet from the nearest rail), look and listen for a train; and cross in a gear that will not require the shifting of gears while crossing (unless the railroad crossing is within a business or residence district, or is protected by a police officer or a traffic-control signal which directs traffic to proceed);⁷³ and operate no flashing warning signal lights on a school bus unless the bus is stopped, or slowing with the intention of stopping, on the street or highway to load or unload students.⁷⁴ No driver shall refuse to submit his vehicle to inspection when called upon to do so by the Department of Public Safety (State Police)⁷⁵ as allowed by the code;⁷⁶ and, no unauthorized person shall be allowed to operate a school bus upon the highways of the State.⁷⁷

The commissioner of Motor Vehicles is given the power and authority by the statutes to adopt various standards and specifications applicable to lighting equipment on school buses⁷⁸ and

to require periodic inspections of the "mechanism, brakes, and equipment" as he designates.⁷⁹ In addition, he may also make necessary rules and regulations to administer and enforce his duties in regard to school buses.⁸⁰

In the event that a bus fails an inspection of the proper authorities, the statutes provide for it to be removed from service until such time as the noted deficiencies can be corrected and a re-inspection shall have ascertained this fact.⁸¹

Boards of education are permitted by statute to contract with a private carrier for bus service for school children to and from school and approved curricular or extracurricular school activities.⁸² Any contract so entered into by the county board cannot be for a period of longer than the current fiscal year.⁸³ The display of warning flags or flares is required at any time a school bus is required to stop for any extended time on the traveled portion of the roadway.⁸⁴

The State Board of Education and Student Transportation

The State Board of Education, acting under its statutory authorities,⁸⁵ has passed specific rules and regulations for the county boards of education to follow in their operation of a school transportation fleet of buses. It is contained in the statutes that any officer or employee of a county board who violates these regulations shall be guilty of mis-conduct and subject to removal from office, or from his employment.⁸⁶ In the case of a private contractor who does not likewise abide by the rules of the State

Board of Education, the contract may be cancelled.⁸⁷

The bus operator has many duties which are specified by the State Board when he accepts the assignment of becoming a driver. As a bus operator he is required to:

1. transport only students, teachers, other board employees, or other persons approved by the board, and to not allow to be transported on the bus any baggage (except personal belongings of students), highly flammable materials, firearms, explosives, or animals (unless to be used as student experiment and then they are to be properly restrained);

2. keep proper discipline on the bus, not allow students to open windows and have their arms and/or heads out side of the bus, keep students out of his line of vision, keep the aisle clear of obstructions, not allow anyone to stand ahead of the seat back stanchion when the bus is moving, allow no unauthorized person to occupy his seat or tamper with the controls, and to conduct emergency exit drills;

3. post pupil regulations and the regular route listing all stops and times, and allow no posters or banners to be displayed inside or outside of the bus (except authorized professional safety posters);

4. not operate a bus that he knows is unsafe, keep a well-stocked first aid kit in a regular storage place, have a fire extinguisher ready to use at all times, use warning flags or flares when needed, follow all rules for the operation of a bus on the school grounds, and use tire chains when road conditions require;

5. pickup and discharge students only at regularly designated stops, keep the established route and make no changes without authorization, make complete and full stops, activate warning signal lights at least 100 feet before stops and in such a way so as to not create highway hazards, stop on or off the highway depending on where students have to come from or proceed to, but must not stop within 200 feet of the crest of a hill;

6. must keep the service door closed when the bus is in motion (except when crossing railroad tracks), must not leave his bus if the engine is running and the parking brake not set, may provide assistance to students across the roadway when conditions warrant it, and may not leave his bus even if an emergency unless provisions for the care and safety of the

pupils has been allowed for; and,

7. he is to report all road hazards and detours necessary to the transportation supervisor, report any incident of vehicle operation which appears to endanger the safety of the students being transported, and promptly make all reports⁸⁸ of injuries or accidents and other reports required of him.

These same regulations require that the county board is to provide an adult aide on all special education buses, and that the principal is to instruct all students in the transportation rules and regulations. They also provide that the superintendent or transportation supervisor may suspend riding privileges of students who violate the rules, and that a principal or teacher riding on a bus can provide discipline during the trip.⁸⁹

Other regulatory items of the State Board include: inspection and maintenance of school buses;⁹⁰ responsibilities of students being transported; qualifications for the employment of school bus operators;⁹¹ steps in qualifying for a special chauffeur's license for school bus operators;⁹² and, health and physical fitness of the school bus operator during the employment period.⁹³ In addition, there are regulations covering curricular and extracurricular trips beyond the immediate school area;⁹⁴ as well as, recommended practices for all those associated with the transportation of students;⁹⁵ and services to those who live beyond the two mile mark from school and who are not transported on county-owned buses.⁹⁶

Miscellaneous Factors Affecting Transportation Operations

The State Superintendent has determined that a county board of education may make minor improvements to private property, with

the approval of the owner, in order to properly maintain an area which is being utilized as a turn-around for school buses.⁹⁷

Both the Attorney General and the State Superintendent have issued statements to the effect that students living within two miles from school may be transported, if in the opinion of the board there is money available and budgeted to cover such additional costs as would be incurred.⁹⁸

The Attorney General has ruled that because the code⁹⁹ prohibits anyone from posting signs, advertisements, etc. on any stone, fence, etc., in the right-of-way of any public road or highway, a board of education has no authority to erect bus shelters paid for by advertising placed thereon.¹⁰⁰ He also has issued an opinion that school buses should be owned by the school board and not an individual school or Parent Teacher Association organization.¹⁰¹ In another opinion the Attorney General ruled that a bus drivers' permit can be recalled when the blood pressure of the driver rises above 150, under proper regulations of the State Board.¹⁰²

The State Superintendent has rendered an interpretation that in an emergency situation a driver may suspend riding privileges of a student on his bus, and the suspension must be reported to the county transportation supervisor or superintendent immediately.¹⁰³ The statutes give to the bus driver the same "in loco parentis" authority, to stand in place of the parent, as it does to the teacher, while students are in the care of the driver.¹⁰⁴ Under this statute, the State Superintendent has ruled that:

If children walk to school, the school is 'responsible' for them from the time they arrive at school until they arrive at home, assuming they travel at or near their normal walking route.

If children ride a school bus, the school is responsible from the time the child is picked up until he is deposited at that pick-up point in the afternoon.

If, at any time, the child, with the parent's permission or under certain circumstances his own volition, leaves the school grounds or leaves the 'authority' of the school, he then would not be the responsibility of the school system; this does not mean those circumstances where the school's agents have acted negligently or not in the manner of the 'reasonably prudent professional' in similar circumstances.¹⁰⁵

Student Transportation in Private Vehicles

The State Superintendent of Schools has issued an interpretation concerning the authority of the board to allow individuals to transport students to school-sponsored functions. The interpretation, in response to a request for such information, said:

The answer is 'yes.' The authority of a county board of education to provide transportation for students on extra-curricular trips is merely permissive; it is not mandatory . . .

A county board of education is itself immune from liability for personal injury and property damage occurring on its property or at any of its functions; however, board employees and others--even if acting pursuant to board authorization--are personally liable for injuries or damage resulting from their acts or failure to act.¹⁰⁶

Moreover, the court in County Court v Demus held that the West Virginia Constitution prohibits any governmental agency of the state from assuming responsibility for the liability of others.¹⁰⁷

In this regard the Constitution says:

The credit of the State shall not be granted to, or in aid of any county, . . . corporation or person; nor shall the State

ever assume, or become responsible for the debts or liabilities of any county, . . . corporation or person . . .¹⁰⁸

In the interpretation issued concerning the school obtaining parental permission, signed and notarized, allowing students to drive cars during school hours, and thereby relieving the board of education of any responsibility in the event of an accident, the State Superintendent said:

The answer is 'yes.' But, remember that your teachers and/or administrators in sending them on errands should act as 'reasonably prudent' professionals in the same position would act. This would not excuse negligence on your part, etc.¹⁰⁹

Transportation Insurance

It is contained in the statutes, that the purchasing of insurance to cover the negligency of any driver of board-owned vehicles (e.g., school buses, trucks or other vehicles) is an appropriate expenditure of public funds.¹¹⁰ In this regard the law is permissive and not mandatory in nature. However, if buses are to be used to transport students to and from extracurricular activities, it is specified that the insurance allowed for in the statutes must be in effect.¹¹¹

The Attorney General has indicated in an opinion that liability insurance can be purchased only to protect against the negligence of school bus drivers.¹¹² In a similar vein, the State Superintendent of Schools has interpreted the law to mean the same as has the Attorney General; however, going further he indicated that in the event a board of education purchased liability insurance, ". . . the insurance company must either waive or agree not

to assert governmental immunity as a defense to any claim covered by the policy."¹¹³

Since the transportation of students is allowed by the statutes,¹¹⁴ it is a governmental function. In Bradford v Board of Education the court held that a county board of education and/or its members cannot successfully be sued for damages arising out of the board's performance of its governmental functions.¹¹⁵ Even with this protection of immunity from suit, the legislature in its wisdom did allow for the purchase of liability insurance to cover its vehicles and made such coverage mandatory if buses are to be used for other than home-to-school-to-home transportation.¹¹⁶

Special Use of Buses

The question of the use of school buses for extracurricular activities and purposes other than the transportation of pupils to and from school has been the subject of much controversy. This debate has prompted various opinions of the Attorney General, as well as several interpretations of the State Superintendent of Schools and regulations by the State Board of Education.

The State Board's regulations concerning the use of buses for extracurricular trips beyond the immediate school area. These include such provisions as: arranging safe and adequate transportation for same; not letting trips conflict with the regularly scheduled student transportation; the need for and required amount of supervision; using only regular drivers; the purchase of insurance as required by law; and the filing of monthly reports about such

trips with the State Director of School Transportation.¹¹⁷

The use of publicly owned school buses for other than home-to-school-to-home transportation is one topic which has been of major importance to county boards. The activity on the part of both the Attorney General and the State Superintendent of Schools about this matter so indicates. However, another course of action that a county board must explore fully before allowing any special usage of its buses, no matter how minimal, is the matter of insurance coverage required by law.

The code in pertinent part states:

. . . Provided, however, that buses shall be used for extracurricular activities as herein provided only when the insurance provided for by this section shall have been effected.¹¹⁸

Before engaging in the use of the district's buses for special activities, it is incumbent upon the board to verify that its insurance policy is worded so as to offer the protection required by the code.

Since the court has determined that the board's authority in all matters is only that which is expressly stated or necessarily implied in the statutes, the board must be directed by the statutes in the granting of any special use of its buses.¹¹⁹ Historically, there have been conflicts of opinion about what type of activities would and would not fall within the purview of the code. For this reason a brief review of the opinions of the Attorney General and interpretations issued by the State Superintendent which pertain to the topic is included here.

Examining first opinions rendered by the Attorney General, we find that in 1953 the following was issued on the question:

It is our opinion that the intent of the Legislature was to limit the use of school buses to regularly scheduled school activities or to other county-wide meetings which the County Board of Education has approved as a part of the school program. It is to be noted that the statute gives the County Boards of Education authority to establish regulations concerning the use of school buses for what might be termed as extra-curricular activities. . . . We, therefore, answer the questions by stating if the activities outlined are considered a part of the school curriculum, and if, after a liberal construction, they can be considered as athletic, literary or band activities, then we feel that the school buses can be used for such transportation. But if the converse of this is true, it is our opinion that the school board would be exceeding its authority in permitting the buses to be used for such transportation.¹²⁰

Here, it is obvious that special uses of school buses was meant to be only for board approved activities having to do with the school educational program. A subsequent opinion followed in the same vein when it was determined that a summer camp merely for public recreation, and not operated by the county board of education, that ". . . the Board of Education is without authority to permit school buses to be used for the transportation of these children."¹²¹

In a further opinion, the Attorney General, when asked about the transporting of school bands to football games and public festivals or celebrations, had this to say:

If the . . . football game and the . . . festival have some reasonable relationship to the school curriculum, the board of education may authorize the use of a school bus or buses to transport the band members for the purpose of participating in such activities.

When a band participates in an activity, it is sometimes difficult to determine the relationship between the activity and the school curriculum. We assume that the band in question belongs to a school which will send athletes to participate in

the . . . football game. If so, this is an important factor in determining whether or not the athletic event is an 'extracurricular activity' reasonably related to the school curriculum.¹²²

In regard to the transporting of school bands to festivals or other similar celebrations, the Attorney General determined that in order for the board to have the authority to do so, the activity must be considered as competition designed only to improve the quality of the band, and not be merely entertainment for the spectators. Actually, the local board of education has the responsibility to determine whether or not the activity under consideration has a reasonable relationship to the school curriculum. The Attorney General further indicated that it is advisable for boards of education to promulgate rules and regulations (policies) by which it can determine the educational/competitive status of an activity versus the entertainment status of the event in which it takes place.¹²³

The Attorney General further enhanced the above premise when he said:

. . . a band at a football game . . . would be furnishing music and entertainment to add to the color and drama of the contest. It would be the band's part in providing such music and entertainment that would be the 'extracurricular activity' referred to in the statute . . .¹²⁴

He went on to say that, using this analogy, the activities of a student pep club at an athletic contest would be an extracurricular activity for this group. However, the board would have to determine for itself if it would wish to approve this as an activity eligible for the use of school buses.¹²⁵

A still later opinion recognizes that a board's authority to

transport pupils is not broad enough to furnish buses for programs not operated by the board as a regular part of the educational program of the county.¹²⁶ However, in that same opinion it was determined that a board might lease its property on a short term basis for a public purpose.¹²⁷ A board should take care that if a lease for buses is entered into with another public agency, that it is really buses being leased and not transportation services being sold.

The statute authorizing transportation¹²⁸ limits the extent to which buses can legally be used, and also further provides that in all cases school buses shall be driven only by regularly employed drivers.¹²⁹ The leasing of buses and drivers could be termed as the sale of transportation services which may well create undue risk on the part of the board, the driver and the board's insurance carrier. The leasing of buses to be driven by someone other than board employees would seem to be barred by the terms of the statute cited above.

In regard to transporting students from "Operation Headstart" programs, the Attorney General determined that these students, may be transported when the program is operated by a county board of education.¹³⁰

Interpretations issued by the State Superintendent are many and somewhat varied on the topic of bus useage. At times there seems to be a conflict between interpretations issued at different times on seemingly the same or similar subjects.

Concerning the special use of school buses, the State Superintendent in one interpretation answered that a board of education has no legal authority to rent its buses to a non-school organ-

ization.¹³¹ Shortly thereafter, in obvious reference to the opinion from the Attorney General (supra, page 203) regarding short-term leasing of buses, the State Superintendent indicated that ". . . local boards may lease buses to . . . public agencies when an educational purpose is involved."¹³² In between the two citings given herein, another interpretation also indicated that it would not be legal to rent or use buses for the programs of other than school organizations.¹³³ In this instance it is stated that "In order to safely do as you outline . . . the legislature . . . would have to provide by statute for such usage."¹³⁴

Further in this regard, a later interpretation issued, referring to the renting and leasing of school buses to non-school organizations, emphasized again that under the "unsigned" opinion of the Attorney General,¹³⁵ county boards may ". . . lease, not rent, buses to public agencies which are carrying out an educational activity."¹³⁶ It is also stressed that ". . . such leasing of local school property is completely at the discretion of the local school board."¹³⁷ In a similar vein an interpretation issued only thirteen days later again stressed these same points.¹³⁸

In a more recent interpretation by the State Superintendent, dealing with the topic of transporting disadvantaged youth to Youth Opportunity Camps, he had this to say:

A county board of education, may, according to West Virginia Law, 'provide for the free, comfortable and convenient use of any school property to promote and facilitate frequent meetings and associations of the people for discussion, study, recreation and other community activities' Although the customary understanding of this statute is that it applies to school buildings and grounds, nevertheless, the term 'property' means

'both real and personal estate' according to the West Virginia rules of statutory construction, except where a different meaning appears from the statute's context. In the context of this statute, the word 'any' would seem to give the word 'property' the broadest meaning imaginable and so include school buses.

No law in conflict with this view has been found; however, the Attorney General has interpreted the 'spirit of this statute' as envisioning the 'use of school property to promote activities of a public rather than a private nature,' the term 'public' being 'defined as pertaining to a state, nation or whole community.' Since the Youth Opportunity Camps are State funded they appear to be public activities, and the use of school buses to promote and facilitate the meeting and association of these young people at this public activity would appear to be within the School Law.¹³⁹

The following constraint, however, was also contained within the same interpretation:

The real problem facing boards of education on this question is not a legal one but rather one of means. If a board allows one public association or agency to use its facilities, then it must allow all others of the same category under similar circumstances to do likewise.¹⁴⁰

In other areas of concern about using school buses, the State Superintendent has held that the use of buses to transport athletes to an athletic banquet ". . . is legal if it is designated as a curricular or extracurricular activity approved by your board."¹⁴¹ However, the transporting of employee groups to meetings of a regional or in-service nature would not be allowed because the code ". . . provides for the transportation of children to school; no code provision exists for the transportation of other groups."¹⁴² This decision is in keeping with a similar one issued only the day before in which the State Superintendent said:

. . . this is not legal due to 18-5-13(6) which only authorizes a local board to transport pupils. Since a local board may only do that expressed by statute or necessarily arises

by implication thereof, additional legislation would be needed to give powers to the board.¹⁴³

The code does allow for boards of education to provide services to senior citizens groups as long as there is "no cost to the board" and that any trips are "operated, or approved by the commission on aging" and that "all costs and expenses . . . shall be borne by such commission."¹⁴⁴ This is also covered in an interpretation ask for specifically about senior citizens' groups.¹⁴⁵

LIABILITY AND INSURANCE

The insurance program of a school district is an important phase of the business operations of the county schools. The types of insurance a board may carry are determined by the statutes. These types of insurance are:¹⁴⁶

1. liability insurance against the negligency of bus operators;
2. public liability insurance generally covering the operations of the school district; and,
3. automobile insurance for a drivers' education program.

An in-depth discussion on liability insurance for the school transportation program has been included as a part of this chapter covering transportation (supra 198) and will not be duplicated here.

Tort Liability

A tort is a civil wrong committed by one party against another, independent of contract.¹⁴⁷ Torts may be divided into three categories:¹⁴⁸

1. intentional (e.g., where one party knows, or can foresee

the results of his intended act--assault, battery, false imprisonment, etc.);

2. strict liability (e.g., where a person may be liable for damages even though he is not at fault for another's injury--the courts have adopted this philosophy in order to place the liability on the person best able to bear the burden); and,

3. negligency (e.g., where conduct of one party falls below an established standard and causes injury to another person--one did not act in a manner come to be expected of the "reasonable man").

Each year a number of actions are brought by "children and other persons," the majority of which are seeking damages for alleged negligent acts of the school districts, their officers, employees or agents.¹⁴⁹ Just because one is injured, it does not automatically follow that the injured party will collect any money for redress from the other party involved--in cases of interest here, meaning the school district.

Hudgins says that the courts must decide the cause of an injury before any award of damages can be determined.¹⁵⁰ Also, according to Hudgins, the courts will usually pose these four questions in trying to determine the actual cause for an incident:

1. did one owe a care of duty to another?
2. did one fail to exercise that care of duty?
3. was there an accident in which a person was injured?
4. was the failure to exercise that care of duty the proximate cause of the injury?¹⁵¹

The court has determined, however, that in order to recover damages on the grounds of negligence, all the essential elements of actionable negligence must be present.¹⁵²

Garber and Reutter have said that:

Liability . . . has its roots in negligence. Just what constitutes negligence is not always clear. In any case the question of whether there is or is not negligence is one of fact, and therefore can be one for the jury.¹⁵³

According to some authors there are at least six main defenses in a tort liability case.¹⁵⁴ These are:

1. proximate cause--where the degree of proximity between the breach of duty complained of and the event(s) resulting in the injury is remote;

2. intervening cause--a contention that injuries were proximately caused by the independent, intervening action(s) of others;

3. contributory negligence--the injured party through his own negligence and fault contributes to his injury;

4. comparative negligence--awards are based on a degree of negligence; even though the injured party may be partly to blame for his own harm, he will not be totally barred from any recovery;

5. assumption of risk--the plaintiff by expressed or implied agreement assumes the risk of danger and thereby relieves the defendant of responsibility; and,

6. immunity--a historical and common law precedent which protects a state agency against liability for its torts.

Knaak says that the concept of sovereign immunity in such cases has been a part of American common law.¹⁵⁵ However, the concept is a very controversial topic, and seemingly has been such almost since the Pilgrims landed on Plymouth Rock by chance in 1620.

Governmental Immunity

In cases involving claims for torts brought against school districts, for many years there has been the "doctrine of governmental immunity," the status of which has had to be determined. This doctrine stems from the English theory of law that "the king can do

no wrong," which then leads one to the result that the government cannot be held liable for torts committed by its officers or employees.¹⁵⁶

The English courts have determined that:

. . . (in) another general principle of law . . . it is better that an individual should sustain an injury than that the public should suffer an inconvenience.¹⁵⁷

However, according to Turco, the whole theory of sovereign immunity finds its American foundation in Mower v Leicester (9 Mass. 247, 1812). This case was determined with reference to the decision of Russell v Men of Devon (100 Eng. Rep. 359, K.B. 1788), despite the lack of a rational foundation and was a poorly reasoned American decision.¹⁵⁸ In addition to its adoption into case law, governmental immunity has been embodied in some state constitutions.¹⁵⁹

It is settled that a public school district, as a local political sub-division of the state, is covered by the cloak of governmental immunity only where such doctrine is in effect.¹⁶⁰

Alexander points out that in recent years the states of Illinois, Wisconsin, Minnesota, and Arizona have abrogated by court order the governmental immunity concept for their school districts.¹⁶¹ The states of Alaska, California, Hawaii, New York, and New Jersey have abolished immunity of governmental agencies, subject to statutory control.¹⁶²

West Virginia and Governmental Immunity

West Virginia is one state which, at this writing, still upholds governmental immunity for its school districts. This

immunity stems from two sources¹⁶³--the constitutional and statutory incorporation of the common law of England into the law of the state, and the constitutional provision granting immunity from suit which reads:

The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding as garnishee or suggestee.¹⁶⁴

In another pertinent part the State Constitution also indirectly grants governmental immunity where it states:

Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the legislature.¹⁶⁵

The above section of the Constitution needs to be read in pari materia with a section of the Code, 1931, as amended, which reads:

The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three, or has been, or shall be, altered by the legislature of this State.¹⁶⁶

The court in Hamill v Koontz, held that any proceedings against boards and commissions which have been created by the legislature as agencies of the state, are in effect proceedings against the state.¹⁶⁷ In Kondos v West Virginia Board of Regents the court determined that the immunity of the state is absolute and cannot be waived, even by the State Legislature or any other state instrumentality.¹⁶⁸

In addition the court in Hesse v State Soil Conservation

Commission held that the prohibition of suit under the constitutional limitation above, relates also to any agency of the state which has been delegated any duties by the state.¹⁶⁹ Since county boards of education are creatures of the legislature¹⁷⁰ brought about under terms of the State Constitution,¹⁷¹ the doctrine of governmental immunity afforded by constitution is pertinent to them.¹⁷²

According to the Attorney General,¹⁷³ the leading case concerning boards of education and governmental immunity is Krutili v Board of Education. In this case, where a student in a classroom was injured while using a power saw, the court held that an action against the board could not be brought by the injured party because the function of education is governmental in nature and therefore immunity is extended to the agency.¹⁷⁴ In this regard the court said:

The general rule in this country is that a school district, municipal corporation, or school board is not, in the absence of a statute imposing it, subject to liability for injuries to pupils of public schools suffered in connection with their attendance thereat, since such district, corporation, or board in maintaining schools, acts as an agent for the state, and performs a purely public or governmental duty, imposed upon it by law for the benefit of the public, and for the performance of which it receives no profit or advantage.

.....

. . . The exemption of the government from liability is based on the theory of sovereignty. The acts of the government were those of the king. In our state, instead of the king being the sovereign, the powers of government reside in all the citizens of the state.

.....

. . . In fact, a cogent ground for non-liability is that boards of education and such educational agencies have no means to pay damages for such claims, are given no power to raise money therefor, and all funds placed under their control are appropriated by the law to strictly school purposes and cannot be diverted by them.¹⁷⁵

We have previously seen that the statutes allow for the expenditure of public funds to purchase liability insurance (see *Insurance, supra*, page 206). The court in Boice v Board of Education held that the fact that the board had contracted for indemnity insurance to pay any judgment against the board would not waive the board's natural immunity. The court said:

As the board is purely a statutory creature, it has no authority to change in any way the mold in which it was fashioned by the legislature. It cannot alter the fact it is a governmental agency; neither can it 'step down from its pedestal of immunity', for that immunity is incident to a governmental agency. Such a recession must come from the legislature and not from an act of the board, and we have no statute affecting the situation.¹⁷⁶

In Hamill the court said also that:

No agency, representative, or department of the State can consent that it be sued or waive state's constitutional immunity from suit.¹⁷⁷

The statute itself does say that if liability insurance is purchased, that:

. . . it shall contain a provision or endorsement whereby the company issuing such policy waives, or agrees not to assert as a defense to any claim covered by the terms of such policy, the defense of governmental immunity.¹⁷⁸

The statute prohibits the defense of immunity in any case where the amount sued for is equal to or within the limits of coverage under any indemnity policy.¹⁷⁹ In the event of any judgment rendered in an amount exceeding coverage afforded by the policy the claim of immunity would then apply to the excess. This permits school districts to purchase liability insurance and to waive immunity up to the coverage limit.¹⁸⁰

The fact that a section of the statutes¹⁸¹ allows the purchase of liability insurance by boards of education, therefore does not implicatively abolish the existing immunity, nor can the board of education be estopped from asserting its immunity. The court has rendered decisions upholding the governmental, or sovereign, immunity in the cases of Webster v Board of Education¹⁸² and Petros v Kellas.¹⁸³

The court in Green v Board of Education determined that the immunity of a county school board, from suit for damages because of injuries sustained by another party, stems not from any Constitutional provision, but from the fact that it is engaged in a governmental function.¹⁸⁴

The court indirectly upheld again the doctrine of governmental immunity for West Virginia school districts when it voted in June, 1976, not to hear appeals from two circuit court decisions. Both cases were concerned with suits against boards of education involving injuries, and had been turned down in their respective circuit court decisions.¹⁸⁵ However, the court has recently voted to now docket one of these cases. The case approved for docketing involves a suit against the Clay County Board of Education and the Clay County Commissioners on behalf of a student who was injured on her way to school when a plank broke on a footbridge.¹⁸⁶ The plaintiff has based her case on the fact that boards of education are required by the code to maintain footbridges utilized for travel to schools or school buses.¹⁸⁷

Boards of education should be aware that changes have occurred in the past few years in the concept of governmental immunity. It has

already been noted that several states have abrogated the doctrine for school districts. While West Virginia at this writing has not followed suit, it should be noted that two separate court decisions have recently terminated governmental immunity for the municipalities of the state.¹⁸⁸ In the most recent, Long v Weirton, the court held that governmental-proprietary distinctions are abrogated and obsolete.¹⁸⁹

Governmental Functions v
Proprietary Functions

The Attorney General, in an opinion issued, intended to clarify the differences between governmental and proprietary types of functions, said:

The nonliability of counties and cities (including county boards of education) for many torts is a harsh rule, and courts in dealing with tort claims against political subdivisions of the State, have recognized a distinction between acts and duties which are public and governmental in their nature and those which are of a private or proprietary nature. It appears to be clear that our Supreme Court of Appeals believes that the right to sue and be sued depends upon whether or not the agency is involved in activities which are proprietary or governmental. If the activity is proprietary, then the agency can be sued as any individual would be sued; if the activity is governmental, then the immunity of Article VI, Section 35, will protect that agency in the performance of that governmental function.

The test, therefore, is to determine which activities are governmental and which are proprietary, and this test is left to the court in which the suit is commenced.¹⁹⁰

The court in Hayes v Cedar Grove held that the difference between these two functions as performed by governmental agencies is by no means clear and cannot be made categorically. In the instant case the court noted that in determining the distinction of any action, it must first be presumed to be governmental. Then in the event that

there be uncertainty, the doubt should be resolved in the favor of a governmental rather than a proprietary function. In this way the usual function of government to act in the interest of the people as a whole is maintained.¹⁹¹

In Ward v County Court the court found that boards of education, as well as other governmental subdivisions, can be subject to actions brought against it. The court held:

. . . where a legislative act attempts to create such liability, or where the action of the board of education does not pertain to governmental functions. It must be kept in mind that the constitutional provisions relating to immunity of the State, and its agencies, cannot be waived by the Legislature. That immunity is absolute.¹⁹²

The court also went on to say that the same type of function, when performed by two different governmental units, is in reality the same. The court held that even though the defendant in the action was governmental in nature, its functions were proprietary and, hence, not entitled to immunity. In this regard it said:

We find no sound reason for holding a municipality liable for such operations (playground) and not holding a public corporation of the nature of the Raleigh County Park Board liable for the same type of operations. If the function is proprietary when performed by a municipality, it is proprietary when performed by such a corporation as the Raleigh County Park Board.¹⁹³

The Attorney General also agreed with this reasoning of the court when he rendered an opinion that the operation of a public playground and swimming pool is a proprietary function. It is possible that a board of education would not be immune from negligence suits arising from their operations. He said:

It is impossible to distinguish the liability of a municipality from that of a board of education or playground board

in operating a public playground.

.....

. . . while operating a public park or playground, may be held liable for injuries or damages sustained by their negligence or that of their employees . . .¹⁹⁴

In another opinion the Attorney General held that the immunity from action of any county board of education from liability for negligence depends upon whether or not the board of education, at the time the personal injury or property damage is done, is engaged in the performance of a governmental function.¹⁹⁵ The sponsoring of a practical nurses' training program by a board of education would render it immune from any negligent acts of the students involved; however, the Attorney General added that the hospital cooperating with the board, and the students themselves, would remain liable for such acts of negligence.¹⁹⁶

If the board is at any time acting in a proprietary capacity, the Attorney General has said that the board would be therefore liable for their torts, but then only if they have been found by a court of competent jurisdiction to be negligent.¹⁹⁷

In an opinion dealing with the board's operation of a funded Headstart program, the Attorney General determined that this would be an authorized governmental function and the same immunity from liability would accrue to the board as in its regular educational program.¹⁹⁸

The State Superintendent also has rendered an interpretation in which he discussed the two functions. Here he said:

Rarely is a school activity proprietary rather than governmental; therefore, ordinarily a board may avoid liability for

personal injury merely by defending on the grounds of governmental immunity.

Public liability insurance can, however, be used to protect anyone injured on school property or at school activities.¹⁹⁹

Personal Liability of Board of Education Members

There have been many court decisions through the years affirming that the individual members of West Virginia county boards of education cannot be held liable for actions arising out of the performance of their statutory duties. The court in State v Cavendish determined that no personal costs should be adjudged against a public officer, in mandamus action, who is honestly and in good faith endeavoring to perform his duty as he conceives it.²⁰⁰

In Kondos, where a charge of defamation was made against a university president by a football coach, the court held that a public officer acting within the scope of his authority in the performance of his official duties may not be held civilly liable for the consequences of his acts, unless it can be proven that the acts were willful, malicious or corrupt.²⁰¹

In Clark v Kelly the court indicated that many cases have applied the sovereignty principles to boards of education when they perform a purely governmental function. The immunity of the state and its agencies, however, does not always extend to its officers and agents in their private capacity, where, in the performance of their duties, they misuse or exceed their powers.²⁰²

The Attorney General has issued an opinion that public funds cannot be expended to purchase liability insurance to cover any

personal liability of a public officer. The only time he could be held personally liable would be while acting outside of his authority or its scope.²⁰³

The court has also found, in Bradford v Board of Education, that the county board of education or its members cannot successfully be sued for injuries and damages arising out of the board's performance of its governmental function. But, members of a county board may be liable for injuries or damages arising out of activities which are beyond the scope authorized by the statutes,²⁰⁴ or which are proprietary in nature.

Personal liability and the Civil Rights Act of 1871. A tort is a civil wrong between parties and is handled in the state courts. However, in a rather recent development in school law, persons have sued in the federal courts for alleged attempts to deny one his constitutional rights. While no such suits have been entered in West Virginia against school board members as of this writing, it is definitely a development of which the school official should be aware.

The Civil Rights Act of 1871 says in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²⁰⁵

As a result of the landmark decision of the United States Supreme Court in Wood v Strickland²⁰⁶ the possibility of school

board members being personally liable for their official acts has been significantly enhanced. However, the court also added a note of encouragement for board members and administrators when it said:

We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity.²⁰⁷

Hudgins has said that relief under the Civil Rights Act of 1871 may take the form of equity or damages. He also reports that the act has been interpreted by the court to allow students as well as adult employees to sue for relief.²⁰⁸

In the instant case two students, having been expelled from attending school, claimed that their constitutional right to due process was violated and they then ask for damages. In granting a writ of certiorari on the part of the board members involved, the high court reviewed the case. The court then upheld the Court of Appeals for the Eighth Circuit and concluded a compensatory award would be appropriate, but only if the boards' actions could be reasonably characterized as not being in good faith. Here the court broke completely from tradition by ruling that a school board member is not immune from liability (at least not under the Civil Rights Act of 1871) if he or she knew, or should have been reasonably aware, that the actions taken would be in violation of the constitutional rights of a student, or if the acts were malicious in nature.²⁰⁹

Personal Liability of
Board Employees

Even though school districts in many jurisdictions are immune from liability for negligence (including West Virginia as of this writing--see West Virginia and Governmental Immunity, supra), that immunity does not extend to the administration²¹⁰ and other board employees. The teachers, administrators, cafeteria workers, custodians, etc. are all subject to tort liability.²¹¹

Liability is not imposed on an administrator because another school employee has negligently caused harm to a student, even though the employee is a direct subordinate. However, an administrator may have subjected himself to liability if he negligently employed an incompetent person who caused the harm. Liability can also arise if the administrator directs a subordinate to perform acts which cause the injury, knowing or being able to reasonably foresee that harm would result from the order.²¹²

The State Superintendent of Schools has issued an interpretation that even though board members may personally not be liable for their authorized actions, this is not the case for employees of the board.²¹³ However, the employee is not covered by the immunity doctrine, there are several defenses which can be utilized: contributory negligence; pure accident; intervening cause; and, assumption of risk.²¹⁴ It should be noted that the statutes, as amended in 1973, do allow for boards of education to protect their professional employees against liability for negligent injury and damage caused while at work, through the purchase of liability insurance.²¹⁵

FOOD SERVICES

In the actual operation of West Virginia's school hot lunch programs, there have been almost no elements of legal entanglement. However, the Attorney General has issued an opinion that a public school can distribute hot lunches to parochial schools;²¹⁶ and, the State Superintendent of Schools has rendered an interpretation that a board of education need not continue a lunch program which is economically unjustified, but it must continue to honor its employment contracts with its school lunch employees.²¹⁷ Also, in the same interpretation, he has determined that the board may not reduce the hours worked by such employees as an economy measure.²¹⁸

In Hunt v Allen the court determined that any monies spent in the maintenance of a hot lunch program, even though they may have come from Federal funds, must be spent subject to the provisions required by State fiscal laws.²¹⁹ In the instant case the court held that even though certain invoices for food stuffs were paid to the business concern of a board member with monies received as Federal subsidy from the operation of a school lunch program, and not with local tax monies, there was still a pecuniary interest on the part of the defendant.²²⁰ See the section in this chapter entitled "Pecuniary Interests in Purchasing."

SUMMARY

Boards of education in West Virginia, in that they expend public monies for the various goals and services that they purchase, have

constitutional and legislative guidelines to which they must adhere in their purchasing activities. All who engage in such activities with a county school board are assessed with the requirement that they be knowledgeable of the legal limitations of the board's authorities.

The courts have been zealous in the upholding of the constitutional restriction of a public servant having any personal or pecuniary interest in the financial affairs of the public. Doing business with one's self cannot be allowed to happen, the courts have held, and the statutes allow for no exceptions to the rule. Any involvement of this type in the business dealings of the district can be cause for legal action against the board member(s) and may be a criminal offense.

The State Board of Education is currently engaged in the preparation of a directive manual which is designed to make boards of education aware of the proper procedures in purchasing and related activities.

While engaging in competitive bidding for the acquiring of goods and services is highly desirable, if, for no other reason than to verify the most expeditious use of public funds, it is not mandatory except in the purchase of school buses and liability insurance covering the operations of the school buses, and then only if the board desires to receive state aid reimbursement for the cost of the insurance.

The statutes are very specific about the transporting of students. Likewise, the State Board of Education has enacted various rules and regulations concerning the operation of a county school transportation system, and the violation of these rules and regulations

can lead to removal of members of the board of education from office, and the dismissal from employment for board employees.

The home-to-school-to-home transportation of students and the use of buses for board-approved curricular and extracurricular activities, is done under statutory authority for all students who reside at least two miles from school. This service, if entered into by the county board, must also then be extended to students attending private and parochial schools throughout the county.

Insurance, covering negligent operation of buses, is permissive under the statutes. Coverage of this type only becomes mandatory if the board wishes to utilize school buses for the transporting of students to curricular or extracurricular activities.

The policy of allowing school buses to be utilized in the transporting of other than students to board-approved activities has been subject of much attention on the part of both the Attorney General and the State Superintendent of Schools. Although the trend in the deliberations of these two public officials appears to be more liberal in scope as to the "legal" uses buses may be put to, an overriding factor may well be the attitude taken by the board's insurance carrier toward usage involving additional trips and/or the sponsoring organizations of such trips.

Whether a county board should purchase liability insurance for anything other than its transportation operation, even though legally permissible to do so, is the subject of much disagreement. The West Virginia Supreme Court of Appeals has steadfastly maintained its view that boards of education are cloaked in governmental immunity when it

comes to tort liability. It is important to note the basic differences between governmental functions and proprietary functions in this regard. Other governmental agencies, such as municipalities, have had their cloak of governmental protection taken away by the courts. Consequently, the governmental versus proprietary situation ceases to be a factor for them. However, such is not the case for county boards of education at this time.

The local board of education should be cognizant of the fact that various states have abrogated the concept of governmental immunity for public bodies. While this is not the situation at this time in West Virginia, it has done away with the doctrine as it would pertain to the municipalities of the state.

It is, therefore, incumbent upon the county board of education to be certain that in the many operational duties it performs it stays within its authority. The board, and its individual members, could be held liable for injury or loss resulting from actions stemming from the misuse or excessive use of powers. It is permissible for a county board of education to purchase insurance covering a judgment for damages rendered against a teacher or other employee who may be judged guilty of neglect in the event of an injury or loss.

In the area of food services, boards of education and their employees, responsible for the daily operations of the program, should be mindful that the same legal restrictions on the purchasing and expenditure of monies which apply to general funds also apply here. The fact that the vast majority of monies handled in these programs are either federal funds or else the local payment for lunches by

students, is of no consequence. All monies expended by the school district must be handled in the same manner.

FOOTNOTES--CHAPTER 5

¹W Va Code Ann., sec. 18-5-19.

²W Va Constitution, article XII, section 9.

³Honaker v Board of Education, supra (1896).

⁴W Va Code Ann., sec. 18-9B-12.

⁵Purchasing, Receiving, Inventory Control and Accounts Payable Manual (Draft Copy), Charleston, WV: West Virginia State Board of Education, 1976.

⁶47 Op. Att'y. Gen. 7, 1956.

⁷Honaker v Board of Education, supra (1896).

⁸Pennsylvania Lightning Rod Co. v Board of Education, supra (1882).

⁹Ward v Board of Education, supra (1917).

¹⁰Rudman v Board of Education, 91 WV 731, 114 SE 208 (1922).

¹¹SBE 4334.

¹²Ibid.

¹³West Virginia Minimum Standards for Design and Equipment of School Buses, Charleston, WV: West Virginia State Board of Education, 1976.

¹⁴SBE 4334.

¹⁵Ibid.

¹⁶W Va Code Ann., sec. 18-9A-7.

¹⁷SBE 1224.1.

¹⁸Ibid.

¹⁹Ibid.

²⁰W Va Constitution, article XII, section, 9.

²¹W Va Code Ann., sec. 61-10-15.

²²Alexander v Ritchie, 132 WV 865, 53 SE 2d 735, (1949).

- ²³W Va Code Ann., sec. 61-10-15.
- ²⁴Alexander v Ritchie, supra (1949).
- ²⁵Jordan v McCourt, 135 WV 79, 62 SE 2d 555 (1951).
- ²⁶Ibid.
- ²⁷W Va Code Ann., sec. 61-10-15.
- ²⁸Alexander v Ritchie, supra (1949).
- ²⁹Jordan v McCourt, supra (1951).
- ³⁰Ibid.
- ³¹49 Op. Att'y. Gen. 28, 1960.
- ³²Dials & Smith v Blair, 144 WV 764, 111 SE 2d 17 (1959).
- ³³45 Op. Att'y. Gen. 55, 1952.
- ³⁴Ibid.
- ³⁵44 Op. Att'y. Gen. 132, 1951.
- ³⁶Ibid.
- ³⁷45 Op. Att'y. Gen. 256, 1953.
- ³⁸Op. Att'y. Gen. 8-29-73.
- ³⁹Ibid.
- ⁴⁰Haislip v White, 124 WV 633, 22 SE 2d 361 (1942).
- ⁴¹Arbogast v Shields, 123 WV 167, 14 SE 2d 4 (1941).
- ⁴²48 Op. Att'y. Gen. 198, 1960.
- ⁴³W Va Constitution, article XII, section 9.
- ⁴⁴48 Op. Att'y. Gen. 198, 1960.
- ⁴⁵50 Op. Att'y. Gen. 21, 1962.
- ⁴⁶Hunt v Allen, 131 WV 627, 53 SE 2d 509 (1948).
- ⁴⁷Ibid.
- ⁴⁸46 Op. Att'y. Gen. 5, 1954.

- ⁴⁹Op. Att'y. Gen. 260, 1961.
- ⁵⁰W Va Code Ann., sec. 18-9A-7.
- ⁵¹Ibid, 21-5A-3.
- ⁵²Op. Att'y. Gen. 9-28-73.
- ⁵³W Va Code Ann., sec. 11-8-26.
- ⁵⁴Wysong v Walden, supra (1949).
- ⁵⁵SBE 4334.
- ⁵⁶Ibid.
- ⁵⁷SSI 12-7-71.
- ⁵⁸W Va Code Ann., sec. 18-5-13.
- ⁵⁹Hughes v Board of Education, WV , 174 SE 2d 711 (1970);
Op. Att'y. Gen. 1-3-69; SSI 1-11-73, SSI 2-5-75.
- ⁶⁰Op. Att'y. Gen. 1-3-69.
- ⁶¹Hughes v Board of Education, supra (1970).
- ⁶²Everson v Board of Education, 330 US 1, 67 S Ct 504, 91 L Ed
711 (1946).
- ⁶³Hughes v Board of Education, 403 US 945, 91 S Ct 2274, 29 L
Ed 2d 854 (1971).
- ⁶⁴W Va Code Ann., sec. 18-5-13, 18-8-1.
- ⁶⁵Nangle v Board of Education, 81 WV 353, 94 SE 500 (1917).
- ⁶⁶W Va Code Ann., sec. 18-5-13.
- ⁶⁷Ibid.
- ⁶⁸Ibid, 17C-12-7.
- ⁶⁹Ibid, 17C-17-4.
- ⁷⁰Ibid, 17C-16-1, 17C-16-2.
- ⁷¹Ibid, 17B-2-4.
- ⁷²Ibid, 18-5-13.

⁷³Ibid, 17C-12-3.

⁷⁴Ibid, 17C-12-8.

⁷⁵Ibid, 17C-16-3.

⁷⁶Ibid, 17C-16-2.

⁷⁷Ibid, 17B-4-4.

⁷⁸Ibid, 17C-12-3.

⁷⁹Ibid, 17C-16-4.

⁸⁰Ibid.

⁸¹Ibid, 17C-16-2, 17C-16-3.

⁸²Ibid, 18-5-13; 50 Op. Att'y. Gen. 524, 1963.

⁸³50 Op. Att'y. Gen. 524, 1963.

⁸⁴W Va Code Ann., sec. 17C-15-40.

⁸⁵Ibid, 17C-14-12, 18-2-5; 45 Op. Att'y. Gen. 548, 1953.

⁸⁶W Va Code Ann., sec. 17C-14-12.

⁸⁷Ibid.

⁸⁸West Virginia School Transportation Regulations, Charleston,

WV: West Virginia State Board of Education (Revised Edition), July, 1972.

⁸⁹Ibid.

⁹⁰Ibid.

⁹¹Ibid.

⁹²Ibid.

⁹³Ibid.

⁹⁴Ibid.

⁹⁵Ibid.

⁹⁶SBE 4333; SSI 1-11-73.

⁹⁷SSI 1-13-72.

- ⁹⁸37 Op. Att'y. Gen. 245, 1937; SSI 6-12-75.
- ⁹⁹W Va Code Ann., sec. 17-19-1
- ¹⁰⁰49 Op. Att'y. Gen. 229, 1961.
- ¹⁰¹45 Op. Att'y. Gen. 628, 1954.
- ¹⁰²45 Op. Att'y. Gen. 703, 1954.
- ¹⁰³SSI 4-15-74.
- ¹⁰⁴W Va Code Ann., sec. 18A-5-1.
- ¹⁰⁵SSI 8-4-72.
- ¹⁰⁶SSI 12-14-73.
- ¹⁰⁷County Court v Demus, 148 WV 298, 135 SE 2d 352 (1964).
- ¹⁰⁸W Va Constitution, article X, section 6.
- ¹⁰⁹SSI 1-14-72.
- ¹¹⁰W Va Code Ann., sec. 18-5-13.
- ¹¹¹Ibid.
- ¹¹²45 Op. Att'y. Gen. 754, 1954.
- ¹¹³SSI 1-4-73.
- ¹¹⁴W Va Code Ann., sec. 18-5-13, 18-5-16.
- ¹¹⁵Bradford v Board of Education, 123 WV 228, 36 SE 2d 512 (1946).
- ¹¹⁶W Va Code Ann., sec. 18-5-13.
- ¹¹⁷SBE 4336.
- ¹¹⁸W Va Code Ann., sec. 18-5-13.
- ¹¹⁹Shinn v Board of Education, *supra* (1894); Madachy v Huntington Horse Show, *supra* (1937); State v Rouser, 127 WV 392, 32 SE 2d 865 (1945).
- ¹²⁰45 Op. Att'y. Gen. 296, 1953.
- ¹²¹46 Op. Att'y. Gen. 457, 1956.

¹²²50 Op. Att'y. Gen. 62, 1962.

¹²³Ibid.

¹²⁴Op. Att'y. Gen. 2-8-71.

¹²⁵Ibid.

¹²⁶Op. Att'y. Gen. 5-5-71.

¹²⁷Ibid.

¹²⁸W Va Code Ann., sec. 18-5-13.

¹²⁹Ibid.

¹³⁰51 Op. Att'y. Gen. 282, 1965.

¹³¹SSI 2-14-72.

¹³²SSI 5-24-72.

¹³³SSI 4-12-72.

¹³⁴Ibid.

¹³⁵Op. Att'y. Gen. 5-5-71.

¹³⁶SSI 5-26-72.

¹³⁷Ibid.

¹³⁸SSI 6-8-72.

¹³⁹SSI 2-13-73.

¹⁴⁰Ibid.

¹⁴¹SSI 6-1-72.

¹⁴²SSI 6-2-72.

¹⁴³SSI 6-1-72.

¹⁴⁴W Va Code Ann., sec. 18-5-13.

¹⁴⁵SSI 8-6-75.

¹⁴⁶W Va Code Ann., sec. 18-5-13, 18-6-7.

¹⁴⁷Alexander, et. al., op. cit., p. 324.

¹⁴⁸Ruth Alexander and Kern Alexander, Teachers and Torts, (Middletown, Kentucky: Maxwell Publishing Company), pp. 1-12.

¹⁴⁹William C. Knaak, School District Tort Liability in the '70's, (St. Paul: Marris Publishing Company, 1969) p. 1.

¹⁵⁰H. C. Kudgins, Jr., et al, The Yearbook of School Law 1976, (Topeka, Kansas: National Organization on Legal Problems of Education, 1976), p. 53.

¹⁵¹Ibid.

¹⁵²Keim v McLaughlin, 121 WV 30, 1 SE 2d 176 (1939).

¹⁵³Lee O. Garber and Edmund Reutter, Jr., The Yearbook of School Law, (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1968), p. 87.

¹⁵⁴Alexander and Alexander, op. cit., p. 22; Knaak, op. cit., pp. 71, 73.

¹⁵⁵Knaak, op. cit., p. 5.

¹⁵⁶Alexander, op. cit., p. 335.

¹⁵⁷Russell et al v the Men of Devon, 100 Eng. 359 (1788).

¹⁵⁸76 W. Va. L. Rev. 545 (1974).

¹⁵⁹Ibid.

¹⁶⁰Alexander, op. cit., pp. 335-36.

¹⁶¹Ibid, p. 340.

¹⁶²Ibid, p. 349.

¹⁶³76 W. Va. L. Rev. 545 (1974).

¹⁶⁴W Va Constitution, article VI, section 35.

¹⁶⁵Ibid, article VIII, section 21.

¹⁶⁶W Va Code Ann., sec. 2-1-1.

¹⁶⁷Hamill v Koontz, 134 WV 439, 59 SE 2d 879 (1950).

¹⁶⁸Kondos v West Virginia Board of Regents, 318 F. Supp. 394 (1970).

- 169 Hesse v State Soil Conservation Commission, 153 WV 121, 168 SE 2d 293 (1969).
- 170 W Va Code Ann., sec. 18-5-1.
- 171 W Va Constitution, article XII, sections 1, 3.
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Chapter 6

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

THE SUMMARY AND CONCLUSIONS

This chapter contains a brief summary of the topics discussed in considerable detail in each of the chapters of the study. As a result of having made the study, the researcher has made various conclusions concerning many of the factors which legally affect the administration of a public school system in the State of West Virginia. Those conclusions, along with several recommendations for future consideration after completion of the study, are stated here in advance of the summary and conclusions for each chapter.

Education and the States

Nationally, education is a matter left to each individual state through the application of the Tenth Amendment to the Constitution of the United States. The State of West Virginia has established its educational system by a constitutional provision which states:

The legislature shall provide, by¹ general law, for a thorough and efficient system of free schools.

Education as a "Right"

The United States Supreme Court in Brown v Board of Education determined that an equal educational opportunity for all was a necessity in order for a child to be able to succeed in life.²

Even though the same tribunal in San Antonio Independent School District v Rodriguez held that education is not a "fundamental right" and therefore not to be afforded explicit or implicit protection under the Constitution,³ it still follows that the educational system of any state is a matter of extreme importance to the future of that state and to the nation as a whole. Each local board of education carries with it in its operations the authorities and responsibilities granted to it.

The State Board of Education

Under terms of the statutes, the West Virginia State Board of Education has the authority not only to make rules and regulations to enforce the school laws of the state, but also to require building and remodeling plans and specifications of county boards to be submitted to it for approval. In this regard the state agency serves as an intermediary between the county boards of education and the legislature.

Authority of West Virginia County Boards of Education

Because of legislation, there can be no doubt that the county boards of education in West Virginia possess only those powers and authorities expressed, or necessarily implied, in the statutes. The county board of education is created by the legislature and charged with the duties necessary to carry out the constitutional mandate set forth above.⁴

The court has on many occasions steadfastly upheld this

premise of expressed or implied authority for the county school board. Among these determinations has been a recent decision where the court stated in its syllabus of Evans v Hutchinson:

A board of education is a corporation created by statute with functions of a public nature expressly given, and no other; as such, it can exercise only such power as is expressly conferred or fairly arises by necessary implication, and only in the mode prescribed or authorized by statute.⁵

Board of Education Functions

Therefore, the student of the legal status for county school boards must conclude that the board may perform only those functions expressly mentioned or necessarily implied by the statutes, and no others. In this regard, indulgency in any other function or activity on the part of the board would then be an illegal act and could lend itself to an action against the board on the part of a taxpayer to vacate such board activity. Depending upon the circumstances of the case at hand, the appropriate legal action on the part of a citizen could merely order the board to cease and desist from such activity, or it could cause board members to repay to the public treasury sums of money determined to be illegally spent. It could also cause board members who had concurred (voted) for the original action in question to be removed from the board, and/or cause such board members to face possible criminal prosecution for their actions.

Similarly, the court in Spedden v Board of Education held that as long as a board maintained its actions within its authorities, it was immune from control by the courts. In its syllabus the court said:

So long as public governing body acts within the limits of its legal powers and jurisdiction, the exercise of its judgment and discretion is not subject to review or control by the courts at the instance of citizens, tax-payers or other interested persons, in the absence of a statute authorizing it.⁶

As the court said in Brown:

School districts . . . are organized not for the purpose of profit or gain, but solely for the public benefit, and have only such limited powers as may be necessary for that purpose. They have therefore been said to be corporations of the most limited power known to the law. They are but the agents of the state for the sole purpose of administering the state system of public education, and have only such powers as are conferred expressly or by necessary implication.⁷

Therefore, it must be concluded that without a doubt the local board of education can perform only those duties, functions and authorities authorized or implied by the statutes; and in so doing, they will not be subject to the court jurisdiction or injunction if they stay within the parameters of such powers.

Introduction

Policymaking is the fundamental role for boards of education everywhere. Policies, then, are the rules the school district is to be governed by and therefore they should always be up-to-date in their meaning. Increasingly, schools and school personnel are being brought into the courts; therefore, the district's policies must be consistent with the foundations for legality that the courts will look at. In this chapter the problem of the study was introduced and identified; the need for overall assistance offered by the study was set forth; the objective of the study was delineated along with its incorporated limitations; and, the methods utilized by the researcher in completing the study were covered.

Background

The sources of school law upon which boards of education must build the policies for the day-to-day administering of their school districts were set forth in this chapter. These sources include: constitutional law; statute law; judicial law; opinions of the State Attorney General; and, interpretations of school law as issued by the State Superintendent of Schools. Additionally, such background materials as the make-up of our federal and state court systems; construction of the statutes by the courts; and, expressions of the importance of school board policies were covered.

Financial Operations

This chapter covered the legal references for boards of education policies in all areas of financial operations for a county school district in West Virginia. Included were materials on revenues of all types; allowable (legal) expenditures; the various funds which are authorized to be maintained and the procedures for handling them; budgetary operations; and, auditing and reporting to the public.

Conclusion--local tax revenues. Once a county board of education has levied the entire legally mandated rate of taxation on each of the four classes of property, the only avenue open to it is to increase taxes by the excess, or special, levy. In this regard a special election must be held. The special election must attain at least a 60 percent affirmative vote of the people casting ballots. The tax rates may be increased by as much as 100 percent for a period of five years.

Conclusion--budgetary methods and procedures. The process that each county board of education must follow in setting its annual operating budget is set forth in the statutes and must be followed explicitly to insure that any actions by the board in budgeting can not be set aside through a legal complaint through the courts.

Conclusion--expenditures. The local board of education has only the powers and authorities expressed by, or necessarily implied within, the statutes. Therefore, it must be concluded that payments of monies on the part of the school board can legally be made only for goods or services so authorized. Anything beyond these authorities could be termed an illegal expenditure which the members of the board could be made to repay personally.

Conclusion--auditing and reporting. The financial books and records of a local county school board are public records and are to be audited by the State Tax Commissioner's office. The board is to annually publish a financial statement in newspapers of the county listing its financial condition and expenditures. The minutes of meetings of the board are also public records and are open to the inspection of all citizens. Each county board of education also must hold all its meetings in the "sunshine", except when certain specific topics are being discussed. Also, under the "open records" legislation, almost all documents and reports of the board of education are to be open to public scrutiny.

Bonding, Site Acquisition,
Construction Contracts,
Building and Grounds
Management, and Property
Disposal Procedures

All phases of property and building facilities management were covered in this chapter. Beginning with the steps and legalities necessary to create a bonding program to finance the acquisition of properties and the construction of physical plant facilities for the modern educational program, the legal references were outlined to help inform boards of education of the requirements before monies may be obtained by the selling of bonds. The procedures for site acquisition; the management of buildings and grounds belonging to the board; use of such facilities by others outside of the school system; and, the disposal of unneeded properties were also discussed in detail in this chapter.

Conclusion--bonding. In the event that a local board of education wishes to issue bonds in order to obtain monies for the up-grading or additions to its physical facilities, there is a very strict legal procedure to follow. There must be a special election held in which the approval of at least 60 percent of those voting approve the issuance of bonds for specific projects. The board is limited in total indebtedness for bonding purposes to an amount not to exceed 5 percent of its assessed valuation of taxable property. If the expressed legal procedures are not followed in setting up and conducting an election, or if the debt limitation is not adhered to, the bonds may be set aside by the Attorney General or by court

action on the part of the taxpayers.

Conclusion--use of school facilities by the community. The statutes set up the fact that members of the community may be granted the use of school facilities for activities of a public nature. However, the granting of this privilege for profitmaking by private endeavors, or on a regular basis for religious activities, is not approved.

Conclusion--disposal of school property. Since property owned by a board of education belongs to the public, it must be disposed of only in the manners provided by law. If the board determines that it possesses property which will not be required for school purposes in the foreseeable future, it has an obligation to the public to dispose of it in a proper manner. In this way the property may return to the tax roles of the county and produce revenue via taxes for the support of the school district.

Purchasing, Student
Transportation, Liability and
Insurance, and Food Services

The remaining, allied, business management functions of a public elementary and secondary educational enterprise in West Virginia were discussed in this chapter. The function of purchasing the necessary goods and materials for the school system is covered in detail; including the all-important element of possible pecuniary interests on the part of board members and employees. All phases of student transportation services were discussed, including the transportation of students to parochial schools and the special use of

school buses for other than the usual home-to-school-to-home student transportation. A section on liability and insurance for West Virginia school districts is also included in this chapter. A discussion on tort actions; governmental immunity as a defense in such actions, the identification of governmental or proprietary functions; and, the personal liability of members of a board of education and their employees were covered. The food services operation for a county school district were also discussed in this chapter.

Conclusion--purchasing. Boards of education, being limited in their powers and authorities by the statutes, may therefore only purchase the goods and services so authorized, or necessarily implied. In the purchasing procedures followed by each local board of education, it is important that no board member or staff employee have any pecuniary interest or involvement. If there is any entanglement of this nature, it may be a criminal violation of the statutes which could mean conviction and forfeiture of position on the board, or of employment with the board, etc.

Conclusion--student transportation. The statutes do not make the transporting of students from home-to-school-to-home mandatory for county boards of education. In the event that a board determines that it does wish to transport students, it must make the same privileges available to all who qualify under terms of the statutes--even those students attending private or parochial schools.

Conclusion--liability and insurance. The statutes make it permissible for local boards of education to purchase insurance to protect them from judgments for damages which may be awarded by the courts. Even though the courts have overruled the doctrine of governmental immunity for the municipalities of the state, it is currently still in effect for boards of education. How long this can be a certainty is unknown, since the court has recently agreed to hear a case brought by a student which involves the alleged negligency of a county board of education. Boards of education throughout West Virginia should watch the outcome of this appeal carefully.

Conclusion--personal liability of board members. Recent developments in the area of board member liability have indicated that a member of a board of education may be personally liable for monetary damages. This can come about under the Civil Rights Act of 1871. However, it must be proven that the board knowingly violated the constitutional rights of another person, or that it acted maliciously against the person.

Conclusion--liability of school employees. Employees of a board of education do not enjoy protection under the governmental immunity doctrine. They are, therefore, subject to tort liability for their actions within the scope of their employment. It is permissible for the board to purchase insurance to cover its employees for this exposure to liability.

THE RECOMMENDATIONS

In view of the foregoing data and documentation concerning the legal authority of county boards of education, and of the frequency with which the courts and public officers (e.g., State Superintendent of Schools and State Attorney General) are being injected into matters of school affairs, it is recommended that each board of education adopt and publish a set of policies by which the school superintendent and his staff can administer the district. These policies, and their accompanying administrative rules and regulations, will allow for consistent and fair determinations to be made on discretionary matters, even if handled by different persons, since from time-to-time the membership of the board or the administrative staff will change.

In this regard, it is imperative that very reasonable effort be put forth by the board of education and its administrative staff toward the recommendation and adoption of policies based on the legal principles set forth herein. This manuscript is not intended to be used in the rendering of any legal advice or services. It is, however, intended to be of service to county board of education members and professional administrators of the public schools by bringing to their attention many of the legal foundations for policy actions and to point out the possible pitfalls of actions not based on firm legal premise.

The effects which the various sources of law outlined herein have on the public school systems of this state will change from

time-to-time. Therefore it is also recommended that a continuing, on-going dimension be added as a follow-up to this study. As statutes change, and the attitude of the courts and regulatory officials change, so will some of the foundations reiterated in this study change. It behooves the educational leaders of tomorrow to be abreast of these changes as they occur in order to place those changes in the proper perspective for compatible educational policies, properly referenced legally.

Implications for Further Research

It is the opinion of the researcher that portions of this study point out certain other major items to be watched closely by educators, and their boards of education. Any, or all, of these can have extensive implications and can form the basis for future research in the area of school business management topics. They are:

1. The West Virginia Code (18-5-13) specifies that boards of education are to

. . . expend . . . for each child an amount not to exceed the proportion of all school funds of the district that each child would be entitled to receive if all funds were distributed equally among all the children of school age in the district upon a per capita basis.

This requirement has very far-reaching implications, especially in view of the other state statutory requirements concerning special education programs for all children aged five to twenty-three (18-8-10 and 18-20-1).

In addition to these state mandates, the recently enacted federal legislation which requires extensive services to exceptional children of all types (PL 94-142), and which has

not been included as a part of the objective of this study, must also be considered when the local county board of education prepares its fiscal budget.

2. The county assessor is charged by law (18-9A-11) to set the assessed valuation of all taxable property of the county ". . . not less than 50 percent nor more than 100 percent of the appraised valuation of . . . said . . . property." Since the county school district is limited by law to a bonded indebtedness of not more than 5 percent of the total assessed valuation, the assessor could enable a board of education to incur a greater debt by simply increasing the assessment percentage of the appraised valuation of the district. However, a converse effect would be attained the following year in the calculation of state aid for the general current expense fund. A higher percentage of assessment would develop increased local tax revenue which would require a higher local share computation in step 8 of the State Aid Formula, thus effecting a reduction in state funds received in the district.

3. The legal requirement that each county board of education furnish to any resident of that county a copy of the published annual financial statement, including the names and salaries of all employees (18-9-3a), could become a monumental task. In the event that all citizens would ask for this in the most populous county, that board of education would have to provide over two hundred thousand such copies.

4. Each county board of education is required by the West Virginia Code to supervise and control all within the district (18-5-1). The state superintendent of schools has interpreted that this authority includes even the private and parochial schools. The code also allows for the inspecting of and the closing of schools which are detrimental to the health and safety of school children (18-4-10). In a time when the private and/or parochial school population would be on the rise, the county board could withhold its certification of such schools in order to force their students into the public schools. While the vast majority of state aid funds is not presently based on student enrollment (a relatively minor amount is currently distributed on adjusted enrollment figures) a change in the State Aid Formula by a future legislature could make attendance a major financial consideration to any county board of education.

5. The legislation which set up job descriptions, half-day or whole-day pay rates and a minimum salary schedule for all non-certified personnel (18A-4-8) has also created many questions which have been unanswered legally at the present time. Specific areas leading to confusion on the part of local boards of education include:

A. job classifications included in the section are not necessarily all-inclusive of every job currently being performed in each county (the State Board of Education is given authority to add new ones; but if they do not can a local board legally employ someone in a category not listed);

B. all years of experience working with a local board in any capacity must count for placement on salary scale in present job (example: years as a bus driver and then successful in being appointed secretary to superintendent means pay level at most experienced clerical rate even though years as a bus driver have no relationship to duties of a secretary);

C. all pay rates as monthly with month defined as twenty days, but also allows for calendar year employees to be employed by calendar month (is the rate for each to be the same since a "monthly" salary?);

D. all employment to be as a full-day or a half-day with a full day being anything over three and one-half hours (does one extra hour, or even a minute, for a three and one-half hour employee due to a special need require that the employee receive a whole days pay?);

E. can anyone be hired for shorter periods than at least two hundred days (summer or seasonal workers);

F. if "overtime" work is performed by a three and one-half hour employee does he receive such pay on his "hourly" rate or at the "whole-day" rate (the hourly rate equates higher on his regular rate because he normally receives half rate for slightly less than half work hours, thus creating an out-of-line condition to the stipulation that all salary schedules be equal for the same category of jobs);

G. code specifies no service or auxiliary employee may have his/her annual salary reduced after this enactment has gone into effect (yet does not mention an employee who desires to reduce his/her day from whole to one-half).

6. Exactly what responsibility does a board of education have for students coming to school and when returning to their homes from school. The State Superintendent has interpreted that such responsibility is different if a student is bused as opposed to that for a student who walks both ways.

7. Personnel for school business management functions specifically referred to in any passages of law include only a "treasurer" (18-9-6). The duties and responsibilities of this position

are set forth in the code. Even though personnel authorized for school districts include a limited number of assistant superintendents as well as general and special supervisors and directors (18-5-32), there is no specific reference to positions or duties of other business management personnel such as "business manager," "purchasing agent," etc.

8. A budget-building timetable requires the compilation of a budget, for a fiscal year of July through June, by the latter part of March. At that time generally the only factual data available to the school board would be the property assessments. All other financial data is based on estimates.

9. The West Virginia Code specifies that there is to be a uniform accounting system for all county school districts and this uniform system shall at least include accrual accounting (18-9B-9). Whereas a uniform accounting system is specified by the State Board of Education it does not include accrual accounting of receipts and of expenditures (encumbrances). A system of double-entry accounting would be required in order to fully comply with the accrual requirement and at this time a single-entry system, with a modified accrual tabulation of receipts and expenditures at the end of each fiscal year, is utilized.

10. Financial audits are required by law to be made of the books and records of the school district (6-9-7). However, there are no such requirements for the substantive audit of data and information upon which various reports to the State Department of Education are based. In many respects these reports can also serve as the basis for financial assistance received by the school systems (e.g., adjusted enrollments, school bus replacements, salary aid for non-certified personnel).

FOOTNOTES--CHAPTER 6

¹W Va Constitution, article XII, section 1.

²Brown v Board of Education, supra (1954).

³San Antonio Independent School District v Rodriguez,
411 US 1, 93 S Ct 1278, 36 L Ed 2d 16 (1973).

⁴W Va Constitution, article XII, section 1.

⁵Evans v Hutchinson, supra (1975).

⁶Spedden v Board of Education, supra (1914).

⁷Brown v Board of Education, supra (1954).

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APPENDIX A

LETTERS OF ORGANIZATIONAL
SUPPORT FOR THE STUDY



State of West Virginia
Department of Education
Charleston
25305

STATE SUPERINTENDENT
OF SCHOOLS

September 10, 1975

Mr. Paul D. Rothrock
Associate Superintendent
Kanawha County Schools
200 Elizabeth Street
Charleston, West Virginia 25311

Dear Paul:

I cannot overstate the value and usefulness of a reference manual such as you describe as a possible product of your dissertation project. You know all too well from your own experience as a superintendent that the multiplicity of statutes, court decisions, opinions, rules and regulations is terribly confusing to those involved in and served by public education in our State.

The Department of Education will make available to you all of the materials you may need that would be in our possession in order to complete the project.

Sincerely,

State Superintendent of Schools

DBT:rf



WEST VIRGINIA SCHOOL BOARDS ASSOCIATION

• CHARLESTON, W. VA. 25324

August 6, 1975

Mr. Paul D. Rothrock
Associate Superintendent
Kanawha County Schools

Dear Paul:

As you are aware, the main business of a local county board of education is policy making. Once the board has adopted the policies which it deems necessary for the smooth and equitable operation of its schools, it is then the task of the superintendent to see that such policies are put into operation throughout the district.

During the past several years, considerable influence over school operations has become apparent by the results of various court decisions and legal actions brought against school board members and administrators. It is for these reasons that boards of education must be extremely careful in their deliberations on policy making and revision.

It is our opinion that a reference manual such as you are proposing to write, incorporating citations of West Virginia law, State Board of Education policies, Superintendent of Schools interpretations, decisions of the Attorney General and court decisions all referenced to common policy descriptor headings, would be an invaluable aid to the various boards of education and superintendents throughout the State of West Virginia. As you are already aware, yourself having previously served in the superintendency, not enough emphasis has been placed on the legal advice in this field in the past. Your project will definitely help fill this void, and can also serve to bring about further realization of this problem and its solutions to school people across the State.

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"Working Together to Improve Education"

Page 2

August 6, 1975

Mr. Paul D. Rothrock

Please keep me informed as to the progress you are making;
and, if our office can be of any assistance, please advise.

Sincerely,

Executive Secretary

GLP/Iw

SOUTHERN REGION SCHOOL BOARDS

AUG 4 1975



RESEARCH AND TRAINING CENTER, INC.

Office of the
Executive DirectorParticipating State
School Board
Associations

ALABAMA

July 31, 1975

ARKANSAS

Mr. Paul Rothrock, Assistant Superintendent
Kanawha County

FLORIDA

GEORGIA

Dear Paul,

KENTUCKY

I'm delighted to know of the progress on your program to develop a codified and classified Policy Reference Manual for the State of West Virginia. Its almost unbelievable that this has not been completed before by the State Department of Education due to the myraid to State Statutes, State Department Regulations, Court Decision and Attorney General Opinions that impact the operations of public school systems on a daily basis. As you know we are working with public school systems throughout the Southern Region to assist them in the development of operating policies and procedures and where possible the local policy is framed within state level guidelines. The process and model that you have described to me should provide the "umbrella" for the school systems in West Virginia in their policy development process and eliminate many of the vagueness that we have and that prevails throughout all school systems in the process of developing and implementing policy.

LOUISIANA

MISSISSIPPI

NORTH CAROLINA

SOUTH CAROLINA

TENNESSEE

TEXAS

VIRGINIA

We are looking forward to the completion of your program. Please don't hesitate to let us know if we can assist in any way.

WEST VIRGINIA

Best Personal Regards,

Executive Director

DLR:

Enclosure

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LEGAL FOUNDATIONS FOR
WEST VIRGINIA SCHOOL BOARD
BUSINESS MANAGEMENT POLICIES

by

Paul D. Rothrock

(ABSTRACT)

The purpose of this study was to synthesize, for the use of others, the pertinent legal requirements for the business management operations of West Virginia county boards of education. The study was undertaken by the researcher to help fill a void in the policy formulation process for West Virginia boards of education. Since many school districts do not have adequate staff, or funds budgeted to hire such staff or competent legal assistance to participate in the policy-making process, this study serves as a point of departure in the initial policy process.

All policies of boards of education need to be legally referenced in order that the day-to-day school operations can be maintained in a manner which will be consistent with the requirements of law, the courts, and the appropriate regulatory agencies and officials. The need for such legal reference materials categorized as to topic was attested to by the State Superintendent of Schools, the West Virginia School Boards Association, the Southern Region School Boards Research and Training Center, and by the vast majority of all of the county superintendents who administer the state's public school system.

In order to accomplish the objective set forth above, it was necessary to read, analyze and categorize all data appropriate to the study. This was done by researching the pertinent elements of the Constitution of the United States, and the Constitution of the State of West Virginia; the West Virginia Code, 1931 as amended; court decisions of the Supreme Court of the United States, the Circuit Court of Appeals for the Fourth Circuit, the federal district courts of the northern and southern districts of West Virginia, and the West Virginia Supreme Court of Appeals; opinions rendered by the State Attorney General which affect public education; the interpretations of school law as issued by the State Superintendent of Schools; and, the policies, rules, and regulations of the State Board of Education.

Due to the large number of cases reported in the courts of jurisdiction set out above, it was necessary to consult the systems of court digests currently available. Cases appropriately referenced for West Virginia educational problems in the area of school business management were researched and briefed in order to ascertain their relevance to the topic of the study.

The West Virginia code was researched for the references pertaining to education, and the policy manual of the state education agency was analyzed. The published and unpublished opinions of the Attorney General, and the interpretations of the State Superintendent of Schools were read and categorized.

Once appropriately categorized as to policy topic, the above data was then synthesized into reference materials which board of education members and their district administrators can refer to in

their policymaking process.

Due to the constant threat that court actions might be brought against today's educational leaders, it is extremely important that boards of education adopt statements of policy which are consistent with today's legal standards. This study, while not rendering legal advice or assistance, is designed to reference for its readers legal precedents affecting West Virginia's educational systems covering the business management areas of financial operations, bonding, site acquisition, building and grounds management, community use of school facilities, properties disposal procedures, purchasing, student transportation, liability and insurance, and food services.