State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

November 16, 2023

Sarah Canterbury
General Counsel
Office of the State Treasurer of West Virginia
State Capitol, Room E-145
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear Ms. Canterbury:

On behalf of the State Treasurer (acting in his capacity as Chairman of the West Virginia Hope Scholarship Board), you have asked for an Opinion of the Attorney General on whether a county school board or public school may take certain actions against students who are enrolled full-time in public-school programs while also attending privately funded nonpublic-school programs.

We are issuing this opinion under West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law … whenever required to do so, in writing, by … any … state officer, board or commission." When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

Your letter explains that some West Virginia students are engaged in "dual enrollment." In that situation, a student enrolls in and attends a public-school program full-time while also attending a privately funded additional education program outside the time that he or she is attending public school. For example, a dual-enrolled student might attend an in-person private school during the day while attending a virtual public school in the evening. Your letter assumes that each student is meeting all the academic and attendance requirements of his or her public-school program while dual-enrolled.

We understand that some families dual-enroll to qualify their children to receive funds under the Hope Scholarship Act. That act creates state-administered educational-savings accounts for eligible students. Among other ways, a student may become eligible to receive Hope Scholarship funds if he or she is "enrolled full-time and attending a public elementary or secondary school program in this state for at least 45 calendar days during an instructional term at the time of application and until an award letter is issued by the [Hope Scholarship] board." W. Va. Code § 18-31-2(5)(B). So after attending their public schools continuously for 45 days, a dual-enrolled student can file a notice of intent to invoke the exemption from compulsory public-school attendance requirements for Hope Scholarship recipients, *id.* § 18-8-1(m), and apply to the Hope Scholarship program, *id.* § 18-31-5. Once accepted, the student can unenroll from the public-school program and use his or her Hope Scholarship account to pay for nonpublic school tuition or any other qualified educational expense. *Id.* § 18-31-7.

Some have objected to this dual-enrollment approach to securing eligibility for Hope Scholarship funds. Your letter reports that at least one public school has informed parents that it will not allow students to enroll in public school if those students are simultaneously enrolled in a nonpublic school program. According to your letter, a parent has also reported that a public school has threatened to mark dual-enrolled students as truant, even though the dual-enrolled students are meeting attendance requirements. The Hope Scholarship Board has also learned that some county school boards plan to adopt policies prohibiting dual enrollment to render a student eligible to receive Hope Scholarship funds.

Your letter thus raises two related legal questions:

(1) *Can a county board of education or public school lawfully prohibit a student from participating in a public-school program based on the student's simultaneous engagement in nonpublic education outside of the public-school program?*

(2) *Can a county board of education or public school lawfully prohibit a student from participating in nonpublic education outside of the public-school program while simultaneously enrolled in and attending a public-school program?*

As we explain further below, we answer both questions the same way: "No." Excluding students from public schools merely because they are pursuing additional educational opportunities elsewhere would contravene both the United States and West Virginia Constitutions and state statutes. The same is true of any attempt by county school boards or schools to bar students from participating in nonpublic school programs while attending public schools. And both approaches would undermine the Legislature's intent in establishing the Hope Scholarship program, further confirming that neither is appropriate.

Any local school authorities who are acting or intending to act against dual-enrolled students should stop immediately.

DISCUSSION

Local school authorities have evidently sought to foreclose "dual enrollment" by either barring certain students from attending public schools or preventing public-school students from participating in private educational activities. We address each approach in turn.

I. Prohibiting Dual-Enrolled Students From Participating In Public-School Programs

Local school authorities, like county school boards and public schools, must always ensure that their actions have not violated either "statutes []or the Constitution." *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 15 n.7, 467 S.E.2d 150, 156 n.7 (1995). So in considering whether those authorities can bar dual-enrolled students from the public schools, we start by examining the statutory and constitutional provisions implicated here.

The Right to Public Education Generally

Education is particularly important in West Virginia. West Virginia's founders "lived among the ruins of a system that virtually ignored public education and its significance to a free people." *Adams*, 196 W. Va. at 15, 467 S.E.2d at 156. So they had a special appreciation for the idea that "[e]ducation is the cornerstone of our society." *Cobb v. W. Va. Hum. Rts. Comm'n*, 217 W. Va. 761, 775, 619 S.E.2d 274, 288 (2005). They thus "gave high priority to public education" when they wrote our Constitution. *Adams*, 196 W. Va. at 15, 467 S.E.2d at 156.

Perhaps unsurprisingly, then, the Supreme Court of Appeals of West Virginia "has unquestionably found that education is a fundamental right" under the West Virginia Constitution. *Kanawha Cnty. Pub. Libr. Bd. v. Bd. of Educ. of Cnty. of Kanawha*, 231 W. Va. 386, 402, 745 S.E.2d 424, 440 (2013). It has repeatedly stressed the right's importance for going on half of a century now. *See, e.g.*, *State v. Beaver*, 248 W. Va. 177, ___, 887 S.E.2d 610, 629 (2022); *Bd. of Educ. of Cnty. of Kanawha v. W. Va. Bd. of Educ.*, 219 W. Va. 801, 807, 639 S.E.2d 893, 899 (2006); *Pauley v. Kelly*, 162 W. Va. 672, 707, 255 S.E.2d 859, 878 (1979). And that right is rooted in the express text of our Constitution, where Article 12, Section 1 of the West Virginia Constitution directs that the State will provide "a thorough and efficient system of free schools." In short, although education is not a fundamental right under the U.S. Constitution, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-39 (1973), the West Virginia Constitution provides broader protections, *Pauley*, 162 W. Va. at 679, 255 S.E.2d at 864 (noting *Rodriguez* does not limit state constitutions).

Every student in the State is entitled to a public education. Indeed, the Supreme Court of Appeals often speaks in blanket and unequivocal terms in defining the right. "*[A]ll students* are entitled to a basic level of education free of budgetary concerns." *Adams*, 196 W. Va. at 21, 467 S.E.2d at 162 (emphasis added); *see also Cowen v. Harrison Cnty. Bd. of Educ.*, 195 W. Va. 377, 381, 465 S.E.2d 648, 652 (1995) (explaining that the West Virginia Constitution "assures every student in West Virginia a thorough and efficient education"). "[A]ll West Virginia children" benefit from that right. *Beaver*, 248 W. Va. at ___, 888 S.E.2d at 629; *see also, e.g.*, *Potter v. Miller*, 168 W. Va. 601, 603, 287 S.E.2d 163, 165 (1981) ("Certainly petitioners have a clear legal

right to reasonable access to public education for their children."). Even a century ago, the Court emphasized how "*[e]very child* of school age in this state is entitled to attend the public schools in the district in which it actually resides for the time being." *Grand Lodge, I.O.O.F., of W. Va., v. Bd. of Educ. of Indep. Sch. Dist. of Elkins*, 90 W. Va. 8, 15, 110 S.E. 440, 443 (1922).

Statutory Considerations

Consistent with this exception-free approach, the Legislature has likewise said that public schools must be open to *all* students of a certain age. West Virginia Code § 18-5-15(a), for example, provides that "[t]he public schools shall be open for the full instructional term to *all* persons who have attained the [statutorily set] entrance age." (emphasis added). Other provisions speak in similarly blanket terms. *See, e.g.*, W. Va. Code § 18-5-18(a) (prescribing that county school boards "shall provide kindergarten programs for all children"); *id.* § 18-20-1 (providing for special educational programs for "all exceptional children" between certain ages).

West Virginia courts read these provisions to mean that "the public schools of this State are presumptively open to all persons of proper age." *White by White v. Linkinoggor*, 176 W. Va. 410, 414, 344 S.E.2d 633, 637 (1986). The only recognized exceptions concern students who are not properly inoculated, those that might be carrying infectious diseases, and those who are so disruptive that they can be properly expelled. *Id.* But otherwise, "[t]here is no authority for school boards to refuse admittance to children to attend public schools within the age requirements provided by statute." *State ex rel. Doe v. Kingery*, 157 W. Va. 667, 673, 203 S.E.2d 358, 361 (1974); *see also Detch v. Bd. of Ed. of Greenbrier Cnty.*, 145 W. Va. 722, 730, 117 S.E.2d 138, 143 (1960) (explaining that Section 18-5-15 is "clearly intended ... to guarantee or assure a child, who has reached the [statutory] age ... before the commencement of a particular term, the right to be enrolled for the full term").

In our view, county school boards and local school officials violate these statutes when they bar dual-enrolled students from attending public-school programs merely because those students are also benefiting from educational opportunities elsewhere. None of the few narrow recognized exceptions to universal education apply here. And we do not see any implied powers in these statutes that would allow a local authority to bar a student who is otherwise meeting the attendance, behavior, and academic standards of the public school. "All persons" and "all students" means just that—all. *See Nat'l Coal. For Students With Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 290 (4th Cir. 1998) (describing how the "broad, inclusive word 'all'" "suggests an expansive meaning because 'all' is a term of great breadth").

Our conclusion adheres to prior interpretations of the statutes from this office and elsewhere.

In a 1966 opinion letter, for instance, the Attorney General explained how "it is generally held that youths of school age have an absolute right to attend public schools." Letter from C. Donald Robertson, W. Va. Att'y Gen., to William Hamilton, Exec. Assistant, State Superintendent of Schs. (Jan. 17, 1966), 1966 WL 87450. The opinion went on to suggest that there might be "conditions under which youths may be excluded in the interest of the welfare of the other students." *Id.* We are unsure if all the "conditions" then listed in the opinion letter align with the

approach later taken in *Kingery*, *Linkinoggor*, and other more recent authority. But even if they do, none of them are analogous to students engaged in dual enrollment—as those students pose no discernible threat to the other public-school students.

Likewise, in another 1966 opinion letter, the Attorney General discussed a different kind of dual-enrollment scenario, in which students attending a nonpublic school wished to attend a public school only part-time. Letter from C. Donald Robertson, W. Va. Att'y Gen., to William Hamilton, Exec. Assistant, State Superintendent of Schs. (Sept. 8, 1966), 1966 WL 87435. The opinion notes again that the right generally admits of no exception. *Id.* It then concludes: "A child who has elected to attend a private, parochial or approved nonpublic school, *and who claims exemption from the statutory attendance requirement in the public school*, has no legally enforceable right to compel his enrollment in the public school under a 'shared time' or 'dual enrollment' plan." *Id.* (emphasis added). That conclusion makes sense—when a student elects to remove himself or herself from the public-school system, it may well be that he or she cannot insist that the county board selectively provide some benefits anyway. *Cf. Beaver*, 248 W. Va. at ___, 887 S.E.2d at 629 (finding that right to public schools was not impermissibly lost by the student's "entirely voluntary" decision to elect private schooling); *Janasiewicz v. Bd. of Educ. of Kanawha Cnty.*, 171 W. Va. 423, 426, 299 S.E.2d 34, 38 (1982) ("[A] parochial school student has chosen to reject a free public school education in favor of a privately paid education."). But that situation, of course, does not track the circumstances you describe, as the dual-enrolled student in your case is assuming both the benefits (continued education from the public schools) and the burdens (continued compliance with the compelled attendance requirements). In other words, the dual-enrolled student is not rejecting public education.

Similarly, in a 2002 interpretation, the State Superintendent of Schools concluded that local school districts could not prevent students from enrolling merely because they pursued other educational activities—in that case, a General Equivalency Diploma. The Superintendent, citing Section 18-5-5, confirmed that public schools did indeed "have to accept GED graduates back into their schools." Letter from David Stewart, State Superintendent of Schools, to Stephen Baldwin, Superintendent, Greenbrier County Schools (July 5, 2002), https://bit.ly/40rYnig. Ultimately, all "students ages twenty-one and younger should automatically be re-enrolled and subject to compulsory school attendance." *Id.* So too here.

In short, given what our State's statutes say about who may attend public schools, county school boards and other local school officials would not have authority to prevent dual-enrolled students who are meeting all statutory requirements from attending public schools.

Constitutional Considerations

Statutes aside, we conclude that local actions barring dual-enrolled students from public schools would also be unconstitutional under the West Virginia Constitution. If a local actor "denies or infringes upon a person's fundamental right to an education, then strict scrutiny will apply." *Beaver*, 248 W. Va. at ___, 887 S.E.2d at 629. The school official must then "prove that [his or her] action is necessary to serve some compelling State interest" and that the action is "narrowly tailored" to serve that interest. *Id.* Denying a dual-enrolled student the right to remain enrolled in public schools at all would, in our view, deny the fundamental right to public education,

so this "difficult" standard would apply. *Whitener v. W. Va. Bd. of Embalmers & Funeral Directors*, 169 W. Va. 513, 517, 288 S.E.2d 543, 545 (1982); *see also Miller v. Johnson*, 515 U.S. 900, 920 (1995) (characterizing strict scrutiny as "our most rigorous and exacting standard of constitutional review").

We do not see how effectively expelling dual-enrolled students from the public-school system could satisfy strict scrutiny here.

No compelling state interest would be served by denying public schooling to students meeting all the requirements of public enrollment but doing additional work in out-of-school hours. In fact, compelling students to enroll in public schools alone only to have them withdraw 45 days later and then enroll in a nonpublic program would seem more disruptive to those students' progress than merely allowing the students to enroll in the nonpublic programs at the outset. We recognize public schools might face challenges from planning and budgeting because of the anticipated withdrawal of some number of students 45 days into the school year. But dual enrollment is not the cause of this shift; students would withdraw 45 days into the year no matter whether they are permitted to "dual enroll" or forced to "single" enroll in public schools during the 45-day window. We also have no evidence that students are departing in sufficient numbers to present real challenges to local schools. (Relatedly, we do not have evidence that these departures materially affect the students that remain.) And budgetary and planning concerns seem less substantial because these students would be *departing* public schools—thus freeing up funds unexpectedly and producing something akin to a financial windfall for the schools. What's more, we think the Legislature has already weighed this interest and found it insufficient to overcome other interests that the Hope Scholarship program serves.

And even if these interests were compelling, we do not think that banning students outright is a narrowly tailored remedy. Most obviously, schools could just as easily ask families whether their students intend to withdraw to help plan and budget. In any event, we do not think that students enrolling in two programs at once present the sort of "extreme cases and ... specific showing[s] of necessity" that must be established before "strict scrutiny could permit the effective temporary denial of all State-funded educational opportunity." *Cathe A. v. Doddridge Cnty. Bd. of Educ.*, 200 W. Va. 521, 532 n.12, 490 S.E.2d 340, 351 n.12 (1997).

We also conclude that county school boards and public schools would offend the U.S. Constitution if they barred dual-enrolled students from enrolling.

Although education is not a fundamental right under the federal constitution, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). So "[i]f the State"—or, in this case, a local entity—"is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest." *Id.* at 230; *see also, e.g.*, *Toledo v. Sanchez*, 454 F.3d 24, 33 (1st Cir. 2006) (explaining that "heightened scrutiny" would apply to a case of "outright exclusion"). Preserving financial resources is not a substantial interest in this context. *Plyler*, 457 U.S. at 229.

We do not think a county school board or public school could justify excluding dual-enrolled students under *Plyler*. The facts would present the sort of outright exclusion described in that case. And as we explained above, we can discern no substantial interests that this exclusion would serve. At most, keeping these students out of public schools might serve some kind of financial or administrative interest, but *Plyler* says that kind of interest is not enough to lock the schoolhouse gate. The state educational system is better served by allowing students to pursue more education, not less. *Cf. Embry v. O'Bannon*, 798 N.E.2d 157, 167 (Ind. 2003) ("[D]ual-enrollment programs provide obvious significant educational benefits to the Indiana children for whom participation in a dual-enrollment program affords educational resources and training in subjects they would not otherwise receive"). Further, as your request notes, the exclusion seems especially unjustifiable considering how many similarly situated students—such as home-school students—would *not* be excluded under the apparent policies at issue.

Thus, even if state statutes could be construed in a way that would not foreclose the local schools' proposed actions, our state and federal constitutions would nevertheless present separate barriers, too.

Arbitrary Decision-making

Lastly, even if we could overlook the significant statutory and constitutional problems that we have just described, any actions barring dual-enrolled students from public schools could very well constitute unlawfully irrational decision-making.

The Supreme Court of Appeals has stressed that county school boards—and, by extension, the public schools they govern—must exercise their discretion "intelligently and not arbitrarily and capriciously." *Blessing v. Mason Cnty. Bd. of Educ.*, 176 W. Va. 32, 34, 341 S.E.2d 407, 409 (1985); *see also, e.g.*, *Bd. of Educ. of Cnty. of Randolph v. Scott*, 217 W. Va. 128, 134, 617 S.E.2d 478, 484 (2005) (explaining how a school board's decision must be "reasonable, in the best interests of the students, and not arbitrary or capricious"). An education-related decision might violate that standard when, among other things, it "work[s] an undue hardship on the children to whom it applies." *Blessing*, 176 W. Va. at 34, 341 S.E.2d at 409. In *Blessing*, for example, the Supreme Court of Appeals found that a county board's "mechanical adherence to an inflexible cut-off date for admission to [its] kindergarten program" was arbitrarily and unreasonably applied to a student just a few days shy of that date. *Id.*

As our above analysis suggests, courts might conclude that excluding these students is a not rational, justifiable approach. Perhaps exclusion serves some minimal financial interests of the local schools, but we do not think those interests can ultimately overcome the students' interests in attending the school of their choice. *Cf. Shrewsbury v. Bd. of Ed., Wyoming Cnty.*, 164 W. Va. 698, 702, 265 S.E.2d 767, 769-70 (1980) (explaining that a county school board could not "arbitrarily or capriciously discriminate among children of school age" for financial reasons). The decision to target a few specific students who are enrolled in academic activities outside public-school hours seems irrational for the additional reason that similarly situated students (such as home-school students) are not targeted in a similar way. And forcing students to either forgo potential Hope Scholarship eligibility or withdraw from a private-school program to which they will return in just 45 days seems to work an undue hardship on the student.

In short, we expect West Virginia courts could declare policies excluding dual-enrolled unlawful students for this separate and independent reason as well.

II. Prohibiting Public-School Students From Participating In Nonpublic-School Programs

We must also consider whether local school authorities can prevent their public-school students from engaging in nonpublic educational activities outside of public-school hours. Here again, we start by examining the statutory and constitutional limits that might apply. *See State ex rel. Dilley v. W. Va. Pub. Emps. Ret. Sys.*, 180 W. Va. 24, 26, 375 S.E.2d 202, 204 (1988) (noting how a county school board must act "within constitutional and statutory limits").

Statutory Considerations

As the Supreme Court of Appeals has stressed for ages, county "boards of education are 'created by statute with functions of a public nature.'" *Hartman v. Putnam Cnty. Bd. Of Educ.*, No. 21-0765, 2022 WL 9925098, at *2 (W. Va. Oct. 17, 2022) (quoting syl. pt. 2, *Napier v. Lincoln Cnty. Bd. of Educ.*, 209 W. Va. 719, 551 S.E.2d 362 (2001)); *see also* syl. pt. 1, *Pa. Lightning Rod Co. v. Bd. of Educ. of Cass Twp.*, 20 W. Va. 360, 360 (1882) ("Corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute creating them."). Every county school board thus depends on its enacting statute for its powers. And the board "can exercise no power not expressly conferred or fairly arising from necessary implication, and in no other mode than that prescribed or authorized by the statute." Syl. pt. 2, *Napier*, 209 W. Va. 719, 551 S.E.2d 362 (quoting syl. pt. 4, *Shinn v. Bd. of Educ.*, 39 W.Va. 497, 20 S.E. 604 (1894)).

When a statute does not expressly grant a board powers, then the board can presume to exercise implied authority only in certain limited circumstances. Implied authority "fairly aris[es] from necessary implication[s]" in the exercise of the board of education's express powers. Syl. pt. 7, *City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743 (1996) (quoting syl. pt. 4, *Shinn*, 39 W. Va. 497, 20 S.E. 604); *cf. Commonwealth, Pa. Fish & Boat Comm'n v. Consol Energy, Inc.*, 233 W. Va. 409, 414, 758 S.E.2d 762, 767 (2014) (explaining that agencies created by statute hold only those implied powers that "may be necessary for the[] just and reasonable execution" of express powers). And if a statute is ambiguous when it comes to the powers it might confer on the board, then a court will find that the board lacks authority. *See* Syl. pt. 1, *McCallister v. Nelson*, 186 W. Va. 131, 411 S.E.2d 456 (1992).

We cannot locate any statutory authority that would expressly or impliedly empower local school authorities to prohibit public-student involvement in nonpublic educational activities outside school hours. We do not see that kind of authority in West Virginia Code § 18-5-13, which sets out the general powers that boards of education may exercise. All the powers listed in that statute concern authority over public-school activities and public-school-owned property. W. Va. Code § 18-5-13(a). None concern private activities. So while local officials concededly have "considerable authority ... to operate [their] *public* schools," *Mason Cnty. Bd. of Educ. v. State Superintendent of Sch.*, 160 W. Va. 348, 351, 234 S.E.2d 321, 323 (1977) (emphasis added), we see no evidence of similar board authority over the nonpublic sphere. *See also Dilley*, 180 W. Va.

at 26, 375 S.E.2d at 204 (explaining how local boards have authority to "control and manage the [public] schools and school interests for all school activities and upon all school property"). That's unsurprising considering how, "[a]s a general matter, private schools are run privately, without governmental interference in the schools' internal administration." *Klunder v. Brown Univ.*, 778 F.3d 24, 32 (1st Cir. 2015).

The closest thing we can find to authority over activities outside the public schools is a local board's authority over extracurricular activities, *see Bailey v. Truby*, 174 W. Va. 8, 11, 321 S.E.2d 302, 305 (1984)—but that power does not extend far enough to encompass a ban on private, out-of-school-hours educational activities. To be sure, county school boards may "control, supervis[e], and regulat[e] … all … extracurricular activities of the students in public secondary schools." W. Va. Code § 18-2-25(a). But "extracurricular" is not generally understood to embrace all educational activities outside the usual public-school curriculum, no matter who conducts them. Rather, "extracurricular activities" usually refer to "voluntary activities *sponsored by a school, a county board or an organization sanctioned by a county board or the State Board of Education.*" *Id.* § 53-8-1(8) (emphasis added); *see also id.* § 18-10F-2(f) (same); W. Va. Code St. R. § 126-26-3.1 (providing that policies governing extracurricular activities governed only "interscholastic athletics, student government, and class officers in grades 6-12"); *id.* § 126-42-12 (defining "extracurricular activities" as "[a]ctivities that are not part of the required instructional day or curricular offerings *but are under the supervision of the school*" (emphasis added)); *accord Thomas v. Crews*, 203 So. 3d 701, 706 & n.2 (Miss. Ct. App. 2016) (explaining that "extracurricular" activities are those sponsored by and usually held at the public school). So county school boards cannot invoke their power over "extracurricular activities" to justify restrictions on unaffiliated, private educational activities in which public-school students might also engage.

Without statutory authority, county school boards and public schools cannot act to bar their students from participating in private educational opportunities outside the hours they are engaged in public schools, including activities that might amount to "dual enrollment."

Constitutional Considerations

We also see constitutional problems with purporting to prevent students from participating in nonpublic educational programs.

Construing the Due Process Clause of the U.S. Constitution's Fourteenth Amendment, the U.S. Supreme Court has repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). And in case after case, the Supreme Court has stressed that—out of respect for that right—state and local officials may not prevent students from choosing a specific educational program (outside the public schools) for their children. A century ago, for example, the Supreme Court held that parents' "power … to control the education of their own," *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923), meant that the State of Nebraska could not ban the teaching of any language other than English to children younger than ninth grade, *id.* at 400-01. A few years later, in striking down Oregon's compulsory school attendance law, the Supreme Court emphasized how the Fourteenth Amendment "excludes any general power of the state to standardize its children by

forcing them to accept instruction from public teachers only." *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

Returning to the subject again decades later, the Court expressed special concern for protecting the "traditional interest of parents with respect to the religious upbringing of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (finding that compulsory education for children older than 16 violated the rights of Amish parents); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting the "[t]he rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief"). *Meyer*, *Pierce*, *Yoder*, *Prince*, and the many cases like them, reflect that "parents, not schools, have the primary responsibility 'to inculcate moral standards, religious beliefs, and elements of good citizenship.'" *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3d Cir. 2005).

At bottom, then, the U.S. Constitution ensures that "parents have the fundamental liberty to choose how and in what manner to educate their children." *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring). That's especially so when it comes to religious education.

Like the federal constitution, "Article III, Section 10 of the Constitution of West Virginia ... protect[s] the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *In re Visitation of L.M.*, 245 W. Va. 328, 336, 859 S.E.2d 271, 279 (2021); *see also Lindsie D.L. v. Richard W.S.*, 214 W. Va. 750, 754-55, 591 S.E.2d 308, 312-13 (2003) (citing *Meyer*, *Pierce*, and *Troxel*, and providing West Virginia authority in accord). So under the West Virgina Constitution as well, parents' rights to decide matters like their children's education "must be respected by the state, its legislature, and the courts." *In re Edward B.*, 210 W. Va. 621, 631, 558 S.E.2d 620, 630 (2001). Those rights must be respected by officials like local school boards, too.

We do not think that the policies that your letter describes—policies that seek to prevent students from undertaking additional educational opportunities outside school hours—track with any of these constitutional principles and limits. Quite the opposite: "Enforcement" of the kinds of policies that your letter describes "would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful." *Farrington v. T. Tokushige,* 273 U.S. 284, 298 (1927). Parents should not, for instance, face the risk of criminal sanctions from recorded truancy violations (for non-truant students) merely because they have chosen to supplement the education that public schools provide through private means. Indeed, we struggle to imagine a clearer violation of the notion that a parent should control his or her child's education than this one. And we see no rational reason behind that infringement, seeing as how children participate in any number of out-of-school-hour activities without interference or objection from school officials.

We recognize that this area of the law is not without debate. For instance, courts have wrestled with what type of scrutiny should apply to a regulation implicating parental rights of this sort, as *Meyer* and *Pierce* were decided long before tiers of scrutiny came to be. *Compare Brach v. Newsom,* 6 F.4th 904, 931 (9th Cir. 2021), *vacated* 18 F.4th 1031 (9th Cir. 2021) (applying strict scrutiny to a "challenged restriction [that] wholly deprive[d] the private-school Plaintiffs of a

central and longstanding aspect of the *Meyer-Pierce* right"), *with Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) (applying rational-basis review to a similar claim and suggesting a higher standard might apply to claims implicating religion). Even so, we are comfortable in concluding that the sort of wholesale denials your letter describes would fail under any standard of review. After all, the policies would do exactly what *Pierce* says they cannot: "forc[e] [students] to accept instruction from public teachers only." 268 U.S. at 535. And your letter informs us that "students utilizing dual enrollment are largely attending nonsecular programs," which adds "a religious element." That religious aspect would seem to trigger a higher level of scrutiny even before courts that employ more forgiving standards of review.

For all these reasons, then, any effort to prevent students from attending nonpublic educational programs outside of school hours while also enrolled in and attending public schools does not appear to be consistent with either the West Virginia or United States Constitutions.

Arbitrary Decision-making

As we've already noted, local school authorities must make reasoned, non-arbitrary decisions on issue likes these. And we do not think that standard can be met when barring students from dual-enrolling in private educational programs.

We agree with your observation that no reasonable explanation supports a decision to prevent a student from seeking *additional* educational services beyond their public-school enrollment. Again: students engage in all sorts of activities in the hours outside school—sports, hobbies, trips, and otherwise—and public-school officials have never shown any concern for that engagement before. If anything, dual-enrolled students might be expected to be better students, having received additional instruction and guidance from diverse sources. *See, e.g.*, *O'Bannon*, 798 N.E.2d at 167. And we cannot see how singling out students who wish to pursue private schooling in their free time benefits the students around them in any discernible way.

So once more, restrictions on a student's "simultaneous engagement in private education outside of the public-school program" could not survive a legal challenge for this additional reason.

* * * *

Having already described the many reasons why county school boards and public schools cannot take the actions you describe, we're reluctant to belabor the point further. But one more item warrants mention.

In the Hope Scholarship Act, the Legislature made the express choice to allow students to depart public schools with state funding in hand so long as they are enrolled in public schools for 45 continuous days. *See* W. Va. Code § 18-31-2. The Legislature placed no further conditions on

this 45-day requirement. We assume—as we must—that the Legislature already weighed the various benefits and costs of the rule when choosing to implement it. *See Garrett v. Bd. of Educ. of Chapmansville Dist.*, 109 W. Va. 714, 720-21, 156 S.E. 115, 118 (1930) ("[T]he Legislature is presumed to have taken into consideration the objections … and to have concluded that the ills to be suffered would be compensated by the advantages received."); *accord Woodall v. Darst*, 71 W. Va. 350, 80 S.E. 367, 367 (1912) (Robinson, J., concurring) ("[T]he legislature must be presumed to have acted in good faith, for the public good, and upon sound reasons."). Local school boards and public-school officials must respect that choice.

We are concerned that the actions taken by local officials you've described in your letter are driven by ideological disagreement with the Hope Scholarship Act itself—and are thus designed to make it more difficult for students to benefit from the Act. *See, e.g.*, Josephine E. Moore, *Raleigh County Fears Impacts of Hope Scholarship*, REGISTER-HERALD (July 12, 2022), https://bit.ly/3Mxlanf (describing a local school board's opposition to the program). If our suspicions are right, then the actions you've described are even more unjustified. "[S]chool boards, as creatures of the State, obviously must give effect to policies announced by the state legislature." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 476 (1982). They cannot "defeat the very purpose of the statute." *Fisher v. Jackson*, 107 W. Va. 138, 141, 147 S.E. 541, 542 (1929). And parents and students should not be punished merely because they intend to benefit from the Hope Scholarship Act. As one court explained in a related context:

> Parents may be committed to private school for their child whatever the [public] school authorities may propose. They may honestly feel that the best the [public] school authorities can offer their child is not enough. This cannot *ipso facto* mean that the parents, as citizens and taxpayers, lose the right to seek a "free appropriate public education" for their child.

Sarah M. v. Weast, 111 F. Supp. 2d 695, 701 n.6 (D. Md. 2000).

From our perspective, the Hope Scholarship Act is a bold step towards enabling parents to choose the best possible education for their children. We expect that the Act will greatly help the State's students. After all, even without the Hope Scholarship, "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." *Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 247 (1968).

But even if local school authorities disagree, that disagreement does not license them to undermine the program, directly or indirectly. We stand ready to act if we suspect that local officials are continuing to do so.

Altogether, county boards of education or public schools may not lawfully prohibit students from engaging in "dual enrollment" or deny students the ability to participate in public-school programs based on those students' simultaneous engagement in private education outside public-school programs.[1]

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Lindsay S. See
Solicitor General

Michael R. Williams
Principal Deputy Solicitor General

Spencer J. Davenport
Assistant Solicitor General

[1] This opinion addresses only students who are enrolled full-time in public schools and who are meeting any attendance and academic requirements the school may impose. Our conclusions here do not necessarily extend to other situations, such as a student who is enrolled full-time in a private school and wants to "dual enroll" in some public-school programs part-time. *See generally, e.g., Snyder v. Charlotte Pub. Sch. Dist.*, 421 Mich. 517 (1984).