
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 15-0662

MONONGALIA COUNTY BOARD OF EDUCATION,
and FRANK D. DEVONO, SUPERINTENDENT,

Respondents below, Petitioners,

v.

AMERICAN FEDERATION OF TEACHERS-WEST VIRGINIA,
AFL-CIO, JUDY HALE, its PRESIDENT, SAM BRUNETT,
JEANIE DeVINCENT, SHELLY GARLITZ, AND MIKE ROGERS,
as representatives of similarly situated individuals,

Petitioners below, Respondents.

AMICUS CURIAE BRIEF OF THE WEST VIRGINIA BOARD OF EDUCATION

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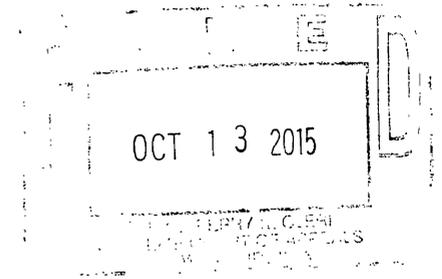


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. BACKGROUND	2
III. ARGUMENT	5
RESAS ARE AUTHORIZED TO CONTRACT WITH COUNTY BOARDS OF EDUCATION TO PROVIDE INTERVENTIONIST SERVICES FOR STRUGGLING STUDENTS AND SUCH CONTRACTS DO NOT RUN AFOUL OF THE STATUTORY REQUIREMENTS IMPOSED UPON COUNTY BOARDS OF EDUCATION FOR THE HIRING OF CLASSROOM TEACHERS	5.
VI. CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Carvey v. West Virginia Board of Education, 206 W. Va. 720, 527 S.E.2d 831 (1999) 7

Charleston Gazette v. Smithers, 232 W. Va. 449, 752 S.E.2d 603 (2013) 7

Lefler v. West Virginia Department of Education, No. 11-0650,
2012 WL 2892348, at *3 (W. Va. Feb. 14, 2012) 6

State ex rel. Boner v. Kanawha County Board of Education, 197 W. Va. 176,
475 S.E.2d 176 (1996) 7

West Virginia Board of Education v. Hechler, 180 W. Va. 451, 376 S.E.2d 839 (1988) 6

STATUTES

W. Va. R. App. P. 30(a) 1

W. Va. Code § 18-2-26 1, 2, 7

W. Va. Code § 18-2-26(c)(1)(D) 3

W. Va. Code § 18A-4-7a 6, 7

W. Va. Const. Art. XII, § 2 1, 2

OTHER

126 W. Va. C.S.R. 26 1, 2, 7

126 W. Va. C.S.R. 26, § 2.2.6 4

126 W. Va. C.S.R. 26, § 3.2.a. 3

126 W. Va. C.S.R. 26, § 3.13.b. 3

126 W. Va. C.S.R. 72, § 2.5.c. 3

126 W. Va. C.S.R. 72, § 3.13. 3

126 W. Va. C.S.R. 72, § 5.1.c. 3
178 W. Va. C.S.R. 136, § 7.1.b.6. 3
178 W. Va. C.S.R. 26, § 2.2 2

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I.

INTRODUCTION

Comes now the West Virginia Board of Education, by counsel, Kelli D. Talbott, Senior Deputy Attorney General, and files this amicus curiae brief pursuant to Rule 30(a) of the West Virginia Rules of Appellate Procedure. The West Virginia Board of Education (hereinafter State Board) is the agency vested with the general supervision of the public schools in this State pursuant to Article XII, § 2 of the West Virginia Constitution. As authorized by West Virginia Code § 18-2-26, the State Board established the regional educational service agencies (RESAs) by rule, 126 W. Va. C.S.R. 26 (Policy 3223), and is responsible for their governance.

The State Board is interested in this matter inasmuch as the outcome will directly impact the provision of important educational services by the RESAs to struggling county school students, not only in Monongalia County, but in all other county school systems in the State of West Virginia.

If the Circuit Court's order is affirmed, the State Board's and the RESAs' ability to provide high quality, cost effective and targeted support to *all* county school students will be diminished. Therefore, the State Board believes that it has an overarching duty to weigh in on the issues presented in this case before this Court.

While the State Board greatly values the professional educators represented by the Petitioners in this case, the State Board is concerned that the Circuit Court's order will affect the delivery of a thorough and efficient education to which the affected students are entitled, as well as other students throughout the State. Therefore, the State Board files this amicus curiae brief to urge this Court to reverse the order of the Circuit Court of Monongalia County.

II.

BACKGROUND

The State Board is the constitutional body charged with the general supervision of the public schools in this State and is responsible for ensuring that West Virginia students receive a thorough and efficient education. W. Va. Const. Art. XII, § 2. In 1972, the West Virginia Legislature provided a statutory framework within which the RESAs could be established by the State Board to provide high quality, cost effective education programs and services to students and schools. West Virginia Code § 18-2-26. The Legislature authorized the State Board to establish the RESAs and provide for their governance through the promulgation of rules. The State Board has exercised this authority by the enactment of 126 W. Va. C.S.R. 26 (Policy 3223), "Establishment and Operation of Regional Education Service Agencies."

The State Board has established eight RESAs in West Virginia covering different parts of the State. 178 W. Va. C.S.R. 26, § 2.2. Each RESA is headed by an Executive Director who is

appointed by the State Board and serves at its will and pleasure. 126 W. Va. C.S.R. 26, § 3.2.a. RESAs are authorized to employ staff necessary to fulfill their purpose and to deliver services. West Virginia Code § 18-2-26(c)(1)(D); 126 W. Va. C.S.R. 72, § 3.13. All regular full-time and part-time RESA employees are non contractual at-will employees of the West Virginia Board of Education. 126 W. Va. C.S.R. 26, § 3.13.b.

Each RESA is responsible for developing a Strategic Plan for the delivery of educational services and that Strategic Plan must be approved by the State Board. 126 W. Va. C.S.R. 26, § 5. The RESAs are authorized to contract with county boards of education to accomplish implementation of their Strategic Plans. 126 W. Va. C.S.R. 72, § 2.5.c. One of the purposes of multi-county RESAs is to share specialized personnel. 126 W. Va. C.S.R. 72, § 5.1.c. The State Board has enacted requirements that ensure that an educator providing contracted services through a RESA has the same licensure as those educators employed by county boards of education. 178 W. Va. C.S.R. 136, § 7.1.b.6. (Policy 5202), “Minimum Requirements for the Licensure of Professional/Paraprofessional Personnel and Advanced Salary Classifications.”

The eight RESAs established by the West Virginia Board of Education employ a total of 218 persons who hold teaching certification. Over half of the positions are part-time. All of them are non contractual, at-will positions pursuant to 126 W. Va. C.S.R. 26, § 3.13.b. Of those holding certification, approximately 162 have direct contact with preK-grade 12 students. The specialized services that these personnel provide directly to students ranges from the interventionist services at issue in this case, to speech therapy, to psychological services, to career development assistance, etc.

RESA VII is comprised of Barbour, Doddridge, Gilmer, Harrison, Lewis, Marion, Monongalia, Preston, Randolph, Taylor, Tucker and Upshur counties. 126 W. Va. C.S.R. 26, §

2.2.6. RESA VII's Strategic Plan, approved by the West Virginia Board of Education, includes the objective of employing interventionists, occupational therapists, physical therapists, speech language pathologists, and academic and job coaches to provide services to students in the RESA VII counties. (J. A. 58)

Interventionists, who are required to hold teaching certification, work directly with individual, at-risk students who need extra support in math and reading. Indeed, interventionists provide support to students that is in addition to the teaching which is delivered by a student's classroom teacher. Interventionists not only serve students in the regular classroom setting, but also outside of that setting. None of the interventionists employed by RESA VII are full-time employees. All of them work a part-time schedule of three to five hours a day and they do not receive benefits. Persons who are hired as interventionists are advised, up front, that the positions are part-time, non-benefit positions. Many of the persons hired as interventionists are retired teachers or those new to the teaching profession that desire a part-time work schedule.

RESA VII and other RESAs have employed interventionists for a number of years and have deployed those interventionists into local schools through contractual arrangements with county boards of education. The RESAs' deployment of interventionists serve to maximize scarce educational resources so that a larger number of at-risk students who need support get that support. Absent the contractual arrangement with the RESAs, the ability of many counties, including Monongalia County, to provide interventionist services would be severely limited, if not eliminated, due to cost considerations.

Interventionists do not replace classroom teachers. Interventionists are not responsible for delivery of required curriculum, as classroom teachers are. Interventionists are an important tool to

supplement the services that classroom teachers provide so that struggling students get the individualized attention that is required for them to succeed. In no way do interventionists diminish the value and importance of the classroom teacher, nor does the employment of interventionists supplant the employment of classroom teachers by county boards of education.

Although the instant cases arises out of circumstances in Monongalia County, the State Board is concerned about the far-reaching impact that the outcome of this case may have on other county school systems and every RESA that provides interventionists and other specialized support to county school systems. As the constitutional body responsible for the public schools in this State, the State Board is obligated to ensure that its position on the issues herein is put forward to this Court inasmuch as the decision in this case could shape the provision of pertinent services to students in every county school system.

A favorable decision by this Court in support of the actions taken by the Monongalia County Board of Education, its Superintendent, and RESA VII, could serve to clarify for the Respondents and other interested parties that the positions of interventionists (as contracted by the RESAs to county boards of education) are valued, appropriate, and may be utilized state wide in accordance with the relevant law.

III.

ARGUMENT

RESAS ARE AUTHORIZED TO CONTRACT WITH COUNTY BOARDS OF EDUCATION TO PROVIDE INTERVENTIONIST SERVICES FOR STRUGGLING STUDENTS AND SUCH CONTRACTS DO NOT RUN AFOUL OF THE STATUTORY REQUIREMENTS IMPOSED UPON COUNTY BOARDS OF EDUCATION FOR THE HIRING OF CLASSROOM TEACHERS.

This Court has held that the West Virginia Board of Education's rule-making authority derives from the West Virginia Constitution and that its rules have the force and effect of law. *West Virginia Board of Education v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988); *Lefler v. West Virginia Department of Education*, No. 11-0650, 2012 WL 2892348, at *3 (W. Va. Feb. 14, 2012). Therefore, the State Board's rule enactments that authorize the RESAs to contract with county boards of education to provide educational services to county boards of education; to deploy specialized personnel, such as interventionists, to county boards of education; and, to hire non contractual, at-will employees, such as interventionists, to provide services to the county boards of education, have the force and effect of law.

However, there is no conflict between the State Board's rule enactments and the statutes under which classroom teachers must be hired by county boards of education. The provisions of West Virginia Code § 18A-4-7a governing the hiring of classroom teachers by the county boards of education do not apply to the hiring of personnel by the RESAs who may be contracted out to county boards of education. The interventionists hired by the RESAs and contracted out to county boards, such as Monongalia County, do not supplant any regular full-time classroom teachers. Neither RESA VII, nor Monongalia County, attempted to circumvent the statutory hiring requirements for the classroom teachers who deliver the required curriculum to students in the classroom. Interventionists provide the kind of discrete, specialized services contemplated by the West Virginia Legislature and the State Board in creating the RESAs and authorizing them to provide such services to county school systems.

The Circuit Court erred when it made the leap that merely because interventionists provide instructional services to students they are, *ergo*, "classroom teachers," who may only be hired by a

county board of education and who may only be hired after conformance with county hiring procedures. Unlike the situation presented in *State ex rel. Boner v. Kanawha County Board of Education*, 197 W. Va. 176, 475 S.E.2d 176 (1996), Monongalia County does not seek to abolish full-time teaching positions and to replace the same with hourly employees – with no showing of a reduction in need for instruction. Here, Monongalia County, and all other counties that contract with RESAs for interventionist services, use such specialized personnel as an adjunct to the valuable classroom teacher in order to deliver targeted support to the most vulnerable student population. Nothing in West Virginia Code § 18A-4-7a prohibits this. The Circuit Court’s conflation of the hiring process required for regular, contractual county teaching staff and the RESA hiring procedures established by the State Board for RESA personnel is erroneous.

The regular full-time teaching positions engaged by county boards of education and the professional personnel employed by the RESAs to provide specialized instructional services in counties can peacefully co-exist and be harmonized under the separate statutory and regulatory structures under which they are placed. This Court has repeatedly held that where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions. *Carvey v. West Virginia Board of Education*, 206 W. Va. 720, 527 S.E.2d 831 (1999); *Charleston Gazette v. Smithers*, 232 W. Va. 449, 752 S.E.2d 603 (2013). The West Virginia Board of Education urges this Court to recognize that West Virginia Code § 18-2-26 and 126 W. Va. C.S.R. 26 pertaining to RESA operations and those statutory procedures that govern the employment of teachers by county board of educations are separate and distinct and can be honored as they apply to different circumstances.

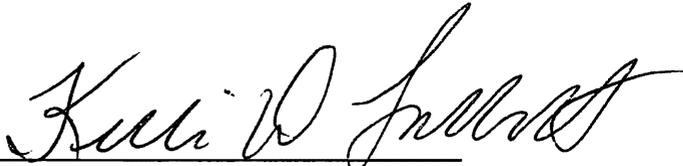
IV.

CONCLUSION

WHEREFORE, based upon the foregoing, the West Virginia Board of Education respectfully requests that this Court reverse the order of the Circuit Court of Monongalia County.

WEST VIRGINIA BOARD OF EDUCATION
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CERTIFICATE OF SERVICE

I, Kelli D. Talbott, Senior Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing Amicus Curiae Brief of the West Virginia Board of Education was served by United States Mail, postage prepaid, this 13th day of October, 2015, addressed as follows:

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