

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

**WEST VIRGINIA ASSOCIATION OF SCHOOL ADMINISTRATORS
BRIEF AS AN AMICUS CURIAE IN SUPPORT OF PETITIONERS
MONONGALIA COUNTY BOARD OF EDUCATION AND
FRANK D. DEVONON, SUPERINTENDENT AND THE REVERSAL OF
THE ORDER OF THE CIRCUIT COURT OF MONONGALIA COUNTY**

Laura Lilly Sutton (WVSB #7075)
401 South Queen Street
Martinsburg, West Virginia 25401
(304)267-3500
lksutton@k12.wv.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
I. INTRODUCTION	3
II. ARGUMENT	5
A. THE CIRCUIT COURT ERRED BY NOT CONSIDERING WEST VIRGINIA BOARD OF EDUCATION RULES THAT SET FORTH THE SPECIFIC INSTRUCTIONAL AND OTHER DUTIES AND RESPONSIBILITIES OF WEST VIRGINIA’S CLASSROOM TEACHERS AND CLEARLY DIFFERENTIATES THEM FROM CONTRACTED INSTRUCTIONAL INTERVENTIONISTS	5
B. THE CIRCUIT COURT ERRED IN DETERMINING THAT A COUNTY BOARD OF EDUCATION CANNOT USE CONTRACTED SERVICE PROVIDERS AS A MEANS OF ECONOMICALLY PROVIDING NECESSARY STUDENT SERVICES BECAUSE COUNTY BOARDS OF EDUCATION ARE AUTHORIZED AND ENCOURAGED TO ENTER INTO SUCH AGREEMENTS BY THE WEST VIRGINIA BOARD OF EDUCATION IN ORDER TO IMPLEMENT A THOROUGH AND EFFICIENT SYSTEM OF EDUCATION IN THEIR RESPECTIVE COUNTIES	8
C. THE CIRCUIT COURT ERRED IN NARROWLY DEFINING THE SCOPE OF ASSISTANCE PROVIDED BY RESA AND ITS ROLE IN SERVING COUNTY BOARDS OF EDUCATION THUS LIMITING THE ABILITY FOR COUNTIES TO PROVIDE ADDITIONAL SERVICES TO STUDENTS IN AN ECONOMICALLY EFFICIENT MANNER	11
IV. CONCLUSION	15

TABLE OF AUTHORITIES

Cases

Pauley v. Kelly, 162 W.Va. 672, 255 S.E. 2d 859 (1979) 4, 8

Constitution of West Virginia

Article XII, §§ 1,3 4

Statutes

W.Va. Code § 18A-1-1 5

W.Va. Code § 18A-5-1 7

W.Va. Code § 18A-1-1(c)(1) 7

W.Va. Code § 18A-4-1 13

W.Va. Code § 18A-4-7a 13

W.Va. Code § 19-9A-1 12, 14

Rules

126 CSR 42 6

126 CSR 44 6, 10, 11

126 CSR 142 6, 9

126 CSR 99 7

126 CSR 202 10

Other Authorities

Merriam-Webster's Dictionary (2004) 8

Education Efficiency Audit of West Virginia's Primary and Secondary
Education System (January 2012) 12

Legislative Auditor's Office, State of West Virginia, Compliance Audit West
Virginia Department of Education WV Public Support Plan FY 2009 to FY 2015 12, 14

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

**WEST VIRGINIA ASSOCIATION OF SCHOOL ADMINISTRATORS’
BRIEF AS AN AMICUS CURIAE IN SUPPORT OF PETITIONERS
MONONGALIA COUNTY BOARD OF EDUCATION AND
FRANK D. DEVONON, SUPERINTENDENT AND REVERSAL OF
THE ORDER OF THE CIRCUIT COURT OF MONONGALIA COUNTY**

I.

INTRODUCTION

Comes now the West Virginia Association of School Administrators, by counsel, Laura Lilly Sutton, and submits this Brief as An Amicus Curiae. Pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, all parties have consented to this filing.¹

¹ Counsel serves as General Counsel to the Berkeley County Board of Education and Assistant Superintendent of Berkeley County Schools. As a member of the West Virginia Association of School Administrators, counsel authored this brief in its entirety without compensation from any source.

The West Virginia Association of School Administrators (hereinafter WVASA) is comprised of county school superintendents, the state superintendent of schools, county and state assistant superintendents and directors and chief administrators and assistant administrators of the state's Regional Education Service Agencies (hereinafter RESA). The purpose of the WVASA is to promote whatever, in the judgment of a majority of its members, will contribute to the best interest of public education. The WVASA has an interest in the outcome in the appeal filed by the Monongalia County Board of Education and Superintendent Devono inasmuch as pursuant to Article XII, Section 3 of the Constitution of West Virginia and West Virginia Code Section 18-4-1, the county superintendent is an officer elected by the county board of education. The county superintendent serves as the chief executive officer of the county board in its implementation of the constitutionally mandated right to a thorough and efficient public education for the children of West Virginia. Const. of WV Article XII, Section 1. The members of the WVASA are concerned that an adverse ruling by this Court will have a broad impact and negatively affect their duties and responsibilities to meet the needs of the students of West Virginia's public schools.

This Court has defined "thorough and efficient system of schools" as developing, as best the state education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and doing so economically." *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E. 2d 859 (1979). In executing this important charge, county school superintendents depend on the services provided through their respective RESAs. The services provided to school districts by the RESAs vary throughout the State, but all are directed toward providing the best education for the children of West Virginia's schools. Any judicial limitation on county school districts' ability to utilize services provided by RESAs or its general ability to enter contracts for services to meet a district's targeted needs, would serve to the

detriment of our students and would undoubtedly create significant economic hardships for county school districts, many of which recently learned that they were underfunded by the State for the past six years and all of which just learned of an immediate a one per cent reduction in State funding. While school district budgets are continually reduced, what remains unchanged is the duty of counties to provide a thorough and efficient system of education to develop the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship. For these reasons, the WVASA deems participation in this matter as an amicus curiae is crucial in serving its mission to promote whatever is in the best interest of public education.

I.

ARGUMENT

A. THE CIRCUIT COURT ERRED BY NOT CONSIDERING WEST VIRGINIA BOARD OF EDUCATION RULES THAT SET FORTH THE SPECIFIC INTRUCITONAL AND OTHER DUTIES AND RESPONSIBILITIES OF WEST VIRGINIA’S CLASSROOM TEACHERS AND CLEARLY DIFFERENTIATES THEM FROM CONTRACTED INTRUCTIONAL INTERVENTIONISTS

As stated in the Monongalia Board of Education’s Petition for Appeal, the Monongalia County Board of Education (hereinafter MCBOE) has provided targeted educational support for students while maximizing its scarce resources by contracting with RESA VII to obtain certain services that it could not otherwise provide to its students. The record appears clear that the contracted service providers were to *supplement* the services provided to students, not *supplant* the critical roles of the district’s classroom teachers or other district employees.

The Circuit Court relied on the limited definition of a classroom teacher found in W.Va. Code § 18A-1-1 and failed to address the rules and regulations of the West Virginia Board of

Education that define the vast duties and responsibilities of a classroom teacher in the State of West Virginia. While the statutory classroom teacher definition as “a professional educator who has a direct instructional or counseling relationship with students and who spends a majority of his or her time in this capacity” sets the framework, the lower court failed to address what, in fact, establishes this direct instructional relationship with students.

Charged with the implementation of a thorough and efficient system of schools, the West Virginia Board of Education set for the in 126 CSR 42, a policy designed for the purpose of Assuring the Quality of Education: Regulations for Education Programs, West Virginia Board of Education Policy 2510 (hereinafter Policy 2510). Policy 2510, requires all classroom teachers to implement each program of study for the respective grade levels they teach. 126 CSR 42-7.5.c.1. This same policy mandates that a teacher’s work day cannot exceed eight hours in length. 126 CSR-42-3.66. In order to implement the program of study for the respective grade level, a classroom teacher must adhere to the West Virginia Board of Education Content Standards and Objectives Policies - Policies 2520A through 2520.162. 126 CSR 44. Classroom teachers are responsible for ensuring that their students meet the instructional goals set forth in these standards, which is measured through the West Virginia Board of Education Performance Evaluation of School Personnel Policy 5310. 126 CSR 142.

By contrast, the interventionists at issue were responsible only for providing instructional support or intervention to a limited number of students in only two subject areas. They are not subject to the provisions of Policy 2510, they are not responsible for implementing the complete program of study for the grades in which they work and are not evaluated against that criteria. Moreover, the record below reflects that the interventionists worked as little as two and a half hours a day or as much as six hours a day. The interventionist served to assist the teacher by

providing additional support to targeted students in meeting the goals and objectives with which students need additional help.

In addition to their responsibilities related to instruction, pursuant to W.Va. Code § 18A-5-1, teachers stand in the place of the parent, guardian or custodian in exercising authority and control of their students from the time they reach the school in the morning until they have returned to their respective homes. Teachers are also given statutory authority to exclude students from their classes for misconduct. *Id.* In this regard, classroom teachers are responsible for the implementation of the West Virginia Department of Education Expected Behavior in Safe and Supportive Schools Policy 4373. 126 CSR 99. Pursuant to this policy, all school employees are responsible for assuring a safe and supportive school climate/culture. When incidents of inappropriate behavior are witnessed by school staff, the behavior shall be address consistently in accordance with the Interventions and Consequences outlined in the Policy. In the matter at hand, the record is void of any indication that interventionists were assigned any responsibilities for student discipline. While anyone working with a teacher or volunteering in a classroom would surely assist in the event of an altercation or other emergency, only the classroom teacher has the authority to exclude an unruly student from his or her classroom and impose the disciplinary measures set forth in Policy 4373.

Based upon the foregoing, a classroom teachers' responsibilities go well beyond the definition found in W.Va. Code § 18A-1-1(c)(1) so heavily relied on by the lower court and the Respondents herein. It is unrealistic to compare the classroom teachers' responsibilities as contemplated by Policy 2510, Policy 2520, Policy 4373 and numerous other federal, state and county policies with which classroom teachers must comply with the limited services provided by

the contracted interventionists. Any conclusion to the contrary risks belittling the work and stature of West Virginia's classroom teachers.

B. THE CIRCUIT COURT ERRED IN DETERMINING THAT A COUNTY BOARD OF EDUCATION CANNOT USE CONTRACTED SERVICE PROVIDERS AS A MEANS OF ECONOMICALLY PROVIDING NECESSARY STUDENT SERVICES BECAUSE COUNTY BOARDS OF EDUCATION ARE AUTHORIZED AND ENCOURAGED TO ENTER INTO SUCH AGREEMENTS BY THE WEST VIRGINIA BOARD OF EDUCATION IN ORDER TO IMPLEMENT A THOROUGH AND EFFICIENT SYSTEM OF EDUCATION IN THEIR RESPECTIVE COUNTIES

As stated in the Monongalia Board of Education's Petition for Appeal, the MCBOE maximized its scarce resources by contracting with RESA VII to obtain certain services that it could not otherwise provide to its students. Like the MCBOE, counties throughout West Virginia must provide a thorough and efficient education system to develop the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and do so economically. *See Pauley, supra*. The challenge created for school districts in this regard is two-fold: First, school districts must provide a "thorough" education. The Merriam-Webster Dictionary defines thorough as "marked by full detail, complete or absolute." Second, school districts must provide a thorough education in an efficient manner. Merriam-Webster Dictionary (2004). Merriam-Webster defines "efficient" as "capable of producing desired results without wasting materials, time, or energy." Merriam-Webster Dictionary (2004). For these reasons and in its simplest form, school districts must work to ensure that they cover every possible part or detail of a student's needs, but do so in a productive manner that is not wasteful of public resources. In order to meet this challenge, school districts across West Virginia seek cost-effective means to provide students the services they need to be successful in school and in life.

Again, the Circuit Court failed to look beyond the statutory scheme of public education in determining a county board of education's responsibilities to provide a thorough and efficient education for its students. In Policy 2510, *supra*, the West Virginia Board of Education establishes the regulations for education programs that are designed to prepare students for a global society by improving the quality of teaching and learning in the public schools and ensuring that equal education opportunities exist for all students, including, but not limited to: rigorous high-quality curriculum, engaging instructional strategies, experiential learning programs, support programs, personnel, instructional resources, supplies, equipment, technology integration, and facilities. This rule provides, in pertinent part: "Ensuring a quality education implies that a thorough and efficient education system exists that provides equal access to substantive curricular offerings and appropriate related services for all students. Providing such an education system must be the goal of the WVBE, West Virginia Legislature, West Virginia Department of Education, Regional Education Service Agencies, county boards of education, and the people of West Virginia." 126 CSR 42.

This rule provides the basic structure for all education programs and student support services necessary for a thorough and efficient system of education to be available to all students. The West Virginia Board of Education defines a thorough and efficient system of education as including: high-quality education programs, student services and experiential learning opportunities; high-quality administrative and instructional practices, personnel, facilities, instructional materials, technology integration, supplies and equipment; a safe and caring environment that fosters supportive relationships, is free from harassment, intimidation, bullying, discrimination and other inappropriate forms of conduct, and involves parents; a demanding curriculum for all students, with emphasis on the programs of study that are aligned with rigorous

standards, learning skills and technology tools and are communicated to students, parents and communities; and accountability measures to ensure the public that a thorough and efficient system of education is being provided to students enrolled in the public schools of West Virginia. *Id.* The West Virginia Board of Education charges county board of education as follows:

It is the responsibility of each county board of education to plan, deliver, and evaluate the education programs and student support services necessary to implement a thorough and efficient system of public education. The programs of study and student support services mandated by regulations must be made available to all students.

In carrying out this responsibility, a county board of education may: 1) cooperate with one or more counties in establishing and maintaining joint programs, 2) use regional services or contract for services with public or private agencies having appropriate programs, and 3) coordinate and share programs, related services and resources with other organizations, agencies and local businesses. 126 CSR 44 (emphasis added).

The West Virginia Board of Education clearly authorizes and encourages counties boards of education to use regional services or contracted services with public or private agencies having appropriate programs in the implementation of a thorough and efficient system of public education in their respective counties. This rule does not limit the types of contracts or services that can be provided under such contracts. In fact, such contracting agreements are regulated through the West Virginia Board of Education's Purchasing Procedures for Local Education Agencies Policy 8200 (hereinafter Policy 8200). 126 CSR 202-9.1.11 and 12.1. Policy 8200 specifically exempts from the competitive bid process agreements for certain professional services, which include student activities and counseling. *Id.*

Through its failure to address the various rules established by the West Virginia Board of Education, the lower court's reasoning begs the question as to whether Policy 8200 is legally sound in that it allows for the very contracts deemed insufficient by the lower court. Should the lower court's ruling stand, a county school board may be unable to contract for educational services for

a special education student who, by virtue of an Independent Education Plan, is placed in a private educational facility for the purpose of providing educational services by one who meets the statutory definition of a classroom teacher. The question is also raised about contracts for much needed mental health and counseling services provided to our students by contracted service providers through grants and community partnerships. Using the lower court's rationale, these services could not be provided by contractors, but only by individuals hired directly by the county board of education. If the mental health needs of our students cannot be met through the contracts and partnerships, the disservice to the students of our schools and the people of West Virginia would be immeasurable.

C. THE CIRCUIT COURT ERRED IN NARROWLY DEFINING THE SCOPE OF ASSISTANCE PROVIDED BY RESA AND ITS ROLE IN SERVING COUNTY BOARDS OF EDUCATION THUS LIMITING THE ABILITY FOR COUNTIES TO PROVIDE ADDITIONAL SERVICES TO STUDENTS IN AN ECONOMICALLY EFFICIENT MANNER

The lower court opined that a RESA cannot hire instructional personnel to be deployed in one or more of the various counties or schools within the RESA. Order at 17. The Court reasoned that such individuals, by virtue of these assignments are classroom teachers that cannot be hired by RESAs. Order at 16-17. This is inapposite in light of Policy 2510, *supra*, wherein the WVBE includes the RESAs among the agencies responsible for providing a thorough and efficient school system and contemplates counties contracting with the RESAs and other public and private agencies in this regard. The lower court's short-cited vision of public education misconstrues public school financing and ignores the educational oversight provided by the West Virginia Legislature, the West Virginia Board of Education and the elected members of our local boards of education.

In an effort to ensure that the State of West Virginia and its counties are appropriately utilizing public education resources, two audits were conducted in recent years at the direction of the West Virginia Legislature. In 2010, the State of West Virginia initiated a comprehensive review of its primary and secondary education system, which it called the “Education Efficiency Audit of West Virginia’s Primary and Secondary Education System” (hereinafter “Education Audit”). The review was intended to help the state achieve two goals: Producing the best possible outcomes for its students and receiving the highest return on the educational dollars it spends. *See Education Audit*, p. 2.

A second audit, a compliance audit of the West Virginia Department of Education Public School Support Plan for the period of July 1, 2009, through June 30, 2015, was released in September 2015 (hereinafter “Financial Audit”). The purpose of this audit was to determine whether the West Virginia Department of Education (hereinafter “WVDE”) calculated the Public School Support Plan formula according to W.Va. Code § 18-9A from fiscal years 2009 through 2015 resulting in the correct appropriation and distribution of State Aid funding to the county school districts during this period. Clearly, the legislature is keenly aware of the economic hardships our school districts face in providing a thorough and efficient public education to students; however, while the school district’s duty to provide a thorough education remains unchanged, it is continually challenged to do so in an efficient manner. An adverse ruling will not affect school district’s responsibilities to its students, but will overwhelmingly impact its ability to provide necessary services in a cost effective manner.

In the first paragraph of the first page of the Education Audit, it is stated that because of the economic challenges facing our state, West Virginia must find better ways to marshal our limited resources and to educate our children. *Education Audit*, p. 1. Importantly the auditors

found that West Virginia's education system has developed into a system that revolves around the needs and wants of adults. The goal of the Education Audit is to redirect the purpose of direction of our education to the perspective of the student. *Id.* In order for this to succeed, **more of the educational decision-making must be driven down to the level closest to the students by eliminating excess bureaucracy, cutting unneeded spending, and reducing inefficiencies in service delivery to put more money into classroom instruction without raising taxes.** *Id.* (emphasis added).

The Education Audit found that one manner of reducing these inefficiencies is through the services provided by the RESAs. The Education Audit included a thorough review of RESAs and recommendations as to how RESAs could better serve county school districts. The Educational Audit includes a table of RESA staffing and a table of RESA services. *Id.* at pp. 72-75. Notably, RESA staffing includes teachers, computer technicians, bus operators, aides, curriculum specialists and other titles that are also found in the provisions of West Virginia Code § 18A-4-1 *et seq.* Importantly, the Education Audit found that there are 15 services provided by all eight RESAs – ranging from professional development to direct student services. *Id.* While the Circuit Court sought to limit the assistance of RESAs, the Educational Audit recommends that the RESAs take on a more formal role in identifying struggling schools and working with the counties and the WVDE to develop interventions. *Id.* at 81.

The Circuit Court also presumes that the only means to insure quality educators and other providers of instructional services is through the hiring criteria of W.Va, Code § 18A-4-7(a) and the lure of benefits packages to prospective teachers. *See* Order at 19-22. As a practical matter, while health insurance and other benefits may assist districts in recruiting and retaining classroom teachers required through the Public School Support Plan (State Aid), additional employees that

are not within that formula must be paid from local, county funds. For that reason, service providers not contemplated or deemed necessary by the State Aid Formula, like those provided by an interventionist, become cost prohibitive for counties when they assume the full employment cost of the employee without assistance from the State.

The West Virginia Public School Support Plan (State Aid) Formula determines the state and county responsibilities for financing public schools in West Virginia. The purpose is to provide a basic foundation support plan that provides for program growth and a more equitable educational opportunity for all students irrespective of where they live. *See* W.Va. Code §§ 18-9A-1 *et seq.* In 2008 and 2009, this chapter was significantly amended to update the calculation of State Aid to more equitably distribute funding based upon population density and enrollment. *Finance Audit*, p.3. The Finance Audit found that the WVDE calculation of the State Aide Formula from 2009 through 2015 resulted in 65% of county districts being underfunded by approximately \$51.7 million. *Finance Audit* p. 3. By example, during this time period Berkeley County Schools were underfunded by \$2,814,666, which reduced per pupil expenditures by \$159. *Finance Audit*, p. 6. To further the financial concerns of local boards of education, On October 5, 2015, Governor Tomblin recently announced a 1% immediate reduction in State Aid for county boards of education. Again, for example, Berkeley County will lose more than \$1 million in State Aid. Regardless of the size or enrollment of a county, the economic impact of the loss of funding affects our students by way of increased class sizes, longer bus rides, fewer instructional support services, limited extracurricular opportunities and many other measures county boards of education take to remain fiscally responsible.

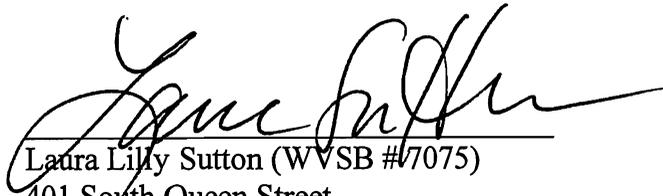
Contracting services, without paying the full cost of the employee, is a logical, legal and cost-effective means for school districts to combat budget cuts and maintain services to students. Any ruling limiting this practice will further hinder school district's efforts to educate it students.

IV.

CONCLUSION

WHEREFORE, based upon the foregoing, the West Virginia Association of School Administrators respectfully requests this Court to reverse the decision of the Circuit Court of Monongalia County.

**WEST VIRGINIA ASSOCIATION OF
SCHOOL ADMINISTRATATORS
By Counsel**



Laura Lilly Sutton (WVSB #7075)
401 South Queen Street
Martinsburg, West Virginia 25401
(304)267-3500
lksutton@k12.wv.us

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October 2015, a true copy of the foregoing **WEST VIRGINIA ASSOCIATION OF SCHOOL ADMINISTRATORS' BRIEF AS AN AMICUS CURIAE** was served upon counsel for all parties by United States mail, postage prepaid, and addressed as follows:

Ashley Hardesty O'Dell, Esquire
Bowles Rice LLP
7000 Hampton Center
Morgantown, WV 26505

Robert M. Bastress, Esquire
P.O. Box 1295
Morgantown, WV 26507

Howard E. Seufer, Jr., Esquire
Bowles Rice LLP
600 Quarrier Street
Charleston, WV 25325

Jeffrey C. Blaydes, Esquire
Mark W. Carbone, Esquire
2442 Kanawha Blvd., East
Charleston, WV 25311



LAURA LILLY SUTTON