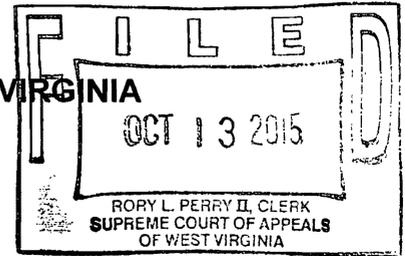


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0622 662

(Circuit Court Civil Action No. 11-C-759)



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

Appellants

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,

Appellees

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BRIEF OF THE WEST VIRGINIA REGIONAL EDUCATION SERVICE AGENCIES  
AS *AMICUS CURIAE* IN SUPPORT OF BRIEF OF APPELLANTS  
MONONGALIA COUNTY BOARD OF EDUCATION  
and FRANK D. DEVONO, SUPERINTENDENT

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## I. Introduction and Statement of Interest

The West Virginia Regional Education Service Agencies (hereinafter “RESAs”) are established pursuant to the provisions of West Virginia Code § 18-2-26, for the purpose of providing “high quality, cost effective education programs and services to students, schools and school systems.” There are eight multi-county RESAs in the state of West Virginia which provide various supportive services to county boards of education, including “[t]echnical, operational, programmatic . . . [and] professional services.” West Virginia Code § 18-2-26(d). All eight of the West Virginia RESA entities join in this brief. Examples of the RESAs’ services include bus operator training, computer/technology specialists who perform repairs and servicing of equipment, substitute teacher certification training, and staff development courses for board of education employees.

The RESAs respectfully submit this Amicus Curiae asking this Court to reverse the Order of the Circuit Court of Monongalia County, West Virginia, dated June 9, 2015. As the educational landscape has consistently evolved, on both the state and federal levels, the role of West Virginia’s RESAs has also changed and become ever-increasingly more vital to an efficient education system. This premise has been succinctly stated by our legislature, as follows:

Since the first enactment of this section in 1972, the focus of public education has shifted from a reliance on input models to determine if education programs and services are providing to students a thorough and efficient education to a performance based accountability model[.]

West Virginia Code § 18-2-26(a). Among other mandates, the legislature has directed the RESAs to develop cost-saving measures to enable county boards of education to

deliver higher quality education programs by utilizing resources in as efficient a manner as possible, in light of the objective of helping school systems improve student performance. See West Virginia Code § 18-2-26(d).

The issue at the heart of the instant case has a significant impact upon all the state RESAs. The economic situation in West Virginia has not had a positive impact upon the state's school systems, yet educational standards have become increasingly more rigorous and demanding. It is in this regard that the services of the RESAs have become more valuable and necessary, enabling the county boards to provide supplemental services that would not be possible otherwise, due to financial and other constraints. Employing part-time interventionists to provide supportive services to students is only one example of a RESA's ability to perform necessary functions that a county school board cannot, at least not without incurring significant, prohibitive expense and logistical obstacles. Accordingly, we urge this Court to reverse the decision of the Circuit Court, so that RESAs can continue to provide necessary and vital supports, such as interventionists and other professional assistance, in order to accomplish their legislative purpose of improving the state's education system, specifically student performance.

## **II. Argument**

The Circuit Court's narrow interpretation of the various statutes at issue was misplaced, at the very least, and ultimately erroneous. There can be no question that our legislature has established an extremely detailed and comprehensive statutory system regarding numerous aspects of public school employment. However, the Circuit

Court's conclusion that those statutes necessarily prohibit the use of contracted support personnel, through the RESA system, is incorrect.

As discussed in great detail in the Circuit Court Order and the legal memoranda submitted by the parties to this case, several statutory provisions specifically discuss the methods by which "classroom teachers" and professional personnel are employed by a county board of education. Much of the focus in this case has been upon whether or not interventionists are encompassed within the statutory definition of classroom teacher, as set forth in West Virginia Code § 18A-1-1(c)(1), thus being, in turn, included in and governed by the provisions for hiring of professional school personnel contained in West Virginia Code § 18A-4-7a. Because the interventionists are providing services that could be deemed "instructional" in nature, the Circuit Court concluded that they are considered classroom teachers and professional personnel, as those terms are defined by statute, and, accordingly, *must* be hired and employed by a board of education, per the applicable provisions.

One statute that is pivotal to the questions presented in this case is the portion of West Virginia Code § 18A-1-1 which defines "teacher." Subsection (g) of that statute defines a teacher as someone "regularly employed for instructional purposes in a public school in this state." In turn, the term "regularly," for purposes of teacher employment, is not clearly defined. Only the phrase "regular full-time employee" is addressed by subsection (j) of the same statute and is defined as "any person employed by a county board who has a regular position or job throughout his or her employment term, without regard to hours or method of pay." The RESAs submit that these provisions may be interpreted to mean that only "regular" employees, i.e. those with a defined employment

term and position, are to be governed by the various other statutes discussing regular employment and hiring. These hourly, as-needed interventionists are simply not regular employees of a county board of education, so are not subject to the strict requirements of public teacher employment.

The positions of interventionists are anything but “regular” in every possible way. They are not employed for a full, 200-day school year, or for a traditional full school day of instruction. The targeted support services provided by these individuals vary on a yearly, weekly, and even daily basis. Therefore, interventionists are not “regular” employees with a contracted employment term or expectation of continued or future employment. Indeed, interventionists are not issued a traditional contract of employment, which, by statute, must be designated as probationary or continuing, simply because they are not employed for “regular” instructional purposes, or at least not for the purposes addressed by the provisions of Chapter 18A of the West Virginia Code. See West Virginia Code § 18A-2-2; Appendix at 116.

While it is quite clear that Chapter 18A does provide a definition of the term “classroom teacher,” it is not readily apparent that this definition is meant to encompass personnel who provide the type of support services that are at issue. When faced with a matter of statutory construction, the first inquiry involves an assessment of the specific statutory language at issue as well as a consideration of the underlying legislative intent. See *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. at 587, 466 S.E.2d at 438. If the statutory language is not clear, the statute is ambiguous and must be construed to ascertain the meaning intended by the Legislature. *Griffith v. Frontier West Virginia, Inc.*, 228 W.Va. 277, 719 S.E.2d 747 (W.Va., 2011). “A statute

that is ambiguous must be construed before it can be applied.” Syl. pt. 1, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992).

The West Virginia RESA organizations submit that, with regard to the situation presented here, the statutes at issue are, indeed, ambiguous. The use of the term “classroom teacher” throughout Chapter 18A is indicative of a traditional concept of education whereby an instructor teaches a subject or curriculum to a group, i.e. class, of students. Appellees will certainly argue that since “classroom teacher” is defined in West Virginia Code § 18A-1-1(c)(1), no ambiguity exists. However, while the Legislature appears to have included professionals who provide direct instruction or counseling to students within that definition, it does not necessarily follow that additional supportive professional services cannot be provided by individuals who are not traditional classroom teachers. As the record in this case has quite clearly established, interventionists provide support and reinforcement to the instruction already provided by the students’ true classroom teacher, lending further credence to the idea that interventionists provide supportive services, not “classroom instruction.”

As can be seen from the Strategic Plan for RESA 7 contained in the record herein, a variety of professional services, in addition to interventionists, are provided by RESA organizations, such as audiology testing, occupational therapy, physical therapy, and speech therapy. Appendix at 46. Obviously, the RESA concept was created for good reason, to provide additional mechanisms to improve student performance which cannot always be provided through the county board of education framework. Intervention and other professional services are not necessarily addressed by or contemplated in the provisions of Chapter 18A regarding school personnel, which is

exactly why the RESAs exist. To deprive the students of such critical services, based upon an overly strict interpretation of school personnel laws, is unnecessary and wrong.

Interventionists are employed in West Virginia pursuant to standards adopted in the federal Individuals with Disabilities Education Act (“IDEA”) in 2006, referred to as “response to intervention” (or “RTI”) and “early intervention” services. “Early intervention” services are administered to students who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment; “response to intervention” services are aimed toward determining whether children qualify for designation as “specific learning disabilities” and in need of associated special education services. 34 CFR 300.226(a); 20 U.S.C. 1413(f)(1). The West Virginia Department of Education has promulgated a comprehensive guide to the RTI process in “West Virginia Response to Intervention: An Implementation and Technical Assistance Guide for Districts and Schools,” published in 2006 and available on the Department’s website at <https://wvde.state.wv.us/osp/RtiImpGuide91906.DOC>.

While providing an extremely detailed explanation of how the RTI process works, the Department of Education’s guide notes that “[t]raditional staffing patterns that limit how teacher expertise may be utilized are not efficient and hinder effective delivery of the reading curriculum.” *Id.* at 29. The guide also provides two examples of schools successfully implementing the intervention process, one of which was using retired teachers, two to three days per week. *Id.* at 32. Clearly, the RTI process is not traditional classroom teaching, but a much more intensive, focused system of providing

needed assistance to struggling students. Even our Department of Education acknowledges that RTI does not lend itself to the confines of the usual staffing process.

The Department's guide also discusses the constantly changing environment in which intervention services are provided. Students are periodically assessed and regrouped, based upon their progress and needs. Therefore, as noted throughout the record in this matter, utilization of full-time teachers is simply not practical, nor even possible. Flexibility is of utmost importance in implementing the intervention model, and that flexibility is not available within the confines of the county board of education personnel structure, with its requirements for planning periods, duty free lunch, etc.

The provisions of West Virginia Code § 18A-1-1, including the various definitions of "classroom teacher" and "regular" employment, have been in effect for many, many years. That statute's legislative history dates back to 1969, and it has been amended numerous times since. Surely, the Legislature did not envision in the 1970s, 1980s, or even the 1990s that federal laws would affect educational services in the manner in which the IDEA and No Child Left Behind have impacted education in the 21<sup>st</sup> century. It is no longer sufficient for one teacher to instruct students in a single class without the assistance of support personnel if school systems are to meet the rigorous requirements of the myriad of federal and state laws governing education. It is not possible that the Legislature of years ago envisioned any of this when defining the various types of school personnel who must be employed by a county board of education pursuant to the rigorous requirements of Chapter 18A.

The Circuit Court's application of this Court's opinion in *State ex rel. Boner v. Kanawha County Bd. of Educ.*, 475 S.E.2d 176, 197 W.Va. 176 (W.Va., 1996), fails to

acknowledge the observation that the Court was “not proscribing the hiring of . . . teachers on an hourly-pay basis,” noting that many smaller counties may not have the need for full-time teachers to serve in that role. 197 W.Va. at 187. Unlike the *Boner* scenario, interventionists are not being hired in place of classroom teachers, nor are their services the same, and they serve in a role that coexists in conjunction with traditional teachers, not in place of them. The use of interventionists is not an effort to deprive classroom teachers of employment, but to improve and support the instruction given by those teachers. Thus, this Court has already acknowledged that the use of hourly instructional personnel is possible, and the RESA organizations are certainly free to employ such individuals to be utilized through contractual arrangements with county boards of education.

### III. Conclusion

West Virginia’s RESAs encourage this Court to allow them to continue providing vital, crucial support services to this state’s children through the services of interventionists and other professional personnel. The Circuit Court’s narrow reading of the provisions of Chapter 18A must be reversed.

**West Virginia Regional Education Service  
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GARLITZ, and MIKE ROGERS, as representatives  
of similarly situated individuals,

Appellees

CERTIFICATE OF SERVICE

I, Denise M. Spatafore, do hereby certify that I served the foregoing **BRIEF OF THE WEST VIRGINIA REGIONAL EDUCATION SERVICE AGENCIES AS AMICUS CURIAE** IN SUPPORT OF BRIEF OF APPELLANTS MONONGALIA COUNTY BOARD OF EDUCATION and FRANK D. DEVONO, SUPERINTENDENT on the parties by placing a true copy thereof, in the United States Mail, First Class pre-paid, this 12<sup>th</sup> day of October, 2015, in an envelope addressed as follows:

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