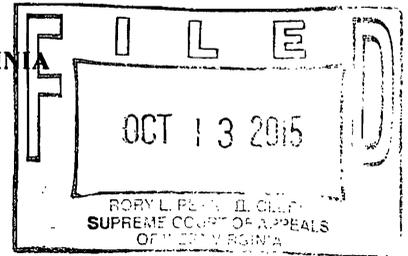


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0662



**MONONGALIA COUNTY BOARD OF
EDUCATION and FRANK D. DEVONO,
Superintendent, Respondents Below,**

Petitioners,

v.

Appeal from the Circuit Court of
Monongalia County (11-C-759)

**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.

**BRIEF OF AMICUS CURIAE WEST VIRGINIA SCHOOL BOARD ASSOCIATION
IN SUPPORT OF PETITION FOR REVERSAL**

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I. INTRODUCTION

The West Virginia School Board Association (“WVSBA”) submits this brief as amicus curiae in support of Petitioners Monongalia County Board of Education (“MCBOE”) and Frank D. Devono, Superintendent.¹ The WVSBA seeks reversal of the Order entered by the Circuit Court of Monongalia County on June 9, 2015, because the Court’s grant of summary judgment to Respondents 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 based upon the finding that the “Interventionists” employed by Regional Education Service Agency (“RESA”) 7 through a contract with the MCBOE are “classroom teachers as defined by W.Va. Code §18A-1-1(c)(1) and, therefore, must be hired pursuant to the procedures contained in W.Va. Code §18A-4-7a” is contrary to the constitutional and statutory authority governing the operation of a thorough and efficient system of public schools in West Virginia. The Interventionists, who are paid on an hourly basis by RESA 7 to provide supplemental support in reading and math to students of the MCBOE, are not “classroom teachers” or county board of education employees; therefore, the hiring factors of §18A-4-7a do not apply.

The Circuit Court overlooked the explicit authority in the W.Va. Const. Art. XII, §2 which provides that “[T]he general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be described by law.” The RESAs were created by W.Va. Code §18-2-26 and are governed by West Virginia

¹ Pursuant to W.Va. R. App. P. 30(b), WVSBA notified counsel of record for all parties of its intention to file an amicus curiae brief. All parties consented to this filing. *See* W.Va. R. App. P. 30(a) (providing, among other things, that amicus curiae may file a brief with the consent of all parties.) Pursuant to W.Va. R. App. P. 30(e), WVSBA reports that no counsel for a party to this action authored this brief in whole or in part. Moreover, no such counsel or party made a monetary contribution specifically intended to fund the preparation and submission of this brief. Finally, no other person who would need to be identified under W.Va. R. App. P. 30(e) made such a monetary contribution.

Board of Education Policy 3223: Establishment and Operation of Regional Education Service Agencies, 126 CSR 72. Included in that authority is the ability to provide services to students by RESA employees such as the “Interventionists” at issue in this case in the counties through the eight RESAs in operation. County boards of education likewise are authorized by W.Va. Code §18-5-5 to enter into contracts and granted general authority by W.Va. Code §18-5-13 in order to achieve their mandate to provide services to students in a thorough and efficient manner. Under W.Va. Code §18-5-34, the exercise of this authority and the performance of other duties is prescribed by law or the regulations of the state board of education, which empower RESA 7 to contract with the MCBOE to implement their Strategic Plan. 126 CSR 72 §2.5.

The WVSBA recognizes that classroom teachers employed by county boards of education must be hired through application of the hiring factors set forth in W.Va. Code §18A-4-7a. However, the Circuit Court failed to recognize that the statutes and policies governing West Virginia schools also provide for supplemental services such as the interventionists employed by RESA 7 based upon the contractual agreement with the MCBOE. The WVSBA submits that a decision upholding the Circuit Court’s Order which would require the county board of education to employ interventionists as county employees and not RESA contracted positions would have far-reaching detrimental effects on the schools in many of the 55 counties which serve the students of West Virginia and impede their duty to provide those students with a thorough and efficient education. In fact, a review of RESA staffing reveals that seven of the eight have employees who provide instructional or other professional services (i.e., occupational therapist, physical therapist, speech-language pathologist, psychologist).² Therefore, this Court should reverse the Circuit Court’s Order.

² *The Education Efficiency Audit of West Virginia’s Primary and Secondary Education System* (January 3, 2012), pp. 72-73, <http://www.governor.wv.gov/initiatives/satf/documents/wvde%20report%final.pdf>.

II. STATEMENT OF INTEREST

As mandated in Article II of its constitution, the WVSBA from its inception has served the purpose of working to promote, in non-partisan means, “the advancement of public education in West Virginia, and to study and seek to attain effectiveness and constructive school board membership... .” The organization works to promote school boards, school board services, and the resolution of problems facing school boards. All 55 school boards in West Virginia belong to the WVSBA.

The WVSBA actively monitors legislative developments and court decisions that affect its membership. In the instant case, the Order of the Circuit Court impacts not only the litigants but potentially the operations of all 55 county boards of education and the eight RESAs in West Virginia operating under the direction of the West Virginia Board of Education. Therefore, the WVSBA joins the Petitioners in seeking reversal of the Circuit Court’s Order.

III. ARGUMENT

A. **The MCBOE’s Contract with RESA 7 to Employ Interventionists is Supported by Constitutional, Legislative and Regulatory Authority.**

This Court should reverse the Circuit Court’s Order granting the Respondents’ motion for summary judgment as it is contrary to the constitutional, statutory, and regulatory authority for the provision of services to students in the public schools of West Virginia by RESAs through contracts with local education agencies. In its Order, the Circuit Court erred in concluding that the “Interventionists” employed by RESA through a contract with the MCBOE meet the statutory definition of “classroom teacher” as delineated in W.Va. Code §18A-1-1(c)(1), triggering the hiring provisions of W.Va. Code §18A-4-7a and, therefore, the Board of Education and its Superintendent abdicated their mandated responsibilities.

In so ruling, the Circuit Court recognizes the authority of the Legislature to provide for a thorough and efficient system of free schools through the enactment of legislation. W.Va. Const. Art. XII, §1. Likewise, the Court below cites the Legislature’s constitutional responsibility to “develop a high quality state-wide education system.” *Pauley v. Kelly*, Syl. Pt. 5, 162 W.Va. 672, 255 S.E.2d 859 (1979). While the Court below is correct that W.Va. Code §18A-4-7a requires that the Petitioners employ classroom teachers with the highest qualifications, the “Interventionists,” who provide the type of instructional support in reading and math more akin to tutors, are not classroom teachers employed by the MCBOE; thus, application of this criteria simply does not apply to the circumstances presented in this case.

This Court has ruled that

[T]he West Virginia Board of Education and the State Superintendent of Schools, pursuant to their general supervisory powers over education in West Virginia under W.Va. Const. Art. XII, §2 and their specific duties to establish, implement, and enforce high quality educational standards for all facets of education under the provisions of Chapter 18 of the West Virginia Code, have a duty to ensure the complete executive delivery and maintenance of a “thorough and efficient system of free schools” in West Virginia as that system is embodied in a Master Plan for Public Education

Pauley v. Bailey, Syl. Pt. 1, 174 W.Va. 167, 324 S.E.2d 128 (1984).

In recognition of the constitutional authority granted, later cases upheld the West Virginia Board of Education’s rule-making authority. Specifically, the Court held that

[T]he State Board of Education’s promulgation of a rule requiring students to maintain a 2.0 grade point average in order to participate in non-academic extracurricular activities is a legitimate exercise of its power of “general supervision” over the state’s educational system under Article XII, §2 of the West Virginia Constitution in furtherance of the fundamental educational goal of academic excellence.

Bailey v. Truby, 174 W.Va. 8, 321 S.E.2d 302 (1984). *See also W.Va. Bd. of Educ. v. Hechler*, 180 W.Va. 451, 376 S.E.2d 839 (1988).

W.Va. Code §18-2-5 provides that

[S]ubject to and in conformity with the Constitution and laws of this state, the State Board of Education shall exercise general supervision of the public schools of the state, and shall make rules in accordance with the provisions of [§§29-A-3b1, *et seq.*], Chapter twenty-nine-a of this code for carrying into effect the laws and policies of the state relating to education, including rules relating to standards for performance and measures of accountability, the physical welfare of pupils, the education of all children of school age, school attendance, evening and continuation or part-time day schools, school extension work, the classification of schools, the issuing of certificates based upon credentials, the distribution and care of free textbooks by county boards of education, the general powers and duties of county boards of education, and of teachers, principals, supervisors, and superintendents, and such other matters pertaining to the public schools of the State as may seem to the state board to be necessary and expedient.

Furthermore, W.Va. Code §18-2-26, the enabling statute for RESAs, provides that

- (a) Legislative intent – The intent of the Legislature in providing for establishment of regional education service agencies, hereinafter referred to in this section as agency or agencies, is to provide for high quality, **cost effective education programs and services to students and school systems.**

(Emphasis added).

In accordance with the authority of *Pauley v. Bailey*, and that granted by W.Va. Code §§18-2-5 and 18-2-26, the West Virginia State Board of Education promulgated W.Va. Board of Education Policy 3223: Establishment and Operation of Regional Education Service Agencies, 126 CSR 72.³

Although the Circuit Court notes the purpose and services cited in the statute and acknowledges that the area of services includes “(6) Developing and/or implementing any other programs or services as directed by law or by the state board,” it does not give ample consideration to this authority in rendering its decision. The RESAs are also expressly

³ 126 CSR 72 was subsequently amended effective January 12, 2015. The amendments made some clarification not relevant here to §126-72-2, but did not substantively affect the authority of a RESA to contract with county boards of education or employ staff.

authorized to employ staff necessary to fulfill the purpose of such agencies. W.Va. Code §18-2-26(c)(1)(C), 126 CSR 72 §3.13.⁴ Likewise, the enumeration of additional RESA powers and duties granted by the rules of the West Virginia Board of Education include:

RESAs are empowered to contract with county boards of education, the West Virginia Department of Education (hereinafter WVDE), persons, companies, or other agencies to implement their Strategic Plan as provided in Section 5.

126 CSR 72 §2.5.

All functions, powers and duties of the RESAs shall be liberally construed to effectuate the intent of the WVBE.

126 CSR 72 §2.8.

It was this constitutional, statutory, and regulatory authority granted to the West Virginia Board of Education that served as the basis for the RESA-employed Interventionists to work in MCBOE schools providing instructional support to students.

County boards of education are also granted broad authority to govern their operations subject to W.Va. Code §§18-5-5 and 18-5-13. Included is the authority to enter into contracts specifically granted by W.Va. Code §18-5-5.⁵ W.Va. Code §18-5-34 further provides that “The district board of education shall exercise such other authority and perform such other duties as may be prescribed by law or by the regulations of the state board of education.” As previously discussed, RESA 7 was empowered to contract with the MCBOE to implement its Strategic Plan.

126 CSR 72 §2.5. The Strategic Plan, which was approved by the West Virginia Board of Education, contained a specific measurable objective, action plan/activities, and

⁴ §3.13 states in pertinent part that: [A] RESA may employ staff, as necessary, to perform services described in the Strategic Plan or to operate demonstration, pilot, or other projects that may require staff and support services for effective implementation.

⁵ In describing the general corporate powers of a county board, W.Va. Code §18-5-5 provides that [T]he county board of education shall be a corporation by the name of “The Board of Education of the County of ...,” and as such may sue and be sued, plead and be impleaded, contract and be contracted with.

progress/evaluation outcomes that related to the provisions of the contract. In the 2011-2012 school year, the contract for employment of Interventionists by RESA was entered into by the parties in order to fulfill measurable objective 3.4 “Employ certified regional providers (interventionists, OTs, PTs, SLPs, academic and job coaches) to provide services and set both by Individual Education Programs and School Improvement Grants for students within RESA 7.”⁶ RESA 7 and the MCBOE, therefore, entered into a lawful contract whereby RESA employed Interventionists to provide instructional support services to students in reading and math. While the Circuit Court recognized the contract between MCBOE and RESA 7, it erred in determining that the RESA 7 Strategic Plan did not enable the employment of the Interventionists. In so doing, the Court below did not give adequate consideration that the employment of the Interventionists was based upon a valid contract between MCBOE and RESA 7, which was supported by law and the regulations enacted by the West Virginia Board of Education.

B. County Board of Education Agreements for the Provision of Services to Students by RESAs in West Virginia Will Be Adversely Affected if the Circuit Court’s Ruling is Upheld.

The WVSBA recognizes the duty of county boards of education to employ classroom teachers with the highest qualifications in accordance with §18A-4-7a. However, the lower court’s reliance on *Dillon v. Bd. of Education of Wyoming County*, 177 W.Va. 145, 351 S.E.2d 58 (1986), and *State ex rel. Boner v. Kanawha County Board of Education*, 197 W.Va. 176, 475 S.E.2d 176 (1996), is misplaced as both cases dealt with employment decisions by county boards of education affecting county classroom teachers. All of the Interventionists serving the students of MCBOE are certified teachers employed by RESA 7. Their credentials as such are not questioned. While the Interventionists do interact instructionally with students as do classroom

⁶ Strategic Plan 2011-2012, Regional Education Agency 7 (2011). A.R. at pp. 46-72.

teachers in the completion of their duties, that in and of itself does not support the holding that they are “classroom teachers” as defined by state code. Their duties in providing support to students at-risk in reading and math are more like tutors rather than classroom teachers whose duties encompass all aspects of their students’ education including all non-instructional facets.

Although not at issue in this case, it is important to note that §18A-4-7a also governs the employment of all professional persons including classroom teachers.⁷ Professional employees are defined in W.Va. Code §18A-1-1(b). “Professional person” or “professional personnel” means those persons or employees who meet the certification requirements of the state, licensing requirements of the state, or both, and includes a professional educator and other professional employee.” While classroom teacher is defined by this statute, there are other professional employees also defined by statute who have traditionally been employed by RESAs through agreements with member counties. A close examination of other services provided by RESA 7 employees to its member counties include, for instance, education audiologist.⁸ Arguably, the audiologist meets the definition of W.Va. Code §18A-1-1 (d) “other professional employee” which means a person from another profession who is employed to serve the public schools.”

County boards of education under the authority granted by statute and regulation are able to provide through the eight RESAs in West Virginia a multitude of services to students that would not ordinarily be available. They range from the supplemental instructional services of the Interventionists and audiologist in RESA 7 to the teachers of the visually impaired in RESA 6⁹ in addition to services of other professional employees such as occupational therapists,

⁷ §18A-4-7a was amended in 2013, and the hiring criteria for professional employees and classroom teachers were combined into one set of criteria. Other changes made are not applicable to this matter but do affect the procedures for the employment of classroom teachers by a county board of education.

⁸ A listing of staff positions for RESA 7 can be found at <http://resa7.k12.wv.us>.

⁹ A listing of areas of service for RESA 6 can be found at <http://resa6.k12.wv.us>.

physical therapists, speech-language pathologists, and psychologists. *See* n.2. County boards of education, by entering into agreements with RESA for the provision of services to students, are not attempting to avoid the hiring criteria of W.Va. Code §18A-4-7a governing the employment of professional employees including classroom teachers. Rather, the intent is to add enrichment to improve student achievement. In the present case, the MCBOE's contract with RESA 7 enabled the employment of the Interventionists who provide reading and math support to students in need in a cost effective and efficient manner. Rather than adding to the number of county professional employees, MCBOE utilized funding to provide more services to students by Interventionists employed by RESA 7.

It is the position of the WVSBA that this lawful arrangement, and the flexibility provided by the multiple Interventionists employed on an hourly basis, assisted the county in fulfillment of its mission to provide a thorough and efficient system of education to its students. By extension, the provision of these specialized services through the contracts established with member counties is not only a thorough but an efficient manner in which to reach students in need throughout West Virginia. Indeed, this Court in defining thorough and efficient stated that

[L]exically, then the words have not changed. The mandate, incorporating the sense of the definitions, becomes a command that the education system be absolutely complete, attentive to every detail, extending beyond ordinary parameters. And further, **it must produce results without waste.**

Pauley, 255 S.E.2d at 874 (emphasis added).

The services provided to the students of the MCBOE by the RESA 7 Interventionists are not only consistent with the thorough and efficient edict mandated by the W.Va. Constitution, the authority granted by §§18-2-5, 18-2-26, 18-5-5, 18-5-13, 18-5-34, and *Pauley*, but are a cost effective way to increase services to students.

IV. CONCLUSION

The Order of the Circuit Court of Monongalia County granting the Respondents' Motion for Summary Judgment is erroneous. If allowed to stand, the ruling will impede the ability of county boards of education to fulfill their responsibility of providing thorough and efficient systems of education to their students through lawful contracts with the eight RESAs in West Virginia.

For all of the foregoing reasons, the WVSBA joins Petitioners in seeking reversal of the Circuit Court's Order.

Respectfully submitted this 13th day of October 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October 2015, a true and accurate copy of the foregoing **Brief of Amicus Curiae West Virginia School Board Association** was deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

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