

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.

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

- I. **THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY FAILING TO HOLD THAT COUNTY BOARDS OF EDUCATION ARE AUTHORIZED TO CONTRACT WITH RESAs FOR INTERVENTIONIST SERVICES.**

- II. **THE CIRCUIT COURT ERRED AS A MATTER OF LAW BY HOLDING THAT INTERVENTIONISTS SHOULD BE HIRED UNDER THE SAME PROCEDURES FOR TEACHERS SET FORTH IN WEST VIRGINIA CODE § 18A-4-7A AND THAT INTERVENTIONISTS SHOULD RECEIVE THE BENEFITS PROVIDED UNDER WEST VIRGINIA CODE § 18A-4-1 *et seq.***

STATEMENT OF THE CASE

In a State that ranks among the lowest in student achievement¹ and among the highest in students living below the poverty level,² the Monongalia County Board of Education (“Board”) developed a way to expand education dollars and maximize services to at-risk students who are most in need of additional support in math and reading. By contracting with its Regional Education Service Agency (“RESA”), the Board is able to provide one-on-one supportive program-based instruction to over 300 struggling elementary and middle school students each year through the use of interventionists. Joint Appendix Volume I, page 227 (hereinafter “App. Vol. I, p. 227”). Importantly, the Board did not eliminate the positions of any regular employees before integrating the interventionists into the classroom. Instead, the interventionists are used in addition to the Board’s regular classroom teachers, and not as replacements for those teachers.

¹ The Education Efficiency Audit of West Virginia’s Primary and Secondary Education System, dated January 3, 2012, cites the National Assessment of Educational Progress findings that West Virginia students scored below the national average on 21 of 24 indicators of student performance. See <http://wvde.state.wv.us/policies/audit-response.html>.

² According to the West Virginia Department of Education, Office of Child Nutrition, Percent of Needy Students, in 2011, 52.8% of West Virginia’s students applied and were approved for free or reduced school meals. Students whose parents’ income is below 130% of the poverty level, and students whose parents’ income falls between 130% and 185% of the poverty level are eligible for reduced-price meals. <http://datacenter.kidscount.org/data/Tables/3412-children-approved-for-free-and-reduced-price-school-meals-grades-k-12?loc=50&loct=2#detailed/2/any/false/867,133,38,35,18/any/7028>.

The work of the interventionists is driven entirely by student needs. App. Vol. I, pp. 215-216. The interventionists concentrate on skills that are determined to be a deficit in order to build those skills for each individual child. *Id.*, pp. 215, 216, 220. Working in one-on-one or small group settings, each interventionist is able to work with the student during the student's reading or math class (as opposed to pulling the student out of another subject) to deliver support designed by the student's teacher, the school psychologist and the academic coach, among others, to intervene *before* the student fails. *Id.*, p. 217. This response to intervention provides support outside of what can be delivered by the classroom teacher or any other staff members available within the school setting. *Id.*, p. 217. Focused solely on direct support, rather than direct instruction, the interventionists do not engage in planning, grading, assessment, parent communication or the other responsibilities assigned to the classroom teacher. *Id.*, pp. 220, 221.

The opportunity to deploy multiple part-time interventionists, rather than a fewer number of regular full-time employees, results in the ability to offer services to a significantly greater number of students during a school day. App. Vol. I, pp. 223, 227, 250. This circumstance exists by virtue of greater flexibility in scheduling multiple interventionists in more than one classroom during the same time period. *Id.*, pp. 227, 228.

The issue in this case is not whether the Board is providing the greatest amount of services to those students that need them the most, but whether, as Petitioners contend, the Board is permitted to contract with RESA VII for the services of an interventionist rather than directly hiring the interventionist as a classroom teacher subject to the requirements set forth in West Virginia Code § 18A-4-1, *et seq.*, which outlines the hiring procedures and benefits offered to the Board's own classroom teachers. As recognized by the circuit court, if the positions are classified

as “teachers” subject to the procedures set forth in West Virginia Code § 18A-4-1, *et seq.*, then the “State’s students will end up being the losers in this case....” App. Vol. I, p. 471.

Funding for Interventionists

The Board, along with the other 54 counties in West Virginia, is and has been the recipient of Title I funding. Title I funds are distributed as formula grants by the federal government. Funding is distributed first to state educational agencies that then allocate funds to local educational agencies which, in turn, dispense funds to public schools in need. See <https://wvde.state.wv.us/titlei/>.

The Board contracts with RESA VII to provide the services of interventionists in schools eligible for Title I services. App. Vol. I, p. 286, 287. In schools not eligible for Title I funding, the services of interventionists are provided through a contract with RESA VII, paid through the Board’s “General Fund³,” thus affording interventionist services to all of the district’s elementary and middle schools. *Id.*, pp. 237, 238.

West Virginia Code Section 18-2-26(h), provides the general authority for county boards to expend funds for services provided by RESAs and for Regional RESAs to receive and disburse funding provided by county boards of education.

West Virginia Board of Education Policy 3233, *Establishment and Operation of Regional Education Service Agencies (RESAs)*, Section 2.4 (W. Va. Code R. § 126-72-2.4 (2015)) (*see also* App. Vol. I., pp. 77-78)), authorizes county boards of education to contract with RESAs to accomplish implementation of each RESA’s Strategic Plan. App. Vol. I, p. 288.

RESA VII’s Strategic Plan, Section 3.4, authorizes RESA VII to employ interventionists, occupational therapists, physical therapists, speech language pathologists, academic and job

³ “General Funds,” as identified herein, do not include excess levy funds.

coaches to provide services to students in the school districts, including the Monongalia County school district, that comprise RESA VII. App. Vol. I, pp. 58, 59, 289.

During 2011, the period in question in this appeal, at a meeting conducted on September 27, 2011, the Board approved the expenditure of Title I funds⁴ to contract with RESA VII for the following services:

Interventionist services at Pressley Ridge (\$25,257)

Interventionist services at Skyview (\$11,480)

Interventionist services at Mason Dixon (\$48,240)

Interventionist services at Brookhaven (\$48,237)

App. Vol. I, pp. 22, 290, 291. At the same meeting, the Board approved the expenditure of General Funds to contract with RESA VII for the following services:

Interventionist services at elementary and middle schools (\$471,750.00).

Id., pp. 22, 290, 291.

Employment of Interventionists

Upon identification of the interventionist positions required, RESA VII advertised for interventionists to meet the Board's needs. App. Vol. I, p. 180. Requirements for the positions included teaching credentials in the area for which the interventionists are hired as a minimum

⁴ Use of funds varies, depending on whether a school is operating a school-wide program or a targeted assistance program. A participating school with at least a 40 percent poverty rate may choose to operate a school wide program that allows Title I funds to be combined with other federal, state and local funds to upgrade the school's overall instructional program. All other participating schools must operate targeted assistance programs and select children deemed most needy for Title I services. Targeted assistance programs must supplement the regular education program normally provided by state and local educational agencies. Monongalia County Schools has elected to operate only school wide programs and has not established targeted assistance programs. Thus, the expenditure of Title I grant funds for the purpose of obtaining the services of an interventionist is not in contravention of a Title I grant and is an authorized expenditure. App. Vol. I, pp. 287-88.

qualification. App. Vol. I, p. 190. Interviews were conducted and the Executive Director of RESA VII made the hiring decisions with input from representatives of the Board. *Id.*, p. 185.

Approximately 30 interventionists provided services to Monongalia County Schools students during the 2011-2012 school year. App. Vol. I, p. 223. Interventionists who provided satisfactory services in prior school years were afforded the opportunity to return in subsequent years. *Id.*, p. 187. Interventionists are compensated at \$25 per hour and work under contracts that expire on June 30 of each year. *Id.*, pp. 185-186. Interventionists are not paid benefits. *Id.*, p. 185. Interventionists only work part-time with schedules varying from 3 to 5 hours per day. *Id.*, p. 223. None of the individuals under contract with RESA VII to provide interventionist services works a full workday (7.5 hours) on the days services are provided. *Id.*, p. 184.

Proceedings Below

This appeal stems from a Petition for Writ of Mandamus filed in 2011 by the American Federation of Teachers - West Virginia, AFL-CIO (“AFT”) against the Board and its Superintendent regarding the Board’s contracting for interventionist services with RESA VII rather than directly hiring interventionists. App. Vol. I, p. 5.

Following discovery and cross motions for summary judgment, on June 9, 2015, the Circuit Court of Monongalia County granted the AFT’s Motion for Summary Judgment and denied the Motion for Summary Judgment of the Board and its Superintendent. App. Vol. I, p. 448. The circuit court held that “interventionists” are classroom teachers under West Virginia Code § 18A-1-1(c)(1) and therefore subject to the policies and requirements of West Virginia Code § 18A-4-1, *et seq.* *Id.*, p. 456. The circuit court recognized that the interventionists are “undoubtedly an asset to our State’s children” and that their services are “necessary” in our State’s public schools. *Id.*, p. 470.

On June 24, 2015, the circuit court stayed its Order pending the outcome of this appeal, recognizing that there was a strong showing that Petitioners could succeed on the merits of this appeal. App. Vol. I, pp. 487-88. The circuit court noted the significant public interests involved, and found that “the public interest sharply tilt[ed] in favor of granting a stay.” *Id.*, p. 488.

In fact, if the decision of the lower court is allowed to stand, the Board could fund only 1/3 to 1/2 of the interventionists currently employed. App. Vol. I, pp. 274, 275. The Board will not have to funds to serve all of the students in need because it will not have the funds to employ an additional 30 employees with full benefits. *Id.*, p. 274. As the lower court recognized, “[t]he opportunity to deploy multiple part-time interventionists, rather than a fewer number of regular full-time employees, results in the ability to offer services to a significantly greater number of students during a school day.” *Id.* pp. 470, 487.

Petitioners urge the Supreme Court of Appeals of West Virginia to reverse the Monongalia County Circuit Court’s Order granting the AFT’s Motion for Summary Judgment. The circuit court made clear errors of law, and this Court must conduct a *de novo* review of the circuit court’s decision. See *Harrison County Cmm’n v. Harrison County Assessor*, 222 W. Va. 25, 27-28, 658 S.E.2d 555, 557-58 (2008). Therefore, this Court should grant Petitioners’ appeal and hold that a county school board may contract with a RESA to obtain interventionist services.

SUMMARY OF ARGUMENT

The circuit court ignored statutory and regulatory authority that expressly permits the Board to use the services of RESA employees in Monongalia County schools, including the instructional services of interventionists. Admitting the difficulty in reconciling the “vague and even conflicting” law with the facts (App. Vol. I, p. 471), the circuit court misstated the relevant issue. Instead of focusing on the relevant statutes and regulations that have long authorized the Board to use RESA interventionists, the circuit court focused on a factual inquiry into whether

the interventionists qualified as “classroom teachers.” According to the circuit court, if the interventionists are “classroom teachers” then they must be hired directly by the Board and provided all benefits available under West Virginia law. Stated otherwise, the circuit court concluded that any person who may fit the statutory definition of “classroom teacher” may not provide instructional services in public schools unless they are hired by the county school system. This conclusion is illogical, unfounded, and contrary to the well-established statutory and regulatory scheme governing the relationship between, and the duties of, county school systems and RESAs.

Even if the circuit court properly framed the issue — which Petitioners dispute — the interventionists’ duties are starkly different from those performed by regular classroom teachers. The circuit court was wrong when it concluded that interventionists are “classroom teachers.” Moreover, because the Board cannot afford to employ the number of interventionists they utilize in the school system through RESA, many students will be deprived of the beneficial educational services the interventionists provide as a result of the circuit court’s decision. On the other hand, the AFT identified no real, concrete harm that would come of a decision in Petitioners’ favor.

For these reasons, and as more fully explained below, Petitioners request that this Court reverse the circuit court’s ruling on the cross-motions for summary judgment and hold that the Board may contract with RESA to obtain the important services provided to Monongalia County students by the RESA interventionists.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because it implicates issues of first impression and issues of fundamental public importance. The circuit court’s decision strips the Board of the ability to provide high quality, cost effective educational services to public school students in Monongalia County. This

is a case of first impression because this Court has never prohibited county boards of education from contracting with RESA to receive professional services from RESA employees. Accordingly, Petitioners request that this Court grant it the opportunity to present oral argument.

ARGUMENT

I. County boards of education are expressly authorized to contract with RESAs to obtain services, including services provided by interventionists.

There is no dispute that the interventionists who are employed by RESA VII and working with students in Monongalia County public schools are providing tremendous educational benefit. Likewise, there is no dispute that the use of RESA interventionists is an efficient, cost effective way for the Board to deploy those services more broadly throughout the county school system. There should be no dispute that the Board is permitted to utilize RESA interventionists to deliver these important, valuable services in Monongalia County's public schools. Unfortunately, the circuit court disregarded the applicable statutes and regulations that explicitly authorize the Board's use of RESA interventionists.

This Court has held that “[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. pt. 5, *State v. General Daniel Morgan Post No. 548*, 144 W. Va. 137, 107 S.E.2d 353 (1959). Legislative intent for statutes can be gleaned from the “spirit, purposes and objects of the general system of law of which [the statute] is intended to form a part...” See Syl. pt. 1, *State v. Hutton*, ___ W. Va. ___, 776 S.E.2d 621 (2015) (*quoting* Syl. pt. 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908)).

‘A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize

completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.’

Id. In this case, as more fully explained below, there is clear legislative authority supporting the Board’s use of RESA interventionists in the school system. In misconstruing the statutes and ignoring the plain legislative intent of statutes governing the delivery of public education in West Virginia, the circuit court made clear errors of law requiring this Court to conduct a *de novo* review of the lower court’s decision. *See Harrison County Cmm’n v. Harrison County Assessor*, 222 W. Va. 25, 27-28, 658 S.E.2d 555, 557-58 (2008).

First, the West Virginia Legislature expressly authorizes county boards of education to employ interventionists on an hourly basis “or otherwise.” West Virginia Code Section 18A-1-1 (2009) provides that:

(a) “School personnel” means all personnel employed by a county board whether employed on a regular full-time basis, ***an hourly basis or otherwise....***

(emphasis added). The phrase “or otherwise” includes obtaining services through a RESA. To prohibit the Board from utilizing RESA interventionists would render this statute meaningless. As more fully explained below, this Court did not disapprove such an interpretation of this statute in *State ex rel. Boner v. Kanawha County Board of Education*, 197 W. Va. 176, 475 S.E.2d 176 (1996).

Moreover, county boards are expressly authorized to transfer funds to RESAs. West Virginia Code Section 18-2-26(h) (2015) provides:

(h) Funding sources. -- An agency may receive and disburse funds from the state and federal governments, from member counties, or from gifts and grants.

Such authority is mirrored in West Virginia Board of Education Policy 3233, *Establishment and Operation of Regional Education Service Agencies (RESAs)*, W. Va. Code R. § 126-72-4.4

(2015) (*see also* App. Vol. I., pp. 77-78), which Policy has the force and effect of law and is considered preeminent if consistent with statutory authority. *See Lefler v. W. Va. Dep't of Educ.*, No. 11-0650, W. Va. Sup. Ct., Feb. 14, 2012) (memorandum decision) (citing *West Virginia Bd. of Educ. v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988)). Policy 3233 provides:

4.4. A RESA may receive and disburse funds from the state and federal governments, from member counties, or from gifts and grants. Each RESA is encouraged to partner with member school systems, particularly those designated as low-performing, and other organizations as appropriate to attract and ***leverage resources available from federal programs to maximize its capacity for meeting the needs of member schools and school systems.*** The WVBE recognizes a RESA as an eligible LEA⁵ for the purposes of applying, on behalf of school systems, for grant funds consistent with performing regional services and functions in this rule and/or supportive of education initiatives of the WVBE.

W. Va. Code R. § 126-72-4.4 (*see also* App. Vol. I., pp. 77-78) (emphasis and footnote added).

The Board's use of RESA interventionists is aligned with the objective to leverage federal Title I funds in a way that would best meet the needs of the greatest number of students.

RESAs themselves are charged with the “delivery of high quality education programs at a lower per student cost” and to “strengthen the cost effectiveness of education funding resources....” W. Va. Code § 18-2-26(d), W. Va. Code R. § 126-72-5.2 (2015) (*see also* App. Vol. I., pp. 78-79). RESA personnel — including the interventionists working in Monongalia County Schools — are actually employed by the West Virginia Board of Education. W. Va. Code R. § 126 -72-3.13.2 (2015) (*see also* App. Vol. I., p. 76). Employees of the West Virginia Board of Education are not subject to the hiring provisions of West Virginia Code Section 18A-4-1- *et seq.* W. Va. Code R. § 126 -72-3.13.2 (*see also* App. Vol. I., p. 76) (“All RESA regular full-time and regular part time personnel are ***non-contractual will and pleasure employees*** of the

⁵ “LEA” refers to local educational agency.

WVBE”) (emphasis added). West Virginia statutory and regulatory law also empowers RESAs to share “specialized personnel” with county boards and authorizes the West Virginia Board of Education to promulgate policies to further define the powers and duties of RESAs. W. Va. Code §§ 18-2-26(b)(3), (c); W. Va. Code R. § 126-72-5.1.3 (*see also* App. Vol. I., p. 78). Thus, it is recognized that specialized personnel employed by RESA and working in the county school systems are not subject to West Virginia Code 18A-4-1 *et seq.* W. Va. Code R. § 126 -72-3.13.2 (*see also* App. Vol. I., p. 76).

To that end, the West Virginia Board of Education authorized RESAs to contract with county boards “to participate in partnership with or on behalf of any county school system or school in those programs that will accomplish implementation of the strategic plan and/or state education initiative.” W. Va. Code R. § 126-72-2.5 (2015) (*see also* App. Vol. I., p. 73). The Strategic Plan for RESA VII, Section 3.4, contains the following measurable objective:

Employ certified regional providers (interventionists, OTs, PTs, SLPs, academic and job coaches) to provide services and set forth by Individual Education Programs and School Improvement Grants for students within RESA 7.

See App. Vol. I, p. 58-59. RESA strategic plans must be approved by the West Virginia Board of Education. W. Va. Code R. § 126-72-5.4 (*see also* App. Vol. I., p. 79). The RESA VII Strategic Plan was approved by the West Virginia Board of Education (*see* App. Vol. I, pp. 452, 463, 465), and is consistent with the Constitutional mandate that it provide general supervision of public schools as set forth in Article 12, Section 2 of the West Virginia Constitution.

Not only did the circuit court ignore the statutes and regulations that expressly authorize the Board to utilize RESA interventionists, but the circuit court also ignored this Court's ruling in *Boner, supra*. The *Boner* Court did not require county boards of education to hire all teaching personnel directly under West Virginia Code Section 18A-4-7a. *Boner*, 197 W. Va. at 186, 475

S.E.2d at 186. The *Boner* case addressed whether county board of education are authorized to hire homebound teachers under extracurricular assignment contracts and pay them on an hourly basis, rather than maintaining regular employees to provide the same services. *Id.* at 178, 178. Although a slightly different factual situation, the *Boner* decision provides support in this case for Petitioners' position that it is authorized by legislation and regulation to utilize RESA interventionists. *Id.* at 186, 186.

The petitioners in *Boner* first alleged that the standard for high quality instruction found within West Virginia's Constitution at Article XII, Section 1 could be satisfied only through the employment of regular full-time professional employees. *Id.* at 186, 186. The Court rejected this argument. *Id.* However, the school board in *Boner* had terminated the regular contracts of homebound teachers and reassigned the same duties to those teachers under extracurricular contracts. *Id.* at 178-79, 178-79. Within this limited context, the Court held that the school board could not lay off regular teachers providing homebound instruction without a corresponding reduction in the need for those services. *Id.* at 186, 186. Importantly, the Court did not hold that county boards of education were prohibited from obtaining homebound teaching services under extracurricular contracts including compensation at an hourly rate. *Id.* Indeed, teachers providing services under such contracts prior to the layoffs of the regular teachers were permitted to continue to provide homebound teaching services under extracurricular contracts. *Id.* at 187, 187.

The instant case is distinguishable because the Board has not replaced any regular teaching positions with interventionists. The significance of the *Boner* decision to the instant appeal is the absence of any ruling compelling county boards of education to hire only regular, salaried professional personnel with benefits to provide interventionist services directly to

students. Moreover, unlike the extracurricular statute at issue in the *Boner* case, the statutes, regulations and approved strategic plan outlined above expressly authorize the Board to obtain interventionist services by contracting with RESA VII.

Accordingly, the circuit court erred by ignoring the express authority granted to the Board to use interventionists employed by RESA VII.

II. It is irrelevant that if the interventionists were directly employed by the Board of Education, they would be classified as “classroom teachers” under the statutes that govern public school employees.

The circuit court considered the applicable law to be vague and contradictory (App. Vol. I, p. 471, but then ignored the express authority that permits the Board to utilize RESA interventionists to provide important educational services and benefits in Monongalia County Schools. Instead the circuit court focused on whether the interventionists could be classified as “classroom teachers” under the definition found in West Virginia Code Section 18A-1-1(c)(1):

‘Classroom teacher’ means a professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity.

The circuit court’s ruling — as urged by the AFT — requires an illogical leap to the conclusion that RESAs somehow are prevented from hiring personnel who fall within the definition of “classroom teacher” to perform services in public schools. If RESAs exist for the express purpose of augmenting and supporting county boards of education (*see* W. Va. Code § 18-2-26(d); W. Va. Code R. 126-72-5.2), then there is no legal authority for the proposition that RESAs are prohibited from hiring instructional personnel to support the educational efforts of the county boards of education they serve.

Indeed, the definitions contained in West Virginia Code Section 18A-1-1 are not exclusive. By defining “classroom teachers,” the Legislature did not preclude school boards from using non-employees to support students where dictated by the context of other

requirements of law. *See* W. Va. Code § 18A-1-1 (“...the following words used in this chapter and in any proceedings pursuant to this chapter have the meanings ascribed to them *unless the context clearly indicates a different meaning.*”) (emphasis added). Pursuant to the authorities outlined above, the mere fact that the interventionists provide these services to students does not mean that they must be hired pursuant to the provisions of West Virginia Code Section 18A-4-1 *et seq.* Stated another way, an unambiguous legal context exists for utilizing professional personnel that are not directly employed by the Board as classroom teachers.

Moreover, this conclusion advances the plain legislative intent of the general system of laws applicable to public education in West Virginia. On the other hand, the circuit court’s decision misconstrues these laws. The circuit court’s reliance on the use of the word “shall” in West Virginia Code Section 18A-4-7a (2013) ignores the context within which that statute is intended to operate. A complete analysis of the relevant statutes reveals the missing context and makes it clear that the Legislature never intended to require county school boards to directly employ every single person who performs instruction in the schools.

First, West Virginia Code Section 18A-1-1 defines “school personnel” as “all personnel employed by a county board.” It then categorizes those school employees as professional or service employees. W. Va. Code § 18A-1-1(a). The statute proceeds to break the category of professional employees down into subcategories, one of which is “professional educator.” W. Va. Code § 18A-1-1(c). The professional educators employed by school boards are then divided into four categories. W. Va. Code § 18A-1-1(c). One of them is “classroom teacher.” W. Va. Code § 18A-1-1(c)(1).

The significance of the statute’s categorizations of a county board’s own employees is that subsequent sections of the school statutes address the selection, employment, compensation,

protections and duties of school employees based upon job categories. *E.g.*, W. Va. Code § 18A-4-1 *et seq.* Depending upon the category of a person's job with a school board, he or she will be treated in particular ways. All of these statutes are predicated on the fact that the individual is an employee of a county board. Nowhere in any of these statutes are boards required to directly employ, with full salary and benefits, any person providing services within the statutory definition of a particular class of school employees. Thus, the circuit court failed to properly frame the issue, and it is irrelevant if the interventionists are teachers.

Assuming *arguendo* that the law requires county boards to directly employ individuals performing these services to students — which Petitioners dispute — the circuit court erred in concluding that the interventionists are classroom teachers. The record before the circuit court demonstrated that the Board's regular classroom teachers perform many functions that are not required of interventionists. The AFT's attempt to develop the record on this issue was limited to depositions of four individuals who served (or continue to serve) as interventionists. Because each of these witnesses worked in different schools, their duties varied somewhat. However, all of the witnesses testified concerning material differences in the duties and responsibilities of interventionists and regular classroom teachers.

Among the most significant differences is that interventionists have no responsibility to deliver required curriculum, whereas, regular classroom teachers have the responsibility to deliver curriculum prescribed by the West Virginia Board of Education. App. Vol. II, Tab 4, pp. 32-33; App. Vol. II, Tab 5, pp. 25-26; App. Vol. II, Tab 7, pp. 34-35. An even more fundamental difference is that while state law requires the employment of regular classroom teachers to provide instruction in required courses or subjects, there is no corresponding law or policy that requires county boards of education to employ interventionists. Accordingly, the

Board had no legal duty to directly employ the interventionists, and the AFT had no clear legal right to an order compelling Petitioners to do so. *See* Syl. pt. 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W. Va. 504, 438 S.E.2d 847 (1993) (elements necessary to establish a right to mandamus). The circuit court even admitted that the law on the issue is “vague and even contradictory in places.” App. Vol. I, p. 471.

Additionally, unlike a classroom teacher, an interventionist does not have a regular assigned “classroom” for the school year. App. Vol. II, Tab 7, p. 28. Interventionists do not determine a student’s grade in a class. App. Vol. I, pp. 220-221; App. Vol. II, Tab 5, p. 25; App. Vol. II, Tab 6, pp. 14, 24, App. Vol. II, Tab 7, p. 34, . Interventionists work at the direction of the classroom teacher with only a select group of students who need additional support. App. Vol. I, p. 217. Also, West Virginia Board of Education Policy 5202, *Licensure of Professional/Paraprofessional Personnel* (W. Va. Code R. § 126-72-7 (2015)), does not prescribe a certificate or license for interventionists, and interventionists are not evaluated under the procedures for evaluating a classroom teacher. App. Vol. II, Tab 5, p. 28; App. Vol. II, Tab 7, p. 38.

Finally, unlike classroom teachers hired by the Board, interventionists are not required to be present during the entire instructional day, complete continuing education programs, attend staff or faculty senate meetings, develop lesson plans, cover content standards, supervise students during lunch, class changes, or bus pickup and drop off, discipline students, participate in Individualized Education Program meetings for special education students, decide which students are retained and which students are promoted, communicate a student’s unsatisfactory progress to parents, or attend parent-teacher conferences. App. Vol. I, pp. 184, 220-21, 223,

244-45 App. Vol. II, Tab 5, p. 29; App. Vol. II, Tab 6, pp. 16, 25-27; App. Vol. II, Tab 7, p. 35-40.

Therefore, there are several critical differences between a classroom teacher and an interventionist. The contrast in duties and responsibilities between interventionists and classroom teachers demonstrates that they are materially different positions.

Because interventionists are not performing the same duties required of “classroom teachers,” there is no requirement that interventionists be hired pursuant to the provisions of West Virginia Code Section 18A-4-1 *et seq.* The circuit court erred in concluding otherwise.

III. Forcing county boards of education to hire interventionists as their own employees under West Virginia Code Section 18A-4-1 *et seq.* will substantially impair the ability of public school systems to provide the important and necessary services provided directly to students by interventionists.

Despite its recognition that the interventionists are “undoubtedly an asset to our State’s children” and that their services are “necessary” in our State’s public schools, the circuit court granted the AFT’s requested relief and ruled that the Board may not use the RESA interventionists in Monongalia County Schools. Therefore, as was also recognized by the circuit court, the “State’s students will end up being the losers in this case....” App. Vol. I, p. 471. The circuit court in essence invited this appeal, commenting that it wanted a different outcome. *Id.*

Indeed, the impact of the circuit court’s ruling will have a detrimental ripple effect on all students in Monongalia County Schools. Without the interventionists focusing their efforts on at-risk students who need extra assistance in the areas of reading and math, the regular classroom teacher now will be unable to focus on advancing the rest of the students in the class. Using RESA interventionists provides the opportunity to deploy multiple part-time interventionists, rather than a fewer number of regular full-time employees. This results in the ability to offer services to a significantly greater number of students during a school day. App. Vol. I, pp. 223,

227, 250. This circumstance exists by virtue of greater flexibility in scheduling multiple interventionists in more than one classroom during the same time period. The Board simply does not have the funds to hire interventionists to serve all of the students who benefit from this assistance. App. Vol. I, pp. 223, 227-28, 250, 274-75, 470. The relief granted to the AFT by the circuit court undoubtedly will diminish services to students in favor of an unfounded, inflexible rule that anybody who provides instructional services to students must be a regularly employed classroom teacher.

IV. The issue presented is not ripe as no actual harm resulted from the employment of RESA interventionists.

Unfortunately, nothing is gained by the circuit court's ruling, because there is absolutely no evidence that anyone — including the AFT's own members — is harmed by the Board's use of interventionists. In fact, the only harm shown to anyone is the clear harm to the students. App., Vol. I, p. 471 (expressing preference for a different outcome because “students will end up being the losers in this case....”).

First, there is no evidence that students are harmed or otherwise shortchanged merely because interventionists are not regular classroom teachers with benefits. Instead, as more fully explained above, the removal of interventionists from the classroom will be to all students' detriment. The AFT argued below that allowing the use of RESA interventionists *could* result in less qualified applicants. However, no evidence was presented below demonstrating that the RESA interventionists working in Monongalia County public schools lack the necessary qualifications to perform those services. In fact, the West Virginia Board of Education has prescribed safeguards to ensure that professional employees who provide services through contracts with RESA meet licensure standards:

Contracted or RESA Services. –The county superintendent shall assure that an educator providing contracted services or services

through a RESA holds the same licensure required for an educator employed by a board of education.

West Virginia Board of Education Policy 5202, *Licensure of Professional/Paraprofessional Personnel*, W. Va. Code R. § 126-72-7.1.b.6. This provision fortifies Petitioners' central contention that county boards are authorized by law to obtain professional services through a RESA.

Notably, no interventionists, including the four deponents, sought to become parties to this litigation or expressed any desire to have the relief that the AFT sought from the circuit court. One witness testified she had no interest in becoming a regular employee and did not understand why she was being called as a witness. App. Vol. II, Tab 4, p. 32. Another witness testified that she found the differing demands of an interventionist, as compared to a regular classroom teacher, preferable. App. Vol. II, Tab 7, pp. 33-41. Other witnesses explained the opportunity of gaining relevant experience, describing the interventionist position as a "stepping stone" that would enable them to better compete for regular teaching positions. App. Vol. II, Tab 6, p. 16; App. Vol. II, Tab 5, p. 13.

None of the AFT's members were deposed, and none expressed a desire to become interventionists. In the absence of any evidence supporting an actual desire on the part of any of the AFT's members to become interventionists, the AFT's claims are tantamount to a request for an advisory opinion.

In general, this Court has held that

[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken. *Mainella v. Board of Trustees of Policemen's*

Pension or Relief Fund of City of Fairmont, 126 W.Va. 183, 185–86, 27 S.E.2d 486, 487–88 (1943).

Syl. Pt. 2, *Harshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991). Moreover,

we have traditionally held that ‘courts will not ... adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies.’ Likewise, ‘courts [will not] resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies.

Indeed, a matter must be ripe for consideration before the court may review it. Courts must be cautious not to issue advisory opinions.

Zaleski v. West Virginia Mut. Ins. Co., 224 W.Va. 544, 552, 687 S.E.2d 123, 131 (2009) (citations omitted).

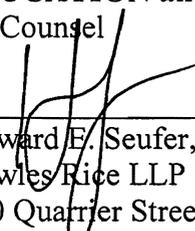
State Farm Mut. Auto. Ins. Co. v. Schatken, 230 W. Va. 201, 737 S.E.2d 229 (2012). This Court should not perpetuate the circuit court’s error in granting relief that remedied no harm.

CONCLUSION

Based on the foregoing, and as is apparent from the entire record, this Court should reverse the circuit court’s decision and hold that the Board may contract with RESA to obtain the important services provided to Monongalia County students by the RESA interventionists.

Respectfully submitted this 13th day of October, 2015.

**MONONGALIA COUNTY BOARD OF
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By Counsel


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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

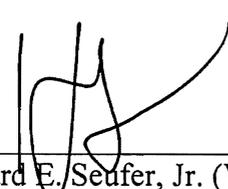
Petitioners Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioners does hereby certify that on this 13th day of October, 2015, a true and accurate copy of the foregoing “Petitioners’ Brief” was served on Respondents’ counsel via first-class mail, postage pre-paid, addressed as follows:

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