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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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.

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ERRORS AND OMISSIONS IN RESPONDENTS' STATEMENT OF THE CASE

The Monongalia County Board of Education ("the Board") is authorized by law to use the services of qualified interventionists in its classrooms when those interventionists' services are contracted through its Regional Education Service Agency ("RESA"). The Petitioners' briefs — both in the circuit court below, and in the present appeal — outline the established statutory authority for its use of the RESA interventionists. The Respondents fail to rebut the Petitioners' position and, instead, offer as a distraction the argument that the interventionists are "classroom teachers" who must be hired directly by the Board. Contrary to the Respondents' arguments, the Petitioners are following the law, not avoiding it.

The use of RESA interventionists is integral to the Board's ability to provide a "thorough and efficient" education. By contracting with RESA to utilize West Virginia Board of Education ("State Board") employees,[1] the Board is able to deploy multiple part-time interventionists who provide one-on-one supportive program-based instruction to over 300 struggling elementary and middle school students each year. Joint Appendix Volume I, page 223, 227-28, 250 (hereinafter "App. Vol. I, pp. __"). These students could not be served by having a fewer number of regular full-time employees provide those services. *Id.* There is no evidence that the interventionists are not qualified to provide program-based support services. In fact, nobody disputes that the interventionists provide tremendous educational value to the public school students in Monongalia County. Even 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.

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[1] *See* W. Va. Code R. §126-72-3.13.2 ("All RESA regular full-time and regular part time personnel are non-contractual will and pleasure employees of the WVBE." *See also* App. Vol. I., p. 76.

As more fully explained below, and apparent from the record before this Court, the Petitioners' appeal should be granted, and the Board should be permitted to continue using the RESA interventionists in Monongalia County Schools.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents argue that this case can be decided on "well settled law that county boards of education must hire classroom teachers by following the requirements of West Virginia Code §18A-4-7a." However, that is not the issue presented in this case. There is no "well settled law" prohibiting a county board of education from utilizing services from RESA employees on a contract basis, even if those services are similar to those provided by classroom teachers or another classification set forth in West Virginia Code Section 18A-1-1. The circuit court's decision presents an issue of first impression and of fundamental public importance. Therefore, this case is appropriate for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

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

The Respondents ignore the clear legislative and administrative authority allowing the Board to contract with RESA for interventionists. Respondents argue that the provisions of West Virginia Code Section 18A-4-7a "trump" any authority for the Board's use of RESA interventionists. The Respondents are wrong.

The West Virginia Legislature directed the State Board to promulgate policies to define the powers and duties of RESAs. W. Va. Code § 18-2-26(c). Indeed, our Constitution charges the State Board with the general supervision of public schools. W. Va. Const. Art. XII, § 2. "Rule-making by the State Board is within the meaning of 'general supervision' of state schools

pursuant to [the Constitution], and any statutory provision that interferes with such rule-making is unconstitutional." *Syl. pt. 3, Bd. of Educ. of the County of Kanawha v. W. Va. Bd. of Educ.*, 184 W. Va. 1, 399 S.E.2d 31 (1990). Thus, State Board policies have the force and effect of law and are 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)).

State Board Policy 3233 (W. Va. Code R. § 126-72-1 *et seq.*) governs the *Establishment and Operation of Regional Education Services Agencies (RESAs)* and requires RESAs to develop strategic plans for the provision of educational services in West Virginia schools. W. Va. Code R.§ 126-72-5 (2010) (*see also* App. Vol. I., pp. 78-80). This is consistent with the statutes charging RESAs 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). The Respondents have not argued that Policy 3233 is inconsistent with the statutory authority and duties delegated to RESAs in West Virginia — nor can such argument be made.

State Board Policy 3233 also authorizes 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...." W. Va. Code R. § 126-72-2.5 (2015) (*see also* App. Vol. I., p. 73). In discharging its constitutionally imposed duties for supervision of public schools, the State Board reviews and approves RESA strategic plans. W. Va. Code R. § 126-72-5.4 (*see also* App. Vol. I., p. 79). The RESA VII Strategic Plan was approved by the State Board (*see* App. Vol. I, pp. 452), including 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., pp. 58-59, ¶3.4.

Accordingly, the State Board — the entity responsible for general supervision of West Virginia schools — has expressly approved the Board's use of interventionists in Monongalia County Schools. This objective is consistent with the statutory authority granted to county boards of education and RESAs to share "specialized personnel" (W. Va. Code §18-2-26(b)(3)); the statutory authority granted to county boards of education to transfer funds to RESAs (W. Va. Code §18-2-26(h)); and the statutory authority granted to county boards of education to employ school personnel "on an hourly basis or otherwise" (W. Va. Code §18A-1-1 (2009)).

In sum, the Respondents' argument that West Virginia Code Section 18A-4-7a requires the Board to hire interventionists directly fails in the face of the explicit statutory and regulatory authority granted to the Board to use RESA interventionists.

II. The use of RESA interventionists allows the Board to provide a "thorough and efficient" education to Monongalia County students.

The court below 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. The circuit court also recognized that the "State's students will end up being the losers in this case...." App. Vol. I, p. 471. The circuit court even commented that it wished for a different outcome. *Id.* Indeed, the record is saturated with references to the benefits and educational value provided by the interventionists.

The record also demonstrates that the use of RESA interventionists allows the Board to expand education dollars without eliminating any regular employees, maximizing services with one-on-one supportive program-based instruction to over 300 struggling elementary and middle

school students. *See* App. Vol. I, p. 227. This Court held in *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979), that the State Board's general supervisory responsibility over education under West Virginia's Constitution includes the "duty to ensure the complete executive delivery and maintenance of a 'thorough and efficient system of free schools....'" Donna Talerico, Assistant Superintendent of Schools in Monongalia County, oversees student support services and elementary curriculum. App. Vol. I., p. 215. Ms. Talerico testified that the use of 30 part-time interventionists contracted through RESA allows the Board to thoroughly and efficiently serve more students:

> We have been able through that process, through the staggered schedule, to touch the lives of probably more than 300 students a year. Again, that gives us a depth of concentration within all of the elementary and the middle school schools to service those needs. And so with 15 or less, or 20 or five, we would never be able to address the needs of all those students.

App. Vol. I., p. 226-228. Thus, if the Board directly employed 15 or 20 interventionists instead of the 30 RESA interventionists, it could only serve 1/2 or 1/3 of the 300 students who currently receive those services. Ms. Talerico also testified as follows:

> Q: Okay. I'm just not understanding why if you had somebody providing 40 hours of services a week, you wouldn't be able to reach as many students as two persons providing 20 hours each.
>
> A. Well, I guess what I'm trying to explain is that within the day, there's only certain times that you can reach those children, so it's not A equals B or, you know, 20 and 20 equal 40. There's only certain portions of the day when reading and math times and when it's appropriate to provide those interventions. So the fact that you have more gives you the latitude to sort of cross over throughout the times of the day and, therefore, actually get the students at the appropriate time to provide those interventions in those areas.
>
> * * *

Q: ...If you had one full-time employee as an interventionist and – as compared to two or three part-time employees as interventionists for that school, could you explain the advantages of that model?

A. I believe I can. A full-time staff member has a myriad of other responsibilities other than direct instruction. And throughout the day they're involved in parent communications, parent conferences, they're involved in school meetings, they're involved in planning for the instruction of their overall students. They're involved – a great deal of their time is not just with direct instruction, and that's the identified need. We're looking at students who are high-risk students that have come into our system. And the idea is to provide services to these very needy students so that before they get to even middle school or high school, they are not potential dropouts, they are not students who have issues with truancy, they were not students who have failed. Those are the symptoms of dropouts. And our system has been very proactive in intervening early and with as much of the resources that we can possibly muster throughout the system to address the needs of those students. And in any single school, we have done that by touching students in a small school, perhaps 20, 25 students to our larger elementary schools of 115 students. And we can do that because we have several interventionists in those schools working with direct instruction at times that are designated by the school schedule.

* * *

Q: Taking for granted the value of the work of the interventionists, it still wasn't clear to my why, using [Greg Bailey's] example, one interventionist couldn't provide the same amount of services as two or three, assuming that even a full-time interventionist would not have the additional duties that a classroom teacher would have, meeting with parents and planning and so on.

A. I guess because there's a finite amount of time within the school day, and depending on that schedule of all the different teachers in those areas, because the third grade teachers delivers reading at a different time than the second grade teacher and so on and so on, and there's a domino issue there. So within that finite amount of time within that school day, we have to be able to fan out, I guess, and get into those times. And one person couldn't physically do that. Or sometimes in the bigger schools, two people couldn't do it.

* * *

> Q: And based on the finite funding that's available for the employment of interventionists, as I understand it, you're able to employ a greater number of individualists (sic) on a part-time three to five hour basis than you would be if you were required to employ full-time regular employees?
>
> A: It would diminish the ability to serve the number of students that we do, um, incredibly.

App. Vol. I., pp. 227-228, 243-244, 247-248, 250, 274-275. Even 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. Thus, contrary to Respondents' argument, the use of RESA interventionists actually enables the Board to provide a thorough and efficient education to students in Monongalia County.

Respondents focus much of their brief on what they argue is the central purpose of West Virginia Code Section 18A-4-7a, specifically, to attract the most qualified teachers. These arguments are speculative, at best, and invite this Court to make an advisory ruling when Respondents have suffered no actual harm. Respondents' arguments also rely, in part, on the assumption that the interventionists are truly functioning as regular classroom teachers. As explained in section II of Petitioners' Brief, it is irrelevant if the interventionists offer instruction. Even if the interventionists are "instructing," they are not "classroom teachers" in the true sense. Moreover, even if the interventionists are providing instruction, there is clear statutory and regulatory authority for the Board to use RESA interventionists.

The Respondents' arguments falsely imply that the interventionists are not qualified to perform the services they are providing in Monongalia County Schools because they were not

hired pursuant to West Virginia Code Section 18A-4-7a. There simply is no evidence in the record to support that assertion. Respondents' arguments that the only way interventionists can provide a thorough and efficient education is if they are hired directly by the Board is without merit and should be rejected.

CONCLUSION

Accordingly, Petitioners respectfully request that this Court 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 21st day of December, 2015.

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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioners does hereby certify that on this 21st day of December, 2015, a true and accurate copy of the foregoing "Petitioners' Reply Brief" was served on Respondents' counsel via first-class mail, postage pre-paid, addressed as follows:

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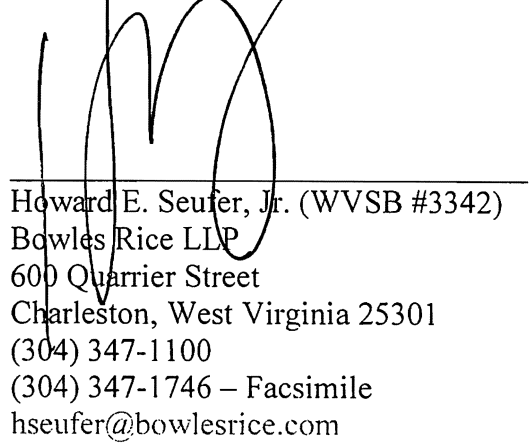

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