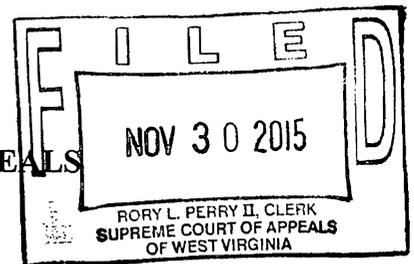


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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,

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

This case presents an instance wherein Petitioners Monongalia County Board of Education and its Superintendent, Frank D. Devono have attempted to circumvent the well-settled requirement that a county board of education must hire the most qualified teacher pursuant to the process established in West Virginia Code § 18A-4-7a. West Virginia Code § 18A-4-7a is a vital component in insuring that the most qualified teacher provide instruction to the students of West Virginia. This statutory provision is designed to help provide “thorough and efficient” education as required by the West Virginia Constitution. (West Virginia Constitution, Article XII, §1) Petitioner, Monongalia County Board of Education (“MCBOE”), in an attempt to unlawfully bypass the requirements of West Virginia Code § 18A-4-7a, uses Interventionists employed by Regional Education Service Agency (“RESA”) VII, as teachers. The legislative intent in the establishment of RESA; “...is to provide for high quality, cost effective education programs and services to students, schools and school systems.” (W. Va. Code § 18-2-26(a)) These Interventionists are directed on a daily basis by MCBOE employees and report directly to the principal of the school in which they are assigned. In all respects, Interventionists are treated as employees of MCBOE.¹ (Joint Appendix, Vol. II, Tab 5, p. 14) However, none of the Interventionists/teachers were hired by the MCBOE pursuant to West Virginia Code § 18A-4-7a.

It is beyond cavil that the Interventionists perform the duties of a classroom teacher as defined in West Virginia Code § 18A-1-1(a). Indeed, the Circuit Court of Monongalia County correctly recognized that the duties performed by the Interventionists are instructional. By having

¹The evidence below indicated that, at times, the decision to hire Interventionists is made solely by RESA VII while at other times, the decision is made jointly by MCBOE and RESA VII. (Joint Appendix Vol. II, Tab 5, pp. 9-10; Vol. II, Tab 6, p.12)

RESA VI directly “employing” Interventionists, RESA VII and MCBOE are circumventing the requirements of the law and the Constitution of the State of West Virginia. MCBOE’s actions reduce the quality of education provided to the students of Monongalia County and presents a threat to the statutory requirements that insure the most qualified teachers are hired to teach in our public schools.

It is undisputed that RESA is not authorized by statute to employ classroom teachers. Under West Virginia law, classroom teachers must be employed by the county boards of education.

PROCEDURAL HISTORY

The 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, filed a Writ of Mandamus and an action for Declaratory Judgment and Injunctive Relief on December 6, 2011, in the Circuit Court of Monongalia County. The Respondents were seeking “to immediately and permanently preclude Respondents Monongalia County Board of Education and its Superintendent, Frank DeVono, from circumventing West Virginia Code § 18A-4-7a...” (Joint Appendix Vol. I, pp. 5, 8) On April 17, 2013, the parties presented their Cross Motions for Summary Judgment. On January 14, 2014, the Circuit Court issued an Order denying Petitioners’ Motion for Summary Judgment, request for Mandamus relief, action for declaratory judgment and request for injunctive relief and also denied the Respondents’ Motion for Summary Judgment. (Joint Appendix Vol. I, p. 340)

On January 22, 2014, the Petitioners filed a Motion for Clarification of the Circuit Court’s January 14, 2014, Order. On February 3, 2014, in response to Petitioners’ Motion for Clarification,

the Circuit Court entered an Order stating “...that this action will not be dismissed in its entirety, and it will proceed in order to allow the Petitioners additional time and opportunity to address the questions of fact as identified in the Court’s previous Order. Specifically, additional discovery was permitted to provide evidence regarding the roles played by, and the responsibilities of, “interventionists” and “job coaches.” (Joint Appendix Vol. I, p. 343)

Following further discovery, the parties again filed cross motions for Summary Judgment. (Joint Appendix Vol. I, pp. 350, 404) On June 9, 2015, the Circuit Court issued an Order granting the Respondents’ Motion for Summary Judgment and denying the Petitioner’s Motion. (Joint Appendix Vol I, 448) The circuit court found that the “Interventionists as defined, perform the duties of ‘teacher,’ specifically a ‘classroom teacher.’” (Joint Appendix, Vol. I, p. 453)

The Circuit Court went on to find that “‘Interventionists’ are ‘classroom teachers’ and as such, are ‘professional educators.’ Their hiring is, thus, governed by West Virginia Code § 18A-4-7a...” (Joint Appendix, Vol. I, p. 461) Finally, the Circuit Court held that “MCBOE has not adhered to its statutory duty to provide its children with the most qualified educations.” (Joint Appendix, Vol. I, p. 466)

On June 22, 2015, the Petitioners filed a motion to stay the June 9, 2015, order. (Joint Appendix, Vol I, p. 472) The Circuit Court granted the Petitioners’ motion to stay by order entered June 24, 2015. (Joint Appendix, Vol. I, p. 486).² This appeal followed.

²While the Petitioners seem to argue that the granting of the stay somehow indicates that the Circuit Court erred in its original order granting the Respondents’ Motion for Summary Judgment, it fails to state that, in fact, the Respondents elected not to challenge the motion to stay in order to allow this important issue to come before the West Virginia Supreme Court of Appeals.

SUMMARY OF ARGUMENT AND RESPONSE TO ASSIGNMENTS OF ERROR

1. The Circuit Court correctly determined that Interventionists must be classified as classroom teachers. West Virginia Code § 18A-1-1(c)(1) defines a “classroom teacher” as 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 evidence is uncontroverted that the Interventionists’ sole job is to instruct students. As classroom teachers, and to insure a thorough and efficient system of free schools, Interventionists must be hired by a county board of education under West Virginia Code § 18A-4-7a. By allowing Interventionists to be hired by RESA VII, and then the MCBOE placing these Interventionists in its classrooms, circumvents the law in order to save money. The use of Interventionists as classroom teachers does not benefit the students of Monongalia County.

2. Allowing RESA to hire Interventionists to be classroom teachers in Monongalia county classrooms is contrary to the mandate and power of RESA, as authorized under State law. To allow RESAs to employ classroom teachers opens the door to allow RESAs to employ all the teachers in the county, thus ignoring the mandates of West Virginia Code § 18A-4-7a.

3. The argument that no teachers have been replaced or harmed due to the hiring of Interventionists ignores the fact that the Interventionists who were hired by RESA should have been hired by the MCBOE. Failure to properly hire teachers affects the potential for employment of teachers in the county and adversely impacts the quality of education in Monongalia County.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

It is well settled law that county boards of education must hire classroom teachers by

following the requirements of West Virginia Code § 18A-4-7a. Therefore, it is the Respondents' position that memorandum opinion is appropriate in this case.

ARGUMENT

- I. INTERVENTIONISTS ARE CLASSROOM TEACHERS AND MUST BE HIRED UNDER THE PROCEDURES SET FORTH IN WEST VIRGINIA CODE § 18A-4-7a AND RECEIVE BENEFITS AS PROVIDED IN WEST VIRGINIA CODE § 18A-4-1, *ET SEQ.*

The Circuit Court was correct when it held that Interventionists should be hired under the procedures prescribed in West Virginia Code § 18A-4-7a.

By hiring the Interventionists “who are performing classroom teaching duties” through RESA VII, the MCBOE has circumvented the hiring procedures for teachers that is mandated by West Virginia Code §§ 18A-4-7a and 18A-4-8b. As a result, the MCBOE has abdicated one of its most essential functions and fundamental responsibilities: hiring the most qualified teachers to teach public school students.

Article XII, § 1 of the West Virginia Constitution mandates:

The legislature shall provide, by general law, for a thorough and efficient system of free schools.

This Court has held that it “has a duty to oversee that the objective of filling this State’s schools with ‘qualified instructional personnel’ is met.” State ex rel Melchiori v. Bd. of Educ. of the City of Marshall, 188 W.Va. 575, 581, 425 S.E.2d 251, 257 (1992) (quoting Dillon v. Bd. of Educ. of Wyoming County, 177 W.Va. 145, 148, 351 S.E.2d 58, 61 (1986))

- A. Interventionists are Classroom Teacher

To properly analyze the issue at hand, it must first be determined whether Interventionists

are instructional personnel. West Virginia Code § 18A-1-1(c)(1) defines a classroom teacher as follows: “‘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.” (Emphasis supplied).

It is clear from the sworn testimony of the deposed Interventionists that the position of Interventionist meets the definition of a “classroom teacher.” The evidence clearly and unequivocally shows that the Interventionists have direct instructional relationships with students without being burdened with administrative duties. The Interventionists spend approximately thirty minutes with various groups of students ranging from one to six pupils at a time. As testified by Erin Arthurs, a current Interventionist, all time spent by the students with the Interventionists is instructional.³ (Joint Appendix Vol. II, Tab 4, pp. 12-13)

Ms. Deborah Savage, another Interventionist, testified that other than the type of programs utilized by the Interventionists, classroom duties performed by the Interventionists are basically the same as a Title I teacher. (Joint Appendix Vol. II, Tab 7; pp. 21-22) Title I teachers are regular, full-time employees of the MCBOE. (Joint Appendix Vol. II, Tab 6, p. 23)

The Petitioners argue that the Interventionists are not required to perform administrative duties because they are not “classroom teachers.” As a threshold matter, it is clear that the contrary is true. In fact, the Interventionists perform purely instructional duties. In other words, their only job is to teach. Clearly therefore, the Interventionists’ job duties fall squarely within the definition of “classroom teacher.” Indeed, the definition of “classroom teacher,” set forth in West Virginia

³Sometimes this instructional period is spent in a separate classroom and on other occasions it occurs in the students’ regular classroom. (Joint Appendix, Vol. II, Tab 6, pp. 8-9)

Code § 18A-1-1(c)(1), does not require or otherwise suggest that a classroom teacher perform administrative duties. Likewise, it does not require that a teacher perform bus duty or lunch duty or monitor the school's hallways. In addition, West Virginia Code § 18A-1-1(c)(1) does not require classroom teachers to attend faculty senate or staff meetings, participate in parent-teacher conferences, be evaluated in a certain manner, develop lesson plans, or have a regular classroom. All of these activities, while clearly required to be performed by full-time teachers, are administrative in nature but do not appear within the definition of a "classroom teacher." These administrative tasks are, by their very nature, non-instructional and outside of the definition of a classroom teacher. At its essence, Petitioners' argument reduces to the bizarre position that Interventionists are not classroom teachers because they spend all of their time teaching students rather than spending some of their time on administrative, noninstructional duties. This non-sensical argument fails on its face.

The Petitioners assert that the fact that the Interventionists do not decide a student's grade in a particular class and do not make the determination that a student will be promoted suggests that they are not classroom teachers. There are, however, many MCBOE employees classified as classroom teachers, such as counselors, who do not give students grades or decide promotions. Ultimately, this argument ignores the core duties of the Interventionists: teaching public school students in West Virginia.

Finally, the Petitioners argue that the Interventionists are not classroom teachers because they do not have the authority to discipline a student if the student exhibits behavioral problems during instructional times. Again, as stated above, the ability to discipline a student is not contained in the definition of a classroom teacher in West Virginia Code § 18A-1-1(c)(1). Nonetheless, many Interventionists exercise discipline through strategies such as positive reinforcement. For instance,

Interventionists give stickers to students if they are well-behaved, and denying them stickers if they are not. (Joint Appendix, Vol. II, Tab 5, pp. 15-16)

There is no factual dispute in this case: Interventionists provide direct classroom instruction. Thus, as a matter of law, the Interventionists are classroom teachers as defined in West Virginia Code § 18A-1-1(c)(1) and must, therefore, be classified as classroom teachers.

B. Interventionists must be hired in accordance with West Virginia Code § 18A-4-7a.

Once the Interventionists are classified as classroom teachers, then the Petitioners must follow West Virginia Code when hiring Interventionists. The facts of this case clearly establish that “Interventionists” are “professional personnel” and “classroom teachers” as defined by West Virginia Code §§ 18A-1-1(b) and (c).

MCBOE has failed to adhere to West Virginia Code § 18A-4-7a in making decisions affecting the hiring of classroom teachers.

West Virginia Code § 18A-4-7a(b) requires that:

[a] county board shall make decisions affecting the hiring of new classroom teachers on the basis of the applicant with the highest qualifications.

In the instant matter, this requirement has been avoided (and circumvented) and, therefore, violated by Petitioners. As the uncontroverted facts indicate, Interventionists are, in fact, “professional personnel,” “professional educators,” and “classroom teachers” as defined by West Virginia Code § 18A-1-1. Therefore, Interventionists are required to be hired (1) by a county board of education (not a RESA) and (2) on the basis of the applicant with the highest qualifications. Neither requirement has been met.

First, Petitioners have abdicated their responsibility to hire the classroom teacher at issue

herein. It is uncontroverted that RESA VII hired the individuals holding the positions of Interventionist and the “county board,” although required by statute, has not.

Second, Petitioners have not abided by the requirements of West Virginia Code § 18A-4-7a, which are vital to the hiring of the most qualified teachers. Specifically, Petitioners failed to consider the criteria set forth in West Virginia Code § 18A-4-7a(b) in hiring the Interventionists, including:

(1) Appropriate certification, licensure or both;

(2) Amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the required certification area;

(3) The amount of course work, degree level or both in the relevant field and degree level generally;

(4) Academic achievement;

(5) In the case of a classroom teaching position or the position of principal, certification by the National Board of Professional Teaching Standards;

(6) Specialized training relevant to the performance of the duties of the job;

(7) Past performance evaluations conducted pursuant to section twelve, article two of this chapter and section two, article three-c of this chapter or, in the case of a classroom teacher, past evaluations of the applicant’s performance in the teaching profession;

(8) Seniority;

(9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;

(10) In the case of a classroom teaching position, the recommendation of the principal of the school at which the applicant will be performing a majority of his or her duties; and

(11) In the case of a classroom teaching position, the recommendation, if any,

resulting from the process established pursuant to the provisions of section five, article five-a, chapter eighteen of this code by the faculty senate of the school at which the employee will be performing a majority of his or her duties.

All of these factors are to be considered by a “county board” in making a hiring decision.

It is undisputed that none of these statutory factors were considered by Petitioners in this case. Instead, Petitioners provided county money to RESA VII to allow it to hire classroom teachers in Monongalia County. This action violates West Virginia Code § 18A-4-7a.

Even assuming that the hiring procedures of West Virginia Code § 18A-4-7a were followed – which the record below clearly indicates that they were not – MCBOE and RESA do not take any steps to ensure or require that the Interventionists continue to be qualified to teach. (Joint Appendix, Vol. II, Tab 4, p. 35) Full-time classroom teachers are required to have six hours of continuing education each year to maintain their status as qualified teachers. (W. Va. Code §18A-3-3(2)) Without a continuing education requirement, MCBOE/RESA fails to provide the most qualified teachers for the students of Monongalia County.

In addition to specifically setting forth the hiring requirements for teachers, West Virginia Code § 18A-4-7a dictates the manner in which job openings for “established, existing or newly created positions” are to be advertised to potential applicants. West Virginia Code § 18A-4-7a(o) states as follows:

Openings in established, existing or newly created positions shall be processed as follows:

(1) Boards shall be required to post and date notices which shall be subject to the following:

(A) The notices shall be posted in conspicuous working places for all professional personnel to observe for at least five working days;

(B) The notice shall be posted within twenty working days of the position openings and shall include the job description;

(C) Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job;

(D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply; and

(E) Job posting may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant[.]

This provision of the hiring procedure manifests the Legislature's desire to attract the most qualified applicants. It requires a certain duration for a posting; mandates that special skills or criteria be listed; demands that postings be written so as to ensure the "largest possible pool" of qualified applicants; and prohibits favoritism. Crucially, information on job postings to be placed in a conspicuous location where it can be observed by qualified applicants. That is, the information must be posted in a public school setting by a board of education so that interested (and the most qualified) parties may apply. This vital publication requirement for teaching positions has been ignored in hiring Monongalia County teachers to serve as "Interventionists."

Other provisions of West Virginia Code § 18A-4-7a are included to insure that the best applicants apply for given teaching positions (like the Interventionist positions at issue). See e.g., West Virginia Code § 18A-4-7a(n) (requiring that "qualified professional personnel" on the recall list be notified of openings so that they can apply).

In the instant matter, it is apparent that Petitioners have ignored the requirements of West Virginia Code § 18A-4-7a to save money. As a result, however, Petitioners have also ignored the statutory requirements established by the Legislature to ensure that public school children are taught

by the most qualified teachers.

C. Interventionists must receive the benefits provided for in West Virginia Code § 18A-4-1.

The unlawful hiring method for the positions at issue deprived the teachers of the statutorily mandated wage and benefit package. The Petitioners readily admit in their brief that Interventionist are only compensated at the rate of \$25.00/hour.

The fabric of West Virginia Code § 18A-4-1, et seq. establishes the salary and benefit package for public school teachers. It is the clear intent of the Legislature to mandate that those who teach our public school children will, upon qualifying, receive certain wages and benefits to perform their jobs. This statutory contract with public school teachers has been violated by the manner in which the positions at issue have been filled. The classroom teachers at issue are being paid in a manner that is inconsistent with the statutory requirements for salaries, wages, and benefits.

Even a cursory review of West Virginia Code § 18A-4-1, et seq. demonstrates that most aspects of the economic relationship of teachers and county boards of education are governed by this chapter. See e.g., West Virginia Code § 18A-4-2 (establishing minimum salaries for teachers); § 18A-4-2a (establishing state minimum salary bonus for teachers with national board certification); § 18A-4-7b (establishing calculation of seniority for professional personnel); §18A-4-9 (withholdings for teachers and other employees); § 18A-4-10 (personnel leave for illness and other causes); § 18A-4-10a (bonus for unused days of personal leave); § 18A-4-10c (personal leave for care givers); § 18A-4-10d (use of personal leave days by surviving spouse); § 18A-4-11 (group insurance); § 18A-4-12 (tax deferred investments for teachers and other employees); and § 18A-4-20 (moving expenses for teachers laid off in counties due to lack of need).

A review of these benefits demonstrates that the Legislature intended for “classroom teachers” and “professional personnel” to receive a certain benefits package. Such a package is designed to attract the best, brightest, and most qualified teachers as required by West Virginia Code § 18A-4-7a. These economic protections for teachers directly benefit the students of this State and Monongalia County. The package is designed as an important part of providing a thorough and efficient education to the students of this State. It is ironic that MCBOE has elected to skirt the statutory mandates designed to ensure quality instruction in hiring individuals to teach the most basic skills to the most needy students in Monongalia County.

This statutory package stands in stark contrast to the unlawful hiring by RESA VII of hourly employees. Indeed, the contrast is apparent when minimum pay, as well as insurance and retirement benefits, are considered. This contrast is exemplified by the requirements of West Virginia Code § 18A-4-14, which provides as follows:

(2) Every teacher who is regularly employed for a period of time more than one half the class periods of the regular school day shall be provided at least one planning period within each school instructional day to be used to complete necessary preparations for the instruction of pupils. No teachers shall be assigned any responsibilities during this period, and no county shall increase the number of hours to be worked by a teacher as a result of such teacher being granted a planning period subsequent to the adoption of this section. (March 13, 1982). (Emphasis supplied)

It is clear from this provision that the statutory scheme for benefits for teachers is designed to include preparation time. Teachers are mandated to receive a planning period. This offers an opportunity for teachers to prepare for classes. Without this statutory requirement, teachers – like those in the Interventionist positions at issue – are denied the ability to properly prepare for class as a part of their compensation package. Again, this violates the statutory scheme for teachers’ wages and benefits.

The Petitioners insist that “[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” and allows for “greater flexibility in scheduling multiple interventionists.” (Petitioners’ Brief, p. 2) Respondents do not challenge the Petitioners’ ability and discretion to engage part-time interventionists. Petitioners are free to operate on the cheap, use part-time hourly personnel, avoid paying fringe benefits to them, and deny them a paid lunch and a paid planning period. (Of course, if they choose to do so, petitioners drastically shrink the available labor pool and shirk their duty to provide a thorough and efficient education to Monongalia County’s children.) What the Petitioners cannot do, however, is delegate to an independent agency its statutory responsibility of employing classroom teachers.

Petitioners state that “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 [sic] 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.” (Petitioners’ Brief, p. 6) These figures are concocted. Nowhere on the pages cited by the Petitioners is there anything to substantiate that the relief sought in this case would require the MBOE to reduce the number of Interventionists by one-half to two-thirds and nowhere in the record is there any documentation or hard evidence to support such a claim. Likewise, the Circuit Court’s order does not suggest that the MCBOE would be required to “employ an additional 30 employees with full benefits” to maintain current levels of teaching by Interventionists. In any event, whether the MCBOE will be forced to choose between full-time Interventionists, with benefits, or part-time Interventionists without benefits is not at issue

in this case.⁴

II. RESA IS NOT AUTHORIZED BY STATUTE TO EMPLOY CLASSROOM TEACHERS

The Petitioners argue that RESA is simply fulfilling its mandate by providing Interventionists to MCBOE. This argument is without merit.

The Respondents agree with the Petitioners that Interventionists are employed by RESA. The Respondents also agree 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).

Petitioners argue that West Virginia Code § 18A-1-1(a) “expressly authorizes county boards of education to employ interventionists on an hourly bases ‘or otherwise’ which includes through a RESA.” (Petitioners’ Brief, p. 9) The Petitioners argue that [t]he phrase “or otherwise” includes obtaining services through a RESA and that to prohibit the MCBOE from utilizing RESA Interventionists would render West Virginia Code § 18A-1-1 meaningless. The Petitioners miss the mark. West Virginia Code § 18A-1-1 requires that school personnel must be “employed by a county board.” The evidence in this case clearly proves that the Interventionists are employed by RESA and not MCBOE. Therefore, the Petitioners’ argument that not allowing RESA to employ Interventionists render this statute meaningless is clearly erroneous. In order for West Virginia Code § 18A-1-1 to have meaning, the Interventionists must be employed by the county board and not by

⁴In the Petitioners’ Brief it contends that the MCBOE authorized the expenditure of \$133,214.00 in Title I Funds and \$471,750.00 in General Funds to contract with RESA VII to employ Interventionists. (Petitioners’ Brief, p. 4) This expenditure totals \$604,964.00. If these funds were used by part-time teachers at \$20,000 for wages and benefits, the MCBOE could employ thirty part-time teachers.

RESA.

As discussed above, the Legislature did not expressly authorize county boards of education to employ Interventionists under West Virginia Code § 18A-1-1(a). Although, the Petitioners contend, that a statute should be given its plain meaning when it is clear and unambiguous, it, nonetheless, urges this Court to interpret the word “otherwise” to mean “obtaining services through RESA.” Nowhere in West Virginia Code § 18A-1-1 does it refer to RESA. Rather, West Virginia Code § 18A-1-1 states that “‘school personnel’ means all personnel employed on a regular full-time basis, an hourly bases or otherwise” – this clearly refers to the methods of possible employment by the school board and does not mean that school personnel can be employed by other entities such as RESA.

The Petitioners further argue that RESAs are allowed to receive money from counties. Although West Virginia Code § 18-2-26(h) allows counties to transfer funds to RESAs, this is not the issue at hand. Rather, the issue now before this Court involves RESAs unlawful use of county funds to employ classroom teachers.

The Petitioners also argue that since RESAs are charged with the “delivery of high quality education programs at a lower cost per student,” that they are somehow authorized to employ classroom teachers. (W. Va. Code § 18-2-26(d)) Taking this argument to its logical conclusion, RESA could employ all teachers at twenty-five dollars an hour without benefits, thus, reducing the cost of education dramatically. This clearly is not the legislative intent. There is no logical basis for distinguishing Interventionists from any other teacher providing specialized instruction. Allowing RESAs to employ Interventionists as classroom teachers is the first step down a slippery slope to depriving teachers of their statutory entitlements.

Finally, the Petitioners argue that since the word “Interventionist” is stated in RESA VII’s Strategic Plan, and that RESA VII’s Strategic Plan was approved by the State Board of Education, then the Strategic Plan somehow trumps West Virginia Code § 18A-4-1, *et seq.* Again, the Petitioner’s argument fails. The Petitioners fail to cite any authority in support of this argument that a statute passed by the West Virginia Legislature and signed into law by the Governor is somehow superceded by a undefined term of “interventionist” contained in a RESA Strategic Plan.

To the contrary, the action of RESA VII supports the Respondent’s argument that the Interventionists are classroom teachers. RESA VII’s only requirement for the positions of Interventionists is that they must be a “certified teacher.” (Joint Appendix, Vol. I, p. 190)

The Petitioners further argue that State ex rel. Boner v. Kanawha County Board of Education, 197 W. Va. 504, 475 S.E.2d 176 (1996), somehow supports its position. Again, the Petitioners’ argument is misplaced. The issue in Boner was whether the Kanawha County Board of Education could replace full-time positions with part-time positions without showing a reduction in need. In Boner, both the original full-time employees and the part-time employees who were paid at an hourly rate were employed by the Kanawha County Board of Education. In contrast, here, the Petitioners have allowed a non-county school board entity, RESA VII, to employ classroom teachers.⁵ Therefore, contrary to Petitioner’s argument, Boner does not support the action taken by MCBOE.

III. THE ISSUE PRESENTED IN THIS APPEAL IS RIPE BECAUSE ACTUAL HARM HAS OCCURRED BY THE PETITIONER’S ACTION.

The Petitioners ignore the harm caused to the students of Monongalia County. Under the

⁵As noted above, Respondents do not challenge the Board’s discretion to engage interventionists on a part-time and hourly basis.

law, the students must receive an education by teachers with the highest qualifications. (W. Va. Code § 18A-4-7a) The fact that an Interventionist is only required to be a certified teacher (and is subject to the requirements of West Virginia Code § 18A-4-7(a)) means that students will not receive the best education available. Therefore, the Petitioners are wrong in their assertion that the action of hiring Interventionists through RESA does not cause harm.

As explained above, the Legislature has set forth specific statutory requirements that must be met in hiring and employing teachers. The MCBOE has not met those requirements regarding the Interventionists engaged in its system even though this quite clearly provides educational and instructional services and despite the facts that those services are “very important” to the educational process (Joint Appendix, Vol. I, p. 221) and are “extremely advantageous to the children.” (Joint Appendix, Vol. II, Tab 3, pp. 16-17) And, of course, “there is an ongoing need for those services.” (Joint Appendix, Vol. II, *Id.*) By contracting out the Interventionist positions, the MCBOE deprives these employees of benefits to which they are statutorily entitled as teachers, and also denies the students their best prospects to be taught by the most qualified teachers.

Crucially, by contracting through RESA VII, Monongalia County avoids seniority requirement and, thus, deprives more senior qualified teachers the ability or incentive to bid on the Interventionist positions. As a result, students are being denied the most qualified teacher.

CONCLUSION

The Circuit Court of Monongalia County was correct in its determination that Interventionists are “classroom teachers.” As classroom teachers, Interventionists must be employed by the Monongalia County Board of Education and hired in accordance with West Virginia Code § 18A-4-

1, *et seq.* Therefore, as argued above, the June 9, 2015, order of the Circuit Court of Monongalia should be affirmed.



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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

I, Mark W. Carbone, Esq., counsel for 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, certify that I have served the original and ten true copies of the foregoing "Respondents' Brief" on the following by hand-delivery on this 30th day of November, 2015, to:

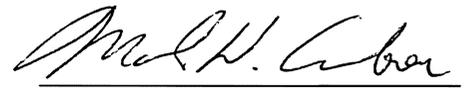
Rory L. Perry, II, Clerk of the Court
West Virginia Supreme Court of Appeals
State Capitol, Room E-317
1900 Kanawha Blvd., E.
Charleston, WV 25305

Further, I, Mark W. Carbone, Esq., counsel for 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, hereby certify that I have served a copy of the foregoing "Respondents' Brief" by placing the same in a

correctly addressed envelope, First Class postage paid, in the United States Mail, on this 30th day of
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