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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

PAMELA SWISHER, et al.

v.

Docket No. 89-20-034

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievants, forty speech therapists employed by Respondent Kanawha County Board of Education,¹ protest assignation of "additional schools, resulting in caseloads above the state-mandated maximums." Grievants rely on West Virginia Board of Education Policy 2419, codified at Section 2.2. in regulations referred to by the parties as "regulations for the education of exceptional students in the State of West

¹Pamela H. Swisher, Charles R. Peal, Norma Ulery, Sally L. Miller, Karen Lohan, Barbara Tabaretti, Regina Ford, Margaret E. Green, Norma Bee, Sabrina M. Dailey, Tracy Bucary, Mary T. Niggemyer, Cynthia A. Martin, Lee Ann Brammer, Janie L. Romine, Sara Darlene Peaks, Helen E. Dunleavy, Vickie L. Lorea, Pamela A. Summers, Nancy H. Foley, Rita H. Nearman, Sheila D. Williamson, Kathryn S. Knighton, Carolyn M. Mullett, Mary Elizabeth Herron, Mary Ellen McDavid, Janice C. Hartstein, Sue O. Gray, Donna Pethel, LuAnne Burgess, Laquetta A. White, Judie W. Purvis, Lisa Hicks, Kathie L. Romeo, R. Beth Daniels, Marilyn V. Bonnett, C. Michael Carr, Cheri L. McIlwain, Maryanne LeDonne and Sharon M. Bright.

Virginia,"² in particular Section 2.2(B)(1), which, for a "Regular Education Program with Modification," provides, "Assign no more than 40 students."

At Level I, on November 22, 1988, Sandra S. Barkey, Director of Respondent's Department of Exceptional Students, did not deny the allegation that caseloads were above the maximum allowed by the regulations, but denied the grievance on the grounds that federal regulations require that all eligible students be provided speech therapy, and the heavy caseloads were necessitated by Respondent's inability to fill 5½ vacancies for speech therapists. At Level II the decision of January 9, 1989, again denied the grievance on the grounds of federal preemption. The evaluator made two further rulings: (1) Since the state regulations created no substantive rights to Grievants, as providers of services to the handicapped, but only to the recipients of the services, the students, Grievants had no standing to grieve; and (2) Since the added workload did not change Grievants' work hours, no transfer, within the meaning of W.Va. Code §18A-2-7, occurred. Respondent waived Level III consideration of the grievance on January 20, 1989, and Grievants

²Only excerpts thereof have been supplied and no proper cite has been given.

filed at Level IV four days later. The hearing was held February 27 and March 8, 1989.³

At the Level IV hearing Respondent again conceded its noncompliance with the state requirements and Grievants, in apparent acceptance of Respondent's preemption argument,⁴ argued that Respondent was not making adequate efforts to procure speech therapists. In their proposed findings of fact and conclusions of law, however, Grievants argue that, because Respondent is not complying with the state requirements, it is denying the students the "free appropriate public education" mandated by the federal Education of the Handicapped Act, P.L. 94-142,⁵ and that the need to group children for therapy, necessitated by the overload, also deprived the students of that right. Throughout these

³While proposed findings of fact and conclusions of law were received from the parties by April 6, 1989, the transcript of the Level IV hearing held March 8, 1989, at Respondent's offices in Charleston was not received from Respondent until June 21, 1989.

⁴The cases Respondent cites, Honig v. Doe, ___ U.S. ___, 108 S.Ct. 592 (1988); Arons v. New Jersey State Bd. of Educ., 842 F.2d 58 (3rd Cir.), cert. denied, 109 S.Ct. 366 (1988), tend to support its argument that, if state requirements conflict with federal requirements, the federal requirements control.

⁵The Act is codified at 20 U.S.C. §§1400 et seq. Section 1400 (c) provides, "It is the purpose of this chapter to assure that all handicapped children have available to them...a free appropriate public education which emphasizes special education and related services designed to meet their unique needs...." The implementing regulations are codified at 34 CFR §§104.33 et seq. and 300.4 et seq.

proceedings Grievants have requested the remedy that they be returned to previous assignments with lower workloads.

Respondent primarily relies on the findings and conclusions of the Level II evaluator, in particular arguing that, because Grievants were not transferred, see Code §18A-2-7, it is not necessary to address the preemption issue.⁶ Since Grievants make no argument based on Code §18A-2-7, Respondent's argument based thereon is inapropos. Furthermore, Grievants' standing is not dependent on the rights provided their students by the West Virginia regulations, as the Level II evaluator ruled. Rather, in that an employee is empowered by the grievance procedure to grieve a "violation, a misapplication or a misinterpretation of the statutes, policies, rules [or] regulations..., including any violation, misapplication or misinterpretation regarding...terms and conditions of employment;...or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, [or] job performance..., " W.Va. Code §18-29-2(a), this matter is grievable and Grievants therefore have standing.

The testimony of Grievants establishes that the overloading of students is gravely affecting Grievants' ability to give therapy of the quality previously given. They testified at length how, in order to provide therapy for all

⁶Respondent relies on Dunleavy v. Kanawha Co. Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989).

their students, they were forced to group them, i.e., provide therapy to two or more students at the same time, and when the grouping was inappropriate the benefits of therapy were slowed or even eliminated. For example, if each individualized educational program (IEP) of two students requires fifteen minutes of therapy, and those students are inappropriately grouped, they are provided the therapy together for fifteen minutes, and, while that therapy fulfills the technical requirements of the students' IEPs, the therapy may not be beneficial or, at least, it does not provide the benefit of fifteen minutes of one-on-one therapy for either student.

Since Respondent concedes, and the record supports, a violation of Section 2.2 of the state regulations, it is not necessary to address whether Respondent is also denying students the free, appropriate public education required by the federal statute, as Grievant argues. Some consideration of the federal requirements is necessary, however, in order to determine whether the remedy Grievants request, that their workloads be reduced and their prior assignments restored, should be ordered.

There is no dispute that Respondent, in order to be in compliance with the federal requirements, must implement the IEPs of all students entitled to speech therapy.⁷ Ms.

⁷See 34 CFR §§300.4, 300.13, 104.33.

Barkey testified that, in order to give all eligible students speech therapy and to fulfill their IEPs, the therapists were given the extra students and further assignments. At the Level IV hearing, when asked how Respondent would be able to provide therapy to all eligible students with implementation of the requested remedy, Grievants' representative stated, "I believe there will be testimony that the school system has made some efforts to take care of...those, and I think our testimony will show that." Tr. IV-6. The evidence establishes that Respondent has made some efforts but there is no showing that any efforts Respondent can make will result in the procurement of therapists for all open positions.

The efforts Respondent has made are interviewing at colleges for recent graduates, advertising in national journals and publications and local newspapers and journals. Grievants correctly argue that the record shows Respondent can make greater efforts, however. Grievant Charles Peal testified that when he was seeking employment in Fall 1988 as a therapist no advertisement appeared in the Charleston Gazette, nor was a position listed with Respondent's hotline on job openings,⁸ and, finally, that Respondent's personnel office incorrectly told him there were no openings.

⁸Cy Faris, Associate Superintendent for Personnel for Respondent, testified that speech therapists were listed on Respondent's hotline, but did not specify whether the
(Footnote Continued)

Grievants submitted into evidence an advertisement Respondent placed in the January 1989 issue of the newsletter of the West Virginia Speech-Language-Hearing Association, which stated that "West Virginia certification is required." Several Grievants testified that they do not meet this criterion but work "on permit" while taking coursework to become certified. The advertisement does not support any allegation of impropriety and this Grievance Board will not order Grievant to advertise for individuals not fully qualified as speech therapists for Respondent.

Grievants also propose as a finding of fact,

In her November 22, 1988, response to Grievants following the informal conference, Kanawha County School Department of Exceptional Students Director Sandra Barkey asserted that the option of having Respondent pay for private therapy and transportation cost (as an alternative to assigning Grievants to additional schools) was rejected because it would not guarantee that each child's IEP would be met.

If this proposal impliedly requests ordering reinstitution of the practice of allowing students to have therapy with private therapists with Respondent paying the cost, the request is denied. No abuse of Respondent's discretion can be found in Respondent's discontinuance of the practice since Respondent is responsible for fulfilling each student's IEP and Respondent is unable to assure that each student will receive therapy when the student's parents are

(Footnote Continued)
hotline maintained notice of such openings at all times.

responsible for transporting the student to the private therapist at the proper time.

Accordingly, while additional efforts can be made by Respondent to hire qualified therapists, there is no assurance that such efforts will result in Respondent's being able to fill all vacant positions for speech therapists. Since the record supports that only with the filling of all the positions will Respondent be able to lower the caseload to the previous levels and also to provide therapy to all eligible students, the remedy Grievants request cannot equitably be ordered.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate:

Findings of Fact

1. Due to Respondent's inability to fill vacant positions for speech therapists, during the 1988-1989 school year Respondent assigned heavy caseloads, sometimes in excess of 40 students, to speech therapists.

2. In order to provide speech therapy to all students assigned them, speech therapists have by necessity grouped students and such grouping has at times been inappropriate, thereby diminishing the benefit of therapy.

3. Respondent has made efforts to hire speech therapists for vacant positions, but can make further efforts.

4. Respondent cannot make assignments at the same levels as those made when all positions were filled without entirely denying some students therapy.

Conclusions of Law

1. It is incumbent on a grivant to prove all the allegations constituting the grievance by a preponderance of the evidence. Payne v. West Virginia Department of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988).

2. This matter is grievable under W.Va. Code §18-29-2(a).

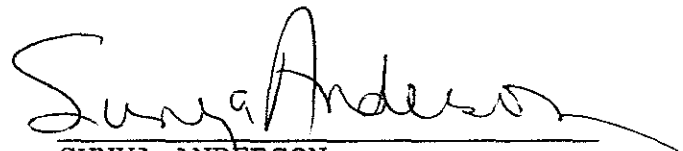
3. Respondent has been in violation of the State of West Virginia's requirement that no more than forty students may be assigned to a speech therapist for therapy.

4. Since denial of speech therapy to some students eligible therefor would be contrary to federal standards, the requested remedy of ordering reinstatement of prior assignments will not be ordered.

Accordingly, the grievance is GRANTED insofar as it requests that Respondent make greater efforts to procure speech therapists to fill all vacant positions. Respondent is ORDERED to advertise weekly for such positions in the Charleston newspapers and any and all other publications in Kanawha County which it may reasonably believe will reach likely candidates, to retain notice of such vacancies on its hotline at all times any positions are not filled, and to

make any and all further reasonable efforts to procure speech therapists for employment. In all other respects, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of this decision. See W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of your intent to appeal so that the record can be prepared and transmitted to the appropriate Court.


SUNYA ANDERSON
HEARING EXAMINER

Date: July 12, 1989