LYNNE FRUTH, et al.,

Grievants,

v.

DOCKET NO. 98-40-371

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Lynne Fruth, Lorie Fitzwater, Donna Kay Kelsey, and Dianna Perdue, currently employed by the Putnam County Board of Education ("Board"), filed this grievance on June 18, 1998:

> The grievants are all Special Education teachers at Hurricane Middle School. In order to meet the county and state Special Education requirements for their students, the grievants had to work on their planning periods. The grievants are asking to be monetarily compensated for the loss of their planning time. Lynne Fruth - 23 days, Lorie Fitzwater - 13 days, Kay Kelsey - 15 days and Diana Perdue - 15 days.

A level two hearing was conducted on July 29, 1998, and a decision denying the grievance was rendered by Harold Hatfield, Grievance Evaluator, on September 14, 1998. Grievants by-passed level three, and appealed to level four on September 24, 1998. The parties agreed to submit this case on the record developed at level two, and this case became mature for decision on October 26, 1998, the deadline for the parties' proposed findings of fact and conclusions of law. Grievants were represented by Rosemary Jenkins, WVFT, and the Board was represented by James W. Withrow, Esq.

SUMMARY OF EVIDENCE

Joint Exhibit

Ex. 1 -

Grievance Statement.

Grievant's Exhibits

Ex. 1 -

Sample Notice/Response: Individualized Education Program Committee Meeting form.

Board Exhibits

Ex. 1 -

IDEA (Individual Disabilities Education Act) 1997 Training Chart.

Ex. 2 -

Putnam County Schools Job Description: Resource Room Teacher - Middle School.

Ex. 3 -

Putnam County Schools Vacancy Bulletin dated July 10, 1997.

Testimony

Grievants Lynne Fruth, Lorie Fitzwater, and Donna Kelsey testified in their own behalf, and presented the testimony of Pat Homberg. The Board presented no testimony.

FINDINGS OF FACT

The facts in this grievance are not in dispute. Grievants are all special education teachers at Hurricane Middle School. As a result of changes in the federal law relating to special education, which changes have become effective over the 1997-98 school year, the way in which the Board is required to devise and prepare a special education student's Individualized Education Program (“IEP”) has been changed substantially. In the past years Grievants have been able to conduct IEP meetings and prepare IEP's for the next succeeding school year beginning in January or February and continuing until the end of school.

As a result of the changes in the law, there was uncertainty at the Federal, state, and local levels

of government concerning how the changes would be implemented. Because of the uncertainty, the Putnam County Special Education Department was not able to have appropriate forms available and conduct the necessary training until April 1998, and all of the IEP's were prepared between May 4, 1998, and June 2, 1998. Due to the compressed time period in which the Grievants were required to conduct the IEP meetings and prepare the IEP's, much of this was done during the teachers' planning periods, to the exclusion of other planning functions. Eighty-three (83) students went through the IEP process, and the average time required for each IEP was two (2) hours.

During the IDEA (Individualized Disabilities Education Act) training process, Pat Homberg, Director of Exceptional Education, advised the principals and vice-principals that the special education teachers were going to be caught in a crunch to get the IEP's prepared in a timely manner, and encouraged them to offer the teachers any assistance they could. In past years, the Board has provided substitutes to cover classes for special education teachers when extra time is needed to complete the IEP process. This year, the teachers requested substitutes, but the request was denied. No explanation was given by Ms. Homberg or Vice Principal Richard Grimm why the request was denied. However, other teachers volunteered to lend their special education aides to Grievants to cover their classes while they were preparing IEP's, and Grievants refused this assistance, stating they wanted more than “a warm body” covering their classes.

DISCUSSION

W. Va. Code § 18A-4-14 provides the following with regard to daily planning periods for certain employees.

> . . . (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 tobe used to complete necessary preparations for the instruction of pupils. Such planning period shall be the length of the usual class period in the school to which such teacher is assigned, and shall be not less than thirty minutes. No teacher 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).
>
> Principals, and assistant principals, where applicable, shall cooperate in carrying out the provisions of this subsection, including, but not limited to, assuming control of the class period or supervision of students during the time the teacher is engaged in the planning period. Substitute teachers may also be utilized to assist with classroom responsibilities under this subsection: Provided, That any substitute teacher who is employed to teach a minimum of two consecutive days in the same position shall be granted a planning period pursuant to this section.

> (3) Nothing in this section shall be construed to prevent any teacher from exchanging his lunch recess or a planning period or any service personnel from exchanging his lunch recess for any compensation or benefit mutually agreed upon by the employee and the county superintendent of schools or his agent: Provided, That a teacher and the superintendent or his agent may not agree to terms which are different from those available to any other teacher granted rights under this section within the individual school or to terms which in any way discriminate among such teachers within the individual school, and that service personnel granted rights under this section and the superintendent or his agent may not agree to terms which are different from those available to any other service personnel within the same classification category granted rights under this section within the individual school or to terms which in any way discriminate among such service personnel within the same classification category within the individual school.

Grievants are not alleging they were denied their planning periods, but rather, that they were required by the new Federal and state IEP regulations to utilize all of their planning period time to prepare IEP's, rather than for preparing classroom instruction. Grievants allege it was arbitrary and capricious for the Board to deny them substitute help during this time period, and wish to be compensated for their planning period time spent preparing IEP's.

The Board denies it violated Code § 18A-4-14, or acted in an arbitrary and capricious manner. Further, the Board alleges that this grievance should be dismissed asto Grievants Lorie Fitzwater, Donna Kay Kelsey, and Dianna Perdue, as they were not signatories to the grievance statement, and Dianna Perdue did not appear at the level two hearing. This argument is denied. Grievants' representative and Grievant Fruth confirmed that the other Grievants had signed onto the grievance, but for some reason the signature page was lost in transmission. A signature page containing the other Grievants' signatures and addresses was provided with the Grievants' level four written submissions, and will be accepted as evidence that all four Grievants were included in the original filing.

The plain meaning of W. Va. Code § 18A-4-14 is inescapable; each teacher must be provided with at least one planning period of the length of the usual class period in the school, but no shorter than 30 minutes. Gant v. Waggy, 180 W. Va. 481, 377 S.E.2d 473 (1988). Further, a teacher cannot be required to give up his or her planning period. Bailes v. Nicholas County Bd. of Educ., Docket No. 89-34-119 (Aug. 30, 1989). If a teacher agrees to give up his or her planning period, he or she must be compensated therefor or provided another “benefit mutually agreed upon by the employee and the county superintendent of school[s] or his agent[.]” Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-544 (Nov. 14, 1989).

Grievants do not contend they were denied planning periods or given planning periods of inappropriate length. What Grievants contend is that, because of the new Federal and state regulations governing IEP's, they were required to cover each other's classes and work exclusively on IEP's during their planning period during the last two months of the school year. With regard to the days Grievants had to work exclusively on IEP's during their planning period, I find that no violation of W. Va. Code § 18A-4-14 has occurred. IEP's are necessarily a part of the “necessary preparations for the instructionof pupils.” Id. While I understand that the day-to-day planning for instruction of the students was disrupted due to the excessive paperwork required for the IEP's, nevertheless, preparing IEP's is part and parcel of a special education teacher's job responsibilities. I imagine that other teachers experience “crunch” periods where they are required to work exclusively on one project or another during their planning periods from time to time. The special education teachers are no different. Further, this “crunch” caused by new IEP regulations was a one-time occurrence. Now that the new regulations and forms are in place, the teachers will be able to begin preparing IEP's earlier in the year, as they have done in the past.

Grievants' contentions that they were required to cover each other's classes during planning period time presents a more persuasive argument. Grievants requested substitute help from the Director of Exceptional Services, Pat Homberg, which was denied. No reasons were given why Grievants were not provided with help during this period. Grievants also requested assistance from Vice-Principal Grimm, and again, no help was forthcoming, despite Ms. Homberg's instruction to the principals during the IDEA training to be cognizant of the needs of the special education teachers during this transition period. The advice to Grievants to “work it out themselves” led them to give up planning periods to cover each other's classes to ensure that the IEP's were completed in a timely manner.

However, in this case, Grievants failed to mitigate their damage suffered as a result of not having substitutes. Grievants were offered the use of supervisory special education aides from other teachers while they were preparing the IEP's and refused this assistance. Grievants' rationale for denying this assistance does not withstand analysis. I find it difficult to imagine that supervisory aides who work in the school on a day-to-day basis, and arefamiliar with the students at that school, could not provide as good or better assistance than a substitute with little or no familiarity with the students. Thus, I find Grievants are not entitled to any relief for their missed planning periods during the 1997-

98 school year.

CONCLUSIONS OF LAW

1. W. Va. Code § 18A-4-14 requires that all teachers receive a daily planning period. This Code Section does not "prevent any teacher from exchanging his . . . planning period . . . for any compensation or benefit mutually agreed upon by the employee and the county superintendent. . .". Id. at (3).

2. The time Grievants spent during their planning periods preparing IEP's for their students constitutes "necessary preparations for the instruction of pupils." Id.

3. Grievants proved by a preponderance of the evidence that they gave up their planning periods occasionally to cover the other teachers' classes so that they could work on their IEP's during the last two months of the 1997-98 school year.

4. Grievants failed to mitigate their damage by refusing the assistance of supervisory aides who offered to cover their classes for them during this time period. Thus, they are not entitled to any relief for those missed planning periods.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 3, 1998