RITA HEATER,

Grievant,

v.

DOCKET NO. 01-01-068

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rita Heater, filed this grievance against her employer, the Barbour County Board of Education ("Board"), on November 29, 2000, alleging as follows:

> Grievant, a regularly employed teacher's aide, is performing physical therapy exercises on a daily basis to help maintain and improve a student's mobility. The Grievant does not receive any additional compensation for the performance of this duty. Grievant alleges a violation of West Virginia Code § 18-5-22.
>
> Relief sought:
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> Grievant seeks payment of an additional pay grade and wages and benefits retroactive to the date that she began performing this duty. Grievant also seeks interest on all monetary sums.

The grievance was denied at level one, and a level two hearing was held on January 31, 2001. The grievance was denied by William D. Staats by decision dated February 20, 2001, and Grievant appealed to level four on March 2, 2001. Following several continuances for good cause, a level four hearing was held on September 5, 2001, in theGrievance Board's Elkins, West Virginia, office. (See footnote 1) The grievance became mature for decision on October 8, 2001, the deadline for the parties'

proposed findings of fact and conclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by Howard E. Seufer, Jr., Esq., Bowles, Rice, McDavid, Graff & Love.

SUMMARY OF EVIDENCE

LII Joint Exhibits

Ex. 1 -

Grievance form and correspondence.

Ex. 2 - W. Va. Code § 18-5-22.

LII Grievant's Exhibits

None.

LII Board Exhibits

Ex. 1 -

Experience Record for Rita Weaver Auvil (Heater).

Ex. 2 -

Basic and Specialized Health Care Procedure Manual for West Virginia Public Schools, West Virginia Department of Education.

Level IV Grievant's Exhibits

Ex. 1 -

Individualized Education Program, dated September 8, 2000.

Ex. 2 -

October 5, 2000 letter from Judy Clevenger to Elaine Benson.

LIV Board Exhibits

Ex. 1 -

Basic and Specialized Health Care Procedure Manual for West Virginia Public Schools, Passive Range of Motion Exercises, dated May 1995 (rev. June 2001).

Testimony

Grievant testified in her own behalf, and presented the testimony of Judith Clevenger and Elaine Benson. The Board presented the testimony of Lenore Zedosky.

FINDINGS OF FACT

After a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

1. Grievant is employed by the Board as a regular school service employee in the aide classification category. She has worked in this capacity for approximately six (6) years, and is currently assigned to Belington Elementary School as an Aide IV/Autism Mentor.

2. One student in Grievant's classroom has cerebral palsy. He receives special education and related services because of his disability.

3. In particular, the student participates daily in “passive range of motion” exercises. These exercises help the student to maintain the flexibility and movement of his limbs.

4. The passive range of motion exercises consist of someone gently pulling on a limb and slowly moving the limb away from the body, stopping when resistance is felt. When the limb moves freely again, or in about five minutes, the limb is moved farther away from the starting position, stopping when resistance is again felt. This continues for about ten minutes, when the limb is returned to starting position and the exercise ends.

5. It is not necessary that someone in a health care profession conduct the passive range of motion exercises. Parents and other lay care givers commonly conduct the exercises without supervision. In previous school years, classroom aides conductedthe exercises for the student in question. Grievant acknowledges that any normal adult is capable of conducting the exercises for the student.

6. At the beginning of the 2000-2001 school year, the classroom teacher assigned Grievant

the task of performing the student's daily passive range of motion exercises.

7. Before Grievant started conducting the exercises, Judy Clevenger, the physical therapist working with the school system, met with her twice to instruct her in the performance of the exercises.

8. Grievant has since conducted passive range of motion exercises on the student's arms and legs. It takes her 10-15 minutes to conduct the exercises on each limb. She alternates between the arms and legs, doing both arms one day and both legs the next.

9. Nobody observes or supervises Grievant while she conducts the exercises for the student. In particular, no school nurses have had any involvement with Grievant relating to her performing these exercises.

10. Grievant does not perform any other procedures which qualify as specialized health care procedures.

DISCUSSION

In a non-disciplinary grievance, the grievant bears the burden of proving her case by a preponderance of the evidence. Tenney v. Barbour County Bd. of Educ., Docket No. 89-01-576 (May 30, 1990). Grievant contends the passive range of motion exercises she conducts for the student qualify as specialized health care procedures under W. Va. Code§ 18-5-22, thus entitling her to additional pay of at least one pay grade higher. The Board disagrees.

W. Va. Code § 18-5-22 provides, in pertinent part:

> Specialized health procedures that require the skill, knowledge and judgment of a licensed health professional, shall be performed only by school nurses, other licensed school health care providers as provided for in this section, or school employees who have been trained and retrained every two years who are subject to the supervision and approval by school nurses. After assessing the health status of the individual student, a school nurse, in collaboration with the student's physician, parents and in some instances an individualized education program team, may delegate certain health care procedures to a school employee who shall be trained pursuant to this section considered competent, have consultation with, and be monitored or supervised by the school nurse: Provided, That nothing herein shall prohibit any school employee from providing specialized health procedures or any other prudent action to aid any person who is in acute physical distress or requires emergency assistance. For the purposes of this section “specialized health procedures” means, but is not limited to, catheterization, suctioning of tracheostomy, naso-gastric tube feeding or gastrostomy tube feeding. “School employee” means “teachers”, as defined in . . . § 18-1-1, . . . and “aides”, as defined in . . . § 18A-4-8 . . ., of this code.

> Any school employee who elects, or is required by this section, to undergo training or retraining to provide, in the manner specified in this section, the specialized health care procedures for those students for which the selection has been approved by both the principal and the county board, shall receive additional pay of at least one pay grade higher than the highest pay grade for which the employee is paid . . .

With the enactment of the statutory provisions requiring higher pay for school employees who perform specialized health care procedures, and with an increase in the kinds and volume of such procedures performed in the public schools, the West Virginia Department of Education convened a Task Force for Medically Fragile Students. Comprised of school nurses, a special educator, and a clinical nurse specialist with expertise in child health care, the Task Force wrote a “Basic and Specialized Health Care Procedure Manual for West Virginia Public Schools.” The manual categorizes studenthealth procedures as “basic health care procedures” and “specialized health care procedures.”

West Virginia Board of Education Policy 2422.7, “Standards for Basic and Specialized Health Care Procedures,” 126 CSR 25A, was adopted in 1990 and amended in 1995. In the policy, the State Board of Education directed county school districts to follow the “Basic and Specialized Health Care Procedure Manual for West Virginia Public School.” The policy acknowledges that school employees may provide specialized health care procedures, but only if they are trained and supervised by the school nurse.

The “Basic and Specialized Health Care Procedures Manual for West Virginia Public Schools” classifies passive range of motion exercises as a basic health care procedure rather than a specialized health care procedure. Unlike specialized health care procedures identified by the Manual, the performance of passive range of motion exercises presents little risk to a student's health, and are not invasive procedures.

CONCLUSIONS OF LAW

1. In a non-disciplinary grievance, the grievant bears the burden of proving her case by a preponderance of the evidence. Tenney v. Barbour County Bd. of Educ., Docket No. 89-01-576 (May 30, 1990).

2. W. Va. Code § 18-5-22 provides, in pertinent part:

> Specialized health procedures that require the skill, knowledge and judgment of a licensed health professional, shall be performed only by school nurses, other licensed school health care providers as provided for in this section, or school employees who have been trained and retrained every two years who are subject to the supervision and approval by school nurses. After assessing the health status of the individual student, a school nurse, in collaboration with the student's physician, parents and in some instances an individualized education program team, may delegate certain health care procedures to a school employee who shall be trained pursuantto this section considered competent, have consultation with, and be monitored or supervised by the school nurse: Provided, That nothing herein shall prohibit any school employee from providing specialized health procedures or any other prudent action to aid any person who is in acute physical distress or requires emergency assistance. For the purposes of this section "specialized health procedures" means, but is not limited to, catheterization, suctioning of tracheostomy, naso-gastric tube feeding or gastrostomy tube feeding. "School employee" means "teachers", as defined in . . . § 18-1-1, . . . and "aides", as defined in . . . § 18A-4-8 . . ., of this code.

> Any school employee who elects, or is required by this section, to undergo training or retraining to provide, in the manner specified in this section, the specialized health care procedures for those students for which the selection has been approved by both the principal and the county board, shall receive additional pay of at least one pay grade higher than the highest pay grade for which the employee is paid . . .

3. The terms of a statute must be applied, not construed. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe but to apply the statute." Oliveto v. United Technical Center and Harrison County Bd. of Educ., Docket No. 96-17-210 (Sept. 5, 1997)[quoting and citing Syl. Pt. 4, McGraw v. St. Joseph's Hospital, Inc., 200 W. Va. 114, 488 S.E.2d 389 (1997), and Keen v. Maxey, 193 W. Va. 423, 456 S.E.2d 550 (1995)].

4. "While not inclusive, the statutory language [of W. Va. Code § 18-5-22] indicates that the additional compensation is to be awarded for complex medical applications not readily performed by untrained individuals." Keith v. Harrison County Bd. of Educ., Docket No. 00-17-129 (Sept. 25, 2000)(denying advanced pay where, as in the instant case, the grievant "did not perform any procedures that could not be completed by the average mother"). 5. The State Board of Education is authorized by law to make rules for carrying into effect the laws of the state relating to education, and county boards of education must obey those rules. W. Va. Code §§ 18-2-5, 18-5-34. The rules include State Board Policy 2422.7, which requires school districts to follow the "Basic and Specialized Health Care Procedure Manual for West Virginia Public Schools." "The state board of

education has been statutorily endowed with a broad authority to exercise general supervision of the public schools of the state . . .[D]etermination of educational policies by the board shall not be controlled by the courts unless shown to be unreasonable or arbitrary." Cyphers v. Marion County Bd. of Educ., Docket No. 94-24-134 (Oct. 31, 1994)[citing Detch v. Bd. of Educ., 145 W. Va. 722, 117 S.E.2d 138 (1960)].

6. Because State Board Policy 2422.7, the Basic and Specialized Health Care Procedure Manual for West Virginia Public Schools," classifies passive range of motion exercise as a basic rather than a specialized health care procedure, the Board was not required to treat the Grievant as performing a specialized health care procedure.

7. The passive range of motion exercises which Grievant conduct for the student do not fall within the statutory definition of a specialized health care procedure, inasmuch as they do not require the skill, knowledge and judgment of a licensed health professional.

8. The passive range of motion exercises which Grievant conduct for the student do not fall within the statutory definition of a specialized health care procedure, inasmuch as even Grievant concedes that the procedure is not performed in consultation with a school nurse or under a school nurse's monitoring or supervision, and the Grievant was neither trained by nor in consultation with a school nurse. 8. Grievant has failed to prove by a preponderance of the evidence that the Board violated W. Va. Code § 18-5-22 by not paying her additional compensation for the performance of passive range of motion exercises.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Barbour County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 8, 2001

Footnote: 1

This matter was reassigned for administrative reasons to the undersigned on August 7, 2001.