



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

March 10, 1987

CHARLIE BROWN
ATTORNEY GENERAL

The Honorable Tom McNeel
State Superintendent of Schools
Department of Education
Building 6, Room 358, Capitol Complex
Charleston, West Virginia 25305

Re: Authority of the State Board of Education
to adopt new service personnel class titles.

Dear Dr. McNeel:

This letter is written in response to your inquiry of July 24, 1986, and your follow-up inquiry and clarification of October 24, 1986. In those letters you have asked numerous questions relating to seniority rights and assignment of service personnel within the class titles of "Aide" as established in W. Va. Code § 18A-4-8. In responding to this question, I have received input, extensive and of much quality, from the National Federation of the Blind of West Virginia, Inc., and the West Virginia School Service Personnel Association, as well as from your staff.

The Federation for the Blind indicates that handicapped students, e.g., visually impaired, mentally retarded, or those with behavior disorders, are being hurt by an over-inclusive job category entitled "Aide." As a result of the job transfer and promotion policy contained in W. Va. Code § 18A-4-8b(b), the aide with the most seniority is promoted or transferred to fill the position vacated by the person who was assisting the teacher with the visually impaired, mentally retarded, or behaviorally disordered students. As you noted in your question, "[d]ifferent training and practices are required as between aides who help with the blind children and those who assist teachers in classrooms with mentally retarded or behaviorally disordered children." Because of the training and experience difference needed to deal with handicapped students, many times the aide with the most seniority is unable to cope with the problems or, at the very least, is unable to provide the specialized assistance needed with these special children. As a result, a great many handicapped children are being deprived of the "thorough and efficient" education that our state constitution guarantees to

them. See Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979).

The Legislature codified various categories of school service personnel in W. Va. Code § 18A-4-8. Among the service personnel positions codified are:

"'Aide I' means those personnel selected and trained for teacher-aide classifications such as monitor aide, clerical aide, classroom aide or general aide.

"'Aide II' means those personnel referred to in the 'Aide I' classification who have completed a training program approved by the state board of education, or who hold a high school diploma or have received a general educational development certificate. Only personnel classified in an Aide II class title shall be employed as an aide in any special education program.

"'Aide III' means those personnel referred to in the 'Aide I' classification who hold a high school diploma or a general educational development certificate and have completed six semester hours of college credit at an institution of higher education or are employed as an aide in a special education program and have one year's experience as an aide in special education.

"'Aide IV' means personnel referred to in the 'Aide I' classification who hold a high school diploma or a general educational development certificate and who have completed eighteen hours of state board-approved college credit at a regionally accredited institution of higher education, or who have completed fifteen hours of state board-approved college credit at a regionally accredited institution of higher education and successfully completed an in-service training program determined by the state board to be the equivalent of three hours of college credit."

The purpose of this statutory enactment was expressed in an earlier opinion of this office as a "continuing effort by the Legislature whose intention has clearly been to improve the salaries and working conditions of auxiliary and service

personnel in the school systems in each county of this State." 56 Ops. Att'y Gen. 243 [1975].

The backdrop of many of the amendments to this provision can likewise be gleaned from a review of the 1975 opinion:

"In this most recent statutory attempt by the Legislature to improve the salaries of auxiliary and service personnel, coupled with the appropriation of public funds to accomplish this purpose, the Legislature was not unmindful of the past efforts of a relatively small number of county boards of education and county superintendents of schools to utilize their reassignment and reclassification authority to circumvent the obvious intent of the Legislature, which is to provide a basic, minimum wage to those auxiliary and service employees whose work is so vital to the operation of our system of free public schools and whose efforts have for so long been repaid with less than a living wage. The fact that this office has been called upon by legislative leaders to reinforce their actions on this subject during the past three years is evidence of the misunderstanding on the part of some, and refusal on the part of a few, to accept these changes which represent the collective will, intent and desire of the Legislature." Id. at 250.

When reading W. Va. Code § 18A-4-8 and Code § 8a, it is apparent that the purpose of the enactments was to assure a living wage and a reasonable working term. With that backdrop of legislative intent, a review of the language relevant to this question becomes appropriate.

"The state board of education is authorized to establish other class titles of service personnel positions and jobs not listed in this section. The state board of education is further authorized to provide appropriate pay grades for such positions and jobs but pay shall be established within the minimum salary scale in section eight-a of this article." W. Va. Code § 18A-4-8.

The legislative purpose of the enactment would not be impinged upon by an exercise of the discretion to create new

categories as long as the pay grades are appropriately established. An example of the appropriateness of an exercise of discretion¹ under this section can be seen from a review of past practice.¹

In 1975 the State Board of Education, by Resolution No. 1 (Policy 5610), established thirty-two (32) additional classifications with the appropriate pay grades. Since that time, most of those classifications have been codified into W. Va. Code § 18A-4-8.

Although it has been suggested that the State Board lacks authority to create new classifications that impinge upon statutory classifications, history does not support that contention.²

One of the thirty-two (32) new class titles created by the State Board in 1975 was:

"25. Multi-classification - means personnel employed to perform tasks that involve the combination of two or more class titles as prescribed in Section eight, Article Four, Chapter eighteen-a, or as created by the West Virginia Board of Education. In such instance the minimum salary shall be the higher pay grade of the class titles involved."

This particular class title established by the State Board clearly encompasses other class titles listed in the statute. It

¹ The State Board could abuse its discretion if it tried to reclassify service employees into a lower pay grade by the subterfuge of a new classification. Such an action would violate the intent of the legislation. No such problem arises herein.

² Apparently this particular interpretation relies on the language of the statute that authorizes the creation of other class titles of service personnel positions "not listed in this section." A more logical interpretation would give the language of the statute its plain, simple meaning; i.e., the State Board may not create a new classification called Aide I while there already exists a statutory Aide I classification.

was reviewed by this office in 1975 and passed scrutiny. 56 Ops. Att'y Gen. 243, 252. It has existed for twelve (12) years and has neither been stricken by a court nor disapproved by the Legislature in any of the six (6) subsequent amendments to W. Va. Code § 18A-4-8. Thus, the State Board has exercised its discretion to create a class title that addresses matters encompassed within the statutory classifications in the past, and such exercise of discretion has not been challenged.

Since the original codification of class titles by the Legislature, many things have changed in this world, including the rights of handicapped individuals. In Medley v. Ginsberg, 492 F. Supp. 1294 (S.D. W. Va. 1980), the United States District Court for the Southern District of West Virginia entertained a class action lawsuit on behalf of mentally handicapped individuals, and subsequently entered an order requiring the state and county boards of education to implement programs to help handicapped students. Although great strides have been made since that time, there still exists room for improvement. Pursuant to the Education of the Handicapped Act, 20 U.S.C.A. §§ 1401-1461, the State of West Virginia and its political subdivisions are required to provide "all handicapped children the right to a free appropriate education" (20 U.S.C.A. § 1412(1)), and to provide for "the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, [and] detailed procedures to assure that all personnel necessary to carry out the purpose of this chapter are appropriately and adequately prepared and trained * * *." (20 U.S.C.A. § 1413(a)(3))

As the United States Supreme Court has noted vis-a-vis this federal enactment:

"The statutory definition of 'free appropriate public education,' in addition to requiring that States provide each child with 'specially designed instruction,' expressly requires the provision of 'such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education.'" Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 201, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982).

Whether there now exists "a comprehensive system of personnel development" that assures that "all personnel" are "appropriately and adequately prepared and trained" so as to provide "such supportive services as may be required to assist a handicapped child to benefit from special education," as required by federal law, is subject to debate. Because of the

over-inclusive "aide" class title, a revolving door now exists that virtually guarantees that those without training are interposed into special education classes. Young blind children need aides who understand Braille, young deaf children need aides that understand sign language, and young behaviorially disordered children need aides who understand how to deal with their temper tantrums. Although secretaries and custodians are so interchangeable that subdivision would be inappropriate, this is not the case a classroom aide. The mission and training differences between aides serving regular classrooms and aides serving special education classrooms are radically different. Even between the various disabilities the missions vary widely.

Just as English teachers cannot appropriately replace math teachers, likewise an aide for a special education student cannot be replaced by a general aide. An over-inclusive aide category is inconsistent with the aims of the Education of the Handicapped Act and certain of its specific provisions. See 20 U.S.C. §§ 1412(1) and 1413(a)(3).

It is the conclusion of this office that:

(1) W. Va. Code § 18A-4-8 grants authority to the State Board of Education to create new class titles for school service personnel; and

(2) A subcategorization of classroom aides to reflect the radically different missions of special education aides and general education aides would be permitted by W. Va. Code § 18A-4-8.

Multiple rules of statutory construction compel these conclusions; e.g., legislative approval of the prior exercise of discretion by subsequent inaction, Sutherland Statutory Construction § 49.10 (4th Ed.), public policy considerations, id. at § 56.01-.95, or the prevention of an absurd result, id. at § 58.05.

The inconsistency of the strict construction with the "thorough and efficient education" provision of the West Virginia Constitution, and its seeming inconsistency with the Education for Handicapped Students Act, 20 U.S.C. § 1501 et seq., would require the adoption of the plain and simple meaning. Sutherland Stat. Const. §§ 45.11, 56.04. The sound dictates of public policy as embodied in the above-noted provisions would urge quick

action by the State Board of Education to assure adequately trained support personnel for the handicapped children of West Virginia.

Very truly yours,

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