

**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Supreme Court Docket No. 31691  
Civil Action No. 01-AA-114 (Circuit Court of Kanawha County)

**THE BOARD OF EDUCATION OF THE COUNTY OF RANDOLPH,**

Appellant,

v.

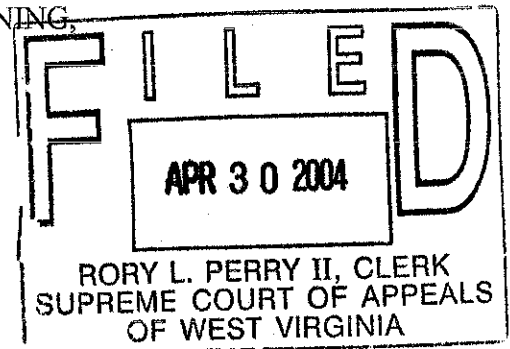
**CHARLOTTE SCOTT and JUDY CHEWNING,**

Appellees,

And

**MELINDA WHITE,**

Intervenor



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**REPLY BRIEF ON BEHALF OF APPELLANT**

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Submitted by:

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## INTRODUCTION

Appellant, The Board of Education of the County of Randolph ("The Board") incorporates by reference its original brief and offers the following reply to the response brief of the Appellees:

Appellees', in their brief, attempt to ignore the case law established by this Court, the Circuit Court of Mingo County, and the West Virginia Education and State Employees Grievance Board ("Grievance Board") by arguing that the qualification of an LPN license cannot be added to a posting for an Aide II position, even though such qualification is reasonably related to the job at issue. Appellees ignore the real issue of this case which is whether or not the Board has the discretion to require additional job qualifications, other than those contained in the statutory definition of a particular classification, in order to meet the unique health needs of particular students and to comply with federal disability laws. The Board does have such discretion, and this Court, as well as the Grievance Board, has held as much. Accordingly, the Grievance Board's decision in this case, and the lower court's decision affirming it, should be reversed.

## DISCUSSION

### **A. The Board Has the Discretion to Require Additional Job Related Qualifications Beyond the Statutory Definitions of Service Personnel Positions To Meet the Needs of Disabled Students.**

Appellees concede that a board of education may add certain job requirements to a particular position, in addition to those listed in the definition of the appropriate classification title. Appellees, however, contend that the additional qualification at issue – LPN licensure – is inconsistent with the qualifications listed in the definition of the Aide II classification and argue that such qualification cannot be required in this case. Appellees go on to cite to various code

sections, none of which are relevant to the issue presently before the Court, in support of their argument. Appellees have cited to no case law, from any court or the Grievance Board, in support of their position.

The Board has never asserted that it could require any additional qualification whatsoever for a posted position. Rather, Appellant has consistently maintained that it has the discretion to consider other job-related factors in determining which applicant who meets the minimum qualifications for a school service personnel position, as specified in W. Va. Code § 18A-4-8(b) and § 18A-4-8(e), is best qualified to fill a posted vacancy. See Hancock County Bd. of Educ. v. Hawken, 209 W. Va. 259, 546 S.E.2d 258 (1999)(Per curiam); Shaffer v. Kanawha County Bd. of Educ., W. Va. Educ. and State Employees Grievance Bd. No. 00-20-085 (June 12, 2000) (attached to Appellant's original brief).

In its original brief, the Board cited several cases in support of its position. Appellees argue that the cases cited by the Board are irrelevant to the issue at hand because they involve supervisor or director positions. First, several cases cited by the Board in support of its position do not involve supervisor or director positions. See, e.g., Ooten, No. 99-C-55 (involving a sign language specialist position); Keith v. Harrison County Bd. of Educ., W. Va. Educ. and State Employees Grievance Bd., No. 99-17-242 (February 24, 2000)(involving a special education aide position); Meade v. Mingo County Bd. of Educ., W. Va. Educ. and State Employees Grievance Bd., No. 99-29-394 (November 16, 1999) (involving a Custodian III position). Second, the type of position involved is completely irrelevant. The Board is hard pressed to conjure another situation where the discretion to consider other job-related qualifications is more vital than in this case, where the health and academic well-being of two

disabled students is at issue. Given the facts of this case, the Board can think of no reason why this Court would not follow its decision in Hawken.

**B. The Intervenor is the Only Qualified Applicant for the Position at Issue.**

Appellees next argue they are both qualified for the position at issue and, given their seniority, one of them should be awarded the job. Contrary to their assertion, neither Appellee is qualified for the job at issue. This Court has clearly stated that achieving a passing score on the state competency test for a particular classification does not conclusively demonstrate that an applicant is qualified to hold that classification title. See Hawken at 263, 546 S.E.2d at 262. Further, this Court has acknowledged the importance of providing students with “a thorough and efficient system of free schools,” and has noted that it “do[es] not believe the Legislature intended for the passing of the test to be the alpha and omega of a board’s hiring process.” Id. (internal quotation omitted). The Circuit Court of Mingo County has stated the same is especially true as it relates to children with disabilities, as “focusing on seniority to the exclusion of qualifications, not only is contrary to West Virginia’s personnel laws, but also subjects [county boards] to liability for violating state and federal special education laws.” Board of Educ. of the County of Mingo v. Ooten, Cir. Ct. of Mingo County No. 99-C-55 (May 24, 2000) (attached to Petition for Appeal). The Board does not dispute that seniority is an integral component of the hiring process in the education system. However, there are certain circumstances, such as those extant here, that require a focus on qualifications, over and above seniority, in order to best serve the unique needs of particular students.

The Intervenor was the only person qualified to fill the position at issue. It is clear from the testimony of Margaret McFarland, the supervisor of the school nurses, and Joseph Super, the Special Education Director, that the students at issue required both medical and

academic assistance. See 1/31/01 Transcript at 61-66, 89-93. Both Nurse McFarland and Mr. Super agreed that neither a school nurse nor an aide, alone, could meet both the medical and academic needs of the students. See id. Accordingly, the Intervenor, the only applicant who is licensed as an LPN and qualified as aide, was awarded the position.

**C. Federal Disability Laws Dictate That the Board Provide a Free Appropriate Public Education to Disabled Students in the Least Restrictive Environment.**

Finally, the Appellees do not address the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 (1970), et seq., in their brief. Rather, they make the bald and offensive assertion that this case is really about money. The Appellees state that the rights of neither the students nor the Appellees need be sacrificed and propose that either an aide serve all of the needs of the children or that both a nurse and an aide be assigned to the students. As stated above, neither a nurse nor aide, alone, can meet both the academic and medical needs of the students. Further, the Board has repeatedly stated that federal laws require that students with disabilities, such as the students at issue here, receive a free appropriate public education in the least restrictive environment possible. See id. Appellees have not responded to and, in fact, have completely ignored this hugely important and relevant factor in this case.

Under the IDEA, in order to be eligible for federal funding, a state must insure that a free appropriate public education is available to all disabled children between the ages of 3 and 21 years who reside in the state. See 20 U.S.C. § 1412(a)(1). Achieving a free appropriate public education includes educating a disabled student in the least restrictive environment pursuant to 20 U.S.C. § 1412 (a)(5)(A). See A.B. v. Lawson, 354 F.3d 315, 319 (4<sup>th</sup> Cir. 2004). The IDEA is an integral part of the education system in this State. In order to continue receiving federal funding, this State must provide a free appropriate public education in the least restrictive

environment to its disabled students.<sup>1</sup> Both Nurse McFarland and Mr. Super agree that a nurse cannot meet the students' academic needs, and an aide cannot meet their unique health needs.

If this Court accepts Appellees' proposal, the two students would be trailed by a classroom aide and a nurse throughout the day. This would single out the students on account of their disability and would be contrary to the provisions of the IDEA which require a free appropriate public education in the least restrictive environment. The health and academic well-being of these students was paramount in the Board's decision to hire the Intervenor. The Board has complied with federal education laws and has followed the laws established by this Court, the Circuit Court of Mingo County, and the Grievance Board.

### CONCLUSION

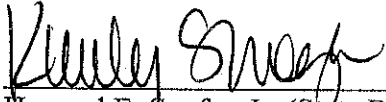
The Administrative Law Judge, and the court below, reached a decision in this case that is in direct conflict with case law established by the West Virginia Supreme Court of Appeals, the Circuit Court of Mingo County, and the Grievance Board. The Grievance Board has invaded the province of the Randolph County Board of Education by improperly interfering with the board's hiring decisions and with its well-established discretion to consider other job-related qualifications when appropriate. The Randolph County Board of Education has taken all necessary steps to ensure that the academic, as well as medical, needs of its students are served to the fullest extent possible and in the least restrictive manner as required by federal law. The Grievance Board's decision would not best serve the needs of these students and would be fiscally irresponsible as well.

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<sup>1</sup> As this Court will undoubtedly agree, the idea of providing disabled students with a free appropriate public education in the least restrictive environment is a laudable one and one that would be worthy of support even if funding were not associated with it.

For all of these reasons, as more particularly explained above, the Randolph County Board of Education, by counsel, respectfully requests that the Court reverse the decision of the lower court.

RANDOLPH COUNTY BOARD OF EDUCATION  
By Counsel



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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and exact copy of the forgoing **Reply Brief on Behalf of Appellant** filed on Behalf of the Randolph County Board of Education upon the following counsel of record by placing a copy in the United States mail, first class postage prepaid, addressed as follows on this the 29<sup>th</sup> day of April, 2004.

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