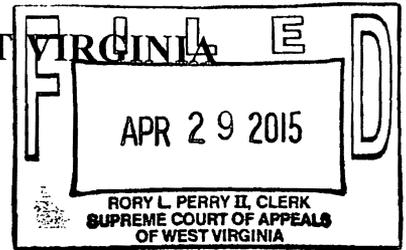


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 14-1213



**CABELL COUNTY BOARD OF
EDUCATION,**

Petitioner,

vs.)

LENNIE DALE ADKINS,

Respondent.

Appeal from a final order of the
Circuit Court of Kanawha County,
West Virginia, Civil Action No.
12-AA-60

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. Standard of Review

The Board of Education hereby incorporates by reference the standard of review previously provided in its opening brief.

II. The Respondent failed to respond to the Assignment of Error regarding the constitutional and implied authority of the Board to suspend the Respondent, and therefore, the Court must assume that the Respondent agrees with the Board's view of the issue.

The West Virginia Rules of Appellate Procedure state as follows:

Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.

W. Va. R. App. P. 10(d). The Assignment of Error is stated in Petitioner's Brief as follows:

The Circuit Court of Kanawha County erred in ruling that the Board of Education's suspension of the respondent was not authorized. Pursuant to Article XII, § 1 of the Constitution of West Virginia, W. Va. Code Chapters 18 and 18A, and the implied duties and powers vested in the Board of Education, the Board of Education was authorized to suspend the respondent based upon the eleven felony complaints relating to possession of child pornography and the employment or use of a minor to produce or assist in doing sexually explicit conduct, pending resolution of those criminal charges.

Petitioner's Brief 1. The Respondent, however, failed to respond to the issue of the Board of Education's constitutional duty, under Article XII, § 1, and its concomitant implied authority, to suspend a school employee when the employee's actions pose a danger to the safety and security of the school environment.

As stated in the Petitioner's Assignment of Error, and as fully briefed therein, pursuant to Article XII, § 1 of the Constitution of West Virginia, and the implied duties and powers vested in the Board of Education, the Board was authorized to suspend the Respondent based upon the eleven-count felony complaint relating to possession of child pornography and the employment or use of a minor to produce or assist in doing sexually explicit conduct, pending resolution of those criminal charges.

The Respondent's brief does not cite Article XII, § 1 of the Constitution and does not address any arguments relating to the certain implied authority of the Board of Education to take actions necessary to protect the safety and security of the school environment. Rather, all authority cited by the Respondent pertains to the power of the Board to suspend a school employee under § 18A-2-8, where the employee's actions affect only his ability carry out his job functions. Relatedly, the Board of Education notes that pages twelve through thirteen of Respondent's Brief excerpt, without a citation thereto, a large quote from *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007). However, neither *Powell* or any other case cited by Respondent pertains to the implied authority of the Board of Education to take actions necessary to protect the safety and security of school children.

Therefore, pursuant to Rule 10 of the Rule of Appellate Procedure, to the extent that the Respondent failed to respond to the Board of Education's Assignment of Error, the Respondent must be deemed to agree with the Board of Education's view that the Board had the implied authority and constitutional duty to suspend the Respondent under the circumstances of this case. The Board's arguments, with which the Respondent must be deemed to agree, are summarized below and fully briefed in the Board's original brief to this Court.

III. The Board of Education was constitutionally required, statutorily mandated, and inherently authorized to suspend the Respondent based upon the felony criminal complaint, pending resolution of the criminal charges.

Although the Respondent addresses the circumstance in which a school employee's actions affect his ability to perform his job functions, the Respondent fails to address the much more limited circumstance, such as in this case, in which an employee's alleged actions pose a grave danger to the safety and security of the school environment. In the former instance, § 18A-2-8(a) and its bases for suspension provide the list of causes, and thus the authority, for which the Board of Education may suspend a school employee. However, in the latter circumstance, in which the school employee's actions affect the safety and security of the school environment, thus implicating and endangering the constitutional right of children to a safe and secure school environment, the Board of Education's authority is derived from its implied powers under the Constitution and related statutory law.

A. The Board of Education, pursuant to the Constitution, was required to take necessary action to protect the safety and security of the school children.

Article XII, § 1 of the Constitution of West Virginia requires the State to provide "for a thorough and efficient system of free schools." § 1. Education, WV CONST Art. 12, § 1. Further, "providing a safe and secure environment wherein our children can learn is implicit in the constitutional guarantee of a 'thorough and efficient school system.'" *Cathe A. v. Doddridge County Bd. of Educ.*, 490 S.E.2d 340, 347, 200 W.Va. 521, 528 (W.Va.,1997) (citing Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 910, 199 W.Va. 400, 401 (W.Va.,1996)). Section 18A-2-8(a) states that a board may suspend or dismiss any person in its employment for, among other things, immorality, incompetency, cruelty, or the conviction of a felony, or guilty plea or a plea of nolo contendere to a felony charge. However, this Court has

not held, and the statute does not dictate, that § 18A-2-8 divests a board of education of all other powers and duties, including, and especially, those required by the Constitution. In other words, § 18A-2-8 is not a talisman to all other authority and duties of the Board of Education. The Board of Education's ultimate goal, policy, and mandate, as prescribed by the Constitution, is to provide a safe and secure environment.

Section 18A-2-8, on the other hand, is limited in its scope. It prescribes the Boards authority to suspend a teacher, but only insofar as the teacher's alleged actions affect the teacher's ability to perform his job duties. However, in limited circumstances, the Board is required to exercise its inherent and constitutional authority to protect the safety and welfare of its students. In other words, § 18A-2-8 governs the Board's authority to suspend an employee when that employee's alleged actions affect his ability to perform his job functions. However, when the employee's alleged conduct affects the safety of the school environment, the Board of Education's authority is based upon Article XII, § 1 of the Constitution.

The Board of Education was presented with a situation in which one of its teachers, the Respondent, was charged with eleven felony counts relating to the possession of child pornography and the use of a minor to produce sexually explicit material, all involving students from the school in which the Respondent taught. Appendix 45-52. The specific dangers, relating to the safety of the involved students and other students in the school, in addition to the nexus between those charges and the teacher's inability to perform his educational duties, were inextricable. In that regard, § 18A-2-8 and its bases for suspension were applicable, but only inasmuch as the Respondent's ability to effectively perform his job was effected. Here, however, the alleged felonious actions of the Respondent posed a grave danger to the school environment.

Thus, the Board of Education's constitutional duty and inherent authority, pursuant to Article XII, § 1, to protect its students, provided the authority for the Board of Education's actions. Therefore, here, in accord with its constitutional duty, where the Respondent was charged with eleven felony counts relating to the possession of child pornography and the use of a minor to produce sexually explicit material, the Board was inherently authorized and required to suspend the Respondent based upon the felony charges.

B. The Board of Education was authorized pursuant to West Virginia Code Chapters 18 through 18A to suspend the Respondent pending resolution of the eleven felony charges.

In addition to the constitutional authority provided by Article XII, § 1, the legislature has, via statute, set forth the policy of this State to provide a safe and secure environment for school children, and has statutorily prescribed that professional educators must stand *in loco parentis*: administrators “stand in the place of the parent(s), guardian(s) or custodian(s) in exercising authority over the school...” *Cobb v. W. Virginia Human Rights Comm'n*, 217 W. Va. 761, 764, 619 S.E.2d 274, 277 (2005); W. Va. Code §18A-5-1(a). In other words, the Board of Education must take on “all or some of the responsibilities of a parent.” Black's Law Dictionary (10th ed. 2014). Moreover, the legislature has set forth the ultimate policy of the State: “[t]he public education system will maintain and promote the health and safety of all students...” W. Va. Code Ann. § 18-1-4(e) (West) (emphasis added). Further, “[e]ach school should create an environment” where students know they are safe. *Id* at (f)5.

The Respondent cites § 18A-2-8 as the sole source of the Board of Education's authority and duties under West Virginia's education code, and, in his response to Petitioner's Brief, fails to address the vast authority of, and direction provided to, the Board of Education under West Virginia's education code. Section 18A-2-8 and the remainder of Chapters 18 and 18A should be

read *in pari material*. *Smith v. Siders*, 155 W. Va. 193, 201, 183 S.E.2d 433, 437 (1971); *Harmon v. Fayette Cnty. Bd. of Educ.*, 205 W. Va. 125, 516 S.E.2d 748 (1999). The ultimate policy of this state, and directive to the Board of Education, is to promote and maintain a safe school environment. Thus, the Board of Education is vested with certain inherent powers to carry out this directive. Further, the Board of Education, and the professionals who carry out its functions, were directed by the legislature to stand *in loco parentis*. To do so, the Board must take necessary actions to protect its students. Here, the Board properly exercised its inherent authority under Chapters 18 and 18A, and suspended the Respondent based upon eleven felony counts relating to the possession of child pornography and the use of a minor to produce sexually explicit material.

C. The Board of Education had the implied authority to suspend the Respondent pending resolution of the criminal charges.

This Court has not had occasion to consider the certain implied authority vested in a board of education to carry out those acts set forth in statute or that arise under the Constitution. In *Burger v. Bd. of Sch. Directors of McGuffey Sch. Dist.*, the Supreme Court of Pennsylvania, interpreting a statute and constitutional scheme paralleling that presented here, held that a specific removal-process provision in the school code did not divest school boards “of their implied authority to suspend [school] officials accused of serious misconduct, even without pay and benefits, within the constraints of procedural due process.” *Burger v. Bd. of Sch. Directors of McGuffey Sch. Dist.*, 576 Pa. 574, 839 A.2d 1055 (2003). The central reasoning, applicable statutes, constitutional provisions, and salient facts of *Burger* instruct that, in limited cases such as here, a school board is vested with certain inherent powers to protect the safety and security of school children.

IV. The Board of Education's suspension of the Respondent based upon the felony charges alone was necessary under the circumstances of this case and in accord with an extensive line of Grievance Board precedent.

Again, the Board of Education was required to suspend the Respondent to protect the safety and security of the school environment. Specifically, the Board of Education was required to do so based upon the criminal complaint alone, pending resolution of the criminal charges, in order to avoid interfering with the pending criminal investigation. The eleven-count felony criminal complaint provided the Board reasonable cause to believe that the alleged actions were committed. *Gilbert v. Homar*, 520 U.S. 924, 934, 117 S. Ct. 1807, 1814, 138 L. Ed. 2d 120 (1997). Thus, upon learning of the felony complaint, the Board faced three alternatives: (1) elect not to act, (2) independently prove that the Respondent committed the alleged felony or (3) base the suspension upon the fact of the felony complaint alone.

Under the second alternative, the Board, as the Respondent concedes, could have sought suspension under immorality. However, to do so, the Board would have been required to prove that the Respondent had committed the felonies with which he was charged. Alternatively, the Board could have not acted. However, taking no action would be contrary to the Board's constitutional authority and duty to provide a safe and secure school environment. Accordingly, the Board of Education elected to suspend the Respondent based upon the felony complaint. The Board of Education's authority to do so is based upon a long line of Grievance Board precedent, which, in turn, is predicated on United States Supreme Court and federal court precedent. *Lemery v. Monongalia County Bd. of Educ.*, Docket No. 91-30-477 (Apr. 30, 1992); *Kitzmilller v. Harrison County Bd. of Educ.*, Docket No. 13-88-189 (Mar. 31, 1989); *Clark v. Kanawha County Bd. of Educ.*, Docket No. 2011-0997-KanEd (Aug. 17, 2011); *Hicks v. Monongalia County Bd. of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004), *aff'd*, Circuit Court of Kanawha

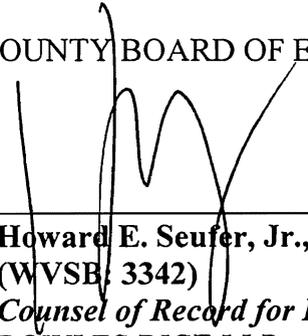
County (No. 04-AA-113, Jan. 18, 2005); *Brown v. Dep't of Justice*, 715 F.2d 662 (D.C. Cir. 1983). Thus, the Board of Education was authorized to suspend the Respondent, based upon the eleven-count felony complaint, pending resolution of those charges.

CONCLUSION

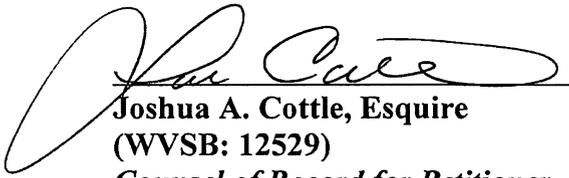
Therefore, based upon the foregoing, and for all those reasons set forth in Petitioner's Brief, the Board of Education respectfully asks this Court to hold that the Board of Education acted within the scope of its authority in suspending the Respondent and, therefore, reverse the decision of the Circuit Court.

Respectfully submitted,

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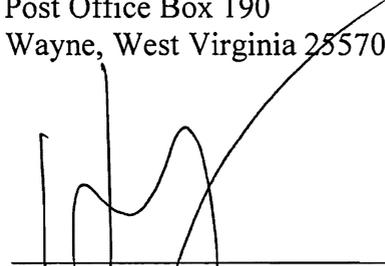
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CERTIFICATE OF SERVICE

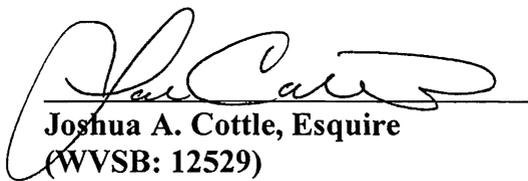
The undersigned hereby certify that on April 29, 2015, we served the foregoing *PETITIONER'S REPLY BRIEF* on counsel for the Respondent by depositing a true copy thereof in the United States Mail, addressed as follows:

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