Davis, J., Concurring in part, Dissenting in part Opinion, Case No.23350 Cathe A. v. Doddridge County Board of Education

Cathe A. v. Doddridge County Board of Education

No. 23350

Davis, Justice, concurring, in part, and dissenting, in part:

While I concur with the ultimate resolution under the circumstances of this particular case, it is with the almost certain impact that this holding will have on the education of the young people of our State that I simply cannot agree. In concluding that C.E.A. had a constitutional right to an alternative education during the period of his expulsion, the Court has determined, in Syllabus Point 4, that:

For a child who is not permitted to attend regular school pursuant to the provisions of the Productive and Safe Schools Act, *W. Va. Code*, 18A-5-1a(g) [1995], the extent and details of the State's constitutional responsibility to provide other state-funded educational opportunities and services to the child must be determined on a case-by-case basis, based on the unique circumstances of the individual child. A primary consideration in making such a determination must be the protection of school children, teachers and other school personnel; another legitimate concern is the need to effectively deter other children from engaging in prohibited conduct. *W. Va. Const.* art. XII, section 1.

However, the plurality opinion concludes further, in Syllabus Point 5, that:

In extreme circumstances and under a strong showing of necessity in a particular case, strict scrutiny and narrow tailoring *could permit the effective temporary denial of all state-funded educational opportunities and services to a child removed from regular school* under the Productive and Safe Schools Act, *W. Va. Code,* 18A-5-1a(g) [1995], *particularly when the safety of others is threatened by the dangerous actions of a child and where a child is unwilling or unable to utilize educational opportunities and services that are consistent with protecting the safety of others*. *W. Va. Const.* art. XII, section 1.

(Emphasis added). It is with this pronouncement of the educational law of this State that I disagree.

This Court would permit a local board of education to withhold educational services from a student based solely upon a determination that the particular pupil is "too dangerous" to educate through alternative schooling. Nevertheless, the law of this State, with regard to education, indicates otherwise. Article XII, Section 1, of the West Virginia Constitution specifically grants, to each young person of this State, a fundamental constitutional right to a public education: "The legislature shall provide, by general law, for a thorough and efficient system of free schools." Furthermore, we previously, frequently, and explicitly have recognized this educational entitlement in our jurisprudence. In *Pauley v. Kelly*, we reiterated that "[t]he mandatory requirements of 'a thorough and efficient system of free schools' found in Article XII, Section 1 of the West Virginia Constitution, make education a fundamental, constitutional right in this State." Syl. pt. 3, *Pauley*, 162 W. Va. 672, 255 S.E.2d 859 (1979). *See also* Syl. pt. 6, *Randolph County Bd. of Educ. v. Adams*, 196 W. Va. 9, 467 S.E.2d 150 (1995) (same); Syl. pt. 1, *State ex rel. Bd. of Educ. for County of Grant v. Manchin*, 179 W. Va. 235, 366 S.E.2d 743 (1988) (same).

With specific regard to disciplinary matters, we recognized in *Keith D. v. Ball* that a student could, by reason of his/her behavior, temporarily forfeit his/her right to attend school. 177 W. Va. 93, 350 S.E.2d 720 (1986). However, in *Keith D.* we did not decide whether a student would, upon suspension or

expulsion from regular school, be entitled to receive alternative education in furtherance of his/her constitutional right to an education. Ruling upon this precise issue left unresolved by *Keith D.*, most recently we concluded in the companion opinion to the case *sub judice*, *Phillip Leon M. v. Greenbrier County Board of Education*:

Implicit within the West Virginia constitutional guarantee of "a thorough and efficient system of free schools" is the need for a safe and secure school environment. Without a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education. However, the State, by refusing to provide any form of alternative education, has failed to tailor narrowly the measures needed to provide a safe and secure school environment. Therefore, we find that the "thorough and efficient" clause of Article XII, Section 1 of the West Virginia Constitution, requires the creation of an alternative program for pupils suspended or expelled from their regular educational program for a continuous period of one year for the sole reason of possessing a firearm or other deadly weapon at an educational facility. To the extent that *Keith D. v. Ball*, 177 W. Va. 93, 350 S.E.2d 720 (1986), is inconsistent with this opinion, it is modified.

Syl. pt. 4, *Phillip Leon*, ___ W. Va. ___, ___ S.E.2d ___ (No. 23349 Dec. 13, 1996).

In addition to our longstanding recognition of a young person's fundamental constitutional right to an education, the West Virginia Legislature has determined that, while the particular circumstances of a certain school-age juvenile may not be amenable to his/her participation in a program of regular education, he/she still is entitled to receive educational opportunities. Consequently, the Legislature specifically has provided for exceptional young people to continue to benefit from an academic setting during a period of suspension or expulsion resulting from the possession of a firearm. *See* W. Va. Code § 18A-5-1a(h) (1996) (Supp. 1996). In addition, school-age juveniles who have been temporarily placed in residential facilities maintained by the Department of Health and Human Resources continue to be educated during their stay in these centers. *See* W. Va. Code § 18-2-13h (1996) (Supp. 1996). Similarly, adolescents who have been adjudicated delinquent as a result of their transgressions are required to participate in daily educational programs during their confinement in institutions operated by the Department of

Corrections. *See* W. Va. Code § 18-2-13f (1988) (Repl. Vol. 1994). *See also* W. Va. Code § 25-4-5 (1975) (Repl. Vol. 1992) (providing for educational instructors at centers housing youthful male law offenders).

Given these numerous examples of other students who are entitled to receive educational services despite their particular circumstances and, in the case of juveniles who have been adjudicated delinquent, even in spite of their previously illegal behavior, I am hard-pressed to determine how a pupil in the position of C.E.A. or J.P.M. could ever be denied an education when these are precisely the students who most require, and who would most benefit from, academic intervention. Particularly in light of the overarching fundamental constitutional right to an education and the fact that delinquent juveniles are afforded educational opportunities, I have difficulty understanding how a student such as C.E.A., who has been expelled, but not adjudicated to be delinquent, could be denied such services based upon a perceived danger to the alternative education instructors or students. In this vein, counsel for the Attorney General of West Virginia best expressed this inconsistent irony: "Surely, it was not intended that a child who has ended up in the criminal justice system, who has been adjudicated a juvenile delinquent [sic] has greater constitutional rights than a child who has engaged in conduct that does not rise to the level of delinquency."

If more violent juveniles residing in correctional facilities are not perceived as too dangerous to educate, then students committing far lesser transgressions resulting solely in expulsion should not be denied their constitutional right to learn. In fact, it is precisely these students, who have not yet deviated from lawful behavior, to whom we should turn our greatest attention in assuring their constitutional right to an education in hopes of preventing their criminal demise. Unfortunately, the decision rendered by this Court will do nothing but give educators a license to refuse such services based upon a discretionary assessment that a particular young person "threatens the safety of others." In the companion case to the one presently before us, which this Court has seen fit to modify, *see* Syllabus Point 6 (modifying *Phillip Leon*), Judge Recht most eloquently prophesied the inherent inequities certain to result from this Court's decision:

Without alternative education, children similar to J.P.M. become orphans, abandoned by the educational system, without anyone to educate them and give them the opportunities inherent in being an educated person. Children with more disruptive behavior are educated within the criminal justice system. Children with financially able parents are educated privately. Children with disabilities that may create disruptions are educated within the public system. Children with similar disruptive behavior in other counties are educated through alternative schools or other programs. If the West Virginia Constitution makes education a fundamental right, then children similar to J.P.M. must be afforded an education and services.

Phillip Leon, ___ W. Va. at ___, ___ S.E.2d at ___, slip op. at 14 (footnote omitted). Let us hope that the discretion authorized by this Court will be closely guarded.

Accordingly, for the foregoing reasons, I respectfully concur, in part, and dissent, in part, from the decision of the Court.