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

No. 23350 - Cathe A. v. Doddridge County Board of Education

Workman, C. J., concurring, in part, and dissenting, in part:

The majority's opinion is very disingenuous. While purporting to find the Safe Schools Act, West Virginia Code § 18A-5-1a(g) (1995) constitutional, it actually finds the statute to be unconstitutional in its application,[(1)] based on its premise that this State's Constitution requires the provision of an alternative education in all but the most extreme factual circumstances. In an ideal world it surely would be preferable to provide an alternative education to students who are expelled; and even in our own imperfect world, it is still a better idea to do so (at least in my opinion). However, we are judges, not legislators; and unless the legislation is determined to be unconstitutional, it is really properly a legislative decision as to what is a good idea. Thus, the only proper inquiry for this Court is whether our state constitution requires the provision of such educational services. And the answer to this question is quite clearly that the constitution does not require it.

Despite this State's recognition of a constitutional right to a free public education, Syl. Pt. 3, Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979), this right, like other constitutional rights, may be forfeited temporarily. See Barker v. Hardway, 283 F.Supp. 228, 238 (S.D. W.Va.), aff'd per curiam, 399

F.2d 638 (4th Cir. 1968), cert. denied, 394 U.S. 905 (1969). Thus, because the right to education is not absolute, but contingent upon appropriate conduct in conformity with state law and school rules, a student may temporarily forfeit his or her right to an education as a result of disruptive conduct. See Keith D. v. Ball, 177 W. Va. 93, 350 S.E.2d 720 (1986), holding limited by Leon M. v. Greenbrier County Bd. of Educ., __ W. Va. __, 484 S.E.2d 909 (1996).

The Doddridge County Board of Education ("Board") convincingly argues that the strict scrutiny analysis typically reserved for denial or infringement of fundamental rights, Lewis v. Canaan Valley Resorts, Inc., 185 W. Va. 684, 408 S.E.2d 634 (1991), is not invoked by a temporary suspension or expulsion from the public schools. The Board suggests that the strict scrutiny analysis--the highest level of constitutional analysis--should only be applied where the right to education is totally denied, such as in a case of permanent expulsion from school. But the right to a public education exists until a child reaches the age of twenty-one; thus, even in the face of a twelve-month expulsion under the Safe Schools Act, an education is not denied, but only temporarily forfeited because of the valid legislative recognition that our schools must be made safe for both the students and the teachers. Because the student is clearly entitled to continue his education upon the expiration of the expulsion period, it is not necessary or legally correct to view the temporary suspension of the right to an education in the same analytical manner (i.e. strict scrutiny) as a permanent denial of a student's right to a public education. See Ball, 177 W. Va. at 95, 350 S.E.2d at 723 n.3 (stating that "fact that the forfeiture is temporary is important" and that "temporary deprivation of constitutional rights does not require the protection that a permanent deprivation would") (citing Syl. Pt. 2, North v. West Virginia Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)).

In the recent decision of Doe v. Superintendent of Schools, 653 N.E.2d 1088 (Mass. 1995) involving the expulsion of a student for bringing a lipstick case knife to school, the court determined

since her expulsion was rationally related[(2)] to the maintenance of order in the school, the defendants' decision not to provide the plaintiff with an alternate

education does not render her expulsion unconstitutional.

This is consistent with our holding in Board of Educ. v. School Comm. of Quincy, 415 Mass. 240, 244-246, 612 N.E.2d 666 (1993), that there is no requirement under Massachusetts law that a school system provide an educational alternative to a student who properly has been expelled for disciplinary reasons. It reasonably may be argued that a requirement that a student who is expelled for misconduct, no matter how egregious, be provided with alternate education by a public school system, would be likely to have a serious detrimental effect on the ability of school officials to deter dangerous behavior within a school by imposing expulsion as a sanction. In any event, we think that it is for the Legislature, not the courts, to decide when, if ever, alternative education must be provided to students expelled for disciplinary reasons, and the form such education must take.

653 N.E.2d at 1097 (emphasis supplied).

In addressing the obligation of the North Carolina school system to provide an alternative education to an expelled student, the court opined:

A student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system. As a general rule, a student may be constitutionally suspended or expelled for misconduct whenever the conduct is of a type the school may legitimately prohibit, and procedural due process is provided. Reasonable regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior.

The public schools have no affirmative duty to provide an alternate educational program for suspended students in the absence of a legislative mandate. Rapp, Education Law, Vol. 2 Sec. 9.06(3)(d)(1986).

In re Jackson, 352 S.E.2d 449, 455 (N.C. App. 1987) (citation omitted and emphasis supplied).

Like the courts in Jackson and Doe, I conclude that neither this State's Constitution nor the laws of this State require that an alternative education be provided to those students properly expelled pursuant to the Safe Schools Act. I further concur with the conclusion reached in both of those cases - - - that it is a legislative decision whether to provide for an alternative educational opportunity, and in the absence of such a legislative mandate, alternative education is simply not required for the temporary forfeiture of the right to receive a public education. At first glance, the majority appears to recognize its limited role in this matter, from its acknowledgment that "[t]he crafting of detailed procedures and standards for implementing the State's compelling interest in ensuring safe schools . . . is a matter properly left to the legislative and executive processes[,]" and its admission that "[i]t is not the business of this Court to make detailed policy or prescriptions." Yet, these statements amount to nothing more than doublespeak, as the majority proceeds to enmesh itself firmly in the middle of policy decisions that are properly the subject of the legislative domain. The majority opinion provides a good example of why this Court needs to avoid intruding into the legislative arena whenever it disagrees with legislative policy or sees an opportunity to inject its perspective into an area of unsettled law. See Randolph County Bd. of Educ. v. Adams, 196 W.Va. 9, 24, 467 S.E.2d 150, 165 (1995) (discussing concept of judicial restraint as requiring "defer[ence] to rationally based legislative enactments").

The federal legislation that impelled the enactment of the Safe Schools Act does not require states to make alternative educational services available; neither does it forbid alternative educational arrangements. Clearly, the state legislation is quite similar. The current state-wide policy grants full discretion to each county to provide alternative education on a case-by-case basis. See 126 C.S.R. § 20.

The majority mistakenly takes the view that the State has sanctioned a denial of alternative education to all expelled students. If the Legislature had

precluded counties from providing alternative educational services to expelled students, then we would be dealing with a constitutionally-elevated issue properly entitled to strict scrutiny analysis. In this case, however, what the Legislature (and the Superintendent in the policy) has done is to leave to the discretion of the counties the decision of whether to provide alternative educational services in such instances.[(3)] It may have been the Legislature's conclusion that any funds diverted to alternative education for kids bringing weaponry to school would be funds taken away from the education of kids who come to school and follow the rules. Many schools have already had to obliterate music and art from their curricula. Special education has endured substantial cutbacks. Now it appears that the majority would siphon more money away from the general student population by their requirement of an alternative education to kids who won't follow the rules.

Furthermore, while the majority recognizes this need to determine on a case-by-case basis the services for a given expelled child, it then fails to identify who is to make this determination. The majority also suggests that the extent of the State's constitutional responsibility to provide alternative educational services is similarly to be determined on a case-by-case basis, but it does not identify who is to make this determination. Thus, the majority cloaks the obligation that they have placed upon the State as to who is to make these case-by-case determinations in a cloud of confusion and irresoluteness.

I am authorized to state that Justice Maynard joins in this separate Opinion.

1. The majority is clever but rather devious in its placement of unconstitutionality on the State Superintendent of School's policy regarding the lack of a mandatory obligation to provide state-funded educational services to expelled students. It is actually quite clear on the face of the statute that no alternative education is required for expelled students. Thus, if the majority was honest, they would say that the statute was unconstitutional in its application. Instead, they take the circuitous route of pronouncing the policy to be unconstitutional.

2. The court in Doe concluded that the proper review mechanism is the rational basis test rather than strict scrutiny analysis after examining the Massachusetts equivalent of Pauley v. Kelley and concluding that the right to an education, while emanating from the Massachusetts Constitution, was not a fundamental right "in the same sense that the constitutional guarantees of freedom of religion and freedom of speech and the press are considered fundamental." 653 N.E.2d at 1095-97 and n.4.

3. The argument can certainly be made that, given the lack of even one individual expelled pursuant to West Virginia Code § 18A-5-1a(g) during the 1995-96 school year, it may not be necessary or cost effective to set aside funding or develop such alternative programming on a county-wide basis. Moreover, because the nature of the student's violent behavior and tendencies would have to be considered in each and every case, a standardized approach to the extension of such educational services would not appear possible or prudent.