

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

No. 33081

FILED

December 4, 2006

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

THE BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,
A PUBLIC CORPORATION,
Plaintiff Below, Appellant

v.

WEST VIRGINIA BOARD OF EDUCATION, A PUBLIC CORPORATION,
AND DR. DAVID STEWART, AS SUPERINTENDENT OF SCHOOLS
OF THE STATE OF WEST VIRGINIA,
Defendants Below, Appellees

Appeal from the Circuit Court of Kanawha County
Honorable Charles E. King, Jr., Judge
Civil Action No. 03-C-2955

REVERSED

Submitted: November 1, 2006
Filed: December 4, 2006

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JUSTICE MAYNARD delivered the Opinion of the Court.
CHIEF JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.
JUSTICE STARCHER dissents and reserves the right to file a dissenting opinion.
JUSTICE ALBRIGHT dissents and reserves the right to file a dissenting opinion.

1. “The concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution.” Syllabus Point 3, *Robertson v. Goldman*, 179 W.Va. 453, 369 S.E.2d 888 (1988).

2. “The 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.” Syllabus Point 3, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979).

3. “Because education is a fundamental, constitutional right in this State, under our Equal Protection Clause any discriminatory classification found in the State’s educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.” Syllabus Point 4, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979).

4. A statute that creates a lack of uniformity in the State’s educational financing system is subject to strict scrutiny, and this discrimination will be upheld only if necessary to further a compelling state interest.

5. “[I]f the State takes some action which denies or infringes upon a person’s fundamental right to an education, then strict scrutiny will apply and the State must prove that its action is necessary to serve some compelling State interest.

Furthermore, any denial or infringement of the fundamental right to an education for a compelling State interest must be narrowly tailored.’ *Phillip Leon M. v. Greenbrier County Board of Education*, 199 W.Va. 400, 409, 484 S.E.2d 909, 918 (1996) (McHugh, J., concurring, in part, and dissenting, in part) (citations omitted). *W.Va. Const.* art. XII, section 1.” Syllabus Point 2, *Cathe A. v. Doddridge County Bd. of Educ.*, 200 W.Va. 521, 490 S.E.2d 340 (1997).

6. W.Va. Code §18-9A-12 (1993), to the extent that it fails to provide that a county school board’s allocated state aid share shall be adjusted to account for the fact that a portion of the county school board’s local share is required by law to be used to support a non-school purpose, violates equal protection principles because it operates to treat county school boards required by law to provide financial support to non-school purposes less favorably than county school boards with no such requirement.

Maynard, Justice:

The Kanawha County Board of Education, the appellant herein, appeals the December 9, 2005, order of the Circuit Court of Kanawha County that granted summary judgment to the appellees, the West Virginia Board of Education and its Superintendent, Steven L. Paine,¹ in the appellant's action seeking a declaration that the appellees' method of financing the Kanawha County school system violates the equal protection clause of the State Constitution. After careful consideration of the parties' arguments and the circuit court's order, we reverse the circuit court. We also hold that W.Va. Code § 18-9A-12 (1993), to the extent that it fails to provide that a county school board's allocated state aid share shall be adjusted to account for the fact that a portion of the county school board's local share is required by law to be used to support a non-school purpose, violates equal protection principles because it operates to treat county school boards required by law to provide financial support to non-school purposes less favorably than county school boards with no such requirement.

I.

STATEMENT OF FACTS

¹When this action was originally brought below, Dr. David Stewart was the State Superintendent of Schools. He has since been succeeded by Steven L. Paine.

The appellant, Kanawha County Board of Education (hereinafter “Kanawha County school board” or “County school board”), operates the public schools of Kanawha County. The appellees, West Virginia Board of Education and its superintendent (hereinafter “State school board”), administer the funding of the public schools of each county according to a financing formula set out in W.Va. Code §§ 18-9A-11 and 18-9A-12.²

²W.Va. Code § 18-9A-11 (2004) provides, in pertinent part,

(a) On the basis of each county’s certificates of valuation as to all classes of property as determined and published by the assessors . . . the State Board shall for each county compute by application of the levies for general current expense purposes . . . the amount of revenue which the levies would produce if levied upon one hundred percent of the assessed value of each of the several classes of property contained in the report or revised report of the value, made to it by the Tax Commissioner as follows:

(1) The State Board shall first take ninety-five percent of the amount ascertained by applying these rates to the total assessed public utility valuation in each classification of property in the county.

(2) The State Board shall then apply these rates to the assessed taxable value of other property in each classification in the county as determined by the Tax Commissioner and shall deduct therefrom five percent as an allowance for the usual losses in collections due to discounts, exonerations, delinquencies and the like. All of the amount so determined shall be added to the ninety-five percent of public utility taxes computed as provided in subdivision (1) of this subsection, and this total shall be further reduced by the amount due each county assessor’s office pursuant to the provisions of section eight [§ 11-1C-8], article one-c, chapter eleven of this code *and this amount shall be the local share of the particular county.* (Emphasis added).

W.Va. Code § 18-9A-12(a) (1993) provides, in part:

The allocated state aid share of the county’s basic foundation program shall be the difference between the cost of its basic foundation program and the county’s local share as determined in section eleven of this article except as provided in subsection (b) of this section.

The State Board applies this formula to provide State financial resources to supplement the financial resources of the State's county school boards.

This financing formula for schools has been summarized by this Court as contemplating,

a shared responsibility of education costs to be borne by the State and

According to W.Va. Code § 18-9A-12(b), in part:

The allocated state aid share shall be adjusted in the following circumstances in the following manner. . . .

(1) In those instances where the local share as computed under section eleven of this article is not reflective of local funds available because the county is under a final court order to refund or credit property taxes paid in prior years, the allocated state aid share shall be the county's basic foundation program, minus the local share as computed under section eleven of this article, plus the amount of property tax the county is unable to collect or must refund due to the final court order. . . .

(2) In those instances where the local share as computed under section eleven of this article is not reflective of local funds available because the county is collecting tax based upon an assessed value which is less than that determined by the tax commissioner in the most recent published survey of property valuations in the state due to an error in the published survey, which error is certified to by the tax commissioner, the allocated state aid share shall be the county's basic foundation program, minus the local share as computed under section eleven of this article, plus the amount of property tax the county is unable to collect based on differences in the assessed valuation between those in the most recent published survey of valuation and the corrected assessed value actually levied upon by the county. . . .

(3) In instances where a county is unable to collect property taxes from a taxpayer during the pendency of any court proceedings, the allocated state aid share shall be the county's basic foundation program minus the local share as computed under section eleven [§ 18-9A-11] of this article, plus the amount the county is unable to collect as a result of the pending court proceedings as certified by the tax commissioner. . . .

individual counties.

Very broadly, the operation of the formula may be described as follows. First, a county's estimated level of need, or "basic foundation program," is determined. The basic foundation program is the total sum required for each of seven categories of need. viz., professional educators, service personnel, fixed costs, transportation costs, administrative costs, other current expenses and substitute employees, and improvement of instructional programs. W.Va. Code, 18-9A-12.

Second, the county's "local share" must be computed. W.Va. Code, 18-9A-11(a). Local share is the amount of tax revenue which will be produced by levies, at specified rates, on all real property situate in the county. Local share thus represents the county's contribution to education costs on the basis of the value of its real property. State funding is provided to the county in an amount equal to the difference between the basic foundation program and the local share. W.Va. Code, 18-9A-12.

State ex rel. Boards of Educ. v. Chafin, 180 W.Va. 219, 221-222, 376 S.E.2d 113, 115-116 (1988) (footnote omitted).

Pursuant to a Special Act passed by the Legislature in 1957, the Kanawha County Board of Education is charged with distributing a part of the proceeds of its annual regular levies to the support of the Kanawha County Public Library. According to this Special Act, in part:

Sec. 5. *Financing.* — In order to provide for the support, maintenance and operation of the public library hereby created, and any and all branches thereof, the supporting governing authorities shall, upon written request by its board of directors, levy annually as follows within the respective taxing districts of the governing authorities, on each one hundred dollars of assessed valuation of the property taxable in the area served by it according to the last assessment for state and county purposes, amounts not exceeding the following amounts for the fiscal year beginning July first, one thousand nine hundred fifty-seven, and for each succeeding fiscal year, as follows: by the board of education of the county of Kanawha, class one, one cent; class two,

two cents; class three, four cents; class four, four cents; by the county court of Kanawha County, class one, one cent; class two, two cents; class three, four cents; class four, four cents; and by the city of Charleston, class one, one cent; class two, two cents; class four, four cents. Each year the board of directors shall request each of the three governing authorities to levy the same amount on each one hundred dollars of assessed valuation of property of the same class, and the amount of the levy on the respective classes of property shall be in the same ratio as the maximum amount of levy on the said classes of property authorized herein. In addition to the aforesaid amounts which, upon written request by the board, the governing authorities shall levy, each governing authority may support the public library with any other general or special revenues or excess levies. All income realized by the operation of the public library from any sources other than the above levies shall be used by the board of directors for the support and maintenance of the public library.³ (Footnote added).

Chapter 178, Acts of the Legislature, Regular Session, 1957. The circuit court below found that in fiscal year 2002-2003, \$2,209,600.00 of Kanawha County's regular tax levy funds were remitted under the Special Act to the Kanawha County Public Library, and that in fiscal year 2003-2004, the diverted amount was \$2,228,070.00.

³This Court upheld the constitutionality of this Special Act in *Kanawha County Public Library v. County Court*, 143 W.Va. 385, 102 S.E.2d 712 (1958), where we held in the Syllabus that,

Chapter 178, Acts of the Legislature, Regular Session, 1957, establishing the "Kanawha County Public Library" and requiring the County Court of Kanawha County to contribute to the support thereof, is not invalid as in contravention of the provisions of Section 39, Article VI, or Section 24, Article VIII of the Constitution of this State.

The circuit court indicates in its order that eight other county school boards are subject to special legislative acts that similarly divert regular tax levy proceeds to local public libraries.

The problem in this case is that when the State school board calculates the County school board's local share under W.Va. Code § 18-9A-11, for each fiscal year, it includes in the local share the portion of the regular tax levy remitted to the library pursuant to the Special Act. The County school board explains in its brief to this Court that "the effect of this fictitious inflation of the Kanawha Board's Local Share was a *pro tanto* diminution in these amounts in such fiscal years of the Kanawha Board's [state share]. Similar consequences have resulted in past fiscal years and will result in subsequent fiscal years." Thus, the County school board wants the State school board, in computing the amount of the County school board's State share, to exclude from its local share the portion of regular tax levy proceeds directed to support the county library.

Accordingly, in 2003, the Kanawha County school board filed a complaint for declaratory judgment and injunctive relief against the State school board and its superintendent asking the circuit court to declare that W.Va. Code § 18-9A-11 and related provisions, as interpreted and applied by the State Board, in combination with the Special Act, creates a discriminatory classification of the County school board within the State's public school financing system in violation of the State Constitution's equal protection clause. The County school board also asked the circuit court to permanently enjoin the State school board from including in its calculation of the County school board's local share the tax receipts that are annually diverted to the library pursuant to the Special Act.

By order dated December 9, 2005, the circuit court denied the relief sought by the Kanawha County school board and granted summary judgment on behalf of the State school board. In support of its ruling, the circuit court made findings of fact that,

Notwithstanding the operation of the Kanawha Special Act, the Legislature's refusal to amend the statutes and the Defendant's refusal to interpret the statutes (by rewriting them in effect), the Plaintiff is providing a thorough and efficient education to Kanawha County's students. In doing so, the Plaintiff is able to provide salary supplements to the teachers and to carry over surplus every fiscal year ranging from \$6,000,000.00 to \$13,000,000.00.

In a county's computation of its local share, West Virginia Code § 18-9A-11(a)(2) permits a deduction of 5% of regular levy funds to cover uncollectibles. This results in a benefit to the Kanawha County Board of Education, because Kanawha County's actual percentage of uncollectibles is lower than the statutory 5%.

Libraries are an aid to education, as evidenced by the fact that in counties not subject to a Special Act, many school districts nonetheless support their public libraries either through direct agreements with their libraries directly or by entering into agreements at the local level to provide a certain portion of funding to the libraries. (Footnote and citations omitted).

In rejecting the county school board's equal protection claim, the circuit court reasoned as follows:

Applying the rational basis test, it is clear that West Virginia Code § 18-9A-11 and § 18-9A-12(b) pass constitutional muster, despite the Legislature's failure to carve statutory "library funding obligations" out of the definition of local share in § 18-9A-11, and/or to add statutory "library funding obligations" to the list of exceptions set forth in § 18-9A-12(b). Libraries are an aid to education Thus, if a county is statutorily required to fund its public library system, and is still able to provide a thorough and efficient education, with salary supplements for teachers, a yearly carryover of \$6,000,000.00 to \$13,000,000.00, and an extra "sock" of money resulting from the fact that the statutory 5% deduction of uncollectibles from local share is higher than the actual percentage experienced, then the Legislature has acted reasonably in spending the state's educational dollars where they are most needed.

The Court finds that the Plaintiff has failed to demonstrate an entitlement to the relief sought in its Complaint. The statutory scheme, W.Va. Code § 18-9A-1 *et seq.* and particularly § 18-9A-11 and § 18-9A-12(b), may not always make it easy but does make it possible, under the facts and circumstances now existing, for the Kanawha County Board of Education to provide a thorough and efficient education for the county's school students. Despite the fact that the Legislature has not carved out a "library funding" exception to the statutory computation of local share, the Kanawha County Board of Education is not only providing a thorough and efficient education but also carrying over millions of dollars every year.

The Kanawha County school board now appeals the circuit court's order.

II.

STANDARD OF REVIEW

Because the issue before us is one of law, we review the circuit court's order herein *de novo*. See Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review.").

III.

DISCUSSION

We start our discussion of the County school board's equal protection claim with this State's equal protection provision. According to the West Virginia Constitution, Article III, § 10, "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." This Court has held that "[t]he concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution." Syllabus Point 3, *Robertson v. Goldman*, 179 W.Va. 453, 369 S.E.2d 888 (1988). We have further explained,

equal protection means the State cannot treat similarly situated people differently unless circumstances justify the disparate treatment. As two commentators have noted, "[t]he equal protection guarantee has nothing to do with the determination of whether a specific individual is properly placed within a classification. Equal protection tests whether the classification is properly drawn." John C. Nowak and Ronald D. Rotunda, *Constitutional Law* § 14.2, at 570 (4th ed. 1991).

In *Cimino v. Board of Education*, 158 W.Va. 267, 274-275, 210 S.E.2d 485, 490 (1974), this Court stated the tests used to determine whether a classification will pass constitutional muster under equal protection:

Whether a statute or governmental action violates the Equal Protection Clause is a determination made by the application of one of two constitutional tests. The more demanding test relates to statutes which impinge upon sensitive and fundamental rights and constitutional freedoms, such as religion and speech. In order to uphold such a statute, a reviewing court must find that a compelling state interest is served by the classification. . . .

In all other instances, the constitutionality of a statute, challenged under the Equal Protection Clause, is subject to the traditional standard requiring that the state law be shown to bear some rational relationship to legitimate state purposes. . . . Under this test, the court must consider whether the classification is a rational one based on social, economic, historic or geographic factors; whether the classification bears

a reasonable relationship to a proper governmental purpose; and whether all persons within the classes established are treated equally.

Kyriazis v. University of West Virginia, 192 W.Va. 60, 67, 450 S.E.2d 649, 656 (1994) (citations omitted).

First, we agree with the County school board that the circuit court erred in applying the rational basis test instead of the strict scrutiny test in this case. As we explained in *Cimino*, the strict scrutiny test is required when the law or governmental action at issue impinges upon a fundamental right. It is well settled that the right to an education is a fundamental under our State Constitution which provides that “The legislature shall provide, by general law, for a thorough and efficient system of free schools.” W.Va. Const., art. XII, § 1. In Syllabus Point 3 of *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979), this Court held 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.” The Legislature’s constitutional mandate to provide a thorough and efficient education includes, at a minimum, the requirement that the State’s formula for funding county school systems be applied in an equal or uniform manner. *See Pauley*, 162 W.Va. at 716, 255 S.E.2d at 882 (explaining that “our thorough and efficient constitutional mandate requires something more than a mere equality of educational funding to the counties.”).

We also held in *Pauley* that “[b]ecause education is a fundamental, constitutional right in this State, under our Equal Protection Clause any discriminatory classification found in the State’s educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.” Syllabus Point 4, *Pauley*, *supra*. In addition,

[I]f the State takes some action which denies or infringes upon a person’s fundamental right to an education, then strict scrutiny will apply and the State must prove that its action is necessary to serve some compelling State interest. Furthermore, any denial or infringement of the fundamental right to an education for a compelling State interest must be narrowly tailored. *Phillip Leon M. v. Greenbrier County Board of Education*, 199 W.Va. 400, 409, 484 S.E.2d 909, 918 (1996) (McHugh, J., concurring, in part, and dissenting, in part) (citations omitted). *W.Va. Const.* art. XII, section 1.

Syllabus Point 2, *Cathe A. v. Doddridge County Bd. of Educ.*, 200 W.Va. 521, 490 S.E.2d 340 (1997). Finally, this Court has indicated, and we now hold, that “a statute that creates a lack of uniformity in the State’s educational financing system is subject to strict scrutiny, and this discrimination will be upheld only if necessary to further a compelling state interest.” *State ex rel. Bd. of Educ. v. Bailey*, 192 W.Va. 534, 538, 453 S.E.2d 368, 372 (1994) (emphasis, citations, and internal quotation marks omitted).

When we apply the strict scrutiny test to the present facts, we can find no compelling reason that justifies treating those school boards differently that are charged by law with applying a portion of their local share to support a non-school purpose such as a public library. Clearly, the end result of such unequal treatment is that county school boards

charged by law with diverting a portion of their local shares to support non-school purposes have less funds from regular tax levies to expend directly on public schools. Simply put, the more than 2.2 million dollars directed each year to the support of the library is money taken from the support of school children in the classrooms of Kanawha County schools. This, in turn, potentially impinges on a school board's ability to provide a thorough and efficient education to its students.⁴

Accordingly, we now hold that W.Va. Code § 18-9A-12 (1993), to the extent that it fails to provide that a county school board's allocated state aid share shall be adjusted to account for the fact that a portion of the county school board's local share is required by law to be used to support a non-school purpose, violates equal protection principles because it operates to treat county school boards required by law to provide financial support to non-school purposes less favorably than county school boards with no such requirement.

Having found that W.Va. Code § 18-9A-12 is constitutionally deficient, we believe that the Legislature must take corrective action by amending the applicable statutes as provided in this opinion. However, because this Court believes that a period of time will be necessary for the Legislature to take the necessary steps to amend the statute, we will do as the State school board suggests and defer entry of a final order to accommodate a

⁴Having found no compelling reason for the unequal treatment, it is not necessary for us to address whether the compelling state interest is narrowly tailored.

legislative solution. Therefore, the effect of this decision will be stayed until the beginning of the next fiscal year on July 1, 2007.

IV.

CONCLUSION

For the reasons set forth above, we find that W.Va. Code § 18-9A-12 is unconstitutional and, accordingly, we reverse the December 9, 2005, order of the Circuit Court of Kanawha County.

Reversed.