

IN THE CIRCUIT COURT OF CALHOUN COUNTY, WEST VIRGINIA

ROBERT and MARJORIE BEVINS,
DELMAS and PHYLLIS RADABAUGH,
ALLEN and DEBRA SMITH, and
BRUCE and BRENDA JONES,

Plaintiffs,

v.

Civil Action No. 00-C-8
Judge David W. Nibert

RONALD BLANKENSHIP, in his
official capacity as Superintendent of the
Calhoun County Public Schools, and the
CALHOUN COUNTY SCHOOL BOARD.

Defendants.

**OPINION ORDER GRANTING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT, IN PART, and GRANTING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, IN PART**

This matter came before the Court on the filing of cross Motions for Summary Judgment and Memorandums in Support of same by counsel for each of the respective parties. This court has considered the cross Motions for Summary Judgment, Memorandums in Support thereof, and oral arguments thereon. Based on a consideration of these matters and a thorough review of all relevant legal authority, this Court concludes that there is no genuine issue of material fact in dispute. Accordingly, this Court hereby finds that the Plaintiffs are entitled to summary judgment, in part, and the Defendants are entitled to summary judgment, in part.

Questions Presented

- 1) Whether the Defendants' practice of filing a criminal complaint against those persons

NO. 22 PAGE 636
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CIRCUIT CLERK

whose home instruction they decide to deny is a violation of state law?

2) Whether the Defendants' policy of requiring the Defendants' approval of a certified teacher to provide a written narrative under West Virginia Code section 18-8-1B(b)(4)(ii) is a violation of state law?

Facts

Four families, Plaintiffs herein, sought approval of the Calhoun County Board of Education and Superintendent thereof, Defendants herein, to home school their children. The approval process was initiated by the Plaintiffs by filing a "Notice of Intent/Application to Home School" with Defendants. Plaintiffs were told that additional information and/or an appearance before the Board of Education was required before a determination was made whether to approve the home schooling. Plaintiffs, apparently believing that they had fulfilled the requirements under West Virginia Code § 18-8-1B, did not comply with Defendants' request for the additional information and/or appearance before the Board. Consequently, Defendants denied the Plaintiffs' requests for home schooling.

Defendants have a practice of filing a criminal complaint against the person(s) whose home instruction request is denied, yet continue to home school their children despite such denial. In these criminal complaints, Defendants allege that the parent or legal guardian, whose request to home school their child(ren) was denied, is in violation of West Virginia's compulsory attendance law, and is therefore guilty of a misdemeanor under West Virginia Code section 18-8-2. This procedure was followed by Defendants herein and a criminal complaint was filed against Plaintiffs herein.

Opinion

It is well-settled in West Virginia that summary judgment is appropriate when it is clear to the court that there is no genuine issue of material fact when the facts are viewed in the light most favorable to the nonmoving party. *see e.g., Painter v. Peavy*, 451 S.E.2d 755 (W.Va.1994). The West Virginia Supreme Court of Appeals has held that an action for declaratory judgment is the appropriate procedure when a person is aggrieved by the Superintendent's failure to grant an exemption under Exemption B of West Virginia Code section 18-8-1. *State v. Riddle*, 285 S.E.2d 359 (W.Va.1981), syl. pt. 2. Likewise, the West Virginia Supreme Court of Appeals has also held that the language "qualified to give instruction in subjects required to be taught in free elementary schools" found in Exemption B is sufficiently definite that an arbitrary and capricious refusal by the county Superintendent and county Board of Education to grant approval to qualified instructors can be corrected by an action for declaratory judgment. *Id.* at syl. pt. 5.

I. Criminal Complaint Initiated by Board of Education

There are two separate sections of the West Virginia Code that are arguably applicable to Question Presented #1, as stated above. West Virginia Code Chapter 18, Article 8, Section 1B, Subsection (b), which gives the county superintendent "the right to seek from the circuit court of the county an order denying home instruction, which order may be granted upon a showing of clear and convincing evidence that the child will suffer educational neglect or that there are other compelling reasons to deny home instruction." West Virginia Code § 18-8-1B(b) (1966). The other section of the West Virginia Code that may apply is West Virginia Code section 18-8-4 which states, in relevant part,

[I]f the parent, guardian or custodian does not comply with the provisions of this article, then the attendance director or assistant *shall* make complaint against the parent, guardian or custodian before a magistrate of the county. If it appears from the complaint that there

is probable cause to believe that an offense has been committed and that the accused has committed it, a summons or a warrant for the arrest of the accused shall issue to any officer authorized by law to serve the summons or to arrest persons charged with offenses against the state. More than one summons or warrant may be issued on the same complaint. The summons or warrant shall be executed within ten days of its issuance.

West Virginia Code § 18-8-4 (1966) (emphasis supplied).

Plaintiffs argue that the remedy provided in West Virginia Code section 18-8-1B(b) is exclusive. Therefore, the only option available to the Defendants is to seek a court order denying home instruction. If such order is denied by the circuit court, there is no other remedy available. Conversely, Defendants assert that the remedies provided in sections 18-8-1B(b) and 18-8-4 are not mutually exclusive. Rather, they are separate and independent remedies allowed by law.

This court agrees with the Defendants' argument, and hereby finds that the remedies prescribed in the relevant portions of the West Virginia Code are separate and independent, and not mutually exclusive. In fact, the two provisions can and should work in concert with each other. Section 18-8-1B(b) gives the county superintendent the option of seeking a court order denying home instruction from the circuit court of that county. It is not mandatory for the superintendent to pursue this remedy. However, if such remedy is sought and the court finds by clear and convincing evidence that the child will suffer educational neglect or that there are other compelling reasons to deny home instruction, the court may grant such an order, thereby denying/discontinuing home instruction. The ultimate decision lies with the court, not with the superintendent or board of education. Clearly, the policy underlying section 18-8-1B(b) is to protect the educational best interests of the children of West Virginia and to provide a procedure therefor. To that end, this section allows the superintendent and, ultimately, the court to intervene and prohibit home instruction if there is a compelling reason to do so, even if all other

requisite procedures for allowing home instruction have been followed by the parents requesting such.

Pursuant to section 18-8-4, the attendance director *shall* make a complaint against the parent, guardian or custodian to the magistrate of the county if said person fails to comply with the mandatory attendance provision. The word "shall" indicates to this court that the Legislature intended it to be incumbent upon the attendance director or assistant to make a complaint against the parent, guardian, or custodian. The attendance director has no discretion in this decision. If the parent, guardian, or custodian of a child is violating the mandatory attendance provision, a complaint must be lodged, regardless of the reason(s) for the parent's violation. The magistrate of the county then makes a determination as to whether there exists probable cause to issue an arrest warrant. This court believes that the obvious purpose of section 18-8-4 is to punish the parent, guardian, or custodian who does not comport with the mandatory attendance provision, as required by the Code. Accordingly, this court finds that the remedies are not mutually exclusive and that the Defendants' filing of a criminal complaint was not only permissible, but was required by the statute.

II. Superintendent's Approval of Certified Teacher

In order to decide the issue of whether the Defendants' policy of requiring the Defendants' approval of a certified teacher to provide a written narrative is a violation of state law, this court must review West Virginia Code § 18-8-1B(b)(4)(ii). It states,

The county superintendent is provided with a written narrative indicating that a portfolio of samples of the child's work has been reviewed and that the child's academic progress for the year is in accordance with the child's abilities. This narrative shall be prepared by a *certified teacher or other person mutually agreed upon by the parent or legal guardian and the county superintendent*. It shall be submitted on or before the thirtieth day of June

of the school year covered by the portfolio. The parent or legal guardian shall be responsible for payment of fees charged for the narrative; or

West Virginia Code § 18-8-1 (1966) (emphasis supplied). Plaintiffs contend that this language grants no discretion to the superintendent to approve/disapprove the person providing the narrative so long as that person is a certified teacher. Plaintiffs further contend that the language, "mutually agreed upon by the parent or legal guardian and the superintendent" modifies "other person" and not "certified teacher." Stated differently, only in the event that such person is not a certified teacher does the Superintendent have a voice in selecting such person. Simply put, certification of said teacher makes him/her automatically qualified, and the board and superintendent must accept that teacher's narrative.

Defendants assert a different interpretation of the statutory language. They encourage this court to adopt an interpretation of the language that vests discretion to approve/disapprove the person providing the narrative with the superintendent, whether or not the person providing the narrative is a certified teacher. Defendants contend that the language "mutually agreed upon by the parent or legal guardian and the county superintendent" modifies both "certified teacher" and "other person." In effect, regardless of certification, the person providing the narrative must be approved by the superintendent.

The inclusion of the words "certified teacher" in the statute indicates to this court that the Legislature intended a certified teacher to be automatically qualified to provide the written narrative. If the Legislature intended to vest discretion with the superintendent regardless of whether or not the person providing the narrative was a certified teacher, there would be no reason for including the words "certified teacher." The mere presence of the words illustrates that the Legislature believed that the licensing/certification of a teacher by the West Virginia State Board of Education is sufficient, without additional approval by the county superintendent.

Accordingly, this court is in agreement, and hereby adopts, the Plaintiffs' interpretation of West Virginia Code section 18-8-1B(b)(4)(ii).

Ruling

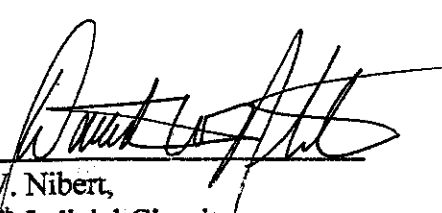
For the reasons set forth in the foregoing opinion, this court ORDERS:

The Plaintiffs' Motion for Summary Judgment, filed on August 25, 2000, is hereby GRANTED, in part and DENIED in part. Plaintiffs' motion is GRANTED in all regards pertaining to the issue of Superintendent's approval of the certified teacher providing a written narrative. Plaintiffs' motion is DENIED in all regards pertaining to the issue of institution of criminal proceedings against parents who are allegedly in violation of the compulsory attendance statute.

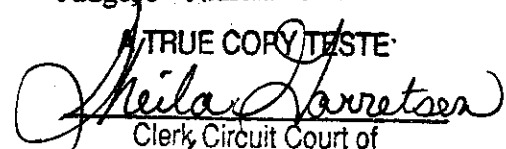
The Defendants' Motion for Summary Judgment, filed on August 28, 2000, is hereby GRANTED, in part and DENIED in part. Defendants' motion is GRANTED in all regards pertaining to the issue of institution of criminal proceedings against parents who are allegedly in violation of the compulsory attendance statute. Defendants' motion is DENIED in all regards pertaining to the issue of Superintendent's approval of the certified teacher providing a written narrative.

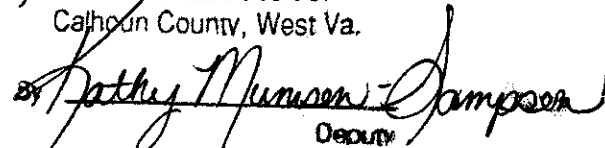
The circuit clerk shall forward an attested copy of this Opinion Order to counsel and self-represented parties, and shall remove this action from the active docket of this Court.

ENTER this Order on this, the 23rd day of Apr., 2002.


David W. Nibert,
Judge, 5th Judicial Circuit

TRUE COPY TESTE


Sheila Tarretsen
Clerk, Circuit Court of
Calhoun County, West Va.


Kathy Munsen-Jamper
Deputy