

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J C Nicholson, Jr , Circuit Court Judge

Case No 2010-CP-10-5197

Storm M H , a minor, by her parent, Gayla S L McSwain,
and Gayla S L McSwain, *pro se*

Respondents/Appellants

v

Charleston County Board of Trustees and Nancy J McGinley,
in her official capacity as Superintendent
of Charleston County School District,

Appellants/Respondents

APPELLANTS' FINAL REPLY BRIEF
of
RESPONDENTS/APPELLANTS

RECEIVED
APR 26 2011
SC Court of Appeals

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ARGUMENTS

I A nonresident child may pay tuition under South Carolina Code § 59-63-30 so as to be eligible to enroll in a magnet school

Plaintiffs disagree with Defendants' statement of the issue on appeal because Plaintiffs do not argue that a nonresident child may pay tuition so as to entitle that child to attend a particular school within a school district. Rather, Plaintiffs argue that a nonresident child may pay tuition to attend a magnet school for which the nonresident child has met that school's admission criteria.

Additionally, Defendants state that "neither § 59-63-30 nor § 59-63-45 entitles a nonresident child to pay tuition to attend the public schools of a school district, absent property ownership." Resp. Init. Br. of Appellants/Respondents, p. 7. However, 59-63-30 expressly states that property ownership within a school district entitles a child to attend a public school in that district "without charge." Therefore, absent such ownership in a district, a nonresident child who wants to attend school in that school district may be charged to attend a public school in that district. *See S. C. Op. Atty. Gen. 31 (1969-1970)* (explaining that school districts are authorized to impose a schedule of charges for attendance at public schools if the residential requirements of Code Section 21-752 ¹ are not met by the child). *And see* Code § 59-63-30: "Children shall be entitled to attend the public schools of any school district, *without charge* if the child owns real estate in the district having an assessed value of three hundred dollars or more." (Emphasis added.)

And, Section 59-63-45 was enacted in June of 1996 "[s]o as to provide a procedure for reimbursing a school district for costs to the district of educating a child not a resident of the

¹ Predecessor of Code Section 59-63-30

school district he attends ” Preamble, Act No 389, 1996 S C Acts 2385 While the Defendants are correct that 59-63-45 refers to giving a credit against tuition to a child who pays property taxes, nothing in that statute requires that a child own property in the school district as a threshold matter In other words, 59-63-45 changed the law, by augmenting 59-63-30, to require a nonresident child to pay tuition to a school district regardless of whether the child owns property in that school district ² Stated differently, if a nonresident child owns property in the school district, the child may be charged tuition but the child gets a credit against that tuition for taxes paid If the nonresident child does not own property within the district, then the child may be charged for the whole of tuition due

Finally, Section 59-63-45, enacted into law in June of 1996, appears to be the last word from the legislature in the area of school tuition payment The beginning language of 59-63-45 is “Notwithstanding the provisions of this chapter ” Judicial rules of statutory construction require that a more specific legislative provision prevail over a more general legislative provision unless a legislative intent is indicated to make the more general provision controlling See *Sutherland Statutory Construction*, Vol 2A, Section 51 05, *Criterion Insurance Company v Hoffman*, 258 S C 282, 188 S E 2d 459 (1972) Here, the legislative intent to make the language of 59-63-45 controlling over the more specific language of 59-63-30(c) is shown by the beginning language of 59-63-45 which states that regardless of what the law has been thus far, a school district may now charge tuition to a nonresident child regardless of the child’s property ownership within the district (but with a credit for school taxes paid on any property owned) If the legislature had intended that a child may not attend school in a school district in which the

² Unless the child is exempted from paying tuition by another statute such as 59 63 31 i e nonresident child s residing with a foster parent due to Department of Social Services placement

child does not reside, the legislature could have very easily said so. It has not, instead, it has stated that a child may be charged tuition to attend school in a district in which the child does not reside which, necessarily, would include a magnet school.

For the foregoing reasons, this court should partially reverse the lower court's findings and find that a nonresident child may pay tuition to enroll in a magnet school so long as the child meets that school's admission requirements.

II The CCSD's policy of excluding nonresident children from its magnet schools violates the equal protection clause of the South Carolina Constitution

CCSD's policy treats nonresident children differently from resident children for no rational reason, therefore, that policy violates nonresident children's right to equal protection of South Carolina Code Section 59-63-30. Defendants argue that the AMHS's admission requirements are rationally related to the legitimate government purpose of meeting local educational needs and maintaining community support for the quality of the District's educational program, however, Defendants have neither identified those needs nor shown how excluding nonresident children from *only* its magnet schools helps to maintain community support for the quality of the District's educational program.

As support for their argument, Defendants cite *Martinez v Bynum*, 461 U.S. 321 (1983). Defendants correctly cite, but only partially so, *Martinez* for the proposition that "[r]esidency requirements have long been upheld with respect to admission to public schools." Resp. Init. Br. of Appellants/Respondents, p. 10. The exact holding in *Martinez* was that the "[c]onstitution permits a State to restrict eligibility for *tuition-free* education to bona fide residents." *Id.* at 333. (Emphasis added.) In other words, residency requirements have been upheld with respect to *free* admission to public schools. It would have been more accurate for

Defendants to cite *Martinez* for the proposition that residency requirements have long been upheld with respect to *free* admission to public schools

The facts and finding of *Martinez* are as follows

This case involves a facial challenge to the constitutionality of the Texas residency requirement governing minors who wish to attend public free schools while living apart from their parents or guardians

Roberto Morales was born in 1969 in McAllen, Texas, and is thus a United States citizen by birth. His parents are Mexican citizens who reside in Reynosa, Mexico. He left Reynosa in 1977 and returned to McAllen to live with his sister, petitioner Oralia Martinez, for the primary purpose of attending school in the McAllen Independent School District. Although Martinez is now Morales's custodian, she is not--and does not desire to become--his guardian. *As a result Morales is not entitled to tuition-free admission to the McAllen schools* (Emphasis added). Section 21 031(b) and (c) of the Texas Education Code would require the local school authorities to admit him [for free] if he or "his parent, guardian, or the person having lawful control of him" resided in the school district, Tex Educ Code Ann § 21 031(b) and (c) (Supp 1982), but § 21 031(d) denies tuition-free admission for a minor who lives apart from a "parent, guardian, or other person having lawful control of him under an order of a court" if his presence in the school district is "for the primary purpose of attending the public free schools." Respondent McAllen Independent School District therefore denied Morales's application for admission in the fall of 1977.

In December 1977 Martinez, as next friend of Morales, and four other adult custodians of school-age children instituted the present action in the United States District Court for the Southern District of Texas against the Texas Commissioner of Education, the Texas Education Agency, four local school districts, and various local school officials in those districts. Plaintiffs initially alleged that § 21 031(d), both on its face and as applied by defendants, violated certain provisions of the Constitution, including the Equal Protection Clause, the Due Process Clause, and the Privileges and Immunities Clause. Plaintiffs also sought preliminary and permanent injunctive relief.

The District Court denied a preliminary injunction in August 1978. It found "that the school boards have been more than liberal in finding that certain children are not living away from parents and residing in the school district for the sole purpose of attending school." The evidence "conclusively" showed "that children living within the school districts with someone other than their parents or legal

guardians will be admitted to school if any reason exists for such situation other than that of attending school only " *Ibid*

Plaintiffs subsequently amended the complaint to narrow their claims. They now seek only "a declaration that § 21 031(d) is unconstitutional on its face," an injunction prohibiting defendants from denying the children admission to school pursuant to § 21 031(d), restitution of certain tuition payments, costs, and attorney's fees. After a hearing on the merits, the District Court granted judgment for the defendants. *Arredondo v Brockette*, 482 F Supp 212 (1979). The court concluded that § 21 031(d) was justified by the State's "legitimate interest in protecting and preserving the quality of its educational system and the right of its own bona fide residents to attend state schools on a preferred tuition basis." 482 F Supp, at 222. In an appeal by two plaintiffs, the United States Court of Appeals for the Fifth Circuit affirmed. 648 F 2d 425 (1981). The Constitution permits a State to restrict eligibility for tuition-free education to its bona fide residents. We hold that § 21 031 is a bona fide residence requirement that satisfies constitutional standards.

While Defendants seek to use the *Martinez* case to support their argument that the CCSD's policy of excluding nonresident children from its magnet schools does not violate the equal protection clause of the South Carolina Constitution, *Martinez* does not do so because it is not on point with the case before this court. The statutes being examined by the respective courts are entirely different. Plaintiffs are not seeking to have Daughter, a nonresident child, to attend the AMHS tuition-free. And, Daughter does not live apart from her parents. To the contrary, Plaintiffs have always been willing to pay tuition. And, unlike the school district in *Martinez*, which accepted tuition to allow that child to attend its school, the Defendants have refused to accept tuition to allow a nonresident child to attend one of its magnet schools. See *Martinez*, 461 U S 351, footnote 3. "Morales attended school in the McAllen school district during the fall, 1978 semester when Texas Rural Legal Aid, Inc, paid his tuition."

Pursuant to Code § 59-63-30, Daughter's purchase of real estate in the CCSD or payment of tuition to the CCSD makes her situated legally the same as a resident child. They both are

statutorily eligible to attend the AMHS but neither can enroll at the AMHS unless they meet the CCSD's admission criteria, i.e., academic standards. As similarly situated citizens, a nonresident child and a resident child are entitled to equal protection under the law as guaranteed by the state constitution, therefore, both a resident and nonresident child are statutorily entitled to enroll at the AMHS so long they meet the admission criteria.

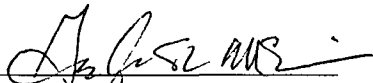


For the foregoing reasons, and because the Defendants have failed to show how its policy of excluding nonresident children from its magnet schools is rationally related to a legitimate governmental purpose, this court should partially reverse the lower court's findings and find that the CCSD's policy is unconstitutional because it violates the Equal Protection Clause of the South Carolina Constitution.

CONCLUSION

For the reasons stated, the trial judge erred by finding that a nonresident child may not pay tuition under South Carolina Code § 59-63-30 to be statutorily eligible to enroll in a CCSD magnet school but, instead, must meet one of the residency requirements of §59-63-30 to be eligible. The trial judge also erred by finding that CCSD's policy of excluding nonresident children from its magnet schools does not violate the Equal Protection Clause of the South Carolina Constitution. Therefore, Plaintiffs request this Court to partially reverse the lower court's order regarding those findings and to order that Daughter, as a nonresident child, has the option to pay tuition to continue her enrollment at the AMHS and to declare that the CCSD's administrative policy of excluding nonresident children from eligibility to enroll in its magnet schools is

unconstitutional because it violates the Equal Protection Clause of the South Carolina
Constitution

Respectively submitted,


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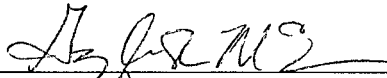
PROOF OF SERVICE

I certify that I have served Respondents' Final Brief of Respondents/Appellants, Appellants' Final Brief of Respondents/Appellants, and Appellants' Final Reply Brief of Respondents/Appellants on the attorneys for the Appellants/Respondents by depositing a copy of them in the U S Mail, postage prepaid, on April 25, 2011, addressed to Kenneth L Childs, Esq , at P O Box 11367, Columbia, SC 29211

And

CERTIFICATION

I certify that Respondents' Final Brief of Respondents/Appellants, Appellants' Final Brief of Respondents/Appellants, and Appellants' Final Reply Respondents/Appellants comply with Rule 211(b), SCACR



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