

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Supreme Court Case No. 2024-001991

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Dec 30 2024

S.C. SUPREME COURT

T.D., by and through his guardians, A.D. and J.D.,

Appellants,

v.

Richland County School District Two,

Respondent.

APPELLANTS' REPLY TO RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, Rule 242, SCACR

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Appellants respectfully submit the following Reply to the Return of the Respondent filed on December 20, 2024.

Argument

I. This case presents novel questions of law, conflicts with multiple Supreme Court precedents, and presents significant constitutional issues.

A. This court has never addressed the “the right to ask questions of all witnesses” contained in S.C. Code Section 59-63-240, nor has it addressed the constitutional minimum due process requirements for student expulsion hearings.

Contrary to Respondent’s current assertions (Return p. 5), the issue of whether parents and students recommended for expulsion have a right to question all witnesses, as provided by S.C. Code Section 59-63-240, has never been addressed by South Carolina courts or the United States Supreme Court.¹

In Goss v. Lopez, 419 U.S. 565, 584 (1974), the United States Supreme Court expressly limited itself to addressing the due process requirements of short-term suspensions under ten days without addressing the procedures required for expulsion.² In Stinney v. Sumter County School District Two, 391 S.C. 547, 707 S.E.2d 397 (2011), this court held that the protections “outlined in section 59-63-240 to be constitutionally sufficient” but declined to decide “the constitutional minimum that must be given in these circumstances.” The Stinney Court noted

¹ Respondent’s own Memorandum in Support of its Motion to Dismiss and the Order of the Circuit Court contain the following identical statement: “*While South Carolina Courts have yet to address the issue concerning the right to confrontation and cross-examination of minor student witnesses in public school expulsion hearings, the South Carolina Court has addressed the use of redacted student statements obtained by law enforcement and/or the school administration in connection with student discipline hearings as it relates to questions of due process.*” R. p. 145.

² “We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.” Goss, 419 U.S. 565, 584 (1974).

that the statute affords “the right to present evidence and question witnesses.” Accordingly, the issue of what our statutory law actually requires in an expulsion hearing is a matter of first impression for the court.

- B. No Court in this state has ever addressed the meaning or requirements of the access and use limitations in S.C. Code §§ 63-19-810, 63-19-2020, or 63-19-2030.

Our courts have never addressed the meaning of South Carolina Code Sections §§ 63-19-810(C), 63-19-2020, or 63-19-2030. Respondents mislead the court by suggesting that Reese v. Richland County School District Two, 3:13-03040-MGL, 2015 WL 9239785, addressed the use of confidential juvenile law enforcement records and information in expulsion proceedings. (Return p. 10). Ashton Reese was 18 years old at the time of his disciplinary incident, and consequently, not considered a “child” subject to the provisions of the Juvenile Justice Code. *See*, S.C. Code § 63-19-20(1)(2012) and (2019). Because Ashton Reese was an adult for law enforcement and prosecution purposes, the confidentiality provisions of S.C. Code § 63-19-810(C), 63-19-2020 and 63-19-2030, were wholly inapplicable to his case. Unlike Reese’s case, S.C. Code Sections 63-19-2030(A) would have precluded a law enforcement officer from appearing and testifying to about confidential “records and information” related to T.D.’s case. The proper use and dissemination of juvenile law enforcement records in schools is a completely novel issue to our courts.

- C. The Case is not Moot because the issues are capable of repetition but escaping review, T.D. will suffer collateral consequences, and the case involves matters of public importance.

This court has already recognized that school disciplinary matters are too short in duration to be fully litigated, therefore they are capable of repetition but escaping review. Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1995). In fact, the school year for which

T.D. had been expelled had ended before the Circuit Court heard this matter in the summer of 2019. Secondly, if a court's decision may affect future events or have collateral consequences for the parties, an appeal from that decision is not moot, even if the appellate court cannot grant effective relief. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591(2001). T.D. has and will endure long-term direct reputational and collateral consequences from being labeled a school threat in a society that is hypervigilant about school violence. If he applies to any institution of higher education, he will be required to disclose that he was expelled for threatening to murder his classmates, even though the charges against him were dismissed outright. Finally, questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest. Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88, 97 (1947). The Court of Appeals issued an unpublished opinion about multiple statutes and issues that impact the lives of thousands of South Carolina children annually in schools, communities, and the Family Courts. This court should take the case to publicly resolve the issues raised herein for the guidance of the bench, bar, parents, law enforcement, and children across South Carolina.

II. Making policy is the purview of the General Assembly. It is not up to the courts to strike down or evade Parental Rights created by the legislature or to judge the wisdom or folly of legislative enactments.

Respondents decline to explain why the Court of Appeals refused to contend with the plain language of a lawfully enacted statute, S.C. Code Section 59-63-240, or the statutory arguments advanced by Appellants [R. p. 57, 73, Brief of Appellant p. 33-15]. Instead, Respondents advance more policy arguments based on Fourteenth Amendment jurisprudence to justify abandoning the plain language of a valid statutory enactment. Respondent's argument and the decision of the Court of Appeals itself, exceed the constitutional limitations of the Court.

“Courts have no authority to countermand a constitutional policy judgment of our state legislature, just as they have no power to impose their own policy judgment on the state legislature or local legislative bodies.” Wilson ex rel. State v. City of Columbia, 434 S.C. 206, 863 S.E.2d 456 (2021). Appellate courts do not sit as a super-legislature to second guess the wisdom or folly of decisions of the General Assembly. Keyserling v. Beasley, 470 S.E. 2d 100, 102 (1996). Additionally, it is the firm policy of our appellate courts to resolve matters on statutory grounds rather than unnecessarily creating and addressing a constitutional issues unnecessary to the resolution of a case. See Fairway Ford, Inc. v. County of Greenville, 324 S.C. 84, 476 S.E.2d 490 (1996).

Appellants have clearly argued the right to question all witnesses emanates from South Carolina statutory law, not the Fourteenth Amendment to the U.S. Constitution at all stages of litigation. Appellants filed an appeal *and* a declaratory judgment action pursuant to S.C. Code § 15-23-20 asking the court to declare the district’s unwritten policy of denying students the right to ask questions of all witnesses to be in violation of Article I, Section 22 of the South Carolina Constitution and S.C. Code § 59-63-240. R. p. 77; R. p. 183-184. The Circuit Court ruled on the issue as a declaratory judgment action, holding that the right to ask questions of *all* witnesses only means the right to ask questions of witnesses present at the hearing. R. p. 22-23. The matter was appealed as an error of statutory interpretation.

Respondents offer no explanation for why the Court of Appeals refused to address the plain language of the statute, choosing instead to invent a constitutional balancing test to determine whether Respondent’s policy of not making witnesses available complies with an accused’s statutory right to ask questions of all witnesses.

- III. The Court of Appeals erred in failing to interpret Section 59-63-240 *de novo* to effectuate the intent of the legislature, where the General Assembly has already set the policy of the state of South Carolina.

The standard of review for a declaratory judgment action depends on the nature of the underlying issue. Nationwide Mutual Fire Insurance v. Walls, 433 S.C. 206, 212, 858 S.E.2d 150, 153 (2021). Questions of statutory interpretation are questions of law, which appellate court’s review under a *de novo* standard. State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (2008); In interpreting and applying a statute, the court’s only role is to effectuate the intent of the General Assembly.

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

The South Carolina Constitution gives South Carolina children the right to attend the system of free public schools open to all children in the State. S.C. Const. Art. XI, section 3. Article I, Section 22 of the Constitution provides that “No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly. In 1973, the General Assembly prescribed the mode of procedure for students facing expulsion in Act No. 543 of 1973, which is now found at S.C. Code Section 59-63-240 (as amended). The General Assembly expressly and intentionally

elected to provide parents and students with rights that were not universally guaranteed by Federal Courts applying the Fourteenth Amendment of the United States Constitution.

The General Assembly is presumed to know the law, State v. McKnight, 576 S.E.2d 168, 352 S.C. 635 (2003), and indeed, the legislators who debated, considered, and passed Act No. 543 of 1973, were keenly interested in recent federal court actions related to student discipline.³ Givens v. Poe, 346 F.Supp. 202 (W.D. N.C.) (1972), a class action lawsuit against the Charlotte-Mecklenburg County School District challenging summary school exclusions and prolonged removals without basic due process protections, was among the freshest and closest federal precedents on the subject of student due process rights. The Givens court recognized that there was not uniformity in federal court decisions on the minimum due process requirements:

Not all school discipline due process cases have reached identical results. The Supreme Court has written no blueprint. However, where exclusion or suspension for any considerable period of time is a possible consequence of proceedings, modern courts have held that due process requires a number of procedural safeguards such as: (1) notice to parents and student in the form of a written and specific statement of the charges which, if proved, would justify the punishment sought; (2) a full hearing after adequate notice and (3) conducted by an impartial tribunal; (4) the right to examine exhibits and other evidence against the student; (5) the right to be represented by counsel (though not at public expense); (6) the right to confront and examine adverse witnesses; (7) the right to present evidence on behalf of the student; (8) the right to make a record of the proceedings; and (9) the requirement that the decision of the authorities be based upon substantial evidence. [Citations Omitted].

Not all courts have expressly required all the items listed above, but all items do appear essential if both the substance and the appearance of fairness are to be preserved.

Givens, 346 F.Supp. 202, at 209. The General Assembly would have been guided by the Givens decision not by the Court of Appeals and Respondent's authorities decided after 1973.

³ The bill's author, Representative L. Roger Kirk, Jr., specifically complained about liberal judges and the ACLU lawsuits as a reason the bill was needed. See, e.g., "School Rules Given Nod," The State, (Columbia, South Carolina), May 11, 1973, p. 18.

Against this background, the General Assembly made a policy choice to provide parents and students with specific enumerated rights that are *not* universally guaranteed by the Fourteenth Amendment to the South Carolina Constitution, namely, the right to be represented by counsel in expulsion hearings and the right to ask questions of “*all* witnesses.” The General Assembly recently reaffirmed its commitment to exceeding the bare minimum of federal due process standards, by retaining the statute’s guarantees of the right to legal counsel and the right to question *all* witnesses, without qualification or limitation. Both chambers of the General Assembly were asked to amend the language to “all witnesses who appear at the hearing,” but those amendments were rejected in both houses.

IV. Respondents have no authorities to show that “lack of subpoena power” is the basis for denying parents and students any statutory right to ask questions of all witnesses.

For the first time in the six-year history of this case,⁴ Respondent identified two authorities for their argument that lack of subpoena power justifies disregarding a statutory right to ask questions of all witnesses. (Return p. 16, citing Hinds County School Dist. Bd. Of Trustees v. R.B. ex. Rel. D.L.B., 10 So. 387, (Sup. Ct. Miss. 2008) and L.Q.A. By and Through Arrington v. Ebenhart, 920 F.Supp. 1208, 1219-20 (M.D. Ala. 1996)). Now that the cases have been identified, it is clear that neither of the cases were resolved on the basis of a school’s lack of subpoena power and neither case stands for the proposition that the lack of subpoena power overrides a school district’s obligation to comply with a *statutory* requirement to provide parents expulsion with the right to question all witnesses in an expulsion hearing.

Indeed, under the analysis advanced Hinds County School Dist. Bd. Of Trustees v. R.B. ex. Rel. D.L.B., 10 So. 387, (Sup. Ct. Miss. 2008), Respondents would have been required to

⁴ Neither the Court of Appeals nor Respondents provided any citations for this argument in their Motion to Dismiss filed in the Circuit Court, R. p. 141, nor did they provide any citations to the Court of Appeals in their Brief. Brief of Respondent, p.

comply with their own policies and make witnesses available for questioning. In Hinds, the Mississippi Supreme Court reviewed the disciplinary decisions of a youth who was transferred to alternative school for possessing a knife, then subsequently expelled for possessing marijuana. Mississippi's school discipline statutes do not provide for a right to ask questions of witnesses.⁵ The expulsion decision was reversed by the Chancery Court, whose decision was then affirmed by the Mississippi Court of Appeals. The dissenting opinion of the appeals court argued that the school board's lack of subpoena power implied that students did not have a right to confrontation. Hinds, 10 So. 387 at 396. The Hinds court did *not* rely on the "subpoena power" rationale of the dissent in reversing the Mississippi Court of Appeals. Instead, the court ruled, based on its prior precedent, Warren County Board of Education v. Wilkinson, 500 So.2d 455 (Miss. 1986), that school districts that have policies requiring confrontation and cross-examination must make witnesses available to comply with due process, whereas those that do not have such policies, are not required to make witnesses available. Hinds, at 400.

Although, the Hinds court noted that it agreed that Mississippi school boards lack the statutory authority to compel students to testify against fellow students at evidentiary hearings, that was not the basis of its ruling.⁶ Moreover, Hinds makes clear that if Richland County School District Two were doing business in Mississippi with Policy JKE and JKE-R (R. pp. 489-495), both of which expressly provide the right to ask questions of all witnesses, Respondents would be mandated to make their witnesses available to comport with due process under Mississippi law.

⁵ Mississippi's school discipline statute requires school districts to establish their own due process procedures and does not expressly include a right to question witnesses. *See*, Miss. Stat. § 37-11-55.

⁶ Additionally, the court found there was no need for cross-examination in this case since R.B. admitted to handling and hiding the marijuana, although claiming another student was the true owner. The marijuana was found where R.B. himself said it was hidden. In short, there was no legitimate factual dispute in the case about R.B.'s possession of marijuana. Hinds, at 402.

The second case cited by Respondents, L.Q.A. By and Through Arrington v. Ebenhart, 920 F.Supp. 1208, 1219-20 (M.D. Ala. 1996), does not support the Court of Appeals decision either. In L.Q.A., a parent filed a 1983 action in federal court claiming his child's federal due process rights were violated in an expulsion proceeding. L.Q.A. was expelled for possession of marijuana. Another student reported to a teacher that L.Q.A. was in possession of a bag of marijuana and a teacher found a bag of marijuana stashed near where the student was seated. At L.Q.A.'s expulsion hearing, *L.Q.A.' parent was able to confront and cross-examine both of his primary accusers, including the student witness and the teacher who found the marijuana.* L.Q.A., 920 F.Supp. 1220. Based on those facts, the court found the student was provided due process. *Id.* Additionally, the school took the additional steps of continuing L.Q.A.'s hearing to obtain the participation of other student witnesses who had given written statements. Those parents declined to have their children participate.

The parent argued that the school's failure to produce the secondary student witnesses violated L.Q.A.'s due process rights under the Fourteenth Amendment (Alabama had no statute governing expulsion rights and procedures until 2024).⁷ The L.Q.A. court ruled, based on other federal authorities, that the Fourteenth Amendment does not mandate confrontation or cross-examination of all witnesses and due process was satisfied.

Not only does L.Q.A. highlight that other schools can and do make student witnesses available even in the absence of a statutory requirement to do so, it shows a stark difference from the Respondents' unwritten policy to disregard the rights outlined in their policies and state law,

⁷ See, Alabama H.B. 188, effective October 1, 2024. Ala. Code 1975 § 16-1-14. The statute actually shows how a legislature can limit student questioning, by expressly limiting the right to question witnesses to persons over age 14 who appear at the hearing.

and their utter refusal to even ask student witnesses to participate. The “administrative burden” is just asking, which the district refuses to do.

Accordingly, the “lack of subpoena power” argument adopted by the Court of Appeals is without merit.

- V. School districts do not need subpoena power to encourage student witnesses to participate in administrative hearings.

Statutory subpoena power is simply not necessary to get student witnesses to participate in hearings. As has been noted previously, schools possess rule-making authority over the conduct of students and use it to coerce them to do things against their will on a routine basis. (Petition for Writ of Certiorari, p.). S.C. Code Section 59-19-90(3) sets out the school board’s duty to promulgate rules and regulations relating to the standards of conduct and behavior. Section 59-19-90(3) and its predecessor, 1962 Code Section 21-230, have been the basis for school districts to create Codes of Conduct since before the expulsion statute even existed. Every district in the state punishes students for “refusal to obey” an order of the school leaders. Richland County School District One created the very first school Discipline Code of Conduct in South Carolina and included “deliberate refusal to obey a teacher when ordered to leave a room or to report to the office” as an offense punishable by suspension or expulsion.⁸ At the time this case arose, the district’s Code of Conduct JICDA-R made refusal to comply with directives of school personnel a Level II offense, that could warrant expulsion. R. p. 55-501. This may seem unpalatable, but it is undeniably available to them, just as they use their authority to compel students to write statements in the first place.⁹ Alternatively, if a witness in an administrative

⁸ See, E.G. “Text of Richland County School District 1 Disciplinary Code,” The Columbia Record (Columbia, South Carolina), August 19, 1971 p. 7-C.

⁹ If there is any doubt about the effectiveness of discipline to encourage cooperation, consider the facts of T.D.’s case. Student witnesses C.G. and K.M. both refused to give written statements to Law Enforcement at the time they were asked, but they both gave a written statement on the spot to their principal.

hearing refuses to participate in a hearing, the district is free not to use the statement, as this Court has previously discussed in City of Spartanburg v. Parris, 161 S.E.2d 228, (1968). What the district is not free to do is disregard its statutory obligation to make witnesses available.

Respondents suggest the “right to ask questions of all witnesses” can only be satisfied by dragging student witnesses from their school campus through a traumatic ordeal. (Return, pp. 11, 14, and 15). Of course, administrative hearings are less formal than court proceedings and commonly allow participation by phone, teleconference, and other means. *See, e.g. Young, supra*, fn. 2 (Board members participated in hearing by phone); In the Matter of Matson, 333 S.C. 242, 509 S.E.2d 263 (1998) (Subpanel allowed respondent to testify to mitigating factors by telephone); *See also*, Rule 30(b)(7), SCRPC (Allowing for deposition by telephone). This was common practice in school hearings even before the COVID-19 pandemic. Schools clearly have the power and ability to have students participate in a hearing by telephone call, Zoom call, teleconference, or other means to answer questions about a statement they have written. Student witnesses would have the Hearing Officer, the district’s attorney, and others to protect them from any aggressive or inappropriate questioning by a parent or an attorney. Making student witnesses available can be satisfied with *de minimis* disruption to a student’s day.

- VI. Removing children from school is antithetical to the concepts of monitoring, supervision, and serving the needs of children and families under the Juvenile Justice Code.

Respondents request controlling authority on the meaning of “supervision, monitoring, and serving the educational needs of the child” found in the juvenile confidentiality statutes. This, of course, highlights that this is indeed a matter of first impression. Appellants continue to maintain that these words have a plain and ordinary meaning and that the statute speaks for itself, however, supervision and monitoring are used throughout the Juvenile Justice Code (Chapter 19

of Title 63), to describe the Department of Juvenile Justice’s close oversight of youth through probation services in the community and supervision by the Family Court. *See*, S.C.; Code § 63-19-350(8), (13) and (15)(Responsibilities of DJJ’s Community Services division); S.C. Code § 63-19-1410(3)(Family court’s authority to order probation or under supervision in the child’s home following adjudication). Naturally, excluding somebody entirely from a location for an extended duration makes supervision, monitoring and serving the youth an impossibility.

The South Carolina Supreme Court has been *extremely* clear that removing a child from school is absolutely inconsistent with the purposes of probation and supervision under the Juvenile Justice Code. In Interest of Johnnie F., 443 S.E.2d 543 (1994), a family court judge “emancipated” a child from school attendance as a condition of court ordered supervision under the probation statute. (currently found at S.C. Code § 63-19-1410(3). The Supreme Court reversed, holding that when a judge puts a child under supervision of the Department of Juvenile Justice or another suitable person, the intent of the supervision must not be a punishment, but “a measure for the protection, guidance, and well-being of the child and his family.” The court held that prohibiting the child from attending school was punitive and inconsistent with the objectives of the court ordered supervision. The court further ruled that:

“Denying any child an education is punishment which can only adversely affect the child’s well-being and the well-being of his or her family.”

Accordingly, removing a child from school is completely incompatible with supervision, monitoring, and serving the educational needs of the child as those terms are understood in the Juvenile Justice Code.

CONCLUSION

This case involves multiple novel issues of law, issues of constitutional significance, and a decision of the Court of Appeals that disregards numerous precedents of the South Carolina Supreme Court. Appellants respectfully request that the Court grant certiorari in this matter, dispense with further briefing, and decide the matters herein on the prodigious record, arguments, authorities, and filings made over the last five years.

Respectfully Submitted,

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