
IN THE SUPREME COURT OF
THE STATE OF VERMONT

SUPREME COURT DOCKET NO.: 2021-177

Sadie Boyd, Madeline Klein, and Town of Whitingham,
Plaintiffs/Appellants,

v.

State of Vermont,
Defendant/Appellee

ON APPEAL FROM THE VERMONT SUPERIOR COURT
CIVIL DIVISION, WINDHAM UNIT
DOCKET NO. 389-10-17 Wmcv

APPELLANTS' REPLY BRIEF

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INTRODUCTION

In their Brief, Appellants asserted that the court below erred in granting Appellee's motion for summary judgment.

Appellants argued that Vermont's education taxation and funding system is unconstitutional on its face and as applied to Appellants, as it deprives Appellant Sadie Boyd ("Boyd") of a substantially equal educational opportunity, requires Appellant Madeline Klein ("Klein") to contribute disproportionately to the funding of the system, and compels Appellant Town of Whitingham (the "Town") to violate the Vermont Constitution in order to comply with the system.

Appellee responded by arguing that (1) Appellants' claims are not subject to strict scrutiny; (2) Appellants have failed to prove that the funding system causes any harm to Appellants; (3) Appellants are seeking to create new constitutional rights; (4) the system survives constitutional scrutiny; and (5) the Town is not a proper party. Appellee's Br. at 4-5.

Appellant disagrees with each argument, for the reasons and on the grounds herein.

ARGUMENT

I. Appellee Bears a "Heavy Burden of Justification" for Infringing upon Boyd's Right to a Substantially Equal Educational Opportunity

This Court has left open the question of exactly what standard of review applies to challenges to the State's education funding system. *See Brigham v. State ("Brigham I")*, 166 Vt. 246, 256 (1997). Cases from other states strongly suggest that education is a fundamental right and that strict scrutiny or something close to it is required when analyzing Vermont's education funding system. *See* Appellants' Br. at 20-23.

Appellee argues that all of Appellants' claims are subject to rational basis review because Appellants do not challenge "the adequacy of Twin Valley's funding." Appellee's Br. at 6. Appellee asserts that Appellants' claims are "tax claims" because "Appellants challenge tax formulas."[1] *Id.* And Appellee suggests that because it "fully

[1] Appellants agree that their Proportional Contribution Clause claim is subject to rational basis review. It is the only one of their claims that should not be subject to strict scrutiny.

funds whatever budget Twin Valley adopts each year," *id.* at 7, funding is not at issue in this case.

Appellee is incorrect. Appellants challenge "the State's use of the number of equalized pupils in Whitingham to calculate the funding for [Boyd's] education, rather than using the actual funding needs of Whitingham's students." AV-20. Appellee's argument assumes that because access to funding has largely been theoretically equalized, Appellants cannot challenge actual funding in their district. That ignores the fact that Twin Valley adopts a budget that is disproportionately inflated by nondiscretionary spending mandated by the State, which is exacerbated by the excess spending penalty. As one of Appellee's experts admitted, some districts facing these circumstances must approve budgets that are at levels below what they deem appropriate. AV-339:17-23.

Appellee cites dicta in a footnote for the proposition that Appellants' Education and Common Benefits Clause claims should face minimal scrutiny as if they are tax claims. Appellee's Br. at 8 (citing *Athens Sch. Dist. v. State Bd. of Educ.*, 2020 VT 52, ¶ 53 n.7). Appellants' claims are distinguishable from the claims in *Athens*. There, this Court held that:

> [P]laintiffs' hypothetical argument—that students in unspecified school districts at some point in the future might not obtain equal educational opportunities due to unequal levels of funding that could result from not obtaining tax incentives or qualifying for small-school grants—is purely speculative and cannot be the basis for this Court to declare Act 46 unconstitutional under the Common Benefits Clause.

Athens, 2020 VT 52, ¶ 53. The Court then noted, without deciding, that "this may actually be a proportional-contribution-clause claim, insofar as it turns on claimed disparate tax burdens, rather than a common-benefits-clause claim." *Id.* n.7.

Here, Appellants' argument is not hypothetical or speculative. Appellants have proffered evidence that Appellee's education funding system is depriving current Twin Valley students (including Boyd) of substantially equal educational opportunities.

Appellee also argues that even if Appellants' claims under the Education and Common Benefits Clauses are not considered "tax claims," they are still not subject to strict scrutiny, citing *Badgley v. Walton*. Appellee's Br. at 8-10 (Appellants "ha[ve] a very weighty burden to overcome . . . .") (quoting *Badgley*, 2010 VT 68, ¶ 20). But in *Badgley*, the Court specifically noted that "[t]he right to work as a state-employed police

officer is not as significant a governmental interest as . . . *the right to educational opportunities addressed in Brigham [I].*" *Badgley*, ¶ 28 (emphasis added).

II. Appellee's Education Funding System Deprived Boyd of a Substantially Equal Educational Opportunity

In their Brief, Appellants cited admissible evidence and testimony which a factfinder could reasonably rely upon to conclude that the State's education funding system deprived Boyd of substantially equal educational opportunity. Appellants' Br. at 24-25. Appellants can establish that the disparities in Whitingham students' educational opportunities as compared to students in larger districts are substantial. Even if those disparities are attributable to school size, location, transportation costs, or other fixed costs, those factors impact a large number of similarly-situated districts—and thus thousands of students—whose students are entitled to equality of educational opportunity with students in more sizable districts. Accordingly, Appellee has a duty to ensure that its education funding system addresses systemic imbalance.

Appellee does not address this reality. It speculates that "local choices or other factors" could have caused Twin Valley "to spend more and get less in return." Appellee's Br. at 13. In support of this argument, Appellee points to actions taken by Twin Valley, citing its 2021 Annual Report and November 5, 2020 meeting minutes. *See id.* at 12. The materials Appellee cites are not in the record and should not be considered on appeal. *See Hoover v. Hoover*, 171 Vt. 256, 258 (2000) ("On appeal, we cannot consider facts not in the record."). Even if they were, they would only establish a disputed question of fact. *See* AV-362:19-23, AV-367:11-19 (testimony of Town's Rule 30(b)(6) witness that Twin Valley was efficient with respect to its spending and staffing and did not spend more than it needed).

Appellee further speculates that additional spending would not improve student performance at Twin Valley, implying that performance is the only indicium of educational opportunity. *See* Appellee's Br. at 12. But Boyd's deprivation of a substantially equal educational opportunity is not limited to performance (which, at Twin Valley, is below the norm). It is also reflected in academic and athletic offerings and in dropout rates. (No parent would consider a school with a 50% dropout rate offering instruction in one language, one instrument, and one sport on a par with another school, with a 10% dropout rate, five languages, instruments, and sports; no matter the comparability of each school's test scores.) This is why Appellants requested an injunction against enforcement of the education taxation and funding system to the extent

it failed to connect funding for Whitingham's students to "what is needed to provide Whitingham's students with an equal educational opportunity . . . ." AV-25 ¶ 5(a).

Appellee also argues that Appellants cannot prove causation, "because Appellants offered no support for their claim that Twin Valley's spending and size are related." Appellee's Br. at 14. In 2015, the Legislature enacted Act 46, finding that (based on national studies): "the optimal size for a school district in terms of financial efficiencies is between 2,000 and 4,000 students." 2015 Bill Text VT H.B. 361 § 1(H). Twin Valley is no exception, but it must bear the financial weight of the same non-educational spending requirements applied to much more efficient districts. That means its ability to spend on educational offerings is reduced substantially, even though its per-pupil spending is much higher.

Appellee argues that despite this, Twin Valley is adequately funded, citing its small class sizes and the availability of "thousands of in-person and online courses," the vast majority of which are online only. Appellee's Br. at 17. Classes on Zoom are not equal to those in a classroom. Boyd testified: "I would much rather take [classes] in person." AV-407:5-8. And the COVID-19 pandemic has shown on a larger scale the disparity between schools which remained in-person and those which did not, and whose students suffered. *See* Dorn, Emma, *et al.*, "COVID-19 and student learning in the United States: The hurt could last a lifetime," McKinsey & Co., Public Sector Practice (June 2020) at 2-3 n.8 ("most studies have found that full-time online learning does not deliver the academic results of in-person instruction").

Judging by the number of in-person options available at larger schools, Boyd is not alone. While online and alternative programs undoubtedly offer some educational opportunity, they are not substantially equal to that provided by in-person classes. At Twin Valley and most schools of comparable size, those options pale in comparison to in-person offerings in larger districts as a direct result of the failures of Vermont's school funding system.

III. Appellants Do Not Seek "New" Constitutional Rights

Appellee argues that "Appellants seek preferential treatment, not equality." Appellee's Br. at 19. Appellee claims that students at Twin Valley enjoy the benefits of attending small schools, and that Appellants seek to obtain the benefits of attending larger schools. *See id.* at 19-21.

The primary basis for Appellee's claim is Seth Boyd's testimony. However, Mr. Boyd stated that he did not think that Twin Valley needed 150 courses. AV-366:8-9.

Instead, Mr. Boyd testified with regard to the courses provided, "I don't think it's a number. I think it's based on student need." AV-366:13-14.

Thus, Appellants do not seek the creation of a "new" constitutional right; they simply seek enforcement of the existing right to a substantially equal educational opportunity.

The testimony of one of Appellee's own experts shows that Appellee's funding system is not designed to protect that right. William Talbott admitted that he could not identify any empirical basis for the excess spending threshold, a critical component of the education taxation system that has a significant impact on the education funding system. AV-338:7-16. He testified that: "All I know is that's the number the legislature agreed to."[2] AV-338:9-10.

If Appellee's expert cannot explain how an important part of its own system relates to providing substantial equality of educational opportunity, it cannot accuse Appellants of seeking preferential treatment.

IV. Appellee's Education Taxation and Funding System Infringes upon Boyd and Klein's Constitutional Rights

In their Brief, Appellants showed that none of the interests Appellee identifies meets Appellee's "heavy burden of justification" for infringing upon Boyd's right to a substantially equal educational opportunity. *See* Appellants' Br. at 25-28. Appellants also showed that Appellee's education property taxation system requires Klein to make a disproportionate contribution to the funding of education in Vermont. *Id.* at 28-30.

A. Appellee Does Not Meet Its "Heavy Burden of Justification" for Infringing upon Boyd's Right to a Substantially Equal Educational Opportunity

Appellee argues that "[u]sing equalized pupil and excess spending formulas is reasonably related to the State's legitimate interests in raising money for education, equalizing districts' access to funds, encouraging wise spending, preserving local control, and ensuring fair treatment of low-income taxpayers." Appellee's Br. at 21.

[2] He also did not know whether districts of a certain size (like Twin Valley) had to spend above the threshold to provide substantial equality of educational opportunity to their students. AV-338:18-25.

"[W]hen no fundamental right or suspect class is involved, state law need only reasonably relate to a legitimate public purpose[.]"[3] *Brigham I*, 166 Vt. at 251 (quoting *Choquette v. Perrault*, 153 Vt. 45, 52 (1989)). " '[L]abels aside,' Vermont case law has consistently demanded in practice that statutory exclusions from publicly-conferred benefits and protections must be 'premised on an appropriate and overriding public interest.' " *Baker v. State*, 170 Vt. 194, 206 (1999). Thus, Vermont's Common Benefits Clause "require[s] a 'more stringent' reasonableness inquiry than was generally associated with rational basis review under the federal constitution." *Id.* at 203. In *Baker*, the Court noted that "[t]his approach may . . . be discerned in the Court's recent opinion in *Brigham [I]*." *Id.* Thus, at a minimum, Appellee must meet the "heavy burden" of justifying that the harm suffered by Boyd is "premised on an appropriate and overriding public interest." *Brigham I*, 166 Vt. at 256; *Baker*, 170 Vt. at 206.

None of the State's purported interests meets the "heavy burden of justification." *Brigham I*, 166 Vt. at 256. Equalizing *districts'* access to funds, which Appellee identifies as a goal of the system, deprives rural *students* (including Boyd) of substantially equal educational opportunities. This is because the disproportionate, involuntary expenses inherent to educating students in smaller districts mean that equal funding does not result in equal opportunity. If it did, how could one explain the extreme divergence in per-pupil spending that currently exists—which is more significant than the disparity before *Brigham I* was decided?[4]

With regard to local control, the *Brigham I* Court noted that it is a "laudable goal," but that:

> Individual school districts may well be in the best position to decide whom to hire, how to structure their educational offerings, and how to resolve other issues of a local nature. The State has not explained, however, why the current funding system is necessary to foster local control. Regardless of how the state finances public education, it may still leave the basic decision-making power with the local districts.

[3] As discussed in Section I above, rational basis review is appropriate only for Appellants' Proportional Contribution Clause claim.

[4] *See* Appellants' Br. at 27 (showing district with highest per-pupil spending in fiscal year 2018 spent 344% of what district with lowest per-pupil spending spent, and that analogous percentage was 259% in fiscal year 1995).

Brigham I, 166 Vt. at 265-66. As the Court later wrote, "there is no necessary or logical connection between local control over the raising of educational funds, and local decisionmaking with respect to educational policy." *Id.* at 267.

The Court's reasoning concerning local control applies equally to the remaining interests. The current funding system, which does not account for the actual cost of educating Whitingham students and penalizes Whitingham taxpayers for attempting to provide an adequate education for their students, is not necessary in order to fund education, equalize districts' access to funds, encourage wise spending, or ensure fair treatment of low-income taxpayers.

With regard to the purported interest in "encouraging wise spending," the fact that there is currently a two-year moratorium on the excess spending penalty suggests that Appellee's claim that absent the penalty each district would have "no incentive to control its spending to the detriment of all taxpayers statewide," Appellee's Br. at 21-22, is without merit.[5] In any event, the evidence shows that Whitingham has spent wisely but has still been subject to the excess spending penalty as if it provides its students with an excess of opportunities and services, when the opposite is true. *See* Appellants' Br. at 28.

B. Appellee's Classification of Klein Is Not Reasonably Related to the Purpose for Which the Classification Was Established

In their Brief, Appellants proffered admissible evidence and testimony showing that Appellee's education property taxation system requires Klein to make a disproportionate contribution to the funding of education in Vermont, as she pays significantly more in education property taxes than similarly situated taxpayers in other municipalities, based only on the happenstance of her residence. *See* Appellants' Br. at 28-30.

Appellee responds that Klein's taxes attributable to her housesite and two surrounding acres would have been lower if, beyond her housesite, "she did not own an additional 39 acres." Appellee's Br. at 22. That argument does not diminish Klein's disproportionate contribution—or that of the many low-income Vermonters whose modest assets are held in the form of land. Farmers, hunters, wildlife enthusiasts, hikers, and homesteaders who wish, like Klein, to enjoy more than two acres, are distinguishable only by a matter of degree from taxpayers who pay the homestead rate on their entire homestead.

[5] *See* 2021 Bill Text VT S.B. 13, § 5 (June 7, 2021).

V. The Town Is a Proper Plaintiff

In their Brief, Appellants showed that the Town is a proper plaintiff in this case. *See* Appellants' Br. at 30-33. Appellee's unconstitutional tax harms the Town by depriving it of revenue. *See id.* at 32. Appellee also compels the Town to collect an unconstitutional tax from its resident property owners, which, in turn, results in substantially unequal educational opportunities being provided to Whitingham students. *See id.*

A. Appellee's Education Taxation and Funding System Harms the Town by Depriving It of Revenue

Appellee argues that the Town is not a proper party because Appellants did not raise the revenue argument in the Complaint. *See* Appellee's Br. at 24. Appellee does not address the holding of the court below that "the pleadings and evidence elicited in discovery were sufficient to provide the State with notice of the Town's claim that its own ability to collect revenues was harmed by the State's education tax system." PC-9. The court below continued:

> The testimony of Whitingham's 30(b)(6) witness did include statements that the Town's high education taxes prevent it from levying taxes for other things, such as its sewer plants, town garage, roads, and parks. This is sufficient for the court to consider whether the Town has raised a viable claim based on its being deprived of revenue, even though it was not specifically referenced in the complaint.

PC-9.

Appellee cites a decision from a Connecticut intermediate appellate court in support of its revenue argument. *See* Appellee's Br. at 24 (citing *Stevens v. Helming*, 163 Conn. App. 241, 247-48 (2016)). But that case involved a defamation claim, and the court noted that there were heightened pleading requirements for such a claim. *See Stevens*, 163 Conn. App. at 247 n.3.

Appellee also cites this Court's decision in a case brought by a taxpayer. *See* Appellee's Br. at 24 (citing *Paige v. State*, 2018 VT 136). But the Town is not a taxpayer, and the harm it suffers as a result of being deprived of revenue is not "generalized." As noted by the court below, Appellants adduced evidence that the Town has been prevented

from levying taxes that would generate revenue for specific purposes, including sewers, roads, and parks. PC-9. Accordingly, it is a proper party.

B. The Town Can Sue Appellee Because Appellee Forces It to Violate the Constitution

Appellee argues that "the State cannot be sued by one of its political subdivisions," and the exception to that rule that applies "where municipalities assert that compliance with a state statute will force them to violate the constitution" does not apply here. Appellee's Br. at 25 (quoting *Town of Andover v. State*, 170 Vt. 552, 553 (1999)).

Appellee relies on a New York case to argue that "Whitingham could not 'be held accountable' for State tax rates over which it has 'absolutely no control.' " *Id.* (quoting *City of New York v. State*, 655 N.E.2d 649, 654 (N.Y. 1995)). But *City of New York* is distinguishable, as this Court has not adopted the "control" requirement in the context of deciding a municipality's capacity to sue. And imposing a control requirement would render the exception meaningless by requiring that a municipality have control over something that a state statute is forcing it to do.

CONCLUSION

Based on Appellants' Brief and the foregoing, Appellants respectfully submit that the lower court's decision should be reversed and the case remanded for trial.

V.R.A.P. 32(a)(4)(D) CERTIFICATE OF COMPLIANCE

May this certify that this brief complies with the word-count limit of V.R.A.P. 32(a)(4)(B)(i). This brief contains 3208 words, as measured by Microsoft Word, the word-processing system used to prepare the brief.

DATED at Brattleboro, County of Windham and State of Vermont, this 17th day of November, 2021.

SADIE BOYD, MADELINE KLEIN, and
TOWN OF WHITINGHAM
Appellants

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