9-29-2016

Schwartz v. Lopez, 132 Nev. Adv. Op. 73 (Sep. 29, 2016)

Scott Cardenas
Nevada Law Journal

Schwartz v. Lopez, 132 Nev. Adv. Op. 73 (Sep. 29, 2016)[1]

CONSTITUTIONAL LAW: EDUCATION SAVINGS ACCOUNTS

Summary

The Court determined that (1) Article 11, Section 1 of the Nevada Constitution does not limit the Legislature's discretion in encouraging other methods of education, and based on this, the Education Savings Account ("ESA") program is not contrary to Article 11, Section 2 which requires the Legislature to "provide for a uniform system of common schools"; and that (2) the funds deposited in the education savings account are not "public funds" subject to Article 11, Section 10; and finally that (3) the ESA program violates the mandate under Section 2 and 6 to fund public education because SB 302 does not operate as an appropriation bill, and nothing in SB 515 provides an appropriation for education savings accounts.

Background

On May 29, 2015, the Nevada Legislature passed SB 302 containing the ESA program. This program provided public funds to be transferred into private education savings accounts for Nevada school children "to pay for private schooling, tutoring, and other non-public educational services and expenses."

To establish an education savings account a parent had to enter into an agreement with the State Treasurer. Various regulations applied to the accounts, such as: the child being enrolled for 100 consecutive days at a public school immediately before the account's establishment, the account being maintained with a financial management firm chosen by the Treasurer, and the amount deposited into the account being based on a statutory formula.[2] An account was valid for a year, but could be terminated early; if terminated early, unused funds reverted back to the State General Fund. There was no limit on the potential number of accounts nor the amount of funds that could be used for the accounts for the biennium.

The ESA program required participating students to be instructed by "participating entities." For a private school to qualify as a participating entity the school had to be licensed or exempt from licensing. Certain religious schools are exempt from licensing.

On June 1, 2015, the Nevada Legislature passed SB 515 to appropriate funds to K-12 public education for 2015-17. SB 515 used a formula known as the Nevada Plan to determine the basic support guarantee for each school district. This was a per-pupil amount which varied based on the historical cost of educating a child in a particular district. Once this was determined the State would calculate the amount each school district could contribute, and if there was a difference between the basic support guarantee and the local funding amount, the State would cover the difference.

State revenue was deposited in the State Distributive School Amount ("DSA"), located in the General State Fund, to fund the basic support guarantee. A "hold-harmless" provision allowed DSA funding to be based on prior year enrollment in a district if the enrollment in that district decreased by five percent or more from one year to the next. SB 515 appropriated over $2 billion from the State General Fund to the DSA for the 2015-17 biennium for public schools.

---

[1] By Scott Cardenas

[2] *See* Nev. Rev. Stat. 353B.860(2).

The amount of money deposited into a child's ESA is deducted from that child's particular school district's apportioned funds in the DSA. Section 16 of SB 302 amended NRS 387.124(1) to allow this movement of funds into the child's account. At the time of this case, over 7,000 students had applied for an ESA.

Two challenges against the ESA program were consolidated.

The plaintiffs/respondents in *Schwartz v. Lopez*, Docket No. 69611, were seven Nevada citizens and parents of children enrolled in Nevada public schools. They sought a judicial declaration that SB 302 was unconstitutional and an injunction enjoining its implementation. The complaint alleged SB 302 violated Article 11, Section 2 and 6. The district court granted a preliminary injunction by finding SB 302 violated Section 6.

The plaintiffs/appellants in *Duncan v. Nevada State Treasurer*, Docket No. 70648, were five Nevada citizens who challenged SB 302 as being unconstitutional because it diverted public funds to private religious schools in violation of Article 11, Section 10 and Article 11, Section 2 of the Nevada Constitution. The district court dismissed the action, finding that the plaintiffs had standing to bring the challenge, but that the facial challenges were without merit.

Discussion

III. Standing of the Plaintiffs.

While the plaintiffs lacked specific injury for standing, the Court found that the plaintiffs met the public-importance exception test for standing. This allows Nevada citizens to challenge legislative expenditures or appropriations as unconstitutional without showing personal or special injury. However, the Court stated this exception was narrow and required the following criteria: (1) the case involves an issue of significant public importance, (2) the legislative expenditure or appropriation is challenged as violating a specific provision of the Nevada Constitution, and (3) the party bringing the action is the best positioned party to fully advocate his or her position.

The plaintiffs met this public-importance exception test. First, the public funding of education raises an issue of statewide importance. Second, the plaintiffs have alleged SB 302 violates specific constitutional provisions regarding support of public schools and use of public funds. Finally, there is no one better positioned to challenge SB 302 and the parties have shown an ability to competently and vigorously advocate their challenges.

IV. The Court applies de novo standard of review.

These two appeals arose from different procedural contexts, however in both cases the district court ruled on the constitutionality of the SB 302. Therefore, the Court reviewed both cases de novo.[3]

Additionally, there is a presumption in favor of constitutionality when a statute is challenged as unconstitutional. Furthermore, the rules of statutory construction apply. The Court

---

[3] See *Hernandez v. Bennett-Haron*, 128 Nev. 580, 586, 287 P.3d 305, 310 (2012).

defers to the plain language of the constitutional provision if it is unambiguous; however, if it is ambiguous the Court looks to legislative history, public policy, and reason to determine the drafters' intent.

V. The ESA program is not contrary to Section 2's requirement to provide a uniform system of schools.

The Legislature may encourage other suitable education measures, such as the ESA program, as long as the Legislature maintains a uniform system of schools available to all Nevada students. The Court began by looking at the plain language of Article 11, Section 2 finding it clearly mandated uniformity *within* the public school system. The Court found SB 302 was not contrary to Section 2's mandate to provide for a uniform system of common schools because SB 302 did not affect the existence or structure of Nevada's public school system.

Additionally, the Court asserted that Article 11, Section 1 provided additional support for its reading of Article 11, Section 2. Article 11, Section 1 requires the Legislature to encourage education "by all suitable means." This language demonstrates the intent to allow broad discretion to the Legislature.

Finally, the Court also found the "and also" separating the suitable means clause and the superintendent clause in Section 1 created two distinct duties. The superintendent clause does not limit the suitable means clause, but instead operates independently in its requirement. Furthermore, the legislative history did not support the plaintiff's narrow interpretation of Section 2. The Legislature could have explicitly stated Section 2's requirement of a uniform school system was the only means by which the Legislature could promote educational advancements under Section 1 if that was its intent.

The Court stated its holding that the ESA program did not violate Section 2 was consistent with the Indiana Supreme Court's interpretation of its state constitution's school uniformity clause, which is similar to Nevada's.[4] The Indiana Supreme Court found the state's voucher program, which permitted the use of public funds to attend private schools, did not conflict with ensuring a uniform system of common schools. Similar to the Nevada Supreme Court, the Indiana Supreme Court focused on the conjunction "and" and found this to create two distinct duties, rather than the second clause limiting the first clause. Thus, the Legislature has broad authority and can permit using public funds for private education.

Therefore, the Legislature satisfies its requirement under Section 2 as long as it maintains a uniform public school system that is available to all students in Nevada. If this is done, then the Legislature may also encourage other suitable educational measures under Section 1. Therefore, the ESA program does not violate Section 2.

VI. The ESA Program does not violate Section 10's mandate to use public funds for only nonsectarian purposes.

The Court held that the ESA program did not violate Article 11, Section 10 because the funds are no longer "public funds" once they are deposited into an education savings account. The Court held the ESA program has a secular purpose, which is the use of funds for education. Once the funds are deposited into an educational savings account for that nonsectarian purpose,

---

[4] *See* Meredith v. Pence, 984 N.E.2d 1213, 1223 (Ind. 2013).

the parents have the authority to decide where to spend those funds for their child's education. This can include religious or nonreligious schools. Because these funds are no longer "public funds" once placed in an education savings account, Section 10 is not implicated.

Furthermore, the regulatory aspects of the ESA program do not alter the public nature of the funds. The Legislature may impose conditions on the funds and provide State oversight based on its broad authority under Article 11, Section 1. This is consistent with the nonsectarian purpose of promoting education. Therefore, regulating the education savings accounts does not change the fact that the funds are not "public funds" while in the accounts.

Next, the Court found *State v. Hallock*[5] did not apply here because no funds were given directly to sectarian institutions. This was the only case in which the Court addressed the meaning of Section 10. However, the Court's decision in *Hallock* concerned public funds appropriated from the State treasury directly to a sectarian institution, which violated Section 10. But here, the ESA program deposits public funds directly into accounts belonging to private individuals. No public funds are paid directly to sectarian institutions. Once the funds are deposited into an account they are no longer "public funds" and the parent may choose to spend the money at a religious school. Thus, Section 10 is not implicated because no public funds are used for a sectarian purpose.

VII. The ESA program violates Article 11, Section 2 and 6.

Next, the Court considered whether the ESA program violated Article 11, Section 2 and 6 of the Nevada Constitution because placing funds in the accounts for private use diverts public funds appropriated for public schools.

Initially, the Court analyzed Article 4, Section 19[6] of the Nevada Constitution and the meaning of the term "appropriation" to determine that SB 302 did not appropriate funds for education savings accounts. An appropriation sets aside a sum of public revenue authorized to be used only for a particular purpose. No technical words are required to appropriate funds, rather the Court looks for language that demonstrates the Legislature's clear intent to appropriate funds.

The Court finds SB 302 does not contain an appropriation.

Based on these principles, the Court found SB 302 did not appropriate funds for two reasons. First, SB 302 did not place a limit on the potential number of education savings accounts nor the maximum amount of funds that could be used for the accounts for the biennium. Moreover, based on the "hold-harmless" provision under NRS 387.1223(3) the Legislature could be required to fund both the school district's per pupil amount based on 95 percent of the prior year's enrollment and the education savings accounts for all students. This could potentially double the $2 billion appropriated in SB 515. Based on this scenario, the Legislature would have specified the maximum number of accounts or funding if it had intended SB 302 to include an appropriation. Second, the Legislature enacted SB 302 on May 29, 2015, but did not enact SB 515 until June 1, 2015. Article 11, Section 6(2) does not allow any other appropriation prior to the appropriation of funds for K-12 education. If SB 302 contained an appropriation it would be

---

5 16 Nev. 373 (1882).

6 This section states "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." Nev. Const. art. 4 § 19.

void under Article 11, Section 6(5). Therefore, the Court concluded SB 302 did not contain an appropriation.

The Court finds SB 302 does not appropriate funds to support the ESA program, but instead unconstitutionally diverts funds appropriated for public schools.

The Court rejected the State Treasurer's argument that the $2 billion appropriation to the DSA in SB 515 is the amount the Legislature found sufficient to fund both public schools and the ESA's. Both the title's focus on public education and the mandate in Article 11, Section 2 and 6, demonstrates SB 515 provides the basic support guarantee of each school district and appropriates $2 billion for that funding. SB 515 does not address education savings accounts. Moreover, the accounts are not mentioned in the legislative history.

Next, the Court refused to presume the Legislature understood SB 515 to fund public schools and education savings accounts from the $2 billion. The Court held it could not find an appropriation for a specific purpose when SB 515 did not explicitly state that purpose. Neither could the Court infer that it did, because while SB 302 was passed on May 29, 2015, it was not signed into law until June 2, 2016, which was after June 1, 2015 when SB 515 was passed. Therefore, SB 515 did not appropriate funds for SB 302's education savings accounts.

The Court found that because SB 515 did not appropriate any funds for private savings accounts, any use of those funds for education savings accounts rather than K-12 public education violates Article 11, Section 2 and 6. Furthermore, SB 302 does not provide for an appropriation of funds to education savings accounts, so they are without an appropriation of state funds to support their operation.

Conclusion

The Court found the use of funds appropriated under SB 515 to support the ESA program under SB 302 violates Article 11, Section 2 and 6. Based on this violation, the Court affirmed in part and reversed in part the district court's order dismissing the complaint in *Duncan*, and remanded the case back to the district court to enter a final declaratory judgment and permanent injunction enjoining the enforcement of Section 16 of SB 302 absent an appropriation. In *Schwartz*, the Court affirmed in part and reversed in part the district court's order granting preliminary injunction, and remanded the case back to the district court to enter a final declaratory judgment and permanent injunction enjoining enforcement of Section 16 of SB 302 absent an appropriation.