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Under Scrutiny: Judicial Review, King Ex Rel. Harvey-Barrow v. Beaufort County Board of Education, and the Fundamental Right to Education in the State of North Carolina

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UNDER SCRUTINY: JUDICIAL REVIEW, *KING EX REL. HARVEY-BARROW V. BEAUFORT COUNTY BOARD OF EDUCATION*, AND THE FUNDAMENTAL RIGHT TO EDUCATION IN THE STATE OF NORTH CAROLINA

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I. INTRODUCTION

Imagine a mild January day in a rural high school yard at the end of a long school day. Multiple fights involving numerous students erupt with too many altercations to identify the individual participants. School administrators break up the fights, and one student is identified and punished for participation by being suspended from school for the remainder of the school year. The student appeals her suspension, and requests placement in an alternative education program.

What responsibility does the school board have to this child? Is education an equal right to all children in the State of North Carolina? Does it matter that this is a disciplinary issue and not a financial or quality of education matter? Is placement in an alternative education program a requirement for out-of-school suspensions?

This case note will first discuss the current state of North Carolina law regarding long-term student suspensions in public schools. It will then critique the holding and standard of review in *King ex rel. Harvey-Barrow v. Beaufort County Board of Education*.[1] Finally, it will discuss the impact of that decision in light of other recent North Carolina Supreme Court decisions.

II. THE CASE

On January 18, 2008, Viktoria King, a sophomore at Southside High School in Beaufort, North Carolina, was allegedly involved in a fight in-

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1. King ex rel. Harvey-Barrow v. Beaufort Cnty. Bd. Of Educ. (*King II*), 704 S.E.2d 259 (N.C. 2010).

volving numerous students at school.[2] Viktoria was identified as a student involved in the skirmish and was immediately suspended from school for ten days, with a recommendation from the principal to the superintendent that the suspension be extended through the remainder of the school year.[3] The superintendent agreed with and followed the principal's recommendation.[4]

In February 2008, Viktoria filed an action in Beaufort County Superior Court requesting injunctive and declaratory relief.[5] She claimed that the Beaufort County Board of Education, along with the superintendent, violated her constitutional right to a free public education by failing to provide an alternative education program during her long-term suspension.[6] Viktoria also filed a Motion for Temporary Restraining Order and Preliminary Injunction requesting that the court order Beaufort County Board of Education to provide her with access to some form of educational services while she was serving her suspension.[7] Viktoria's motion was denied and the court dismissed her complaints pursuant to North Carolina General Statute § 1A-1 and Rules 12(b)(6) and 12(b)(7) of the North Carolina Rules of Civil Procedure.[8] Viktoria appealed the dismissal of her complaint.[9] The North Carolina Court of Appeals, in a divided opinion, affirmed the trial court's judgment.[10] The Court of Appeals relied heavily on *In re Jackson*,[11] and stressed the importance of following precedent.[12] The Court explained that *Jackson* was the last case to deal specifically with discipline in the schools.[13] "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same Court is bound by that precedent, unless it has been overturned by a higher court."[14]

In *Jackson*, the North Carolina Court of Appeals held that when a school district has reasonable policies and procedures with suspension as a consequence, it is not denying students the right to education, only the right to engage in prohibited behavior.[15] The Court emphasized that other cases

2. *Id.* at 261.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. King ex rel. Harvey-Barrow v. Beaufort Cnty. Bd. of Educ. (*King I*), 683 S.E.2d 767, 770 (N.C. Ct. App. 2009).
11. 352 S.E.2d 449 (N.C. Ct. App. 1987).
12. *King I*, 683 S.E. 2d at 772.
13. *Id.* at 770.
14. *Id.*
15. *Id.*

addressing fundamental rights, such as *Leandro v. State*[16] and *Hoke County Board of Education v. State*,[17] addressed issues that were limited to the quality of education and financing, and had nothing to do with disciplinary issues.[18] Judge Geer, dissenting, wrote that education had been established as a fundamental right in North Carolina.[19] Judge Geer opined that the limitations cited by the majority were not in fact limitations, and that education, as a fundamental right, applied to all children.[20] Further, once a plaintiff presents evidence of the denial of a fundamental right, the burden shifts to the defendant "to establish that their actions denying this fundamental right are 'necessary to promote a compelling governmental interest.'"[21]

Pursuant to N.C. Gen. Stat. § 7A-30(2), Viktoria's case was heard in the North Carolina Supreme Court on March 22, 2010.[22] In an opinion written by Justice Martin, the North Carolina Supreme Court acknowledged that education is a fundamental right in North Carolina.[23] Further, the Court held that students receiving a long-term suspension from school, but not provided with an opportunity for alternative education, have a right to know the reason for the exclusion under the North Carolina Constitution's equal access provision.[24] School administrators cannot arbitrarily deny access to alternative education programs to students under long-term suspensions without articulating "an important or significant reason" for doing so.[25] However, although the Court affirmed education as a fundamental right, it held that the appropriate standard of review for students receiving long-term suspensions subject to alternative education is intermediate scrutiny, not strict scrutiny.[26]

In her dissent, Justice Timmons-Goodson wrote that education is a "fundamental right that is indivisible and not subject to parceling."[27] Justice

16. 488 S.E.2d 249 (N.C. 1997).

17. 752 S.E.2d 365 (N.C. 2004).

18. *King I*, 683 S.E.2d. at 773 (Geer, J., dissenting) (citing Leandro v. State, 488 S.E.2d 249 (N.C. 1997), *and* Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004)).

19. *Id.* at 772.

20. *Id.*

21. *Id.* at 773 (quoting Town of Beech Mountain v. Cnty. of Watauga, 378 S.E.2d 780, 782 (N.C. 1989), *cert. denied*, 493 U.S. 954 (1989)).

22. King II, 704 S.E.2d at 260; *see also* N.C. GEN. STAT. § 7A-30(2) (2013). An appeal is a right from a decision of the North Carolina Court of Appeals when the decision includes a dissenting opinion.

23. *King II*, 704 S.E.2d at 262.

24. *Id.* (quoting Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997) ("Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools."). Article IX of the North Carolina Constitution guarantees every North Carolina child the right to participate in the public schools, also known as the "equal access" provision. N.C. CONST. art. IX, § 2.

25. *Id.* at 265.

26. *Id.*

27. *Id.* at 266 (Timmons-Goodson, J., dissenting).

Timmons-Goodson explained that this fundamental right to education is not only recognized in precedent by the North Carolina Supreme Court, but this right could also be found in the State Constitution.[28] Further, because education is clearly an established fundamental right, it should be strictly scrutinized, and not subject to intermediate scrutiny.[29] Justice Timmons-Goodson stated that before the *King I* decision, the right to education had never been "parsed" by the Court, so it was given varying degrees of protection depending on whether it was analyzing financing, quality, or discipline.[30]

III. BACKGROUND

The North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[31] Article IX of the North Carolina Constitution is dedicated entirely to the subject of education.[32] Section One of that Article reads that the "means of education shall forever be encouraged."[33] The subject of attending school on a regular basis is addressed in Section Three, stating "[t]he General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means."[34]

To obtain a full understanding of this issue, it is important to gain an appreciation of fundamental rights. Black's Law Dictionary defines a fundamental right as "[a] right derived from natural or fundamental law."[35] Thirty-five years ago, the North Carolina Supreme Court recognized education as a fundamental right in *Sneed v. Greensboro City Board of Education*.[36] Justice Exum, writing for the Court, explained that the North Carolina Constitution guarantees the right to education "to ensure every child a fair and full opportunity to reach his full potential."[37] Justice Exum also opined that "[i]t is clear then, that equal access to participation in our public school system is a fundamental right, guaranteed by our state constitution and protected by considerations of procedural due process."[38]

28. *Id.*
29. *Id.* at 266–67.
30. *Id.* at 267.
31. N.C. CONST. art. I, § 15.
32. *Id.* at art. IX.
33. *Id.* at art. IX, § 1.
34. *Id.* at art. IX, § 3.
35. BLACK'S LAW DICTIONARY 541 (7th ed. 2000).
36. 264 S.E.2d 106 (N.C. 1980).
37. *Id.* at 113 (citing N.C. CONST. art I. § 15).
38. *Id.*

A fundamental right triggers strict scrutiny in order to determine a constitutional violation.[39] The test of strict scrutiny in North Carolina is clarified in *Rhyne v. K-Mart Corp.*[40] The Court in *Rhyne* cited Article I, Section 19 of the North Carolina Constitution, which provides that no person shall be "deprived of his life, liberty, or property, but by the law of the land" and that "[n]o person shall be denied the equal protection of the laws."[41] The Court explained that these phrases are tantamount to the "due process of law" clause of the Fourteenth Amendment to the United States Constitution.[42] When a challenge is made to a North Carolina statute alleging a violation of the Equal Protection Clause of the North Carolina Constitution, one of two levels of scrutiny is triggered: rational basis or strict scrutiny.[43] If the statute or law impacts a fundamental right or a suspect class of persons, the court applies a test of strict scrutiny.[44] If the statute affects neither a fundamental right nor a suspect class, then the court will use the rational basis test.[45] The North Carolina Supreme Court has only applied intermediate scrutiny in one other case, *Blankenship v. Bartlett*.[46] In *Blankenship*, the issue was also the Equal Protection Clause of the North Carolina Constitution, but the court applied the principle to judicial voting districts.[47] Although the North Carolina Constitution does not address voting rights for judges, the Supreme Court held that the right to vote in elections for superior court judges was a quasi-fundamental right for North Carolinians and therefore subject to heightened scrutiny, intermediate.[48]

Neither does the North Carolina Constitution specifically address school policies and procedures; however, the North Carolina General Statutes require that local school boards develop and write Codes of Conduct informing students of behavior standards, disciplinary actions, and the ranges of those actions.[49] Beaufort County Public Schools, where Viktoria attended school, developed a Code of Conduct that provided for long-term suspension in the following situations: inappropriate use of wireless devices, unauthorized use of drugs or use of alcohol, distribution and/or misuse of non-prescription medication, any gang related activity, theft, damage to proper-

39. *Id.*
40. 594 S.E.2d 1, 15 (N.C. 2004).
41. *Id.* (citing N.C. CONST. art. I, § 19).
42. *Rhyne*, 594 S.E.2d at 15 (citing *In re* Sterilization of Moore, 221 S.E.2d 307, 309 (N.C. 1976)).
43. *Rhyne*, 594 S.E.2d at15 (citing State *ex rel.* Util. Comm'n v. Carolina Util. Customers Ass'n., 446 S.E.2d 332, 346 (N.C. 1994)).
44. *Rhyne*, 594 S.E.2d at 15.
45. *Id.* (citing Richardson v. North Carolina Dep't of Corr., 478 S.E.2d 501, 505 (N.C. 1996)).
46. Blankenship v. Barlett, 681 S.E.2d 759 (N.C. 2009).
47. *Id.* at 765.
48. *Id.*
49. N.C. GEN. STAT. § 115C-390.2(b) (2011).

ty, assault, threats, bullying and harassment, discrimination, possession of weapons or weapon-like items, bomb threats and hoaxes, terrorist threats, tertiary violations of inappropriate bus conduct, and all other threats to the safety of students and employees.[50] This is consistent with the North Carolina General Statutes which specify that long-term suspensions, suspensions totaling more than ten days, may only be imposed for violations that threaten the safety of students, staff, or visitors, or threaten to significantly disrupt the educational environment.[51]

In *King I*, the Court of Appeals relied on *In re Jackson*, the most recent North Carolina case to address discipline prior to the *King* decision.[52] The *Jackson* case is almost thirty years old, and there has been little case law in this area.[53] The student-plaintiff in *Jackson* was adjudicated as a delinquent by the juvenile courts.[54] The student was convicted of simple assault, breaking and entering with the intent to commit larceny, larceny of a firearm, and carrying a concealed weapon.[55] Previously, the student was suspended by the school district for prior offenses at school.[56] The North Carolina Court of Appeals held that the Board of Education did not have an affirmative duty to provide alternative education for the student, as there was no legislative mandate to provide a suspended youth with special needs, such as disciplinary issues, with any alternative education.[57] Further, the Court did not find, within the Juvenile Code, any legislative authority with which to restrict a school's disciplinary procedures.[58] The *Jackson* Court stressed that the needs and constitutional rights of the student should not outweigh the school's interest in protecting the safety of other students and school employees if the student's behavior is threatening or dangerous to others.[59]

Prior to *Jackson*, the United States Supreme Court decided *Goss v. Lopez*,[60] a class action brought by Ohio public school students to have their out-of-school suspensions reviewed for due process.[61] The students in *Goss*

50. *Code of Student Conduct and Student/Parent Handbook*, BEAUFORT COUNTY SCHOOLS (Aug. 2014), http://beaufort.schoolfusion.us/modules/groups/homepagefiles/cms/603856/File/2014%202015%20web%20information/Student%20Code%20of%20Conduct%20&%20Student-Parent%20Handbook%202014-2015%20English.pdf?sessionid=c539dcbfc2bd8dcd11942855975bd2dc.

51. N.C. GEN. STAT. § 115C-390.2(f) (2013).

52. King I, 683 S.E.2d 767, 770 (N.C. Ct. App. 2009).

53. *Id.*

54. *In re* Jackson, 352 S.E.2d 449, 451 (N.C. Ct. App. 1987).

55. *Id.*

56. *Id.*

57. *Id.* at 455.

58. *Id.* at 454.

59. *Id.* at 455.

60. 419 U.S. 565 (1975).

61. *Id.*

were suspended from school for ten days without a hearing.[62] Justice White explained that, although Ohio was not constitutionally obligated to provide a free public education, the Ohio State Constitution had established a right to a free public education and required attendance as well.[63] Justice White explained that "[t]hose young people do not 'shed their constitutional rights' at the schoolhouse door."[64] Students were entitled to the same constitutional protection as adults.[65] Boards of Education are not exempt from the constitutional protections of the Fourteenth Amendment.[66] A free public education entitles a student to a property interest which is therefore protected by the Due Process Clause, and "which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[67]

The Court in *King* referenced *Goss,* but relied on other cases, most notably *Leandro*, in which the North Carolina Supreme Court interpreted the State Constitution as requiring the State to provide every child with a sound, basic education.[68] A sound, basic education is one that provides a student with the following skills:

> (1) [S]ufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society,
>
> (2) [S]ufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation;
>
> (3) [S]ufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and
>
> (4) [S]ufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[69]

Leandro explicitly held that denying children the right to a sound, basic education is the denial of a fundamental right and triggers strict scrutiny.[70] The majority placed the burden on local authorities to ensure students re-

62. *Id.* at 568.
63. *Id.* at 574.
64. *Id.* (quoting Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 506 (1969)).
65. *Id.*
66. *Goss,* 419 U.S. at 574.
67. *Id.* at 574.
68. Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997).
69. *Id.* at 255 (citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky.1989)); *see also* Pauley v. Kelly, 255 S.E.2d 859, 877 (W.Va.1979).
70. *Leandro,* 488 S.E.2d at 261.

ceive a sound basic education, as the Court recognized that "judges are not experts in education."[71] In his dissent, Justice Orr pointed out that there is no place in the constitution delegating responsibility for education to local governments.[72] Justice Orr emphasized that it is the State's and the General Assembly's ultimate responsibility to "provide for a general and uniform system of free public schools."[73] Justice Orr explained that the framers of the North Carolina Constitution removed the discriminatory language from an amendment in 1971. The amendment was rewritten to provide "equal opportunities . . . for all students," from the previous language providing that children of all races, black and white, would be taught separately.[74] The issue is that the framers did not intend this phrase to be racially exclusive, but rather for it to apply to all children.[75] In his conclusion, Justice Orr stated "[t]he Constitution, by its literal reading, means all students and does not discriminate as to race, handicap, economic status, or geography."[76] Further, he explained "in regard to education, our Constitution displays a deep concern for 'ensur[ing] every child a fair and full opportunity to reach his full potential'"[77] In summary, Justice Orr stated that "'equal opportunities' in practical terms means substantially equal opportunities."[78]

The third precedential case that followed *Leandro* in 2004 was *Hoke County Board of Education v. State.*[79] The issue in *Hoke* was whether the evidence showed the State had failed to provide the children of Hoke County with the opportunity to receive a sound, basic education, and if so, whether the State demonstrated that its failure to provide that opportunity was necessary to promote a compelling government interest.[80] In *Hoke*, the Boards of Education from a group of low-wealth school districts brought an action seeking declaratory relief in Halifax Superior Court.[81] The low-wealth school boards asserted a violation of the state constitutional right to equal educational opportunity because of the inequitable funding of schools by statute in North Carolina.[82] Defendant, the State of North Carolina, filed a motion to dismiss which was subsequently denied by the Superior Court.[83] The North Carolina Court of Appeals reversed, and plaintiffs peti-

71. *Id.* at 259.
72. *Id.* at 261–62 (Orr, J, dissenting in part, concurring in part).
73. *Id.* (citing N.C. CONST. art. IX, § 2(1)).
74. *Id.* at 262 (citing N.C. CONST. art. IX. §2(1) (emphasis in original)).
75. *Id.* at 263.
76. *Id.*
77. *Id.* (citing Sneed v. Greensboro City Bd. of Educ., 264 S.E.2d 106, 113 (N.C. 1980)).
78. *Id.*
79. 599 S.E.2d 365 (N.C. 2004).
80. *Id.* at 374.
81. *Id.* at 365–66.
82. *Id.* at 366.
83. *Id.*

tioned for discretionary review and gave notice as to appeal of right.[84] The North Carolina Supreme Court reversed in part, affirmed in part, and remanded.[85] On remand to the Wake County Superior Court, the court entered a declaratory judgment after finding constitutional violations, and the State was ordered to correct any deficiencies in the public school education system.[86] Defendants appealed, plaintiffs filed an intervening appeal, and the North Carolina Supreme Court granted discretionary review.[87]

Justice Orr, writing for the Court, recognized the right of North Carolina children to receive a sound, basic education.[88] He also explained that with the *Leandro* decision, the substance of the litigation involving the fundamental right to education changed from a funding issue to one requiring the "analysis of the qualitative educational services . . . ."[89] Justice Orr explained the standard by which the violation of a fundamental right is analyzed.[90] If the trial court makes findings of fact and conclusions of law from competent evidence that a child has been denied a sound, basic education, then the plaintiff will have established a denial of a fundamental right.[91] The Court concluded that once the denial of a fundamental right is established, the burden shifts to defendants to prove a compelling government interest.[92] If defendants cannot prove a compelling government interest, it is the trial court's duty to grant declaratory relief.[93]

Five years after *Hoke County*, the North Carolina Supreme Court held that education was a fundamental right in *Wake Cares, Inc. v. Wake County Board of Education*.[94] In *Wake Cares,* parents filed for declaratory and injunctive relief from mandatory-year round school attendance for students.[95] At trial, the Wake County Superior Court found for the plaintiffs, prohibiting the Board of Education from requiring mandatory year-round attendance without informed parental consent.[96] The Court of Appeals reversed.[97] On discretionary review, the North Carolina Supreme Court affirmed the Court of Appeals.[98] The Court's analysis interpreted N.C. Gen. Stat.

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 374.
88. *Id.*
89. *Id.* at 373.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. Wake Cares, Inc. v. Wake Cnty. Bd. of Educ., 675 S.E.2d 345 (N.C. 2009).
95. *Id.* at 348.
96. *Id.*
97. *Id.*
98. *Id.*

§ 115C-1, which codifies the State's constitutional requirement of "a general and uniform system of free public schools . . . ."[99] Further, the General Assembly has delegated broad and specific authority to local school districts to administer their calendars.[100] The Court affirmed *Leandro*, indicating that the "general and uniform" system specifies "a fundamental right to a sound basic education."[101]

In *Wake Cares*, the majority stressed that local school boards are in the best position to make decisions involving education, and that the Court should not substitute its judgment for that of the school board.[102] However, Justice Martin's dissent challenged the majority and stated that local school boards are not in a position to make important decisions without guidance from the General Assembly.[103]

It is unclear whether important decisions involving education should be made by the local school boards or the courts in North Carolina, and although it is clear that education is a fundamental right, it is not clear at what level it is to be scrutinized.

IV. ANALYSIS

North Carolina has clearly established education as a fundamental right, not only constitutionally, but through its case law.[104] *Sneed*, *Leandro*, *Hoke County*, and *Wake Cares* all affirm education as a fundamental right.[105] In *King*, while affirming education as a fundamental right, the Court ignored precedent regarding the appropriate level of scrutiny and chose to apply intermediate scrutiny.[106] The Court explained that procedures drafted by school boards to impact discipline are not designed to withstand strict scrutiny.[107] The Court continued by saying that strict scrutiny almost always results in a reversal of the disciplinary action.[108] According to the Court, disciplinary and long-term suspensions would be virtually unusable as disciplinary measures and would inundate the courts with a surplus of litigation questioning administrative decisions.[109] Because the policies and pro-

99. *Id.* at 350, (citing N.C. GEN. STAT. §115C-1 (2007)).

100. *Id.*

101. *Id.* (citing Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997)).

102. *Id.* at 351.

103. *Id.* at 354 (Martin, J., dissenting).

104. *See* N.C. CONST. art. I, § 15; *see also* Sneed v. Greensboro City Bd. of Ed., 264 S.E.2d 106 (N.C. 1980); *Leandro*, 488 S.E.2d 249 (N.C. 1997); Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004); *and Wake Cares*, 675 S.E.2d 345.

105. *See Sneed*, 264 S.E.2d 106; *Leandro*, 488 S.E.2d 249; *Hoke Cnty*, 599 S.E.2d 365; *Wake Cares*, 675 S.E. 2d 345.

106. King II, 704 S.E.2d 259, 265 (N.C. 2010).

107. *Id.* at 264.

108. *Id.*

109. *Id.* at 263.

cedures affecting student discipline cannot withstand strict scrutiny, the Court established a rule ignoring precedent and disregarding a constitutionally established fundamental right, intermediate scrutiny.[110] The Court's use of intermediate scrutiny is consistent with its prior use, in *Blankenship*, when it applied intermediate scrutiny as a similar convenience.[111]

The North Carolina Supreme Court held in *King II* that alternative education decisions for students under long-term suspensions are reviewed under the standard of intermediate scrutiny.[112] This level of scrutiny reduces the burden of proof for the school administrators.[113] Under intermediate scrutiny, only an important or significant reason must be proven, not a compelling government interest.[114] This is a considerably reduced burden of proof for the school administration. The Court explained that intermediate scrutiny is a balance between protecting the student's right to education and the school administrator's duty to keep the schools safe and free from disorder.[115] In trying to strike that balance, however, the fundamental rights of the students to a sound, basic education are overlooked.

Justice Timmons-Goodson, dissenting in the *King II*, explained that not providing alternative education to suspended students, that is, terminating all state-funded education, should be strictly scrutinized.[116] Justice Timmons-Goodson emphasized that the North Carolina Constitution not only guarantees the people the right to the privilege of education, but that Article IX is solely committed to education.[117] The first section of Article IX reads: "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged."[118] Justice Timmons-Goodson stressed that it is not coincidental that these rights are directly beside certain other undeniable fundamental rights such as religious liberty, freedom of speech, freedom of the press, and freedom from *ex post facto* laws.[119] Citing *Sneed*, *Leandro*, *Hoke County*, and *Wake Cares*, Justice Timmons-Goodson emphasized that not only is education fundamentally guaranteed by the North Carolina Constitution, it is a fundamental right affirmed by the North Caro-

110. *Id.* at 265; (citing Blankenship v. Barlett, 681 S.E.2d 759, 764 (N.C. 2009)).
111. *See Blankenship*, 681 S.E.2d at 765.
112. *King II*, 704 S.E.2d at 265.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 266–67 (Timmons-Goodson, J., dissenting).
117. *Id.* at 266.
118. *Id.* (citing N.C. CONST. art. IX, § 1).
119. *Id.*

lina Supreme Court.[120] Justice Timmons-Goodson concluded that, "[p]ut simply, the right to education is indivisible and cannot cease to be fundamental."[121] Regardless of whether the discussion relates to school financing, educational goals, school discipline, or mandatory attendance, education is a fundamental right and should therefore be subject to strict scrutiny.

In the application of strict scrutiny, Justice Timmons-Goodson explained that it is undeniable that local boards of education have compelling interests in ensuring safe and orderly schools.[122] "Accordingly, strict scrutiny only requires school administrators to consider whether a long term suspension or expulsion without some alternative educational option is necessary to achieve safety and order."[123] If denying any type of alternative education is not necessary to further a compelling government interest, the action is not narrowly tailored, and reversal is necessary.[124] Strict scrutiny would not remove the latitude that school administrators enjoy and "immunize individuals from the consequences of their own misconduct."[125] Strict scrutiny would be satisfied by evidence that a student must be removed, either from long term suspension or expulsion, in order to maintain safety and discipline in the schools.[126] The dissent in *King* pointed out that alternative education can take many forms, such as online computer learning in the home.[127]Strict scrutiny and the establishment of a denial of a fundamental right should result in declaratory relief for the plaintiff according to the North Carolina Supreme Court; however, the Court does not follow its own guidance.[128] The fundamental right is established, but then it is picked apart with intermediate scrutiny. At the conclusion, the right is not really fundamental.

Conversely, the majority only requires the government to articulate its reasons for denying alternative education to a student.[129] The conclusion that the majority arrived at did not logically follow the analysis provided. After walking through education as a fundamental right, the Court selected pieces of education that did not work for the conclusion of intermediate

120. *Id.* at 267. *See also* Sneed v. Greensboro City Bd. of Ed., 264 S.E.2d 106 (N.C. 1980); Leandro v. State, 488 S.E.2d 249 (N.C. 1997); Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004); Wake Cares, Inc. v. Wake Cnty. Bd. of Educ., 675 S.E. 2d 345 (N.C. 2009).

121. *Id.*

122. *Id.* at 268.

123. *Id.*

124. *Id.*

125. *Id.* at 270.

126. *Id.*

127. *Id.*

128. *Hoke Cnty.*, 559 S.E.2d at 373; *see also Wakes Cares*, 675 S.E.2d at 350; *Leandro*, 488 S.E.2d at 255.

129. *King II*, 704 S.E.2d at 262.

scrutiny.[130] It delineated education into three separate categories: funding, discipline, and access.[131] The funding and equal access components of education are considered fundamental rights, and thus the Court applied strict scrutiny.[132] The Court considered rational basis review for disciplinary issues and found the plaintiff's argument for injunctive relief insufficient.[133] Finally, the Court decided the answer was intermediate scrutiny, a blend of strict scrutiny and rational basis.[134]

The Court concluded that school officials, not the courts, should be empowered to make and enforce disciplinary decisions.[135] "The general supervision and administration of the free public school system shall be vested in the State Board of Education."[136] "The State Board of Education shall establish a policy for the system of free public schools, subject to laws enacted by the General Assembly."[137] In spite of this, North Carolina courts have traditionally allowed school administrators much latitude in utilizing their disciplinary authority.[138]The Court concluded that the legislature was best prepared to balance the reasonable requirements of local schools with the interests of students and their families.[139] This applied to financial or attendance decisions, as well as to disciplinary decisions.

Equity is not about funding, quality, or discipline; equity is about equality. Parceling removes equity.[140]Justice Orr closed *Hoke* stating:

> The world economy and technological advances of the twenty-first century mandate the necessity that the state step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in Leandro, but fulfill the dreams and inspirations of the founders of our state and nation. Assuring our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets the challenge remains to be determined.[141]

Children are our most valuable resource; education is a fundamental right. When the State fails to meet its burden with respect to discipline, it fails on many levels.

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130. *Id.* at 265.
131. *Id.* at 268.
132. *Id.* at 264.
133. *Id.* at 265.
134. *Id.*
135. *Id.*
136. N.C. GEN. STAT. § 115C-12 (2007).
137. *Id.*
138. *King II*, 704 S.E.2d at 262.
139. Wake Cares, Inc. v. Wake Cnty. Bd. of Educ., 675 S.E. 2d 345, 358 (N.C. 2009).
140. *King II*, 704 S.E.2d at 266, (Timmons-Goodson, J., dissenting).
141. Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 397 (N.C. 2004).

V. CONCLUSION

While the courts have traditionally been deferential to school administration regarding disciplinary matters, it is crucial to remember that education is a fundamental right, guaranteed by the North Carolina Constitution.[142] As a fundamental right, education is subject to the strict scrutiny standard of review.[143] Lower courts should be cautious when reading *King II* and applying an intermediate level of scrutiny to a fundamental right. The Court has left North Carolina students exposed to potential constitutional violations under judicial review of fundamental rights using intermediate scrutiny.

142. N.C. CONST. art. IX, § 1.
143. Leandro v. State, 488 S.E.2d 249, 261 (N.C. 1997).