KEITH AND CYNTHIA J.,

Appellant

v.

PRINCE GEORGE'S COUNTY BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 08-44

OPINION

In this appeal, the Appellants challenge the decision of the Prince George's County Board of Education (local board) upholding the long term suspension of their sons, D.J. and T.J., from Kenmoor Middle School for assault and sexual harassment of another student. The local board has filed a Motion for Summary Affirmance arguing that its decision was not illegal or unconstitutional. Appellants have filed a Response to the local board's motion. The local board has filed a Reply to the Appellants' Response.

FACTUAL BACKGROUND

On or around September 4, 2007, a female student notified a parent liaison at Kenmoor Middle School that she was physically fondled by three male students, including T.J. and D.J., while riding the school bus home on August 31, 2007. The student alleged that the three boys tried to grab, touch and kiss her, and that they touched her on the chest, between her legs and her backside. In addition, the student reported that her arms were initially "locked to the back of the bus seat" by D.J. while the other boys were touching her. The student reported that she unsuccessfully attempted to fight the boys off and that she repeatedly told them "no" in order to get them leave her alone. (Expulsion Investigation Report for D.J. and T.J. at p 2.) Both D.J. and T.J. deny that they committed any of the alleged acts.

After receiving this information, the principal of Kenmoor spoke with the students involved and parents and made a request for D.J. and T.J. to be expelled from Prince George's County Public Schools (PGCPS). The Notification of Request for Expulsion stated that the request was based on "physical fondling of PGCPS student while riding on PGCPS bus" and "other acts", a Level IV violation.[1]

[1] The local school system Code of Student Conduct (CSC) has four categories of offenses ranging from Level I to Level IV, with Level IV encompassing the most serious conduct. "Other acts" is included as a Level IV violation and is defined as: "any singular act, the reoccurrence of

Following this request for expulsion, the local Superintendent, Dr. John E. Deasy, directed the pupil personnel worker assigned to Kenmoor to conduct an investigation of the incident. The pupil personnel worker spoke with the alleged victim and three witnesses about the incident, but she was not able to speak with either T.J. or D.J., who were represented by counsel by that time. Two of the three student witness accounts implicated T.J. or D.J. in some way in the incident. On September 17, 2007, following his review of the pupil personnel worker's report, Dr. Deasy notified the Appellants that there were grounds to consider T.J. and D.J.'s expulsion from the school system.

On September 24, 2007, the Superintendent's designee, Ms. Dorothy B. Stubbs, held an expulsion conference for T.J. and D.J. Ms. Stubbs was joined on the expulsion panel by two other administrators in the school system. After hearing the evidence presented, the panel concluded that T.J. and D.J. committed the offense of "sexual harassment/assault – physical fondling of a PGCPS student on a PGCPS bus."[2] The panel decided not to issue an Order of Expulsion, but that T.J. and D.J. would be placed on long-term suspension through October 2, 2007, and would be suspended from riding the school bus through November 30, 2007.

The Appellants appealed this decision to the local board. On December 12, 2007, a hearing was held before the local board's Hearing Officer, Terry Bell, Esq. The Appellants argued that T.J.'s and D.J.'s suspensions should be reversed and their records expunged for the following reasons: there was no evidence to prove which of the two brothers was involved in the incident; the initial "charge" from the school system was a violation of the "other acts" provision of Code of Student Conduct ("CSC"), not "sexual harassment/assault"; and the alleged conduct did not amount to sexual harassment, assault, or "other acts" under the CSC and warranted a

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which could be considered persistent disobedience, which, in the opinion of the Principal, was so severe in its purpose, motivation, or commission, that it caused an adverse impact on the educational environment." (Sec. XVII, p. 18).

[2] "Assault" is defined under the CSC as: "physically pushing, hitting, or otherwise attacking another student, staff member, or other person lawfully on school property. **For any assault that results in substantial bodily injury to the victim, the Principal shall request an expulsion.**" (Sec. XVII, p. 17, emphasis in original.).

"Sexual harassment" is defined under the CSC as: "behavior which includes, but is not limited to, verbal or physical sexual advance, including pressure for sexual activity; unwelcome sexually motivated touching, pinching, patting, or intentional brushing against; repeated sexual verbal harassment or abuse; repeated remarks or gestures of a sexual nature; obscene or profane language or humor; sexually oriented printed material; or demanding sexual involvement accompanied by threats. It is the policy of the Board of Education to maintain an educational environment that is free from sexual harassment." (*Id.*, p. 19.).

lesser punishment, if any.

The Hearing Officer concluded that there was sufficient evidence in the record that T.J. and D.J. "engaged in some type of inappropriate touching of another student that is conduct punishable by the CSC under the 'catch-all' provision of 'other acts' or under the sexual harassment/assault provision based on the nature of the touching."[3] Finally, the Hearing Officer found no reason to expunge the suspensions from their records based on his findings.

The Appellants filed numerous exceptions to the Hearing Officer's decision to the local board. The Appellants essentially reiterated arguments made before the Hearing Officer and disagreed with his findings, but they also argued that "sexual harassment/assault" is not a singular offense recognized by the CSC and the expulsion panel's selection of that offense was arbitrary. By letter dated January 18, 2008, the local board affirmed the Superintendent's decision to place T.J. and D.J. on long term suspension and to deny the request for expungement of their records.

The Appellants next filed this appeal.

STANDARD OF REVIEW

It is well established that the decision of a local board with respect to a student suspension or expulsion is considered final. Md. Code Ann., Educ. §7-305. The State Board may not review the merits of a student suspension or expulsion. The State Board's review is limited to determining whether the local board violated State or local law, policies, or procedure; whether the local board violated the due process rights of the student; or whether the local board acted in an otherwise unconstitutional or illegal manner. COMAR 13A.01.05.05G.

In addition, an appeal regarding a student suspension or expulsion is not moot even though the student is readmitted to school. The disciplinary action is a part of the student's record; thus, a real controversy with an effective remedy exists. *Adams-Frazier v. Mont. County Bd. of Educ.*, MSBE Op. No. 01-07 (Feb. 27, 2001); *Peacock v. Balt. County Bd. of Educ.*, 7 Op. MSBE 1287 (1998).

ANALYSIS

In their appeal to this Board, the Appellants reiterate most of the exceptions presented to

[3] The Hearing Officer reached this conclusion despite also finding that some of the kissing between the students appeared to be consensual.

the local board and their disagreement with the Hearing Officer's conclusions.[4] The Appellants generally argue that the local board's decision is illegal and unconstitutional for the following reasons.

First, the Appellants argue that the expulsion panel's finding that T.J. and D.J. violated the sexual harassment/assault policy is improper, unsupported by the record, and was not listed on the expulsion request notification. The Appellants' position is that the expulsion panel's review was limited solely to the alleged violation listed on the Notification of Request for Expulsion -- "other acts" -- which was the only violation for which they were given notice.

Based on our review of the record, the expulsion panel's decision to weigh the evidence and assign a different label to the violation, which resulted in a lesser penalty for T.J. and D.J., did not violate T.J.'s and D.J.'s due process rights. The Appellants did not cite, nor are we aware of, any requirement under State or local law or policy that requires a suspension or expulsion review to be limited to the initial "cause" listed on a notification report. Indeed, it seems reasonable to expect that an expulsion panel's review will weigh the evidence presented and determine what, if any, violation of the student code occurred.

In addition, we agree with the local board's description of how the Appellants were, in fact, provided notice of the conduct at issue:

> [T]he Appellants were provided ample notice of the issues that would be considered by the Superintendent as well as the Board's Hearing Examiner. First, the Notice of Request for Expulsion clearly stated that the conduct involved the "physical fondling" of a student on the school bus. Moreover, the Appellants were provided with a copy of the Pupil Personnel Worker's Investigative Report prior to the Expulsion Conference. That report outlined the victim's allegations in detail, which included unwanted sexual touching and restraint. Further, the report summarized witness statements, including allegations that D.J. reached for the victim's "butt" although she "consistently" said "stop" and "no". The fact that the Superintendent's Designee, at *the conclusion of the conference*, classified the actions as sexual harassment and assault and imposed a lesser penalty does not constitute a due process or any other violation.

(Local Board's Motion at 5-6, emphasis in original.)

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[4] The Appellants also correctly argue that the Hearing Officer mistakenly identified the alleged violation as a physical attack against a school system employee. The local board acknowledged this error in its Motion for Summary Affirmance.

Further, our view is that the local board's use of a slash in "sexual harassment/assault" did not violate local policy by creating a new "offense" under the student code. Rather, the record clearly reflects that T.J.'s and D.J.'s conduct was found to constitute both sexual harassment and assault.

Next, the Appellants contend that the alleged conduct does not meet the standard for an "other acts", assault or sexual harassment violation under the student code, nor does it warrant categorization as a Level IV violation resulting in expulsion or long term suspension. Based on our review, the local board correctly asserts that this argument essentially challenges the merit of the suspension decisions, which is not reviewable by the State Board. The local board did not abuse its discretion by weighing the credibility of the students, by finding T.J.'s and D.J.'s conduct more serious and extensive than mere "horseplay", or by concluding that their conduct constituted sexual harassment and assault to a degree that warranted a long-term suspension. While the Appellants strongly disagree with the findings of the expulsion panel and hearing officer, the record shows that T.J. and D.J. were afforded all appropriate due process.

Finally, the Appellants seek to have the suspensions expunged from T.J.'s and D.J.'s educational records. However, based on our analysis above, we do not find that an expungement is warranted, as the long term suspension was not illegally or unconstitutionally imposed by the local board.

CONCLUSION

For these reasons, and finding no due process violation or other illegality in the proceedings, we affirm the decision of the Prince George's County Board of Education.

James H. DeGraffenreidt, Jr.
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Vice President

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absent
Dunbar Brooks

Charlene M. Dukes

Mary Kay Finan

Rosa M. Garcia

Richard L. Goodall

Karabelle Pizzigati

Ivan C.A. Walks

Kate Walsh

September 23, 2008