DAVID J.,

Appellant

v.

HOWARD COUNTY BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 11-39

OPINION

INTRODUCTION

In this appeal, Appellant challenges the local board's decision upholding his suspension from school for 45 days for violating the school system's policy on distribution of alcohol. The local board has filed a Motion for Summary Affirmance maintaining that its decision is not illegal and should be upheld. The Appellant has opposed the motion and the local board has responded.

FACTUAL BACKGROUND

At the time of the incident, Appellant was an 11th grade student at Marriots Ridge High School (MRHS).

On December 6, 2010, a female student at MRHS who was violently ill, displaying seizure-like symptoms and projectile vomiting was brought to the health suite and later taken to the hospital by ambulance. Students informed school staff that the student had taken pills before school with a male student. (Motion, Administrative Investigation Docs; Tr.16 – 18.). This led to an investigation by school administration.

Cara Moulds and Clovis Thomas, Assistant Principals at MRHS, questioned the male student and conducted an administrative search. The search revealed that the male student was in possession of a Red Bull Energy Shot bottle filled with alcohol. The student identified the Appellant as the student who gave him the bottle. (*Id.*).

Thereafter, Ms. Moulds and Mr. Thomas conducted an administrative search of the Appellant and his belongings. The search revealed several empty bottles of Red Bull Energy drinks; 1 bottle of Monster Hitman Energy Shooter filled with alcohol; 3 Vivarin tablets; and a

sealed plastic bag filled with approximately 4 to 5 ounces of a light brown powdered substance that the Appellant identified as coffee. Appellant answered questions and also submitted a written statement. He admitted that he had given a bottle of Red Bull Energy Shot filled with alcohol to a male student. He also admitted that he had filled the now empty Red Bull Energy Shot bottle with alcohol from home and had consumed it with another student earlier in the day. (Motion, Administrative Investigation Docs; Tr.19 – 20.).

Ms. Moulds and Mr. Thomas met with the Appellant and his parents on December 6, 2010. They explained the incident and the results of the investigation. At that time, Ms. Moulds and Mr. Thomas advised that the Appellant would be receiving a 10 day suspension for alcohol possession and distribution, but that it would likely be extended upon review by the Superintendent. (*Id.*). By letter dated December 7, 2010, Patrick Saunderson, Principal of MRHS, confirmed the 10 day suspension, effective December 7, 2010, for violating Policy #9230 – Alcohol, Other Drugs, Prescription Medication and Over the Counter Products.[1] He further advised that Appellant was prohibited from being on Howard County Public School grounds and property and from participating in school sponsored extra-curricular activities for 30 days. (Motion, Administrative Docs.).

On December 15, 2010, David A. Bruzga, the Superintendent's Designee, held a conference at which the Appellant, his attorney and father were present. At the conference, Mr. Bruzga advised Appellant of the charges against him and gave him the opportunity to offer an explanation. He reviewed Appellant's attendance, academic, and discipline records.

Based on his review, Mr. Bruzga determined that the Appellant had violated Policy #9230 and the Howard County Public School System's Student Code of Conduct for alcohol distribution. (Bruzga Letter, 12/17/10). Mr. Bruzga imposed a 45 day suspension, ending on February 17, 2011. He advised the Appellant that he could attend the Evening School Program held at the Homewood Center during the suspension period.[2] In addition, pursuant to the implementation procedures for Policy 9230, Appellant was excluded from all extracurricular and school related activities for the remainder of the current semester and for the following semester. He was also required to undergo an addictions assessment, counseling and/or education. (*Id.*).

Appellant appealed to the local board, which held an evidentiary hearing on January 20, 2011, about one month from the date the 45 day suspension was imposed. Counsel for Appellant did not contest the underlying facts of the case, rather, he argued that the 45 day suspension be reduced to time already served while maintaining the other sanctions, such as the suspension from extracurricular activities. On February 16, 2011, the local board upheld the 45 day suspension, finding that the penalty was reasonable and consistent with school system procedure given the facts of the case, and the Appellant's clean disciplinary and strong academic

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[1]Policy #9230 prohibits students from possessing, using or distributing alcohol on school grounds or at school-related activities. It also prohibits students from possessing an over-the-counter product in the absence of a written medication order. IV.C.1.

[2]Appellant did not attend the Evening School Program at the Homewood Center. Instead, he collected his classwork from school to complete at home and return for grades and credit.

record. (Local Board Decision, p.6).

This appeal followed.[3]

STANDARD OF REVIEW

In student suspension and expulsion cases, the decision of the local board is considered final. Md. Code Ann., Educ. §7-305(c). Therefore, the State Board will not review the merits of the decision unless there are "specific factual and legal allegations" that the local board failed to follow State or local law, policies, or procedures; violated the student's due process rights; acted in an unconstitutional manner; or that the decision is otherwise illegal. COMAR 13A.01.05.05G(2).

A decision may be considered "otherwise illegal" if it is:

(1) Unconstitutional;
(2) Exceeds the statutory authority of jurisdiction of the local board;
(3) Misconstrues the law;
(4) Results from an unlawful procedure;
(5) Is an abuse of discretionary powers; or
(6) Is affected by any other error of law.

ANALYSIS

The Appellant does not dispute the facts of this case, nor does he dispute that he should have received some form of punishment. Rather, he maintains that the 45 day suspension was a "knee jerk reaction" by Mr. Bruzga and the local board who abused their discretion in imposing the penalty. Appellant also claims that the decision violates his substantive due process rights.

In order to discuss these claims we need to understand the policy in question and how it was applied in this case. The policy states that the student will be referred to the superintendent/designee "for a suspension of not less than 45 school days or expulsion" for the first offense of the school system's policy prohibiting the distribution of alcohol other drugs or prescription medication. Policy 9230-PR(IV)C.1.

On its face this provision requires a minimum penalty of suspension for 45 school days. Based on the statements made by Mr. Bruzga in his decision and at the hearing, it is clear that he viewed the policy as requiring a minimum penalty of 45 school days. (Bruzga Report, 1/20/11; Bruzga Letter to Richman, 12/30/10; T. 34-35). He believed that the only discretion he could exercise once he found the Appellant had violated the policy was to determine whether just the minimum penalty should be imposed or some greater penalty in excess of the 45 days. (*Id.*).

[3]The Appellant's suspension ended in February 2011and he returned to school prior to filing the appeal to the State Board. The matter is not moot, however, because the disciplinary action remains on his school record.

The local board, however, has a different view of the penalty provision. In its response to the Appellant's memorandum, the local board explains that it has interpreted its own policy as allowing it the discretion to apply a penalty less than a 45 school day suspension in the interests of justice. The local board refers to two local board cases (not appealed to the State Board) in which it applied less than the minium penalty set forth in its disciplinary policies. Those cases are as follows:

In *Board of Education of Howard County Appeal #08-12* (attached), an eighth grade student was suspended for 45 school days for violation of Policy 9230 based on his distribution of drugs in school. The student was asked by Student A to give something wrapped in aluminum foil to Student B in his homeroom class. The student saw that the foil contained marijuana and passed the foil to Student B in class. The student initially denied any involvement but later admitted to passing the packet. The local board considered the circumstances of the incident, that the student was remorseful for his actions, that several teachers and other adults had written favorable character references, that the student had had to deal with being charged with possession of CDS through the criminal justice system, and that the suspension was going to continue into the beginning of the next school year when the student began high school. The local board reduced the suspension to 30 days, holding the remaining 15 days in abeyance with the right to reinstate if the student were to violate the Student Code of Conduct or school system rules . The local board expressed its willingness to "re-fashion the discipline in a way that will enable [the student] to begin the important academic and emotional transition to high school before the end of the suspension term." Thus, the transition from middle to high school combined with the other factors influenced the local board to reduce the penalty.

In *Howard County Board of Education Appeal #08-14* (attached), the student violated the school system's Policy 9270 based on his battery of school staff which resulted in injuries to some teachers and students. Violation of Policy 9270 provided for a suspension of not less than 45 school days or the remainder of the semester, whichever is greater, and exclusion from extra-curricular activities during the course of the suspension and for the semester following the suspension. The student's challenge focused on his exclusion from extracurricular activities for the first semester of the following school year. Although the local board found the exclusion from extracurricular activities fully justified, it modified the exclusion to allow the student to participate in activities from the end of the first marking period until the end of the first semester provided the student had no further disciplinary referrals. This modification allowed the student to try out for winter sports as try outs took place during the first semester. Without the modification, the first semester extracurricular activity exclusion would have effectively extended the period of ineligibility for athletics beyond the first semester. In addition, the local board had recently modified Policy 9270 to have the period of exclusion for extracurricular activities coincide with the period of suspension, a provision that was not in effect at the time of the disciplinary infraction in the case.

Based on this information, it appears to be the case that the Superintendent's Designee interprets the minimum penalty rule to preclude him from going below the 45 day minimum penalty but that the local board interprets the minimum penalty rule to allow it to do so based on

mitigating factors.

Substantive Due Process

The Appellant argues that the local board violated his substantive due process rights by suspending him for 45 days for distribution of alcohol.[4]

In the context of student discipline, the appropriate level of scrutiny in a substantive due process analysis is the rational basis test. *Mitchell v. Board of Trustees of Oxford Mun. Separate Sch. Dist.*, 625 F.2d 660, 665 (5th Cir. 1980). *See also Johnson v. Baltimore County Bd. of Educ.*, 7 Op. MSBE 466, 470 (1996). Under the rational basis test, the official action must be directed to a legitimate purpose and rationally related to achieving that purpose. *See Mitchell, 625 F.2d 665*; *Hammock v. Keys*, 93 F. Supp. 2d 1222, 1231 (S.D. Ala. 2000).

The local board has a policy that imposes a minimum 45 day suspension for distribution of alcohol. That is the penalty that the Appellant received. The purpose of the policy is to ensure a safe and alcohol free school in which students do not distribute alcohol to others. The possession and consumption of alcohol by minors is illegal and may pose serious health and safety risks. Applying the rational basis test to the facts of this case, we conclude that protecting the health and safety of students is a legitimate purpose and a 45 day suspension is rationally related to that purpose because it likely serves as a deterrent to students to engage in such behavior. (*See* T.26 – 27; 55). Thus, in our view, the local board's actions comport with substantive due process.[5]

Some courts have recognized substantive due process limitations on the severity of the disciplinary action imposed and have overturned a school district's actions "if there is a shocking disparity between the punishment and the offense." *See Mitchell v. Board of Trustees of Oxford*, 625 F.2d 660 (5th Cir. 1980); *Kolesnick v. Omaha Pub. Sch. Dist.*, 558 N.W.2d 807 (Neb. 1997).

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[4]Although it is not clear that he is doing so, to the extent that the Appellant is maintaining that the Appellant's procedural due process rights were violated, we find no merit to such claims. Appellant was provided all the due process required, including a hearing before the superintendent's designee and an evidentiary hearing before the local board.

[5]To the extent that the Appellant claims the local board's policy violates substantive due process because it sets forth a mandatory minimum penalty, policies establishing mandatory minimum penalties for violations of school disciplinary rules are not per se unconstitutional. *See Jacobs v. Prince George's County Bd. of Educ.*, 5 Op. MSBE 80 (1988)(citing *Mitchell v. Board of Trustees of Oxford*, 625 F.2d 660 (5th Cir. 1980) and *Clinton Municipal Separate Sch. Dist. v. Byrd*, 477 So.3d 237, 241 (Miss. 1985). Nonetheless, as we explained above, the local board has interpreted the policy as allowing it to reduce the penalty to less than a 45 day suspension in the interest of justice.

In such cases, the actions are unconstitutional because there is no rational relationship between the punishment and the offense. *See Seal v. Morgan*, 229 F.3d 567, 575 (6th Cir. 2000); *Mitchell*,625 F.2d at 664 n8; *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989); *Brewer v. Austin Independent Sch. Dist.*, 779 F2d. 260, 264 (5th Cir. 1985).

We find no "shocking disparity" here between the punishment and offense. Such a finding is consistent with prior cases in which this Board has upheld the legality of similar punishments for violations of school system policies prohibiting distribution of drugs and alcohol. *Ashtianie v. Howard County Bd. of Educ.*, MSBE Op. No. 05-20 (2005)(upheld 45 day suspension for distributing alcohol on school bus); *Simmons v. Montgomery County Bd. of Educ.*, MSBE Op. No. 01-05 (2001)(upheld suspension from February 29 through end of school year for possession of controlled dangerous substances (Aderol pills) and distribution to classmates); *Webster v. Montgomery County Bd. of Educ.*, MSBE Op. No. 00-43 (2000) (upheld suspension from December 13 through the end of the school year for distribution of drugs (marijuana) on school grounds).

Abuse of Discretion

Appellant argues that the local board and Mr. Bruzga abused their discretion by failing to exercise any discretion at all in this case. Specifically, the Appellant argues that when Mr. Bruzga and the local board failed to reduce the penalty in light of the evidence they committed an illegal abuse of discretion. The evidence to which the Appellant refers is information and data contained in the Columbia Addictions Center report and evaluation, the testimony of the Appellant at the hearing,[6] and the letter from the Appellant's psychiatrist requesting leniency because Appellant suffers from attention deficit hyperactivity disorder which likely led to the impulsive behavior at issue in this case.[7] (App's. Memorandum, Ex. 3).

The State Board has explained that for an abuse of discretion to be found "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Atanya C. v. Dorchester County Bd. of Educ.*, MSBE Op. No. 09-26 at 5 (2009)(quoting *State v. WBAL-TV*, 187 Md. App. 135, 153 (2009)). In finding no abuse of discretion in *Atanya C.*, we stated:[8]

> The student here was in the 9th grade. She had been involved in at least two fights at school. The expulsion occurred at the beginning of the school year and extended for the full school year. That is

[6]Although no specific testimony is identified by the Appellant, we presume he refers to the testimony concerning his remorse, his ADHD, and his academics. (T.62.– 76).

[7]At the time of the incident, the Appellant was not yet evaluated, diagnosed or treated for the disorder.

[8]We also held in *Atanya C.* that imposing a long term suspension without giving a student access to any but the most minimal of education services could tip the scale toward an abuse of discretion, but that is not the case here as Appellant was offered enrollment at an alternative school.

> indeed a harsh punishment, but we do not second guess the decision of the local board. We recognize that the safety of teachers and students is a paramount public concern. When schools are unsafe, when students behavior threatens the disciplinary fabric of the school, schools have the authority and obligation to discipline those students and, given the facts of each case, to discipline appropriately. In this case, a year-long expulsion was the penalty for this student's assaultive behavior. It is our view that, although the penalty was harsh, imposing it was not *per se* an abuse of discretion.

In our view, Mr. Bruzga's and the local board's decisions were not an abuse of discretion. They both considered the facts and circumstances of the case, including that the Appellant had a good academic record and disciplinary record. In addition, the local board considered the January 17, 2011 letter from Appellant's psychiatrist and all of the Appellant's testimony at the board hearing. (Superintendent's Ex. 1, Local Board Decision at 4-5). Both Mr. Bruzga and the local board determined that the 45 day penalty was appropriate. Unlike its decisions in *Board of Education of Howard County Appeal #08-12* and *#08-14* discussed above, the local board did not find sufficient mitigating circumstances to reduce the penalty below the 45 days stated in the policy. We do not find Mr. Bruzga's and the local board's failure to mitigate the penalty in light of the evidence to be an abuse of discretion as a 45 day suspension for distributing alcohol to another student on school property during the school day is within a standard of reasonableness and not outside the fringe of an acceptable penalty.[9]

CONCLUSION

Because we find no illegality in the local board's decision to suspend Appellant for 45 days for distribution of alcohol, we affirm the decision of the local board.

James H. DeGraffenreidt, Jr.
President

Charlene M. Dukes
Vice President

[9] Even if the Superintendent's Designee or the local board were wrong about the inability/ability to exercise downward discretion with regard to the penalty, we find this to be harmless error as it does not change our view of the outcome of this case.

absent
Mary Kay Finan

S. James Gates, Jr.
S. James Gates, Jr.

Luisa Montero-Diaz
Luisa Montero-Diaz

absent
Sayed M. Naved

Madhu Sidhu
Madhu Sidhu

Guffrie Smith EMK
Guffrie M. Smith, Jr.

Donna Hill Staton
Donna Hill Staton

Ivan C.A. Walks

absent
Kate Walsh

August 30, 2011