HOWARD AND BRYNNA W., Appellant v. HOWARD COUNTY BOARD OF EDUCATION, Appellee.	BEFORE THE MARYLAND STATE BOARD OF EDUCATION Opinion No. 13-42

OPINION

INTRODUCTION

The Appellants, parents of E.W., appeal the suspension and discipline of their son. The Howard County Board of Education (local board) filed a Motion for Summary Affirmance to which the Appellants responded. The local board replied to that response.

FACTUAL BACKGROUND

The Appellants do not dispute that in January, 2012, during a Friday night basketball game E.W. was found in a lavatory stall with another student mixing Nyquil and Sprite in a combination known to be used as an intoxicant. According to E.W.'s written statement, "We had Nyquil and were going to mix it with sprite and drink it."

E.W., a 10th grader at the time, was suspended for three school days for possession of Over-the-Counter medication, which is a direct violation of Policy 9230 Alcohol, Other Drugs, Prescription Medication and Over-the-Counter Products and the Howard County Public School System's Student Code of Conduct.

In September, 2012, when E.W. was an 11th grader, he was found in a highly intoxicated state at a Friday night football game at Hammond High School. According to witnesses he smelled strongly of alcohol, vomited repeatedly and had trouble focusing his eyes and staying awake. Due to E.W.'s extreme level of intoxication, the principal recommended to E.W.'s father that he be taken to a hospital. E.W. later admitted to drinking vodka as he walked to the game but he remembered nothing after buying the ticket.

On September 19, 2012, E.W. was suspended for 10 school days for being intoxicated on school property. The school system considered that his 2nd violation of Policy 9230. His parents were advised that the principal would recommend that E.W.'s suspension be extended beyond 10 school days.

The matter was referred to David A. Bruzga, Administrative Director, Secondary Schools, as the Superintendent's Designee, for the purpose of considering a period of suspension beyond 10 days. After conducting an investigation and considering all of the parents' arguments, Mr. Bruzga found that E.W. had committed a second violation of Policy 9230 and extended E.W.'s suspension through October 15, 2012, for a total of 20 school days. Mr. Bruzga reasoned,

"Although a second violation of Policy 9230 specifies a suspension of up to forty five days (45) school days, [E.W.] was assigned a total suspension of only 20 school days in view of his academic record and his reasonably good disciplinary record." *Report of Superintendent's Designee* at 2. E.W. was also prohibited from participating in extra-curricular activities for the remainder of the semester and the next semester.

On October 24, 2012, E.W.'s parents noted their appeal to the local board. In their Appeal Information Form, they identified two issues: "(1) Whether the incident of September 14, 2012, was a 'second offense'. (2) Whether the punishment for the incident of September 14, 2012, was fair and reasonable." *Record* Tab "Appeal Documents" at 2.

E.W., his parents, and their attorney appeared before the local board on December 13, 2012. Stipulations were entered concerning E.W.'s responsibility for both offenses, and the Superintendent's documents were admitted into evidence by the agreement of the parties.

On December 21, 2012, the local board unanimously agreed that E.W. had violated the alcohol/drug policy twice within the past twelve months. But a majority of the board was unable to reach a consensus on whether the penalty should have prohibited participation in extra-curricular activities for only the period of suspension, rather than two semesters. Absent consensus, the local board held that the decision of the Superintendent/Designee remained in effect.

On January 22, 2013, the Appellants noted this appeal to the State Board.

STANDARD OF REVIEW

COMAR 13A.01.05.05G(2) provides that the State Board "may not review the merits of a student suspension or expulsion" and shall accept an appeal only if "there are specified factual and legal allegation of one or more of the following: (a) The local board has not followed State or local law, policies, or procedures; (b) The local board has violated the due process rights of the student; or (c) The local board has acted in an unconstitutional manner." *Id.* The State Board may reverse or modify a student suspension or expulsion if the decision of a local board is otherwise illegal as defined in COMAR 13A.01.05.05C. *Id.* at §G(3). *David J. v. Howard Co. Bd. of Educ.*, MSBE Op. No. 11-39 at 3 (2011). In this case, the burden of proof by a preponderance of the evidence rests with the Appellants.

ARGUMENT

The central issues in this case are whether E.W. committed a "second offense" under Policy 9230 and whether he was disciplined legally for the offenses committed. Policy 9230 establishes the parameters for disciplinary actions taken in response to a violation of that policy which governs alcohol, drugs, prescription medication and over the counter products. Policy 9230 states:

1. It is a violation of this policy for any student to:

a. Possess, use (including constructive possession), or distribute alcohol or other drugs on school property or at school-related activities.
b. Possess or use prescription medication or an over-the-counter product in the absence of or inconsistent with a written medication order.
c. Distribute either prescription medication or an over-the-counter product.

2. Violations of this policy are cumulative; subsequent offenses may affect the nature and severity of the consequences.

Based on the Policy itself, stating that violations are "cumulative," it would appear correct to conclude that E.W. did indeed commit a second offense when he was drunk at the football game. The Appellants argue, however, that Policy 9230-PR, setting forth the procedures for implementing Policy 9230, establish a siloed approach to discipline that requires the second offense to be the same type of violation as the first offense. In this case, the first offense involved Nyquil, an over-the-counter product. The second offense involved alcohol.

Appellants argued that the procedures established under Policy 9230 PR separately delineate first, second, and third offense consequences for 4 categories of violations:

A. Possession and/or Use of Alcohol and Other Drugs
B. Possession and/or Use of Prescription Medication and Over-the Counter Products
C. Intent to Distribute and/or Distribution of Alcohol, Other Drugs, or Prescription Medication
D. Intent to Distribute and/or Distribution of Over-the Counter Products

That separate delineation, they assert, prevents a finding of cumulative violations unless the subsequent offense is in the same category as the first offense. We find that interpretation of Policy 9230 PR to be overly rigid and in direct contravention to the overall directive in Policy 9230 that offenses can be considered cumulatively. Indeed, the record reflects that the school system has consistently applied Policy 9230/9230PR to allow cumulative consideration of offenses from different categories. (T. 59). *See also,* e-mail of 11/16/11 from Mark Blom to David Bruzga attached to Report from Superintendent's Designee. The school system has expertise in interpreting its own policies. We defer to that expertise unless the interpretation is clearly wrong. We cannot conclude, given the wording of the policy, that the interpretation is clearly wrong.

As to the penalty imposed here, the argument seems to revolve around E.W.'s exclusion from extracurricular activities for two semesters rather than for the length of the suspension. Under Policy 9230 PR, a second offense for possession or use of alcohol or other drugs leads to suspension from extra-curricular and school-related activities for the remainder of the current semester and the next consecutive semester. In contrast, a second offense for possession or use of over-the-counter products leads to exclusion from all extracurricular and school-related activities

over the course of the suspension. The local board could not reach consensus on which of the penalties was appropriate in this case. Thus, the exclusion from extracurricular activities for the next full semester remained the penalty, as the Superintendent had imposed.

The Appellant challenges the legality of imposing the harsher penalty asserting that it was an abuse of discretion. For abuse of discretion to occur in this context, the decision "has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Atanya C. v. Dorchester County Bd. of Educ.*, MSBE Op. No. 09-26 at 5 (2009); *David J. v. Howard County Bd. of Educ.*, MSBE Op. No. 11-39 at 6 (2011) (citing *State v. WBAL-TV,* 187 Md. App. 135, 153(2009)). In *Atanya C.*, we concluded that harsh punishment does not immediately constitute an abuse of discretion. The local board can look at the facts surrounding the student's conduct and balance those with the school's "authority and obligation to discipline those students." *Atanya C.* at 7. Simply put, there is only an abuse of discretion "when the ruling 'is violative of fact and logic,' or when it constitutes an 'untenable judicial act that defies reason and works an injustice.'" *Id.* at 5 (citing *King v. State,* 407 Md. 682, 697(2009)).

We cannot conclude that the ruling violates fact and logic. Indeed, it is our view that Policy 9230 gives school system staff discretion to choose enhanced penalties across the categories of offenses, so long as they have a rational basis for doing so. In this case, based on our reasoning in *David J. v. Howard Co. Bd. of Educ.*, MSBE Op. 11-39 at 3 (2011), we believe there was a rational basis for the enhanced penalty. In that case, we said:

> 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 [enhanced penalty] is rationally related to that purpose because it likely serves as a deterrent to students to engage in such behavior . . . Thus, in our view, the local board's actions comport with substantive due process.

Id. at 5 (footnote omitted).

Policy 9230 could be more clear about the possibility that the harsher penalty can be applied when the first and second offenses are not the same category, but as written and applied here, we conclude that the decision here does not represent an abuse of discretion.

CONCLUSION

For all the reasons stated, we affirm the decision of the local board.

Charlene M. Dukes
President

Mary Kay Finan
Vice President

James H. DeGraffenreidt, Jr.

Linda Eberhart

S. James Gates, Jr.

Luisa Montero-Diaz

Sayed M. Naved

Madhu Sidhu

Donna Hill Staton

Guffrie M. Smith, Jr.

July 23, 2013