T. G.,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 99-3 6

OPINION

In this appeal, a parent of a student at Dulaney High School contests the local board's upholding of the superintendent's decision to expel his son from Dulaney based on a violation of local board Policy 5550, Disruptive Behavior. Appellant argues that: (1) the discipline decision was based on witness testimony that is not credible and on hearsay evidence; (2) the evidence does not support the local board's decision; (3) COMAR 13A.05.05.03 was violated when school officials failed to adjust T.G.'s schedule upon return to school from a prior expulsion; and (4) T.G.'s due process rights were violated. The local board has filed a Motion to Dismiss for failure to state a claim, maintaining that its decision should be upheld. Appellant has filed a response opposing the motion.

BACKGROUND

During the 1998-99 school year, T.G. was in the ninth grade at Dulaney High School in Baltimore County. Beginning September 17, 1998, T.G. was expelled from school for two quarters and assigned to Rosedale Alternative Center.[1] He successfully attended Rosedale and was reinstated at Dulaney on January 25, 1999.[2]

On February 2, 1999, an incident occurred between T.G. and another student, Michael, in the cafeteria. William Zepp, Assistant Principal, witnessed the incident. He stated in his report:

As the administrator on duty during B lunch in the Dulaney High

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[1]T.G. was expelled because twelve bags of marijuana were found in his locker. (Tr. 26). The search of T.G.'s locker was triggered by a complaint from the mother of another student, Michael, that T.G. forced her son to smoke a cigarette in school. School authorities found the marijuana while searching T.G.'s locker for cigarettes.

[2]On November 13, 1998, Michael's mother reported to Assistant Principal, Melinda Garvin, that T.G. had approached Michael on school property and threatened him. The event occurred during T.G.'s expulsion when he was prohibited from entering onto Dulaney High School property.

> School cafeteria, I was walking by a lunch table near the serving line at about 11:30 a.m. on February 2, 1999. As I walked by I overheard a student (later that student was identified as T.G.) threatening another student (later the threatened student was identified as Michael [ ]). T.G. was using very loud and vulgar language and that caught my attention.
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> When I turned and walked close to T.G. and Michael, I heard T.G. threaten to get Michael because T.G. said to Michael, "You will pay for what you cost me." T.G. held in his hand a bent up metal drink can and had that can in Michael's face about 6-10 inches from Michael's face. Michael had not said anything to T.G. that I could hear. After I moved T.G. away from Michael, Michael told me that T.G. kept threatening him. However, he did not tell me why the threats came, but he was visibly upset.

Mr. Zepp had T.G. throw away the can and stand near the wall until the lunch period ended. After lunch, he and the guidance counselor, Mrs. Sento, spoke to T.G. about his behavior. T.G. told them that it was Michael who had gotten him expelled earlier in the school year. T.G. was eventually sent to class.

Later that school day, Michael's mother phoned Mr. Zepp and informed him that Michael was afraid to attend school.[3] She told him that the incident between the students that day involved T.G. threatening to cut Michael's throat with the soda can because some of T.G.'s property had been seized by the police during the fall incident that had resulted in T.G.'s prior expulsion.

Another assistant principal, Melinda Garvin, conducted an investigation of the incident. As part of this investigation, she interviewed T.G. and the following occurred:[4]

> On February 3, 1999, I asked T.G. to tell me about the incident with Michael [ ] and Mr. Zepp in the cafeteria on February 2. T.G. indicated that there was no problem in the cafeteria but did confirm that he had stopped by Michael's table to talk to him. T.G. stated that he told Michael, "I don't appreciate you sending me to Rosedale. You sent me there. I want you to stay away from me." T.G. said that Mr. Zepp came up to him and told him to throw his soda can into the recycle bin and to stand against the wall of the cafeteria. I asked T.G. to write a statement giving his side of the

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[3]Michael did not attend school the following day, February 3, 1999. (Tr. 18).

[4]T.G. refused to write a statement for Ms. Garvin.

> incident. He refused and became very angry, accusing me of denying him his education. I asked him to sign a statement indicating he would not give his account of the events; he refused saying, "I really don't care about your records." When given the charges for his suspension, T.G. said, "I'm going to raise hell, I guarantee it."

Ms. Garvin also received a written statement from Michael which reads as follows:

> 2/1/99
> On T.G. [sic] first day back I saw him in gym 1st period, he just looked at me and shook his head. In math 3rd period I saw him, I tried to ignore him. He said, "Thanks for sending me to Rosedale you piece [sic] of trash." Then I saw him in B lunch he said, "I think I should send your ass to Rosedale."
>
> 2/2/99
> I saw him in gym 1st period and nothing happened then. But in 3rd period math he said it may not be today it may not be tomorrow but I'm going to kill you! Just watch your back you sack of shit." [sic] In B lunch I moved tables to try to avoid him. When he found me he pushed my shoulder when I turned around he had a torn can to my throat telling me he's going to slice my god damn neck you sorry piece [sic] of trash. Then he said, "If you tell on me again he's going to rip my eye out. [sic] Once Mr. Zepp stood him up against the wall he was hitting his fists. Before he came back to school my friends and some people I don't know told me I was going down.

Based on the investigation, T.G. was charged with assault and battery on a student, and deprivation through intimidation of another individual's right to attend school or classes pursuant to local board Policy 5550. Under the policy, these are Category II offenses for which a student is normally suspended and may be expelled. The school principal suspended T.G. and recommended his expulsion.

The superintendent's designee conducted a hearing in which the student and his father were present. Based on his own investigation of the incident, the superintendent's designee determined that T.G. was guilty of the charges, and he expelled T.G. from Dulaney High School. Appellant was informed of this decision by letter dated February 17, 1999.[5]

Appellant appealed to the local board. A full evidentiary hearing was held. At the

[5]The other student involved, Michael, did not receive any punishment.

hearing both Mr. Zepp and Michael testified in a manner consistent with their earlier written statements. (Tr. 4, 26). The local board upheld the superintendent's decision to expel T.G.

ANALYSIS

The decision of a local board with respect to a student suspension or expulsion is considered final. Md. Code Ann., Educ. § 7-305 (a)(7). The State Board's review is therefore limited to determining whether the local board violated State or local law, policies, or procedures; whether the local board violated the due process rights of the student; or whether the local board acted in an otherwise unconstitutional manner. COMAR 1 3A.01.01.03E(4)(b).

Credibility of Witnesses

Appellant claims that the local board's decision in this case should be reversed because its credibility decisions with regard to witness testimony were improper. Specifically, Appellant maintains that the testimony of both Assistant Principal Zepp and Michael is unreliable.

Determinations concerning witness credibility are within the province of the local board as trier of fact. *See, e.g., Board of Trustees v. Novik,* 87 Md. App. 308, 312 (1991), *aff'd,* 326 Md. 450 (1992) ("It is within the Examiner's province to resolve conflicting evidence. Where conflicting inferences can be drawn from the same evidence, it is for the Examiner to draw the inferences."); *Board of Education v. Paynter,* 303 Md. 22, 36 (1985)(same). The State Board may not substitute its judgment for that of the local board acting as trier of fact unless there is independent evidence in the record to support the reversal of a credibility decision. *See Dept. of Health & Mental Hygiene v. Anderson,* 100 Md. App. 283, 302-303 (1994); *Kaleisha Scheper v. Baltimore County Board of Education,* MSBE Opinion No. 98-23 (April 29, 1998); *Corey Williamson v. Board of Education of Anne Arundel County,* MSBE Opinion No. 97-20 (April 30, 1997); *Mecca Warren v. Board of Education of Baltimore County,* MSBE Opinion No. 96-16 (April 29, 1996).

It is evident based on the local board's decision to uphold the charges against T.G. that it found the live testimony of Mr. Zepp and Michael more credible than the live testimony of T.G. and his friend. Although Appellant cites portions of the transcript to support his position, we find the cited testimony insufficient to support a reversal of the local board's credibility determinations. At best, the cited testimony may demonstrate that the evidence in this case required the board to make certain credibility decisions in order to assess the events that took place between T.G. and Michael. As noted above, that is precisely the purview of the local board as trier of fact to resolve conflicts in testimony.

Reliability of Hearsay Statements

Appellant also opposes the consideration of statements made by the mother of Michael to school officials, claiming that it is unreliable hearsay. The proceedings in this case were not held

in a court of law. Rather, the proceedings consisted of a hearing before an administrative body which was not bound by the rules of evidence and in which hearsay evidence was admissible. *See, e.g., Travers v. Baltimore Police Dep't,* 115 Md. App. 395, 408 (1996); *Kade v. Charles H. Hickey Sch.,* 80 Md. App. 721, 725 (1989); *Eichberg v. Maryland Bd. of Pharm.,* 50 Md. App. 189, 192-193 (1981). The thrust of the mother's statements were that her son feared for his life because of T.G.'s threats. Appellant had ample opportunity to test the reliability of the hearsay in his cross-examination of Michael himself. (*See* T. 7-15). As noted above, the credibility of the mother's statements is a matter for the local board. Accordingly, we find that Appellant's argument with regard to the hearsay testimony lacks merit.

Sufficiency of Evidence

Additionally, Appellant argues that the evidence in this case does not support the charges of assault and battery, and deprivation by intimidation. Based upon our review of the record, it is unclear whether a battery (unwanted touching) occurred because Mr. Zepp intervened on time to prevent the incident from escalating.[6] Whether a battery occurred, however, is inconsequential to the ultimate decision of whether T.G.'s expulsion should be upheld. Both "assault and battery" and "assault" are Category II offenses holding the same penalty. *See* Policy 5550. The record discloses ample evidence of threats and intimidation by T.G. The testimony of Michael and Mr. Zepp is particularly instructive in this regard, although other evidence is supportive as well. (*See* Tr. 4, 26). We therefore find that the local board acted reasonably in upholding the superintendent's decision.

Alleged Violation of COMAR l3A.05.05.03

Appellant argues that COMAR 13A.05.05.03 was violated by the school's failure to change T.G.'s schedule upon his return to school in January after his expulsion. Appellant's theory seems to be that if the schedule change had been made, T.G. and Michael would have had different schedules, would not have been in the cafeteria at the same time, and the incident at issue would never have occurred. COMAR l3A.05.05.03A describes Pupil Personnel Programs as "a systematic approach to programs and services that use the resources of the home, school, and community to enhance the social adjustment of students," and are "designed to address a student's academic, personal, and physical needs by providing comprehensive casework management." COMAR 13A.05.05.03C sets forth various goals and subgoals for Pupil Personnel Programs. It is noteworthy, however, that there is no requirement in COMAR 13A.05.05.03 for any school to take any specific action for any particular student. Accordingly, we do not find that a violation of the regulation occurred.

Due Process Issues

[6]Michael did testify that T.G. tapped him on the shoulder. (Tr. 5). That tap might be construed as an unwanted touching.

(1) Appellant claims that T.G.'s due process rights have been violated because the local board did not require Michael to remain for the duration of the hearing in the event that Appellant wanted to re-examine him after other witnesses had testified. Case law including State Board rulings have followed the principle that students facing suspension or expulsion are entitled to confront and cross-examine teachers or administrators who accuse the student of wrongdoing, but confrontation and cross-examination of student accusers may be disallowed because of a concern for reprisals. *See, e.g., Paredes by Koppenhoefer v. Curtis,* 864 F. 2d 426, 429 (6th Cir. 1988); *Newsome v. Batavia Local School District,* 842 F.2d 920, 922-25 (6th Cir. 1988); *Brewer v. Austin In dependent School District,* 779 F. 2d 260, 263 (5th Cir. 1985)*; Marc Bazemore v. Baltimore County Board of Education,* MSBE Opinion No. 96-36 (September 25, 1996). Thus, the right to cross-examine and confront witnesses at administrative hearings concerning the suspension or expulsion of a student is not absolute, and due process does not require that. Additionally, an administrative hearing is not bound by the same technical rules of evidence and procedures of a court of law. *See Zengerle v. Board of County Comm'r for Frederick County,* 262 Md. 1, 21(1971); *Hyson v. Montgomery County Council,* 242 Md. 55, 69 (1966).

In this case, the primary student witness against T.G. did testify at the local board hearing and was subject to cross-examination by Appellant. Appellant, who was aware that one of the charges against his son was deprivation by intimidation, had every opportunity on cross-examination to inquire if Michael were afraid to attend school based on T.G.'s actions. Furthermore, the record discloses that in granting the request for Michael to be excused from the hearing at the conclusion of his cross-examination, presiding board member Kennedy indicated that although the hearing would continue, Appellant could raise questions regarding the need to recall Michael after all of the testimony in the case was heard.[7] (T. 16). However, the record discloses that even though he was given the opportunity, Appellant did not request to recall Michael. Accordingly, we find no violation of due process on this basis.

(2) Appellant further argues that his due process rights were violated based on actions of board members during the hearing. Specifically Appellant argues that board members improperly asked questions, made improper statements, and made improper rulings. As previously noted, an administrative hearing is not a court of law. The formal evidentiary rules and strict procedures required by a court are not mandated. Local board members act as fact finders in these proceedings and are entitled to question witnesses on matters relevant to the determination of whether the superintendent's decision should be upheld. Based on our review of the hearing transcript, we find that the local board conducted a proper and impartial hearing.

(3) Finally, Appellant opposes consideration of the statement of the guidance counselor, Ms. Sento, because Appellant was not afforded the opportunity to cross examine her as a

[7]If a request to recall Michael were made, the hearing could have been continued to an agreed upon future date.

witness.[8] Ms. Sento's statement addresses her meeting with T.G. upon his return to school after his prior expulsion and the ensuing discussion about his schedule. It also addresses her encounter with T.G. and Mr. Zepp in the cafeteria after the incident at issue. It is unclear exactly which aspect of the statement is being challenged. With regard to the scheduling matter, as previously explained, no violation of COMAR 13A.05.05.03 occurred, thus evidence concerning T.G.'s schedule is wholly irrelevant. As for the events that occurred between the two students in the cafeteria, Ms. Sento was not an eyewitness to that event; therefore her statement is immaterial in that regard as well.

CONCLUSION

Based upon our review of the record in this matter, we find no due process violations or other illegalities in the proceedings. We therefore affirm the decision of the Board of Education of Baltimore County.

Walter Sondheim, Jr.
President

Edward Andrews
Vice President

Raymond V. Bartlett

JoAnn T. Bell

Philip S. Benzil

George W. Fisher, Sr.

Morris Jones

Marilyn D. Maultsby

[8]Ms. Steno was not present at the hearing before the local board.

Judith McHale

Adrienne L. Ottaviani

John Wisthoff

July 28, 1999