

JANELLE KAHN,

Appellant

v.

BALTIMORE COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 99-47

OPINION

In this appeal, the mother of a student at Dulaney High School contests the expulsion of her daughter from Dulaney based on a violation of the school system's alcohol policy. Appellant argues that the local board's decision was arbitrary, unreasonable and illegal. The local board has filed a motion to dismiss the appeal for failure to state a claim. Appellant has filed a response in opposition to the motion.

BACKGROUND

During the 1998-99 school year, Janelle was in the eleventh grade at Dulaney High School. On her way to sixth period math class on April 15, 1999, Janelle allegedly asked an individual named Amanda for some of her beverage, which Amanda identified for Janelle as Mystic fruit punch. Amanda poured some of her drink into Janelle's sports drink bottle so that the bottle labeled lemon-lime now contained a red liquid.¹ Janelle sipped some of the beverage in the hallway on her way to class, but decided that she did not like it and put it away in her backpack. (Tr. 30).

During class, another student, James, saw the bottle in Janelle's backpack and asked Janelle for some of her beverage. Janelle told James that she did not like the drink and he could have it. (Tr. 30). The math teacher noticed James with the bottle and told him to put it away.² A few minutes later, the teacher noticed another student, David, drinking out of the bottle. At the teacher's request, James retrieved the bottle from David and put it away. The teacher then spotted a third student, Ryan, holding the same bottle up to his lips. The teacher confiscated the bottle and placed it on her cart. Several minutes later, the teacher noticed that the bottle was missing off of her cart. She retrieved it from James, and asked another teacher to take the bottle to an administrator. The three male students were called out of class and questioned. They revealed that the bottle originally came from Janelle. Janelle admitted that the bottle was hers and that she drank from its contents. However, she claimed that it was Mystic fruit punch given to

¹Janelle had just come from lunch and her bottle still contained several drops of the lemon-lime drink. (Tr. 35).

²Food and drinks are prohibited in the school's classrooms.

her by “Amanda.” (Tr. 30).

Assistant Principal Melinda Garvin took the beverage to the science teacher to conduct a test to determine the presence of alcohol. A waft test and a test for combustible substance were performed. The waft test was done by placing a small volume of the substance into a test tube and wafting the substance towards the teacher’s nose. The teacher indicated that there was a distinct alcoholic odor. The combustible substance test was performed by placing one milliliter of the substance into a test tube, heating it, and then passing a lit match over the top of the test tube so that if a combustible substance were present, the match would flare. This test was performed two times and in both instances the match flared when passed over the test tube. *See* Supt. Exhibit 2A.

The student discipline policy for Baltimore County Public Schools states in relevant part that “[t]he possession, use, distribution, or conspiracy to distribute alcoholic beverages or illegal drugs in any quantity is prohibited on property owned by the Board of Education, on school buses, or at off-site school-sponsored activities. Any student who violates the provisions of this policy shall be expelled from the regular day-school program” Knowledge that a substance is an alcoholic beverage is not a prerequisite to a finding of possession.

Based on the investigation, the principal suspended Janelle for possession of alcohol; use of alcohol, under the influence of alcohol, or showing evidence of having consumed alcohol; and refusing to cooperate with school rules and regulations. The principal also recommended that the superintendent expel Janelle for these offenses. After reviewing the matter and meeting with Janelle and her mother, the superintendent’s designee found Janelle guilty of all charges, and expelled her for violations of Baltimore County Board of Education Policy 5540 - Alcoholic Beverages and Drugs and 5550 - Disruptive Behavior.³ In a decision rendered on May 12, 1999, the local board upheld the decision of the superintendent’s designee.

ANALYSIS

The process afforded a student who has been suspended for more than ten days or expelled is set forth in Md. Code Ann. Educ. § 7-305. In accordance with this provision, Appellant received a full evidentiary hearing at the local level. County board decisions in such matters are considered final and the State Board is not permitted to consider an appeal on its merits. Md. Code Ann. Educ. § 7-305 and COMAR 13A.01.01.03E. Rather, the State Board’s review is 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. *Id.*

³Janelle was placed at Catonsville Alternative Center. The appeal materials do not indicate whether she has completed the requirements for reinstatement into the regular day school program at Dulany High School.

Appellant argues that Janelle's procedural due process rights were violated during the proceedings conducted at the school level and by the superintendent's designee. Although Appellant appealed the expulsion decision to the local board, the record discloses that Appellant is raising these due process issues for the first time before the State Board.

The State Board has consistently declined to address matters that have not been reviewed initially by the local board. *See Chase Craven v. Board of Education of Montgomery County*, MSDE Opinion No. 97-43 (October 29, 1997) (failure to challenge suspension before local board constituted waiver); *Theresa H. Fentress v. Howard County Board of Education*, MSBE Opinion No. 96-37 (September 25, 1996) (failure to challenge 5-day suspension before the local board constituted waiver). Accordingly, Appellant has waived her right to now assert due process issues that were not presented to and reviewed by the local board.

Moreover, even if Janelle's procedural due process rights were violated by the superintendent or by the school, any procedural error was cured by the full evidentiary hearing before the local board of education. *See Corey Williamson v. Board of Education of Anne Arundel County*, MSBE Opinion No. 97-20 (April 30, 1997) (failure to give prompt notice would be cured by local board's full evidentiary hearing on appeal); *Harrison v. Somerset County Board of Education*, MSBE Opinion No. 96-20 (July 30, 1996) (failure of superintendent to meet with student was cured by local board hearing); *West & Bethea v. Board of School Commissioners of Baltimore City*, MSBE Opinion No. 96-47 (December 10, 1996) (failure to hold conference within ten days was cured by the *de novo* hearing on merits before the local board).

In upholding the expulsion decision, the local board reviewed the totality of the circumstances in this case and made certain credibility decisions. While Janelle claims that the bottle contained Mystic fruit punch from Amanda, she has disclosed little information about Amanda, and is unable to locate her. The record also reflects that school officials stated that the liquid smelled like alcohol, and that students suspiciously passed the bottle around during class and shared its contents. The local board weighed the evidence, and determined that Janelle's testimony concerning the contents of the bottle was not credible.

Appellant argues however that the local board failed to demonstrate that the liquid in the bottle was an "alcoholic beverage" as defined by Policy 5540. The policy defines an alcoholic beverage as "**ale, beer, wine, whiskey, rum, gin, or any other spiritous, vinous, malt, or fermented liquor, liquid, or compound by whatever name called, containing one-half of one percent or more of alcohol by volume.**" (Emphasis added). Although testimony indicates that the substance in Janelle's bottle smelled like alcohol, and a match flared when the combustible substance test was performed on the substance, we find that none of these methods identified the substance according to the strict literal terms of the policy. The tests simply did not confirm the presence of "one-half of one percent or more of alcohol by volume." Furthermore, the science teacher's tests are not conclusive since no controls were used during the experiments. (Tr. 19). For example, the science teacher did not perform the waft test on warm Mystic fruit punch, nor did he test to determine if any combustible substances other than alcohol were contained in the

“fruit punch.”

In contrast, the principal, Dr. Hoffman, testified that when illegal drugs are discovered by school officials, the substance is handed over to the police who then test it. Unfortunately, this same procedure is not followed when alcohol is discovered by school officials. According to Dr. Hoffman, there is no need to test alcohol because the smell test is sufficient for school purposes. (Tr. 18-19). Given the definition of “alcoholic beverage” in Policy 5540, we find that the school’s position is flawed. If the policy defines the substance by percentage of alcohol per volume, we believe that it is necessary for laboratory analysis of the substance to include specific identification of the substance and percent of volume if a student disputes the identification of the substance as alcohol.

Relying on *Ryan Wilson v. Board of Education of Baltimore County*, MSBE Opinion No. 96-26 (June 25, 1996), in which the State Board upheld the expulsion of a student for alcohol possession and consumption, the local board argues that the sniff test was sufficient to identify the substance in this case as an “alcoholic beverage” pursuant to Policy 5540. In *Wilson*, a teacher on lunch duty noticed two students sharing the contents of a drink bottle and observed other peculiar student behavior. The beverage was confiscated, and the assistant principal identified the contents of the bottle as alcohol by smelling the drink. We find, however, that the crucial difference between *Wilson* and this case is that the student in *Wilson* identified the contents of the bottle as alcohol, either vodka or gin. Here, Janelle disputed that the substance was alcohol, claiming instead that it was Mystic fruit punch. Therefore, under a strict application of Policy 5540, we find that the local board has not conclusively demonstrated that the substance in Janelle’s bottle met the policy definition of “alcoholic beverage.”

CONCLUSION

For these reasons, we find that the local school officials did not meet their burden of proving the presence of alcohol in Janelle’s bottle as defined by Policy 5540. We therefore reverse the decision of the Board of Education of Baltimore County and direct the Board to take actions consistent with this decision with respect to Janelle’s status in the regular school program.

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