

TOMMY KUKA,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 00-51

OPINION

This is an appeal of disciplinary action imposed on a student based upon the student's involvement in creating a website in which fellow students were invited to participate in polls to rate certain female classmates on certain sexual traits. Appellant claims that the local board has no jurisdiction to discipline him for conduct that occurred off school grounds and that his actions are protected by the First Amendment right to freedom of speech. The local board has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Appellant has submitted an opposition to the motion.

FACTUAL BACKGROUND

During the 1999-2000 school year, Appellant was an 8th grade student at John Poole Middle School in Montgomery County. During the school year, an incident occurred involving the creation of a website by Appellant. As described by Appellant, the website is "a series of polls asking his fellow students to vote on the sexual attributes of certain named students at his school." *See* 7/31/00 letter of appeal to State Board. As stated in the local board's decision:

The website contained the names of six female students at John Poole Middle School, and persons logging on to the website were asked in one 'poll' to rate them [the six female students] as to who had the 'best boobs.' In a separate poll, persons logging on to the website were asked to identify which of the six female students listed in the question has the 'best booty.' Another poll question asked participants in the poll to identify which of the six identified John Poole Middle Students had the 'best (nice) big ass to stick your long schlong in.' The existence of the website was communicated within the student body at John Poole Middle School, and some of the girls identified in the poll complained to school officials that they felt everyone was looking at them, they were embarrassed, and in some cases did not want to come to school and did not.

Local board decision at 1.

In light of this information, Mr. Joseph Sacco, Principal of John Poole Middle School, met with Appellant to discuss the website. Appellant indicated that “he had not done anything wrong and that he was only joking.” Mr. Sacco did not perceive Appellant as being remorseful for his actions. Based on his investigation, Mr. Sacco suspended Thomas for ten days and recommended his expulsion “for a sexual harassment incident involving nine female students.”¹ See letter of 3/8/00 from Principal Sacco to Mr. and Mrs. Kuka.

Ms. Thelma Bates, Field Office Specialist, held an investigative conference on March 23, 2000 with the student, his parents and their attorney. Also present were Mr. Sacco and Ms. Sydney Hauser, Pupil Personnel Worker. In her conference report, Ms. Bates found as follows:

The material on the site used inappropriate, vulgar terminology pertaining to several girls in the school. They complained that they felt that every one [sic] was looking at them, that they were embarrassed and in some cases did not want to come to school and did not. Thomas did not see the harm of what he did. He basically stated he made the site because he wanted to. Ask [sic] why he had links to pornography sites, he stated because he felt like it. His parents state that he has periodic counseling, but Thomas stated he did not need it. He has been suspended just recently for burning a sweatshirt on the roof of the school building or behind it. . . . Last year Thomas made some kind of sexual statement to someone but usually he gets into minor things. He is an honor roll student. He said he would not do this again because his mother would get angry. However, it was very difficult to get him to make any statement that came close to his being sorry for the incident. He said he would write an apology.

Based on the investigation, the Supervisor of Pupil Services upheld the expulsion recommendation.

Consistent with due process requirements, the Deputy Superintendent’s designee, Mr. Arch W. Webster, conducted an investigation of the incident. A conference was held at which the student, his parents and their attorney were present.² Mr. Webster recommended that the ten day suspension stand, that the recommendation for expulsion be held in abeyance, and that Thomas be assigned home teaching through the home and hospital teaching office for the remainder of the 1999-2000 school year. The Chief Operating Officer (“CEO”) upheld the recommendation,

¹The record variously refers to six or nine female students.

²Also present were Mr. Sacco; Ms. Stephanie Curry, Student Support Specialist; and Ms. Hauser.

indicating that if Thomas were successful in the home teaching program, he would be permitted to attend his assigned high school for the 2000-2001 school year provided that he and his parents sign a code of conduct contract dealing specifically with the use of computers.

Appellant appealed to the local board the CEO's decision assigning Thomas to home and hospital teaching for the remainder of the 1999-2000 school year. In response to the appeal, the Superintendent submitted a memorandum stating in part:

[I]t is my judgment that the decision to assign Thomas to home teaching for the remainder of the 1999-2000 school [year] was appropriate. Mr. Rand's [Appellant's attorney] comments about the female students and their parents forgiving Thomas' actions are not consistent with the direct contacts Mr. Sacco had at the time of the incident or while investigati[ng] it. There is no question that time is often a healer, but in this incident time is not an appropriate palliative. The facts are clear that Thomas conducted a sexually oriented poll on his Web site that affected the lives of nine female students who were never given the opportunity to decide whether or not they wanted to participate. Dr. Seleznow took into consideration many of the points raised in this appeal before he made his decision. It was for those reasons that he chose not to expel Thomas as was recommended by the principal. I concur with that decision and also agree with Dr. Seleznow that the home teaching assignment was clearly the most appropriate course of action, and I recommend that his decision be upheld. If Thomas is not involved in further serious incidents, he will be permitted to attend his regularly assigned high school next fall.

A seven member majority of the local board found the discipline in the case appropriate and upheld the CEO's decision based on the reasons contained in Mr. Webster's April 11, 2000 memorandum and the Superintendent's May 9, 2000 memorandum. One board member dissented because it was not clear to that member that there was a health or safety issue warranting discipline by the school system.

ANALYSIS

A decision of a local board with respect to a student suspension or expulsion is considered final. Md. Code Ann., Educ. § 7-305. Therefore, 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. COMAR 13A.01.01.03(E)(4)(b).

Off Campus Conduct

Appellant argues that the local board lacks jurisdiction to discipline him for conduct that occurred off school grounds. However, in *Schlamp v. Howard County Board of Education*, 7 Op. MSBE 27 (1995), the State Board described the principles that must be applied to determine the validity of school regulation of off campus conduct: whether the conduct being regulated had a direct effect on the order and general welfare of the school and whether the regulation of the conduct was reasonable in scope. Since the issuance of the *Schlamp* opinion, the State Board has repeatedly recognized the authority of a school system to discipline a student for off campus behavior under the principles enunciated in *Schlamp*. See *William Arnold v. Carroll County Board of Education*, MSBE Opinion No. 99-41 (September 22, 1999) (upholding school system's authority to discipline student for non-school-sponsored activity off of school grounds); *Pickett v. Montgomery County Board of Education*, 7 Op. MSBE 1302 (1998) (upholding school district's authority to discipline student for non-school-sponsored activity off of school grounds); *DiGiacomo v. Board of Education of Montgomery County*, 7 Op. MSBE 87 (1995) (upholding disciplinary action imposed on student for actions off school property).

Applying the principles enunciated in *Schlamp* to this case, we believe that the conduct being regulated had a direct effect on the order and general welfare of the school, and that the scope of regulation of the conduct was reasonable. Here, local board policy JFA on student rights and responsibilities clearly states that “[s]tudent conduct that disrupts class work, involves disorder, or invades the rights of others will not be tolerated and may be cause for suspension or other disciplinary action.” Policy JFA at C.16(b). Policy JFA further provides that students may be penalized for activities unrelated to school that are carried on outside of school hours and away from school grounds if the principal reasonably believes that the health or safety of others will be compromised in the school setting. Policy JFA at C.16(d)(4). In addition, local board policy ACF on sexual harassment advises that the local board will not tolerate inappropriate sexual conduct which includes “verbal, written, or physical conduct of a sexual nature . . . [w]hen such conduct has the effect of unreasonably interfering with the individual’s work and/or academic performance or creating an intimidating, hostile or offensive work or learning environment.”

In its decision, the local board stated in pertinent part,

While the specific act of Thomas Kuka in creating a web site took place off the campus of John Poole Middle School, it is clear that [his] activities were directly related to the school and were designed to, and did cause embarrassment and humiliation to a number of students, thereby interfering with their learning experience and causing emotional distress to them. Under the circumstances, it was more than appropriate for the principal to conclude that such activities were both related to school and, even if not, that the emotional health or safety of others would be compromised in the school setting.

Local board decision at 2. We believe that the record in this case supports the local board's conclusions. Given the overlay of the sexual nature and sexual harassment of the communications, we view Appellant's conduct as disruptive, invading the rights of others, and creating an intimidating or offensive environment at school for the young women who were subjects of the polls. The young women had a right to be free from sexual harassment as set forth in local board policy. Appellant's conduct jeopardized the emotional health and well being, and could have jeopardized the physical safety of the young women at issue. Additionally, his conduct had the potential to impede learning and did humiliate fellow students before their peers in the school environment. Under these circumstances we find that the suspension for 10 days followed by home and hospital instruction for the remainder of the semester was reasonable. We therefore believe the *Schlamp* principles were satisfied.

Freedom of Speech

This case is complicated by the fact that the conduct here impacts the First Amendment right to freedom of speech and involves the speech of a student communicated to others via the Internet. Before the advent of the Internet, written speech was never disseminated as widely or as readily as it is today. Now, information can be disseminated to locations all over the world with a computer and the mere click of a button. This technological advance presents new dilemmas in the free speech context because there may be serious repercussions within the school environment even though the Internet is being used outside of the school.

Appellant claims that the content of his website is protected by the First Amendment and that the local board violated his right to freedom of speech by upholding the disciplinary action against him. It is well established, however, that while students are entitled to free speech rights in the school setting, those rights are subject to certain limitations based on the special characteristics of the school environment. See *G.F. v. Anne Arundel Board of Education*, 7 Op. MSBE 1336 (1998). One such limitation on the free speech rights of students is that schools are permitted to prohibit speech if the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 513 (1969); accord, *Bethel School District v. Fraser*, 478 U.S. 675 (1986). See generally *Thomas v. Board of Educ., Granville Cent. Sch. Dist.*, 607 F. 2d 1043, 1052 n.17 (2nd Cir.) (describing circumstances in which free speech rights may be appropriately limited by school officials because students incite disruption within the school from a remote locale).

In this case school officials found that the Appellant's website conduct amounted to sexual harassment of the targeted female students. Some of the young women complained to the principal that they felt violated because of the content of the website. Distressed parents contacted the principal about the incident. Additionally, at least one female student became physically ill and did not come to school as a result of the incident. See 4/11/00 hearing officer report and 3/23/00 investigative conference report. The principal believed that Appellant's actions embarrassed, humiliated and emotionally disturbed various students and interfered with

their ability to attend school free of unwanted attention of a sexual nature.³ See 5/9/00 memorandum from superintendent to local board. The record supports the fact that students and parents were upset by the website and that the school administration was required to use both time and resources to address the situation. It is therefore not unreasonable to conclude that under these facts, the school principal reasonably found a substantial disruption of or a material interference with school activities.

For all of these reasons, we do not believe that the local board's decision violated Appellant's free speech rights. See *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Cmwlth. 2000) (finding no violation of student's free speech rights by school authorities who disciplined student for creating website at home containing threatening and derogatory comments about teacher and principal); *Aziz Barimani v. Montgomery County Board of Education*, MSBE Opinion No. 00-30 (July 25, 2000) (upholding a ten day suspension and placing a student on home instruction for the remainder of the semester for creating and maintaining a web site from home on which fellow students posted death threats and obscene statements toward other students at the school.)⁴

CONCLUSION

For the reasons noted above, we find that the local board had jurisdiction to discipline

³In his appeal to the State Board, Appellant has included letters from four of the families of the targeted female students written several months after the incident. These individuals have belatedly expressed their willingness to forgive Appellant for his actions and have offered their opinions regarding the appropriateness of the disciplinary action imposed on Appellant. These letters, however, do not minimize the impact and severity of Appellant's actions at the time of their occurrence, and are contrary to the complaints and other information initially received by the principal.

⁴With regard to Internet communications by students, some communications may be protected by the First Amendment and therefore would not be subject to disciplinary action by school authorities. For example, in *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp.2d 1175 (E.D. Mo. 1998), a student had created a personal Internet homepage from his home computer which was critical of the school administration. The court found that the school principal did not discipline the student based on a fear of disruption or interference with school discipline, reasonable or otherwise. Rather, the principal by his own testimony indicated that he disciplined the student because he was upset with the content of the homepage. *Id.* at 1180. Pursuant to *Tinker*, merely being upset with the content of the communication is not an acceptable justification for limiting student speech. The communication must cause some substantial disruption or material interference with school activities or reasonable fear thereof.

Appellant and in doing so did not violate Appellant's free speech rights.⁵ We therefore affirm the decision of the Board of Education of Montgomery County.

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December 5, 2000

⁵While the content of the website might possibly be viewed as obscene in which case there would be no First Amendment protection, because of the subjective nature of obscenity, we have decided this appeal using the *Tinker* analysis for regulation of non-school sponsored speech by a student.