TANYA JOHNSON,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS,	OF EDUCATION
Appellee	Opinion No. 02-41

OPINION

Appellant challenges the denial of an opportunity to appeal an expulsion from Lakeland Elementary/Middle School of sixth grader Tanora Johnson for assaulting a teacher. The local board has filed a Motion to Dismiss maintaining that the appeal is moot and that the Appellant failed to file a timely appeal before the local board. Appellant has filed an opposition to the Motion claiming that the appeal is not moot and that the local board violated its own rules by not attempting to modify Appellant's behavior before suspending her, by not providing a determination of discipline within ten school days of removal, and by not notifying Appellant of the discipline imposed via certified mail.

FACTUAL BACKGROUND

Appellant Tanora Johnson was a sixth grade student at Lakeland Elementary/Middle School in the 2001-2002 school year. On October 4, 2001, she got into an altercation with her art teacher. According to the art teacher, Tanora jumped out of her seat overturning her chair, knocked all her belongings off her desk, and tore up the art work of another student. She then shoved the teacher out of the way in attempting to leave the room, and in doing so, injured the teacher's arm, drawing blood. (Incident Report of teacher, 10/4/21 and Suspension Report, 10/24/01). The teacher went to the Baltimore City Clinic for treatment. (Motion to Dismiss, p.1).

According to Appellant, she was attempting to leave the room to avoid a confrontation with the teacher and only "bumped shoulders" with the teacher. (Suspension Report). Appellant's mother came to the school and requested that an administrator talk to the students who saw the incident but the administrator denied this request. (Suspension Report). The administrator informed Appellant that she was being proposed for a long term suspension, and that she would receive a conference with the Office of Attendance and Suspension Services. A letter would follow with the date and time of the conference.

On October 17, 2001, Ms. Toby Epstein of the Office of Attendance and Suspension Services held a conference with Appellant, her mother, and counsel for Appellant. After reviewing the incident, Ms. Epstein placed Appellant on long term suspension, pending the Chief Executive Officer's decision regarding the proposed expulsion. Appellant and her mother signed a referral for home teaching, a letter informing Appellant that the suspension was upheld and that

she was being referred to the CEO with a recommendation for expulsion, as well as a letter noting that she had a right to appeal the final suspension decision. (Referral for Home Teaching, letter upholding suspension, and Notice of Right to Appeal.) The Referral for Home Teaching and the letter recommending expulsion noted Appellant's address as 3021 Huron Street. In mid-November, Appellant and her mother moved to 2752 Druid Park Drive. Appellant's mother did not notify the school of the change in address. Appellant's mother stated that she returned to the Huron Street address frequently to retrieve her mail after the move and that she never received a letter from CEO Russo at the Huron Street address. (Sworn Affidavit of Tanya Johnson, 5/23/02).

On January 3, 2002, counsel for Appellant wrote to CEO Russo, inquiring why Appellant had not received a letter with a final decision on her expulsion. (Letter of January 3, 2002). She also wrote a letter to both Ms. Russo and Mr. Williams, Managing Director of the Office of Suspension Services, requesting an appeal. (Letter of January 3, 2002). On January 14, 2002, Ms. Epstein informed Appellant that CEO Russo had sent out the letter upholding the expulsion on October 30, 2001.

A letter postmarked January 14, 2002, was sent to Appellant at the Huron Street address, informing Appellant that a conference was scheduled for her reinstatement to school on January 17, 2002. The conference was held on January 17, 2002 with Ms. Epstein at which time Appellant was told she could return to school. Appellant indicated to Ms. Epstein that she had moved and Ms. Epstein recommended returning her to her new zoned school.

On January 22, 2002, the letter concerning the reinstatement conference was returned as not deliverable at the Huron Street address. On February 4, 2002, Appellant's counsel wrote again to CEO Russo, explaining that her client never received the final determination concerning her suspension/expulsion and again requesting an appeal. On February 14, 2002, counsel for Appellant spoke with counsel for the local board concerning the appeal. He referred her to Ms. Judith Donaldson, Board Executive. (Letter of Appeal, p. 2). On February 19, 2002, Ms. Donaldson left a message with Appellant's counsel that Appellant's record would not be expunged and that since Appellant had been reinstated to school, her request for an appeal was denied. (Letter of Appeal, p. 2).

ANALYSIS

The decision of the local board with respect to a student suspension or expulsion is considered final. Md. Educ. Code Ann. § 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).

Appellant contends her appeal is not moot. She also alleges the actions of the local board were illegal because the local board failed to follow its own rules in that it did not attempt to modify the student's unacceptable behavior prior to suspension, it did not make a determination

on the discipline within 10 school days of the removal, and it did not send notice via certified mail.

1. Mootness

It is well established that a question is moot when "there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the courts (or agency) can provide." *In Re Michael B,* 345 Md. 232, 23 (1997); *see also Bonita Mallardi v. Carroll County Board of Education*, MSBE Opinion No. 00-07, (February 3, 2000); *Walter Chappas v. Montgomery County Board of Education*, MSBE Opinion No. 98-16 (March 25, 1998).

The local board argues that the case is moot because the Appellant has returned to school after serving the expulsion and an appeal "cannot offer any remedy." (Motion to Dismiss, p.8). However, Appellant indicates that the expulsion remains on her school records and if the disciplinary action were reversed on appeal, she would have the right to have her records expunged. (Response to Motion, p.10). Therefore, because there is a remedy that may be provided, we find that the case is not moot.

2. Modification of Behavior

Appellant argues that under Board Rules 506.02 and 505.01, the administration must attempt to modify the student's behavior prior to suspension or expulsion and take into consideration factors such as the severity of the offense, frequency of offense, situation, age and decision-making capacity of the student and the like. Appellant alleges that there is no evidence that the school administration took any steps to modify her behavior before suspension or expulsion. However, her claims that the school did nothing are not supported by any affidavit or other evidence.

The local board asserts that due to the severity of the incident, suspension was warranted in light of Appellant's record. The local board further notes that:

> It was not Appellant's first day of "problems". The altercation occurred only one month into the school year (October 4). On eight previous occasions in that month-old school year, Appellant's teacher had contacted the student's mother about inappropriate behavior. The sixth grade team met with the mother to discuss and review Appellant's behavior and progress in school. The assistant principal, Mr. Robert Webb, also spoke to the mother on several occasions about appellant's behavior.

(Motion to Dismiss, p. 7).

Unfortunately, there is no local board decision or transcript on which to base a decision on this issue. Moreover, the board offers no affidavits from the assistant principal or from any teachers, or other evidence such as discipline logs to support the allegations in its Motion. We find that the record is therefore inconclusive on this issue.

3. Determination within Ten School Days of Removal

The local board argues that it followed Board Rule 507.09 that requires that a conference be held and a determination be made on the discipline within ten school days of the student's removal from school. Here, the Appellant was removed from school on October 4, 2001. A conference was held with Ms. Epstein on October 17, 2001, within the ten school day rule. At that time, Ms. Epstein, the CEO's designee, upheld the recommendation for suspension. Thus, we find that the determination as to discipline was made within the ten school day period.

Appellant argues that the final determination on expulsion was not made until CEO Russo's letter of October 30, 2001, beyond the ten school day rule. However, a decision was made on the long term suspension within ten school days. The rule does not require that any further discipline, such as expulsion, occur within the ten school day period. Therefore, we believe that the local board correctly followed its own rules on this issue. However, since the rules are somewhat confusing, we urge the local board to clarify its rules to avoid further litigation on this issue.[1]

4. Proper Notice to the Appellant of Right to Appeal

Appellant argues that the local board should have followed the procedures in Rule 407.05, which requires that notice be given by certified mail. The local board argues that it properly served notice of the CEO's final decision on expulsion by regular first class mail pursuant to Rule 507.05. While an agency is generally entitled to deference in the interpretation of its own rules, *MTA v. King*, 2002 WL 1271895 (June 10, 2002), in this case, the local board has failed to address Appellant's argument that Rule 407.05 should have been followed.

From our review of the record, we believe that three different board rules govern long-term suspension and expulsions. Local Board Rule 407.05 A provides in pertinent part:

> An Area Executive Officer, after review with the school principal, may recommend the long-term suspension or expulsion of a student to the CEO....A copy of the written recommendation to the CEO shall be provided to the parents, guardians and/or student. The parent, guardians and/or student shall also receive notice of the procedures to challenge the recommended disciplinary action. **This**

[1]This is not the first time that appellants have raised the issue of whose determination must be made within ten school days of removal. *See Jonathon Heriot-Fitzsimmons v. New Board of School Commissioners for Baltimore City,* Op. MSBE 02-26, p. 4 (June 26, 2002).

notice shall be provided by certified mail. (Emphasis added.)

The letter from Area Executive Officer Barry Williams, dated October 26, 2001, that recommended that Appellant be expelled was not sent certified mail to Appellant nor did it give notice of the procedures to challenge the recommended disciplinary action.

Section 407.05 B provides:

> Parents, guardians and/or students shall request a hearing with the New Board to challenge *proposed* long-term suspensions or expulsions within 10 business days after the written notice advising of the *proposed* disciplinary actions is received. If the parents, guardians and/or students fail to timely request a hearing, the CEO shall approve or disapprove the recommended disciplinary actions based upon information supplied by the principal and the Area Executive Officer. **A letter confirming the action taken by the CEO shall be sent to the parents, guardians and/or student by certified mail.** (Emphasis added.)

These provisions appear to indicate that parents, guardians and/or students have a right to appeal the *recommended* disciplinary action. Appellant was not notified of this right in this case. Moreover, the rule also requires that a letter confirming the CEO's action must be sent by certified mail. We find that that was not done in this case.

Rule 507.05 also governs long-term suspensions and expulsions. Pursuant to Rule 507.05, it is the *final* decision of the CEO that must be appealed within ten days of the date of her decision. Under the section entitled "Notice of Decision", the rule provides that:

> The decision of the Chief Executive Officer or his/her designee shall be in writing and shall be mailed or hand-delivered immediately upon its issuance to the student and parent(s), and to the principal who recommended the long-term suspension.

In the section entitled "Right of Appeal", the Rule provides:

> The decision of the Chief Executive Officer regarding a suspension under this section may be appealed by the student, parent or guardian if made in writing to the School Board within ten (10) days of the date of the Chief Executive Officer's decision. The specific appeal process is outlined in Section 407.

The local board claims that since they mailed the CEO's final decision by first class mail rather than certified mail as is permissible under Rule 507.05, it has not violated its own procedures. However, the local board does not address the fact that both rules refer to the procedures set out in 407 which require certified mailing.

Principles of statutory construction apply to rules as well as statutes. *In Re Victor B.*, 336 Md. 85 (1994). Statutory interpretation requires that the statutes:

> must be read together, i.e., interpreted with reference to one another, and harmonized to the extent possible both with each other and with other provisions of the statutory scheme. Neither statute should be read, however, so as to render the other, or any portion of it meaningless, surplusage, superfluous or nugatory. (Citations omitted).

Mayor & City Council of Baltimore, 360 Md. 505, 129-30, (2000).

Rule 507.05 requires that the decision of the CEO shall be in writing and mailed or hand-delivered to the students, parents, and principal. Both Rule 507.05 and Rule 507.06 direct that the specifics of the appeal process are to be found in Rule 407.05. Rule 407.05 requires notice to the parents and students via certified mail. To harmonize these two rules, we believe that the "mailing" referred to in Rule 507.05, when read in conjunction with rule 407.05, requires that the notice of the decision be sent to the parents via certified mail.

The local board concedes that it did not mail the CEO's decision by certified mail. It also offers no evidence to support its assertion that the Russo letter of October 30, 2001 was actually mailed. The local board argues that it was Appellant's responsibility to keep the local board informed of her correct address and that return of the certified letter as undeliverable would not have provided notice to Appellant. However, Appellant produced a sworn affidavit from her mother indicating that even though the family had moved, a letter sent by regular mail on October 30, 2001 would have reached her in a few days since she did not move until mid-November. She also swore to the fact that she regularly stopped by her old address and checked for mail and never received a letter from CEO Russo.[2]

We believe that the *Accardi* doctrine applies in this case.[3] That doctrine mandates that "[a]n agency of the government must scrupulously observe rules, regulations, or procedures

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[2]The local board also indicates that "it was not until the January 8, 2002 letter from Ms. Epstein was returned...that there was any indication that Appellant's address had changed." It claims that the letter was returned on January 22, 2002. However, the local board knew from the letter of January 4, 2002 from Appellant's counsel that there was a question as to whether Appellant had received CEO's Russo's final decision. And by January 22, 2002, the school system had already held a return conference with Appellant on January 17, 2002, and returned Appellant to her zoned school *in her new neighborhood.* While it is unclear how the local board successfully contacted Appellant to invite her to the return conference, it is clear that at the latest on January 17, 2002, the local board knew that Appellant had moved.

[3]*U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

which it has established." *See Bd. of Ed. of A.A. Cty. v. Barbano*, 45 Md. App. 27, 41 (1980). When an agency fails to do so, its action can not stand. *Id.* "This principle applies to regulations that are intended to confer important procedural benefits upon an individual as opposed to regulations adopted to ensure the orderly transaction of business before the agency." *Singletary v. Maryland State Dept. of Public Safety and Correctional Services*, 87 Md. App. 405, 418-19 (1991). We believe that the requirement to notify a student by certified mail of a final disciplinary action as stringent as a long-term suspension or expulsion provides a procedural safeguard for the student. The local board acknowledges that it did not provide notice by certified mail and fails to offer any corroborating evidence that staff actually mailed the letter of October 30, 2001. Therefore, we find that the local board violated its own rules.

CONCLUSION

For these reasons we are remanding this matter to the Baltimore City Board of School Commissioners for the scheduling of a hearing on the merits of the long-term suspension.

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