

MICHAEL M [REDACTED],

Appellant

v.

HARFORD COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 05-25

OPINION

This is an appeal of an expulsion of the Appellant's son B.M. from Joppatowne High School, for the period from December 15, 2004 through the balance of the school year. The student was expelled because he physically pushed a teacher and violated his previous "re-entry contract."¹ In his appeal, the Appellant contends his son did not physically touch the teacher; the investigation that the school system conducted was not thorough; and Appellant's son followed the teacher's order to go to the principal's office. The Appellant asserts that the local board's decision to expel his son was thus arbitrary, unreasonable, or illegal.

The local board has submitted a response to the appeal and a motion to dismiss and/or for summary affirmance asserting that the Appellant has made no factual or legal showing that the local board failed to follow the law and local policy, violated the student's due process rights, or acted in an unconstitutional manner. The Appellant has filed a reply opposing the board's position.

FACTUAL BACKGROUND

Appellant's son was a twelfth grade student at Joppatowne High School at the beginning of the 2004-2005 school year. On October 13, 2004, after a ten day suspension, the student and his parents signed a re-entry contract in which B.M. promised, among other things, to comply with orders of the administration and staff. On December 14, 2004, he was involved in an incident in the Child Development Laboratory which led to his expulsion. According to the teacher:

One of the little kids bit [B.M.]. B.M. knocked the hat off of the child in anger. I put the child in time out and told B.M. to go sit in the hall. B.M. slammed the door twice on his way out. I told him to go to the office. He started to go then turned around and started banging on the classroom door. I opened the door and told him to

¹A re-entry contract is signed by the student and parent in order for the student to return to school after a suspension. Appellant's son had been suspended from 9/29/04 - 10/31/04 for a drug infraction. See Exhibit 2.

go to the office. He pushed me out of the way and walked into the classroom to get his binder. He continued to push me out of his way on the way out of the room. I cannot have B.M. in this room since he cannot control himself and physically pushes a teacher.

(Response to Appeal, Exhibit 2).

According to B.M.:

The child, Christopher, bit me in my hand so I told Ms. Ordes. She said, "He's just a kid and it didn't matter." So I told him that it was bad and I was playing around with him and knocked his hat off. So then Ms. Ordes yelled at me and told me to sit outside. So when I walked out the door it slammed shut. When that happened she told me to go to the office so I went to try and get my books out of the classroom and she blocked the doorway so I reached over top her arm and grabbed my books and walked to the office.

(*Id.*)²

As a result of that incident, the principal suspended B.M. for 10 days for "violation of school rules . . . pertaining to Code 401, Physical Attack - Teacher/Staff." According to school policy, such violation required referral to the Superintendent for further action. (*Id.*, Exhibit 6). A conference with B.M., Mr. & Mrs. M██████████, and the superintendent's designee initially scheduled for December 22, 2004, took place on January 5, 2005.

On January 5, 2005, after reviewing the referral and investigation report, the Superintendent informed Appellant that she had "decided to suspend [Appellant's] son for the remainder of the 2004-2005 school year." (*Id.*, Exhibit 7). That letter does not set forth the specific reason for the suspension.

A hearing was held on February 16, 2005 before the Harford County Board of Education. On February 18, 2005, counsel for the local board informed the Appellant by letter that the local board had "decided to uphold the Superintendent's . . . decision" because it had "found as a fact, based on the evidence presented, that [B.M.] had committed the infractions which are more fully set forth in Superintendent's Exhibit 1." (*Id.*, last exhibit, unnumbered). On March 18, 2005, this appeal was timely filed.

²If B.M.'s version of the incident were accurate, we would be troubled by the teacher's handling of the behaviors displayed. In that regard as a preventive measure, we request the local superintendent to review with staff appropriate behavior management techniques used in the child development laboratory classes.

STANDARD OF REVIEW

In student suspension and expulsion cases, the decision of the local board is considered a final decision. Md. Code Ann., Education § 7-305(c)(7). Therefore, the State Board may not review the merits of the suspension or expulsion. COMAR 13A.01.05.05G(2). The State Board will, however, review the local board's decision if the Appellant makes "specific factual and legal allegations" that the local board failed to follow the state or local law or policies; violated the student's due process rights; acted in an unconstitutional manner; or that the decision was otherwise illegal. *See* COMAR 13A.01.05.05G(2)&(3). A decision is illegal if it is unconstitutional; exceeds statutory authority; misconstrues the law; results from unlawful procedures; is an abuse of discretion; or is affected by other error of law. COMAR 13A.01.05.05(C).

If the State Board finds in favor of the Appellant, it may reverse or modify the suspension. COMAR 13A.01.05.05(G)(3).

ANALYSIS

The Appellant contends in his appeal that at the hearing the teacher stated that she was not "physically attacked." He also contends that the teacher stated that "the only reason that we are here is because [the student] allegedly swung at a child not that she was attacked." There is, however, no transcript of the hearing from which to confirm that testimony. According to the local board, the audiotape was inaudible. The Appellant therefore appears to allege that the local board's decision is illegal because there was no evidence to support it given the teacher's alleged testimony at the hearing that there was no physical attack.

The unavailability of the transcript to verify that testimony is generally problematic.³ In Maryland courts, if the absence of complete transcript would absolutely preclude meaningful appellate review, courts will, in those rare cases, order a new hearing or trial. *Bradley v. Hazard Technology*, 340 Md. 202, 213 (1995). Before doing so, however, "an appellant should be required to demonstrate . . . that the missing portion is relevant to the appellate issues raised . . ., [and] must make diligent efforts to reconstruct the missing portion of the record through the use of affidavits and stipulations with the opposing party." *Id.* at 211.

In this case, we believe that it would be unfair to this *pro se* Appellant to impose on him the burden of reconstructing the record. As we have pointed out, it is the local board's

³We point out that it is the responsibility of the local board to transmit the entire record of the hearing to the State Board, including a transcript of the proceedings. COMAR 13A.01.05.03(E).

responsibility to produce the transcript based on an audible audiotape.⁴

A reconstructed record is only required, however, if the missing portion is material to the appellate issues. In this case, it is arguable that if in fact the teacher's testimony were that there was no physical attack, the reconstructed record would be material and dispositive of the validity of that reason for suspension. There was, however, an additional reason for the suspension - - the student, by his behavior, had violated a previous re-entry contract.

On October 13, 2004, the student and his parents signed a re-entry contract after a 10 day out of school suspension was completed.⁵ In that re-entry contract, the student agreed to "comply with the direction of the principal and staff" concerning school rules and procedures. (Exhibit 5, attached to Response to Appeal).

The student's own statement supports the fact that he did not comply with the teacher's direction. He stated that the teacher told him to report to the principal's office but, prior to doing so, he returned to the classroom for his books, specifically ignoring the teacher's admonition not to re-enter the classroom. (*See* Exhibit 2, attached to Response to Appeal).

Whether he subsequently pushed her or shoved her remains an open question. Superintendent's Exhibits introduced at the hearing contain statements that set forth somewhat conflicting views of the incident. The teacher said the student pushed her aside; the student said he made no physical contact with the teacher; one student wrote that B.M. "kinda pushed" the teacher back so he could get his books; another student wrote that B.M. "shoved her [the teacher] aside to get his books and then he left." Other student witness statements neither confirm nor deny that fact.⁶ (*See* Exhibits 1-3).

Moreover, it appears that the Superintendent's reason for suspension was primarily that the student had violated the re-entry contract. Indeed, at the hearing Superintendent's Exhibit 1, contained the following recommendation:

⁴Thus, if we were to decide that reconstruction of the record were necessary, we would recommend that the task be assigned to counsel for the local board working cooperatively with the Appellant.

⁵In his reply, the Appellant questioned the "legality and constitutionality" of the re-entry contract. No facts were offered to support such a challenge to the contract. On its face, we find it both a legal and constitutional document.

⁶The Appellants have contended that the school's investigation of the incident was not thorough. The record, however, contains statements from seven witnesses, the student, and teacher. We find the investigation to have been quite thorough.

- a. The student has violated his recent reentry contract with the superintendent as it pertains to condition 1. [sic] In which he agreed to comply [sic] the directions of the principal and staff.
- b. The student has met his graduation requirements for HCPS.
- c. Because of his actions and the violation of his contract, the pupil has forfeited his right to participate in any privileges or extra activities available to the other students.
- d. The student's suspension should be extended for the remainder of the school year and he be allowed to complete his exams and participate in the graduation ceremonies with his home school.

(Exhibit 1, p. 2).

The local board stated in its letter upholding the expulsion that it relied on Superintendent's Exhibit 1 to provide the basis for its decision. Thus, even though there is no transcript, given Superintendent's Exhibit 1 - the four page long term suspension report, the re-entry contract, and the student's own statement, we find that the record contains sufficient documentation to allow this Board to conduct a meaningful review of this case in order to determine whether any illegality occurred in the decision-making process.

In our opinion, the only possible illegality would have been an abuse of discretion on the part of the local board in upholding an expulsion based on no evidence of wrong doing. That is not the case here. Whether or not there was a physical attack on the teacher, there was evidence that the student violated the re-entry contract and that that was one of the reasons for the expulsion. There is no evidence presented by the Appellant that the local board failed to follow state and local law and policies, violated due process, or acted in an unconstitutional manner.

CONCLUSION

For the reasons described above and finding no due process violations or other illegalities in the proceedings, we affirm the disciplinary decision of the Harford County Board of Education.

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July 20, 2005