

M.S.

Appellant

v.

MONTGOMERY COUNTY  
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 20-04

## OPINION

### INTRODUCTION

M.S. (Appellant) appeals the decision of the Montgomery County Board of Education (local board) to affirm his five-day suspension from Winston Churchill High School for race-based harassment.<sup>1</sup> The local board filed a Memorandum in Response. Appellant responded and the local board replied.

### FACTUAL BACKGROUND

During the 2018-2019 school year, Appellant was an eleventh-grade student at Winston Churchill High School. (Motion, Ex. A). On Friday, February 8, 2019, Appellant and a group of friends were eating lunch in an upstairs hallway. *Id.* Appellant shared five copies of a “Willy Wonka N-Word pass” with his friends that he printed and brought to school. *Id.*

The passes became a topic of conversation among other groups of students who were lunching in the same area as Appellant. A student not associated with Appellant’s group approached one of Appellant’s friends to see what was going on. (Appellant Response, Ex. Student 10 Statement; M.S. Affidavit). Upon reading the pass, she became upset, tore the pass up, and dropped it on the floor. *Id.* Later that day, multiple students reported the passes to the counselor’s office. (Motion, Ex. A; Appellant Response, Ex. Student 10 Statement).

Principal Brandice Heckert, learning of the incident that day, directed Assistant Principal Dr. La Faye Howard to conduct an investigation. (Motion, Ex. A). Student statements were collected, and security footage was viewed. Dr. Howard identified Appellant as one of the students involved. (Motion, Ex. B). Dr. Howard, in the presence of two members of the school security staff, questioned Appellant. Dr. Howard told Appellant that she had confirmed he was involved through security footage. She asked him to make a written statement. (Motion, Ex. B). Appellant acknowledged that he and his friends were joking around at lunch, but he declined to complete a written statement. (M.S. Affidavit; Motion, Ex. B).

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<sup>1</sup> Appellant filed a Motion for Discovery. The regulations for appeals to the State Board do not provide for discovery. Thus, the Motion is denied.

Principal Heckert instructed Assistant Principal Stephen Reck, Appellant's grade-level administrator, to contact Appellant's mother to inform her of the incident, tell her that Appellant was involved, and to request a meeting for Monday, February 11, 2018 with Appellant and his mother. (Motion, Ex. A).

Later on February 8<sup>th</sup>, school personnel contacted Appellant's mother, and scheduled a meeting for February 11<sup>th</sup>. That same evening, Principal Heckert sent an email to the school community advising them that a "racist and ignorant incident" had occurred at school that day, and that the school administrators, as well as Montgomery County Police Department, were investigating the matter. *Id.*

On Monday morning, February 11, 2019, Appellant and his mother met with Dr. Howard and Mr. Reck at the school. They showed Appellant and his mother part of the school's security video, and Mr. Reck informed them that Appellant was suspected of bringing in and distributing the passes at school. Appellant was given an opportunity to respond and share his side of events, but he refused. Dr. Howard informed Appellant and his mother that the investigation was ongoing, and Appellant's punishment was not finalized, but that he would be suspended for at least that day. Dr. Howard asked Appellant's mother to take him home and told her that the school would be in touch with his final punishment once the investigation concluded. (Motion, Ex. B).

The school administration concluded its investigation on February 11, 2019 and met to determine the consequences for the students involved in the incident. Administration decided that Appellant's actions warranted a five-day suspension for race-based harassment. (Motion, Exs. A and B). Mr. Reck contacted Appellant's mother the evening of February 11<sup>th</sup> and informed her of the five-day suspension. (Motion, Ex. A). He told her that a suspension letter was to follow with more details. (W████ Affidavit; Motion, Ex. A).

On the evening of February 11<sup>th</sup>, Principal Heckert sent a second email to the school community to provide an update. Without releasing any personally identifiable information, Principal Heckert referenced the "N-Word" passes and assured the community that the situation was being dealt with according to the Student Code of Conduct. She also shared how she planned to address the issue with the broader school community. (Appeal, Ex. p. 12).

On Tuesday, February 12, 2019, Appellant's mother called the school around noon and was told that a suspension letter would be sent out later that afternoon. (Appeal, Ex. p. 13). She attempted to call the school again that afternoon, but she was unable to connect with anyone. (W████ Affidavit). Appellant's mother emailed Principal Heckert to inform her that she had not received a suspension letter, and that she still had not been informed what part of the Code of Conduct her son had violated, and alleged that Appellant had not been afforded an opportunity to respond. Appellant's mother also asked for various forms of documentation related to the event. (Appeal, Ex. p. 13).

Principal Heckert emailed Appellant's mother a copy of the suspension letter in the evening of February 11<sup>th</sup> stating that Appellant was suspended for five days (Feb. 11-15) for race-based harassment. (Motion, Ex. 1). Principal Heckert informed the parent that the school counselor would ensure Appellant was able to make up schoolwork. (Appeal, Ex. pp. 27-31).

On February 15, 2019, Appellant's mother appealed his suspension by letter to Principal Heckert and requested various forms of documentation. (Motion, Ex. 2). Appellant's mother's attorney contacted Principal Heckert on February 18, 2019 and February 22, 2019, to follow up on the appeal. (Motion, Ex. 4-5).

On March 10, 2019, Principal Heckert responded to Appellant's mother, stating she had reviewed the investigatory materials and concluded that the five-day suspension was warranted. The Principal advised Appellant's mother of her right to appeal to the Director of the Department of Pupil Personnel and Attendance Services. (Motion, Ex. 6).

On March 12, 2019, Appellant's attorney filed an appeal to Mr. Steve Neff, Director of Pupil Personnel and Attendance Services. The letter requested production of evidence, including the student statements, video, and proof of production and distribution of the passes. (Motion, Ex. 5).

On March 20, Mr. Neff spoke with Appellant's attorney, and on March 27, 2019, Appellant's attorney sent Mr. Neff a memorandum further explaining the reasons for the appeal and requesting a hearing to allow Appellant, his mother, and witnesses to be heard. (Motion, Exs. 8 and 9).

On April 15, 2019, Mr. Neff replied to Appellant's attorney, stating that he had reviewed the evidence, spoken with Principal Heckert, and determined that the five-day suspension was warranted. Mr. Neff also informed the attorney that a hearing was not procedurally required at that level of appeal. He informed the attorney about the next level of school system appeal. (Motion, Ex. 9).

On April 23, 2019, Appellant's attorney filed an appeal to Dr. Andrew Zuckerman, Chief Operating Officer and provided him with additional documents on April 26<sup>th</sup>. (Motion, Exs. 10 and 11). Dr. Zuckerman assigned the matter to a hearing officer, Carole Goodman, for review. Ms. Goodman spoke with various parties involved in the matter. Following her review of the record, Ms. Goodman issued a report concluding the incident was of a serious nature and recommending that the suspension be upheld. (Motion, Ex. 12).

By letter dated May 16, 2019, Dr. Zuckerman advised Appellant's mother that he had reviewed Ms. Goodman's report, concurred with her findings, and was upholding the suspension. The letter also advised of the right to appeal the decision to the local board. (Motion, Ex. 13).

On June 3, 2019, Appellant's attorney appealed the suspension to the local board. (Motion, Ex. 14). On June 20, 2019, by memorandum to the local board, Dr. Jack Smith, Superintendent of MCPS, recommended that the board uphold Dr. Zuckerman's decision. (Motion, Ex. 15). On July 1, 2019, Appellant's attorney submitted a Reply Memorandum. (Motion, Ex. 16). On July 29, the local board issued a decision affirming the suspension. (Appeal, Ex. pp. 3-6).

This appeal followed.

## LEGAL ANALYSIS

Appellant challenges his five-day suspension from Winston Churchill High School for race-based harassment for bringing to school and sharing Willy Wonka N-Word passes. Appellant specifically maintains that the school system improperly applied the Code of Conduct, imposed punishment that was too severe, violated his First Amendment Rights, and denied him due process. We address these in turn.

### *Race-based Harassment*

Appellant argues that his suspension should be rescinded because his actions do not meet the definition of race-based harassment under the MCPS 2018-2019 Student Code of Conduct, MCPS Board Policy JHF-RA, and Md. Code Ann., Educ. § 7-424. MCPS has a policy and regulation, based on Education Art. §7-724, prohibiting bullying, harassment and intimidation which includes conduct motivated by an actual or a perceived personal characteristic. MCPS Board Policy JHF-RA defines harassment as follows:

*“Bullying, harassment, or intimidation”* means intentional conduct including verbal, physical, or written conduct or an intentional electronic communication that creates a hostile educational environment by substantially interfering with a student’s educational benefits, opportunities, or performance, or with a student’s physical or psychological well-being, and is:

- (1) Either – Motivated by an actual or a perceived personal characteristic, as defined in Board Policy ACA, *Nondiscrimination, Equity, and Cultural Proficiency...*”

This definition is adapted from Education Art. §7-724(a)(2)(i)(1) that includes race as a motivation.

Appellant printed out and brought “N-Word” passes to school to share with his friends. These passes were seen by multiple students, some of whom became upset and reported the incident to the counselor’s office. One student even tore the pass up in anger and dropped it on the floor. Appellant does not dispute these facts, but rather, he maintains that he did not have any intent to create a hostile educational environment, and that his actions were not directed towards any of the alleged victims of his harassment. He describes his actions as merely “sharing some light hearted/ joke memes” with a small group of friends, and argues that the distribution of the passes containing the N-Word “are not race-based.” (Amended Appeal, pp. 9, 13).

As we have previously noted, the harassment, bullying and intimidation of students is a serious issue. *See David & Linda S. v. Baltimore County Bd. of Educ.*, MSBE Op. No. 10-40 (2010). Appellant acted intentionally when he printed out the passes and shared them with friends. He could have foreseen the negative responses of his classmates when he chose to bring a pass with an offensive, race-based term to school. The school system did not doubt, and neither do we, that Appellant’s “N word” pass was motivated by actual or perceived characteristics of African Americans. It is not credible that Appellant meant something innocuous by printing the passes and giving them to friends. Appellant claims to have been joking around, but it shows a racial bias that is inappropriate in the school environment. Accordingly, we find no error with the MCPS decision that Appellant’s conduct rose to the level of racial harassment under the MCPS policy and was subject to discipline.

### *Severity of Punishment*

Similarly, Appellant argues that his five-day suspension was disproportionate to his actions, and therefore his suspension should be rescinded. Appellant argues that Principal Heckert and staff did not consider “Factors Impacting Discipline Decisions” as described in the Code of Conduct. (Amended Appeal, Ex. p. 8). Under the Code of Conduct, MCPS staff should consider the following criteria in imposing school discipline:

1. The student’s age;
2. Previous serious disciplinary infractions (including the nature of any prior misconduct, the number of prior instances of misconduct, and the progressive disciplinary measures implemented for such misconduct);
3. Cultural or linguistic factors that may provide context to understand student behavior;
4. The circumstances surrounding the incident;
5. Other mitigating or aggravating circumstances; and
6. Imminent threat of serious harm.

Appellant provides no evidence to support his claim that these factors were not considered. The record shows that Appellant was an 11<sup>th</sup> grade student at the time. The record also shows that Principal Heckert weighed the evidence before her, consulted the MCPS Student Code of Conduct and gave Appellant a punishment in alignment with the Code of Conduct. Appellant’s unsupported claim that the guidance was not followed, and that his punishment was too severe, does not make the five-day suspension illegal.

### *Freedom of Inquiry, Expression, Speech, and Assembly*

Appellant argues that he was engaged in freedom of inquiry, expression, speech, and assembly as defined by the 2018-2019 A Student’s Guide to Rights and Responsibilities in Montgomery County Public Schools (MCPS Rights and Responsibilities Guide); therefore, he should not have received the suspension. (Amended Appeal, Ex. pp. 82-83). 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 would “substantially interfere with the work of the school or impinge upon the rights of other students.” *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 509 (1969); accord, *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

Race-based harassment in the school setting is not protected speech. Appellant’s distribution of his “N-Word” pass is offensive and was motivated by an actual or perceived race characteristic of African Americans. The record shows that the conduct impinges upon the rights of other students to be free from this type of expression in the school environment. We find no violation of Appellant’s right to free speech and assembly by his suspension.

### *Due Process*

Due process in the student discipline context requires that there be notice of the charges

and a meaningful opportunity to be heard prior to removal or as soon as practicable. *Goss v. Lopez*, 419 U.S. 565, 581-583 (1975); *Parent H. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 13-27 (2013). In *Ali, et al. v. Howard County Bd. of Educ.*, MSBE Op. No. 00-15, (2000), the State Board explained that the process due for a suspension of ten days or less only requires that the student be given oral or written notice of the charges against him and if he denies them, an opportunity to present his side of the story. Due process does not entitle Appellants to a full evidentiary hearing before the local board or the State Board. In this case, Appellant's son received oral and written notice of the charges and was afforded several opportunities to tell his side of the story. He thus received ample due process.

Appellant argues that MCPS failed to follow due process requirements under the MCPS Rights and Responsibilities Guide. The "Appeal-Complaint Procedure – Due Process" cited by Appellant in the MCPS Rights and Responsibilities Guide does not apply to this situation. The language of the section clearly states the appeal-complaint procedure is for "disciplinary action not involving suspension or expulsion..." (Motion, Ex. 17). Since this disciplinary action involved a five-day suspension, MCPS Board Regulation JGA-RB applies.

Appellant argues that MCPS staff failed to follow the suspension due process procedures under MCPS Board Regulation JGA-RB, Section IV. Appellant argues that he was not given the allegations, an explanation of the evidence, and an opportunity to share his version of events, as required by JGA-RB (IV)(A)(1)(a)-(b). The record shows that school administrators met twice with Appellant on February 8<sup>th</sup> and February 11<sup>th</sup>, where he was informed of the school's investigation and the allegations that he brought in and distributed the passes. Appellant was asked for his version of events, on February 8<sup>th</sup>. When asked to put his statement in writing he declined. While there is some dispute as to whether Appellant was afforded an opportunity to tell his version of events at the February 11<sup>th</sup> meeting, the meeting with administrators on February 8<sup>th</sup> satisfied the requirements of JGA-RB (IV)(A)(1)(b).

Appellant next argues that his parent was not provided with appropriate notification of his suspension as required by JGA-RB (IV)(B)(1)(a)-(c)(1). The regulations require that the principal or her designee inform the parent orally or in writing of the suspension, including the suspension's effective date and length; schedule a conference with the parent to review the incident; and advise the parent of their appeal right. The record shows that the school principal's designee informed Appellant's mother of the suspension and held a conference with Appellant and his mother on February 11<sup>th</sup>. They reviewed what the school's investigation uncovered. On February 11<sup>th</sup>, Assistant Principal Heck informed Appellant's mother that her son was suspended for five days. On February 12<sup>th</sup>, Appellant's mother received in writing notice of the suspension and her appeal rights from Principal Heckert.

Appellant appealed his suspension through the MCPS process. Appellant first requested Principal Heckert to reconsider the suspension on February 15<sup>th</sup>. On March 12, 2019, Appellant filed an appeal to Mr. Steve Neff, Director of Pupil Personnel and Attendance Services, who affirmed the discipline. On April 23, 2019, Appellant appealed to Dr. Andrew Zuckerman, Chief Operating Officer, and submitted additional documents to consider. Dr. Zuckerman assigned the matter to a hearing officer, Carole Goodman. Ms. Goodman, following her investigation, drafted a report upholding the discipline. On May 16, 2019, Dr. Zuckerman upheld the suspension. On June 3, 2019, Appellant appealed the suspension to the local board. Appellant had multiple opportunities to tell his side of the story. MCPS provided the Appellant and his mother with the due process required by law and MCPS policy; there was no error.

CONCLUSION

For the forgoing reasons, we affirm the decision of the local board.

Signatures on File:

\_\_\_\_\_  
Jean C. Halle  
Vice-President

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Gail H. Bates

\_\_\_\_\_  
Clarence C. Crawford

\_\_\_\_\_  
Charles R. Dashiell, Jr.

\_\_\_\_\_  
Vermelle D. Greene

\_\_\_\_\_  
Justin M. Hartings

\_\_\_\_\_  
Rose Maria Li

\_\_\_\_\_  
Joan Mele-McCarthy

\_\_\_\_\_  
Michael Phillips

\_\_\_\_\_  
David Steiner

Absent:  
Warner I. Sumpter  
President

January 28, 2020