

MICHAEL D.,

Appellant,

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 20-07

OPINION

INTRODUCTION

Michael D. (“Appellant”) appeals the decision of the Anne Arundel County Board of Education (“local board”) to affirm his son’s two-day suspension from Severna Park Middle School for bias behavior. The local board filed a copy of its appeal decision and record. Appellant filed a supplemental letter. Subsequently, the local board filed a response to the appeal.

FACTUAL BACKGROUND

During the 2018-2019 school year, Appellant’s son, B.D., was an eighth-grade student at Severna Park Middle School (“SPMS”). (Opinion, Ex. 3).

During the early part of the 2018-2019 school year, SPMS had a number of bias-based incidents. (Opinion, Ex. 28). This resulted in SPMS Principal, Sharon Hansen, making an announcement to the school on February 15, 2019 that highlighted the importance of diversity, and cautioning that students who used bias-motivated language would be subject to the Code of Conduct and a possible five to ten-day suspension. (Opinion, Ex. 9). Principal Hansen also sent a letter to parents the same day explaining steps SPMS was taking to address the bias-motivated incidents, and to request parents’ assistance in speaking with their children. (Opinion, Ex. 11).

On April 4th, B.D. came to school with a cast on his arm, which he allowed other students to sign. Student 1 signed the words “Nick Gurr.” (Opinion, Ex. 4). When the term “Nick Gurr” is read out loud, it sounds like a racial slur for African Americans.

Later that same day, B.D., Student 2, and Student 3 were walking in the hall. Student 3 asked to see B.D.’s cast. Student 2 encouraged B.D. to show it to Student 3. B.D. showed his cast and pointed out the racial slur to Student 3, who is a student of color. Student 3 walked away. (Opinion, Exs. 2, 4).

On the evening of April 5th, Student 3 informed her parent of what happened. Student 3’s parent contacted the school to report the incident. On April 8th, a “Bullying, Harassment or Intimidation Reporting Form” was filed. (Opinion, Ex. 2).

SPMS Assistant Principal Michelle Malone investigated the matter by interviewing the students involved in the incident. On April 10th, after finishing her interviews, Ms. Malone issued B.D. a five day out-of-school suspension for “Bias Behavior” to begin on April 10th with a return date of April 17th. (Opinion, Ex. 3). By letter dated April 10th, Ms. Malone, on behalf of Principal Hansen, advised Appellant of the terms of the suspension. (Opinion, Ex. 7). B.D. was also expected to attend a Biased Motivated Behavior class. (Opinion, Ex. 8).

On April 11th, Appellant emailed an appeal to Principal Hansen. Appellant argued that the suspension was “excessive” given B.D. did not intend to offend Student 3, this was B.D.’s first disciplinary offense, and B.D. was a National Honor Society student. (Opinion, Ex. 12). By letter dated April 12th, Assistant Principal Amy Smith upheld the five-day suspension after reviewing the documentation, consulting the Code of Conduct, and conferring with the principal.¹

On April 22nd, Appellant filed an appeal with Regional Assistant Superintendent Janine Robinson. In addition to the concerns raised to Principal Hansen, Appellant also argued that the investigation into the incident was defective as Assistant Principal Malone showed bias through statements to and in front of B.D. (Opinion, Ex. 14). By letter dated April 30, 2019, Ms. Robinson upheld the five-day suspension given the impact of B.D.’s actions on Student 3 and the warning issued by Principal Hansen in the February announcements. (Opinion, Ex. 15).

On April 30th, Appellant filed an appeal with Associate Superintendent for School Performance Dawn Lucarelli. (Opinion, Ex. 16). On May 10th, Associate Superintendent Lucarelli responded via letter wherein she upheld the five-day suspension. (Opinion, Ex. 17).

On May 10th, Appellant appealed Associate Superintendent Lucarelli’s decision to Deputy Superintendent Monique Jackson, reiterating that the incident did not merit the suspension and that local board procedures were not followed. (Opinion, Ex. 24). By letter dated May 30th, Deputy Superintendent Jackson advised Appellant that after a review of the evidence and discussions with school staff, she was modifying B.D.’s punishment from a five-day suspension to a two-day suspension, citing his good disciplinary record in middle school. (Opinion, Ex. 25).

On June 26th, Appellant filed an appeal with the local board via email. Appellant argued among many things that the investigation was biased, the school failed to follow board policies and the Code of Conduct, that his son had not heard the February 15th announcement, and the suspension was an abuse of discretion. (Opinion, Ex. 29). On October 23rd, the local board affirmed the Superintendent’s decision and denied the appeal. (Opinion).

On November 27th, Appellant filed an appeal with this Board.

STANDARD OF REVIEW

In student suspension and expulsion cases, the decision of the local board is considered final. COMAR 13A.01.05.06(G)(1). The State Board only reviews the merits of the case if

¹ SPMS Principal Sharon Hansen was out of the country during the incident and subsequent appeal to the principal.

there are specific factual and legal allegations that the local board failed to follow State or local law, policies, or procedures; violated the student's due process rights; or that the local board acted in an unconstitutional manner. COMAR 13A.01.05.06(G)(2). The State Board may reverse or modify a student suspension or expulsion if the allegations are proven true or if the decision of the local board is otherwise illegal. COMAR 13A.01.05.06(G)(3).

LEGAL ANALYSIS

Appellant challenges his son's two-day suspension from SPMS for a bias-based incident involving a display of a racial slur. Appellant alleges the initial investigation and the punishment are biased, that Anne Arundel County Public Schools (AACPS) did not comply with school policies, and that the Bias Behavior offense violates due process. Appellant also alleges the local board failed to comply with regulations governing State Board appeals. We address these arguments in turn.

State Board Appeal Timelines

Appellant has argued that the local board's response to his appeal is untimely; therefore, the local board's reply should not be considered, and this Board should find automatically in Appellant's favor. Appellant filed his appeal on November 27, 2019. This Board, via letter on December 4th, confirmed receipt of the appeal and the deadline of December 27th for the local board's response. The local board submitted a copy of the paper record from the appeal on December 12th. The local board then filed a response dated January 15, 2020. We agree that the local board's response on January 15th was untimely, and as such, we will not consider it.

However, we decline to forego our legal analysis and automatically find in favor of Appellant. The State Board appeal process is governed by the Code of Maryland Regulations ("COMAR"). COMAR 13A.01.05.06(A) clearly states that "Decisions of a local board...shall be considered prima facie correct[.]" COMAR 13A.01.05.06(D) also reads, "The appellant shall have the burden of proof by a preponderance of the evidence." Taken together, it is clear that this Board must conduct an analysis of the allegations based on the record before it, regardless of whether the local board files a response to an appeal. In this particular case, the local board did file a copy of their decision and the record from their paper review of the appeal. As such, we will consider both Appellant's appeal and the local board record in determining whether the local board violated their policies and procedures, violated the student's due process rights, or otherwise acted unconstitutionally.

Biased Behavior by School Staff

Appellant argues that Assistant Principal Malone's actions were biased and unethical; therefore, his son's suspension should be rescinded. To support these allegations, Appellant asserts the Assistant Principal made a number of statements in the presence of Appellant's son and another student related to the educational history of Student 3, references to her own experience as a person of color, and suggestions that Student 3 find friends of color. The local board found that despite these allegations, there was sufficient evidence in the witness statements to establish that the incident between the students occurred. We concur with the local board.

The Bullying, Harassment or Intimidation Reporting Form filed by Student 3's parents, along with the other student statements, confirmed that the phrase "Nick Gurr" was written on B.D.'s cast, that all students involved understood it to reference a racial slur, and that B.D. showed the cast with the racial slur to Student 3. Whether Assistant Principal Malone made remarks that some may find inappropriate does not alter these facts. Furthermore, we find that any possible bias in the investigation and subsequent disciplinary consequence was remedied by the five levels of appeal and review Appellant received from AACPS staff and the local board.

Appellant also argues that Assistant Principal Malone did not have authority under AACPS policies to issue a long-term suspension, thus requiring the suspension to be rescinded. Appellant does not cite to any relevant AACPS policy that would deny Assistant Principal Malone the authority to impose the long-term suspension. COMAR 13A.08.01.11(B)(6) defines a principal as the "principal of a school or the principal's designee." The record indicates that Principal Hansen was out of the country at the time of the incident; Assistant Principal Malone was the eighth grade administrator, and therefore, in charge of discipline of the eighth grade students. (Opinion, Ex. 1). We find that Assistant Principal Malone had the authority to investigate and impose a disciplinary consequence in this situation.

Failure to Follow AACPS Policies and Abuse of Discretion

Appellant requests his son's suspension be rescinded on the basis that it did not comply with AACPS policies and procedures – specifically, Board Policy JD: Student Suspension and Expulsion ("Policy JD") and the AACPS Student Handbook. Appellant cites Policy JD (C)(4)(b), "...a suspension **shall normally occur** only after reasonable intervention strategies have been implemented in accordance with *The Code of Student Conduct*[,] and (C)(6), "Long-term suspensions and expulsions may only be utilized after other options to address student behavior are exhausted[.]" (Emphasis added). Appellant also notes the Student Handbook includes language indicating that administrators are "to use progressive interventions to change student behaviors." Student Handbook, p. 10). Read together, Appellant argues that the school was required to implement a progressive discipline scheme and utilize other interventions prior to a suspension.

Appellant's interpretation of AACPS Policy JD and the Student Handbook is incorrect as it ignores the discretionary language contained in both documents. The language of Policy JD – "shall normally occur" – infers that there may be circumstances in which a suspension precedes utilization of other intervention strategies. The Student Handbook states, "For serious violations, interventions/consequences may begin at a higher level." (Student Handbook, p. 10). This clearly indicates that administrators are not required to institute the lowest level of intervention in meting out consequences. We also note that Appellant's interpretation of the Policy and Handbook runs afoul of laws and regulations that require a suspension or expulsion for a specific act, regardless of the student's discipline history. (See the *Gun-Free Schools Act*, 20 U.S.C.A. § 7961 (2015), requiring states receiving federal funds to have in effect a state law requiring the expulsion for one year of a student determined to have brought a firearm to school. Md. Code Ann., Educ. § 7-305(f)).

Appellant also argues that his son's actions did not rise to the level required by the Student Handbook to sustain a short or long-term suspension. The Student Handbook reads, "The principal has the authority to remove a student for behavior that has created a substantial

barrier to learning for others[.]” (Student Handbook, p. 25). Appellant argues that his son’s actions, showing his cast with the racial slur reference to a student of color (Student 3), did not create a substantial barrier to learning. Appellant has provided no evidence to support this argument outside of his assertion that Student 3 told Assistant Principal that she was not offended by B.D.

However, it is clear from the record that based on the incident Student 3 and her parent were prompted to file a Bullying, Harassment or Intimidation Reporting Form. The record also demonstrates that the SPMS community was already being impacted by bias-based behavior, resulting in the Feb. 15th school announcement and letter to parents about school community and inclusion. There is nothing in the record to suggest that AACPS staff acted in violation of their policy or that the final two-day suspension was an abuse of discretion. Indeed, the fact that Deputy Superintendent Jackson reduced the suspension from five-days to two-days demonstrates that AACPS reviewed the evidence before them and made a careful decision about the appropriateness of B.D.’s disciplinary consequences based on the severity of the incident and B.D.’s prior discipline history.

Due Process and Sufficient Notice

Appellant maintains that the AACPS policy in the Student Handbook prohibiting bias behavior failed to provide sufficient notice of prohibited behavior in violation of the 14th Amendment of the Due Process Clause of the U.S. Constitution. In *In re: Talbot County Lacrosse Players*, MSBE Op. No. 12-12 (2012), we wrote:

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that school rules provide sufficient notice of what conduct is prohibited and not be impermissibly vague. *Chicago v. Morales*, 527 U.S. 41, 46 (1991). A provision may be declared void if it fails to give a person adequate warning that the conduct is prohibited or if it fails to set out adequate standards to prevent arbitrary and discriminatory enforcement. *Id.* at 56. Generally, a provision is unconstitutionally vague where it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Kolaendar v. Lawson*, 461 U.S. 352, 357 (1983).

The AACPS Student Handbook 2018-19 contains a glossary that defines “Bias Behavior.” On page 30, it states that bias behavior is “[a] behavioral offense, verbal, written, or symbolic in nature, committed against a person or property which is motivated by the offender’s bias, a negative opinion or attitude toward a group of persons based on their race, religion, disability, sexual orientation, gender, gender identity, or ethnicity/national origin.” Appellant argues that this definition is unconstitutionally vague under *Chicago v. Morales*. We disagree that the policy is unconstitutionally vague. The definition explicitly states the types of activities (verbal, written, or symbolic) and motivations (including race-based) that would constitute a bias behavior. A person “of common intelligence” would reasonably infer that use of a racial slur would constitute an act of bias behavior. The record does not show, nor does the Appellant contend, that B.D. did not understand that “Nick Gurr” was a reference to a racial slur. The

potential consequences for engaging in bias behavior were clearly stated on p.16 of the Student Handbook.

Additional Arguments

On appeal, Appellant introduced a new argument that the actions of Assistant Principal Malone were outside the law and her scope of authority; therefore, any evidence gathered by her should be excluded. We have long held that arguments not raised before the local board will not be considered on appeal by the State Board. *See Nikol E. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 19-18 (2019) (citing cases). It would be inappropriate to rule on an issue that the local board did not have an opportunity to address; therefore, we decline to consider Appellant's argument.

Appellant also raised an issue regarding subsequent treatment of his son by Assistant Principal Malone after the appeal of his suspension. Appellant contends that his son was forced to sit out part of field day, constituting an in-school suspension, which he believes was done in retaliation. Before us in this matter is the five-day suspension issued in April that was subsequently reduced to two-days. While any inappropriate conduct by school staff should be addressed, it is not relevant to the question of whether B.D.'s suspension was illegal. We also note that the local board directed the Superintendent to provide a response to Appellant on the actions AACPS took to address these concerns. In a December 18, 2019 letter, Deputy Superintendent Jackson stated that she investigated the matter and reviewed her findings with Assistant Principal Malone. She assured Appellant that action was taken, though she was unable to share specifics as it was a personnel matter. (Supplement, Jackson Letter).

CONCLUSION

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

Signatures on File:

Warner I. Sumpter
President

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

ABSTAINED:

Jean C. Halle
Vice-President

February 25, 2020