

F.W.,

Appellant

v.

BALTIMORE COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 23-22

OPINION

INTRODUCTION

Appellant appeals the January 30, 2023, decision of the Baltimore County Public Schools (“BCPS”) Chief of Schools to uphold the decision to assign Appellant’s child to the eLearning program based on an adjudication for a sexual offense in another state. The Baltimore County Board of Education (“local board”) filed a motion to dismiss, which the State Board denied in MSBE Op. No. 23-12 on May 23, 2023, and set the case for additional briefing. Appellant filed a brief to which the local board responded. Appellant responded, and the local board replied.

FACTUAL BACKGROUND

The Appellant’s child is sixteen years old and enrolled in the 10th grade in BCPS. When the student was 13 years old, they committed a sexual offense in a different state. In July 2021, the juvenile court in that state issued an Adjudication and Disposition Order suspending the disposition of the case for two years on condition that the student “exhibits good behavior and complies with the terms of [the] Order[.]” The student was required to comply with placement at, and successfully complete, a rehabilitative program, as well as not have any unsupervised contact with the victim and continue with therapy upon completion of the rehabilitative program. (Appellant, Ex. A).

Upon completion of the rehabilitative program, the student returned to reside in Baltimore County with the Appellant.¹ In August 2022, the Appellant attempted to enroll the student in their zoned high school. The Appellant spoke with the school Pupil Personnel Worker, who inquired where the student attended ninth grade. When the Appellant provided the name of the rehabilitative program, the Pupil Personnel Worker inquired about the nature of that program. The Pupil Personnel Worker set up a meeting with the Appellant and the student. At the meeting the student was asked why they attended the rehabilitative program, and the student explained it was because they committed a sexual offense in another state. (Appellant, Ex. B).

¹Prior to attending the rehabilitative program, the student was enrolled in the eighth grade at a BCPS middle school. The student attended in-person in the spring of 2021. The family did not report the pending charge to BCPS. (Appellant, Ex. C).

Shortly after the meeting, the Appellant received a phone call from the high school informing them that the student would not be allowed to enroll for in-person instruction. Instead, the student was assigned to the BCPS eLearning program. The Appellant was told that the student's enrollment would be re-evaluated after the student was adjudicated. Appellant did not receive any of this information in writing, nor was the Appellant provided with an explanation for the student's denial of enrollment for in-person learning. (Appellant, Ex. B).

In late October or early November, the Appellant called the Pupil Personnel Worker to inquire about enrolling the student in Crossroads Center, a BCPS alternative school, instead of the eLearning program. The Appellant was concerned that the student struggled with the eLearning program and was failing all of their classes during the first grading period. The Pupil Personnel Worker informed the Appellant the student must remain in the eLearning program. (Appellant, Ex. B).

In November, the Appellant retained legal counsel, who arranged a meeting with the zoned high school's Principal and the Pupil Personnel Worker. At the December 9, 2022, meeting, the Principal informed the Appellant that a BCPS hearing officer made the decision to deny the student's entrance to the high school and re-assigned the student to the eLearning program due to a reportable offense. (Appellant, Ex. B).

On December 16, 2022, counsel for the Appellant sent a letter to BCPS appealing the decision to remove the student to the eLearning program. On January 23, 2023, the BCPS Chief of Schools, Dr. Michael Zarchin, scheduled a meeting with the Appellant and their counsel. The purpose of the meeting was for the Appellant to produce information demonstrating that BCPS' decision to move the student to eLearning was incorrect. (Appellant, Ex. C).

On January 30, 2023, Dr. Zarchin sent a letter to the Appellant's counsel denying the appeal. Dr. Zarchin found that BCPS was not required to "ignore" the student's offense because it occurred in another state. Dr. Zarchin stated that BCPS has a responsibility to "review the matter and consider whether [the student's] in-school presence poses a threat to students or staff or will cause a substantial disruption to the educational process." In accordance with BCPS Rule 5561, he found that based on the limited information at his disposal, he "did not have sufficient information to determine that [the student] is not a threat to students or staff" (emphasis in original). Dr. Zarchin found the hearing officer's decision to assign the student to eLearning reasonable. He required the Principal and the Supervisor of eLearning to look into barriers that may be impacting the student's performance. Citing Superintendent Rule 5561 VIII.F, the letter noted that the decision of the Chief of Schools is final. (Appellant, Ex. C).

Appellant filed an appeal with the State Board, and the local board filed a motion to dismiss. This Board reviewed the briefing and decided to exercise jurisdiction over the case as it involves a question of State law that has not yet been considered by the State Board. The parties subsequently submitted briefings on the issues.

STANDARD OF REVIEW

The State Board shall exercise its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.06E.

LEGAL ANALYSIS

Before this Board is an appeal of the decision by BCPS to remove the Appellant's child to a virtual alternative educational program at the beginning of the 2022-2023 school year based on a reportable offense. While Appellant did not appeal the decision of BCPS to the local board, we exercised our original jurisdiction over this case as it involves a new area of law not previously considered by this Board.

During the 2022 legislative session, the General Assembly passed House Bill 146 - *Education - Reportable Offenses, Student Discipline, and School Disruptions - Presence of an Attorney and Reporting* (2022 Md. Laws, Chap. 742). A reportable offense is an offense committed off school property, away from a school sponsored event, and involving one of an enumerated number of serious crimes. Md. Code, Educ. §7-303(a)(6). Upon arrest for a reportable offense, law enforcement is tasked with informing the student's local superintendent, principal, and school security officer of the arrest. The law allows the school to use this information to provide appropriate educational programming and related services to the student while maintaining a safe and secure school environment for students and school personnel. Md. Code, Educ. §7-303(f)(1).

Beginning July 1, 2022, statutory changes went into effect, including amendment of Md. Code, Educ. §7-303 to require the local school system to invite the student's attorney to participate in the conference between the family and school personnel. Additionally, Md. Code, Educ. §7-305 (the statutory section governing suspension and expulsion procedures) was amended to require the application of the school discipline procedures to removals from the student's regular school program arising out of a reportable offense. Thus, if a school determines that a student must be removed from the school program for safety reasons arising from the reportable offense, then the student or the student's parent must be promptly given a conference with the principal. Only the local superintendent or superintendent's designee may issue a removal for greater than 10 days, and such a removal can only occur after the superintendent or superintendent's designee has conducted a thorough investigation into the matter and held a conference with the student or the student's parent. Md. Code, Educ. §7-305(d)(2)-(3). The parent is then afforded a right to appeal the decision of the superintendent or designee to the local board.²

Appellant argues that the decision to remove the student from their regular school program is: (1) illegal because BCPS failed to follow the procedural requirements of Md. Code, Educ. §§7-303 and 7-305, and (2) arbitrary and unreasonable as the exclusion was based solely

²On July 25, 2023, the State Board granted permission to publish amendments to COMAR 13A.08.01.17 – *School Use of Reportable Offenses*. A copy of these proposed amendments can be found on the [Department's website](#). The proposed changes clarify the procedural requirements for removing a student from their regular school program due to a reportable offense.

on the nature of the offense and not an individualized determination. We address these arguments in turn.

Procedural Requirements

Appellant argues that BCPS failed to follow the procedural requirements of the statute by (1) not conducting a thorough investigation into the matter, (2) failing to promptly hold a conference with the student or parent, (3) failing to provide notice of the reasons why the student was being removed from the regular school program, and (4) failing to provide notice of the right to appeal.

It is clear that BCPS failed to follow statutorily required procedures when it first learned of the student's offense. BCPS did not hold a conference between the superintendent or designee with Appellant to discuss the facts of the reportable offense before issuing a removal for greater than 10 days, nor was there a formal decision that the student presented a safety threat to other students or staff necessitating the removal. The record is devoid of what information was used to make the initial determination to remove the student or which personnel made the initial determination. It wasn't until almost four months after the decision to remove the student was made, and Appellant obtained legal counsel, that BCPS held a conference between the principal and Appellant. However, as the removal was longer than 45 days, BCPS was required to have a conference between the superintendent or designee and Appellant. Only after Appellant appealed the decision to the BCPS Chief of Schools, Dr. Michael Zarchin, was a conference held with the superintendent's designee and notice of designee's findings issued.

The local board argues that the conference with Dr. Zarchin cured any procedural errors as the Appellant, the student, and the student's counsel were invited to the conference; Appellant was provided an opportunity to be heard; and Dr. Zarchin issued a decision detailing his reasoning for upholding the decision to remove the student to eLearning. In support of this position, the local board cites *D.B. and K.G. v. Baltimore County Bd. of Educ.*, MSBE Op. No. 19-26 (2019). The State Board found that a full evidentiary hearing before a local board can cure any procedural error that previously occurred in a case. In *K.B. and D.G.*, which involved an expulsion of a student, the superintendent's designee failed to address whether a student's return to school would pose an imminent threat of serious harm. While we found the letter did not comply with the school discipline regulations, we also determined the local board "cured" this defect when it made appropriate findings in its review of the determination.

We find the case at hand to be distinguishable from *D.B. and K.G.* While the conference with Appellant and Appellant's counsel may have cured some of the procedural errors, there remain two glaring issues – the failure of Dr. Zarchin to make a determination that the student presented an imminent threat of serious harm to other students or staff, and the failure to include accurate information regarding appeal rights.

In order to remove a student from their regular school program for more than 45 days under Md. Code, Educ. §7-305, the superintendent or designee must hold a conference and determine that the removal is warranted. While Md. Code, Educ. §7-305 is silent on the standard for removing a student from their regular school program, the State Board has clarified in its regulations that in order to remove a student for more than 45 days (i.e., an expulsion), the

superintendent or designee “has determined that the student's return to school prior to the completion of the expulsion period would pose an imminent threat of serious harm to other students or staff[.]” COMAR 13A.08.01.11B(2)(a). As the General Assembly has found it appropriate to assign the same due process protections afforded in school discipline removals to reportable offense removals, the State Board finds the imminent threat standard to also apply in this context.

In this case, Dr. Zarchin did not articulate any rationale that the student posed any threat to other students or staff. Rather, Dr. Zarchin held he “[did] not have sufficient information to determine that [the student] is not a threat to students or staff.” (emphasis in original). As we explained in *R.P. v. Baltimore City Bd. of Sch. Comm’rs*, MSBE Op. No. 16-18 (2016), the “imminent threat” finding must be made explicit and cannot simply be inferred based on the seriousness of the conduct. While Dr. Zarchin knew the student was adjudicated for a sexual offense and on probation, he did not cite any evidence that demonstrated the student presented a safety risk. As such, his decision was based on the charge alone and inconsistent with the requirement to find the student’s return to school would present an imminent threat of serious harm to other students or staff.

Dr. Zarchin’s letter is also defective in that it fails to provide accurate appeal information. Specifically, Dr. Zarchin informed the Appellant in his letter that pursuant to Superintendent’s Rule 5561 VIII.F, the decision of the Chief of Schools is final. This conflicts with State law. Md. Code, Educ. §7-305(d)(5) clearly provides a right of appeal and hearing before the local board from the superintendent’s designee’s decision. As such, this portion of the letter is also defective and fails to comply with statutory requirements.

Based on the two identified defects, we find that Dr. Zarchin’s conference and letter did not cure all of the procedural errors committed by BCPS. Therefore, BCPS’s decision to remove the student was illegal.

Individualized Analysis for Removal Determinations

Appellant also argues that Dr. Zarchin’s decision to uphold the removal was arbitrary and unreasonable as he failed to conduct an individualized analysis of the student’s case and upheld the removal on the basis of the student’s charge alone. The local board argues that the serious nature of the crime and the fact that the student was placed on probation and required to attend a treatment center presents enough of a safety risk to warrant the student’s exclusion from the school setting. We disagree.

While this Board does not downplay the serious nature of the student’s offense, it cannot allow BCPS to remove the student without conducting a thorough investigation and making an individualized determination about any safety threat. *See T.R. and B.J. v. Caroline County Bd. of Educ.*, MSBE Op. No. 20-06 (2020) (where we found the local board failed to conduct an individualized analysis and removed the student based solely on the serious nature of the offense). Dr. Zarchin mentioned in his letter that he had limited information to inform his decision. However, we note that in this case, Dr. Zarchin was aware that the offense occurred three years ago, in another state, in a home setting, and involved a family member. Therefore, there was no alleged victim attending school in BCPS. Furthermore, the student attended BCPS

schools in-person after the arrest and before they were required to attend the rehabilitation center, which should provide BCPS with some information on the student's performance and behavior in a regular school environment. There is no mention of how the student behaved during this time.

Additionally, the student was required to complete treatment at a rehabilitation facility. While one may not assume that completion of treatment automatically means it is appropriate for the student to return to the school setting, one also cannot assume that requiring treatment means the student will *never* be able to safely return to the school setting. At a bare minimum, BCPS could have requested to speak to the rehabilitation center and/or the student's court-ordered therapist to receive a professional opinion from an expert on the student's safety concerns. There is no evidence that Dr. Zarchin or other members of staff attempted to do any investigation other than review the rehabilitation center's website.

As such, we are left to conclude that BCPS made its decision to remove the student from the regular school program because it was afraid there could be a safety concern, but it failed to complete a thorough investigation and make findings that the student actually presented an imminent threat of serious harm to other students or staff. We do not take lightly the decisions that BCPS and other school systems must make related to safety. It is challenging to make these determinations but given the potential negative impact of removal from the regular school program on the student, we believe that the best way to maintain a safe and secure school environment is to use an individualized approach to school removal. Therefore, since there does not appear to have been an individualized approach or a meaningful attempt at an investigation, we find Dr. Zarchin's decision to uphold the removal arbitrary and unreasonable.

Identification of the Student

In the local board's response to the appeal, the local board identifies the student by their full name. Appellant objects and requests that we strike this reference from the record. The State Board takes seriously the privacy of our students. As the name of the student is not relevant to our review and analysis of this case, we grant the Appellant's request. We will strike the student's name from the record.

CONCLUSION

For the reasons stated above, we find that BCPS removed the student from school in violation of legally required procedures, and failed to conduct a thorough investigation and make an individualized determination as to whether the student presents an imminent threat of serious harm. We direct BCPS to *promptly* conduct a thorough investigation into the matter and hold a hearing with the Appellant, student, and Appellant's counsel to determine whether the student presents an imminent threat of serious harm to other students or staff. If BCPS determines the student does not present an imminent threat of serious harm, then BCPS must determine whether there was a negative impact to the student's education progress due to the illegal removal to

eLearning and determine compensatory education to remedy the harm. BCPS shall provide a report of these actions to the State Board no later than October 15, 2023.

Signatures on File:

Clarence C. Crawford
President

Joshua L. Michael
Vice-President

Shawn D. Bartley

Chuen-Chin Bianca Chang

Susan J. Getty

Monica Goldson

Nick Greer

Irma E. Johnson

Rachel McCusker

Joan Mele-McCarthy

Samir Paul

Warner I. Sumpter

Holly Wilcox

August 22, 2023