

ROBIN H.,

Appellant

v.

MONTGOMERY COUNTY BOARD
OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 16-44

OPINION

INTRODUCTION

Appellant appeals the decision of the Montgomery County Board of Education (“local board”) affirming the Superintendent’s decision to suspend her son from school for one and a half days for refusing to follow instructions and pushing a teacher. The local board filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Appellant opposed the motion and the local board replied.

FACTUAL BACKGROUND

Appellant’s son, A.H., was involved in the incident at issue while attending a compacted math class for Grade 4 and 5 students at Roberto W. Clemente Middle School.¹ On November 6, 2015, as first period was ending, the substitute teacher instructed A.H. to return a borrowed pencil to the pencil cup located on the teacher’s desk. A.H. replied “No!” The teacher directed him to do so again, and A.H. gave the same reply. A.H., who had been standing outside the classroom doorway without permission, reentered the classroom at the teacher’s instruction. The teacher positioned herself in the doorway and gave the pencil to A.H. to place in the cup, explaining the need to be responsible when borrowing things. A.H. took the pencil and threw it across the room. (Motion, Exs. 1 & 8).

The teacher shifted in the doorway so that she was now in front of A.H. She told him to remain in the classroom to discuss his behavior as she motioned for the other students to exit the room. A.H. then exited the classroom, despite the teacher’s instruction. He pushed the teacher and other students out of his way as he was leaving the room. As he began walking down the hallway, the teacher told him that she was upset that he had thrown the pencil and pushed through everyone, and that she was going to report his behavior. A.H. replied that “he did not care.” The teacher further stated that his behavior was serious, and he again responded that he did not care. Once the teacher mentioned that the school video cameras likely caught his actions

¹ A.H. was enrolled in the 4th grade at Germantown Elementary School (“Germantown”), but attended the compacted math class at Roberto W. Clemente each morning prior to attending his regular elementary school. (Appeal).

on film, A.H. apologized for his behavior. The teacher reported the incident to the school administration.² *Id.*

Ms. Bryant, the principal of Germantown, investigated the incident. She collected statements from the substitute teacher, A.H., and other students in the math class, and spoke with the Appellant. (Motion, Ex.2). Ms. Bryant suspended A.H. for one and a half days for shoving a teacher. She advised Appellant of her decision by phone on November 6 and in writing by letter dated November 9, 2016. *Id.*

Appellant wrote to Ms. Bryant to appeal the suspension decision. (Motion, Ex.3). She argued that the substitute teacher created a “power struggle” with A.H. which was the catalyst for his inappropriate behavior. She also claimed that the consequence was too harsh because the behavior only rose to a level 3 response under the Code of Conduct, rather than a level 4 response. Level 3 responses involve in-school suspensions and in-school interventions, whereas level 4 responses can include out-of-school interventions. Appellant requested that documentation of the incident be removed from her son’s student record. Appellant also alleged improper implementation of child abuse reporting protocols based on A.H.’s allegation that the teacher pushed into his face.³ She also inquired about having an intake meeting with Ms. Bryant. *Id.*

By letter dated November 20, 2015, Ms. Bryant upheld her decision to suspend A.H. (Motion, Ex.4). She stated as follows:

In regard to [A.H.’s] suspension, per our conversation, your son’s behavior while serving as a compacted math student at Roberto Clemente Middle School was inappropriate and not in keeping with the MCPS Code of Conduct. [A.H.’s] out of school suspension was a result of disrespect (talking back), insubordination (refusing to follow directions of the substitute teacher), disruption (throwing a pencil), and attack on an adult (shoving/pushing the substitute teacher out of his way). Each offense named, range[s] from level 2 to level 3 offenses. The number of offenses as well as his prior conduct (a suspension for a similar offense on April 29, 2015) impacted my discipline decision as the procedural requirements within the Code of Conduct dictates [sic].

Id. Ms. Bryant also stated MCPS procedures were followed with regard to Child Abuse and Neglect policies. She stated that Child Protective Services was called but chose not to follow through with an investigation. Ms. Bryant advised the Appellant that she was available to meet with her if she so desired, but that she had not set up an intake meeting given that they spoke on the phone several times since the November 6 incident. Further, it was her understanding that Appellant had already met with an administrator at Roberto W. Clemente about the incident. *Id.*

² The previous day, the substitute teacher spoke to A.H. about his behavior towards one of the students in class at whom he had directed inappropriate comments. (Motion, Ex.1). Although the teacher did not originally report A.H. to the administration for this behavior, she included it in her report regarding the November 6, 2015 incident. *Id.*

³ This allegation was not a part of the Appellant’s appeal to the local board and was not raised in the appeal to the State Board.

The prior incident referenced in Ms. Bryant's letter occurred on April 29, 2015 and is described in Appellant's State Board appeal. Appellant stated that the incident occurred at a time when A.H. was not listening and was doing whatever he wanted in class. During the incident, A.H. had a pen in his hand that he had taken from the teacher's desk. The teacher removed the pen from A.H.'s hand. When the teacher did so, A.H. smacked her hand away and a verbal exchange took place. A.H. then began walking around the room in circles. When Ms. Bryant arrived in the classroom, she tried to stop A.H. and escort him out of the room. As she attempted to do so, A.H. body checked her. Appellant states that A.H. was suspended for this behavior but the record does not contain information regarding the length of the suspension. Appellant did not pursue an appeal of the April 2015 suspension beyond the Pupil Personnel Services level. (Appeal & Motion, Ex. 12).

On December 11, 2015, Appellant appealed Ms. Bryant's decision to the Director of Pupil Services, Steve Neff.⁴ (Motion, Ex.4). She again raised her concerns about the level of consequence. She argued that suspension was to be used as a last resort measure and that the teacher had not employed restorative practices.⁵ She also alleged that the staff at Roberto W. Clemente had no knowledge of A.H.'s Behavioral Intervention Plan ("BIP") and was not implementing it there.⁶ Appellant further claimed that A.H. was being more severely disciplined than other students in the school system with similar behaviors. *Id.*

Appellant attached A.H.'s BIP and Functional Behavioral Assessment ("FBA"), both dated February 11, 2015, to her State Board appeal. The FBA discloses that A.H. is a regular education student with a history of behavioral issues. In the third grade, he displayed significant interfering behaviors such as making inappropriate comments to his teachers and peers, ignoring directions of the teachers, leaving the classroom without permission, hitting his peers, walking around the classroom during instruction, destroying property belonging to others, and standing on furniture. The parent was contacted when these incidents occurred and A.H. lost recess for one of the incidents. A BIP was developed. The goal of the BIP was to have A.H. communicate in a socially appropriate manner when avoiding undesirable tasks or seeking attention or control. It included teacher strategies such as reviewing discussion rules with A.H. prior to lessons and activities, providing him with leadership opportunities in the classroom, providing enrichment activities in his areas of strength, having him check-in with a staff member when transitioning from recess, prize incentives, and modeling or instructing on appropriate ways to communicate. (Appeal Attachment). The BIP was updated on May 5, 2016. (Appeal).

By letter dated January 6, 2016, Mr. Neff upheld the decision to suspend A.H. (Motion, Ex.6). He found that Ms. Bryant did an extensive investigation in coordination with Roberto W. Clemente staff before reaching her decision. He indicated that she had considered the totality of A.H.'s actions, including "the age of the student, previous disciplinary infractions, cultural factors, circumstances specific to the incident, and other mitigating facts." He found that she had

⁴ The letter was received by Pupil Services on December 29, 2015. (Motion, Ex.6).

⁵ A restorative practice is a practice used proactively to establish and maintain a positive school climate and establish a structured approach to teaching appropriate social skills. Such practices include responses designed to address the harm caused by an incident. (Motion, Attach.15, p.6).

⁶ Appellant also stated that the BIP contained "very little data or additional information because [A.H.'s] classroom teacher at [Germantown] has not needed to utilize it since [his] placement in her class last May 4, 2015." Appellant indicated that the move "basically eliminated the problem" causing her "to question the need for the FBA/BIP." *Id.*

effectively followed the MCPS Code of Conduct. In addition, he stated that Ms. Bryant follows the MCPS Code of Discipline for all student discipline cases and did not treat A.H. any differently than other students. *Id.*

By letter dated January 15, 2016, Appellant appealed to the Chief Operating Officer (“COO”), Andrew Zuckerman. (Motion, Ex.7). The COO referred the matter to a hearing officer for review and recommendations. The hearing examiner recommended that the appeal be denied, but also recommended that A.H.’s suspension record for the incident be expunged from his record at the end of his elementary school years, with Ms. Bryant’s agreement. The hearing examiner further recommended that the Educational Management Team review the need for the BIP and inform staff at both schools of the decision. (Motion, Ex.8). The COO concurred with the hearing officer’s findings and adopted her recommendations. (Motion, Ex.9).

By letter dated March 6, 2016, Appellant appealed to the local board. She argued that the suspension was too severe a consequence and that the school should have been utilizing the BIP to provide A.H. with positive incentives. (Motion, Ex.12). In a 5-3 decision issued May 10, 2016, the local board affirmed the suspension decision finding it in compliance with the MCPS Code of Conduct. (Motion, Ex.13). While acknowledging that out-of-school suspensions should not be taken lightly, the local board found the one and a half day suspension reasonable under the circumstances given that A.H.’s “conduct during the incident continued to escalate from insubordination and disruption to actually shoving a teacher to exit the classroom.” The local board also noted that it was the second recent episode of similar conduct by the student. The local board held that, with the principal’s consent, the infraction would be expunged from A.H.’s record at the end of elementary school if no other serious disciplinary situations occurred during that time. *Id.*

This appeal followed.

STANDARD OF REVIEW

In student suspension and expulsion cases, the decision of the local board is considered final. COMAR 134.01.05.05. Therefore, the State Board will not review the merits of the decision unless 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 the local board has acted in an unconstitutional manner. COMAR 134.01.05.05. The State Board may reverse or modify a student suspension or expulsion if the allegations are proved true or if the decision of the local board is otherwise illegal. COMAR 134.01.05.05.

A decision may be considered “otherwise illegal” if it is:

- (1) Unconstitutional;
- (2) Exceeds the statutory authority or jurisdiction of the local board;
- (3) Misconstrues the law;
- (4) Results from unlawful procedure;
- (5) Is an abuse of discretionary powers; or
- (6) Is affected by any other error of law.

COMAR 13A.01.05.05C.

LEGAL ANALYSIS

Suspension Decision

Appellant challenges the local board's decision upholding the suspension maintaining that it was an abuse of discretion because the suspension was too severe a penalty under the MCPS Code of Discipline given the circumstances of the case.

The MCPS Code of Conduct provides the decision-maker with discretion to consider the totality of the circumstances of each case in determining the appropriate disciplinary response. (Motion, Ex.15, p.10). In evaluating the totality of the circumstances of a case, the Code of Conduct states that school staff should consider the following criteria:

- The student's age;
- 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);
- Cultural or linguistic factors that may provide context to understand student behavior;
- The circumstances surrounding the incident; and
- Other mitigating or aggravating circumstances.

Id. at p.3.

At the decision-maker's disposal is the Disciplinary Response Matrix which is a list of suggested disciplinary responses for each offense based on a continuum of tiered responses from levels 1 through 5.⁷ With regard to utilizing the disciplinary levels, the MCPS Code of Conduct states:

- On the first instance of any inappropriate or disruptive behavior, school staff shall first consider one or more interventions or disciplinary responses from the lowest level indicated on the Matrix for that behavior (or one or more interventions or disciplinary responses from a lower level).
- If the same behavior is repeated during the same school year, school staff should consider utilizing one or more interventions or disciplinary responses from the next highest level indicated on the Matrix for that behavior, or any lower level.
- Staff is encouraged to implement several lower-level interventions before proceeding to higher levels that may involve disciplinary responses that remove the student from the classroom.
- If the principal determines that there are unique or exceptional circumstances that warrant an intervention or disciplinary response

⁷ The MCPS Disciplinary Response Matrix is based on the Maryland Guidelines for a State Code of Discipline ("State Guidelines") which serve as a framework for the local school systems to use in establishing their own disciplinary policies. (Motion, Ex. 15 at p.10).

at a level that is above the highest level or below the lowest level indicted on the Matrix, the principal must consult with his/her associate superintendent in the Office of School Support and Improvement before taking action.

Id. at p.10. The MCPS Code of Conduct also states that school discipline “should be administered in a way to keep students within their regular school program to the greatest extent practicable” and that “[s]uspensions and expulsions are to be used only as a last resort.”⁸ *Id.* at 1.

In this case, A.H. had the following infractions: Disrespect, Insubordination, Disruption and Attack on an Adult. Under the MCPS Code of Conduct, the offenses call for the following response levels: Disrespect calls for up to a level 2 response; Insubordination calls for up to a level 3 response; Disruption calls for up to a level 3 response for habitually engaging in minor behavior that distracts from the learning environment (e.g. talking out of turn, throwing small items, horseplay); and Attack on an Adult calls for up to a level 3 response for engaging in shoving, pushing, or otherwise being physically aggressive toward another. None of the offenses calls for anything more than a level 3 response.⁹ Level 3 responses do not include out-of-school exclusions such as a short-term suspension.¹⁰

The local board argues that the suspension decision is consistent with the MCPS Code of Conduct. We disagree. The MCPS Code of Conduct specifies that school staff can consider responses from the next highest level for the “same behavior” that is repeated during the “same school year,” yet A.H.’s prior similar behavior occurred in the prior school year, not the current one. In addition, the MCPS Code of Conduct states that a higher level response can be considered for unique or exceptional circumstances, yet no unique or exceptional circumstances supporting a higher level response have been identified here. It also states that out-of-school exclusions are to be used as a last resort, but it appears that other in-school responses had not yet been attempted. The inconsistency, however, does not necessarily result in an illegal decision.

To be illegal, the imposition of the one and a half day suspension would have to constitute an abuse of discretion. The abuse of discretion standard is a very high standard:

“Abuse of discretion” is one of those very general, amorphous terms that appellate courts use and apply with great frequency but which they have defined in many different ways. It has been said to occur “where no reasonable person would take the view adopted by the [trial] court,” or when the court acts “without reference to any guiding rules or principles.” It has also been said to exist when the ruling under consideration “appears to have been made on untenable grounds,” when the ruling is “clearly against the logic

⁸ The State Guidelines provide that school staff and administrators should “[m]ake every reasonable effort to keep students in school, and, unless required by law, use exclusionary disciplinary measures, including out-of-school suspension and referrals to law enforcement and/or school resource officers, as a last resort. (State Guidelines at 6).

⁹ The local board points out that Disruption under the MCPS Code of Conduct allows a level 4 response for “[e]ngaging in moderate to serious behavior that distracts from teaching and learning and directly affects the safety of others (e.g., throwing harmful items . . .). The principal clearly found, however, that A.H.’s behavior rose only to a level 3. (Motion, Ex.4).

¹⁰ Level 4 is the first level that includes short-term out-of-school exclusionary responses. (*Id.* at 9).

and effect of facts and inferences before the court,” when the ruling is “clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result,” when the ruling is “violative of fact and logic,” or when it constitutes an “untenable judicial act that defies reason and works an injustice.”

King v. State, 407 Md. 682, 687 (2009). The Court of Special Appeals has explained that those general terms, when applied, mean that “[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.” *State v. WBAL-TV*, 187 Md. App. 135, 152-153 (2009).

As already stated above, imposition of the level 4 disciplinary response was technically not consistent with the MCPS Code of Conduct, but it is not so far off the mark. A.H. engaged in prior similar behavior just several months prior to the incident for which he received a suspension, even if it was not during the same school year. Also, the teacher first attempted to direct A.H. with polite oral direction to address the inappropriate behavior. There were multiple offenses here, albeit stemming from one incident, based on an escalation of behavior from insubordination and disruption to actually shoving a teacher to exit a classroom. In the context of the abuse of discretion standard and how we have applied it in other student discipline cases, we find that the local board’s decision upholding the one and a half day suspension does not constitute an abuse of discretion and is, therefore, not illegal. See *Atanya C. v. Dorchester County Bd. of Educ.*, MSBE Op. No. 09-26 (2009) (Imposition of a full year expulsion for fighting was not *per se* an abuse of discretion).

Our concern now is what happens to this student moving forward in terms of management of his behavior in both schools. A.H.’s BIP was updated May 5, 2016. (Appeal). It is critical that staff at both schools, including substitute teachers, are aware of the contents of the updated BIP and follow its requirements, whatever they may be. It may be that if the substitute teacher here had known about the BIP, there would not have been an escalation of the behavior.

New Issues

Appellant claims for the first time in the State Board appeal that Ms. Bryant failed to have an in-person meeting with her regarding the suspension. The State Board has consistently declined to address issues that were not initially reviewed by the local board. *Lessie B. v. Caroline County Bd. of Educ.*, MSBE Op. No. 11-16 (2011)(citing *Etefia v. Montgomery County Bd. of Educ.*, MSBE Op. No. 03-03 (2003)); *Craven v. Bd. of Educ. of Montgomery County*, 7 Op. MSBE 870 (1997). Moreover, there was no requirement for an in-person meeting and Appellant was clearly aware of the suspension decision and pursued her appeal rights.

New Evidence

In her response to the local board’s Motion, Appellant seeks to introduce new evidence in the form of her own handwritten notes regarding the prior behavioral issue and an email exchange between the Appellant and A.H.’s math teacher indicating the date the teacher received A.H.’s BIP. The State Board may admit additional evidence when the evidence is material and there were good reasons for the failure of the appellant to offer the evidence in the proceedings before the local board. COMAR 13A.01.05.04(C). The handwritten notes Appellant seeks to introduce are from May 2015 and are not material to this appeal. Although the email exchange is

dated June and July 2016, which is after the local board's decision, the information contained in the email was from November 2015 and there is no reason why that information could not have been presented to the local board. Moreover, most of the information in the email exchange is already a part of the record, including the fact that Roberto W. Clemente did not have a copy of A.H.'s BIP. (See Motion, Attach. 8). We therefore decline to admit the additional evidence.

CONCLUSION

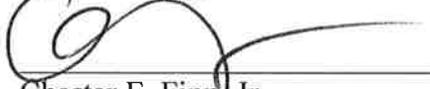
For the reasons stated above, we uphold the decision of the local board.



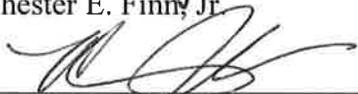
Andrew R. Smarick
President



S. James Gates, Jr.
Vice-President



Chester E. Finn, Jr.



Michele Jenkins Guyton



Laurie Halverson



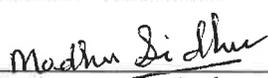
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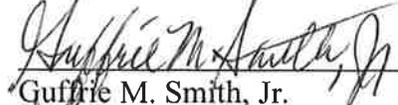
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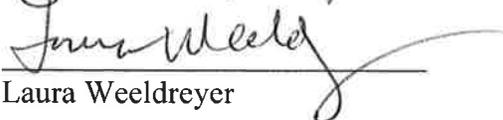
Barbara J. Shreeve



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