IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Yarisa Rivera, a minor, by her mother, Yajaira Cruz-Rivera, Appellants	:	
	:	No. 1077 C.D. 2009
v.	:	
	:	Argued: October 12, 2010
Eugenio Maria De Hostos Charter School	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: February 18, 2011

Yarisa Rivera, a minor, by her mother, Yajaira Cruz-Rivera, appeals from the April 24, 2009, order of the Court of Common Pleas of Philadelphia County (trial court) denying her appeal of the decision of the Eugenio Maria De Hostos Charter School (School) to permanently expel Yarisa for failure to comply with the School's attendance policy.

The School opened in 1998 under a charter from the School District of Philadelphia to provide a public education for students in kindergarten through sixth grade. (R.R. at 16a.) Each year, the School provides students with a Parent and Student Handbook (Handbook) setting forth the School's policies and procedures as enacted by the Board of Trustees (Board). (R.R. at 18a.) The Handbook states that a student is required to reapply for admission in each successive school year and that

failure to adhere to the School's policies will result in the denial of re-enrollment. (R.R. at 19a.)

Yarisa was accepted into the School's kindergarten class for the 2005-2006 school year. Yarisa was then admitted into the School's first-grade class for the 2006-2007 school year. During this year, Yarisa, who suffers from asthma, had thirty-four absences and twenty-four late arrivals, including at least ten that were unexcused. (R.R. at 43a.) In May of 2007, the Board convened a hearing with respect to Yarisa's unexcused absences and to consider expulsion. (R.R. at 42a.) The Board chose not to expel Yarisa and instead placed her on attendance probation. (R.R. at 44a.)

Yarisa's acceptance at the School for the 2007-2008 school year was conditioned upon execution of an attendance probation contract. (R.R. at 44a.) Yarisa's mother signed the contract, dated May 31, 2007, which included numerous provisions regarding Yarisa's attendance for the 2007-2008 school year. (R.R. at 44a-46a.) The contract provided that there would be no unexcused absences and no more than two unexcused late arrivals per marking period; it also required a physician's note to document any absence due to illness and set forth the possibility of expulsion as a consequence for even one unexcused absence. (R.R. at 45a-46a.)

Nevertheless, Yarisa had twenty-one unexcused absences and twenty-three unexcused late arrivals during the 2007-2008 school year. (R.R. at 3a, 47a-53a.) The Board convened another hearing on June 10, 2008. (R.R. at 1a.) The School's assistant principal, Diana Garcia, acknowledged that Yarisa exhibited no behavioral problems at School and that she was in good academic standing. (R.R. at 6a.) Yarisa's mother argued that she had the right to keep her child out of school if she believed Yarisa was ill and asserted that many of the late arrivals were caused by the lack of a car. (R.R. at 4a.)

The Board thereafter voted to permanently expel Yarisa. (R.R. at 11a.) Yarisa's mother appealed the Board's decision to the trial court. By order dated April 14, 2009, the trial court denied the appeal.

In a subsequent opinion, the trial court explained that a charter school is governed by many of the regulations set forth in the Public School Code of 1949 (Code),[1] including section 1318, which provides as follows:

> Every principal or teacher in charge of a public school may temporarily suspend any pupil on account of disobedience or misconduct, and any principal or teacher suspending any pupil shall promptly notify the district superintendent or secretary of the board of school directors. The board may, after a proper hearing, suspend such child for such time as it may determine, or may permanently expel him. Such hearings, suspension, or expulsion may be delegated to a duly authorized committee of the board, or to a duly qualified hearing examiner, who need not be a member of the board, but whose adjudication must be approved by the board.

24 P.S. §13-1318. The trial court noted that section 510 of the Code permits a school board to "adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers, and…all pupils attending the public schools in the district…." 24 P.S. §5-510. The trial court also cited our previous decision in Gonzalez v. Philadelphia School District, 301 A.2d 99 (Pa. Cmwlth. 1973), holding that a school board had discretion to determine that numerous unexcused absences or latenesses constituted "disobedience or misconduct" under

[1] Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §§1-101 – 27-2702.

section 1318 and that this discretion is not to be disturbed by the Courts absent an infringement of the constitutional rights of a student.[2]

The trial court found that Yarisa's expulsion was not arbitrary, capricious, or against public policy, noting that the Board had adopted an attendance policy which was explicitly set forth in the Handbook, that Yarisa blatantly violated the policy for two successive school years, and that Yarisa also violated the attendance probation contract. The trial court noted that while Yarisa attempted to relate her absences to a medical condition, i.e., chronic asthma, she presented no evidence regarding the same to the Board. Finally, the trial court concluded that Yarisa received due process and observed that she was only expelled from the School, not the entire school district.

On appeal to this Court,[3] Yarisa first argues that the trial court erred in concluding that the School had the statutory authority to adopt and enforce policies that allowed for Yarisa's permanent expulsion. We disagree.

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[2] We note that Gonzalez involved two high school students, one of whom was beyond compulsory school age and was expelled for admittedly numerous and unexcused absences, and the other who was of compulsory school age and was suspended for admittedly numerous and unexcused latenesses. The students filed a complaint in equity against the school district, with the suspended student alleging that the school district's actions prejudiced his admission to college and future employment. The students further alleged that the school district was not authorized to suspend or expel a student for unexcused absences or latenesses and that they have a right to attend school until they reach the age of twenty-one. This Court sustained the preliminary objections of the school district, concluding that a school board has discretion to conclude that numerous unexcused absences or latenesses constituted disobedience or misconduct under section 1318 of the Code, thereby subjecting the offending student to suspension or expulsion. Further, this Court rejected the students' argument that they have an unfettered right to attend school until the age of twenty-one, noting that a school board has authority under section 510 of the Code to adopt reasonable rules and regulations regarding the conduct of students.

[3] In an expulsion case, our scope of review is limited to determining whether a school board's adjudication is in violation of a student's constitutional rights, whether it is in accordance with the law, or whether the findings of fact are supported by substantial evidence. M.T. v. Central

(Footnote continued on next page…)

As the trial court noted in its opinion, the School is subject to the provisions of the Code. Section 510 of the Code specifically permits a school board to adopt and enforce such reasonable rules and regulations it deems necessary and proper regarding the conduct of all students. Additionally, section 1318 of the Code vests a school board with broad discretion to expel a student after a proper hearing when circumstances deemed sufficient by the board to justify an expulsion are shown to exist. Both our Supreme Court and this Court have reaffirmed the local school boards authority in this regard. Hamilton v. Unionville-Chadds Ford School District, 552 Pa. 245, 714 A.2d 1012 (1998) (expulsion of student who admitted selling property stolen from another student and who was later found in possession of marijuana on school property was proper); Giles v. Brookville Area School District, 669 A.2d 1079 (Pa. Cmwlth. 1995), appeal denied, 544 Pa. 686, 679 A.2d 231 (1996) (expulsion of student who negotiated deal during school hours to sell marijuana to another student off campus, which the purchasing student then sold to other students on school property, was proper). Thus, the trial court did not err in concluding that the School had the statutory authority to adopt and enforce policies that allowed for Yarisa's permanent expulsion.

Next, Yarisa argues that the School's decision to permanently expel her was arbitrary, unreasonable, and/or an abuse of discretion. We agree.

As noted above, the School had the authority to adopt and enforce the policies set forth in its Handbook. Moreover, we recognize our previous decision in Gonzalez that school boards have the discretion to determine that numerous unexcused absences or latenesses of high school students well beyond compulsory

(continued…)

York School District, 937 A.2d 538 (Pa. Cmwlth. 2007), appeal denied, 597 Pa. 723, 951 A.2d 1168 (2008).

age constituted "disobedience or misconduct" under section 1318. Further, as this Court upheld in Gonzalez:

> Plaintiffs have overlooked that portion of Section 13-1301 of the Code which indicates that students between the ages of six (6) and twenty-one (21) 'may attend public schools' but 'subject to the provisions of this Act.' Clearly, this section grants a right -- but not an absolute privilege to attend school unfettered by reasonable rules and regulations adopted by the School Board for the attendance and punctuality of all students whether of compulsory age or over such age. Section 5-510 [§ 510, 24 P.S. § 5-510] of the Code empowers School Boards to adopt reasonable rules and regulations regarding the management of school affairs and the conduct and deportment of all pupils attending the public schools in the district pursuant thereto.

Gonzalez, 301 A.2d at 104.

However, section 12.6(a) of the Department of Education's regulations specifically provides that a school's governing board has a duty to "define and publish the types of offenses that would lead to exclusion from school." 22 Pa. Code §12.6(a). Section 12.6(b) of these regulations provides that "[e]xclusion from school may take the form of suspension or expulsion." 22 Pa. Code §12.6(b). The School's Handbook fails in this regard.

In a letter to Yarisa's mother dated May 30, 2008, Evelyn Lebron, the School's director, advised that Yarisa was in violation of the School's attendance policy and that a hearing would be held to determine whether Yarisa should be expelled. However, as reflected in the Handbook, the School's attendance policy **does not** provide for such expulsion. Rather, the attendance policy provides only that excessive absences "will affect enrollment for the following school year." (R.R. at 22a.) The attendance policy specifically provides as follows:

> Excessive absences will affect enrollment for the following school year. If a student has 10 or more unexcused absences/and or lateness, a hearing will be convened by the Board of Trustees to determine your child's enrollment status for the following school year.

Id. Importantly, the attendance policy does not indicate the possibility of a student's expulsion for unexcused absences or late arrivals, nor does the policy provide for the execution of an attendance probation contract which essentially modifies the terms thereof.[4]

While the attendance probation contract and the Handbook do reference the expulsion process, they do so in the context of a student's request for re-enrollment. However, expulsion and re-enrollment encompass two very distinct principles, with the former representing a significant negative indication on a student's permanent educational record.[5] Because the School's attendance policy as set forth in the Handbook does not clearly set forth the possibility of expulsion as a possible consequence for unexcused absences, we must conclude that the School abused its discretion in expelling Yarisa, an eight-year-old student with no behavioral

[4] The attendance probation contract, which provides that Yarisa will not be permitted any unexcused absences, similarly states that Yarisa's enrollment is conditional and that her enrollment status will be terminated in the event of her failure to comply with the terms of the contract. (R.R. at 45a.)

[5] While section 1318 of the Code empowers a school board to expel a student on account of disobedience or misconduct, we note that expulsion is generally reserved for cases involving more extreme behavior on the part of student. See, e.g., J.S. v. Bethlehem Area School District, 569 Pa. 638, 807 A.2d 847 (2002) (student expelled for creating a graphic website soliciting funds to hire a hit man to kill a teacher); M.T. v. Central York School District, 937 A.2d 538 (Pa. Cmwlth. 2007), appeal denied, 597 Pa. 723, 951 A.2d 1168 (2008) (student expelled for making false school identification cards and hacking into the school's computer system); Picone v. Bangor Area School District, 936 A.2d 556 (Pa. Cmwlth. 2007) (student expelled for bringing a pellet gun onto school property and firing the gun at another student).

issues and in good academic standing.[6] We note that, during the course of the year, the School could have initiated compulsory attendance proceedings against Yarisa's mother pursuant to section 1333(a)(1) of the Code, 24 P.S. §13-1333(a)(1).[7]

Furthermore, we note that the present expulsion proceedings appear to have been commenced in June of 2008, following the conclusion of the 2007-2008 school year. Arguably, the provisions of the Handbook (a new Handbook is adopted each year) are not applicable following the conclusion of the school year. Certainly, and consistent with the Handbook, the School could have simply elected to deny Yarisa enrollment for the subsequent school year. The School chose neither of the aforementioned options, instead opting to impose an unreasonable and excessive permanent expulsion.[8]

[6] Given our determination of this issue, we need not reach Yarisa's argument that the Board violated her right to substantive due process under the Fourteenth Amendment to the United States Constitution.

[7] Section 1333(a)(1) provides that a parent or guardian of a child of compulsory school age who fails to comply with the compulsory attendance provisions of the Code is subject to a summary proceeding which may result in the payment of fines and court costs or be mandated to complete a parenting education program. This section merely requires that a district superintendent, attendance officer, or secretary of the board of school directors provide the parent or guardian with three days written notice of a compulsory attendance violation.

[8] We note that because students must reapply for admission every year, our disposition of this case has no practical effect other than to amend Yarisa's academic record to remove the expulsion.

Accordingly, the order of the trial court is reversed.[9]

PATRICIA A. McCULLOUGH, Judge

[9] Yarisa raises an additional issue in her brief to this Court regarding whether the School had an obligation under federal law to determine if she was a child with a disability entitled to accommodations and protections, citing section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and various sections of the Individuals with Disabilities Education Act and its accompanying regulations, including 20 U.S.C. §§1401(3), 1412(a)(3), and 34 C.F.R. §§300.8(a)(1), 300.111. However, Yarisa failed to raise this issue before the Board or the trial court, and, hence, it is waived. Pa. R.A.P. 302(a); Riverside School Board v. Kobeski, 604 A.2d 1173 (Pa. Cmwlth. 1992).

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ORDER

AND NOW, this 18th day of February, 2011, the April 24, 2009, order of the Court of Common Pleas of Philadelphia County is reversed.

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PATRICIA A. McCULLOUGH, Judge