IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Appeal of N.O., by Her Parent S.O. from the decision of Bethlehem Area School District, a local agency	:	
	:	No. 1757 C.D. 2010
	:	Submitted: January 14, 2011
Appeal of: N.O., by her parent S.O.	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: May 23, 2011

N.O., by her mother S.O., appeals the decision of the Court of Common Pleas of Northampton County (trial court)[1] denying her appeal of the decision of the Bethlehem School District to expel her permanently from high school. The trial court upheld the conclusion of the Board of School Directors that N.O.'s physical assault on a School District employee required her expulsion. We affirm.

The incident that caused N.O.'s expulsion took place during the 2009-2010 academic year. At that time, N.O. was a sophomore at one of the District's

[1] N.O. filed a petition for review and an appeal from the School Board's adjudication, which the trial court consolidated.

high schools where she was enrolled in the school's English as a Second Language program.

On the morning of December 16, 2009, N.O. got into an argument in the hallway with another student, C.L. A teacher, Carmen DeLeon, told the girls to stop arguing and go to class. Instead, N.O. entered a nearby bathroom. C.L. remained in the hallway and began arguing with DeLeon, becoming angrier and more combative. At that point, the school nurse, Kathy Halkins, and Nancy Romig, a hall monitor, tried to help DeLeon. While Halkins, Romig, and other staff members tried to stop C.L. from running away, N.O. left the bathroom. Upon seeing N.O., C.L. attacked her. Halkins tried to separate the two girls, and all three fell to the floor. During the struggle, Halkins was punched repeatedly on her shoulders and back and had her hair pulled in opposite directions. The struggle ended when teachers and staff members separated the three and restrained the girls.

In accordance with its Student Code of Conduct, the District suspended N.O. for 10 days for assaulting a district employee and scheduled an expulsion hearing.[2] Initially scheduled for January 15, 2010, the hearing was rescheduled to January 25, 2010, at the request of N.O.'s attorney.

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[2] Pursuant to the District's Student Code of Conduct, assaulting a District employee is classified as a "Level IV" infraction, which is the most severe type of infraction. The Student Code of Conduct provides, in relevant part:

> Level IV infractions include behaviors which represent an immediate danger to the safety and well being of the total school community.
>
> 1. Students cited for Level IV infractions will be suspended from school for ten (10) school days and referred by the building principal to the Superintendent of schools for an expulsion hearing before the Board of School Directors of the Bethlehem Area School District.
> 2. Level IV infractions include but are not limited to the following types of behavior:

(Footnote continued on the next page . . .)

At the expulsion hearing, Halkins testified for the District. She stated that after she was knocked to the ground she curled up and closed her eyes. Accordingly, she could not see who was hitting her or pulling her hair, but she knew the blows and hair pulling came from two sides. She surmised that both C.L. and N.O. were hitting her and pulling her hair.

Romig testified that as she pulled N.O. off of Halkins, she saw N.O. pulling Halkins' hair and swinging with her fists. Romig explained that she had to physically remove N.O.'s hands from Halkins' hair. Throughout the ordeal, Romig shouted at both girls to "let the nurse's hair alone, you're pulling the nurse's hair." Notes of Testimony, January 25, 2010, at 27, (N.T.___).

In her defense, N.O. offered the testimony of several people. They included: Antonio Traca, the School's Assistant Principal; Carmen DeLeon; J.T., a student who witnessed the fight; and N.O.'s sister.[3] N.O. also testified on her own behalf.

N.O.'s testimonial evidence was offered principally to show that C.L. was the aggressor and N.O. the victim. However, some of N.O.'s offered testimony related to the assault on Halkins. For example, DeLeon stated that she did not see who pulled Halkins' hair or whether N.O. actually struck Halkins. J.T. stated that he saw only C.L. pulling Halkins' hair. N.O. testified that she did not

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b. *Assault upon a district employee*.

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Reproduced Record at 38a (R.R. ___) (emphasis added).

[3] N.O. also offered the written statements of Abdou Chami and S. Norwood; they did not appear at the hearing to testify. The only exhibit offered by N.O. that was not admitted into evidence was a posting on C.L.'s MySpace page in which she bragged about her attack on N.O.

pull Halkins' hair or hit her. Rather, she testified that she was trying only to free herself from the pile by pushing everyone away.

The School Board found, as fact, that N.O. assaulted Halkins and expelled her permanently from the District. It offered her placement in a night school program with continued English as a Second Language instruction. N.O. appealed. The trial court held that N.O.'s constitutional rights were not violated, that no procedural rules of law were violated, and that the School Board's findings were supported by substantial evidence. Accordingly, the trial court affirmed the School Board's decision, dismissed N.O.'s petition for review and denied her appeal. N.O. appealed to this Court.

On appeal,[4] N.O. raises four issues for our review.[5] First, N.O. contends that the School Board's expulsion proceedings were procedurally defective. Second, she contends that the School Board did not make a complete record because it did not advise her of certain facts helpful to her case; accordingly, the trial court should have taken additional evidence or remanded for more fact finding by the Board. Third, N.O. argues the trial court erred because, contrary to the trial court's holding, the School Board abused its discretion; violated her constitutional rights; and made findings not supported by substantial evidence. Finally, she believes that the trial court erred in finding that the night

[4] Our scope of review of an appeal brought pursuant to the Local Agency Law, 2 Pa. C.S. §§751-754, where, as here, the lower court determined that a complete record was made before the local agency, is to affirm the adjudication unless it is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. *Hamilton v. Unionville-Chadds Ford School District*, 714 A.2d 1012, 1013 (Pa. Cmwlth. 1998).

[5] We have reorganized and restated the issues for purposes of our analysis.

school program offered her constituted a "proper education." We address the issues *seriatim.*

We begin with N.O.'s contention that the expulsion proceedings were procedurally defective. Specifically, she alleges the District violated regulations of the Department of Education that govern suspension and expulsion hearings and are designed to afford students due process. N.O. contends that the District violated 22 Pa. Code §12.6(d)[6] by suspending her for more than 10 days without first giving her an informal hearing and determining that her presence in class would constitute a threat to the health, safety or welfare of others. Further, the District violated 22 Pa. Code §12.8(c)[7] by not satisfying the requirements of an

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[6] It states:

> If it is determined after an informal hearing that a student's presence in his normal class would constitute a threat to the health, safety or welfare of others and it is not possible to hold a formal hearing within the period of a suspension, the student may be excluded from school for more than 10 school days. A student may not be excluded from school for longer than 15 school days without a formal hearing unless mutually agreed upon by both parties. Any student so excluded shall be provided with alternative education, which may include home study.

22 Pa. Code §12.6(d).

[7] It states:

> (c) *Informal hearings*. The purpose of the informal hearing is to enable the student to meet with the appropriate school official to explain the circumstances surrounding the event for which the student is being suspended or to show why the student should not be suspended.
>
> (1) The informal hearing is held to bring forth all relevant information regarding the event for which the student may be suspended and for students, their parents or guardians and school officials to discuss ways by which future offenses might be avoided.
>
> (2) The following due process requirements shall be observed in regard to the informal hearing:

(Footnote continued on the next page . . .)

informal hearing. Accordingly, N.O. believes the District violated her due process rights.[8]

In response, the School Board, as did the trial court, focuses upon the language in Section 12.6(d) stating that "[a] student may not be excluded from school for longer than 15 school days without a formal hearing unless mutually agreed upon by both parties." 22 Pa. Code §12.6(d). N.O. was "excluded from school" beginning on December 17, 2009, and the School Board scheduled a formal hearing for January 15, 2010, which was within the 15-day limit after scheduled holiday vacation days were subtracted. Because N.O.'s counsel could not attend a hearing that day, the parties mutually agreed to reschedule it to January 25, 2010. The School Board is correct that it complied with the 15-day formal hearing requirement.

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> (i) Notification of the reasons for the suspension shall be given in writing to the parents or guardians and to the student.
>
> (ii) Sufficient notice of the time and place of the informal hearing shall be given.
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> (iii) A student has the right to question any witnesses present at the hearing.
>
> (iv) A student has the right to speak and produce witnesses on his own behalf.
>
> (v) The school entity shall offer to hold the informal hearing within the first 5 days of the suspension.

22 Pa. Code §12.8(c).

[8] Due process is a flexible concept requiring procedural protections only to the extent the situation demands. *Burger v. Board of School Directors of McGuffey School District*, 576 Pa. 574, 586, 839 A.2d 1055, 1062 (2003); *Abremski v. Southeastern School District Board of Directors*, 421 A.2d 485, 487 (Pa. Cmwlth. 1980).

However, N.O.'s argument is focused on the pre-suspension *informal* hearing. Section 12.6(d) of the regulation states:

> If it is determined *after an informal hearing* that a student's presence in his normal class would constitute a threat to the health, safety or welfare of others and it is not possible to hold a formal hearing within the period of a suspension, *the student may be excluded from school for more than 10 school days*.

22 Pa. Code §12.6(d) (emphasis added). N.O. maintains that she was not given an informal hearing before being suspended for more than 10 school days. The record does not support N.O.'s argument.

At the formal hearing before the School Board, Traca testified that N.O. was suspended after a meeting with N.O. and her mother, at which he explained their options and informed them that the District was moving forward with a formal expulsion hearing. The District's Conduct Referral Report, which was submitted into evidence at the hearing, stated that an informal due process hearing was held December 22, 2009. Further, the evidence shows that N.O. was offered placement in the evening program at the end of the 10-day suspension. This evidence supports the finding that an informal hearing took place. Further, N.O. failed to specify in what way the informal hearing did not conform to 22 Pa. Code §12.8(c).

In her second issue, N.O. contends that the trial court should have remanded the matter to the School Board for more fact finding because it did not make a complete record. Specifically, she argues the Board did not advise her of favorable evidence prior to the expulsion hearing, namely that Officer Scott of the Bethlehem Police Department, who investigated the incident, was willing to testify

in her defense and had pictures showing her physical injuries.[9] Officer Scott's testimony would have supported her claim that she was the victim in this case. Moreover, N.O. alleges the Board erred in not admitting one of her exhibits, a print-out of C.L.'s profile page on MySpace.com, where C.L. boasted about C.L.'s assault of N.O.

The trial court's review of a local agency decision varies, depending on the adequacy of the record made before the local agency. If the trial court concludes the record is not "full and complete," it may take additional evidence under Section 754(a) of the Local Agency Law, 2 Pa. C.S. §754(a).[10] A "full and complete record" is defined as:

> a complete and accurate record of the testimony taken so that the appellant is given a base upon which he may appeal and, also, that the appellate court is given a sufficient record upon which to rule on the questions presented.

Lamar Advantage GP Co. v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 997 A.2d 423, 436 (Pa. Cmwlth. 2010) (citation omitted). The adequacy of the local agency's record is a matter committed to the discretion of the trial court. *City of Philadelphia v. Murphy*, 320 A.2d 411, 414 (Pa. Cmwlth.

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[9] Officer Scott investigated the fight in connection with juvenile criminal charges lodged against N.O. for, *inter alia*, simple assault. N.O. alleges that Officer Scott expressed concern about her expulsion and supported her staying in school. Appellant's Brief at 10.

[10] It states:

> (a) Incomplete record.--In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand the proceedings to the agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.

2 Pa. C.S. §754(a).

1975). Here, the trial court determined that a full and complete record was made before the School Board.

In so holding, the trial court expressly addressed N.O.'s argument regarding Officer Scott. It explained:

> [W]e are not compelled to find the record is incomplete because Officer Scott was not called as a witness in the hearing and that photographs in his possession were not shown to the [Board]. Officer Scott . . . was not an eyewitness to the event and . . . there is no proffer by [N.O.] that Officer Scott has any competent evidence to introduce with regard to the incident in question. *Without a proffer that Officer Scott would provide new information, supportive of the Student's position, we find that the failure of the [District] to call Officer Scott . . . is of no matter*. . . . [I]t is a Student's burden to show that a full and complete record was not made. [N.O.] has not satisfied this burden.

Trial Court Opinion of 07/20/10, at 9-10 (emphasis added). If N.O. wanted to present evidence in addition to that presented to the School Board, she had to present that request to the trial court. However, N.O. did not ask the trial court to admit more evidence. In any case, the record was replete with evidence to support N.O.'s claim that she was the victim. Testimony from Officer Scott would have been merely cumulative of other evidence relating to a fact not even in dispute, *i.e.*, that N.O. was a victim of C.L. The only issue at the expulsion hearing was whether N.O. assaulted a District employee.[11]

[11] At a formal expulsion hearing, a school district must only provide a student with "the names of *witnesses against the student*." 22 Pa. Code §12.8(b)(5)(emphasis added). Since Officer Scott was not called as a witness against N.O., the District was not required to inform N.O. if he was available or willing to testify in support of her case.

In her third issue, N.O. argues that the trial court erred in upholding the School Board. Specifically, N.O. asserts that the School Board improperly overlooked the fact that she was the victim of an attack on school grounds; that the Board was biased by selectively relying on Nancy Romig's testimony when all of the other evidence supported N.O.'s position; and that since the Student Code of Conduct does not define "assault" the Board should have employed the definition from the Crimes Code, requiring the District to present evidence that N.O. "intended" to assault Halkins.

School boards have broad discretion in determining school disciplinary policies. *Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117, 120 (Pa. Cmwlth. 2000)(noting those challenging the policy bear a heavy burden). Courts, generally, will not interfere with a school board's discretion unless its actions were arbitrary, capricious, and prejudicial to the public interest. *Id.* (citation omitted). With regard to disciplinary matters, a school board must define and publish all the offenses that could lead to a suspension or expulsion. 22 Pa. Code §12.6(a).[12] However, in doing so the board need not compose policies that are as detailed as criminal codes. *Schmader ex rel. Schmader v. Warren County School District*, 808 A.2d 596, 599 (Pa. Cmwlth. 2002)(citing *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)).

In support of her bias claim, N.O. points to the questions posed by Board President Loretta Leeson at the hearing. N.O. contends that Leeson's

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[12] It states, in relevant part:

> (a) The governing board shall define and publish the types of offenses that would lead to exclusion from school. . . .

22 Pa. Code §12.6(a).

questions were designed to help the District make a case for expulsion. Further, Leeson failed to give weight to the fact that N.O. was a victim. The trial court held, however, that N.O. mischaracterized Leeson's questions. We agree.

Leeson's questions were germane to the issue of expulsion. For example, Leeson asked Halkins if she threw any punches in self-defense and whether the girls tried to continue fighting after being separated. She also asked Romig if she clearly identified Halkins as the recipient of blows during the girls' fight. Some of Leeson's questions of Romig tested Romig's certainty that it was Halkins, not C.L., who was the focus of N.O.'s blows. In any case, as already stated, the fact that N.O. was herself a victim was not relevant to whether she committed her own assault.

N.O. also argues the School Board's decision was not supported by substantial evidence because it relied predominantly on the testimony of only one witness, Nancy Romig. This argument lacks merit. While it is true that the Board relied heavily on Romig's account of the incident, there was other evidence that N.O. assaulted Halkins. Most compelling was Halkins' own testimony that both N.O. and C.L. were hitting her and pulling her hair. Thus, we agree with the trial court that the Board's decision was supported by substantial evidence, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Clites v. Upper Yoder Township*, 506 Pa. 349, 354, 485 A.2d 724, 726 (1984).

Finally, N.O. argues that since "assault" is not defined in the Student Code of Conduct, the definition of "assault" in the Crimes Code must govern.[13] It

[13] Chapter 27 of the Crimes Code, 18 Pa. C.S. §§2701-2717, governs the crimes of assault. N.O. does not direct the Court's attention to any specific section of Chapter 27, but she is likely
(Footnote continued on the next page . . .)

follows, N.O. contends, that to prevail, the District had to prove that she intended to harm Halkins. Because she was defending herself from C.L.'s attack, and the District did not prove otherwise, N.O. believes she could not have committed an "assault". We disagree.

N.O. cites no authority to support her argument that a reviewing court must turn to the Crimes Code to define an undefined term in a school district's code of conduct. This argument is at odds with this Court's precedent that school districts need not construct their disciplinary policies with the same level of detail as criminal codes. *Schmader*, 808 A.2d at 599 (citing *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)). Moreover, the District policy at issue in this case is not vague or in any way unclear; it expressly advises students that an "assault upon a district employee" is a Level IV offense that may result in expulsion. The School Board did not abuse its discretion in finding that striking a school nurse and pulling her hair constituted an "assault upon a district employee."

In her final issue, N.O. argues that the trial court erred in finding the evening program constitutes an adequate alternative education for her. N.O. contends that five hours a week of supervised instruction is insufficient, especially in light of the fact that she is a Spanish speaking student who is learning the English language. She argues that the evening program does not meet the State

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referencing the definition of "Simple Assault" provided for in Section 2701. In relevant part, it provides that:

> A person is guilty of assault if he:
>
> > (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another . . . .

18 Pa. C.S. §2701.

Board of Education's requirements under 22 Pa. Code §4.26[14] for English as a second language students.

School districts are required to provide alternative education programs to expelled students. 22 Pa. Code §12.6.[15] This Court, in interpreting an earlier enactment of this regulation, held that local school officials have the discretion to determine the amount and type of alternate instruction necessary and appropriate in each case. *Abremski*, 421 A.2d at 488. In the case *sub judice*, the District concluded the evening program provides a sufficient amount of alternative education to students. This finding was supported by Traca's testimony that the evening program offered to N.O. takes into account that N.O. needs language

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[14] It provides:

> Every school district shall provide a program for each student whose dominant language is not English for the purpose of facilitating the student's achievement of English proficiency and the academic standards under §4.12 (relating to academic standards). Programs under this section shall include appropriate bilingual-bicultural or English as a second language (ESL) instruction.

22 Pa. Code §4.26.

[15] In relevant part, it provides:

> (d) [. . .] Any student so excluded shall be provided with alternative education, which may include home study.
>
> (e) Students who are under 17 years of age are still subject to the compulsory school attendance law even though expelled and shall be provided an education.
>
> (1) The initial responsibility for providing the required education rests with the student's parents or guardian, through placement in another school, tutorial or correspondence study, or another educational program approved by the district's superintendent.
>
> (2) [. . .] If the parents or guardians are unable to provide the required education, the school entity shall . . . make provision for the student's education. . . .

22 Pa. Code §12.6.

training. N.O. offered no evidence to support her contention that the evening program will not accommodate her needs. Therefore, in light of the broad discretion granted to the District, and Traca's testimony that the evening program provides English as a Second Language instruction, we conclude that the trial court did not err in finding that the District provided N.O. with a proper alternative education.

For all of the foregoing reasons, we affirm the order of the trial court.

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MARY HANNAH LEAVITT, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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O R D E R

AND NOW, this 23rd day of May, 2011, the order of the Court of Common Pleas of Northampton County in the above-captioned matter, dated July 20, 2010, is AFFIRMED.

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MARY HANNAH LEAVITT, Judge