NO. COA09-530

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

Petitioner, a minor, by
and through his mother
and legal guardian,
STACEY WATSON-GREEN,
Petitioner

Wake County
No. 08 CVS 000520

v.

WAKE COUNTY BOARD OF
EDUCATION,
Respondent

Appeal by petitioner from order entered 11 August 2008 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 4 November 2009.

Legal Aid of North Carolina, Inc., by Suzanne Chester and Kelly Clarke, for petitioner-appellant.

Tharrington Smith, L.L.P., by Robert M. Kennedy, Jr., for respondent-appellee.

CALABRIA, Judge.

The petitioner, "Ryan,"[1] was suspended from the Wake County Schools for the 2007-2008 school year. He appealed his suspension to all three levels afforded by the Wake County Board of Education ("the Board"): a panel of teachers, the superintendent, and a panel of Board members. The suspension was upheld at every level. Ryan,

[1]All minors in this opinion shall be referred to by pseudonyms to protect their identities and for ease of reading.

by and through his mother and legal guardian, Stacey Watson-Green, appeals the trial court's order affirming the Board's decision upholding his long-term suspension. We affirm.

I. BACKGROUND

On 18 September 2007, Ryan, a 14-year-old student at Panther Creek High School ("Panther Creek"), was eating lunch in the cafeteria when a 16-year-old student, "Bill," approached him and insulted him. Ryan and Bill (collectively "the boys") quickly began grappling and punching each another. Ryan told Bill, "When you get off of me, I'll punch you in your face."

Two teacher assistants, Chris Kingston ("Mr. Kingston") and Steven Klein ("Mr. Klein") (collectively "the teacher assistants"), attempted to break up the fight. They spent about 60 seconds trying to get the boys to stop fighting. Ryan heard at least one of the teacher assistants telling him to stop fighting. Other teachers arrived and tried to separate the boys. Approximately 20 seconds after the teachers separated the boys, as Mr. Klein held Bill, Ryan hit Bill's face and Mr. Klein sustained an injury to his nose from also being hit.

Panther Creek Assistant Principal Greg Welsh ("Mr. Welsh") interviewed the boys as well as other witnesses and documented their statements ("the witness statements"). The school resource officer for Panther Creek, Officer Shauna Geyer ("Officer Geyer"), of the Cary Police Department, reviewed the witness statements and interviewed Mr. Klein. Officer Geyer completed an incident report ("incident report") for Panther Creek and charged both boys. Bill

was charged as an adult with the misdemeanor of disorderly conduct and Ryan was charged as a juvenile for assault on a school employee and disorderly conduct. Ryan was suspended for violating four policies of the Board by Panther Creek Principal Rodney Nelson ("Principal Nelson"). One of the policies, 6425.3A ("Policy 6425.3A"), provided for long-term suspension for students in grades 6-12 who assault school employees. On 19 September 2007, Principal Nelson found that Ryan violated Policy 6425.3A. Ryan was suspended for 10 days with a recommendation to the Wake County Public School superintendent ("the superintendent") for a long-term suspension. (R pp. 8-10) The suspension was imposed pursuant to N.C. Gen. Stat. § 115C-391(c):

> The principal of a school, with the prior approval of the superintendent, shall have the authority to suspend for periods of times in excess of 10 school days but not exceeding the time remaining in the school year, any pupil who willfully violates the policies of conduct established by the local board of education. The pupil or his parents may appeal the decision of the principal to the local board of education.

N.C. Gen. Stat. § 115C-391(c) (2007).

On 25 September 2007, Ryan appealed the recommendation for long-term suspension and requested a school-level hearing ("school-level hearing"). The school-level hearing was held on 18 October 2007 before a panel of three Panther Creek teachers ("the panel"). Ryan and Panther Creek were each represented by counsel at the school-level hearing and presented evidence, called witnesses, and made legal arguments. The panel found that Ryan violated Policy 6425.3A and affirmed Principal Nelson's recommendation for a long-

term suspension and offered an alternative educational placement at the Richard Millburn School ("Millburn"). An issue of discrepancy in punishments was raised by Ryan at the close of the school-level hearing.

Following the school-level hearing, Ryan appealed the decision of the panel to the superintendent. On 1 November 2007, the Discipline Review Committee reviewed the information gathered by the panel and recommended to uphold Ryan's long-term suspension for the remainder of the 2007-08 school year. The superintendent approved the recommendation on 2 November 2007.

On 14 November 2007, Ryan appealed the superintendent's decision to the Board. A three-member panel of the Board heard Ryan's appeal on 29 November 2007 ("the Board-level hearing"). Ryan and Panther Creek were each represented by counsel at the Board-level hearing. After considering the evidence, the Board upheld Ryan's long-term suspension.

Ryan sought judicial review of the Board's decision in Superior Court alleging the superintendent and the Board upheld Principal Nelson's decision despite the lack of substantial evidence, numerous due process violations in the decision-making process, and the denial of the fundamental right to an education. Ryan also alleged the decision was arbitrary and capricious. Ryan requested that the Board reverse his suspension, remove all references to the suspension from his record, and permit him to return to school immediately.

On 11 August 2008, the trial court, sitting without a jury, affirmed the Board's decision upholding Ryan's long-term suspension. The trial court concluded, in pertinent part: (1) there was substantial evidence to support a finding that Ryan willfully behaved in such a manner that could reasonably cause physical injury to a school employee and that he was not acting in self-defense; (2) the decision of the Board upholding Ryan's long-term suspension was not arbitrary, capricious, or an abuse of discretion; (3) the Board did not commit an error of law and acted within its statutory authority in upholding Ryan's long-term suspension; (4) the Board did not violate Ryan's procedural or substantive due process rights under the United States and North Carolina Constitutions; and (5) Ryan's long-term suspension did not infringe on his right to an opportunity to receive a sound, basic education. Ryan appeals.

II. STANDARDS OF REVIEW

> Pursuant to N.C. Gen. Stat. § 115C-391(e), an appeal of a local school board's decision regarding a suspension of a student for a period of time in excess of ten school days but not exceeding the time remaining in the school year is subject to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes, part of the Administrative Procedures Act ("APA").

In re Alexander v. Cumberland Cty. Bd. of Educ., 171 N.C. App. 649, 653, 615 S.E.2d 408, 412-13 (2005) (citing N.C. Gen. Stat. § 115C-391(c), (e) (2003)). In reviewing a school board's decision upholding a long-term suspension, a court may reverse or modify the decision:

> if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b)(1)-(6) (2007). "A *de novo* standard of review applies to asserted errors under subsections (1) through (4) of N.C.G.S. § 150B-51(b), while errors under subsections (5) and (6) of this statute are reviewed under the whole record test." *Davis v. Macon Cty. Bd. of Educ.*, 178 N.C. App. 646, 652, 632 S.E.2d 590, 594 (2006). "When conducting *de novo* review, the court considers the matter anew and may freely substitute its own judgment for the board's." *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 185 N.C. App. 566, 572, 649 S.E.2d 410, 415 (2007).

"The whole record test, by contrast, requires the reviewing court to examine all competent evidence and determine whether the board's decision is supported by 'substantial evidence.'" *Id.* (citing *Davis*, 178 N.C. App. at 652, 632 S.E.2d at 594).

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Therefore, if we conclude there is substantial evidence in the

> record to support the Board's decision, we must uphold it. We note that while the whole-record test does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached, the test does not allow the reviewing court to replace the [] Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.

Meads v. N.C. Dep't of Agric., 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (internal citations and quotations omitted).

> As to appellate review of a superior court order regarding an agency decision, "the appellate court examines the trial court's order for error[s] of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly."

ACT-UP Triangle v. Commission for Health Services, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)).

In the instant case, there is no dispute that the trial court exercised the appropriate scope of review. Instead, Ryan challenges the application of the whole record test and the trial court's *de novo* review of his constitutional claims regarding his right to a sound, basic education and his due process rights.

III. WHOLE RECORD TEST

A. Fact-Finding Inquiry v. Formal Findings of Fact

Ryan argues that the trial court misapplied the whole record test by affirming the decisions made by the school and the Board

and making new findings of fact at variance with those decisions. We disagree.

When the trial court reviews a school board's decision under the whole record test, the court lacks authority to make findings at variance with the findings of the school board when the board's findings are supported by competent, material and substantial evidence. *Beaufort County Schools v. Roach*, 114 N.C. App. 330, 335, 443 S.E.2d 339, 341 (1994). "'[W]here the reviewing court determines that the findings of the agency are not supported by substantial evidence, the Court may make findings at variance with those of the agency.'" *Id.* (brackets omitted) (quoting *Scroggs v. North Carolina Criminal Justice Educ. and Training Standards Comm'n*, 101 N.C. App. 699, 702-03, 400 S.E.2d 742, 745 (1991)).

In *Davis*, a school board upheld a principal's recommendation not to renew a non-tenured teacher's contract. 178 N.C. App. at 647, 632 S.E.2d at 592. The teacher argued that the trial court misapplied the whole record test when reviewing the school board's decision. *Id.* at 655, 632 S.E.2d at 596. In affirming the order of the trial court to uphold the board's decision, this Court stated that "a school board need not make exhaustive inquiries or formal findings of fact. Rather, the administrative record, be it the personnel file, board minutes or recommendation memoranda, should disclose the basis for the board's action." *Id.* at 655-56, 632 S.E.2d at 596 (internal quotations, citations, and brackets omitted); *see Abell v. Nash County Bd. of Education*, 71 N.C. App. 48, 52-53, 321 S.E.2d 502, 506 (1984). Therefore, for suspensions

issued pursuant to N.C. Gen. Stat. § 115C-391, school boards need not make findings of fact. They need only to conduct a fact-finding inquiry, and the basis or bases for their decisions must be disclosed in the administrative record.

In the instant case, Mr. Welsh documented the boys' statements and interviewed witnesses to the altercation. In the Notice of Student Suspension from School, Principal Nelson noted that Ryan "was given an opportunity to respond to the charges by [Mr.] Welsh," and described the nature of Ryan's offense. Panther Creek conducted the school-level hearing and received evidence from Ryan and the Board. The panel stated that Ryan violated Policy 6425.3A "[a]fter considering all of the evidence provided[.]"

After the superintendent's hearing, Ryan received a letter stating that "the Discipline Review Committee reviewed the information gathered at the school hearing" and based on that information, the superintendent approved the recommendation for long-term suspension. The letter also recited the description of the nature of Ryan's offense from the Notice of Student Suspension from School. Ryan appealed to the Board.

At the Board-level hearing, a three-member panel of the Board considered an audio recording of the school-level hearing and sixteen different documents, including the school-level hearing report. The Board conducted an exhaustive fact-finding inquiry, and the record is replete with documents that disclose the basis for the Board's action. Since there was a basis for the Board's

action, the requirements of *Davis*, *Abell*, and *Beaufort County Schools* are satisfied. Ryan's assignments of error are overruled.

B. The Trial Court's Review of the Board's Decision

Ryan asks this Court to substitute its judgment for the judgment of the Board and points to portions of the record that would have supported a contrary ruling. We disagree.

"The 'whole record' test requires the reviewing court to examine all competent evidence ('the whole record') in order to determine whether the agency decision is supported by 'substantial evidence.'" *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*[.]" *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

1. Evidence Supporting or Rejecting Self-Defense

Ryan argues that the *trial court* erred in finding that Ryan was not acting in self-defense because this finding was not supported by substantial evidence. Essentially, Ryan asks this Court to substitute its judgment for that of the Board, and points to portions of the record that would have supported a contrary ruling. We disagree.

N.C. Gen. Stat. § 115C-391(d2)(3) specifically prohibits a school from giving a long-term suspension to a student who causes

physical injury to an employee while the student was acting in self-defense. Policy 6425.3A, based on N.C. Gen. Stat. § 115C-391, states in pertinent part:

> Assault on a School Employee or Other Adult - No student shall assault or attempt to cause physical injury or behave in such a manner that could reasonably cause physical injury to any school employee or other adult.
>
> A. The first violation of [this section] by a student in grades 6-12 *shall* result in removal to an alternative educational setting or long-term suspension from the school system for the remainder of the school year.

WAKE CO. SCH. BD. POLICY § 6425.3A (2007) (emphasis added). The Board's policy also provides that "[a] student who is attacked may use reasonable force in self-defense, but only to the extent necessary to get free from the attack and notify proper school authorities." WAKE CO. SCH. BD. POLICY § 6425 (2007) ("Policy 6425").

In the instant case, there is no dispute that Ryan actually hit Mr. Klein when he swung at Bill. The only issue is whether Ryan acted in self-defense when he did so. Although Ryan alleges he was in the throes of an attack by Bill and that he threw his punch in self-defense, substantial evidence supports the conclusion that the fight between Ryan and Bill had already ended when Ryan consciously threw the punch that struck Mr. Klein. The most compelling evidence that the fight had already ended when Ryan struck Mr. Klein is Ryan's own testimony at the school-level hearing:

> Q [counsel for the Board]: Okay. So you acknowledge today that you hit [Bill] in

> the face after the teachers had initially broken up the fight?
> A [Ryan]: If I knew - if I just found out today?
> Q: No, no. I'm saying you acknowledge today in this hearing that you hit [Bill] in the face after the teachers initially broke up the fight?
> A: Yeah.

Ryan argues that the Board mistakenly characterizes his "Yeah" as an admission that he hit Bill after the teachers broke up the fight. Therefore, Ryan argues that a different reasonable inference can be drawn from his testimony. Assuming *arguendo* that different reasonable inferences can be drawn from Ryan's testimony, we will not disturb the Board's determination of which reasonable inference to believe because this determination is for the Board. *See Thompson*, 292 N.C. at 410, 233 S.E.2d at 541.

Ryan's testimony was corroborated by Mr. Klein's testimony that approximately 20 seconds had passed between the time the teachers broke up the fight and the time Ryan threw the punch. Ryan's friend, "John," admitted that Ryan threw the punch after the teachers broke up the fight:

> Q [counsel for the Board]: Okay. So the teachers broke up the fight and then [Ryan] threw the punch?
> A [John]: Yes, ma'am.

Even if Ryan had not admitted the fight had already ended when he threw the punch that struck Mr. Klein, his actions still would not qualify as self-defense under Policy 6425, which provides that a student "who is attacked may use reasonable force in self-defense, but only to the extent necessary to get free from the attack and notify proper school authorities." WAKE CO. SCH. BD.

POLICY § 6425 (2007). According to the evidence, Ryan was not trying to get free from an attack or notify the proper school authorities when he used force.

In conclusion, the trial court properly considered the evidence in the record regarding Ryan's, John's and Mr. Klein's testimonies, along with evidence that Ryan threw the punch when he knew that teachers were on the scene and that Ryan was not trying to get free from an attack or notify authorities. The trial court properly concluded substantial evidence supported the Board's conclusion that Ryan was not acting in self-defense when he threw the punch that caused Mr. Klein to sustain injuries to his nose and "[Ryan] willfully behaved in such a manner that could reasonably cause physical injury to a school employee . . . ."

2. Credibility of Witnesses

Ryan disputes the credibility of Mr. Klein's version of the events. Therefore, Ryan argues that this Court should substitute its judgment for that of the Board since numerous witnesses support Ryan's claim of self-defense. We disagree.

"North Carolina is in accord with the well-established rule that it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980). "Credibility determinations and the probative value of particular testimony are for the administrative body to

determine, and it may accept or reject in whole or part the testimony of any witness." *Oates v. N.C. Dept. of Correction*, 114 N.C. App. 597, 601, 442 S.E.2d 542, 545 (1994) (internal citations and quotation marks omitted). "On review of an agency's decision, a trial court 'is prohibited from replacing the Agency's findings of fact with its own judgment of how credible, or incredible, the testimony appears to [the trial court] to be, so long as substantial evidence of those findings exist in the whole record.'" *N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 N.C. App. 530, 536, 616 S.E.2d 594, 599 (2005) (quoting *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)).

Ryan further argues that "[s]chool suspension cases, with their absence of findings, cannot be governed by this rule" and that Mr. Kingston's testimony contradicts that of Mr. Klein. Ryan cites *Thompson* to support his argument.

In *Thompson*, our Supreme Court reversed a school board's dismissal of a career teacher. 292 N.C. at 415, 233 S.E.2d at 544. A panel of "teachers and laymen" had cleared the teacher of a number of charges, but the school board disagreed. *Id.* at 414, 233 S.E.2d at 543. In discussing the importance of witness credibility, our Supreme Court stated:

> [T]he evidence supporting a school board decision may appear less substantial when an impartial panel, which has observed the witnesses and dealt with the case, has drawn different conclusions than when the panel has reached the same conclusions as the school board. The significance of the panel report depends largely on the importance of the witnesses' credibility in the case.

Id.

In the instant case, both the panel and the Board drew the same conclusion that Ryan violated Policy 6425.3A by throwing a punch after the fight was over. *A fortiori*, both the panel and the Board concluded that Mr. Klein's testimony was credible. Nothing in the record suggests otherwise.

The Board determines the weight and sufficiency of the evidence, the credibility of the witnesses, draws inferences from the facts, and evaluates conflicting evidence. *State ex rel. Utilities Comm. v. Thornburg*, 314 N.C. 509, 515, 334 S.E.2d 772, 775 (1985). The Board evidently determined that Mr. Klein was credible and gave considerable weight to his testimony. Mr. Klein's testimony supports a reasonable inference that the fight was over and the boys had been separated when Ryan hit him.

The trial court properly considered the evidence in the record and determined that substantial evidence supported the Board's decision. Therefore, the trial court properly refused to substitute its judgment for that of the Board and upheld Ryan's long-term suspension. Under the whole record test, this Court is bound by the Board's determination of Mr. Klein's credibility and, like the trial court, this Court's judgment cannot be substituted for the Board's judgment. *In re Alexander*, 171 N.C. App. at 659, 615 S.E.2d at 415. Ryan's assignments of error are overruled.

C. Evidence Regarding Willful Violation of Policy

Ryan argues that the record does not contain substantial evidence that he *willfully* violated Policy 6425.3A. He contends

that there is no evidence that he "hit [Bill] for the purpose of behaving in a manner that could reasonably cause [Mr.] Klein, or any employee, to be hit." We disagree.

Ryan contends that we should use the definition of "willful" found in *Elshoff v. N.C. Bd. of Nursing*, 189 N.C. App. 369, 658 S.E.2d 65 (2008). In *Elshoff*, a nurse was charged with violating a Board of Nursing policy which provided that "'[b]ehaviors and activities which may result in disciplinary action by the Board include . . . harassing, abusing, or intimidating a client either physically or verbally[.]'" *Id.* at 372, 658 S.E.2d at 67 (quoting 21 N.C. Admin. Code 36.0217(c)(10)). Since the Board could discipline a nurse only for "willful" violations, we held that there must be substantial evidence that the nurse "willfully committed actions or said words with the purpose or intent to harass, abuse, or intimidate a client . . . ." *Id.* at 373, 658 S.E.2d at 68. The evidence in *Elshoff* showed that the nurse did not act with the intent and purpose to harass the client. *Id.* at 374, 658 S.E.2d at 69.

However, the definition of "willful" in *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005), is more applicable to the instant case. In *Hilliard*, a superintendent of a correctional facility was demoted for, *inter alia*, "the willful violation of known or written work rules[.]" *Id.* at 597, 620 S.E.2d at 17 (quoting 25 N.C.A.C. 1J.0614(i) (2003)). In affirming the superintendent's demotion, this Court stated that "a willful violation occurs when the employee *willfully takes action* which

violates the rule and does not require that the employee intend his conduct to violate the work rule." *Id.* (emphasis added).

In the instant case, with guidance from *Hilliard*, there is sufficient evidence in the whole record to support the Board's decision that Ryan intended to take action which violated Policy 6425.3A, not that he acted for the purpose of violating the policy. The teacher assistants spent about 60 seconds talking to the boys to try to get them to stop fighting. Ryan heard at least one of the teacher assistants telling him to stop fighting. Other teachers arrived and tried to separate the boys. The boys had been separated for approximately 20 seconds when Ryan threw the punch. There is no evidence that Ryan's punch was an accident or reflex. Therefore, since Ryan intended to throw a punch, his action willfully violated Policy 6425.3A. Ryan's assignments of error are overruled.

Ryan also argues that neither the panel nor the Board "found that [he] willfully violated the [B]oard policy . . . mandat[ing] a long-term suspension." More specifically, he argues that "[w]ithout a finding that [his] violation was willful, the hearing panel's determination that [he] violated School Board Policy # 6425.3A was not sufficient to support a long-term suspension of [Ryan] pursuant to N.C. Gen. Stat. § 115C-391(c)."

There is no requirement that the Board explicitly find that a student "willfully" violated the applicable policy. Indeed, there is no requirement that the Board make any findings at all. The only requirement is that the student "willfully violates the

policies of conduct established by the local board of education." N.C. Gen. Stat. § 115C-391(c); *see also Davis*, 178 N.C. App. at 655-56, 632 S.E.2d at 596 (noting that a school board need not make "exhaustive inquiries or formal findings of fact," if the administrative record discloses the basis for the Board's action). The Board, by suspending Ryan for the rest of the school year, necessarily determined that he willfully violated the Board policy. Furthermore, we note that Ryan fails to cite any law to support his argument. Therefore, his assignment of error is dismissed pursuant to N.C.R. App. P. 28(b)(6) (2008).

D. Inadmissible Evidence

Ryan further argues that the Board relied on inadmissible evidence to suggest that he started the fight with Bill. We disagree.

N.C. Gen. Stat. § 150B-29 governs the rules of evidence in administrative hearings. That statute provides:

> In all contested cases, irrelevant, immaterial and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence available shall be admitted. On the judge's own motion, an administrative law judge may exclude evidence that is inadmissible under this section. The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence. It shall not be necessary for a party or his attorney to object at the hearing to evidence in order to preserve the right to object to its consideration by the administrative law judge in making a decision, by the agency in

> making a final decision, or by the court on judicial review.

N.C. Gen. Stat. § 150B-29(a) (2007). Ryan contends that even though Bill did not testify at the school-level hearing, since Bill was at school on the day of the hearing, he was "reasonably available," and thus the Board erred in relying on a statement signed by Ryan containing, in part, Bill's version of what occurred. However, if Bill was "reasonably available," then Ryan had an opportunity to call him to testify at the school-level hearing. Ryan had the burden of proof to establish the facts by a preponderance of the evidence, and there is no evidence in the record that shows that Ryan attempted to do this by calling Bill to testify at the school-level hearing.

E. Arbitrary and Capricious

Ryan argues that the Board's decision to suspend him for 165 days was arbitrary and capricious because Bill was also fighting when Panther Creek employees were trying to separate the boys, yet only Ryan was given a long-term suspension. We disagree.

Under the whole record test, school board decisions may be reversed as arbitrary or capricious "if they are patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment." *Richardson v. N.C. Dept. of Pub. Instr.*, ___ N.C. App. ___, ___, 681 S.E.2d 479, 483 (2009) (internal quotations and citations omitted). Long-term suspending only the student who actually hits a school employee is not a "whimsical" decision because it does not "'indicate a lack of fair

and careful consideration'" or 'fail to indicate any course of reasoning and the exercise of judgment . . . .'" *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (quoting *Comm'r of Ins.*, 300 N.C. at 420, 269 S.E.2d at 573) (internal quotations omitted). "This Court cannot 'override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.'" *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 153 N.C. App. 652, 661, 571 S.E.2d 262, 269 (2002) (quoting *Lewis*).

1. Good Faith, Fair and Careful Consideration, and Acting in Accordance With the Law

In the instant case, Ryan violated Policy 6425.3A, which provides that the first violation of Policy 6425.3A "*shall result* in removal to an alternative educational setting or long-term suspension from the school system for the remainder of the school year." WAKE CO. SCH. BD. POLICY § 6425.3A (2007) (emphasis added).

Ryan, his mother, and counsel all attended the Board-level hearing on 29 November 2007. The principal and two attorneys from the school were also present. Evidence was presented including Officer Geyer's incident report as well as the tape and transcript from the initial hearing. In addition, the Board restated Ryan's violation, allowed each side 15 minutes to present their respective cases, and asked Ryan questions. Finally, the chair of the three-member panel stated that the Board "will be looking at all the information we have before us."

In *In re Alexander*, the school board upheld the petitioner's fifteen-day suspension for pulling down a classmate's pants and exposing the classmate's bare rear end to other students. 171 N.C. App. at 650, 615 S.E.2d at 411. The petitioner argued that the board's decision was arbitrary and capricious because other students engaged in similar activity but received shorter suspensions. *Id.* at 660, 615 S.E.2d at 416. However, the principal articulated a valid reason for the difference in the length of the suspensions, *i.e.*, in the petitioner's case, the victim's bare rear end was exposed, while in the other cases, the victims' private areas were not exposed. *Id.* at 661, 615 S.E.2d at 417. Therefore, the board's action upholding the petitioner's suspension "was not arbitrary and capricious in that the decision did not lack reason and was not whimsical." *Id.*

Ryan argues that *In re Alexander* is "entirely different" from the instant case. To the contrary, the Board in the instant case also articulated a valid reason for upholding Ryan's long-term suspension, *i.e.*, that Ryan was the only student charged with violating a policy mandating a long-term suspension. The Board offered Ryan an alternative educational placement at Millburn, which provides courses in Science, Mathematics, English/Language Arts, and Social Studies. However, Ryan did not submit the "Request for Alternative School Placement" form to the Board. According to Policy 6425.3A, long-term suspension was mandatory if Ryan did not choose an alternative placement. Given this mandate, school officials had no discretion in deciding whether to recommend

Ryan for long-term suspension once he was charged with violating Policy 6425.3A. Therefore, the Board's decision upholding Ryan's long-term suspension shows that the Board acted in good faith, gave fair and careful consideration, and acted in accordance with the law in upholding Ryan's long-term suspension and that the Board's decision was not arbitrary and capricious.

2. Goals of N.C. Gen. Stat. § 115C-391

Ryan also argues that the primary goals of N.C. Gen. Stat. § 115C-391 (2007) were not served by his long-term suspension. Ryan cites *State v. Davis*, 126 N.C. App. 415, 485 S.E.2d 329 (1997) to support his argument. We disagree.

The issue in *Davis* was whether the United States and North Carolina constitutions prohibit a student from being convicted in a court of law for an offense for which the student was suspended from school. *Id.* at 418, 485 S.E.2d at 331. This Court held there is no prohibition. *Id.* at 421, 485 S.E.2d at 333. In reaching this decision, this Court examined whether the primary purpose of school suspension was punitive or remedial in nature. *Id.* at 420, 485 S.E.2d at 332. By examining the plain language of N.C. Gen. Stat. § 115C-391, this Court found that "the primary goal of suspension and expulsion is the protection of the student body." *Id.*

However, the protection of the student body is not the only goal of N.C. Gen. Stat. § 115C-391. The statute provides that a local board may "expel any student 14 years of age or older whose behavior indicates that the student's continued presence in school

constitutes a clear threat to the safety of other students *or employees*." N.C. Gen. Stat. § 115C-391(d) (2007) (emphasis added). "'School officials not only educate students who are compelled to attend school, but they have a responsibility to protect those students *and their teachers* from behavior that threatens their safety and the integrity of the learning process.'" *In re D.D.*, 146 N.C. App. 309, 316, 554 S.E.2d 346, 351 (2001) (emphasis added) (quoting *In Interest of Angelia D.B.*, 564 N.W.2d 682, 689 (Wis. 1997)). Therefore, protection of school employees is also a goal of suspension and expulsion. Since Ryan struck a school employee, his long-term suspension was appropriate under N.C. Gen. Stat. § 115C-391. Ryan's assignments of error are overruled.

IV. *DE NOVO* REVIEW: CONSTITUTIONAL CLAIMS

A. Fundamental Right to an Education

Ryan argues that the Board's decision to uphold the long-term suspension infringed on his fundamental right to an education under Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution. Ryan argues that the Board's decision did not pass either rational basis or strict scrutiny.

> Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and

> political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Leandro v. State of North Carolina, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997). Ryan correctly states that our Supreme Court examined the constitutional provisions and identified the individual right of each child to a sound, basic education. *Id.* Therefore, public schools must provide each student an opportunity to receive a sound, basic education. Our Supreme Court provides guidance for *Leandro* violations in *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004). *Hoke County* clearly states that a *Leandro* violation must be shown at trial. *Hoke Cty. Bd. of Educ.*, 358 N.C. at 620, 599 S.E.2d at 379.

In the instant case, Ryan concedes that he was charged with violating a policy that carried a mandatory long-term suspension. After Ryan's suspension, the Board offered Ryan an educational placement at Millburn as an alternative to suspension, and pursuant to Policy 6425.3A. Millburn provides courses in Science, Mathematics, English/Language Arts, and Social Studies.[2] Ryan has not demonstrated that such a program at Millburn, the alternative

[2]Our Supreme Court in *Leandro* held that for the purposes of our Constitution, a "sound basic education" included the same type of courses as the ones offered at Millburn. 346 N.C. at 347, 488 S.E.2d at 255.

school, was inadequate to provide a sound, basic education for him under *Leandro*. Ryan's assignment of error is overruled.

B. Due Process

1. Subpoena Requests

Ryan argues his procedural due process rights under the U.S. and North Carolina Constitutions were violated when his requests to examine and present evidence were denied, when the Board withheld evidence it considered in upholding his suspension, and when the same law firm represented the school and the Board throughout the various proceedings. We disagree.

Suspensions lasting longer than ten days require more formal procedures than short-term suspensions for ten days or less. *In re Alexander*, 171 N.C. App. at 657, 615 S.E.2d at 415 (citing *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)).

> This Court has held that when a school board seeks to impose a long-term suspension, a student not only has the right to notice and an opportunity to be heard, the student also has the right to a full hearing, an opportunity to have counsel present at the hearing, to examine evidence and to present evidence, to confront and cross-examine witnesses supporting the charge, and to call his own witnesses to verify his version of the incident.

Id. (citing *In re Roberts*, 150 N.C. App. 86, 92-93, 563 S.E.2d 37, 42 (2002), *overruled on other grounds by N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004)). "'In order to establish a denial of due process, a student must show substantial prejudice from the allegedly inadequate procedure.'" *Hardy v. Beaufort County Bd. of Educ.*, ___ N.C. App.

___, ___, 685 S.E.2d 550, 554 (2009) (quoting *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1242 (10th Cir. 2001)). *See also S.K. v. Anoka-Hennepin Ind. School Dist. No. 11*, 399 F.Supp.2d 963, 968 (D. Minn. 2005); *Sykes v. Sweeney*, 638 F.Supp. 274, 279 (E.D. Mo. 1986); *Covington County v. G.W.*, 767 So.2d 187, 191 (Miss. 2000); *Stratton v. Wenona Com. Unit Dist. No. 1*, 551 N.E.2d 640, 649 (Ill. 1990).

Ryan argues that his right to present evidence was violated at the school-level hearing and the Board-level hearing because: (1) the mother of a student witness, "James," did not allow him to testify at the school-based hearing; and (2) the Board denied Ryan's request to subpoena James on his behalf at the Board-level hearing. We disagree.

In the instant case, counsel for the Board interviewed James at school. When Ryan's counsel contacted James, "[James'] mother was so upset that the prior interview had been conducted at the school without her consent that she would not allow [Ryan's] counsel to talk with him and she did not want him to attend the [school-level] hearing." However, Ryan fails to cite any authority in support of his argument that a private actor's refusal to allow a witness to testify on his behalf violates his due process rights. Therefore, Ryan's assignment of error is dismissed pursuant to N.C.R. App. P. 28(b)(6) (2008).

Ryan further argues that the Board violated his due process rights when it denied his request to subpoena James to attend the Board-level hearing. Ryan cites *Nichols ex rel. Nichols v.*

DeStefano, 70 P.3d 505 (Colo. App. 2002), to support his argument. We disagree.

In *Nichols*, the petitioner was suspended for her involvement in a fight at school. *Id.* at 506. School administrators recommended her expulsion, and she requested a hearing. *Id.* Before the hearing, the petitioner requested permission from the school board to interview and subpoena two of her teachers, and the school board denied her requests. *Id.* The petitioner's counsel requested permission from the school board because counsel believed the teachers were represented by the school board's attorney, and therefore the attorney did not want to violate Colorado's Rules of Professional Conduct regarding contacting represented persons. *Id.* at 507. At the hearing, the petitioner admitted her conduct, and despite this, the Board offered "numerous statements of anonymous students" regarding the fight. *Id.* at 506. The Colorado Court of Appeals concluded that, in examining the totality of the circumstances, the school board violated the petitioner's due process rights because "the School District was in a position to permit [the petitioner's] attorney to speak with these teachers or to request, at a minimum, that the teachers voluntarily attend the hearing," and because the petitioner was not afforded an opportunity to present witnesses to challenge the anonymous statements. *Id.* at 508.

In the instant case, the Board did not forbid Ryan's attorney from speaking with James. It was James' mother who forbade Ryan's attorney from speaking with James. While the school board in

Nichols could have requested that the teachers voluntarily attend the expulsion hearing because the school board employed the teachers, the Board in the instant case had no such authority over James. In addition, Ryan presented four witnesses, besides his testimony, at the school-level hearing.[3] Ryan has not suggested that James would have provided information that was not available from Ryan's other witnesses, and therefore has not shown that he was prejudiced by James' absence. These facts show that the Board did not violate Ryan's due process rights by declining to subpoena James to testify on Ryan's behalf. Ryan's assignment of error is overruled.

2. Examination of Evidence

Ryan next argues that his right to examine evidence was violated when he was not allowed to review evidence related to his defense concerning the school's disciplinary actions against Bill before this evidence was submitted to the Board at the board-level hearing. We disagree.

> [T]he Family Educational Rights and Privacy Act, enacted by the Congress of the United States in 1974, commonly called the Buckley Amendment, 20 U.S.C.A. § 1232g(b)(d) . . . provides, "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information)" concerning a student without his consent.

[3]We also note that we have found no other jurisdiction that has cited *Nichols* for the proposition that a school board has a duty to compel witnesses to testify on behalf of a student facing suspension or expulsion.

Student Bar Association v. Byrd, 293 N.C. 594, 598, 239 S.E.2d 415, 419 (1977). While the Board could have chosen to release Bill's disciplinary record, it would have done so only at the risk of losing significant amounts of federal funding. To avoid that fate, the Board could have released Bill's discipline records to Ryan only with Bill's consent.

In the instant case, there is nothing in the record showing that Bill gave his consent. Prior to the Board-level hearing, Ryan requested "[d]isciplinary records, with names redacted, for all students involved in the incident leading to [Ryan's] long-term suspension," contending that since the Board's decision "was both arbitrary and capricious, these records are necessary for his appeal to the Board." The Board denied Ryan's request, but stated that the Board itself would review the records "to provide the board some guidance[.]" Ryan did not object.

Ryan cites *Newsome v. Batavia Local School Dist.*, 842 F.2d 920 (6th Cir. 1988), in support of his argument that the Board's actions violated his due process rights. In *Newsome*, the school board entered into a closed session to consider evidence against a student facing long-term suspension. *Id.* at 927-28. The school board did not disclose to the student that it was considering this evidence. *Id.* The *Newsome* court held that the school board's actions "completely deprived [the student] of any opportunity to rebut the evidence and amounted to a clear deprivation of his right to procedural due process of law." *Id.* at 928 (footnote omitted).

In the instant case, the Board disclosed to Ryan that it would be considering Bill's disciplinary records and subsequently gave Ryan an opportunity to respond. Since Ryan asked for these records and then did not object when the Board considered them, Ryan cannot have suffered substantial prejudice. Therefore, his due process rights were not violated when the Board considered Bill's disciplinary records in closed session.

3. Right to an Impartial Tribunal

Ryan argues that his right to have his case heard by an impartial tribunal was violated because Panther Creek and the Board were represented by the same law firm, creating the appearance of partiality. More specifically, he argues that the instant case is controlled by the United States Supreme Court's recent decision in *Caperton v. Massey*, ___ U.S. ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009). We disagree.

"One of the essential elements of due process is a fair hearing by a fair tribunal. In order to provide a fair hearing, due process demands an impartial decision maker." *Hope v. Charlotte-Mecklenburg Bd. of Education*, 110 N.C. App. 599, 602, 430 S.E.2d 472, 474 (1993). The *Caperton* Court held that in the context of the right to a fair and impartial tribunal, a judge should recuse himself or herself when, "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at ___, 129 S. Ct. at 2263, 173 L.

Ed. 2d at 1222 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)).

Caperton is inapplicable to the instant case because "[d]ue process is a fluid concept, and what constitutes due process required at a school board hearing is different from due process which is required in a court of law." *Hope*, 110 N.C. App. at 602, 430 S.E.2d at 474.

> Carrying out the Board's responsibilities requires a wider latitude in procedure than in a court of law. Therefore, although the Board was required to provide petitioner with all the essential elements of due process, it was permitted to operate under a more relaxed set of rules than is a court of law.

Id. "[B]ecause of their multi-faceted roles as administrators, investigators and adjudicators, school boards are vested with a presumption that their actions are correct, and the burden is on a contestant to prove otherwise." *Crump v. Bd. of Education*, 326 N.C. 603, 617, 392 S.E.2d 579, 586 (1990).

In *Hope*, a school board dismissed a teacher for, *inter alia*, inadequate performance and the teacher appealed. *Hope*, 110 N.C. App. at 601-02, 430 S.E.2d at 473-74. The teacher argued that her due process rights were violated because the lawyer representing the superintendent and the lawyer representing the school board worked at the same law firm. *Id.* This Court held that the teacher's due process rights were not violated, finding that "[t]he Board is the decision maker, not its attorney, who acts only in an advisory capacity." *Id.* at 603, 430 S.E.2d at 474. Furthermore, the *Hope* Court found that the teacher made no showing of actual

bias or unfair prejudice. *Id.* at 603-04, 430 S.E.2d at 474-75. The mere potential or appearance of bias is not enough. *Id.*

In the instant case, Christine Scheef and Bob Kennedy of Tharrington Smith, LLP ("Tharrington Smith"), represented Panther Creek at the Board-level hearing, and Rod Malone of Tharrington Smith served as legal counsel to the Board. However, Ryan made no showing of actual bias or unfair prejudice. Ryan merely alleged that his "right to an impartial hearing was violated when attorneys from Tharrington Smith LLP represented the school at the school-based hearing and also represented [the Board] at the hearing before the three-member panel of the Board." This allegation is insufficient to show a due process violation in the context of a school board hearing. Ryan's purely speculative allegations of bias and unfairness are insufficient to establish a constitutional violation. Ryan's assignments of error are overruled.

V. CONCLUSION

Ryan has failed to bring forth arguments on his remaining assignments of error. Therefore, they are abandoned pursuant to N.C.R. App. P. 28(b)(6) (2008). The trial court's order affirming the Board's long-term suspension of Ryan is affirmed.

Affirmed.

Judges HUNTER, Robert C. and GEER concur.

Report per Rule 30(e).