[Cite as *Cisek v. Nordonia Hills Bd. of Edn.*, 2011-Ohio-1042.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DANIEL and NICOLE CISEK on behalf of L.C., minor	C. A. No. 25556
Appellees	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
NORDONIA HILLS BOARD OF EDUCATION, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2009 10 7363
Appellants	

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

WHITMORE, Judge.

{¶1} Appellants, Nordonia Hills City School District ("Nordonia Hills") and its Superintendent, J. Wayne Blankenship, appeal from the judgment of the Summit County Court of Common Pleas, reversing the decision of Nordonia Hills' Board of Education ("the Board"). This Court affirms.

I

{¶2} In early September 2009, the principal of Nordonia High School notified Daniel and Nicole Cisek ("the Ciseks") that their daughter, L.C., was being issued a three-day, out of school suspension due to a verbal confrontation she had with another student. The Ciseks sought to challenge L.C.'s suspension and, on September 9, 2009, appeared for a suspension appeal hearing held before Assistant Superintendent Joe Clark, the designee for the Board. Assistant Superintendent Clark notified the Ciseks the following day that he was upholding L.C.'s three-day suspension.

{¶3} On October 8, 2009, the Ciseks filed an appeal in the Summit County Court of Common Pleas, challenging the Board's decision and naming Nordonia Hills and Superintendent Blankenship as defendants. The trial court reviewed the administrative record as well as the briefs submitted by the parties and issued a decision on July 30, 2010. The trial court determined that L.C.'s behavior did not amount to a "threat of physical harm" and, as such, was not an assault in violation of Section 2 of Nordonia Hills' 2009-2010 Student Handbook ("the Handbook"). The court further found that although L.C. violated Section 8 of the Handbook, governing disruptions of classes or school, her suspension fell outside the sanction guidelines for that offense. Consequently, the court modified L.C.'s sanction to one Saturday detention and converted the three-day suspension she served to three days of excused absences.

{¶4} Nordonia Hills and Superintendent Blankenship now appeal from the judgment of the lower court and raise one assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT ERRED IN DETERMINING THE NORDONIA HILLS CITY SCHOOL DISTRICT BOARD OF EDUCATION'S DECISION WAS UNREASONABLE AND UNSUPPORTED BY THE PREPONDERANCE OF THE SUBSTANTIAL, RELIABLE, AND PROBATIVE EVIDENCE IN THE WHOLE RECORD."

{¶5} In their sole assignment of error, Nordonia Hills and Superintendent Blankenship argue that the trial court erred by reversing the Board's decision to uphold L.C.'s three-day, out of school suspension. Specifically, they argue that the record contains substantial, reliable, and probative evidence that L.C. violated Section 2 of the Handbook. They further argue that, even if L.C. did not violate Section 2, other provisions in the Handbook would support a three-day, out of school suspension in these circumstances. We disagree.

{¶6} Administrative appeals initiated under R.C. 2506.04 require the trial court to "consider[] the entire record before it and 'determine[] whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.'" *Summit Cty. v. Stoll*, 9th Dist. No. 23465, 2007-Ohio-2887, at ¶9, quoting *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St.3d 142, 147. Based on its review, the trial court may "affirm, reverse, vacate, or modify the order[.]" R.C. 2506.04. The trial court's judgment "may be appealed by any party on questions of law[.]" Id. Whether the trial court abused its discretion is "[w]ithin the ambit of 'questions of law' for appellate court review." *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, fn.4. An appellate court's review in such an instance, however, "does not include the same extensive power to weigh 'the preponderance of substantial, reliable, and probative evidence,' as is granted to the common pleas court." *Henley*, 90 Ohio St.3d at 147, quoting *Kisil*, 12 Ohio St.3d at 34, fn.4. Rather, we must affirm the trial court's decision if such evidence exists in the record. *Summit Cty. v. Stoll*, 9th Dist. No. 24681, 2009-Ohio-6615, at ¶6, citing *Kisil*, 12 Ohio St.3d at 34. "Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so." *Henley*, 90 Ohio St.3d at 147, quoting *Lorain City School Dist. Bd. of Educ. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261.

{¶7} Assistant Superintendent Clark notified the Ciseks that L.C.'s suspension was due to an "inappropriate verbal confrontation with another student in the locker room during 6th period physical education class." L.C.'s Notice of Intended Suspension provided that her conduct violated the provisions of the Handbook regarding assault/battery and disruption of

school. Section 2 of the Handbook prohibits any assault or battery and defines the term "assault," in relevant part, as follows:

> "An unlawful threat to injure another person, whether by word or deed, under circumstances calculated to produce fear and when one might reasonably expect that the threat could be carried out."

Section 8 of the Handbook prohibits students from disrupting "the operation of the school or the education process" and "engag[ing] in any act that is potentially harmful to the health, welfare, and safety of the student himself, other students, or staff." With regard to sanctions, Section 2 provides that a student who commits assault will be subject to various penalties, including a one to ten-day out of school suspension. Section 8 does not set forth the sanction a student might receive for a disruption of school violation, but the Handbook's Student Discipline Guidelines Quick Reference Section does suggest a sanction of one to three Saturday detentions for first-time offenders who disrupt a class.

{¶8} L.C. gave her version of the events at the hearing before Assistant Superintendent Clark on September 9, 2009. L.C. testified that another student, G.W., approached her in the locker room before gym class and accused L.C. of "talking s**t" about her. L.C. stated that G.W. began "waving her hands up" while another student held G.W. back. G.W. then told L.C. that she "better shut the f**k up before I kick your ass." In response, L.C. told G.W., "I'm sick and tired of you threatening me. If you're going to beat me up, then just do it already. If you're going to kick my ass, then just do it." Before anything further occurred, a teacher stepped in and separated the girls. According to L.C., she and G.W. had spoken with each other over the phone the previous year, and G.W. threatened L.C. at that time. L.C. also described at least one other incident she had with G.W. prior to these events, during which G.W. threw a ball at her head in gym class after L.C. had already been eliminated from the game.

{¶9} The teacher who separated L.C. and G.W. in the locker room and overheard their fight did not testify at the suspension appeal hearing. The Associate Principal, Kevin Tanner, testified that L.C. was suspended as the result of a verbal confrontation or altercation in the locker room. He explained that he viewed a verbal confrontation or altercation as "a heated argument that's a precursor to physical violence" and a "threat of violence, that [has the] possibility of escalating to a physical confrontation[.]" He cited the phrases, "I'm going to kick your ass" and "Come on and do it" as examples of "clear-cut verbal altercation." Associate Principal Tanner further testified that "if somebody is inviting somebody else to a fight, that in essence to me is an assault[.]"

{¶10} The plain language of the Handbook does not support the conclusion that L.C. committed an assault in violation of Section 2. Section 2 first and foremost requires "[a]n unlawful threat *to injure another person*[.]" (Emphasis added.) L.C. never threatened to injure G.W. Contrary to Associate Principal Tanner's example, L.C. never told G.W., "I'm going to kick your ass." Rather, she told G.W. to stop threatening her and, if G.W. was going to hurt her, to go ahead and do so. L.C.'s statement that G.W. should go ahead and hurt her did not constitute a "threat to injure another person," as set forth in Section 2 of the Handbook. Moreover, the record reflects that the statements L.C. made to G.W. in the locker room were the only statements upon which the Board relied in support of L.C.'s alleged assault violation. Because none of L.C.'s statements constituted an assault, as defined by Section 2 of the Handbook, the trial court correctly concluded that L.C. did not verbally assault G.W. Compare *Baire v. Bd. of Educ.* (Apr. 12, 2000), 9th Dist. No. 99CA007293, at *2 (reversing trial court's rejection of school board's sanction where student's behavior, in fact, violated specific policy set forth in student handbook).

{¶11} Nordonia Hills and Superintendent Blankenship also argue that the trial court erred by modifying L.C.'s three-day, out of school suspension. They argue that, even if L.C. did not violate Section 2 of the Handbook and a Section 8 violation for disrupting class would not support an out of school suspension, the Handbook also provides that students who violate any of its provisions are "subject to the full array of student discipline provisions." Because L.C. used profanity during the incident with G.W., they argue that the Board could impose a three-day, out of school suspension for her inappropriate language. The Handbook's Student Discipline Guidelines Quick Reference Section suggests "1-3 Saturday Detentions and/or 3 [out of school suspension days], Parent Contact," as one possible sanction for a profanity violation.

{¶12} The Handbook's Student Discipline Guidelines Quick Reference Section begins as follows:

> "STUDENTS FOUND TO BE IN VIOLATION OF ANY OF THE ACTIVITIES DESCRIBED BELOW, OR ANY OTHER SIMILARLY RELATED ACTIVITIES AS DETERMINED BY THE ADMINISTRATION, ARE SUBJECT TO THE FULL ARRAY OF STUDENT DISCIPLINE PROVISIONS INCLUDING DETENTION, SUSPENSION, EXPULSION AND/OR EXCLUSION FROM SCHOOL."

While the plain language of the Handbook clearly permits the Board to impose sanctions beyond those specifically listed for any specific violation, that fact does not absolve the Board from having to follow its own disciplinary procedures. Nordonia Hills' Bylaws & Policies require that a student subject to a possible out of school suspension be "informed in writing of the potential suspension *and the reasons for the proposed action*." (Emphasis added.) Nordonia Hills City School District Bylaws & Policies, Due Process Rights: Student Subject to Suspension. A student will then have the opportunity to "challenge the reason for the intended suspension and [] explain his/her actions" at a hearing. Id.

{¶13} The Notice of Intended Suspension that L.C. received from Nordonia Hills explicitly lists the reasons for her suspension as "DISRUPTION OF SCHOOL" and "ASSAULT/BATTERY (VERBAL)." Those two listed violations are marked with an "X." Although the Notice also listed "PROFANE/OBSCENE BEHAVIOR" as a possible violation warranting suspension, that particular violation was not marked with an "X." Nor did the school cite to profanity as the reason for L.C.'s suspension. The Ciseks specifically asked the Board's designee at L.C.'s hearing whether L.C.'s out of school suspension was due to her use of profanity. Assistant Superintendent Clark stated that the reason for the suspension was that "if somebody is inviting somebody else to a fight, that in essence to me is an assault in that you're offering to fight with somebody, and the nature of a fight is physically harming somebody." He did not point to L.C.'s use of profanity as the basis for her suspension. As such, Nordonia Hills and Superintendent Blankenship cannot now seek to impose a suspension for a profanity violation, retrospectively. While we do not take issue with the Board's authority to impose a suspension for profanity at the appropriate time, it may not do so in contravention to its outlined procedures. See Nordonia Hills City School District Bylaws & Policies, Due Process Rights: Student Subject to Suspension.

{¶14} L.C.'s sole violation, a violation of Section 8 of the Handbook, does not warrant an out of school suspension, pursuant to the plain language of the Handbook. Accordingly, the trial court did not err by modifying L.C.'s sanction and rescinding her three-day suspension. See R.C. 2506.04 (permitting court to affirm, reverse, vacate, or modify an order on administrative appeal). Nordonia Hills and Superintendent Blankenship's sole assignment of error is overruled.

III

{¶15} Nordonia Hills and Superintendent Blankenship's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

DAVID KANE SMITH, and SHERRIE CLAYBORNE MASSEY, Attorneys at Law, for Appellants.

HANK F. MEYER, Attorney at Law, for Appellees.