STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

BOARD OF EDUCATION OF THE BAY SHORE UNION FREE SCHOOL DISTRICT,

Petitioner,

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

COMMISSIONER OF EDUCATION, RICHARD P. MILLS, in his official capacity as the COMMISSIONER OF EDUCATION THE STATE EDUCATION DEPARTMENT, LITZA D. LOPEZ And DAVID M. PEPPER, as parents of STUDENT R.A.,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-08-ST9188 Index No. 6555-08

Appearances:

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

During the 2007-2008 school year respondent R.A. was enrolled as an 11th grade student in the Bay Shore Union Free School District ("School District"). On November 13, 2007 at approximately 6:00 p.m. R.A. and three Hispanic classmates were involved in an altercation with a group of African-American students at a shopping mall. The cause of the altercation is disputed. The School District maintains that R.A. instigated the altercation when he confronted the African-American students and asked them if they were members of the street gang known as the "Bloods". R.A., on the other hand, claims that the African-American students initiated the altercation when they directed racist, anti-Hispanic, bigoted remarks at the petitioner and his companions. On the following day, November 14, 2007, the School District's Head of Security, Corey Swinson, learned of the incident which had occurred on the prior evening and conducted an investigation. By letter dated November 15, 2007, the School District informed respondent's parents that R.A. was suspended from school for a period of five days, commencing on November 15, 2007. The suspension was based upon charges that R.A. violated the School District Code of Conduct by engaging in "Prohibited Gang Affiliation"[1] and "Inciting Violence"[2]. A hearing was held on the charges

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[1]As stated in the Code of Conduct: "[a]ny activity, affiliation and/or communication in connection with a non-school sanctioned club/group including fraternal organizations or gangs is prohibited."

[2]Inciting Violence/Menacing is defined in the Code of Conduct as "knowing about and not reporting an actual or potentially violent act, encouraging someone or planning to participate

on November 26 and 27, 2007. Upon conclusion of the hearing, the Hearing Officer found the charges to be supported by substantial evidence, and continued the suspension pending the final determination of the Superintendent of Schools. On December 3, 2007 the Superintendent of Schools issued her determination in which she found the charges to be substantiated and suspended R.A. until November 28, 2008. R.A. appealed the Superintendent's determination to the New York State Commissioner of Education ("Commissioner"). In a determination dated June 19, 2008 the Commissioner reversed the suspension and directed that it be annulled and expunged from R.A.'s record. The School District has now commenced the above-captioned CPLR Article 78 proceeding seeking review of the June 19, 2008 determination of the Commissioner.

Initially, the Court agrees with the Commissioner that the five-day suspension imposed on November 15, 2007 was improperly imposed. Under Education Law § 3214 (3) a School District has the power to suspend a student for a period not to exceed five days without the necessity of conducting a hearing. Prior to the suspension however, the student and the student's parents must be given written notice of the proposed suspension, and an opportunity to attend an informal conference with the school principal with regard to the alleged misconduct (which includes the opportunity to confront the complaining witnesss[es]) (see Education Law § 3214 [3][b]; see also 8 NYCRR § 100.2 [l] [4]). The requirement of advance notice and an opportunity to attend an informal conference is mandatory "unless the pupil's presence in the school poses a continuing danger to persons

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in a violent unsafe or illegal act".

or property or an ongoing threat of disruption to the academic process" (Education Law § 3214 [3] [b] [1]; see also 8 NYCRR § 100.2 [l] [4]). The foregoing procedure, in addition to providing the student and his parents with advance notice of the charges and an opportunity to be heard, "affords the principal the opportunity to decide whether his [or her] original decision to suspend was correct or should be modified" (Appeal of R.M. and L. M., 44 Ed Dept Rep 218, Decision No. 15,154 [2004]). As pointed out by the Commissioner in his determination here, there is no evidence in the record that R.A.'s presence in the school posed a continuing danger to persons or property, or an ongoing threat of disruption to the academic purpose. Nor is there evidence that such a finding was ever made. It is undisputed that written notice of the suspension was served upon R.A.'s mother at 5:00 p.m. on November 15, 2007, the day the suspension commenced. Thus, in the absence of advance written notice of the prospective suspension, the Commissioner properly found that the five day suspension was improperly imposed (Appeal of C.C. and R.C., 47 Ed Dept Rep 295, Decision No. 15, 701 [2007])[3].

Turning to the one-year suspension, as stated in Matter of Board of Education of Monticello Central School District v Commissioner (91 NY2d 133 [1997]):

> "The decision to suspend a student must be based on competent and substantial evidence that the student actually participated in the conduct charged, but the burden of proof and evidentiary rules imposed school disciplinary hearings are not as stringent as in a formal trial" (Matter of Board of Education of Monticello

[3]The School District also took the position that one of its Deans left a telephone message in Spanish at R.A.'s home on November 14, 2008. This, however, does not fulfill the requirement that the notice be in writing (see 8 NYCRR § 100.2 [l] [4]; see also Appeal of R.J. and D.J., 44 Ed Dept Rep 191, Decision No. 15, 145 [2004]).

Central School District v Commissioner, at 140-141)

As noted by the Appellate Division in Matter of Board of Education of the City School District of the City of New York v Mills (293 AD2d 37 [3rd Dept., 2002]):

> "In the final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably – probatively and logically...." (Matter of Board of Education of the City School District of the City of New York v Mills, supra, at 39, quotation omitted).

In reviewing the determination of the Commissioner of Education, "[t]he standard of review is [] whether the Commissioner's determination overruling [the student's] suspension was arbitrary and capricious, lacked a rational basis or was affected by an error of law" (id., at 139, citing Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 758; Matter of Gundrum v Ambach, 55 NY2d 872, 873; Matter of Board of Educ. v Ambach, 96 AD2d 637, lv denied 61 NY2d 603, and Education Law § 310). Thus, the issue before this Court is whether the determination of the Commissioner, which found that the School District's decision to suspend R.A. for one year was not supported by competent and substantial evidence, was affected by an error of law, was irrational, arbitrary and capricious, or an abuse of discretion.

The School District relied upon the testimony of Mr. Swinson to satisfy its burden of proof. Mr. Swinson testified that on November 14, 2007 Ms. Laura Solis, an ESL (English-Spanish Language) teacher, advised him that a number of her male students were wearing blue and white shirts in the class room and they "seemed to be a bit agitated". At some point

during the day Mr. Swinson also learned of the incident which had occurred at the shopping mall on the previous evening. Mr. Swinson testified that after speaking to Ms. Solis, and after speaking to one of the African-American youths who had been involved in the incident on the prior evening, he then spoke to R.A. According to Mr. Swinson, R.A. admitted that he (together with his friends) had been involved in a physical altercation with a group of African-American youths on the previous evening. Mr. Swinson testified that R.A. had admitted confronting the African-American youths and asking them if they were members of the Bloods street gang. In Mr. Swinson's words, "they[4] admitted to that evening of wearing certain colors, blue and white, which regarding this incident I note to be gang colors, more specifically MS13 or Mara Salvatrucha." Mr. Swinson indicated that when he interviewed R.A. on November 14, 2007, R.A. was wearing a blue shirt with a white shirt underneath; and had in his possession a blue lanyard or key chain, and a blue bandanna in his pocket (the latter of which, according to Mr. Swinson, is referred to as a "flag" in the parlance of street gangs). Mr. Swinson indicated that he had received training in street gangs from a Suffolk County gang expert and a Detective in Intelligence at the Suffolk County Police Department.

Mr. Stinson testified that he based his conclusion that R.A. was a member of the MS13 gang upon the following factors: that R.A. had been involved in an altercation with the African-American boys at the shopping mall on the evening of November 13, 2007; that in connection with the altercation R.A. had admitted confronting the African-American boys

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[4]It is unclear to which specific individual or individuals the word "they" refers. Thus it is unclear whether R.A. is claimed to have made such an admission.

and asking them if they were Bloods[5]; and that on the following day at school R.A. was wearing a blue shirt over a white shirt, and had a blue bandanna in his pocket. Mr. Swinson also mentioned a meeting which had been conducted with certain Hispanic students (including R.A.). that occurred in early October 2007. During the meeting Mr. Swinson and other School District employees had cautioned the youths in very general terms that certain behaviors might be misconstrued as connoting a gang affiliation. He indicated that this was done without accusing anyone of being a member of a gang, or even mentioning the word "gang".

The Court is mindful that "[i]n a school disciplinary proceeding, evidence may consist of hearsay and reasonable inferences drawn will be sustained if the record supports the inference" (see Matter of Ebert v Yeshiva University, 28 AD3d 315, 316 [2006], citing Matter of Board of Education of Monticello Central School District v Commissioner of Education, 91 NY2d 133, supra). Notably, in reviewing a student disciplinary determination "the Commissioner will not substitute his judgment on witness credibility unless the findings are not supported by facts on the record" (Appeal of a Student Suspected of Having a Disability, Decision No. 14,707 [2002], citing Appeal of Oliver, 39 Ed Dept Rep 817; Appeal of Bowen, 35 Ed Dept Rep 136, Decision No. 13,491; Appeal of Kittell, 31Ed Dept Rep 419, Decision No. 12,686).

Upon review of the entire record, the Court finds that there was competent and

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[5]Mr. Stinson testified that "no reasonable person that's not in a gang would ask somebody who they suspected to be Bloods, are you Bloods." By way of explanation, he indicated that most youngsters who were not gang members would stay as far away as possible from gang members.

substantial evidence to support the School District determination. Mr. Swinson testified to admissions made by R.A. when R.A. was interviewed by Mr. Swinson on November 14, 2007. He also testified to his observations concerning R.A.'s dress on the same day, as well as his conversations with the African-American youth and Ms. Solis. In addition, Mr. Swinson testified with respect to his knowledge, gained through training and experience, with regard to street gangs and, as relevant here, the MS13 gang. While R.A. denied being a member of MS 13, this essentially distilled down to a question of credibility. Because the Court finds that the evidence adduced at the hearing in support of the charges of "Prohibited Group Affiliation" and "Inciting Violence" was competent and substantial, the Court finds that the determination of the Commissioner to vacate the School District determination was affected by an error of law, irrational, and arbitrary and capricious. As a consequence, the Court finds that the Commissioner's determination with respect to this issue must be vacated.

Turning to the issue of the one year suspension from school, ordinarily, the penalty imposed by an administrative agency must be upheld unless it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (Matter of Pell v Board of Educ., 34 NY2d 222, 233 [1974], citations omitted; Matter of Featherstone v Franco, supra; Matter of Torrance v Stout, 9 NY3d 1022, 1023 [2008]; Matter of Bottari v Saratoga Springs City School District, 3 AD3d 832, 833 [3d Dept., 2004]; Matter of Martindale v Novello, 13 AD3d 761, 763-764 [3d Dept., 2004]; Matter of Waldren v Town of Islip, 6 NY3d 735, 736-737 [2005]). Within the context of student suspension hearings, the Commissioner has held that he (or she) may modify the penalty imposed by a School District where the penalty "is so excessive as to warrant substitution

of the Commissioner's judgment for that of the board of education" (Appeal of a Student with a Disability, Decision No. 15,364 [2006], citing Appeal of a Student Suspected of a Disability, 44 Ed Dept Rep 158, Decision No. 15,131; Appeals of J.J., 44 Ed Dept Rep 113, Decision No. 15,115; Appeal of D.C., 43 Ed Dept Rep 217, Decision No. 14,976).

The Code of Conduct of the School District sets forth what it denominates "Minimum Administrative Action" (i.e. minimum penalties) for Code violations. The minimum penalty for the charge of Inciting Violence/Menacing is, for a first violation, two days in school suspension; for a second violation, two days out of school suspension; for a subsequent violation, five or more days of out of school suspension. For the charge of Prohibited Group Activities, the minimum penalties are, for a first violation, two days in school suspension and parental notification; for a second violation, two days out of school suspension; for a subsequent violation, five or more days of out of school suspension. This was a first offense.

The Commissioner found that

> "[t]he range of minimum penalties set forth in respondent's code strongly suggests that, even if the record contained enough evidence to support the charges against petitioner, a suspension until November 28, 2008 for a first offense for a first offense would be excessive."

In view of the fact that R.A. had already received a five day out of school suspension prior to the hearing[6], and that this exceeded the minimum penalty for the two Code infractions combined if imposed for a second offense, the Court finds that the determination of the Commissioner, that a one year suspension from school was excessive, was not

[6]At the end of the hearing, the temporary suspension was continued by the Hearing Officer to the date of the determination of the Superintendent of Schools, which was made on December 3, 2007.

arbitrary and capricious. In view of the Court's determination here (which reinstates the determination of the Superintendent of Schools to the extent that she upheld the disciplinary charges) the Court finds that the matter must be remanded to the Commissioner to review the penalty imposed.

ORDERED and ADJUDGED, that the petition be and hereby is granted in part and denied in part; and it is further

ORDERED and ADJUDGED, that the petition, to the extent that it seeks to vacate that portion of the determination of the Commissioner of Education dated June 19, 2008, which vacated and expunged the five day temporary suspension of student R.A., imposed on November 15, 2007, be and hereby is dismissed; and it is further

ORDERED and ADJUDGED, that the petition is granted to the extent that it seeks to annul that portion of the determination of the Commissioner of Education dated June 19, 2008 which vacated and expunged the charges against R.A. of "Prohibited Group Affiliation" and "Inciting Violence" ; and it is

ORDERED and ADJUDGED, and the determination of Superintendent Holman dated December 3, 2007 which found that the charges of "Prohibited Group Affiliation" and "Inciting Violence" were substantiated by the evidence is reinstated; and it is further

ORDERED and ADJUDGED, that the matter is remanded to the Commissioner of Education for further proceedings with respect to the penalty to be imposed, not inconsistent with this decision/order/judgment.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the petitioner who is directed to enter this

Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: January 9, 2009
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated August 20, 2008
2. Affirmation of Michael G. McAlvin, Esq., dated August 19, 2008, Supporting Papers and Exhibits
3. Petition dated July 29, 2008
4. Answer of Respondents Litza D. Lopez and David M. Pepper dated August 11, 2008, Supporting Papers and Exhibits
5. Answer of Respondent Richard P. Mills dated August 18, 2008
5.. Notice of Amended Petition dated September 2, 2008
7. Amended Petition dated September 2, 2008, Supporting Papers and Exhibits
8. Verified Answer to Amended Petition of Respondents, Litza D. Lopez, David M. Pepper and R.A.
9. Answer of Respondent Mills
10. Letter dated June 23, 2008 of Christopher W. Hall, Assistant Attorney General