020-16

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF
EDUCATION

M. DOE

v.

CHARIHO REGIONAL SCHOOL COMMITTEE

DECISION

Held: Student who received a one-day, in-school suspension for "instigating a fight" by spraying silly string at another student received an appropriate consequence for her actions under the district's Standards for Student Behavior at Chariho High School. Despite the district's contention that the Commissioner lacks jurisdiction to hear this dispute, jurisdiction to hear this appeal arises under both R.I.G.L. 16-39-2 and R.I.G.L. 16-2-17 (c).

DATE: August 15, 2016

Travel of the Case:

On March 8, 2016 Mr. and Mrs. Doe appealed the decision of the Chariho Regional School Committee to uphold the discipline imposed on their daughter for "instigating a fight" at Chariho High School on October 16, 2015. The written decision of the School Committee was issued on March 7, 2016. Following their appeal to the School Committee, Mr. and Mrs. Doe retained new legal counsel, and so hearing in this matter was deferred in order to give counsel sufficient time to prepare.

A hearing was scheduled and held on two agreed-upon dates, May 19 and 20, 2016. Just prior to the first hearing, Chariho's counsel moved to dismiss the appeal for lack of subject matter jurisdiction. The hearing officer determined that it was efficient to consolidate a ruling on the motion to dismiss with a ruling on the merits of the case. Post-hearing, two additional exhibits were offered by counsel for the Appellant on May 30, 2016. Chariho's counsel filed a written objection to the admission of these two additional exhibits on June 11, 2016. Closing arguments were made on June 21, 2016, with the final transcript received on July 13, 2016. The record closed at that time.

ISSUES

- ✓ Does the Commissioner have jurisdiction to hear this matter?
- ✓ Did Student Doe instigate a fight at Chariho High School on October 16, 2015 and, if so, is a one-day, in-school suspension an appropriate consequence for her action?

Findings of Relevant Facts:

- On October 16, 2015 Doe intentionally sprayed "silly string"[1] from a can onto Student A's face and hair when both were in the school hallway during the celebration of "Spirit Week". As she sprayed Student A, Doe said "B----." Student A retaliated by hitting Doe

[1] Silly string was described by several of the witnesses as light foam that flies in the air. It was not allowed in school that day, but evidently several students, including Doe, brought it to school in celebration of "Spirit Week".

with her cell phone on the back of her head two times and once on her backpack.[2] S.C. Ex.2, 4 and 10; Tr. Vol. I pp.53; 77-81; 170-172; 204; 211. Prior to spraying Student A, Doe asked her then-best friend "Should I spray her?" Her friend responded "yes". Tr. Vol. I, pp.79-81.

- Doe and Student A have a mutual ex-boyfriend and some resentment between them has existed since Doe's freshman year at the high school. Tr. Vol. I, p. 45; According to Doe's testimony, Student A and her friends have harassed her on social media and tweeted negative comments about her, all of which she has ignored to avoid getting into a conflict with her. Tr. Vol. I, pp. 235-247.
- Immediately after the altercation, Student A approached the Dean of Students and reported to him that she had punched Doe several times because she had been sprayed in the face with silly string and that she had been called a "f------ b---- by Doe. App. Ex. C.
- The Standards for Student Behavior at Chariho High School define a "fight" as "an aggressive physical act between two or more students. It results in hostile contact that could include hitting, pushing, kicking, etc." S.C. Ex.3.
- The infraction of "fighting (or instigating a fight)," first violation, calls for a consequence of a 1-3 day out-of-school suspension, Assignment(s) and possible police contact. S.C. Ex. 3.
- After an investigation, school officials determined that Doe had provoked or instigated a fight with Student A by spraying silly string in her face on October 16, 2015. The Assistant Principal imposed a one-day, out of school suspension. The penalty was later reduced by the Principal to a one-day, in-school suspension. Upon further review by the Superintendent (who upheld the discipline imposed), it was determined that Doe would be provided with an alternate way to serve her suspension (e.g. detention, extended

[2] Doe testified that she was struck by Student A from behind on the back of her head three times. Vol. I, p.53. Student A admitted in her testimony that she "punched" Doe on the back of her head, but did not remember how many times. Vol. I, p. 170. The digital download showed two strikes to the back of Doe's head and a third landing on her backpack. S.C. Ex. 2.

- school day, community service) so that she would not miss additional instructional time.[3] App. Ex. B; S.C.Ex.7.
- It was Doe's first offense and in fact she has no prior disciplinary referrals at Chariho High School, where she is about to enter her senior year. Vol. I. pp.286, 293-294.
- Doe's parents appealed the Superintendent's decision upholding the one-day in-school suspension for "instigating a fight". After giving notice, the Chariho Regional School Committee held an appeal hearing on the issue of Doe's suspension on February 23, 2016. Both parties were represented by counsel, witnesses and documentary evidence were presented, and opportunity to cross-examine those who testified was afforded. The School Committee voted to uphold the Superintendent's decision. S.C. Ex. 9.
- Doe intends to apply for admission to a number of colleges this fall, several of which use the "Common Application". Tr. Vol. I, pp.290, 293.
- Currently, applicants using the Common Application must answer the following question about their disciplinary history:

Have you ever been found responsible for a disciplinary violation at any educational institution you have attended from the 9th grade (or the international equivalent) forward, whether related to academic misconduct or behavioral misconduct that resulted in a disciplinary action? These actions could include, but are not limited to: probation, suspension, removal, dismissal, or expulsion from the institution.

A subsequent section of the Common Application designates space for the applicant to provide "Additional Information" about disclosures related to any disciplinary history. App. Ex. E.

[3] Counsel for the Appellant argued in her closing argument that Doe was injured when hit by Student A and that she missed six days of school following the incident. The record (which included a digital download of the incident) indicates that the two strikes to the back of Doe's head by Student A were forceful. Doe testified that she immediately complained of a headache to her first block teacher and others, but when called down to the Dean of Students office (to whom Student A had already reported the incident) she did not indicate that she was injured. The school nurse evaluated Doe for a possible concussion later on that morning and suggested follow up by Doe's doctor or at an emergency room. The record includes no medical diagnosis of an injury. App. Ex. C and D.

Positions of the Parties:

The Appellant:

Counsel for the Appellant submits that Doe did not instigate a fight on October 16, 2015 and focuses on facts that she contends demonstrate that Doe was a victim and Student A the sole aggressor. According to her counsel, Doe was participating in "Spirit Week" and celebrating seniors that morning along with most of the student body. Students celebrated with blow horns, spray paint, streamers and silly string. As seniors walked through the hallway, many of them dressed in white togas, they were sprayed by Doe and others in innocent fun, with no intent whatsoever to harm or incite anyone to anger. Counsel points out that just as another group of "togas" approached Doe and her friend, she reached her arm over a tall boy directly in front of her and randomly sprayed silly string up into the air. After she turned around, she felt three "bashes" to the back of her head. Her counsel argues that if she had intentionally sprayed Student A to provoke her into a fight, she would not then have turned her back and left herself vulnerable to a violent attack from this student. Doe's attorney argues that Student A was hit unintentionally as Doe strayed at random. Because of the "history" between these girls, Student A responded with unanticipated violence, striking Doe several times and then running away. Student A's behavior was not foreseeable by Doe and she certainly had no intent to provoke this response when she sprayed silly string into the air that morning.

In addition to punishing Doe for an infraction she did not commit, the School Committee's decision maintains a permanent blemish on her otherwise-pristine disciplinary record at Chariho High School. Mandatory disclosure of the fact of her one-day, in-school suspension, and especially the reason for the suspension- instigating a fight- will be an obstacle in her gaining admission to college and possibly in other future endeavors.[4] Her family has gone through the multiple layers of the appeal process to rectify this record. They

[4] It is this permanent disciplinary record, her counsel argues, that impinges on the Appellant's reputation and liberty interest. She is, therefore, aggrieved by the school committee's decision and entitled to a de novo review by the commissioner.

do not want to see her future damaged by a disciplinary record that their daughter does not deserve. Doe lost time from school, missed other school activities and could not participate in part of her field hockey season. She submits that she has been punished enough for an incident in which she committed no aggression and yet has been labeled as the "instigator" of a fight.

Doe's counsel submits that the Commissioner should uphold this appeal and order that Doe's disciplinary record be expunged.

Chariho School Committee:

Counsel for the Chariho Regional School Committee questions the Commissioner's exercise of jurisdiction in this case, which he views as a "trifling and frivolous" appeal. There is absolutely no property or liberty interest at stake here which should warrant the use of resources at the Commissioner's level of hearing. Doe has already had multiple layers of due process, with reviews of the circumstances of the incident by the Dean of Students, Assistant Principal, Principal, Superintendent Ricci, and finally a full and fair hearing by the Chariho Regional School Committee. On each occasion Doe's suspension for "instigating a fight" has been upheld.

In order to qualify for a hearing before the Rhode Island Commissioner of Education, Doe must be "aggrieved" by the decision of the School Committee pursuant to RIGL 16-39-2. The parameters of "aggrievement" are coextensive with deprivations of a property or liberty interest for due process purposes, as recognized in Goss v. Lopez, 419 U.S. 565 (1975). Neither a property nor a liberty interest is compromised by the one-day, in-school suspension imposed on Doe for her infraction of school rules. Doe will lose no instructional time[5] and in fact she has been offered alternate methods of "serving" this suspension by the Superintendent. Contrary to the assertions of Doe's counsel, the only post-secondary institutions that make inquiries concerning a student's disciplinary history are the service

[5] In Chariho, students on in-school suspension are expected to do assignments from their teachers and are supervised by a certified educator.

academies and Doe is not seeking an appointment to one of these institutions.[6] Citing Lancy (sic) v. Farley[7], 501 F.3d 577 (6th Cir. 2007), Chariho submits that courts have rejected the contention that brief, in-school suspensions implicate a property interest or impact adversely on a student's liberty interest in their reputation. Thus, Doe has failed to establish that she is "aggrieved" by Chariho's decision.

Even if Doe were "aggrieved" by a single day of in-school suspension, she has received all the due process that should be accorded to the meting out of such discipline. The administrative burden and expense of providing yet another hearing at the Commissioner's level far outweigh the minimal interests at stake and risk of error. The interests and burdens must be weighed in determining what "process" is due to protect these rights. See Newsome v. Batavia Local School District, et al, 842 F2d 920 (6th Cir. 1988). As counsel for the district frames it, "(a) n in-school suspension where there has been sufficient due process should not end up in the Commissioner's office." The Commissioner should not establish a precedent that will open the floodgates to appeals of brief, in-school suspensions and bring with it a waste of public resources. This appeal should be dismissed on the basis of lack of subject matter jurisdiction, Chariho submits.

With regard to the merits, the district takes the position that the evidence clearly establishes that Doe instigated a fight. A witness who at the time was Doe's best friend testified that the spraying of silly string at Student A was intentional. Consistently, the School Resource Officer (SRO), who viewed the video of the incident, recounted in detail his analysis of the incident and his conclusion that Doe intended to target Student A when she sprayed silly string, striking her on the left side of her face. The SRO viewed Doe as the initial aggressor, with Student A retaliating. Counsel for Chariho submits that this evidence supports a finding that Doe instigated a fight and according to the Handbook, the discipline for this infraction is warranted. Discipline must be imposed evenhandedly and taking into

[6] In Chariho's Reply Brief In Support of Its Procedural Motion To Dismiss, counsel responded to evidence presented by the Appellant that the Common Application includes a question on "disciplinary history". Counsel argues that even if inquiries will be made by other institutions to which Doe will apply, she will have the opportunity to explain in the space provided on the form. See footnote 1 of Chariho's Reply Brief,

[7] Counsel for both parties cite Lancy v. Farley, supra, in their arguments. We believe the correct citation to be Laney v. Farley, 501 F3d 577 (Sixth Circuit 2007).

account all of the circumstances, the district has reduced the punishment from a one-day out-of-school suspension to a one-day, in-school suspension. Disciplinary consequences will not be fair and even-handed if they are further adjusted or wiped out simply because a college-bound student may experience an adverse impact in the college application process.

For the foregoing reasons, Chariho requests that the appeal be denied and dismissed.

DECISION

The School Committee appropriately questions the wisdom of permitting an appeal of a one-day, in-school suspension to proceed to the Commissioner's level.[8] Generally speaking, one would not anticipate that after a local (or in this case a regional) school committee has conducted a full evidentiary hearing, the parties were represented by counsel and opportunity for cross examination has been provided, that the factual findings could be erroneous or that a disproportionate penalty would remain in place. However, the wisdom of the Commissioner's de novo review of school suspensions has been determined to be present whenever a Rhode Island student is "suspended" -not just when the student is "aggrieved" by a school committee decision upholding a suspension under R.I.G.L. 16-39-2. R.I.G.L. 16-2-17, entitled "Right to a safe school"[9] states:

> (c) A student suspended under this section may appeal the action of the school committee, or a school principal as designee, to the commissioner of elementary and secondary education, who, after notice to the parties interested of the time and place of hearing, shall examine and decide the appeal without cost to

[8] The Commissioner previously reviewed a one-day suspension involving a kindergarten student who was found to have kicked a teacher and thrown a pair of plastic scissors at another student. See the May 1, 2001 decision In the Matter of Student A.R. Doe, 0009-01.

[9] Section 16-2-17 was extensively revised by the General Assembly in 1992. It previously was entitled "Suspension of pupils" and gave the authority to suspend a student only to a school committee. It was revised most recently during the 2016 session of the General Assembly, inter alia, to limit out-of-school suspensions to cases in which a student's conduct meets the standards set forth in §16-2-17(a) or the student represents a demonstrable threat to students, teachers, or administrators.

the parties involved.

The statute goes on to provide even further appellate reviews for the suspended student. Thus, a right of appeal is created under R.I.G.L. 16-2-17 separate from any jurisdiction conveyed under R.I.G.L. 16-39-2 and its requirement that the appellant demonstrate that he or she has been "aggrieved" by the school committee's decision. Stated another way, under our state law, a suspended student is, a fortiori, aggrieved. In fact, this statutory right of appeal was cited when Doe's family was provided with notice of their appeal rights in the March 7, 2016 decision of the Chariho School Committee.[10]

Even if there were a jurisdictional requirement that a suspended student demonstrate that he or she is "aggrieved," we find the Appellant's arguments persuasive that under the facts here, Doe's liberty interest is implicated by the record of her suspension, and more specifically, the reason for the suspension- "instigating a fight." Under the plain language of Goss, supra, and other cases cited by the Appellant, the fact that there is a permanent record of this disciplinary incident, coupled with the requirement that she disclose the fact of her suspension in completing the Common Application, constitutes evidence of a sufficient impact upon her future opportunities at this point to render her "aggrieved" under R.I.G.L. 16-39-2.

Although the precise nature of the impact such disclosure would have is not easily proven,[11] courts have recognized that records of student misconduct could potentially seriously damage a student's standing with fellow pupils and teachers as well as interfere

[10] The last paragraph of the Committee's March 7, 2016 letter to Doe's parents states: "Please be advised this decision may be appealed to the Rhode Island Department of Education pursuant to R.I.G.L. §16-39-1 §16-39-2 and § 16-2-17, copies of which are attached."

[11] The Appellant sought to prove the nature of potential adverse consequences in the college admission process by submitting two additional exhibits, one a study prepared by the National Association for College Admission Counseling, entitled "State of College Admission" (September, 2008) and the other a study by the Center for Community Alternatives, entitled "Education Suspended: The Use of High School Disciplinary Records in College Admissions" (May, 2015). We find that neither of these reports, and the surveys on which they are based, are reliable enough to be admitted in an administrative hearing. They also do not fall within the two exceptions to the hearsay rule cited by the Appellant, i.e. "market reports and similar commercial publications" or "learned treatises, periodicals or pamphlets". The arguments raised against admission of both of these proffered exhibits were well articulated by Chariho's counsel in his Objection to Student (Doe's) Additional Exhibits.

with later opportunities for higher education and employment. See Goss v. Lopez, supra at 574-575. In Laney v. Farley, supra, a case involving a one-day, in-school suspension of a middle school student, the Sixth Circuit found that neither a property interest (in educational benefits) or a liberty interest (in reputation) was implicated by the suspension. Therefore procedural due process protections were not warranted. The Court distinguished between the deprivation accompanying an out-of-school suspension and the ongoing completion of academic work and maintenance of educational opportunities for Tennessee students placed in an in-school suspension. The resulting conclusion was that no deprivation of a property interest had occurred. With respect to its analysis of a liberty interest, the Sixth Circuit found that there were insufficient facts to determine whether the suspension would be included in the student's record going forward. The Court found no impact on her liberty interest in her reputation, in part because of the absence of evidence that the suspension would be placed on her permanent record and that "others may learn of it as well." (See Laney, supra, at 583)

Doe's case is distinguishable on its facts. Her disciplinary record is embedded in her permanent school record at Chariho High School. Its likely disclosure as part of her college application process (by her and her school counselor) is imminent. Her opportunities for admission may be compromised. We find on these facts that the impact on her liberty interest, although imprecise and difficult to prove, is potentially serious enough to constitute her being "aggrieved" by her suspension and to warrant a full review of the evidence and arguments of the parties to this matter. The Commissioner appropriately asserts his jurisdiction over this dispute under both R.I.G.L. 16-2-17 and 16-39-2.

Mindful of the potentially serious implications Doe's suspension may bring with it, we have conducted a thorough and careful review of all the evidence in this record. We find that the facts underlying the suspension –that Doe intentionally sprayed silly string at Student A who retaliated by striking her several times with her cell phone in her hand- have been proven by a preponderance of the evidence. In fact, despite the different account offered by Doe in her testimony, we find that the testimony of her former best friend (who was standing right next to her) and the video of the incident, establish by clear and convincing evidence that Doe intentionally sprayed silly string in the face and hair of Student

A that morning. Although Doe did not have the specific intent to "instigate" a fight, she had the general intent to do the act which produced retaliation on Student A's part. Student discipline does not necessarily rest on the elements of a crime or the need to establish specific intent to commit a disciplinary infraction. School disciplinary codes are not criminal codes. They do not serve the purpose of a criminal code, and they are not, nor should they be, designed in the likeness of a criminal code, or construed in a way that criminal codes are construed. See In the Matter of Student R.C. Doe, decision of the Commissioner dated May 14, 2001.[12] We do not find specific intent to be an element of the infraction of "instigating a fight" as set forth in Chariho's handbook.

The provisions of Chariho's handbook relating to the "Standards for Student Behavior" have also been applied in a reasonable and fair manner. The Handbook defines fighting as "an aggressive physical act between two or more students. It results in hostile contact that could include hitting, pushing, kicking, etc."[13] Intentionally spraying silly string in someone's face can be an act of aggression and it was proven to be so by the evidence in this record.[14] The incident involved mutual aggression of varying degrees, but we find that it was a "fight" and it was instigated, or initiated, by Doe. Although she may not have thought about what could happen if Student A became upset by having silly string sprayed in her face as she walked through the school hallway that morning or anticipated that Student A would retaliate by striking her, Doe's action brought about Student A's retaliation. The entire incident, with two mutually aggressive acts, can be reasonably construed as a fight.

We appreciate the fact that the levels of aggression were quite different and that Doe did not retaliate when struck three times by Student A. However, based on the record, we find that the district has also taken these circumstances into account by reducing the penalty called for in its Handbook and offering options that Doe may utilize by serving detention, extended school day, or performing community service instead of in-school suspension.

[12] Decision 0014-01
[13] See Chariho's Handbook at page 26.
[14] The aggressive intent of Doe was evident, inter alia, by the fact that as she uttered the word "bitch" as she sprayed Student A Tr. Vol I, pp.81, 110.

The offense of "instigating a fight" may be indistinguishable from "fighting" when it appears on the disciplinary record of a high school student.[15] The description of Doe's disciplinary infraction, although accurate, creates an inference that Doe engaged in conduct such as hitting, pushing, kicking (Chariho Handbook's definition of "fighting") when the nature of her aggressive action in this fight, although serious, was not at that level. The testimony of the Principal of Chariho High School established that there is a degree of flexibility exercised by a student's guidance counselor in responding to a student's disclosure of his or her suspension on the Common Application or to a prospective college. It is quite possible that the concerns Doe and her family have raised with respect to reporting her one-day, in-school suspension on the Common Application can be addressed by her, her family, and her guidance counselor working together.[16]

Despite the unfortunate implications of Doe's conduct, we must affirm the School Committee's decision upholding her suspension and deny and dismiss her appeal.

For the Commissioner,

_____
Kathleen S. Murray,
Hearing Officer

DATE: August 15, 2016

_____
Ken Wagner, Ph.D.
Commissioner

[15] The instigator is by definition involved in the fight.

[16] It may be possible to avoid unnecessary inferences when she and her guidance counselor describe the reason for her suspension. Perhaps the conduct giving rise to the suspension –spraying silly string in the face of another student- could be identified, rather than the disciplinary code's characterization of that conduct.