ALEXANDER AND ARLENE A., Appellant v. HARFORD COUNTY BOARD OF EDUCATION, Appellee.	BEFORE THE MARYLAND STATE BOARD OF EDUCATION Opinion No. 18-21

OPINION

INTRODUCTION

Appellants appeal the decision of the Harford County Board of Education ("local board") upholding the decision of the local superintendent to impose an extended suspension on their son for sexual harassment of a female student. The local board filed a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable or illegal. The Appellant responded to the local board's motion and the local board replied.

FACTUAL BACKGROUND

During the time of the incident at issue, Appellants' son, Student A, was a senior at Patterson Mill High School ("Patterson Mill"). He had maintained a consistent record of high academic achievement, performing well in advanced placement ("AP") and high-level courses at Patterson Mill. During his senior year, he was taking AP Statistics, AP Physics, AP English Literature, Computer Programming 3, Forensics, Anatomy and Physiology, and Weight Training and was an aide in the guidance office. (T.129). He was college bound, having already been offered admission to and scholarships from eight colleges. By the start of the 2017-2018 school year, Student A had a cumulative weighted grade point average of 4.0417 and needed only 2.5 credits to graduate.[1]

On the afternoon of October 13, 2017, Student A was at Patterson Mill waiting to play in the homecoming football game. At approximately 5:00 p.m., he became involved in an interaction with a female student, Student B, who was in the vestibule of the doorway that accessed the school. Sean Arlen, Principal of Patterson Mill, explained the incident in the following way:

> [Student A] asked for a hug and [Student B] agreed to the hug and when they were hugging he then tried to take it further to kiss her, grab her rear-end, put himself on her. At which point, according to [Student A], she, and the victim's statement, was the same. You know, she tried to get away and didn't want that and he let her go

[1] Student A graduated from high school while this appeal was pending before the State Board.

> and apologized to her and she said it was okay. And then he said, alright, let's still be friends. Give me a hug again.
>
> So then she agreed to hug and he did the same thing a second time. He tried to kiss her some more; tried to touch her, touch her inappropriately and put himself onto her at which point and then she got away and removed herself from the vestibule of the school.

(T. 13). Student B then reported the incident to the School Resource Officer ("SRO") and the high school administration became involved, which included Dr. Abel and Stacey Zengel, Assistant Principal.

Dr. Abel and Mrs. Zengel, as well as the SRO and other law enforcement became involved in the investigation that evening. Student A and B both gave statements. Student B wrote:

> [Student A] [g]rabbed me, touched me, kissed me, forced me into the wall, pulled me into the cheer room. I tried to push him off as he opened the community room door. He pushed me into the room, but I tried to stop him. I tried to leave the building the first time, but he grabbed my jacket and pulled me back so I couldn't leave the school. I wasn't physically able to push him completely off. After a few minutes, he stopped and I was able to leave the school.

(Sup't. Ex. 4). Student A wrote that "[he] walked down the hallway & saw the girl & proceeded to talk to her & then things escalated and I touched her inappropriately." (Sup't. Ex. 4). Dr. Abel also spoke with both students. He asked Student A what he meant by "touched her inappropriately", he responded that he touched Student B's butt, kissed and hugged her, and tried to kiss and hug her again. (Sup't. Ex 20; T. 12-14).

School surveillance video captured portions of the incident. As summarized by Mrs. Zengel the video footage shows the following:

> [Student A] and [Student B] are shown. Student [A] grabbed [Student B] and pushed her against the wall. They then disappear from the camera range, but appear shortly thereafter. Student [A] grabs [Student B] and again, pushes her against the wall.

Based on the investigation, Dr. Abel found no discrepancies between the accounts given by the students and the video footage. He determined that Student A had committed a sexual attack on Student B. (Sup't. Ex. 2, T. 14). He also determined that Student A's return to school presented an imminent threat of serious harm.[2] *Id*. The discipline report explains that "the imminent threat has already occurred and there will be ongoing impact for [Student B] while she is here at school if [Student A] is present in the building" given that that students are in the same grade and they "will have ongoing interaction simply by the nature of their daily academic work

[2] Maryland law mandates that a student expulsion "only may occur" if the "superintendent or designated representative has determined that the student's return to school prior to completion of the expulsion period would pose an imminent threat of serious harm to other students or staff." COMAR 13A.08.01.11(B)(2)(a).

and their involvement in afterschool athletics." (Sup't. Ex. 2). Dr. Abel recommended expulsion beyond 45 days to the local Superintendent.

The school referred Student A to the Sherriff's office. The Sherriff's office charged Student A with a 4th degree sexual offense and a 2nd degree assault.

Dr. Abel called the Appellants to school to pick up their son and notified them of the decision to suspend him for 10 days for a Sexual Attack. He also prohibited Student A from participating in the football game that evening and the Homecoming Dance the following day. (T. 31-32).

Dr. Abel followed up in writing in a letter to the Appellants dated October 16, 2017. In the letter, Dr. Abel again stated he was suspending Student A for 10 school days for Sexual Attack, Code 604.[3] He stated that "the investigation revealed this to be a very serious violation. Therefore, I have referred [Student A] to the office of the Superintendent of Schools for further action." Dr. Abel advised the Appellants of a conference with the Superintendent's Designee on October 23, 2017 and referenced that the suspension was made under the provisions of §7-305 of the Education Article, Annotated Code of Maryland.

In emails dated October 19, 2017, Student B's father advised Mrs. Zengel that Student B was very scared by the incident and would not feel comfortable or safe if Student A is allowed back at school during the school year.

Also by letter dated October 19, 2017 and hand delivered to the school, the Appellants requested that Dr. Abel reconsider the suspension decision. They stated that the "misbehavior [was] unrelated to any disruption of classroom or the educational process." They also noted that Student A is a "college bound senior" who "is an academically solid student with no previous disciplinary history." They included that he is a student athlete, has a weekend job, and has made many positive contributions to the school community. (Sup't. Ex. 12). Appellants also sought to get copies of the suspension document packet prior to their conference on October 23, but were unable to do so. (Sup't. Ex. 18).

The matter was assigned to Mr. Buzz Williams, the superintendent's designee, who reviewed the case. Mr. Williams spoke with the Assistant Principal, Mrs. Zengel, prior to the disciplinary conference. He reported that Mrs. Zengel stated the following during the call:

> (1) that [Student A] is a varsity athlete and this was out of character and shocking to the [Patterson Mill] staff; (2) that [Student B] is a varsity athlete who enjoys the drama associated with reporting a sexual assault; (3) While [Student B] immediately sought the SRO, she also texted [Student A's] girlfriend citing that [Student A] tried to rape her; (4) that [Student A] and [Student B] cite that [Student B] consented to a hug and [Student A] took it to the next level of kissing and touching her butt and pushing her against the wall; that they separated and [Student A] asked if he could have another hug and [Student B] consented; that [Student A] again attempted to kiss

[3] He stated the code number for sexual attack as 604 in error. It is Code 601. There is no Code 604.

> and touch [Student B's] butt and hold her against the wall; that [Student B] left the area this time; (5) that [Student A] stated that he was not comfortable returning to school because of the hype that [Student B] has caused telling peers; (6) that [Mrs. Zengel] feels that expulsion [of Student A] through the remainder of the year would be fair for [Student B] but not fair to [Student A]; (7) that she feels that [Student A] would be committed to staying away from [Student B] if he returned to [Patterson Mills], but that he would sometimes be seen by [Student B] and that could be upsetting to her.

(Sup't. Ex. 13).

The conference was scheduled for October 23, 2017 at 1 p.m. Mr. Williams learned of the Appellants' request for the suspension documents when he arrived at work that morning. He contacted Appellants' counsel and advised her that he did not have all of the suspension documents available. He offered counsel the choice of receiving them just prior to the conference and reviewing them at that time, which was their usual procedure, or to reschedule the conference for another date. Counsel responded that she wanted to proceed with the conference that day. (Sup't. Ex. 19).

The conference went forward as scheduled on October 23, 2017. Appellants presented documentary evidence, including a list of high school achievements, a letter from Student A's employer, a letter from St. Margaret's Parish citing Student A's participation since 2012, a February 2, 2017 letter of recommendation from the school counselor, and a letter of recommendation from Student A's French teacher. Appellants argued that the encounter was a single, isolated incident and that the imminent threat of serious harm criteria had not been met and their son should be returned to Patterson Mill when the 10 days suspension ended. Student A acknowledged responsibility and demonstrated remorse for his behavior and the Appellants confirmed that he would be receiving professional counseling for the behavioral health concerns giving rise to the disciplinary referral.

Mr. Williams was not persuaded by the Appellant's arguments. He determined that the imminent threat criteria had been met. He stated in his report that "[t]he extended suspension is warranted because serious harm occurred in the form of unwanted sexual touching and emotional anxiety associated with [Student A] returning to school. Long standing HCPS practice considers unwanted sexual touching an imminent threat because it results in harm to the victim physically, emotionally, and mentally." He stated further that "because the harm of emotional and mental stress has already occurred to [Student B], the imminent threat criteria is met." In addition, he noted that that suspension would provide a "cooling off period for the school community" and would allow "time for the emotion of the incident to decrease." (Sup't. Ex. 13).

In his testimony at the hearing before the local board, Mr. Williams reiterated the school system's viewpoint that the fact that an act or harm has already occurred meets the criteria for the imminent threat determination. (T. 77-78). He stated that the "Harford County Public Schools defines imminent threat as whether harm already occurred or whether harm is likely." He also stated that long standing school system practice "considers unwanted sexual touching an imminent threat." (T. 58). Appellant's counsel engaged Mr. Williams in the following line of questioning:

Q: Now, based on your testimony, you're telling me that you have indicated that this local school system has determined that the fact that an act occurred, in your opinion, satisfies this requirement of posing an imminent threat?

A: Not only my opinion, but Superintendent Canavan, Executive Director Schmitz, Mr. Spicer, all agree that imminent threat is more than just likely to occur if the student returns. The fact -

Q: So, even –

A: -- that the harm already occurred meets the criteria for imminent threat.

….

Q: Okay. And as to would – would pose an imminent threat if returned, you're saying that imminent as in something in the future that you have decided that although it says, pose an imminent threat, you have decided, rather the school system has decided that imminent threat is satisfied just because someone already did something?

A: Absolutely, and I feel very strongly about it.

Q: Okay. So you didn't actually make any assessment as to whether it would be likely to occur?

A: I did make an assessment and I felt that it was not likely to reoccur upon returning.

(T. 77-80).

Although he himself determined that the conduct was not likely to recur if the Student A returned to his school, Mr. Williams followed school policy that the conduct itself demonstrated an imminent threat of serious harm. Mr. Williams found this encounter to be a very serious incident with evidence of a sexual attack. He exercised leniency due to mitigating factors. He reduced the charge to sexual harassment that still includes "unwanted physical conduct of a sexual nature." He based this, in part, on the fact that Student B agreed to hug Student A in both phase 1 and phase 2 of the incident, which sent mixed signals. He also based it on Student A's honesty, otherwise good behavior, his academic record, and senior status. (Sup't. Ex. 13; T.61-62). Mr. Williams recommended imposition of an additional 35 days suspension to the 10 days already imposed by Dr. Arlen, for a total of 45 days, with referral to the alternative education program. This made Student A eligible for readmission to Patterson Mill on December 22, 2017. (Sup't. Ex. 13). Mr. Williams stated that handling the matter in this way allowed Student A to return to school after only one report card, to be eligible for spring sports, to resume all senior activities and to walk to stage at graduation. (T. 70). The local superintendent accepted the

recommendation and advised the Appellants of the decision by letter dated October 26, 2017. (Sup't. Ex. 14).

Appellants declined to enroll their son in the alternative education program because it offered none of the advanced placement and other specialized courses in which Student A was enrolled. (T.109). They requested that Patterson Mill provide them with his schoolwork so that he could complete it at home. Although the school had provided Student A with schoolwork from the date of his suspension through the date of the conference, it declined to continue to do so thereafter due to the referral to the alternative education program. (Sup't. Ex. 17; T.108). In response to one of the Appellants' inquiries for schoolwork, in an October 30, 2017 email, Mr. Williams explained again that Student A's educational services would be provided by Aberdeen Alternative Education Program ("AEP") and not by Patterson Mill. He stated,

> While you do not have to accept the educational services at AEP, declining does not afford [your son] educational services or makeup work from PMHS. Further, while you have a right to appeal the suspension decision to the Board of Education, appealing does not afford [your son] educational services or makeup work from PMHS.

Id. The Appellants enrolled Student A in Harford Community College to take some courses during the rest of the suspension period. (T.126).

Appellants appealed the local Superintendent's decision to the local board. (Appeal, Ex. K).

Meanwhile, on November 16, 2017, the Juvenile Court of Maryland for Harford County issued a Peace Order requiring that Student A stay away from Student B, including staying away from Patterson Mill, through May 16, 2018. (Sup't. Ex. 21). Student A appealed the Peace Order and was awaiting a decision. (T.114). The Student Services Supervisor advised Appellants that Student A could elect re-entry at another Harford County High School. Appellants selected a high school that offered the same advanced placement and specialized courses their son had been taking.

On December 5, 2017, a panel of the local board conducted an evidentiary hearing on the appeal. Appellants were represented by counsel and had the opportunity to examine and cross-examine witnesses and to present documentary evidence. In a decision issued December 8, 2017, the local board upheld the extended suspension imposed by the local superintendent. Among other things, the local board found that the "imminent threat of serious harm" standard was satisfied "because of the nature of the attack and emotional damage and mental stress had resulted from the unwanted contact." The local board also found that no educational services had been denied due to the referral to the alternative education program. (Appeal, Ex. A).

On December 22, 2017, Appellants and their son attended the re-entry meeting and he began attending a new school. At that time, Student A's senior year transcript reflected a 2.0 grade point average.

STANDARD OF REVIEW

In student suspension and expulsion cases, the decision of the local board is considered final. COMAR 134.01.05.05. Therefore, the State Board will not review the merits of the decision unless there are "specific factual and legal allegations" that the local board failed to follow State or local law, policies, or procedures; violated the student's due process rights; or the local board has acted in an unconstitutional manner. COMAR 134.01.05.05. The State Board may reverse or modify a student suspension or expulsion if the allegations are proved true or if the decision of the local board is otherwise illegal. COMAR 134.01.05.05.

A decision may be considered "otherwise illegal" if it is:

> (1) Unconstitutional;
> (2) Exceeds the statutory authority or jurisdiction of the local board; (3) Misconstrues the law;
> (4) Results from unlawful procedure;
> (5) Is an abuse of discretionary powers; or
> (6) Is affected by any other error of law.

COMAR 13A.01.05.05C.

LEGAL ANALYSIS

Findings Required Before Imposition of Extended Suspension – COMAR 13A.08.01.11(B)(3)(a)(i) and(a)(ii).

COMAR 13A.08.01.11(B)(3) provides that an extended suspension may not be imposed unless:

> (a) The superintendent or designated representative has determined that:
>
> (i) The student's return to school prior to the completion of the suspension period would pose an imminent threat of serious harm to other students and staff; or
>
> (ii) The student has engaged in chronic and extreme disruption of the educational process that has created a substantial barrier to learning for other students across the school day, and other available and appropriate behavioral and disciplinary interventions have been exhausted."

The Appellant incorrectly interprets the above provisions to require three separate findings before an extended suspension can be imposed -- an "imminent threat of serious harm" finding, a "chronic and extreme disruption" finding, and an exhaustion of "behavioral and disciplinary interventions" finding. There are only two prongs in the regulation. Only one prong need be satisfied to impose the suspension. The first prong, (3)(a)(i), requires a finding that the student's return to school poses an imminent threat of serious harm. That is the finding that the

superintendent's designee made in this case to support the extended suspension. (We will address this below). The other prong, (3)(a)(ii) is comprised of two findings, neither of which is relevant here because the extended suspension in this case was not based on that prong.

Imminent Threat of Serious Harm

There are two points in the disciplinary process in which a decision maker must decide whether the student would pose an imminent threat of serious harm to others if the student returned to the school. The first decision point comes if the superintendent needs more time to make a decision to suspend or expel the student for more than 10 days. The regulation states:

> If additional time [beyond 10 days] is necessary to complete the process, either because of delays due to parent or guardian unavailability or due to the complexity of the investigation, the student shall be allowed to return to school [after the 10th day], unless the local superintendent or designated representative determines that the student's return to school would pose an imminent threat of serious harm to other students or staff.

COMAR 13A.08.01(C)(3)(d).

A second decision point comes when the superintendent imposes extended suspension (11-45 days) or expulsion (more than 45 days). In either of those circumstances, the decision maker must determine that the student's return to school, meaning the school he or she was attending at the time the conduct leading to discipline occurred, prior to the completion of the extended suspension or expulsion period would pose an imminent threat of serious harm to other students. COMAR 13A.08.01.11(B)(2)&(3).

This case gives us the opportunity to address in some detail the imminent threat of serious harm determination. The State Board's school discipline regulations were built on the premise that students belong in school unless they pose a serious risk to safety and security in their home school because putting students out of school for any period of time, especially long periods of time, would likely be detrimental to the student in any number of ways. *See The Maryland Guidelines for a State Code of Discipline* (7/22/14). Thus, a student who is not a continuing, pending threat to his fellow students or staff belongs back in his or her school because it is likely the best environment for the student.

Harford County Public Schools ("HCPS") has a system-wide policy that certain types of serious conduct will always lead to a determination that the student's return to school poses an imminent threat of serious harm to other students. Thus, in HCPS, an extended suspension will always be appropriate if the student engaged in a particular type of serious conduct. This conduct-based approach does not take into account other facts known about the student, such as prior history, behavior and discipline record, or mitigating factors. It allows no discretion by the decision-maker. In essence, the conduct-based approach is like a "zero tolerance" policy.

The State Board's discipline regulations were, however, meant to be an antidote to zero tolerance discipline policies. Indeed, the State Board regulations direct local boards to establish discipline policies that "allow for discretion in imposing discipline." COMAR 13A.08.01.11A(4). A purely conduct-based approach is antithetical to discretion in imposing discipline. Particularly, in determining imminent threat of serious harm, a conduct-based

approach in which there is no consideration of the individual circumstances, only the conduct, there is no discretion in meting out the discipline.

We believe that the better way to determine imminent threat is to use an individualized approach. An individualized approach is a holistic assessment that takes into consideration the totality of the facts and circumstances surrounding the incident, the student, and the school. Using this approach, a decision maker would, among other things, review the student's past conduct, consider the student's response to the consequence of the behavior, the response to the victim, consider the impact the student's behavior has on the school environment, and whether changes can be made in the student's and victim's schedules to prevent additional conflict. Those types of facts, and there may be many others, can form the basis for an individualized imminent threat decision. In some previous decisions we have encouraged this more individualized approach. (*See, e.g., M.S. v. Prince George's County Bd. of Educ.,* MSBE Op. No. 18-09 (2018) (finding imminent harm when student with history of committing violent acts during prior high school years engaged in an unprovoked and vicious attack that rendered the victim unconscious).

In applying the individualized approach to the facts of this case, we point out that the superintendent's designee, Mr. Williams, made an individualized determination that Student A was not an imminent threat. Mr. Williams testified that he did not feel that the same conduct was likely to reoccur upon Student A's return to school, but then he deferred to the school system's conduct-only policy to find that Student A posed an imminent threat of serious harm due to the severity of the offense. (T. 80). The Appellants argue, therefore, that Mr. Williams' determination that Student A posed a serious threat of harm is an illegal abuse of discretion because it is not supported by substantial evidence. We agree.

The abuse of discretion standard is a very high standard:

> "Abuse of discretion". . . . has been said to occur "where no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." It has also been said to exist when the ruling under consideration "appears to have been made on untenable grounds," when the ruling is "clearly against the logic and effect of facts and inferences before the court," when the ruling is "clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result," when the ruling is "violative of fact and logic," or when it constitutes an "untenable judicial act that defies reason and works an injustice."

King v. State, 407 Md. 682, 687 (2009). The Court of Special Appeals has explained that those general terms, when applied, mean that "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *State v. WBAL-TV,* 187 Md. App. 135, 152-153 (2009).

Mr. Williams' determination that Student A posed an imminent threat of serious harm to other students and staff based only on the type of offence Student A committed, and the local board's affirmation of that decision, defies logic given that Mr. Williams did not believe that Student A would engage in the same type of conduct were he to return to school. The two points are mutually exclusive. Mr. Williams and the local board should not have placed Student A on

extended suspension. Accordingly, we reverse the decision of the local board affirming Student A's suspension and direct that the school system to make the appropriate correction to his record.[4]

Provision of Educational Services

The next issue to consider is the type of educational services provided in long-term suspension cases.

Whenever a principal or superintendent suspends *any* student out of school for *any* length of time, if the student is not "placed in an alternative education program", the student must receive daily classwork and assignments from *each* teacher, which must be corrected and reviewed on a weekly basis and returned to the student. COMAR 13A08.01.11(F)(1) (emphasis added). These are considered "Minimum Educational Services." Moreover, the principal must assign a school staff liaison between the teachers and the various suspended students to communicate weekly about classwork assignments and school related issues. COMAR 13A.08.01.11(F)(2). In this way, one of the fundamental premises of the school discipline regulations - - "to keep students connected to school so that they may graduate college and career ready" - - comes to life. COMAR 13A.08.01.11(A)(2).

Whenever a superintendent imposes an *extended suspension* or *expulsion,* the school system must "provide the excluded student with comparable educational services and appropriate behavioral support services to promote successful return to the student's regular academic program." COMAR 13A.08.01.11(B)(2)&(3).

Questions have arisen in this case around the educational services and behavioral supports that were provided in this case. To answer the questions for this particular case, we have looked at the interplay between the minimum education services requirement for *any* suspension and the comparable education services requirement for *extended suspensions* and *expulsions.*

When the State Board added these provisions to the disciplinary regulations, the view was that placing a student who was subject to an extended suspension or an expulsion in an alternative education program was a way of providing comparable education services to the student during the period of time the student was not in the regular education program. In the disciplinary context, the Board did not then, nor do we now, expect a school system to replicate every conceivable course a student might take as part of the student's regular education program into the alternative program. What the Board did envision, however, was that school systems would use a thoughtful approach regarding educational programming, taking an individualized look at each student to determine how best to keep the student on track in order to "promote successful return to the student's regular academic program." COMAR 13A.08.01.11(B)(2)&(3). For some students this might mean a referral to the alternative education program, whether brick and mortar or online, for others it might mean getting work from their teachers, or some combination of these. At the very minimum, however, if a student is not placed in an alternative education program, a school must provide daily classwork and assignments from *each* teacher, which must be corrected and reviewed on a weekly basis and returned to the student.

[4] We acknowledge that this type of case might normally be moot because the Appellant has already graduated high school. However, this case is capable of repetition yet evading review.

In this case, Patterson Mill provided schoolwork for Student A to complete and return for grading during the period of time between the initial suspension and the hearing, but refused to do so after the local superintendent's referral to the alternative education program. Although the local board believed that the educational services requirement was satisfied by the referral, it was not.[5] In *K.B. v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 16-12 (2016), we were faced with a similar scenario. The school system had referred the suspended student to an alternative education program and the parent declined to enroll her daughter there during the duration of the suspension because she was concerned about bullying. We found that the local board failed to provide minimal educational services to the student, stating that "[r]egardless of the reasons, K.B. was not placed in the alternative program and, therefore, was entitled to get the minimum educational services of having her classwork and assignments sent home," citing COMAR 13A.08.01.11(F). It was of no consequence that it was the parent's decision not to place the student in the alternative program.

The school system here could have assessed Student A's educational situation and worked something out with the Appellants, especially since the Appellants were extremely engaged in the process and Student A was a motivated, high performer who was already completing his assignments while out on suspension. We find, therefore, that the local board violated the regulatory requirement to provide educational services. Because Student A has graduated, however, it appears that there is no remedy for him in this regard.

Duration of Suspension Period

Appellants argue that the extended suspension violates COMAR and local board policy because it was imposed as a "final resort." We believe that the Appellants are referring to COMAR 13A.01.08.11(B)(3)(b) that requires the superintendent or designated representative to limit the duration of the exclusion from school to the shortest period practicable and the references in the local board's disciplinary policy regarding progressive discipline.

Although the local board's disciplinary policy encourages progressive discipline, it requires it "as appropriate" and does not foreclose the possibility that an offense could result in consequences that bypass far less severe consequences.

Due Process Violations

Appellants claim that their son's procedural and substantive due process rights were violated by imposition of the extended suspension. They then go on to make various arguments regarding procedural due process issues only. We address those procedural issues in turn.

Due process in the student discipline context requires that there be notice of the charges and a meaningful opportunity to be heard. *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Parent H. v. Montgomery County Bd. of Educ*., MSBE Op. No. 13-27 (2013). Appellants claim that they failed to receive notice that Student A was facing a possible expulsion from school for his

[5] Although the Appellants maintain that the school system failed to provide appropriate behavioral support services in violation of COMAR 13A.08.01.11(B)(3)(c), Mr. Williams testified that such services are provided by the school system through the alternative education program. (T. 85-86). While it was the Appellants prerogative not to enroll Student A in the alternative education program, they cannot now claim that the school system failed to provide the supports.

conduct. Here, Dr. Abel sent written notice to the Appellants that he was suspending their son for 10 school days for a Sexual Attack. He advised them that the incident was a serious violation and that he was referring their son to the superintendent for further action. He also referenced that the suspension was made under the provisions of §7-305 of the Education Article. Section 7-305 sets forth the process and potential for further suspension or expulsion in connection with a principal's disciplinary referral to the superintendent. In addition, HCPS has a disciplinary policy and regulation that are readily available. In the context of the letter, "further action" from the superintendent necessarily meant further disciplinary action. There is nothing ambiguous about it. This was more than sufficient information to convey notice of the charges against Appellants' son.

Even if the Appellants did not understand from the letter that further action by the superintendent meant possible suspension or expulsion, it is difficult to believe that they did not understand that to be the case at the time of the hearing before the local board where they were also represented by counsel. Nevertheless, to the extent that any due process violation may have occurred at the school level, and we do not conclude that such a violation occurred, the evidentiary hearing before the local board had a curative effect on any deficiencies in the process. *See Parent H. Montgomery County Bd. of Educ*., MSBE Opinion No. 13-27 (2013); *Venter v. Bd. of Educ*., MSBE Opinion No. 05-22 (2005); *Williamson v. Bd. of Educ. of Anne Arundel County*, 7 Op. MSBE 649 (1997); *Hanson v. Somerset County Bd. of Educ*., 7 Op. MSBE 391 (1996).

With regard to the hearing, the Appellants argue that they were deprived a meaningful opportunity to be heard at the hearing because they did not receive the suspension papers until 30 minutes beforehand. Appellants have waived this argument because their counsel consented to move forward and declined to reschedule the hearing for another day. (Sup't. Ex. 19). Appellants further claim they were deprived the right to confront witnesses against their son because none of the administrators who investigated the incident were present at the suspension hearing. To the contrary, Dr. Abel, Principal of Patterson Mill, who investigated the incident and who was the decision-maker at the school level, testified at the hearing. The Appellants had the opportunity to cross-examine him, as well as Mr. Williams, the superintendent's designee. We do not find any due process violations here.

Alleged Discriminatory Discipline

Appellants argue that the school system discriminated against Student A by imposing the extended suspension because he is African-American. They argue that this violated the local board's Non-Discrimination Policy, Policy 24-0002-000. They also argue that the school system's disciplinary policy has a disproportionate impact on African American males, and thus a disproportionate impact on Student A.[6]

To support their argument, the Appellants rely on the case of *Kelly D. v. Harford County Bd. of Educ*., MSBE Op. No. 13-32 (2013). The *Kelly D*. case was a challenge to the local board's decision denying LD, a white, male, senior at Patterson Mill, the ability to attend senior week activities after the school system received notice from law enforcement of a reportable offense violation for an assault charge based on an encounter between LD and a female student

[6] Appellants cite to COMAR 13A.08.01.21, which is a regulation that requires MSDE to analyze local school system discipline data to determine whether there is a disproportionate impact on minority students.

at school.[7] The female student reported the incident to the school resource officer. She stated that "she was near her locker by a classroom door when LD grabbed her right arm tightly and would not release it when requested to do so . . . LD grabbed her tighter, leaving red marks on her arm, and pushed her against the wall pressing his fingers against her left side and ribs to the point where it hurt . . . LD would not release her until she gave him a kiss, so she did so and left quickly. *Id.* LD denied the claims and maintained that the allegations were retaliation for breaking up with the female student. The female student got a Peace Order against LD, and LD was charged with second degree assault. The school system transferred LD to the Alternative Education Online Program,[8] prohibited him from participating in any school activity at Patterson Mill, including all senior week activities except for graduation, and prohibited him from being on any Harford County Public School property without authorization. LD challenged only the portion of the decision regarding participation in senior week activities.

The Appellants maintain that LD was not "disciplined" because he was white. We do not agree that LD was not disciplined. He was removed from school and all school property, assigned to an alternative program and prohibited from all school activities including senior week. We are keenly aware, however, that in our school systems African American males are subject to more frequent and greater discipline disproportionate to their white counterparts. We take the issue seriously and have instituted programs, data collection and research to get to the cause of the problem and to eliminate disproportionate discipline.

But, recognizing a disproportionality problem in general does not necessarily provide evidence of discrimination against a specific individual. The Appellants have not presented evidence to support an individual claim of discrimination specifically against their son. To prove a *prima facie* case of intentional discrimination the Appellants must demonstrate by a preponderance of the evidence that (1) Student A is a member of a protected group (African Americans); (2) that he was subjected to an adverse educational action; and (3) that a similarly situated student not in the protected group was given better treatment. *See Brewer v, Board of Trustees of Univ. of Ill*., 479 F.3d 908, 921 (7th Cir. 2007); *Byrant v. Independent Sch. Dist. No. 1-38 of Gavin County, OK*, 334 F.3d 928, 930 (10th Cir. 2003).

Appellants rely on the *Kelly D.* case to demonstrate that Student A, was similarly situated to LD, a white senior at Patterson Mill, and that Student A received discipline for conduct similar to that committed by LD while LD received no discipline for the conduct. The problem here is that LD was disciplined for his actions, albeit not through the same legal process as Student A. In fact, the school system removed LD from Patterson Mill and precluded his participation in school activities for a greater time-period than it did Student A. The discipline in both cases is remarkably similar. In our view, the Appellants have not provided evidence to support a *prima facie* case of discrimination.

CONCLUSION

We find that the local board's decision upholding the extended suspension was arbitrary, unreasonable and illegal. We direct the local board to make appropriate corrections to Student

[7] Section 7-303(f) allows the information obtained by the school system regarding a reportable offense to be used to provide appropriate educational programming and related services to the student, and to be used to maintain a safe and secure school environment.

[8] At the time, LD was only attending school part-time due to a prior disciplinary matter.

A's records. In addition, we find that the local board violated the regulatory requirement to provide minimum educational services to Student A during the suspension period.

Signatures on File:

_____
Chester E. Finn, Jr.
Vice-President

_____
Jean C. Halle

_____
Justin M. Hartings

_____
Stephanie R. Iszard

_____
Rose Maria Li

_____
Joan Mele-McCarthy

_____
Michael Phillips

_____
David Steiner

_____
Warner I. Sumpter

Dissent:

Signatures on File:

_____
Andrew R. Smarick
President *

_____
Michele Jenkins Guyton

Voted on: June 20, 2018
Issued on: July 24, 2018

*Mr. Smarick was present for the discussion and vote on this case at the June 20, 2018 meeting. As of July 1, 2018, he is no longer a State Board member.