

JODY MARK FARVER,

Appellant

v.

CARROLL COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 99-42

OPINION

In this appeal, two brothers, one a senior and one a junior at Westminster High School during the 1998-99 school year and their father, contest the decision prohibiting the students from participating in extracurricular activities from February 11, 1999 until April 20, 1999 based on a violation of the school system's extracurricular activity conduct eligibility policy.¹ Appellants argue that the local board's decision is arbitrary, unreasonable and illegal. The local board has filed a Motion to Dismiss or Summarily Affirm, maintaining that its decision should be upheld. Appellants have filed an opposition to the motion.

BACKGROUND

On February 6, 1999, Matthew and Nicholas² and two friends attended an un-chaperoned party at the home³ of another Westminster High School student where minors were illegally consuming alcohol.⁴ After conducting an extensive investigation, the principal's designee charged Nicholas and Matthew with constructive possession of alcohol in violation of the school system's extracurricular activity conduct eligibility policy, and deemed the students ineligible for

¹*William Arnold v. Carroll County Board of Education* and *Courtney Johnson v. Carroll County Board of Education* arise out of the same incident.

²Ineligibility prohibited Nicholas from participating in the remainder of the basketball season and a portion of the baseball season, and limited his participation in National Honor Society activities. (Tr. 28). Matthew will be returning for the 12th grade this coming school year. He was also active in the National Honor Society.

³Testimony concerning the home in which this party took place discloses that the house is of extremely grand size, with many rooms and levels, a large front and back yard, and a long circular driveway. (Tr. 42-43).

⁴School officials approximated that during the time at issue, 150-200 minors were present at the party.

participation in extracurricular activities for 45 days.⁵

The brothers claim that they arrived at the party with two friends at approximately 9:30 p.m. and began watching a basketball game on television in the family room. They further claim that approximately 45 minutes later, around 10:15 p.m., when they realized that students were arriving at the party with alcohol, they promptly left the party in order to avoid violating school policy. (Tr. 22-26).

The Westminster High School Student/Parent Handbook section on conduct eligibility for extracurricular activities (p.38 - 41) states:

- a. The county-wide disciplinary regulations for all students as outlined in the Pupil Services Handbook and this Student-Parent Handbook will be enforced.⁶
- b. Students may not use, be in actual or constructive possession of, manufacture, or distribute any

⁵Approximately 50 students in total were disciplined as a result of the party. Only nine of those students were charged with consumption of alcohol. Neither Nicholas nor Matthew were charged with consumption of alcohol. Forty-one students including Appellants were charged with constructive possession. Twenty students appealed to the superintendent, four of whom were successful in their appeals and were reinstated.

⁶The drug and alcohol disciplinary policy states (Student/Parent Handbook p. 18):

The Board of Education of Carroll County strongly . . . endorses aggressive disciplinary action for the use, possession, constructive possession, manufacture, or distribution of controlled dangerous substances, controlled paraphernalia, . . . and alcohol by students. . . Students in violation of drug/alcohol policies, at anytime, on or off school premises, will be declared ineligible for extracurricular activities. . . .

It further states (p.20) that:

Strong deterrents are necessary in an effort to give students additional reasons not to use alcohol or drugs. Therefore, it is the policy of the Board of Education to consider any student ineligible for participation in extracurricular activities if the student uses, possesses, manufactures, or distributes controlled dangerous substances, controlled paraphernalia, look-alike drugs, or alcohol, at any time, on or off school premises.

controlled dangerous substance, drug paraphernalia, controlled paraphernalia, look-alike drugs, or alcohol, the possession, use, transfer, or sale of which is prohibited by law, at any time, on or off school premises.

The school administration interprets the conduct eligibility policy as requiring students to remove themselves from circumstances in which they are knowingly in proximity to minors illegally consuming alcohol at any time on or off school premises. (Tr. 52-53). Students who violate the policy are deemed ineligible to participate in any extracurricular activity for the remainder of the season or forty-five (45) school days, whichever is longer.

Appellants appealed the ineligibility determination, and on March 2, 1999, attended a conference conducted by the superintendent's designee.⁷ By letter dated March 12, 1999, the superintendent's designee advised Appellants that the superintendent was upholding the decision. That letter states in part the following:

We found the testimony given on behalf of [the brothers] at the March 2, 1999 appeal hearing to be very powerful. However, when we consider what was shared then with what we have learned through reviewing the history of the policy and its implementation, the notes taken by school administrators during the questioning of students, the letters of appeal and listening to parents and students during the appeal hearings we are convinced that:

- at 9:35 P.M. there was ample evidence of the presence of alcohol and underage drinking,
- alcoholic beverage containers were littering the grounds, cars lined the driveway, the critical mass of the 150-200 attenders were present,
- many students were drinking, although few have admitted to drinking,
- drinking occurred throughout the house and on the surrounding property,

⁷Simultaneously, Appellants and other aggrieved students and parents unsuccessfully sought a temporary restraining order and preliminary injunction in the United States District Court for the District of Maryland, *Farver v. Board of Education of Carroll County*, 40 F. Supp. 2d 323 (D. Md. 1999), and in the Circuit Court for Carroll County, *Farver v. Board of Education of Carroll County*, Case No. C-99-29126 (Mar. 22, 1999).

- by virtue of the sheer number of students who reported seeing [the brothers], they were not isolated from other partygoers.

Appellants appealed the superintendent's decision to the local board. A full evidentiary hearing was held where Appellants were represented by counsel.⁸ In a decision issued on April 14, 1999, the local board upheld the ineligibility determinations. The local board found that:

- the students were aware of the conduct eligibility rule and understood they could not place themselves in proximity to underage persons possessing or consuming alcohol;
- the two brothers gave inconsistent versions of their actions, first denying their presence at the party and later admitting their presence and then changing the arrival times to reflect a shorter period of time (emphasis added);
- information obtained by school administrators revealed inconsistencies in the statements offered by the brothers;
- information gathered by school officials reasonably established that a large number of students had arrived in the 9:30-10:00 time frame and that underage consumption of alcohol was occurring, as witnessed by 38 of the 50 students who were present during that time;
- ample evidence showed that by 9:35, underage drinking was occurring in different sections of the house;
- student statements revealed that illegal consumption of alcohol was occurring both inside and outside the house in the 9:30-10:15 time frame;
- the brothers were readily observed in the 9:30-10:00 time frame when underage alcohol consumption was occurring, and that the brothers failed to act in a reasonably prompt manner to remove themselves from the party;
- the hearsay testimony of students present at the party had a

⁸Counsel for the Appellants is the same attorney who represented all of the students involved in the proceedings in the United States District Court. Appellants are not represented by counsel in their appeal before the State Board.

- high degree of reliability because they were statements against interest which were corroborated;
- the conduct eligibility rule is a proper exercise of the local board's authority to enact rules to manage its public school system; and
- the conduct eligibility rule encourages student leaders and athletes to set a high standard for other students to follow while also serving as a deterrent.

ANALYSIS

Mootness

As a preliminary matter, the local board contends that this appeal should be dismissed as moot. It is well established that a question is moot when “there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the courts [or agency] can provide.” *In Re Michael B.*, 345 Md. 232, 234 (1997); *See also Walter Chappas v. Montgomery County Board of Education*, MSBE Opinion No. 98-16 (March 25, 1998). Although the ineligibility penalty has lapsed and Nicholas has graduated from Westminster High School, Appellants request that their records containing references to the extracurricular activities disqualification be expunged. However, the principal of Westminster High School has filed an affidavit stating that the high school does not place documentation of a loss of extracurricular eligibility in a student's educational records and that neither Nicholas' nor Matthew's records reflect the ineligibility determination. Therefore, we find that this appeal is moot because there has been no impact on Appellants' records and there is no remedy to provide.

Legality of Policy Regulating Off-School Conduct

Nonetheless, if we were to review the merits of the appeal we would uphold the local board decision for the following reasons. It is well established that the standard of review for a controversy over a decision of a local board involving a local policy is that the decision of the local board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.01.03E(1).

In *Sara Johnson v. Baltimore County Board of Education*, MSBE Op. 96-29 (September 25, 1996), the State Board explained its role in reviewing school disciplinary policies:

We do not believe it is appropriate for the State Board to determine the specific punishment for a student's misconduct. Rather, our role is to determine whether the disciplinary code established by a local school system is rationally based, publicized to the student

body, and fairly and consistently applied.

Additionally, in *John Schlamp v. Board of Education of Howard County*, MSBE Opinion No. 95-11 (May 13, 1995), the State Board enumerated the principles that must be applied to determine the validity of school regulation of off campus conduct: whether the conduct being regulated has a direct effect on the order and general welfare of the school and whether the regulation is reasonable in scope.

Applying the criteria enunciated above, we find that the conduct being regulated is rationally based and has a direct effect on the order and general welfare of the school. Courts of other jurisdictions have recognized rules regulating out of school conduct as reasonable and rationally related to legitimate interests. See *Bush v. Dassel-Cokato Board of Education*, 745 F. Supp. 562, 571-572 (D. Minn. 1990); *Felton v. Fayette School District*, 875 F.2d 191, 193 (8th Cir. 1989); *Braesch v. DePasquale*, 265 N.W.2d 842, 846 (1978), *cert. denied*, 439 U.S. 1068 (1979); *Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555, 563-564 (1972). This Board has also upheld school disciplinary/eligibility policies encompassing behavior off school property at a private event. See *Kevin Pickett v. Board of Education of Montgomery County*, MSBE Op. 98-45 (August 26, 1998). Moreover the Circuit Court for Carroll County has previously held the school system's conduct eligibility policy to be "directly related to an issue of great concern, both to the schools and to the community at large." See *Kaltenbacher v. Carroll County Board of Education*, Case No. CV0337 (1984) (denying injunction to prevent imposition of penalty on students deemed in violation of conduct eligibility policy. *N.B.* "Constructive possession" was not included in the policy at that time).

Bush v. Dassel-Cokato Board of Education, the opinion rendered by the U.S. District Court for Minnesota, is particularly instructive in this instance because of the similarity of the school policy at issue in that case to the policy at Westminster. In *Bush*, a student was declared ineligible for extracurricular activities because of her attendance for approximately fifteen minutes at a party where alcohol was served to minors. The school policy prohibited attendance at parties where alcohol and/or illegal drugs were present. *Id* at 564. The *Bush* court upheld the policy and the application of the policy to the behavior of the student, stating that the "[d]isciplining of a student for attending a party at which alcohol is consumed by minors is a reasonable means of deterring alcohol consumption among students, a goal which is not only legitimate, but highly compelling. *Id* at 572.

In addressing the nexus between student behavior off school grounds and the effect of that behavior on the school environment, the *Bush* court had no difficulty concluding that "illegal consumption of alcohol 'has a direct effect on the welfare of the school,'" and that "school regulations aimed at curbing alcohol consumption among students fall within the authority of the school board, even if the activity regulated occurs off school grounds." *Bush*, 745 F. Supp. at 573. In so holding, the court quoted *Schall by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1324 (7th Cir.) (sustaining a high school's random urinalysis program):

[I]f students are to be educated at all, an environment conducive to learning must be maintained. The plague of illicit drug use which currently threatens our nation's schools adds a major dimension to the difficulty the schools face in fulfilling their purpose – the education of our children. If the schools are to survive and prosper, school administrators must have reasonable means at their disposal to deter conduct which substantially disrupts the school environment.

In the present case, the local board's policy and the mandated punishment were implemented to deter alcohol use among its students, particularly those who represent the school in extracurricular activities and athletics and thereby serve as examples to others. William H. Hyde, Superintendent of Carroll County Public Schools, testified to the urgency in addressing underage alcohol use within the school community. *See* Testimony of Hyde, Supt. 6, Tr. 4-10. The illegal use of alcohol and drugs by young people in Carroll County is a serious problem. *See* 1996 Maryland Adolescent Survey (indicating that 53.7% of 12th graders surveyed in Carroll County public schools had consumed beer and/or wine coolers within the month prior to the survey, and that 38.1% surveyed had consumed liquor). The policy promotes student health and safety; promotes students involved in extracurricular activities as positive peer models and representatives of the schools; and provides students who participate in extracurricular activities with strong incentives and acceptable reasons not to succumb to peer pressure to use alcohol or drugs, or to attend parties where such substances are illegally served and consumed by minors. *See* Westminster High Student/Parent Handbook (p. 18, 20, 40) and Pupil Services Handbook (p. 67-67a). For all of these reasons, we find the school board policy rationally related to legitimate school interests.

We also find that the school board is authorized to prescribe such rules. Section 4-108 of the Education Article, Annotated Code of Maryland, mandates that local boards of education “[a]dopt, codify, and make available to the public bylaws, rules, and regulations not inconsistent with State law, for the conduct and management of the county public schools.” (1997 Repl. Vol.). As explained above, the policy at issue is reasonably related to and has a direct effect on the welfare of the school.

Interpretation of Constructive Possession

As noted above, the conduct eligibility policy prohibits among other things actual or constructive possession of alcohol at any time on or off school premises. While the conduct eligibility policy does not define constructive possession, the policy must be read in light of the other disciplinary policies referenced therein and interpreted in a manner consistent with those policies. The drug and alcohol policy defines possessor as follows:

a student who has alcohol, drugs, or paraphernalia as defined in Section V A on his/her personal property or who has such

substance under his/her control or who has knowingly placed himself/herself in proximity with a person known to have alcohol or drugs on his/her personal property or under his/her control on school property, at school-sponsored or related functions, and on school buses/coaches. (Emphasis added).

When viewing these policies together, we find that constructive possession reasonably includes attendance at a party where underage alcohol possession and consumption occur.

If there appears to be some ambiguity in the language of the conduct eligibility policy, any significant ambiguity was clarified by the principal's designee, John Seaman, who orally publicized the school's interpretation of the policy to the entire student body at the annual back to school assembly. At the hearing before the local board, the parties stipulated that Mr. Seaman annually addresses the conduct eligibility policy during the assembly, and advises students that they will be ineligible for participation in extracurricular activities if they are present at a party where alcohol is being consumed by minors. (Tr. 54).

Additionally, one of the brothers participated on the football, basketball and baseball teams whose members were specifically counseled by their coaches on the conduct eligibility policy. The coaches of these teams submitted affidavits stating the following:

I make it a point to have a 'Team Talk' at the beginning of the season where an assistant principal meets with my players and discusses, among other things, the application of the drug and alcohol policy to participants in extracurricular activities. In these meetings, it is clearly explained to the players that they will be found ineligible if they attend a party or other gathering where illegal drug use or underage drinking takes place, even if they do not actually consume the drugs or alcohol. In addition to the presentation by the assistant principal, I also periodically advise my players about this policy and stress the importance of not attending gatherings where underage drinking or illegal drug use takes place.

See Affidavits of Scott Tobias and James Rodriguez; *See also* Affidavit of David Byers. Moreover, Nicholas testified that he understood from school officials that he should remove himself from any such situation. (Tr. 40). In light of these facts, we find that the policy was reasonably explained and publicized to the brothers.⁹

⁹The conduct eligibility policy also appears to have been consistently applied. All students that were present at the party for other than a few minutes were found to be in constructive possession of alcohol in violation of the conduct eligibility policy. (Tr. 57).

Nonetheless, while the goals of the policy are commendable, the policy as currently worded may be difficult to apply in certain situations. For example, it can be extremely difficult to prove that a student has actual knowledge that an underage individual is consuming alcohol, and that the student has not removed himself from the situation in a timely fashion. Additionally, although not the case here, it is possible that the conduct eligibility policy could encompass violations that were not intended. For example, a student might be seated on a train or airplane or at a concert or sporting event near an underage person consuming alcohol; or the student might be at a wedding where he is seated near a minor drinking alcohol while partaking in the champagne toast. Under a literal reading of the policy, these would all amount to violations if the student did not remove himself immediately from the situation. We can also conceive of a situation where a student's attempt to comply with the policy may place the student's safety in peril. For example, a female student attempting to remove herself from proximity to underage drinking occurring at a party on the grounds outside the home may put herself in a precarious position by waiting on a dark street late at night. In light of these concerns, we strongly recommend that the conduct eligibility policy be revised in order to avoid these pitfalls and to explicitly define the meaning of constructive possession.

Application of Conduct Eligibility Policy

With regard to the application of the conduct eligibility policy to the facts of this case, we note that participation in extracurricular activities is a privilege and not a right. Therefore, there is no Fourteenth Amendment due process violation; however the board's application of the policy is subject to review under the arbitrary, unreasonable or illegal standing set out at COMAR 13A.01.01.03E(1). Here, we believe that a reasoning mind could have reasonably reached the same conclusion as the local board. As the record reflects, the local board considered the entire record in making its decision to uphold the exclusion of Nicholas and Matthew from extracurricular activities. Part of the board's deliberative process, as trier of fact, includes making credibility decisions concerning the witnesses and their testimony, as well as determining the weight to be accorded hearsay testimony.¹⁰ See, e.g., *Board of Trustees v. Novik*, 87 Md. App. 308, 312 (1991), *aff'd*, 326 Md. 450 (1992) ("It is within the Examiner's province to resolve conflicting evidence. Where conflicting inferences can be drawn from the same evidence, it is for the Examiner to draw the inferences."); *Board of Education v. Paynter*, 303 Md. 22, 36 (1985)(same). The State Board may not substitute its judgment for that of the local board unless there is independent evidence in the record to support the reversal of a credibility decision. See *Dept. of Health & Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994); *Kaleisha Scheper v. Baltimore County Board of Education*, MSBE Opinion No. 98-23 (April 29, 1998); *Corey Williamson v. Board of Education of Anne Arundel County*, MSBE Opinion No. 97-20

¹⁰The proceedings in this case were not held in a court of law. Rather, the proceedings consisted of a hearing before an administrative body which was not bound by the strict rules of evidence and in which hearsay evidence was admissible. See, e.g., *Travers v. Baltimore Police Dep't*, 115 Md. App. 395, 408 (1996); *Kade v. Charles H. Hickey Sch.*, 80 Md. App. 721, 725 (1989); *Eichberg v. Maryland Bd. of Pharm.*, 50 Md. App. 189, 192-193 (1981).

(April 30, 1997); *Mecca Warren v. Board of Education of Baltimore County*, MSBE Opinion No. 96-16 (April 29, 1996).

In this case, the students admittedly attended a party where they observed underage alcohol consumption. However, they claim that they left upon discovering that underage alcohol consumption was taking place. (Tr. 22-26). The record reveals that the brothers changed their testimony on several occasions, originally claiming that they did not attend the party. (Tr. 55-56). The result is a conflicting account concerning the timing of the night's events.

The record also contains the testimony of the principal's designee concerning the investigation of the incident conducted at the school level, including the questioning of approximately 58 students. Based on the investigation, the principal's designee evaluated the events of the evening, taking credibility into account, and made necessary conclusions concerning the sequence of events and what had transpired at the party, such as the number of people in attendance, their times of attendance, and the amount of alcohol present and consumed. (Tr. 57-59, 68). Additionally, the record contains the testimony of the superintendent's designee, who conducted her own investigation and considered the totality of the information that she had gathered. (Tr. 72-78). She noted the inconsistencies in answers given by the two brothers and their companions during the investigation at the school level, as compared to consistent to the minute answers given by the time the appeal reached her office. (Tr. 73, 88).

Finally, we note that this Board has upheld the denial of a student's privilege to participate in school sponsored extracurricular activities due to violations of the school's disciplinary policy in several prior decisions. Consistent with those cases, we find the penalties imposed in this case were not unduly harsh. See *Richard Olتمان v. Worcester County Board of Education*, MSBE Opinion No. 99-11 (February 23, 1999); *Ryan Rantz v. Worcester County Board of Education*, MSBE Opinion No. 98-47 (August 31, 1998); *Chase Craven v. Board of Education of Montgomery County*, MSBE Opinion No. 97-43 (October 29, 1997); *Michael Schneider v. Board of Education of Montgomery County*, MSBE Opinion No. 97-47 (October 29, 1997).

CONCLUSION

For the reasons noted above, we dismiss this appeal as moot. Alternatively, for the reasons so noted, we would affirm the decision of the Board of Education of Carroll County.

Walter Sondheim, Jr.
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September 22, 1999