

FILED

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

WAKE COUNTY

2011 MAR 21 AM 9:42

SUPERIOR COURT DIVISION

10CRS008745

WAKE COUNTY, C.S.C.

T.B., a minor, by and through his Legal Guardian,

Petitioner,

v.

WAKE COUNTY PUBLIC SCHOOL SYSTEM BOARD OF EDUCATION; DR. ADELPHOS BURNS, immediate past SUPERINTENDENT OF WAKE COUNTY PUBLIC SCHOOL SYSTEM, in his official capacity, and DANA KING, in her official capacity as Principal of Millbrook High School,

Respondents

ORDER

THIS MATTER CAME ON FOR HEARING before the undersigned Superior Court Judge Presiding on 7 February 2011, as an administrative appeal, pursuant to N.C. Gen. Stat. § 115C-391(e) and Article 4 of Chapter 150B of the General Statutes, from the 16 April 2010 final decision of Respondent Wake County Board of Education ("Board") upholding Petitioner's long-term suspension from Millbrook High School. In addition, the Court heard Respondents' Motion to Dismiss (1) all claims against Dr. Burns and Ms. King and (2) all claims arising under or pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, ("IDEA").

Petitioner ("T.B.") was represented by Mark S. Trustin, Attorney at Law and the Respondents were represented by Deborah R. Stagner of Tharrington, Smith, L.L.P. Upon hearing and considering the arguments of counsel for Petitioner and Respondents and reviewing the administrative record and the briefs of both parties, the Court enters the following **findings of fact**:

1. During the 2009-10 school year, Petitioner T.B. was a freshman at Millbrook High School, a school under the general control and supervision of the Board, a body corporate organized pursuant to Article 7, Chapter 115C of the North Carolina General Statutes.
2. On the morning of 10 September 2009, at or adjacent to a Wake County Public Schools middle school bus stop while a group of students was gathering to wait for the bus, words were exchanged between T.B. and an East Millbrook Middle

- School student named "John." During the exchange, John called T.B. "a bitch" and T.B. struck John two times in the face. John did not strike back at T.B.
3. Moments after the incident, John and the other students boarded the middle school bus and rode to East Millbrook Middle School. T.B. boarded his bus at a nearby Wake County Public Schools high school bus stop and rode to Millbrook High School.
  4. John arrived at East Millbrook Middle School with a bleeding, swollen lip and a bruise on his cheek. John required only first aid attention for his injuries. John was given the opportunity to write a statement describing the incident.
  5. When T.B. arrived at school, he was questioned by Assistant Principal Kelly Aman. T.B. freely admitted striking John because he was "mad" about being called names by John and other students.
  6. On 11 September 2009, as a result of this incident, T.B. was suspended for ten school days with a recommendation for long-term suspension for violation of Board policies 6425.2B ("Assault on Student (Grades 6-12 First Violation)"); 6410.4 ("Intimidation/Disrespect"); 6425.1A ("Physical Aggression/Fighting"); and 6410.5 ("Class/Activity Disturbance").
  7. On 17 September 2009, a manifestation determination review concluded that the conduct for which T.B. was suspended did not constitute a manifestation of his disability.
  8. Board Policy 6425.2 ("Assault on Student"), in effect on 10 September 2009, expressly states that "[n]o student shall ... attempt to cause serious physical injury to any student [or] intentionally behave in such a manner that could reasonably cause serious physical injury to any student." Policy 6425.2B further provides that the "first violation of 6425.2 during a school year by a student in grades 6-12 shall result in long-term suspension from the school system for the remainder of the school year."
  9. Board Policy 6400 ("Code of Student Conduct"), in effect on 10 September 2009, expressly states that "All students shall comply with the Code of Student Conduct of the Wake County Public School System, state and federal laws, school board policies, and local school rules governing student behavior and conduct. This code applies to any student ... whose conduct at any time or place, on or off campus, has a direct and immediate effect on maintaining order and discipline or protecting the safety and welfare of students or staff in the schools."
  10. Petitioner appealed the long-term suspension recommendation. A hearing was held on 23 February 2010 before a panel of three Millbrook High School teachers, with a designated hearing officer presiding. Petitioner was represented by counsel, was provided the opportunity to examine the evidence against him, the right to present evidence, and the right to confront and cross-examine witnesses. After hearing the witness testimony and reviewing the documentary evidence, the panel voted to uphold the recommendation by the administration for long-term suspension.
  11. Petitioner appealed his suspension and it was reviewed by the Discipline Review Committee ("DRC"). The DRC considered the information from the school hearing and written submissions from counsel for Petitioner and the school. The

DRC recommended upholding the recommendation by the school for long-term suspension.

12. The Superintendent later upheld the recommendation of the DRC.
13. Petitioner then appealed the decision by the Superintendent to the Board, and hearing was held on 15 April 2010 before a panel of three Board members.
14. After thoroughly reviewing all the information presented by Petitioner and the administration, and after careful consideration of the facts, the Board upheld the long-term suspension of T.B.
15. Although the administration had recommended that T.B. be suspended for the remainder of the school year, the Board modified the recommendation of the Superintendent and allowed T.B. to enroll in Phillips High School immediately to complete the 2009-10 school year. The transfer of T.B. to Phillips High School was deemed necessary by the Board to ensure no further disruption of the learning environment in Millbrook High School. Petitioner was notified of the decision of the Board by letter dated 16 April 2010.
16. Petitioner filed his Petition for Judicial Review ("Petition") in Wake County Superior Court on 20 May 2010 seeking judicial review of a final disciplinary decision of the Board pursuant to section 115C-391(e) and Article 4 of Chapter 150B of the North Carolina General Statutes.
17. At the time of the incident, on 10 September 2009, Respondent Dr. Adelphos J. Burns was the Superintendent of the Wake County Public School System and Respondent Dana King was the Principal of Millbrook High School.

Based on the foregoing **Findings of Fact**, the Court makes the following **Conclusions of Law**:

1. This action is before the court on a Petition for Judicial Review of a final decision of the Wake County Board of Education, pursuant to N.C. Gen. Stat § 115C-391(e) and Article 4 of Chapter 150B of the General Statutes.
2. The Court lacks subject matter and personal jurisdiction over respondents Dr. Adelphos J. Burns, immediate past Superintendent of Wake County Public School System, and Dana King, Principal of Millbrook High School.
3. Upon judicial review of a final decision of a local Board of Education, the Court may affirm, reverse, modify, or remand the final decision of the local Board of Education. N.C. Gen. Stat. § 150B-51(b) (2010).
4. The Court may reverse or modify the final decision of the local Board of Education only if Petitioner's substantial rights were prejudiced because the decision of the Board was "(1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedure; (4) Affected by error of law; (5) Unsupported by substantial evidence ... in view of the entire record submitted; or (6) Arbitrary, capricious, or an abuse of discretion." N.C. Gen. Stat. § 150B-51(b). Upon judicial review in superior court, alleged agency errors under subsections (1) through (4) are reviewed *de novo*, whereas alleged errors under subsections (5) and (6) are reviewed under the "whole record test." *Davis v. Macon Cty. Bd. of Educ.*, 178 N.C. App. 646, 652, 632 S.E.2d 590, 594 (2006).

5. Upon *de novo* review, the Court finds that the Board had no jurisdiction to act in this matter, as the actions herein complained of did not happen in school, on school property, at a school-sponsored event or related school activity as required by N.C. Gen. Stat § 115C-391(d2)(3).
6. Upon *de novo* review of the alleged violations by the Board of the rights of Petitioner under the North Carolina Constitution, the Court finds no violation of the right of Petitioner to an opportunity to receive a sound basic education. The long-term suspension of Petitioner does not infringe on his right to an opportunity to receive a sound basic education because “[r]easonable regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior. *In re Jackson*, 84 N.C. App. 167, 176, 352 S.E.2d 449, 455 (1987).
7. The Court lacks subject matter jurisdiction over claims of Petitioner arising under the IDEA. Further, upon judicial review of a final decision of a local Board of Education, pursuant to Article 4 of Chapter 150B of the General States, there is no authority to award Petitioner tutoring, compensatory education or other specific educational services.
8. There is no statutory or other authority for awarding Petitioner damages, costs, or attorneys’ fees in this action.

**WHEREFORE, IT IS HEREBY, ORDERED, ADJUDGED AND DECREED THAT:**

1. The Wake County Public Schools immediate Past Superintendent, Dr. Adelphos J. Burns, in his official capacity and otherwise, is hereby **DISMISSED** as a party from this suit.
2. Dana King, Principal of Millbrook High School, Wake County Public School System, in her official capacity and otherwise, is hereby **DISMISSED** as a party from this suit.
3. There being no jurisdiction for the school and Wake County Public School System to have taken action in this matter, the decision by Respondent Wake County Board of Education upholding the long-term suspension of Petitioner is hereby **REVERSED**.
4. Respondent Wake County Board of Education shall direct the responsible party (or parties) to correct the record of behavior of the Petitioner to remove any reference to misconduct related to the allegations named herein.
5. All remaining claims of Petitioner, including claims purportedly arising under or pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, are hereby **DISMISSED**.

6. This case shall remain closed.

This the 21th day of March 2011.

A handwritten signature in black ink, appearing to read 'Carl R. Fox', written over a horizontal line.

Honorable Carl R. Fox  
Superior Court Judge Presiding