IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

	*	
CHRISTIAN HEYNE, and his parents	*	
WILLIAM AND ROBIN HEYNE,	*	
individually and as next friends	*	
	*	NO. M2010-00237-COA-R3-CV
Petitioners-Appellees	*	
	*	Chancery Court No. 09-136-III
VS.	*	
	*	
	*	
METROPOLITAN NASHVILLE	*	
BOARD OF PUBLIC EDUCATION,	*	
	*	
Respondent-Appellant	*	

BRIEF OF *AMICUS CURIAE* TENNESSEE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENT/APPELLANT METROPOLITAN NASHVILLE BOARD OF EDUCATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTEREST OF AMICUS 4

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 5

STATEMENT OF THE ISSUES 5

ARGUMENT AND CITATION OF AUTHORITY 5

I. INTRODUCTION 5

II. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY RULING ON THE MERITS OF THE DECISION OF THE SCHOOL SYSTEM, RATHER THAN LIMITING ITSELF TO REVIEWING THE MANNER IN WHICH THE DECISION WAS REACHED. 6

III. THE PETITIONER/APPELLEE RECEIVED THE PROCESS HE WAS DUE. 8

A. THE STANDARD FOR DUE PROCESS IN STUDENT SUSPENSIONS 8

B. THE STANDARD OF DUE PROCESS UNDER TENNESSEE LAW 14

IV. CONCLUSION 15

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases

421 Corp. v. Metropolitan Government of Nashville and Davidson County, 36 S.W.3d 469 (Tenn.Ct.App.2000). 7

Buchanan v. City of Bolivar, Tenn., 99 F.3d 1352, 1359 (6th Cir. 1996)..... 14

Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)..... 10

Epperson v. Arkansas, 393 U.S. 97, 104 (1968)...... 10

Goss et al. v. Lopez et al., 419 U.S. 565; 95 S. Ct. 729; 42 L. Ed. 2d 725..... 8

Hall v. McLesky, 83 S.W.3d 752, 757 (Tenn.Ct.App.2001)..... 6

Morrissey v. Brewer, 408 U.S., at 481..... 10

Powell v. Parole Eligibility Review Board, 879 S.W.2d 871, 873 (Tenn.Ct.App.1994).... 6

Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969) 9

Williams v. Cambridge Bd. of Educ., 370 F.3d 630, 2004 U.S. App. LEXIS 10951, 2004 FED App. 169P (6th Cir.) (6th Cir. Ohio 2004) 14

Statutes

Ohio Rev. Code Ann. § 3313.64 (1972)..... 9

Ohio Rev. Code Ann. § 3313.66 (1972)..... 9

Tenn Code Ann. § 39-6-3401(c)(1-3)..... 14

Tenn. Code Ann. § 27-8-101, et seq. 6

Tenn. Code Ann. § 49-2-2001 4

Tenn. Code Ann. § 49-6-3401(c)..... 6

Constitutional Provisions

Tennessee Constitution Article XI Section 12..... 10

The Tennessee School Boards Association (TSBA) submits this brief in support of its *Motion for Leave to File an Amicus Curiae Brief in Support of Respondent-Appellant, Metropolitan Nashville Board of Public Education.* TSBA respectfully asks this Court to reverse the judgment of the Davidson County Chancery Court.

INTEREST OF AMICUS

As explained in the Tennessee School Boards Association's *Motion For Leave to File an Amicus Curiae Brief in Support of Respondent-Appellant Metropolitan Nashville Board of Public Education*, TSBA is a not-for-profit organization, created exclusively for charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code. TSBA is recognized in Tenn. Code Ann. § 49-2-2001 (2002) as the organization and representative agency of Tennessee's school board members and its membership is comprised of 135 county, city and special school district boards of education throughout the state. The purpose of TSBA as stated in Article II of the TSBA Constitution and Bylaws, is to work for the general advancement and improvement of public education in Tennessee.

The purpose and intent of TSBA's filing of this brief is to argue that the Chancery Court erred in its decision that the plaintiff was denied due process in regard to the ten day suspension from school. This suspension was ultimately upheld through three levels of review by the school district (*pp. 8-10, Appellants Statement of the Facts*). TSBA argues that not only was the plaintiff awarded all process due for this suspension, but that he received additional levels of appeal to which he was not entitled.

All of TSBA's 135 member school boards, along with county and city governments across the state, are potentially affected by this decision. The issue before

this court concerns the long-standing due process procedures followed by Tennessee school districts when dealing minor incidents of misbehavior. Those procedures are clearly supported by State law and by United States Supreme Court precedent.

STATEMENT OF THE CASE

TSBA refers this Court to the Statement of the Case appearing at page 3 of Respondent-Appellant's brief to the Court of Appeals.

STATEMENT OF FACTS

TSBA refers this Court to the Statement of Facts contained at pages 4-15 of the Respondent-Appellant's brief to the Court of Appeals.

STATEMENT OF THE ISSUES

TSBA believes that the statement of issues provided by the Defendant/Appellant accurately reflects the posture of this case. However, TSBA does wish to state two additional, but closely related issues that pertain to its membership. First, did the Trial Court exceed its authority by ruling on the merits of the disciplinary action taken by the Respondent/Appellant? Second, did the Petitioner/Appellee receive the process he was due?

ARGUMENT AND CITATION OF AUTHORITY

I. INTRODUCTION

On December 23, 2009, the Trial Court issued a Memorandum and Order ruling against the School Board and ordering that the Board expunge Christian Heyne's 10-day suspension. (TR 345.)[1] The Trial Court's order identifies four legal claims on behalf of

[1] In the interests of avoiding confusion, the Amicus adopts the conventions used by the appellant in its brief.

the petitioner. They are a violation of the petitioner's procedural due process rights, a violation of the petitioner's substantive due process rights, a violation of the petitioner's equal protection rights and a violation of the petitioner's right to an impartial decision maker. (TR 346) The Trial Court dismissed the petitioner's claims for violations of his substantive due process and equal protection rights. (TR 348) In finding that the defendant violated the plaintiff's procedural due process rights and his right to an impartial hearing officer, the Trial Court stated:

> The Court concludes that the School Board violated the petitioner student's procedural due process rights and rendered an arbitrary decision with no evidence to support it. As to the due process violation, the court finds that the petitioner was not provided an impartial panel to decide the charges. (TR 346)

II. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY RULING ON THE MERITS OF THE DECISION OF THE SCHOOL SYSTEM, RATHER THAN LIMITING ITSELF TO REVIEWING THE MANNER IN WHICH THE DECISION WAS REACHED.

Tennessee statutes do not permit an appeal of a suspension ten (10) days or less to the Chancery Court. Tenn. Code Ann. § 49-6-3401(c). As such, the only authority the Trial Court has to review the decision of a school system is through the common law writ of certiorari. Tenn. Code Ann. § 27-8-101, et seq. Under a common law writ of certiorari, the Trial Court has a very limited role.

> Further, the scope of review under the common law writ of certiorari is very narrow. It does not involve an inquiry into the intrinsic correctness of the decision of the tribunal below, but only into the manner in which the decision was reached.

Hall v. McLesky, 83 S.W.3d 752, 757 (Tenn.Ct.App.2001) citing *Powell v. Parole Eligibility Review Board*, 879 S.W.2d 871, 873 (Tenn.Ct.App.1994).

> Judicial review under a common-law writ of certiorari is limited to the record made before the board or agency, unless the court permits the introduction of additional evidence on the issue of whether the board or agency exceeded its jurisdiction or acted illegally, capriciously, or arbitrarily. See *Cooper v. Williamson County Bd. of Educ.*, 746 S.W.2d 176, 179 (Tenn.1987); *Davison v. Carr*, 659 S.W.2d 361, 363 (Tenn.1983). The reviewing courts will not reweigh the evidence, see *Watts v. Civil Serv. Bd.*, 606 S.W.2d 274, 277 (Tenn.1980); *Hoover, Inc. v. Metropolitan Bd. of Zoning Appeals*, 924 S.W.2d 900, 904 (Tenn.Ct.App.1996), examine the intrinsic correctness of the decision being reviewed, see *McCord v. Nashville, C. & St. L. Ry.*, 187 Tenn. 277, 294, 213 S.W.2d 196, 204 (1948); *Tarpley v. Traughber*, 944 S.W.2d 394, 395 (Tenn.Ct.App.1996), or substitute their judgment for that of the local officials. See *Whittemore v. Brentwood Planning Comm'n*, 835 S.W.2d 11, 15 (Tenn.Ct.App.1992).

421 Corp. v. Metropolitan Government of Nashville and Davidson County, 36 S.W.3d 469, 474 (Tenn.Ct.App.2000).

The Trial Court found that there was no evidence to support the decision of the appellant to suspend the petitioner student for ten days. (TR 362) As the appellant discusses in its brief, the Trial Court acknowledged that the record contained multiple witness statements attesting to the petitioner student's reckless actions. (TR 363-365) The Trial Court may not have found the evidence compelling, sufficient, or credible. That does not, however, mean that the evidence was absent.[2]

There is also a limitation to the remedies available under the writ.

> The common-law writ of certiorari likewise provides limited options for dealing with errors discovered in the proceedings being reviewed. Because courts should avoid dictating specific decisions to local zoning boards except in the most extraordinary circumstances, the most common judicial remedy in zoning cases is to remand the case to the zoning agency with instructions appropriate to the circumstances of the case. See 4 Robert M. Anderson, *American Law of Zoning* § 27.39, at 598 (3d ed. 1986). Rather than shouldering the local agency's responsibilities, the courts should insist that the agency carry out its task in an appropriate manner. The goal of a remand should be to place the parties and the agency in the position

[2] The danger presented by a moving vehicle to a group of pedestrians is of such common knowledge in our society, that requiring a specific finding of such a danger in an administrative proceeding is ludicrous.

> they would have been in had the agency not acted improperly. See *Hoover, Inc. v. Metropolitan Bd. of Zoning Appeals*, 955 S.W.2d at 55.

421 Corp. v. Metropolitan Government of Nashville and Davidson County, 36 S.W.3d 469, 474-475 (Tenn.Ct.App.2000).

Rather than an excessive award of attorney's fees and an order expunging the petitioner's record, the Trial Court should have remanded the matter back to the appellant, with appropriate instructions regarding what it perceived to be error at the administrative level, and allowed the appellant to render a decision consistent with those instructions. The Trial Court's decision to do otherwise is not an indication of how egregious the appellant's actions were in this case, but how far the Trial Court has departed from its accepted role in these types of proceedings.

III. THE PETITIONER/APPELLEE RECEIVED THE PROCESS HE WAS DUE.

The law is well settled that students are entitled to some due process rights when they are deprived of their right to a public education. However, it is equally well settled that the actual scope of those rights are limited in the event that the deprivation is ten (10) days or less, as was the case here.

A. THE STANDARD FOR DUE PROCESS IN STUDENT SUSPENSIONS

To determine whether the plaintiff in this case was denied due process, the Court must first review the facts and holdings in *Goss et al. v. Lopez et al.,* 419 U.S. 565; 95 S. Ct. 729; 42 L. Ed. 2d 725.

Nine students in the Columbus Ohio Public School System brought an action against the Board of Education and various administrators of the school system under *42 USCS § 1983* for deprivation of constitutional rights. The students each had been

suspended for misconduct for up to ten (10) days without a hearing either prior to suspension or within a reasonable time thereafter and sought a declaration that the Ohio statute, *Ohio Rev. Code Ann. § 3313.64* (1972), which permitted such suspensions, was unconstitutional. The students additionally sought to enjoin the administrators to remove all references to such suspensions from the students' records. *Goss*, at 567.

On the basis of the evidence, a three-judge District Court declared that plaintiffs were denied due process of law because they were "suspended without a hearing prior to suspension or within a reasonable time thereafter," and that *Ohio Rev. Code Ann. § 3313.66* (1972) and regulations issued pursuant thereto were unconstitutional in permitting such suspensions. It was ordered that all references to plaintiffs' suspensions be removed from school files. *Goss at 571*. The decision was directly appealed to the United States Supreme Court.

In *Goss*, the Court, recalling their holding in another important constitutional case stated "(T)hese young people do not "shed their constitutional rights" at the schoolhouse door. *Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969)*. The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause. *Goss at 574*.

Tennessee's Constitution clearly vests in the General Assembly the responsibility of establishing and maintaining a system of free public schools, thus granting to

Tennessee students a property interest in attending said schools. *Tennessee Constitution Article XI Section 12*.

The school district in *Goss* argued that due process should only come into play if the State subjects a student to a "severe detriment or a grievous loss" and that a ten (10) day suspension is neither therefore the Due Process Clause is of no relevance. The Court responded by stating that a "10-day suspension from school is not *de minimis* in their view and may not be imposed in complete disregard of the Due Process Clause." *Goss at 575*.

The Court outlined that issue as follows. "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer, 408 U.S., at 481*. "We turn to that question, fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).* The Court was also mindful of its own admonition:

"Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Epperson v. Arkansas, 393 U.S. 97, 104 (1968).*" *Goss at 577-78.*

The Court stated that at the very minimum students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. *Goss at 579.*

The Court recognized, however that school district must be able to deal with behavioral issues **without unnecessary interference and second guessing from the Courts**. "The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." *Goss at 579-80*. (emphasis added)

Additionally the Court stated that "the prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done." *Ibid*.

Ultimately, the Court outlined the student's Due Process rights as follows: "Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or

less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Goss at 580*.

Further, the Court stated: "There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated. *Goss at 582-83*.

The Court did hold, however, that there were limitations to the requirements of Due Process. **"We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.** Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities

in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." *Goss at 583.* (emphasis added) The Court also clarified that its holding dealt solely with shorter suspensions not exceeding 10 days. *Goss at 584*.

Since the *Goss* decision, other Courts have closely followed and in some instances distinguished the reasoning.

> While the Due Process Clause applies to children and to public schools, the Supreme Court has long made clear that the procedural requirements of the Clause have considerably less force when applied to discipline meted out by school officials to students under their care. Unlike juvenile criminal proceedings, for example, hearings in connection with short school suspensions need not "afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Goss v. Lopez*, 419 U.S. 565, 583, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975)**.** Imposing such formalities on a school suspension proceeding would "not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." *Id*. Before suspending a student for ten days or less, as a result, all that a school official must do is give (1) adequate notice of the charge against the student, (2) an explanation of the evidence supporting the charge and (3) an opportunity for the student to respond. *See id*. at 581; *Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 706 (7th Cir. 2002) ("Under *Goss* students have a right to only minimal process."); *Donovan v. Ritchie*, 68 F.3d 14, 17-18 (1st Cir. 1995) (applying these requirements to a temporary school suspension that also barred participation in athletics and school activities, yet noting that under *Goss*, "the mere fact other sanctions are added to a short suspension does not trigger a requirement for a more formal set of procedures"); *C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383, 386-87 (11th Cir. 1996) (noting that, in the short school-suspension context, "the process provided need consist only of 'oral or written notice of the charges against [the student] and, if he denies them, an explanation of the evidence the authorities have and an opportunity [for the student] to present his side of the story'") (quoting *Goss*, 419 U.S. at 582); *Signet Constr. Corp. v. Borg*, 775 F.2d 486, 490 (2d Cir. 1985) (citing *Goss* for the proposition that "situations may occur where, given the burden a normal proceeding would impose, the nature of the interests at stake, the time limit for state action, and other circumstances, an informal non-judicial hearing will suffice").

Williams v. Cambridge Bd. of Educ., 370 F.3d 630, 2004 U.S. App. LEXIS 10951, 2004 FED App. 169P (6th Cir.) (6th Cir. Ohio 2004) .

The United States Court of Appeals for the Sixth Circuit has stated, "once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the *Fourteenth Amendment* demands." *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1359 (6th Cir. 1996), quoting *C.B. v. Driscoll*, 82 F.3d 383, 386 (11th Cir. 1996).

B. THE STANDARD OF DUE PROCESS UNDER TENNESSEE LAW

The Tennessee General Assembly has formally adopted due process procedures consistent with *Goss*, as a part of Tennessee Law. Tenn. Code Ann. § 39-6-3401(c)(1-3) reads as follows:

(c) (1) Except in an emergency, no principal, principal-teacher or assistant principal shall suspend any student until that student has been advised of the nature of the student's misconduct, questioned about it and allowed to give an explanation.

(2) Upon suspension of any student other than for in-school suspension of one (1) day or less, the principal shall, within twenty-four (24) hours, notify the parent or guardian and the director of schools or the director of schools' designee of:

(A) The suspension, which shall be for a period of no more than ten (10) days;

(B) The cause for the suspension; and

(C) The conditions for readmission, which may include, at the request of either party, a meeting of the parent or guardian, student and principal.

(3) If the suspension is for more than five (5) days, the principal shall develop and implement a plan for improving the behavior, which shall be made available for review by the director of schools upon request.

All Principal Manuel was required to do to ensure the due process rights of Mr. Heyne was to give him notice and an opportunity to be heard. Manuel clearly did this but also took the additional step of invoking more formal procedures which provided Heyne with not just one, but three (3) levels of administrative appeal in which his original

decision was upheld. (pp. 7-10, Appellant's Statement of Facts). Based on common law precedent as well as Tennessee law, the holding of the Trial Court that Heyne was denied due process is baffling and the excessive award of attorney fees is outrageous. Should this decision be allowed to stand, it will adversely affect every school district within the State of Tennessee by overruling a clearly established precedent by which all of Tennessee's school districts operate, and replacing it with confusion and misunderstanding.

IV. CONCLUSION

Schools exist for the purpose of educating students. It is, however, a sad fact of life that in order to accomplish this goal, school administrators must maintain order and discipline. This includes punishing students who attempt to use their car as a bowling ball and their fellow students as bowling pins.

The Trial Court was grossly mistaken concerning the applicable standard of due process in this case. Rather than rely upon the well settled principles set forth by State and Federal law, the Trial Court chose to craft its own understanding of constitutional due process for student disciplinary actions. In the process it choose to disregard the findings of the school system and reweigh the evidence, as well as set a procedural standard for student disciplinary hearings that, if adopted, would completely overburden the school system. Schools must be free to punish matters quickly, rather than allowing them to fester and grow. They must do so free from the threat of overzealous Courts and unwarranted damage awards. For these reasons, the Order of the Trial court should be set aside and this matter remanded with instructions consistent with the well-settled legal precedent in this area.

Respectfully submitted this 24nd day of September 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing motion has been served upon counsel for parties in interest herein:

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by mailing to said counsel to their offices VIA United States Mail, postage prepaid.

On this, 24th day of September, 2010.

_____
Randall G. Bennett