



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

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A VASSP Bimonthly Publication • September, 2019 • Vol. 3, No. 1 • www.vassp.org

VIRGINIA SUPREME COURT CONFIRMS FLEXIBILITY IN STUDENT PROCEEDINGS

The Virginia Supreme Court on May 19, 2019, confirmed for Virginia public school educators that disciplinary proceedings undertaken to enforce school divisions' respective student codes of conduct need not provide the same level of due process afforded criminal defendants. In *Fairfax County School Board v. S.C.*, the Court said in no uncertain terms that "a school is an academic institution, not a courtroom or administrative hearing room.

The case involved a student, S.C., who was disciplined for the nonconsensual touching of three of her fellow female students at school. The school administration suspended her for ten days and referred her to the division superintendent's hearing officer to determine appropriate further discipline. The principal's letter referring S.C. to the hearing officers stated that it was "necessary because [S.C.] was involved in a sexual assault against another student." Two hearing officers conducted a disciplinary review, in which they determined that S.C.'s actions were "willful, deliberate, and far outside the bounds of acceptable student conduct," in violation of her high school's "Student Rights and Responsibilities: A Guide for Families" handbook. The handbook specifically proscribed under the category "assault" certain acts, including "[i]mproper touching of another person (whether or not consensual)" and "sexual assault or battery upon any person."

S.C. appeared at the hearing represented by legal counsel. A court reporter transcribed the

proceedings. S.C. confirmed that she understood she was accused of "sexual battery" against other students. Her attorney sought to establish that her conduct was not sexual battery, which is a criminal charge with elements defined by statute (Virginia Code Section 18.2-67.4). During her testimony, S.C. admitted that she had touched other students in a sexual manner, thereby violating the school's disciplinary policy. The hearing officers, therefore, determined that S.C. had engaged in various incidents of sexual touching that were not consensual, but added that they were not able to determine whether the touching rose to the level of sexual

battery. The hearing officers reassigned S.C. to an alternative learning center for the remainder of the then-current school year; established probationary conditions for a minimum of one year; and reassigned her to a different Fairfax high school for the ensuing school year. As a corollary, the hearing officers ordered that any reference in her student record to "battery/assault of student-no injury" be replaced with "offensive touch – student."

After an unsuccessful appeal to the Fairfax County School Board, S.C.'s parents filed a petition for judicial review pursuant to Virginia Code Section 22.1-87. That Code Section provides that "[a]ny parent . . . of a pupil attending the public schools in a school division who is aggrieved by an action of the school board may, within thirty days after such action, petition the circuit court having jurisdiction in the school division to review the action of the

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school board." The circuit court conducts the review on the record and considers any other evidence found to be relevant. The Code Section requires the circuit court to sustain the school board's action unless it is found to be arbitrary or capricious.

Here, the Fairfax County Circuit Court determined that the School Board did act arbitrarily and capriciously, finding that the school board violated S.C.'s constitutional rights to due process. Essentially, the circuit court reasoned that: (1) prior to the hearings the school board advised S.C. about the allegations of "sexual battery;" (2) the hearing officers could not determine that her conduct rose to the level of sexual battery; (3) the hearing officers' determination imposed on the circuit court deference to a finding that no assaults had occurred; and (4) the handbook, while notifying students that they could be disciplined for some variant of assault or improper touching of another person, did *not* provide notice that they could be disciplined for "offensive touch – student," as was S.C.

On appeal, the Virginia Supreme Court first acknowledged the powers vested in school boards to supervise the public schools by Article VIII, Section 7 of the Virginia Constitution. It then rehearsed well-recognized notions of minimum due process required for student disciplinary proceedings, originally articulated by the United States Supreme Court in *Goss v. Lopez* (1975) and related cases: namely, notice to the student of the alleged offense, and an opportunity to be heard. The Virginia Supreme Court further viewed the issue through the lens of the United States Supreme Court's decision in *New Jersey v. T.L.O.*, a student search and seizure case, in which the highest Court said "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures."

In S.C., the Virginia Supreme Court reiterated that the amount of process due to students in school proceedings will vary depending on circumstances, including the length of the

proposed disciplinary removal. For instance, in short-term suspension proceedings, a student is not permitted the right to secure legal counsel, to confront and cross-examine witnesses, or to call her own witnesses. The Virginia Supreme Court also recognized that the United States Supreme Court has never specifically addressed the amount of process due a student, such as S.C. in these circumstances, who is transferred to another school because of a disciplinary infraction. Lower courts have reached different conclusions, some finding that such a transfer without a diminution of educational services does not deprive the student of a property interest in education. In light of these principles, the Virginia Supreme Court held that S.C. received all process to which she was due.

The Court then turned its attention to the circuit court's factual predicate (e.g., that the hearing officers "boxed themselves in" by finding they were unable to determine S.C. committed sexual battery). The Court recognized that the hearing officers did not need to determine whether or not the alleged conduct met the definition of

criminal sexual assault, but that it was sufficient that they found S.C. sexually touched students without their consent. The Court held that the hearing officers never asserted that the phrase "offensive touch-student" was to serve as a verbatim disciplinary infraction, but rather the conduct violated the very clearly stated handbook prohibition against "improper touching of another person (whether or not consensual)." The Court wrote: "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions."

Virginia principals should align student disciplinary recommendations with their respective student handbook provisions, but may take comfort in the flexibility acknowledged by the Virginia Supreme Court.

***"Maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures."
Virginia Supreme Court***