[Cite as *Burton v. Cleveland Hts.-Univ. Hts.*, 2016-Ohio-2841.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103415

AYAN BURTON

PLAINTIFF-APPELLANT

vs.

CLEVELAND HEIGHTS-UNIVERSITY HEIGHTS SCHOOL DISTRICT

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Administrative Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-843631

BEFORE: S. Gallagher, J., Keough, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: May 5, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Ayan Burton appeals the trial court's dismissal of his administrative appeal as being moot. For the following reasons, we affirm.

{¶2} In November 2014, Burton, then 18 years old, attacked two younger students walking home from school. The students were brothers, and both were smaller than Burton, the youngest being remarkably smaller and younger. The assault was recorded and posted online by a group of Burton's followers. The video depicted Burton harassing the older brother as he attempted to walk down the street. Both brothers tried to ignore Burton and continue walking home to no avail. The harassment consisted of 40 seconds of Burton pushing and slapping the older brother in the back of the head. Burton also verbally tried to coax the brother into a fistfight. Frustrated with his unheeded overtures, Burton grabbed the older victim's backpack and punched him in the face, causing serious physical injury that required hospitalization. The younger, out-matched victim attempted to defend his prostrate and defenseless sibling, only to have Burton, a self-proclaimed "pacifist," refocus his belligerence. Burton's attack on the smaller victim resembled that of a boxer working over a punching bag. Burton then body-slammed the child to the concrete surface after kneeing him in the stomach. Burton walked away, telling the camera, "Thank you, I had fun." Burton was arrested and charged for the incident, ultimately pleading guilty to the felonious assault.[1]

[1]In his trial court briefing, Burton claims that the police investigation created doubt as to the

{¶3} The next day, the principal of the high school suspended Burton for ten days, and recommended expulsion based on the video evidence of the incident. The principal sent notice of the suspension, pursuant to R.C. 3313.66(D), to Burton's mother. The principal also noted in the letter that Burton "received a Notice of Intent to Suspend, per district policy, [and] was provided the opportunity to discuss the reasons for the intended suspension *AND RECOMMENDED EXPULSION* during an informal hearing with the school administrator" on November 11, 2014. (Emphasis sic and originally written in boldface type.) Burton never appealed the principal's decision to suspend and to recommend expulsion to the school board. The right and procedure to such an appeal was specifically delineated in the November letter. Burton served the ten-day suspension, and the letter was placed in Burton's student record without objection.

{¶4} Following the recommendation, notice of the expulsion hearing set to occur in November 2014 was sent to the Burton family pursuant to R.C. 3313.66(B)(6) and *Stuble v. Bd. of Edn. of the Cuyahoga Valley Joint Vocational School Dist.*, 8th Dist. Cuyahoga No. 44412, 1982 Ohio App. LEXIS 12318, *10 (Oct. 7, 1982) (notice sent to student's parent at shared address satisfies R.C. 3313.66(B)(6) notice requirements, and technical defects in the expulsion process do not defeat substantial compliance with due process requirements). The letter indicated that Burton's conduct was classified by the school district as "fighting," a less severe allegation than "assault," which is how the

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brothers' allegations. It is not clear what relevance, if any, the criminal matter has to the current posture of the case, but because Burton deemed the criminal investigation relevant to his administrative appeal, we note the outcome.

conduct should have been classified according to the principal. In that hearing for expulsion, and for the first time, Burton claimed that the older brother bullied him and that Burton just "snapped."

{¶5} Despite having a procedure to report suspected bullying, neither Burton nor his parents notified the school district of any alleged harassment until after Burton was arrested and suspended for the assault. Even then, no formal report was filed with the school district. Before the incident, Burton allegedly told his stepfather about the older brother's pre-attack conduct and the stepfather recommended that Burton just ignore it. Further, the school district had no record of any other allegations against the older brother. The school district, nonetheless, took the post hoc allegation seriously. After investigating the matter, the principal could not find any evidence to support Burton's claim, so the school district could take no further action.

{¶6} To be clear, there is no allegation that the younger brother had any contact with Burton before the assault, much less any allegation that the younger brother was complicit in the alleged bullying. As much as Burton claims the bullying was justification for sending another human being to the hospital, nothing explains his conduct toward the younger brother.

{¶7} On December 1, 2014,[2] the school district expelled Burton for 72 days from November 25, 2014 through March 27, 2015, but held the expulsion in abeyance as long

[2] The November 25 expulsion was set to commence over the Thanksgiving Day holiday, and therefore, the R.C. 3313.66(D) notice went out the following week.

as Burton complied with an educational placement plan set to commence on December 12, 2014. On December 11, 2014, Burton appealed the school district's decision to expel him for 72 days and, further, asked to hold the expulsion in continued abeyance. The appeal went forward on February 27, 2015, with all parties present. Burton declined to present a case in favor of his appeal after cross-examining the school district's witnesses.

{¶8} The hearing officer who heard the appeal concluded (as did the hearing officer before him) that even if the bullying had occurred, Burton's attack was unwarranted and a blatant violation of the school district's anti-fighting policy. The expulsion was affirmed and, again, held in abeyance. The school district's goal was to allow Burton to continue earning credits toward his graduation requirements instead of removing Burton from school altogether as the expulsion policy provided. Burton followed the plan and timely graduated from high school.

{¶9} Burton filed an administrative appeal to the trial court. Upon motion, the trial court dismissed the appeal as moot in light of the fact that Burton had adhered to the educational plan and graduated from high school. Burton timely appealed the dismissal, claiming a continuing harm from the expulsion being noted on his academic records or, in the alternative, that the issue presents a debatable constitutional question or a matter of great public interest. We disagree.

{¶10} The mootness doctrine precludes a review of Burton's appeal. "'American courts will not decide cases in which there is no longer any actual controversy.'" *In re A.G.*, 139 Ohio St.3d 572, 2014-Ohio-2597, 13 N.E.3d 1146, ¶ 37, quoting *Black's Law*

Dictionary 1100 (9th Ed.2009). "'Although a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of great public or general interest.'" *Id.*, quoting *State ex rel. White v. Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 16, and *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St.3d 28, 505 N.E.2d 966 (1987), paragraph one of the syllabus.[3] Burton is not appealing the school district's policies in general or its authority to enforce an anti-fighting policy, either of which could possibly create a debatable policy or constitutional consideration. *See, e.g., In re Appeal of Huffer from Circleville High School*, 47 Ohio St.3d 12, 546 N.E.2d 1308 (1989) (the student challenged the authority of the school district to make and enforce certain rules). Burton's administrative appeal is, therefore, moot.

{¶11} We acknowledge that in *Dawson v. Richmond Hts. Local School Bd.*, 121 Ohio App.3d 482, 485, 700 N.E.2d 359 (8th Dist.1997), a panel of this court concluded that graduating from high school does not render administrative appeals moot. The holding from *Dawson* is inapplicable to the facts of the current case. In *Dawson*, the

[3] There is also an inapplicable exception to the mootness doctrine for cases that are "'capable of repetition, yet evading review,'" which applies only if "'(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998), quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990); *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982). Burton can never be subject to being expelled or suspended from high school again, and therefore, there is no expectation that he will be subject to the action again.

student actually served the suspension before graduating and there was no discussion regarding the impact on the student's permanent school record.

{¶12} In this case, Burton was expelled, but that expulsion was held in abeyance in order for him to graduate from high school, and the record indicates that the expulsion was not referenced in his permanent record. The facts, therefore, are more akin to those leading to our decision in *Dreyfus v. Lakewood City Schools*, 8th Dist. Cuyahoga No. 70004, 1996 Ohio App. LEXIS 3851,*9 (Sept. 5, 1996). In *Dreyfus*, a case in which the student served a short out-of-school sanction, the panel concluded the administrative appeal is moot if the student's permanent record does not contain any reference to the sanction. We are bound by *Dreyfus* and must assume that *Dawson*, inasmuch as the opinion is silent with respect to the permanent record issue and being the later of the two decisions, is in harmony with *Dreyfus*. As a result, we conclude that if the student's education is not interrupted or delayed by the sanction (whether a suspension or expulsion) and there is no evidence that the sanction is referenced on the student's permanent record, any administrative appeal is moot following the student's graduation. *Dreyfus*. If, on the other hand, the student graduates but has demonstrated that the sanction is referenced on his permanent school record, then an administrative appeal is not moot and may be heard on the merits. *Dawson*.

{¶13} Burton served ten days of the 72-day expulsion, and was allowed to return to an educational program for a timely graduation. In other words, similar to the facts of *Dreyfus*, Burton served a short out-of-school punishment with no educational detriment.

Also similar to *Dreyfus*, there is no demonstrable damage to Burton's reputation because of the expulsion being referenced in Burton's permanent school record. Burton has not demonstrated that his permanent school record included a reference to the expulsion. In fact, a review of the record, provided for the purposes of this administrative appeal, indicates otherwise. Burton's unappealed notice of suspension was specifically copied to his student file, demonstrated by the November letter to Burton's mother indicating as much and by Burton's attendance record through November 24, 2014, that also noted the suspension. The expulsion notice was not similarly copied into the student file. Thus, his claim that his student record contains a notice of the expulsion is speculative based on the record on this appeal. *See* App.R. 16(A)(7). In light of the facts that the expulsion was not referenced in his permanent student record and that Burton graduated timely, the administrative appeal is moot.

{¶14} This is a cautionary tale. The Heller-esque irony of Burton seeking to shield his conduct from future scrutiny by filing an administrative appeal to a court of public record has not gone unnoticed. Sometimes discretion is the better part of valor. Burton's decision to file an administrative appeal to a court of public record negates his efforts "to protect his reputation" by limiting public access to his past transgressions. Even if successful with the arguments raised in the administrative appeal, which largely addressed minor deviations from procedure or harmless errors,[4] Burton has now ensured

[4]Burton only raised four assignments of error in his administrative appeal. Despite our holding in *Stuble*, 8th Dist. Cuyahoga No. 44412, 1982 Ohio App. LEXIS 12318, at *10, and the fact that he was able to attend every hearing in the expulsion process, Burton claimed that the notice of a

the very harm he set out to prevent. By making public his disagreement with the school district's decision to discipline him for an undisputed fight and an undisputed violation of the school district's policies, Burton has forever surrendered his reputation to the whims of the public.

{¶15} Burton's administrative appeal is moot, and the dismissal is affirmed.

It is ordered that appellee recover from appellant costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and

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pending expulsion hearing sent to his mother was insufficient. He also claimed that the notice indicated the expulsion was for an "assault" and not for the less severe violation of "fighting," the allegation the hearing officers actually considered. Further, Burton claimed that the expulsion, based on the undisputed evidence that Burton assaulted two victims, was against the manifest weight of the evidence. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433 (in pertinent part, the standard of review under R.C. 2506.04 is whether the order is unsupported by the preponderance of substantial, reliable, and probative evidence). Burton's claim that the expulsion was against the manifest weight of the evidence was based on his self-serving testimony, evidence expressly considered and rejected on the grounds that bullying, even if proven, would never be justification for fighting and severely injuring another. Finally, Burton claimed that the delay in hearing his unsuccessful appeal to the superintendent of the school district was somehow prejudicial to his serving the expulsion that was held in abeyance while he continued his education and graduated.

FRANK D. CELEBREZZE, JR., J., CONCUR