R.L.,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS	OF EDUCATION
	Opinion No. 17-27
Appellee.	

OPINION

INTRODUCTION

The Maryland Office of the Public Defender Juvenile Court Division filed an appeal on behalf of R.L., a 7th grade student in Baltimore City Public Schools System (BCPSS), alleging that R. L. was denied due process when he was transferred to another school and thereafter suspended/expelled from the new school. The Baltimore City Board of School Commissioners (local board) filed a Motion to Dismiss the appeal to which the Appellant responded. Thereafter, the local board filed a response which the Appellant characterized as a second motion to dismiss and opposed.

FACTUAL BACKGROUND

In school year 2016-2017, the Appellant was a 7th grade student at Stadium School. A series of short-term disciplinary actions, repeated phone calls to Appellant's mother, and meetings about the Appellant's drug use, skipping school, and bad behavior culminated in a meeting on March 7, 2017. The meeting attendees were Shana Hall, Principal; Nicole Witt, teacher; Sharone Brinkley Parker, Director of Office Enrollment and Attendance; members of School Police; the Appellant; his mother; and two other students with whom Appellant hung out. As an outcome of that meeting, the Appellant was transferred to Friendship Academy and enrolled there on March 9, 2017. (See, Ex. G, Local Board's Motion to Dismiss; Ex. D, Local Board's Motion, Affidavit of Lisa Miller, Assistant Principal, Friendship Academy, ¶ 4).

At the end of the Appellant's first day at Friendship Academy, the Appellant allegedly assaulted and robbed another student behind the school. *Id.* Ex. D, ¶ 4. According to the local board, on March 10, 2017, the Principal of Friendship Academy contacted the Appellant's mother and his lawyer. His mother came to the school and the Appellant was "released into her custody." *Id.* ¶¶ 7-8. The Principal "explained to [Appellant's] mother that other consequences may follow but that [the Appellant] was to come to school until [the Principal] was able to hear back from the Office of Suspension Services." *Id.* Ex. D, ¶ 10. The Appellant did not return to school.

This appeal ensued.

STANDARD OF REVIEW

In this case, for a variety of reasons discussed below, there is no local board decision to review. Thus, two issues arise – whether this case is ripe for review or whether this Board lacks jurisdiction to review this case at all. On both issues, we exercise our independent judgement to decide the extent of our power to review this case under State education law.

LEGAL ANALYSIS

Jurisdiction

The local board argues that this Board has no jurisdiction over this case because the Appellant failed to appeal to the local board and thus to exhaust his administrative remedies. In addition, the local board argues that the case is not ripe for review because there is no final decision of the local board to review.

Our jurisdiction to review and decide cases arises under state education law. Two parts of the State statute establish the State Board's quasi-judicial jurisdiction. They are Education Article §4-205 and §2-205. Section 4-205 established the State Board's quasi-judicial authority in 1969. Prior to that date, there was "no appeal…to the State Board from the action of a County Board…." *Robinson v. Board of Education of St. Mary's County*, 143 F. Supp. 481, 491 (D.MD. 1956) (citing Art. 77 §143, the predecessor to §4-205). Likewise, there was no appeal to the county board from a local superintendent's decision. Before 1969, an appeal would lie from the local superintendent's decision only to the State Board. *Id.* In 1969, the statute was changed to allow an appeal of a local superintendent's decision to the county board and a subsequent appeal to the State Board.

But that change did not eliminate the State Board's jurisdiction under §2-205. Under §2-205(e), the State Board is given the power to determine the true intent and meaning of the state education law and to decide all cases and controversies that arise under the State education statute and State Board rules and regulations. That authority has existed in statute since 1870. The Court of Appeals has explained the interplay between §2-205 and §4-202. Section 2-205 was intended by the General Assembly as a grant of "original jurisdiction" to the State Board allowing an appellant a direct appeal to the Board "without the need to exhaust any lower administrative remedies", while §4-205 vests the State Board with "appellate jurisdiction" over decisions of local boards. *See Board of Education for Dorchester County v. Hubbard,* 305 Md. 774, 789 (1986), *Board of Education of Garrett County v. Lendo*, 295 Md. 55, 65-66 (1982); *See e.g., Sandra H. v. Prince George's County Board of Education,* MSBOE Op. No. 10-32 (2010); *Sartucci v. Montgomery County Board of Education,* MSBOE Op. No. 10-31 (2010).

In the usual school discipline case, we would decline to exercise original jurisdiction because the merits of a school discipline decision should be appealed to the local board for decision before any review is sought at the State Board level. That is particularly true because our standard of review in school discipline cases limits the extent to which this Board can consider the merits of the disciplinary decision. Specifically, in student suspension and expulsion cases, the decision of the local board is considered final. COMAR 13A.01.05.05(G)(1). The State Board only reviews the merits of the case if there are specific factual and legal allegations

that the local board failed to follow State or local law, policies, or procedures; violated the student's due process rights; or that the local board acted in an unconstitutional manner. COMAR 13A.01.05.05(G)(2). Thus, it is important that the local board review carefully the merits of each school discipline case before it reaches this Board.

The local board asserts that there was no formal discipline meted out in this case. Yet, events occurred here that seem to take on the form of discipline. Specifically, the Appellant alleges he was involuntarily transferred from Stadium School to Friendship Academy. He also alleges that his removal from Friendship Academy was an illegal suspension. He asserts, however, that he was without recourse to contest such actions, and thus, he could not exhaust his administrative remedies. (Appellant's Opposition at 8).

We do not agree that the Appellant had no recourse. Under Ed. Art. §4-205(c), the local superintendent is directed to decide all controversies and disputes that involve local board rules and regulations and the proper administration of the school system. The alleged involuntary transfer and alleged illegal suspension involve just such disputes. The Appellant, who was represented by counsel, failed to challenge them and thus failed to exhaust his administrative remedies. But for the fact that we have recently identified problems in the BCPSS disciplinary process and the use of somewhat convoluted procedures of transfers or expungements to obfuscate avenues of review of disciplinary decisions, we would dismiss this case.[1]

Ripeness, mootness, and failure to exhaust administrative remedies are not absolute bars to our exercise of jurisdiction. *See, e.g., K.B. v. Baltimore City Board of School Commissioners,* MSBOE Op. No. 16-12 (We addressed issues in a moot case because BCPSS ignored due process requirements governing the imposition of discipline, *i.e.*, suspension turned into expulsion lasting 57 days without following due process procedures set forth in regulatory requirements.); *R.P. v. Baltimore City Board of School Commissioners,* MSBOE Op. No. 16-18 (reviewed violations of due process despite expungement of the discipline which made case moot; transfer decision remanded); *D.J. v. Baltimore City Board of School Commissioners*, MSBOE Op. No. 16-17 (reviewed violation of due process despite expungement which rendered the case moot; transfer decision remanded). Because of the problems we have seen in the BCPSS disciplinary process,we have decided to exercise our original jurisdiction to review the merits of Appellant's argument.

Merits

There are two points of contention in this case. The first one involves the facts surrounding the transfer from Stadium School to Friendship Academy. The second involves the events after the alleged assault and robbery at Friendship Academy.

Transfer

The Appellant contends that his "transfer" from Stadium School to Friendship Academy was involuntary and thus was illegally used as a form of discipline without due process of law. The local board contends that Appellant's mother agreed to the transfer from Stadium School to Friendship Academy and thus it was a legal transfer.

[1] In *R.P. v. Baltimore City Board of School Commissioners,* we cautioned BCPSS from using certain practices because they could be viewed as tactics to intentionally render a case moot to avoid State Board review. MSBOE Op. No. 16-18 at 4, FN 1.

It goes without saying that a school system cannot use an involuntary transfer as a substitute for discipline. *See, e.g., D.J. v. Baltimore City Board of School Commissioners*, MSBOE Op. No. 16-17. A voluntary transfer to avoid a disciplinary action would be legal, however. Whether the transfer at issue was voluntary or involuntary is a question of fact.[2] The local board supports its assertion that the transfer was voluntary with the affidavit of Sharone Brinkley Parker, Director of the Office of Enrollment and Attendance who states:

> - I ended [the March 7, 2017 meeting] with saying that if anyone wanted to explore other school options at the present time, we could discuss that as well. Ms. J. [mother of Appellant] stated she was frustrated with the school and felt her son was always being targeted so she opted to discuss options.
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> - We went through a few options, staying close to the northeast quadrant as she wanted and she chose FAET [*i.e.*, Friendship Academy]. She received an assignment letter (one was scanned to the principal of Stadium as well) and was told to report to Stadium for the transfer packet and then to FAET for enrollment.
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> - The transfer of [Appellant] was not involuntary. The option of school transfer was offered and agreed to by Ms. J. without force or coercion, after Ms. J. and [her son] were asked what other options could assist with the problems [her son] was exhibiting.

Local Board's Motion, Ex. C, ¶¶ 7-9.

The affidavit of two of the other attendees at the meeting reflect a more angry and emotional ending to the meeting. Ms. Witt, the teacher, states that Appellant's mother said "she was sick and tired of Stadium School calling her all the time and to send him wherever you want." *Id.* Ex. B, ¶ 8. The Principal's affidavit reiterates the same scenario. The Principal states "[Appellant's mother] became very aggressive and angry and said "Send him wherever you want, I know what I am going to do." *Id.* Ex. A, ¶ 19.

The Appellant's version of the meeting is that Appellant and his mother were told that Appellant could not return to Stadium School, were presented with limited options for a school transfer and "[D]espite objection from [Appellant's mother], Appellant was then transferred to [Friendship Academy] via a transfer letter issued by Dr. Brinkley-Parker effective March 7, 2017." (Appeal at 1-2). Those assertions were not supported by affidavit, however. Unsupported statements set forth in a legal memorandum are not sufficient to overcome the facts affirmed under penalty of perjury. *See, e.g. Kristine Lockwood v. Howard County Board of Education,* MSBOE Op. No. 00-40 at 3-4. (citing *Ewing v. Cecil County Board of Education,* 6 Op. MSBE 818, 820 (1995)).Therefore, on the issue of the legality of the transfer, we conclude that as a matter of undisputed fact, the transfer was voluntary. As a matter of law, therefore, the transfer was a legal one.

[2] In addressing the facts, we treat the Appellant's and local board's filings as competing Motions for Summary Affirmance. Thus, we must determine if there are any disputes of material fact and whether either party is entitled to judgment as a matter of law.

Suspension

The issue of Appellant's "suspension" from Friendship on March 10, 2017 similarly involves a dispute of fact. Appellant contends that he was "removed" from school that day without due process. The local board asserts that he was told to come back to school.

The local board filed an affidavit of Lisa G. Miller, Assistant Principal, in which she explains that the robbery and assault allegedly committed by the Appellant occurred on March 9, 2017, at the end of the Appellant's first day at Friendship Academy. The next day, the Principal called Appellant's mother and lawyer and the Appellant "was released into the custody of his mother." Local Board's Motion, Ex. D, ¶ 48. The affidavit states:

> Principal Manning explained to his mother that other consequences may follow but that R.L was to come to school until Ms. Manning was able to hear back from the Office of Suspension Services.
>
> R.L.'s mother has not sent him to school since that day. He was not given suspension papers and was not told that he was suspended because the suspension had not been approved.

Id. ¶¶ 9-10.

In the face of those statements made under oath, the Appellant asserts in his Memorandum in Opposition to the Motion to Dismiss that his mother "was instructed by Ms. Manning [the Principal] not only that [Appellant] was not to return, but that he would never be returning to Friendship and that she should await a letter from the Office of Climate and Suspension Services. After 10 days, no letter arrived and [Appellant] remained out-of-school without recourse to contest Ms. Manning's declaration and [Appellant's mother's] request for some resolution or a safety transfer remained unanswered." (Opposition at 8).[3]

If those assertions had been supported by an affidavit, there would be a dispute of fact surrounding the putative suspension. Bald assertions, however, cannot overcome the force and weight of an affidavit. Therefore, as a matter of fact, we conclude that the Principal told the Appellant to return to school and that Appellant failed to do so. We find, as a matter of law, that the school system did not formally suspend the student.

Yet, as best we can tell from the record, the Appellant remained out-of-school from March 10, 2017 to the end of the school year. There is no indication in the record that the school made any effort to find the student, contact his mother, or in any way seek him out to return to school. This represents a serious failure on the part of the school system. One that we must address.

The research tells us that the fate of a student who drops out of school is a dire one. Over 40% of the dropouts in 2007-2011 entered the Maryland juvenile justice system. *See " School*

[3] As stated previously, we do not agree that Appellant had "no recourse" to contest the Principal's alleged actions. The Appellant, represented by counsel, could have appealed the Principal's decision to the CEO of BCPSS. The CEO's decision could, thereafter, have been appealed to the local board.

Dropouts and Their Impact on the Criminal Justice System," Task Force to Study High School Dropout Rates of Persons in the Criminal Justice System (December 2012). Dropouts have a greater need for social services; their earning capacity is greatly reduced. *"School Discipline and Academic Success: Related Parts of Maryland's Education Reform,"* Report of the Maryland State Board of Education (July 2012).

In that *School Discipline* report in 2012, this Board stated the philosophy upon which the current school discipline regulations are based. *See* COMAR 13A.08.01.11(A). We said:

> No student comes to school "perfect," academically or behaviorally. We do not throw away the imperfect or difficult students. Wise school discipline policies fit our education reform agenda because those policies show all students that they are included in the world class education goal. We want a world class education for them because the desired, sustainable result is a better economy and quality of life for everyone in Maryland.
>
> In order for our students to get a world class education, they need to be in school. Thus, our school discipline philosophy focuses on keeping students in school. If suspension or expulsion is necessary, as a last resort, the school must keep suspended or expelled students connected to the school by providing education services that will allow the student to return to school with a chance to become college and career ready.
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> *Every student who stays in school and graduates, college and career ready, adds to the health and wealth of the State of Maryland and improves the global competitiveness of this country.*
>
> It is that simple. It is that important. It is all connected.

The school system here violated that policy by standing by while this student stopped coming to school for four months. If he was not formally suspended, as the school system states, the effect of the school system's inaction is the same as an extended suspension. Even students who are suspended for long periods of time must have access to education services pursuant to our discipline regulations. *See* COMAR 13A.08.01.11(F). This student did not get the benefit of such services.

In this case, the Baltimore City School System and the Board of School Commissioners seem to have approached school discipline with little attention to their responsibility to keep students in school. At least, that is our impression from this case. R.L. was a 7th grader, obviously under the age at which he could legally drop out of school. A new school year will begin in September. We are concerned that the Appellant will not return to school and that neither BCPSS (which may be relieved he is gone) nor his mother (who believes he is lost to the streets) will make an effort to get him back into school. An education may be this student's only hope of staying out of the pipeline to prison. If R.L. is lost to the streets, the school system shares substantially in the responsibility for that outcome. Their failure to make even a *de minimus* effort to keep him in school could make that outcome forseeable, if not inevitable.

Therefore, we direct the local board to ascertain the status of this student, determine what plan is in place for his return to school, including additional or compensatory services, and report that information to this Board by September 15, 2017.

CONCLUSION

While we find that the transfer in this case was voluntary and that R.L. was not *formally* suspended, the school system's failure to follow-up with this 7th grade student for four months is inexcusable. We direct the local board to make every effort to locate this student, put a plan in place to return him to school with the supports he may need to stay in school, and report such information to this Board on or before September 15, 2017.

Signatures on File:

_____
Andrew R. Smarick
President

_____
Chester E. Finn, Jr.
Vice-President

_____
Michele Jenkins Guyton

_____
Justin Hartings

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Stephanie R. Iszard

_____
Rose Maria Li

_____
Michael Phillips

_____
David Steiner

July 18, 2017