SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 5
NASSAU COUNTY

In the Matter of ETHAN MIRENBERG, an infant under the age of 16 years, by his father and natural guardian BILL MIRENBERG, individually,

Petitioners,

ORIGINAL RETURN DATE:02/26/08
SUBMISSION DATE: 02/26/08

For a Judgment under Article 78 of the CPLR that stays the suspension imposed by Respondents

-against-

INDEX No.: 1873/08

LYNBROOK UNION FREE SCHOOL DISTRICT BOARD OF EDUCATION and SUPERINTENDENT OF LYNBROOK SCHOOLS,

Respondents.

MOTION SEQUENCE #1

The following papers read on this motion:

Order to Show Cause [Notice of Petition & Petition].....	1
Answering Papers.....	2
Reply.....	3

Petitioners, by Order to Show Cause dated February 1, 2008 (Phelan, J.), seek an order (1) staying the suspension of petitioner, Ethan Mirenberg ("Ethan"); (2) vitiating the finding of guilt in the 3214 disciplinary hearing; (3) vitiating the modified penalty imposed by the Superintendent of Lynbrook Schools; (4) immediately expunging all records of the disciplinary hearing and associated findings, modifications and ratifications; and (5) immediately returning petitioner, Ethan Mirenberg, to school. Respondents oppose the application.

Petitioner is a 14-year old student in the Lynbrook Union Free School District. A disciplinary hearing pursuant to Education Law 3214, at which the student was represented by counsel, was held on December 5, 2007, before Hearing Officer Terrence Smolev, for consideration of the following charges:

1. On Friday, November 2, 2007, during a school-sponsored basketball game held at the Lynbrook High School, Ethan Mirenberg approached teacher Sharon Cantante and forcibly pressed his knuckles against her scalp, grinding them into her scalp and causing her pain.

2. On the occasion noted in Paragraph 1 above, despite Mrs. Cantante's directive to stop, Ethan Mirenberg continued to follow Mrs. Cantante as she attempted to move away from him and continued to forcibly press his knuckles against her scalp, grinding them into her scalp and causing her pain.

3. Ethan Mirenberg's actions as specified in paragraphs 1 and/or 2 are in violation of the Lynbrook Union Free School District Code of Conduct.

4. On Wednesday, November 7, 2007, at approximately 2:40 p.m., Ethan Mirenberg, a ninth grade student at Lynbrook High School, entered the South Middle School without permission of the building administrator, in violation of the Lynbrook Union Free School District Code of Conduct.

5. On Wednesday, November 7, 2007 at approximately 2:40 p.m., Ethan Mirenberg entered Mrs. Cantante's classroom at South Middle School, forcibly grabbed her around the neck, holding her tightly and simultaneously ground his knuckles into her scalp, causing her pain.

6. On the occasion noted in paragraph 5 above, Ethan Mirenberg disobeyed Mrs. Cantante's directive to him to stop, refused to release his grip on her, and continued to grind his knuckles into her scalp, continuing to cause her pain.

7. Ethan Mirenberg's actions as specified in paragraphs 5 and/or 6 above are in violation of the Lynbrook Union Free School District Code of Conduct.

(Pet'r Ex. B).

Ms. Cantante testified at the hearing that she is 4'11" and weighs approximately 115 pounds (Pet'r Ex. B, p. 12). The first incident was not reported because Ms. Cantante "felt that [Ethan] had learned his lesson" (Id., p. 18). When the second incident occurred, there were three other high school students with Ethan (Id., p. 22). After this incident, Ms. Cantante called the principal (Id., p. 23).

With regard to the first incident, Ethan testified that he "lightly patted [Ms. Cantante] on her head in a playful way" (Id., p. 79). Ethan testified with the regard to the second incident that he had hugged Ms. Cantante and "gently patted her on the head" (Id., p. 93). Ethan also testified that he is 5'4" and weighs approximately 155 pounds and participates in football, lacrosse and wrestling (Id., p 102).

Testimony was elicited revealing that Ethan had prior disciplinary issues (Id., p. 158). Five disciplinary procedures were recorded in the 7 th grade and five disciplinary procedures were recorded in the 8th grade, which included non-violent activity, vocal conflicts and some violence (Id., p. 164). The principal testified that counseling with a social worker was provided to Ethan during most of the 8th grade (Id., p. 163).

The student was found guilty of all seven (7) charges (Id., p. 158). The hearing then proceeded on the issue of disciplinary punishment.

The Hearing Officer stated that he would "recommend to the Superintendent that this student be suspended from school to and including November 7th, 2009, and that he receive home tutoring during that entire period of time, and that he be permitted to come back to school in his 11th grade November 7, 2009" (Id., pp. 182-183).

The Superintendent of Schools adopted the Hearing Officer's findings of guilt but determined that he should only be suspended through September 2, 2008 (Pet'r Ex. B). That determination was appealed, and the Board of Education upheld the decision noting that: "This determination may be appealed to the Commission of Education in accordance with Education Law Section 310 within 30 days of the date of this determination" (Pet'r Ex. C).

Petitioners submit that the hearing held on December 5, 2007, was not fair contending that the Hearing Officer had prejudged Ethan's guilt, exhibiting blatant bias and clear animus toward the student. Instead of appealing to the Commissioner of Education, petitioners bring this Article 78 proceeding on the grounds that the challenged suspension is unconstitutional, that resort to an administrative remedy would be futile and that such pursuit would cause irreparable harm. Petitioners claim that it would be futile to appeal to the Commissioner anticipating that a decision would not be rendered until after the suspension had already been served. It is alleged that such prolonged suspension would cause irreparable harm upon Ethan's educational and social development. Counsel for petitioners assert that Ethan was denied due process alleging that a biased decision maker is constitutionally unacceptable citing *Winthrow v. Larkin,* 421 US at 46-47.

Respondents counter that the Hearing Officer's determination was based solely on the record and the testimony before him and that "there was competent and substantial evidence adduced at the hearing to show that the student engaged in the charged conduct" (Ans. ¶3). Moreover, respondents allege that the Superintendent's adoption of the Hearing Officer's finding of guilt was made "after an independent review of the testimony and evidence adduced at the disciplinary hearing" (Id. ¶4).

Contrary to petitioners' contention, the within Article 78 proceeding is not premised upon constitutional grounds. As submitted by respondents, Ethan was afforded due process having been given adequate notice of the charges against him and having been represented by counsel at the hearing. In support of their constitutional claim, petitioners argue that Ethan did not receive a fair hearing as a result of the Hearing Officer's bias and pre-determination of guilt. To support their

position, a portion of the transcript is quoted indicating that it "will be made available to the district attorney" (Rely Aff. ¶3). This is taken out of context. The full portion of that text reads as follows:

> I will explain to Mr. Schlissel that I read the charges and, of course, I have not prejudged this case, but I have read the charges, and the charges to me indicate alleged criminal activity. If, in fact, based upon the testimony of the witnesses and any documentary evidence provided to me, I make a determination of guilt, it will be my recommendation that the copy of the transcript and charges and other evidence be turned over to the Nassau County District Attorney for appropriate action (Pet'r Ex. A, pp. 4-5).

The court does not find, as posited by petitioners, that this is a pre-determination of guilt before Ethan had an opportunity to tell his side of the story. There was testimony elicited from the teacher, the principal and Ethan. The record, including the Hearing Officer's findings, was reviewed by the Superintendent of Schools. Although the Superintendent acknowledged that the "teacher's and the student's versions of the events are diametrically opposed," he found "no motivation for the teacher to fabricate two separate incidents" and concurred with the Hearing Officer that the "student's story [w]as simply not credible" (Pet'r Ex. B).

"While exhaustion of administrative remedies is not required where an agency's action is challenged as unconstitutional, the mere assertion that a constitutional right is involved will not excuse the failure to pursue established administrative remedies that can provide the required relief (citations omitted)" *Levine v. Board of Educ. of the City of New York,* 173 AD2d 619 [2d Dept. 1991]).

Accordingly, the petition is denied, without prejudice, as the court finds that the administrative process has not been exhausted. The court is not inclined to substitute its judgment for the Education Department. Moreover, petitioners have not shown to the satisfaction of this court that their appeal to the Commissioner is futile and that such pursuit will cause irreparable harm. Petitioners may, therefore, pursue their remedies in their appeal filed on or about February 1, 2008, with the Commissioner of Education.

This decision constitutes the order of the court.

Dated: 4-8-08

HON THOMAS P. PHELAN

J.S.C.

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