



STATE OF NEW HAMPSHIRE  
BOARD OF EDUCATION

**Recommendation of the Hearing Officer**

**Student and Sunapee School Board**

**Case No. SB-FY-09-12-006**

**Procedural Background**

A request for a hearing before the State Board of Education was received by the New Hampshire Department of Education on December 23, 2008. A hearing schedule was issued on January 6, 2009. The issue named was "Appeal of Suspension." A Pre-Hearing Conference was held on January 29, 2009 and an Order resulted on February 2, 2009. The Parents appeared *pro se* to request that the State School Board reverse or vacate two consecutive suspensions: one by the Superintendent, from November 19 to December 5, 2008 for violating school rules and gross misconduct; and a second relating to the same incident was issued by the Sunapee School Board, from December 5, 2008 through January 23, 2009, following an appeal hearing on December 3, 2008.

There was no dispute on the burden of proof and the application of that burden of proof on Parents. The burden of proof is proof by a preponderance of the evidence that the Local Board decision is wrong. A hearing was scheduled for March 2, 2009, but that was continued when it became apparent two hearing dates were necessary. The hearing took place on April 7, 9, 16 and 28, 2009. It was agreed that the scope of direct and cross examination would be liberally interpreted to allow all testimony from a witness to be taken in one day.

A post hearing memorandum dated May 8, 2009, was received from each party. On May 12, a Motion to Strike sections of the Parents' Memorandum was received and it is granted with regard to those sections that are based on information on which no testimony was taken.

At the first day of hearing, April 7, 2009, exhibits were reviewed and Parents' Exhibits 1-37 were accepted into evidence, as were School Board's exhibits numbered 1 through 16 and Exhibit A, the transcript of the December 3, 2008 hearing before the Sunapee School Board. On the last of the four half days of hearing, April 28, 2009, Parents' Exhibit 39, the CD of that December 3 hearing was marked as evidence though only short segments were played during the hearing.

The Parents' complaint charges the administration with retaliation in the form of extreme punishment of Student for actions of the Student's Father and the complaint states that punishment was for off campus emails to school staff done by another child, not Student, suggesting a lack of jurisdiction. There were charges of failure to provide due process at an initial interview that preceded the first ten day suspension.

### Hearing

Shaun P. Carroll, Jr., Chairperson of the Sunapee School Board, was called to testify by the Parents on April 7, 2009. He was sworn in and was questioned about the legality of the proceeding at the Sunapee School Board meeting of December 3, 2008 under the Right to Know Law, RSA 91-A, whether the administration and the School Board followed the procedures set down in school policy (P Ex 1) when it suspended Student for sixty-six calendar days and whether the evidence was sufficient for the administration and the School Board to link the Student to inappropriate emails sent to her teacher, Laura Kessler, and to the principal, Mr. Moynihan, over another student's name (SD Ex 1-3).

Parent asked questions on procedures used at the December 3 meeting: did the meeting begin before the noticed time, was the vote pre-determined, was a member of the school board instructed on how to vote, were minutes of the non-public session withheld and was School Board policy regarding suspension and expulsion (P Ex. 2) proper in light of state administrative rules, Rule Ed 317.04.

Mr. Carroll recalled it was the Superintendent Minnihan who issued the first ten day suspension, (P Ex. 25), skipping a step since Principal Moynihan was involved as a recipient of an email. After that, the matter went to the Sunapee School Board for hearing on December 3, 2009. There was testimony regarding provisions made by the School Board for Student's access to education during the suspension.

Carroll testified that he was first made aware of a nasty email when told by Superintendent Minnihan after a school board meeting. He agreed with Minnihan that the offensive emails could not be ignored and testified that he had not discussed the nature of the incident with any member of the school board before the hearing on December 3, 2008. He stated that he simply told members that a hearing was about to be held and that they would be the jurors so there would be no prior discussion.

He offered the opinion that the School Board's action was justified. The emails were terrible, (SB Ex 1-3) targeting three people, taking forethought and effort to open an account in another student's name and then to email two staff members. He testified that he read

the rules dealing with suspension and expulsion together to allow for a suspension of longer than ten days. (Rule Ed 31.7.03 and 04). The basis of the suspension is a serious violation of school rules. There was testimony in reference to the transcript of School Board hearing of December 3, 2008 (SB Ex A) and Carroll testified that he believed the transcript shows throughout that it was understood that the Student admitted sending the emails.

On April 9, the Parents next called to the stand Laura Kessler, an 8th and 9th grade teacher with the Sunapee School District. She was sworn and testified that on Sunday, October 5, 2008, she opened an offensive email indicating it was sent from a student she would not have expected to send such an email. It had been received at her home through the school email account. She immediately forwarded it to Mr. Moynihan and the school technology person.

Kessler acknowledged that the email refers to a pornographic insertion in a school copy of the movie, *Roots*, that was shown mistakenly in her classroom and that it was understood as such by the

administration. She said she was shocked and humiliated by the email and it has damaged the relationship with that student. It has become difficult to look the student named as the author of the email in the eyes and that student will not look her in the eyes. Kessler was questioned about her testimony given at the December 3rd hearing School Board hearing moderated by School Board counsel, Barbara Loughman, Esq., at which Mr. Minnehan presented the School Board's case (Ex A, p 69). She was aware that the police had indicated that the Student had admitted to sending the emails. She recalled explaining that she did not know who pressed the "send" key but that she was confident of Student's involvement when she had been told that the police had found the emails came from Student's home.

She recalled that the day after the hearing, a former student and parents came to her home and that child admitted to participating in sending the emails from the Student's home computer. She later learned that the former student and parents talked to Mr. Carroll and Mr. Minnihan as well about the former student's involvement in the matter. She testified that she would have gone to the School Board if it had been revealed that Student was totally innocent but that was not the case.

Principal Sean Moynihan next testified that the Student in question was a ninth grader. The school houses grades 6 through 12 with the lower grades in one wing and the high school grades in another wing. He was upset when he received the first email. He doubted that it had been sent by the student named as signing the email and so contacted that student to alert her that this was happening. When he learned that Ms. Kessler had also received an offensive email, he was more disturbed and wondered how many other such emails had been sent.

Moynihnan stated that, after Google was contacted, he learned that it would be necessary to involve the police as a warrant was required to investigate further. The police traced the account to the Student's family's home, a warrant was issued on November 13, 2008 (P Ex 22). He was aware that a statement was taken from the Student. That "Voluntary Statement " is dated November 14, 2008 (P Ex 23). A CHINS petition for harassment was filed by the police with Newport Family Court on November 21, 2008, (P Ex 24) stating in part that the Student "...did commit the crime of harrasment (sic) ...[and] did make repeated communications, to wit, electronic messages to school officials...." As a result, the Student was referred to a juvenile diversion program. Mr. Moynihnan saw no duplication of punishment as the penalty of suspension was for serious violation of the schools rules and the police action was for the criminal activity of harassment.

After the School Board hearing of December 3, Moynihnan received a visit from the mother of a former student who apologized for her child's role in the incident and, in the process, described Student's and her child's roles. Before that post-hearing visit, he did not know of the former student's role. He was aware that there might have been another person involved but Student and the family would not reveal who that might have been (Ex A.p.90-95) but said it was the other person's responsibility to come forward.

Mr. Moynihnan testified that he was aware of past problems between the Student and the student whose name was used as author of the email. He did not feel that Student had apologized and that she had not displayed remorse. When questioned by the Parent, he stated that he had no ill will toward the Student and the brother whom he had had in class.

On April 16, Superintendent Brendan Minnihnan began his testimony with questions from the Parent. He stated that the Student was suspended for failure to follow school rules (P Ex 1, p 32). He had erred in citing gross misconduct as one of two rule violations but that the second reason, failure to follow reasonable school rules, held. He believes that the power to suspend for long periods of time can be extrapolated from the power to expel that is set down in RSA 193:13 II.

Mr. Minnihnan was questioned about how the police became involved and received information about his child. Parent questioned the police statement that there had been repeated incidents of email abuse and whether the Student had admitted to sending the emails where there was a question of who it was that did "press send." Police involvement followed when it was necessary to obtain information about the source of the emails.

Minnihan was aware that the police obtained a warrant to search Student's home computer (P Ex 22) and a "voluntary statement" from Student (P. Ex. 23). The statement, dated November 14, 2008, includes an admission by Student to creating a Gmail account in another student's name. The statement indicates that two emails were sent in one day to Mr. Moynihan and Ms. Kessler. The statement contains the following quotation, "This was done as a childish prank, witch (sic) I thought nobody would take seriously.....It wasn't intended to upset anybody, but I'm sorry if it did. I intend to apologize to all who I involved, and am again very sorry." The Student did not testify at the recent hearing nor at the December 3, 2008 hearing.

Superintendent Minnihan stated that he learned from the police, the home from which the emails had been sent on a Thursday. He called the next Monday or Tuesday to set up a meeting for that coming Wednesday. He had taken over the discipline from the Principal and handled the initial hearing or meeting of November 19 that would ordinarily have been conducted by Mr. Moynihan because of the latter's involvement as a recipient of an offending email. Mr. Minnihan agreed that no electronic recording had been made of the November 19 hearing but stated that Michael Trajano, Business Manager, had been present.

There was no prior written communication as to the nature of the meeting of November 19. Neither the father nor Student was sent a written notice of the meeting. Student and the father both attended the meeting. Minnihan testified that, when the Parent asked him if Student would have a hearing before suspension, he answered, that the present meeting was the suspension hearing. He recalled the Parent asked if he could have an attorney and that he refused the request and that he had told the Parent that he believed his decision could not be appealed. He recalled apologizing for the quality of the copy of the rule he claimed had been violated that he gave the Parent that day. Following the meeting, Minnihan's letter of November 19, 2008 imposed a suspension of ten school days, from November 19, 2009 until December 5, 2009, and informed the Parents that the school board would meet on December 3, 2008 and that he intended to ask the Sunapee School Board to impose, under RSA 193:13 II, a long term suspension for "gross misconduct" and "neglect or refusal to conform to school rules" (SB Ex. 4). He averred that each student is given a copy of and is held responsible for reading the Sunapee Middle High School Student/ Parent Handbook and must sign for its receipt and so is accountable for knowing its contents.

Mr. Minnihan agreed that, after the December 3 hearing, he had met with the parents of another child, no longer a student at his school, and that those parents admitted that their child had played a part in the sending of the emails in question.

Neither party submitted requests for findings of fact or rulings of law. The following are the facts relied upon in reaching the below recommendation.

**Findings of Fact**

1. The Student in question was a fourteen year old ninth grade student at Sunapee Middle School in September 2008 (Pleadings, Form to Request a State Board Hearing, ).
2. Student set up G-Mail account in the name of another student who is an acquaintance or friend of Student.
3. Student and a friend participated in writing and sending two emails from a computer at Student's home to addresses on the school's email system (SD Ex 16, Testimonies of Moynihan, Kessler and Minnihan); one to the school principal, Sean Moynihan on September 28, 2008 and another on October 2, 2008, to one of Student's former teachers, Laura Kessler (SD Ex 1-3).
4. Neither Laura Kessler nor Sean Moynihan believed the sender named in the emails had in fact sent them (Testimonies of Kessler and Moynihan).
5. After receipt of the first email, Principal Moynihan responded with an email asking the author to come forward, stating that the police would be brought into the matter (SD 2).
6. The author of the email failed to respond. The Sunapee Police Department was contacted following which a police investigation ensued (Testimony of Moynihan).
7. The investigation revealed that the emails originated from a computer in the Student's home (Testimony of Moynihan, Minnihan). A warrant was issued (P Ex 22).
8. The police and her family went to the police station and the police took a statement from Student, dated November 14, 2008, in which admissions of involvement were made including setting up the ruse email account and sending emails from the father's computer (P Ex 23).
9. Although Parents and Student suggested that another person participated, on no occasion until the second person came forward, the day after the School Board hearing, did Student or either parent reveal the co-perpetrator's identity (Testimony of Moynihan).
10. The police filed a CHINS petition (P Ex 24) and the Student was ordered to juvenile diversion because of harassment (questions of P. and Testimony of Minnihan, P Ex 37).

11. Superintendent Brendan Minnihan took over the educational disciplinary matter from Principal Moynihnan to avoid the conflict where Mr. Moynihnan had been the recipient of the first email (Testimonies of Moynihnan, Minnihan).
12. Minnihan had learned that the police had identified Student's house and later that same week called Student's home, spoke with the father and arranged for a meeting the next week on November 19, 2008. He advised that the father should accompany the Student. Student was not contacted directly (Testimony of Minnihan).
13. No written notice was provided for this meeting. No charges were provided prior to the meeting. At the meeting, Minnihan informed the Parent and Student that he intended to suspend student for ten days or more beginning on that day. He presented them with a poor copy of the portion of the Sunapee Middle School Student Handbook on which he based his action (Testimony of Minnihan).
14. During the meeting, when Parent asked if Student was to be given a suspension hearing, he was told that the instant meeting was the suspension hearing. Parent was told that there was no appeal. Parent was asked if he had a right to counsel and was told he did not and the meeting continued (Testimony of Minnihan).
15. By letter dated November 19, 2008, Mr. Minnihan informed Student's Parents that Student was suspended for ten school days, from November 19 through December 5, 2008 for the act of sending the emails and doing so in the name of another (P Ex 25) . He wrote that he had scheduled a Sunapee School Board hearing for December 3, 2008 and that he would ask the School Board to impose a long term suspension (Ibid); that he had enclosed the computer use policy and he cited RSA 193:13 II as authority for long term suspension (Ibid).
16. Parent's appeals makes reference to violations of basic due process rights (P Exs 26-29).
17. The School Board hearing was held on December 3, 2008. It was conducted by School Board Counsel, Barbara Loughman, Esq. There were irregularities relating to notice and start time in light of the requirements of the Right to Know Law, RSA 91-A (Ex A).
18. Following the hearing, the School Board extended Student's suspension through January 23, 2009 but made provisions for Student to keep up with her work during the time she was not in school and for the performance of community service (SD Ex 10, 11) .
19. The Sunapee Middle School Handbook begins with a ten page section on appropriate use of electronic technology entitled Acceptable Use Policy (P Ex 1, p 11 to 22). Under Unacceptable use is included a prohibition against offensive, abusive obscene, pornographic...harassing

...messages....(Ibid p 14). Section IV of the Handbook, Behavior and Discipline, contains a heading, Out-of-School Suspension under which a student may be suspended for gross misconduct or neglect or refusal to conform to the reasonable rules of the school and makes reference to RSA 193:13, the statute that provides legal parameters for suspension (Ibid p 32).

### Discussion

Errors in the conduct of the School Board hearing of December 3, 2009 relating to the "right to know" law were challenged by the Parent. They were harmless and did not influence the outcome. Accusations about the motives of the two administrators who were witnesses were raised. They are not relevant to the issue at hand but are peripheral to the issue that can be decided, was the Sunapee School Board's affirmation of the ten day suspension (November 19-December 5, 2008) and the imposition of a long term suspension (December 5, 2008-January 23, 2009) actions the State School Board can uphold.

The emails that gave rise to this hearing were sent to Middle School staff over the school's email network. To the extent that this ninth grade Student is involved, there is jurisdiction. However, the school has no authority to take action against the second person, the former student implicated in the sending of the emails. The existence of such a person was not confirmed until December 4, 2008, when that former student and his family made three visits to Sunapee officials. The consequences, if any, to that co-perpetrator are in the hands of law enforcement.

The offensive emails harmed two school staff members and a student. Testimony taken from the staff members profess significant disturbance. The School Board considered the emotional response of the student over whose name the offensive emails were sent.

Ninth grade students and others are issued and held accountable for the contents of the Sunapee Middle School Handbook. The first policy in the Sunapee Middle School Handbook, P. Ex. 1, deals with acceptable use of computers, networks, electronic sources and access to the Internet (Ibid, p 11). The act of establishing an email account in another's name and sending emails to others over that name is a serious matter that qualifies as an act of neglect or refusal to conform to the reasonable rules of the school (Ibid, p 32) for which an out-of-school suspension of up to ten days may be imposed (Ibid, and RSA 193:13). The charge of gross misconduct that was originally included in the charges was dropped when it was determined not to apply to this matter.

Equivocating regarding one's actions, when accused of such flagrant misbehavior is serious and

cannot be overlooked. This might have been a different case had Student come forward when Principal Moynihan hit "reply" and responded to the first email by stressing its seriousness and consequences and advising that the responsible party come forward (SD 2).

The Sunapee Middle High School Handbook contains the policies relied on in this matter. (P. Ex. 1) The Handbook contains an eleven page Acceptable Use Policy regarding its computer equipment and networks (P 1, p 11-22). The infractions here go well beyond the misuse of a computer. The general discipline policy is utilized (Ibid, p 27-33). The latter policy includes a due process provision.

In its Post Hearing Memorandum of Law, the School District relies on *Goss v. Lopez*, 419 US 565 (1975) in saying that due process violations have not occurred. This seminal case clarifies that students do not leave their due process rights outside the school house door but that school discipline requires a process that is not formal so that schools may function. A ten day suspension is not *de minimus*.

In states that have accepted education as a right, as has New Hampshire in the cases known as *Claremont I*, 635 A.2d 1375, 1378 (1993) and *Claremont II*, 703 A. 2d 1353, 1375 (1997), a property right and a liberty interest are both implicated. When a ten day suspension is imposed, a basic due process must be followed. The informal hearing process requires notice of charges, written or verbal, before or at least at the same time as the meeting which must be before the student is removed from school. However, prior notice and written notice is not required. The student must be given an opportunity to refute or explain what has occurred. There is no right to counsel. An appeal from the result may then be brought and a more formal process is due such as that afforded by the Sunapee School Board on December 3, 2008.

The Sunapee Middle School policies referred to above are substantially in harmony with NH RSA 193:13 and Rule Ed 317:04 and the Goss decision cited above. Superintendent Minnihan took an unusual role when he meted out discipline in Principal Moynihan's stead. As required, this was initiated soon after the discovery of the source of the emails, that same week. Verbal notice of the rule violations was given promptly to Student and parent at the meeting/hearing with written versions following. Though Minnihan stated that he believed that appeal might not be taken by Parent to the Sunapee School Board, he informed the Parent that he would bring the matter to the Board. Parent filed for appeal and the erroneous statement regarding Parent's right to appeal had no detrimental effect.

**Recommendation of the Hearing Officer**

Though I may find the actions of the Superintendent and the Sunapee School Board harsh considering the future of the Young Student, careful examination yields no basis to overturn the decision of the local school board. Had errors made by the Superintendent or the School Board been substantial, thereby changing the outcome of either hearing, my recommendation would be otherwise. The Goss decision and the law and rules that have followed represent a balance between due process and the realities of school administration. I recommend that the local school board be upheld in this matter.

Signed this 18th day of August, 2009.



Gail C. Morrison, Hearing Officer