0035-89

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

JOHN M. DOE

vs.

WARWICK SCHOOL COMMITTEE

D E C I S I O N

November 8, 1989

Travel of the Case

This matter was appealed to Commissioner J. Troy Earhart on May 15, 1989 for a de novo hearing on the issue of the appellant's suspension from Pilgrim High School for the period of one calendar year commencing April 6, 1989. After the matter was scheduled for hearing it was determined that Hearing Officer Forrest L. Avila had a conflict in the case, and the matter was reassigned under authorization from the Commissioner to the undersigned.

A full hearing was held on August 21, 1989, a stenographic record made, and the record of the hearing closed on September 7, 1989.

Jurisdiction to hear the appeal falls under Rhode Island General Laws §16-39-1 and §16-39-2.

Issues

(1) Do sufficient facts exist to justify a finding that this student sold, or attempted to sell, a controlled substance [LSD] to other students in Pilgrim High School on Thursday, April 6, 1989?

(2) If so, is the suspension for one calendar year, April 6, 1989 -April 6, 1990, appropriate and permitted under Rhode Island law?

Issue Determination

The precise nature and extent of the misconduct alleged to have occurred and relied on by the School Committee as the basis for the discipline imposed was our threshold determination in this case. At the

outset we noted some ambiguity in the record as to whether the basis for suspension went beyond the allegation of sale or attempted sale of drugs at school on April 6, 1989. As reflected in our statement of the issues in this case, we have resolved this question to confine our inquiry to the allegations pertaining to drug involvement at school on the day in question, and whether, if true, this activity exclusively supports the suspension. We do not consider or decide, therefore, whether evidence of other misconduct contained in the record of the case would form additional support for the suspension. Our reasoning is set forth as follows:

Notice of the precise allegation of "sale or attempted sale of LSD at Pilgrim High School on April 6, 1989" was given to the student's parents in a letter from Superintendent Elliott N. LeFaiver. This April 14, 1989 communication also advised the parents of their opportunity to be heard at a School Committee meeting of April 26, 1989 (where evidence of this allegation was to be presented) and to be represented by counsel. Following this hearing, at which evidence was taken and we understand a transcript was made, the School Committee notified the parents of its vote to suspend their son for one calendar year. The letter notifying the parents of the Committee's decision contained no findings of fact, nor did it indicate the factual basis for the suspension.[1] We assume, then, that the School Committee based its disciplinary action on a finding that the student was involved in drug transactions at school on April 6, and not on evidence of

[1] School Committee Ex. D, letter of Henry S. Tarlian dated April 28, 1989.

any other misconduct which may have been contained in the record made at the April 26 hearing. We note that at the de novo hearing before us evidence of other acts was cited by counsel for the School Committee (i.e., perjury, the student's use of LSD after he left school on April 6, possession and delivery of L S D to another student the following day). We conclude that counsel's reference to these other acts, committed after the student had left the school grounds, was for the sole purpose of buttressing the School Committee's position that this student was part of a conspiracy to distribute drugs at Pilgrim on the day in question.

For us to conclude otherwise, and not restrict our consideration of the basis for suspension to that previously identified by the School Administration, would result in a process we believe would be flawed from a constitutional procedural due process standpoint.[2] It would also result in a procedure fundamentally unfair because it is likely that in his belief that the School Committee's case was confined to this issue, that the student freely admitted to much of the out-of-school misconduct contained in the record before us.

Thus, any findings of fact made on the evidence in the record before us regarding out-of-school misconduct are relevant and considered only as they may support the School Committee's allegation that this student sold, or attempted to sell drugs at Pilgrim High School on April 6, 1989.[3]

2] See Regulations of the Board of Regents Governing Disciplinary Exclusions (July 8, 1976) and the general discussion of due process procedures attendant to long-term suspensions contained in Education Law by James A. Rapp §9.05 [3].

3] As elucidated by counsel for the Committee, it is alleged that the student was a member of a conspiracy to sell drugs at Pilgrim on April 6, 1989 and, as such, although he is not alleged to have sold or attempted to sell the drug himself that day, the alleged acts of his co-conspirators who did are attributable to him.

Summary of Relevant Testimony

Student Doe

Student Doe testified that on the morning of April 6, 1989 he arrived at school at eight o'clock, one-half hour late. He went to his locker, and then to the lavatory which is located on the other side of the school. He didn't have to make use of the lavatory's facilities, but Student Doe went there that morning because he "always went there before class". He does not know why he always did so. (Tr. p. 12-13). When he went into the lavatory, one of his classmates was there, smoking a cigarette, and about three minutes later they were joined by two other boys. Seconds later, Student Doe testified, Mr. Edmund Miley, the School Principal, came in and told them to report to the office. The student gave conflicting testimony on whether he knew any of his classmates in the lavatory were in possession of illegal drugs that morning (Tr. pp. 16, 20-21). He denied that any drug transactions took place in the period of time after he entered the lavatory and before Mr. Miley entered and ordered the students to the office. Student Doe testified that he was not at any time in possession of drugs nor did he sell drugs at school that morning. He was suspended that morning for tardiness.

After leaving school, Student Doe testified he went to a nearby Mr. Donut where one of the students who had been with him in the lavatory (Student A) showed him LSD, and gave him one "hit" which he took. Later, the group moved on to McDonald's where Student Doe came into possession of thirty "hits" of LSD[4] which he delivered the next day per the instructions

4] He testified he took possession of this LSD when he prevented his friend ("Student A") from over-dosing by removing the drugs from his mouth.

of another student (not part of the original group in the lavatory) who had purchased these drugs from Student A.

Student Doe knew in advance that Student A was going to be buying "acid" because the two had met and talked together on the night of April 5, at a third student's house (Student B). Student B was with Student A the next morning in the lavatory (Tr.p.27). Student Doe maintained he didn't know exactly when Student A was going to buy the drugs and he didn't know that Student A would be in the lavatory with the drugs on the morning of April 6. (Tr.p.55-56).

Testimony of Student B

Student B also arrived at school at eight o'clock on the morning of April 6. He observed Student A in the company of another student inside the building. Student A and the other student "ran because the teacher came down". The other student ran into the lavatory. Student A slowed down, was joined by Student B and together they entered the lavatory. Student Doe was already there along with the fourth student. While the four students were present in the lavatory, two other students came in and bought drugs from Student A. These transactions occurred right in front of Student Doe who was standing about three feet away, smoking a cigarette. The sales were completed in about five or ten minutes when Mr. Miley came in and "caught" the four and ordered them to the office. Student B did not observe Student Doe in possession of drugs, or selling drugs at school, but did see him put a quantity of LSD in his cigarette pack later that afternoon at McDonals's. (Tr.pp.102-103).

Student B said he, too, had advance knowledge that Student A was going to be getting drugs, but did not know Student A would be bringing them to school. Student B did not recall a meeting at his house on the evening of April 5 (as was testified to by Student Doe) at which time the subject of Student A's prospective purchase was discussed.

At the end of the afternoon, Student Doe and Student B returned to Student B's house where they learned from another student that "somebody flipped out at school", and that Student A's father was apparently looking for the person responsible (or his own son, the record is not clear on this point) and he would be arriving shortly. At that point in time, Student Doe ran away. (Tr.p. 101-102).

Testimony of Mr. Miley

School Principal Miley initially suspended Student Doe for tardiness. Following his investigation of the facts surrounding several students becoming ill from drug use on April 6, he recommended the full calendar year suspension. Mr. Miley had no personal observation or knowledge of Student Doe's involvement in any drug transactions in school that day. He testified this was the first time Student Doe had been disciplined for violation of the provision of the school policy dealing with the sale, use, or possession of drugs.

Findings of Relevant Facts

- Student Doe had used illegal drugs prior to April 6, 1989. (Tr.p. 25).
- Student Doe knew Students A and B prior to April 6, 1989.
- Student Doe had advance knowledge on April 5 that Student A would be acquiring drugs.

- Student Doe was present with three other students in the lavatory at Pilgrim on the morning of April 6 when Student A sold LSD to two other students.
- After his suspension for tardiness, Student Doe left school with two of the three students who had also been present in the lavatory when these drug transactions occurred (Student A, who made the sales, and Student B).
- Student Doe took LSD at Mister Donut upon leaving the school premises. He received the drug from Student A.
- Student Doe took possession of a quantity of LSD from Student A at McDonald's that afternoon.
- Student Doe spent the entire afternoon with Students A and B, until he ran from Student B's house to avoid confronting Student A's father.
- Student Doe facilitated the delivery of LSD to another Pilgrim student who had purchased it from Student A. (Tr.p. 55).

Conclusions

Our findings of fact indicate that we do not accept Student Doe's account of what took place in the lavatory in his presence on the morning of April 6. We conclude that the drug transactions described by Student B did occur, and that Student Doe must have seen them.[5] Taking the

5] Student Doe lied when he testified he did not see drugs in the men's room that morning or any drug sales. (Tr.p. 16, 20, 21). It also strains credibility, and we reject as untrue, his testimony that with his history of suspensions for tardiness, he arrived late to school on the morning of April 6, went to the men's room on the other side of the building, where he just happened to meet with three other students, two of whom he had met with the preceding night and discussed Student A's prospective drug purchase.

evidence as a whole, however, we do not find sufficient evidence that Student Doe was a participant in a conspiracy to sell drugs at Pilgrim High School that day.

The School Committee submits that their case against this student rests on the conspiracy theory, such that the drug sales made by Student A are attributable to Student Doe. This "concert of action" theory of criminal liability is recognized as a punishable offense under common law (RIGL §11-1-1) and by specific Rhode Island statute as well (RIGL §11-1-6). The elements of a conspiracy are an agreement or combination of two or more persons to commit some unlawful act or do some lawful act for an unlawful purpose. State v. Brown, 486 A.2d 595 (R.I. 1985). If a conspiracy is established, then each co-conspirator is criminally responsible for the acts of his associates in furtherance of the common purpose for which they combined.[6] It is true that the combination or agreement which is the gravamen of the conspiracy, may be proved by circumstantial evidence[7] such as evidence that the alleged co-conspirators acted in concert or shared a common purpose.[8]

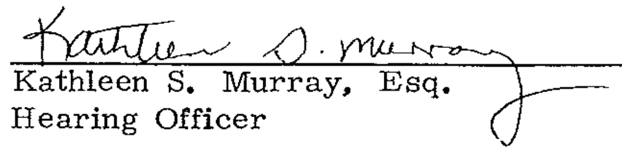
Our review of the testimony, our findings of fact and the inferences flowing therefrom, do not indicate substantial evidence that a conspiracy or agreement to distribute drugs at Pilgrim that day existed or that Student Doe was a member of such a conspiracy. While we do acknowlege some evidence that would support the conspiracy allegation, the weight of

6] State v. Barton, 424 A.2d 1033.
7] United States v. Acevedo, 842 F.2d 502 (1988 C.A. 1st Circuit).
8] State v. Main, 180 A2d. 814, 94 R.I. 338 (R.I. 1962).

this evidence is not substantial enough.[9] Having reached this conclusion, we do not find that Student Doe can be attributed, or held responsible for, Student A's drug distribution to students at Pilgrim High School on the morning of April 6, 1989.[10] Therefore, the suspension imposed is set aside. Student Doe should be reinstated immediately and that part of his disciplinary record relating to this suspension should be expunged.

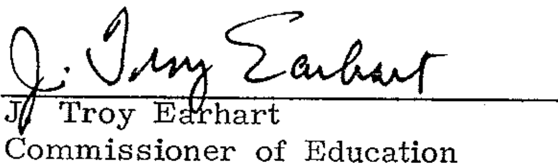
9] We do not imply by our characterization of the weight of the evidence on this issue as "not substantial" that we hold school committees to a standard of "beyond a reasonable doubt" or even a "clear and convincing" standard of proof in school suspension cases. We recognize significant legal authority for the proposition that in long-term suspension cases a standard of proof more stringent than a "preponderance of the evidence" is applied. We need not so rule today, because it is our finding that the evidence submitted by the School Committee does not meet the "preponderance" standard of proof.

10] We should note here that even if Student Doe's suspension were not set aside, his exclusion from school could probably not have continued beyond the school term ending in June of 1989 in any event. See the historical note contained in the 1948 McEntee treatise on the <u>Laws of Rhode Island Relating to Education</u> at page 20.



Kathleen S. Murray, Esq.
Hearing Officer

Approved:



J. Troy Earhart
Commissioner of Education

November 8, 1989