No. 17913

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of N.R., on behalf of her son, J.R., from action of the Board of Education of the Valley Central School District regarding student discipline.

Law Office of Laura Wong-Pan PLLC, attorneys for petitioner, Laura Wong-Pan, Esq., of counsel

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, Steven L. Banks, Esq., of counsel

Petitioner appeals the decision of the Board of Education of the Valley Central School District ("respondent") to suspend her son, J.R. ("the student"). The appeal must be sustained.

At all times relevant to this appeal, the student attended eighth grade at respondent's middle school. By letter dated December 10, 2018, respondent's superintendent informed petitioner that the district intended to convene a long-term suspension hearing based upon the student's conduct on or about November 19, 2018.[1] More specifically, the letter charged that, on or about November 19, 2018, the student "searched for inappropriate topics" on his school-issued computer (the "Chromebook"[2]). The notice of charges for the long-term suspension hearing identified the

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[1] The student was previously suspended for five days beginning on December 6, 2018. Petitioner commenced a separate appeal pursuant to Education Law §310 challenging this short-term suspension. I take notice of the records in that file, which indicate that the appeal was withdrawn after respondent agreed to expunge the short-term suspension from the student's record (see 8 NYCRR §276.6). As such, the student's short-term suspension is not at issue in this appeal.

[2] The school-issued computer is referred to in the record as a "Chromebook."

following searches, which the district alleged were inappropriate:[3]

- What temperature does gasoline freeze at Fahrenheit;
- worst WWI gun;
- I will kill every drug addict;
- funniest ways to die;
- what's the sharpest knife;
- nitroglycerin explosion;
- is nitroglycerin really that unstable;
- the fastest gun firing rate;[4]
- mother of all bomb explosion;
- what is the sign that death is near;
- is lidocaine legal;
- kill shot; and
- how to hard reset a chromebook while on school grounds.[5]

The long-term suspension hearing, presided over by a hearing officer, convened on December 18, 2018. At the hearing, the student admitted that he had performed the disputed internet searches but denied that such conduct violated district policy or was otherwise improper. The district called one witness - the middle school principal - who testified as to why he believed that the student's internet searches violated district policy. The student testified on his own behalf and explained the circumstances underlying each of the disputed searches.

In a written recommendation dated December 20, 2018, the hearing officer recommended that the student be found guilty of the "charged misconduct by making inappropriate searched on his school-issued Chromebook." The hearing officer also made specific findings concerning the student's search for "how to hard reset a chromebook," recommending that the student be found guilty of violating the district's Chromebook student user agreement because he had failed to bring his Chromebook to the district's technology department after the computer experienced "pixel

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[3] All quoted search terms are reproduced verbatim from the December 10, 2018 notice of the charge.

[4] According to the record, the search was for: "fastest gun fire rate."

[5] At the hearing, the district clarified that the phrase "on school grounds" was not part of this search and, instead, was meant to modify all of the listed searches (i.e. that the student made each of the alleged searches "while on school grounds").

death."[6] The hearing officer recommended that the student's suspension be extended through Friday, January 25, 2019.

By letter dated December 19, 2018, the superintendent found the student guilty of the charged misconduct on the ground that the student "pleaded guilty" during the hearing. The superintendent determined that the student would be permitted to return to school on Monday, January 28, 2019. Petitioner appealed this determination to respondent by letter dated January 4, 2019. Thereafter, petitioner received an amended determination letter from the superintendent dated January 7, 2019, in which the superintendent found the student guilty on the basis of the hearing testimony and the record - not the student's purported guilty plea.

By letter dated January 23, 2019, respondent upheld the superintendent's decision and denied petitioner's appeal. This appeal ensued.

Petitioner asserts that the district failed to prove that the student's internet searches violated district policy because each search was non-violent in nature when placed within the appropriate context. Petitioner also alleges that the student was never made aware of the policies that he was alleged to have violated. Moreover, petitioner argues that the student could only be found guilty for those searches which took place on November 19, 2018 - the date of the student's charged misconduct, according to the superintendent's December 10, 2018 letter. Petitioner also contends that the hearing officer's recommendation regarding the student's alleged violation of the district's Chromebook student user agreement was outside the scope of the misconduct with which the student was charged. Petitioner further alleges that, even assuming that the district proved the charge against the student, his suspension was excessive. For relief, petitioner requests that I expunge the student's long-term suspension from his record.

Respondent argues that the appeal must be dismissed because the district's determination of guilt was based upon competent and substantial evidence. Respondent further contends that the student's suspension was appropriate given the severity of the student's conduct.

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[6] The student alleged that the "pixel death" caused him to search how to "hard reset" a Chromebook.

First, I must address petitioner's arguments relating to the sufficiency of the charge. The charges in a student disciplinary proceeding need only be "sufficiently specific to advise the student and his counsel of the activities or incidents which have given rise to the proceeding and which will form the basis for the hearing" (Bd. of Educ. of Monticello Cent. School Dist. v. Commissioner of Education, et al., 91 NY2d 133; Appeal of D.B., 57 Ed Dept Rep, Decision No. 17,244; Appeal of a Student Suspected of Having a Disability, 48 id. 391, Decision No. 15,895). As long as students are given a fair opportunity to tell their side of the story and rebut the evidence against them, due process is served (Bd. of Educ. of Monticello Cent. School Dist. v. Commissioner of Education, et al., 91 NY2d 133). Reasonable notice must provide the student with enough information to prepare an effective defense but need not particularize every single charge against a student (Bd. of Educ. of Monticello Cent. School Dist. v. Commissioner of Education, et al., 91 NY2d 133; Appeal of D.B., 57 Ed Dept Rep, Decision No. 17,244; Appeal of a Student Suspected of Having a Disability, 48 id. 391, Decision No. 15,895).

In an appeal to the Commissioner, a petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which petitioner seeks relief (8 NYCRR §275.10; Appeal of P.C. and K.C., 57 Ed Dept Rep, Decision No. 17,337; Appeal of Aversa, 48 id. 523, Decision No. 15,936; Appeal of Hansen, 48 id. 354, Decision No. 15,884).

Petitioner contends that the student could only be charged with misconduct for those internet searches that he conducted on November 19, 2018. The December 10, 2018 notice of charges specified that the student violated various district policies "on or about November 19, 2018," when he used the Chromebook to perform inappropriate internet searches (emphasis added). As revealed at the hearing, the specific searches identified in the notice of the charge occurred on different dates in November 2018, ranging from November 2, 2018, through November 27, 2018. Petitioner argues that, because the written notice specified the date of "November 19, 2018," she did not receive sufficient notice regarding charged misconduct that occurred on any other day.

I find that respondent provided petitioner with sufficient notice with respect to the date of the alleged searches. As indicated above, the written notice identified the search date as "on or about November 19,

2018." The written notice further provided a verbatim list of all the search terms that allegedly violated school policy. The audio recording of the hearing demonstrates that the student understood the nature of the charge against him and offered testimony in support of his claim that he had reasonable explanations for such searches. There is no evidence in the record suggesting that the student did not have an adequate opportunity to defend himself. Therefore, I find that the December 10, 2018 notice provided the student with sufficient notice of the charges against him (see Appeal of a Student with a Disability, 58 Ed Dept Rep, Decision No. 17,560).

However, I agree with petitioner insofar as the district was limited to charging the student with misconduct for the specific search terms identified in the notice. At the hearing, certain search terms were discussed which were not listed within the written notice, such as "claymore" and "biggest european sword." The district also implied at the hearing that the student violated district policy because some of his searches were unrelated to his schoolwork, rather than inherently inappropriate or violent in nature. The Commissioner has held that a district must be held to the language of the charges it chooses to pursue against a student (see Appeal of a Student with a Disability, 58 Ed Dept Rep, Decision No. 17,560; Appeal of J.M., 57 id., Decision No. 17,335; Appeal of A.F. and T.P., 56 id., Decision No. 16,997). While it is unclear from the record if the hearing officer, superintendent, or respondent found the student guilty based upon any search terms that were not identified in the notice of charges, any such reliance would have been improper.[7] Indeed, at the hearing, the middle school principal admitted as much when he indicated that the district chose not to charge the student with misconduct for certain search terms (e.g. "worst poker hand") that were not related to the student's academics.

I further agree with petitioner that the hearing officer erred by recommending that the student be found guilty of violating the district's Chromebook student user

[7] I do not find that the district's use of broad language - such as "including" and "and/or" - preserved its ability to charge the student with search terms beyond those identified in the notice of the charge. The student's search history, entered into evidence at the hearing, consists of several hundreds of searches and was not provided to petitioner or the student prior to the hearing. Thus, it would have been impossible for petitioner to present an effective defense if any of the searches contained in the search history could have been the subject of the long-term suspension hearing.

policy. The written notice of the long-term suspension hearing charged the student with a single charge; namely, a violation of its policies as a result of searching for inappropriate terms. While the written charge did include a reference to the student's search for "how to hard reset a chromebook," this phrase was grouped together with the other allegedly inappropriate search terms. As the district made clear at the hearing, its theory was that the student conducted the "hard reset" search to determine whether he could delete or conceal his inappropriate internet searches.

However, in his decision, the hearing officer recommended that the student be found guilty of violating the Chromebook student user agreement because he did not bring his Chromebook to the technology department "as soon as possible" after it began experiencing "pixel death." The district did not charge the student with violating the Chromebook student user agreement by failing to deliver a malfunctioning Chromebook to the technology department. Indeed, respondent did not charge the student with violating the Chromebook student user agreement at all. Instead, the notice alleged that the student engaged in:

> conduct in violation of Section 3214 of the Education Law and/or the Valley Central School District's Internet Acceptable Use Policy and/or the Valley Central School District Discipline Code of Conduct and/or the Middle School Discipline Code contained within the Valley Central School District Student Handbook.

None of these sources include the Chromebook student user agreement that the hearing officer alleged the student to have violated. While this agreement indicates that it is "governed by the District Acceptable Use Policy,"[8] it is not explicitly incorporated into any other district policy. Thus, I find that the hearing officer improperly sought to

[8] It is unclear to which policy this pertains, as respondent has submitted copies of four policies, none of which are entitled "District Acceptable Use." Specifically, respondent has submitted copies of the following four policies: (1) computer and networked information resources (policy 4526); (2) computer and networked information resources regulation (policy 4526-R); (3) computer and networked information resources student user agreement (policy 4526-E.1); and (4) computer and networked information resources staff user agreement (policy 4526-E.2).

charge the student with conduct not identified in the notice of the charge.

Nevertheless, there is no evidence in the record that the superintendent found the student to be guilty of any such additional charge or otherwise relied on the hearing officer's recommendation in rendering his determination. In both the original December 19, 2018 and the revised January 7, 2019 determination letters, the superintendent concluded that the student was "guilty of Specification 1, as charged" in the December 10, 2018 notice of the charge. Because the superintendent found the student guilty of only the original charge and did not reference the hearing officer's recommendation in any way, petitioner has failed to prove that the hearing officer's recommendation was prejudicial. Accordingly, the hearing officer's recommendation that the student be found guilty of an additional, improper charge was harmless error (see Appeal of R.T. and S.T., 53 Ed Dept Rep, Decision No. 16,581; Appeal of M.A., 47 id. 188, Decision No. 15,663).

Turning to the charge of which the student was found guilty, Education Law §3214(3)(a) permits the suspension of "[a] pupil who is insubordinate or disorderly or violent or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others." The decision to suspend a student from school pursuant to Education Law §3214 must be based on competent and substantial evidence that the student participated in the objectionable conduct (Bd. of Educ. of Monticello Cent. School Dist. v. Commissioner of Educ., et al., 91 NY2d 133; Bd. of Educ. of City School Dist. of City of New York v. Mills, et al., 293 AD2d 37; Appeal of M.J., 57 Ed Dept Rep, Decision No. 17,292; Appeal of B.M., 48 id. 441, Decision No. 15,909). Where a student admits the charged conduct, the admission is sufficient proof of guilt (Appeal of N.S., 57 Ed Dept Rep, Decision No. 17,268; Appeal of S.U., 57 id., Decision No. 17,159; Appeal of M.K., 48 id. 462, Decision No. 15,916).

In this instance, the student admitted to conducting the objectionable internet searches listed in the notice of the charge. Additionally, the district proved, by competent and substantial evidence, that the student conducted the searches that were the subject of the charge. However, I cannot find that these searches violated either Education Law §3214 or the district policies identified in the notice of charges. The student specifically denied that such searches were inappropriate, violent in nature,

or that they constituted misconduct under the policies cited by the district, and respondent otherwise failed to establish how the student's internet searches created any risk to other students or otherwise disrupted the school environment.

I agree with respondent that several of the terms for which the student searched - e.g., "the fastest gun firing rate," "nitroglycerin explosion," and "kill shot" - appeared violent on their face and warranted further investigation. At the hearing, however, the student testified as to his underlying reasons for conducting the searches, and none of these reasons were violent in nature. For example, the student testified that he searched for "kill shot" because he was looking for the lyrics to a popular song titled "Killshot." Similarly, the student testified that he searched for "nitroglycerin explosion" because he wanted to understand how nitroglycerin can be used as a medication for heart conditions when it was also used as an explosive during the construction of the transcontinental railroad. Indeed, the student's search history revealed that he had also searched for "what was nitroglycerin used for?" in close proximity to the "nitroglycerin explosion" search. The district notably did not submit any evidence to rebut the student's testimony during the hearing. Thus, there is no evidence in the record establishing that the student posed an actual threat of violence or had any violent intent when conducting the internet searches listed in the notice of the charge.

Furthermore, the record reflects that the student conducted the "hard reset" search on November 2, 2018, prior to the date upon which he engaged in the other search terms to which respondent objects. Thus, it could not have been performed, as respondent implies, to conceal the student's search history. Respondent did not otherwise explain how the "hard reset" search was improper, nor did it allege or prove that the search violated any district policy.

Moreover, respondent failed to prove by competent and substantial evidence that the mere act of searching for such terms - regardless of the student's intent - endangered the safety, morals, health, or welfare of others. The student's search history was only discovered after respondent decided to examine the student's Chromebook for reasons unrelated to student discipline. Notably, there is no evidence that the student informed anyone of his internet searches or that anyone at the

school would have been aware of the student's search history if not for the district's review of such search history. Nor is there any evidence in the record that any students or faculty members became aware of the student's search history after the district's review of the student's Chromebook, except for those individuals involved in bringing the instant disciplinary charge against the student. Thus, I find that the student's conduct, which was unknown prior to its discovery and which would not foreseeably cause any disruption to school operations or activities, was not conduct for which the district could properly suspend the student under Education Law §3214(3)(a) (see Appeal of a Student with a Disability, 58 Ed Dept Rep, Decision No. 17,560 [concluding that student could not be punished for conduct "which was unknown prior to its discovery ... and which did not cause any disruption to school operations or activities"]; Appeals of A.F. and T.P., 56 id., Decision No. 16,997 [overturning students' suspensions where there was "no evidence linking any conduct by (the students) to (a) subsequent disruption" at school and the students did not "engage in any other conduct ... that endangered the health or safety of students or adversely affected the educative process"]).

The prior decisions of the Commissioner cited by respondent are distinguishable insofar as they involved threats or harassment directed at, or heard by, others (Appeal of a Student with a Disability, 58 Ed Dept Rep, Decision No. 17,515 [student suspended after he was overheard making comments at a pep rally about "shoot(ing) up the school" and being a "school shooter," which student claimed were "a joke"]; Appeal of N.C., 57 id., Decision No. 17,417 [student suspended for harassing another student on social media, which included "posting negative comments about that student's sexual orientation, making racially insensitive and inappropriate remarks, and making inappropriate remarks about the other student's deceased grandmother"]; Appeal of D.B. and A.B., 57 id., Decision No. 17,395 [permanent suspension upheld for bomb threat and terroristic threat sent to district officials via email]). These decisions are inapposite to the situation here, insofar as the student did not direct any threatening or harassing language toward anyone else, the objectionable searches were ultimately established to be non-violent in nature, and the student's search history was not shared with anyone and would not be have been publicly known but for the district's disciplinary action.

Given my conclusion that the district could not properly suspend the student for his conduct pursuant to Education Law §3214(3)(a), I need not separately determine whether the student's conduct violated district policy 4526-R, as respondent argues. I note, however, that the scope of this policy does not appear to encompass the student's conduct in this case. The relevant language upon which the district relies is:

> Some networks and Internet systems contain defamatory, abusive, obscene, profane, pornographic, age-inappropriate and otherwise offensive, threatening, inflammatory, hate-promoting, violence-promoting, anti-social, or illegal materials. The school district does not condone or permit the use of such materials in the school environment. ... Users who bring such materials into the school environment ... may be subject to school disciplinary action, consistent with the Student Code of Conduct ....

Respondent has not explained how this policy prohibited the searches at issue. There is no evidence in the record as to what results the student obtained, or viewed, after performing the searches at issue. Consequently, there is no basis upon which to conclude that the student brought inappropriate materials "into the school environment" within the meaning of policy 4526-R (cf. Appeals of M.S. and M.D., 41 Ed Dept Rep 285, Decision No. 14,687 [board of education erroneously found students guilty of accessing a website with inappropriate content where the district did not introduce a copy of the material obtained from the website into evidence at the long-term suspension hearing]).[9]

In light of this disposition, I need not address the parties' remaining contentions.

THE APPEAL IS SUSTAINED.

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[9] Additionally, as indicated above, respondent did not charge the student with violating the Chromebook student user agreement or otherwise allege that he misused district property. Therefore, I need not decide whether the student could be found guilty of such charges consistent with the principles articulated above.

IT IS ORDERED that respondent annul and expunge from the student's record all references to the long-term suspension described herein.

IN WITNESS WHEREOF, I, Betty A. Rosa, Interim Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 19th day of August 2020.

Interim Commissioner of Education