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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-16

Filed 06 June 2023

Mecklenburg County, No. 22 CVS 1008

E.D., a minor, by and through his parent, EBONY ASHLEY, Petitioner,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, Respondent.

Appeal by respondent from order entered 1 August 2022 by Judge Reggie E. McKnight in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 May 2023.

Katten Muchin Rosenman LLP, by Lindsey L. Smith, Karen M. Hinkley, and Jessica L. Harrell; and Council for Children's Rights, by Caitlin Whalan Jones and Alyson Martin, for petitioner-appellee.

Campbell Shatley, PLLC, by Dean Shatley and Kristopher L. Caudle, for respondent-appellant.

ARROWOOD, Judge.

Charlotte-Mecklenburg Board of Education (“the Board”) appeals from the trial court’s order remanding E.D.’s¹ (“petitioner”) decision for expulsion for a new

¹ Initials are used to protect the identity of the minor child, who is appearing by and through his parent.

Opinion of the Court

hearing. On appeal, the Board contends the trial court erred in: (1) finding the expulsion decision did not comply with the relevant statutes; (2) relying on procedural arguments that were waived at the hearing; and (3) failing to apply a presumption of correctness and regularity in its judicial review of the Board's expulsion decision. In response, petitioner has filed a motion to dismiss the appeal as interlocutory. The Board denies the appeal is interlocutory but has also filed a petition for *writ of certiorari* ("PWC") for this Court to review the trial court's decision. For the following reasons, we grant petitioner's motion to dismiss the Board's appeal as interlocutory. Accordingly, we dismiss the Board's appeal and deny their PWC in our discretion.

I. Background

On 3 November 2021, petitioner, who was enrolled as a student in a Charlotte-Mecklenburg County high school, was involved in a fight while on campus. During the altercation, "a gun and a clip fell to the floor[.]" and petitioner could be seen on surveillance footage picking up the gun and taking it with him into a restroom. Petitioner stated that he was "afraid" one of the people he was fighting would use the gun to "shoot him, his friends, or other students[.]" so he took it to the restroom to dispose of it. The school was placed on lockdown, and an extensive search of the restroom failed to yield the firearm. The firearm was eventually located on another person.

Petitioner "was transported to jail from the school and . . . charged with possession of a weapon on school grounds and fighting, per" school policy. Petitioner

was suspended from school “for [ten] days or less.” Following his “short-term suspension[,]” the superintendent of the school recommended a long-term suspension.

A due process hearing was held on 12 November 2021, at which time it was determined there was “substantial evidence” that petitioner violated school policy by engaging in a physical altercation and possessing a handgun on campus. Petitioner was suspended “for 365 days, effective 19 November 2021.” Furthermore, the superintendent told petitioner’s guardian, in a letter dated 12 November 2021, that he would “not be offered any alternative education program” while suspended due to “the extremely dangerous nature of [his] offense[.]” Petitioner’s guardian was notified in that same letter that the superintendent would be recommending petitioner for expulsion. Petitioner’s guardian filed a notice of appeal from the long-term suspension on 16 November 2021, to “discuss consequences[.]”

Thereafter, “[t]he long-term suspension appeal and the expulsion hearing” was held “before a panel of the Board on” 15 December 2021. Following the hearing, the Board unanimously denied petitioner’s appeal and accepted the recommendation of the superintendent to expel petitioner, as they found by “clear and convincing evidence that [petitioner’s] presence in school constitute[d] a clear threat to the safety of other students and staff.”

On 14 January 2022, petitioner filed a petition for the superior court to review his expulsion, pursuant to N.C. Gen. Stat. “§§ 150B-43 to 52 and § 115C-45(c)[.]” Petitioner alleged the expulsion decision was in error because:

Opinion of the Court

(1) it violated [petitioner's] constitutional right to the opportunity to receive a sound basic education and equal education access; (2) it was made upon unlawful procedure; (3) the Board's conclusion that [petitioner's] continued presence creates a clear threat to school safety was not supported by substantial evidence; and (4) the Board's decision to not address and therefore not provide alternative education services during [petitioner's] expulsion was arbitrary and capricious.

The matter came on for hearing on 13 July 2022 in Mecklenburg County Superior Court, Judge McKnight presiding.

During the hearing, petitioner argued his expulsion was unconstitutional because it failed "to meet intermediate scrutiny," which required the Board to "show that its decision to expel [petitioner] was substantially related to school safety," meaning "the expulsion [did] not infringe on [petitioner]'s right to an education substantially more than is necessary to advance school safety." Petitioner contended the Board fell short of meeting this standard because they failed to: (1) "explain why a lesser consequence was insufficient[;] and" (2) "consider the mitigating evidence[.]"

Furthermore, petitioner argued the expulsion decision should be reversed since it was "made upon unlawful procedure." Specifically, petitioner contended that: (1) he "was never given the opportunity to be heard fairly on the issue of expulsion in violation of his constitutional and statutory procedural rights[;]" and (2) the Board did "not provide a sufficient explanation for the expulsion in violation of state law." Petitioner contended that it was not until after he appealed the long-term suspension that he was notified the superintendent was recommending expulsion, and the Board

Opinion of the Court

unilaterally decided to merge the long-term suspension appeal hearing with the expulsion proceeding, despite the two proceedings having entirely “different evidentiary standards [and] . . . fact-finding inquiries.” Petitioner argued the Board’s counsel “verbally informed [him] and his counsel the day before the hearing that he could not present new evidence or call witnesses[.]” and the Board “relied almost entirely on the record that was created at the long-term suspension due process hearing” in making their decision. Petitioner did acknowledge this verbal comment was “not documented in the” record.

Lastly, petitioner requested the trial court “reverse [the Board’s] decision not to provide [petitioner] alternative education services[.]” because the decision did “not meet intermediate scrutiny” and was made “upon unlawful procedure[.]” Petitioner argued the Board failed to provide a reason for the lack of alternative education services and such services were “not addressed in any capacity in the board’s final decision letter or board minutes[,] despite petitioner’s counsel’s argument at the 15 December “hearing includ[ing] discussion[s] of alternative services[.]”

By contrast, the Board argued there was nothing in the record to indicate petitioner “could not introduce evidence, speak on [his] own behalf or have someone [else] speak on [his] behalf[.]” and “no objection to the proceedings[.]” Furthermore, the Board argued the statute only requires them to “consider” alternative education services and the fact that an explanation for denial of those services was not “in the letter [sent to petitioner] is not proof that it was not considered[.]” Lastly, the Board

Opinion of the Court

argued they “should be given deference . . . when the decision is supported by the record[,]” as it was in this case.

On 1 August 2022, the trial court entered an order finding petitioner “was not afforded the opportunity to question witnesses, or present witnesses other than a character letter submitted by counsel” at the expulsion hearing and petitioner was expelled without an explanation for why he would not receive alternative education services. Based on these findings of fact, the trial court remanded the matter for a new hearing “in compliance with the provisions” of N.C. Gen. Stat. §§ 115C-390.11 and 115C-390.8(e)(1)-(8), and for the Board to address their decision regarding access to alternative education services. The Board filed a notice of appeal on 30 August 2022.

II. Discussion

On appeal, the Board contends the trial court erred in: (1) finding the expulsion decision did not comply with the relevant statutes; (2) relying on procedural arguments that were waived at the hearing; and (3) failing to apply a presumption of correctness and regularity to the expulsion decision. In response, petitioner has filed a motion to dismiss the appeal as interlocutory. The Board denies the appeal is interlocutory but has also filed a PWC for this Court to review the trial court’s decision. As an initial matter, before addressing the merits of the Board’s contentions, we must first determine whether this appeal is interlocutory.

“An order is either ‘interlocutory or the final determination of the rights of the parties.’” *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 76, 711 S.E.2d 185, 188 (2011) (quoting N.C. Gen. Stat. § 1A-1, Rule 54(a) (2022)). “A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh’g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (citation omitted). Conversely, “[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Id.* at 362, 57 S.E.2d at 381 (citation omitted).

“An order of the trial court remanding an action to an agency for hearing is interlocutory because it directs further action prior to a final decree.” *Byers v. N.C. Sav. Insts. Div.*, 123 N.C. App. 689, 693, 474 S.E.2d 404, 407 (1996) (citations omitted); *Heritage Pointe Bldrs. v. N.C. Licensing Bd. of Gen. Contractors*, 120 N.C. App. 502, 504, 462 S.E.2d 696, 698 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (Mem) (1996). However, “an interlocutory order may be appealed immediately . . . if (i) the trial court certifies the case for immediate appeal pursuant to N.C. [Gen. Stat.] § 1A-1, Rule 54(b), or (ii) the order ‘affects a substantial right of the appellant that would be lost without immediate review.’” *McIntyre v. McIntyre*, 175 N.C. App. 558, 562, 623 S.E.2d 828, 831 (2006) (citation omitted).

When an appellant is appealing an interlocutory order, their statement of the grounds for appellate review “must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.” N.C.R. App. P. 28(b)(4) (2023); *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 19, 824 S.E.2d 436, 438, *disc. review denied*, 372 N.C. 701, 831 S.E.2d 73 (Mem) (2019). Although noncompliance with Rule 28(b) does not normally lead to a dismissal, “when an appeal is interlocutory, Rule 28(b)(4) is not a ‘nonjurisdictional’ rule[,]” and “the *only way* an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right.” *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77-78, 772 S.E.2d 93, 95-96 (2015) (emphasis in original) (citations omitted). Here, the Board does not address the interlocutory nature of their appeal in their brief, but they do provide, in their response to petitioner’s motion to dismiss, several reasons this Court should address their appeal on its merits, and they have also filed a PWC.

In their brief in opposition to petitioner’s motion to dismiss, the Board first claims that the order remanding the matter is a final order. This contention is incorrect, as our precedent clearly states that an order of remand is interlocutory. *Byers*, 123 N.C. App. at 693, 474 S.E.2d at 407; *Heritage Pointe Bldrs.*, 120 N.C. App. at 504, 462 S.E.2d at 698. “[P]resuming, without deciding, [the Board] properly raised the allegation of a substantial right deprivation in their response to

[petitioner’s] Motion to Dismiss the Appeal,” we also address the Board’s argument related to their substantial rights. *SR Auto Transp., Inc. v. Adam’s Auto Grp., Inc.*, __ N.C. App. __, __, 883 S.E.2d 487, 491 (2023).

In the alternative, the Board argues that even if the order is interlocutory, we should review their appeal on its merits, as it affects their substantial rights “in the development and implementation of student discipline policies and procedures” and “in the correct legal application of its student disciplinary policies.” However, the Board presents no legal precedent or argument as to how these alleged substantial rights are affected if the case is remanded to them for a new hearing. Furthermore, the Board contends that since they would be “the tribunal” if the issue was remanded, they would lose the right to appeal the final decision, as only the student can statutorily seek judicial review of board decisions. This argument is likewise without merit.

“A substantial right is ‘a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests *which [one] is entitled to have preserved and protected by law*: a material right.’” *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (alteration in original) (emphasis added) (citation omitted). Here, the Board has no statutory right to appeal *their own decision* and thus no material right which we are required to safeguard by law. See N.C. Gen. Stat. §§ 115C-390.8(g), 115C-45(c) (2022); *Gilbert*, 363 N.C. at 75, 678 S.E.2d at 605. When creating this statute, our legislature

Opinion of the Court

specifically granted students the right to appeal adverse board decisions to the superior court, but they did not include a way for the Board to be able to appeal their own decisions. *See* N.C. Gen. Stat. § 115C-45(c). As a matter of pure logic why would a party seek to appeal a decision which they made. Accordingly, we will not find one today.

As the Board did not meet their burden of demonstrating the order of remand deprives them of a substantial right, we grant petitioner's motion to dismiss this appeal. Accordingly, we dismiss the appeal.

In our discretion, we deny the Board's PWC.

III. Conclusion

For the foregoing reasons, we allow petitioner's motion to dismiss the appeal as interlocutory and deny the Board's petition in our discretion.

DISMISSED.

Judges TYSON and RIGGS concur.

Report per Rule 30(e).