THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2019-001603
Case No. 2019-CP-40-01615

T.D., by and through his guardians, A.D. and J.D.,

Appellants,

v.

Richland County School District Two,

Respondent.

APPELLANTS' FINAL REPLY BRIEF

D. Michael Mathison
Richland County Public Defender's Office
1701 Main St., Suite 103
Post Office Box 192
Columbia, South Carolina 29202
Ph: (803) 766-5170
Fax: (803) 766-5180
Mathison.Michael@richlandcountysc.gov
Attorney for Appellants

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TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iii

Argument 1

I. The Family was Prejudiced by the Use of Incomplete and Inaccurate Transcripts of Proceedings, because they misrepresented the record to the reviewing tribunals and omitted critical evidence related to Student's procedural due process claims. 1

A. The Family objected to the incomplete transcripts at the Board Level and Before the Circuit Court. 1

B. The Family was prejudiced by Respondent's submission of incomplete transcripts and the reviewing tribunal's reliance on those transcripts...2

C. The Board and Circuit Court Relied on the Inaccurate Transcripts rather than the Official Record....................5

D. In the absence of a complete transcript and record, Respondent "revised" the evidence, reinvented the record and simply denied that the evidence existed....................6

E. This Court Should Rely on the Audio Files as the Authoritative Record based on Respondent's Own Policy and Respondent's Representation that the audio files are the best evidence of what occurred during the Evidentiary Hearing on December 12, 2018, and the Board Appeal Hearing on February 12, 2019....................8

II. Doe v. Richland County School District Two does not limit the Scope and Standard of Review, which are controlled by S.C. Code Ann. §§ 1-23-380(5) and 1-23-610(B)....................9

III. The Circuit Court and Respondent misapply the Substantial Evidence Standard of Review by Reviewing the Evidence Blindly from One Side, Conflating the Record of Multiple Hearings and Considering Evidence Expressly excluded from Consideration by the lower tribunal.................... 11

IV. Respondents Arguments under the Rules of Evidence are irrelevant and inaccurate statements of law....................12

V. Contrary to Respondent's assertion, without the Hearsay evidence, there was no evidence, let alone "compelling" evidence to expel T.D. threatening the school – the message for which he was expelled....................14

Conclusion....................16

Table of Authorities

South Carolina Cases

Doe v. Richland County School District Two, 382 S.C. 656 (Ct. App. 2009)..........9, 10

Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). 2, 11

S.C. Dept. of Motor Vehicles v. McCarson, 391 S.C. 136, 148; 705 S.E.2d 405, (2011)..13

State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003)............................ 9

Young v. Charleston County School Board, 397 S.C. 303, 725 S.E.2d 107 (2012) ...2, 3, 9

Federal Cases

Goss v. Lopez, 419 U.S. 565 (1975) 3, 8

U.S. v. Menendez, 48 F.3d 1401, 1409-1410, 5th Cir. (1995)............................ 2

Statutes

S.C. Code Ann. 1-23-380...9

S.C. Code Ann. 1-23-610(B)..9

Court Rules

Rule 613, SCRE...13

Rule 805, SCRE...13, 14

ARGUMENT

This is an appeal from the Richland County Circuit Court's decision to uphold Richland County School District Two's expulsion of student T.D. for the remainder of the 2018-2019 school year. T.D.'s grandparents ("Appellants" or "Family") are the Appellants in this matter. The Appellants filed their Initial Brief and Designation of Matter on January 27, 2020. Respondent School District filed its initial brief on March 27, 2020. Appellants respond to the arguments in Respondent's Brief as follows.

I. The Family was prejudiced by the use of incomplete and inaccurate transcripts of proceedings, because the transcripts misrepresented the record to the reviewing tribunals and omitted critical evidence related to Student's procedural due process claims.

In its brief, Respondents acknowledge that the "meeting minutes" prepared by the Hearing Officer and Halligan, Mahoney & Williams were not a complete record of the proceedings on December 12, 2018. Brief of Respondent, p. 7. They argue that the inaccurate minutes did not result in substantial prejudice to Appellants. Brief of Respondent, p. 7. Respondents also suggest that the Family raised allegations "stating or inferring that Respondent, through its employees or representatives, have intentionally altered or misrepresented documents contained in the record" for the first time on appeal. Id.

The Family has consistently objected to the incomplete and inaccurate transcripts throughout these proceedings. The Family's objections are much broader than Respondent suggests, and the omissions in the transcripts relate to testimony and statements that were critical to Student's Appeal. The Family was prejudiced by the omissions because the Board and Circuit court relied on the incomplete and inaccurate transcripts.

A. The Family objected to the incomplete transcripts at the Board Level and Before the Circuit Court.

First of all, the Family called attention to alterations to the evidence and material omissions in the transcripts or "meeting minutes" prepared by Respondent and Respondent's counsel on appeal to the Board and the Circuit Court. (R. pp. 483; R. pp. 39-45; R. pp. 56-57; R. p. 66; Final Brief of Appellants, pp. 25-28 and *passim*). The Family has consistently argued that the evidence was altered and misrepresented to the Family during the Hearing on December 12, 2018, and that the subsequently produced transcripts of that hearing were incomplete and inaccurate. *See*, R. pp. 39-45; R. pp. 65, 66, 71, Summons and Complaint ¶ 18, fn. 3, ¶ 25, ¶ 40; R. pp. 163-165, 167-170; Initial Brief of Appellant; R. pp. 324-327. The School District has not only acknowledged that administrators altered the evidence to conceal witness information, but have embraced and defended the practice of changing and concealing witness information. [R. p. 145; Memo in Opposition, p. 25].

B. The Family was prejudiced by Respondent's submission of incomplete transcripts and the reviewing tribunal's reliance on those transcripts.

Incomplete and inaccurate transcripts deny an appellant a meaningful review. For a meaningful review to occur, a school Board must have all of the evidence before it. Young v. Charleston County School Board, 397 S.C. 303, 308-309, 725 S.E.2d 107, 109-110 (2012). That includes evidence of procedural due process violations. Under a substantial evidence standard, a reviewing Board is required to consider the record as a whole. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). If a reviewing tribunal does not have crucial portions of the record, the error of failing to provide that record is not harmless. U.S. v. Menendez, 48 F.3d 1401, 1409-1410, 5th Cir. (1995). Moreover, our Supreme Court has held that when a School Board considers an incomplete and inaccurate report of the evidence prepared by the individuals who have already made an adverse determination against a citizen, the appeal procedure is inherently flawed and prone to bias. Young, 397 S.C. 303, 310, 725 S.E.2d 107, 110. This should be

especially true where the grounds for appeal include allegations of hearing officer misconduct. It is not necessary for Appellants to allege or prove deliberate malfeasance by the school administrators. Appellants must only show that the procedural errors resulted in prejudice to the substantial rights of the Appellants. S.C. Code Ann. 1-23-380(5).

Appellants were prejudiced by the incomplete and inaccurate transcripts. Appellants painstakingly cited to these audio files at three levels of review to highlight information altered or omitted in the written record. There were major and material differences between the audio files, the transcripts and the documentary evidence. Respondent claims that "a few words in the students' statements were not accurately transmitted or accurately reflected into the record …."[1] This is an understatement and mischaracterization of the issues raised by the Family. In addition to changing evidence, Respondent omitted almost fifteen minutes of the evidentiary hearing from the transcribed record, [R. pp. 196-210]. Those fifteen minutes included statements and evidence that were critical to Student's appeal.

The Family's appeal to the Board argued, *inter alia*, that the administrators failed to provide an explanation of the evidence and access to the evidence as required by school district policy AR-JKE-R and clearly established federal precedent. [R. pp. 39-45]. Goss v. Lopez, 419 U.S. 565 (1975) (Due Process requires an explanation of the evidence even for a short-term suspension when a student denies misconduct). It also argued that the Hearing Officer demonstrated bias and acted as the prosecutor instead of a neutral adjudicator. [R. pp. 45-48].

Respondent's original minutes [R. pp. 196-201] "condensed" or omitted the first fifteen minutes of the hearing and most of the last fifteen minutes of the hearing, including the Family's testimony in defense of T.D. and the Hearing Officer's prosecutorial tactics. [R. pp. 324 -19;

[1] In its brief, Respondent limits discussion of Appellant's concerns to two misstatements of the evidence during the hearing on December 12, 2018. Initial Brief of Respondent, pp. 7, 12.

Compare R. pp. 196-201, *with* Board Audio 1 and 2, 0:00-8:00 and R. pp. 214-230]. The "condensed" and omitted information was directly relevant to the Family's appeal to the Board and the Circuit Court, including, without limitation, the following:

1. J.D. expressing concerns about not knowing why the proceedings were going forward without charges or any explanation of the evidence.

2. The Hearing Officer's instructions to the Administration and Family that the Administration would disclose the evidence to the Family.

3. Discussion of the prior telephone call between the administrator and J.D. on Tuesday, December 4, 2018.

4. Karis Mazyck's failure to disclose the evidence to the Family, after being instructed to do so by the Hearing Officer.

5. Karis Mazyck's misrepresentation to the Family that they could not receive relevant evidence and would have to obtain all paperwork from law enforcement. [Hearing Audio 2, 6:00-7:40; R. pp, 225, line 9 – p. 226, line 18 ; *Compare* with Policy AR-JKE-R, R. p. 491-492, providing the Family the right to receive all written statements and evidence before the hearing).

6. Karis Mazyck's misrepresentation to the Family that there were no charges against T.D. [Hearing Audio 2, 6:00-7:40; R. pp, 225, line 9 – p. 226, line 18].

7. Alterations to the evidence when read by administrators and the hearing officer, including alterations of the incident report, student witness statements, and investigation follow-up report. *See*, Final Brief of Appellant, pp. 18-21.

8. The Hearing Officer's *ex parte* sidebar conversations with the Administrators about changes to the evidence. [Hearing Audio 2, 34:30-35:06].

9. The Hearing Officer's prejudiced remarks toward the Student T.D. [See, Final Brief of Appellant, pp. 23-27]

10. The Hearing Officer's cross-examination of T.D. using her own evidence, which was not part of the Administration's presentation. [Hearing Audio 2, 38:00-41:42; R. pp. 254, line 21-p. 257, line 23].

The Family objected to the incomplete and inaccurate transcript when filing its supplemental appeal to the Board. [R. p. 483; Email from D. Michael Mathison dated February 5, 2019].[2] The Family quoted portions of the audio files that were not included in the minutes. R. pp. 39-45.

On February 7, 2018, Halligan, Mahoney & Williams, prepared a second version of the minutes, which *still* omitted the first fifteen minutes of the hearing and contained additional alterations of the record as contained in the audio files.[3] The "revised minutes" continued to "condense" and omit items 1 through 6 enumerated above, which were referenced in the Family's Appeal. [R. p. 39-47; Exhibit 26]. Appellant's counsel sent a letter to the Board on February 8, 2019, expressly objecting to the inaccurate, piecemeal renditions of the record, because it omitted information relevant to the appeal. [R. pp. 56-57; A.R. Exhibit 29].

The original and revised minutes were submitted to the Board through an *ex parte* submission, [R. p. 87; Answer and Return, ¶ 32], despite the Family's written objection. On the day of the hearing before the Board, Respondent's attorney, Vernie L. Williams, submitted a letter to the Board suggesting that the Board could disregard the audio files if it chose to do so. [R. p. 58].

C. The Board and Circuit Court Relied on the Inaccurate Transcripts rather than the Official Record.

There is clear evidence that the Board and Circuit Court did disregard the audio files in favor of the incomplete transcripts. One member of the Board stated, "we are just seeing what we read." R. p. 306, l. 4-14. Another stated that she "read the hearing." Appellants' counsel requested that the Circuit Court listen to the audio files, to which the court responded, "Well, I

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[2] Family submitted a copy of Young v. Charleston County School Board, 397 S.C. 303, 725 S.E.2d 107 (2012), in support of its objection. [R. p. 49-55; A.R. Exhibit 26].

[3] Respondent's counsel also sent an email which inaccurately stated that the "revised minutes" included the portions of the hearing referenced in the Student's appeal. [R. p. 482; A.R. Exhibit 32]. That was not accurate. [*Compare* R. pp. 39-47and R. pp. 202-211].

may do that later on." R. p. 315, line 5-20. Subsequently, the judge signed an order that did not include a single statement from the first fifteen minutes of the Hearing on December 12, 2018. The only reference to the entire first fifteen minutes of the evidentiary hearing is a single footnote in the Circuit Court's order. [R. p. 10, fn. 3; Order, fn. 3; Initial Brief of Respondent, fn. 6; R. p. 123, fn. 5; Respondent's Memorandum in Opposition, fn. 5]. Finally, the Order quoted directly from the inaccurate minutes rather than the documentary evidence itself. [R. p. 13-14; Order p. 6-7].

Thus, the Appellants were significantly prejudiced because the Board and the Court relied on inaccurate and incomplete transcripts, which omitted the evidence supporting their claims. The Appellants continue to ask that this Court review the audio files, which are the official record in this case according to Respondent's own policy, AR-JKE-R [R. pp. 492].

D. In the absence of a complete transcript, Respondent freely "revised" the evidence and reinvented the record at will.

In the absence of a complete transcript of the December 2018 evidentiary hearing before the Hearing Officer, Karis Mazyck revised the procedural facts in a statement she read to the Board on February 12, 2019. Although the Board hearing was a "non-evidentiary" hearing, in which Appellants were prohibited from introducing evidence or asking questions of witnesses, Karis Mazyck revised the facts surrounding the procedural due process violations described in the Family's appeal. Respondent and the Circuit Court then referenced and relied on these "revised facts" rather than the actual record of what transpired at the hearing on December 12, 2018.

The Family's appeal cited extensively to the first fifteen minutes of the hearing, which Respondent's counsel did not transcribe. [R. p. 40-44, 46; A.R. Exhibit 26]. In the absence of any transcript of what Lottie Chishom, Karis Mazyck and the Family actually discussed during

the first fifteen minutes of the December hearing, Karis Mazyck provided a "revised" procedural history in her statement to the Board on February 12, 2019. [Board Audio, 1:03-3:18; R. p. 265, line 3 - p. 267, line 13].

In her revised procedural history, Karis Mazcyk claimed that she disclosed the nature of the evidence with Student's grandfather (J.D.) during a telephone call on December 4, 2018. [Board Audio 1:03-3:18; R. p. 265 line 7 - pp. 267, line 13]. In short, she created evidence to counter Student's argument on appeal that the evidence was not disclosed. She made this claim notwithstanding the fact that the audio record of the December 12th hearing clearly showed Mazyck and the Hearing Officer acknowledging that the evidence had never been disclosed to or discussed with the Family. [Hearing Audio 1 and 2, 0:00-8:00; R. p. 215, line 1 – page 226, line 24]. Moreover, the documentary evidence shows that Ms. Mazyck did not have any referral, law enforcement records or students statements until after telephone the conversation with the grandfather on the morning of December 4, 2018.[4] Without a transcript to contradict her, Mazyck expressly represented to the Board that she collected student statements before that call on December 4, even though each of the statements were dated December 5, 2018. [R. p. 265 line 7 - pp. 267, line 13]. At the Board hearing, Appellants' counsel requested the opportunity to cross-examine Ms. Mazyck on her "revised" facts, and pointed out the contradictions. [R. pp. 271, line 15- p. 272, line 8].[5] This request was refused.

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[4] Karis Mazyck's texted Investigator Truluck to discuss her conversation with J.D. around 9:00 a.m. on December 4, 2019. [R. p. 351]. Investigator Truluck emailed the entire law enforcement file on T.D. to Ms. Mazyck that night, and the student's school statements were each signed on December 5, 2019. [R. pp. 353; R. pp. 414-416]. In short, no documentary evidence was available or disclosed to the Family on the morning of December 4, 2018.

[5] Ms. Mazyck also changed her statement to say that she was notified of the allegations against T.D. from the School Resource Officer. [R. p. 265, line 7-13; Board Audio 1:03-3:18]. This contradicted what she told the Family in the omitted portions of the Hearing. On December 12, 2018, she told the Family that she received a call directly from an investigator, and that she had no prior knowledge of the incident before that contact. [R. pp. 220, line 1-line 6]. This was the same investigator she was corresponding with about her efforts to get a statement out of a thirteen year old boy. [R. p. 351-354; R. p. 368]. There was no mention of a school resource officer during the December

The Respondent and the Circuit Court have relied on Karis Mazyck's revised statement to the Board as the definitive version of the facts [R. p. 9; Order, p. 2; R. p. 122; Initial Brief of Respondent, p. 2]. Appellants do not want to advance a "sinister conspiracy," but the "condensed" transcript and the "revised testimony" had the convenient effect of creating a "conflict in the evidence" related to Respondent's violation a child's constitutional rights under Goss v. Lopez.

E. This Court Should Rely on the Audio Files as the Authoritative Record based on Respondent's Own Policy and Respondent's Representation that the audio files are the Best Evidence of What Occurred During the Evidentiary Hearing on December 12, 2018, and the Board Appeal Hearing on February 12, 2019.

The Family has urged this Court to review the audio files of the expulsion hearing on December 12, 2018, and "non-evidentiary" hearing before the Board of Trustees on February 12, 2019, instead of relying on the prior transcriptions prepared by Respondent in connection with this administrative appeal. [Final Brief of Appellant, p. 2]. This Court has granted Respondent leave to supplement the record with new transcripts of audio files. Appellants request that the audio files should continue to serve as the authoritative record, because the audio tapes are the official record according to Respondents Policy AR-JKE-R [R. p. 492]. The Family has continuously argued that the audio files should control the review of this matter, [R. p. 315, ll. 14-20; Final Brief of Appellants, p. 2]. Respondent concurred repeatedly alleging that the audio files were the best evidence of what was said at those hearings.[6] It is axiomatic that a party may

hearing. At least one board member, James Shadd, appeared to place great weight on the involvement of School Resource Officer in his evaluation of the facts. [Board Hearing 31:25-33:32; R. pp. 298, line 16-p. 301, line 4].

[6] Throughout the Answer and Return, Respondent repeatedly instructed the Circuit Court to consider the audio file as the definitive record. [R. pp. 84-85; Answer and Return, ¶ 17 ("[Defendant] would defer to the to the referenced audio recordings, in their entirety, as the best source regarding communications between BMS administration and Plaintiffs prior to and during the hearing on December 12, 2018"); ¶18 ("Defendant admits the audio recording, in its entirety, speaks for itself and would defer to the audio recording as the best source regarding documents introduced and information shared during the hearing."); ¶ 20 ("[Defendant] would defer to the recording of the hearing as the best source regarding Plaintiffs' testimony during the hearing."); ¶ 22 ("[Defendant] admits the audio recording of the hearing is an accurate reflection of communications of those in attendance during the hearing and

not argue one position at the Circuit Court and another position at the Court of Appeals. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

The Family would ask the court to pay particular attention to passages which are not picked up or properly transcribed by Creel Court Reporting. For example, the Hearing Officer's sidebar conversation with an administrator about alterations to the evidence:

> Chishom: "Where is my report, the girl, the girl, something about the girl...
>
> Adminsitrator: "She was in that report [inaudible], but I changed his name on that [Hearing Audio 2, 34:30-34:06].[7]

The tone of the Hearing Officer's interrogation of T.D. is also relevant evidence of the Hearing Officer's bias during the hearing.

Because the audio files should have constituted the authoritative record at the lower levels they should also serve as the authoritative record for this Court.

II. Doe v. Richland County School District Two does not limit the Scope and Standard of Review, which are controlled by S.C. Code Ann. §§ 1-23-380(5) and 1-23-610(B).

Respondents open and close their argument by reciting the standard of review set forth in S.C. Code Ann. §§ 1-23-380(5) and 1-23-610(B). Brief of Respondent, pp. 2 and 27. This is the correct standard of review of a school board decision according to the South Carolina Supreme Court. Young v. Charleston County School District, 397 S.C. at 306, 725 S.E.2d at 108.

However, in its Standard of Review section, Respondent quotes the substantial evidence language from Doe v. Richland County School District Two, 382 S.C. 656 (Ct. App. 2009).

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would defer to the recording as the best source regarding communications made or documents referenced by the Hearing Officer during the hearing."); ¶ 23 ("[Defendant] further admits that the audio recording of the December 12, 2018, hearing accurately depicts documents referenced or introduced during the hearing and the testimony from those present and would defer to the audio recording as the best source regarding the same."]

[7] Creel Court Reporting's transcription of T.D.'s brother's statement at R. p. 257, lines 18-19, is inaccurate. The audio clearly shows the brother stated, "I thought there was no charges." Hearing Audio 2, 41:00-41:42, Final Breif of Appellants, p. 26, and fn. 22].

[Brief of Respondent p. 8]. Respondents suggest that the substantial evidence standard controlled a due process issue raised in Doe. Id. That is not an accurate reading of Doe. The only issue addressed by this Court in Doe, was whether the decision of the Board was supported by substantial evidence in the record. *See,* Doe, 382 S.C. 658 ("Thus, the narrow question before us is whether the Board's decision to uphold the expulsion of Doe ... is supported by substantial evidence."). Because that issue was dispositive, the Court of Appeals did not reach the School District's argument that it provided due process to a student who was not allowed to review evidence used against her in a school expulsion proceeding.

Respondent further contends, "the substantial evidence review was not applied to all issues raised in the appeal, particularly those concerning questions of law or statutory interpretation." Brief of Respondent, p. 14. Respondents did not provide any citation to the Order for this proposition. The order of the Circuit Court actually states:

> "South Carolina courts have not hesitated to apply the substantial evidence review standard even when there have been allegations of procedural defects or violations of due process in student discipline hearings ...[Citing Doe, supra] ... Accordingly, this Court declines to depart from controlling well established precedent, and the appeal should be confined to the record and reviewed under the substantial evidence standard of review."

[Order, p. 5-6; R. p. 12-13]. There is no separately stated standard of review in the order, and the Circuit Court continued to rely on "substantial evidence" to interpret and apply statutes. [Order p. 17; R. p. 24].

Appellants urge this court to apply appropriate standards of review to questions of law.

III. The Circuit Court and Respondent misapply the Substantial Evidence Standard of Review by Reviewing the Evidence Blindly from One Side, Conflating the Record of Multiple Hearings and Considering Evidence Expressly excluded from Consideration by the lower tribunal.

Appellants have consistently contended that substantial evidence review is neither adequate nor appropriate in light of the numerous due process violations before the Hearing Officer and the Board. [R. p. 72-73; Summons and Complaint, ¶ 41;; Supplemental Reply Brief, pp. 24-26, R. pp. 181-183; Final Brief of Appellants, pp. 11-12]. Nevertheless, it is important to note the Circuit Court and Respondent's misapplication of the substantial evidence standard. "'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

The Order of the Circuit Court and Respondent's arguments represent a view of the evidence blindly from one side. There are no references to any of the statements or misstatements made by administrators or the Hearing Officer during the December 12, 2018, evidentiary hearing. Moreover, there are no references or discussion of the contradictory information contained in the law enforcement records, which were withheld from the Family on December 12, 2018. There is no reference to the Hearing Officer's selective, partial publication of the "Investigative follow-up" report, omitting the critical fact that Student K.M. denied receiving any messages from T.D. [Order, p. 7-8; R. pp. 14-15; Initial Brief of Respondent, p. 11]. That portion of the document was not disclosed to the Family during the evidentiary hearing.[8]

[8] The Hearing Officer simply told the family "You talk to the cops..." R. p. 257, line 20.

Not only does the court not address the impact of withheld evidence. The Circuit Court's order blindly ignores facts that were critical to student's argument. For example, the assertion that there is no evidence of a separate snap chat account, [R. p. 16; Order, p. 9], is manifestly contrary to the evidence ultimately disclosed by the administration.[9] In fact, the *only* evidence in the record about the actual snapchat account that sent the messages came from student C.G.'s emailed statement to law enforcement, which stated: "I had already had T.D. blocked on snap chat but he decided to make another snap chat and added me on it that night." [R. 366]. The screenshots also show no fewer than three different screennames and two separate usernames. [R. pp. 419-30, 449-450].

Finally, the Circuit Court did not rely on the same evidence as the Board "to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." The Board stated that *it did not consider law enforcement records* in reaching its conclusion. [R. p. 27]. The Circuit Court, by contrast, relied on the incident report, investigation documents and statements provided to law enforcement, which were expressly excluded from the Board's consideration. [R. p. 13; Order, p. 6].

Accordingly, neither the Board nor the Circuit Court employed the "substantial evidence standard of review" as urged by the Respondent.

IV. Respondents arguments under the Rules of Evidence are irrelevant and misstate the law.

The Family argued that all evidence in the record, including the incident report and investigation documents were unreliable hearsay, which lacked the probative force to sustain a finding of guilt. [R. pp. 65, 66 and 71; R. pp. 173-175; R. pp. 318, p. 328 line 16-24; R. p. 335,

[9] Student C.G. wrote an email to law enforcement stating: "I had already had T.D. blocked on snap chat but he decided to make another snap chat and added me on it that night." The screenshots also show no fewer than three different screennames and two separate usernames. R. pp. 380-392, 419-430, 449-459.

ll. 19-25]. Without addressing Appellants' arguments, the Circuit Court and Respondents claim that the out of court statements offered to prove the truth of the matter asserted therein are not hearsay under the Rules of evidence. [R. p. 15-16; Order, p. 8; Initial Brief of Respondent, p. 14]. This argument is irrelevant to Appellants' contentions and erroneous in light of the actual law on the subject.

First of all, neither Appellants nor Respondent contend that the Rules of Evidence apply to school disciplinary hearings. Accordingly, admissibility under the rules of evidence is irrelevant to the appeal.

Second, police incident Reports are not admissible in administrative proceedings under the "business records" exception to the rule on hearsay. The South Carolina Supreme Court has clearly stated that police incident reports containing the statements and impressions of non-testifying officers are not admissible in administrative hearings under any exception to the hearsay rule. S.C. Dept. of Motor Vehicles v. McCarson, 391 S.C. 136, 148; 705 S.E.2d 405, __, fn. 11 (expressly rejecting the business records exception to permit the admission of an incident report in an administrative hearing). Moreover, as Appellants argued, the incident report and investigation report rife with hearsay within hearsay. R. p. 345, line 15- 19; Supplemental Reply Brief pp. 17-18; R. pp. 174-175. The incident report contains four separate levels of hearsay. [R. pp. 174-175, Supplemental Reply Brief, pp. 17-18; R. pp. 412-13; *See,* Rule 805, SCRE.

The investigation follow up report is not a "prior inconsistent statement" as defined by Rule 613, SCRE, because the document is an anonymous, undated out of court statement offered to prove the truth of the matter asserted – namely, that the accused confessed. R. pp. 362-63; 417-418. Extrinsic evidence of a prior inconsistent statement is only admissible if "the witness is advised of the substance of the statement, *the time and place it was allegedly made, and the*

person to whom it was made, and is given the opportunity to explain or deny the statement." The record reflects that the T.D. was not advised of any of that information. Indeed, the Hearing Officer couldn't have advised him of those facts, because the Investigation Follow-Up does not have any identified author. R. pp. 362-63; 417-418. Because there is not an exception for each level of hearsay, the document would be excluded under the rules of evidence. Rule 805, SCRE.

V. Contrary to Respondent's assertion, without the Hearsay evidence, there was no evidence, let alone "compelling" evidence to expel T.D. threatening the school – the message for which he was expelled.

Respondent argues that even if the law enforcement hearsay and student hearsay statements were excluded there was still evidence to support the expulsion decision. This contention is manifestly without merit. Respondent writes:

> "Appellants claim they were prejudiced by their inability to cross-examine students who provided written statements to the administration and law enforcement officials who provided the investigative report. However, absent these statements and reports, there was still compelling evidence to support the Board's conclusion as noted in the administration's testimony and the copies of the actual screenshots."

Brief of Respondent, p. 17. Respondent suggests that putting hearsay statements of non-testifying witnesses into the administrators' mouths negates their hearsay nature. It does not. Rule 805, SCRE. Additionally, Respondents blur the record to expand the original basis of expulsion beyond what was discussed on December 12, 2018.

Without the hearsay statements of students and law enforcement there was no evidence at the December 12, 2018, hearing linking T.D. to threatening to shoot up the school. The testimony of the administrators was simply an echo of the hearsay statements – and the hearsay statements of law enforcement and other children were simply the echo of C.G.'s claim that T.D. sent the message.

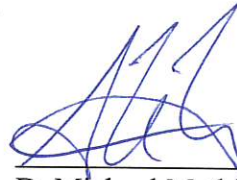
At the evidentiary hearing, the Hearing Officer claimed to have only one screenshot. [Hearing Audio 2, 29:26 to 30:30; R. pp. 247, line 25 - p. 248, line 15; R. p. 207]. That screenshot had no name, no phone number, no screenname, no username or any other identifiable feature that could link it to T.D., [R. p. 449; R. p. 419], and it did not come from T.D.'s known account. [R. 366]. Respondent now claims the Hearing Officer and Board based their decision on the additional screenshots, which were submitted to the Board, *ex parte*.[10] This is a conflation of the record of two separate hearings, and a *post hoc* justification that contradicts the actual decisions. The Hearing Officer did not include any reference to *any* screenshots in her summary of the evidence. [R. pp. 31-32]. As noted above, the Board claimed it did not consider any law enforcement records [R. pp. 27-28], which would include the additional screenshots sent to Mazyck by law enforcement or sent to the Board *ex parte*. Without the untestable hearsay statements of students and law enforcement there was no substantial evidence in the record to expel T.D. for sending the threatening message about the school.

Finally, Respondent's shifting rationales demonstrate the fallacy of their arguments. Additionally, they contradict Respondent's claim that the *ex parte* communications to the Board were not material. [Brief of Respondent, p. 18]. Respondent now claims that the screenshots submitted to the Board *ex parte* are "compelling" evidence rather than an immaterial *ex parte* submission.

[10] Appellants had proposed to introduce clean copies of these messages [R. pp. 449-459], which show the times they were sent, but that request was refused by the Board. Respondent submitted a dozen screenshots to the Board without notice to the Appellants.

Conclusion

The Appellants respectfully request this Court to thoroughly review the record in this matter, including the audio files, which contain material evidence about the unfair and inquisitorial process used in this student discipline case. The Appellants ask that this Court reverse the Order of the Circuit Court on all issues.



D. Michael Mathison
Richland County Public Defender's Office
1701 Main St., Suite 103
Post Office Box 192
Columbia, South Carolina 29202
Ph: (803) 766-5170
Fax: (803) 766-5180
Mathison.Michael@richlandcountysc.gov
Attorney for Appellants

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