

DANIEL SHIFFLETT,

Appellant

v.

CAROLINE COUNTY  
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 22-09

## OPINION

### INTRODUCTION

Daniel Shifflett (“Appellant”) filed an appeal of the Caroline County Board of Education’s (“local board”) opinion affirming the decision of the Interim Superintendent to ban Appellant from entering on any Caroline County Public Schools property or attending school-related functions until further notice. The local board filed a Response to the Appeal. Appellant responded and the local board replied.

### FACTUAL BACKGROUND

Appellant is the father of students enrolled in Caroline County Public Schools (“CCPS”). During the 2021-2022 school year, CCPS implemented a mask wearing policy for its system, including students. Appellant had concerns about this policy, and he repeatedly attempted to contact the Interim Superintendent, Dr. Derek Simmons, to voice his opinion on the matter. On or around August 19, 2021, Appellant called the local board offices multiple times seeking to speak to the Interim Superintendent. Two office staff received several calls from Appellant.<sup>1</sup> These calls involved Appellant asking persistent and repeated questions about the mask policy, asking where the Interim Superintendent was in order to speak with him, stating that he knew the Interim Superintendent’s home address, expressing his disgust with the masking policy, and threatening to file a civil suit. Appellant recorded at least one of these calls without the permission of CCPS staff. (T. 29-33, 40-43).

On August 19, 2021, the Interim Superintendent was at North Caroline High School for a new teacher practice. Appellant contacted the high school multiple times and asked to speak to him. When the Interim Superintendent finished the training, he took a call from Appellant. Appellant shared his dissatisfaction with the mask policy and indicated that it could be child abuse. The two men engaged in a back and forth before ending the call by agreeing to disagree. (T. 90-93).

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<sup>1</sup> Appellant refused to provide his name during these calls. However, staff wrote his phone number down from caller ID during each call. They were later able to identify the caller as the Appellant. While Appellant disputes the tone and tenor of these calls, he does not deny calling CCPS staff.

On August 23, 2021, members of the local community organized a protest of the mask policy outside the local board offices. While not allowed in the building, protestors were able to congregate on the sidewalk and grassy area outside the building. The protest was scheduled for approximately one hour from 3:30-4:30pm. Approximately 80 individuals attended the demonstration, including Appellant and his family. (T. 60-61).

During the protest, Appellant entered the building, where he initially encountered the CCPS receptionist secretary, Ms. W■■■■. Ms. W■■■■ asked the Appellant how she could help him, and he initially inquired about the process for withdrawing his children from CCPS. While Ms. W■■■■ answered his question, Appellant changed topics and began asking for the Interim Superintendent and voicing his concerns with the mask policy. (T. 43).

Appellant's persistent questioning caught the attention of the CCPS Communications Officer, Ms. B■■■■, seated in her office near reception. Ms. B■■■■ went to the boardroom where CCPS School Safety Security Coordinator, Mr. G■■■■, and Caroline County deputies, who were in the building to ensure the protest remained peaceful, were watching the protest from the windows. Ms. B■■■■ informed the men that someone was pestering Ms. W■■■■. The deputies advised Ms. B■■■■ to ask the Appellant to leave. Ms. B■■■■, accompanied by Mr. G■■■■, went to the reception area, introduced herself to the Appellant, and asked him to leave the building. Appellant asked Ms. B■■■■ why he had to leave the building then continued to ask questions about the mask policy. Ms. B■■■■ returned to her office for a business card, which she gave to the Appellant asking him to email her his questions. Ms. B■■■■ told Appellant he could leave, and Appellant stated he would wait for the Interim Superintendent.<sup>2</sup> Ms. B■■■■ and Mr. G■■■■ left to consult with the deputies, and a decision was made to let Appellant remain given the building would be closing for the day in 15-20 minutes. Appellant remained in the building for another 5-10 minutes, but ultimately left of his own volition before the close of business at 4:30pm. Throughout his time in the building, Appellant videoed his encounters with staff without notifying them. (T. 52-55, 59).

Upon leaving the building, Appellant joined a group of the protestors. At the close of the business day, staff began to leave the building for their cars in the parking lot. When Ms. W■■■■ exited the building, the Appellant saw her and allegedly stated, "Here comes Ms. W■■■■," and "We're getting all their [license plate] numbers." (T. 46). When Ms. B■■■■ decided to leave, Mr. G■■■■ offered to get her car and drive it around for her, so she would not have to interact with the protestors. At this time, Mr. G■■■■ saw Appellant. Although he did not find Appellant threatening, Mr. G■■■■ heard Appellant say something about having gotten a copy of the car he was driving. (T. 65).

Also exiting the building that day was Ms. A■■■■, an instructional supervisor for CCPS. On the way to her car, Ms. A■■■■ observed Appellant and another man who appeared to be filming with cell phones. Ms. A■■■■ allegedly heard Appellant say he had her license plate number and would follow her to Delaware. As she was getting into her vehicle, she heard a male voice call her an "f\*cking c\*nt." She left the parking lot without further incident. (T. 80-84).

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<sup>2</sup> Appellant disputes that staff asked to leave the building twice. He maintains that he was asked to leave the building once, but staff continued to talk with him.

Ms. J■■■■■, a data systems operator for CCPS, also encountered protestors when she left the building that day. Upon walking to her car, Ms. J■■■■■ was approached by four individuals, including Appellant. Appellant was filming with his phone, and allegedly said he would get her license plate number. Ms. J■■■■■ also claimed to hear Appellant call her an “f\*cking b\*tch.” Ms. J■■■■■, upset, called the office to report what happened. The Interim Superintendent made the decision to have the remaining employees escorted to their vehicles and to shut down the building for the night. (T. 74-77, 95).

On August 27, 2021, based on employee statements and pursuant to Education Article § 26-102, the Interim Superintendent sent a letter to Appellant denying him access to CCPS buildings and property. The letter read in part:

On Monday, August 23, 2021 you entered the Board of Education office building. You were recording CCPS employees while they were working. When asked to stop recording, you did not comply. After interacting with the CCPS Communication Officer, you were asked to leave but did not comply with the request at the time it was made. While in the parking lot of the Board of Education office, you were observed approaching staff members as they were leaving the building for the work day. You engaged with staff in a manner that was disrespectful and included profane language and intimidation. This behavior is unacceptable and will not be tolerated on school system property. (Local Board, Ex. A- Joint 2).<sup>3</sup>

Appellant subsequently filed an appeal of the Interim Superintendent’s decision to the local board. Appellant stated that he was exercising his First Amendment rights on the day in question, and he disputed that he refused to leave the building, used profane language, or acted in a disrespectful manner. (Local Board, Ex. A- Joint 1).

On October 27, 2021, the local board, led by board counsel acting as the Hearing Facilitator, held a closed hearing to hear the parties’ arguments and take evidence. The Interim Superintendent was represented by counsel. The parties jointly submitted Appellant’s appeal letter and the Interim Superintendent’s letter to the local board. Counsel for the Interim Superintendent also called the Interim Superintendent and six staff members to testify to Appellant’s behavior, and she moved for statements from the staff members to be entered into evidence.

Appellant, who appeared without counsel, did not present any witnesses, but testified on his own behalf. Appellant argued that he never used bad language or acted in a disrespectful manner towards staff. He also stated that he never intended to intimidate or make anyone feel uncomfortable with his actions. Appellant pointed to some discrepancies in the staff members’ written statements and oral testimony.

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<sup>3</sup> The letter did not have an end date for the ban from school property. The Interim Superintendent clarified that while the assumption was the ban would last for a year, he was reviewing it on a monthly basis. He also stated that he was unaware of the Appellant violating the order.

Appellant requested to present video footage from his phone as evidence in support of his testimony disputing the staff members' accounts. Appellant stated that the footage would start from before he entered the building until after he exited. He alleged it would show that he was asked to leave the building only once but was subsequently engaged in conversation by Mr. G■■■■. Appellant also had video from when the employees began exiting the building and his interaction with the employees, which he believed would substantiate his claims that he never used profanity, said anything about following anyone home, or otherwise acted in a threatening manner. (T. 109-113). Counsel for the Interim Superintendent objected to admission of the videotape on the grounds that it was allegedly made in violation of Maryland's Wiretap law, claiming Appellant did not have the right to film staff without their knowledge. The Chairman of the local board commented that he was concerned that if the videos were admitted, then the local board would need to ask digital professionals to review the video to determine whether it was edited in any way, which would turn the hearing into a multi-day event. The Chairman asked the Hearing Facilitator to consider this when making his ruling. (T. 118).

The Hearing Facilitator sustained counsel's objection to the evidence. He made this decision on the basis that Appellant filmed staff without their consent, which in his opinion meant the videos were illegally obtained, and therefore, inadmissible. The Hearing Facilitator also found that the videos did not "go to the fundamental issue of the basis for the current penalty...because [d]isrupting or disturbing the normal education function of the institution doesn't depend on whether [Appellant] uttered profanity." (T. 120-121). The Hearing Facilitator went on to state that while the video recorded in the parking lot may have been permissible, there was no way to verify that the video had not been edited and Appellant failed to bring a qualified expert to testify to it.

The local board continued to question Appellant about the videos, sharing their opinion that the videos were illegally obtained. Appellant argued he was allowed to film government officials in public spaces. Appellant also testified the Interim Superintendent's ban was impacting his children as he was not able to attend events at the schools, take his children to extracurricular sports, or watch games.

On November 11, 2021, the local board issued an opinion in the matter. The local board affirmed the decision of the Interim Superintendent and denied the appeal. The local board found Appellant's behavior, including "the repeated telephone calls, video-taping despite request to stop, video-taping and recording activities without permission, aggressive and threatening behavior toward employees attempting to perform their customary duties and responsibilities, refusal to leave an administrative building despite request and further aggressive behavior in the parking lot," was a deliberate disturbance to the reasonable conduct of school system activity. (Local Board, Ex. A).

This appeal followed.

## STANDARD OF REVIEW

Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered *prima facie* correct. The State Board will not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.06A. Appellant bears the burden of proof by a preponderance of the evidence. COMAR 13A.01.05.06D.

## LEGAL ANALYSIS

Education Article §26-102(b)(3) provides a local Superintendent with the authority to deny access to school system buildings or grounds to any person who acts in a manner that disrupts or disturbs the normal educational functions of the local school system. In the case at hand, the local board affirmed the Interim Superintendent's decision to ban Appellant given his manner on phone calls to CCPS staff, recording of conversations and interactions with CCPS staff without consent, failure to leave the local board offices when asked, and profane and hostile comments in the local board parking lot. Appellant appeals this decision, arguing that he was entitled to record staff under the First Amendment and that CCPS staff lied about his involvement in the events of August 23, 2021.

### *Motion to Dismiss*

The local board in response to the appeal asks the State Board to dismiss the appeal for failure to “specifically state the facts necessary to understand the appeal; failure to articulate the issues for which the appeal is taken; failure to provide reasons for the appeal; and failure to articulate the relief sought.” We find that Appellant has appropriately filed this complaint and provided a sufficient basis for his appeal. We decline to dismiss.

### *Exclusion of Evidence*

Appellant objects to the decision of the local board to exclude the video recordings taken on his cell phone of the August 23, 2021 events. The Meeting Facilitator ruled in favor of the Interim Superintendent's objection to the evidence on the basis that it was illegally obtained in violation of Maryland's Wiretap law. The Meeting Facilitator also noted that the video recording was turned off in between the encounter in the building and the encounters with staff in the parking lot, and as there was no expert witness to testify to the veracity of the video, the recordings were inadmissible. (T. 122-123). In the local board opinion, the local board stated it “determined not to view and admit the video on the grounds that it was obtained without disclosure to or permission of the Board employees recorded; violated the Maryland wiretap statute; and was not relevant to the behaviors testified to by the Superintendent's witnesses providing the basis for the Superintendent's disciplinary action.” (Local Board, Ex. A, p. 4).

Appellant argued at the hearing and in his appeal that he was legally entitled to record his encounters with staff as there was no reasonable expectation of privacy. We concur. The Maryland Wiretapping and Electronic Surveillance Act, Md. Code Ann., Cts. and Jud. Proc. §10-401 *et seq.*, protects individuals from the interception of their private conversations, thereby

maintaining their reasonable expectation of privacy in their conversations. *Agnew v. State*, 461 Md. 672, 683 (2018). The local board failed to consider whether the CCPS staff recorded by Appellant had a reasonable expectation of privacy in their interactions with Appellant.

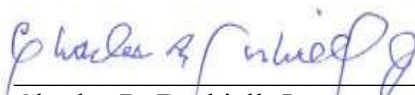
The Maryland Court of Special Appeals applies a two-prong test to determine whether an individual has a reasonable expectation of privacy. The Court asks first whether the individual exhibited an actual subjective expectation of privacy with regard to his statements[,]” then “whether that expectation is one that society is prepared to recognize as reasonable.” *Malpas v. State*, 116 Md. App. 69, 84 (1997) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)). There were at least two recordings taken by Appellant – one in the lobby of the local board building and the other in the parking lot of the local board. We note that both locations are public. In addition, there were multiple individuals present for both recordings. The conversations were not conducted in private offices or in hushed tones. Therefore, we do not find that any of the CCPS staff involved had an actual subjective expectation of privacy in the conversations, thus placing these conversations outside the purview of the Maryland Wiretap law.

Furthermore, we disagree with the local board that the videos were not relevant to the behaviors testified to by the witnesses. Appellant proffered that the videos captured his interactions with the witnesses, including his oral communications with the witnesses. This could not be more relevant to the behaviors forming the basis of the Interim Superintendent’s decision to ban Appellant. As such, we find the local board erred in denying Appellant’s evidence by misapplying the Maryland Wiretap law and finding the videos irrelevant.

Therefore, applying our standard of review, we find the local board committed an evidentiary error when it: (1) illegally excluded the evidence under a misapplication of the Maryland Wiretap law, and (2) unreasonably found the proffered evidence irrelevant. We now consider the appropriate remedy for this evidentiary error. The local board upheld the Interim Superintendent’s decision citing evidence that Appellant engaged “in repeated telephone calls, video-taping despite request to stop, video-taping and recording activities without permission, aggressive and threatening behavior toward employees attempting to perform their customary duties and responsibilities, refusal to leave an administrative building despite request and further aggressive behavior in the parking lot[.]” (Local Board, Ex. A, p. 5). The video recordings allegedly address all of these findings with the exception of the repeated telephone calls. Given most of the local board’s findings may be impacted by the admission of Appellant’s recordings, we believe that the rules of fundamental fairness demand that we remand the case back to the local board for review and consideration of Appellant’s evidence. Upon correction of the evidentiary error, the local board shall issue a new opinion that includes consideration of the recordings.

## CONCLUSION

For the foregoing reasons, we remand the case to the local board for admission and consideration of Appellant’s video evidence.



Charles R. Dashiell, Jr.  
Vice-President



Shawn D. Bartley



Chuen-Chin Bianca Chang



Vermelle Greene



Jean C. Halle



Rachel McCusker



Lori Morrow



Warner I. Sumpter



Holly C. Wilcox

Absent:

Clarence C. Crawford

Gail H. Bates

Susan J. Getty

Joan Mele-McCarthy

March 22, 2022