UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 692

September Term, 2015

PATRICIA SULLIVAN

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.

Woodward,
Leahy,
Wilner, Alan M.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Leahy, J.

Filed: March 13, 2017

Patricia Sullivan ("Appellant") was terminated from her job as a special education teacher for Montgomery County Public Schools ("MCPS") on September 12, 2012, after receiving three reprimands for failing to comply with MCPS's Regulation JGA-RA on Classroom Management and Student Behavior Interventions ("Behavior Interventions Regulation"). The termination centered on three incidents where Sullivan was alleged to have used physical and mechanical restraints inappropriately to manage the behavior of her special needs students.

Sullivan unsuccessfully sought administrative review of her termination with the Montgomery County Board of Education ("County Board") and the Maryland State Board of Education ("State Board") (collectively, "Appellees"). Sullivan sought judicial review of the State Board's decision in the Circuit Court for Montgomery County. On appeal from the circuit court's May 4, 2015 opinion and order affirming the decision of the State Board, Sullivan presents three questions for our review, which we have reordered:

I. "Was [the] decision of the agency to support the reprimand given appellant for allegedly having used a 'mechanical restraint' in her second incident arbitrary or capricious given the vagueness of the definition, her professional understanding of the term 'mechanical restraint,' the exigent circumstances, and the non-compliant and inconsistent training in behavioral management from her employer?"

II. "Was the decision of the agency as to the third incident based on cherry-picking the testimony of one multiply-discredited witness such that the agency's decision was either unsupported by competent, material, and substantial evidence or arbitrary or capricious?"

III. "Was the exclusion of evidence generated by the appellant's employer and of the agency's own pronouncements on the subject matter of the dismissal arbitrary or capricious?"

For the reasons stated herein, we affirm the State Board's decision upholding Sullivan's termination from her employment with MCPS.

BACKGROUND

Sullivan worked for MCPS as a special education teacher since 1997. Beginning in 2006, she worked at Baker Middle School as a school/community-based teacher working with children with special needs, and later in 2011, she was transferred to Rockville High School where she worked as an instructor in the Learning for Independence Program. On September 12, 2012, MCPS terminated Sullivan for three incidents of alleged inappropriate physical interactions with her special needs students.[1]

First Incident: Food Aversion Therapy

The first incident occurred on May 11, 2011, while Sullivan served as a special education teacher at Baker Middle School. The students in Sullivan's classroom were participating in a group cooking activity in which each student added an ingredient to a bowl. One student, who was on the autism spectrum with a known tendency to spit on

[1] Out of concern for the students' privacy, this decision will not identify any of the students by name.

people and objects, spat into the bowl. Sullivan immediately responded with a behavioral intervention method known as aversion therapy. The aversion therapy technique "seeks to stop disruptive behavior by creating a negative association with that behavior." Sullivan threw some of the contents of the bowl into the student's face and on the student's shirt before giving a verbal reprimand.

As a result of this incident, MCPS placed Sullivan on administrative leave on May 19, 2011. MCPS issued a formal reprimand for Sullivan's "failure to exercise professional judgment expected of a [MCPS] employee" in a letter dated August 19, 2011. The reprimand also served to notify Sullivan that MCPS does not subscribe to aversion therapy and that there would be more severe disciplinary action for future instances of improper behavioral management techniques. Sullivan does not contest this reprimand and has apologized for her behavior.

Second Incident: Wrestling Mat

The second incident occurred on September 2, 2011, less than a week after MCPS cancelled a revised behavioral management techniques training for teachers and staff that Ms. Sullivan had signed-up to take. A student in Sullivan's class became upset when Sullivan tried to direct him to a new activity. According to Sullivan's testimony, the student kicked her, bit her forearms, pulled an earring out of her ear, and began striking other students. After failing to control the student with alternative methods, Sullivan, with

assistance from a Para educator, proceeded to surround the student with a large wrestling mat as a means to protect the other students. Sullivan kept the student inside the mat while he continued to act violently, and instructed the Para educator to use a walkie-talkie to summon the school principal to the classroom. When the school principal arrived and observed the student surrounded by the mat, she ordered Sullivan to release the student. The principal informed Sullivan that using a mat as a restraint is a procedure outside of MCPS protocol.

Sullivan was placed on administrative leave while MCPS investigated the incident. Child Protective Services was notified of this incident. After an investigation, CPS notified Sullivan, in a letter dated November 3, 2011, that it ruled out child neglect and would expunge Sullivan's record. While Sullivan was on administrative leave, she was prohibited from entering MCPS property and was not permitted to attend the rescheduled teacher training sessions on behavioral intervention techniques.

Third Incident: Hallway Incident

At the conclusion of MCPS's investigation of the second incident, on October 26, 2011, Sullivan was transferred to Rockville High School where she taught in the Learning for Independence program.[2] Shortly after her transfer, Sullivan attended a Crisis

[2] The Learning for Independence Program teaches life skills to special needs students.

Prevention and Intervention training provided to the high school's staff. This training covered behavioral intervention methods.

On May 16, 2012, Sullivan's students were scheduled to attend a community field trip. One of her students, who had Fragile X syndrome and autism, was vacillating between staying at school and attending the community field trip. Apparently the student stood at the door of the bus, but would not board the bus. Sullivan asked the student whether he wanted to attend the field trip or remain in the school. The student was indecisive and did not convey his preference to Sullivan. After Sullivan waited for the student's response and did not receive one, she placed her hands on the student's backpack to escort him back to the classroom.

A Para educator accompanying Sullivan recalled that the student dragged his feet, requiring Sullivan to push him along, but not in a "malicious or forceful way." Upon arriving at the classroom, the student did not want to go inside. According to Sandra Boyke, a teacher in Learning for Independence program, Sullivan pushed the student into the classroom while he held onto the threshold of the classroom door. Sullivan disputes this characterization, and, instead, avers that she was supporting the student because he refused to move and could fall.

Boyke testified at the January 17, 2013 hearing that she was standing with Ms. King, a security officer, when she observed Sullivan pushing the student. In response, Boyke

yelled down the hall at Sullivan to stop pushing the student. When Sullivan did not comply, Boyke testified that she ran down the hall to them. Boyke intervened and told Sullivan to "just back off." Sullivan returned to the bus and took the students on the field trip. Meanwhile, the student complained that Sullivan hurt him and that his arm was in pain. Boyke observed "some red marks on his upper shoulders" and took the student to the nurse. The nurse's health room report states that there were "no visible marks" on the student.

The principal of Rockville High School reprimanded Sullivan for this incident in a letter dated May 21, 2012. Sullivan filed a grievance on June 5, 2012, asserting that the reprimand was issued without proper cause and requesting the May 21, 2012 reprimand be removed from her file and destroyed. MCPS placed Sullivan on administrative leave on June 10, 2012. The principal denied her grievance on June 12, 2012. Sullivan then unsuccessfully appealed her grievance to the county superintendent and to the Department of Association Relations. On September 12, 2012, the superintendent for MCPS recommended the County Board terminate Sullivan's employment on the "grounds of insubordination, willful neglect, and misconduct in office."

Proceedings Before the County Board

In response to the superintendent's recommendation to terminate her employment, Sullivan requested a hearing before the County Board. A hearing examiner conducted a

two-day evidentiary hearing on January 17 and 18, 2013.[3] After considering the evidence presented in the case, the hearing examiner noted that Sullivan "continued to use . . . unsanctioned physical contact after being warned about her behavior on two prior occasions," and found that this fact was "an indication that she either won't or can't conform her interactions with students on the rules and regulations of MCPS." As a result, the hearing examiner concluded that Sullivan's actions constituted misconduct in office. The hearing examiner also found that Sullivan's actions constituted insubordination because, despite various warnings, "she failed to adhere to the earlier directions to her to conform her conduct to MCPS standards." Finally, the hearing examiner found that Sullivan's "failure to obey the directives regarding utilizing behavior techniques acceptable to MCPS and her use of unsanctioned physical control practices were willful neglect of duty." In a written opinion and recommendation dated May 28, 2013, the hearing examiner found that the record fully supported the MCPS superintendent's recommendation to terminate Sullivan for misconduct in office, insubordination and willful neglect of duty.

The County Board heard oral arguments on July 15, 2014. On September 23, 2013, the County Board voted to adopt the hearing examiner's findings and recommendation,

[3] Sullivan did not present evidence regarding MCPS's lack of compliance with state restraint regulations—an allegation she makes on appeal—during the evidentiary hearing.

and dismissed Sullivan from MCPS employment. The County Board's decision also considered several arguments that Sullivan raised in a post-hearing brief. First, Sullivan argued that, since her dismissal recommendation was based on the totality of three incidents, failure of rationale for any one of them would defeat the rationale for dismissal. The County Board found that sufficient evidence supported the findings for all three incidents and dismissed this argument. Second, Sullivan averred that she proved that her actions were neither violent nor aggressive. The County Board explained in its written decision and order, however, that the question presented in the case was not whether Sullivan was violent or aggressive, but rather, whether she engaged in misconduct, insubordination, and willful neglect of duty. Relying on security video footage, Sullivan also challenged the credibility of testimony from teachers who observed the third incident.[4]

[4] During the January 17, 2013 proceedings before the hearing examiner, one of the teachers testified that she saw Sullivan pushing the student and that the teacher then "ran down the hall." However, the hearing examiner noted that the video contradicted any suggestion that the teachers "'ran' or moved quickly towards Sullivan." The hearing examiner's written decision described the security video as consisting of three different segments. He described how the video shows Sullivan coming into the school with "her hands on [the student's] back or on the backpack[.]" He added that "Sullivan [was] directing his movement forward by exerting pressure with her hands on his back." He then described how, by the time Sullivan was within view of the third camera, "she [did] not appear to be applying any force through her hand" while "three individuals [were] moving toward the side of the hallway." Sullivan and the student then "appear[ed] to be in a scuffle in the hallway" and "[a]s the pushing and shoving" continued, the video showed two teachers "move slowly up the corridor without an apparent sense of urgency."

However, the County Board noted that the hearing examiner found the witnesses credible, and acknowledging the discrepancies that Sullivan highlighted, the Board explained:[5]

> The testimony of all of the witnesses (save Ms. Sullivan) and the videotape are fundamentally consistent on the major elements: Ms. Sullivan had her hands on the student (inappropriately): she was pushing the student: this conduct resulted in the student becoming very agitated and vocal: and some form of physical event, whether characterized as a scuffle or otherwise, occurred. The incident may have been more aggressive or forceful, as some testimony suggests, but the superintendent found the conduct of Ms. Sullivan to be inappropriate and the Board agrees.

Sullivan also argued that MCPS did not use "progressive discipline" in her case, and noted that employers generally use increasingly severe disciplinary actions following each similar violation. However, the County Board found that the three incidents were so similar that the reprimands that were given to Sullivan constituted progressive discipline. Moreover, the Board underscored that the key issue was whether Sullivan had engaged in misconduct, insubordination, or willful neglect of duty.

Finally, Sullivan argued that her termination recommendation was in retaliation for having filed a grievance. The County Board concluded, however, that her "retaliation argument relie[d] entirely on temporal juxtaposition" and concluded that, through an independent examination, the evidence was sufficient to support her termination.

[5] Written statements by various MCPS staff who observed the third incident all described Sullivan as "pushing" the student along the hallway.

Proceedings Before the State Board

On October 31, 2013, Sullivan appealed the County Board's decision to the State Board. The State Board, in turn, referred the case to the Office of Administrative Hearings ("OAH") on November 12, 2013. An OAH administrative law judge ("ALJ") conducted a hearing on February 20 and 24, 2014.

At the hearing, Sullivan sought to introduce twelve new exhibits that she had not offered into evidence at the proceeding before the County Board. The ALJ denied admission of ten of the twelve exhibits including a positive performance evaluation of Sullivan dated May 5, 2011; reports summarizing the findings of child protective services investigations of the two incidents that occurred in 2011; a letter dated June 6, 2011 from the Maryland State Board of Education notifying the County Board of its noncompliance with restraint and seclusion regulations; a letter dated May 29, 2012 scheduling Sullivan for an evaluation in response to the Rockville High School's principal's concerns about Sullivan's job performance; and email correspondence dated August 8, 2011 between Sullivan and the principal of Baker Middle School seeking advice to comply with school policies. The ALJ admitted the definition of mechanical restraint from a Google search and a U.S. Senate Committee Report titled Dangerous Use of Seclusion and Restraints in Schools Remains Widespread and Difficult to Remedy: A Review of Ten Cases.

Sullivan argued that she should not have been terminated based on the three incidents because her actions in the third incident were not violent or aggressive. She again challenged the credibility of the teachers who observed the incident and served as the County Board's witnesses, maintaining that a security video showed that she escorted the student in a calm and peaceful manner.[6] Sullivan also averred that the reprimands were not for similar conduct and thus could not be aggregated to justify termination. Sullivan further contended that the facts in the second incident did not comport with the definition of mechanical restraint. Finally, she noted that MCPS gave her little direction on how to change her behavior management techniques and that she should have been allowed to rely on her common sense interpretations of the regulations.

The County Board responded that Sullivan reacted to the students with anger and frustration in each of the three incidents and that the County Board lost confidence in Sullivan's judgment or ability to manage student behavior. The County Board also

[6] After reviewing the video, the ALJ described the images as showing that Sullivan "had two hands on [the student's] back and her gait demonstrated a pushing action . . . . she was clearly directing [the student's] movements down the hallway against his will." The ALJ noted that: "[t]he video does confirm that neither [of the testifying teachers] ran up the hallway towards [Sullivan] and [the student]. However the video does make clear that something caught their attention[.]" According to the ALJ, the video shoes that "[t]here [was] a vague movement at the end of the hallway, as if there was a scuffle between [Sullivan] and [the student]." The ALJ concluded that the video showed that the testifying teachers "moved in their direction as if they needed to intervene."

averred that Sullivan did not produce any evidence that she was prevented from attending behavior management trainings and noted that she refused to attend monthly refresher courses that took place after hours. Lastly, the County Board found that Sullivan never met with the behavior intervention specialist who was charged with advising and training teachers on behavior intervention matters.

The ALJ recommended that the State Board affirm Sullivan's termination, finding that Sullivan was insubordinate for refusing to obtain behavioral intervention training and neglected her duties by using inappropriate behavioral intervention techniques with her students.

Sullivan filed exceptions to the ALJ's recommendation. In response, the State Board heard oral arguments on August 24, 2014. During the hearing, Sullivan presented eight exceptions to the ALJ's decision:

> (1) additional evidence offered by [Sullivan] at the hearing was improperly excluded; (2) the ALJ did not read the record evidence; (3) the ALJ improperly stated that [Sullivan] did not contest the local board's version of the facts in each of the three incidents at issue; (4) the ALJ improperly construed MCPS policies; (5) the ALJ failed to address a question raised by [Sullivan] about whether a second reprimand constituted disparate discipline; (6) the ALJ failed to address the question of whether a teacher is entitled to rely on the written policies of her employer; (7) the ALJ improperly rejected her claim of retaliation; and (8) the ALJ improperly rejected her argument that MCPS's actions in connection with the second incident constituted a breach of the duty of good faith and fair dealing [to place students in Sullivan's class without appropriate behavioral support].

The State Board rejected all of Sullivan's exceptions. Regarding the admission of new evidence, although the evidence was material, the State Board concluded that Sullivan did not offer a "good reason" for failing to introduce the evidence at the evidentiary hearing before the County Board as required by the Code of Maryland Regulations ("COMAR") 13A.01.05.04C.

The State Board agreed with Sullivan that the ALJ erred in three factual findings, but it found that the errors were not material.[7] The State Board then noted that "[a]lthough [Sullivan] is unhappy with the conclusions reached by the ALJ, that does not mean that the ALJ failed to take into account her version of events or improperly viewed the facts as being entirely uncontested." The State Board ultimately concluded that Sullivan's behavior "was not consistent with permissible forms of [contact]" and that her actions "constituted physical restraint and were not permitted by regulations."

The State Board also rejected Sullivan's retaliation exceptions, finding that MCPS showed "a legitimate non-discriminatory reason" for placing Sullivan on administrative leave and terminating her employment. Lastly, Sullivan contended MCPS breached its duty of good faith and fair dealing by placing a student in her class without the appropriate

[7] The State Board found that the ALJ erroneously identified Robin Lupia as an assistant principal at Baker High School; that Sullivan taught at Cloverly Elementary School; and that the ALJ's decision refers to a student by the wrong initials.

behavioral support—that had MCPS offered her more classroom support, she would not have violated its policies. The State Board rejected this argument for two reasons: (1) Maryland does not recognize Sullivan's claim as a separate cause of action and (2) the ALJ was not required to accept Sullivan's claim as a defense for her actions. Even assuming Sullivan could raise the argument as a legitimate defense, the State Board found the argument to be without merit.

The State Board adopted the ALJ's recommendation in a written opinion on September 23, 2014. The State Board concluded that "[e]ach one of these incidents, standing alone, might not support a decision to terminate," but that "[t]hree incidents within the span of a year[,] taken together . . . demonstrate a pattern on [Sullivan's] part of failing to modify her behavior[,]" even after receiving warnings from MCPS.

Proceeding Before the Circuit Court

On October 21, 2014, Sullivan sought judicial review of her termination from the Circuit Court for Montgomery County.[8] After a hearing on April 21, 2015, the circuit

[8] Maryland. Code (1984, 2014 Repl. Vol., 2016 Supp.), State Government Article ("SG"), § 10-222(a)(1) permits "a party who is aggrieved by the final decision" of an administrative agency to seek judicial review.

court affirmed the State Board's decision in a written order and memorandum entered on May 5, 2015. Sullivan timely filed a notice on appeal to this Court on June 3, 2015.[9]

DISCUSSION

Standard of Review

"[I]n an appeal from the final decision of an administrative agency, we review the agency's decision, not the decision of the circuit court." *State Bd. of Physicians v. Bernstein*, 167 Md. App. 714, 750 (2006) (citations omitted). Administrative agency decisions "carry with them the presumption of validity." *Heaps v. Cobb*, 185 Md. 372, 378 (1945). Therefore, we review the "agency's decision in the light most favorable to it[.]" *Bernstein*, 167 Md. App. at 751 (citations omitted). Our review "'is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Id.* (quoting *Finucan v. Maryland Bd. of Physician Quality Assurance*, 380 Md. 577, 590–91 (2004) (internal quotations and citations omitted).

When reviewing an administrative agency's factual findings,

> [o]ur review . . . entails only an appraisal and evaluation of the agency's fact finding and not an independent decision on the evidence. This examination seeks to find the substantiality of the evidence. That is to say, a reviewing

[9] SG § 10-223(b)(1) provides an appeal to this Court.

> court, be it a circuit court or an appellate court, shall apply the substantial evidence test to the final decisions of an administrative agency . . . . In this context, substantial evidence, as the test for reviewing factual findings of administrative agencies, has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Tomlinson v. BKL York LLC, 219 Md. App. 606, 614 (2014) (alterations omitted) (quoting *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560, 568–69 (1998)), *cert. denied*, 441 Md. 219 (2015). It is the agency's responsibility to resolve conflicting evidence and "where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences." *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 513 (1978) (citing *Labor Bd. v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106–07 (1942)). If the agency's determination of fact is "predicated on substantial evidence from the record," we will not disturb the agency's findings. *Martin v. Allegany Cty. Bd. of Educ.*, 212 Md. App. 596, 605 (2013).

Because "agency rules are designed to serve the specific needs of the agency, are promulgated by the agency, and are utilized on a day-to-day basis by the agency," courts recognize that the administrative agency's expertise is more pertinent to the interpretation of the agency's rule than even its interpretation of its governing statute. *Maryland Comm'n on Human Relations v. Bethlehem Steel Corp.*, 295 Md. 586, 593 (1983). This deference stems from the view that "an agency is best able to discern its intent in promulgating a regulation" and thus its expertise in interpreting that regulation carries great

weight. *Id.* In fact, "'an agency's interpretation of an administrative regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Maryland Transp. Auth. v. King*, 369 Md. 274, 288-89 (2002) (quoting *Ideal Federal v. Murphy*, 339 Md. 446, 461 (1995)).

Having established the principle that we give great deference to determinations by administrative agencies generally, we overlay the precept that additional deference is accorded specifically to the State Board of Education under Maryland law. In Maryland, "the paramount role of the State Board of Education in interpreting the public education law sets it apart from most administrative agencies." *Bd. of Educ. for Dorchester Cty. v. Hubbard*, 305 Md. 774, 791 (1986). The Court of Appeals has underlined the State Board's role, noting that it:

> "has very broad statutory authority over the administration of the public school system in this State," that the totality of its statutory authority constitutes "a visitatorial power of such comprehensive character as to invest the State Board 'with the last word on any matter concerning educational policy or the administration of the system of public education."

Baltimore City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch., 400 Md. 324, 342-43 (2007) (quoting *Resetar v. State Board of Education*, 284 Md. 537, 556 (1979)). Consequently, State Board decisions "'are entitled to greater deference than those of most other administrative agencies.'" *Libit v. Baltimore City Bd. of Sch. Comm'rs*, 226 Md.

App. 578, 584 (2016) (quoting *Patterson Park Pub. Charter Sch., Inc. v. Baltimore Teachers Union*, 399 Md. 174, 197 (2007)).

I.

The Second Incident and MCPS' Restraint Regulations[10]

Before this Court, Sullivan challenges MCPS's interpretation of the Behavior Interventions Regulation—the restraint regulations applicable to Maryland schools and other public agencies pursuant to which she was reprimanded for the mat incident at Baker Middle School and the hallway incident at Rockville High School.[11] Specifically, Sullivan challenges the State Board's determination that her use of a wrestling mat constituted an improper use of a mechanical restraint, arguing that this finding is arbitrary and capricious because such an interpretation and the vague language of the Behavior Interventions Regulation does not provide proper notice of acceptable behavioral management practices.

In response, Appellees emphasize the heightened deference that courts give to the State Board's interpretations of public education regulations and contends that, because

[10] Sullivan does not challenge the County Board's determination as to the first incident in which she used "food aversion therapy."

[11] MCPS's Regulation JGA-RA on Classroom Management and Student Behavior Interventions.

Sullivan failed to show that the State Board's interpretation of the challenged rules was plainly erroneous, its findings should not be disturbed.

Both MCPS and the State Board prohibit the physical and mechanical restraint—restrictive forms of behavioral intervention—of students with certain exceptions.[12] *See* COMAR 13A.08.04.05; Behavior Interventions Regulation III.H. These behavioral intervention methods are defined in COMAR as:

> (8) Mechanical Restraint.
>
> (a) "Mechanical restraint" means any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body and that the student cannot easily remove.
>
> (b) "Mechanical restraint" does not include a protective or stabilizing device.
>
> * * *
>
> (11) Physical Restraint.
>
> (a) "Physical restraint" means the use of physical force, without the use of any device or material, that restricts the free movement of all or a portion of a student's body.
>
> (b) "Physical restraint" does not include:
>
> (i) Briefly holding a student to calm or comfort the student;
>
> (ii) Holding a student's hand or arm to escort the student safely from one area to another;
>
> (iii) Moving a disruptive student who is unwilling to leave the area if other methods such as counseling have been unsuccessful; or

[12] MCPS revised its Behavior Interventions Regulation on March 13, 2012. The prohibition on the use of mechanical restraints and physical restraints, with narrow exceptions, remain the same.

> (iv) Intervening in a fight in accordance with Education Article §7-307, Annotated Code of Maryland.

COMAR 13A.08.04.02B(8), (11). The State Board and MCPS allow limited instances of other behavioral interventions that are less restrictive than physical and mechanical restraints. These behavior intervention methods include exclusion and the use of protective or stabilizing devices for the purposes of preventing self-injury. *See* COMAR 13A.08.04.03-.04; *see also* Behavior Interventions Regulation IV(I), IV(M), IV(N), IV(P). These behavioral interventions are defined in COMAR as:

> (4) "Exclusion" means the removal of a student to a supervised area for a limited period of time during which the student has an opportunity to regain self-control and is not receiving instruction including special education, related services, or support.
>
> * * *
>
> (13) Protective or Stabilizing Device.
>
> (a) "Protective or stabilizing device" means any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body for the purpose of enhancing functional skills, preventing self-injurious behavior, or ensuring safe positioning of a person.
>
> (b) "Protective or stabilizing device" includes:
>
> (i) Adaptive equipment prescribed by a health professional, if used for the purpose for which the device is intended by the manufacturer;
>
> (ii) Seat belts; or
>
> (iii) Other safety equipment to secure students during transportation in accordance with the public agency or nonpublic school transportation plan.

COMAR 13A.08.04.02B(4), (13).

As noted *supra*, "an agency's interpretation of an administrative regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *King*, 369 Md. at 288-89 (2002) (quoting *Ideal Federal*, 339 Md. at 461). In determining whether an agency's interpretation of a regulation is "plainly erroneous," courts interpret the regulations using the "same principles that govern the interpretation of a [s]tatute." *Miller v. Comptroller of Md.*, 398 Md. 272, 282 (2007) (citations omitted). "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature. . . . Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology." *Kushell v. Dep't of Nat. Res.*, 385 Md. 563, 576 (2005) (internal citations omitted). While interpreting a statute, courts do not analyze individual provisions in isolation, but rather as part of a complete statutory scheme. *Outmezguine v. State*, 335 Md. 20, 41 (1994) (citations omitted). Courts aim to "avoid constructions that are illogical, unreasonable, or inconsistent with common sense." *Frost v. State*, 336 Md. 125, 137 (1994).

In this case, the State Board adopted the ALJ's conclusion that "the use of the wrestling mat which 'stood on end' and was 'secured by Velcro to form a tube, with the student inside,' was a mechanical restraint." The State Board reasoned that

> [t]he mat, while not tight against the student's skin, was closely adjacent to his body and restricted his freedom of movement. The ALJ stated that the student "could not move beyond the enclosure and/or remove it from around his person. He was completely enclosed and restrained." In our view, the ability of the student to still strike against the mat does not mean he had the unrestricted "freedom of movement" or the normal access to his own body envisioned by the regulation. While the record contained conflicting testimony about whether the mat was "secured by Velcro" or whether the Velcro did not work and the mat was secured by Appellant holding it together, the student could not have easily removed the mat.

Sullivan contends that the State Board should have instead concluded that her actions with the mat were permissible because they constituted either (1) the use of a protective device to protect the student and others from his violent behavior, or (2) a temporary exclusion of the student while he had an opportunity to regain self-control.

In analyzing Sullivan's contention, we conclude that the State Board's interpretation of "mechanical restraint" is consistent with the definition of those terms in COMAR 13A.08.04.02B(8) as a "device or material . . . adjacent to the student's body that *restricts freedom of movement* . . . and that the student *cannot easily remove*." (Emphasis added). Although Sullivan presses that her actions instead amounted to using a protective or stabilizing device, or a temporary exclusion, this Court will not "'substitute its judgment for the Expertise of those persons who constitute the administrative agency from which the appeal is taken.'" *Bulluck*, *supra*, 283 Md. at 513 (quoting *Bernstein v. Real Estate Comm.*, 221 Md. 221, 230 (1959)). Therefore, we conclude that the State Board's

interpretation of its regulation and exclusion on mechanical restraints is not plainly erroneous.

II.

The Third Incident

Sullivan contends that the State Board's finding regarding the hallway incident at Rockville High School was not supported by substantial evidence, asserting that the State Board's decision relied on the testimony of a witness, Sandra Boyke, who lacked credibility. Sullivan points to inconsistencies between Boyke's original statement describing the incident, Boyke's testimony at the January 17, 2013 hearing, and the nurse's health room report. For example, Sullivan points out that Boyke's original statement is silent as to how quickly she responded after observing Sullivan pushing the student, but that Boyke testified at the hearing that she ran down the hall. Sullivan argues that "an honest examination" of the security video shows that Boyke and a security officer were walking in "a casual, not-in-any-particular-hurry" manner toward Sullivan and the student. Sullivan argues also that Boyke's testimony that the student had red marks on his shoulders was inconsistent with the nurse's health room report which stated there were "no visible marks." Sullivan also argues that the State Board only credited certain written statements by the paraeducator who accompanied her while taking the Rockville High School student

back to the classroom without considering the totality of the statements or how the statements progressively changed.

Appellees counter that the State Board's decision to uphold Sullivan's termination was supported by sufficient evidence of the three incidents. Appellees emphasize that appellate review is limited to the evaluating the agency's fact-finding and not an independent review of the evidence.

As we noted *supra*, this Court will not disturb an administrative agency's findings of facts if substantial evidence supports the agency's determination. *Martin*, 212 Md. App. at 605. Courts have defined substantial evidence as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Snowden v. Mayor & City Council of Baltimore*, 224 Md. 443, 448 (1961) (quoting *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197, 229 (1938)). "No matter how the test for reviewing factual findings of administrative agencies is phrased, the reviewing court's 'appraisal or evaluation must be of the agency's fact-finding results and not an independent original estimate of or decision on the evidence.'" *Anderson v. Dep't of Pub. Safety & Corr. Serv.*, 330 Md. 187, 212 (1993) (quoting *Insurance Comm'n v. Nat'l Bureau*, 248 Md. 292, 309 (1967)). Instead, a reviewing court's role is "restrained and disciplined judicial judgment so as not to interfere with the factual conclusions of the agency that are adequately supported by the record." *Beeman v. Dep't of Health & Mental*

Hygiene, 107 Md. App. 122, 136–37 (1995). Moreover, it is the administrative agency's responsibility to resolve conflicting evidence and "where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences." *Bulluck*, 283 Md. at 513 (citations omitted).

There is ample evidence in the record—Boyke's testimony aside—to support the State Board's findings regarding the third incident. First, Sullivan attended a "restraint training where [Sullivan] learned to avoid physically restraining or pushing a student unless the student's or others' well-being is in danger." A special education resource teacher, who attended that training, was in agreement that this point was emphasized in the training. Second, the parents of this particular student "made it clear [to the teachers and staff of Rockville High School] not to use physical contact when he refused to move." Third, Sullivan had received two prior reprimands for using improper behavioral intervention techniques with students. Lastly, the written statements and testimony of Rockville High School staff, paraeducators, and teachers who observed the incident were consistent with the findings of the ALJ and the conclusions of the State Board.

Sullivan also maintains that her actions while ushering a student back to a classroom at Rockville High School were not a physical restraint because her actions were consistent with an exception to the regulation that allows a teacher to hold "a student's hand or arm to escort the student safely from one area to another." Behavior Interventions Regulation

III(K)(2)(b). However, relying on the ALJ's findings that she placed her hands on the student and pushed him, the State Board concluded that these actions constituted an improper physical restraint. The State Board explained that such behavior is not consistent with the noted exception and that, even if Sullivan had no malicious intent in pushing the student, such intent was not necessary to engage in an impermissible behavioral management practice. Sullivan fails to present facts showing that such a finding is arbitrary or capricious and this Court must afford great deference to the State Board's interpretation of education policy.

The ALJ reviewed video footage of the incident, considered conflicting testimony of MCPS employees, as well as Sullivan's own statements about the incident, and properly explained his reasoning in crediting certain statements over others, and the State Board, after a full hearing accepted those findings. We are mindful of our role to evaluate the agency's fact-finding results, in that vein, we conclude that the record includes substantial evidence to support the State Board's conclusions and the ALJ's findings about the incident. *See Anderson*, 330 Md. at 212. Therefore, we will not disturb the State Board's decision. *Martin*, 212 Md. App. at 605.

III.

Evidence Exclusion

Finally, Sullivan challenges the State Board's exclusion of additional evidence,[13] which demonstrated that the Maryland State Department of Education determined MCPS was not compliant with restraint regulations (COMAR 13A.08.04.05A and .05B) during part of the time period relevant to this appeal, arguing that such exclusion was arbitrary and capricious. Sullivan asserts that excluding the exhibits was arbitrary and capricious because the State Board was aware that MCPS had not complied with State regulations on behavioral intervention methods.

Appellees counter that the State Board correctly denied Sullivan's request to admit new evidence because Sullivan failed to provide "good reasons for [her] failure to offer the evidence in the proceeding before [the County Board]" as required by COMAR 13A.01.05.04C, the regulation for the admission of additional evidence.

The Administrative Procedures Act empowers, "[e]ach agency [to] adopt regulations to govern procedures under this subtitle and practice before the agency in contested cases." SG § 10-206(b). Towards that purpose, the State Board adopted COMAR 13A.01.05.04C, which provides that:

[13] The OAH hearing examiner admitted two of the twelve exhibits Sullivan introduced as additional evidence.

> C. Additional Evidence. If an appellant asks to present additional evidence on the issues in an appeal, and it is shown to the satisfaction of the State Board that the additional evidence is material and that there were good reasons for the failure to offer the evidence in the proceedings before the local board, the State Board *may*:
>
> (1) Remand the appeal to the local board for the limited purpose of receiving the additional evidence upon conditions the State Board considers proper; or
>
> (2) Receive the additional evidence.

(Emphasis added). Agency decisions receive an even more deferential review regarding matters that are committed to the agency's discretion and expertise. In such situations, courts may only reverse an agency decision if it is "arbitrary and capricious." *Cty. Council of Prince George's Cty. v. Zimmer Dev. Co.*, 444 Md. 490, 574 (2015) (citing *Spencer v. Maryland State Bd. of Pharmacy*, 380 Md. 515, 529–30 (2004)).

Sullivan attempts to draw a parallel between the State Board's decision to exclude additional evidence and uphold Sullivan's termination "for not having acquired the training that the agency itself knew that she had no way of acquiring" and the Montgomery County Merit System Protection Board's arbitrary and capricious decision to uphold the Montgomery County Police Department's "unmethodical[] and unrecorded" promotional procedures in *Montgomery Cty. v. Anastasi*. 77 Md. App. 126, 130 (1988). In *Anastasi*, the police chief solicited personal recommendations from his ranking subordinates for some of the candidates eligible for a promotion in addition to each candidate's score on a written examination. *Id.* at 129. The ranking subordinates only submitted

recommendations for candidates whom they personally observed and, as a result, this additional information was not sought or considered for every promotional candidate. *Id.* at 130. The Montgomery County Code required, among other things, that all applicants to the county merit system receive "fair treatment." *Id.* at 132. The Montgomery County Merit System Protection Board upheld the validity of the police chief's selection process despite its finding that the police chief's practice of soliciting personal recommendations from his ranking subordinates for individuals eligible for promotions was "casual, unmethodical, and unrecorded." *Id.* at 130. This Court reversed the Merit System Protection Board's decision upholding the police chief's promotional practice, finding the Board acted capriciously when it declined to follow the "thorough and sound reasoning" of a prior Board decision on the Montgomery County Police Department's promotion process "without adequately explaining the basis for doing so." *Id.* at 133, 138–39.

We are not persuaded by Sullivan's attempt to analogize this case with *Anastasi*. Unlike *Anastasi*, the State Board's decision to exclude ten of the twelve exhibits as additional evidence was in line with its governing regulation. The State Board reasoned that Sullivan's prior counsel's choice "not to offer" the exhibits before the County Board was not a "good reason[]"under COMAR 13A.01.05.04C to warrant admission of the additional evidence before the proceeding at the State Board.

Even though the ten exhibits appear to be material to Sullivan's termination challenge, we cannot substitute our judgment for the judgment of the ALJ and MCPS pursuant to COMAR 13A.01.05.04C, given the deferential standard of review. The State Board was not satisfied that Sullivan had a "good reason" for her failure to offer the evidence in the proceedings before the local board. Sullivan fails to point us to any evidence that the State Board's decision was not in line with prior precedent or its own regulations. Therefore, although reasonable minds could differ as to whether the State Board should have admitted the exhibits, we cannot find that the State Board's actions were arbitrary or capricious. As a result, we affirm the State Board's decision to exclude the additional evidence.

JUDGMENT AFFIRMED; COSTS ASSESSED TO APPELLANT.