



State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

March 29, 2019

John D. Kitch, Esq.
Cornelius & Collins, LLP
Nashville City Center, Suite #1500
511 Union Street
P.O. Box 190695
Nashville, Tennessee 37219-0695



RE: In the Matter of: [REDACTED], the Student, and [REDACTED], the Student's Parent/Guardian, Petitioners
vs. Montgomery County School Board, Respondent.
Docket No. 07.03-157207J

Enclosed is a Final Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/aem
Enclosure

cc: Steve Sparks, IDEA Complaints Investigator, TN Department of Education

Notice

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.

FILED
CLERK OF DISTRICT COURT
DAVIDSON COUNTY, TENNESSEE
MAY 21 1978
RECEIVED

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION**

IN THE MATTER OF:

█, *the Student, and*
█, *the Student's Parent/Guardian,*
Petitioners,

v.

**CLARKSVILLE-MONTGOMERY
COUNTY SCHOOL SYSTEM,**
Respondent.

DOCKET NO: 07.03-157207J

FINAL ORDER

This contested case under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) was heard by Administrative Judge Rachel L. Waterhouse on March 12, 2019. The Petitioners, student █ and █ █ █ chose to proceed without legal representation. The Respondent, the Clarksville-Montgomery County School System (CMCSS), is represented by attorney John Kitch.

After the hearing, the transcript of the contested case hearing was filed on March 15, 2019. Pursuant to 20 U.S.C. § 1415(k)(4)(B), the deadline for entry of the Final Order is 10 school days after the hearing, which is April 2, 2019.

The issues to be determined in this case are: (1) whether █ conduct of being under the influence of marijuana at school was a manifestation of █ disability due to diagnoses of other health impaired (ADHD) and Mood Disorder NOS, or (2) whether the conduct in question was the direct result of the local educational agency's (LEA) failure to implement █ individual education plan (IEP). Specifically, the language of the controlling legal authority states the issue to be determined as whether "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability." 20 U.S.C. §1415(k)(1)(E)(i)(I).

After review of the testimony of witnesses, exhibits, arguments of the parties, and consideration of the entire record in this matter, it is determined that [REDACTED] conduct was not a manifestation of [REDACTED] disability nor was it the result of the school's failure to implement [REDACTED] IEP. Therefore, the decision of CMCSS to expel [REDACTED] from school for one calendar year in accordance with CMCSS policy and Tenn. Code Ann. § 49-6-4216 was appropriate and is hereby **UPHELD**. This determination is based upon the following Findings of Fact and Conclusions of Law.

RESPONDENT'S MOTION TO DISMISS

At the close of the Petitioners' proof, the Respondent made a Motion to Dismiss the matter based on the argument that the Petitioners had not presented proof sufficient to meet their burden by a preponderance of the evidence. At the time, the Motion to Dismiss was taken under advisement for consideration by the undersigned, and the hearing continued with the Respondent presenting its proof. After consideration of the Respondent's Motion to Dismiss, it is **DENIED**.

FINDINGS OF FACT

1. During the events giving rise to this matter, [REDACTED] was a student at [REDACTED] [REDACTED] within the LEA of the CMCSS.
2. [REDACTED] is [REDACTED] years old [REDACTED]
3. [REDACTED] is [REDACTED] [REDACTED]
4. [REDACTED] is a student with a disability – [REDACTED] has a diagnosis of ADHD and Mood Disorder NOS, which are documented on school forms. (Hearing Exhibits¹ 6, 7 & 8).

¹ The hearing exhibits on which the student's name was not redacted have been redacted by the undersigned to ensure the student's privacy.

5. As a student with a disability, [REDACTED] is entitled to the protections of the IDEA. 20 U.S.C. §1400 *et seq.* As such, [REDACTED] is a student eligible for special education and related services, and has a current IEP dated May 4, 2018. (Hearing Exhibit 9).

6. On January 15, 2019, [REDACTED] came to school in the morning after smoking marijuana. [REDACTED] was reported by the morning school bus driver for smelling of marijuana. That day, in a meeting about the report, [REDACTED] admitted to both the LEA's Assistant Principal and School Resource Officer that [REDACTED] had smoked marijuana that morning prior to getting on the bus for school. (Hearing Exhibit 1). That day, after the meeting, [REDACTED] was notified of the situation.

7. On January 18, 2019, a manifestation determination review meeting was held to determine (1) whether [REDACTED] conduct of being under the influence of marijuana at school was a manifestation of [REDACTED] disability due to diagnoses of other health impaired (ADHD) and Mood Disorder NOS or (2) whether the conduct in question was the direct result of the LEA's failure to implement [REDACTED] IEP. Attending the meeting were: parent [REDACTED]; Kathy Young, High School Assistant Principal; Jessica Hamilton, Special Education Teacher; Ania Tinord, General Education Teacher; and Megan Christensen, School Psychologist. (Hearing Exhibits 2, 7 & 8).

8. The school personnel determined that the conduct of being under the influence of marijuana at school was not a manifestation of [REDACTED] disability and was not a result of the LEA's failure to implement [REDACTED] IEP. [REDACTED], [REDACTED], [REDACTED] disagreed with the school personnel's unanimous determination.

9. Being under the influence of marijuana at school is a zero tolerance offense, subjecting a student to expulsion for one calendar year, pursuant to CMCSS policy and Tenn. Code Ann. § 49-6-4216. However, because [REDACTED] is a student with disabilities under the IDEA, [REDACTED] was assigned to the alternative school to receive services.

10. On February 4, 2019, the student and [REDACTED] parent, [REDACTED] and [REDACTED] respectively, filed a Due Process Hearing Request Form alleging that the parent was not given a chance to speak to CMCSS's decision to expel and place [REDACTED] in alternative school, and that [REDACTED] was not told the rule that was broken by [REDACTED] conduct. In response to the question on the form about a proposed resolution to the problem, [REDACTED] wrote "out of school suspension."

APPLICABLE LAW

1. The Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in the Petitioners' favor. Rule 1360-4-1-.02, Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies, TENN. COMP. R. & REGS. 1360-4-1 (June 2004 (Revised)); Schaffer v. Weast, 546 U.S. 49 (2005).

2. 20 U.S.C. §1415(k)(1) states:

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

3. 20 U.S.C. §1415(k) states:

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may--

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

4. In Tenn. Code Ann. § 49-6-4216(a) and (b)(1) (underline added)², the Tennessee Legislature gave authority to school boards to adopt policies to address drug offenses, defined certain offenses by students as zero tolerance offenses, and allowed for an alternative school placement:

(a) Each local and county board of education shall file annually with the commissioner of education written policies and procedures developed and adopted by the board:

(1) To ensure safe and secure learning environments free of drugs, drug paraphernalia, violence and dangerous weapons; and

(2) To impose swift, certain and severe disciplinary sanctions on any student:

(A) Who brings a drug, drug paraphernalia or a dangerous weapon onto a school bus, onto school property or to any school event or activity;

(B) Who, while on a school bus, on school property or while attending any school event or activity:

(i) Is under the influence of a drug;

(ii) Possesses a drug, drug paraphernalia or dangerous weapon; or

(iii) Assaults or threatens to assault a teacher, student or other person; or

(C) Who transmits by an electronic device any communication containing a credible threat to cause bodily injury or death to another student or school

² Tenn. Code Ann. § 49-6-3401(g) provides for a mandatory one-year expulsion, subject to modification by the director of schools, for a student unlawfully possessing any drug, among other things.

employee and the transmission of such threat creates actual disruptive activity at the school that requires administrative intervention.

(b)(1) It is the legislative intent that any rule or policy designated as a zero tolerance policy means that violations of that rule or policy will not be tolerated, and that violators will receive certain, swift and reasoned punishment. Reasoned punishment may include a spectrum of disciplinary measures designed to correct student misbehavior and promote student respect and compliance with codes of conduct and board policies. A zero tolerance violation shall not necessarily result in a presumptive one (1) calendar year expulsion except for those types of student misconduct set forth in § 49-6-3401(g). It is the legislative intent that the local school boards shall retain responsibility for development of disciplinary policies and student codes of conduct including assurances that students are afforded fair due process procedures. Nothing in this section shall be construed to prohibit assignment to an alternative school for those students under suspension or expulsion including students engaging in misconduct set forth in § 49-6-3401(g).

5. Tenn. Code Ann. § 49-6-3401(g), under the title of "Suspension of Students," has language very similar to Tenn. Code Ann. § 49-6-4216, refers to zero tolerance, and allows for punishment based on drug violations, among other things.

6. Tenn. Code Ann. § 49-6-3401(g)(4) states: "Disciplinary policies and procedures for all other student offenses, including terms of suspensions and expulsions, must be determined by local board of education policy."

7. The CMCSS Board has designated the Student Code of Conduct as "the controlling authority with respect to student discipline and details offenses for which disciplinary action may be taken." (Hearing Exhibit 4).

8. CMCSS Student Disciplinary Policy #INS-A083 states in pertinent part:

CMCSS students are expected to behave in a way that does not interrupt the education of other students, or endanger other students or themselves. Students are held accountable for any disorderly conduct on school grounds; at bus stops, en route to and from school, including, but not limited to, school buses; off school grounds at a school activity, function, event or school-related circumstances as determined by the principal and/or the Director of Student Services even if the alleged violation did not occur on a school day; and/or off school grounds if the behavior is potentially or actually disruptive to the school environment and its educational purpose or constitutes a threat to the health, safety, or welfare of a student or students and/or school personnel. Teachers, principals, and

administrators have the authority to discipline the student in accordance with district policy and local, state, and federal laws.
(Hearing Exhibit 4).

9. The Student Code of Conduct for students enrolled in the CMCSS provides that a student under the influence of marijuana on school property has committed a zero tolerance offense. (Hearing Exhibit 5, page 24 of 48).

10. The IDEA does not eliminate a school's ability to discipline disabled students for their misbehavior. 20 U.S.C. § 1415(k)(1).

ANALYSIS and CONCLUSIONS OF LAW

1. [REDACTED] is an individual entitled to the protection of the IDEA due to [REDACTED] diagnoses.
20 U.S.C. §1400 *et seq.*

2. CMCSS is an LEA and is subject to the requirements of the IDEA. 20 U.S.C. §1400 *et seq.*

3. [REDACTED] was under the influence of marijuana on school property.

4. [REDACTED] conduct of being under the influence of marijuana on school property was not a manifestation of [REDACTED] disability.

5. [REDACTED] conduct of being under the influence of marijuana on school property was not a direct result of the LEA's failure to implement [REDACTED] IEP.

6. The participants in the MDR meeting properly considered [REDACTED] disability in reviewing [REDACTED] conduct during the MDR meeting.

7. The participants in the MDR meeting were school personnel who had experience with [REDACTED] and [REDACTED] diagnoses.

8. They relied upon that experience, as well as the information presented at the meeting about [REDACTED] conduct on January 15, 2019, of being on school property under the influence of marijuana.

9. The MDR meeting fully and appropriately considered whether [REDACTED] conduct on January 15, 2019, was a manifestation of [REDACTED] disability, and the school personnel unanimously determined that it was not.

10. Further, the school personnel in the MDR meeting unanimously determined that [REDACTED] conduct in question was not the direct result of the school's failure to implement [REDACTED] IEP.

11. The attendees at the MDR meeting conducted on January 18, 2019, correctly determined that [REDACTED] conduct of being under the influence of marijuana on school property was not a manifestation of [REDACTED] disability, nor a direct result of the school's failure to implement [REDACTED] IEP.

12. [REDACTED] was appropriately expelled from school for one calendar year in accordance with CMCSS policy and State law.

Accordingly, the decision of CMCSS to expel [REDACTED] from school for one calendar year in accordance with CMCSS policy and Tenn. Code Ann. § 49-6-4216 was appropriate and is hereby **UPHELD**. The Petitioner's due process complaint is **DISMISSED**. Further, the Respondent's Motion to Dismiss made at the conclusion of the Petitioners' proof is **DENIED**.

The policy reasons for this decision are to uphold state and federal laws pertaining to the education of children with special needs.

It is so ORDERED.

This Final Order entered and effective this the 29th day of MARCH, 2019.

Rachel L. Waterhouse
RACHEL L. WATERHOUSE
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the

29th day of MARCH, 2019.

J. Richard Collier

J. RICHARD COLLIER, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE