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December 9, 2019

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RE: E.C., THE STUDENT AND B.C., THE STUDENT'S PARENT V. KNOX COUNTY SCHOOLS, APD Case No. 07.03-191689J

Enclosed is a *Final Order,* including a *Notice of Appeal Procedures*, rendered in this case.

Administrative Procedures Division
Tennessee Department of State

cc: Scott Indermuehle, Senior IDEA Complaints Investigator, TN Department of Education

/aem

Enclosure(s)

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF:

B.C. THE PARENT,
E.C. THE STUDENT,
Petitioner,
v.

KNOX COUNTY SCHOOLS,
Respondent.

APD Case No. 07.03-191689J

FINAL ORDER

This contested case under the Individuals with Disabilities Education Act was heard by Administrative Judge Michael Begley on November 18-19, 2019. The Petitioners, student E.C., and his parent, B.C., are represented by Michael Braun. Respondent, Knox County Schools (KCS), is represented by Amanda Morse.

At the conclusion of the hearing, the undersigned Administrative Judge ruled on the record and in favor of the Petitioners. Due to the length of the transcript and the short timeline within which a Final Order would be due, the foregoing Findings of Fact and Conclusions of Law are without the benefit of the transcript.

The issue to be determined in this case is whether E.C.'s conduct of possessing marijuana on his middle school campus was a manifestation of his disability due to diagnoses of attention deficit hyper activity disorder, (ADHD), Other Health Impairment (OHI) and language impairment. After review of the testimony, exhibits, arguments of the parties, and the record in this matter, it is determined that the Petitioners have failed to meet their burden of proving by a preponderance of the evidence that E.C.'s conduct was not a manifestation of his disability. However, the Petitioners have met their burden of proof by a preponderance of the evidence that

the IEP was not designed to enable E.C. to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in E.C.'s IEP. Therefore, the decision by KCS to enroll E.C. at Ridgedale Alternative School is **OVERTURNED**. E.C. shall return to the previous placement at West Valley Middle School. This determination is based on the following.

FINDINGS OF FACT

1. During the events giving rise to this case, E.C. was a student within the local education agency (LEA) of the KCS.

2. B.C. is E.C.'s mother.

3. E.C. is a student with diagnoses of ADHD, OHI, and language impairment.

4. As such, E.C. is entitled to the protections the Individuals with Disabilities Education Act.

5. The Petitioner's presented evidence of a possible anxiety diagnosis. Specifically, they presented a letter from a physician at the September 27, 2019, meeting. However, B.C. refused the request by KCS to conduct evaluations regarding an anxiety diagnosis.

6. E.C.'s IEP identified activities that are limited by his disability – executive function and organizing. The IEP and KCS staff accommodates E.C.'s challenges by directing that he be in position to minimize distractions, be allowed a short break if needed, be cued to stay on task, have extended time on certain assignments, and be given the opportunity to correct missed questions at times.

7. The incident giving rise to the manifestation determination occurred during school hours on school property. On September 19, 2019, video footage shows another student placing marijuana into E.C.'s locker. The same individual was seen later that same day removing the

marijuana from E.C.'s locker. The other student told school personnel that E.C. directed the marijuana to be placed in E.C.'s locker and later directed it be removed. E.C. admitted that day that the substance was marijuana and that he had directed the other student to place it in the locker and later remove it from the locker.

8. Possession of marijuana on school property is a zero-tolerance offense, subjecting a student to expulsion for one calendar year.

9. At the time of the incident, E.C.'s IEP, developed on April 3, 2019, included the following direct related services: 300 minutes per week of special education cases in a co-taught English Language Arts (ELA) and 300 minutes per week of special education services for pre-vocational support for math. Consultative language therapy was also included. Total service minutes per week were at 600.

10. On September 20, 2019, a Manifestation Determination Review (MDR) meeting was held. KCS used the IEP form for the MDR. It is undisputed that all required parties were present at each meeting. The attendees voted that E.C.'s possession of marijuana on school property was not a manifestation of his disability.

11. On September 25, 2019, KCS held a disciplinary meeting from which it was determined that E.C. would receive a 180 day suspension under the zero tolerance policy.

12. On September 27, 2019, an IEP meeting was held to amend the existing IEP in order to facilitate placement of E.C. at Ridgedale Alternative School. No goals, diagnoses, or any other aims were changed from the prior IEP. The only change on the face of the document was the related services section. KCS removed co-taught ELA and pre-vocational support for math entirely, also eliminating direct instruction and co-teaching as it was previously practiced. A category entitled "consultative" was added at 5 times per week of 15-minute sessions in the

general education setting by a special education teacher. The language therapy services remained the same. Transportation was added. Total minutes had been reduced to 75 minutes per week.

13. KCS testified that the change in related services was due to the change in setting. KCS cited a class size of 10-12 students on average at Ridgedale Alternative School compared to 28-30 students on average at West Valley Middle School. As such, KCS witnesses testified that a general education teacher in conjunction with a teaching assistant (TA) could meet the goals on E.C.'s IEP because E.C.'s accommodations and modifications did not require a special education teacher, and his co-taught classes have always been in the general education setting.

14. The IEP contains no information about how the reductions in the related services section would facilitate the attainment of the same goals from the prior IEP.

APPLICABLE LAW

1. 34 CFR § 300.530 States the following regarding a manifestation determination:

> (a) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.
>
> (b) General.
>
> (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).
>
> (2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year,

during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) Additional authority. For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) Services.

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must -

(i) **Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP**; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in § 300.101(a), so as to enable the child to continue to participate in

the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(5) If the removal is a change of placement under § 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

(e) Manifestation determination.

(1) 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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must 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 LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

(f) Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must -

(1) Either -

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child -

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) Notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504.

(i) Definitions. For purposes of this section, the following definitions apply:

(1) Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law…

2. The implementing regulations of the IDEA regarding a manifestation determination review provide:

> (a) General. The parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).
>
> (b) Authority of hearing officer.
>
> (1) A hearing officer under § 300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.
>
> **(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—**
>
> **(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530** or that the child's behavior was a manifestation of the child's disability; or
>
> (ii) Order a change of placement of the 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 the child is substantially likely to result in injury to the child or to others.
>
> (3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.
>
> (c) Expedited due process hearing.
>
> (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§ 300.507 and 300.508(a) through (c) and §§ 300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.

(2) The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

(3) Unless the parents and LEA agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in § 300.506—

(i) A resolution meeting must occur within seven days of receiving notice of the due process complaint; and

(ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

(4) A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in §§ 300.510 through 300.514 are met.

(5) The decisions on expedited due process hearings are appealable consistent with § 300.514. (emphasis added)

3. TENN. CODE ANN. § 49-6-3401 provides:

(a) Any principal, principal-teacher or assistant principal of any public school in this state is authorized to suspend a pupil from attendance at the school, including its sponsored activities, or from riding a school bus, for good and sufficient reasons. Good and sufficient reasons for suspension include, but are not limited to:

***

(10) Unlawful use or possession of barbital or legend drugs, as defined in § 53-10-101;

***

(g) Notwithstanding this section or any other law to the contrary, a pupil determined to have brought to school or to be in unauthorized possession on school property of a firearm, as defined in 18 U.S.C. § 921, shall be expelled for a period of not less than one (1) calendar year, except that the director may modify

> this expulsion on a case-by-case basis. In addition to the other provisions of this part, a student committing aggravated assault as defined in § 39-13-102 upon any teacher, principal, administrator, any other employee of an LEA or school resource officer, **or unlawfully possessing any drug including any controlled substance, as defined in §§ 39-17-403 – 39-17-415, controlled substance analogue, as defined by § 39-17-454, or legend drug, as defined by § 53-10-101, shall be expelled for a period of not less than one (1) calendar year, except that the director may modify this expulsion on a case-by-case basis.** For purposes of this subsection (g), "expelled" means removed from the pupil's regular school program at the location where the violation occurred or removed from school attendance altogether, as determined by the school official. Nothing in this section shall be construed to prohibit the assignment of such students to an alternative school. Disciplinary policies and procedures for all other student offenses, including terms of suspensions and expulsions, shall be determined by local board of education policy.

TENN. CODE ANN. § 49-6-3401(a)(10), (g) (emphasis added).

ANALYSIS

As an initial matter, E.C. was in possession of marijuana on school property by way of it being in his locker. While the Petitioners dispute whether he directed the marijuana to be placed in his locker and later removed from his locker, E.C.'s statements to school personnel show by a preponderance of the evidence that E.C. knowingly possessed marijuana in his locker. The participants in the MDR meeting considered E.C.'s disability in reviewing his conduct and concluded that it E.C.'s behavior was not a manifestation of his disability.

KCS had information that E.C. may have a diagnosis of anxiety disorder by way of prior interaction with E.C. and the letter that B.C. presented at the meeting. However, 34 CFR § 300.534 (c)(1)(i) clearly states "A public agency would not be deemed to have knowledge under paragraph (b) of this section (outlining when a public agency could be deemed to have knowledge of a disability prior to the behavior in question) if – the parent of the child has not allowed an evaluation of the child pursuant to §§ 300.00 through 300.311…" KCS requested an

evaluation for anxiety, among other things, that B.C. refused. As such, KCS fulfilled its obligation regarding anxiety. Even if E.C. also carried a diagnosis of anxiety disorder, there is insufficient evidence in the record to establish a causal connection between E.C.'s behavior related to the incident and anxiety.

The Petitioner's prevail in this matter by proving by a preponderance of the evidence that KCS did not implement an IEP at Ridgedale Alternative School that would allow E.C. to progress toward meeting the goals set out in his IEP. There is no question that services can change based on a change in setting and still allow students to progress toward meeting their IEP goals. A Federal Register comment on § 300.530 (d) states the following:

> We caution that we do not interpret "participate" to mean that a school or district must replicate every aspect of the services that a child would receive if in his or her normal classroom. For example, it would not generally be feasible for a child removed for disciplinary reasons to receive every aspect of the services that a child would receive if in his or her chemistry or auto mechanics classroom as these classes generally are taught using a hands-on component or specialized equipment or facilities.

Federal Register, Volume 71, No 156, p. 46716. August 14, 2006.

The intent of the comment appears to be to allow for flexibility when an alternative placement location simply cannot replicate a more advanced or better situated former placement. As such, comparison is made to mechanics classes and chemistry labs. In this case, the only difference is the staffing. Staffing is a common and readily considered variable in special education. Ultimately, the IEP at issue is the same on its face as the prior IEP with the only change being the related services section wherein E.C.'s hours and related services were reduced. Moreover, the IEP at issue does not specify any reason or detail regarding the provision of services to E.C. and how those same goals could still be met by the reduction in services in a different location.

CONCLUSIONS OF LAW

1. E.C. is an individual entitled to the protection of under the Individuals with Disabilities Education Act due to his diagnoses of ADHD, OHI, and language impairment.

2. KCS is an LEA and is subject to the requirements of the IDEA.

3. E.C. was in possession of marijuana on school property.

4. E.C.'s possession of marijuana was not a manifestation of his disability.

5. The attendees at the MDR meeting correctly determined that E.C.'s conduct was not a manifestation of his disability.

6. E.C. was appropriately expelled from school for one calendar year in accordance with TENN. CODE ANN. § 49-6-3401.

7. The IEP lacks specificity to show it has been providing E.C. with access to the general education curriculum and that it has been allowing E.C. to make progress on his goals in accordance with 34 C.F.R. 300.530(d)(1).

8. The IEP at issue is a virtual carbon copy of the prior IEP with the only change being the related services section wherein E.C.'s hours and services were reduced on the face of the document.

9. The IEP does not specify any reason or detail regarding the provision of services to E.C. that would show E.C. could make progress at Ridgedale Alternative School toward the IEP goals despite the reduction in services on the face of the document.

10. IT IS THEREFORE ORDERED that upon entry of this Order (1) KCS will enroll E.C. at West Valley Middle School; and that (2) the IEP in effect for E.C. prior to the September 27, 2019, amendment will be in effect upon E.C.'s return to West Valley Middle School. It is also ORDERED that the Petitioners shall be awarded reasonable attorney's fees in accordance with 34 CFR § 300.517.

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 **9th day of December, 2019.**

MICHAEL T. BEGLEY
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 **9th day of December, 2019.**

STEPHANIE SHACKELFORD, DIRECTOR
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

IN THE MATTER OF:
E.C., THE STUDENT AND B.C., THE STUDENT'S PARENT V. KNOX COUNTY SCHOOLS

APD CASE No. 07.03-191689J

NOTICE OF APPEAL PROCEDURES

REVIEW OF FINAL ORDER

The Administrative Judge's decision in your case in front of the **Tennessee Department of Education**, called a Final Order, was entered on **December 9, 2019**. If you disagree with this decision, you may take the following actions:

1. **File a Petition for Reconsideration:** You may ask the Administrative Judge to reconsider the decision by filing a Petition for Reconsideration. Mail to the Administrative Procedures Division (APD) a document that includes your name and the above APD case number, and states the specific reasons why you think the decision is incorrect. The APD must **receive** your written Petition no later than 15 days after entry of the Final Order, which is **December 26, 2019.**

   The Administrative Judge has 20 days from receipt of your Petition to grant, deny, or take no action on your Petition for Reconsideration. If the Petition is granted, you will be notified about further proceedings, and the timeline for appealing (as discussed in paragraph (2), below) will be adjusted. If no action is taken within 20 days, the Petition is deemed denied. As discussed below, if the Petition is denied, you may file an appeal no later than **February 7, 2020**. *See* TENN. CODE ANN. §§ 4-5-317 and 4-5-322.

2. **File an Appeal:** You may appeal the decision in federal or state court within 60 days of the date of entry of the Final Order, which is no later than **February 7, 2020**, by:

   (a) filing a Petition for Review "in the Chancery Court nearest to the place of residence of the person contesting the agency action or alternatively, at the person's discretion, in the chancery court nearest to the place where the cause of action arose, or in the Chancery Court of Davidson County," TENN. CODE ANN. § 4-5-322; or
   (b) bringing a civil action in the United States District Court for the district in which the school system is located, 20 U.S.C. § 1415.

   The filing of a Petition for Reconsideration is not required before appealing. *See* TENN. CODE ANN. § 4-5-317. A reviewing court also may order a stay of the Final Order upon appropriate terms. *See* TENN. CODE ANN. §§ 4-5-322 and 4-5-317.

STAY

In addition to the above actions, you may file a Petition asking the Administrative Judge for a stay that will delay the effectiveness of the Final Order. A Petition for stay must be **received** by the APD within 7 days of the date of entry of the Final Order, which is no later than **December 16, 2019**. *See* TENN. CODE ANN. § 4-5-316.

FILING

To file documents with the Administrative Procedures Division, use this address:
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NOTICE OF APPEAL PROCEDURES