

MARK H [REDACTED],

Appellant

v.

CALVERT COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 06-20

OPINION

In this appeal, Appellant contests his daughter's one day in-school suspension for violating the Calvert County Public Schools (CCPS) cellular telephone policy. The local board has submitted a response to the appeal asserting that suspension was not arbitrary, unreasonable or illegal. Appellant has submitted a reply in opposition to the local board's response.

FACTUAL BACKGROUND

During the 2005-2006 school year, Appellant's daughter, M.H., was in the 7th grade at Southern Middle School in Calvert County. On October 10, 2005, an unknown person called the cellular telephone which was in M.H.'s purse during science class. The cellular telephone was on, but the ringer was turned off. Although the phone did not ring, the phone emitted three chirping tones for a total duration of approximately ½ second to indicate that a call had been missed. The phone was new and M.H. claims that she was unaware that the phone would make the chirping sound to indicate missed calls. The teacher confiscated the cell phone and reported the incident to the Vice Principal, Ms. Johnson. Ms. Johnson met with M.H. on October 11 and notified her that she would serve a one day in-school suspension for violation of the CCPS policy on communication devices. M.H. served the in-school suspension on October 13.

Appellant appealed the Vice Principal's decision. Mr. Butler, the Principal of Southern Middle School, upheld the in-school suspension. He stated in his response to Appellant that the decision was made "with clarification from the central office that the term 'use' [as set forth in the policy] was considered as the phone being on when it 'chirped.'" He also stated that he was "following the code of conduct and being consistent with prior incidents of this nature." *See* 11/9/05 e-mail from Butler to [REDACTED].

On further appeal, Kathryn T. Coleman, Director of Student Services, acting as the Superintendent's designee, upheld the Principal's decision regarding the one day in-school suspension. Ms. Coleman noted in her decision that CCPS considers a cellular phone in use when it is in the "on" position and equipped to receive and send messages and calls. Thus, the fact that the ringer was disabled in this instance was irrelevant because the phone was on and made a chirping noise upon receipt of a missed call. *See* 11/18/05 letter from Coleman to [REDACTED]. Ms. Coleman also found that dismissal of the in-school suspension was not warranted

despite the fact that the Principal did not honor Appellant's request to defer imposition of the suspension until a later time.

Thereafter, on January 19, 2006, the local board unanimously upheld the Superintendent's decision to deny Appellant's request to rescind the one day in-school suspension.¹

STANDARD OF REVIEW

The standard of review for a student suspension or expulsion is that the State Board will review the record to determine whether the local board violated State or local law, policies, or procedures; whether the local board violated the due process of the student; or whether the local board acted in an otherwise unconstitutional manner. If any of these basis are found, or if the decision is otherwise illegal as defined in COMAR 13A.01.05.05C, the State Board may reverse or may modify the penalty. COMAR 13A.01.05.05G; *Ryan H. v. Anne Arundel County Board of Education*, MSBE Opinion No. 06-08, Mar. 29, 2006.

ANALYSIS

Due Process

As a preliminary matter, Appellant argues that his daughter's due process rights were violated because the Principal failed to defer imposition of a penalty for several days so that Appellant could explore appeal options per the discussion between Appellant and the Principal on October 12. Despite this discussion, M.H. served her in-school suspension on October 13, before the expiration of the five day time period for noting an appeal had expired and before in-school suspension paperwork was signed by the Appellant.

Under *Goss v. Lopez*, 419 U.S. 565, 581 (1975), the United States Supreme Court has held that for a suspension of 10 days or less, due process requires only that the student be given oral or written notice of the charges against him and if he denies them, an opportunity to present his side of the story. According to the appeal materials submitted by Appellant, M.H. was provided with notice of the charges against her and the opportunity to be heard on those charges. When the incident occurred, M.H.'s teacher immediately advised her of the violation of school policy. The following day, M.H. met with the Vice Principal who advised her of the violation and the consequence of in-school suspension. Appellant also acknowledges discussing the violation and the penalty with the Principal prior to M.H. serving the in-school suspension. Although the local board in its Reply fails to address the issue of deferring imposition of the penalty, which was allegedly discussed between the Appellant and the Principal, and fails to address the unsigned paperwork, we hold that these matters do not amount to a due process violation.

¹ The local board's decision does not provide any explanation or rationale for its decision.

Communication Devices Policy

The Calvert County Public Schools policy on communication devices is contained in the Code of Student Conduct. The policy states:

[S]tudents may possess portable communication devices, including pagers, cellular telephones or any portable instrument capable of communicating with another such instrument on school property and on school buses during the school day and under the following conditions:

- The device must be turned to the “off” position.
- The device must be concealed at all times.

The policy further states that if a student violates the policy and procedures regarding communication devices, he/she will receive the following penalties:

- Assigned to In-School Suspension for a period of one to three days for the first infraction of visible possession, depending on individual circumstances.
- Suspended out of school from one to five days for the second infraction of visible possession and lose the privilege of possessing a phone on school property for the remainder of the school year.
- Suspended out of school for one to three days for the first offense for use of cellular phone. The phone will be confiscated by the administration and returned to the parent.
- Suspended out of school for five days and loss of the privilege to possess a cellular phone on school property for the remainder of the school year on the second offense for use. The phone will be confiscated by the administration and returned to the parent.
- Suspended out of school for ten days on the third offense for visible possession or use. The phone will be confiscated by the administration and returned to the parent.

Code of Student Conduct at pp. 15-16 (emphasis in original).

Appellant challenges CPCS’s interpretation of its own policy on communication devices, specifically with regard to the interpretation of the term “use.” M.H. received a one day in-

school suspension for violating this policy. The local board maintains that M.H. was penalized under the provisions for “use” of a cell phone, as opposed to being penalized for visible possession of a cell phone. Appellant maintains that M.H. was not using the phone and therefore she could not have violated the policy. Despite the fact that the cell phone was turned on, Appellant argues that it was not in use because the phone was in his daughter’s purse with the ringer set to silent. He explains that she was not actively dialing a number, text messaging or answering a phone call.

The CPCS policy on communication devices requires that the cell phone be turned off and concealed at all times. There is no dispute here that while the cell phone was concealed in M.H.’s purse, the phone was not turned off. As explained by the Superintendent’s designee, under the circumstances of this case, it is irrelevant that the ringer was turned off because the phone was turned on. It is because the phone was on that it was capable of emitting chirping noises during class. We find that such an interpretation of the policy is reasonable and that the local board did not err in upholding this interpretation of the policy.

This case can be distinguished from *Sydnor v. Calvert County Bd. Of Educ.*, MSBE Opinion No. 02-43 (Aug. 27, 2002), where a gym bag containing a cell phone with the power on had not been in the student’s possession for many hours before it rang. In *Sydnor*, the State Board reversed a three day suspension because the evidence suggested that the last student who used the phone the previous night had forgotten to turn it off or that someone turned it on during the school day while the gym bag was sitting in the classroom out of the owner’s possession. Here, there is no evidence that M.H. unknowingly violated the policy because the phone was turned on and there is no indication that anyone other than she was responsible for the phone.

It is curious that the chosen penalty was an in-school suspension when the communication devices policy provides for an out-of-school suspension for first time violations based on “use.” The relevant provision regarding in-school suspension is found on p. 46 of the Code of Student Conduct. That provision states that “In-School Suspension is designed primarily as an alternative to Out-of-School Suspension for students who have violated school policies concerning student behavior and conduct.” Clearly, the Principal did not believe that the circumstances here warranted a harsher result in the form of an out-of-school suspension; nor do we intend to impose the more severe penalty here.

Student Suspension Philosophy

Appellant argues that the policy on communication devices is inconsistent with the CCPS Philosophy of Student Suspension. The Philosophy of Student Suspension is found in the Code of Student Conduct at p. 45 and states as follows:

The suspension process is an administrative responsibility sanctioned by State law as a measure to discipline students. It is recognized that maximal educational benefits for all students

require the maintenance of acceptable standards of student conduct. Since the maintenance of a proper learning environment is the responsibility of the principal, utilization of suspensions is at the discretion of the principal. A student may be suspended for any action that is considered disruptive and/or detrimental to the operation of the school. If the offense is serious or illegal in nature, it may warrant a suspension on the first offense.

This provision on the Philosophy of Student Suspension addresses the discretion of the principal to utilize suspensions. The principal did exercise his discretion in this case particularly by imposing an in-school suspension rather than an out-of-school suspension. We can see no inconsistency with the CCPS Philosophy on Student Suspension.

Consistent Application of Policy

Appellant suggests that the cellular telephone policy has not been consistently applied throughout the school system because a student at Calvert Middle School was given a verbal warning when the exact same incident occurred. Appellant provides no documentation in the form of an affidavit or otherwise to support this proposition. Appellant also asserts that this argument is supported by the fact that the school Principal contacted the central office for clarification of the term “use” as set forth in the policy. This request for clarification, however, does not translate into inequitable application of the policy. Rather, it suggests that the Principal was trying to apply the policy to cell phone use conduct in the same manner it is applied throughout the school system.

Policy Revision

Appellant argues that the local board has abused its discretionary powers by refusing to revise its policy on communication devices to provide lesser penalties for infractions. On two prior occasions, in *Sydnor v. Calvert County Bd. Of Educ.*, MSBE Opinion No. 02-43 (Aug. 27, 2002) and *Berry v. Calvert County Bd. Of Educ.*, MSBE Opinion No. 05-28 (Aug. 31, 2005), the State Board has requested that the local board revisit this policy to provide discretion to impose lesser penalties for extenuating or mitigating circumstances. Given that the principal chose a less severe penalty than that stated in the policy, and that the chosen penalty was upheld by the superintendent and the local board, we again urge the local board to review the policy and provide discretion for lesser penalties. This case clearly demonstrates the need for a more flexible approach.

Nevertheless, although we urge the local board to take action on this issue, we do not believe that it has abused its discretion by failing to do so.

Based on our review of the record, we find that the local board did not violate State or local law, policies, or procedures; did not violate M.H.’s due process rights; and did not act

unconstitutionally in upholding M.H.'s one day in-school suspension for violating the communications devices policy.

CONCLUSION

For the foregoing reasons, the decision of the Calvert County Board of Education is affirmed.

Edward L. Root
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June 20, 2006