PARENT H.,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 13-27

OPINION

INTRODUCTION

Appellant challenges the decision of the Montgomery County Board of Education ("local board") finding that her son engaged in the possession and sale of controlled dangerous substances on school property, and modifying her son's disciplinary record to reflect an extended suspension in lieu of an expulsion. The local board filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Appellant opposed the motion, and the local board replied.

FACTUAL BACKGROUND

Appellant's son attended the 10th grade at Northwest High School (Northwest) during the 2011-2012 school year.

On October 3, 2011, Appellant's husband emailed Russell Larson, School Resource Officer, to report that there was a boy in his son's math class selling Adderall tablets to other students. He also inquired if there was an Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) program at Northwest. (Record, Tab D, Ex. 77). That same day, Mr. Larson requested a description of the student dealer and any buyers, and advised Appellant's husband to contact the school counselor who would have information on resources for assisting parents and students with drug related issues. *Id.* Appellant's husband indicated that he would get the additional information from his son. *Id.* The two then tried to schedule a time to meet about the issue, but no such meeting ever took place. The last email between the two was on October 18, 2011. *Id.* At some point after the October 3 email exchange, Appellant's husband spoke to someone in the administrative office at the school who advised him that the school did not have any AA or NA programs at the school and that he would have to contact the programs directly. (T.193-194).

On October 26, 2011, Timothy Britton, the Assistant Principal, received a report from the school counselor that some students had told the counselor that they witnessed Appellant's son selling drugs in the school courtyard. Mr. Britton had Appellant's son report to the office where

he questioned him about the drugs. Appellant's son admitted to buying and selling Adderall at school. (T.33-36). At 9:45 a.m., he signed the following written statement:

> I was selling Adderall in school to _____ and _____. I sold 3 to _____ and 2 to _____. I bought them from _____. I sold them for $3 to _____ and $2 to _____. I bought them for 50¢ each in side (sic) the bathroom. I bought 100 [A]dderall pills and took a lot, and when my parents found them they had me flush all that I had.

(Record, Tab D, Ex. 16). Mr. Britton questioned the student that Appellant's son identified as the dealer. The student dealer admitted to selling the drugs to Appellant's son. (T.51). Mr. Britton found the student dealer in possession of the same type of pills Appellant's son had been selling, which the dealer's parent identified as Adderall. (T.137-138). Later that same day, two students signed statements that they had witnessed Appellant's son distributing pills, one of whom said that Appellant's son had offered a pill to that student.[1] (Record, Tab D, Ex. 81).

On the same day, Mr. Britton called the Appellant and advised her that her son was being suspended for 10 days for buying and selling Adderall at school. (T.52-55). He testified that he also advised Appellant that her son could be expelled for the infraction. Appellant testified to the contrary that Mr. Britton did not advise her of the expulsion possibility. (T.55, 224). When Appellant arrived at school to get her son, Mr. Britton explained the next steps of the process -- that there would be an investigative conference and that someone from the school system would be contacting her. Appellant did not want to stay at the school to further discuss the disciplinary issue, so she got her son and left. (T.53-54, 223). Thereafter, Jerry Logan, Pupil Personnel Worker, contacted her regarding the scheduling of the investigative conference. (T.225).

On November 2, 2011, Teri Musy, Coordinator for the Disciplinary Review and School Assignment Unit, conducted an investigative conference. The Appellant, her husband, her son, her son's attorney, Mr. Britton and Jerry Logan, Pupil Personnel Worker, attended. At the beginning of the conference, Ms. Musy outlined the possible outcomes of the case and stated that the purpose was to determine if there was sufficient evidence to warrant expulsion of the student or to return him to school. (T.73-74, 209). Mr. Britton stated that he was contacted by a school counselor who related that students had expressed concerns about drugs being sold at school, that the students named Appellant's son as a student selling pills, and that Appellant's son had admitted to buying and selling Adderall when Mr. Britton questioned him about it. (Appeal, Tab D, Ex. 24). After conferring with counsel, Appellant's son admitted to the purchase and sale of Adderall to students on school grounds. (T.204-205). Appellant and her husband asked that their son not be expelled, presenting evidence that the son did well in school, had no other disciplinary issues, and participated in extracurricular activities, including working towards becoming an Eagle Scout. (*Id.;* Appeal, Tab D, Ex. 24). By letter dated November 3, 2011, Ms.

[1] There is a third student statement but it does not set forth any first-hand knowledge of the drug possession or distribution. (Record, Tab D, Ex. 81).

Musy advised Appellant that she was upholding the 10-day suspension and forwarding the school principal's recommendation for expulsion to the Chief Operating Officer of MCPS. (*Id.*).

On November 7, 2011, several days after the investigative conference, Appellant received a letter dated October 26, 2011, from Lance Dempsey, Principal of Northwest, stating that Appellant's son had admitted to buying and selling Adderall at school, and that he was suspending him for 10 days and seeking expulsion as a result of that conduct. (Record, Tab D, Ex. 17). The letter was apparently not placed in the U.S. mail until November 4, 2011 because Principal Dempsey had put the letter in the school system interoffice mail and the letter was first sent to the central office mailroom before being placed in the outgoing U.S. mail. (Record, Tab D, Ex.42). This resulted in Appellant's delayed receipt of the letter.

Meanwhile, Chief Operating Officer, Larry Bowers, was already considering the expulsion request. He referred the case to a hearing officer for review. On November 8, 2011, one day after Appellant received the letter from the school principal, a hearing officer, Mary Dempsey, conducted a hearing regarding the recommendation that Appellant's son be expelled. Appellant, her husband, her son, her son's attorney, Principal Dempsey, Vice Principal Britton, and Pupil Personnel Worker, Jerry Logan, attended the hearing. (Record, Tab A, Dempsey Report, 11/14/11).

During the hearing, Mr. Britton explained what occurred on October 26. Appellant's son, represented by counsel, also made some remarks. Hearing Officer Dempsey summarized the testimony:

> [Appellant's son] began his remarks by testifying that everything Mr. Britton said was correct. [Appellant's son] said his grades had been falling at the end of September. He was paired with Student A in math class and noticed Student A taking a pill. Student A explained that the pill (Adderall) helped him focus and he offered to sell some to [Appellant's son]. The next day, [Appellant's son] bought 10 pills from Student A for $10.00. For a few days, [Appellant's son] took three pills each day. When he ran out, Student A sold him 100 pills for $50.00. [Appellant's son] said that word must have gotten out that he had the pills, because a girl approached him and asked him if she could buy some. [Appellant's son] said that he initially said no but then agreed. He sold her two pills for $4.00. [Appellant's son] told another student the he had the pills, and the student also asked [Appellant's son] to sell him some. [Appellant's son] then sold the student three pills.

Id. Appellant's son also stated that when his parents found the pills they flushed them down the toilet. He further stated that Student A wanted him to sell more pills and offered him 30 percent of the profits, but that he did not want to sell them anymore. Student A continued to pressure Appellant's son up until the October 26 incident. *Id.*

Hearing Officer Dempsey found that Appellant's son violated MCPS Regulation COF-RA, *Intoxicants on MCPS Property*, by buying 110 Adderall pills from another student and then reselling some of the pills to other students. Ms. Dempsey recommended that Mr. Bowers uphold the 10-day suspension and expel Appellant's son for the remainder of the 2011-2012 school year. *Id.*

Ms. Dempsey also noted in her report that Appellant's husband said that he had left the November 2nd investigative conference with the impression that he could request a school change for his son at the November 8th hearing, which he believed would satisfy his safety concern about his son returning to Northwest and would also serve as the disciplinary action for the incident. Ms. Dempsey explained that the safety issue of what school his son should attend would be considered when his son was permitted to return to school. *Id.*

By letter dated November 18, 2011, Mr. Bowers expelled Appellant's son from Northwest High School. Mr. Bowers stated that he could seek readmission for the first semester of the 2012-2013 school year through the Expulsion Review Board at its May 2012 meeting. (Records, Ex. A).

Appellant appealed Mr. Bowers' decision to the local board on November 23, 2011. She asked that the expulsion be rescinded and that any reference to it in her son's educational record be redacted. (Record, Tab D, Ex. 36). The local superintendent responded to the appeal by memorandum to the local board on December 15, 2011. (Record, Tab D, Ex. 42). On December 20, 2011, the local board received a request from the Appellant for an expedited hearing in the case. (Record, Tab D, Ex. 42A). The local board received a second request for expedited hearing on January 3, 2012. (Record, Tab D, Ex. 44).

On January 13, 2012, the local board forwarded the matter to Hearing Officer, William Roberts, for handling. (Record, Tab D, Ex. 46). On February 28, 2012, an attorney for the Appellant entered his appearance in the case and filed a Motion to Strike Expulsion and Memorandum of Law in Support. The Motion requested that Hearing Officer Roberts reverse the expulsion decision without holding an evidentiary hearing. The parties briefed the matter through the end of March.

On April 4, 2012, Hearing Officer Roberts advised the parties that he was denying Appellant's Motion to Strike and setting the case in for an evidentiary hearing. (Record, Tab D, Ex. 56). He asked for potential hearing dates from the parties, excluding the period from May 6 - May15 due to office leave, and also requested the parties to submit all documents intended to be introduced as evidence. *Id.* Although there were communications between Hearing Officer Roberts and Appellant's counsel during April regarding the submission of documents, neither party submitted potential hearing dates.

On May 3, 2012, Hearing Officer Roberts emailed the parties in an attempt to hold a conference call to select a hearing date. (Record, Tab D, Ex. 67). Counsel for Appellant responded that there were efforts by his office "to both advance the hearing and undertake settlement, unfortunately, all to no avail." He stated that counsel for both parties had agreed to a

May 30th date, but that he was awaiting confirmation of the date from the Appellant, who was trying to get in touch with her husband in Afghanistan. (Record, Tab D, Ex. 67). On May 21, 2012, counsel for Appellant withdrew his representation. (Record, Tab D, Ex. 70). Appellant advised the hearing officer that she intended to proceed on May 30 without new counsel. (Record, Tab D, Ex. 71).

On May 30, 2012, Hearing Officer Roberts, conducted an evidentiary hearing.[2] Thereafter, in June 2012, the parties submitted post-hearing memoranda. (Record, Tab D, Exs. 82 & 83).

On August 9, 2012, Mr. Roberts issued a 54-page decision, concluding that Appellant's son violated MCPS Regulations COF-RA and JFA-RA by possessing and distributing controlled dangerous substances. He offered the local board two recommendations. The first was to uphold the expulsion through the second semester of the 2011-2012 school year. The second was to uphold the placement of Appellant's son out of school through the second semester of the 2011-2012 school year but to modify the student's academic record to reflect that period of time as an extended suspension rather than an expulsion. Mr. Roberts recommended the second option as a means to "temper the blemish on the student's record, in light of the fact that the parents were in the process of doing what they thought was appropriate to address this problem before October 26, 2011." (Record, Tab C, Roberts' Decision at pp. 52-53).

The local board held oral argument on October 1, 2012.[3] On November 13, 2012, the local board issued its decision adopting the second option recommended by Mr. Roberts to have the education record reflect only an extended suspension rather than an expulsion. The local board found that there were mitigating circumstances in that the parents moved quickly to address the situation with their son, including seeking treatment, and that their son was only 14 years old at the time of the incident. (Local Bd. Decision, p.6).

The State Board received the appeal in this matter on December 14, 2012. The parties briefed the case through January 2013. The State Board received the full record of proceedings before the local board in March.[4]

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[2] Counsel for the Appellant proposed the hearing date, but withdrew his appearance prior to that date. (Record, Tab D, Exs. 68, 70). Appellant represented herself at the hearing.

[3] Meanwhile, the Expulsion Review Board granted Appellant's son readmission to school for the 2012-2013 school year. We note that when the suspension was first put in place, Appellant's son received school work to complete at home and educational services through the Home and Hospital Teaching Program. Within two weeks of that time he began attending The Avalon School, a private school in Montgomery County. He is currently enrolled in Montgomery County Public Schools. (T.233, 240-241).

[4] We expect local boards to provide a copy of the full record of proceedings before the local board with its response to the appeal, including the transcript of any evidentiary hearing that took place before the local board or its designee. COMAR 13A.01.05.03E. We note that the cost of transcription is initially to be paid by the Appellant. *Id.*

STANDARD OF REVIEW

In student suspension and expulsion cases, the decision of the local board is final. Md. Code Ann., Educ. Section 7-305(c). The State Board only reviews the merits of the decision if there are "specific factual and legal allegations" that the local board failed to follow State or local law, policies, or procedures; violated the student's due process rights; acted in an unconstitutional manner; or that the decision is otherwise illegal. COMAR 13A.01.05.05G(2).

A decision may be considered "otherwise illegal" if it is:

(1) Unconstitutional
(2) Exceeds the statutory authority of jurisdiction of the local board;
(3) Misconstrues the law;
(4) Results from an unlawful procedure;
(5) Is an abuse of discretionary powers; or
(6) Is affected by any other error of law.

ANALYSIS

The Appellant challenges the legality of the local board's decision in six ways.

First, Appellant maintains that the school system's failure to send out the October 26, 2011 letter from Principal Dempsey before the November 2nd investigative conference with Ms. Musy violated MCPS regulation. Thus, she argues, that violation prejudiced her son at the November 2nd and November 8th hearings because she lacked clear notice that expulsion was possible and was not prepared to defend against it.

Due process in the school discipline context requires that a student be provided with notice of the charges against him and the opportunity to be heard. *See Goss v. Lopez*, 419 U.S. 565, 581 (1975). To that end, MCPS Regulation JGA-RB(IV)(B) provides that when there has been a decision to suspend a student, the principal must provide written notice to the parent even though notice of the disciplinary action may first be given orally. The written notice must include the effective date and period of suspension; an offer to schedule a conference with the parent as soon as possible to review the incident and the suspension; and a statement advising the parent of the right to appeal the disciplinary decision. JGA-RB(IV)(B)(1)(a) – (c). Although, the regulation does not specify a time frame for sending the written communication, based on the plain language of the regulation it is only logical that the written communication should be sent prior to convening the conference. Thus, we find that, while the school system ultimately sent written notice to the Appellant on November 4th, there was a technical violation of the regulation because the conference took place on November 2nd, prior to the date notice was sent.

The State Board has consistently held, however, that that the opportunity for a full evidentiary hearing serves to cure deficiencies that occurred in prior administrative proceedings. *See Williamson v. Board of Educ. of Anne Arundel County*, 7 Op. MSBE 649 (1997); *Harrison v. Somerset County Bd. of Educ.*, 7 Op. MSBE 391 (1996); *see also Mayberry v. Board of Educ. of Anne Arundel County*, 131 Md. App. 686, 690-691 (2000)(any defects in procedure were cured

by *de novo* evidentiary hearing before local board). Here, the Appellant fully participated in an evidentiary hearing before the local board's hearing officer, Hearing Officer Roberts. There is no dispute that Appellant had notice of the hearing and was aware at that time of the charges against her son and the possibility of expulsion. Appellant was able to present evidence, examine and cross-examine witnesses, make legal argument, and create a complete record. Therefore, the full evidentiary hearing before Hearing Officer Roberts had a curative effect on the technical violation of the regulation and there was no due process violation.

In addition, we note that at the start of the November 2nd investigative conference, Ms. Musy laid out the possible outcomes of the conference and explained that expulsion was one of them. Appellant's own testimony confirms this. T.207-209. Appellant and her husband, who are both attorneys, requested that Ms. Musy not expel their son, thereby conveying an understanding of the potential outcome. In addition, private legal counsel was present for Appellant's son.[5] Appellant claims that she and her husband left the November 2nd investigative conference thinking expulsion was no longer an issue, and that they did not fully understand that expulsion was still a possibility at the November 8th hearing before Hearing Officer Dempsey. Yet Appellant had received the principal's letter notifying her of the expulsion recommendation the day before the hearing and Hearing Officer Dempsey clarified any misunderstanding that Appellants may have had during the hearing.

It bears mentioning that the school system was operating within a very tight time frame once the principal suspended Appellant's son with a recommendation for the superintendent to expel. Once that happens, the superintendent or designated representative is required to promptly investigate and conduct a conference on the disciplinary action, preferably within 10 school days of the suspension and recommendation for expulsion. *See* COMAR 13A.08.01.11. The school system must work reasonably within that window of time to conduct the face to face meeting in order to deal swiftly with the disciplinary action. The school was successful in making that happen here. Appellant attended the conference with Ms. Musy and another with Hearing Officer Dempsey, all within ten school days of the initial suspension.

Second, Appellant argues that the local board's decision is illegal because the school system failed to establish conclusively that the pills were Adderall, relying on the State Board's decision in *Kahn v. Baltimore County Bd. of Educ.*, MSBE Op. No. 99-47 (1999). In *Kahn*, the State Board reversed the student's expulsion for possession of an alcoholic beverage on school property because the student maintained that the beverage was fruit punch and the school system had not tested the beverage to determine that it contained "one-half of one percent or more of alcohol by volume" to satisfy the "alcoholic beverage" definition set forth in the school system policy. We distinguished *Kahn* in *Wilson v. Board of Educ. of Baltimore County*, 7 Op. MSBE 383 (1996). In that case we did not require testing of the alcoholic beverage by anything more than the sniff test, noting that the student in *Wilson* identified the contents of the bottle as alcohol. The case at hand is like *Wilson* in that Appellant's son admitted that the pills were Adderall and the student dealer's parent identified the pills as such.

[5] Appellant maintains that legal counsel was present on November 2nd and 8th so that she would be there in the event an arrest was made during either meeting. (Tr.225, 234-235).

Third, Appellant maintains that her son's statements regarding the Adderall were taken without the administration of *Miranda* warnings and, therefore, cannot be used as evidence in the case. *Miranda* warnings are warnings that law enforcement authorities are required to administer in the criminal context to individuals subject to custodial police interrogations advising them of their Constitutional rights against self-incrimination and the right to counsel. *See Miranda v. Arizona*, 382 U.S. 436 (1966). *Miranda* warnings are an element of criminal procedure and are not applicable to school officials in the school disciplinary context when determining whether a school rule has been violated and whether a penalty such as suspension or expulsion should be imposed. There was no requirement that school officials give Appellant's son such warnings prior to taking his statement here.

Fourth, Appellant claims that the expulsion was arbitrary and unreasonable because it is an excessive punishment and inconsistent with the policies and procedures of other school systems that do not specify expulsion for use, possession or distribution of controlled substances. The policies and procedures of other school systems are not at issue here. The MCPS disciplinary policy allows for the expulsion of a student for the offense charged here. *See* MCPS Regulation COF-RA. That is within the discretion of the school system. There is no evidence that such a consequence is unreasonable, particularly in light of the fact that Appellant's son was distributing the drug to other students.

Fifth, Appellant contends that the decision is illegal because it is based, in part, on the admission of materials submitted or obtained during earlier levels of review. Appellant argues that those materials were inadmissible at the May 30th hearing before Hearing Officer Roberts because the hearing was supposed to be a *de novo* hearing, as required by MCPS procedures.

Hearing Officer Roberts discussed the concept of *de novo* review in his decision, citing *Mayer v. Montgomery County*, 143 Md. App. 261 (2002) and cases cited therein:

> A trial or hearing "de novo" means trying the matter anew the same as if it had not been heard before and as if no decision had been previously rendered. Thus, it is said that where a statute provides that an appeal shall be heard de novo such a hearing is in no sense a review of the hearing previously held. . . .
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> * * *
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> A trial de novo or a de novo hearing of the matter under "review" may be new and different from the trial or hearing before the administrative agency in respect to one or more, or all, of the following: evidence heard or facts considered, especially where the administrative agency did not afford a hearing; issues raised; findings made; grounds for decision; and the view of the evidence heard or facts considered, the opinion as to the preponderance of the evidence, and the proper judgment to be reached or action to be

> taken in accordance with the evidence or facts as thus viewed. The last element would appear to be the essential element of a true trial or hearing de novo and may be embraced by general statements of a court that a trial de novo is involved. (Internal citations omitted).

(Roberts' Decision at p. 17).

The fact that a case is subject to *de novo* review does not mean the documents introduced at a prior hearing are eliminated from the scope of admissible evidence. The admissibility of evidence depends upon its relevance to the issues in the case. Such evidence is then considered along with any other evidence and testimony admitted during the hearing. Under the *de novo* standard, neither Hearing Officer Roberts nor the local board is required to give deference to prior decision makers in the case. Rather, they make their own assessment of the evidence and testimony in the case in reaching their determinations. That is what happened here.[6]

Sixth, Appellant also claims that the local board's decision is illegal because it is premised upon statements made by her son after Appellant contacted Officer Larson, the School Resource Officer, seeking information regarding the availability of NA or AA meetings for her son. Section 7-412 of the Education Article provides that a statement made by a student seeking information from a teacher, counselor, principal or other professional educator employed by the school system to overcome any form of drug abuse is not admissible against the student in any student proceeding. The statements made by Appellant's son regarding the possession and distribution of Adderall were not made in the course of his seeking treatment information for drug abuse. Rather, he made those statements during the school's investigation which was initiated based on information students told to the school counselor regarding Appellant's son selling Adderall. Mr. Britton testified that he had not spoken to Officer Larson about Appellant's son prior to the initiation of the investigation on October 26 and that it was the school counselor who advised him of the situation. (T.33-35). Nor is there any evidence that the Appellant or her husband spoke to the school counselor about this issue prior to that date. Therefore, no violation of §7-412 occurred.

Before coming to a conclusion in this case, we want to review the timeline and look at what happened after Appellant appealed the case to the local board. On November 18, 2011, Mr. Bowers had expelled Appellant's son for the entire 2011-2012 school year. Appellant appealed that decision to the local board on November 23, 2011 and sent two requests to expedite the case, one on December 15, 2011 and one on January 3, 2012. The local board referred the case to Hearing Officer Roberts on January 13, 2012. Hearing Officer Roberts did not conduct the hearing until May 30, 2011, and did not issue a decision until August 9, 2012. The local board heard oral argument on October 1, 2012 and issued its decision on November 13, 2012. Almost one year after Mr. Bowers' decision.

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[6] To the extent that Appellant disagrees with the admission of statements made by her son during those hearings we note that her son had already admitted to selling the pills when he spoke with Mr. Britton.

We have looked at the lengthy record in this case. We understand that there were some intervening school system closures during November and December, as well as some legal wrangling based on filings by counsel for Appellant while the case was before Hearing Officer Roberts. Despite all of that, we cannot understand why it took the local board a year to reach a decision in a student expulsion case that had been through nearly all levels of local review within ten school days of the principal's recommendation. During that one year time frame, the Appellant's son had already served the full disciplinary period and had been readmitted to Montgomery County Public Schools. Such lengthy time frames in student discipline cases are one of the reasons why this Board believes more stringent timelines should apply in school discipline cases.

CONCLUSION

For all these reasons, we find that the local board's decision was not arbitrary, unreasonable or illegal. Accordingly, we affirm the decision of the local board.

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Linda Eberhart

May 21, 2013