

THOMAS L. SYDNOR,

Appellant

v.

CALVERT COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 02-43

OPINION

In this appeal, Appellant challenges his son's suspension from school for three days for violating the Calvert County Public Schools' cellular telephone policy. The local board has submitted a Motion to Dismiss maintaining that a three day suspension is not appealable to the State Board. Alternatively, the local board has submitted a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable, or illegal. Appellant has submitted a compelling reply in opposition to the local board's motion.

FACTUAL BACKGROUND

During the 2001-02 school year, Appellant's son Daniel was in the 11th grade at Northern High School in Calvert County. On December 7, a cellular telephone in Daniel's gym bag rang during the last class period of the school day. His father had given Daniel the cellular phone to use the previous night for a ride home after basketball practice because the gymnasium phone was inoperable. After practice, Daniel used the cellular telephone, as did a teammate who placed the phone back in Daniel's gym bag. At school the following day, Daniel's first period teacher, Mr. Halstead, permitted Daniel to leave his gym bag in the classroom during the day while Daniel attended his other classes.¹ A work associate called Daniel's father on the cell phone during instructional time at approximately 2 p.m. while Daniel's gym bag was in Mr. Halstead's classroom. Mr. Halstead reported the incident to the principal who suspended Daniel from school for three days for violation of the cellular telephone policy.

Appellant appealed the decision to the local board, who referred the matter to a hearing examiner for a full evidentiary hearing. The hearing examiner recommended that the local board uphold the three day suspension finding that the school system had handled all violations of the cellular telephone policy consistently; that the policy was publicized to all students; and that the policy which mandated a three day suspension in this case was properly executed.

¹The bag contained items for the away basketball game that evening and was too large to fit in Daniel's locker. Tr. 23-24; 53.

After conducting oral argument, the local board by a vote of four to one accepted the recommendation of the hearing examiner, thereby upholding Daniel's three day suspension for violating the Calvert County Public Schools' cellular telephone policy.

ANALYSIS

As a preliminary matter, the local board maintains that the State Board lacks jurisdiction to hear an appeal of a three day suspension. In *Junaid Ali, et al. v. Howard County Board of Education*, MSBE Opinion No. 00-15 (March 22, 2000), the State Board ruled that a suspension of ten days or less may be appealed to the State Board. For the reasons stated in *Junaid Ali*, this appeal is properly before the State Board.

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 rights of the student; or whether the local board acted in an otherwise unconstitutional manner. If any of these bases are found or if the decision is otherwise illegal as defined in COMAR 13A.01.01.03E1(c), the State Board may reverse or may modify the penalty.

The Calvert County Public Schools' policy on cellular telephones that is contained in the Code of Student Conduct provides:

Students may possess some portable communication devices on school property and on school buses; however, they **MUST NOT** have pagers, cellular telephones, or any portable device capable of communicating with another portable device:

- 1) turned to the "on" position,
- 2) visible (in sight) at any time, or
- 3) used to send or receive messages.

Students must abide by these procedures on school buses, inside school buildings Students participating in extracurricular activities such as football, cheerleading, basketball, after school clubs, etc. may use pagers, cellular telephones, and other portable communication devices on school property after regular school hours, but not inside school buildings. (Emphasis in original).

The policy further states that a student will be suspended from school for three days for a first offense.² Code of Student Conduct at 15-16.

Appellant provides a variety of reasons why Daniel's suspension was not warranted, citing among other things, that Daniel was not physically in possession of the phone at the time it rang; the phone was not owned by Daniel; another student had used the phone last and placed it in Daniel's bag without turning it off or someone turned the phone on the next day when the gym bag was in Mr. Halstead's room; Daniel was not aware that the telephone was in his gym bag; the only reason Daniel had the phone with him was due to the inoperable phone in the gymnasium; and Daniel had an away game that evening and had to leave his gym bag in Mr. Halstead's classroom because there was no other secure location in which to store it.

Appellant also asserts that discretion should have been used in meting out the punishment for the cellular telephone offense given that Daniel is an exceptional student and athlete and that he had no prior disciplinary actions in his school career. Appellant argues that such discretion is supported by the Philosophy of Student Supervision, contained in the Code of Student Conduct, which states:

Usually a suspension is not implemented until all appropriate school resources have been utilized. If the offense, however, is serious or illegal in nature, it may warrant a suspension on the first offense. The suspension process is individualized by considering various factors such as the student's background, the dynamics of the student's behavior, and the local school situation. The effective use of the suspension is, hopefully, a learning activity for the child. *See* Code of Student Conduct at 45.

The local board argues that while there is no dispute that what occurred in this case was unintentional, the applicable policy contains no element requiring intentional conduct. Additionally, ownership of the telephone is irrelevant given that Daniel brought the phone to school for his own use. Furthermore, even though Daniel was not in actual physical possession of the telephone when it rang, he was in constructive possession of the telephone which was contained with his other belongings in his gym bag.

We disagree with the local board's position and find Appellant's arguments persuasive. Under the unique circumstances of this case we conclude that there is insufficient evidence to sustain the three day suspension. In particular we find that the gym bag containing the phone had

²The Calvert County cellular phone policy was newly enacted for the 2001-02 school year. Pursuant to State law, prior to October 1, 2001, the possession of cellular telephones and paging devices by students was not permitted on public school grounds in any jurisdiction in the State of Maryland. The possession of such devices is now left to the discretion of the local school system for all jurisdictions except Baltimore City, and Caroline, Dorchester, Somerset, Talbot, Wicomico, and Worcester Counties. *See* Md. Code Ann., Educ. § 26-104.

not been in Daniel's possession for many hours before it rang. The record evidence suggests that it was the last student to have used the phone the previous night who forgot to turn it off or that someone turned it on sometime during the school day while the bag was sitting in Mr. Halstead's classroom.³

CONCLUSION

Because there was insufficient evidence that Daniel violated the cellular telephone policy, we reverse the three day suspension imposed by the Board of Education of Calvert County and direct the Board to remove the suspension from Daniel's records.

Marilyn D. Maultsby
President

Reginald L. Dunn
Vice President

JoAnn T. Bell

Philip S. Benzil

Dunbar Brooks

Walter S. Levin, Esquire

Karabelle Pizzigati

ABSTAIN

³As an additional matter, the State Board does not look favorably upon automatic penalty provisions that leave a board with no discretion to consider extenuating circumstances or mitigating factors. We therefore commend the Calvert County Board for revising its policy on cellular phones and pagers to allow consideration of these factors in future cases.

Edward L. Root

ABSTAIN

Walter Sondheim, Jr.

DISSENT

Finding that the local board has handled all violations of the cellular telephone policy consistently, that the policy was publicized to all students, and the policy mandated a three day suspension for the first offense, we would affirm the three day suspension imposed in this case.

Clarence A. Hawkins

John L. Wisthoff

August 27, 2002