Commonwealth of Kentucky
Office of the Attorney General

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March 13, 2023

OAG 23-02

Subject: Whether KRS 158.150 or the Kentucky Constitution limits the maximum duration of a student's expulsion from school to one year.

Requested by: Representative Kim Banta
Kentucky House of Representatives, District 63

Representative Steve Rawlings
Kentucky House of Representatives, District 66

Written by: Aaron J. Silletto
Assistant Attorney General

Syllabus: Neither KRS 158.150 nor the Kentucky Constitution limits the maximum duration of a student's expulsion from school to one year, so long as it is not arbitrary.

Opinion of the Attorney General

You have requested an Opinion from this Office concerning the scope of authority local boards of education have regarding school discipline. Specifically, you have asked whether a local board of education may, consistent with Kentucky law, expel a student for more than one year. For the reasons below, it is the Opinion of this Office that a local board of education may expel a student for more than one year.

Your request cites several statistics to show the exigencies supporting it: "The U.S. has had 2,032 school shootings since 1970, and these numbers are increasing. Alarmingly, 948 school shootings have taken place since the tragedy at Sandy Hook Elementary School in December 2012." You also state that local school districts in Kentucky recently "have faced serious threats or acts of violence" in their schools, and you indicate in your request that the General Assembly intends to "do [its] part . . . to keep our children safe." It is against this backdrop of threats and violence that this Office addresses your request.

Answering the question posed by your request starts with KRS 158.150, the current statute governing the suspension or expulsion of students in Kentucky schools. It provides that the "[w]illful disobedience or defiance of the authority of the teachers or administrators, . . . assault or battery or abuse of other students, the threat of force or violence, . . . the carrying or use of weapons or dangerous instruments," and "other incorrigible bad conduct," among others, may be grounds for suspending or expelling a student from school. KRS 158.150(1). Each local board of education is required to adopt a policy "requiring disciplinary actions, up to and including expulsion from school," for students who engage in certain conduct, including possessing controlled substances on school grounds with the intent to sell, or committing a physical assault or battery against school personnel or other students. KRS 158.150(2)(b).

The statute allows school administrators, teachers, "or other school personnel" to "immediately remove or cause to be removed threatening or violent students from a classroom setting or from the district transportation system pending any further disciplinary action that may occur." KRS 158.150(4). Each local board of education is required to adopt a policy "to assure the implementation of" KRS 158.150 "and to assure the safety of the students and staff." *Id*.

The authority to suspend a student is conferred on each school district superintendent, principal, assistant principal, or head teacher of any school. KRS 158.150(6). Generally, before a student may be suspended from school, the student must be given notice of the charges against him or her, an explanation of the evidence, and an opportunity to present his or her own version of the facts relating to the charges. KRS 158.150(5).[1] But the authority to expel a student rests solely with the local board of education. KRS 158.150(6). The board may not expel a student "until the parent, guardian, or other person having legal custody or control of the pupil has

[1] The statute does allow a student to be suspended prior to a hearing if "immediate suspension is essential to protect persons or property or to avoid disruption of the ongoing academic process." KRS 158.150(5). But in such a case, the student must be given a hearing no later than three school days after the suspension. *Id*.

had an opportunity to have a hearing before the board." *Id*. The decision of the board with respect to an expulsion "shall be final." *Id*.

In reviewing the text of KRS 158.150, it is clear that the General Assembly has described the conduct that may subject a student to suspension or expulsion from school; conferred the authority to make decisions regarding suspensions and expulsions to school administrators and the local boards of education, respectively; and required due process protections for students, including notice and an opportunity to be heard, before they can be suspended or expelled. However, nothing in KRS 158.150 prescribes the maximum duration of any such expulsion from school. Specifically, nothing in KRS 158.150 limits the maximum duration of an expulsion from school to one year.[2] Neither has the Kentucky Board of Education promulgated an administrative regulation on the maximum duration of expulsions from school. *See* KRS 156.070(4) (authorizing the state board to promulgate such administrative regulations as are "necessary for the efficient management, control, and operation of the schools and programs under its jurisdiction").

The current "one year rule" to which your request refers therefore is not prescribed by statute or regulation, but is the product of two prior Opinions of this Office. First, in OAG 74-165, the Office was asked whether a local board of education could expel a student from school "permanently." Noting that Kentucky had a compulsory attendance law, KRS Chapter 159, the Office observed that "[i]t is clearly the public policy of the Commonwealth that all children of school age be in school." OAG 74-165 (Mar. 1, 1974), at 3. The Office then cited several federal court cases that describe education as "important" and "of value to the student." *Id*. at 3–4 (citations omitted). After this very brief discussion, and noting no Kentucky cases specifically addressed the issue, *id*. at 3, the Office then concluded:

> The gist of all the recent Federal court cases on this subject is that school children should not be separated from the public schools except in the most extreme cases; that suspension should be of short duration; that expulsions not be ordered without a due process hearing *and that they be for no longer than the current school year*. . . . It is therefore the opinion of this office that *KRS 158.150 should be interpreted as authorizing the expulsion of a child from the public schools for no longer than the current school year*.

[2] In fact, in one circumstance—a student bringing a weapon onto school property—KRS 158.150 sets a *minimum* duration of the expulsion. KRS 158.150(2)(a) ("Each local board of education shall adopt a policy requiring the expulsion from school for a period of *not less than one (1) year* for a student who is determined by the board to have brought a weapon to a school under its jurisdiction." (emphasis added)). This provision was added by a 1996 amendment to the statute. *See* 1996 Ky. Acts ch. 51 § 1.

Id. at 5 (emphasis added). No attempt was made in OAG 74-165 to tether the "no longer than the current school year" limitation to the actual text of KRS 158.150.

This Office was asked to reconsider OAG 74-165 in 1988. The specific question answered in OAG 88-65 concerned whether "carry-over expulsions," *i.e.*, expulsions extending beyond "the beginning of the next school year," were permissible in Kentucky public schools. OAG 88-65 (Sept. 29, 1988), 1988 WL 409933, at *1. This Office said that they were.

> There are no cases in Kentucky or any other jurisdiction which directly discuss the legality of a carry-over expulsion. Several cases exist in other states as to expulsion for a "school year" and in that instance where "school year" is defined as a particular number of days, then that time may be carried over to the fall semester. However, *our legislature has not provided disciplinary actions for a time period not to exceed one school year*. Therefore, in our opinion, based upon review of the Kentucky statutes and the few Kentucky cases discussing expulsion and suspension, carry-over discipline is not prohibited in our state. However, the utmost caution should be exercised in any carry-over discipline, be it expulsion or suspension.

Id. at *1 (emphasis added). Thus, "to the extent [OAG 88-65] is in conflict with any conclusions of OAG 74–165, that opinion [was] overruled." *Id*. Your request notes that, based on the emphasized language from OAG 88-65 quoted above, "the Kentucky Department of Education and other authorities advise the Commonwealth's boards of education to adhere to a 'one year rule' for expulsions."

OAG 88-65 did not actually state that a local board of education is prohibited by Kentucky law from expelling a student for more than one school year. Rather, the opposite is the case. The Opinion referred to "[s]everal cases . . . in other states" that limit student expulsions from school to a "school year." Because, in those unidentified out-of-state cases, "'school year' is defined as a particular number of days," those states allowed a school-year suspension to extend into the following school year. But, as the Opinion noted, the General Assembly "has *not* provided disciplinary actions for a time period *not to exceed one school year*" (emphasis added).

This double-negative appears to have caused some confusion. The point of this passage from OAG 88-65 was to the effect that the General Assembly in KRS 158.150 has *not* limited the maximum durations of expulsions to one "school year," as some other states apparently had done. Yet this passage has been construed to place a hard, one-year cap on the maximum term of any expulsion from the public schools. To the extent OAG 88-65 has been construed to limit a local board of education's authority to expel a student to one year, it is overruled.

Rather, because KRS 158.150 itself does not limit the maximum term of a student's expulsion to a certain amount of time, OAG 88-65 correctly states only that the penalty imposed on a student may not be "so grossly disproportionate to the offense as to be arbitrary," and school discipline may not be arbitrarily or maliciously enforced. 1988 WL 409933, at *2 (citing *Petrey v. Flaugher*, 505 F. Supp. 1087, 1091 (E.D. Ky. 1981); *Bd. of Educ. of Harrodsburg v. Bentley*, 383 S.W.2d 677, 679 (Ky. 1964); *Rone ex rel. Payne v. Daviess Cnty. Bd. of Educ.*, 655 S.W.2d 28, 30 (Ky. App. 1983)); *see also* Ky. Const. § 2 (prohibiting the exercise of "[a]bsolute and arbitrary" government power). Student misconduct that "endanger[s] the health and safety of students and staff" may subject a student to carry-over discipline, *id*., and if particularly egregious, could result in expulsion for more than one year. In imposing such discipline, the local board of education must balance "whether continued attendance by the student would be in the best interest of the district" with "the denial of future education for the student." *Id*.[3]

It must be noted that the Supreme Court of Kentucky decided *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), after this Office issued OAG 88-65. In *Rose*, the Court interpreted Section 183 of the Kentucky Constitution[4] to protect a "fundamental" right of each child in Kentucky "to an adequate education." *Rose*, 790 S.W.2d at 212; *see id*. at 213 ("The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education."). Consistent with this interpretation of Section 183, KRS 158.150(2)(b) generally requires that "[a] board that has expelled a student from the student's regular school setting shall provide or assure that educational services are provided to the student in an appropriate alternative program or setting."[5] But neither *Rose* nor Section 183 limit a local school board's authority to determine the appropriate

[3] Potentially relevant to the board's decision regarding the length of any expulsion is the ability of the board to provide an adequate education to the expelled student by means other than in-person instruction. For example, the Kentucky Board of Education permits a local board of education to make an involuntary placement of a student in an alternative education program "[t]o ensure the safety of the individual student, the student body, or staff," "[t]o meet the educational needs of the student," or "[f]or disciplinary purposes." 704 KAR 19:002 § 1(8)(a); *id*. § 3(1)(a). Such an alternative education program may be either an on-site program or an off-site program, *i.e.*, provided via the internet. *Id*. § 2(3). This Office does not opine here as to the suitability of any particular board's alternative education program for any particular student. But to the extent educational services could be made available to the student by remote means, it is certainly relevant to the board's consideration of the extent to which its disciplinary decision would result in a "denial of future education for the student."

[4] "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." Ky. Const. § 183.

[5] The statute contains an exception to this requirement where "the expelled student posed a threat to the safety of other students or school staff and could not be placed into a state-funded agency program." KRS 158.150(2)(b).

amount of discipline for threats of violence or conduct that endangers the health and safety of students and staff. No Kentucky court has ever held to the contrary.

In sum, nothing in either KRS 158.150 or the Kentucky Constitution categorically prohibits a local board of education from expelling a student from school for more than one year, so long as the punishment is not arbitrarily disproportionate to the offense. To the extent OAG 88-65 is construed to state otherwise, it is overruled.

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