

# **SCHOOL DISCIPLINARY HEARINGS**

**KEVIN L. COLLINS**

Vogue Building, Suite 250

600 Navarro

San Antonio, Texas 78205

Tel: 210-223-9480

Fax: 210-227-1501

E-mail: [Kevin@kevincollinslaw.com](mailto:Kevin@kevincollinslaw.com)

State Bar of Texas

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Kevin L. Collins  
Vogue Building, Suite 250  
600 Navarro Street  
San Antonio, Texas 78205  
Phone: (210) 223-9480  
Fax: (210) 227-1501  
[www.kevincollinslaw.com](http://www.kevincollinslaw.com)

## **Biographical Information**

### **EDUCATION**

B.A., University of Missouri-Columbia, 1983  
J.D., University of Missouri-Kansas City, 1986

### **PROFESSIONAL ACTIVITIES**

San Antonio Bar Association; San Antonio Criminal Lawyers Association; Texas Criminal Defense Lawyers Association; Bar Association of the Fifth Circuit; National Association of Criminal Defense Lawyers, Member, Sentencing Committee; William S. Sessions Inn of Court; American Inns of Court; Council Member, Juvenile Law Section.

### **PUBLICATIONS, ACADEMIC APPOINTMENTS & HONORS**

Member, 1983-1986, and Topics Editor, 1986, University of Missouri-Kansas City Law Review. Law Clerk to Judge William R. Collinson, Eastern and Western Districts of Missouri, 1986-1987. Frequent speaker and author on a variety of adult and juvenile topics for the Juvenile Law Section, TDCLA, and the Texas Judicial College. Council Member of the Juvenile Law Section. Selected One of San Antonio's Best Criminal Defense Lawyers, 2007, 2008, 2009, 2011, and 2012. Fellow: San Antonio Bar Foundation. Board Certified: Criminal Law and Juvenile Law, Texas Board of Legal Specialization. AV Rating from Martindale-Hubbell. Selected to Texas Super Lawyers, Criminal Defense, 2009, 2010, 2011, and 2012.

### **PERSONAL INFORMATION**

Born in Maryville, Missouri in 1961, Kevin L. Collins has been practicing law for over 25 years. A former federal law clerk and state prosecutor, his practice ranges from federal white collar litigation to driving while intoxicated, and juvenile defense. One of seven in the State of Texas, Mr. Collins is Board Certified in both Criminal Law and Juvenile Law. He is passionate about his practice and his clients and exoneration is his goal in every case. As a Council Member of the Texas Bar Juvenile Law Section and a member of the National Association of Criminal Defense Lawyers, Mr. Collins is a frequent lecturer and author on criminal and juvenile law issues. Mr. Collins enjoys spending his free time with his wife, Heather, and their three boys, Liam, 10, Colman, 8, and Rowan, 2.

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## SCHOOL DISCIPLINARY HEARINGS

### I. THE SCENE TODAY

Little Johnny just received his driver's license and is driving himself to school for the very first time. His parents let him drive the old clunker that has been in the family for years. This past summer Johnny and his father went on a fishing trip and drove the old clunker to their fishing destination. Unbeknownst to Johnny, some of the fishing equipment was left in the car. Johnny parks his car in the school parking lot and goes to class. During his second period class Johnny gets called out of class to go to the principal's office. The school police have conducted a search of the parking lot and the dogs have alerted on Johnny's car. Johnny opens the car for the officer confident that he did not bring anything illegal to school. The officer finds what the dog had smelled; an empty can of chewing tobacco. In the passenger side door of the vehicle the officer finds an eight inch fillet knife. Both of these items were left in the vehicle by Johnny's father after the fishing trip and Johnny had no knowledge that they were in the vehicle. The school has a zero tolerance policy. Johnny is given a ticket for underage possession of tobacco, and is sent home with threats of expulsion for the knife. The next day Johnny's parents receive notice that the school plans to expel Johnny and that a school disciplinary hearing is set.

This scenario is becoming increasingly common with the popularity of school's zero tolerance policies towards certain contraband such as "weapons" or "drugs." Picture the middle school student who brings prescription medication to school, but forgets to bring the prescription or to give notice to the nurse. What if this student shares his medication with another student who is sick? What if this student sells some of the medication with another student? Should the students in each of these scenarios be punished? If so, should they all have equal punishment? Often, the school believes that the student must be punished because of the zero tolerance policy, but that is not always the case. This article discusses school disciplinary hearings for juveniles in Texas and some of the legal questions and situations that arise during the process such as the difference between a school violation versus a criminal offense, the difference between expulsion and detention or alternative school, and the disciplinary hearing itself. A small amount of this article will be spent on school search and seizure and zero tolerance as these topics normally come hand-in-hand with school disciplinary hearings.

### A. Zero Tolerance Policy

Many schools in Texas have a zero tolerance (ZT) policy in some form or fashion. "A zero tolerance policy is a school or district policy requiring predetermined consequences or punishment for particular offenses without consideration of the circumstances or the disciplinary history of the student."<sup>1</sup> ZT policies became prevalent after Congress passed the Gun Free Schools Act of 1994 in response to a perceived threat of increased school violence. Even more schools jumped on board after the Columbine school shooting in 1999. The school's ZT policy can normally be found in the student handbook or code of conduct. Recently, there has been a push by some against ZT policies because they do not consider a student's intent or disciplinary history. In this sense the school ZT policies are more strict than many courts of law today. Consider Johnny from the opening paragraph. Yes there was a tobacco can in the car he brought to school, but was there any tobacco in it? Was it his and did he ever use it? Yes the knife was considered illegal because of the size of its blade, but did he intend to bring it to school? Did he intend to use it? For an excellent article on ZT see the citation at footnote 2.<sup>2</sup>

### B. School Search and Seizure

Although entire books could be written about school search and seizure, this article will only briefly touch on the subject in order to guide the reader to the seminal case on the subject. For a more in depth look at search and seizure please see the related article in this packet.

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<sup>1</sup> Jill Richards, Comment, *Zero Room for Zero Tolerance: Rethinking Federal Funding for Zero Tolerance Policies*, 30 U. Dayton L. Rev. 91, 91 (2004)

<sup>2</sup> see [http://www.texaszerotolerance.com/data/MolsbeeTexasTechLawReview\\_\\_1\\_.pdf](http://www.texaszerotolerance.com/data/MolsbeeTexasTechLawReview__1_.pdf)

In *New Jersey v. T.L.O.*<sup>3</sup> T.L.O. was caught smoking in the restroom. Smoking was allowed at the school, but only in designated areas. A teacher took T.L.O. to the principal's office. T.L.O. denied smoking. The principal took her into his office and demanded her purse. Inside the purse the principal found evidence that the student was smoking tobacco and that she was selling marijuana to other students at school. The Supreme Court of the United States defined the issue as a child's expectation of privacy versus a school's interest in maintaining order and discipline. The Supreme Court ultimately ruled that school officials need reasonable suspicion to search a student instead of the probable cause standard that is used outside of schools.

### C. School Code Violation vs. Criminal Offense

#### 1. Double Punishment

This article has already outlined some of the differences between a school code violation and a criminal offense, such as the standard required for a search by school faculty and ZT policies. However, there are more differences and more often than not the client or her parents will need this explained to them. One issue to be aware of in the school setting situation is that the school punishment will rarely have any effect on the criminal punishment of the case. If the student is in trouble at school for an offense that is also in violation of the penal code, then the student could face double punishment: One from the school and one from the city, state, or government.

Let's go back to our example of Little Johnny. Johnny was in violation of the school policy for having tobacco at school. He was also in violation of the penal code for possessing tobacco while under the age of majority. Further, he violated his school's ZT policy by bringing the knife to school, and he violated the penal code by bringing an illegal weapon to school. In this situation Johnny faces punishment from the school and punishment for his violation of the penal code if the prosecution decides to file the case. In the majority of situations, the school will not take into consideration the punishment the student will face at the hands of the state or government when considering how to punish the student at school.

#### 2. School Property

An important aspect to look at in both the criminal case and the school case is whether or not the alleged act took place on school property. The Penal Code will often raise the degree of the offense for an illegal act that takes place school property and the school may not have jurisdiction over an alleged act that does not take place on school property.

There is no definition of "school property" in the penal code. Most offenses in the Penal Code will list a certain distance from the school within which an act must take place for the law to apply. The Texas Education Code, however, defines "school property" as including: "a public school campus or grounds on which public school is located and any grounds or buildings used by a school for an assembly or other-school sponsored activity."<sup>4</sup> The same section defines "public property" as including "a street, highway, alley, public park, or sidewalk."<sup>5</sup>

Back to Little Johnny. The tobacco and knives were found in his vehicle which was in the school parking lot. Would the parking lot be considered school property or public property? For purposes of a school hearing there could be an argument that the parking lot is not school property. However, the parking lot of a school is normally within the distance described in the Penal Code. Further, some schools define an offense as including a violation of the Penal Code. In any case, it's always important to look at the definitions in the law and the school's rules.

#### 3. Statements to Police and School Faculty

Should a student make a statement to the school faculty or school police? Does a school have authority to question a student without their parents' knowledge? The answers to these questions are crucial to both the school hearing and the criminal case.

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<sup>3</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)

<sup>4</sup> Texas Education Code 37.124

<sup>5</sup> *id.*

From a defense perspective, a statement given by the defendant usually only serves to hurt the defendant. This holds true in regards to the school's case and the prosecution's case. Unfortunately, many students and parents will go in and give a statement to the school or police with the intent of clearing their names only to wind up making the school's case for them.

As for hearsay, statements from anyone and everyone can come in at the school hearing. There is no rule barring hearsay. Further, hearsay is also not barred from police reports. Another important point to note is that school officials are not required to inform the student of her rights as is required of police as per *Miranda*. Simply put, school officials can question a student without parental permission or knowledge. Further, making a statement to school officials or police is seldom helpful to the child.

#### **D. The School Hearing**

Parents normally look to hire an attorney only after the school hearing has occurred and their child has been "sentenced" by the school board. There is a limited time to appeal the decision. Unfortunately, by this time most of the damage has been done and an attorney can only hope to get the sentence reversed or lessened. If at all possible, an attorney should be at the first school hearing.

##### 1. When a Student is Entitled to a Hearing

Chapter 37 of the Texas Education Code answers the question of when a student is entitled to a hearing. Essentially the answer comes down to whether the proposed punishment is suspension or whether it is expulsion. Expulsion and placing students in alternative settings for more than three days requires a hearing.<sup>6</sup> An "alternative setting" does not necessarily include a disciplinary alternative education program such as "In School Suspension."<sup>7</sup> An example of placement in an alternative setting that requires a hearing would be placement in the Juvenile Justice Academy. A suspension of three days or less does not require a hearing.<sup>8</sup> The Education Code requires that parents be given notice of the hearing. Students younger than 10 normally cannot be expelled, but can be placed in disciplinary alternative education.<sup>9</sup> However, students younger than 10 can be expelled if the child brings a firearm to school. In this situation expulsion is required by federal law, but the school is not allowed to just toss the child out. The school must expel the child in the disciplinary alternative education program in order to educate the child.

##### 2. Student's Intent

As mentioned earlier, some students, parents, and educators began pushing back against ZT policies at school because they do not take the intent of the child into consideration. ZT policies offer a one size fits all punishment when one size may not actually fit all. What is the point of the school hearing if the student's side of the story cannot change anything? The question as posed in *Tarkington ISD v. Ellis*<sup>10</sup> was this: With zero tolerance laws, is the student's side of the story ever considered? The court's answer in *Tarkington*, more or less, was "it depends." More specifically, the court stated:

"We believe that the public interest is served by requiring school districts that have adopted intent as a factor in expulsion decisions to recognize that expelling students who involuntarily possess prohibited weapons is not mandated by the Education Code. The public's interest is not served when a District erroneously believes that expulsion is mandatory under circumstances when it is not."

The issue, then, is whether the school has adopted intent as a factor in its expulsion hearings. If the school has adopted intent as a factor in its expulsion hearings, then the school must consider intent. If the school has not adopted intent as a factor in its expulsion hearings, then the school cannot consider intent. It

<sup>6</sup> Texas Education Code 37.0081

<sup>7</sup> Texas Education Code 37.0051

<sup>8</sup> Texas Education Code 37.005

<sup>9</sup> Texas Education Code 37.007

<sup>10</sup> *Tarkington ISD v. Ellis*, 200 S.W.3d 794

is therefore imperative to research the school's expulsion policy. The following is an example of a local school's expulsion policy:

“Students shall be treated fairly and equitably. Discipline shall be based on a careful assessment of the circumstances of each case. Duration and severity of consequences will depend on, but is not limited to, the offense, the nature of the violation, the students' age, disciplinary history, **INTENT**, disability, and the overall effect upon student welfare and the learning environment. While these factors are considered, the severity of an incident remains the primary factor in determining what specific disciplinary action will be taken.”

(Emphasis added)

According to *Tarkington* the school that holds to this discipline policy must consider intent because intent is considered in their expulsion decisions. It is important to note that just because the school must consider intent, does not mean that the school must make intent the controlling factor. It must merely be considered.

### 3. The Hearing

Different schools will have different rules for their hearings. There is no set standard although you will find that many schools have similar procedures. Read the student handbook and notice of hearing for details on the rules of the hearing. It is important to remember that the rules of court are not the rules of the school hearing. Further, the rules of the hearing are not necessarily followed.

As mentioned earlier, any statements or perceived evidence are allowed to come in at a school hearing. If the student made a statement to school faculty or police, the statement comes in with or without Miranda. The student is entitled to be represented by parent, guardian, or other adult who can provide guidance to the student and who is not an employee of the District (a.k.a. an attorney). A hearing may be held without the student and or his parent if the District makes a good-faith effort to inform the student and the student's parent or guardian.

It is also important to remember that the people you are arguing against are the people who will make the ruling. Angering them may not be the best way to get the results you want for your client, but letting them run all over you might not be the best way either. Each hearing is different and you must feel out the participant's of each hearing and make a decision from there. Arguments that school penalties are harsher than the penal code are not always as effective as one would think. One final tip, the school may have an attorney at the hearing. Find out who it is and contact them before the hearing. You just might be able to persuade them.

### 4. Appeal

As noted above, the attorney will often not be contacted by the parent until after the initial hearing. By this time the damage may already be done. The student may have made a damaging statement to school faculty or police. The student may have made a damaging statement at the hearing. In either case, the hearing did not go as planned because the attorney is now being sought. However much damage was done before the attorney was brought on, it can still be profitable to request an appeal. After an appeal is requested the school should put together an appeal packet that includes statements from witnesses and police and testimony from the original hearing. This material can be used as part of the discovery of the criminal case if the case goes that far.

The people deciding the appeal have already decided the initial hearing. They may be stuck on their decision based on the student's admission. Often-times the best an attorney can do is reduce the duration of the punishment. Again, don't forget to remind the school that they must consider intent if their code of conduct calls for it.

5. Can the Student Avoid the Hearing and Punishment?

Many times a parent or student will wish to take their child out of the school where they are in trouble and move them to another school. They will want to know if they can do this and if this will help their child avoid any punishment. The answer is that it depends. If the student is transferring from one public school to another, the original school must send the disciplinary record of the student to the new school. Many schools will require the student to finish the punishment before they can attend regular classes. This is especially true if the new school is in the same district as the old school. The school's code of conduct will be able to answer this question.

If the student is transferring to a private school, then the decision is up to the private school. Should the parent tell the private school about the alleged offense? That decision is up to the parent. There may be no duty to inform the school unless the child must register as a sex offender or something similar.

## II. CONCLUSION

Little Johnny lost his school hearing but got a lesser punishment on appeal. Both his ticket and his misdemeanor case were dismissed. The appeal packet the school had put together had pictures of the evidence that helped both cases get dismissed. School hearings, although sometimes challenging can offer the opportunity for the Defense to get early discovery and possibly get rid of the school or criminal case. At the very least there is an opportunity to help the student by get her punishment reduced. It is critical for any attorney who will participate in a school hearing to look up the school's code of conduct and research all of the issues. Remember, most of the people on the school board will not be lawyers. An attorney is in a unique position to sway the school board by explaining the law to them in a manner that they can understand.






## SCHOOL DISCIPLINARY HEARINGS

State Bar of Texas  
 26<sup>th</sup> Annual Juvenile Law Conference  
 February 11-13, 2013  
 Grand Hyatt, San Antonio, Texas

Kevin L. Collins  
 Board Certified Criminal Law  
 Board Certified Juvenile Law  
 Vogue Building, Suite 250  
 600 Navarro  
 San Antonio, Texas 78205  
 Tel: 210-223-9480  
 Fax: 210-227-1501  
 Kevin@kevincollinslaw.com



## Earning A School Hearing

- Zero Tolerance Policies: a “one size fits all solution”
  - A school or district policy requiring predetermined consequences or punishment for particular offenses without consideration of the circumstances or the disciplinary history of the student.
- Prescription drugs, but no doctor’s note
- Tobacco Products
  - “Weapons” someone else put in the car
  - Fighting a student who is bullying another student
  - Student relieves himself outdoors

• [http://www.texaszerotolerance.com/data/MolsbeeTexasTechLawReview\\_1\\_.pdf](http://www.texaszerotolerance.com/data/MolsbeeTexasTechLawReview_1_.pdf) (excellent law review article on Zero Tolerance)

## New Jersey v. T.L.O

469 U.S. 325 (1985)

- School Searches
- Child's expectation of privacy v. School's interest in maintaining order and discipline.
- 6-3 Ruling – School officials need only reasonable suspicion to search.

### Ethical Consideration:

Multiple students come to you for criminal charges arising out of same event. Can you represent all of them?



## School Property

- Texas Education Code 37.124
- Section deals with disruption of classes, but defines school property as including:
  - “a public school campus or grounds on which public school is located and any grounds or buildings used by a school for an assembly or other-school sponsored activity.”
- Public property “includes a street, highway, alley, public park, or sidewalk.
- Many laws include a certain distance from school property a person must be within to be charged.
  - Is the school parking lot “school property?”
  - What about the museum during a class field trip?



## Statement to Police/School Faculty

- Important to both school hearing and criminal case.
- Statements from anyone and everyone come in at the school hearing and become part of police investigation.
- Parent wants to clear child's name and takes him/her in to make a statement. Very seldom helpful to child.
- No Miranda rights from school officials.

### Ethical Considerations:

- What do you do if the child makes a statement of admission to school officials, but it is not included in the Prosecutor's file?
- Your client did nothing and is being charged. He/she knows who did it.
  - Client wants to snitch
  - It's the client's friend and he doesn't want to tell
- Your client did do it, but another student is being charged.



## When Is A Student Entitled To A Hearing?

- Difference between suspension and expulsion
- Texas Education Code 37.0081
  - Expulsion and Placing students in alternative settings requires a hearing. (Ex. JJA)
- 37.005 – Suspension 3 days or less does not require hearing.
- 37.0051 – Removal to disciplinary alternative education program does not necessarily require a hearing.
- Students and parents must be given notice of hearing.
- 37.007 – Students younger than 10 can not be expelled, but can be placed in disciplinary alternative education.



## What About The Student's Intent?

- Question: With Zero Tolerance laws, is the student's side of the story ever considered?
- Answer: It depends.
- *Tarkington ISD v. Ellis*, 200 S.W.3d 794
  - School told student it could not consider intent because of zero tolerance rules.

"We believe that the public interest is served by requiring school districts that have adopted intent as a factor in expulsion decisions to recognize that expelling students who involuntarily possess prohibited weapons is not mandated by the Education Code. The public's interest is not served when a District erroneously believes that expulsion is mandatory under circumstances when it is not."

- Issue is whether the school has adopted intent as a factor in expulsion hearings.



## What About The Students' Intent?

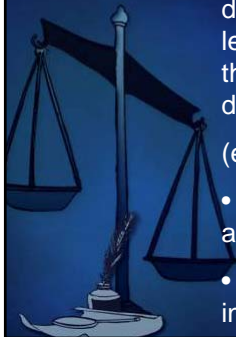
Example from NEISD Student Code of Conduct 2011:

- DISCIPLINE OPTIONS

"Students shall be treated fairly and equitably. Discipline shall be based on a careful assessment of the circumstances of each case. Duration and severity of consequences will depend on, but is not limited to, the offense, the nature of the violation, the students' age, disciplinary history, **INTENT**, disability, and the overall effect upon student welfare and the learning environment. While these factors are considered, the severity of an incident remains the primary factor in determining what specific disciplinary action will be taken."

(emphasis added)

- According to Tarkington, this school **MUST** take intent into account because it is in their code of conduct.
- But realize that like this school, most schools will not make intent the controlling factor.



## The Hearing

- Due process requires notice.
  - must contain statement of specific charges and grounds that, if proven, would justify expulsion.
- Hearsay? – allowed
- Student is entitled to be represented by parent, guardian, or other adult who can provide guidance to the student and who is not an employee of the District (a.k.a. attorney).
- Hearing may be held without student and/or his parent if the District makes a good-faith effort to inform the student and the student's parent or guardian.

### Ethical consideration:

- At the hearing you will be advocating for your client against a panel of non-attorneys. Should you take it easy on them?



## The Hearing

- Who should do the talking?
- Should the student say anything?
- Should the parent say anything?
- What should the attorney say?
- Rules of Court are not the Rules of the Hearing. Even the rules set for the hearing are not necessarily followed.
- Remember: The people you are arguing with are the people who will make the ruling.
- Arguments that school penalties are harsher than the penal code are not always as effective as one would think. These people are not lawyers.
- Practice tip: The school may have an attorney at the hearing. Find out who it is and contact them before the hearing. They just might agree with you.



## Appeal

- Often, attorney will not be contacted until after the initial hearing. By that point the damage may already be done.
- It can still be profitable to request an appeal.
- An appeal packet should be prepared by the school
  - Containing rules, transcript of initial hearing, student records, etc.
- Remember: The people deciding the appeal have already decided the initial hearing. They may have already decided based on the student's admission. Often-times the best an attorney can do is reduce the duration of punishment.
- **IMPORTANT!**
  - Don't forget to remind the school that they **MUST** consider intent if it's in their code of conduct.
- **ALSO IMPORTANT! MAYBE EVEN MORE SO!**
  - Only remind them of the intent rule if it will help your case.



## Avoid the Hearing?

- Question: Can a student avoid the hearing/punishment and transfer to a different school?
  - Answer: It depends
  - If transferring to another public school, the original school must send the disciplinary record of the student to the new school. Many schools will require a student to finish the punishment. Especially if the new school is in the same district as the old school. Read the new school's code of conduct.
  - If transferring to a private school, it's up to the private school.
- Ethical Consideration:
- Client is transferring to a private school because of an expulsion from a public school. The offense was a felony. Does the attorney or the client need to give notice of the offense to the new school?



## War Story Checklist

- Fishing Knife
- Empty Tobacco Cans
- Selling Brownies
- Samurai sword
- School hearing officers more confrontational than some judges
- “No new evidence considered that was not presented at the expulsion hearing.”



THE END  
THANK YOU

Kevin L. Collins  
Board Certified Criminal Law  
Board Certified Juvenile Law  
Vogue Building, Suite 250  
600 Navarro  
San Antonio, Texas 78205  
Tel: 210-223-9480  
Fax: 210-227-1501  
Kevin@kevincollinslaw.com

