

**Iowa State Board  
of Education**  
(Cite as 10 D.O.E. App. Dec. 195)

In re Jed and Tessa Thompson :  
Vicky Thompson, :  
Appellant :  
v. : DECISION  
Parkersburg Community :  
School District, :  
Appellee. : [Admin. Doc. #3206]

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The above-captioned matter was heard on July 6, 1992, before a hearing panel comprising Don Smith, consultant, Bureau of Technical and Vocational Education; Jim Tyson, consultant, Bureau of School Administration and Accreditation; and Kathy L. Collins, legal consultant and designated administrative law judge, presiding. Appellant Vicky Thompson appeared in person, unrepresented by counsel. Appellee Parkersburg Community School District [hereafter "the District"] was present in the persons of Superintendent Virgil Goodrich and Secondary Principal Ned Sellers, also unrepresented by counsel.

A mixed evidentiary and on-the-record hearing was held pursuant to departmental rules found at 281 Iowa Administrative Code 6. Appellant seeks reversal of a May 11, 1992, decision of the board of directors [hereafter "the Board"] of the District denying her request to have her children Jed and Tessa excused from physical education class in order to take additional academic subjects in high school. Jurisdiction for the appeal is found at Iowa Code Chapter 290.

**I.  
Findings of Fact**

The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and the subject matter of this appeal.

Appellant is the mother of two high school students, Jed, who is in eleventh grade this year, and Tessa, who is in ninth grade. Both have been identified as talented and gifted and both have grade point averages above 3.4. They are both active in activities; Jed is on the football, basketball, and track teams while Tessa is out for basketball, track, and cheer-leading.

Appellant spoke to Mr. Sellers when Jed was starting high school about the possibility of her children being waived out of physical education classes. She testified at our hearing that Mr. Sellers "seemed hesitant" at that time, so she dropped the subject for the time being. She brought it up again in the fall of Jed's sophomore year in conversations with the guidance counselor and principal, but again chose not to pursue it with the superintendent or the Board until January. Jed and Tessa brought home a student handbook and Appellant and her children read it thoroughly. She testified that when she initially approached the Board, they were in favor of granting her request (3-2). Thereafter they voted to reconsider the approval of the P.E. waiver, then revoted, denying her request. Appellee's Exhibit A at p.1 (Bd. Mins. of 1/13/92). She did not appeal but instead brought the issue up again before the Board in May of 1992. The decision was again unanimous to deny her request.

On the agenda for the May meeting Superintendent Goodrich placed the following explanation and recommendation:

Vicky Thompson has requested that Jed and Tessa receive waivers from the Physical Education requirement.

Physical Education has been a requirement of our Board for students to graduate for at least the thirteen years I have been at Parkersburg. With an increased emphasis on physical fitness and wellness in our society, I believe it is a worthwhile requirement. Physical education is just one of the areas that a school must offer and teach to be accredited. The local board determines what is to be taken and successfully completed to graduate. The Boards have traditionally believed that Physical Education was important and I recommend the requirement remain. 'If' the decision is made to grant this waiver for Jed and Tessa, every request for a waiver must be honored. If the request is not approved, I further recommend that your philosophy in support of the Physical Education requirement be entered into the minutes.

Board agenda for May 11, 1992 (attachment to Appellant's affidavit of appeal).

The Board minutes of that meeting reflect that no motion was made and Appellant's request went unanswered.<sup>1</sup> A motion was made, seconded, and passed unanimously that the minutes reflect the following statement:

With the increased emphasis on physical fitness and wellness in society today and the fact that previous boards have set this requirement, the board feels that it is worthwhile and important enough to keep as is.

Prev. Record, Bd. Mins. of 5/11/92, p.1.

In addition to the statement of philosophy, the District Board also has a policy, adopted or approved in March of 1991, related to Physical Education. Board Policy 603.6 states as follows:

*Students in grades one (1) through twelve (12) shall be required to participate in physical education courses unless they are excused by the principal of their attendance center.*

*Students will be excused from physical education courses if:*

- *the student presents a written statement from a doctor stating that such activities could be injurious to the health of the student;*
- *the student is enrolled in academic courses not otherwise available;*
- *the student has been exempted because of a conflict with the student's religious beliefs.<sup>2</sup>*

Appellant's Exhibit 1 at p. 6 (Board Pol. #603.6). The policy references Iowa Code section 256.11 (1989) and 281 IAC 12.5(3)(f), .5(4)(f), .5(5)(f), and 4.5(6), which are portions of the accreditation standards for schools. Appellant believes the Board's denial in her case was in violation of its own policy (603.6).

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<sup>1</sup>Normally for State Board jurisdiction to be invoked, a voted decision must be made at the local level to come under Chapter 290 of the Code requiring a "decision" in order for an appeal. In this case, two facts support our exercise of jurisdiction: Appellant's request was an action item on the agenda and was treated as such by the Board, and the District did not file a Motion to Dismiss the appeal on the ground that no decision had been made.

Although the general rule is that a voted decision is a necessary prerequisite to an appeal, there are at least two circumstances where no decision can be a decision. The first is in situations such as this one (action item; no affirmative vote but result is denial of request) and the second is where the Board refuses to vote on an issue to avoid the possibility of an appeal. See In re Ronald E. Thompson, 5 D.o.E. App. Dec. 296 (1987).

<sup>2</sup>This exemption is a right by statute. See Iowa Code §256.11(6) (1992).

The following facts were also ascertained at hearing.

1. Jed plays the trumpet and Tessa plays the flute. Appellant wishes them to continue taking band.
2. Band and chorus are daily courses in the District.
3. Students are grouped in physical education class by grade, and the curriculum is sequential by grade level.
4. Physical education is offered every other day opposite study hall for ninth and eleventh graders and opposite health class for sophomores and seniors.
5. Jed is college bound with a current goal to major in business with perhaps an emphasis in accounting.
6. Tessa's plans for the future are not as firm as Jed's, but Appellant wants her to take as many academic courses as possible at high school.
7. Surrounding school districts of Dike, New Hartford, and Aplington (now in a sharing agreement with the District; both school districts' high school students attend in the District) have released students from p.e. to take additional academic courses.
8. Before the sharing agreement began, Superintendent Goodrich learned that Aplington's p.e. waiver policy has been applied to students who were out for athletics and who were short of credits as they approached graduation.
9. Scheduling of classes is not done until after registration for courses, so students cannot always anticipate conflicts in selecting their courses for next semester.
10. Two credits of physical education are required for graduation in the District. Thus, each semester's p.e. class gives the students 1/4 of a credit.
11. The high school operates on an eight-period day.
12. Jed proposed to take a full eight-course load this year and next. Because of the Board's denial, he has had to drop to seven academic courses plus p.e. and study hall this year and p.e. and health next year.
13. Appellant did not seek a waiver from the health requirement, but given the District's scheduling that would be a natural consequence of a p.e. waiver for

Jed in his senior year. (The courses he desires all meet daily.)

## II. Conclusions of Law

To some extent, the law in Iowa gives us a starting point to address this situation. Iowa Code §256.11(5)(g) reads, in pertinent part, as follows:

In grades nine through twelve, . . . [t]he minimum program to be offered and taught . . . is:

. . .  
g. All students physically able shall be required to participate in physical education activities during each semester they are enrolled in school except as otherwise provided in this paragraph. A minimum of one-eighth unit each semester is required. A twelfth grade student who meets the requirements of this paragraph may be excused from the physical education requirement by the principal of the school in which the student is enrolled if the parent or guardian of the student requests in writing that the student be excused from the physical education requirement.

. . .  
Students in grades nine through eleven may be excused from the physical education requirement in order to enroll in academic courses not otherwise available to the student if the board of directors in which the school is located . . . determine that students from the school may be permitted to be excused from the physical education requirement.

. . . Physical education activities shall emphasize leisure time activities which will benefit the student outside the school environment and after graduation from high school.

Iowa Code §256.11(5)(g) (1991 Supp.) (emphasis added).<sup>3</sup>

This section appears to send a mixed message; it stresses the requirement for physical education, stresses the importance of it, and then provides for several circumstances under which it may be waived. At hearing, Superintendent Goodrich urged the

<sup>3</sup>The statute goes on to provide another situation in which the p.e. requirement may be waived; when a student is participating in an extra-curricular activity that "requires at least as much participation per week as one-eighth unit of physical education," the principal "may" excuse the student for up to one semester per year but not for the whole year. Iowa Code §256.11(5)(g) (1992 Iowa Acts Ch. 1088 §1) (effective 4/15/92). We assume the "may" language means that the initial decision to apply this waiver is the Board's which is then communicated by policy to the principal of the high school. This issue was not raised by Appellant. It also was not a part of the Board's p.e. policy.

hearing panel to focus on the permissive ("may") language of the above-quoted statute. We acknowledge that with the exception of the religious beliefs conflict exemption (which is found in a different Code section) the decision whether or not to waive p.e. as a *policy matter* is discretionary. That brings us to the main problem in this case.

The Board adopted Policy 603.6 in March of 1991. Appellee's Exhibit A at p.14; Appellant's Exhibit 1 at p.6. The policy clearly states that "students *will be excused* from physical education courses if: . . .the student is enrolled in academic courses not otherwise available." (Emphasis added.) This is not the position that the Board took with respect to Appellant's requests for Jed and Tessa. In fact, in the superintendent's recommendation no mention was made of the existence of the policy nor was there any discussion of it by the directors. One might infer from this that the superintendent and Board forgot about the policy's existence.<sup>4</sup>

Our task is to determine whether Appellant has a right to have Jed and Tessa excused from p.e. upon her request. We believe her approach was inappropriate. Instead of seeking an exemption for Jed (Tessa's ninth grade classes were all required courses with room for band or chorus as electives, from which she chose band) on the basis of his schedule, she made a blanket request for a waiver for her children from the physical education requirement every semester of their high school careers. Her repeated requests of the principal, which she did not pursue until January of 1992, did not appear to be based upon the children's unique schedules.

There was simply no proof that Tessa had course conflicts that would justify the release from p.e. With respect to Jed, however, his planned schedule for junior year included a desire to take accounting, which is a year-long prerequisite to Advanced Accounting which he planned to take his senior year. He also wanted to take Computer Application. These electives were in addition to the required courses of English III, math, and science, and in addition to his other chosen electives Spanish II, band, and chorus. For his senior year, Appellant proposed (at the time of hearing) that Jed take band and chorus again, Advanced Accounting, Computer Programming, and Behavioral Science in addition to English IV, math, and economics (first semester) and government (second semester) as required courses.

One could certainly argue that Appellant and her children had already made choices when they selected music (band and chorus) and Spanish (for Jed). The awkwardness occurs because, with the opportunity for the waiver of p.e. in the law and

<sup>4</sup>The Board also has a policy, #210.4, "Suspension of Policy" which authorizes only the Board to suspend its own policies "in extreme emergencies of a very unique nature." Appellee's Exhibit A at p.11. No mention was made in the minutes or at hearing of a deliberate suspension of policy.

portions of it adopted by the Board in policy, physical education is consequently not really "required" but not really an elective either. One can't blame Appellant for asking to waive p.e., the opportunity was there that would, if granted, allow Jed and Tessa to stay with instrumental music and take additional academic courses as well.

It appears to the hearing panel that the Board violated its own policy when it failed to approve Appellant's request for Jed. We do not conclude that the Board violated policy regarding the request for Tessa because she had no course conflict *per se*. Rather, Appellant just believed that academic courses are more important than physical education. That is not her decision to make. It is the Board's and then only to the degree authorized by the Iowa Code.

When a school board deviates from its own policy, the circumstances are ripe for a charge of arbitrariness or capricious action. Unless a school board consciously suspends its policy, it is bound by it until such time as it votes to change it. Board policies and the regulations adopted to implement the policies are the "laws" of the school district. The policy manual serves both as notice to a district's students, parents, and employees of the school board's position on various subjects, and as a guide for its own governance so that decisions are not made monthly on an *ad hoc* basis. The Board's failure to apply its own policy as to Jed's situation is grounds for reversal.

This does not mean that the Board cannot amend its policy. Of course it may do so. But until it either votes to apply Policy #210.4 ("Suspension of Policy") or follows its own rules and practices to amend formally Policy 603.6, it is bound by it. See In re Shawna and Joshua Barnett et. al., 10 D.o.E. App. Dec. 35(1993) (Des Moines school board's decision to deny open enrollment applications out of the district to all non-minority students was last minute change in its own policy that violated the due process rights of the students and parents filing requests).

Jed will be a senior next fall and Tessa will be a sophomore. No doubt the Board will continue to receive requests from Appellant for another three years, so it behooves the Board to gather as much information as possible to decide whether or not to change its policy. We remind Appellant that she may not ask for a blanket release from the p.e. requirement but must "make her case" to the principal on the basis of course conflicts, including her rationale for desiring the additional courses.

Any motions or objections not previously ruled upon are hereby denied and overruled.

III.  
Decision

For the foregoing reasons, the decision of the board of directors of the Parkersburg Community School District to deny the request of Vickye Thompson to waive the physical education requirement is hereby recommended to be reversed in part and affirmed in part. The decision on Appellant's request as to Jed's schedule is recommended for reversal; the decision is affirmed as to the denial of a p.e. waiver for Tessa.

There are no costs of this appeal to be assessed under Iowa Code Chapter 290.

May 21, 1993  
DATE

Kathy L. Collins  
KATHY L. COLLINS, J.D.  
ADMINISTRATIVE LAW JUDGE

It is so ordered.

June 10, 1993  
DATE

Ron McGauvran  
RON MCGAUVRAN, PRESIDENT  
STATE BOARD OF EDUCATION