

**IOWA DEPARTMENT OF EDUCATION
(Cite as 27 D.o.E. App. Dec. 726)**

<i>In re Expulsion of Student A.</i>)	
)	
Parents of Student A,)	
)	PROPOSED DECISION
Appellant,)	
)	
v.)	
)	
St. Ansgar Community School District,)	Admin. Doc. No. 5030
)	
Appellee.)	

STATEMENT OF THE CASE

The Appellants seek reversal of an October 13, 2015 decision by the St. Ansgar Community School District (“District”) Board of Directors (“Board”) to expel their minor child, Student A, for a period until the end of the 2015-2016 academic school year, to not allow Student A on school premises without permission, and requiring Student A to obtain counseling before re-admittance. The affidavit of appeal filed by the Appellants on November 13, 2015, attached supporting documents, and the school district’s supporting documents are included in the record. Authority and jurisdiction for the appeal are found in Iowa Code § 290.1 (2015). The administrative law judge finds that she and the State Board of Education (“State Board”) have jurisdiction over the parties and subject matter of the appeal before them.

An in person evidentiary hearing was held in this matter on March 11, 2016, before designated administrative law judge, Nicole M. Proesch, J.D., pursuant to agency rules found at 281 Iowa Administrative Code chapter 6. The Appellants were present with Student A and were represented by attorney Brendon Moe. The District was represented by Attorney Drew Bracken. Superintendent Jody Gray (“Superintendent Gray”) appeared on behalf of the District. Also present for the District was Principal Lynn Baldus (“Principal Baldus”).

The Appellants and Student A testified in support of the appeal. Appellant’s exhibits were admitted without objection. Superintendent Gray and Principal Baldus testified for the District and the school district’s exhibits were admitted into evidence without objection.

FINDINGS OF FACT

At the time of his expulsion Student A was a 15 year old freshman at St. Ansgar High Schools (“SHS”) at the beginning of the 2015-2016 school year. Student A has had a number of disciplinary issues while attending schools in the District. The final incidents leading up the

expulsion hearing occurred on September 22, 2015, during and after a volleyball game at the school. The incidents were both caught on tape and alerted to Principal Baldus.

In the first incident, Student A and several other students were outside the school gym when they drug a student out of the gym and pulled his clothes off. The student's underwear were pulled down to his knees and Student A and the other students ran off. That same evening, after the game, Student A and several other students were walking out of the school gym in the hallway and decided to "ape"¹ another student. The student was pulled to the ground by several students and Student A "oil checked"² the student. Student A admitted to participating in the aping and admitted to oil checking the student.

On or about October 2, 2015, the Appellants were notified in writing that Student A was placed on out of school suspension for engaging in student to student harassment, student to student hazing, and student to student assault. They were also notified that Superintendent Gray was recommending that Student A be expelled for the remainder of the 2015-2016 school year and that a hearing would be held in front of the Board on October 13, 2015. The letter included a notification of Student A's right to attend the hearing, present evidence and testimony and the right to be represented.

On October 13, 2015, a disciplinary hearing was held before the Board to determine the appropriate punishment for Student A for the incidents and his involvement. The Board met in closed session for several hours to hear from witnesses, Student A, the Appellants, and to deliberate on the administration's recommendation to expel Student A from school for the remainder of the 2015-2016 school year. The administration based its recommendation on Student A's behavior in the current incidents and prior disciplinary record in the District evidencing similar behaviors. Principal Baldus outlined Student A's pertinent disciplinary records leading up to the current incident at the expulsion hearing for the Board.

The first disciplinary incident dates back to October 1, 2012, when Student A was in 7th grade at St. Ansgar Middle School. During this incident Student A was caught pulling down the pants of another student. Student A was required to eat lunch in the office for the remainder of the week as punishment.

The second incident occurred in December of 2012. Student A assaulted a sixth grader by sticking his finger in the student's buttocks outside the clothing while the student was wearing gym shorts and laughing at the student. This happened on several occasions and the parents of the sixth grade student contacted law enforcement who conducted an investigation. The student also reported two other students who had been assaulted by Student A. Law enforcement contacted the parents of the other students. All of the students' parents wanted the harassment to stop immediately. The parents did not want file charges and requested that the school closely monitor Student A and make sure it did not happen again. As a result, the

¹ "Aping" was described by Student A as surrounding someone and acting like an ape by making ape sounds and poking at the person.

² "Oil Checking" was described by Student A as sticking your finger in someone's butt with their clothes on. Another student testified it is also an illegal wrestling move used to startle your opponent.

school investigated the incident under its bullying and harassment policies and had a meeting with Student A regarding his behavior.

The third incident that was reported on April 9, 2013, and involved sexting. Two female students reported to Mrs. Rustad that they had received inappropriate pictures on their phones from Student A of his naked groin area, which they deleted. Student A admitted to Superintendent Gray, that Student A had sent the inappropriate photos to the two females. The discipline received for this incident was not specified in the record.

The fourth incident occurred on October 31, 2013, and involved sexting. Several female students reported that Student A requested naked photos of them and they sent the photos to Student A. Student A saved the photos and shared them with other students. Student A also sent naked photos of himself from the waist down back. Student A also threatened to tell people information about students if they did not send him pictures. After receiving several pictures from one of the students, Student A started grabbing the student in the butt and thighs and said he would only stop if she sent him another picture so the student did. Student A admitted to sending, receiving the photos, and to inappropriately touching students. The incident was referred to the police since it occurred outside the school.

The fifth incident occurred on February 27, 2014. Student A pulled down another student's shorts in P.E. class twice. The incidents were caught on tape and Student A admitted the behavior. Student A received in school suspension and removal from P.E. class for two weeks with alternative assignments.

The sixth incident occurred on March 19, 2015. A student reported to the guidance counselor that he was in the locker room after P.E. changing and Student A came up behind him and started rubbing his genitals on the students head. Student A admitted the behavior and received an in-school suspension for the incident. Student A was also found ineligible for the next scheduled performance activity under the school's good conduct policy. The incident was also reported to the police.

The seventh incident occurred on April 1, 2015. Student A sketched an inappropriate picture of himself and another student, in which he was holding a knife and performing a sex act on another student. Student A admitted to drawing the picture to "cheer up" his friend. Student A was sent to the office and given a warning.

In this instance, Superintendent Gray found that Student A violated board policy 503.12, Student to Student Harassment, and board policy 503.1, Student Conduct. Superintendent Gray testified that although the recent incidents alone would not have warranted a recommendation for expulsion; however, based on Student A's long disciplinary record involving similar conduct, Superintendent Gray recommended expelling Student A for the remainder of the 2015-2016 school year under board policy 503.2.

At the hearing before the Board, ten students testified on Student A's behalf. Overall the testimony collectively was that aping was "just guys horsing around" or "just having fun." A common theme was that "everyone is doing it" and it was not hurting anyone. Likewise, the testimony collectively was that oil checking was always done with clothes on and there was no

intention of making anyone uncomfortable. However, at least one student testified “it’s kinda perverted, but it’s just one of those things that’s gone on here for years and no one – no one usually makes it seem weird.”

Student A’s mother testified that Student A was diagnosed with ADHD in fourth grade. She provided evidence that Student A had received three weeks of counseling in 2013 due to behavioral concerns. She also provided evidence that during the 2014 school year Student A had a psychological evaluation done at Mercy Medical Center at their request due to concerns that Student A was struggling in school, avoiding and lying about homework, and other impulsive behaviors. Additionally, on September 9, 2015, she emailed Principal Baldus about getting a 504 plan for Student A to help him with distractions and focusing when taking tests. However, no plan was implemented because accommodations were given to Student A as part of his regular education plan. Student A’s father also offered information to the Board about individuals with ADHD.

Student A also addressed the Board. Student A admitted to participating in the aping but insisted that he did not know he was doing anything wrong. He also stated that he has poked others in the butt with their clothes on but that he has never oil checked. This is contrary to his written statements and contrary to what the video shows. He also stated that all someone had to do was to tell him to stop aping and oil checking and he would have stopped. He stated that everyone was doing it and no one was offended by it.

Based on the evidence, testimony, and exhibits the Board found that Student A participated in two separate acts of student to student harassment and student to student assault which involved aping and oil checking. The Board also found that student A was disciplined for similar acts of putting his fingers over the clothes in the rear end of several students in December 2012 and January of 2013. The Board also found that the diagnosis of ADHD was not an excuse and that Student A admitted the behavior. Thus, the Board found a violation of Board policies 502.12 and 503.1.

The Board voted 4-0, with two abstaining, to expel Student A as follows:

“for a period until the end of the 2015-2016 academic school year, said student shall not be present at any time on any school property during the period of expulsion without prior written consent from the school administration, and the Board and administration will require the student to engage in suitable, verified counseling and show progress before that student may be readmitted . . .”

The Appellants filed a timely notice of appeal with the State Board on November 13, 2015. The Appellants argue that Student A was not given appropriate due process, that evidence of prior incidents of discipline was improperly admitted, and that Student A was denied a 504 plan. The District argues that the punishment was based on progressive discipline, Student A received notice, and there was no violation of Student A’s rights under section 504.

CONCLUSIONS OF LAW

The State Board in reviewing appeals under Iowa Code section 290.1 has been given broad authority to make decisions that are “just and equitable.” Iowa Code § 290.3 (2013). The standard of review in these cases requires that the State Board affirm the decision of the local board unless the local board decision is “unreasonable and contrary to the best interest of education.” *In re Jesse Bachman*, 13 D.o.E. App. Dec. 363 (1996). Thus, the test is *reasonableness*.

The Iowa Legislature has conferred broad statutory authority upon local school boards to adopt and enforce its own rules and disciplinary policies. *See* Iowa Code § 279.8. Under Iowa Code section 279.8 “the board shall make rules for its own government and that of the . . . pupils, and for the care of the school house, grounds, and property of the school corporation, and shall aid in enforcement of the rules. . . .” Local school boards have the explicit statutory authority to expel or suspend students for violating school rules pursuant to Iowa Code section 282.4, which provides as follows:

1. The board may, by a majority vote, expel any student from school for a violation of the regulations or rules established by the board, or when the presence of the student is detrimental to the best interests of the school. The board may confer upon any teacher, principal, or superintendent the power temporarily to suspend a student, notice of the suspension being at once given in writing to the president of the board.

School districts have broad discretion to punish students who break the rules as long as the district follows appropriate due process requirements. Due process requires “notice and opportunity for hearing appropriate to the nature of the case.” *Goss v. Lopez*, 95 S. Ct. 729, 738 (1975). However, due process does not “shield [a student] from suspensions properly imposed”. *Id.* at 739. An expulsion or a long-term suspension will generally be upheld as long as the student received written notice of the alleged offense; notice of the time, date, and place of the hearing; sufficient time to prepare an adequate defense, to present witnesses, and to cross examine witnesses; notice of individual rights; and if the hearing conducted by the board was free of bias. *See In re Cameron Wilson*, 25 D.o.E. App. Dec. 223, 224 (2010). The State Board will not overturn a local board’s decision unless it is unreasonable. *In re Jesse Bachman*, 13 D.o.E. App. Dec. at 363.

Due Process

The Appellants argue that Student A was not afforded due process in this case. Specifically, they argue that notice was provided to the Appellants and not Student A directly. Due process in an expulsion case like this requires written notice of the alleged offense; notice of the time, date, and place of the hearing; sufficient time to prepare an adequate defense, to present witnesses, and to cross examine witnesses; notice of individual rights; and if the hearing conducted by the board was free of bias. The record shows that a letter was sent to the Appellants, who are the parents of Student A, notifying them of the alleged offense, the time, date, and place of the hearing, and of their rights. We find this notice to the parents of a minor sufficient. The Appellants and Student A were also present at the hearing and given the opportunity to present witnesses and cross examine witnesses. There is no evidence they were deprived of these opportunities in any way. Furthermore, the appellants were present at the

hearing when the Board made its decision and they were given notice that a written decision was available at the school when it was completed.

The Appellants also argue that the use of prior incidents of discipline at the hearing against Student A was improper and based on hearsay and they had no opportunity to cross examine the witnesses regarding prior disciplinary incidents. However, in an administrative proceeding of this nature rules of evidence are more relaxed and the ultimate test of admissibility is whether the offered evidence is reliable, probative, and relevant. *See* Iowa Admin. Code r. 281 – 6.12(2)(o)(1). The record shows the prior incidents of discipline were recorded in Student A’s education record, which was offered and entered as an exhibit at the hearing. There is no evidence to indicate that this record is not reliable, probative, or relevant. Student A’s disciplinary record shows that Student A received progressive discipline over time and Student A failed to correct his behavior. The failure to correct this pattern of behavior is what resulted in administrations recommendation to expel Student A. We find no due process error here.

Finally, the Appellants also argue that the District should have given Student A a 504 plan and the failure to do so was a violation of due process. However, the Appellants offer no evidence to support this claim. The evidence shows that the Appellants contacted Principal Baldus just days before receiving a notice of hearing in this case about a 504 plan for Student A relating to his academic performance, not his challenging behaviors. However, Student A was already receiving these accommodations. The Appellants did not argue at the hearing that his behavior was a result of a disability; rather, the Appellants’ case at the hearing rests on the idea that the behavior that Student A was engaging in was “just for fun” and “everyone was doing it.” The Appellants also argue that if someone would have told Student A to stop he would have, which is inconsistent with the 504-based argument they now advance. Thus, there is no evidence that the Appellants were not afforded appropriate due process.

Reasonableness

As long as the punishment of the Board is reasonable, the decision will be upheld. Based on the record before us the State Board cannot say that the decision of the Board was unreasonable, given the circumstances in this case and the long history of disciplinary issues with Student A. At least one of the behaviors involved in this incident “oil checking” Student A had been counseled on in 2012. Student A also admitted the behavior but downplayed the seriousness of it characterizing it as horseplay and suggesting that “everybody’s doing it.” While that may be the case, it does not make the behavior okay and it does not take away the fact that Student A had already been counseled on at least one prior occasion that it was not okay. Additionally, these incidents of a sexual nature may also implicate both Title IX of the Education Amendments of 1972³ and Iowa’s Bullying and Harassment statute under Iowa Code section 280.28.⁴ These types of situations must be taken seriously by the District or the District

³ Title IX is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public schools that receive federal funds must comply with Title IX.

⁴ Iowa Code section 280.28 prohibits harassment and bullying based on age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status. Schools are required to have a policy in place prohibiting this conduct.

can be held liable. *See Davis v. Monroe County Board Of Education*, 529 U.S. 629 (1999). The District is right to be concerned that this behavior will continue if Student A is allowed to remain in school. Thus, it is clear from the record that the Board thoughtfully considered the evidence presented and the recommendations of administration to expel Student A. We cannot say that the Board acted unreasonably.

While this may not be the preferred educational outcome for Student A, we also understand that Student A's conduct is not the preferred conduct that the Board expects of its students. Furthermore, Student A's conduct was progressive in nature and Student A failed to correct behavior which he had previously been warned about. After the 2015-2016 school year Student A will have an opportunity to return to school after providing proof of counseling and progress to the Board. Thus, we find the decision of the Board was reasonable.

DECISION

For the foregoing reasons, the decision of St. Ansgar Community School District Board made on October 13, 2015, to expel Student A for a period until the end of the 2015-2016 academic school year, not allow Student A on school premises without permission, and requiring Student A to obtain counseling before re-admittance is hereby AFFIRMED. There are no costs of this appeal to be assigned.

5/12/2016
Date

/s/ Nicole M. Proesch, J.D.
Nicole M. Proesch, J.D.
Administrative Law Judge

5/12/2016
Date

/s/ Charles C. Edwards, Jr.
Charles C. Edwards Jr., Board President
State Board of Education