**IOWA STATE BOARD**
**OF EDUCATION**
**(Cite as 22 D.o.E. App. Dec. 147)**

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***In re Marcus Kavanaugh***

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| Mike and Crystal Kavanaugh, Appellants, | : | |
| vs. | : | DECISION |
| Southern Cal Community School District, Appellee. | : | [Admin. Doc. 4544] |

The above-captioned matter was heard in person on August 13, 2003, before designated administrative law judge Carol J. Greta. Appellant, Mike Kavanaugh, was present on behalf of his son, Marcus, who was not present. Mr. Kavanaugh was represented by legal counsel, Thomas W. Polking. Appellee, the Southern Cal Community School District [hereinafter, "the District"], was represented by legal counsel, Brian L. Gruhn. Also appearing on behalf of the Appellee were Superintendent Dwayne Cross, High School Principal Matt Patton, and School Board President Chuck Loeck.

An evidentiary hearing was held pursuant to agency rules found at 281 Iowa Administrative Code chapter 6. Authority and jurisdiction for the appeal are found in Iowa Code § 290.1. The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter of the appeal before them.

The Kavanaughs seek reversal of a decision of the local board of directors of the District made on April 24, 2003, finding that Marcus had violated the District's good conduct policy and punishing him accordingly. They filed a timely appeal to this agency.

## I.
## FINDINGS OF FACT

This case and its companion case, *In re Josh and Jon Perry*, 22 D.o.E. App. Dec. 155(2003), arise from incidents of illegal possession and consumption of alcoholic beverages by several students of the District at a West Des Moines hotel during the 2003 state wrestling tournament. The tournament took place in Des Moines on February 26, 2003 – March 1, 2003. The District's wrestling team qualified an unspecified number of individuals for the meet. The qualifiers, other members of the wrestling squad, wrestling cheerleaders, managers, and statisticians were all excused from school to attend the

tournament. The District rented five or six rooms at the University Park Holiday Inn [hereinafter, "Holiday Inn"] in West Des Moines for these students and for the adult coaches. The breakdown of room assignments is as follows:

- Two rooms for the wrestlers, one for the qualifiers and a separate room for the other members who made the trip to Des Moines[1];
- One room for the cheerleaders;
- One room for the statisticians ["stat girls' room"]; and
- One or two rooms for the coaches.

The week following the tournament the high school principal, Matt Patton, received a phone call from the parent of one of the students who had stayed at the Holiday Inn. The parent informed Mr. Patton that students had been drinking alcoholic beverages while at the hotel for the tournament. Mr. Patton immediately started an investigation into the allegations, eventually interviewing 35 students and school employees. Ultimately, 25 students were punished for violations of the District's good conduct rule – nine students for consuming alcoholic beverages and the other 16 students for violation of the "mere presence" provisions of the good conduct rule. Marcus, Josh Perry and Jon Perry were among those found to be in violation of the mere presence rule. They are the only students of the 25 punished by the District who have appealed to this Board.

Not all of the students interviewed by Mr. Patton admitted their involvement in any illegal activity, nor did they implicate other students in such activities. When punished by the school administrators, however, none protested but for Marcus and the Perry brothers. The District did present several written statements signed by students that implicated Marcus. The students' statements to Mr. Patton included the following assertions that are pertinent to Marcus' case:

- Student A:
  - Admitted that she was drinking.
  - Saw several bottles of vodka in the stat girls' room.

[1] Those involved in this case consistently used the term "the wrestlers' room" to denote the room used by the non-qualifiers from the team. This room was the one assigned as sleeping quarters to Marcus, the Perry brothers, and others from the team. That term is similarly used throughout this decision.

- Stated “everyone knew” that Marcus was drinking vodka from a McDonald’s cup poolside at the Holiday Inn Thursday night.
- Heard Marcus tell others that vodka was in his cup.

- Student B:
  - Admitted that he was drinking.
  - Claims Marcus brought vodka and hid it under a bed.
  - On Friday night saw Marcus pour vodka in a McDonald’s cup and drink it.
  - Saw “lots of” beer in the cheerleaders’ room (under the sink, on ice in the sink, and in grocery bags) and that the cheerleaders’ coach/chaperone was present and aware of the beer.

- Student C:
  - Admitted that she was drinking.
  - Saw “lots of” alcohol in cheerleaders’ room.
  - States that not only was the cheerleaders’ coach/chaperone aware of the beer and alcohol, she provided some of it.
  - Saw students drinking wine coolers and beer in the cheerleaders’ room.
  - Saw Marcus drink on Friday night.
  - Saw several bottles of vodka and a bottle of rum in various rooms rented by the District at the Holiday Inn throughout the four days of the tournament.

- Student D:
  - Initially claimed he did not drink but approached Mr. Patton later on same day of his interview to admit otherwise.
  - Stayed in wrestlers’ room at the Holiday Inn.
  - Saw beer, Black Velvet, and vodka in the cheerleaders’ room.

- Student E:
    - Admitted that he was drinking vodka and Black Velvet in the wrestlers' room on Thursday evening.
    - Saw beer in the cheerleaders' room; also drank some there.
- Student F:
    - Admitted that she was drinking.
    - Saw people drinking alcohol from pop cans in the stat girls' room (she was offered some and knows it was alcohol).
    - Saw several bottles of alcohol in stat girls' room.
    - Saw alcohol in cheerleaders' room.
    - Saw people come in and out of cheerleaders' room with bottles of beer in hand.

In the course of his investigation, Mr. Patton interviewed Marcus, telling Marcus that other students had told him that Marcus was present at the Holiday Inn while illegal underage drinking was occurring. When questioned by Mr. Patton, Marcus denied his own involvement, but did implicate four classmates as having been drinking at the Holiday Inn. Marcus spent Thursday night, February 27, with a friend in Ames, but was present poolside and in the wrestlers' room at the Holiday Inn prior to leaving for Ames. He spent Friday and Saturday nights at the Holiday Inn, sleeping in the wrestlers' room Friday night and the coaches' room Saturday night.

Jon Perry testified that Marcus was in the wrestlers' room for about an hour Thursday night, and that no drinking occurred during that hour. He further stated that he, Jon, was asleep when Marcus returned to the room Friday night after Marcus had been riding go-carts and did not awaken at that time. At the hearing before the local board, Marcus denied any illegal drinking or knowledge of the same by others. Marcus also presented statements of a few adults in his defense (Exhibits 102, 104 – 107), but these statements exonerate him solely from acting or smelling as if he had consumed alcohol in the brief periods of time that the adults saw Marcus. The coaches (wrestling and cheerleading) charged with supervising the students and performing room checks at the Holiday Inn, claimed not to have seen any alcoholic beverages present or consumed by District students when interviewed by Mr. Patton.

Marcus was determined by the local board to be in violation of the mere presence portion of its good conduct rule. Although he was also charged by the District administrators with having possessed and consumed alcohol at the Holiday Inn, the local board did not so find. Marcus filed a motion in limine to keep out evidence that he consumed or possessed beer or other alcoholic beverages because such evidence is not relevant to whether he violated the mere presence rule.

## II.
## CONCLUSIONS OF LAW

The Iowa Legislature has directed that the State Board, in regard to appeals to this body, make decisions that are "just and equitable." Iowa Code § 290.3.[2] The standard of review, articulated in *In re Jesse Bachman*, 13 D.o.E. App. Dec. 363 (1996), requires that a local board decision not be overturned by the State Board unless the local decision is "unreasonable and contrary to the best interest of education." *Id*. at 369.

School districts have the authority to promulgate rules for the governance of pupils. Iowa Code § 279.8 mandates that the board of directors of a school corporation "shall make rules for its own government [sic] and that of the … pupils … ." Districts can also govern out-of-school conduct by students involved in athletics and other extracurricular activities. *Bunger v. Iowa High School Athletic Assn.*, 197 N.W.2d 555, 564 (Iowa 1972). There is no dispute that Marcus was covered by the District's good conduct policy.

Marcus asserts the procedural due process argument that he was given insufficient notice of the allegations against him. He also raises the substantive arguments that the mere presence language in the District's good conduct policy is unreasonable, overbroad, vague, and ineffective, and that the rule was unreasonably applied to him. Before discussing his procedural and substantive claims, we must rule on the motion in limine.

### Motion in Limine

Marcus argues that any evidence of whether he possessed or consumed alcoholic beverages is irrelevant to the claim that he was in the mere presence of such beverages. This ignores the reality that a mere presence violation is a "lesser offense" of a possession or consumption violation. If a student is in unlawful possession of or consumes alcoholic beverages, s/he is automatically *in the presence of* such unlawful

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[2] This section has been interpreted by the State Board as meaning that the hearing at this level is a *de novo* hearing. Therefore, although by mutual consent of the parties the transcript of both the evidentiary and deliberative portions of the hearing before the local board was provided to the undersigned, that part of the transcript with the local board's deliberations has not been reviewed by the undersigned or by any member of the State Board.

activity. As no other evidence was presented by the administration to prove that Marcus was merely present while others unlawfully consumed alcohol, the evidence that he was seen drinking vodka Thursday and Friday nights is highly relevant. The motion in limine is overruled.

**Procedural Due Process**

Mr. Patton told Marcus that he had statements from other students to the effect that Marcus was unlawfully consuming alcoholic beverages at the Holiday Inn during the time of the state wrestling tournament. Given that a federal court in Iowa has held specifically that there is no right of a student to participate in interscholastic athletics, and, therefore, little procedural process due to a student charged with a violation of a local good conduct policy (*Brands v. Sheldon Community School*, 671 F.Supp. 627, 630-631 (N.D. Iowa 1987)), Marcus had sufficient notice of the allegations against him. He certainly had enough information from what Mr. Patton told him to prepare a defense. There was no deprivation of procedural due process in this case.

**Reasonableness of the Rule as Written**

The next argument Marcus makes is that the mere presence language in the District's good conduct policy is unreasonable, overbroad, vague, and ineffective. Marcus cites *Bunger v. Iowa High School Athletic Assn.*, *supra*, for its ruling that there must be a "closer relationship between the student and the beer…than mere knowledge that the beer is there." 197 N.W.2d at 565.

The pertinent portion of the District's good conduct policy (the mere presence clause) states that "[s]tudents shall not … attend a function or party where illegal drugs or alcohol are being used illegally by minors." The District's footnote to this clause clarifies that a violation will be founded where "alcohol or a controlled substance is consumed by the minor student, or the minor student socializes with others who are illegally consuming alcohol or drugs and the student knows or reasonably should know that these individuals are minors illegally consuming alcohol."

There appears to be nothing vague about the overall intent of the above language. This Board has previously ruled that school boards need not write rules that prohibit certain conduct "with the precision of a criminal code." *In re Justin Anderson, et al.*, 14 D.o.E. App. Dec. 294, 299 (1977), quoting favorably *Fowler v. Bd. of Educ.*, 819 F.2d 657, 664 (6th Cir. 1987). The District's policy in this case sufficiently puts its students on notice that if they are in a situation where alcoholic beverages are being consumed unlawfully, they should take steps to remove themselves from the situation or suffer the consequences. The words "function or party" in the rule are not the focus of the rule, but are illustrative, not limiting, of situations that may arise in the context of mere presence.

Marcus points out that the students were expected to use the Holiday Inn rooms rented on their behalf by the district. Therefore, his belief is that the school cannot reasonably punish students for using the assigned rooms because there allegedly was alcohol being unlawfully consumed in those rooms. This argument ignores that Marcus is not being punished for being in the room to which he was assigned. Putting aside the fact that Marcus only spent one night in his assigned room, and that his violation took place in part poolside at the Holiday Inn, neither Marcus nor any of the other students were punished for using the rooms as intended. It is the unintended use of the rooms in violation of the mere presence rule that is being addressed by the District.

Finally, the bare language of the rule is not open to attack. As stated by our federal circuit court, challenges to a school policy that are not based on First Amendment concerns are to be analyzed under an "as applied" standard and not by determining the facial validity of the policy. *Woodis v. Westark Community College*, 160 F.3d 435, 438 (8th Cir. 1998). Accordingly, we next turn to the application of this rule herein.

**Reasonableness of the Rule as Applied**

"As long as a decision rests upon 'some evidence,' [substantive] due process may have been satisfied." *Brands, supra*, 671 F.Supp. at 632, quoting *Superintendent v. Hill*, 472 U.S. 445, 105 S.Ct. 2708, 86 L.Ed.2d 356 (1985). That evidence may be circumstantial; it may consist solely of hearsay. But, as long as a preponderance of the evidence points to Marcus' culpability, he may be punished under the good conduct policy.

Here, it is reasonable for the District's board to have concluded that Marcus violated the District's good conduct "mere presence" rule and to punish him accordingly. The only adults from whom Marcus solicited statements either had very little contact with him during the days in question or, in the case of the coaches who gave statements, had self-serving interests to protect. It is entirely reasonable to give credibility to the students who admitted their own guilt and implicated Marcus and to discount the statements of the District employees. The students had no incentive not to be truthful about the conduct of their peers; their punishments were not dependent on what they said about others. On the other hand, the school personnel who were supposed to be supervising the students had their jobs on the line. Marcus' denials of guilt, flying as they do in the face of the picture of rampant underage drinking painted by other students who were there, are not believable. We find that Marcus violated the good conduct policy of the District by his knowing presence in the company of students who were consuming alcoholic beverages.

## III.
## DECISION

For the foregoing reasons, it is recommended that the decision of the Board of Directors of the Southern Cal Community School District made on April 24, 2003, finding that Marcus Kavanaugh violated the District's good conduct policy and punishing him accordingly, be AFFIRMED. There are no costs of this appeal to be assigned.

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Date Carol J. Greta, J.D.
Administrative Law Judge

It is so ordered.

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Date Gene E. Vincent, President
State Board of Education