

**IOWA STATE BOARD
OF EDUCATION
(Cite as 20 D.o.E. App. Dec. 247)**

In re Kyle Foust	:	
James Foust,	:	
Appellant,	:	DECISION
v.	:	
Indianola Community School District,	:	
Appellee	:	[Admin. Doc. #4414]

The above-captioned matter was heard on January 24, 2002, before Susan E. Anderson, J.D., designated administrative law judge, presiding. Appellant, James Foust and his wife, Pamela Foust, were present and were represented by Attorney P. F. Elgin, of Elgin & Patin of Indianola, Iowa. Appellee, Indianola Community School District [hereinafter, “the District”], was present in the persons of Tom Narak, superintendent; John Parker Jr., board president; John Monroe, high school principal; and Darcy Moeller, board secretary. The District was represented by Attorney Ron Peeler of Ahlers, Cooney, Dorweiller, Haynie, Smith & Albee, P.C., of Des Moines, Iowa.

An evidentiary hearing was held pursuant to Iowa Code chapter 290(2001) and Departmental Rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for this appeal are found at Iowa Code section 290.1(2001).

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.

Appellant seeks reversal of a decision of the Board of Directors [hereinafter, “the Board”] of the District made on December 4, 2001, that upheld the ineligibility of his son, Kyle Foust, from participating in public performances in extracurricular activities for one year after a second violation of the District’s good conduct rule.

**I.
FINDINGS OF FACT**

Appellant James Foust is a resident of the Indianola Community School District. His son, Kyle Foust [“Kyle”], attends the District’s high school. Mrs. Foust is Kyle’s stepmother. At the time of the appeal hearing, Kyle was 16 years old and in the eleventh grade. Prior to being suspended from participating in public performances in extracurricular activities, he had participated on the high school’s basketball, baseball, and football teams. Kyle would like to participate in football during the fall of 2002, and in baseball during the summers of 2002 and 2003.

The Board's Good Conduct Rule, Code No. 503.4, states, in pertinent part:

Participation in school activities is a privilege. School activities provide the benefits of promoting additional interests and abilities in the students during their school years and for their lifetime.

Students who participate in extracurricular activities serve as ambassadors of the school district throughout the calendar year, whether away from school or at school. Students who wish to have the privilege of participating in extracurricular activities must conduct themselves in accordance with board policy and must refrain from activities which are illegal, immoral or unhealthy.

Students who fail to abide by this policy and the administrative regulations supporting it may be subject to disciplinary measures. The principal shall keep records of violations of the good conduct rule.

It shall be the responsibility of the superintendent to develop rules and regulations for school activities. Students wanting to participate in school activities must meet the requirements set out by the school district for participation in the activity.

(Good Conduct Rule, Exhibit 1, p. 1.)

The District's Good Conduct Rule from the Student Handbook states, in pertinent part:

The objective of the Good Conduct Rule is to establish and provide for the enforcement of specific standards for all students attending Indianola High School who are involved in extra-curricular (athletics, clubs, etc.) and/or co-curricular activities (band, vocal music, orchestra, etc.) or where students attend class to participate in this activity. This rule shall govern the following activities: interscholastic athletics, cheerleading, drill team, instrumental music, orchestra, vocal music, drama, debate, speech, student publications, and all other school sponsored clubs, organizations, and activities.

It is the philosophy of Indianola Community Schools that participation in extra-curricular and co-curricular activities is a privilege to be earned by not only demonstrating a particular talent

or ability, but also by demonstrating lawful and reasonable conduct. This policy shall be in effect for the entire calendar year (365 days), both during the regular school year as well as all vacation periods.

The district's high school administration shall promptly investigate any report of a violation of the Good Conduct Rule. Based on factual circumstances relevant to said report, the high school administrative team shall determine whether the student has, in fact, violated the Good Conduct Rule. Such factual determination shall be based upon substantial evidence when the information is obtained or reported from non-school personnel in an informal administrative investigation. This investigation shall be limited by any formal rules of evidence or procedure.

The following behaviors or actions by a student shall be in violation of the Good Conduct Rule and shall be determined by a student being observed by a source deemed reliable by the high school administrative team after an investigation, or student admitting to violating these rules.

- Possessing or using any tobacco product.

...

First Offense

A student violating the tobacco, alcohol, and controlled substance guidelines shall be ineligible to participate in 1/3 of all regularly scheduled public performances in all activities that he or she is engaged in at the time of infraction, or in the next activity in which the student is involved.

...

Second Offense

The student shall be ineligible for all regularly scheduled public performances in all activities which he or she is engaged in at the time of infraction, or in the next activity in which the student is involved for one calendar year (365 days). This pertains to all offenses listed under the Good Conduct Rule. Any additional violation of the Good Conduct Rule will result in a one calendar year (365 days) ineligibility period, which starts with the day the infraction is determined to have taken place.

...

Special Considerations

All violations are cumulative throughout a student's high school career in grades 9 – 12. Students who are participating in summer activities between grade 8 and grade 9 are considered to be in grade 9.

...

Any ineligibility for activities under this policy shall be in addition to any other action or temporary suspension or expulsion from school under other school district rules and regulations.

Appeal Process

Any student may, by written notice to the high school principal within three (3) days of notice of ineligibility, appeal such decision to the superintendent of schools. Upon receipt of the notice of appeal or notification thereof, the superintendent of schools shall appoint a panel consisting of four teachers and two students to hear such appeal. The superintendent of schools and the panel shall confirm the ineligibility, or shall declare the student eligible. If the student wishes to appeal the superintendent's decision, they must do so in writing within three (3) days of such decision to the Board of Education.

...

(Indianola High School Student Handbook (2001-2002) Exhibit 1, pp. 2-4.)

Mrs. Foust and Kyle both signed the following document, which appears in the Student Handbook's good conduct rule, during the summer of 2001:

We sign below to signify we understand this policy. We also understand we must sign this document before our son or daughter will be allowed to practice or participate in any public performance for any extra-curricular or co-curricular school sponsored groups while representing the Indianola Schools.

(Exhibit 1, p. 4.)

Mrs. Foust testified that she had not read the Student Handbook rules. She signed the document only because she knew Kyle could not play high school sports without a parent's signature.

Kyle's first violation of the good conduct rule occurred on or about September 5, 2001. Kyle had been arrested for possession of a controlled substance and possession of stolen property. His sanction under the good conduct rule was ineligibility from participating in four football games during the fall of 2001. Kyle was allowed to continue practicing with

the team and to be on the sidelines in street clothes during those four football games. The Fousts did not appeal this ineligibility for Kyle's first violation of the good conduct rule.

Kyle's second violation of the good conduct rule occurred on November 1, 2001. On that date, John Taylor, the high school's dean of students, witnessed Kyle smoking a cigarette while Kyle was stopped in his car at an intersection in Indianola. Mr. Taylor notified John Monroe, the high school principal.

On November 6, 2001, Mr. Monroe called Kyle into his office to tell him about Mr. Taylor's report. Mr. Taylor was also present. Mr. Monroe testified that Kyle's parents were not called into his office that day because the administrators do not call parents during the investigative state of good conduct violation reports unless an outside entity such as a local law enforcement agency is involved. Kyle did not admit smoking that day, but Mr. Taylor was certain that he had observed him smoking. After questioning Kyle on November 6, 2001, Mr. Monroe wrote the following letter to Mr. and Mrs. Foust:

This letter is to inform you that Kyle was observed by a high school staff member smoking on the corner of 2nd and Buxton last Thursday at 4:53 p.m. This is Kyle's second violation of the Indianola High School Good Conduct Rule. As a result, Kyle is ineligible for one calendar year for any and all extra-curricular activities for which he is involved. Kyle will regain his eligibility on November 6, 2002. Kyle will need to communicate with his coaches at that time to regain his eligibility. Kyle is aware of his right to appeal the decision of the Superintendent of Schools. At noon today, Kyle gave me a letter of appeal (a copy of which is enclosed). Dr. Narak, Superintendent of Schools, will be in communication with Kyle concerning the hearing date.

(Exhibit 1, pp. 7,8.)

At Kyle's request, a Review Committee hearing was set for November 13, 2001. Kyle attended the Review Committee hearing along with Mr. and Mrs. Foust. In a letter dated November 16, 2001, the High School's Assistant Principal notified the Fousts that the Review Committee had confirmed Kyle's one-year ineligibility for a second violation of the good conduct rule. (Exhibit 1, p. 10.)

The Review Committee took written notes of its hearing (Exhibit 1, p.11.) The Review Committee notes state, in pertinent part:

VIII. Kyle then stated that he wasn't smoking at the time, but didn't deny it when confronted by Mr. Taylor and Mr. Monroe. He stated that he was pretty sure he wasn't smoking when leaving his community service assignment with a friend.

IX. Kyle then stated that he has smoked before, when questioned by a student on the committee, but that he wasn't sure if he was smoking at the time in which Mr. Taylor was accusing him.

...

XIII. The committee unanimously affirmed the position that the high school administration had followed the policy.

(Exhibit 1, p. 11.)

Appellant appealed in writing to the District's Board of Education on November 14, 2001. (Exhibit 1, p. 12.) Mr. Foust requested an open session hearing. On November 26, 2001, the Superintendent wrote Mr. Foust to notify him of the date for the good conduct appeal hearing before the Board. (Exhibit 1, p. 13.) . A special meeting was held on December 4, 2001. (Exhibit 1, p. 13.)

At the Board meeting on December 4, 2001, the Fousts and the administration made a presentation to the Board. The Board voted to affirm the Review Committee's decision to uphold Kyle's ineligibility for one year for the second violation of the good conduct rule. The Review Committee and District's Board of Education kept a written record of their proceedings and findings.

The Board's Findings of Fact, Conclusions and Decision states, in pertinent part:

On the 4th day of December, 2001, this matter was heard before the Board of Directors of the Indianola Community School District in Room E300 at the Indianola High School. The matter was heard by [the] following Board members: John Parker, Jr.; Ken Bresnan; Eric Larsen; Cyd Dyer and Grant Johnson.

The hearing was conducted in open session at the request of the student's father. The proceedings were tape recorded. Those present at the hearing were Superintendent Tom Narak; High School Principal John Monroe; John Taylor, Dean of Students; Bob Young, High School Teacher; Personnel Director Ken Borgman; Kyle Foust, student; James Foust, Kyle's father; Pam Foust, Kyle's step-mother; Darren Worthington, Kyle's friend; Phil Elgin, the family's attorney; Darcy Moeller, Board Secretary; and Ronald Peeler, Board Counsel.

Information on behalf of the administration was received from Superintendent Narak, Principal Monroe, John Taylor, and Bob Young. Information on behalf of the student was received from Kyle Foust, James Foust, Darren Worthington, and Pam Foust.

FINDINGS OF FACT

...

2. At 4:53 p.m. on November 1, 2001, John Taylor observed Kyle at the corner of Buxton and 2nd Avenue, driving his maroon vehicle. Kyle agrees that he was there at that time, and that Darren Worthington was with him.

The factual dispute is whether Kyle was smoking a cigarette when he was observed by Mr. Taylor. Kyle states that he was not smoking, but that he believes Darren was. Darren said that he thought he was smoking, but Kyle was not. John Taylor, however, was certain that he saw Kyle smoking.

...

CONCLUSIONS

The Board makes the following conclusions:

1. The Good Conduct Rule is a valid exercise of the school's authority over students who participate in school activities.
2. The administration correctly applied and followed the Rule in this case.
3. On November 1, 2001, Kyle Foust committed a second violation of the Rule, and should be subject to the sanctions of the Rule.

DECISION

It is the decision of the Board that the Good Conduct Rule appeal is denied, and that the administration's action is sustained.

The Fousts then appealed to the State Board of Education. Superintendent Narak testified at the appeal hearing that since 1998, the high school has suspended nine students (including Kyle) from extracurricular activities for one year after a second violation of the good conduct rule. Three of the nine suspensions under the good conduct rule were for tobacco use. Mr. Narak further testified that Kyle's suspension under the good conduct rule does not prohibit him from practicing with the baseball and football teams.

On appeal to the State Board of Education, the Fousts did not dispute that Kyle had been smoking on November 1, 2001. Instead they argued that the Board's decision should be reversed for the following four reasons:

1. That the application of the policy violates Kyle's due process rights because with one year of ineligibility at stake, Kyle's parents should have been contacted before his being questioned by the administration.
2. Even if Kyle was smoking, it would have occurred off school grounds and after the school day and therefore the school had no jurisdiction over that conduct.
3. A calendar year of ineligibility is excessive and unreasonable.
4. Since each activity participant and parent/guardian signs an acknowledgement of the Rule each year, the "agreement" is good only for that school year and any sanction issued cannot extend into the next school.

(Affidavit of Appeal, December 31, 2001.) The Fousts had made these same four arguments to the District's Board at its special meeting on December 4, 2001.

II. CONCLUSIONS OF LAW

The State Board has been directed by the Legislature to render a decision that is "just and equitable" [Iowa Code section 290.3(2001)]; [Iowa Code section 282.18(18)(2001)]; and "in the best interest of education" [Iowa Administrative Code 6.17(2)]. The test is *reasonableness*. Based upon this mandate, a more precise description of the State Board's standard of review is this:

A local school board's decision will not be overturned unless it is "unreasonable and contrary to the best interest of education."

In re Jesse Bachman, 13 D.o.E. App. Dec. 363, 369 (1996).

The question before us is whether the Board's decision to uphold Kyle's one-year suspension from participating in public performances in extracurricular activities was a reasonable exercise of its authority. We conclude that the Board's decision was reasonable. The Fousts argue that their son has been treated unfairly by the District's administrative staff and Board of Directors. They contend that Kyle was excluded from extracurricular activities for one year without due process of law. Based upon the evidence before us, we do not agree. We will address the Fousts' four specific due process arguments below.

1. Parents not in Principal's Office:

The Fousts argue that the application of the policy violates Kyle's due process rights because with one year of ineligibility at stake, Kyle's parents should have been contacted before his being questioned by the administration. One of the purposes of due process is to give a person accused of a violation of law or policy the opportunity to tell his or her side of the story to

guard against “unfair or mistaken findings of misconduct” *Goss v. Lopez*, 419 U.S. 565, 569 (1975). Due process, it should be noted, is not required for every deprivation instigated by a public school district. It applies whenever the liberty or property interest at stake is more than “de minimus”. *Id.* See also, *Brands v. Sheldon Comm. Sch. Dist.*, 671 F.Supp. 627 (N.D. Iowa 1987). In constitutional terms, Kyle’s deprivation from extracurricular activities would probably be deemed “de minimus” by the court in terms of the property interest at stake. “There is no constitutional right to participate in high school athletics.” *McFarland v. Newport Special School Dist.*, 980 F.2d 1208, 1211 (8th Cir. 1992). *Gonyo v. Drake University*, 837 F.Supp. 989, 994 (S.D. Iowa 1993).

The seminal case cited for the establishment of public school students’ rights under the United States Constitution to “due process of law” as promised by the Fifth and Fourteenth Amendments is *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975). That case involved the suspension of students from public school for ten (10) days. In addition to guaranteeing that students facing “short-term suspensions of ten days or less” have the minimal right to notice (oral or written) of the charges against them and an opportunity to be heard prior to the imposition of the suspension, the Supreme Court strongly suggested in *Goss* that for longer exclusions more process may be required, including a hearing before the board, the opportunity to secure counsel, to confront and cross-examine witnesses and to call witnesses on the student’s behalf to verify the student’s version of the incident. *Goss, supra* at 419 U.S. 584.

Following that case, the State Board established that the minimal procedural due process guarantees for students facing *expulsion (suspensions from school, longer than ten days)* are:

- 1) no removal from school prior to a hearing, except in emergency circumstances;
- 2) a written statement of the alleged misconduct, sufficient to prepare a defense to the charges;
- 3) written notice of time, date, and place of the hearing;
- 4) notification of the right to be represented;
- 5) an opportunity for the student to be heard;
- 6) an opportunity for the student to examine documents and cross-examine witnesses;
- 7) a written decision outlining the facts upon which the decision is based; and
- 8) a verbatim record of the hearing.

In re Monica Schoor, 1 D.P.I. App. Dec. 136, 139 (1979).

In the 23 years since the *Monica Schoor* decision the State Board has had many additional opportunities to modify those requirements. A review of the cases suggests that only the final requirement, that a verbatim record of the hearing be made, is no longer deemed essential, for purposes of appeals to the State Board of Education because our review

of school board decisions is *de novo* (“a new”). *In re Andrea Talley*, 1 D.P.I. App. Dec. 174, 176(1978); *In re Connie Berg, et al.*, 4 D.P.I. App. Dec. 150, 167(1986); *In re Joseph Childs*, 10 D.o.E. App. Dec. 1(1993); *In re Isiah Rice*, 13 D.o.E. App. Dec. 13, 21(1996).

Procedural due process rights have never been afforded to those deprived of participation in extracurricular activities. That is because due process is a flexible concept that varies with the particular situation. *Cinerman v. Burch*, 494 U.S. 113, 127(1990). Since the property interest in participation in extracurricular activities is considered constitutionally “de minimus” by the courts, and since there is “no constitutional right to participate in high school athletics”, the due process rights afforded to students expelled for longer than ten days are not available to students suspended from participation in extracurricular activities. *See, Brands v. Sheldon Comm. School Dist.*, 671 F.Supp. 627 (N.D. Iowa 1987); *In re Bryce Ricklefs*, 16 D.o.E. App. Dec. 300(1999).

For these reasons, we conclude that there is no due process requirement to notify the parents before the administrators investigate a good conduct rule violation.

2. Conduct off School Grounds

The Fousts argue that even if Kyle was smoking, it would have occurred off school grounds and after the school day and therefore the school had no jurisdiction over that conduct. The State Board of Education has addressed a similar argument in *In re Bryce Ricklefs*, 16 D.o.E. App. Dec. 300 (1999). In *Ricklefs*, the State Board concluded that a student who had purchased tobacco for other people off school grounds could be suspended from athletic eligibility under a district’s good conduct policy. *Id.* at 308.

The first principle in considering the validity of the school rule is its scope. The rule must pertain to conduct “which directly relates to and affects the management of the school and its efficiency.” *Bunger* at 563.

Student misconduct in the classroom obviously affects the operation of the school; misbehavior of a child at home within the family clearly is beyond the concern of the school. Between those extremes lie the cases which more or less affect the operation of the school and the task is to determine on which side of the line particular conduct falls.

Id. at 308.

Is the connection between Kyle’s conduct and effect upon the school too tenuous to come within the scope of the Board’s authority? We think not. Iowa Code section 279.9 requires a board to enact rules that prohibit “the use of tobacco...by any student of the school. Schools and

the board may suspend or expel a student for a violation of a rule under this section.” A “student” is described as a “resident who is between the ages of 5 and 21 years who has not graduated from a four-year course in an approved high school or its equivalent.” Iowa Code section 282.6(2001).

Inherent in the notion of a good conduct policy is the idea that participants in extracurricular activities should be held to a higher standard than non-standout students. Extracurricular activities are not mandatory. By electing to participate, the student agrees to abide by the terms of the good conduct policy even when school is not in session. *In re Josh Burns*, 15 D.o.E. App. Dec. 344, 348 (1998). In general, school discipline policies address student conduct that occurs on school grounds during the school day. This is because the school district’s regulation of school conduct must bear some reasonable relationship to the educational environment. However, districts may also reach out-of-school conduct by student athletes and those involved in extracurricular activities. Because of the leadership role of these “stand-out” students, their conduct, even out of school, directly affects the good order and welfare of the school. *Bunger v. Iowa High School Athletic Assn.*, 197 N.W. 2d 555, 564 (Iowa 1972). For these reasons, we conclude that the good conduct rule prohibiting Kyle’s use of tobacco while off school grounds is valid in its scope.

3. Length of Ineligibility

The Fousts did not dispute the Board’s authority to establish rules governing student behavior, nor did they claim that their son was treated differently from other students who committed the same offense. Rather, their claim is that a one-year period of ineligibility for a second offense is too severe.

The Fousts argue that their position is bolstered by a document they introduced into the record at the appeal hearing as Exhibit 3. The document is a good conduct rule sample handbook provision that appears on the web site of the School Administrators of Iowa (SAI) as a service to its members. The Fousts copied this document from the SAI web site. It states: “SAI offers the sample handbook provision for districts to consider.” (Exhibit 3, p. 1.) The sample provision later includes a penalty of up to twelve weeks of ineligibility for a second offense within the student’s high school career. (Exhibit 3, p. 4.) The District argues that the sample provisions do not in any way control the District’s local authority to establish its own good conduct rule and penalties. We agree with the District’s reasoning.

The State Board has previously been asked to rule on the severity of penalties imposed for violations of good conduct policies. In *In re Bryce Ricklefs*, 16 D.o.E. App. Dec. 300 (1999), a student was found to have committed a second violation of the good conduct policy for possession of a tobacco product. The penalty was suspension from extracurricular activities for one year. Although it expressed concern about good conduct policies that “focus more on ‘sanctions’ than on ‘solutions’,” the State Board concluded that

a “one-year penalty is not ‘unreasonable’ per se.” *Id* at 310. The Board reached the same conclusion in the appeal of *In re Corey Carroll*, 18 D.o.E. App. Dec. 265 (2000). We must reach the same conclusion in this case.

4. Acknowledgement Form

The Fousts argue that the form signed by Mrs. Foust and Kyle during the summer of 2001 prohibits the District from enforcing Kyle’s one-year of ineligibility into the 2002-2003 school year. We conclude, however, that once a student participates in extracurricular activities during a school year, his violations of the District’s good conduct rules are subject to sanctions even if those sanctions end in a subsequent school year.

The Fousts in this appeal have failed to show that the Board’s decision was unreasonable and contrary to the best interest of education. There is no other basis on which to overturn it.

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

III. DECISION

For the foregoing reasons, the decision of the Indianola Community School District Board of Directors made on December 4, 2001, that upheld the one-year ineligibility of Kyle Foust from participating in public performances of extracurricular activities for a second violation of the good conduct rule, is hereby recommended for affirmance. There are no costs to be assigned under Iowa Code Chapter 290.

DATE

It is so ordered.

SUSAN E. ANDERSON, J.D.
ADMINISTRATIVE LAW JUDGE

DATE

CORINE HADLEY, PRESIDENT
STATE BOARD OF EDUCATION