Iowa State Department of Education

(Cite as 18 D o E. App. Dec. 357)

In re John Lawler	:	
Colleen Lawler, Appellant,	:	
v.	:	DECISION AFTER PARTIAL REHEARING
Northwood-Kensett Community School District, Appellee.	:	[Adm. Doc. #4171]

The above-captioned matter was originally heard on November 3, 1999, before a hearing panel comprised of Tom Andersen, consultant, Bureau of Administration and School Improvement Services; Klark Jessen, consultant, Office of the Director; and Susan E. Anderson, J.D., designated administrative law judge, presiding. Appellant, Colleen Lawler, was present along with her son, John Lawler. Appellant was represented by Judith O'Donohoe of Elwood, O'Donohoe, O'Connor and Stochl, of Charles City, Iowa. Appellee, Northwood-Kensett Community School District [hereinafter, "the District"], was present in the persons of Jerry McIntyre, superintendent; and John Dayton, secondary school principal. The District was represented by John Greve of Northwood, Iowa.

Authority and jurisdiction for the appeal are found in Iowa Code section 290.1(1999). An evidentiary hearing was held pursuant to Departmental Rules found at 281 Iowa Administrative Code 6.

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 sought reversal of a decision of the Board of Directors [hereinafter, "the Board"] of the District made on September 9, 1999, to expel her son from school through the 1999-2000 school year for violation of the Board's weapons policy. On January 3, 2000, the administrative law judge issued a proposed decision recommending reversal of the decision. On January 13, 2000, the State Board of Education adopted the administrative law judge's recommendation in the decision of *In re John Lawler*, 18 D.o.E. App. Dec. 61(2000).

On February 10, 2000, the State Board of Education considered and granted Appellee's Application for Rehearing under 281 IAC 6.20 and 6.21 on the basis that "other good cause" existed due to a new interpretation of the Department's rules relating to notices of appeal from proposed decisions. A partial rehearing was granted to rehear evidence on the due process issues and was originally scheduled to be held on March 13, 2000. This date was continued to April 18, 2000, at the request of Appellee. On April 18, 2000, the hearing panel reheard the evidence on the due process issues.

I.
Findings of Fact

In December of 1998, John Lawler was a seventh-grade student attending the secondary school in the District. He had turned 13 years of age on August 30, 1998. He was a good student and had no history of disciplinary problems at school. On the evening of December 7, 1998, John was to perform in a band concert in the elementary building where he had attended the year before. On the bus going home from school that afternoon, John showed a package to some other students which he claimed was a "bomb". Before the performance on that evening, John placed the package near the desk of one of his former teachers, Ted Carpenter. The package contained 3 fireworks, a glass baby food jar with cook-stove fuel in it, and a small tin of gunpowder. These items were connected together with duct tape inside the shoebox-sized cardboard container. A fuse protruded out of one end of the package and a cigarette lighter was taped to the outside of the package near the fuse. The package was wrapped in Christmas paper and a bow. It came with a note addressed to Mr. Carpenter, which included instructions for lighting the fuse, as follows:

> Dear Ted: your hunky. I have loved and admired you ever since I first layed eyes on you. In order to work this gift just light the green string on the side of the gift with an "X" on it. Don't worry there is no danger of fire, the most wonderful thing will then happen in five minutes.
>
> P.S. For best results, place under Christmas tree and I gave you a lighter for the string.
>
> Love your secret admirer

On the morning of December 8, 1998, Mr. Carpenter found the package in his classroom. Mr. Carpenter notified school officials of the suspicious package and the elementary building was evacuated. The package was placed outside of the building under a wastebasket until State Fire Marshal Agent Mike Keefe and law enforcement officials arrived. Agent Keefe disrupted the package by aiming a "water cannon" at it. The speed of the water coming out of a water cannon blows the package open from a distance. Agent Keefe told secondary school Principal John Dayton that the package was a device capable of doing injury to people and property. After use of the water cannon, the contents of the package scattered, but the evidence was inconclusive on whether the water cannon caused the scattering or whether the package actually exploded on its own.

In the meantime, Principal Dayton had come over to the elementary building from the secondary building to try to determine who had left the package in Mr. Carpenter's room. He had remembered that students from the secondary school had been performing in a concert in the elementary building the night before. Another student told Principal Dayton that John Lawler was probably the student who had put the package on Mr. Carpenter's desk.

Principal Dayton found John Lawler and asked if he had put the package on Mr. Carpenter's desk. After briefly denying it, John said he had. Mrs. Lawler was contacted and asked to come immediately to the school. Agent Keefe talked to John and John indicated that he had put the package on Mr. Carpenter's desk because Mr. Carpenter had been an unpopular teacher with all the students, and because John wanted to impress his peers. Mr. Keefe interviewed various students and witnesses during the afternoon as part of his investigation. During the course of the investigation, a knife and a lighter were found in John's locker.

On Thursday, December 10, 1998, John was removed from his home by law enforcement officials and taken to Mercy Hospital in Mason City for evaluations. Also on that date, Principal Dayton sent a letter to Mr. and Mrs. Lawler stating as follows:

> Mr. and Mrs. Lawler, on December 8 an explosive device was discovered in the West Elementary building. While investigating this incident officers discovered that John had a knife and lighter in school. As a result, he was suspended for three days. Later, charges were formally made that he was responsible for the bomb. As a result of this latest development, John is suspended till the Board convenes to consider disciplinary action
>
> According to policy, this absence is excused. We will provide John with assignments. The work will be corrected and graded. If you have any questions, please phone me at 324-2142.
>
> Regards,
>
> John O. Dayton

Also on December 10, 1998, Superintendent McIntyre sent a separate letter to the Lawlers informing them that the Board would hold a special disciplinary meeting "to deal with board policy 903.1 – "Weapons", a copy of which was enclosed. The letter contained no list of witnesses to be called by the Board. The letter informed the Lawlers that they were entitled to bring counsel and witnesses to the meeting. The entire text of this letter follows:

> Mr. and Mrs. Lawler:
>
> This letter is to inform you of a special disciplinary meeting I have called to deal with board policy 903.1 – Weapons.

> You are entitled to bring legal representatives, any witnesses you feel necessary and other people that you desire to this disciplinary hearing.
>
> The meeting is to take place at 4:30 p.m. in the East Elementary boardroom.
>
> If you have any questions, please give me a call at 324-2021.
>
> A copy of the board policy 903.1 is enclosed with this letter.
>
> Sincerely yours,
>
> Jerry D. McIntyre
> Superintendent

Policy #903.1 of the District provides, in pertinent part, as follows:

> Students bringing a firearm to school shall be expelled for not less than 12 months. The Superintendent shall have the authority to recommend this expulsion requirement be modified for a student on a case-by-case basis. For purposes of this portion of this policy, the term "firearm" includes any weapon which is designed to expel a projectile by the action of an explosive, the frame or receiver of any such weapon, a muffler or silencer for such a weapon, or any explosive, incendiary or poison gas.

The letter did not specify the date upon which the special Monday meeting would occur. The text of neither letter specifically stated that John was being considered for expulsion, although it was implied by the inclusion of the weapons policy in Superintendent McIntyre's letter. The Lawlers received the letters either on Friday, December 11, 1998, or on Saturday, December 12, 1998. They were unable to obtain counsel for John before the Special Board Meeting on December 14, 1998. The Lawlers were preparing to attend John's juvenile hearing already scheduled for earlier that same day, December 14, 1998.

On December 14, 1998, the Special Board Meeting took place. John was unavailable to attend the meeting because he was being detained by juvenile court officials for psychiatric evaluations. Mrs. Lawler had contacted John's court-appointed attorney and he refused to attend the meeting. He instructed her to go to the meeting and request a closed session for the deliberation. John's court-appointed attorney also instructed Mrs. Lawler not to say anything during the meeting. Therefore, Mrs. Lawler attended the meeting only to request a closed session for the deliberations by the Board members, but she did not say anything other than to request the Board to consider John's education. She and John were, therefore, unrepresented by counsel at the December 14 meeting.

At the rehearing, Appellee presented evidence in an attempt to show that Appellee's counsel had given Mrs. Lawler a chance to request a continuance of the December 14 meeting. The closed session on December 14, 1998, was tape-recorded by the Board and the original tape was admitted into evidence as Rehearing Exhibit 1. The quality of the tape recording is still poor, making it very difficult, if not impossible, to hear the entire evidence and discussion. Both parties introduced transcripts of some audible excerpts from the tapes. Rehearing Exhibit 1 and Rehearing Exhibit 4, introduced by Appellee, and Rehearing Exhibit 3, introduced by Appellant, showed the following exchanges, in pertinent part:

> (Appellee's Counsel) Greve: You indicated that you had some questions.
>
> Mrs. Lawler: Yeah, I thought it was going to be in closed session.
>
> Greve: Well, yes it is, it is a closed session usually but this is a hearing that you have the right to make that request. I just wanted to make sure you understood that before we started, I guess. Do you have any questions with respect to the procedure or what we're going to do?
>
> Mrs. Lawler: I think not. (Rehearing Exh. 4)
> or (Inaudible response) (Rehearing Exh. 3)
>
> Greve: Okay. Basically, basically, so that we all understand what is going on, we have a very unfortunate incident. I am, all I know is what I have heard second hand. The policy that covers this kind of situation. Ah, ah, you were sent the notice and you were sent a copy of the school policy. And, ah, ah, your son would have the right to be present, as I understand it he is not in the area right now. Correct?
>
> Mrs. Lawler: (Inaudible response)
>
> Greve: Okay. So we will proceed at this point in time unless there is some reason that we know of or you want to make us aware of that we should not proceed.
>
> Mrs. Lawler: As far as I understand it is, you know, a school matter.
>
> Greve: It is a school matter.
>
> Mrs. Lawler: Irrelevant to whatever other matters . . . .
>
> Greve: This has nothing to do with, with, ah, your son's legal matters, and we don't want you to say anything that would jeopardize or have any bearing on his other matters nor are we concerned about this

other then [sic] as an administrative decision but – the school board dealing with school matters.

During this period of time, Superintendent McIntyre gave a statement that he had seen the package detonated and it had scattered about 20 feet. Principal Dayton read from his notes about what John had said to Agent Keefe and what Agent Keefe had reported to the school officials about the package, which he said had been referred to by Agent Keefe as a "device capable of causing injury." Principal Dayton stated that he had seen the outside of the package, but had never seen inside of it. Agent Keefe was not present to testify. Police Chief Dorsey came to the hearing but stated that the juvenile court had sealed his notes and that he, therefore, could not discuss his notes at the meeting.

Greve: Does the Board have any questions of Mr. McIntire? Mrs. Lawler, do you have any questions of either of these gentlemen? Do you have any comments or anything that you think the Board should be aware of or should hear?

Lawler: (Inaudible response)

...

(Board President) Tenold: John, if, in fact, we decide to in favor of the expulsion, do we have to put a specific time on it or can we say a minimum of 12 months, or how does that have to be done?

Greve: Your Board policy says that you have a minimum, that they shall be expelled for not less than 12 months. I think what the Board needs to do is to make a finding of fact as to number 1 – Whether it was an explosive device; number 2 – Whether it was put on the school premises by this particular student. If so, then they need to determine the length of the expulsion. They can approve an expulsion for 12 months, but they cannot, ah, or they could go longer. I mean I don't know what, I have not talked to any one Board member about this. I think that what the Board needs to do is make a finding and a determination as to whether there has been a substantiation of the fact allegation to warrant an expulsion and then 2, set an expulsion for whatever period of time, not less than 12 months, assuming that the fact situation is verified which I honestly feel it has been, and do this by a formal finding that we would reduce to writing and show in our minutes.

...

(Director) Kate Midtgaard: According to our policy, does anybody doubt that this was an explosive device? Does anybody doubt that it was placed by John Lawler? So those are the criteria that are set forth in this particular code. Really is, you know, whatever else was in the locker,

anything else doesn't have any bearing on the explosive device this deals with. So the facts of the matter are it was an explosive device, it was placed by John Lawler, so now as I understand it, we have to determine the terms of his expulsion?

Greve: That's correct.

Midtgaard: A minimum of 12 months?

Greve: Yes.

Midtgaard: So what do you start from there?

Tenold: I don't know .... puts us in a very, very difficult spot. You know, I think we're all very much aware of how concerned our entire community is about this, parents and everybody else that puts every other child at risk and I will give a personal opinion on this and that's all it is. I think that we obviously have to do something for the 12 months. Beyond that, I think that's one reason I asked the question I did of John Greve. I think we have, we have, a lot of latitude there to go and I guess my concern is, and I think it's the concern of the entire Board, is certainly you can expel somebody for 12 months. If his problems are not resolved in that time is that the final action that we have? If, in fact, our administrator and people that are professionals in this particular area feel that he could still be a danger to the safety of the other children in the school, the staff members, whatever, are at that point, um, you know, bound to take him back into school district at the end of 12 months. I guess frankly in my opinion, I would rather error on the long side and reconsider and lessen it.

Greve: Well, perhaps, Mr. Tenold, what you feel that you should do is make a determination that there has been a violation, then make a finding of what the fact situation is, and defer final decision until such time as the juvenile authorities, as I understand it, what's happened is that they have sealed the records. ...

Mr. Tenold: That's my concern. This is the first time most of us have been exposed to this ... concealed and police reports and stuff like that. I feel very strongly we need to keep the child's rights in mind. At the same point, I don't want to limit ourselves, ah, cause the overall, over-riding concern to me is the safety of the entire school and, ah, so I guess I would, I would make that motion that we defer our decision until we have a report and, ah, some more information is, ah, released on this.

> Greve: Are you making a, is the Board making a finding at this time that the policy has been violated? That is the unanimous concern because when we come back, we don't want to go through everything and, ah, ah, start from word one.
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> Tenold: ... individually to answer that?
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> Greve: Well, everybody has indicated yes, and what I think we should do is to maintain contact with Mrs. Lawler and her family so that if you can provide us with any information or any guidelines or if we can get a juvenile report, it would be greatly appreciated. And I realize that you don't feel that you should say anything, but I'm just saying that, that this is what the school would like to have so that they have some guidelines to see what the future is going to hold on this.
>
> Mrs. Lawler: I've been told totally different things than most of you are assuming, um, I guess the only concern I have right now is trying to keep my son's education up to date, ah, I guess the question I have is if he is expelled, is there, is there any contact I have with the school to try and keep his schooling up to date or is that left to us alone.

Appellee's counsel at least twice suggested the idea that the Board should wait for a report from the juvenile authorities before it decided how long to expel John. After the above evidence and discussions, the Board went into open session. In open session, as reflected in the December 14, 1998 minutes, the Board adopted a resolution that the package violated the Board's weapons policy and that John had brought the package onto school property.

In spite of the resolution, and in spite of the Board's weapons policy and the Gun Free Schools Act (both of which require at least a 12-month expulsion), the Board did not take an official vote to expel John. The Board wanted to wait for more information from the juvenile court to see whether it could expel him for more than the 12 months required by the Board's weapons policy and the Gun Free Schools Act. The Board minutes of December 14, 1998, state:

> Upon motion duly made, seconded and unanimously carried, a resolution was adopted showing that the resolution would constitute a finding of fact that:
>
> 1. A bomb or incendiary device was placed on school property on December 8, 1998; and
> 2. The bomb or incendiary device was placed by Student X.

> After detailed discussion concerning the penalties involved, it was determined that there needed to be input from juvenile authorities or parties who could provide information to the Board as to whether or not the mandatory one year expulsion should be in effect or in order to protect the students and facility of the Northwood-Kensett Community School District, a longer expulsion could be imposed. Final action was deferred pending request and receipt of information from the juvenile authorities as to the nature, treatment, and their recommendation for the student subject.
>
> It was approved that this matter would be scheduled for further determination with respect to penalties to be invoked pending receipt of additional information, if available, from the juvenile authorities.

(Board Minutes 12/14/98.)

Some of the members of the 5-person Board had children who were then elementary students. The Board never sent Mrs. Lawler a copy of the December 14, 1998 Board minutes. She first saw the minutes when she requested them from the Board as part of her appeal to the State Board of Education on or about September 20, 1999.

John went from being evaluated at Mercy Hospital in Mason City to a Youth Shelter under the authority of the juvenile court where further evaluation was done. He was charged with first-degree arson in Worth County Juvenile Court. During John's stay at the youth shelter, John received educational instruction based on the Mason City School District's curriculum. He was released on February 8, 1999, and went home to his parents.

On February 11, 1999, Mrs. Lawler called Superintendent McIntyre and stated she was concerned with John's education and wanted to have John in school. Superintendent McIntyre told her to call Principal Dayton. During a conversation on February 17, 1999, Principal Dayton told Mrs. Lawler that the school had no further obligation to provide an education to John. Principal Dayton testified at the appeal hearing that it was very confusing to him as to what John's status was. He considered that John was expelled as of February 17, 1999. Superintendent McIntyre testified that between December 8, 1998 and September 9, 1999, he considered John to be truant. No truancy notices were ever sent to the Lawlers. To confuse matters even more, when the District filed its 1998-1999 Gun Free Schools Act Expulsions form with the Iowa Department of Education on June 23, 1999, it reported that it had expelled one student for threatening a student or teacher with a bomb or explosive device.[1] (Rehearing Exhibit 10.) At the hearing and rehearing, however, the District's position was that John was not expelled until September 9, 1999.

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[1] **This form was not introduced into evidence at the original hearing. The form was brought to the administrative law judge's attention by a member of the hearing panel the day after the hearing. We took notice of our Department's official form which is public record.**

By February of 1999, Mrs. Lawler had obtained private counsel, Judith O'Donohoe. As a result of conversations between Mrs. Lawler's attorney and the District's attorney, the District agreed to the Lawlers' request that it would provide John with some seventh-grade books and course materials. The District also agreed to provide a list of possible in-home tutors for John. The list consisted of some substitute or retired teachers whom the District had used in the past.

Mrs. Lawler testified that she contacted the individuals on the list, but they either declined to tutor John or did not return her calls. She did receive textbooks and course materials for the remainder of what would have been John's seventh-grade year, but that was the extent to which the school was involved with John's educational needs. The District made no attempt to make a plan outlining even general procedures for Mrs. Lawler to follow regarding if, how or when John's coursework would be graded by the District. Mrs. Lawler testified that the District did not correct any of John's work. The District, through Principal Dayton, testified that if Mrs. Lawler had brought John's work to school, it would have been graded. Mrs. Lawler testified, however, that she did not bring any course work to the school, because she had no idea that she should do so.

Basically, then, John's education for the remainder of what would have been his seventh-grade year and for the beginning of what would have been his eighth-grade year has consisted of his mother's efforts to give him instruction at home from the textbooks and course materials which the school provided after the requests by her attorney. The District has a report card for John for only the first quarter of the 1998-99 school year. There has been no credit for any work done since December 8, 1998. The juvenile court judge had determined that Mrs. Lawler's attempts to provide for John's education at home were not working out. The court directed Ms. O'Donohoe to follow through with the District to ensure that John had an adequate educational program.

On July 15, 1999, John was adjudicated a delinquent in juvenile court for committing first-degree arson. On August 24, 1999, the dispositional order sentenced John to probation for two years, with mandatory counseling. During this time, he was to reside with his parents. The Board had still taken no action due to the Board's original decision to wait until the juvenile court's proceedings were completed before deciding what action should be taken with regard to John's discipline. By February of 1999, the Lawlers had succeeded in retaining counsel, who requested the Board to wait as well. (Rehearing Exhibit 5.)

Finally, on September 9, 1999, the Board met in closed session to hear statements on what action should be taken to discipline John. By this time, nine months had passed between the date of the incident and the date the Board officially met to act on John's discipline. The Board did not revisit its December 14 resolution that John had violated its weapons policy. Ms. O'Donohoe represented the Lawlers during the closed session. Both John and Mrs. Lawler were also present at this meeting.

The closed session on September 9, 1999 was tape-recorded by the Board and a copy of the original tape was admitted into evidence at the rehearing as Rehearing Exhibit 2. The quality of the tape recording of the evidence and discussion that followed Ms. O'Donohoe's presentation and John Lawler's apology still makes it very difficult at times, if not impossible, to hear the entire evidence and discussion. However, it was audible on the tape that Ms. O'Donohoe questioned whether any disciplinary action the Board took that day would be retroactive back to February of 1999, the date on which Mrs. Lawler called Principal Dayton and told him she wanted John to be in school. Counsel for the District then stated over Ms. O'Donohoe's voice that the Board needed to get back into open session to vote on the disciplinary action and also to attend to several other items on the agenda. Therefore, the discussion about the actual length of the expulsion and about retroactivity was cut short and the Board proceeded back into open session

After returning to open session, the Board heard various comments from patrons of the District, many of them parents of students who stated that they would take their children out of the District if John were allowed to return to school. The Board then voted without any deliberation to expel John "through the 1999-2000 school year." The minutes of the Board meeting simply state:

> After hearing comments from some of the citizens on the student discipline issue, motion by Director Julsetah, seconded by Director Midtgaard. Upon the recommendation of secondary principal Dayton to expel the student from the Northwood-Kensett Community School District through the 1999-2000 school year. Motion carried 5-0.

At the rehearing, all five members of the Board testified. Each board member was asked the same two questions:

1. What did you personally believe John's status was between December 14, 1998, and September 9, 1999?; and

2. What did you personally believe when you voted on the length and retroactivity of John's expulsion at the September 9, 1999, meeting?

In response to the first question, all five board members testified that they thought that John's status as a student was "in limbo" for the nine-month period between the two board meetings. In response to the second question, the board members' beliefs were inconsistent and confused. Board President Tenold testified that he thought that expelling John "for the rest of the 1999-2000 school year" meant that the expulsion was not retroactive. He thought that the expulsion was for 12 months until September 9, 2000, but was really for 9 months because they were "giving John a little break" in shortening it to the end of the 1999-2000 school year. Director Midtgaard testified that she thought the expulsion was retroactive back to December 14, 1998, and prospective to the end of classes in June of 2000. She thought the expulsion was for 18 months. Director Hovey testified that he believed the expulsion was not retroactive and

was for 9 months. Director Julseth testified that he thought that the expulsion was "a little bit retroactive" back to the beginning of the 1999-2000 school year and then 9 months prospective to the end of classes in June 2000. Director Dierenfeld testified that he thought the expulsion was not retroactive and was for 9 months to the end of the 1999-2000 school year.

On the date of the rehearing, the undisputed evidence showed that John Lawler was attending a private Iowa school and still living with his parents. The juvenile court officer assigned to oversee his probation had reported: "John is happy about attending school again. Since his enrollment, he appears much happier to this office. The child has successfully followed the court's order. All present services appear appropriate. John should continue under the current terms and conditions of the probation agreement." (Rehearing Exhibit 15.) In addition, his psychologist had reported: "John has been cooperative and willing to confide to me those things that are troubling to him. I have no concerns what so ever about John being dangerous to the public or of his repeating the incident that brought him to the attention of the court." Rehearing Exhibit 15.) His in-home counselor had reported: "John was completing his community service work freely and cooperatively. Overall, the objective of John using pro-social skills to improve his relationships has shown significant progress. He has had no altercations or behaviors of an anti-social nature during this reporting period." (Rehearing Exhibit 15.)

II.
CONCLUSIONS OF LAW

In hearing appeals brought under Iowa Code section 290.1(1999), the State Board must render a decision which is "just and equitable," and "in the best interest of education." Iowa Code section 290.3(1999); 281 IAC 6.17(2); *In re Rashawn Mallett,* 14 D.o.E. App. Dec. 327(1997). The test is reasonableness. *Mallett, supra,* at 334. A local board's decision will not be overturned unless it is "unreasonable and contrary to the best interest of education." *Id.* The decision must be based on the laws of the United States, the State of Iowa, and the Iowa Department of Education rules. 281 IAC 6.17(2).

Iowa Code section 282.4 (1999) sets out the local school board's authority regarding expulsions 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.
>
> 2. A student who commits an assault, as defined under section 708.1, against a school employee in a school building, on school grounds, or at a school-sponsored function shall be suspended for a time to be

> determined by the principal. Notice of the suspension shall be immediately sent to the president of the board. By special meeting or at the next regularly-scheduled board meeting, the board shall review the suspension and decide whether to hold a disciplinary hearing to determine whether or not to order further sanctions against the student, which may include expelling the student. In making its decision, the board shall consider the best interests of the school district, which shall include what is best to protect and ensure the safety of the school employees and students from the student committing the assault [Not applicable to this appeal.]
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> 3. Notwithstanding section 282.6 [regarding tuition-free public school for all Iowa residents between the ages of 5 and 21], if a student has been expelled or suspended from school and has not met the conditions of the expulsion or suspension, the student shall not be permitted to enroll in a school district until the board of directors of the school district approves, by a majority vote, the enrollment of the student.

Id. [bracketed information supplied.]

The questions Appellant places before the State Board are whether the Northwood-Kensett Board decision violated John's procedural due process rights, and whether the decision to expel John was reasonable and in the best interest of education. We will first discuss whether the Board's decision violated John's constitutional right to procedural due process. Since we find that the Board violated John's procedural due process rights and that John was prejudiced by those violations, we must reverse the Board's decision. We therefore have no reason to discuss the expulsion itself as an appropriate discipline for John's actions.

In *Goss v. Lopez,* 419 U.S. 565(1975), the United States Supreme Court decided that the Due Process Clause of the Constitution gives students facing short-term suspensions certain procedural protections. The students in *Goss* were suspended for periods of up to 10 days. The Court stated that "interpretation and application of the Due Process Clause are intensely practical matters and that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Goss, supra at* 578 (quoting *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895(1961).) The Court recognized that "events calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss, supra at* 580. However, the Court held that the students subject to suspensions of 10 days or less have a right to oral or written notice of the charges against them, and if the charges are denied, an explanation of the evidence school authorities have and an opportunity to present their side of the story." *Goss, supra at* 581. The purpose of this rudimentary due process is to protect "against unfair or mistaken findings of misconduct and arbitrary exclusion from school." *Id.*

The Court held that in cases involving short suspensions, the student does not have a right to counsel, to confront and cross-examine witnesses supporting the charge, or to call his or her own witnesses. *Id. at* 583. Nevertheless, the *Goss* court suggested that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Goss*, 419 U.S. at 584, 95 S.Ct. 729.

In the case of *Colquitt v. Rich Tp. High School*, 232 Ill. Dec. 924, 699 N.E.2d 1109 (Ill. App. Dec. 1 Dist. 1998), an Illinois appellate court discussed the due process requirements for expelling a student under the following circumstances:

> On January 14, 1997, the Board entered an order expelling Lemont Colquitt from Rich South for three semesters due to gross misconduct, harassment, and verbal intimidation. The Board had conducted a hearing previously and provided notice to Lemont's parents in accordance with the applicable provisions of the School Code (105 ILCS 5/10-22.6 (West 1996)).
>
> A hearing officer appointed by the Board presided over the hearing, which took place on January 9, 1997. In attendance were Lemont and his parents, their attorney, numerous witnesses, and the attorney for Rich South's administration. The hearing lasted six hours. Both oral testimony and written statements were admitted. Both attorneys were provided the opportunity to cross-examine the witnesses. Although no court reporter was present, the hearing officer prepared a 36-page report summarizing the evidence.

Id. at 1111.

The *Colquitt* court recognized the principles set forth in *Goss, supra,* and went on to analyze the due process requirements in an expulsion situation:

> Due process is a flexible concept determined by the nature of the interest affected and the context in which the alleged deprivation occurs. *See, Mathews v. Eldridge*, 424 U.S. 319,334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).
>
> . . .
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> The United States Supreme Court has held that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss[].'" *Goldberg v. Kelly*, 397 U.S. at 262-63, 90 S.Ct. 1011, quoting *Joint Anti-Fascist Refugee Committee v. McGarth*, 341 U.S. 123, 1688, 71 S.Ct. 624, 95 L.Ed. 917(1951). Whether the loss threatened by a particular type of

> proceeding is sufficiently grave to warrant more than average administrative safeguards, therefore, turns on both the nature of the private interest threatened and the permanency of the threatened loss.
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> . . .
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> Unquestionably, a student's legitimate entitlement to a public education (is) a property interest protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause. *Goss,* 419 U.S. at 574, 95 S Ct. 729.
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> . . .
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> Accordingly, Lemont's entitlement to a public education is of significance, particularly when expulsion proceedings place that interest in jeopardy for a lengthy period of time. The question remaining, therefore, concerns whether the procedures used in the instant case were sufficient to guard against the erroneous deprivation of that interest

Colquitt v. Rich Tp. High School, supra, at 1115

The *Colquitt* court held that the 36-page report by the hearing officer summarizing the evidence at the expulsion hearing was adequate to satisfy due process requirements, even though there was no word-for-word transcript of the hearing. The hearing officer's report was sufficiently detailed to provide for adequate and effective review. *Id.* at 1114. The court went on to hold, however, the student's due process rights were violated because he had no opportunity to cross-examine the witnesses whose written statements formed the basis for his expulsion. *Id.* at 1116.

The next year, a Washington appellate court reviewing an expulsion stated:

> With *Goss* establishing that a student's entitlement to public education is a significant property interest, the remaining questions are what procedures are sufficient to guard the erroneous deprivation of that interest and how difficult those procedures would be to implement. *Mathews,* 424 U.S. at 335, 96 S.Ct. 893. Expulsion places the student's education interests in jeopardy for a long time. The risk of erroneously expelling a student must, accordingly, be treated seriously. Josh was never allowed to confront or question the only witnesses who actually observed the incident that was the basis for his expulsion. Although an expulsion hearing is not subject to all the rules of evidence, the decision of the hearing officer is based solely on the evidence presented, and the credibility of that evidence is critical to the disposition. *See,* WAC 180-40-305; *Colquitt,* 298 Ill.App.3d at 864, 232 Ill.Dec. 924, 699 N.E.2d 1109.

Stone v. Prosser Consol. School Dist., 971 P.2d 125 (Wash. App. Div. 3 1999)

In the case of expulsions as opposed to suspensions, therefore, due process and State Board cases require more elaborate procedures before a student is expelled. Due process is a flexible concept, and what is due in each case depends on the specifics of that case. *Matthews v. Eldridge,* 424 U.S. 319 (1976); *In re Rashawn Mallet,* 14 D.o.E. App. Dec. 327 (1997). The fundamental requirement is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id. at* 333 (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). *In re Don A. Shinn,* 14 D.o.E. App. Dec. 185 (1997); *In re Isaiah Rice,* 13 D.o.E. App. Dec. 13 (1996); *In re Joseph Childs,* 10 D.o.E. App. Dec. 1 (1993). As reaffirmed in *Shinn,* the following are the elements of due process for students facing expulsion in Iowa:

A. Notice

1. The student handbook, board policy, the Code of Iowa, or "commonly held notions of unacceptable, immoral, or inappropriate behavior," may serve as sources of notice to the students of what conduct is impermissible and for which discipline may be imposed.

2. Prior to an expulsion hearing, the student shall be afforded *written* notice containing the following:

   a. the date, time and place of hearing;

   b. sufficiently in advance of the hearing (suggestion: a minimum of three working days) to enable the student to obtain the assistance of counsel and to prepare a defense;

   c. a summary of the charges against the student written with "sufficient specificity" to enable the student to prepare a defense;[2] and

   d. an enunciation of the rights to representation (by parent, friend, or counsel), to present documents and witnesses in the student's own behalf, to cross-examine adverse witnesses, to be given copies of documents which will be introduced by the administration, and to a closed hearing unless an open hearing is specifically requested.

[2] **Inherent in this right is the fact that no new charges will be brought up at the expulsion hearing that were not in the notice.**

B. Hearing Procedures

1. The student will have all of the rights announced in the notice, and may give an opening and closing statement in addition to calling witnesses and cross-examining adverse witnesses. (This is "a full and fair opportunity to be heard.")

2. The decision making body (school board) must be impartial. (No prior involvement in the situation; no stake in the outcome; no personal bias or prejudice.)

3 The student has a right to a decision solely on the basis of the evidence presented.

4. There must be an adequate factual basis for the decision. This assumes that the evidence admitted is reasonably reliable. A "preponderance of the evidence" standard is sufficient to find the student violated the rule or policy at issue.[3]

C. Decision Making Process/Creating a Record

1. No one who advocated a position at the hearing should be present during deliberations unless the other party or parties are also permitted to attend the deliberation phase.

2. Following the decision in deliberations, the Iowa Open Meetings Law (chapter 21) requires that decisions be made in open session. (§21.5(3).)

3 The student is entitled to written findings and conclusions as to the charges and the penalty.

Shinn, supra at pp 190 – 192.

Although the above were not rules promulgated by the Department, and therefore are not absolute requirements to be followed in every case, they do provide guidance as to how the State Board will interpret due process requirements in expulsion cases. *In re Isaiah Rice,* 13 D.o.E. App. Dec. 13 (1996). With this guidance in mind, in addition to the other authorities discussed above, we will apply these principles to the circumstances of John's expulsion.

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[3] A "preponderance" is enough to outweigh the evidence on the other side, enough to "tip the scales of justice one way or the other"; 51% of the total evidence suggests guilt or innocence.

A. Notice:

In determining whether the District's pre-hearing procedures were sufficient to comply with due process, we must look at what was done and determine whether it allowed the Lawlers to be heard at "a meaningful time and in a meaningful manner." *Matthews v. Eldridge, supra*. Previous State Board decisions have suggested that a minimum notice of three working days is required. Those decisions have also stated that the student is entitled to written notice containing the time of the hearing, a statement of charges sufficiently specific to enable the student to prepare a defense, and an enunciation of the rights to representation, to present documents and witnesses on the student's behalf, to cross-examine adverse witnesses, to be given copies of documents which will be introduced by the administration, and to a closed hearing unless an open hearing is specifically requested. *In re Don A. Shinn, supra at* 190-191.

In this case, we conclude that the notice procedures before the December 14, 1998, expulsion hearing were constitutionally inadequate and a violation of the due process rights of the Appellant. If a case were relatively simple, notice of less than three working days might be adequate if written notice containing all the requirements had been given to the student. This might be sufficient to allow the student to be able to prepare a meaningful defense. We are sensitive to the fact that the District wanted to have the hearing during the suspension period, and recognize that students also have an interest in prompt hearings before the Board. However, this was not a simple case.

In this appeal, Appellant argues that the pre-hearing procedures followed by the District with respect to the December 14 hearing violated the right to due process in a number of respects. First, the Appellant did not receive the recommended minimum of three working days to enable them to obtain the assistance of counsel and to prepare a defense or ask for a continuation. The letter was dated December 10, 1998 and could not have reached Mrs. Lawler until at least December 11, which was a Friday. The evidence showed that she might not have received it until Saturday. The hearing was on the following Monday. The two days in between the date she received the notice and the date of the hearing were Saturday and Sunday, which are not considered working days.

Furthermore, the Lawlers' notice was inadequate because it did not contain a summary of charges with sufficient specificity to prepare a defense. It also failed to mention the right to cross-examine adverse witnesses. No list of witnesses was provided.[4] It is incumbent on the State Board to look at the combination of circumstances in this case. The combination of circumstances show clearly that Mrs. Lawler was prejudiced by these deficiencies since she did not have enough time to hire a lawyer and prepare a meaningful defense, when she was given only the weapons policy as the basis for the expulsion, and when she was not given the minimum notice of three working days. We therefore conclude that the notice of the expulsion hearing

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[4] **The Board's notice also failed to inform the Lawlers that they had a right to a closed hearing. However, there was no prejudice because it did, in fact, hold a closed hearing.**

provided to the Appellant violated the Due Process Clause as interpreted by previous State Board decisions. The tapes and transcribed excerpts of the December 14, 1998 meeting showed that Appellee's counsel asked Mrs. Lawler (a layperson who had just been occupied with her son's juvenile hearing), vague and general questions to which her replies are inaudible. These questions clearly did not give Mrs. Lawler information that she had a right to request a continuance until John could be there or until she could get counsel. Mrs. Lawler's testimony and an affidavit both showed that she did not know that she could have an opportunity to continue the hearing. In addition, there was no testimony by Appellee to show that she would have been granted a continuance even if she had asked for one.

The complexity of this case is worsened by the Board's bifurcation of its expulsion decision between its findings of fact on December 14, 1998 and its disciplinary action nine months later on September 9, 1999. The Board needed both the findings of fact and its disciplinary action to form a complete expulsion decision. Due to the Board's bifurcation of its decision in this way, we must conclude that the Board's action on John's expulsion was not final until after its September 9, 1999 meeting. We therefore conclude that all due process violations that occurred on or before the December 14, 1998, meeting contaminated the final Board action on September 9, 1999.

B. Hearing Procedures:

We also agree with the Appellant that the procedures at the hearing itself before the Northwood-Kensett Board were constitutionally inadequate. Due process requires a neutral decision maker, the right to counsel, the right to present evidence on the student's behalf, and the right to cross-examine adverse witnesses. It requires that the student receive copies of all documents relied on by the District. It requires a decision based solely on the evidence presented at the hearing, and an adequate factual basis for the decision. *In re Don A. Shinn, supra at* 190-191. The Appellant did not have all of these protections afforded her at the hearing before the Northwood-Kensett Board. Due process requires essentially that the hearing be fair. The Appellant was unrepresented by counsel, and we have recognized that she was hampered in that regard by the insufficient hearing notice. In addition, since John was not available to attend the hearing, there was no meaningful opportunity to present evidence on his behalf. The fire marshal's report was not in evidence at the expulsion hearing on December 14, 1998, which denied her the right to cross-examine either him or the many witnesses he interviewed. Therefore, the Board had inadequate evidence in the record on which to base its decision. Therefore, we conclude that the procedures followed by the Board at the hearing itself were constitutionally inadequate

We do not agree with Appellant's argument that John did not have an impartial decision maker due to the fact that some of the members of the Board had children attending the elementary school where the package was found. In order to disqualify a board member from sitting on a hearing panel, it is necessary to prove actual bias on behalf of the board member

against the individual involved. *Shinn, supra,* at 193. There was no specific evidence that any of the five members of the Board had a bias or prejudice against John due to the fact that their children were in the elementary building. People who serve on local school boards often do so because they have children in the school district. This is often one of the reasons that they decide to be on the board in the first place. Often, then, school board members are going have a personal interest in what happens to the district and to its children, including their own.

We realize that there may be times that a specific board member should abstain from voting on a decision due to bias or prejudice against the student involved. However, absent some specific showing of personal bias or prejudice, we are not prepared to reverse a decision of a board merely because some of the board members were interested in the outcome of a decision because their own children would be affected by it. In this appeal, Appellant has failed to show any evidence of actual personal bias or prejudice on the part of any of the members of the Board. Therefore, we reject Appellant's argument that John did not have an impartial decision maker.

C. Decision Making Process/Creating a Record:

Finally, the Board issued inadequate written findings and conclusions as to the charges and the penalty. The due process requirements announced in the *Shinn* decision state that an expelled student is entitled to written findings and conclusions as to the charges and penalty. The Board minutes in this case were inadequate to meet this due process requirement. The written findings and conclusions must at the very least give the student a summary of the witnesses who testified and the evidence upon which the Board based its decision. Neither of the Board's minutes from December 14, 1998 or from September 9, 1999, gives John a sufficient explanation of the basis for the Board's findings and conclusions as to the charges and penalty against him.

Furthermore, the minutes from the September 9, 1999, meeting expelling John "through the 1999-2000 school year" are constitutionally inadequate to give him and his parents notice of the exact length of the expulsion. The inconsistent and confused testimony of the board members shows that not even the Board as a whole knew what it was actually voting to do with regards to the length of John's expulsion. In the absence of the rendition of a proper order expelling a student, there is nothing for a court to review nor, for that matter, any true legal obstacle to the student's return to classes. *Mitchell v. Leon Co. School Bd.*, 591 So.2d 1032, 1033 (Fla.App. 1 Dist. 1991).

For the above reasons, the Board's decision to expel John is reversed for due process violations. John could have been expelled immediately as soon as the Board found that he had violated its weapons policy, but only after following due process requirements.[5]

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[5] The State Board reminds the Northwood-Kensett Board that Iowa Code section 280.17B(1999) places the responsibility on local school authorities to prescribe procedures for continued school involvement with students during the time they are suspended or expelled.

Although the decision to expel John for the remainder of the school year has been reversed, we would like to take this opportunity to clarify the State Board's position in this matter. The State Board recognizes that a local board must have heightened concerns for the safety of its students and staff. The State Board supports the efforts taken by local districts to comply with the mandates of Iowa Code section 280.21B and the Gun Free Schools Act. Clearly, a responsible local district must act quickly in responding to situations that compromise the safety of the school environment. The response taken must be consistent with constitutional due process rights. Providing constitutional due process to a student need not compromise the safety of other students. However, a board's failure to observe these rights before depriving a student of the opportunity to attend school will expose the board to reversal upon appeal. It is a district's responsibility to clarify the official status of a student during the time he is out of school. Leaving him "in limbo" for nine months is unacceptable.

During the original appeal hearing, the administrative law judge did not allow several proposed exhibits into evidence on the basis that they were not available to the Board at the December 14, 1998 and the September 9, 1999 hearings. The administrative law judge ruled that these proposed exhibits would be admitted into evidence only if the hearing tapes labeled Exhibits 22A and 22B were not available. The tapes were inaudible. All of the proposed exhibits that were not allowed into evidence during the appeal hearing subject to review of the hearing tapes are therefore admitted into evidence.

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

Appellee's request to remand this matter to the Northwood-Kensett Board to correct the due process violations is denied for two reasons. First, Appellee failed to make this request at the original hearing. Second, the nature of the due process violations and the passage of time make it impossible to remedy the lost time in John Lawler's education even if the due process requirements were followed after remand.

III.
Decision

The hearing panel heard no evidence on rehearing to support a result different from the State Board's reversal at its January 13, 2000 board meeting. For the foregoing reasons, the decision of the Northwood-Kensett Community School District's Board of Directors on September 9, 1999 to expel John Lawler, is again recommended for reversal. There are no costs to be assigned under Iowa Code chapter 290.

8-11-2000
DATE

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

IT IS SO ORDERED.

9/14/00
DATE

Corine Hadley
CORINE HADLEY, PRESIDENT
STATE BOARD OF EDUCATION