**IOWA STATE BOARD
OF EDUCATION
(Cite as 16 D.o.E. App. Dec. 269)**

In re Sharon Ortner	:	
Sharon Ortner, Appellant, v.	: :	DECISION
Wall Lake View Auburn Community School District, Appellee	: :	 [Adm. Doc. #4052]

The above-captioned matter was heard on January 12, 1999, before a hearing panel comprising Donna Eggleston, consultant, Bureau of Children, Family, & Community Services; Susan Fischer, consultant, Bureau of Practitioner Preparation and Licensure; and Ann Marie Brick, J.D., legal consultant and designated administrative law judge, presiding. The Appellant, Sharon Ortner, and her mother, Cindy Finley, were "present" telephonically and were represented by Attorney James R.Van Dyke of Van Dyke & Werden, P.C., Carroll, Iowa. Appellee, Wall Lake View Auburn Community School District [hereinafter, "WLVA" or "the District"], was "present" both by telephone and at the State Board Room by Superintendent John Dotson, Diane Schroeder, president of the Board; and Board member, Sandy Aschinger who attended the hearing in Des Moines. The District was represented by attorney Brian L. Gruhn of Gruhn Law Firm, Cedar Rapids, Iowa, who appeared telephonically.

An evidentiary hearing was held pursuant to Departmental Rules found at 281--Iowa Administrative Code 6. Authority and jurisdiction for this appeal are found at Iowa Code section 290.1(1997).

Appellant filed an affidavit seeking review of an October 14, 1998, decision of the Board of Directors of the District [hereinafter, "the District Board"] which sustained an earlier decision of Superintendent John Dotson. The superintendent's decision imposed a one-year suspension of eligibility on Sharon Ortner for a third violation of the "good conduct" eligibility policy. This "ineligibility" extends to Sharon's participation in the senior prom, as well as the commencement exercises for graduation.

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.

I.
FINDINGS OF FACT

The parties have stipulated that the relevant facts are undisputed. Sharon Ortner is an 18 year-old senior student in the District. The District has a "Good Conduct Eligibility" policy that regulates student participation in extracurricular activities. The policy is

contained in the WLVA's *Activities Handbook* at pages 9-16. The *Activities Handbook* states that,

> WLVA CSD "has adopted a good conduct policy that governs the behavior of all students who choose to participate in the activities program. ...
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> ...
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> The programs offered at WLVA include:
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> |---|---|
> | Football | Volleyball |
> | Cross Country | Band |
> | Chorus | Speech |
> | Basketball | Wrestling |
> | Track & Field | Golf |
> | FFA | FHA |
> | NHS | Baseball |
> | Softball | Thespians |
> | Student Council | Cheerleading |
> | Drama | Drill Team |

(*Activities Handbook,* p.1)

The good conduct code is a separate policy contained within the handbook at pages 9-16. The good conduct policy describes "applicable activity programs". In that portion it states that "[t]he student activity program includes all school sponsored extracurricular activities, including but not limited to:

1) all athletics;
2) all extracurricular music, speech, drama, cheerleading, and like activities;
3) school royalty;
4) student council and other elective officers;
5) school honors;
6) activities such as student clubs and club activities, **prom,** homecoming, **graduation**, etc."

(*Id.* at 10 (emphasis added)).

The description of the covered activities listed in the *Activities Handbook* as covered by the good conduct policy, is inconsistent with those listed in the good conduct policy itself.

Sharon Ortner is currently not involved in any of the "WLVA activity programs" described on page 1 of the *Activities Handbook.* It is unclear whether she intended to be a participant in any activities during her senior year. However, as a senior, she hopes to attend prom and commencement.

The District's good conduct eligibility policy prohibits students from possessing and/or consuming alcoholic beverages. The policy applies to all "student activity program participants ... at all times and in all places (365 days of the year)". (*Good Conduct Policy* at 9.) The policy was adopted in an effort to deter consumption of alcohol among the students. This was a reaction to the fact that there had been 12 alcohol violations among the students during the 1997-98 school year.

During the 1997-98 school year, the District made students and parents aware of the requirements and the operation of the District's Good Conduct Eligibility Policy [hereinafter, "the Policy"] by presenting it in two public meetings to all parents and students who were going to participate in extracurricular activities in the District. In addition, Todd Wolverton, the District's high school principal, discussed the Policy with the entire student body on a class-by-class basis at the beginning of the school year. Ms. Ortner was aware of the District's Policy and understood it.

On Monday, February 9, 1998, Ms. Ortner notified Principal Wolverton that she had been cited for possession of alcohol over the weekend. Principal Wolverton determined that Ms. Ortner's conduct constituted a violation. This was Ms. Ortner's first violation. The policy provides that each violation shall be counted cumulatively from year-to-year (grades 9-12), regardless of the specific portion of the Good Conduct Code that is violated. (*Good Conduct Policy* at 10). Under the Good Conduct Policy, a first violation for possession of alcohol carries with it six weeks of ineligibility from participation in extracurricular activities. Based upon the fact that Ms. Ortner came forward in a timely manner and admitted her violation, Ms. Ortner's suspension was reduced from 6 to 4 weeks. Principal Wolverton wrote Ms. Ortner's parents a letter on February 9, 1998, notifying them of Ms. Ortner's conduct, the fact that her conduct was a violation of the District's policy, and the fact that Ms. Ortner had been suspended from participation in extracurricular for her violation.[1]

On Monday, May 18, 1998, Ms. Ortner notified Principal Wolverton that she had been cited for possession of alcohol the previous night in Lake View, Iowa. Principal Wolverton and Ms. Ortner discussed her actions and the fact they were in violation of the Policy. Based upon the fact that this constituted Ms. Ortner's second violation of the District's policy, Ms. Ortner was deemed ineligible to participate in extracurricular activities for 12 weeks. Principal Wolverton also notified Ms. Ortner that if she violated the policy again, a third offense would result in a one-year period of ineligibility that would include prom and commencement. Principal Wolverton wrote Ms. Ortner's

[1] **The record showed that Sharon has participated in volleyball, FFA, FHA, Speech and Drama, and Flag Corp during her high school career. However, there was no indication of whether or not she is participating in any of these activities during her senior year. She is not challenging the application of the policy to these extracurricular activities. (Bd. tr. at 3.)**

parents a letter on May 18, 1998, notifying them of Ms. Ortner's conduct, the fact that her conduct violated the District's policy, and the fact that Ms. Ortner had been suspended from participation in extracurricular activities for her violation.

The 12-week period of ineligibility for Sharon's second violation expired on August 10, 1998. On or about August 26, 1998, Principal Wolverton learned that Ms. Ortner had been charged with OWI on Sunday, August 23, 1998. He learned this through a newspaper report listing the Carroll, Iowa, police department's arrests and citations. Principal Wolverton immediately wrote a letter to Ms. Ortner's parents informing them of the fact that Sharon's arrest for driving while intoxicated constituted a third violation of the District's Policy. Principal Wolverton's letter stated that Ms. Ortner would be ineligible to participate in extracurricular activities in the District for one year. Principal Wolverton's letter cited the activities Sharon was ineligible to participate in as all those activities in the Good Conduct Policy under section III. Among the activities cited were "prom, homecoming, graduation, etc.". (Letter dated August 26, 1998.) The letter also notified Ms. Ortner's parents of the right to appeal Sharon's period of ineligibility.

On September 2, 1998, Ms. Ortner submitted an appeal of her period of ineligibility to District Superintendent John Dotson. On September 8, 1998, Mr. Dotson wrote Ms. Ortner a letter notifying her of his decision on her appeal. Superintendent Dotson denied Ms. Ortner's appeal and notified her that she had a right to appeal his decision to the District's Board of Directors. On September 15, 1998, Ms. Ortner appealed Superintendent Dotson's decision to the District's Board of Directors. On October 14, 1998, the Board held a hearing on Ms. Ortner's appeal. The hearing was held in open session, pursuant to the request of Ms. Ortner and her parents. Ms. Ortner was represented by legal counsel and was given the opportunity to present witnesses and evidence to the Board and cross-examine witnesses presented by the District's administration.

After deliberations, the Board unanimously voted in open session to uphold Ms. Ortner's suspension from participation in extracurricular activities. However, the Board provided an opportunity for Ms. Ortner to participate in commencement if she successfully complied with certain conditions. The conditions imposed by the Board were:

1) No more violations of any part of the Good Conduct Eligibility Policy;
2) Submits a 10-page paper by January 10, 1999, to the administration for their approval, about the negative effects of minors drinking alcohol, said paper to be written so that it could be read to younger grade school students such that they would understand and learn from the paper;
3) Attend alcohol counseling at a treatment center such as Manning or in Carroll, as approved by the administration at student's expense, with attendance continuing until treatment counselor provides written report to principal that student is unlikely to commit another alcohol violation of

4) rules and student has received maximum benefit from the treatment counseling. Must be complete by April 1, 1999;
5) Student must appear before the Board, at their first April Board meeting and provide an explanation of how student has successfully changed her behavior and is now a good role model for younger students.

(October 14, 1998, Bd. dec.)

In her Affidavit of Appeal filed November 3, 1998, Ms. Ortner states that she's appealing the District Board's decision for the following reasons:

1. It is believed that the Board did not correctly apply the precedent of the Department of Education;
2. The activities of Sharon Ortner have no bearing whatsoever upon the operation and management of the school district. The unequivocal testimony was that there was no disruption to the school.
3. These disciplinary actions all arose from conduct outside school hours.
4. The punishment, which includes banning participation in commencement bears no reasonable relationship to the activity being punished and the punishment far exceeds the authority of the school because of banning the student from commencement punishes her family as well as the student.

Id.

II.
CONCLUSIONS OF LAW

Standard of Review

The Standard of Review exercised by the State Board of Education is established by the Legislature. Iowa Code chapter 256 creates the Department of Education which is to act through its State Board "in a policymaking and advisory capacity and to exercise general supervision over the state system of education." Iowa Code section 256.1. The State Board acts as a policymaker and advisor when it fulfills the duties mandated by sections 256.7(5) and 256.7(6). These are the duties of rulemaking and hearing appeals under Chapter 290, respectively. The Standard of Review governs what the State Board is required to do when it hears appeals. The Legislature tells us how that Review process should occur:

> At the time fixed for hearing, it [the State Board] shall hear testimony for either party ... and it shall make such decision as may be just and equitable, which shall be final unless appealed from as hereinafter provided.

Iowa Code section 290.3(1997).

The State Board has been directed by the Legislature to render a decision that is "just and equitable" [section 290.3], "in the best interest of the affected child(ren) [section 282.18(20)] and "in the best interest of education" [section 281 IAC 6.11(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).

In applying the appropriate Standard of Review to the facts of this case, we must ask whether the District's good conduct policy is a reasonable exercise of the Board's authority. This is because Appellant, Sharon Ortner, has objected to the policy on two grounds:

(1) The policy punishes out-of-school conduct that has no direct bearing or relationship on the management or operation of the school as required by *Bunger v. Iowa High School Athletic Assn.*, 197 N.W.2d 555 (Iowa 1972); and

(2) The policy's penalty of exclusion from commencement and prom for behavior that occurred some nine months earlier, during the summer months, is overly broad and unenforceable.

School districts do have the authority to promulgate rules for the governance of pupils. Iowa Code Section 279.8 mandates that the board of directors of a school corporation "shall make rules for its own government and that of its directors, officers, employees, teachers, and pupils ... and shall aid in the enforcement of the rules ... ." *Id.* Section 279.9 requires boards to adopt rules that prohibit and punish students for the possession of tobacco or the use or possession of alcohol, beer, or controlled substances. To be within the scope of the local school board's authority, however, a valid school rule must pertain to conduct that has a direct relationship to the management and operation of the school. *Bunger v. Iowa High School Athletic Assn.*, 197 N.W.2d 555 (Iowa 1972).

The most prevalent rules that have been the subject of considerable litigation over the past 25 years are the so-called "good conduct" rules.[2] These "good conduct" rules usually refer to school rules that attempt to govern out-of-school conduct, as well as in-school conduct, by students who are engaged in extracurricular activities. *Id.*

The *Bunger* case has been described as the leading court decision on the issue of the legal authority of schools to promulgate "good conduct" rules. *Supra* at 1089. The most important aspect of the decision for our purposes is the fact that it was decided by the Iowa Supreme Court. Therefore, the *Bunger* case provides the legal precedent that must be followed by the State Board

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[2] ***See***, **Bartlett Larry D.,** ***The Court's Review of Good Conduct Rules for High School Student Athletes***, **82 Ed Law Rep. 1087 (July 29, 1993). This commentary presents a review of 17 court decisions involving good conduct rules adopted in 12 states and students in 12 different sports and activities.**

of Education when it reviews the reasonableness of "good conduct" policies brought before it on appeal.

This is notable because it has been observed that the Constitutional authority of educational institutions to control student conduct ebbs and flows. Recent years have seen somewhat enhanced authority, at least in elementary and secondary education. *See generally, Annot. 53 A.L.R.*3d 1124 (1973)(right to discipline pupil for conduct away from school grounds and are not immediately connected with school activities). School authorities are cautioned that judicial decisions in other states may allow school boards to exercise broader authority over out-of-school student conduct than does *Bunger*. It is recommended that districts contemplating such broad sweeping policies first consult with their school attorney.

Every jurisdiction may have different legal precedent governing the permissible scope of school rules. For example, the 7th Circuit Court of Appeals recently affirmed a rural Indiana District's drug testing policy to conduct random tests on students involved in any extracurricular activity, or who drive to and from school. *Todd v. Rush Co. Schools*, 133 F.3d 984 (7th Cir. 1998). However, the 7th Circuit decision is only precedent for Indiana, Illinois, and Wisconsin; not Iowa. In contrast, the Colorado Supreme Court recently found that the Fourth Amendment to the Constitution precluded a school district from compelling marching band members to submit to urine analysis drug testing. The key to the court's decision was the determination that band members have a higher expectation of privacy than do student athletes. In addition, the court noted that the "voluntariness" aspect of high school athletics was not present in the context of the marching band. *Trinidad Sch. Dist. No. 1 v. Lopez,* 97 S.C. 124 (Colorado 1998). The point is that *Bunger* is still the law in Iowa.

Although the issues facing school districts may be different in 1998 than they were in 1972 when *Bunger* was decided, we are not at liberty to depart from the Iowa Supreme Court's precedent. The United States Supreme Court chastised the court of appeals for concluding that a Supreme Court precedent had been overruled "by implication". In *Agostini v. Feldon*, the Court stated:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected by some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court, the prerogative of overruling its own decisions.

Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997).

According to *Bunger*, there are two principles which must be examined when reviewing a "good conduct" policy. The first principal involved in considering the validity of the school rule is its scope. The second is the rule's *reasonableness*. The rule must pertain to conduct "which directly relates to and affects 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 upon which side of the line particular conduct falls.

(*Id.* at 564.)

As far as school board policies and rules that reach beyond school grounds, school hours and school activities, the Court in *Bunger* had this to say:

> The present case involves the advantages and enjoyment of an extracurricular activity provided by the school, a consideration which we believe extends the authority of the school board somewhat as to participation in that activity. The influence of the students involved is an additional consideration. **Stand-out students, whether in athletics, forensics, dramatics, or other interscholastic activities, play a somewhat different role from the rank and file.** Leadership brings additional responsibility. These student leaders are looked up to and emulated. They represent the school and depict its character. We cannot fault a school board for expecting somewhat more of them as to eligibility for their particular extracurricular activities.
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> We have no doubt that school authorities may make a football player ineligible if he drinks beer during football season. No doubt such authorities may do likewise if the player drinks beer at other times during the school year, or if he then possesses, acquires, delivery, or transports a beer. (Citations omitted.) Probably a player shown to actually have violated beer laws during summer vacation, whether convicted in criminal court or not, can be rendered ineligible by school rule. All of these situations have a direct bearing on the operation of the school, although the bearing becomes progressively less direct.
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> . . .
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> In dealing with ineligibility for extra-curricular activities as contrasted to expulsion from school altogether, and with the students who represent the school in interscholastic activities as contrasted with less active students, school rules may be broader and still be reasonable.

Id. at 564-65. (Emphasis added.)

The *Bunger* guidelines make it clear that athletes can be held to a higher standard of behavior, at least as far as eligibility for activities is concerned, than students not involved in activities. It would appear that students who are not active in school activities cannot be reached by such rules because their conduct would not have an effect on the operation and management of the school. *See, Bunger* at 565. Other courts have agreed with Iowa in accepting the concept that the status of being a "stand-out" student through participation in extracurricular activities extends the student's responsibility beyond regular school hours. Courts also have agreed that stand-out students can be held to a higher standard of conduct than "rank and file" students. *See, e.g., Schaill v. Tippecanoe Co. Sch. Corp.*, 864 F.2d 1309, 1320-21 (7th Cir. 1988).

This appeal presents a classic example of the need for line drawing required of school administrators by the *Bunger* case. Student misconduct in the classroom is at one extreme; misbehavior of a child at home is at the other. "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 564.

In two recent appeal decisions, the State Board has stretched the line as far as it believes that *Bunger* will allow. *See, In re Jesse Bachman*, 13 D.o.E. App. Dec. 363 (1996) (upheld one-year ineligibility for violation of beer rule in the summer by a "stand-out" student); *In re Scott Martin*, 16 D.o.E. App. Dec. 252(1998)(upheld one-year ineligibility of "stand-out" student for violation of beer rule in Germany on student trip). In those two cases, there was no evidence presented that there was a "direct and immediate impact" of the students' behavior on the management and operation of the school. However, there was ample evidence that these boys were "stand-out" students. Although the conduct occurred in the summer, both boys were involved in the football program which began in August. The impact of their behavior on fellow students was presumed. The *Bunger* case seems to allow such presumption:

> Probably a player shown to have actually violated beer laws during summer vacation, whether convicted in criminal court or not, cannot be rendered ineligible by school rule. All of these situations have direct bearing on the operation of the school, although the bearing becomes progressively less directed.

Id. at 564.

We recognize that in the above-referenced appeals, the "bearing" had become progressively less direct. In the present appeal, however, we are being asked to approve a nexus between the school and a situation that is far too tenuous. Sharon Ortner is being denied participation in her senior prom and graduation for conduct that occurred nine months prior to these events; conduct that occurred outside the school year; conduct that occurred off school property and which had no relationship to a school activity. There is no evidence that Sharon's behavior in August 1998 had any impact on the operation and management of the school. On the contrary, the direct testimony of both the principal and superintendent state that they could not identify any impact on the school. (Bd. hrg. tr. at pp. 8-12.)

The problem with the District's Good Conduct Eligibility Policy is that it extends beyond the permissible scope of school rules when it designates *prom* and *commencement* as extracurricular activities. Prom and commencement are not usually considered "extracurricular activities. Although a legal definition of "extracurricular activities" could not be found, there are common characteristics of such activities.

Extracurricular activities may be academic or nonacademic. *Bailey v. Truby,* S.E.2d 302 (W.Ca. 1984). They have been described as "those student activities that extend beyond class instruction and include a variety of special interest groups and events, e.g., student government, class officers, student publications, drama productions, music productions, debate tournaments, interscholastic athletics, and cheerleading." *Id.* at 305.

In the present case, the student *Activities Handbook* defines the activities available at WLVA and those activities do not include commencement or prom. *Activities Handbook,* p. 1. It is only in the Good Conduct Eligibility Policy that prom and commencement are included as activities for which a student may be deemed ineligible for infractions of the Good Conduct Code. *Id.* at p. 9. It would be different if the ineligibility was restricted to prom queen or prom king and the ineligibility for commencement was for the valedictorian. However, what we find more significant is that prom and especially commencement exercises lack the "voluntariness" aspect that is present with most traditional extracurricular activities.

For one thing, prom and graduation are one-time events with broad-based student participation. Even so, there are distinctions between the two: prom has more of a "voluntary" aspect than commencement. Commencement marks the successful completion of twelve years of schooling. The student, as well as the student's family, *expects* to attend this event. Commencement only occurs one time in the student's K-12 academic career. It is not a seasonal activity like football or cross-country. By designating commencement as an extracurricular activity, the school is attempting to transform all of the "rank and file" seniors into "stand-out students.

By elevating prom and commencement exercises to the level of other extracurricular activities, the school has extended its authority to students who would not otherwise be subject to a good conduct rule. We hold that the rule in question is invalid as beyond the permissible scope of school rules insofar as it defines prom and commencement as extracurricular activities. This is not to say that a student cannot be prevented from attending either activity. It does require that the student's conduct bear a more direct relationship to the activity from which the student is barred.[3]

The situation created by this policy (including prom and commencement as extra-curricular activities) is similar to a Storm Lake student conduct policy that was found invalid for similar reasons. *See, 5 D.o.E. App. Dec. Ruling 48.* In the Storm Lake student activities program, student participants were expected to maintain high academic and social standards as

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[3] **For example, a student who has been found to have used drugs or alcohol at a student dance can be barred from future dances, etc.**

representatives of the school. A student participant was defined "as a student who is currently involved in any of the programs associated with the student activities program. *Participation* in any of the programs associated with the student activities program shall be defined to include, but is not limited to, the following: member of a performing group, ***spectator***, member of an auxiliary group or event worker. ..." *Id.* at p. 2. (Emphasis added.) The policy was held invalid under the *Bunger* principles because: "There's no distinction between the conduct of the stand-out student who's involved in extracurricular activities and the rank and file student who merely attends these activities. There is no distinction between student conduct which occurs on school premises, outside of the community, during summer vacation, or during the extracurricular activities themselves." *Id.* at 10.

By including prom and commencement as extracurricular activities in a good conduct policy that governs student behavior 24-hours-a-day, 365 days a year, the school is reaching beyond its authority into the sphere of the parent(s) or civil authorities. Such sweeping attempts to control student behavior go beyond the grant of authority provided by sections 279.8 and 279.9 of the Iowa Code (1997).

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

III.
DECISION

For the foregoing reasons, it is recommended that the decision of the Board of Directors of the Wall Lake View Auburn Community School District made on October 14, 1998, is reversed in part and affirmed in part. As to the imposition of a one-year suspension of Ms. Ortner from participation in extracurricular activities, the Board's decision is AFFIRMED. As for the exclusion of Ms. Ortner from participation in prom and commencement as part of her penalty under the Good Conduct Policy, the District's decision is REVERSED. Ms. Ortner is entitled to attend prom and commencement on the same basis as other students at Wall Lake View Auburn Community School. There are no costs of this appeal to be assigned.

February 1, 1999 [signature]

DATE

ANN MARIE BRICK, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

February 11, 1999 [signature]

DATE

CORINE HADLEY, PRESIDENT
STATE BOARD OF EDUCATION