

IOWA STATE BOARD
OF EDUCATION
(Cite as 16 D.o.E. App. Dec. 1)

In re Thomas Menuey :

Thomas & Lolynn Menuey, :
Appellants, :

v. : DECISION

Waterloo Community School :
District, Appellee. : [Adm. Doc. #3939]_____

The above-captioned matter was heard telephonically on January 9, 1998, before a hearing panel comprising Susan Fischer, consultant, Bureau of Practitioner Preparation and Licensure; Gary Henrichs, consultant, Office of Educational Services for Children, Families and Communities; and Ann Marie Brick, J.D., legal consultant and designated administrative law judge, presiding. Appellants, Thomas and Lolynn Menuey, were "present" telephonically and unrepresented by counsel. Appellee, Waterloo Community School District [hereinafter, "the District"], was also present on the telephone and represented by Attorney Steven Weidner, of Swisher & Cohrt, P L.C., of Waterloo, Iowa. Testimony on behalf of the District was given by Officer Kevin Dill, of the Waterloo Police Department; and Patrick Clancey, Director of Students with Special Needs. Others were present on the conference call on behalf of the District, but did not testify.

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

Appellants seek reversal of a decision of the Board of Directors [hereinafter, "the Board"] of the District made on November 25, 1997, to expel their son from school for the remainder of the school year for "possession of a dangerous weapon on school grounds."

The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and the subject matter of the appeal before them.

I.
FINDINGS OF FACT

On October 28, 1997, two Waterloo police officers were patrolling the East High School parking lot. At approximately 10:00 a.m., they saw two boys sitting in a car parked at the back of the lot. They walked over to talk to the boys to find out if they were East High School students and why they were not in class. One of the boys stated that he had just been suspended and was not supposed to be on the school grounds. While discussing the situation, one of the officers saw a beer bottle on the floor of the car between one of the boy's legs. Officer Kevin Dill testified that he asked the boy to get out of the car. As the officer leaned down to pick up the beer bottle, he noticed a bat and a pellet gun under the driver's seat of the car. The car had been driven to school by Thomas Menuey, who is the subject of this appeal. Thomas was not one of the two boys the officers saw sitting in the car. Thomas was in class at the time.

Thomas was taken out of class in order to be questioned by Mr. Blau, the vice-principal, and Officer Kienol, the school liaison officer. Both of these gentlemen were present during the telephonic hearing, but were not called upon to testify. There is no dispute about the fact that the gun was found in a car driven by Thomas Menuey and parked on school grounds. The evidence showed that the gun did not "technically" belong to Tom because he was either keeping it for a friend or thinking about buying it from the friend. However, Thomas did not deny that he knew the gun was in the car when he drove the car to school that day. All the parties agree that Thomas was forthright and truthful when telling his version of the facts and in answering the school authorities' questions about the matter.

At the time the incident occurred, Thomas was a 16-year-old eleventh grader at East High School. He was also a student identified for special education services. Thomas has been receiving services for learning disabilities since he was identified in the third grade. There were also some indications in his staffing materials that he had had some problems with authority and following school rules. On November 4, 1997, AEA 7 arranged a "manifestation determination" hearing to determine whether Thomas' disability was related to the behavior of bringing or possessing a gun on school grounds.¹ According to the testimony

¹ Such a determination hearing is required prior to the expiration of the 10 days of suspension for a special education student. Under the provisions of the Individuals with Disabilities Education Act (IDEA) and the Gun-Free Schools Act, a special education student who brings a gun to school may be placed in an alternative educational setting for up to 45 days if the behavior is unrelated to the disability. Even if the disability and the behavior are unrelated, however, services may not be withheld during this 45-day period.

of Patrick Clancey, the director of Students of Special Needs who attended the manifestation determination hearing, the staffing team unanimously found that Thomas' behavior was unrelated to his disability. Mrs. Menuey was present at this hearing and also agreed with the staff's conclusion. However, after reviewing all of the other information and data gathered by the team for the manifestation determination hearing, it was *additionally* decided that it did not appear that Thomas would continue to benefit from special education services and that he could be staffed out of the special education program entirely. The evidence is disputed over whether or not Mrs. Menuey agreed with this result. In any event, Mr. and Mrs. Menuey were not in agreement with that determination at the time of the appeal hearing.

Mr. Menuey testified that Thomas had received services during tenth grade from an outstanding resource teacher. Due to this teacher's motivation, Thomas had performed better during his sophomore year than he had in all his previous years of schooling. Unfortunately, at the end of his sophomore year and because of his success, Thomas was put on a "maintenance program". The resource teacher was not available to provide services for Thomas during his junior year and the maintenance program did not appear to the hearing panel to have been very successful. For the first five weeks of the 1997-98 school year, Thomas was flunking every class except World Cultures, in which he was receiving a "D". There were also several indications that during the first four and one-half weeks, he was experiencing behavioral and attendance problems at school. Nevertheless, he was staffed out of special education services as a result of the November 4th "manifestation determination" hearing and subsequently expelled by the Waterloo School District Board of Directors on November 25, 1997, for the remainder of the 1997-98 school year.²

To summarize the parents' arguments, Thomas was severely punished for the actions of other students: (1) He was not in the car drinking beer, but because the police saw the other students drinking beer, they searched the car and found the gun and the bat; (2) that the gun did not belong to Thomas; and (3) that Thomas should be in school (*albeit*, not East High School).

The School's position is relatively simple: (1) Under the provisions of the Gun-Free Schools Act, a student must be expelled for possession of a gun on school property; (2) there is no dispute that Thomas knew the gun was in the car when he drove it on school property and that constitutes "possession" for the purposes of the law; (3) although the provisions of the IDEA mandate that a student who is "expelled" for bringing a gun to school must receive services during the period of "expulsion",

² Once he was staffed out of Special Education, the District no longer had an obligation to provide alternative education to Thomas.

once Thomas was staffed out of Special Education, he was no longer eligible for services.

II. CONCLUSIONS OF LAW

This appeal was brought before the State Board of Education because the parents questioned the appropriateness of the expulsion as mandated by the Gun-Free Schools Act. During the course of the appeal hearing, the parents raised a second issue concerning the appropriateness of the manifestation determination hearing which concluded that Thomas was no longer eligible for Special Education services. As indicated by Patrick Clancey, director of Students with Special Needs, the second issue is one that must be resolved in a different forum. That is correct. The State Board of Education has no jurisdiction to determine whether or not the decision to staff Thomas out of Special Education was appropriate in light of his needs. Under the provisions of the IDEA, the State must provide a special complaint procedure for parents who want to question the appropriateness of their child's educational program. This process is also available to parents who want to question or dispute whether or not their child(ren) should be staffed out of Special Education. If Appellants still have reservations about the staffing decision that was made on November 4, 1997, we would encourage them to pursue their concerns through the rules of Special Education.³ Consequently, for the purposes of this appeal, we will only address the issue of whether or not Thomas was properly expelled under the District's Dangerous Weapons Policy. We will review the District Board's action without regard to the issues surrounding Thomas' status as a Special Education student.

The Gun-Free Schools Act [GFSA] was enacted on October 20, 1994, as part of the Improving America's Schools Act of 1994 (the reauthorization of the Elementary and Secondary Education Act of 1965 [ESEA]), Public Law 103-382. The GFSA provides that each state receiving federal funds under ESEA must have in effect by October 20, 1995, a state law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to school (emphasis added). Each state's law must also allow the chief administering officer of the local education agency (in Iowa, this is the superintendent) to modify the expulsion requirement on a

³ If the parents wish to pursue their concerns about Thomas' Special Education needs, they should contact DeeAnn Wilson at the Bureau of Special Education, (515) 281-5766, to seek information about this process.

case-by-case basis. The Iowa Legislature complied with the Federal Law by enacting Iowa Code section 280.21B. This statute entitled, "**Expulsion - Weapons in school,**" provides in pertinent part as follows:

The board of directors of a school district and the authorities in charge of a nonpublic school which receives services supported by federal funds shall expel from school for a period of not less than one year a student who is determined to have brought a weapon to school or knowingly possessed a weapon at a school under the jurisdiction of the board or the authorities. However, the superintendent or chief administering officer of a school or school district may modify expulsion requirements on a case-by-case basis. This section shall not be construed to prevent the board of directors of a school district or the authorities in charge of a nonpublic school that have expelled a student from the student's regular school setting from providing educational services to the student in an alternative setting. If both this section and section 282.4 apply, this section takes precedence over section 282.4. For purposes of this section, "weapon" means a firearm as defined in 18 U.S.C. §921. This section shall be construed in a manner consistent with the federal Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq.

Id. at 282.21B(1997)(emphasis added).

The section above that is emphasized was added by the Iowa Legislature and goes beyond the requirements of the federal law. Under Federal law, a student must bring the weapon to school ... Iowa law provides for expulsion for merely "possessing" a weapon on school grounds. In other words, knowingly possessing a weapon at school means knowingly having a gun or weapon in your car parked on the school grounds.

The facts are undisputed that Thomas drove the car to school and parked on school grounds with the knowledge that there was a gun under the driver's seat. He admitted doing it and he explained why he did. His actions constitute "possession".⁴

Although the Board's expulsion of Thomas appears very harsh under the circumstances surrounding his case, the Board's action was mandated by state law. State law does not give the Board the option to suspend a student who possesses a weapon. The student who possesses a weapon, under Iowa law, must be expelled. "The Board of Directors ... shall expel from school for a period of not less than one year a student who is determined to have brought a weapon to school or knowingly possessed a weapon at a school under the jurisdiction of the board §282.21B, supra. (Emphasis added.)

We are mindful of the parents' distress over the fact that their car was searched because of the actions of students who were not authorized to be sitting in their car, and as a result, their son bore the consequences. However, the result is not unfair when one thinks of the consequences of possessing a gun on school grounds. When a student is found to be in possession of a weapon on school premises, no matter how the weapon is discovered, the board must expel rather than suspend the student. This represents the message of "**zero tolerance**" that our elected representatives want to send to students in Iowa. There is no indication that the Legislature wanted school authorities to forebear with respect to students who only "possess" guns until such time that these guns are actually used. See, Dell v. Supt. of Schools of Worcester, 421 Mass. 117, 653 N.E.2d 1088 (1995).

Our decision is to uphold the Board of Directors' action despite our sympathy for Thomas' situation. The Board's decision is consistent with both state and federal law.

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

⁴ Even under the more stringent requirements of a criminal "possession" statute, Thomas would have been found to have "knowingly possessed" a weapon under the terms of the statute. See, e.g., U.S. v. Wright, 968 F.2d 1393, 1397 (1st Cir.1991). (Element of "knowing possession" under a statute prohibiting being in possession of a firearm may be established by proving the defendant was in constructive possession of the firearm, and as long as convicted felon knowingly has the power and the intention at a given time of exercising dominance and control over a firearm or over the area in which the weapon is located, directly or through others, he is in "possession" of the firearm); State v. Thomas, 252 A.2d 215, 217, 105 N.J. Super.331(1967)(Although defendant did not own the gun, he voluntarily took possession of it and made no effort to deliver it to the lawful owner or to the police authorities, but participated in an effort to conceal it in his brother's pocket, his dealings with the gun constituted "possession".)

III.
DECISION

For the foregoing reasons, the decision of the Board of Directors of the Waterloo Community School District made on November 25, 1997, expelling Thomas Menuey for the remainder of the school year for possession of a dangerous weapon, is hereby affirmed. There are no costs to this appeal to be assigned under §290.1.

DATE

ANN MARIE BRICK, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

DATE

CORINE HADLEY, PRESIDENT
STATE BOARD OF EDUCATION