IOWA STATE BOARD OF EDUCATION

(Cite as 13 D.o.E. App. Dec. 363)

In re Jesse Bachman	:	
Cindy Barkmeier, Appellant,	:	
v.	:	DECISION
Southern Cal Community School District, Appellee.	:	[Admin. Doc. # 3815]

The above-captioned matter was heard on October 16, 1996, before a hearing panel comprising Ron Riekena, Bureau of Food and Nutrition; Vince Bechtel, Bureau of Data Processing; and Ann Marie Brick, J.D., legal consultant and designated administrative law judge, presiding. Appellant, Cindy Barkmeier, and her son, Jesse Bachman, were "present" telephonically, unrepresented by counsel. Appellee, Southern Cal Community School District [hereinafter "the District"], was "present" by telephone in the person of Dr. Cheryl Huisman, superintendent. Appellee was represented by Brian L. Gruhn of Gruhn Law Firm, P.C., Cedar Rapids, Iowa.

An evidentiary hearing was held pursuant to Department of Education rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for the appeal are found at Iowa Code § 290.1. Appellant filed an affidavit seeking review of a September 9, 1996, decision of the board of directors [hereinafter "the Board"] of the District, which sustained an earlier decision of then-superintendent Larry Shay. The superintendent's decision imposed a one-year suspension of ineligibility on Jesse Bachman for a third violation of the school activity policy.

I.
FINDINGS OF FACT

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

On September 9, 1996, the Board of the District met in closed session to hear evidence on whether or not Jesse Bachman violated the Board's "Activity Policy," commonly known as a "Good Conduct Policy." Because this incident would constitute Jesse's third offense under the policy, the penalty was suspension from participation in extracurricular activities for one year.

After voting in open session to sustain the superintendent's findings that a violation had occurred, the Board had its decision prepared with "Findings of Fact," and "Conclusions," separately stated.[1] The following facts were "found" by the District Board and were undisputed by Appellant Cindy Barkmeier on appeal:

1. Jesse Bachman is presently a senior at Southern Cal High School. He is class president for the 1996-97 school year. He has been elected class president for the past three years. In the past, Jesse has been involved in FFA, football and basketball. He is covered by Southern Cal's Activity Policy. Section III (B)(1) & (2)(b) of the policy specifically states: any student will be ineligible to participate in extracurricular activities … b. who is found guilty of, or admits to, consumption, possession, acquiring, delivery or transporting of alcoholic beverages and/or dangerous drugs.

   In the same section of the policy, it also states:

   > Any student will be ineligible to participate in extracurricular activities for a probationary period of one calendar year (12 months) for the third offense of the above listed violations of the good conduct policy." B(4).

   Jesse Bachman had two previous violations of the Activity Policy: the first occurred in July 1995 and was alcohol-related (Exh. 5.); the second was OWI (Exh. 4.). The police were involved in both prior incidents.

2. On July 12, 1996, Jesse Bachman consumed alcohol and the alcohol consumption was at a minimum three cans

[1] This procedure is a tremendous asset to the hearing panel in a chapter 290 appeal. That is because the recitation of the Board's "findings" followed by its "conclusions" helps the hearing panel focus on the reasonableness of the Board's final decision.

and/or bottles of beer. Jesse Bachman admitted to consuming this much at his mother's residence with his mother's permission.

3. On the evening of July 12, 1996, after consuming at least three beers with his mother at home, at approximately 11:00 p.m., Jesse Bachman got into a motor vehicle with two other individuals: his brother, Cain, and Aaron R. (both minors and students). These individuals admitted that they had consumed between six and nine beers between them prior to when Jesse joined them. At the time these individuals picked up Jesse Bachman, there were 15 to 18 cans of cold beer in the back seat of their vehicle. The beer was in a red and black bag which could also be referred to as a soft cooler.

4. On the evening of July 12, 1996, Officer Gary Bellingheim of the Lake City Police Department stopped Cain Bachman's vehicle for having an expired license. Upon stopping the vehicle, he indicated that he smelled alcohol on Cain Bachman's breath. He indicated that he also observed a soft cooler, described as a red and black bag, in the back seat and that Jesse Bachman was leaning on it. The officer testified that he asked the boys in the car whether or not they had been drinking and that Cain Bachman answered first denying that any of them had been drinking. The Officer testified before the District Board that he asked each individual boy whether or not they had been drinking and that all three denied any consumption of alcohol. He then asked Jesse Bachman to open up the bag that he was leaning on in the back seat. The Officer indicated that Jesse first opened up the side pockets and there was nothing in those side pockets. He then opened up the middle of the bag where the Officer said there were 15 to 18 cans of cold beer. The Officer then took breath tests of all three boys and they all tested positive for alcohol. He indicated that Jesse Bachman tested .04. The boys denied knowing who owned the bag or where the bag or the beer came from.

5. Officer Bellingheim testified before the District Board that he subsequently discovered that the bag belonged to the father of Aaron R. because he came to the police station to claim it. The Officer also testified that the boys had not been truthful about their knowledge of the contents of the soft cooler or who owned it.[2]

[2] It is undisputed that the Officer testified to these facts before the District Board.

6. By letter dated April 5, 1996, Appellant was advised that her son had been declared ineligible for a period

of eight weeks for his second violation of the good conduct policy. At that time, Appellant was informed that "[s]hould Jesse commit a third offense prior to March 16, 1997 he would be ruled ineligible under the school activity policy for a period of one calendar year (12 months)." (Exh. 4.)

Although the Board's separate "conclusions" were fairly specific and detailed, the basic conclusions were that Jesse was covered by the policy; that Jesse's consumption of alcohol and his admission that he consumed the alcohol was a violation of the policy; that this incident constituted the third offense of the policy and since it occurred prior to March 16, 1997, Jesse would be found ineligible to participate for one full year.

The Board's "conclusions" note that Jesse and his mother, who were represented by legal counsel before the District Board, raised two objections to the Superintendent's recommendation of ineligibility at the local board hearing:

a. that Jesse's consumption of three beers with his mother's permission is legal under Iowa Code Section 123.47A which states "*a person shall not sell, give, or otherwise supply alcoholic liquor, wine, or beer to any person knowing or having reasonable cause to believe that the person is age eighteen, nineteen, or twenty … however, a person age eighteen, nineteen, or twenty can possess alcoholic liquor, wine, or beer given to the person within a private home with the knowledge, presence, and consent of the person's parent or guardian, … .*" Iowa Code Section 123.47A(1)(1995).

b. Secondly, Appellant objected to the validity of the attendance policy as it covered his behavior during the summer when he was not "registered and enrolled as a student."

Both of these objections were renewed by Appellant on appeal before the State Board. In addition, she argued that Jesse was not given his due process rights of being "presumed innocent until proven guilty" beyond a reasonable doubt because the school administration and Board believed the Officer's testimony to be more credible than her son's. Specifically, Jesse's denial that he had been drinking after he left his home or that he was aware

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Appellant, however, disputes the truthfulness of the Officer's testimony since it contradicts the statements given by her son.

that he was leaning on a soft cooler of beer while riding in his brother's car. Basically, Appellant's issues on appeal can be recast as follows:

Issue #1: Whether a good conduct policy that prohibits the use of drugs or alcohol by student athletes[3] during the summer is a reasonable exercise of the Board's authority?

Issue #2: Whether a good conduct policy that punishes a student athlete for behavior that would be legal if done by a non-athlete (or some one who is not a participant in extracurricular activities) is a reasonable exercise of the Board's authority?

II.
CONCLUSIONS OF LAW

***STANDARD OF REVIEW*:**

For the second time, we wish to discuss and clarify the appropriate standard of review applied by the State Board of Education when reviewing school board decisions appealed under Iowa Code chapter 290. See, In re Debra Miller, *et al.*, 13 D.o.E. App. Dec. 302, 315-18(1996).

In Miller, we restated the Standard of Review expressed by the State Board of Education from the beginning of its reported decisions under Iowa Code chapter 290. See, Affidavit of Grievance by Edna S. Kennett, 1 D.P.I. App. Dec. 52 through In re Marilene McCandless 5 D.o.E. App. Dec. 45 (1986). By reiterating the language of the earlier cases, we intended to show the historical as well as the legal basis for the State Board of Education's function in reviewing local board decisions. The Standard of Review resurrected by the Miller case recognizes that the proper Standard of Review is not limited to actions that are "arbitrary, capricious or an abuse of discretion." The State Board's original standard of review stated that actions would also be reversed if they were "ill-advised, unwise, and inexpedient." In re Affidavit of Grievance by Edna S. Kennett, 1 D.P.I. App. Dec. 52. Accord, In re Kenneth Hoksberger, 1 D.P.I. App. Dec. 86, 88 (1975).

It has become apparent that there is a need for further

[3] The issue is discussed as it applies to "student athletes" because that is the case before the State Board. However, the same principles would apply to students who are "non-athletes" but who are participants in extracurricular activities and covered by the good conduct policy.

explanation of the Standard of Review in relation to the State Board's function under Iowa Code chapter 290. First of all, it needs to be emphasized that the Standard of Review is established, not by the State Board, but 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." Section 256.1. The State Board functions

as a policymaker and advisor when it fulfills the duties mandated by Section 256.7(5) and Section 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 (1995).

When the appeal to the State Board under chapter 290 concerns open enrollment, the Legislature has given the State Board even more authority to overturn local board decisions:

> Notwithstanding the general limitations contained in this section, in appeals to the state board from decisions of school boards relating to student transfers under open enrollment, the state board shall exercise broad discretion to achieve just and equitable results which are in the best interest of the affected child or children.

Iowa Code Section 282.18(20)(1995).

The Administrative Rules implementing the chapter 290 appeal process state:

> The Administrative Law Judge after due consideration of the record and the arguments presented, and with the advice and counsel of the staff members, shall make a decision on the appeal.
>
> The decision shall be based on the laws of the United States, the state of Iowa, and the regulations and policies of the department of

> education and *shall be in the best interest of education*.

281—Iowa Administrative Code 6.11(1),(2)(emphasis added).

The State Board has been directed by the Legislature to render a decision which is "just and equitable" [Section 290.3], "in the best interest of the affected child"

[282.18(20)], and "in the best interest of education" [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 decision will not be overturned unless it is "unreasonable and contrary to the best interest of education."

This is not as broad a standard as "unwise and inexpedient," but it is certainly broader than "arbitrary, capricious or an abuse of discretion."

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 Cindy Barkmeier has objected to the policy on two grounds:

> (1) It regulates the use of drugs or alcohol by participants in extracurricular activities, even during the summer months, when school is not session; and
>
> (2) it penalizes a student covered by the policy for conduct which is otherwise legal and for which a non-covered student would not be punished.

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. (Emphasis added.)

In general, school discipline policies address student conduct which occurs on school grounds during the school day. This is because a school district's regulation of student conduct must bear some reasonable relationship to the educational

environment. This principle was enunciated over 100 years ago in the case of Lander v. Seaver, 32 Vt. 114 (1859). But districts can also reach out of school conduct by student athletes and those involved in extracurricular activities. Because of the leadership role of these "stand-out" students, their conduct, even out of school, directly affects the good order and welfare of the school. Bunger v. Iowa High School Athletic Assn., 197 N.W.2d 555, 564 (Iowa 1972). Therein it was stated:

> 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.

Id. at 564.

Jesse Bachman is certainly an example of a "stand-out" student. He has been class president for the past three years. He participated on the football and basketball teams, as well as in FHA. Jesse also has an cumulative grade point average of 3.69 on a 4.0 scale. Jesse strongly contends that he represents his school well and should not be penalized for this third infraction by being declared ineligible for extracurricular activities. We disagree.

Inherent in the notion of a good conduct policy is the idea that participants in extracurricular activities should be held to a higher standard than non-stand-out students. Students like Jesse are higher profile students who represent the highest standards of the school district. Extracurricular activities are not mandatory. By electing to participate, the student agrees to abide by the terms of the good conduct policy even when school is not in session. See, e.g., In re Joseph Fuhrmeister, 5 D.o.E.

App. Dec. 335 (1988). In reviewing the legality of these rules, it is commonly held that 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 Sch. Ath. Assn., 197 N.W.2d 555, 558 (Iowa 1972). The possession and consumption of drugs or alcohol during the summer by a student athlete like Jesse, meets the test.

Appellant's second objection to the Board's decision to discipline Jesse under the good conduct policy is that his conduct was not illegal. Jesse is 18 years old. His mother testified that Jesse consumed three beers with her, in her home,

with her permission. She relies on Iowa Code section 123.47A which states that "[A] person age eighteen, nineteen, or twenty may possess alcoholic liquor, wine, or beer given to the person within a private home with the knowledge and consent of the person's parent or guardian … ." Id. Basically, her argument is that what Jesse does in the privacy of his own home with his mother's permission cannot be grounds for punishment by the school. In other words, what is legal under Iowa Law should not be punishable under the school's good conduct policy.

Appellant's position would be tenable if Jesse were not involved in extracurricular activities. The School does not have much control over the conduct of a non-participant student while the student is in his own home under the supervision of his parent(s). That is not the case here. Jesse, by participating in extracurricular activities, has implicitly agreed to abide by the conditions of the good conduct policy. The conduct prohibited by the good conduct policy need not be synonymous with the criminal code. A student who is covered by the good conduct policy need not engage in illegal activity to be punished under the terms of that policy. This is reinforced by the fact that the Iowa Code gives school boards the authority to suspend or expel any student for the use of tobacco on school premises. Being 18 years of age does not excuse a *student* from complying with the rules which prohibit smoking on school grounds. See, Section 279.9.

Additionally, both Jesse and his mother readily admit that he had "a few beers" or "three beers" while at home in his mother's presence. Section B(2)(b) of the Activity Policy specifically states that admitting to consumption of alcohol constitutes a violation. There is no exception for "drinking at home with parents." On top of that, Jesse was stopped by the police while riding in a car with 15 to 18 cans of beer in his

"possession." We agree with the District Board's finding that Officer Bellingheim's testimony regarding the location of the soft cooler full of beer under Jesse Bachman's arm was more credible than the testimony of the boys. This is because the Officer had nothing to lose by being truthful. In contrast, Jesse had a lot to lose. It is "incredible" to the hearing officer that Jesse Bachman would be riding around in the back seat of an automobile leaning on a soft cooler, and be unaware that it contained 15 to 18 cans of cold beer. He denied that he had been drinking, but he tested positive for alcohol.

It is undisputed that Jesse's breath test was positive for alcohol at .04 on the breath test. That alone would render him in violation of the good conduct policy for the consumption of alcohol. The School warned Jesse in their letter to him dated April 5, 1995, that one more violation of the good conduct policy

would render him ineligible for extracurricular activities for the period of one year. He acknowledged that he understood the significance of that letter. Yet, a little over three months later, he knowingly consumed three beers. It is unnecessary to determine the veracity of the other charges. This alone is sufficient evidence for the Board to apply the penalties of the good conduct policy and render Jesse ineligible for extra-curricular activities for one year.

It is reasonable for the District to have good conduct rules prescribing the use of alcohol and tobacco by an athlete, even if it is not contrary to the Law. This is a reasonable means to deter the use of alcohol and tobacco by those representing the school in extracurricular activities. (See, Braesch v. DePasquale, 265 N.W.2d 842 (Neb. 1978).

Finally, we would like to comment on Ms. Barkmeier's concerns that the testimony before the District Board did not prove that Jesse "was guilty beyond a reasonable doubt." That is not the standard to be used in school disciplinary actions. "Guilty beyond a reasonable doubt" is a standard used in criminal courts before a person can be incarcerated for the commission of a crime. The standard in school disciplinary cases is that the decision reached is supported by a preponderance of the evidence. Smyth v. Lubbers, 398 F.Supp. 777 (W.D.Mich. 1975). See, also, 2 Rapp Education L. Section 9.05[3][g]. There was sufficient evidence in the Board's "findings" to support its decision by a "preponderance."

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

III.

DECISION

For the foregoing reasons, the decision of the Southern Cal Community School District's board of directors made on September 9, 1996, is hereby recommended for affirmance. There are no costs of this appeal to be assigned.

DATE

ANN MARIE BRICK, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

DATE

CORINE HADLEY, PRESIDENT
STATE BOARD OF EDUCATION