IOWA STATE BOARD
OF EDUCATION
(Cite as 11 D.o.E. App. Dec. 39)

In re David Ward	:	
David and Leann Ward, Appellants,	:	
v.	:	DECISION
Dubuque Community School District, Appellee.	:	[Admin. Doc. # 3210]

The above-captioned matter was heard on March 25, 1993, before a hearing panel comprising Richard Boyer, assistant chief, Bureau of School Administration and Accreditation; Don Smith, consultant, Bureau of Technical and Vocational Education; and Kathy Lee Collins, legal consultant and designated administrative law judge, presiding. Appellants Mrs. Leann Ward and her son David Ward were present in person and represented by Mr. David L. Hammer of Hammer, Simon & Jensen, Dubuque. Appellee Dubuque Community School District [hereafter "the District"] was present in the persons of Larry Mitchell and Bernard Ferry, principal and assistant principal respectively, at Dubuque Senior High School. The District and school board [hereafter "the Board"] were represented by Allen J. Carew of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque.

Appellants seek review of a decision of the District Board made on June 1 and memorialized on June 2, 1992, to expel David Ward for the balance of the 1991-1992 school year, with the attendant loss of academic credits earned in the spring 1992 semester for possession and sale of LSD, a controlled substance, on school grounds.

Authority for and jurisdiction of the appeal are found at Iowa Code section 290.1. A mixed stipulated and evidentiary hearing was held pursuant to rules of the department of education found at 281 Iowa Administrative Code 6. Briefs of the parties were received on April 5.

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 before them.

Appellant David Ward was a sophomore honor roll student at Dubuque Senior High School ("Senior") in May of 1992 when school authorities were advised that he had sold LSD, a controlled substance, to another student or students. A law enforcement officer who serves as a liaison at Senior was contacted. David Ward admitted in his presence and in the presence of school officials that he was in possession of over twenty "hits" or "tabs" of the illegal substance and had, in fact, sold one or more hits on that day and on two previous occasions that month at school.[1]

David was initially suspended for three days, which was later extended to ten school days. He and his parents were advised that (then) Superintendent Howard Pigg intended to recommend to the Board that David be expelled for this misconduct. The Board held a hearing on June 1, 1992, in closed session, to reach a decision on the superintendent's recommendation. David and his parents were in attendance and were represented by Mr. Hammer.[2] The Board deliberated in closed session following the presentation of evidence, testimony, and arguments by counsel and voted 6-1 in open session to expel David for the second semester of the 1991-92 school year. Although David lost only a total of fourteen school days (ten prior to the hearing), he was denied his earned credits from that semester.

Another student, whom we will refer to as "N.J.," was also involved in the incident. N.J. is said to have supplied David Ward with the LSD with which he was in possession in May. N.J., an eighteen-year-old senior, had completed all of his coursework for the semester and for his diploma at the time of the incident. The school administrators extended his suspension from school to include the last day of school for seniors. They permitted him to receive his diploma although he was not allowed to participate in graduation activities and exercises. N.J. apparently had not been charged with any criminal code violations at the time of David Ward's expulsion hearing, but Brian Jobgen, the police liaison officer at Senior, testified at the expulsion hearing

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[1]Subsequently either criminal or juvenile charges were filed against David for the same conduct after his expulsion hearing. He pleaded guilty and received six months of probation and 100 hours of community service, which were completed by the time of our hearing.

[2]Mr. Hammer objected to the Board's going forward with the hearing because criminal charges had not yet been brought against David. The objection was noted, but no continuance of the hearing was granted.

that N.J.'s status as an adult would mean significant differences in the punishment he faced from the criminal justice system than those faced by David Ward.[3]

David's expulsion cost him slightly over five credits toward graduation. He was permitted to return to school in the fall of 1992-93 school year, as a junior. Although he was behind schedule for graduating with his class, making up the credits was a matter of taking six courses plus physical education each semester of his junior and senior years instead of five courses plus p.e., or he could take seven credits plus contract physical education. In addition to those options, David could take summer school courses or approved correspondence courses to make up his lost credits in time to graduate with his class.[4]

Testimony at hearing evidenced the fact that David Ward's permanent school records do not refer to his expulsion. Rather, a notation has been made for second semester of the 1991-92 school year of "W" for "withdrawn." Counsel for Appellants likens the "W" on David's record to Hester Prynne's scarlet "A." They seek removal of this incident in all respects from David's records.

II.
CONCLUSIONS OF LAW

Appellant has not questioned the District Board's authority to expel him, as well he could not. Iowa Code sections 282.4 and .5 empower a school board to "expel any pupil from school for a violation of the regulations or rules established by the board, or when the presence of the pupil is detrimental to the best interests of the school . . ." Although the Code of Iowa does not speak to the duration of the expulsion, the general practice in Iowa is to follow the advice of a 1944 opinion of the Attorney General that expulsions should not exceed a maximum of one school year. Unpub'd. 1944 O.A.G., Strauss to Bruner, Cty. Atty., 10-28-44(L). The law states that "when expelled by the board, the [pupil] may be readmitted only by the board or in the manner prescribed by it." Iowa Code §282.5 (1991). Former Superintendent Howard Pigg testified that the District's policy limits expulsion to one semester. Appellee's Exhibit 7 (transcript) at p. 50. See also Appellee's Exhibit 4 ("Guide to Student Conduct and Discipline,") Policy #6200, at p. 3, item IV.J.7: "No expulsion shall continue beyond the end of the school year in which it occurred; and at the beginning of the following school

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[3]Counsel at our hearing offered in argument that N.J. was subsequently convicted and sentenced to ten years in prison.

[4]David was still concerned about his options because he was already working to save money for college and to pay his attorney's fees; thus he suggested that summer school would be a hardship on his ability to work for pay.

year, the student shall be admitted without Board action." The same policy addresses the loss of credits for the semester during which the expulsion was in effect. Id. at J.8.

Although the Policy apparently does not state how an expulsion is recorded on a student's school records, testimony at our hearing indicated that the word "expulsion" does not appear on the student's transcripts nor elsewhere in his permanent record, nor is there a reference to drugs or juvenile charges.

Appellants' challenges to the Board's action are three: first, that David Ward was subjected to disparate treatment and selective enforcement of its rules by the administration and Board in that he and N.J. were guilty of identical offenses (possession and sale of a controlled substance at school) but received different punishments; second, that David Ward's constitutional rights were violated by the Board's action and that the policy of the Department and State Board of Education has been violated by this expulsion; third, that David Ward's Fifth Amendment right to be free from compulsion to testify against himself was violated at the Board's hearing.[5] We will address these arguments individually.

A. Equal Protection Violation

The Fourteenth Amendment prohibits government from treating differently persons who are "similarly situated." In general, if the government sets up classifications or denies privileges or rights to one group (or individual) which are accorded to other individuals, then government must have at least a "rational basis" for the different treatment. The premise upon which Appellant's argument rests is that he and N.J. were "similarly situated," focusing on the misconduct that both students engaged in. The District Board responds that the two young men were not similarly situated; one (David) had two weeks of classes plus final exams remaining before he had "earned" any credit for the semester, and the other (N.J.) had completed all coursework for the semester and for graduation on May 15 and 17 when the facts of the possession and sale came to light. Further, the Board points out that the two students' ages were a factor as well as the potential punishments they faced in the juvenile and criminal justice systems.

While we do not think that the Board was *prohibited* from expelling N.J. in his last week of school for his conduct, we respect the fact that counsel for the Board so advised his client, and we can readily distinguish David Ward's circumstance from N.J.'s. The young men were not "similarly situated." The fact that they committed the same offense is not, according to legal authority, the sole factor in determining whether the

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[5]It is unclear whether Appellant's Fifth Amendment argument relates to his appearance and testimony at the Board's hearing, or, more likely, to the fact that the hearing took place prior to the filing of criminal charges against David thereby "compelling" him to admit under oath to conduct that could result in a conviction.

Constitution requires that they be treated identically. See e.g., State v. Apt, 244 N.W.2d 801,804 (Iowa 1976); Johnson v. Civil Service Comm'n, 352 N.W.2d 252, 255 (Iowa 1984). Moreover, the administration had a "rational basis" for the differing treatment: one student had completed all credits for the semester and the other had not.

Similarly, the "selective enforcement" argument must fail. The District administrators did not selectively enforce the school policy prohibiting students from engaging in illegal drug transactions at school; they recommended dissimilar consequences but took action to enforce the policy against both students. There was literally no evidence of a discriminatory purpose or effect against David Ward. See Wayte v. United States, 470 U.S. 598, 608, 105 S.Ct. 1524, ___ (1985) and cases cited therein.

Nor is this argument new to the State Board of Education. In 1992, the State Board upheld the expulsion of a student for the possession of LSD despite the fact that another student who was found to be in possession, even involved in the sale of the substance, was not expelled. In re Eric Plough, 9 D.o.E. App. Dec. 234, 238 (1992). In that case there were also differing circumstances which served as a reasonable basis for the decisions of the administration.

B. Constitutional Rights Violation and D.o.E. Policy Violation

Appellant urges us to find a constitutional violation in the deprivation of his right to an education, citing Goss v. Lopez, 419 U.S. 565 (1975). Goss affirmed that even in the absence of an explicit constitutional guarantee of an education, a public school cannot deny a student his or her right to attend school without first observing the Fifth and Fourteenth Amendments' guarantee of due process of law. Stated conversely, the government (in this case a public school board) may take away a student's liberty or property if it first provides due process of law. Although the United States Supreme Court has not directly addressed what would constitute "due process" in an expulsion situation, the Court did suggest that more process would be due than is due in a Goss-type suspension of ten days or less.

In this case, we are at a loss to know what additional protections Appellant believes should have been afforded to him beyond what he was provided. He had ample notice of the time and place of the Board's hearing in writing, with the facts underlying the recommendation clearly laid out, as well as citation to the policy violated. See Appellee's Exhibits 1-4. He was advised of the persons who would be called to present evidence against him. Appellee's Exhibit 1 at p. 2. He was advised of his right to produce his own witnesses and to cross examine the witnesses against him; that he had the right to a closed hearing under Iowa law; that he had the right to counsel; that the hearing would be recorded by tape recording or shorthand reporter; that the Board would make its decision solely on the facts elicited at the hearing and would issue findings and conclusions

in writing. Id. Appellant was even advised of his right to seek review by the State Board of Education. Id. at p. 3. Appellant has cited no authority, nor are we aware of any, that would indicate what rights were not available to him that should have been. Our only conclusion is that David's final argument (that his Fifth Amendment right was violated) is dovetailed into a denial-of-due-process argument. We will explore that argument in depth below.

As to the suggestion that the policy of the Department of Education was violated, Appellant quotes from a State Board decision, Merk v. Algona Comm. Sch. Dist., 5 D.o.E. App. Dec. 270 (1987), to the effect that the Department and State Board of Education hold the practice of lowering grades in disfavor and urge local school boards to find alternatives to loss of credit. David mistakenly relies on Merk, for that case stood for the proposition that expulsion, as the most serious punishment that can be used against a student, should be reserved for only the most serious offenses. Merk, 5 D.o.E. App. Dec. at 276. (Korene Merk was expelled for skipping school twice and smoking a cigarette on school grounds in one semester; therefore, the expulsion was reversed as a violation of substantive due process.)

Appellant's grades were not lowered; he lost credit entirely for the semester of the expulsion. The State Board's Position Statement (October 1987) on academic penalties includes the following:

> Upon the expulsion of a student for good cause by the board of directors following due process of law, the retroactive loss of all credit for the term for which the expulsion is applied is a recognized consequence.

Thus, neither department of education nor State Board policy has been violated by this expulsion. In fact, the State Board affirmed an expulsion of another student guilty of distributing LSD in 1992, and in so doing adopted language that specified that "distributing or using drugs or carrying weapons" would amount to the type of "singularly egregious conduct" spoken of in Merk that would justify expulsion. In re Cam Schaefbauer, 9 D.o.E. App. Dec. 188, 192 (1992) (quoting in part from Merk, supra, at p. 276).

Thus, the administrative law judge sees no merit in either the D.E. policy argument or the vague constitutional violation argument.

C. Fifth Amendment Right Against Self-Incrimination

Appellant and his counsel tried to continue the Board's expulsion hearing on the ground that criminal charges had not yet been filed against him, and although he wished to testify at the expulsion hearing, he presumably did not wish to have that testimony used against him by law enforcement officials. The State's job to prove his guilt in a juvenile or criminal justice setting would be made considerably easier with his sworn statement of admission.

There are two basic flaws with this argument, a factual one and a legal one. Factually, Appellant had already (admirably) admitted his possession of LSD to school officials and the police liaison officer on May 15 when he was first questioned. This pretty much removed all doubt of his guilt. He need not have testified at the Board's hearing; his admission was already "in the record."

Legally, there are multiple problems with this assertion. First, no one "compelled" David to testify against himself; in fact, he did not even have to appear at the Board's hearing. Moreover, the administration did not call David as a witness; David's attorney called him as his own first witness. This hardly constitutes "compulsion" by the government.

Finally, legal authority strongly suggest that issues of "custodial interrogation, self-incrimination, and the right to counsel" in incidents where school officials confront students at school are not applicable. "Each of these rights applies almost only to criminal prosecutions, so there is no violation of the restrictions on the government in the proceeding at school." Salazar v. Luty, 761 F.Supp. 45, 48 (S.D. Tex. 1991); Accord Brewer by Dreyfus v. Austin Indep. Sch. Dist., 779 F.2d 260 (5th Cir. 1985)("The technicalities of criminal procedure ought not to be transported into school suspension cases.")

Counsel for the District has also pointed out in its brief other legal authority for the proposition that David Ward's Fifth Amendment argument must fail. Peiffer v. Lebanon Sch. Dist., 673 F.Supp. 147, 150-51 (M.D. Pa. 1987), aff'd 848 F.2d 44 (3rd Cir. 1988) held that there is nothing inherently repugnant to due process in requiring a person to choose between giving testimony at a civil administrative hearing, a course that may assist criminal prosecutors, and keeping silent, a course that may result in losing the case. Hart v. Ferris State College, 557 F.Supp. 1379, 1384-85 (W.D. Mich. 1983) noted that the weight of authority in cases where criminal proceedings are pending or possible and a student is facing an earlier disciplinary hearing in an administrative context strongly indicates that postponement or continuance of the school hearing is neither required nor necessarily advisable.

We believe that factually and legally, David Ward's Fifth Amendment self-incrimination issue lacks merit. We are also of the opinion that a "W" on David's record does not imply expulsion, nor is it tantamount to a scarlet letter. Accordingly, the recommendation of the hearing panel and administrative law judge is that the State Board of Education affirm this expulsion decision.

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

III.
DECISION

For the foregoing reasons, the decision of the board of directors of Dubuque Community School District made on June 1, 1992, to expel David Ward for the balance of the 1991-92 school year, with attendant loss of academic credits earned in the spring 1992 semester, for possession and sale of LSD on May 15, 1992, is hereby recommended to be affirmed. Costs of the appeal are to be certified as required by Iowa Code section 290.4, and are hereby assigned to Appellants.

December 30, 1993
DATE

Kathy Lee Collins
KATHY LEE COLLINS, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

1-14-94
DATE

Ron McGauvran
RON MCGAUVRAN, PRESIDENT
STATE BOARD OF EDUCATION