IOWA STATE BOARD
OF EDUCATION
(Cite as 10 D.o.E. App. Dec. 1)

In re Joseph Childs	:	
Robin Lund, Appellant,	:	
v.	:	DECISION
Davenport Community School District, Appellee.	:	[Admin. Doc. #3183]

The above-captioned matter was heard on May 27, 1992, before a hearing panel comprising Dr. Lee Wolf, consultant, Bureau of Instruction and Curriculum; Dr. Barbara Wickless, Consultant, Bureau of School Administration and Accreditation; and Kathy L. Collins, legal consultant and designated administrative law judge, presiding. Appellant Robin Lund was present in person, along with her husband, and was not represented by counsel. Appellee Davenport Community School District [hereafter the District] was present in the persons of Dr. Paul Johnson, director of secondary education for the District and Mr. William Rettko, principal, West High School. The District was represented by Carole J. Anderson of Lane & Waterman, Davenport.

An evidentiary hearing was held pursuant to departmental rules found at 281 Iowa Administrative Code 6. Authority and jurisdiction for the appeal lie in Iowa Code Chapter 290. Appellant filed an affidavit seeking review of a March 2, 1992, decision of the District board of directors [hereafter the Board] to expel her son Joseph Childs from school for the balance of the school year. Prior to our hearing, the District Board reheard the expulsion case on April 13, 1992, at which time the Board again expelled Joseph or affirmed its original decision.

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.

On February 10, 1992, shortly before classes began, Joseph Childs, a tenth grade student at Davenport West High School, was walking in the halls with a friend, Kevin Hamma. Suddenly another student named Mike Killian approached and assaulted Kevin, apparently believing Kevin had been involved in an incident at the mall the previous night when Killian's younger brother was attacked.

This is the last moment of the altercation when all witnesses and participants agree. Kevin Hamma and Joe Childs testified for this hearing panel, consistent with their statements in all prior reviews and hearings in this case, that Kevin Hamma and Mike Killian both fell to the ground. Joe Childs then kicked Mike Killian in an effort to get Mike, the larger and older boy, to stop beating up on Kevin. As Joe and Kevin's version of events continues, at that point Mike rose and came after Joe. Joe backed up with his hands in loose fists up high, by his face. He says he was then grabbed by the shoulder and turned, causing his hand to strike Ms. Carol Mavis in the mouth resulting in a swollen lip.

At about the time Kevin and Mike first hit the ground, a crowd began converging in the hall, and three West High staff became involved. Predictably, their three statements, given later in writing and at subsequent hearings orally, do not coincide exactly with each other's nor with Joe's. Ms. Mavis, a teacher who came out of the office and tried to hold back the crowd, was not present at our hearing to testify, but a review of her written statements (See Appellant's Exhibits B and E), a summary of her oral statement at one hearing, and a transcript of her statements at another hearing show inconsistencies regarding where she stood in relation to Joe at the time she was hit in the mouth. One thing she has been consistent about is that she believed from the outset that Joe did not mean to hit her. The problem comes in that in her memory, she was in front of Joe with her arms outstretched, holding back the crowd, when Joe came from behind her, ignoring her authority, to kick Mike Killian in the stomach. She admitted grabbing him and attempting to pull him away from the fight when she was struck.

Ms. Barbara Lange, a teacher's aide, and Mr. Ernie Terrell, a security guard, were the two other staff members involved. Ms. Lange did not see Joe kick Mike Killian, and Mr. Terrell was on the floor attempting to restrain Kevin and Mike, so his view of events was questionnable. Although Joe and his parents have urged us to unravel the participants'

statements in an attempt to reconstruct the events of those brief moments, we do not feel it is necessary to do so.[1]

We believe it is sufficient to find as fact that Joe Childs kicked Mike Killian and inadvertently struck Ms. Mavis.

All three students involved were initially suspended for ten days out of school. However, some two or three hours after receiving a telephone call from Vice-Principal Brown informing her of her son's suspension, Joe's mother received another call. This one was from William Rettko, principal at West, who informed her that he was going to recommend that the Board expel Joseph for assaulting a teacher. This was not the end of the telephone calls, however.

At about 4 p.m., Mrs. Lund received a call from the Davenport police asking her to take Joe to the police station that afternoon. Officer Holden, who was also the police liaison assigned to Davenport West, informed Appellant that he was pressing charges of assault against Joe on behalf of West High School. Mrs. Lund asked him if there were charges filed against Mike Killian, and Officer Holden is said to have responded, "No because he [Mike] hit a kid; Joe hit a lady." The charges were subsequently dismissed against Joe without a hearing.

Appellant received notice of a hearing to consider an expulsion recommendation before an "Administrative Advisory Council" to be held on February 20. Mrs. Lund was informed of Joe's right to representation and to call and cross-examine witnesses. The notice made no reference to Joe's behavior or the rule(s) he allegedly violated. The family hired an attorney and appeared at the hearing.

The Advisory Council is comprised of a chair, usually Dr. Johnson, and panel members that include another central office administrator (in this case, Dr. Daryl Spaans), a principal at a school other than the school at which the incident occurred, and a teacher from the student's high school. The school's "witnesses" were Mr. Rettko, the principal; Ms. Mavis, the teacher who was hit; Ms. Lange, the educational aide and witness; and Officer Holden. Joe, his parents, and his attorney were present but called no witnesses other than Joe.

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[1]Other than the three students and three school employees involved, no other persons were interviewed by school administration despite the large crowd of witnesses to the incident.

As a result of this hearing, the Advisory Council recommended that Joe be expelled for the balance of the semester. His ten-day suspension was due to expire February 24, but as a result of the Council's recommendation, Joe's suspension was continued until the Board hearing on March 2, an additional 5 school days. He was provided with "home instruction services" though that time. Appellant's Exhibit A at p. 2 (2/24/92 letter from Dr. Johnson to Joe Childs).

At the March 2 Board hearing, six of the seven directors were present, unrepresented by counsel. A closed hearing was held for approximately ninety minutes regarding Joe's expulsion.[2] Ms. Mavis either did not speak or Joe's attorney was not allowed to cross-examine her, so Joe was unable to question her about the incident and inconsistencies in her written and oral statements. Before counsel for Joe had an opportunity to "rest his case" and make a closing statement, Board President Robert McCue announced that the hearing was concluded because the Board needed to begin its general meeting.

Appellant, her husband, Joe, and his attorney were then excused from the room while the Board deliberated. However, several members of the administration--including Principal Rettko, Dr. Spaans, and Dr. Johnson--remained with the Board as did Ms. Mavis.

The Board then returned to open session and voted 4-2 to expel Joe for the rest of the semester, banning him from school grounds until his readmission would be considered just prior to the start of the 1992-93 school year. The Board issued no written findings of fact or conclusions about Joe's behavior, and did not cite the handbook or Board Policy he violated to justify the expulsion. No transcript was made of the hearings, although it was undoubtedly tape recorded as required for closed sessions by Iowa Code section 21.5(4).

Appellant promptly appealed Joe's expulsion to the State Board under Chapter 290 of the Code of Iowa.[3] This office

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[2]This special board meeting was called primarily to hear the expulsion cases of four students, two of whom were expelled and two of whom were "excluded" for the year. Previous Record, bd. mins. of 3/2/92. None of the three other expelled students was involved in this altercation.

[3]Appellant complains also that no one advised her or Joe of their right to appeal the Board's decision to the State Board of Education. They learned of this opportunity by later asking a secretary in the administration office.

provided a copy of the affidavit of appeal to the superintendent and board secretary pursuant to our rules, and soon the Board determined that it should hold another hearing. Appellant was notified of the rehearing by counsel for the District Board in a letter dated April 2. Presumably Joseph was still expelled through this period. Counsel for the District advised Appellant of the date and time of the rehearing, of the right to submit documents for the Board's consideration, of their right to representation, established time lines for the second hearing (30 minutes for Joe; 15 minutes for the administration; 5 minutes for rebuttal for Joe; and 5 minutes to each party for closing arguments); and stated that no witnesses or their representatives would sit in on the deliberations with the Board. Appellant's Exhibit F.

A transcript was made of the April 13 Board rehearing which took place in open session upon request of Appellant. All directors were present. Joe called Kevin Hamma, Mr. Terrell, Ms. Lange, and Ms. Mavis in addition to speaking on his own behalf. The District called no witnesses but did cross-examine those called by Joe. The Board was given copies of character reference letters written on Joe's behalf and again considered all of the written documentation submitted at the March 2 hearing. Both parties gave closing statements.

The Board then voted to go into closed session to deliberate. Coming back into open session, the Board voted 5-2 to expel Joe. No written findings or conclusions were provided, and the minutes do not reflect the reason for the expulsion. Official written notification to Appellant and her husband of Joe's expulsion, if it exists, was not introduced into evidence at our hearing.

Joe has a previously clean disciplinary record, is a student athlete, and says he has only been in one fight prior to this incident, which occurred when he was in seventh or eighth grade off school grounds.

II.
CONCLUSIONS OF LAW

In her affidavit and remarks made at our hearing, Appellant bases her appeal on a belief that Joe's rights to procedural and substantive due process were violated by the first (March 2) hearing in the following respects:

1. A denial of the opportunity to question Ms. Carol Mavis, the teacher whom Joe "assaulted." Because she did not speak and inconsistencies existed in her written statements about the incident, and because Joe

was probably recommended for expulsion for hitting Ms. Mavis, the hearing was inherently unfair.

2. The hearing was run on a tight time schedule that did not permit Joe's counsel to argue and advocate fully for his client.

3. The inclusion of members of the school administrative team in the Board's deliberation process, without allowing Joe's attorney to be present, tainted the decision making process.

4. The Board President's frequent admonitions to Joe's counsel to be quiet during others' statements interfered with Joe's ability to be represented adequately by counsel.

5. No one informed Appellant or Joe of their right to appeal the Board's decision to the State Board, until they asked a school secretary several days later what their recourse was.

Official Record, Affidavit of Appeal at pp. 1-2.

Appellant also raised concerns about the fairness of the Administrative Council's hearing on February 20 and the accuracy of the minutes or summary of the Council's hearing, which we see as beyond our authority to review as the Counsel's hearing was not the Board's hearing. Iowa law limits us to the review of board decisions or orders. See Iowa Code §290.1 (1991).

Appellant also questions whether the punishment (expulsion) was fair in this case. She and Joe ask us to consider the fact that the real instigator in the fracas, Mike Killian, was given only a ten-day suspension for an unprovoked assault, whereas Joe's attack on Mike Killian was in defense of his friend, and his "assault" on Ms. Mavis was, without dispute, unintentional. Inherent in that request is their belief that arbitrary or discriminatory discipline is being imposed at West High School.

Iowa statutory law is relatively terse regarding student expulsions. It is clear, however, that the school board, and only the board, has the right to expel. "The board may, by a majority vote, expel any scholar for immorality, or for a violation of the regulations or rules established by the board, or when the presence of the scholar is detrimental to the best interests of the school." Iowa Code §282.4 (1991). The Code does not spell out what constitutes an expulsion, nor does it address the rights of a student facing expulsion. Rather, those issues have been litigated over a period of time before the state and federal courts of this country.

The State Board of Education has also had numerous opportunities to reflect on the judicial decisions and articulate its expectations for the rights of students facing suspension and expulsion from school.

The seminal case cited for the establishment of public school students' rights under the United States Constitution to "due process of law" as promised by the fifth and fourteenth amendments is Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975). That case involved the suspension of students from public school for ten days. In addition to guaranteeing that students facing "short-term suspensions of ten days or less" have the minimal right to notice (oral or written) of the charges against them and an opportunity to be heard prior to the imposition of the suspension (except in emergency removal situations), the Supreme Court strongly suggested in Goss that for longer exclusions more process may be required, including a hearing before the board, the opportunity to secure counsel, to confront and cross-examine witnesses and call witnesses on the student's behalf to verify the student's version of the incident. Goss v. Lopez, 419 U.S. at 584, 95 S.Ct. at 740-4.

In an early, unreported case involving Iowa's expulsion statute, a federal district court judge found that the due process rights of students facing more than a semester expulsion had been denied for inadequate notice.

> With respect to the claims of Snowdahl and Sickler, the record establishes an inadequate notice and hearing process in connection with their six-month suspension.
>
> Formal charges against these students were not adequately filed. No transcript or recording of the proceedings resulting in their [expulsion] was made. The Board's findings of fact and determination were not adequately set out.
>
> Considering the length of their suspensions, the Court must conclude that these plaintiffs were [expelled] in violation of the constitutional guarantee of due process.

Anderson v. Seckels, No. 75-65-2 (S.D. Ia. 12/20/76) p. 8.

Following that case, the State Board established that in Iowa, minimum guarantees for students facing expulsion (suspensions longer than ten days) are as follows:

1. No removal from school prior to a hearing (except in emergency circumstances).

2. A written statement of the alleged misconduct, sufficient to prepare a defense to the charges.

3. Written notice of time, date and place of the hearing.

4. [Notification of the] right to be represented.

5. An opportunity for the student to be heard.

6. An opportunity [for the student] to examine documents and cross-examine witnesses.

7. A written decision outlining the facts upon which the decision is based.

8. A verbatim record of the hearing.

In re Monica Schnoor, 1 D.P.I. App. Dec. 136, 139 (1977).

In the ensuing fifteen years since Monica Schnoor was decided, the State Board has had many additional opportunities to modify those requirements. A review of cases suggests that only the final requirement, that a verbatim record of the hearing be made, is no longer deemed essential, at least for purposes of appeals to the State Board because our review of school board decisions is de novo ("anew"). In re Andrèa Talley, 1 D.P.I. App. Dec. 174, 176 (1978); In re Connie Berg et al., 4 D.P.I. App. Dec. 150, 167 (1986).

A review of the State Board's seven remaining due process requirements for a student expulsion hearing against the facts in this case leads to the clear conclusion that the District Board failed to provide Joseph Childs with due process in the following respects:

- Insufficient written notice. Neither Appellant nor Joe was advised of the charges against him, let alone given any details of what witnesses and evidence would be introduced.

- Insufficient opportunity for Joseph to be heard, through his legal representative, at the March 2 hearing.

- Absence of a written decision with findings of fact and conclusions as to the violations with which he was charged.

Having found these three procedural violations does not end our inquiry, however. Two steps remain in the analysis: first, whether the rehearing sufficiently compensated for or

eradicated the rights violations, Strickland v. Inlow, 485 F. 2d 186, 190 (8th Cir. 1973); In re Monica Schnoor, supra; In re Dwaine Kunde, 1 D.P.I. App. Dec. 251, 254 (1978); In re Scott Sadler, 2 D.P.I. App. Dec. 164, 166 (1980), and second, whether Joseph was prejudiced by any or all of the Board's failings. In re Dustin Stober, 7 D.o.E. App. Dec. 306 (1990); In re Eric Plough, 9 D.o.E. App. Dec. 234 (1992) (citing Jones v. Board of Trustees, Poscagoula Min. Sep. Sch. Dist., 542 So.2d 968, 972 (Miss. 1988)). Nor does the inquiry end regarding other due process rights, established by the courts since the State Board's 1977 decision, which may have been violated in this case; we will discuss those further below.

Was the insufficient notice cured by the second hearing? It was not. The Constitution, as interpreted by the judiciary, requires that Joe be notified of the charges against him in specific enough detail to enable him to prepare a defense. See, e.g., Stratton v. Wenona Comm. Unit Dist. No. 1, 141 Ill. Dec. 453, ___, 551 N.E. 2d 640, 648 (Ill. 1990)(citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).)

Neither Joe nor his parents were ever notified in writing of what rule of the District he was said to have violated or what conduct caused the recommendation. It even became necessary for the panel to ask the question at our hearing, which was the fourth hearing held in this matter,[4] what rule(s) the Board found Joe to have broken to justify the expulsion.

Clearly the notice of all three hearings was constitutionally flawed. However, to date no one has raised this issue nor complained of the sufficiency of the notice. Appellant, her husband, and counsel for Joe may be deemed to have waived any objection to the notice when they appeared at the hearings without raising the issue. This is not, apparently, a situation where Joe was expelled for an

[4]We were told that Joe was expelled because he violated rules prohibiting assaults on students and teachers. Board policies and administrative rules adopted by the District do include references to such assaults. See Appellant's Exhibit C ("Proactive Disciplinary Position K-12") at p. 3, items 4 and 5. However, as the other two student participants in the fight were not recommended for expulsion, it seems clear to us that Joe was singled out because he struck Ms. Mavis.

accumulation of offenses that he was not prepared to defend against. Joe and his mother knew what conduct he was accused of and that such conduct was in violation of school rules. We cannot see how Joe was prejudiced by the inadequate notice of hearing.

The second constitutional flaw in this case, the strict time limits imposed--without advance warning of what those limits would be--on Joe and his counsel at the first Board hearing were cured by the subsequent hearing held on April 13. Although time limits were again imposed on Joe's counsel, he was advised of the procedures and limits in a letter from Carol Anderson, counsel for the District. See Appellant's Exhibit F. Although we're not enamored of the idea of time limits for student hearings in cases where serious rights are at issue as they are in any expulsion case, we can justify the limitations imposed on the second Board hearing because it was, more or less, a continuation of the first hearing.

As to the third violation of the modified Schnoor criteria, we find that the failure of the Board to issue written findings and conclusions was an egregious act that was never cured and did prejudice Joe. As stated above, the hearing panel had to ask a witness at this hearing what Joe was actually expelled for. And as that witness was not a director, the panel is not convinced the Board even knew what it was expelling Joe for, except in general for the incident that occurred in the hallway of West High School on the morning of February 10.

While procedural due process violations may be cause for reversal, the remedy available to the aggrieved person is the ordering of the governmental body (school board in this case) to correct the deficiency. In essence, if the higher authority reverses the decision below, the District Board would be ordered to issue written findings and conclusions. Procedural due process violations are curable by doing that which was not done before. Anderson v. Seckels, supra. Thus, if we were to reverse on the ground that no findings and conclusions were ever issued to Joe, the Board could simply issue them at this point, which is little or no comfort to Joe.

It is now time to turn to the other allegations of error raised by Appellant in her affidavit of appeal, specifically the fact that the Board permitted members of the administration who "prosecuted" the case, and a witness (Ms. Mavis), to remain in executive session during its deliberations following the first hearing, but it did not allow Joe nor his parents or representative to remain as well.

The inclusion of non-board members in a closed session of the meeting does not nullify the action taken. The problem arises when witnesses, indeed even the nonintended "victim" of Joe's behavior, Ms. Mavis, are allowed to remain during deliberations. This casts doubt on whether the deliberations focused on only the evidence presented at hearing, or whether additional statements or evidence heard or received in the closed session influenced the directors. It was as inappropriate to allow the high school principal and Ms. Mavis to remain during deliberations of the school board as it would be for the prosecutor and victim to sit with the jury in a criminal trial while that panel deliberates.

Clearly counsel for the District recognized this and changed the procedure for the second hearing. The questions remain, however, whether the rehearing cured this problem and whether Joe was prejudiced by the error at the first hearing to a sufficient degree to justify reversal on this basis. The hearing panel collectively believe that the integrity of the board's deliberations and Joe's right to a decision based solely on the evidence at the hearing were violated by the inclusion of school officials (who had assumed the prosecutorial role) and witnesses in the deliberation process, and because this occurred at the first hearing when the initial decision was reached, it was prejudicial error that could not be cured by a subsequent hearing and deliberation. See In re Eric Plough, 9 D.o.E. App. Dec. 234 (1992); Rucker v. Colonial School Dist., 517 A.2d 703 (Del. Super. 1786).

As to Appellant's fourth allegation of error, that the Board President's frequent admonition to Joe and his attorney to be quiet interfered with Joe's ability to be represented adequately, we find no merit. If the president's urgings had seriously diminished Joe's ability to communicate with his attorney, it was incumbent upon the attorney to ask for a recess or a continuance.

Finally, Mrs. Lund raises the District's failure to notify her of her right to appeal to the State Board as reversible error. The State Board has previously determined that a school board is not required by statute or common law to give notice of the right to appeal to the state as this procedure is in the Iowa Code and all citizens are charged with knowledge of the law. In re Kam Schaefbauer, 9 D.o.E. App. Dec. 188, 193 (1992) ("This argument falls under the admonition that we are all charged with knowing our rights, and 'ignorance of the law is no excuse.' ")

While it may seem like overkill at this point to call attention to other errors committed by the District in the expulsion of Joe Childs, we do so for the purpose of educating this and other school districts in the proper procedures to be followed in expulsions.

As we stated earlier in this opinion, Goss v. Lopez, decided by the United States Supreme Court, and In re Monica Schnoor, decided by our State Board of Education, attempted to establish student due process rights for suspension and expulsion hearings in 1975 and 1977, respectively. Since that time our courts have heard literally hundreds if not thousands of factual situations involving suspensions and expulsions of students and have refined the rights of students beyond the rudiments laid down in Goss.[5]

We will attempt herein to summarize the elements of due process for students facing expulsion.

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,

[5]Goss established that minimal procedures were due a student facing short term suspensions of under ten days, and that more process is due for students facing longer term suspensions or expulsions. This has come to mean that if a student is excluded from school, denied an education, for more than ten school days, s/he has a right to a hearing before the board.

c. a summary of the charges against the student written with "sufficient specificity " to enable the student to prepare a defense,[6]

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.

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.[7]

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.

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[6]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.

[7]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.

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.

We have already concluded that the expulsion of Joe Childs was flawed by the insufficient written notice of the board hearing and an insufficient opportunity to be heard at the hearing, and that these flaws were either not prejudicial or were cured by the subsequent rehearing. We have also concluded that the Board's failure to issue written findings and conclusions was error but that the remedy for this error is the issuance of those findings and conclusions, approved by the Board.

The expulsion was, however, fatally flawed and constitutionally tainted by the presence of witnesses and advocates during the Board's deliberation process, and this was not and could not be cured by subsequent rehearings. Finally, we conclude that the suspension of Joe Childs for more than ten school days without a board hearing[8] violated his right to due process of law under Goss and its progeny.

Appellant has also asked us to look at the penalty of expulsion as a violation of Joe's right to substantive due process in this case. Substantive--as opposed to procedural --due process encompasses the notion of "fundamental fairness," that the penalty must "fit the crime." Joe and his parents urge us to find that Joe should not have been expelled for coming to the defense of his friend Kevin ("defense of others" is a legal excuse for assault) nor for accidentally striking Ms. Mavis (assault by definition involves ill intent).

Although the State Board has been asked to consider substantive due process violations on many occasions, only once in recent memory has it reversed on that ground. See In re Korene Merk, 5 D.o.E. App. Dec. 270 (1987)(two truancies and a smoking violation resulting in expulsion of an at-risk student violated her right to substantive due process). It is not enough to say this panel would not have

[8]Joe's suspension initially ran from February 11 to February 24; it was then "continued" until March 2, the first Board hearing. This is a total of 15 school days.

expelled Joe Childs under the circumstances. Instead we must remind ourselves in these situations that we are not a school board. Our purpose on appeal is limited to a review of the local directors' action to determine if the decision was made arbitrarily or capriciously, was without basis in law or fact, was beyond the authority of the board, was unlawful, or constituted an abuse of discretion. In re Jerry Eaton et. al., 7 D.o.E. App. Dec. 137, 141 (1989); In re Carl Raper, 7 D.o.E. App. Dec. 353, 355 (1989).

While we may not have reached the same decision as a majority of the Board in this case, that is, to expel Joe Childs, we cannot conclude that the decision to expel him for his behavior on February 10 was so arbitrary and capricious or without basis in fact to shock our collective conscience. Accord In re Douglas W. Williams, 2 D.P.I. App. Dec. 42, 45 (1979) ("As much as we empathize with Doug's position, we cannot bring ourselves to sufficiently support that position to overturn the District Board's decision to expel him" for multiple minor offenses); In re Carl Raper, 7 D.o.E. App. Dec. 352 (1989) (In a case remarkably similar in facts to the instant appeal, the hearing panel and State Board reluctantly affirmed the expulsion of a student who became involved in an altercation with another student then struck a teacher who tried to break up the fight); In re Starla Roach, 8 D.o.E. App. Dec. 169, 172 (1991) ("In this case, as much as we may personally disagree with the result, we cannot conclude as a matter of law that the Board's action was unreasonable" when student was expelled for composing a "death threat" note to the school librarian on her computer in typing class); In re Eric Plough, 9 D.o.E. App. Dec. 234 (1992) (Expulsion of student, whose father has recently died, for "possessing" LSD for a few minutes before deciding to throw it away, upheld.)

In our view, Joe was probably going to be suspended for ten days, as were Kevin and Mike, until the principal learned that Joe had struck a teacher. Frankly, at our hearing, Mr. Rettko's testimony and demeanor painted a picture of a man who was overly zealous in his pursuit of Joe Childs' expulsion. The panel got the impression that he and the school police liaison officer, neither of whom was present for the fracas in the hallway, overreacted to Joe's striking of Ms. Mavis. It was as if they saw red when they learned that a teacher had been injured while breaking up a student fight. Ms. Mavis has been consistent all along in her belief that Joe did not intentionally hit her.[9] Nevertheless,

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[9]See Appellant's Exhibit B at p.5; Appellant's Exhibit E at pp.2, 4.

Mr. Rettko was determined that Joe be recommended for expulsion. Considering the fact that neither Mike Killian nor Kevin Hamma was recommended for expulsion, we can only conclude Joe's treatment was different because he struck a teacher. Apparently intent to injure is not important to the administration where a teacher or other school employee is affected. Nevertheless, we cannot say as a matter of law that Joe shouldn't have been expelled for his behavior on February 20.

We have already concluded that the Board erred in two constitutional respects that do justify reversal. Unfortunately, by the time we heard this case at the end of May, Joe had already served almost all of his penalty. While this decision confirms Joe's and Appellant's belief that he was denied due process of law in some respects, our reversal does little to undo the damage that was done when he lost all credits for second semester. The only consolation, if there is one, for Joe is that the administration and Board are now advised of the proper procedures to follow--and to avoid--in an expulsion case and that Joe's record must be expunged of references to his expulsion. We trust Joe returned to school this fall and is successful.

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

III.
DECISION

The decision of the Davenport Community School District board of directors made on March 2 and affirmed on April 13 to expel Joe Childs is hereby recommended for reversal on procedural due process grounds: the inclusion of administrators and Ms. Mavis in the deliberation portion of the March 2 hearing violated Joe Childs' right to a decision made solely on the basis of the evidence introduced at the hearing and his right to a decision by a fair and impartial decision making body.[10]

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[10]We also conclude that the exclusion of Joe Childs from school for 15 days (February 11 through March 2) without a hearing before the School Board violated his due process rights under Goss as well. Moreover, once the Board determined to grant a rehearing, Joe's status as expelled or not expelled should have been articulated. Was the Board rescinding its prior decision? What was the effect of the rehearing if not to withdraw the previous decision because of improper procedure?

The Davenport school board is hereby ordered to remove any reference to Joe's expulsion from his permanent record. We see no need, in light of the reversal, for the Board to issue findings and conclusions regarding its March and April expulsion decisions.

There are no costs of the appeal to be assigned under Iowa Code section 290.5.

January 4, 1993
DATE

Kathy L. Collins
KATHY L. COLLINS, J.D.
ADMINISTRATIVE LAW JUDGE

It is so ordered.

January 14, 1993
DATE

Ron Mc Gauvran
RON MC GAUVRAN, PRESIDENT
STATE BOARD OF EDUCATION