

IOWA STATE BOARD
OF EDUCATION
(Cite as 9 D.o.E. App. Dec. 80)

In re Troy Wallis and
Richard Kaufman

Troy Wallis and Richard Kaufman,
Appellants,

v.

Malvern Community School District,
Appellee.

DECISION

[Admin. Doc. #3128]

The above-captioned matter was heard on August 19, 1991, before a hearing panel comprising Stan Kerr and Jim Tyson, consultants, Bureau of School Administration and Accreditation; and Kathy L. Collins, legal consultant and designated administrative law judge. Appellants were present in person and were represented by Ms. Marti Nerenstone of Legal Services Corp. of Iowa. Appellee Malvern Community School District [hereafter the District] was present in the persons of Superintendent Allan Whitlatch and high school Principal Robert Hinrichs, and was represented by Mr. Robert Laubenthal and Ms. Sue Ellen Overton of Smith, Peterson, Beckman & Willson, Council Bluffs.

An evidentiary hearing was held pursuant to departmental regulations found at 281 Iowa Administrative Code 6. Appellants timely appealed a May 13 decision of the board of directors [hereafter the Board] of the District to remove them from and deny all credit in classes in which each had a total of 11 or more absences during second semester [1991]. The Board's decision resulted in the senior boys not graduating from the District in May. Jurisdiction for the appeal is found at Iowa Code chapter 290.

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.

A. Richard Kaufman

Richard (Rick) Kaufman was a senior at Malvern High School in the 1990-91 school year and scheduled to graduate on May 26. He was active and excelled in football and at the time of this hearing had been conditionally accepted at William Penn College for the 1991-92 school year. Rick had a 2.58 grade point average (GPA) going into his senior year. He also had an abysmal attendance record.

Rick's mother works and his father is disabled, suffering from a bad back, diabetes and complications from that disease. Mr. Kaufman had been employed as a railroad worker but took up garage mechanics as a part-time vocation. Rick was on work release second semester from seventh and eighth hour classes to help his father. The family received social services benefits, one of which was dental care. Rick would turn 18 on

April 13 and cease to be covered by social services at that time, so he scheduled his dental work to be performed in the spring. Extensive work was done on his teeth and jawbone, which accounted for a large number of his absences second semester.¹ As he was placed under sedation at each visit, he could not drive home. His best friend and co-Appellant in these proceedings, Troy Wallis, often drove him to and from the dentist's office in Glenwood, 12 miles from Malvern. The school was advised of Rick's dental appointments by Mrs. Kaufman, and his frequently swollen jaw made it apparent he was undergoing oral surgery and treatment.

Rick's attendance records show 15 full days of absence between January 14 and May 7, 6 half-days of absence, and 12 tardies.² Appellants' Exhibit H (computer print-out). Handwritten notations on the same exhibit reflect "English = 20 absences, 9 tardies; Economics = 18 absences; Physics = 17 absences, 4 tardies. All classes about 18 days." Id. Second semester grade reports nevertheless indicated that he had a B as of April 29 in advanced math and an A as of May 1 in advanced chemistry. Appellants' Exhibit I. He may not have been passing in economics, but believes he would have passed all other classes had he not been expelled on May 13. Rick needed 2.2 credits, including required English, to receive the 40 credits he had to have to graduate; if he passed all of his other courses he would graduate with 41 credits. (Mr. Hinrichs, the principal, testified that Rick did need to pass economics to complete social studies credits.)

On April 11, 1991, Mr. Robert Hinrichs, high school principal, sent a letter to Mr. and Mrs. Kaufman indicating that Rick had accumulated 16 absences and 10 tardies.³ "School policy provides for withdrawal of credit for any course missed in excess of 11 days." Appellants' Exhibit J. The letter served as a warning that any more absences would endanger his credit and graduation. Id. Nevertheless, Rick was again absent all day on April 15, he was tardy after lunch on April 19, and missed all day on May 7.

At 3 a.m. on May 7, Rick drove his mother and father to Iowa City hospitals responding to an emergency situation for his father's health. He failed to take a note from his mother to school the next day, May 8.

That day Mr. Hinrichs sent home a registered letter to the Kaufman's. It stated in general that Rick had failed to heed the April 12 warning and that Mr. Hinrichs would be "convening a conference . . . at 10 a.m. May 13 to give Rick an opportunity to show cause why he should not be removed from those classes in which he has an excess of 11 absences." Appellants' Exhibit F. The letter went on, "Should my decision at that hearing be for removal, Rick will be allowed to attend those classes until the Board of Education has had an opportunity to rule on a recommendation for removal."

¹ Appellant's mother had obtained an affidavit from his dentist showing the dates of his dental appointments, but could not find it on the date of our hearing.

² Rick testified his car is not in good condition and is unreliable as transportation. His father often cannot drive and his mother leaves for work at 5:30 a.m.

³ We received no explanation as to the inconsistencies in Rick's attendance records.

Id. The letter requested the Kaufman's appearance at the conference and concluded, "Should you and Rick decide not to appear for the conference, the matter will be placed before the Board of Education at their regular meeting that same day." Id. Mrs. Kaufman picked up the certified letter at the post office on Saturday, May 11.

Mrs. Kaufman accompanied Rick to the 10 a.m. conference on Monday, May 13. Both Rick and Mrs. Kaufman testified that the conference began with Mr. Hinrichs' announcement that he had already made up his mind that he would recommend removal and loss of credit from Rick's classes in his presentation to the superintendent and Board. Mr. Hinrichs then heard Mrs. Kaufman's explanation as to why Rick had been absent on May 7, and the principal excused himself to discuss the situation with Superintendent Whitlatch. Upon his return, Mr. Hinrichs announced that the May 7 absence would be considered "a gray area." He then went on to discuss Rick's attitude toward authority and recounted an incident between Rick and a teacher on May 8. He indicated he would be assigning a three day out-of-school suspension for Rick, which would count as three absences and put him over the limit anyway. Rick reminded Mr. Hinrichs that he had never been suspended before, and the usual procedure was in-school suspension (ISS) for a first offense. Mr. Hinrichs agreed to "alter the punishment based on precedent" and reduced the penalty to two days of ISS. However, he then returned the discussion to the absence on April 15, the tardy on April 19, and projected "absences" for his two-day in-school suspension and again concluded that his recommendation would be that the Board remove him from all classes in which he had more than 11 absences. He told them the Board was meeting that night at 8. In actuality, the item was already on the agenda for the Board meeting.

B. Troy Wallis

Troy Wallis was also a senior at Malvern in the spring of 1991. He held a 3.04 GPA, ranked in the top half of his class, and was a member of National Honor Society. He and Rick Kaufman are best friends and rode to school together. Troy also had a very poor attendance record his senior year. His computer printout shows that between January 18 and May 7, Troy missed 12 full days, 4 half-days, and was tardy 17 times. Appellants' Exhibit 3 at pp. 1-2. Attached to the printout is a typed recital of his attendance in individual classes: world geography = 20 absences and 9 tardies, advanced math = 17 1/2 absences, economics = 13 absences, physics = 16 absences, 2 tardies, and world literature = 22 absences. Also, "Absences include school suspensions." is noted on this typed page. Id. at p. 3. About half of Troy's absences in the spring correspond to Rick's absences, lending credence to their testimony that Troy often took off from school to drive Rick to the dentist.

Troy's absences, he testified, were due to illness, driving Rick to his dental appointments, and suspensions (both ISS and out-of-school). His tardies were due in part to oversleeping on some occasions, but mainly due to Rick's unreliable car. His disciplinary suspensions stemmed primarily from a stubborn disregard of the rule limiting the number of students who can sign out of study hall to the library. Troy insisted he couldn't read or get any work done in the noisy study hall, so he would go to the library -- not cut the study hall -- even though he was often not one of the first three students to request library privileges.

Troy had had several clashes with administration, one involving Mr. Hinrichs' decision that Troy would not be allowed to make up any work missed due to out-of-school suspensions (OSS). Troy wrote a five-page

letter to the superintendent complaining that other students given OSS had been allowed to make up their work, and he wanted equal treatment.

Troy was taking world geography, advanced math, economics, physics, and world literature second semester. He needed only his English credit (world literature) to graduate. Like Rick, he didn't think he would pass economics, but Troy apparently didn't need it to graduate.

Troy's parents also received a letter from Mr. Hinrichs dated April 12 recounting Troy's 11 days of absence and 16 tardies. Appellants' Exhibit E. The letter served as a "final warning" of the potential loss of credit and diploma if he had further absences or tardies. Id.

Troy was marked "absent" on three more occasions after April 12: he was in ISS⁴ on April 25 and 26 and home on May 7, the same date Rick was absent due to driving his father to Iowa City. The two-day suspension punishment was assessed for Troy's failure to serve assigned detentions due to "going to the library without permission" and signing out at "1:35" when he really left at 10:35 to go home on April 23. He did return to school that day.

Mr. Hinrichs then notified Mr. and Mrs. Wallis by registered letter that Troy had failed to heed the warning contained in the April 12 letter, and as a result, Mr. Hinrichs was holding a conference at 9 a.m. on Monday, May 13, for Troy to show cause why he should not be removed from all classes in which he had more than 11 absences. Appellants' Exhibit 4. This letter also warned that if Troy and his parents failed to appear at the conference, the matter would be placed before the Board Monday night.

Troy met with Mr. Hinrichs at 9:00. Troy, too, was told by Mr. Hinrichs that he had made up his mind to recommend loss of credit for Troy's classes. When Troy protested that this was supposed to be an opportunity for him to "show cause," Mr. Hinrichs allegedly told him to tell it to the Board as it was already on the agenda.

Mrs. Wallis also testified that she and her husband separated at about the time all of this started in April. She related that on May 7 she left home early to accompany her younger son and his class on a field trip to Living History Farms. She did not know that Troy was ill, but he was home when she arrived home that afternoon. She wrote a note excusing his absence for that day and left it on the table. Apparently he didn't take it to school. (Troy testified he didn't believe notes were required if he had his parent's approval for the absence, and that he had never taken a note before nor was he ever asked for one.) When one of the District's witnesses stated that on May 7 the school called the Wallis home and received no answer, she explained that Troy's room is in the basement and they only have one telephone, a "poor quality \$10 phone, that can only be heard if you're in the same room."

Mrs. Wallis also recounted a number of very unpleasant conversations with school officials this year. She said she had never had notice of

⁴ Troy testified he served in-school suspension on those days. However, Appellant's Exhibit 26, a letter to the Wallises from Mr. Henrichs, stated that he was suspending him out-of-school.

any trouble at school with her children until this year, and she had left the building in tears a few times because school officials had treated her with a lack of respect. She was particularly incensed over Troy's suspensions for reading magazines in the library, thought it was ridiculous to punish him for that, and told this to Mr. Hinrichs early in the semester. She said she was certain Mr. Wallis had been in contact with school officials as well, but as she and he were in a strained relationship she wasn't aware of what was said.

C. The Board Hearing

Troy and Mr. and Mrs. Wallis and Rick and Mrs. Kaufman attended the closed hearing. The Board allowed Troy to speak, but not his father.⁵ The Board allowed both Rick and Mrs. Kaufman to speak. The Board was given packets of material by the administration related to the boys' attendance and possibly disciplinary histories. They showed these to Appellants and their parents but did not provide copies to Appellants nor allow them to question the accuracy of the records. Principal Hinrichs called one witness whom the Appellants state they were not permitted to question. That statement is refuted by the District.⁶ After approximately 85 minutes, the Board went back into open session and voted 4-0 twice to approve the administration's recommendation to remove Rick and Troy from all classes in which each had a total of 11 or more absences. Another senior student lost credit in one class on the same basis following a separate vote on her situation as well. At the time of our hearing three months later, neither of Appellants had received any written notification of the Board's findings, reasoning, or conclusions. The hearing was taped, but the District did not provide Appellants with a copy of the tape.⁷

During the hearing, prior to the vote, Board President Lee Dinklage testified that the Board discussed with Appellants the Board's willingness to do everything in their power to see that the boys graduated with a diploma from the District, but the boys were expected to come up with their own plan. Appellants were denied the opportunity to go through the graduation ceremonies, even if they didn't receive a diploma. They had, of course, had senior pictures taken, caps and gowns ordered, invitations sent out, and family members coming in for the graduation.

D. Post-Hearing Activity

After the May 13 Board hearing, Appellants retained legal counsel and obtained a temporary injunction allowing them back in school; the Board's May 13 action had not only cost them their credits but also the right to

⁵ This fact was not explained at our hearing.

⁶ The witness was apparently a teacher with whom Rick had had a confrontation. There is no evidence that his testimony related to absenteeism in any way.

⁷ Iowa law requires a governmental body to tape closed sessions of Board meetings, and also provides that the tape is not to be made available except in limited circumstances when an action is brought alleging a violation of the Iowa Open Meetings law. Iowa Code §21.5(4)(1991). Appellants would have been able to tape it for themselves, presumably, but they did not do so.

attend school. The injunction was effective on May 20 and part of the day on May 21, at which time the District was able to convince the court to dissolve the injunction. During that time Rick was able to complete most or all of his coursework in literature and advanced math, except for his final exams. Troy still had to write a semester essay and take his final in English in order to graduate, but he was not able to complete that when the injunction was dissolved. Semester exams were held May 23 and 24.

Mr. Hinrichs had made arrangements with a guidance counselor to contact Rick and Troy to see if anything could be done through correspondence or otherwise to get the boys their credits. He testified that the District would have provided any required supervision for tests to complete a correspondence course. Mrs. Gadberry, the counselor, contacted Kirkwood Community College who agreed to accept the boys for correspondence courses. However, the boys did not take the courses. Rick was unable to work for two weeks in June or July and his family did not have the more than \$200 for tuition. He also couldn't find a job in June and went to spring training at William Penn, which undoubtedly kept him from working. Troy, who only needed to complete English, did not take any correspondence work either.

At some point after the injunction was issued on May 20 allowing the boys back in school, allowing them to do their work for credit and go through the graduation ceremony, the third senior student who had lost credit in one class at the same Board meeting was informed that she could go through the ceremony. This was apparently an attempt on the part of the District to treat her the same as the boys, although she had not joined with Appellants in their quest for legal relief. Thereafter the injunction was dissolved and the boys were once again not allowed to participate in graduation, but the young lady continued to be permitted to participate. She was not awarded a diploma at that time, but she was permitted to make up her work in the one class for which the Board removed her credit.

The District explained that the difference between the young lady's situation and Appellants' was that the teacher of the course in which she lost credit came to the administration, apparently feeling bad that her course would keep the girl from graduating, and indicated a willingness to work with the young woman after school was out. No teachers made a similar request on behalf of the boys. In fact, sixteen teachers signed an open letter "to the Board and Concerned Parents" expressing a belief that "the school has pursued every option for these students and that we have exhausted every possibility before this board hearing. It is also our belief that these cases have come this far because of choices made by the students." Appellee's Exhibit B at p. 3.

The minutes of the June 3 Board meeting confirm the fact that the young woman had been allowed to make up the work and get a diploma. Appellants' Exhibit 14 at p. 1. The same minutes show that requests by Appellants were approved for the correspondence coursework. *Id.* at p. 2. However, Mrs. Wallis' verbal requests for the same treatment for Troy as that given to the young lady (finish the coursework with the regular teachers) was denied.

E. The Policy

Robert Hinrichs took over the principalship of the District high school on August 1, 1990. Prior to that the Board had authorized

significant changes to the student handbook, which contained the rules and regulations for student conduct, but those changes had not been implemented. The principal and superintendent developed the attendance policy which was adapted from the Harmony district. The final copy of the handbook went to print in December, 1990, toward the end of the first semester. Although Mr. Hinrichs met with the student body at the beginning of the school year to go over the rules and regulations, he did not fully enforce them first semester, particularly the attendance policy, because the rules weren't available to the students in writing.

The attendance policy at issue in this case reads as follows, in pertinent part:

1. Parents are requested to phone the school by 8:15 a.m., when the student is absent. The school may call the home to verify the absence.
2. Any student missing more than three days, must, on their fourth absence and every absence thereafter, present a note to the Principal's office from their parent or guardian stating the reason for their absence.
3. Please be aware that a note from home stating the reason for the absence, does NOT guarantee that the absence will be considered an excused absence.
4. After six absences in a semester from any class, a Student Absence Report will be completed and mailed to the parents, or the parents will be contacted personally by phone.
5. Parents will be notified by mail when the student has eight absences, and informed that the student is close to the limit of absences allowed.
6. When the student has missed a class period 10 times in a semester, a conference must be held between the student, the teacher, the principal, and if possible the parent or guardian of the student. The conference will be the basis for deciding whether:
 - a. An extension of the number of days that may be missed will be granted,
 - OR
 - b. If no extension is granted, upon the 11th absence, the principal and the superintendent will jointly prepare a recommendation to the school board that the student be expelled or that other disciplinary action be taken.

The board will hear the recommendation at the next regular or special meeting. A date for the formal hearing will be set. The hearing shall be no later than five days after the board hears the initial recommendation. Between the 11th absence and the formal hearing, the student shall be allowed to continue attending classes.

Appellants' Exhibit 1 at pp. 5-6 (emphasis in original). The rules also state that school-sponsored activities off school grounds will not count in the total, that three tardies equal one absence, and that make up work is allowed for all absences except truancies and OSS "absences." Id. Mr. Hinrichs testified that the rules do not really distinguish between excused and unexcused absences, at least not until an appeal or a request for an extension is filed.

F. Miscellaneous

Board President Dinklage testified that he had had multiple conversation with Mr. Wallis, Troy's father, including a statement allegedly made by Mr. Wallis to the effect that Troy overslept on May 7, and that his father had criticized him saying if he would have just gone to school that day, even late, he would not have lost his credits. Mr. Wallis did not attend our hearing to confirm or deny this statement.

Appellants observed Mr. Hinrichs talking to Board President Dinklage at school on May 13, which goes to their concern for ex parte communications, discussed infra.

II. Conclusions of Law

Appellants raise a number of errors in their appeal, most of which relate to alleged due process violations. The first area of contention is whether the Board's action in this case constituted an expulsion. The District does not characterize the Board's action as expulsion; however, they do not offer an alternative term.⁸ The Code of Iowa does not define the term, but the State Board has previously stated that expulsion is long-term suspension from school attendance privileges resulting in loss of credit for the period of expulsion. See e.g., In re Richard Crawford, 2 D.P.I. App. Dec. 176, 179 (1980) and cases cited therein; In re Korene Merk, 5 D.o.E. App. Dec. 270, 276 (1987).

The law does provide that the school board makes the rules, Iowa Code §279.8, and that only the school board can expel students. Id. at 282.4.

Pure misconduct is the usual basis for expulsion. The fact that the action taken here was based on absenteeism rather than misconduct per se may be the reason the District does not see the Board's action as an expulsion. The question is not so much what to call it, but what the result is. The result looks exactly like an expulsion: no right to attend school (albeit had they had some classes in which they were not denied credit, they could have gone to those, presumably)⁹ and a loss of credit.

The distinction between expulsion and some other type of disciplinary action is important from the standpoint of due process. The Supreme

⁸ In its Brief the District uses the term expulsion to explain Board action. (See e.g., Appellee's Brief, Kaufman, at p. 4).

⁹ In fact, Mr. Hinrichs testified that the boys did not lose their credits for physical education. No evidence was presented as to whether these seniors continued to attend p.e. classes, or even whether they would have been allowed to.

Court's seminal decision on student due process rights, Goss v. Lopez, establishes a constitutional difference between what process (procedural guarantee) is due students facing temporary suspensions of under ten days and students facing longer term deprivations. Goss v. Lopez, 419 U.S. 565 (1975).

A short suspension is, of course, a far milder deprivation than expulsion. But, "education is perhaps the most important function of state and local governments," Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954), and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for ten days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

. . .
Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.

Goss v. Lopez, 419 U.S. 565, at 579, 585 (1975)

However, the Iowa State Board of Education has ruled on the amount and type of process due a student facing an expulsion. There are eight separate general rights that must be afforded a student at a school board hearing:

- (1) No removal of the student prior to the board meeting except in emergencies;
- (2) A written statement of the factual basis of the allegations against the student in sufficient specificity to afford the student an adequate opportunity to defend against the accusations;
- (3) Written notice of the time, date and place of the hearing sufficiently in advance of the hearing to prepare a defense;
- (4) A statement that the student has the right to be represented (by counsel or the person of the student's choice);
- (5) An opportunity to be heard;
- (6) An opportunity to examine documents and cross examine witnesses giving testimony against the student;
- (7) A written summary of the board's conclusions and the basis or rationale for the board's decision;
- (8) The right to a verbatim record of the hearing.

In re Monica Schnoor, 1 D.P.I. App. Dec. 136, 139 (1977). See also In re Richard Crawford, 2 D.P.I. App. Dec. 176, 179-80 (1980); In re Jeff Smith, 3 D.P.I. App. Dec. 126, 128 (1983).

Did the Board afford Rick and Troy adequate protection from an unconstitutional deprivation to their rights of liberty and property in this case? The question is easily answered: No.

The administration failed to provide the necessary due process in this case in the following respects:

1. **Inadequate notice of the hearing.** The boys and their parents were afforded approximately 10 hours to prepare for the Board meeting. This is completely unreasonable. Even if we view the May 8 registered letter as notice of the hearing (which we do not) the period from Friday when one opens one's mail (or Saturday in Mrs. Kaufman's case, as that was her first opportunity to sign for and receive the registered letter) until Monday evening is inadequate.

2. **Failure to advise Appellants and their parents of their right to representation.** Given time, Appellants did contact and retain legal counsel. Had they known they could have had an attorney present for the hearing, it seems logical to conclude they would have done so.

3. **Insufficient opportunity to examine documents and cross-examine witnesses against the boys.** Passing the boys and their parents a copy of the packet of materials the Board members had, but not providing them with their own copies -- thus enabling them to look at but not carefully examine the documents -- is unfair on its face. Moreover, the modified notice they did receive, in the May 8 registered letter, made no mention of any misconduct aside from absenteeism. Thus, any reference at the Board hearing to either boy's disciplinary history was grossly unfair as Appellants did not even know it was at issue.

4. **No written findings and conclusions.** The fact that they were present to hear the Board's deliberations and vote does not negate Appellants' need to know and have in writing the basis of the Board's decision and the rationale for it.

As to Schnoor right number eight, we excuse the Board from not providing the Appellants and their parents with a copy of the tape of the closed session due to the enactment of Iowa Code §21.5(3) in 1977 after the Schnoor decision. For this reason we modify our previous number eight which recognized a student's right to a verbatim transcript of the proceedings. Until such time as the Iowa Supreme Court interprets subsection 21.5(3) to the effect that others present in a closed board hearing may tape the proceedings in addition to the taping required to be made by the governmental body, we withdraw it as a "right" of students facing expulsion. See generally Dillon v. City of Davenport, 366 N.W.2d 918 (Iowa 1985).

Having found substantial due process violations in the Board's hearing process, the next question is what relief should be afforded Appellants to rectify the errors. We certainly cannot order the Board to issue diplomas

to Troy and Rick; assignments were not completed and finals remain untaken. Fashioning a remedy in this case, nearly five months after the expulsion, is difficult. In general, procedural due process violations are remedied by repeating the process but correcting the errors. (Substantive due process violations, on the other hand, justify outright reversal. In re Korene Merk, 5 D.o.E. App. Dec. 270 (1987).)

As there is no adequate way to redress the Appellants' loss of the opportunity to experience the once-in-a-lifetime event of high school graduation, and as the 1991-92 school year has begun, we offer the following relief:

1. The District is required to rehear the case, correcting previous errors.
2. If the decision is still to deny credit to Appellants in the classes in which they had excessive absences, the Appellants may re-appeal to the State Board of Education.
3. If the decision is to grant credit contingent upon completion of their coursework, Appellants shall be given the opportunity to complete the same work they were denied in May rather than retaking the full course(s) through correspondence.
4. In the alternative, the parties are free to reach an agreement on their own as to the resolution of this case, submitting a copy of it to the State Board.

In terms of guidance, it is appropriate to comment on the attendance policy at issue in this case. The attendance procedures seem reasonable to the panel.¹⁰ However, the administration would be well advised to follow them, including the Handbook's guarantee of providing parental notification after six and eight absences, and conferencing after ten absences.

The policy itself needs to be reexamined in light of State Board precedent. For several years, we have been called upon to address the question of attendance policies that do not take into consideration valid absences when establishing a limit, after which credit is lost. Recently

¹⁰ We have one concern about the statement that the "date for the formal hearing . . . shall be no later than five days after the board hears the initial recommendation." Appellants' Exhibit 1 at p. 6 (attendance policy, last paragraph under #6). The potential import of this statement is to rush the hearing, perhaps not giving adequate time to the students to retain counsel or other representation or to prepare a defense. Of course, a board need not delay a hearing indefinitely, either, just because the student claims not to be ready. Somewhere between three full working days and two weeks strikes us a reasonable amount of advance notice to prepare for an expulsion hearing. Those timelines could always be waived if the parent or guardian wishes to proceed sooner, but they should be advised that they have a reasonable time to prepare.

the State Board overturned a similar policy, holding: "No attendance rule which denies credit to a student for excessive absences will be upheld unless the absences are for unexcused reasons or truancy." In re Lorne Segerstrom, 9 D.o.E. App. Dec. 38, 44 (1991). In so holding, the State Board merely affirmed its own precedent dating back 13 years. See In re Sandra Mitchell, 1 D.P.I. App. Dec. 201 (1978). We ask that the District officials and Board in this case give serious consideration to the Mitchell and Segerstrom cases in reaching a decision on Appellants' rehearing. We also ask them to consider whether a student is "absent" when he or she is taken out of classes (to ISS) or school (OSS) at the command of school officials.

The panel was also disappointed in the District for its decision to create a new attendance policy (and presumably other policies as well) without adequate community representation or input in the development of those policies. The school accreditation standards require that policies be adopted after receiving input from parents, students, faculty and staff, and community members in addition to board members and administration. 281 IAC 12.3(8). One hearing panelist found it "inexcusable" that the handbook was not ready for publication until December. Under the circumstances (apparently the previous principal left over the summer; Mr. Hinrichs was hired to start on August 1), it might have been wiser to have lived with the old policies and rules one more school year. At a minimum, administrators and the attendance staff should be extremely familiar with the policy and rules and apply them as written. (It's noteworthy that Rick and his family were not formally advised of his attendance problems until he had a combined total of 22 absences. Also, Troy Wallis testified he was not required to produce a note all year despite the rule requiring parental notes beginning with the fourth absence.)

Appellants also raised an objection to what they perceived to be communications between Board members and administration prior to the hearing. They cite In re Richard Crawford as support for the proposition that such conduct also violates their due process right to a fair hearing before an impartial decision maker. The Crawford case is similar in several respects to the facts of this case, but the nature and timing of the ex parte meetings between the board and administration in that case were different. First, we have no knowledge or evidence as to the topic of discussion between the Board president and Mr. Hinrichs; all we know is that the boys saw Mr. Dinkluge talking to Mr. Hinrichs on May 13. Second, in Crawford the Board's expulsion hearing began and ended without allowing the students and their parents to be a part of it. In re Richard Crawford, 2 D.P.I. App. Dec. 176, 178-79. This situation, speculative as it is, is a far cry from the exclusionary methods used by the school board in Crawford. Moreover, the State Board has already refused to hold that administration is prohibited from communicating with the Board members or officers prior to the hearing for the purpose of providing background material or information prior to the hearing. In re Bryan Campbell and Craig McClure, 9 D.o.E. App. Dec. 69, 78 (1991).

Two other issues merit comment in this case. First, Mr. Hinrichs' statements on the morning of May 13 to the effect that his mind was made up certainly belie his letter inviting or commanding the two boys to appear and "show cause" why they shouldn't lose credit for excessive absences. In their brief, Appellants ask us to find this action to be a violation of even minimal due process of the kind discussed by the U.S.

Supreme Court in Goss v. Lopez. Actually, the hearing did not result in a suspension or other deprivation of the students' rights, so technically no process was due Troy and Rick. It was in essence an informational conference. However, we do agree with Appellants in principle: Mr. Hinrichs' attitude and words did not create an aura of fairness or even open inquiry. In his defense, Mr. Hinrichs did change his mind about the effect of Richard's May 7 absence after hearing the reason for it.

Finally, we are also concerned about the differing treatment afforded the young lady whose single credit was denied by the Board the same evening as Rick and Troy lost theirs. The fact that she was allowed to go through the ceremony, albeit without receiving her diploma, coupled with the fact that she was later allowed to complete her course rather than starting over by correspondence doesn't strike us as justified and does create the impression, as Appellants suggested at hearing, that who the student is and how popular he or she is with the faculty (and perhaps whether the student seeks legal or judicial intervention or not) determines the treatment he or she is afforded by staff, administration, and the Board. While there may indeed be some circumstances that would justify the different treatment she received from that Appellants received, we did not hear them.

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

III.
Decision

For the foregoing reasons, the decision made by the Malvern Community School District on May 13, 1991, to remove Troy Wallis and Rick Kaufman from their classes with loss of credit in those classes due to excessive absences is hereby vacated. Their cases are remanded to the Malvern board of directors with instructions to rehear the cases affording due process to the students, and in reaching a decision on the denial of credit, to consider State Board precedent on attendance policies. Costs of this appeal under Iowa Code section 290.4 are hereby assigned to Appellee.¹¹ It is so ordered.

10-11-91


DATE



RON MCGAUVRAN, PRESIDENT
STATE BOARD OF EDUCATION

October 11, 1991

DATE



KATHY L. COLLINS, J.D.
LEGAL CONSULTANT
AND ADMINISTRATIVE LAW JUDGE

¹¹ In their brief, Appellants sought immediate credit for their classes, an award of their diplomas, a public apology from the District, attorney fees, costs and damages. We award only costs. We are powerless to award monetary damages. Iowa Code §290.6. We are disinclined to grant the other relief sought except, as stated above, for "costs" as anticipated in section 290.4.