

IOWA STATE BOARD  
OF EDUCATION  
(Cite as 8 D.o.E. App. Dec. 37)

In re Eugene Whisenand	:	
Catherine Schultz,	:	
Appellant,	:	
v.	:	DECISION
Brooklyn-Guernsey-Malcom	:	
Community School District,	:	
<u>Appellee.</u>	:	[Admin. Doc. #3028]

The above-captioned matter was heard on July 16, 1990, by a hearing panel comprising David H. Bechtel, special assistant to the director and designated presiding officer; Mary Jo Bruett, referral specialist, Bureau of Planning, Research and Evaluation; and Jim Tyson, consultant, Bureau of School Administration and Accreditation. Appellant was present in person, unrepresented by counsel. Appellee Brooklyn-Guernsey-Malcom Community School District [hereafter B-G-M or the District] was present in the person of Superintendent Craig Cochran, also unrepresented by counsel.

An evidentiary hearing was held pursuant to departmental rules and procedures found at 281 IAC 6. Appellant seeks reversal of a decision made by the District board of directors [hereafter the Board] on June 6, 1990, expelling her stepson, Eugene Whisenand, from school for first semester of the 1990-91 school year for misconduct. She timely appealed the Board's decision under Iowa Code chapter 290, and this hearing followed.

I.  
Findings of Fact

Eugene Whisenand, at the time of hearing in this matter, was a 15 year-old freshman in the District who transferred in from out of state when he came to live with his father, Appellant's husband. Gene is an exceptional artist, and his early grades at B-G-M were average but went downhill over the course of the year. He also had a relatively difficult year in terms of rules violations. The problems appeared to increase in frequency during second semester. His violations and consequential penalties arose primarily from smoking, cutting classes, and throwing things. His disciplinary record includes references on occasion to possibly being "on something" or "taking something" such as illicit drugs. (October 4, 1989; February 16, 1990). In March, he was accused of breaking a school window. Although another student identified Gene and another boy as being responsible, the school did not pursue the matter with the police. Gene steadfastly denied having broken the window. In April, Gene's father requested testing for Gene for special education, but due to the timing, testing was not accomplished during the 1989-90 school year.

On May 30, Gene admitted to consuming several "Mad Dogs" (an alcoholic beverage) before school and coming to school under the influence. The school board policy and administrative rules provided for a five-day

suspension with attendant recommendation for expulsion by the Board. This information was provided to Gene's father and stepmother in a letter of the same day from Duane Monson, principal. The letter included information regarding the upcoming meeting of the Board on June 6 where the matter of Gene's expulsion would be considered, but contained no reference to any violations other than the alcohol incident of that day. The letter therefore implied that the Board would be considering expulsion on the basis of the alcohol incident of May 30 only.

At the June 6 meeting, the Board went into closed session to discuss Gene's possible expulsion and that of at least one other student. Because the meeting was held in closed session, those minutes are sealed by law. We have only the superintendent's recommendation and the Board's motion to expel for "chronic and repeated offenses" in the minutes, and the results of the Board's vote: 4-2 to expel. Previous Record.

Superintendent Cochran testified that the Board considered sending Gene at District expense to the Ladora Alternative Learning Center if his parents would transport him. This would be a problem because Gene's father works in the construction field and moves from site to site, and Appellant's work site is in a town in a different direction from Ladora. The superintendent also stated the District would consider sending Gene to Grinnell Community School District to enroll in that district's at-risk program, and offered to pay for the tuition for this summer and first semester this fall to one of the two programs. At the time of hearing, the District had not checked with Grinnell to see if the administration would accept Gene.

Gene's parents worked with him this summer on his mathematics course, but Appellant acknowledged their limitations in this area.

Appellant seeks reversal on several grounds:

1. The penalty (expulsion) for Gene's drinking on the last day of school was too harsh and unrealistic.
2. Expulsion will be psychologically damaging to Gene's self-esteem, creates a sense of powerlessness in him, and will cause him to view school personnel with fear and resentment. Appellant fears Gene will also be stigmatized by staff as a result of the expulsion, and that he will lose his desire to complete his education.
3. The Board failed to take into consideration Gene's childhood difficulties: he lost a twin brother at 2 1/2 months of age, his parents divorced and had little or only bitter communication about the children. Appellant believes Gene may have had professional counseling in Illinois, but because of the lack of communication with Gene's mother, is not sure.
4. The notification Gene's parents received regarding the recommendation to expel was devoid of reference to any other incidents of misconduct, yet the Board was presented with and considered his disciplinary and academic record for the entire school year in reaching its decision.

The District encourages the hearing panel and State Board to affirm the local Board's decision.

## II. Conclusions of Law

The law with respect to student discipline, including suspension and expulsion, is relatively clear.

"The board shall make rules for its own government and that of the . . . pupils . . . ." Iowa Code §279.8 (1989). "Such rules shall prohibit the use of tobacco and the use or possession of alcoholic liquor or beer or any controlled substance . . . by any student of such schools and the board may suspend or expel any student for any violation of such rule." Id. at 279.9.

"The board may, by a majority vote, expel any scholar from school for immorality, or for a violation of the regulations or rules established by the board . . . ; and it may confer upon any teacher, principal, or superintendent the power temporarily to dismiss a scholar, notice of such dismissal being at once given in writing to the president of the board." Id. at 282.4.

"When a scholar is readmitted by the teacher, principal, or superintendent, . . . [he or she] may be readmitted by such teacher, principal, or superintendent, but when expelled by the board the scholar may be readmitted only by the board or in the manner prescribed by it." Id. at 282.5.

With respect to constitutional constraints or limitations on suspension or expulsion beyond the rudimentary framework quoted above, some guidance is offered by the courts. In the areas raised in this case, that is, the adequacy of the notice before the board hearing and the harshness of the penalty in light of the cited rules infraction(s), we have assistance from cases heard by the State Board and in other jurisdictions.

"Due process requires that a student be given a statement or notice of the specific charges or grounds which, if proven, would justify expulsion or other specified disciplinary action under the rules and regulations of the board. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961). While this notice need not be drawn with the specificity of a criminal charge, it should include sufficient detail, factual allegations and references to applicable board rules and regulations to fairly advise the student of what he is accused, as well as a fair opportunity to prepare a proper defense. Smith v. Miller, 213 Kan. 1, 514 P.2d 377 (1973); Pierce v. School Comm. of New Bedford, 322 F.Supp. 957 (D.Mass. 1971). The notice should set forth the procedures to be followed and the procedural rights available, including the right to counsel if available. If a code of rules of student conduct and disciplinary procedures has been established, a copy should be provided.

Rapp, James A., Education Law, Matthew Bender, 1990, Vol. 2, §9.05[3], pp. 9-105-106.

While it appears that the administration violated Gene's procedural due process right to adequate notice of the charges and evidence that would be before the Board, it also appears that except for the alleged vandalism (breaking a window), Gene had previously acknowledged or admitted all of the violations for which he was expelled. We have no information regarding the collective thinking of the Board to know whether or not the vandalism incident allegedly committed by Gene, but denied by him, served any basis for or was a factor in the Board's action to expel. We can say that Gene's record of repeated rules infractions, even without the reference to the broken window incident, would support the Board's decision to expel Gene. Accord, In re Dustin Stober, 7 D.o.E. App. Dec. 306, 316 ("... although we have clear evidence that neither the superintendent nor the Board followed the law to the letter in every respect, we still conclude that Appellant knew of the conduct of which his son was accused, and had a full opportunity to defend [the boy's] actions ... before the Board ...")

Likewise, in this case, Appellant and her husband were made generally aware during the course of the year of Gene's problems in school<sup>1</sup> his suspensions and detentions. They knew he had had a rough year and had been in trouble from time to time. Had they or Gene seriously disputed any of the infractions underlying the recommendation for expulsion, we would have a different result. As it is, our options are two: remand this case to the District Board to make a finding of fact<sup>2</sup> as to whether Gene's alleged participation in vandalism was included in its reasons for expulsion, or assume that the Board did not consider the window breaking incident and determine whether a sufficient basis exists for the expulsion without it. We are inclined to make the latter assumption and, as noted above, believe that considering Gene's brief history in the District, his extensive disciplinary record supports his expulsion. The alternative in this case, a remand to the Board, would seem to us simply to require a step that, while necessary to comply with due process, would most likely result in the same decision. We hope, instead, that the administration takes more care with its notices and supplies a "findings and conclusions" letter after student disciplinary hearings in the future.

With respect to the harshness of the penalty for the infraction of being under the influence, the hearing panel disagrees with Appellant. Although there are additional actions the Board or administration could

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<sup>1</sup> However, the two notations that Gene may have ingested some substance or may have been "on something" were not conveyed to his parents by mail or phone. Although a school official in this day and age might be reluctant to accuse a student formally of being under the influence of a controlled substance because of the inability to prove the accusation, we still believe most if not all parents would want this type of information as quickly as possible. We urge the District officials to think through their practice or policy in this regard.

<sup>2</sup> Due process also requires a written statement following the hearing of the Board's decision and the reason(s) for it. This appears not to have been done in this case, but Appellant has not raised the issue, probably because she and her husband were in attendance at the Board hearing.

take,<sup>3</sup> we believe that a student who comes to school having consumed alcohol is a candidate for suspension or expulsion. Thus, we believe the penalty does "fit the crime" in this case. No substantive due process violation has occurred.

It is sad that almost without exception the students who experience disciplinary problems at school also have significant home, family, or social problems outside of school. Understanding this connection has, in part, given rise to a wave of national concern over students "at risk" of failure. The fact that the Board or administration in this case has considered and is willing to pay the costs to tuition Gene either to Ladora or Grinnell is a recognition of Gene's status as an at-risk student and of the District's inability at the current time to provide a specialized program for him. We hope the transportation issue can be resolved in order to allow Gene to attend school somewhere this fall. Appellant and her husband would certainly be within their rights to ask the Board to reconsider its decision if the other two school options cannot be worked out. We, too, believe Gene should be in school somewhere, but that does not eradicate the need for him to be held accountable for his misconduct last year. We also hope Gene will recognize the fact that one pays the price for one's actions and not allow himself to become hostile toward school officials. He is the one who misbehaved, after all. We trust and have faith that Gene's teachers and administrators will be willing to give Gene a new start if and when he does return to the District.

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

III.  
Decision

For the foregoing reasons, the decision made by the Brooklyn-Guernsey-Malcom Community School District board of directors on June 6, 1990, to expel Eugene Whisenand for fall semester 1990-91 is hereby affirmed. Costs, if any, under chapter 290, are assigned to Appellant.

<p><u>Sept. 13, 1990</u> DATE</p>	<p><u>Sept 5, 1990</u> DATE</p>
<p><u>RON McGAUVVRAN</u> RON McGAUVVRAN, PRESIDENT STATE BOARD OF EDUCATION</p>	<p><u>DAVID H. BECHTEL</u> DAVID H. BECHTEL, SPECIAL ASSISTANT TO THE DIRECTOR AND PRESIDING OFFICER</p>

<sup>3</sup> For example, if a school is concerned that a student has a substance use or abuse problem and that problem evidences itself at school, the school officials can condition a child's return from a period of suspension or expulsion on the child's assessment by a substance abuse facility and submission to treatment, if recommended. We also believe a school board or the administration could reduce an otherwise authorized penalty (e.g., 10-day suspension) for use or possession at school if a student agrees to counseling or an assessment. Of course, as we stated above, we also recommend contacting parents with general concerns even if the concerns do not stem from "catching" a student with, or using, or under the influence of alcohol or other controlled substances.