

OF EDUCATION  
(Cite as 5 D.o.E. App. Dec. 270)

In re Korene Merk :  
Larry and Sharon Merk, :  
Appellants, :  
v. : DECISION  
Algona Community School :  
District, :  
Appellee. : [Admin. Doc. 924]

The above-captioned matter was heard on July 23, 1987, by a hearing panel consisting of Dr. James E. Mitchell, deputy director, Department of Education and presiding officer; Dr. Carol McDanoldis Bradley, administrator, Division of Instructional Services; and Dr. Orrin Nearhoof, chief, Bureau of Teacher Education and Certification. Appellant Larry Merk was present in person and represented by Mr. David Skilling, Algona. Appellee Algona Community School District [hereafter the District] was present in the persons of Superintendent Richard Boyer and Mr. David Stoakes, assistant principal at Algona High School, and was represented by Mr. Tom Lipps, Algona. An evidentiary hearing was conducted pursuant to Iowa Code chapter 290 and departmental rules found at Iowa Administrative Code 670-51.

Appellants sought reversal of a February 9, 1987, decision by the District board of directors [hereafter the Board] expelling Korene Merk for first semester. Appellants also sought as relief the reinstatement of Korene's grades and credits which were removed from her record as a result of the expulsion.

I.  
Findings of Fact

The presiding officer finds that he and the State Board of Education have jurisdiction over the subject matter and the parties of this appeal.

Korene Merk was in ninth grade at Algona High School in the fall of 1986. She received a copy of the District's rules and regulations<sup>1</sup> presented to all students in the first week of school, and was in attendance at a freshman class meeting when Assistant Principal David

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<sup>1</sup> Testimony evidenced the fact that the school rules are created by administration and perhaps faculty, and are printed in the Handbook each June. In August the Board "approves" the rules as printed in the handbook. There appears to be no uniform procedure for periodic review and revision of rules.

Stoakes verbally explained the rules of student conduct during the first four days of school. Although Korene's memory of some of the finer points of the policy is hazy, there is no dispute as to her receipt of the rules contained in the "Student Handbook," a two-pocket glossy folder.

On October 7, Korene left the building, presumably to go home for lunch, and failed to sign out or return for the balance of the day. Korene stayed home and offered no explanation for the necessity of doing so. Upon her return to school the next day, she was called in to Mr. Stoakes' office. Because she admitted leaving and not returning and presented no note from her parent, she was deemed to have been truant.<sup>2</sup> Pursuant to the policy and rules, she was given a three-day in-school suspension. Mr. Stoakes spoke with Korene about the lack of wisdom of her actions and advised her that she then had "one strike" against her, and that her next violation, if any, that year would result in a second suspension with loss of credit for the time she spent in suspension. There was some question about whether Korene's mother was promptly contacted and advised of Korene's suspension. The Handbook appears to require notice to parents after a second suspension, but Mr. Stoakes recalled having a conversation with Mrs. Merk at the time of the first. She was not present at the hearing to verify that evidence.

On November 18, the Spanish Club had apparently scheduled a field trip which Korene initially signed up to attend. She and several other students instead went to Fort Dodge for the day, skipping school and the field trip. She was caught and punished by a second three-day in-school suspension and, following the pre-announced procedures, was denied credit for those three days. This time a letter was sent to Mrs. Merk informing her of the second suspension and requesting a conference, also per the school rules, with the superintendent, principal and assistant principal as soon as possible. Appellee's Exhibit 2. This meeting was held and Mrs. Merk was informed, as was Korene, of the consequences of a third violation in the school year: that Korene would be recommended for expulsion. Neither Superintendent Boyer nor Mr. Stoakes could clearly recall whether they explained the basic premise that expulsion would mean a loss of credit for all courses taken.

With only five days remaining in the first semester, Korene was caught smoking on school property, in a private van in the high school parking lot. She admitted her guilt to Mr. Stoakes when she was called in to the office. This, her third infraction, occurred on Friday, January 9, 1987. Regular classes were to be held through Wednesday a.m., January 14, and finals given Wednesday afternoon through Friday, January 16. Korene was given a five-day out-of-school suspension, in essence for the balance of the semester. Mr. Stoakes reaffirmed his intention to recommend to the

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<sup>2</sup> A truant is defined by Iowa law as a child of compulsory attendance age (7-16) in proper physical and mental condition to attend school, who fails to attend regularly without reasonable excuse for the absence. Iowa Code section 299.8 (1987). Truancy, under the Board's policy and rules, is distinguished from unexcused absence because the absence is without parental or school approval. An unexcused absence is one with parental but not school approval.

Board that Korene be expelled because she committed three violations within one school year.

The next regularly scheduled Board meeting was the Monday evening following Korene's smoking incident. Normally a recommendation to expel would be placed on the agenda of the next meeting and the student would be suspended pending the Board's decision. Superintendent Boyer testified that he and Mr. Stoakes and Mr. Allen, the high school principal, decided that three days (from Friday to Monday) would probably not be sufficient time for Korene's parents to locate an attorney or other representative, should they desire one, to attend the Board meeting with them. Thus an administrative decision was made not to schedule the expulsion proceeding for Monday, January 12, but to allow Korene to return to school on January 19, the first day of the second semester.

In addition, the administration concluded that in fairness to Korene, she should be allowed to take her semester exams. The next Board meeting would be on February 9, 1987. At this meeting Korene's expulsion would be considered by the Board. In sum, she was denied the opportunity to attend classes on Monday, Tuesday, and Wednesday morning but attended on Wednesday afternoon, Thursday, and Friday to take her finals, returning full-time the following Monday. The decision to allow Korene to take her exams was reached because in the event that the Board voted not to expel her, Korene would be in a position either of having no final exam grades or taking those exams approximately five weeks after covering the material.

Mr. Stoakes sent a letter to Mrs. Merk delineating these provisions. Appellee's Exhibit 3. Mrs. Merk was informed of the smoking violation, the duration of Korene's suspension from school, the recommendation to expel, the date of the Board meeting, and the decision to allow Korene to take her finals pending the outcome of the Board's decision on February 9. Id.

Mr. and Mrs. Merk met with Mr. Stoakes the week of January 12 to discuss the situation. At this time they expressed their disagreement with the school rules. The gist of their argument centered on the severity of the penalty for only three rules infractions. Mr. Merk testified at the hearing that he was in agreement with a penalty for both truancy and smoking, but felt that expulsion was simply too harsh a result under the circumstances. He also testified that at the time he was not aware of her previous suspensions<sup>3</sup> nor of the automatic loss of credit if she would be expelled.

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<sup>3</sup> Mr. and Mrs. Merk were divorced in October, 1986. Mrs. Merk, as Korene's custodial parent, received all communications from school; Mr. Merk was not informed. He admitted that he had not sought to be notified of school events, grade reports, conferences, etc. He has since requested that he be kept informed and receive copies of correspondence to Korene's mother. This we understand to be his right under the Family Educational Rights and Privacy Act of 1974.

Nevertheless, if the non-custodial parent's whereabouts are known, advising him or her of the child's educational progress, including disciplinary actions, would be advisable.

The expulsion was taken up by the Board on February 9, as scheduled, upon Mr. Stoakes' recommendation. Korene's parents attended without legal representation, but Korene was not at the meeting. As the adequacy of the evidence against her was not at issue, the Board hearing centered on a discussion of the fairness of the rule as written and as applied to Korene. Mr. and Mrs. Merk were allowed to make statements and ask questions. The directors discussed the rule among themselves and the administrators and eventually reached a decision to expel Korene retroactive to the first semester, a decision which resulted in loss of credit for Korene's course work first semester. Had the Board voted not to expel, Korene would have passed six classes and physical education. Had the Board voted to expel her prospectively, she would not have been allowed to attend school the entire second semester nor, of course, receive any credit for the second semester. Appellants' Exhibit A. Inadvertently a copy of her report card was sent home showing successful completion of all subjects. Mr. Stoakes explained this as an administrative or secretarial oversight.

Korene completed the second semester of the school year without incident, although her grades show a serious decline. Korene testified that she doesn't like school anymore, and also feels that some of her teachers have held her first semester problems against her and that it is hard for her to win back their confidence. She also stated that she realizes if she takes extra courses for the remainder of her high school career, she could still graduate with her class, which she hopes to do.

Mr. Stoakes testified that truancy and unexcused absences are a problem and that some 60-70 suspensions are issued each school year. Only one or two students are expelled each year on the average. He also testified that to his knowledge the statistics have remained fairly stable over the years; the problem is not going away nor improving as a result of the strict rules.

## II. Conclusions of Law

School rules duly adopted and noticed to the students are presumed to be valid. Greene v. Board of Directors, 259 Iowa 1260, 147 N.W.2d 854 (1967). Iowa law confers upon a local school board the responsibility to "make rules for its own government and that of the directors, officers, employees, teachers and pupils . . . , and shall aid in the enforcement of the rules . . . ." Iowa Code § 279.8 (1985). "Such rules shall prohibit the use of tobacco . . . 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. Moreover, "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 . . . ." Id. at § 282.4. When a board expels, it also has the right to readmit the student on terms it prescribes. Id. at § 282.5.

The question of deprivation of school attendance rights as a result of suspension or expulsion was initially addressed by the United States Supreme Court in Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975).

Therein the Court determined that a student's right to attend school, guaranteed and even required by statute in all fifty states, amounts to a property interest. That property cannot be taken away without due process of law under the Fourteenth Amendment to the United States Constitution. (" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .")

Due process has two components: procedural and substantive due process. The former is understood to constitute notice, of both the kinds of acts required or prohibited and notice of the "charge" against one upon accusation of a violation, and an opportunity to be heard prior to the loss of a guaranteed right. Substantive due process translates into "fundamental fairness," or the notion that a rule must be reasonable and further a valid goal to be enforceable. In Goss v. Lopez, the Court was asked "how much [procedural] process is due" in student suspensions situations and concluded that minimal due process is required for short-term suspensions "of up to ten days in duration" when there is no danger or emergency justifying immediate removal without a brief hearing. For long-term suspensions or expulsions, the Court opined that more process may be required, up to and including a hearing before the board, the opportunity to secure counsel, to confront and cross-examine witnesses and call witnesses on the student's own behalf to verify the student's version of the incident. 95 S. Ct. at 740, 741.

In this case, Appellants are not contesting the sufficiency of procedural due process. Their challenge focuses on the fairness or substance of the school's rule. The applicable rule reads, "After a second suspension during the school year, student and parents will meet with the superintendent and high school administration. Additional punishment will occur, or recommendation to the Board for expulsion for the rest of the semester, depending upon the infraction." Appellee's Exhibit 1 at page 2 at column 2 (emphasis added). In addition, the rules state that "for infractions 1, 2, and 3 above, [possession or use of tobacco, drugs or alcohol, or suspicion that the student is under the influence of a mood altering substance] a second offense within one school year means PROBABLE EXPULSION FROM SCHOOL for the balance of the semester." Id. (emphasis in original).

Mr. Stoakes, in his second year at Algona High School, testified that the rules represent a progressive disciplinary procedure. His understanding is that a third violation of any of the nine defined rules automatically results in a recommendation for expulsion. In contrast, we see the disjunctive "or" in the first quoted rule above as an opportunity for an administrator to use discretion "depending upon the infraction." In addition, although a second offense related to the tobacco, drug, or alcohol rules means "probable expulsion," Korene had not twice violated "infractions 1, 2, or 3." She violated the first one, tobacco, once.

Mr. Merk's statements at the hearing revealed his shock to know that school rules have become so harsh. He remembers, as do most of the hearing panel members, the days when principals issued detentions for violations of school rules, or made students copy pages out of the dictionary or write papers for punishment. He remembers when one had to do "something pretty serious" before he or she would be expelled. Lesser offenses meant cleaning blackboards or clapping erasers after school. His

daughter skipped school for a total of one and a half days and was caught smoking once. Should she be expelled for this?

We agree with Mr. Merk regarding the fairness of the policy. While our intention is not to undermine the authority of a school board to expel students or to establish policies, or of an administration to adopt rules in furtherance of those policies, we feel compelled to assert ourselves in this case for two reasons.

First, we find a problem with the application of the rules to this situation. There are two statements in the student handbook regarding potential expulsion:

For infractions of 1, 2, and 3 above, a second offense within one school year means PROBABLE EXPULSION FROM SCHOOL for the balance of the semester. . . . Any act that is extreme in nature and harms or intends to harm the physical or mental well-being of any teacher, student, or school employee, may result in expulsion from school.

Korene was not guilty of two violations of the tobacco, drug, and alcohol rules. Likewise, there was no contention that her actions (truancy and smoking) were "extreme in nature." The expulsion recommendation came because of Mr. Stoakes' interpretation of the rules, to the effect that a third violation of any of the rules in a school year constituted grounds for expulsion. He failed to recognize and the Board failed to exercise discretion in dealing with Korene's misconduct. This is the pitfall of having predetermined punishments. It means that everyone committing a violation will be treated the same -- a worthy goal -- but it does not take into consideration extenuating circumstances, contrition, mistake, or the subtle factual differences in every case.

The failure to exercise one's discretion is arguably an abuse of that discretionary power that could amount to arbitrary action. It is clear from our reading of the handbook that Mr. Stoakes had more discretion under the rules than he believed he had. The notation that a recommendation for expulsion may be made "depending upon the infraction" after the second suspension would allow him to have given Korene another three-day suspension without an accompanying recommendation for expulsion to the Board.<sup>4</sup> Even if the rules were written in a mandatory fashion,

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<sup>4</sup> Korene was given a five-day suspension on her third offense because it was her third offense. A girl also caught smoking with Korene was given a three-day suspension because it was her first offense. This does not appear to be in accord with the rule that "suspensions can be from 1-5 days of school depending upon the severity of the infraction." Appellee's Exhibit 1. Korene's suspension depended on how many previous problems she had had, not on the severity of the infraction. Nevertheless the five-day penalty was within the range stated in the Handbook.

that would not prevent the Board from exercising discretion at the level of an expulsion hearing. See Clinton Mun. Separate School Dist. v. Byrd, 477 So.2d 237 (Miss. 1985) ("That a school rule may be worded in mandatory language does not deprive school boards and their subordinates of the authority to administer the rule with flexibility and leniency." Id. at p. 241.) It is just as incumbent upon local school boards as it is upon administrators to understand the legalities of student discipline. Boards should become well-versed in due process considerations as well as the practical implications of their actions as board members.

Our second basis for reversal in this case is what we perceive to be a violation of substantive due process or the notion that to be valid rules must be fundamentally fair in their application. In essence, the punishment meted out must "fit the crime." We agree with Appellants that the penalty of expulsion is unduly harsh in light of the violations. We would have little quarrel with a suspension for the smoking violation. School boards are, in fact, required to "prohibit the use of tobacco" and may suspend or expel for a smoking violation. Iowa Code § 279.9. But expulsion and its attendant loss of credit for the work performed up to that time is a significant loss which we believe should be reserved for singularly egregious conduct or for incorrigible behavior, if exercised at all.

As is our pattern, in addition to the action we take today we offer some suggestions to the Algona Board of Directors and others. Apparently there is no established pattern or procedure for periodic, broad-based review of disciplinary rules and penalties by the Algona administration and Board. We encourage those in power to create a policy and rules review committee comprised of members from all segments of the community to reassess and revise disciplinary practices in the District. Certainly staff members of the Department of Education stand ready to assist when called upon, and the Department also provides guidance in the form of model policies and rules. We further suggest that the directors familiarize themselves with and read proposed rules prior to their adoption. See Iowa Code § 279.8 (1987). In addition, those rules should clearly spell out the definitions of suspension and expulsion and all consequences that flow from those actions.

Secondly, we recommend that the Board and administration consider graduated penalties for various violations. This will result in two benefits: a distinction between less serious and more serious behavior, and a lesser penalty for the more minor offenses. To start with suspension for less serious violations means that the only place to go is toward expulsion. Detention has traditionally served the school's need for punishment, but, according to Appellee's Exhibit 1, is not even an option in Algona. Loss of privileges such as open campus or signing out of study hall could also be applied as a disciplinary measure designed to deter repeated infractions. Strongly encouraging or even requiring counseling for students at risk because of academic or disciplinary problems should be considered. We think the administration should do everything in its power to keep students in school, not create a system that immediately excludes them whenever they transgress. See Nielsen, "Let's Suspend Suspensions: Consequences and Alternatives," Personnel and Guidance Journal, May 1979.

Finally, we feel compelled to comment on the District's practice of denial of credit for the time a student spends in suspension. Although the practice was not made an issue in this case, it bothered the hearing panel and seriously concerns the State Board. There was no indication in the printed rules distributed to District students that denial of credit is to be applied whenever a student is given a second or subsequent in-school suspension. Granted, Korene was given verbal notice by Vice-Principal Stoakes following her first truancy incident that a second violation would lead to an in-school suspension and loss of credit for the three-day period, so technically due process notice provisions were met. Frankly, it is not procedural due process that troubles us regarding the practice of denial of credit or grade reduction as a disciplinary tool.

A number of cases have been reported around the country dealing with academic sanctions for non-academic violations. Results differ. One of the first such cases arose in Kentucky in 1975. Dorsey v. Bale involved a student suspended for four days and therefore subject to school rules requiring a 5% reduction in each of his course grades for each day of suspension. In holding for the student and restoring his grades, the Kentucky Court of Appeals stated, "The Board can determine the length of suspension so that such action constitutes a complete punishment for the offense." Dorsey v. Bale, 521 S.W.2d 76 (Ky. Ct. App. 1975).

In Iowa we would prefer that the practice of lowering grades be eliminated except for rare circumstances. We have "come a long way" from the days when schoolwork was assigned as punishment. Nevertheless, there is much to be said for detention, double make-up time, and in-school suspension and the opportunities those avenues provide for students to contemplate their actions and get or stay caught up in their studies. Boards, administrators, and teachers would be wise to remember why the students are compelled to attend school in the first place. Denial or reduction of credit as a punishment may work as a deterrent for some students, but for others, primarily the "at-risk" population, it may be "the last straw."

We regret that we did not establish in hearing the District's drop-out rate per year. Korene's brother dropped out of school, as his father stated, because he just got tired of being suspended every time he turned around. Korene's grades and attitude surely place her in the category of students at risk. It is beyond dispute that one's grades suffer more when grade reductions are applied for disciplinary infractions. It is even conceivable that a passing grade could be reduced to a failing grade because a student violated a rule.

We strongly suggest that this Board and all others re-examine discipline policies and devise alternatives to loss of credit. See, e.g., Katzman v. Cumberland Valley School District, 479 A.2d 671 (Pa. Commw. 1984)

Here, although the [grade reduction] penalty was for the five days [of suspension], the assessed penalty downgraded achievement for a full marking period . . . [which is] improper and, we think, illegal whether the achievement is misrepresented by upgrading or by



downgrading, if either is done for reasons that are irrelevant to the achievement being graded. For example, one would hardly deem acceptable an upgrading in a mathematics course for achievement on the playing field.

For a full discussion of the issue of grade reduction as punishment for non-academic violations of rules, see Pepe, "Student Grades and School Discipline -- A Philosophical and Legal Question," NCLPE School Law Journal, vol. 7 #2 (1977); Bartlett, "Academic Evaluation and Student Discipline Don't Mix -- A Critical Review," Journal of Law & Education, Vol. 16 #2 (1987), and cases cited therein.

Therefore, we conclude that the Board's failure to exercise discretion coupled with the harsh result through application of the disciplinary rules in this case to Korene Merk requires reversal of the Board's action.

All 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 Algona Community School District made on February 9, 1987, expelling Korene Merk for the first semester in the 1986-87 school year and the accompanying loss of credit that attached to the expulsion is hereby reversed. While her disciplinary records may show three suspensions for violations in that semester, her grades are to be restored in full.

Costs of this appeal, if any, under chapter 290 are hereby assigned to Appellee District.

September 14, 1987

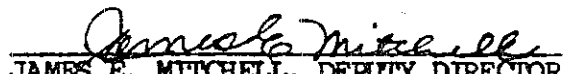
DATE



LUCAS J. DEKOSTER, PRESIDENT  
STATE BOARD OF EDUCATION

September 15, 1987

DATE

  
JAMES E. MITCHELL, DEPUTY DIRECTOR  
DEPARTMENT OF EDUCATION  
AND PRESIDING OFFICER