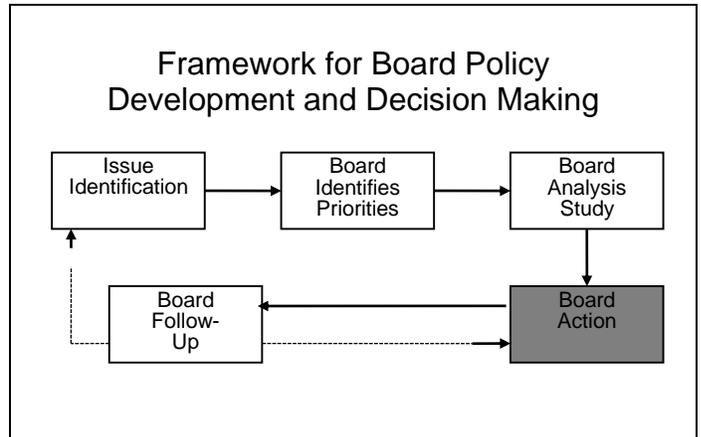


Iowa State Board of Education

Executive Summary

September 17, 2015



Agenda Item: *In re Suspension of J.M. (Colfax-Mingo Community School District)*

Iowa Goal: All PK-12 students will achieve at a high level.

State Board Role/Authority: Under Iowa Code section 290.1 the State Board of Education has authority to hear appeals from local school board decisions.

Presenter: Nicole Proesch, Administrative Law Judge

Attachments: 1

Recommendation: It is recommended that the State Board approve the proposed decision affirming the decision of the local board of directors of the Colfax-Mingo Community School District ("CMCSD Board") to suspend J.M. for three days from school and for four calendar weeks from athletic activities.

Background: The facts are undisputed. During the 2014-2015 school year, administration at CMCSD received information that J.M. was in possession of and disseminating nude photographs of female CMCSD students to junior high and high school boys. After a short investigation J.M. was found in possession of the photos on his cell phone. Several boys indicated that J.M. had shared those photos with them.

The principal at Colfax-Mingo High School determined this conduct to be a substantial disruption to the school environment and the present health and safety of other students. He immediately issued a three day out of school suspension under the Student Conduct Policy and a suspension of four calendar weeks from participation in athletics under the good conduct policy. The CMCSDBOARD in a 4-2 decision upheld the decision of administration. The Appellants appeal this decision.

The proper standard of review of a decision of the local school board that involves discretion is for an abuse of discretion. Thus, we apply that standard here. We find there is more than enough evidence that J.M. violated the District's Student Conduct Policy and Good Conduct policy. There is no evidence that the local board abused its discretion. As long as the punishment is reasonable, the decision will be upheld. The State Board cannot say that the decision of the CMCSDBOARD is unreasonable.

Thus, it is recommended that the State Board affirm the decision of the local board.

IOWA DEPARTMENT OF EDUCATION
(Cite as ___ D.o.E. App. Dec. ___)

<i>In re Suspension of J.M.</i>)	
)	
Jan M.,)	
)	PROPOSED DECISION
Appellant,)	
)	
v.)	
)	
Colfax-Mingo Community)	Admin. Doc. No. 5012
School District,)	
)	
Appellee.)	

STATEMENT OF THE CASE

The Appellant, Jan M., seeks reversal of a May 12, 2015, decision by the Colfax-Mingo Community School District (“CMCSD” or “District”) Board of Directors (“CMCSD Board” or “Board”) to suspend her minor child J.M. from school for three days and from athletics for four calendar weeks for a violation of the district’s student conduct policy and good conduct rule, Board policies 502.1A and 502.6. The affidavit of appeal filed by the Appellants on May 29, 2015, attached supporting documents, and the District’s supporting documents are included in the record. Authority and jurisdiction for the appeal are found in Iowa Code § 290.1 (2015). The administrative law judge finds that she and the State Board of Education (“the State Board”) have jurisdiction over the parties and subject matter of the appeal before them.

A telephonic evidentiary hearing was held in this matter on August 11, 2015, before designated administrative law judge, Nicole M. Proesch, J.D., pursuant to agency rules found at 281 Iowa Administrative Code chapter 6. The Appellant was present with her minor child, J.M., and represented by Attorney Richard Phelps. The District was represented by attorney Kristy Latta. The High School Principal Todd Jones (“Principal Jones”) appeared on behalf of the District.

The Appellant testified in support of the appeal. Appellant’s exhibits #A-B, which were attached to the affidavit of appeal, were admitted into evidence without objection. Principal Todd Jones testified for the District and the school district’s exhibits #1-7 were admitted into evidence without objection.

FINDINGS OF FACT

At the time of J.M.’s suspension, J.M. was finishing the 2014-2015 school year as an eleventh grader at Colfax-Mingo High School (“CHS”). J.M. participates in track and other

extracurricular activities for CHS. The underlying reason for J.M.'s three day out-of-school suspension and four calendar week suspension from athletics was that J.M. was identified as an individual who was in possession of and had forwarded to other students nude and partially nude photos of female students who attend CHS. The issue in this appeal is the whether or not J.M. violated school rules. The record establishes the following facts and circumstances leading up to this appeal.

The facts regarding the incident are undisputed. On May 8, 2015, while investigating another incident involving two junior high students, Principal Jones received a report that Student A had nude photos of CHS girls on his cell phone and he had been showing them to others. Principal Jones spoke to Student A, who admitted to having the photos, showed them to Principal Jones, and advised that he had obtained them from Student B and Student C. Principal Jones spoke to Student B who admitted he had the photos on his phone but stated he deleted them. He also spoke to Student C who admitted he still had the photos on his phone and showed the photos to Principal Jones. Both students involved identified J.M. as the individual who had sent the photos. Principal Jones then questioned J.M. about the photos. J.M. admitted having nude photos on his phone and stated that some of the photos were of students at CHS and some of the photos were of students from other schools. J.M. was not asked if he forwarded the photos to others, nor did he admit doing so. J.M. showed his phone to Principal Jones who determined there were nude photos on J.M.'s phone. J.M. and another student provided the names of two other students who provided the nude photos to them. Principal Jones then spoke to Student D, who admitted that he had nude photos on his phone that he had deleted that afternoon shortly before he had approached Student D. He also spoke to Student E, who admitted that he had nude photos on his phone. Each of the students' parents were contacted and all of the phones which contained nude photos were turned over to law enforcement including J.M.'s phone.

After school Principal Jones was asked to speak with the members of the track team at practice about acceptable behaviors with social media. During this meeting team members were told if they had any additional information to share it with Principal Jones. After practice five students told Principal Jones that they had received at least one picture of a nude female from J.M. that was unsolicited, which they deleted.

Following the investigation Principal Jones determined this conduct to be a substantial disruption to the school environment and the present health and safety of other students. He immediately issued a three day out-of-school suspension under the Student Conduct Policy (502.1A) and a suspension of four calendar weeks from participation in athletics under the Good Conduct Policy (502.6) to each of the boys involved, including J.M., for being in possession of pornographic material, including photos of CHS female students while at school, and forwarding the material to other students.¹

The Appellants provided a written request for a hearing to appeal the decision of administration that same day. The appeal was placed on the agenda for the May 12, 2015,

¹ The County Attorney declined to prosecute the individuals involved in this incident.

CMCSD Board meeting. The Appellants were provided with notice of the appeal hearing date and time.

On May 12, 2015, a hearing was held before the Board in closed session. The Board reviewed the exhibits presented by the District, which included the notice of the hearing, the letter of appeal, an incident report, board policies, and student discipline information on J.M. The Board also reviewed the exhibits presented by the Appellants, which included Iowa Code § 709.21 (“Invasion of Privacy”) and letters in support of J.M. At the hearing Principal Jones testified about the incident and offered his explanation regarding the application of the two school policies.

The Student Conduct Policy reads in relevant part:

The Board believes that inappropriate student conduct causes material and substantial disruption to the school environment and presents a threat to the health and safety of students, personnel, and visitors on the school premises.

Students shall conduct themselves in a manner fitting to their age level and maturity and with respect and consideration for the rights of others while on school premises, while on school owned and/or operated school or chartered buses, while attending or engaged in school activities, while away from school grounds if misconduct will directly affect the good order, efficient management and welfare of the school.

Students who fail to abide by this policy may be disciplined for conduct which disrupts or interferes with the educational program, conduct which disrupts the orderly or efficient operation of a school or school activity, conduct which disrupts the rights of other students to obtain their education or participation, or conduct which interrupts the maintenance of a disciplined atmosphere. Disciplinary measures, include, but are not limited to, removal from the classroom, detention, suspension, probation, and expulsion.

Board Policy 502.1A.

The policy also provides a list of conduct that will result in punishment to include in pertinent part: 1) conduct which disturbs the orderly, efficient and disciplined atmosphere and operation of the school or school related activity; 2) possession of weapons, contraband, or dangerous objects; 3) criminal or illegal behavior; 4) fighting or engaging in disruptive or violent behavior at school or school events; and 5) documented conduct detrimental to the best interest of the school district.

The Good Conduct Policy (Board Policy 502.6) reads in relevant part:

Students who participate in extracurricular activities serve as ambassadors of the school district throughout the calendar year whether at or away from school. Students who wish to have the privilege of participating in school extracurricular activities and other school sponsored activities, must conduct themselves in accordance with Board policy “Student Conduct” throughout the year.

Specifically, Principal Jones testified that the fact that nude photos of CHS students were being circulated to students in the school and in possession of students while at school was a substantial disruption to the school environment and created a potential for further disruption. He testified under the circumstances he felt a three day out-of-school suspension was appropriate. He also testified that if a student receives a three day suspension under the Student Conduct rule then it also rises to the level of a Good Conduct violation. A student who violates this policy is ineligible to participate in extracurricular activities for four calendar weeks for the first offense. This was J.M.'s first offense.

The Appellants did not dispute the facts before the Board but instead argued that J.M.'s conduct was not criminal and his conduct was not specifically included in the laundry list of items which would be considered a violation under the Student Conduct and Good Conduct policies. Specifically, they argued that it is not illegal to have naked pictures on a private cell phone and that J.M. is not the only student to have naked pictures. They also argued that the only disruption to the school was the actions of administration during the investigation of the incident and not the conduct itself.

After considering the evidence, testimony, and arguments of the parties the Board voted 4-2 to uphold the decision of administration. In the Board's written decision the Board noted:

The Board has considered all of the information and documents that were presented at the hearing. The Board determines that there is sufficient evidence to establish that [J.M.] possessed pictures of nude females on his cell phone at school, some of who are female students, and distributed such pictures to male students. The Board concludes that [J.M.'s] actions are in violation of the district's Student Conduct policy and Good Conduct rule. Indeed, [J.M.'s] conduct is a serious breach of these policy provisions. Such behavior is not only disruptive to the orderly operation of the school, it is antagonistic to the rights of others and present a threat to a respectful school environment. Misconduct of this nature warrants corrective action for the best interests of the District, including the welfare of other students and staff, as well as for J.M.'s own best interest.

Jan M. filed a timely notice of appeal with the State Board on May 29, 2015. The Appellants argue that J.M.'s conduct did not violate the District's policies and the District has no authority to discipline J.M. The District argues that the Board's decision to affirm the decision of administration was reasonable and there was sufficient evidence to support a finding of misconduct.

CONCLUSIONS OF LAW

In appeals to the State Board under Iowa Code chapter 290, the legislature has mandated that the State Board render a decision that is "just and equitable." It is well settled that the State Board cannot overturn a local board decision unless the local decision is "unreasonable and contrary to the best interest of education." *In re Jesse Bachman*, 13 D.o.E. App. Dec. 363, 369 (1996). Thus, the standard of review is a test of *reasonableness*.

The Iowa Legislature has conferred broad authority to local school boards to adopt and enforce its own rules and disciplinary policies. See Iowa Code §§ 279.8 & 282.4. Under section 279.8, “the board shall make rules for its own government and that of the . . . pupils, and for the care of the school house, grounds, and property of the school corporation, and shall aid in enforcement of the rules.” Local school boards have the explicit statutory authority to expel or suspend students for violating school rules pursuant to Iowa Code section 282.4, which provides as follows:

The board may, by a majority vote, expel any student from school for a violation of the regulations or rules established by the board, or when the presence of the student is detrimental to the best interests of the school. The board may confer upon any teacher, principal, or superintendent the power temporarily to suspend a student, notice of the suspension being at once given in writing to the president of the board.

Thus, school districts have broad discretion to punish students who break the rules as long as the district follows appropriate due process requirements. *In re Suspension of A.W.*, 27 D.o.E. App. Dec. 587 (2015). Due process requires “notice and opportunity for hearing appropriate to the nature of the case.” *Id.* (quoting *Goss v. Lopez*, 95 S. Ct. 729, 738 (1975)). However, due process does not “shield [a student] from suspensions properly imposed”. *Id.* (quoting *Goss*, 95 S. Ct. at 739). The record establishes J.M. was afforded the required due process.

Also inherent in Iowa Code section 279.8 is the school board’s authority to adopt and enforce a good conduct policy. The Iowa Supreme Court has also ruled that schools and school districts may govern out of school conduct of its students who participate in extracurricular activities because “these student leaders are looked up to and emulated” and “they represent the school and depict its character.” *Bunger v. Iowa High Sch. Athletic Assn.*, 197 N.W. 2d 555, 564 (Iowa 1972).

The leading case in good conduct appeals is *Brands v. Sheldon Community School District*, 671 F. Supp. 627, 630-631 (N.D. Iowa 1987). *Brands* established several principles that apply to students and interscholastic athletics or extracurricular activities. First, a secondary student has no “right” to participate in interscholastic athletics or other extracurricular activities. *Id.* Second, since there is no right to participate, the amount of due process owed to a student in such cases is minimal. *Id.* Due process only requires notice and opportunity to be heard. *Id.* Lastly, *Brands* established that in order for a student to be disciplined under a schools good conduct policy there need only be “some evidence”² that a student violated the policy. *Id.*

In this case, Principal Jones spoke to at least seven students who advised him that J.M. had sent them nude photos of female CHS students. J.M. admitted to having the photos on his phone at school. Although, he was not asked if he sent the photos he did not deny sending them either. As such, Principal Jones found that J.M. violated the provision of CMCS D’s Student Conduct Policy regarding conduct that “causes [a] material and substantial disruption to the school environment and presents a threat to the health and safety of students, personnel,

² Due process does not require courtroom evidence standards. “Some evidence” is less than preponderance of evidence and far from beyond a reasonable doubt.

and visitors on the school premises” for having pornographic pictures of other CHS students on his phone at school and distributing those pictures to others. Additionally, Principal Jones found that J.M. violated CMCS D’s Good Conduct Policy as a result of that behavior.

The Appellants argue that J.M.’s conduct was not specifically listed as prohibited in the Districts policies, that his conduct was not criminal, and that his conduct did not cause a material and substantial disruption to the school environment and thus, there was no violation of either policy. The Appellant also argues that J.M. had nude photos on his private cell phone and the school has no authority to regulate what J.M. carries on his cell phone. Finally, the Appellant argues that the District’s own actions during the investigation caused the disruption and it was not attributable to J.M.’s actions. The State Board disagrees.

School boards are not required to write student conduct or good conduct rules “with the precision of criminal code.” *In re Justin Anderson et al.*, 14 D.o.E. App. Dec. 294, 300 (1997). However, the rules must be written “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Id.* (quoting *Fowler v. Bd. Of Educ.*, 819 F.2d 657, 664 (6th Cir. 1987)). Parents and students should be able to determine from reading the rules what behavior would result in a violation of the rule. Here the question is whether or not J.M.’s conduct resulted in a violation of the rules. Without question we think it does.

Although J.M.’s conduct was not specifically listed in the rules we find that a reasonable interpretation of the rules would encompass J.M.’s behavior. First, while J.M. may not have been charged criminally for his conduct that does not take away the criminal nature of the incident. The Iowa Supreme Court has recently upheld the conviction of a high school student for knowingly disseminating obscene material to a minor under Iowa Code section 728.2. *State vs Canal*, 773 N.W.2d 528 (Iowa 2009). In that case, a fourteen year old female student attending high school received two photographs via email from Canal, who was eighteen at the time and also attended the same high school. *Id.* at 529. One of the photos was a photo of Canal’s own erect penis and the other was a photo of his face accompanied by the words “I love you.” *Id.* The evidence showed the girl requested the photo and was not offended by it, however, her parents were. *Id.* The Court found that the evidence was sufficient for a jury to determine that the material Canal sent to the female was obscene under the statute. *Id.* at 532.

The facts here are even more egregious than the facts in *Canal* in that J.M. was not disseminating nude photos of himself to only one individual; instead, J.M. was disseminating nude photos of other female CHS students to other students in both junior high and high school.³ There is no question that these photos were continuing to be circulated to students throughout the school. In a day and age where social media makes it possible to disseminate photos far and wide with a simple text message or post online, having nude photos of students floating out there for all to see is a huge problem for the District. J.M. could easily have been charged in state court with several counts of disseminating obscene material to a minor⁴, sexual

³ The records is not clear what the ages of the boys and girls involved were.

⁴ Iowa Code § 728.2 (2015).

exploitation of a minor⁵, or in federal court with possession and dissemination of child pornography⁶.

Not only was J.M.'s conduct likely criminal but his actions also implicate both Title IX of the Education Amendments of 1972⁷ and Iowa's Bullying and Harassment statute under Iowa Code section 280.28.⁸ The U.S. Supreme Court in *Davis v. Monroe County Board Of Education* has held that school districts may be liable under Title IX for student on student sexual harassment. 529 U.S. 629 (1999). To establish liability under *Davis* students must show 1) sexual harassment by peers; 2) deliberate indifference by school officials with actual knowledge of the harassment; and 3) harassment so severe, pervasive and objectively offensive it deprived the student of access to educational opportunities.

The Appellants' argument that administration was responsible for the disruption because of their investigation into an issue that was brought to their attention by a junior high student is absurd. Furthermore, the idea that the District should ignore this type of illegal behavior is obnoxious. Once Principal Jones was made aware of the nude photos of CHS female students that were being circulated to junior high and high school boys he had a legal responsibility⁹ to investigate the incident and stop further dissemination. To do nothing and sweep it under the rug because "everyone is doing it" as the Appellants suggests would equate to deliberate indifference and potentially subject the District to liability.

J.M.'s conduct is the perfect example of off campus conduct spilling onto campus. Even though J.M. had these photos on his private cell phone, the subsequent dissemination of nude photos of CHS female students to other male students at CHS and possession of the photos at school created substantial nexus to the school. Even assuming arguendo that that J.M.'s conduct did not spill onto campus, the law is clear that districts may govern out of school conduct of its students who participate in extracurricular activities because "these student leaders are looked up to and emulated" and "they represent the school and depict its character." *Bunger*, 197 N.W. 2d at 564. Under these circumstances there is no question J.M.'s conduct led to a material and substantial disruption to the school environment and presented a threat to the health and safety of students, personnel, and visitors on the school premises. To find otherwise would be unreasonable.

⁵ Iowa Code § 728.12 (2015).

⁶ 18 U.S.C. § 2252A (2015).

⁷ Title IX is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public schools that receive federal funds must comply with Title IX.

⁸ Iowa Code section 280.28 prohibits harassment and bullying based on age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status. Schools are required to have a policy in place prohibiting this conduct.

⁹ In April of 2014 the Office of Civil Rights for the U.S. Department of Education issued guidance to colleges, universities, and schools on addressing sexual violence and other forms of sex discrimination. In that guidance schools are encouraged to be proactive in their efforts to prevent sexual violence, remedy prohibited conduct, prevent reoccurrence, and to address the impact of sexual violence. The failure of a school district to appropriately respond in a situation involving sexual harassment can result in a violation of Title IX. See <http://www.ed.gov/news/press-releases/guidance-issued-responsibilities-schools-address-sexual-violence-other-forms-sex> and <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

We find there is more than enough evidence that J.M. violated the District's Student Conduct Policy and Good Conduct policy. The punishment imposed here in many ways seems entirely too light considering the possible ramifications here. However, we will not substitute our judgement for that of the Board. As long as the punishment is reasonable, the decision will be upheld. This Board cannot say that the decision of the CMCSB Board is unreasonable.

DECISION

For the foregoing reasons, the decision of CMCSB Board made on May 12, 2015, to suspend J.M. from school for three days and from athletics for four calendar weeks for a violation of the district's Student Conduct and Good Conduct policies is hereby AFFIRMED. There are no costs of this appeal to be assigned.

Date

Nicole M. Proesch, J.D.
Administrative Law Judge

Date

Charles C. Edwards Jr., Board President
State Board of Education