

IOWA DEPARTMENT OF EDUCATION
(Cite as 26 D.o.E. App. Dec. 192)

In re Good Conduct Discipline of Brandon M.

Anne Michehl,	:	
Appellant,	:	DECISION
vs.	:	
	:	[Admin. Doc. 4742]
Eagle Grove Community School District,	:	
Appellee.	:	

The above-captioned matter was heard in person on February 7, 2012, before designated administrative law judge Carol J. Greta, J.D. Anne Michehl and her minor son, Brandon M., were present with their attorney, Dani Eisentrager. The Eagle Grove Community School District was represented by its attorney, Rick Engel.

Ms. Michehl seeks reversal of the December 12, 2011 decision of the local board of directors of the Eagle Grove School District to uphold the administrative finding that Brandon violated the District's good conduct policy. Ms. Michehl filed a timely appeal to the State Board of Education on January 11, 2012.

Hearing was held pursuant to agency rules found at 281 Iowa Administrative Code chapter 6. Authority and jurisdiction for the appeal is found in Iowa Code chapter 290 (2011). The administrative law judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter of the appeal before them.

FINDINGS OF FACT

Like most schools, Eagle Grove has a good conduct policy proscribing certain behaviors for its students who participate in extracurricular activities, including interscholastic sports. Among the prohibited conduct is possession and use of any tobacco product.

The Eagle Grove good conduct policy includes the following steps to be followed when a student disputes an allegation that the student is in violation of the policy's prohibitions (these are reproduced verbatim from Appellant's Exhibit 1):

Step 1: **The Principal** will conduct a preliminary investigation and meet with the student in order to provide the opportunity for the student to explain, admit, or deny the allegation. This is done in order to determine whether there is enough evidence to call a meeting for the Activities Counsel [sic], which should take place within 2 school days.

Step 2: **Activity Council** meets to determine guilt or innocence. If the Activity Council is satisfied that a violation has taken place, they will initiate the appropriate action. The student and parents/guardians will be notified in writing by the Principal specifying the consequences and ineligibility period. The student will remain ineligible until the suspension time is completed or until an appeal reserves the decision. A copy will be sent to the activities office, school principal, and parents/guardians.

Step 3: If the student is dissatisfied with the action taken in step 2, he or she may appeal to the **Appeals Committee**. The hearing shall take place within two school days of receipt of the appeal request. After the hearing before this group, the penalty may be eliminated or affirmed.

Step 4: If a student is dissatisfied with action taken in Step 3, he or she may appeal the decision to the **superintendent** of schools. The superintendent's review shall take place within two school days of the receipt of the request.

Step 5: If a student is dissatisfied with the result of step 4, they may appeal the decision to the **Board of Education** in session through arrangement by the superintendent of schools.

Brandon M. is a junior at Eagle Grove High School; he participated this school year in cross country and wrestling.

On the evening of Saturday, November 19, Brandon was seen at a local Ampride™ gas and convenience store by a member of the local school board, Erin Halverson, who believed that Brandon had chewing tobacco in his mouth. Later that evening Ms. Halverson contacted Principal Jeske first via text message and then, upon Mr. Jeske's request, via email to report her suspicion that Brandon was using chewing tobacco.

The following Monday morning at school Mr. Jeske talked to Brandon, who denied that it was chewing tobacco in his mouth. Brandon told his principal that he had been chewing sunflower seeds. Mr. Jeske responded that a "conduct council" would be convened for later in the day to determine whether Brandon had violated the good conduct policy; he then had Brandon call his mother to invite her to the council.

Before convening the activity council, Mr. Jeske called the legal services director of School Administrators of Iowa ("SAI") to get more information about the necessary level of proof. Mr. Jeske explained that he had no physical evidence; he had a reliable adult witness who saw a bulge in the student's lower lip, but he also had a firm denial from the student that the bulge was tobacco. Mr. Jeske reported to Superintendent Toliver that the SAI legal services director expressed reservations about whether a finding of guilt could be legally justified in the absence of the witness actually seeing tobacco.

Superintendent Toliver stated that he did not believe he could find Brandon guilty of the good conduct violation, based on the evidence. He testified herein that he accordingly decided to attend the meeting that day, which he said was no longer an activity council meeting because there would not be a determination of guilt or innocence. He stated that his reasons for attending the meeting, which he characterized as now being a "parent meeting," were to make sure that Ms. Michehl was aware of the allegation against Brandon, to make mother and son aware that the school officials believed the allegation but were not going to pursue it, and to ask Ms. Michehl if she would consent to have Brandon take a drug test.

When Brandon and his mother met with Mr. Jeske after classes on the afternoon of Monday, November 21, the other school officials present were Superintendent Toliver, Activities Director Kelly Williamson and Head Wrestling Coach Aaron Schafer. Neither Brandon nor his mother was told that this meeting was not the activity council meeting

(Step 2 of the good conduct policy). However, all witnesses who attended the meeting agreed that Superintendent Toliver stated at the outset of the meeting that the District could not “prove [the allegation against Brandon] one way or the other.”

One of the administrators then stated to Ms. Michehl that this was not the first time that Brandon had been accused of use of chewing tobacco. Superintendent Toliver stated that he believed that Brandon used chewing tobacco, that he had a breathalyzer with him, and that he would like Ms. Michehl’s permission to test Brandon for recent tobacco usage. At that point Brandon surprised everyone at the meeting by stating that he had used chewing tobacco within the past three days, although not on the occasion when Ms. Halverson had seen him at the Ampride™.

Following this admission, the meeting ended fairly quickly. No vote was taken and no formal “determination” was made at the meeting that a violation had been proved. Coach Schafer testified that one of the administrators reminded Brandon before he and his mother left that this was his “third strike.”

The next week, following the District’s Thanksgiving recess, Brandon received written notification that his admission of tobacco use was his third offense under the good conduct policy, the penalty for which is a full year of ineligibility from interscholastic athletics.¹ Brandon exercised his opportunity to appeal to the Appeals Committee. The Appeals Committee affirmed the administrative finding that Brandon was guilty of use of tobacco. He then asked for and received a hearing before the local school board, which unanimously upheld the finding that Brandon violated the good conduct policy.

CONCLUSIONS OF LAW

The local school board’s authority to enforce a good conduct policy derives from Iowa Code section 279.8, which states that “the board shall make rules for its own government and that of the ... pupils, and for the care of the schoolhouse, grounds, and property of the school corporation” 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. *Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555, 564 (Iowa 1972).

The polestar case remains *Brands v. Sheldon Community School*, 671 F.Supp. 627, 630-631 (N.D. Iowa 1987). That case clearly establishes the following principles, which are followed in the vast majority of states:

- A secondary student has no “right” to participate in interscholastic athletics or other extracurricular activities.
- Accordingly, very little process is due to the student. Such due process consists of two elements:
 - The student must be told what he is accused of and
 - The student must be given an opportunity to tell his side of the story.

¹ Ms. Michehl does not appeal the sanction itself.

- It is only required that there be “some evidence” that a student violated the school’s good conduct policy for a student to be disciplined under such policy. “Some evidence” falls short of a preponderance of the evidence, and shorter still from the criminal standard of beyond a reasonable doubt.

Ms. Michehl argues that there were multiple violations of Brandon’s due process rights, starting with the holding of an Activities Council. She states that school officials were barred from convening the Activities Council because the school officials did not have sufficient evidence to proceed to Step 2 under the local good conduct policy.

This argument does not take into account that the school officials had no intention of punishing Brandon for the alleged tobacco violation from the evening of November 19. The evidence overwhelmingly demonstrates that the meeting with Brandon and his mother on the afternoon of November 21 was not a convening of the Activities Council. The Eagle Grove school officials proceeded with a meeting with Brandon and Ms. Michehl to impress upon them that just because school officials were not going to attempt to prove that Brandon used chewing tobacco, the officials believed Brandon was making poor choices regarding his behavior. Plainly put, the school officials believed that Brandon had a problem and wanted to get Brandon and his mother’s attention.

Noting that Step 4 of the Eagle Grove good conduct policy provides for the superintendent to hear an appeal from a student, Ms. Michehl argues that it was prejudicial error for Superintendent Toliver to take part in the meeting of November 21. She cites *Nielsen, et al. v. Audubon Community School District*, 13 D.o.E. App. Dec. 284 (1996) for the proposition that school officials must follow written board policy before imposing discipline under a good conduct policy. In *Nielsen*, this Board stated that the local “policy is notice to the parents and students that certain procedures will be followed before disciplinary action is imposed.” *Nielsen* at 296. Again, this argument fails because the meeting on the afternoon of the 21st was not a convening of the Activities Council. The steps of the Eagle Grove policy were meaningless at that point because the school officials had no intention of pursuing a punishment of Brandon for the alleged misconduct on the 19th.

Brandon’s unanticipated admission was a game changer. Up to that point, there was no due process violation because no further process was due to Brandon. He had been told early in the day on November 21 by Mr. Jeske what Ms. Halverson reported to Mr. Jeske, and he had been given the opportunity to dispute Ms. Halverson’s account. And, importantly, *Brandon has not been disciplined for the incident on the evening of November 19*. His third offense under the Eagle Grove good conduct policy is his admission of use of chewing tobacco at another, unspecified time. The question becomes whether the admission was coerced. If the admission was coerced, the finding of a third violation of the good conduct policy against Brandon must be reversed.

An argument of coercion does not stand up to the facts herein. There was no drug test administered here, but any drug testing in Iowa is subject to Iowa Code chapter 808A, the Student Search and Seizure Act. Under section 808A.2, a school official may conduct a search of a student (including a drug test) if the “official has reasonable

grounds² for suspecting that the search will produce evidence that a student has violated or is violating either the law or a school rule or regulation.” Nothing in chapter 808A requires a school official to ask for consent from the parent or guardian of a minor student. Nevertheless, Superintendent Toliver did ask Ms. Michehl for her consent to administer the breathalyzer on Brandon. As soon as the superintendent asked for parental consent, Brandon admitted to having recently used chewing tobacco.

No peace officers were present, so there was no real or perceived involvement of law enforcement. No threats were made; no trickery was used; no pressure was exerted. Ms. Michehl stated that Mr. Jeske was “verbally aggressive,” but gave no examples. She testified that Brandon was intimidated, but Brandon did not testify herein. This Board understands that Brandon was sitting around a table with his mother and with persons in positions of authority from the school district, but none of the school officials were abusing their authority. It is quite possible that Brandon felt uncomfortable during the meeting because he knew he had recently violated the Eagle Grove good conduct policy by using chewing tobacco, and had not told his coach about it.³

The local school board concluded that Brandon was neither tricked nor coerced into admitting to a good conduct violation. There was no error in that conclusion.

DECISION

For the foregoing reasons, the decision of the Board of Directors of the Eagle Grove Community School District made on December 12, 2011, finding that Brandon M. committed his third violation of the District’s good conduct rule, is AFFIRMED. There are no costs of this appeal to be assigned.

03/05/12
Date

/s/
Carol J. Greta, J.D.
Administrative Law Judge

It is so ordered.

03/29/12
Date

/s/
Rosie Hussey, President
State Board of Education

² A school official need only have “reasonable grounds” to invoke chapter 808A, not the “probable cause” that law enforcement must use. Inasmuch as no breath test was administered here, we do not have to decide if reasonable grounds were present.

³Coach Schafer testified that Brandon told him of the allegation that stemmed from being seen at Ampride by a school board member, but he learned of Brandon’s use of chewing tobacco at the same time as all other attendees at the meeting on November 21. The coach stated that Brandon knew that he was unhappy with Brandon’s decisions not to tell him when Brandon was facing earlier allegations of good conduct violations.