

**STATE BOARD OF EDUCATION
STATE OF GEORGIA**

DAMON P.,	:	
	:	
Appellant,	:	
	:	CASE NO 1993-9 (II)
vs.	:	
	:	DECISION
COBB COUNTY	:	
BOARD OF EDUCATION,	:	
	:	
Appellee.	:	

**PART I
SUMMARY**

This is an appeal by Damon P. (Student) from a decision by the Cobb County Board of Education (Local Board) to permanently expel him based upon charges that he violated the Local Board's policy relating to gang activity. The Student claims that the Local Board did not have jurisdiction to expel him because he had moved out of the school district before charges were made against him and the Local Board's policy is unconstitutional. The Local Board's decision is reversed.

**PART II
FACTUAL BACKGROUND**

This is the second appearance of this case. See. Damon P. v. Cobb Cnty. Bd. of Educ., Case No. 1993-9 (Ga. SBE, May 13, 1993) (Damon I). In the first appearance, the State Board of Education reversed the Local Board's decision to permanently expel the Student, because the Local Board failed to give the Student proper notice, and remanded the case for another hearing. The Local Board did not attempt to hold another hearing before the end of the 1992-1993 school term.

On July 19, 1993, the Student's mother moved to Marietta, Georgia, and the Student withdrew from the Cobb County School System and enrolled in the Marietta School System. After the Student withdrew from the Cobb County School System, the Local Board sent a notice to the Student on July 29, 1993, that it would conduct another hearing on charges the Student violated the provisions of Local Board Policy JCDC, Gang-related activities.

The hearing was not held until September 20, 1993. In the meantime, the Student enrolled in the Marietta School System and started classes. After the Student was enrolled for approximately two weeks, the Cobb County School System informed the Marietta School System that the Student had been permanently expelled. The Marietta School System has a policy that prohibits a student from enrolling if the student has been permanently expelled from another school system. Marietta, therefore, told the Student that he could no longer attend school in Marietta.

During the hearing before the Local Board, evidence was presented that on November 19, 1992, the principal at Campbell High School noticed students moving en masse at approximately 8:20 a.m. Because of rumors she had heard, the principal was concerned about the possibility of a gang fight at the school and she called school security and the Cobb County Police. The principal then went to investigate. The principal spotted the Student and four other young men in the hallway. Although no fighting was taking place, the Student and the four other men ran out the doors of the school building. The four young men ran to a van that was parked off campus; the Student ran into an apartment complex that was adjacent to the school property.

An assistant principal caught the Student as he was coming out of the apartment complex. A security officer and the police caught the other young men. The entire group was taken to a conference room in the school and questioned. One of the young men had a knife, but the Student was unarmed. The Student was then suspended for ten days.

At the hearing held on September 20, 1993, the Student testified that he had left home and was walking to school when the four other young men drove up in the van and asked him if he wanted a ride to school. He got into the van and rode with them to school and they walked into the building with him. The Student testified that there was no intent to become involved in a fight. Testimony was also presented that the van had been stolen on the previous evening.

The Student testified that he had been a member of a gang when he lived in Indiana, but he had dropped his affiliation with the gang upon moving to Georgia. There was also testimony that gangs are operating in Georgia and they are affiliated with gangs from California and Chicago. One of the young men had a T-shirt with gang writing and symbols on it. The Student also had gang tattoos that he obtained while living in Indiana.

At the conclusion of the hearing, the Student Disciplinary Tribunal voted to permanently expel the Student. The Student appealed to the Local Board, but the Local Board upheld the Student Disciplinary Tribunal's decision. The Student then appealed to the State Board of Education.

PART III DISCUSSION

Constitutionality of Policy JCDC

The Student claims that Local Board Policy JCDC is unconstitutional, both facially and as applied. The Local Board counters by first arguing that the State Board of Education does not have jurisdiction to determine the constitutionality of its policies, and then arguing that its policy is constitutional and has been constitutionally applied.

O.C.G.A. § 20-2-1160 gives the State Board of Education the authority to review local board decisions that involve a controversy concerning the administration and interpretation of school law. The Local Board claims that the interpretation of Policy JCDC necessarily involves the interpretation of the federal and state constitutions, not the interpretation and administration of school law. Accordingly, the Local Board claims that the State Board of Education lacks subject matter jurisdiction.

The State Board of Education serves as a quasi-court. See. Murdock v. Perkins, 219 Ga. 756 (1964). Inherent in the role of a quasi-court is the power to make decisions regarding the constitutionality of policies and actions of local boards of education. For example, in Dalton City Bd. of Educ. v. Smith, 256 Ga. 394, 349 S.E.2d 458 (1986), the Court observed that a hearing under O.C.G.A. § 20-2-1160 was unnecessary if a claim of unconstitutionality was not made. If,

however, a claim was made that some action was unconstitutional, then a hearing is necessary. The only purpose of such a hearing is to permit both the local board and the State Board of Education to decide the constitutional claim. The State Board of Education, therefore, concludes that it has the authority to rule on the constitutionality of the Local Board's policy.

The Student claims that Local Board Policy JCDC is unconstitutional because it denies freedom of speech and freedom of association, it unlawfully attempts to control non-school related activities, and is too broad in its approach to fairly inform what activities it prohibits. The Local Board argues that the policy was crafted from state statutes that have been declared constitutional, and that the policy is constitutional if read with an awareness of existing court interpretations of the words used in the policy.

The policy provides that no student shall:

1. Display or wear gang articles, paraphernalia, or clothing.
2. Threaten to commit, or actually commit, any crime of violence or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, school bus, or other school facility or otherwise causing disruption to the orderly operation of any activity on any school campus or school property, or in reckless disregard of the risk of causing such terror or disruption.
3. Shoot at or throw an object at a school bus or other school owned or operated vehicle which is being operated or which is occupied by passengers.
4. Recruit or solicit membership in any gang or gang-related organization.
5. Hold himself or herself out as a member of a gang.

Local Board Policy JCDC, Gang-related Activity, Part B, adopted November 11, 1992.

The policy defines a gang as:

any group or association of three or more persons, whether formal or informal, which encourages, solicits, promotes, urges, counsels, furthers, advocates, condones, assists, causes, advises, procures, or abets any illegal or disruptive activity or behavior of any kind, whether on or off school campuses or school property.

Local Board Policy JCDC, Part A.

The policy further provides that:

Any student who urges, encourages, counsels, furthers, promotes, assists, causes, advises, procures, or abets any other student or students to violate any section or paragraph of this policy shall be deemed to have violated that section or paragraph.

Local Board Policy JCDC, Part C.

The policy is, without question, overly broad. Two simple illustrations of the extent of the policy show its breadth. If a group of Boy Scouts are camping in the North Georgia mountains and discussing survival techniques and the weaving of palmetto leaves into plates

without knowing that federal law prohibits the picking of palmetto leaves, then they would be subject to the policy. They constitute a group of three or more persons who are encouraging, promoting, urging, counseling, furthering, and advising an illegal activity. They are also engaged in a prohibited activity under the policy because they are wearing gang articles, paraphernalia, and clothing, i.e., Boy Scout uniforms. Additionally, since the group has been identified as a gang with distinctive clothing, any other student who wears the Boy Scout uniform is engaging in a prohibited activity and thus violates the policy, regardless whether the student is aware that the original group engaged in advising about an illegal activity. A violation of the policy does not require any intent to commit an illegal act, or the knowledge that others have engaged in any illegal activity.

The Local Board argues that the activity has to be disruptive before a person is in violation of the policy. The policy, however, does not address itself only to disruptive activity; it is also addressed to “any illegal activity,” regardless of whether there is any intent to violate the law, or any action is taken to violate the law. The policy attempts to control the speech and actions of students regardless whether the speech or actions relate to the operation and management of the school. We conclude that the policy is unconstitutional.

Authority of Local Board to Conduct a Hearing

The Student also claims that the Local Board did not have the authority to conduct a hearing because it did not have jurisdiction over him when the notice of the hearing was issued. The Local Board counters by arguing that the hearing was held because the State Board of Education ordered a new hearing when it remanded the case.

The Local Board’s jurisdiction, however, is not based upon directions from the State Board of Education. Instead, it is dependent upon the relation between the Student and the School System. When the State Board of Education reversed and remanded in Damon I, the Local Board’s previous actions were nullified, including the original notice. The Local Board had thirty days to appeal the State Board of Education’s decision. Arguably, therefore, the Local Board would have retained jurisdiction during the thirty days, regardless of whether the Student was still enrolled in school. At the end of the thirty days, however, the Student was in the position of not having been charged with any infraction. When he left the Cobb System, he left without any charges pending against him. Without any charges pending, the relation between the Student and the Local Board ceased and the Local Board lost jurisdiction to thereafter bring charges against the Student.

The Local Board argues that it could not have held a hearing during the summer months because teachers were on vacation. The Local Board also argues that the Student was not harmed by holding the hearing at a later date because he did not attend school after the State Board of Education remanded Damon I, and he could not have attended school during the summer months. Jurisdiction, however, is not predicated upon the availability of witnesses or the convenience of the parties. Instead, it rests on the relation between the parties. At the time the Local Board finally issued a letter of charges against the Student, the Student was no longer enrolled in the Cobb County School System. We, therefore, conclude that the Local Board did not have jurisdiction to conduct another hearing when it issued the charge letter after the Student withdrew to enroll in another school system.

PART IV
DECISION

Based upon the foregoing, the State Board of Education is of the opinion that the Local Board's Policy JCDC is unconstitutional, and that the Local Board lacked jurisdiction to conduct a hearing on charges made against the Student after he withdrew from school. The Local Board's decision, therefore, is

REVERSED.

This 14th day of April, 1994.

Mr. Brinson, Mrs. King, Dr. Thomas Mr. Williams were not present.

Richard C. Owens, Chairman
State Board of Education

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PART I

SUMMARY

This is an appeal by the parent of Damon P. ("Student") from a December 29, 1992, decision by the Cobb County Board of Education ("Local Board") decision to uphold the decision of a disciplinary tribunal to permanently expel the Student for violating its policy relating to gang-related activity. The Student claims he was denied procedural and substantive due process because the notice of the hearing was improper; the Local Board's rule is unconstitutional, and the Local Board's decision is arbitrary and capricious. The decision of the local board of education is hereby reversed and remanded with direction to hold a new hearing consistent with the findings in this order.

PART II

FACTUAL BACKGROUND¹

On November 20, 1992, the Cobb County School System notified the Student's parent that the Student was suspended from school and charged with gang-related activity. The written notice stated that a hearing would be held before December 7, 1992, and that a recommendation had been made to permanently expel the Student. The letter also said that additional details would be provided later. Attached to the letter was a copy of the Local Board's policy on expulsion, Policy JDD.

¹ A transcript was not provided with the appeal because of the parent's indigence. This background is based upon the record submitted by the Local Superintendent, which only contains correspondence, a copy of the Local Board's policy, and the Local Board's decision.

Policy JDD requires the Local Superintendent, or the school board attorney, to provide a written notice of the charges to the student. The notice has to include:

[a] brief statement of the act(s) student is alleged to have committed, along with a copy of the rules allegedly violated.

Policy JDD, Hearing Procedures, Par. 2(a).

Additionally, Policy JDD provides:

Objection to the sufficiency of the notice and or other procedural objections shall be waived unless written notice thereof is filed with the Superintendent or school board attorney at least 24 hours prior to the time that the hearing is scheduled to begin. The hearing may be postponed until such defects have been removed or remedied.

Policy JDD, Hearing Procedures, Par. 6.

On December 3, 1992, counsel for the Local Board sent a letter to the Student's parent stating that the hearing would be held on Monday, December 4, 1992.² The letter also stated that the Student was charged with violating Local Board Policy JCDC, Gang-Related Activities, on November 19, 1992. A list of witnesses was also given. The Student's parent asked, in writing, the Local Board's counsel for a delay in the proceedings to permit the parent to hire an attorney and interview witnesses. On December 7, 1992, the Local Board's counsel delivered another letter to the Student's parent that said the hearing would not be postponed and would be held that day, December 7, 1992, and the request for a delay was denied. Additionally, the letter contained subpoena forms for the Student's use.

The hearing proceeded before the Disciplinary Tribunal on December 7, 1992, without the Student being represented by a lawyer. The Disciplinary Tribunal found that the Student had violated Local Board Policy JCDC, "Gang Related Activity" and voted to permanently expel the Student.

The Student filed a timely appeal with the Local Board. On December 29, 1992, the Local Board decided to uphold the decision of the Disciplinary Tribunal. The Student filed a timely appeal with the State Board of Education. The Student's parent, however, did not provide the Local Superintendent with a transcript of the proceedings because the parent was unable to pay the transcript costs. The Local Superintendent forwarded the record, without the transcript, to the State Board of Education.

² The Local Board argues that the date was an obvious misprint; Monday was December 7, 1992.

PART III
DISCUSSION

On appeal, the Student raises the following issues:

- (1) the Local Board violated its own policies by denying the Student's request to delay the date of the hearing;
- (2) the Student's procedural rights were violated when the Local Board failed to provide him with adequate notice of the charges against him with any required specificity;
- (3) the Student's procedural rights were violated because the Local Board failed to waive the transcript fee requirement;
- (4) the Student's procedural rights were violated when the Local Board failed to provide a copy of the complete record to the State Board of Education;
- (5) the Local Board's gang policy (JCDC) is unconstitutionally broad and vague, both on its face and as applied;
- (6) the Local Board's gang policy is invalid on its face and as applied due to its regulation of community based/speech and association conduct;
- (7) the Local Board's gang policy punishes the innocent and holds them responsible for the acts of others;
- (8) permanent expulsion is unconstitutional because it is a total deprivation of a fundamental right to a basic education under federal equal protection and due process clauses, both of which require the school system to demonstrate a compelling interest which cannot be served through any less drastic means;
- (9) the Local Boards decision to permanently expel the Student is too harsh, and
- (10) permanent expulsion is an inadequate solution. The Local Board claims it is not required to provide a transcript of the initial hearing and the appeal should be dismissed since the Student failed to provide a transcript. The Local Board also claims the Student failed to raise any of the remaining issues at the initial hearing and the issues cannot be raised on appeal. The Local Board also argues that its notice was adequate, and that its Policy JCDC is constitutional.

A. ADEQUACY OF NOTICE

We first take up the question whether the notice provided to the Student was adequate. Without a transcript, we are unable to determine whether this issue was raised before the Local

Board. Notwithstanding, we have the notices and there is sufficient information for us to determine if the notice was adequate.³

Only two notices were provided by the Local Board, one on November 20, 1992, and one on December 3, 1992. In the November 20 notice, the Student's parent was told that a hearing would be held no later than December 7, 1992, on charges the Student violated Cobb County Board of Education Policy JCDC (Gang Related Activity). The letter also stated that "[t]he hearing date, time and place will be forwarded to you in writing along with the procedures for such a hearing." The letter did not state how the Student had violated Policy JCDC.

The second notice was sent on December 3, 1992. The second letter stated that the Student was charged with being "involved in gang-related activity on school campus on November 19, 1992, so as to be in violation of Cobb County School District Policy JCDC." The letter contained a list of witnesses, but it did not inform the Student of what actions constituted a violation of Policy JCDC.

O.C.G. .A. § 20-2-754(a) provides that the notice of a hearing shall contain "a short and plain statement of the matters asserted..." In addition, a "verbatim electronic or written record of the hearing shall be made and shall be available to all parties." O.C.G.A. § 20-2-754(a) (3).

The Local Board's Policy JDD also requires the notice to contain a "brief statement of the act(s) student is alleged to have committed, along with a copy of the rules allegedly violated." Policy JDD, Hearing Procedures, Par. 2(a).

In this case, neither of the notices informed the Student of what acts constituted a violation of Policy JCDC; both notices simply informed him that he had violated the policy. The policy, however, prohibits many activities.⁴ For example, the Policy prohibits the wearing of certain clothing or uttering statements. Without some indication of the prohibited acts allegedly committed, the Student is forced to guess what case the Local School System will present.

One of the main reasons for requiring notice is to permit the accused to prepare a defense. To prepare a defense, the accused needs to know the rule or rules allegedly violated, the date, time, and place the offense occurred, and the act or actions that result in an offense to the rule or rules. The amount of information needed to prepare a defense depends on the specificity of the rule involved.

If the rule is specific, e.g., a prohibition against fighting with another student, then identification of the rule, the date, time, and place, may supply substantially all of the information needed to prepare a defense. If, however, the rule or policy is an agglomeration of several rules, then more information is needed about the specific acts and specific rules before an accused can prepare an effective defense. For example, to tell someone they violated the Internal

³ The notices of charges were not forwarded by the Local Superintendent but were included as exhibits in the briefs submitted by the parties. Since the notices should have been part of the record submitted by the Local Superintendent, they are considered here.

⁴ The pertinent part of Policy JCDC is set out in Appendix A, attached hereto.

Revenue Code when they filed their federal tax return does not permit preparation of an effective defense. Thus, if the rule is specific, a proper defense may not require specificity concerning the acts that constitute a violation. If, however, the rule is not specific, then a proper defense requires greater specificity in detailing the acts.

The Local Board argues that the Student had adequate notice because he was told by his principal and by the security chief that his conduct on November 19, 1992, would result in disciplinary action. Additionally, the Local Board argues that due process merely requires that a student needs to be notified that a hearing will take place. The Local Board then argues that under the holding in Goss v. Lopez, 419 U.S. 565 (1975), a school district merely has to provide a student with “some kind of notice,” and a student does not have the same rights as litigants in a civil case or defendants in a criminal case. Based upon these principles, the Local Board argues that the two notices to the Student’s parent and the statements by the principal and the security chief were sufficient to provide the Student with due process.

The Local Board’s argument, however, overlooks its own Policy JDD, which requires notice of the “acts” the Student allegedly committed to violate the rules. Thus, notwithstanding any rule set out in Goss v. Lopez, *supra*, the Local Board’s policy requires more than notice that a hearing will take place. The policy also requires the acts to be set out in the notice; oral statements by school officials are not considered. Neither of the notices provided to the Student’s parent gave any notice of the acts he allegedly committed to violate the rules.

An examination of Policy JCDC shows that it covers the entire spectrum of human activity from thinking, writing, talking, and wearing clothing or paraphernalia, to the commission of crimes established by state law. To simply inform the Student that he violated the policy on a particular date does nothing to inform him of what part of the policy he violated. The Student could prepare a defense that his clothing was not gang clothing but find out at the hearing that the violation he supposedly committed was that he had condoned gang activity by not interfering or reporting gang activity he observed. Simply informing him that he violated Policy JCDC did not permit the Student to prepare a proper defense.

The Local Board has not advanced any reason for not informing the Student of the acts he allegedly committed. If the only notice provided was the one from the Local Superintendent, then the lack of information could be attributed to the lack of legal knowledge by school officials. In this case, however, a second notice was sent by the Local Board’s attorney, as provided in the Local Board Policy JDD. The lack of legal knowledge cannot be attributed to the Local Board’s attorney. There may be circumstances where the lack of legal knowledge may justify less information than a defense attorney might want. But where, as here, permanent expulsion from the public education system is being sought, we believe that a student should be fully informed of why such drastic action is being pursued. The stakes are too high for the student to permit any form of gamesmanship when full disclosure is easily provided.

We conclude that the Local Board failed to follow its own notice policy by not informing the Student of the acts that allegedly constituted a violation of Policy JCDC. The notice, therefore, was insufficient and denied the Student due process.

B. POSTPONEMENT OF HEARING

The Student claims he was denied due process because the Disciplinary Tribunal proceeded with the hearing notwithstanding the Student's parent's timely request for a postponement to obtain legal representation. The Local Board claims the request was not made because the Student's parent made the request in writing to the Local Board's attorney rather than to the Disciplinary Tribunal. The Local Board also argues that the school board attorney did not deny the request for postponement, but was merely telling the Student's parent that he would not, as opposing counsel, agree to a postponement.

The Student's parent made the written request for postponement to the Local Board's attorney on December 4, 1992, the day she received notice from the attorney of when the hearing would be held. Policy JDD specifically provides:

Objections to the sufficiency of the notice and or other procedural objections shall be waived unless written notice thereof is filed with the Superintendent or school board attorney at least 24 hours prior to the time that the hearing is scheduled to begin. The hearing may be postponed until such defects have been removed or remedied. [Emphasis added.]

The Student's parent followed the explicit directions of the Local Board by filing an objection with the school board attorney.

The Local Board's only justification for denying the request for postponement is that the Student's parent, even though not represented by an attorney, should have known that a request to opposing counsel was insufficient and the request should have been filed with the Disciplinary Tribunal. The Local Board's argument, however, is clearly contrary to own policy. We, therefore, conclude that the Local Board's decision not to grant a postponement was arbitrary and capricious and contrary to its own policy.

C. PROVIDING TRANSCRIPT

The Student claims that the Local Board's refusal to provide a transcript of the Disciplinary Tribunal hearing for either the appeal to the Local Board or to the State Board of Education denied him due process and equal protection of the law. The Local Board claims that there is no requirement for it to pay for a transcript under state law, State Board of Education policies, or under any court decisions.

The case law supports the Local Board's argument that federal due process does not require a transcript to be provided by the government when a student appeals, even if the student cannot afford the cost of a transcript. It was not until 1956 that the United States Supreme Court said that convicted felons had a right to a government provided transcript. See, Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 process rights. We note, however, that the Local Board quoted extensively from the transcript in its brief, thus indicating that the Local Board purchased a copy of the transcript. The Local Board's counsel also stated during oral argument that the Local Board purchased a copy of the transcript. There was, therefore, no

reason for the Local Board not to make the transcript available to the Student. While it would be an easy matter to hold that the Local Board violated O.C.G.A. § 20-2-754 in not providing this transcript to the Student, we do not view the fortuitous circumstance that the Local Board voluntarily purchased the transcript as a sound basis for establishing policy.⁵

D. CONSTITUTIONALITY OF POLICY JCDC

The Student claims that the Local Board's Policy JCDC is unconstitutionally overbroad. Based upon our conclusions in Parts A and B, above, we do not need to address the constitutionality of the Policy.

PART IV

DECISION

Based upon the foregoing, the State Board of Education is of the opinion the Local Board failed to give the Student proper notice of the hearing, and the Local Board's decision not to postpone the hearing was arbitrary and capricious. The decision of the local board of education is hereby reversed and remanded with direction to hold a new hearing consistent with the findings in this order.

This 13th day of May, 1993.

Al Abrams' seat is vacant due to his resignation effective April 30, 1993.

Robert M. Brinson
Vice Chairman for Appeals

⁵ There is an old legal maxim that says, "Bad facts make bad law." We resist the temptation.