LETTER OPINION
2004-L-77

December 27, 2004

Mr. Stuart A. Larson
Traill County State's Attorney
PO Box 847
Hillsboro, ND 58045-0847

Dear Mr. Larson:

Thank you for asking whether a school district may prevent a high school student from participating in an extracurricular activity for using tobacco off school grounds during nonschool hours and, as a result, violating a school district rule, even though the tobacco use is legal because of the student's age.[1] In my opinion, unless the school district can demonstrate that the conduct in question will have negative repercussions in the school environment, a rule allowing suspension of an 18-year-old student from attending an extracurricular activity such as the prom for smoking tobacco off school property and not during school hours is unreasonable.

ANALYSIS

A high school district adopted a rule providing for suspension from extracurricular activities, including athletic and music contests, as well as specified school activities, including the prom, for "[t]he use or possession of tobacco, alcohol, or any controlled substance as defined by North Dakota law." Subsection 1.1 of Offenses, Extracurricular Activities Infractions/Suspensions.[2] An 18-year old student was prohibited by the district from attending the prom because the student was smoking off school grounds and not during school hours in violation of the rule. Smoking or tobacco use by an 18-year-old adult is a legal activity. N.D.C.C. § 12.1-31-03.[3]

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[1] You also asked whether a school district may extend the North Dakota High School Activities Association (NDHSAA) disciplinary rules to extracurricular activities not governed by the NDHSAA rules. It is not necessary to address this question independently, as the analysis to any rule adopted by the school district would likely be the same as that discussed in this opinion.

[2] The school district rule is modeled on a rule promulgated by the NDHSAA relating to school district contests involving athletic teams and certain other competitive programs, including music and speech. See Article XIV, § XII, NDHSAA By-Laws.

[3] But use of tobacco by a minor is a noncriminal offense punishable by a fine of $25 for minors age 14 to 18 years. N.D.C.C. § 12.1-31-03(2), (4).

A school district has authority to "[a]dopt rules regarding the instruction of students, including their admission, transfer, organization, grading and government." N.D.C.C. § 15.1-09-33(17) (emphasis added). Because a school district's authority is confined to the school and its operation, school rules must pertain to conduct that "directly relates to and affects management of the school and its efficiency." Bunger v. Iowa High School Athletic Ass'n, 197 N.W.2d 555, 563 (Iowa 1972). See also Crandall v. N.D. High School Activities Ass'n, 261 N.W.2d 921, 925 (N.D. 1978) (the purpose behind a rule must be legitimate). In addition, rules adopted by a school district must be fair and reasonable. Crandall, 261 N.W.2d at 926; 78A C.J.S. Schools and School Districts § 794 (1995) (a rule in regard to discipline and management of a public school must be reasonable). Rules established by a school are presumed to be reasonable. Batty v. Bd. of Educ. of City of Williston, 269 N.W. 49, 50 (N.D. 1936). Whether a rule is reasonable is a question of law. Id.

School district rules, as applied to out-of-school conduct, have usually been found reasonable if the conduct has a direct and immediate effect on the discipline or general welfare of the school. Clements v. Board of Trustees of Sheridan County School District No. 2, 585 P.2d 197, 204-05 (Wyo. 1978), citing Daniel E. Feld, Right to Discipline Pupil for Conduct Away from School Grounds or Not Immediately Connected with School Activities, 53 A.L.R.3d 1124, 1132 (1973). In Clements, suspension of a student for harassing a school bus with his car on a highway was upheld under a statute allowing suspension for behavior "detrimental to the education, welfare, safety or morals of other pupils." Id. at 199. The court in J.S. ex rel. H.S. v. Bethlehem Area School Dist., 757 A.2d 412, 421 (Pa. Commw. Ct. 2000), observed that "courts have allowed school officials to discipline students for conduct occurring off of school premises where it is established that the conduct materially and substantially interferes with the educational process." The court affirmed suspension of a student for creating a web site off school property because the site had hindered the educational process. The web page showed a teacher's severed head, contained a solicitation for funds to cover the cost of a hit man, and contained derogatory comments about that teacher and other teachers, resulting in one teacher taking medical leave. The web page was accessed by both students and faculty while on school grounds. See also Bethel School District No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986) (upholding suspension for delivery of a sexually charged speech at a school assembly because it was disruptive of the educational process).

Whether a rule is reasonable may also depend on the extracurricular activity involved and the student's status as a "role model" or representative of the school. Certain cases that have dealt with such rules have held they apply to off-campus conduct because the student participating in school contests, e.g., athletic contests, represents the school. See, e.g., Veronia School District 47J v. Acton, 515 U.S. 646, 657, 663

(1995) (status of a student athlete as a "role model" a factor in finding a random drug test reasonable to meet a drug problem in school); Bunger v. Iowa High Sch. Athletic Ass'n, 197 N.W.2d 555, 564 (Iowa 1972) (standout students, whether in athletics, forensics, drama, or other interscholastic activities are leaders held to a higher standard than others because they are looked up to and emulated); Larry D. Bartlett, The Courts' View of Good Conduct Rules for High School Student Athletes, 82 Ed. Law Rep. 1087, 1101 (1997). See also Crandall v. North Dakota High School Activities Ass'n., 261 N.W.2d 921, 926-25 (N.D. 1978) (concluding that NDHSAA eligibility rules regarding athletics were reasonable without being discriminatory and that the Legislature had endorsed the NDHSAA program by enacting N.D.C.C. § 15-29-08(20), the precursor of N.D.C.C. § 15.1-09-33(18), which allows school districts to join the NDHSAA and pay dues).

Where the conduct has no relationship to the educational process, suspensions based on school rules applied to off-campus behavior have not been upheld. In Bunger, a student was ineligible for football because he was riding in a car containing a case of beer. Bunger, 197 N.W.2d at 559. The conduct occurred outside of the football season, was beyond the school year, and there was no illegal or improper use of the beer. The court found the rule to be unreasonable because the court could not find a direct effect on the school. Id. at 564. See also Board of Education of the Millbrook Central School District v. Ambach, 465 N.Y.S.2d 77, 78 (S. Ct. 1983) (affirming reinstatement of a student suspended for an assault of a person, who was neither a student or teacher, during vacation, under a statute allowing suspension if conduct endangers the safety or welfare of other students); Martinez v. School Dist. No. 60, 852 P.2d 1275, 1278 (Colo. App. 1992) ("In considering the district's policy here, we observe that a school district's regulation of students' conduct must bear some reasonable relationship to the educational environment; a school district cannot regulate purely private activity having no effect upon that environment). Even where a state statute authorized expulsion for conduct off school grounds that was "seriously disruptive of the educational process," possession of marijuana in the trunk of a car off school grounds after school hours did not justify expulsion because the statute was constitutionally vague regarding that specific conduct and there was no tangible nexus to school operation which made it seriously disruptive of the educational process. Packer v. Board of Education of Thomaston, 717 A.2d 117, 130, 134 (Conn. 1998). Thus, in order to permissibly regulate off-premises conduct, the conduct must have negative repercussions in the school environment. Deskins v. Gose, 85 Mo. 485 (1885); Ark. A.G. 2002-101.

In the only case located regarding this precise issue, the Traill County District Court, in granting a preliminary injunction, found the rule in question as applied to be "arbitrary, capricious and unreasonable" and that there was no rational basis for application of the

rule to conduct off school grounds and not nearby or at a school event. Fitzpatrick v. Hillsboro Public School, No. 49-04-C-00040, Memorandum Opinion dated April 1, 2004. It is also notable that the school rules in question prohibiting use or possession of tobacco, alcohol, or a controlled drug make a distinction between legal and illegal possession of alcohol or drugs. For example, prohibited possession is defined to include attendance by students at a public event or wedding dance where alcohol or drugs are being "illegally consumed." Subsection 1.3-A of Offenses. Use of tobacco is not an illegal activity for 18-year-olds, while use of alcohol or drugs is illegal for high school age students.

No purpose was expressed explaining how this rule, as applied to a student legally smoking off the premises during nonschool hours, would negatively disrupt the educational process or the school environment. In my opinion, unless the school district can demonstrate that the conduct in question will have negative repercussions on the educational process or to the school environment, a rule allowing suspension of an 18-year-old student from attending an extracurricular activity such as the prom for smoking tobacco off school property and not during school hours is unreasonable.

Sincerely,

Wayne Stenehjem
Attorney General

tam/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).