THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion from Marshall High School of PAUL F[redacted] and SCOTT B[redacted],

OPINION AND FINAL ORDER

Appellants.

THE NATURE OF THE CASE

These are appeals pursuant to Section 120.13(1)(c), Stats., from October 18, 1978 orders of the Board of Education (hereinafter Board) of Joint School District No. 2, Marshall, Wisconsin (hereinafter District) expelling appellants from Marshall High School. As both appeals raise substantially the same issues, they will be treated as one for the purposes of this review. This matter is now before the State Superintendent of Public Instruction on appellants' motion to dismiss the District's charges against appellants and vacate the Board's orders of expulsion on the grounds of various asserted procedural defects by which appellants contend they have been denied due process of law. Now having reviewed the briefs of counsel and being fully apprised of all matters of record, consisting of transcripts and minutes of the September 25, 1978 and October 18, 1978 proceedings before the Board, a transcript of the November 14, 1978 hearing before the State Superintendent's designated examiner, related exhibits, and written notices and correspondence between the parties relative to these matters, the State Superintendent of Public Instruction makes the following

FINDINGS OF FACT

During the first two months of the current school year, both appellants were repeatedly suspended from school for alleged infractions of school policy. While Appellant B[redacted]'s father (his custodial parent) and both Appellant F[redacted]'s parents were given written notice as to each period of suspension stating in general terms the reasons for such suspensions, no notice specified the time, place and circumstances surrounding any specific alleged infraction.

On September 18, 1978, F[redacted]'s parents were notified in writing that the Board would conduct a hearing as to his possible expulsion. The charge against him was stated in relevant part as follows:

> "The reason for this hearing is that your son . . . . [repeatedly refused to obey school rules."]

Although no written notice of hearing was issued in regard to Appellant B[redacted], both he and his father appeared before the Board on the evening of September 25, 1978, at the request of the high school principal. At such time, Appellant F[redacted] appeared in person in the company of his father. After the taking of testimony, the Board determined to return both appellants to school on a "last chance" basis.

Appellant F[redacted]'s parents and Appellant B[redacted]'s custodial parent were notified on October 13, 1978 and October 11, 1978, respectively, of the Board's decision to hold another hearing as to the students' possible expulsion on October 18, 1978. In both cases the charges against appellants were stated in the same terms as in the September 18, 1978 notice to F[redacted]'s parents. Following the taking of testimony at the hearing, the Board voted to expel appellants from Marshall High School.

CONCLUSION OF LAW

School districts are limited purpose municipal corporations and have only such powers as are conferred specifically by statute or are necessarily implied thereby. Iverson v. Union Free High School Dist., 186 Wis. 342 (1925). The legislature has conferred upon school boards the power to expel students by Section 120.13(1)(c), Stats. The statute mandates a two part test for determining whether expulsion is warranted in a particular case. Initially, it must be established that the conduct with which a student is charged falls within either of the alternative statutory grounds for expulsion: ". . . repeated refusal or neglect to obey school rules . . ." or ". . . conduct while at school or while under the supervision of a school authority which endangers the property, health or safety of others . . ." Once a student's conduct has been found to fall within either of the proscribed grounds, the second part of the test requires a finding to be made that, in view of such conduct, the interests of the school demand his or her expulsion. The statute further requires that a written notice of hearing be issued ". . . specifying the particulars of the alleged refusal, neglect or conduct . . ." (emphasis supplied) for which expulsion is sought.

A free public education is a matter of express constitutional right in this state. Wisconsin Constitution, Art. X, sec. 3. Noting the constitutional significance of this right, the U.S. Supreme Court has held that, at a minimum, due process demands that a student charged with serious misconduct must be provided with adequate notice of charges and an opportunity to be heard before he or she may be lawfully deprived of that right. Goss v. Lopez, 419 U.S. 565 (1975). In 1974, the U.S. District Court for the Eastern District of Wisconsin

granted summary judgment to an expelled student on the grounds of inadequate notice in Keller v. Fochs, 385 F. Supp. 262, a case involving an expulsion ordered by the Wauwatosa Board of Education. Citing with approval the Seventh Circuit Court of Appeals holding in Betts v. Board of Education, 466 F. 2d 629 (1969), the Court stressed the necessity of adequate notice of charges to enable a student to prepare his defense:

> Even in that situation wherein a student unequivocally admits the conduct charged at an expulsion hearing, and procedural protections thus serve a more limited function in terms of insuring a fair and reasonable determination of the retrospective factual question of guilt of the conduct charged, the Seventh Circuit Court of Appeals will look to the existence of adequate notice of the charges and sufficient opportunity to prepare for the hearing on review of alleged due process violations. p. 265.

The court went on to note at p. 266: "The lack of adequate notice necessarily affects Plaintiff's ability to prepare his defense and thus the meaningfulness of his opportunity to be heard." The state legislature has codified the case law in this respect by requiring the notice of hearing under Section 120.13(1)(c) to state the ". . . particulars of the alleged refusal, neglect, or conduct . . ." giving rise to the expulsion proceeding. The notices issued in the instant matter merely advised the parties that on more than one occasion appellants had allegedly refused to obey school rules. The notices contain no reference to the nature of any particular alleged refusal as mandated by the statute; rather, the District has merely noted its decision to rely upon the first alternative statutory ground in prosecuting appellants' expulsions. In effect, the District has stated a conclusion of law which it seeks to have drawn if undisclosed issues of fact are proven. Disclosure of the facts at issue is essential to adequate notice, for, without such specification of the charges, appellants could have no greater inkling why they are faced with expulsion than if they were provided with nothing more than a copy of Section 120.13(1)(c).

As the notices fail to specify the particulars of the alleged conduct, they are defective on their face. The District contends that any such defect has been cured by information previously supplied to appellants through the several suspension notices and alleged conversations between parents and administration which are outside of the record. Such a contention was expressly rejected by the court in Keller, supra. There, as in the instant matter, suspension notices had been issued prior to the commencement of the expulsion proceedings stating the reasons for disciplinary action in terms of general categories without reference to the time and circumstances of specific alleged occurrences. The court reasoned that even where the offending conduct had been so categorized, the student had not been sufficiently apprised of what specific actions he was being charged and, hence, he had no means of determining what evidence would be needed to mitigate or refute the allegations with which he would be confronted at hearing. Likewise, the District's contention that defects in the notice were cured at the time of the hearings through the presentation of its case against appellants is without merit. The provision of a hearing is nothing more than a hollow gesture where an individual charged with an offense is not given advance notice of specific allegations so that he may have a real opportunity to prepare a defense prior to hearing. For this reason, the state legislature has mandated that notice be given at least five days prior to hearing specifying the particulars of the alleged offending conduct.

The District has suggested that demanding of it strict compliance with the requirement of adequate notice and other due process obligations will place an undue burden upon the schools of this state in prosecuting meritorious expulsions. However, the American concept of justice enshrined in both the state and federal constitutions rests upon the safeguarding of an accused's rights

whether he be faced with criminal sanctions in a court of law or lesser penalties before an administrative tribunal, such as the Board in the instant matters. Fundamental fairness dictates no less and the Wisconsin Legislature, through Section 120.13(1)(c), demands no more than this. Through the review of numerous expulsion appeals, the State Superintendent has observed that the vast majority of Wisconsin school districts have had little difficulty in satisfying such requirements while still conducting proceedings in an efficient manner.

As the State Superintendent is obligated to grant appellants' motion for the above reasons, it is unnecessary to pass upon the remaining issues raised in this appeal.

BY ORDER OF THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION: the October 18, 1978 orders of the Board expelling appellants are hereby and herewith vacated with all charges dismissed. It is further ordered that any and all references to these proceedings be forthwith expunged from any records relating to appellants maintained by the District.

Dated this 29th day of January, 1979.

Barbara Thompson
Barbara Thompson
State Superintendent