THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion from
Oconto Falls School District of
BRIAN R[redacted] (M[redacted]),

Appellant.

OPINION
AND
ORDER

THE NATURE OF THE CASE

This matter is before the State Superintendent under sec. 120.13(1)(c), Stats., on appeal from an October 6, 1981 order of the School Board (hereinafter Board) of the Oconto Falls Public School District (hereinafter District) expelling appellant from the schools of the District for the balance of the current school year. Now having fully reviewed all matters of record, the State Superintendent of Public Instruction makes the following:

FINDINGS OF FACT

At the time of the events giving rise to this matter, appellant was a 15 year old student attending school in the District. Although he is a resident of the Gillett School District, he had been placed by contractual arrangement through the auspices of CESA 3 in a program for the emotionally disturbed which is housed in the District. That placement was the result of his identification as a student having one or more exceptional educational needs (EEN).

On September 28, 1981, appellant was questioned by school authorities as to an incident involving the sale of marijuana at school. At that time, appellant admitted to having sold the substance to a fellow student. Following due notice and hearing, appellant was expelled on the basis of that conduct.

Additional facts will be set forth as necessary in the balance of this opinion.

CONCLUSIONS OF LAW

In this appeal, appellant has asserted that the conduct for which he was expelled was the result of his EEN condition and that, therefore, his expulsion was impermissible under the law. Although additional grounds for the appeal have been raised, their consideration is unnecessary to a decision in this case.

School districts are limited purpose municipal corporations and have only those powers which are expressly provided for by statute or are necessarily implied thereby. Iverson v. Union Free High School District, 186 Wis. 342 (1925); also see generally Elroy-Kendall-Wilton District Schools v. CESA 12, 102 Wis. 2d 274 (Court of Appeals 1981). The legislature has accorded school boards the power to expel students by sec. 120.13(1)(c), Stats.

In general, this statute mandates a two step analysis in the consideration of whether expulsion is warranted in a particular case. The first step or phase of an expulsion proceeding requires the board to determine whether the student has committed an expellable offense. In order to reach that determination, the board must first find that the student is guilty of the conduct charged in the notice of hearing and then must conclude that the conduct falls within one or more of the substantive grounds for expulsion specified by sec. 120.13(1)(c), Stats., (in this instance, "conduct while at school . . . which endangered the property, health or safety of others"). Once it has been determined that the student is guilty of an expellable offense, the board may proceed to the second phase of the statutory analysis. This step entails resolution of the broader policy question of whether or not the interests of the school demand the student's expulsion,

a consideration which can be likened to the sentencing phase of a criminal proceeding. However, where an EEN student is the subject of expulsion proceedings, an additional phase or step to those specified by the statute is required.

The effect of the Education of All Handicapped Act, P.L. 94-142; Sec. 504 of the Rehabilitation Act; and comparable legislation at the state level such as Subch. V, Ch. 115, Wis. Stats., upon the board's authority to expel has been the subject of at least four reported judicial decisions.[1] These cases have several common threads which, when viewed as whole, outline permissable and impermissable situations for and the procedures necessary to the lawful expulsion of EEN students. The initial premise recognizes that the legislation in question mandates the provision of a free appropriate education for the EEN student. Stated another way, (the law prohibits the denial of appropriate educational services to a student on the basis of an EEN condition.) In cases where the misconduct at issue is a manifestation or product of the student's EEN condition, the mandate for a free appropriate education precludes the use of expulsion since an expulsion for misconduct which is causally related to the EEN condition would amount to a denial of appropriate educational services on the basis of the EEN condition itself. However, where there is no causal relationship between the student's misconduct and any EEN condition, there exists no absolute bar against the application of expulsion as a disciplinary mechanism. As the court observed in Kroger:

> "It is the purpose of the Handicapped Act . . . to provide handicapped students placement which will guarantee their education despite the student's handicap. It is not the purpose of the Handicapped Act to provide handicapped students placement which

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1. Stuart v. Nappi, 443 F. Supp. 1235 (D.C. Comm. 1978); Doe v. Kroger, 480 F. Supp. 225 (D.C. N.D. Ind. 1979); Southeastern Warren Comm. School District v. DPI, 285 N.W. 2d 173 (Iowa 1979); and S-1 v. Turlington, 635 F. 2d 342 (5th Circuit 1981).

> will guarantee their education despite the student's will to cause trouble. For an appropriately placed handicapped child, expulsion is just as available as for any other child. Between a handicapped child and any other child, the distinction is that, unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt."

Secondly, the cases have observed that both federal and state law commit the identification of and placement development for EEN students to a staff of professionals having expertise in the particular EEN condition (in Wisconsin, the multi-disciplinary or "M" team). Implicit in this aspect of the statutory scheme is the legislative judgment that school boards and administrators lack sufficient expertise in such matters; accordingly, it is necessary to refer those considerations to a staff of individuals who do possess the necessary technical expertise as to the particular EEN condition. By the same token, the courts have held that the determination of the existence of a causal relationship between expellable misconduct and a student's EEN too is beyond the competence of local boards and administrators and must, rather, be resolved via the appropriate professional staffing under procedures comparable to the identification and placement analysis.

Finally, the courts faced with the issue have suggested that the wholesale cessation of educational services during the period of expulsion would be inappropriate in even the case of the EEN student whose misconduct has been found by the requisite screening mechanisms to be unrelated to the handicapping condition.[2]

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2. On this point, the Fifth Circuit Court of Appeals provided the following explanatory comment in a footnote to its decision in S-1:
(footnote number 2 is continued on page 5)

These common denominators distilled from the relevant caselaw lead to the conclusion that in expulsion proceedings involving EEN students, an additional consideration must be superimposed over the two part test mandated by sec. 120.13(1)(c), Stats., for the expulsion of students generally. At a minimum, therefore, in the case of the EEN student, the board must not only consider the student's guilt or innocence of an expellable offense and the broader policy consideration of whether or not the interests of the school demand that student's expulsion, but must further, by referral to and report back from the M-team or comparable professional staffing arrangement, determine whether any causal relationship exists between the misconduct at issue and the student's handicapping condition. Since the cases in point have held that the board has no competence to undertake the conduct to con-

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2. (continued):

"This opinion does not infringe upon the traditional authority and responsibility of the local school board to ensure a safe school environment. A comment to the regulations provides: 'While the placement may not be changed, this does not preclude dealing with children who are endangering themselves or others.' 45 C.F.R. §121a.513 (comment). Thus the local school board retains the authority to remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others. In such case, the child would of course be remanded to the special change of placement procedures for reassignment to an appropriate placement. It is appropriate to superimpose this very limited authority, as contemplated by the above quoted comment, because nothing in the statute, the regulations, or the legislative history suggests that Congress intended to remove from local school boards--who alone are accountable to the entire school community--their long-recognized authority and responsibility to ensure a safe school environment."

Further discussion of this question is unnecessary to the resolution of the instant expulsion appeal since the provision of continuing services (should the misconduct at issue ultimately be found to have no relationship to appellant's EEN condition) would remain the responsibility of his district of residence and not that of the respondent District whose only obligations to appellant arise from a contractual arrangement through which he was placed in a programmatic setting housed within its schools.

dition analysis, it necessarily follows that the Board has no discretion but to rely upon the judgment of the appropriate staffing as to this issue.

In terms of the sequence of events in the three part test for the expulsion of an EEN student, it must first be observed that the product of the conduct to condition analysis is likely to have a significant if not a controlling effect upon the broader policy determination of whether or not the interests of the school demand expulsion. Consequently, the determination of the existence of any relationship between the student's misconduct and the EEN condition must of necessity be made before the broader policy (or "sentencing") analysis is undertaken. However, neither the rights accorded under the applicable handicapped legislation nor the constraints of procedural due process would appear to dictate any particular order between the guilt or innocence phase and conduct to condition phase of an EEN expulsion, provided that continuity of placement is maintained during the pendency of these analyses. Thus, a district may prefer to submit the issue of the student's guilt or innocence of the conduct charged to the board for consideration first since a finding of innocence could obviate the need for incurring the time and expense inherent in the conduct to condition analysis. On the other hand, a district might prefer to refer the case for that analysis prior to submitting the guilt or innocence question to the Board so as to avoid compelling the Board to consider that question and the final policy consideration as to the interests of the school at two separate meetings.

In the case at hand, the record fully supports the Board's conclusion that appellant committed an expellable offense. Appellant admitted to engaging in the sale of marijuana at school as charged in the notice of hearing. The sale of controlled substances in the schools is inherently dangerous to

the health and safety of others and, accordingly, satisfies the requisite substantive ground for expulsion under sec. 120.13(1)(c), Stats. See orders of the State Superintendent in cases 76-7703X (May 16, 1977) and 74-7503X (May 2, 1975). Therefore, the Board's resolution of the guilt or innocence phase of the proceedings must be sustained.

The meager record of the proceedings before the Board at its October 6, 1981 hearing on the matter contains not one scintilla of evidence that the formal conduct to condition analysis required in light of appellant's status as an EEN student was ever undertaken in conjunction with the consideration of his expulsion. In the absence of a report containing findings as to this issue from the appropriate professional staffing arrangement as contemplated by the cases discussed above, this office on review cannot and the Board at the outset could not properly address the final policy consideration as to whether or not the interests of the school demanded appellant's expulsion.

Under the circumstances, appellant is entitled to an order setting aside his expulsion and remanding the matter to the Board for proceedings not inconsistent with this opinion. If the Board at hearing did in fact have the benefit of a contemporaneous formal report as to a conduct to condition analysis by an "M" team or comparable professional staffing arrangement, that report should be submitted to this office for further review of appellant's appeal. If, however, no such report was prepared and submitted to the Board for consideration at its October 6, 1981 hearing and if the District wishes to proceed further with this expulsion, it is incumbent upon the Board to refer the matter to the appropriate staffing arrangement for determination as to the existence of any causal relationship between appellant's EEN condition and the offense which has given rise to this case before finally deter-

mining at a subsequent hearing whether or not the interests of the school demand expulsion.

BY THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION: So ordered.

Dated and mailed this 6 day of January, 1982.

Herbert J. Grover
State Superintendent