THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion from
the Spooner School District of
BRADLEY B[redacted], INTERIM ORDER

Appellant.

THE NATURE OF THE CASE

This is an appeal to the State Superintendent of Public Instruction pursuant to sec. 120.13(1)(c), Wis. Stats., from the March 9, 1982 decision of the Spooner School Board expelling the appellant, Bradley B[redacted], from school for the remainder of the 1981-82 school year. The immediate matter before the State Superintendent is appellant's motion for reinstatement pending final determination of the appeal. Having reviewed the hearing record and the arguments submitted by the parties, the State Superintendent makes the following:

FINDINGS OF FACT

It is uncontroverted that on the morning of February 9, 1982, Bradley B[redacted], age 18 (D.O.B. 9/14/63), telephoned a bomb threat to the home of the Superintendent of the Spooner School District. Bradley was an adult at the time the threat was made and was no longer subject to the compulsory attendance requirements of sec. 118.15, Stats. He was also charged with a felony as a result of that threat, and since his expulsion, has pleaded guilty to the lesser misdemeanor offense of turning in a false alarm in violation of sec. 941.13, Stats., and been sentenced to a term of probation.

Bradley's request for reinstatement pending final determination of this appeal appears to be primarily based on two factors: first, that he is not presently receiving any educational services from the district, and second, that prior to his expulsion he was enrolled in a special education program for educably mentally retarded students.

Bradley initially received a three day suspension for his conduct on February 9. The record establishes that he decided not to return to school at the end of the suspension period because he and his parents believed that it would not be in his best interest to do so prior to the expulsion hearing scheduled for March 9. At the March 9 hearing he advised the Board, through his counsel, that he wished to join the Marines rather than return to school. Bradley did not file this appeal and concomitant request for reinstatement pending final determination of the appeal until April 26, 1982.

In an April 30, 1982 letter to Attorney Mary Brooks Fraser of the DPI legal staff, John McDermott, Superintendent of Schools for Spooner, advised this office that the Spooner School District sent their school psychologist, Gary Murphy, to the B[redacted] home on February 16, 1982 after being advised by Mr. B[redacted] that Bradley would not return to school prior to the hearing. Mr. Murphy assisted Bradley with G.E.D. requirements and sample questions and contacted the VTAE office in Rice Lake to arrange for study materials on the G.E.D., which were picked up by Mr. B[redacted] that same day.

The record and correspondence filed with this office indicate that from the date of the incident (February 9) to the date of receipt of the notice of appeal (April 27), the School District of Spooner was led to believe that Bradley did not want to come back to school and would be enlisting in the Marine Corps. Upon receiving our April 27, 1982 letter regarding this appeal, the school attorney, Mr. Bitney, contacted appellant's counsel, Mr. Bisbee,

and offered homebound instruction to Bradley for the remainder of the school year. (The homebound instruction would have been provided by Bradley's regular special education teacher.) The offer of homebound instruction has apparently been declined, although the district stands by its offer.

The record also indicates that the school district administration, through Mr. Snell, the high school principal, presented testimony that Bradley was enrolled in a special education program for EMR students, and that Mr. Snell had met with the school psychologist and guidance counselor who were in agreement that Bradley knew right from wrong.

There is no indication in the record that Mr. Snell was cross-examined by appellant's counsel, nor did appellant offer any evidence that would tend to refute Mr. Snell's testimony in this regard.

CONCLUSIONS OF LAW

Wis. Admin. Code Section P.I. 1.09, provides:

> The state superintendent may issue such protective order or grant such temporary relief as is necessary to preserve the rights of any party to a matter subject to this chapter prior to the issuance of a final decision or order.

The grant or denial of such temporary relief as contemplated by this provision and as sought by appellant is highly discretionary. Browne v. Milwaukee Board of School Directors, 83 Wis. 2d 316 (1978). The Wisconsin Supreme Court has summarized the criteria for issuance of a temporary injunction as follows:

> (T)his court has stated the following guidelines (for issuance of temporary injunctions): Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial. A temporary injunction is not to be issued unless a movant has shown a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued only when necessary to preserve the

> status quo. Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm . . .

It is my conclusion that appellant has failed to demonstrate either a reasonable probability of success on the merits of his appeal, or that irreparable harm will result if temporary reinstatement is denied. In addition, appellant has not demonstrated that temporary relief is necessary to preserve the status quo.

Appellant, who is 18 years of age and not subject to the compulsory attendance requirements of sec. 118.15, Stats., voluntarily removed himself from school at the end of the three day suspension imposed by the school on February 9, 1982. (We also note, without deciding its applicability, the similarity of the fact situation at hand to the provisions of sec. 118.15(1)(c), Stats.) He did not seek review of his March 9, 1982 expulsion until April 26, 1982, nearly six weeks after it was imposed and roughly one month before the end of the school term.

In addition to voluntarily absenting himself from school and delaying the filing of an appeal, appellant represented throughout this period that he intended to join the Marines and did not wish to return to school. He has also failed to avail himself of the educational alternatives available to him (i.e., the G.E.D. exam or homebound instruction). In short, appellant has failed to demonstrate that irreparable harm will result from a failure to order his reinstatement in school pending the final outcome of his appeal. Since the status quo (i.e., appellant's present exclusion from school) results mainly from the actions of appellant, temporary relief in appellant's reinstatement at this point in time would be inappropriate.

Finally, we address the issue of appellant's probability of success on the merits. Although he has raised numerous issues relating to alleged

procedural errors, the gravamen of Bradley's appeal is that the school district has failed to meet its alleged burden of establishing that Bradley's misconduct was not a symptom of his handicap. However, the record indicates that Bradley's special education status was raised and addressed by the district's testimony before the Board. Appellant also suggests that despite his expulsion he is entitled to continuing educational services for the handicapped. Assuming, arguendo, that he is correct in his assertion, the record reflects that appellant has repeatedly expressed a lack of interest in continuing educational services and has either declined or failed to take advantage of the educational services made available to him by the district. Even more importantly, however, appellant does not suggest, nor could he suggest on the basis of the record before us, that he is not guilty of the conduct for which he was expelled. Section 120.13(1)(c), Stats., specifically provides for expulsion whenever a school board "finds that a pupil knowingly conveyed or caused to be conveyed any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives, . . ." In short, appellant has not shown a reasonable probability of ultimate success on the merits of this appeal.

Appellant's failure to establish irreparable harm is in and of itself sufficient to deny reinstatement pending final decision of this appeal; combined with appellant's failure to demonstrate a reasonable likelihood of prevailing upon the merits, a grant of temporary relief reinstating him to school would be inappropriate, unnecessary for preservation of the status quo and an abuse of discretion.

IT IS THEREFORE ORDERED that appellant's request for reinstatement pending final decision of his appeal be and hereby is denied.

IT IS FURTHER ORDERED that appellant's brief or statement as to the merits of this matter be served and filed no later than May 24, 1982. Respondent's reply brief or statement of position shall be filed no later than June 1, 1982.

Dated and mailed this 13th day of May, 1982.

Herbert J. Grover
State Superintendent