THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion from the Green Bay Area Public Schools of BRAD H[redacted],

Appellant.

DECISION AND ORDER

THE NATURE OF THE CASE

This is an appeal to the State Superintendent of Public Instruction pursuant to sec. 120.13(1)(c), Stats., from an expulsion decision of the Board of Education (hereinafter Board) of the Green Bay Area Public Schools (hereinafter Respondent) on April 2, 1982, expelling Brad H[redacted] (hereinafter appellant) from Respondent's schools for the remainder of the second semester of the 1981-82 school year. This matter is now before the State Superintendent on appellant's motion for a protective order under Wis. Admin. Code s. PI 1.09 reinstating him to attendance in Respondent's Junior High School pending the State Superintendent's final decision on the expulsion appeal. Now having reviewed all matters of record, the State Superintendent makes the following:

FINDINGS OF FACT

Facts appearing of record, insofar as relevant to the instant order, are as follows:

Appellant is 13 years of age and was, until his expulsion, a full time eighth grade student at Edison Junior High School in Respondent's district. On February 15, 1982 appellant was suspended from school for three days for

being in violation of the district's controlled substance and alcohol abuse policy (hereinafter KDAJ) after having been reported by a fellow student for having "sniffed" a non-prescription drug through an empty pen shell in the in-school suspension room. There was a conference with appellant's father as required by sec. 120.13(1)(b), Stats., on February 15, 1982 at which time appellant did not dispute the suspension but agreed to the counseling as required by the KDAJ policy. On March 25, 1982, appellant was charged with his second offense of the school's KDAJ policy after being apprehended while attempting to skip school and a pot or marijuana pipe was observed in his possession.

CONCLUSIONS OF LAW

I have exercised my discretion not to grant appellant's request for a protective order readmitting appellant to school pending my final decision on his appeal as later appears in the order.[1] The record reveals that an extensive hearing with counsel present for both the appellant and the Board was held by the Board prior to its order expelling appellant on April 2, 1982 and there does not exist a material issue of fact on which further hearing is necessary.

Appellant contends that he should ultimately prevail in the expulsion proceedings for three reasons:

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1. "PI 1.09 Temporary orders. 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). At a minimum, a party seeking such relief has the burden of showing that he will be irreparably harmed if the relief sought is not granted, that he has no adequate remedy at law, and that there is a reasonable likelihood that he will prevail on the merits of the case. See generally, Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513 (1977), and cases cited therein.

1. That in neither of the two incidents did he violate the school's KDAJ policy;
2. Furthermore, if he did violate the policy that policy is vague, general and overreaching; and
3. That because the two incidents were so isolated in time appellant should not have been expelled.

In contending that his involvement in the "sniffing" incident did not consist of a violation of the school's KDAJ policy appellant overlooks the fact that at the suspension conference on February 15, 1982 appellant and his father had the opportunity to dispute the basis for the suspension and that if unfairly or unjustly imposed, the suspension would be rescinded and expunged from his record.[2] Thus, appellant had all the process due under the statute in the first suspension and the facts stand undisputed that his "sniffing" the white substance on February 15, 1982 was a violation of Respondent's KDAJ policy. The contention that there was no proof offered that the material appellant was "sniffing" was a drug or was represented by appellant to be a drug contrary to the KDAJ policy is best answered by the fact that a fellow student thought appellant was "sniffing" a drug and reported him to the office. However, as indicated when appellant accepted the suspension process as final he lost the right to question the school's

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2. In pertinent part, sec. 120.13(1)(b), Stats., states:

> "The parent or guardian of a suspended minor pupil shall be given prompt notice of the suspension and the reason for the suspension. The suspended pupil or the pupil's parent or guardian may, within 5 school days following the commencement of the suspension, have a conference with the school district administrator or his or her designee who shall be someone other than a principal, administrator or teacher in the suspended pupil's school. If the school district administrator or his or her designee finds that the pupil was suspended unfairly or unjustly, or that the suspension was inappropriate, given the nature of the alleged offense, or that the pupil suffered undue consequences or penalties as a result of the suspension, reference to the suspension on the pupil's school record shall be expunged."

decision that "sniffing" the white material under the circumstances, was a violation of the KDAJ policy. Appellant's next and main contention is that there was insufficient evidence to support findings of the guilt of the conduct charged, which in this instance was possession of a marijuana pipe at the school.[3]

In a recent expulsion case decided by a circuit court when the student was charged with criminal activity, it was held that hearsay evidence is admissible in student expulsion cases (Racine Unified School District v. Thompson, Racine County Circuit Court, File No. 80-CV-0894). The court said, rather than applying technical rules of evidence, the State Superintendent must determine whether the evidence in question is of reasonable probative value to support the expulsion.[4]

In an expulsion case where the misconduct charged was fighting on the school premises and was not criminal in nature but of serious consequences to the student body, the circuit court held that upon the record presented it was satisfied that the decision of the State Superintendent was "based upon substantial competent evidence, that the State Superintendent acted within her decision and did not act arbitrarily or capriciously in modifying the expulsion order."[5] In this case, there is sufficient evidence of reasonable probative value in the record to support the conclusion that the pipe

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3. The KDAJ policy provides that possession of related drug paraphernalia at any time on school premises is a violation of the policy, and that a student may be expelled when found to have twice violated the policy.

4. The Racine case is on appeal to the Court of Appeals, District II, Certification Case No. 80-2202. In a decision dated May 19, 1982, the Court of Appeals affirmed the circuit court's decision that hearsay evidence is admissible in expulsion cases before the school board.

5. City of Beloit School Board v. Thompson, Rock County Circuit Court, Case No. 18475, Memorandum Decision, p. 7, March 12, 1975. In this case, although affirming the Board's order, the State Superintendent modified the length of the expulsion after considering certain mitigating factors that appeared of record.

found in the possession of appellant on March 25, 1982 was a pot or marijuana pipe and was drug paraphernalia prohibited by Respondent's KDAJ rules.[6]

In reviewing the record of the Board's expulsion of appellant for the remainder of the 1981-82 school year, I have considered the interval between the February 15, 1982 and March 25, 1982 incidents as well as the serious consequences that could result from repeated violations of the school's KDAJ policy and find that under the circumstances the length of the expulsion was reasonable.[7] Accordingly, the Board's expulsion must be affirmed.

BY THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION: So ordered.

Dated and mailed this 24th day of May, 1982.

Herbert J. Grover
State Superintendent

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6. The principal at Edison Junior High School testified over appellant's objection that the pipe found in appellant's possession was tested by a Green Bay police officer and that the test resulted in positive indications that there was marijuana or hashish residue in the pipe.

   In addition, the assistant principal testified that from his experience, smelling marijuana as vice-principal, that the residue found in the pipe was marijuana. There was also testimony from McCormick, Respondent's district manager of secondary education, that appellant told him the pipe possessed on February 25, 1982 was a pot pipe, although appellant's father denies the statement.

7. I have considered appellant's objection that the KDAJ policy is "vague, general and overreaching" as a legal objection that should be made to the court. I also note that Circuit Court #II for Brown County, in a decision rendered on April 9, 1982, had before it the school's KDAJ policy and determined that it was unlikely that appellant would prevail on his appeal to the State Superintendent.

AN APPEAL FROM THIS DECISION MAY BE TAKEN WITHIN 30 DAYS TO THE CIRCUIT COURT OF THE COUNTY IN WHICH THE GREEN BAY AREA PUBLIC SCHOOLS ARE LOCATED AS PROVIDED IN SEC. 120.13(1)(c), WIS. STATS.