THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of
JOHN C. B[redacted] by the Board of
Education, Milwaukee School District

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), Wis. Stats., from the January 11, 1983 decision of the Board of School Directors of the Milwaukee Public Schools expelling the appellant, John C. B[redacted], from the Milwaukee Public Schools. The appeal was filed on January 31, 1983. In accordance with the provisions of Wis. Admin. Code s. PI 1.04(3), this decision is based on a review of the record of the school board hearing. Both parties were offered an opportunity to submit written arguments regarding the merits of the appeal and have done so.

FINDINGS OF FACT

John B[redacted], a twelfth-grade student at Washington High School in the Milwaukee School District, was expelled by the Milwaukee Board of Education for conduct which endangered the health and safety of another student after a hearing held by the School Board on January 11, 1983. The expulsion was for the remainder of the 1982-83 school year.

The January 4, 1983 Notice of Expulsion hearing contained the following alleged violation of school rules:

> This action follows the charge made by Mr. Brandl, Principal, Washington High School that on Friday, December 3, 1982, you allegedly touched a female student in an improper manner. The breach of discipline committed by you is a violation of rules governing pupil discipline and Board policy and is the basis for the expulsion.

John, who was 18 years old at the time of the hearing, appeared before the Board with two attorneys, Mr. Leppanen from Legal Action of Wisconsin, Inc. and Mr. Goldberg from the State Public Defenders Office. (Mr. Goldberg represented John in the criminal matter arising from the same incident.) John, through his attorneys, denied the charge against him.

Mr. Brandl, the principal of Washington High School, testified that a distraught ninth-grade female student came to his office at approximately 3:00 on the afternoon of December 3, 1982 and indicated that she had been sexually assaulted by two male students. The student, a member of the Pep Club, had gone down to the gym to get a basketball schedule from the coach. While she was trying to locate the coach she was attacked by two male students who dragged her to the rear of the locker room where they tore her clothes, pulled off her pants, ripped her underclothing, and fondled her breasts. The girl told Mr. Brandl that her assailants were associated with the football team.

During his investigation of the incident, the principal learned that one of the coaches had seen the victim come down the stairs and into the gym and had observed a "hassle" between the victim and a male student. The same coach also indicated that he had seen the appellant in the gym area at the time of the incident. The principal also saw him there while he was investigating the incident.

The victim, who recognized her assailants but did not know their names, identified them from the file of identification photographs maintained by the school. She identified the appellant, John B████, as one of her attackers and stated that he had held his hand over her mouth to muffle her screams as the two students dragged her into the locker room.

Linda Eccher, a City of Milwaukee police officer assigned to the Vice-Squad Sexual Assault Unit, was the administration's second witness. Officer

Eccher was sent to the school to interview the alleged assault victim. The victim informed the officer that she had gone back into the school after school hours to speak to a teacher but could not find him in his office near the gym. She was then approached by two males who came up to her and one attempted to place his hand into the neckline of her blouse, but she fought him off. Both boys then forcibly took her into the rear of a locker room. One of them raised her blouse and her bra and placed his hands on her bare breast and fondled it. The boys then attempted to remove her pants and in doing so they broke the zipper. They pulled her pants down to her ankles and both boys touched her in her vaginal area. One of them also inserted his finger partially into her vagina. One of the boys heard someone coming and they left. The girl then tried to go back to the coach's office. As she was knocking on the coach's door, one of the boys returned, pulled her arm away so she could not knock, and ran away again. She then went to the office and reported what had happened to the principal.

The officer testified that she believed the victim was telling the truth because she was so distraught and upset, her clothing was torn, and her story was consistent. The officer also testified that the victim identified John B[illegible] as the boy who placed his hand over her mouth and his finger in her vagina.

At the end of the hearing, the Board went into executive session, then reconvened in open session to take a roll call vote of the motion to expel the appellant. The vote to expel him was unanimous (7-0). A written notice of expulsion was sent to appellant on January 3, 1983.

The grounds for this appeal, which was filed on January 31, 1983, are that:

1. Appellant was denied his constitutional due process right to confront and cross-examine the student making statements against him.

2. Appellant's use of his Fifth Amendment right to remain silent was wrongly used as an admission of guilt and as a basis for punishment by the school board.

3. School officials did not meet their burden of proof in expelling the appellant.

4. The school board did not provide adequate findings of fact to justify the appellant's expulsion.

CONCLUSIONS OF LAW

School districts are limited purpose municipal corporations and have only such powers as are conferred specifically by statute or are necessarily implied therefrom. Iverson v. Union Free High School District, 186 Wis. 342 (1925). School boards have been granted the authority to expel students in accordance with the provisions of sec. 120.13(1)(c), Wis. Stats. In addition to specifying several alternative grounds for expulsion, the statute expressly accords students charged with expellable offenses certain procedural rights including notice of hearing, entitlement to counsel, the option to close the hearing to the public, the preservation of a record of the proceedings, written notification of the expulsion order, and the right to appeal the board's expulsion to the State Superintendent of Public Instruction.

In a recent Wisconsin Court of Appeals decision involving the State Superintendent's review of an expulsion appeal, the Court made the following observation:

> While our decision is founded solely upon an error of law of the state superintendent, we point out, obiter dicta, that the superintendent's review of a board's expulsion hearing would appear to be limited by the statute which created that appeal, namely, sec. 120.13 (1)(c), Stats. The superintendent's review then, would be one to insure that the school board followed the procedural mandates of subsection (c) concerning notice, right to counsel, etc. Racine Unified School District v. Thompson, 107 Wis. 2d 657 (1982).

The appellant has not alleged any violations of the procedural requirements of sec. 120.13(1)(c), Wis. Stats. The record, in fact, reflects that

the appellant was afforded all of the procedural rights due him under the statute.

The statute also specifies that a school board may expel a pupil from school whenever it finds the pupil guilty of conduct which endangered the health or safety of others at school and is satisfied that the interest of the school demands the pupil's expulsion. In the instant case, there was a single charge against the appellant which, if proven, clearly constituted conduct which endangered the health or safety of others at school. Since school officials have a responsibility for the safety and well-being of students, it should go without saying that conduct which endangers the health or safety of another student, in the absence of any mitigating circumstances whatsoever, is more than sufficient to establish that the interest of the school demands the pupil's expulsion. Consequently, it cannot be seriously argued that this appellant was not provided with adequate findings of fact justifying his expulsion.

Appellant's argument that his use of the Fifth Amendment right to remain silent was wrongly used as an admission of guilt and as a basis for punishment by the School Board is equally without merit. The appellant has not pointed to any facts that would tend to support this conclusion. He admits that no one questioned his right to remain silent. The problem with this argument is that school disciplinary proceedings are administrative proceedings which are not sufficiently criminal in nature to require the Fifth Amendment's protection against self-incrimination.

The question of self-incrimination usually arises when a student's conduct results in his being charged with both a school offense and a violation of criminal law. When both criminal and disciplinary proceedings are pending, students have maintained that they cannot be compelled to testify in the disciplinary hearing because the testimony, or leads from it, may

be used to incriminate them at the later criminal proceeding. In a California case, for example (Furutani v. Ewigleben, 297 F. Supp. 1163 (N.D. Cal. 1969)), students sought to enjoin expulsion hearings until criminal action arising out of the same incidents had been completed. They argued that to avoid expulsion they would be forced to incriminate themselves, and their testimony would then be offered against them in criminal proceedings. In denying their request, the Court held that the students could object at the criminal trial to incriminating statements made at the expulsion hearings, and no Fifth Amendment right would have been jeopardized. That decision represents the thinking of the majority of the courts which have addressed this issue.

The companion issue to this question is whether a student may postpone a suspension or expulsion hearing pending a criminal proceeding that stems from the same conduct. Courts have consistently held that a delay need not be granted. In a case from Vermont, a student facing criminal charges of burglary, attempted rape, and simple assault alleged a violation of due process when the school refused to await the criminal proceeding before initiating its own hearing. Nzuve v. Castleton State College, 133 Vt. 225, 335 A.2d 321 (1975). In Pierce v. School Comm. of New Bedford, 322 F. Supp. 957 (D. Mass. 1971), the board denied a student's request for a continuance until the criminal action was completed on the ground that the court proceeding might take years. Both courts rejected the claims by saying that educational institutions have both a need and a right to formulate their own standards and enforce them independently of the criminal law. Furthermore, requiring the school to wait assumes that civil remedies must, as a matter of law, await the outcome of related criminal charges. Such a delay might allow a student to complete his education and earn his diploma, thus effectively completing an "end run" around the disciplinary rules and

procedures of the school. It is precisely this result that appellant seeks to achieve with his arguments about an alleged violation of his Fifth Amendment rights.

Because an expulsion hearing is a civil proceeding, the school district is required to establish the appellant's guilt by a preponderance of the evidence. The Fifth Circuit Court of Appeals in Boykins v. Fairfield Board of Education, 492 F.2d 697, 700-701 (5th Cir. 1974), cert. denied, 420 U.S. 962 (1975), pointed out the fallacy of trying to apply the technical rules of evidence in an administrative proceeding conducted by laymen. The Court said that the "basic fairness and integrity of the fact-finding process" are the criteria for judging the constitutional adequacy of the disciplinary hearing. Although a school board should not uncritically admit as fact testimony of questionable veracity, it should not exclude evidence simply because it is hearsay. Indeed, in the Racine Unified case cited above, the Wisconsin Court of Appeals stated at page 664 that:

> We are persuaded, finally, that the hearsay statements from schoolteachers or staff members were admissible. We agree with the fifth circuit's statement that a lay board cannot be expected to observe the niceties of the hearsay rule. Moreover, in the absence of an allegation of bias, we can conceive of no reason why school staff would fabricate or misrepresent statements of this sort. Such statements have, then, sufficient probative force upon which to base, in part, an expulsion.

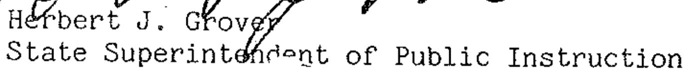
In the Boykins case, the Fifth Circuit ruled that a fair determination of the issue can be based on the hearsay evidence of school administrators charged with the duty to investigate school disruption. More importantly for the present case, the Court also held that when there are factors establishing the reliability and probative value of the evidence, hearsay testimony from school administrators alone may constitute sufficient evidence to support an expulsion. We believe that the hearsay evidence presented in this case

by the Washington High School principal and the investigating police officer supported as they are by the things they themselves observed about the victim, constitute sufficient evidence to support the Board's expulsion order. The appellant had an opportunity to fully cross-examine these witnesses and took advantage of that opportunity. He has offered no evidence that would support a claim that the hearsay testimony at issue was unreliable. Consequently, his claims that he was denied his constitutional right to confront and cross-examine the victim and that the evidence against him was insufficient to establish his guilt are without merit.

The Board's decision to expel the appellant from school for conduct endangering the health and safety of another is adequately supported by the record in this matter. The record also reflects that the appellant was accorded all of the procedural rights due him under sec. 120.13(1)(c), Wis. Stats.

IT IS THEREFORE ORDERED that this appeal be and hereby is denied.

Dated and mailed this 31st day of October, 1983.



Herbert J. Grover
State Superintendent of Public Instruction