THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of
JOE M[redacted]
by the School District of Milton
Board of Education

DECISION
AND
ORDER
84-EX-05

BASIS OF THE APPEAL

This matter is before the State Superintendent under s. 120.13(1)(c), Wis. Stats., on appeal from the October 15, 1984 decision of the School Board (Board) of the School District of Milton (School District or District) expelling the appellant, a student with exceptional educational needs (EEN), from the Milton Senior High School until the commencement of the 1985 fall term. The appellant has claimed numerous violations of both federal and state special education law as they may relate to the expulsion process. The respondent maintains that the District has met its statutory obligations to Joe M[redacted] and that Joe M[redacted] is no longer a special education student.

Now, having fully reviewed all matters of record regarding both the expulsion process and the special education programs, the State Superintendent makes the following:

FINDINGS OF FACT

1. Joe M[redacted], DOB 6/12/66, was in an EMR (educable mentally retarded) program from his second year of kindergarten until April 20, 1982 on which date Joe, then age sixteen (16), was offered a placement in a joint EMR (educable mentally retarded)/ED (emotional disturbance) program by the Janesville School District.

2. Joe M[redacted] transferred to the Milton School District sometime during the spring or summer of 1982.

3. A Multidisciplinary Team (M-team) Report, based upon records transferred from the Janesville School District to the Milton School District, and an M-team Summary and Recommendations, were prepared by the Milton School District and dated August 31, 1982. The M-team identified Joe M[redacted] as EMR/ED and recommended a "possible 1/2 day school program with work experience." The record does not indicate that any placement offer was made or that any individualized education program (IEP) was prepared as a result of this M-team report.

4. By letter dated October 6, 1982, the school psychologist of the Milton School District referred Joe M[redacted] to the Janesville Clinic for Mental Health for evaluation and possible treatment. Drs. Paul Baldwin, M.S., M.S. Ed., and F. Gregory Krembs, M.D., acknowledged this referral by letter dated November 10, 1982.

5. A second M-team report, based upon the M-team meeting held on November 4, 1982, identified Joe M[redacted] as ED and indicated that he was no longer considered EMR. In its Summary and Recommendations, the M-team suggested, among other things, shortened academic class periods, small group or one-to-one instruction, and continued counseling at the Janesville Clinic for Mental Health. A "Staffing Notice" indicates that Milton staff members were invited to meet on November 11, 1982 to discuss program planning for Joe M[redacted]. The record does not indicate that Joe M[redacted] parents were extended an invitation to this meeting or that the meeting was ever held. The record is unclear as to whether any placement offer or IEP ever resulted from the M-team report of November 4, 1982.

6. On November 16, 1982, Joe M[redacted] was involved in an incident during which another student's wrist was injured. Based upon this incident, the Milton School District suspended Joe M[redacted] effective November 16, 17, and 18, 1982. In a Milton Police Department Report, Patrolman Thomas Gilland who investigated the incident concluded

that he would not arrest Joe M[redacted] without a district attorney's opinion. The record does not indicate that any arrest was ever made. The student who was injured subsequently indicated that he did not feel that Joe M[redacted] was at fault in the incident.

7. A third M-team Report and a Summary and Recommendations, both dated November 24, 1982, resolved that Joe M[redacted] was to be put on homebound instruction with continued counseling at the Janesville Clinic for Mental Health. An M-team meeting was subsequently held on December 2, 1982. A Placement Decision, dated and signed by Mr. Ed M[redacted], Joe M[redacted] father, on December 2, 1982, provided for a homebound program, a work study job, and continued counseling from the Janesville Clinic for Mental Health. An IEP is also dated December 2, 1982.

8. By letter dated February 24, 1983, Dr. Paul Baldwin of the Janesville Clinic for Mental Health recommended that Joe M[redacted] be provided with homebound services for the remainder of the school year. At a meeting held on March 3, 1983, by members of the Milton staff, Joe M[redacted] progress in homebound was reported to be satisfactory and a decision was made to keep Joe M[redacted] on homebound instruction for the remainder of the school year.

9. By a memo signed August 29, 1983 and addressed to the Principal of the Milton High school, Mr. and Mrs. Ed M[redacted] requested that Joe be removed from EEN classes and enrolled in regular education classes.

10. A notation dated September 27, 1983 indicates that Joe M[redacted] referred himself back to special education.

11. An M-team meeting was held on October 3, 1983 and an M-team Report was prepared. The M-team Summary and Recommendations of the same date states in part as follows:

> The school personnel feel that all local educational possibilities to meet Joe's needs have been exhausted (and were unsuccessful). This has included a referral for psychiatric evaluation and outpatient psychotherapy.

> Due to Joe's continued difficulties and the lack of effective controls available to the schools, combined with concerns for the safety and well-being of others, a referral to Mendota Mental Health Center or other qualified Psychiatric Setting shall be made for a comprehensive Psychiatric evaluation sufficient to inform the School District of Milton regarding appropriate educational interventions and structures.

12. An Addendum to the M-team Report of October 3, 1983 was prepared to summarize the contents and results of a meeting held on October 16, 1983 at the request of Mr. and Mrs. M[redacted] to reconsider the recommendations that were previously made. The discussion at the meeting centered on the recommended psychiatric evaluation of Joe M[redacted] as well as Joe M[redacted] wish to pursue general equivalency degree (GED) courses at Blackhawk Technical Institute. The Addendum concludes in part as follows:

> The M-team concurred that to meets (sic) Joe's needs sufficiently the psychiatric evaluation as previously stated was a necessity. Hence, for Joe to continue in special education the evaluation would be required. On the other hand, if he chose (sic) to go for the GED, he must withdraw from school officially, or else he is truant.

The record does not demonstrate that Joe M[redacted] or his parents subsequently consented to a psychiatric evaluation at Mendota Mental Health Center, that Joe M[redacted] subsequently withdrew from school, or that Joe M[redacted] was ever considered truant.

13. By letter dated January 12, 1984, the School District of Milton, by its Superintendent of Schools, acknowledged a request from Joe M[redacted] to be readmitted to the Milton Senior High School. The Superintendent of Schools informed the M[redacted] that while Joe M[redacted] could not be readmitted as a regular education student, the M[redacted] could request another M-team meeting.

14. During January or February of 1984, Joe M[redacted] was arrested and convicted of armed robbery.

15. By letter dated February 9, 1984, the School District of Milton, by its attorney, notified the M[redacted] that, based upon M-team findings, Joe M[redacted] could not be readmitted to the Milton High school as a regular education student.

16. Joe M[redacted] became eighteen (18) years old on June 12, 1984.

17. A Parental Consent to Evaluate, dated September 13, 1984, was offered to Joe M[redacted] but never signed. The form indicated Milton's intent to have an in-depth psychiatric evaluation conducted by a psychiatrist to be arranged and to review the psychological and psychiatric assessment already completed by various agencies and personnel upon the receipt of an authorization from Joe M[redacted] releasing such records.

18. Joe M[redacted] signed an authorization dated September 7, 1984 which would allow the Milton schools and Dr. Robert Gordon, Ph.D., to exchange diagnostic and psychological data concerning Joe. The record does not further identify Dr. Gordon.

19. On September 10, 1984 Joe M[redacted] was asked to and did sign a statement indicating that he would "follow all school rules of Milton High School."

20. By Notice of Hearing and Specification of Charges dated October 9, 1984, the Milton School District informed Joe M[redacted] of an expulsion hearing to be conducted on October 15, 1984.

21. In a letter dated October 15, 1984, Dr. Paul Baldwin of the Janesville Clinic for Mental Health advised the School District of Milton that Joe M[redacted] had been obtaining care at the Clinic since his referral by the Milton School District in September, 1982. Dr. Baldwin recommended that Joe M[redacted] be allowed to complete his high school education, including obtaining a high school diploma.

22. An expulsion hearing was held on October 15, 1984. Joe M[redacted] was expelled effective that date for repeated rule violations until the commencement of the 1985 fall term of the Milton Senior High School.

23. A notation dated October 24, 1984 concerning Joe M[redacted] states in part as follows: "He asked about special ed. I reminded him of the M-team's statement (made twice) that information from a psychiatric exam is needed. He disdainfully rejected that once again."

24. An expulsion order of the Milton School Board was dated October 30, 1984 and received by Joe M[redacted].

CONCLUSIONS OF LAW

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 (Ct. App. 1981). The legislature has accorded school boards the power to expel students in accordance with Wis. Stat. s. 120.13(1)(c).

In Racine Unified School District v. Thompson, 107 Wis. 2d 657, 667, 321 N.W. 2d 334 (Ct. App. 1982), the Wisconsin Court of Appeals has stated that the State Superintendent's review of a board's expulsion hearing is intended to "insure that the school board followed the procedural mandates of subsection (c)." Having reviewed the record before me, I find that the School District has met the procedural requirements of Wis. Stat. s. 120.13(1)(c).

However, handicapped children are afforded additional procedural safeguards under the federal Education for All Handicapped Children Act (EAHCA), 20 U.S.C. ss. 1401 et seq. and under state law, Chapter 115, Subchapter V. In Blue v. New Haven Board of Education, 3 EHLR 552:401, 404 (D.C. Conn. 1981), the United States District Court of Connecticut stated in part as follows:

> Among the numerous rights afforded handicapped children under the Act and the regulations are: (1) the right to remain in one's placement until the resolution of his special education complaint; (2) the right to have all changes in placement effectuated in accordance with prescribed procedures; (3) the right to an education in the least restrictive environment; and (4) the right to an appropriate public education.

These same rights have been identified and considered in other federal court decisions. See e.g., Stuart v. Nappi, 443 F. Supp. 1235 (1978), Doe v. Koger, 480 F. Supp. 225 (N.D.

Indiana 1979), S-1 v. Turlington, 635 F. 2d 342 (5 Cir. 1981), cert. denied 102 S. Ct. 566 (1981), Kaelin v. Grubbs, 4 EHLR 554:115 (6 Cir. 1982). Further, the courts have agreed that an expulsion constitutes a change of placement under EAHCA.

Joe M[redacted], as well as any handicapped student, is entitled to have all changes of placement made in accordance with the procedures set forth in EAHCA and Chapter 115, Wis. Stats. According to EAHCA, 20 U.S.C. s. 1415(e)(3), and its implementing regulations:

> Section 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and the agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

(34 C.F.R. s. 300.513, Comment.) Similarly, Wis. Stat. s. 115.81(3) states as follows:

> (A) change in the program or status of a child with exceptional educational needs shall not be made within the period afforded the parent to request a hearing nor, if such is requested, before the hearing officer issues a decision, unless a program change is made with the written consent of the parent. If the health or safety of the child or of other persons would be endangered by delaying the change in assignment, the change may be made earlier, upon order of the school board, but without prejudice to any rights that the child or parent may have.

The School District has found, in accordance with the requirements of Wis. Stat. s. 120.13(1)(c), that Joe repeatedly violated school rules and that the interests of the school demanded his expulsion. However, more than that is required with respect to a handicapped student. Based upon case law and as stated in an opinion of the State Superintendent dated January 6, 1982:

> 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 question of whether or not the interests of the school demand that student's expulsion, but must further, by referral to a 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. . . . (T)he board has no discretion but to rely upon the judgment of the appropriate staffing as to this issue.

(Emphasis added.) While the record supports the Board's conclusion that the appellant committed an expellable offense, the Board did not make any finding, based upon a

professional staffing, that Joe M[redacted] handicap has no causal relationship to the behavior which resulted in his expulsion. The District maintains that it has met its statutory obligations to Joe M[redacted] and that Joe M[redacted] is no longer a special education student. I disagree.

Three factors are relevant to this determination. First, while the District maintains that Joe M[redacted] was no longer a special education student on October 15, 1984, the record fails to support that contention. The record does indicate that Joe M[redacted] was identified by the Milton School District as ED in 1982; Joe's parents removed him from EEN classes in August, 1983; Joe referred himself back to special education in September, 1983; an M-team meeting was held on October 3, 1983 and a follow-up meeting was held on October 16, 1983; the School District of Milton, based upon M-team findings, refused to consider Joe for regular education classes in January and February, 1984; Joe was offered but did not sign a Parental Consent to evaluate dated October 15, 1984; and Joe inquired about special education classes after his expulsion in October, 1984.

The United States Supreme Court, in the case of Board of Education of the Hendrick Hudson Central School District Board of Education v. Rowley, 458 US 176 (1982), emphasized the importance of the procedural requirements of EAHCA. The Court stated in part as follows:

> Therefore, a court's inquiry in suits brought under s. 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

(Footnotes omitted).

The record in this matter does not establish that the District has met the procedural requirements of EAHCA. Specifically, the record does not clearly demonstrate that Joe M[redacted] was not a special education student on October 15, 1984. On the other hand, the record does demonstrate that Joe M[redacted] was a student with exceptional education needs

on that date. If the District intends to except itself from its obligations, imposed by EAHCA, to a student with exceptional education needs, then the District must establish at a minimum that it has complied with the procedural requirements of law. Since the District has not clearly documented the procedures which it relied on to conclude that Joe M[redacted] was no longer a special education student on October 15, 1984, I cannot, as the District urges, draw the same conclusion.

Second, in this case we are not considering a student who may or may not need special education services. Rather, we are concerned with a student who has been identified as a student with exceptional educational needs since his second year of kindergarten. Joe has obtained special educational services for at least ten (10) years. In addition, the School District of Milton has recognized and continues to recognize the need for special education services to benefit Joe educationally. Accordingly, this is not a case in which there is any disagreement concerning Joe M[redacted] need for special education services.

Third, in this case the behaviors which the school district relied on as justifying expulsion may reasonably seem to be associated with Joe M[redacted] EEN/ED. The notice of hearing states in part as follows:

> Specifically, Joseph M[redacted] is charged with repeated violations of school rules by engaging in aggressive and disruptive behavior in high school classes posing a threat of harm to other students and faculty, refusing to participate in a special education program and demanding to be admitted as a regular education student, violating the standards of behavior expected of senior high school students, refusing to work or participate in class, walking out of biology class, refusing to serve truancy detention, and violating specific rules set forth on September 27, 1984 by being in and out of the main office without permission and to the disruption of the activities of the main office.

PI 11.34(2)(h)2., Wis. Administrative Code, reads as follows:

> Emotional disturbance is characterized by emotional, social, and behavioral functioning that significantly interferes with the child's total educational program and development including the acquisition or production, or both, of appropriate academic skills, social interactions, interpersonal adjustment. The condition denotes intraindividual and interindividual conflict or variant or deviant behavior or any combination thereof, exhibited in the social systems of school, home and community and may be recognized by the child or significant others.

A perfunctory analysis, at least, suggests that the behaviors which were charged may be referable to the identified handicapping condition. An M-team is responsible for determining whether that is, in fact, the case.

Based upon these three factors, I find that the School District of Milton, during the expulsion proceedings, was under an obligation to determine, by referral to a report back from the M-team, whether any causal relationship existed between Joe M[redacted] handicapping condition and the misconduct at issue. The failure to make such a determination renders the Board's expulsion decision invalid.

For the above stated reasons, the decision of the School Board of Milton to expel Joe M[redacted] must be reversed. This opinion is not intended to condone the behaviors which were the subject of Joe M[redacted] expulsion hearing, nor to dissuade the School District of Milton from disciplining its students. Rather, it is intended to ensure that the rights of handicapped children under federal and state law, as previously detailed, are protected during the expulsion process.

ORDER

Based upon all of the foregoing, the order of the Milton School Board expelling Joe M[redacted] is hereby reversed.

Dated and mailed this 22nd day of February, 1985.

Herbert J. Grover
State Superintendent of Public Instruction