THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of
JESSE K[redacted]
by the School Board of
Joint District No. 2 of the City of Sun Prairie, Towns of Blooming Grove, Bristol, Burke, Cottage Grove, Sun Prairie and York, Dane County and Town of Hampden, Columbia County

DECISION AND ORDER 85-EX-03

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to §120.13(1)(c), Wis. Stats., from the February 18, 1985 resolution of the above school board to expel Jesse K[redacted], an eighth-grade student, from the Sun Prairie Public Schools for an unspecified period of time. This appeal was filed on March 20, 1985 and held in abeyance at appellant's request until April 8, 1985. In accordance with the provisions of Wisconsin Administrative Code PI 1.04(3), this decision is confined to a review of the record of the school board hearing and the procedural standards required by §120.13(1)(c), Wis. Stats.

FINDINGS OF FACT

On February 5, 1985 school officials at the Sun Prairie Junior High School were notified by the owner of the company which operates the school bus that the bus driver had reported that Jesse K[redacted] had been on the bus with a loaded gun (T. p. 32). Based on this

report the school principal and assistant principal searched Jesse's locker and found a gun in his jacket (T. p. 31). The Sun Prairie Police Department was contacted and Detective John Summers came to the school and identified the weapon as a Smith & Wesson .38 caliber hand gun (T. p. 35). The gun was not loaded but four .38 caliber bullets were found in the jacket pocket (T. pp. 36-37). Detective Summers then questioned Jesse about the gun. Jesse was referred to the Sun Prairie Police Department on February 5, 1985 and was suspended from school for three days (February 6, 7, and 8, 1985).

On February 8, 1985 Jesse and his parents were individually notified by letter that Jesse was being suspended for an additional seven days (February 11-19, 1985). That letter also contained a notice that an expulsion hearing would be held on February 18, 1985. The notice set out the time and place of hearing, specified the charges and alleged violations, stated the hearing could result in Jesse's expulsion, advised the student of his right to be represented by an attorney, indicated that the student could request a closed hearing, and included a copy of §120.13(1)(c), Wis. Stats., all as required by statute.

Jesse and his parents appeared at the February 18, 1985 school board meeting and participated in the hearing. They were not represented by counsel.

The school board heard testimony from the junior high school principal, the assistant principal, Jesse's school bus driver, Det.

Summers, and several students who had been on the school bus with Jesse the morning of February 5, 1985.

One student, Jamie B., had shared a seat with Jesse that day. Jamie B. testified that Jesse showed him the gun and bullets and at one point in time turned around in his seat and reached over the seat back with the gun in his hand (T. pp. 5-7).

Another student, James R., testified that he was sitting across the aisle from Jesse and saw Jesse pull the gun out of his pocket, turn around and lean over his seat and point the gun at James' sister, Ann R., who was sitting in the seat directly behind Jesse (T. pp. 11-13). James further testified that the gun was not loaded at first, but that Jesse brought the gun back over the seat, put two bullets in it and with the cylinder open showed Ann the loaded gun, then put the gun back in his pocket (T. p. 14).

Another student, Jason Z., was sitting kitty-corner from Jesse on the bus (T. pp. 16-17). Jason testified that he saw Jesse point the gun at Ann (T. p. 17), and later saw Jesse put two bullets in the gun and show the loaded gun to Ann with the cylinder open (T. p. 19).

Ann R. also testified that Jesse pointed the gun at her head (T. pp. 27-28) and showed her the bullets in his hand (T. p. 30).

At the hearing Jesse denied ever loading the gun or putting it above the seat (T. p. 4) and stated he brought the gun to school to give it to a friend and did not realize the implications of having a hand gun (T. p. 38).

After hearing the testimony, the school board convened in closed session to consider the matter. The board made several findings of fact and concluded that on February 5, 1985 Jesse had engaged in conduct while at school or under the supervision of a school authority which endangered the property, health and safety of others, and that the interest of the school demanded Jesse's expulsion. The board also adopted a resolution and order that Jesse be expelled from the Sun Prairie Schools.

The board then reconvened in open session and informed Jesse and his parents of the expulsion decision. On February 21, 1985, a copy of the Minutes of the Special School Board meeting, including the Resolution and Order, was mailed separately and individually to Jesse and each of his parents.

On March 20, 1985, Jesse, through his attorney, appealed the expulsion on the grounds the expulsion was excessive discipline (because of mitigating evidence which was not brought out at the hearing), and that the school board violated §120.13(1)(b), Wis. Stats., by suspending Jesse for three days (February 6-8, 1985) then suspending him for an additional seven days (February 11-19, 1985) before the expulsion hearing.

On March 18, 1985 Jesse and his attorney requested the school board to reconsider the expulsion, and submitted an affidavit by Chris David Mitchell concerning the incident with the hand gun. On March 25, 1985 the school board met and considered the request and affidavit of Mr. Mitchell and found that even though the new

evidence would be proven, it was insufficient to absolve Jesse from responsibility for his actions or justify or mitigate Jesse's conduct. The motion to reconsider was denied.

In a May 15, 1985 letter to the district administrator, DPI's chief legal counsel asked for a clarification as to whether Jesse's expulsion was permanent, indefinite or for a fixed period. In a letter dated May 17, 1985 the district administrator, Dr. Gland, responded, "There was no specific duration delineated as far as the expulsion is concerned. Thus, without a fixed period for the expulsion in the resolution, the expulsion has no specific duration." (Emphasis added.)

CONCLUSIONS OF LAW

School districts are limited purpose municipal corporations and have only those powers which are conferred specifically by statute or are necessarily implied therefrom. Iverson v. Union Free High School District, 186 Wis. 342, 353 (1925). A school board's power to expel students derives from §120.13(1)(c), Wis. Stats., which establishes certain categories of offenses which may be the basis for an expulsion and sets out specific procedures which must be followed in the expulsion process. Concerning grounds for expulsion, the statute states in relevant part,

> The school board may expel a pupil from school whenever it finds . . . that the pupil engaged in conduct while at school or while under the supervision of a school authority which

ing in petting and sexual activity on January 15, 1985 on the athletic bus returning from Iola-Scandinavia." The notice also gave the time and place of hearing, indicated expulsion would be considered and included copies of §120.13(1)(c), Wis. Stats., and relevant parts of the Student Handbook concerning due process.

A hearing was held before the school board on February 25, 1985. Bill and his parents, Mr. and Mrs. Rolland J[redacted], Mr. Wayne S[redacted] and Mrs. Doreen S[redacted], were present at the hearing. They were not represented by counsel. During the hearing the board heard testimony from the school principal, the two basketball coaches, the school bus driver, a student witness, and Kathleen. Bill did not testify. The board also received certain documents as exhibits. These exhibits included several typewritten transcriptions of handwritten statements which students had given the coaches and principal and a diagram of the inside of the school bus. The principal, Ms. Arndt, testified that she took statements from two cheerleaders who indicated they saw Kathy and Bill engage in sexual intercourse in the bus on January 15th. Ms. Arndt testified that one student was sitting in the seat directly in front of Bill and Kathy and the other was sitting kitty-corner across from them (Tr. 17). At the hearing Ms. Arndt refused to identify the cheerleaders whose statements she had taken (Tr. 15). Ms. Arndt further testified that she was satisfied the witnesses were telling the truth and that it was her opinion that this sort of conduct [i.e.,

engaging in sexual intercourse] endangered the health and safety of the students involved as well as other students (Tr. 25).

Assistant basketball coach James Fazen testified that two basketball players told him that they personally witnessed Bill and Kathy "screwing" in the back of the bus (Tr. 27 and 28). Mr. Fazen also testified that he had every reason to believe the players were telling him the truth and further, that in his opinion, such activity would be harmful to the health and welfare of the students involved and other students (Tr. 27).

Head basketball coach John Sherman testified that around February 7 or 8, 1985 some of his basketball players told him that Bill and Kathy had engaged in sexual intercourse on the bus on January 15th (Tr. 36-37). Subsequently, Mr. Sherman asked the students he coached who could have witnessed the incident to write down what they saw. The students were given the option to write "No comment" if they chose. Mr. Sherman testified that some of the students who had told him they saw Kathy and Bill have sexual intercourse chose not to submit written statements to that effect (Tr. 39).

A student, Steve G., testified that on January 15, 1985 he was sitting directly in front of Bill and Kathleen and stated he did not witness any petting or sexual activity (Tr. 48-49). Under cross-examination he further testified that he really did not pay much attention, and really did not look, but he believed if Bill and Kathleen had been doing anything other than "laying hands", he would have known just by movement or sound (Tr. 50).

Stats., which establishes certain categories of offenses which may be the basis for an expulsion and sets out specific procedures which must be followed in the expulsion process. As far as grounds for expulsion, the statute states in relevant part,

> The school board may expel a pupil from school whenever it finds . . . that the pupil engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health, or safety of others, . . . and is satisfied that the interest of the school demands the pupil's expulsion.

§120.13(1)(c), Wis. Stats.

In reviewing an appeal of an expulsion decision, the Wisconsin Court of Appeals has indicated that the scope of the state superintendent's review is limited by the language of §120.13(1)(c), Wis. Stats. In Racine Unified School District v. Thompson, 107 Wis. 2d 657, 667, 321 N.W.2d 334 (1982), the Court of Appeals opined in dicta that, "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." Thus, it is incumbent upon the state superintendent in reviewing an expulsion decision to ensure that the required statutory procedures were followed, and that the board's decision is based upon one of the established statutory grounds.

A review of the record in this case indicates that the Tri-County Area School Board complied with all the procedural require-

ments of §120.13(1)(c), Wis. Stats., including notice, right to counsel, and right to a closed hearing. Accordingly, I conclude that there were no procedural violations of the statute in this expulsion process.

As to the grounds for the expulsion, the board's order indicated that it found that the sexual activity, which it concluded had taken place, endangered the health or safety of the students involved as well as other students and that the interest of the school demanded the students' expulsions.

In his letter of appeal, the appellant raised several issues concerning his expulsion. First, he alleged that the hearing was not fairly conducted and he was denied the ability to defend himself against the charges. Second, he challenged the fact that he was not given the opportunity to confront the witnesses against him, since the names of the two students who provided written statements to the principal were not revealed. Third, he alleged that he had no notice that the rules of the school would prohibit conduct such as that of which he was accused. Fourth, he contends that the evidence in the record does not support the Board's findings that he conducted himself in a manner justifying expulsion. Fifth, in his brief the appellant alleges that the Board did not act impartially because the attorney for the school district presented the district's case and also provided counsel to the Board. Sixth, he contends that the Board's decision should not be based purely on hearsay

evidence, especially when there was no evidence presented as to the reliability of the hearsay statements. Each of these allegations will be addressed separately.

First, a review of the record and transcript in this case reveals no evidence that the hearing was not fairly conducted or that the appellant was denied the ability to defend himself. Throughout the hearing the appellant and his parents were given opportunities to ask questions of the witnesses (T. 25, 34, 40, 44, 58) and only once did they avail themselves of this opportunity (T. 34). The appellant apparently chose to make no statement or testify on his own behalf. However, nothing in the record indicates he was denied an opportunity to do so. Accordingly, I conclude this first allegation is without merit.

Second, appellant contends that the school's refusal to identify the authors of the written statements submitted into evidence deprived him of his right to confront the witnesses against him. Case law from the federal courts in this circuit has specifically held that students involved in expulsion proceedings are not entitled to the same due process protections provided in a criminal trial or juvenile delinquency proceeding. See Keller v. Fochs, 385 Fed. Supp. 262, 265 (E.D. Wis. 1974), citing Linwood v. Bd. of Educ., 463 F.2d 763, 770 (7th Cir., 1972). I can find no authority for the proposition that a student has the right to confront the witnesses against him in an expulsion hearing. To the contrary, there is authority that it is permissible for school officials to rely

upon hearsay evidence in such proceedings. See Racine v. Thompson, supra. Accordingly, I conclude this second allegation is without merit.

Third, appellant contends he had no notice that behavior, such as that of which he was accused, was prohibited by school rules. The statute governing student expulsions does not require that the conduct alleged violate school rules. Rather, the school board may expel a pupil whom it has found "engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others at school or under the supervision of a school authority . . ." §120.13(1)(c), Stats. Common sense dictates that a school board cannot condone students having sexual intercourse while on a school bus returning from a school-sponsored activity. Under the circumstances of this case, I do not believe the appellant can be heard to complain that he had no notice that sexual intercourse while on a school bus could result in some form of discipline. See Korf v. Ball State University, 726 F.2d 1222, 1227 (7th Cir. 1984) in which the court rejected a similar due process claim of inadequate notice.

Fourth, appellant contends the record does not support the board's findings that he conducted himself in a manner justifying expulsion. In reviewing the findings of an administrative board sitting as the trier of fact, the Wisconsin Supreme Court has held that the findings of such a body "are conclusive if any reasonable

view of the evidence sustains 'them . . ." State ex rel. DeLuca v. Common Council, 72 Wis. 2d 672, 695 (1976). Thus, if there is any reasonable view of the evidence which will sustain the Tri-County School Board's findings, those findings must be upheld.

The school board heard conflicting testimony as to whether sexual intercourse took place between Kathleen and Bill on the school bus on January 15, 1985. The principal and coaches testified that several students had related that they [the students] personally saw the sexual activity. On the other hand, Kathleen denied that any sexual activity took place and Steve G. testified he did not witness any sexual activity between Bill and Kathleen. Given this conflicting evidence, it was solely within the province of the school board to judge the credibility of the witnesses and to determine who they believed. DeLuca, supra at 695; State ex rel. Wasilewski v. Board of School Directors, 14 Wis. 2d 243, 260, 111 N.W.2d 198 (1961).

Further, it was not improper for the board to rely upon the hearsay evidence presented by the principal and two basketball coaches. In Racine Unified School District v. Thompson, 107 Wis. 2d 657 (Ct. Apps. 1982), the Wisconsin Court of Appeals was persuaded that hearsay statements from school teachers or staff members were admissible in a school disciplinary hearing and could be found to have "sufficient probative force upon which to base, in part, an expulsion." Id. at 664. The Racine court also indicated it was

particularly persuaded by the rationale used by the federal Fifth Circuit Court of Appeals in Boykins v. Fairfield Board of Education, 492 F.2d 697 (5th Cir. 1974), cert. den. 420 U.S. 962 (1975).

In Boykins the 5th Circuit noted that it was disinclined to impose upon a board of laypeople the duty of observing and applying the rules of evidence, and concluded that, "the rights at stake in a school disciplinary hearing may be fairly determined upon the 'hearsay' evidence of school administrators charged with the duty of investigating the incidents." Id. at 701.

In the case at hand, the school principal and coaches were charged with investigating the allegations against Kathleen and Bill. Their investigations consisted of talking to the basketball players and cheerleaders who were on the bus on the day in question and eliciting the students' oral and written statements as to their personal knowledge of the events.

Based on the circumstances of this case, and the nature of the conduct in question, I believe it was appropriate for the school board to base its decision to expel entirely on the hearsay testimony presented by the principal and coaches as to the statements made by other students, and I conclude the record supports the board's findings and conclusions.

Fifth, the appellant alleges that the attorney for the school district acted improperly by assisting the school administrators in presenting their case and giving advice to the school board.

I can find nothing in the record which indicates that the attorney acted improperly in this matter.

Sixth, the appellant challenges the use of hearsay evidence at the hearing. This issue has been discussed above.

The school district has raised an issue as to the timeliness of appellant's appeal. As noted above, the school board issued its decision to expel Bill on March 14, 1985. An appeal was filed with the state superintendent on April 5, 1985. The appeal the state superintendent received indicated that a copy of the appeal had been mailed to the superintendent of schools for the Tri-County School District. Section 120.13(1)(c), Stats., dictates no timeline within which appeals to the state superintendent must be filed. Further, there is no statutory requirement that the appellant send a copy of the appeal to the respondent school district. Even if the school district did not receive its copy of the appeal letter, they were advised by letter on April 24, 1985 that an appeal had been filed with the state superintendent. Based on the record and the statute, I conclude the appeal was timely filed.

ORDER

IT IS THEREFORE ORDERED that the permanent expulsion of William S[redacted] by the Tri-County Area School Board be and is hereby affirmed.

Dated and mailed 21st this day of June, 1985.

Herbert J. Grover
State Superintendent of Public Instruction