THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

MICHAELENE J[redacted]

by the Washington School District Board of Education

DECISION AND ORDER 89-EX-02

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction under s. 120.13(1)(c), Wis. Stats., from the decision of the Washington Island Board of Education to expel Michaelene (Missy) J[redacted] for the remainder of the 1988-89 school year. This appeal was filed on March 20, 1989, by Missy's parents, Ivan G. and Micki J[redacted].

In their letter of appeal and in their subsequent written statement, the J[redacted] list several reasons as the basis for their appeal:

1. Their request to postpone the expulsion hearing, because their attorney could not make the trip to Washington Island on the day of the hearing, was unfairly and improperly denied.

2. The school board denied the request of Missy's parents to hold the hearing in open session. The board, instead held the hearing in closed session.

3. Missy did not get a chance at the expulsion hearing to tell her version of the facts in question. A board member (Clay Blair) stated that because Missy had been totally honest and forthcoming with her testimony in the prior closed investigative session before the school board, they were able to get to the bottom of the matter, and there was no need for her to re-tell the facts. The J[redacted] complain that this indicates the board members had already made up their minds to expel her.

4. There is no other school on Washington Island which Missy could attend.

5. The J[redacted], as Missy's parents, never knew Missy was being questioned at such great lengths by the school board until the night of the open school board meeting on February 27, 1989, which was the night before they received notice of her expulsion hearing. They assert they were never apprised of the seriousness of the situation because the board insisted on confidentiality.

In accordance with the provisions of s. PI 1.04(5), Wis. Adm. Code, this decision is confined to a review of the record of the school board hearing, additional material filed in this appeal and the procedural standards the school

board must follow in accordance with s. 120.13(1)(c), Wis. Stats., and other relevant laws.

FINDINGS OF FACT

1. On Tuesday, February 28, 1989, at approximately 5:00 p.m., the Washington Island School Board provided written notice to the J[redacted] that a closed hearing would be held on March 8, 1989, to determine whether Michaelene J[redacted] should be expelled from school. It is not clear from the record whether both Missy and her parents were each sent written notice of the hearing, as required under s. 120.13(1)(c), Wis. Stats. The notice provided to the J[redacted] advised them that the reason for considering expulsion was the allegation that Missy had engaged in activity endangering the property of the district. Specifically, Missy was accused of stealing confidential correspondence and files from the district administrator's office and then disseminating those materials to the public.

2. The notice was sent more than five days before the hearing, specified the charges against Missy, stated the time and place of the hearing, and indicated that the hearing could result in Missy's expulsion.

3. The notice also included a copy of s. 120.13(1)(c), Wis. Stats., concerning expulsion proceedings.

4. On the morning of Tuesday, March 7, 1989, the day before the hearing, Missy's parents asked the school board to postpone the hearing because they could not retain an attorney familiar with school law who could come to Washington Island on such short notice. (In March of 1989 the ferry service to Washington Island is limited to one trip per day.) The J[redacted] made substantial attempts to secure counsel, making numerous calls to attorneys which resulted in almost $150.00 in telephone bills. They tried until the day before the hearing to obtain such help, yet were unsuccessful.

5. The school board denied the J[redacted]' request to postpone the hearing, stating that arrangements had already been made to have its attorney present and that other hearings were scheduled for the board for the evening of March 8th. The board alleges that under the statutes a student may not be suspended for more than seven consecutive days prior to the expulsion hearing, and that if the hearing was not held on March 8, the student would have been required to return to school until the hearing could be held.

6. Before the hearing, Mr. and Mrs. J[redacted] requested an open hearing, and were told by Charles Stultz, a school board member, that he could see no reason why the meeting could not be "open." Subsequently, however, the J[redacted] were informed in the Notice of Expulsion Hearing and at the hearing itself that the hearing would be closed. Counsel for the school board told the J[redacted] that in order to protect the student's reputation, expulsion hearings were normally closed. The J[redacted] believed it would have been in Missy's best interest to get the facts out in the open by having an open hearing.

7. The hearing was held on March 8, 1989.

8. At the hearing, the school board gave Missy the opportunity to tell what had happened in response to the charges, but asked her if she wished to waive putting all her testimony into the record, in light of the fact that she had provided information to the board in an investigatory meeting called by the board before March 8th. Missy and her parents agreed to waive her right to testify as to the facts surrounding the charges and instead to incorporate the results of the investigatory sessions into the record by reference. Missy then offered the board alternatives to her expulsion for the members to consider.

9. As a result of the investigatory meetings held before March 8, the board had prepared a "Summary of Events" concerning the "break-in" and this was the document that was incorporated into the expulsion record.

10. Along with letters filed in this appeal by Mr. and Mrs. J[redacted] and Missy, the J[redacted] also filed a copy of the "Summary of Events" document which included editing notes prepared by Missy J[redacted] and Bridget Leiskau, a teacher in the school district. This edited version indicates that Missy did not agree with the statements about the "break-in" as summarized by the school district.

11. After hearing Missy's statements, the board considered the expulsion. By unanimous vote, the board ordered that Michaelene J[redacted] be expelled for the remainder of the 1988-89 school year.

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 School District, 186 Wis. 342, 353 (1925). A school board's power to expel students derives from s. 120.13(1)(c), Wis. Stats., which establishes certain categories of offenses which may be the basis for an expul-

sion and sets out specific procedures which must be followed in the expulsion process.

In reviewing an appeal of an expulsion decision, the Wisconsin Court of Appeals has stated that the scope of the state superintendent's review is limited by the language of s. 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 in dicta stated 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." It is, therefore, 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.

This appeal is based on the contention that there were procedural errors, and that such errors violated Missy J[redacted]'s due process rights. The central question in this appeal, then, is whether Missy J[redacted], in the course of the expulsion proceedings by the school board, received the due process protections to which she was entitled under s. 120.13(1)(c), Wis. Stats.

Section 120.13(1)(c), Wis. Stats., reads in pertinent part:

> . . . Prior to such expulsion, the school board shall hold a hearing. Not less than 5 days' written notice of the hearing shall be sent to the pupil and,

> if the pupil is a minor, to the pupil's parent or guardian, specifying the particulars of the alleged refusal, neglect or conduct, stating the time and place of the hearing and stating that the hearing may result in the pupil's expulsion. Upon request of the pupil and, if the pupil is a minor, the pupil's parent or guardian, the hearing shall be closed. The pupil and, if the pupil is a minor, the pupil's parent or guardian may be represented at the hearing by counsel.The school board shall keep written minutes of the hearing. Upon the ordering by the school board of the expulsion of a pupil, the school district clerk shall mail a copy of the order to the pupil and, if the is a minor, to the pupil's parent or guardian. (Emphasis added.)

It is well established that a student is entitled to due process at an expulsion hearing. Racine Unified School District v. Thompson, supra. "As long as a property deprivation is not de minimus, due process, in some form, must be accorded." Racine, 107 Wis.2d at 661, quoting Goss v. Lopez, 419 U.S. 565, 575-76 (1975). The Racine court went on to quote the conclusions reached by the Court in Goss:

> We stop short of construing the Due Process Clause to require, country wide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.
>
> We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. (Emphasis added.)

Racine, 107 Wis. 2d at 661-662, quoting Goss, 419 U.S. at 583-84.

The Court in Racine also looked at another Supreme Court case, Board of Curators v. Horowitz, 435 U.S. 78 (1978), for further guidance. In Horowitz the Court emphasized that due process provides a "meaningful hedge against erroneous action." Racine, 107 Wis.2d 657, quoting Horowitz, 435 U.S. at 89. In applying this principle to a student expulsion, the Racine court stated that, "the process due a student in a disciplinary action is to be determined by balancing the deprivation at stake with the efficiency possible in the hearing and, we believe, the ability of the school board to implement those protective procedures." Racine, supra at 662.

The Racine court also quoted from Boykins v. Fairfield Board of Education, 492 F.2d 697 (5th Cir. 1974), cert. denied, 420 U.S. 962 (1975), noting that in school expulsion hearings, "Basic fairness and integrity of the fact-finding process are the guiding stars."

The federal district court in Wisconsin has shed additional light on the application of due process to student expulsion hearings. It held, in Keller v. Fochs, 385 F.Supp. 262, 265 (E.D. Wis. 1974), that a student facing expulsion "is entitled to timely and adequate notice of the charges against him so as to allow him a meaningful opportunity to be heard," even where the student unequivocally admits the conduct charged.

The Keller court noted that the 7th Circuit Court of Appeals, in reviewing allegations of due process violations, will "look to the existence of adequate notice of the charges and sufficient opportunity to prepare for the hearing." Id., citing Betts v. Board of Education of City of Chicago, 466 F.2d 629, 633 (7th Cir. 1972).

In Givens v. Poe, 346 F.Supp 202, 209 (N.C. 1972), the court acknowledged how modern courts have held that due process in school disciplinary cases requires a number of procedural safeguards, such as:

1. written notice and specific statement of the charges;
2. a full hearing after adequate notice;
3. conducted by an impartial tribunal;
4. the right to examine exhibits and other evidence against the student;
5. the right to be represented by counsel (though not at public expense);
6. the right to confront and examine adverse witnesses;
7. the right to present evidence on behalf of the student;
8. the right to make a record of the proceedings; and
9. the requirement that decision of authorities be based on substantial evidence.

The Givens court concluded, "Not all courts have expressly required all of the items listed above, but all do appear essential if both the substance and appearance of fairness are to be preserved." Id.

Courts addressing due process in school disciplinary hearings seem to agree that flexibility is required in applying due process. The Court in Goss v. Lopez noted that, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Goss, supra at 481, citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). See also Boykins v. Fairfield Board of Education, supra at 701 in which the court reasoned,

> The requirements of due process are sufficiently flexible to accommodate themselves to various persons, interests and tribunals without the reduction to a stereotype and hence to absurdity.

In applying these principles to the appeal at hand, the question is,

> Did the Washington Island School Board's refusal to postpone the hearing to enable Missy J[redacted] and her parents the opportunity to secure counsel violate Missy's due process rights?

The answer to this question is necessarily yes.

Allowing Missy J[redacted] and her parents some additional time to secure counsel would have provided a "meaningful hedge against erroneous action" in the expulsion proceeding. See Horowitz, supra. The hearing in question was fraught with problems. First, there was a great potential for bias on the part of the decision-making board, which not only voted for expulsion but also took part in a confidential investigation prior to the expulsion hearing. The charges at the expulsion hearing were based on testimony elicited at investigative sessions conducted by the board. The parents

were not informed about these investigative meetings nor was the student told that the statements she made could be used against her.

The need to provide the substance and appearance of fairness is even more acute in a situation such as this where the tribunal (school board) served as both investigator and adjudicator. See Withrow v. Larkin, 421 U.S. 35 (1984). Rather than exercising extreme caution and giving Missy every opportunity for a fair hearing, the board fell short of this standard. It failed to provide the additional time requested by the J[redacted] to secure counsel, it denied the family's request to hold the hearing in open session, and it encouraged Missy to waive her right to "re-tell" her story at the hearing and instead to incorporate by reference into the record the investigative summary, which she later contested.

Fairness would dictate that at the hearing the board should have carefully explained to Missy and her parents exactly what due process rights were to be accorded her. See Keller v. Fochs, supra, in which the president of the board explained to the parents and student their right to question anyone present, and to make statements and comments with reference to any charge made against the student. See also Decision and Order In the Matter of the Expulsion of Roy H. by the Blair School District Board of Education, September 26, 1988, No. 159, at p. 7. There it was noted that the board was careful to extend due process to the student and

parent throughout the expulsion hearing and to carefully explain the due process procedures being afforded. In contrast, in Missy's case I find nothing in the record to indicate that the student and family were advised of their rights at this hearing.

Keller v. Fochs, supra, dictates that a student facing expulsion is entitled not only to timely and adequate notice of the charges, but also to a meaningful opportunity to be heard. Here, Missy J[redacted] could not prepare a proper defense because she did not have enough time to secure counsel who could get to the island for the hearing.

The application of flexibility in the due process determination is critical in this appeal. We are dealing here with a very unique geographic situation of an island school district in the winter where ferry service is limited to one trip per day. The J[redacted] had difficulty obtaining counsel in 4-5 days partly because of the logistical complexities of transportation to meet with counsel and to have counsel present at the hearing. The remoteness of the island also made it difficult for the J[redacted] to find counsel knowledgeable in school law on short notice. Even though the board met the statutory requirement for five days' notice, in this particular situation that notice was not sufficient to ensure due process.

The practical matter of due process as stressed by the Court in Goss v. Lopez, supra, indicates that the board

should have made an attempt to accommodate the Johnsons' request for additional time to secure counsel.

The board's argument that Missy would have to be returned to the classroom is not sufficient reason for refusing to postpone the hearing. Further, there are ways to structure a student's isolation from others while in school, such as an in-school suspension served in the principal's office or other removed space, until the hearing could be held.

In balancing the deprivation at stake (Missy's expulsion from school) with the board's ability to implement the protective procedures (allowing her return to school with whatever isolation believed necessary), it is clear the Racine v. Thompson test of due process in this instance required granting more time to secure counsel.

I conclude that the student's due process rights and statutory right to counsel were violated because the board refused to postpone the hearing to permit the student time to obtain counsel. Based on this conclusion, there is no need to address the other issues of the appeal, including whether the board met the requirements to provide separate written notice of the hearing to the pupil and pupil's parents. Accordingly, I must reverse the board's decision to expel Missy. I have reached this decision with a great deal of reluctance, and this decision should in no way be construed as condoning the actions of the pupil.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Michaelene (Missy) J[redacted] from the schools of the Washington School District is hereby reversed.

Dated and mailed this 19th day of May, 1989.

Herbert J. Grover
State Superintendent of Public Instruction