THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion

ANTONIO M[redacted]

by the Kenosha Unified School District No. 1 Board of Education

DECISION AND ORDER 91-EX-02

NATURE OF THE APPEAL

This appeal to the State Superintendent of Public Instruction from the January 23, 1991 decision of the Kenosha Unified School District Board of Education to expel Antonio M[redacted] until the end of the 1993-1994 school year, was filed by Antonio's attorney, Gary C. Sumpter. The appeal is filed under sec. 120.13(1)(c), Wis. Stats., and was received by the Department of Public Instruction on February 18, 1991.

In accordance with the provisions of sec. PI 1.04(5), Wis. Adm. Code, this decision is confined to a review of the record of the school board hearing. The state superintendent's review authority is specified in sec. 120.13(21)(c), Wis. Stats. The state superintendent's role is to ensure that the required statutory procedures were followed, that the board's decision was based upon one of the established statutory grounds, and that the board was satisfied that the interest of the school demanded that the student be expelled.

FINDINGS OF FACT

The record shows that the Kenosha Unified School District Board of Education (hereafter "board") caused personal service of the notice of expulsion hearing on the pupil, Antonio M[redacted] (hereafter "Antonio"), and separately on his mother, Wanda E[redacted]. The separate notices were personally served on Antonio and his mother by an investigative service, E.S.I. Associates, Kenosha, on January 1, 1991. The board also mailed a single copy of the Notice of Hearing to Antonio and his mother on January 11, 1991.

The notice contained information about the date, time and place for hearing and other required information. It stated that the hearing will be closed to the public unless there is a request for an open hearing. The notice also stated the following concerning other rights: "You are informed that you will be given an opportunity to present evidence in behalf of the student or to contradict by cross examination or other means the evidence which will presented by the school administration. You are also advised that Antonio Mosier need not make any statements which would be inculpatory, and he may remain silent if he so desires. The student and parents or guardian may be represented at the hearing by counsel."

The record shows that a hearing was held by the board on January 21, 1991. Antonio and his mother attended the hearing. The record also reveals that Antonio expressed a

desire to testify, but that there appeared to be some confusion on the part of the school board president, Mr. Neiman, Antonio and his mother regarding whether Antonio had the right to offer evidence on factual contested matters or post evidentiary argument, and whether he would be allowed to answer questions asked by his own advocate (his mother) or only questions directed by board members or opposing parties. Antonio did not testify, but did give a closing statement.

At the hearing teacher Doris Heller testified about an incident involving a student who was burned by a heating unit. Ms. Heller testimony included hearsay statements that a student told her that Tony (Antonio) had burned him, that Tony insisted he had not done it, and that when asked if he was positive it was Tony responded "well, I thought it was him."

Other hearsay evidence was admitted at the hearing, including double hearsay provided by witness Benjamin Villarruel, Assistant Principal, that a teacher reported to him that a student stated that another student, who she was unable to identify for some time, pointed a gun at her for some cigarettes behind the Dairy Queen outside of school premises. Antonio denies the allegations, and because the testimony came in as double hearsay he was not able to cross-examine any of the students involved.

Evidence also was presented at the hearing that Antonio was associated with a gang. The evidence consisted prima-

rily of hearsay testimony of Mr. Villarruel that Antonio was referred for drawing gang signs on his desk. Mr. Villarruel did clarify, however, that the symbols drawn were not identified as a gang symbol for any particular gang. He also testified that Antonio has consistently denied involvement in any gang.

An additional incident raised at hearing involved a folding knife found in a pocket in Antonio's locker during a search for a stolen wallet. According to Mr. Villarruel, Antonio was not in any way implicated with the stolen wallet. Rather, school administrators pointed to this as an example of how Antonio knowingly violated a school rule for possessing a knife on the premises. The record does not show, however, whether Antonio ever received notice of the policy as part of the student handbook distributed to students at the beginning of the school year, as the record does reveal Antonio entered as a new student later in the year.

The record contains a single notice of expulsion dated January 23, 1994 (the number 4 was circled and acknowledged to be an error by the school board), and addressed to Antonio M[redacted] and Wanda E[redacted]. The notice advised as to the board's decision to expel Antonio until the end of the 1993-1994 school year, specifically until June 1994. By statements to the department by the school board, a copy of the Expulsion Order was mailed to the student and his mother, and an Affidavit of Mailing sent to the department

confirmed that the board's legal counsel mailed a single copy of the notice to both Antonio and his mother.

DISCUSSION

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 sec. 120.13(1)(c), Wis. Stats., which sets forth 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 sec. 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 stated "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." (emphasis added). It is, therefore, the role of the state superintendent in reviewing an expulsion decision to ensure that the statutory procedures were followed.

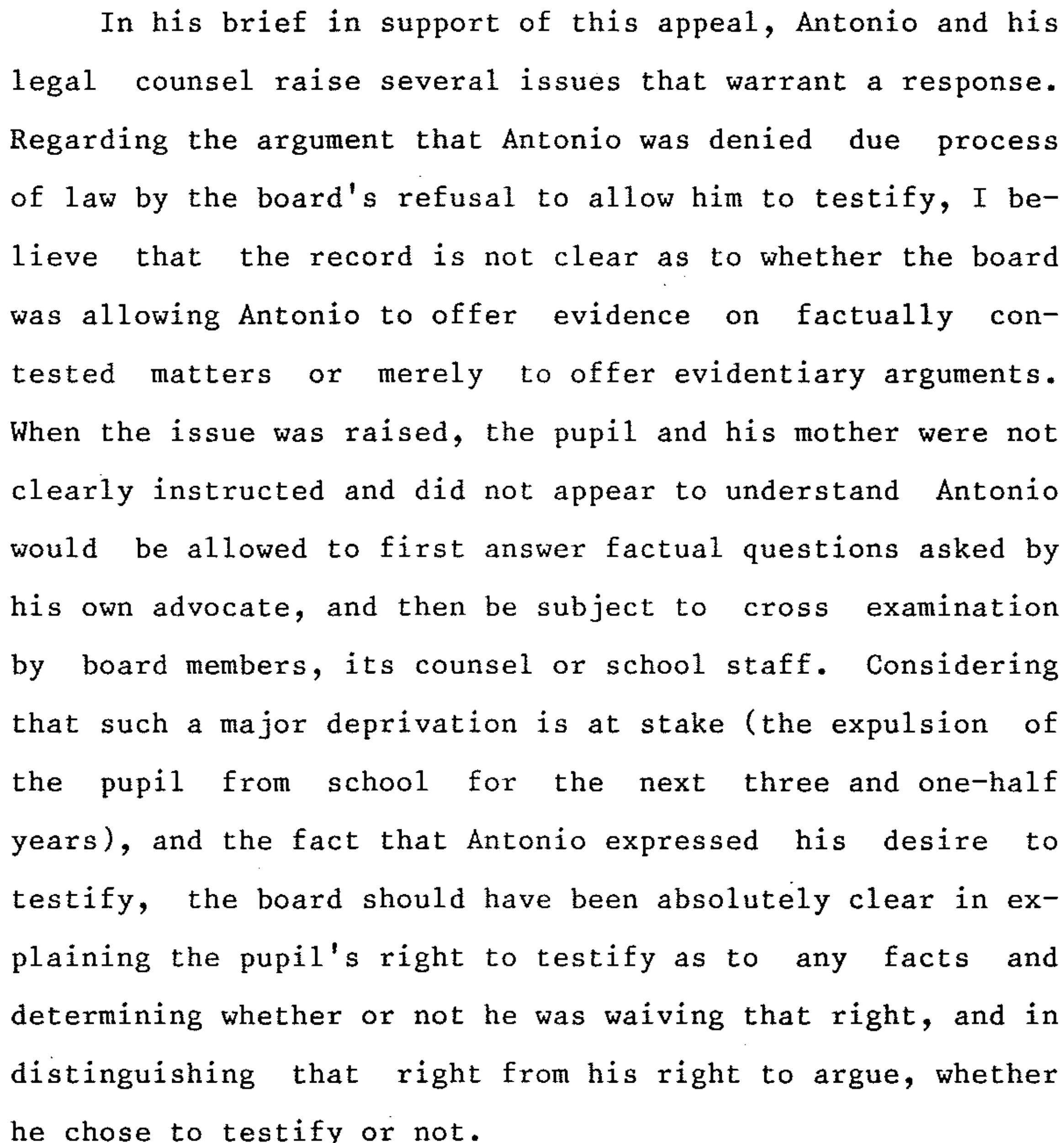
It appears from this record that a procedural error was made in this case. As is more fully discussed below, such error requires the reversal of the board's expulsion deci-

sion. I must point to other possible errors in the hearing as well which the school board will want to address should it consider expulsions of any pupils in the future.

As described in the Findings above, a written copy of the expulsion order was not sent to Antonio individually. Section 120.13(1)(c), Wis. Stats., clearly requires that when minor pupils are involved, the school district clerk shall mail a copy of the order to the pupil and the pupil's parent or guardian. When the word "and" is used in a statute, it means that both of the stated requirements must be met. Trojan v. U.W. Board of Regents, 128 Wis. 2d 270, 273 (1985). Further, when the legislature amended sec. 120.13(1)(c), Wis. Stats., in 1973, it specifically extended to individual pupils the right to notice of hearing, the right to notice of the expulsion decision and the right to appeal. See Laws of 1973, ch. 94 (effective August 9, 1973). Before the 1973 amendments, these individual pupil rights did not exist in the law. See sec. 120.13(1)(c), Wis. Stats. (1971). One must assume that this specific legislative amendment means that the individual pupil, not just the parent, has a right to receive separate notice.

I find that addressing a single notice of expulsion to both the pupil and his parent does not meet the statutory requirement of individual notice to the pupil. I have previously reversed expulsion decisions based on failure to meet the statutory notice requirements. Russell B. v. Muskego-Norway School District, Decision and Order No. 175

(2/28/91); Michael S. v. Milwaukee Public Schools, Decision and Order No. 128 (5/19/85); Travis V. v. Waterloo School District, Decision and Order No. 144 (7/2/86).



In his brief in support of this appeal, Antonio and his legal counsel raise several issues that warrant a response. Regarding the argument that Antonio was denied due process of law by the board's refusal to allow him to testify, I believe that the record is not clear as to whether the board was allowing Antonio to offer evidence on factually contested matters or merely to offer evidentiary arguments. When the issue was raised, the pupil and his mother were not clearly instructed and did not appear to understand Antonio would be allowed to first answer factual questions asked by his own advocate, and then be subject to cross examination by board members, its counsel or school staff. Considering that such a major deprivation is at stake (the expulsion of the pupil from school for the next three and one-half years), and the fact that Antonio expressed his desire to testify, the board should have been absolutely clear in explaining the pupil's right to testify as to any facts and determining whether or not he was waiving that right, and in distinguishing that right from his right to argue, whether he chose to testify or not.

Counsel for Antonio also argues that Antonio's right to due process was violated by the extensive use of hearsay evidence. I have previously held that hearsay testimony from school administrators alone may constitute sufficient evi-

dence to support an expulsion when there are factors supporting the reliability and probative value of such testimony. Joshua S. v. D.C. Everest School District, Decision and Order No. 170 (6/22/90); John C. B. v. Milwaukee School District, Decision and Order No. 116 (10/31/83). From the record as pointed out in the Findings, it appears that much of the hearsay relied upon was speculative and unsubstantiated. The double hearsay contained in the testimony of Benjamin Villaruel about alleged threat with a gun was so likely to be prejudicial that even if one were to assume reliability (which is not demonstrated on this record), it is not clear that the evidence should have been received. In light of the extreme deprivation Antonio was potentially facing, and the highly inflammatory nature of any gun possession testimony in a school related setting, he may very well have been entitled in such case to the right to directly cross examine his accusers.

Regarding the issue of knowingly violating school rules by possessing a pocket knife in his locker, the record is void of evidence establishing that school officials provided Antonio upon admission to school with a list of such policies, and consequences for violations. There is no evidence that Antonio used the knife or displayed it in any threatening manner, nor that he owned it.

Because I am reversing the expulsion order on procedural grounds, it is unnecessary for me to make holdings on the above alleged deprivations. However, I would caution

the board that the pupil facing expulsion should be afforded a meaningful opportunity to be heard, and in appropriate cases to cross-examine his accusers. The extensive use of hearsay evidence involving speculation without the opportunity for cross examination raises at least the possibility of due process deprivations.

The foregoing discussion and my decision herein should in no way be construed as condoning or minimizing Antonio's alleged conduct which led the district to pursue his expulsion.

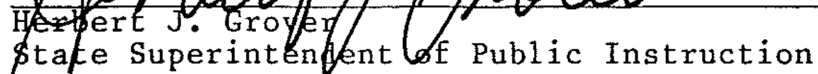
CONCLUSIONS OF LAW

Based upon my review of the record in this case, and the findings set out above, I conclude that the school board failed to comply with all of the procedural requirements of sec. 120.13(1)(c), Wis. Stats. Further, based upon the statutory standard of review required of the state superintendent, I conclude that the school board's noncompliance constitutes reversible error.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Antonio M[redacted] by the Kenosha Unified School District Board of Education is reversed.

Dated and mailed this 18th day of April, 1991.



Herbert J. Grover
State Superintendent of Public Instruction