

THE STATE OF WISCONSIN
BEFORE
THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion

KEVIN M. [REDACTED]

by the Oak Creek-Franklin School
District Board of Education

DECISION
AND
ORDER
91-EX-07

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction from the June 10, 1991 order of the Oak Creek-Franklin School District Board of Education expelling Kevin M. [REDACTED] from school. The expulsion was ordered for the remainder of the 1990-91 school year and the entire 1991-92 school year; readmission of Kevin would begin at the start of the 1992-93 school year subject to conditions outlined in the Board's order. The appeal was filed by Kevin's attorney, Karl O. Rohlich, and was received by the Department of Public Instruction on July 15, 1991.

Kevin and his attorney raise three issues in their appeal: (1) that the board failed to provide adequate and specific notice of all of the alleged conduct upon which the board based its expulsion decision; (2) that the board's Findings of Fact and Conclusions incorrectly refer to the allegation that Kevin possessed a "handgun" rather than a CO-2 BB gun; and (3) that the

expulsion is too excessive based on the facts presented and Kevin's cooperation in the matter.

As provided under sec. PI 1.04(5), Wis. Adm. Code, this appeal is confined to a review of the record of the school board hearing, and written statements filed by the parties. The State Superintendent's role is to ensure that the required statutory procedures under sec. 120.13(1)(c), Wis. Stats., 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

By letter dated May 16, 1991, Gene Bibis, Assistant Principal at Oak Creek Senior High School sent a letter to Kevin, and a separate letter to his mother, Mrs. Cheryl M█████, informing Kevin that the Oak Creek-Franklin Board of Education would be conducting an expulsion hearing regarding the following charges and conduct:

. . . possession of a weapon (pistol) in the parking lot of Oak Creek Senior High School on May 10, 1991, and conduct endangering the health and safety of the student body.

The letter indicated that the meeting may result in Kevin's expulsion from school.

The transcript of the board expulsion hearing states that the board went into closed session "for the purpose of consideration of discipline charges against a student for violation of school rules and other violations." (Emphasis added.)

In his presentation of the case for the administration, Mr. Bibis, the assistant principal, introduced and explained a summary he prepared of Kevin's disciplinary history. Included in that disciplinary summary was a statement that Kevin was suspended from school. When Kevin's attorney, Karl Rohlich, raised a question about the use of the history, he was told it would have a bearing on the appropriate penalty to be imposed by the board. Mr. Rohlich responded that the notice for expulsion tells only of the May 10 incident. The school's attorney, Mark Olson, replied, "that's right, that's right. This is for the board's background in determining what they wish to do after they have heard the facts."

The board also heard testimony concerning Kevin's involvement in the incident noticed in the May 16, 1991, letter about the expulsion hearing. The transcript shows that at the conclusion of the hearing the board adjourned to "consider any recommendation in view of the evidence placed before it."

In its Order of Expulsion, the board explains that the case came to be heard on May 28, 1991, ". . . for refusal or neglect to obey School District rules and for conduct while at school which endangered the health and safety of others, to-wit,

possession of a weapon in the parking lot of the Oak Creek Senior High School on May 10, 1991." (Emphasis added.) Its Findings of Fact include a finding under paragraph 5 that the notice of expulsion sent to Kevin and his parent ". . . stated the particulars of the incident(s) leading to the Administration recommendation that Kevin M█████ be expelled from the Oak Creek Senior High school." (Emphasis added.)

The board concludes in its Order that Kevin, through possession of a weapon, engaged in conduct while at school which endangered the health and safety of others. It goes on to state "that the interests of the student, his fellow students, the faculty and employees of the Oak Creek Senior High School are best served by expulsion of Kevin M█████ from the Oak Creek Senior High School for the remainder of the 1990-91 school year, and for the entire 1991-92 school year."

DISCUSSION

The primary issue in this appeal is whether adequate notice was given to Kevin of the conduct to be considered at the expulsion hearing. In prior cases I have stated that notice in a due process proceeding is intended to ensure that the student is sufficiently apprised of the charges to be able to adequately defend against them. Joshua S. v. D.C. Everest School District, Decision and Order No. 170 (6/22/90); Missy J. v. Washington School District, Decision and Order No. 165 (8/1/89).

In the board's letter of May 16, 1991, Kevin was notified of a singular charge which would be presented at the expulsion hearing, i.e. the May 10, 1991 weapon incident. There is no reason to anticipate from this notice that Kevin's entire attendance, academic and disciplinary history would be subject to review and consideration by the board in making its decision to expel.

Kevin's argument that the board relied on erroneous information about a suspension that was not served, which is uncontested by the district, in deciding whether to expel exemplifies the inadequacy of the notice provided in affording an adequate opportunity to defend against charges to be considered.

The record is replete with examples of the fact that the board considered and relied on Kevin's prior disciplinary history in deciding whether or not to expel. The board's own hearing transcript indicated it adjourned to closed session "to consider discipline charges for violation of school rules and other violations." Its Order of Expulsion states the case came to be heard for the expulsion of Kevin M. . . . for refusal or neglect to obey School District rules and for conduct while at school which endangered the health and safety of others," and refers to plural incident(s) leading to the administration's recommendation for expulsion. In addition, the board's counsel conceded in statements at hearing and in this appeal that the board used the information about Kevin's prior discipline to determine "the severity of the penalty . . . which would be

imposed . . ." and ". . . the appropriate level of discipline which was to be dispensed to Kevin M. . . ." There can be no doubt of the prejudice to the student under these circumstances.

I find that in hearing and considering evidence of conduct beyond those charges stated in the notice of expulsion, the board failed to provide adequate notice under sec. 120.13(1)(c), Wis. Stats., and deprived Kevin of his statutory and due process rights. The statute requires that conduct considered in the decision to expel be specified in advance notice to the pupil and parent. The student has a right to receive full and fair notice of what conduct and violation of rules will be reviewed by a board in reaching its decision to expel.

My interpretation of the adequacy of statutory notice is supported by decisions of the federal district court for Wisconsin, which held in Keller v. Fochs, 385 F.Supp. 267, 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." More recently, the court reinforced the necessity for fair notice in stating that "a student facing dismissal from a public institution is entitled to notice and a hearing permitting him or her to rebut the evidence of the allegedly wrongful conduct or to put it into context." Martin v. Helstad, 578 F.Supp. 1473, 1482-1483 (W.D. Wis. 1983).

The district relied in its notice on one instance of misconduct. I conclude its decision to expel relied also on prior alleged or perceived misconduct. This is contrary to sec. 120.13(1)(c), Wis. Stats.

The case of Joshua S. v. D.C. Everest School District, Decision and Order No. 170 (6/22/90), is cited as authority that background information can be used by a board without notice if not considered as grounds for expulsion. In that case, the record was not as clear as in the instant one as to whether that background information was used by the board in considering whether or not to expel. To the degree that case is contrary to the ruling in this case, Joshua S. is hereby modified.

Because of the board's failure to provide adequate notice as required under the statute, I find I must reverse the board's decision to expel Kevin. Accordingly, it is not necessary to address the remaining grounds of this appeal.

My decision should in no way be construed as condoning the actions of the pupil. However, it is clear that in deciding these appeals it is the state superintendent's duty to ensure that all procedural requirements have been followed. Since I have found the board did not comply with the requirements of sec. 120.13(1)(c), Wis. Stats., as discussed above, the order of the board must be reversed.

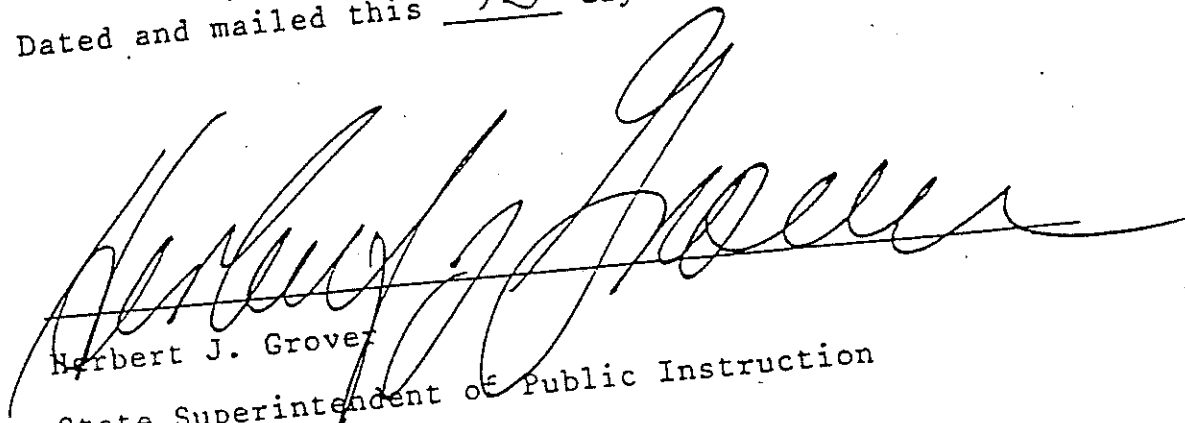
CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school board complied with all of the procedural requirements of sec. 120.13(1)(c), Wis. Stats., that the board's decision was properly based on established statutory grounds and that the board found that the interest of the school demanded that the student be expelled.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Kevin M. [REDACTED] by the Oak Creek-Franklin School District Board of Education is reversed.

Dated and mailed this 13 day of September, 1991.


Herbert J. Grover
State Superintendent of Public Instruction