THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of
LENNY R. G[redacted]

by the Madison Metropolitan School
District Board of Education

DECISION
AND
ORDER
93-EX-04

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to sec. 120.13(1)(c), Wis. Stats., from the order of the Madison Metropolitan School District Board of Education to expel Lenny R. G[redacted] from Van Hise Middle School from the date of its executive session vote March 15, 1993, to the end of the '92-'93 school year. The appeal letter was drafted by the pupil's attorney, Mary Anne Royle, on March 16, 1993, and was received by the Department of Public Instruction on March 16, 1993.

In accordance with the provisions of sec. PI 1.04(5), Wis. Adm. Code, this Decision and Order is confined to a review of the examiner and school board proceedings. The State Superintendent's review authority is specified in sec. 120.13(1)(c), Wis. Stats. The State Superintendent's role is to ensure that the required statutory procedures were followed, that the school board's decision was based upon one or more of the established statutory grounds, and that the school board was satisfied that the interests of the school district demand that the student be expelled.

FINDINGS OF FACT

In response to the Department's customary appeal acknowledgement letter and prior to a briefing schedule letter being sent, the department received a call from Attorney Clarence Sherrod on behalf of the district indicating the basic hearing notice and documents were ready to be forwarded to this agency but that issues raised in the appeal letter suggested there may be a need for supplementation of the record, and requesting a briefing schedule that would accommodate receipt of that information. In response, by letter dated March 26, 1993, the Department set such a schedule "without assuming any supplemental information is receivable at this stage," from either party. Subsequently the Department received two affidavits from Mr. Sherrod, and several other affidavits and attachments from the district, most directed toward explaining the time delays in the processing of this matter. Attorney Royle has objected to the supplementation, and while including statements of fact in her briefing that are nowhere else reflected in the record, has not submitted any affidavits but did submit three attachments to her first brief. The Department will refer to certain of the supplemental information in this decision for completeness sake without deciding whether it is properly receivable. As will become clear the same result would have been reached absent such reference.

The documentation available to the Department shows the following. The underlying facts of the event on which the expulsion is based are essentially uncontested. On Friday, December 4, 1992, Lenny, an academically average seventh grade pupil at Van Hise Middle School with no prior disciplinary record, brought an unloaded .177 CO_2 powered BB pistol to school. His goal was to return it to the pupil who had tried to sell

it to him and from whom he had received it the day before while not at school. That previous day, without telling his parents he had the gun, he asked his father whether he could get one. His father refused. Upon arriving at school December 4, 1992, Lenny immediately attempted to give the pistol back to the pupil from whom he had received it but the pupil did not want to touch it. A third pupil saw and heard the attempted interchange, volunteered to take the pistol, and put it in his own locker. Because other children had seen the gun, word of it eventually reached administration by mid morning. A search was conducted and the pistol was located in the third child's locker, and the search also located another BB gun, "with BBs" in another location. There was some evidence the pistols had been stolen in the recent past. Lenny was questioned and relayed essentially the above information as he did at hearing.

That same day, Assistant Principal E. J. De La Torre signed an Individual Suspension Report suspending Lenny for three days, referring to the gun possession and Lenny's cooperation, indicating the expulsion process may be invoked and stating Lenny may return to school December 10 (Hrg. Ex. 7).

The following Monday, December 7, principal Dr. Marvin Meissen directed a short memo to Assistant Superintendent of Secondary Education Dr. Shirley Baum recommending Lenny's expulsion for bringing a weapon other than a firearm to school. On December 9, Drs. Meissen and Baum, Lenny, and both his parents met in Dr. Baum's office. There was apparently discussion of various alternatives after which a form entitled "Offer of Homebound Study Services" was approved in writing by Lenny's mother. The form called for Lenny to receive homebound instruction from December 9, 1992, to

January 15, 1993. The next day Dr. Meissen filled out an Evaluation For Homebound Instruction form giving more detail of the instruction but in the blank following the instruction that the period of instruction will be "at least 30 calendar days" the handwritten notation is "until 1-15-93 and 4th quarter." The following day, Tuesday, December 11, Dr. Meissen wrote a letter to Lenny and his parents enclosing a copy of the three day suspension form referred to above and stating the letter "confirms the decision to expel you" for possession of the gun and invoking the school policy that requires him to recommend this action (Hrg. Ex. 6).

The next information available to the Department is a letter dated January 13, 1993, and received by the district January 14, 1993, in which Attorney Norma Briggs entered her appearance on behalf of Lenny. That day she had a telephone conference with Attorney David Rohrer who at all pertinent times represented the district administration in prosecution of the expulsion case. Attorney Briggs asked for a meeting to be scheduled with Dr. Baum. A subject of the meeting was whether the "proposed disposition" of the case "apparently agreed to by the G[redacted]was still acceptable to them" (Affidavit of David E. Rohrer dated April 14, 1993). The meeting was held January 20, 1993, where

> "...Attorney Briggs asked the District consider the placement on homebound instruction that was then in effect as a sufficient disposition of the case in lieu of an expulsion proceeding. When the District refused to drop the expulsion proceeding, Attorney Briggs stated that she would be conferring further with her clients prior to the scheduled hearing to determine if the expulsion would be contested or not."

Affidavit of Attorney Rohrer. That same date, January 20, 1993, notices of expulsion in proper form were issued by the district setting a hearing date of January 26, 1993,

(Affidavit of Attorney Sherrod dated April 14, 1993, Ex. 8 of 16 of Attorney Sherrod's submission to the department dated April 14, 1993), with copies to Attorney Briggs. On January 25, in a prehearing conference call with Hearing Examiner John Stewart, see sec. 120.13(1)(e), Stats., Attorney Briggs requested a postponement of the January 26 hearing because of the press of other business (Affidavit of David E. Rohrer), and the hearing was rescheduled for February 4, 1993, by mutual consent. On January 27 by letter to Attorney Briggs, Attorney Rohrer stated he and Dr. Baum, noting Attorney Briggs' disagreement with the administration's recommendation in this case, questioned whether there might be a conflict or incompatibility with her also being an independent examiner on the district's panel of expulsion examiners. The letter asked her to review whether she should serve in both roles and Attorney Briggs apparently shortly thereafter withdrew in this case. On February 1, 1993, Attorney Mary Anne Royle undertook representation of Lenny (Attorney Royle's brief-in-chief, p. 6). In the meantime, on January 28 the district duly and timely issued new notices of hearing for February 4, 1993.

At hearing the district called Drs. Meissen and Baum and Lenny presented testimony from his homebound teacher, Charlotte K. Miller, from himself, and from his mother. Dr. Baum described briefly what the district's recommendation was for three pupils involved with the guns, a nine week period of no services from the district (Hrg. Tr. 66). There was no amplification by either side of the December 9 meeting. There were essentially no contested issues of material fact regarding possession and transfer of the gun. The focus of the defense as stated was the question of law as to whether the gun was a weapon or dangerous weapon as defined under district rule and applicable

precedents (Hrg. Tr. 28, 122). Emphasis was placed in argument on length of possible expulsion and how much punishment was enough punishment. Lenny's mother argued he was being punished twice: That the homebound program was one type of punishment, and expulsion with no services was another type of punishment (Hrg. Tr. 125). At the conclusion of the three hour hearing the examiner indicated he desired a transcript but would rule "forthwith" (Hrg. Tr. 127).

On February 22, 1993, the examiner issued his recommended decision expelling Lenny "through April 23, 1993." No beginning date for expulsion was listed. Lenny was still on homebound instruction which circumstance the examiner ordered continued "until my decision is approved" by the board.

At a March 15, 1993, meeting the board authorized entry of an order approving the examiner's decision, findings, and conclusion as amended. The amendment stated the expulsion commenced immediately and was to continue to the end of the second semester of the '92-'93 school year, but that commencing April 19, 1993, the district would offer "an alternative Madison School District program" until the end of that same semester.

Further facts as are relevant will be referred to below.

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 High School Dist., 186 Wis. 342, 353, 202 N.W. 788 (1925). A

school board's power to expel students derives from sec. 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.

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 to that set out in sec. 120.13(1)(c), Wis. Stats. In Racine Unified School Dist. v. Thompson, 107 Wis. 2d 657, 667, 321 N.W.2d 334 (1982), the court of appeals *in dicta* 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." Id. It is therefore incumbent upon the State Superintendent in reviewing an expulsion decision to ensure that the required statutory procedures were followed, that the school board's decision is based upon one of the established statutory grounds, and that the school board is satisfied that the interests of the school district demand the pupil's expulsion.

On appeal the pupil raises five mostly constitutional issues. With one statutory exception I generally agree with the legal positions argued by the district. However because I find procedural error in failing to closely observe the letter and spirit of time limits respecting suspensions pending expulsions, I must reverse.

First, both the statute and the school district policy based on it contemplate a speedy hearing process which calls for the return of the child to school if the time lines are not met. The issue is whether the process employed here placing the pupil on homebound instruction without issuing a hearing notice is contrary to the intent behind

secs. 120.13(1)(b), (c) and (e), Wis. Stats. Section 120.13(1)(b), Wis. Stats., provides in part:

> ". . . any principal . . . may suspend a pupil for not more than 3 school days OR, if a notice of expulsion hearing has been sent under par. (c) or (e) or 119.25, for not more than a total of 15 consecutive school days nor noncompliance with such rules . . . ." (Emphasis added.)

The Department believes the meaning of this statute is plain on its face and is unambiguous. The key word in the part of the statute that pertains here is the word "or" emphasized above. Assuming the pupil is suspended from school, as here, the Department reads that word as presenting a district with a choice between two options: Between a disciplinary suspension of no more than three days OR suspending for nor more than 15 school days AND issuing a hearing notice pending expulsion. Under secs. 120.13(1)(b) and (c), Wis. Stats., (where no hearing examiner or panel is used but the hearing is conducted in front of the board) the outside limit for hearing is 15 school days. If no board decision has been rendered by the sixteenth school day following notice of expulsion, the child is entitled to return to school until such decision is rendered. See Michaelene J. by the Washington Island School Dist., p. 14, Decision and Order No. 161, (May 17, 1989). Under sub. (e) where an examiner or panel hears the case, as here, the total period may not exceed the total of 15 consecutive school days under sub (b), and assuming a timely examiner decision within those 15 days no more than 30 more calendar days pending board decision."[1] If either of those two time limits is exceeded,

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[1] The examiner's decision ". . . shall be enforced while the school board reviews the order." Sec. 120.13(1)(e), Wis. Stats.

the child is entitled to return to school. This interpretation is corroborated by the district's own policy which states:

> "12. The PRINCIPAL may suspend a pupil for up to 3 days while the District is determining whether or not to seek the expulsion of the student.
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> 13. When a pupil is suspended AND, pursuant to paragraph 14 below, [outlining the statutory expulsion process under sec. 120.13(1)(c)] IS SENT A WRITTEN NOTICE of an expulsion hearing, the Superintendent shall place the pupil on homebound instruction and such placement shall continue either until the BOARD reviews and affirms the hearing examiner's/panel's order to expel the pupil or until the BOARD decides to expel the pupil." MMSD Procedure 4045, (Emphasis supplied.)[2]

If one looks at legislative intent behind the statutory language this likewise reveals that the time limits are to be strictly observed. The number of days within which the board must act, if it wishes to keep the pupil out of school pending expulsion, was recently expanded from 10 to 15 days, 1991 Act 269, sec. 650q. This is legislative recognition of both the limited choices and the shortness of time within which the board must act. Were this time limit intended to be read more flexibly, there would appear to be little reason for the legislature to have expanded it. That the legislature intends the times in the expulsion statutes to be read as requiring prompt action lest pupils be prejudiced by delay, is also reflected in the absolute limitation placed on the state superintendent's time for decision on appeal. The outside limit is 60 days from date of

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[2] It is noteworthy this policy appears to require homebound instruction be offered to all pupils suspended pending expulsion. This Department has said so frequently in these cases that citation is unnecessary, that even upon a decision of expulsion, continued educational services from the district to the pupil are strongly encouraged. I encourage this practice as well with respect to periods of suspension pending expulsion. However, homebound study pending expulsion with notice and hearing within 15 school days are not mutually exclusive. The board's own policy which mandates homebound instruction pending expulsion appears to recognize this.

receipt by the department, regardless of when the school district record is received. The entire statutory scheme is directed toward prompt action by all entities involved so that absence of the pupil, who may ultimately NOT be expelled, is kept to a minimum.

In prior cases, the department has treated the procedural requirements of sec. 120.13(1)(c), including the notice and timing requirements, as mandatory. Michelle R. by the Suring Public School Dist., No. 126, March 7, 1985, Nancy Z. by the Janesville School Dist., No. 139 May 23, 1986. The requirements have been treated as jurisdictional and not subject to waiver by consent. See John K. by the Wisconsin Rapids School Dist., (No. 178) May 17, 1991. One of the bases for this approach is uniformity of procedure state wide while allowing more flexibility on matters of substance (like length of expulsion) to local authorities. Another is simplicity of both hearing and review on appeal which, the supreme court has suggested, should not become unduly formalized, trial-like Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, 740 (1975) and laden with analyses of possible prejudice. A third is to permit review on a fairly simple and straight forward hearing record encompassing a finite number of procedural points, thus providing some security as to anticipated outcome for all concerned. On the sole basis of construing the time lines as outlined above, requires reversal.

From the department's unique position as an observer and provider of technical assistance statewide, and over the many years it has interpreted cases on appeal under this statute, it has not previously seen a case in which a district sought to modify the operation of these time limits in this fashion. Even assuming that waiver of such time limits may ever properly occur, the record here fails to reflect a knowing and intelligent

waiver, by the parents and pupil of the operation of the limits as outlined above, Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.E. 1461, 1466 (1938).

All of the information referring to events in the first seven days after the gun episode reflect this. Hearing Exhibit 7, the Individual Suspension Report issued by Mr. De La Torre on the incident date indicates discipline, that is punishment, including "the expulsion process" is what was contemplated. Dr. Meissen recommended expulsion the next school day (Hearing Ex. 3). The Offer of Homebound Study Services form, made out at the meeting between the G[redacted] and Drs. Baum and Meissen the day before the 3 day suspension was to expire [3] states that Dr. Baum is recommending Lenny for homebound instruction for one reason: "Expulsion." The Evaluation form filled out the next day by Dr. Meissen in the blank calling for a statement "summarizing the need for Homebound" referral states "Lenny was involved in an incident regarding a weapon in the school."

The record in this case fails to reflect a knowing and intelligent waiver of the 15 day time limit in sec. 120.13(1)(b) Stats., by the parents and pupil. What is clear is that whatever came out of the conference on December 9 between the parents, pupil and Drs. Baum and Meissen, while the parents and pupil were without counsel, was so unclear to the parents, that after the passage of more than a month with their child on homebound

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[3] Section 120.13(1)(b), Wis. Stats., also provides that parents shall be given prompt notice of the suspension and reasons for it. The pupil or parent may then, within 5 school days following commencement of the suspension have a conference with an administrator who "shall be someone other than a principal, administrator or teacher in the suspended pupil's school." This person is to review the suspension for fairness and appropriateness and has the power to expunge the suspension. Though Dr. Baum is an administrator not from the pupil's school, the December 9 meeting also included principal Meissen and otherwise there is no evidence in this record reflecting the purpose of this meeting was a review of a 3 day disciplinary suspension for fairness.

and no expulsion hearing notice issued, they felt compelled to hire counsel. It is also clear that in that meeting which resulted in the placement of Lenny in the homebound program and delayed issuance of the hearing notice, there was discussion of a " proposed disposition" which was be being reduced to writing and was felt by administration to have been agreed upon:

> At that meetng, I proposed a disposition of the case which included, along with a period of expulsion, placing Lenny on homebound instruction for a period of time. The District's expulsion policy was explained to the G[redacted] at that time and they were informed that a hearing would be held at a mutually convenient time to present the agreed upon proposed disposition to a hearing officer. After the meeting, Mrs. G[redacted] signed the District's homebound form which authorized the placement of Lenny on homebound instruction. It was further agreed that the proposed disposition would be reduced to writing. I and Mr. Meissen felt that the case was resolved given the apparent consent of the G[redacted] to the proposed disposition. Homebound instruction is an educational program provided by the District in which a student receives one-on-one educational services from a teacher outside of school for two hours a day, five days a week."
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> Affidavit of Shirley Baum, April 14, 1993.[4]

Except as has been generally described above, the department has not been provided with the "proposed disposition" nor evidence that it was ever reduced to writing. The department assumes the good faith of the district administration in seeking to enter into an agreement. Nevertheless, if there is to be a knowing and intelligent waiver of the pupil's and parents' statutory right to a prompt hearing and decision and of the pupil's state constitutional right to attend school, i.e., an agreement to "a period of expulsion," presumably the district would have to demonstrate on the record that such waivers were knowingly and intelligently obtained from both the child and the parents. In this case

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[4] The information provided by the attorney for the district also contains an affidavit from Principal Meissen in virtually the same language.

there is no showing the parents and child were informed of their statutory right to have a hearing and examiner decision within 15 school days of the first day the child was suspended or have the child returned to school. There is further no showing they were advised of what the limits of the possible "period of expulsion" were, when it would begin and what the outside limits of that period were[5] - in other words, the period of possible expulsion that was actually at stake.[6] Even assuming the pupil and parents were advised that the district's recommendation would be for a nine week expulsion, there is no showing the G[redacted] were advised as to whether the board would be bound by that recommendation, and if not, the G[redacted]s understanding of its relationship to the total period of possible expulsion at stake. The record fails to show the G[redacted]s understanding of what the district was giving up in theoretical exchange for waiver of the 15 day period, particularly if the district's own policy mandated homebound AND an immediate hearing notice, as it seems to. See footnote 2.

Appellant argues that use of the homebound program in the fashion employed here is contrary to its intended purpose and is punitive.

Sec. 118.15(1)(d)5. Stats., states:

> (d) Any child's parent or guardian, or the child if the parent or guardian is notified, may request the school board, in writing, to provide the child with program or curriculum modifications, including but not limited to:
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> . . .
>
> 5. Homebound study, including nonsectarian correspondence courses or other courses of study approved by the school

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[5] The state constitution provides that the right to free district school education runs "between the ages of 4 and 20 years." Art. X, sec. 3.

[6] The notation on the December 10 homebound evaluation form "until 1-15-93 and 4th quarter" is wholly unexplained. What is the pupil's possible status during third quarter? The school calendar is not of record.

> board or nonsectarian tutoring provided by the school in which the child is enrolled.

Homebound study is not intended as a disciplinary program. It is an academic alternative program designed as an exception to the compulsory education law which allows modifications of the standard school day and hours but still fulfill mandatory attendance. Sec. 118.15(1), Wis. Stats. It is for children for whom regular class attendance is not resulting in academic success or for children with short term temporary changes in circumstances such as health problems, unwed mothers shortly prior to and after giving birth, etc. None of the statutory scheme suggests a legislatively intended relationship between the alternative education program and delaying the time between a suspension pending expulsion and issuance of notice of expulsion hearing. (See footnote 2, above.) Had such a link been contemplated, the legislature would have made it express.

In addition, the legislature and our prior cases have emphasized that notice rights, hearing rights, right to an attorney, etc. are independently and separately available to both the child and parents. Michelle R. by the Suring Pub. School Dist. (No. 126) March 7, 1985, Russel B. by the Muskego-Norway School Dist., (No. 175) February 28, 1991, John K. by the Wisconsin Rapids School Dist., (No. 178) May 17, 1991). Here, there is no signature of the child, nor other direct evidence in this record of the pupil's knowing and intelligent waiver of the statutory 15 day notice and hearing right, nor of any of the other aspects of the "agreement."

Where important constitutional and statutory rights are being waived in a proceeding involving a governmental agency, the agency before whom the rights are being surrendered usually has the burden of demonstrating the validity of the waiver. See

Ernst v. State, 43 Wis. 2d 661, 672, 170 N.W.2d 713 (1969). The school administration and board have not produced a record that reflects such knowing and intelligent waiver. Since this is so even with the additional documentation supplied by the district, there is no need to directly address the propriety of district record supplementation in this case.

One further point is suggested by this record. School boards should be sensitive that they, not administration, are the source of power over expulsion. To the extent a Board allows the adjustment of time limits or other processes touching upon the elements outlined above, it may be limiting its own discretion. In this case the Board ultimately determined to expel the pupil through the end of the school year, with an offer of alternative programming beginning on April 19. Assuming misconduct of which the Board is convinced would support only a two month removal from school, (i.e. including suspension time and a period of no school services), and assuming the same delay as occurred in this case, (three and one half months between offense and Board action), the administrative practice indulged here would moot the Board's best intentions as well as forfeit unnecessarily an additional period of full education for the child.

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 secs. 120.13(1)(b) and (c), Wis. Stats.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Lenny R. G[redacted] by the Madison Metropolitan School District Board of Education is reversed.

Dated this 17th day of ~~April~~ May 1993.

Lyle C. Martens, Deputy State
Superintendent of Public Instruction