THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of
MARC G[redacted]

by the Maple School
District Board of Education

DECISION
AND
ORDER
93-EX-11

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 Maple School District Board of Education expelling Marc G[redacted] from that school district effective September 28, 1993. This appeal was filed on behalf of the pupil by Attorney Joseph C. Crawford and was received by the Department of Public Instruction on October 22, 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 record of the school board hearing. 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

The record contains a Notice of Hearing dated September 20, 1993, which was sent to and personally served upon the pupil and his mother on September 21, 1993. The Notice advised that a hearing would be held on September 27 which could result in Marc's expulsion. The Notice alleged that Marc had engaged in conduct at school which had endangered the health, property, and safety of others. The Notice also included an attached disciplinary summary specifying Marc's alleged violations of school rules, which summary culminated in his alleged possession of a semi-automatic handgun at school on September 15, 1993.

The board convened the hearing on September 27 in closed session, citing sec. 19.85(1)(f), Wis. Stats., as authority to do so. Marc, his mother, and Mr. Crawford were present at the hearing. Mr. Crawford entered an objection to the closed session and requested that the board proceed in open session. His request was denied.

At the hearing the school district administration presented testimony supporting the alleged misconduct by the pupil. Because Marc is a pupil with an identified exceptional educational need (EEN), the district also presented evidence of an M-Team evaluation conducted on September 27, 1993, which concluded that Marc's misconduct was not related to his handicapping condition. The pupil was then afforded an opportunity to present evidence.

After the hearing, the school board deliberated in closed session and voted to expel Marc. The minutes of the meeting

indicate that at the close of the hearing "everyone else was excused and the board went into private deliberation."

The board entered an Order expelling the pupil dated September 28, 1993. The Order found that Marc had engaged in specific acts of misconduct at school which endangered the health, safety, or property of others, including possession of a semi-automatic handgun on September 15, 1993. The order also indicated the board's conclusion that such misconduct was not related to Marc's handicapping condition. Finally, the Order included a finding by the board that the interests of the school demand expulsion. A copy of the order was properly served upon Marc and his mother on September 30, 1993.

In this appeal Mr. Crawford raises several issues on behalf of the pupil which will be discussed below. In appealing this expulsion, Mr. Crawford also requested that a hearing officer be appointed to address alleged errors in evaluating and meeting the pupil's exceptional educational needs. The district was accordingly advised by this Department to process that request and to schedule a due process hearing in accordance with the time frames and other requirements governing special education in this state. The parties were further advised that in the context of this expulsion appeal, the State Superintendent would review the record to assure that the procedures set out at sec. 120.13(1)(c), Wis. Stats., were met. Issues involving the evaluation of the pupil's known or suspected handicapping condition(s), the relationship, if any, of such condition(s) to the pupil's misconduct, and the propriety of the education

offered to the pupil before and after expulsion, as well as the appropriate educational placement during the pendency of the due process proceeding pursuant to sec. PI 11.13, Wis. Adm. Code, are all subjects within the proper domain of the special education hearing officer.

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.

The first procedural error alleged on behalf of the pupil relates to the board's decision to conduct the expulsion hearing in closed session. On the evening of the hearing, counsel for the pupil requested that the proceeding be held in open session. The board denied that request citing sec. 19.85(1)(f), Wis. Stats., as authority for doing so. That statute provides in part that a meeting may be conducted in closed session if the board is considering "personal histories or disciplinary data of specific persons . . . which if discussed in public would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data . . . ."

On the other hand, sec. 120.13(1)(c), Wis. Stats., provides in part that "upon request of the pupil . . . and the pupil's parent . . , the hearing shall be closed." Counsel for the pupil argues that this language requires that a hearing be held in <u>open</u> session if the pupil and parent so demand. However, the language on its face gives the pupil and parent the right only to insist on a closed session. If a board proceeded in open session contrary to the request of the pupil or parent, the procedural requirements of sec. 120.13(1)(c), Wis. Stats., would compel reversal. In this case, however, the matter was conducted in closed session and the right to demand and receive a closed session was, therefore, not violated.

There are sound reasons for interpreting this provision in this manner. For example, many expulsion proceedings involve the histories or confidential data relating to pupils other than the pupil who is the subject of the expulsion proceeding. Clearly it would be inappropriate to permit the public airing of otherwise confidential information relating to such pupils at the sole demand of the pupil who is the subject of the expulsion proceeding.

In addition, reference to related statutes indicates that the Legislature knows how to give ultimate authority to demand an open meeting if that is the intent of the law. For example, sec. 19.85(1)(b), Wis. Stats., relating to the discipline of public employees gives the employees the right to demand an open meeting on the matter. That section provides in part that the board's authority to convene in closed session does not apply to such disciplinary matters "where the employe . . . requests that an open session be held."

Counsel for the school district argues that the confidentiality provisions at sec. 118.125, Wis. Stats., relating to pupil records compelled the closed proceeding. However, sec. 118.125(4), Wis. Stats., provides that nothing in that statute "prohibits the use of a pupil's records in connection with the suspension or expulsion of the pupil." Section 118.125, Wis. Stats., does not address the issue of whether or not the expulsion proceeding should be held in open or closed session.

Counsel for the school district also indicates that the district gave the pupil and his counsel an opportunity to request

an open hearing, but "set a time limit on which the same was to be done so that the meeting could be properly advertised under open meetings law." School District's Brief, p. 3. In carrying out its obligations as a public body under ch. 19, Wis. Stats., a school board has authority to convene in closed session in appropriate circumstances. In the context of an expulsion, a board may not proceed in open session if a closed session is demanded by the pupil or parent. However, the board retains the authority under sec. 19.85, Wis. Stats., to determine whether a closed session is appropriate even in the absence of such a demand.

The district's request in this case that the pupil give some advance notice of a desire to proceed in open session is not inconsistent with sec. 19.85, Wis. Stats. The pupil's preference on whether to proceed in open session, for example, appears relevant to the analysis of whether an open session would be likely to have an adverse effect on the pupil's reputation under sec. 19.85(1)(f), Wis. Stats. Section 120.13 (1)(c), Wis. Stats., however, does not make the pupil's preference dispositive on the issue. Furthermore, sec. 120.13(1)(c), Wis. Stats., does not authorize the State Superintendent to determine whether or not a violation of the open meetings law has occurred in a particular expulsion proceeding. The State Superintendent is authorized to address the open or closed nature of the proceeding only if the pupil or parent demands a closed meeting and that demand is denied.

Counsel for the pupil next alleges that the district's principal, assistant principal, and superintendent remained with the board during deliberations, while the pupil, his parent, and counsel were excluded. The State Superintendent has previously warned districts against this seemingly unfair practice. See e.g. Russell B. v. Muskego Norway School District, Decision and Order No. 175 (February 28, 1991). However, the record in this matter fails to demonstrate that the school administration did in fact remain during the board's private deliberations. Rather, the board minutes indicate that "everyone else was excused and the board went into private deliberations." In the absence of evidence to the contrary in the record, the State Superintendent will accept the district's assurance, offered by its attorney, that school administration personnel were not present during deliberations.

The third error alleged on behalf of the pupil relates to the timeliness of service of the notice of hearing. Counsel for the pupil argues that sec. 801.15(1)(b), Wis. Stats., applies to the notice of hearing and that Saturday, Sunday, and legal holidays should accordingly be excluded in calculating the minimum five day notice period. However, the State Superintendent has previously addressed this issue and has determined that sec. 990.001(4), Wis. Stats., rather than sec. 801.15(1)(b), Wis. Stats., applies in this context and that Saturdays and Sundays are properly included in the calculation of the five day minimum notice period. Brian C. v. Sheboygan Area School District, Decision and Order No. 158 (September 9, 1988);

Lori P. v. School District of Cudahy, Decision and Order No. 169 (May 21, 1990).

Despite compliance with the minimum five day notice period, the State Superintendent has previously held that in certain cases due process may require additional notice. See Michealene J. v. Washington Island School District, Decision and Order No. 161 (May 19, 1989). In that case, the pupil requested a postponement of the hearing because her attorney was unable to be present at the scheduled time. The State Superintendent held that the school board improperly denied that request. However, in this case the record does not reveal a request for a postponement and counsel for the pupil was present at the hearing and presented evidence on the pupil's behalf.

In reviewing the record in this case I find that the school district complied with all of the procedural requisites in this matter. I am, therefore compelled to affirm the expulsion decision as entered.

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.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Marc G[redacted] by the Maple School District Board of Education is affirmed with

regard to the procedural requisites set out at sec. 120.13(1)(c), Wis. Stats. This order does not address the particular considerations and requisites applicable to this pupil as a pupil with exceptional educational needs, which issues are subject to a pending due process hearing before a hearing officer.

Dated this 20th day of December, 1993

John T. Benson
State Superintendent of Public Instruction