THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Benjamin I[redacted] L., by the Maple School District Board of Education	DECISION AND ORDER 93-EX-12

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 Benjamin (Ben) I[redacted] from that school district effective October 12, 1993, through the remainder of the first semester of the 1993-94 school year. 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 29, 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 October 4, 1993, which was sent to and personally served upon the pupil and his mother and stepfather on October 5, 1993. The Notice advised that a hearing would be held on October 11, 1993, which could result in Ben's expulsion. The Notice alleged that Ben had engaged in conduct at school which had endangered the health, property, and safety of others. Specifically, the notice alleged that Ben had brought marijuana to school with the intention of selling or distributing it and that Ben had brought a vial containing alcohol to school. Evidence submitted at hearing indicates that the alleged possession of marijuana and alcohol occurred on October 1, 1993.

Ben, his mother, and Mr. Crawford appeared at the hearing on October 11, 1993. The board proceeded in closed session despite Mr. Crawford's request for an open hearing. The school district administration presented evidence supporting the alleged misconduct by the pupil. In addition, evidence relating to other misconduct by the pupil was presented. Mr. Crawford was then afforded an opportunity to present evidence on behalf of the pupil.

During the course of the hearing, Mr. Crawford requested that the expulsion proceeding be adjourned pending an evaluation of the pupil by a multidisciplinary team (M-Team) to consider whether the pupil has exceptional educational needs (EEN). The board denied that request. At the time of the hearing, Ben had not been identified as a pupil with EEN.

After the hearing, the school board deliberated in closed session and voted to expel Ben. 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 School District Clerk signed an order dated October 12, 1993, expelling the pupil for the remainder of the semester for "engaging in conduct while at school or under the supervision of a school authority that endangered the health, safety, or property of others." The order did not specify what the pupil's misconduct consisted of, but indicated that "this order is based on the attached findings by the School Board." Attached to the order was a resolution expelling the pupil from school. In that resolution, the board found that Ben had "brought marijuana to school with the intention of selling or distributing" and had "brought a vial containing alcohol to school." The board further found that said conduct "constitutes refusal or neglect to obey the rules and regulations" of the school and that the interest of the school demands expulsion to "prevent further refusals to obey school rules which are disruptive" to the district. The board's findings did not include a determination that Ben's conduct endangered the property, health, or safety of others.

A copy of the order with attached board resolution was delivered to Ben and to his stepfather on October 15, 1993.

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.

Counsel for the pupil raises several procedural objections to the expulsion proceeding. Counsel objects to the fact that the board proceeded in closed session despite his request for a open hearing. He also argues that insufficient notice of hearing was provided in that the minimum five day notice period included Saturday and Sunday in this case. Both of these arguments were

recently raised and rejected in Mark G. v. Maple School District Board of Education; Decision and Order No. ___ (December __, 1993). 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. Further, the State Superintendent has permitted the inclusion of Saturday and Sunday in the calculation of the minimum five day notice period pursuant to sec. 990.001(4), Wis. Stats.

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 17, 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 on the basis of a scheduling conflict or insufficient preparation time and counsel for the pupil was present at the hearing and presented evidence on the pupil's behalf.

Counsel for the pupil also alleges that the district's principal, assistant principal, and administrator 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 indicate 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 statement in the minutes indicating that the board members deliberated privately.

Counsel also argues that the expulsion proceeding should have been postponed pending an M-Team evaluation. With regard to a pupil with an identified exceptional educational need, the State Superintendent has reversed an expulsion decision based on the board's failure to consider whether the pupil's handicapping condition was related to the misconduct. See e.g. Anita P. v. Janesville School District, Decision and Order No. 124 (February 5, 1985); Joe M. v. Milton School District, Decision and Order No. 125 (February 22, 1985). These decisions are based on the particular requisites and protections under both federal and state law relating to pupils with an identified EEN.

With regard to all other aspects of special education law, however, the State Superintendent has previously determined that an expulsion appeal is not the appropriate context within which to challenge the district's application of special education provisions to a particular pupil. Such a challenge is beyond the scope of sec. 120.13(1)(c), Wis. Stats. Michael P. v. Kenosha Unified School District, Decision and Order No. 172 (October 8,

1990).[1]

During the pendency of an expulsion proceeding, or even after an expulsion decision is effective, a pupil may be referred for an M-Team evaluation as to a suspected handicapping condition. The school district in this case was accordingly advised by the Department of Public Instruction to process the request of counsel for an evaluation of Ben pursuant to the time frames and other requisites governing special education in this state. If Ben's parents disagree with the findings of the evaluation, they may request a due process hearing to challenge the matter. They may also request an independent evaluation of the pupil. The independent evaluation would be at district expense if the conditions of sec. PI 11.08, Wis. Adm. Code, are met. The parents should call upon the district or staff at the Department of Public Instruction for further assistance in understanding Ben's rights under special education law, if necessary.

Finally, Mr. Crawford also points to the principal's acknowledgement that the pupil's alleged possession of pornography contributed to the recommendation for expulsion.

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1 Considerations governing special education, and beyond the scope of this appeal, may support postponing an expulsion proceeding pending an EEN evaluation in certain circumstances. For example, if the district has reasonable cause to believe that a pupil has an EEN, the district has an obligation under sec. PI 11.03, Wis. Adm. Code, to refer the pupil for a multidisciplinary (M-Team) evaluation. Under such circumstances, postponing the expulsion proceeding pending such evaluation would appear appropriate.

Because that alleged misconduct was not included in the notice of hearing, counsel argues that reference to that allegation at hearing is error. The State Superintendent will reverse an expulsion decision if the board considers evidence of misconduct in determining whether or not to expel and that conduct was not included in the notice of hearing. Kevin M. v. Oak Creek-Franklin School District, Decision and Order No. 181 (September 13, 1991). In this case, it is unclear whether the board considered the alleged possession of pornography in its decision to expel in that the board made no findings with regard to that allegation. I do not find error on that basis.

The district is cautioned, however, that if alleged misconduct is considered as a basis for expulsion, that misconduct must be included in the notice of expulsion hearing. Further, if prior academic and disciplinary records regarding the pupil will be considered as background information only, better practice suggests reference to that material in the notice of expulsion hearing as well.

The board's order does, however, include a flaw that requires reversal in this matter. As discussed above, the notice of expulsion cited an incident involving alleged possession of marijuana and alcohol at school, and indicated that the incident endangered the health, safety, or property of others. In its resolution to expel the pupil, however, the board failed to find that the conduct contained in the notice endangered the health, safety, or property of others. Instead, the board found that the conduct constituted refusal to obey rules. While a pupil may be

expelled for refusal to obey rules, such refusal must be based on repeated violations, rather than the single incident cited in this case. Further, the statutory basis for the expulsion must be reflected in the notice of expulsion hearing, must be supported by evidence in the record, and must be reflected in the ultimate findings of the board. John K. v. Wisconsin Rapids School District , Decision and Order No. 178 (May 17, 1991). By citing the "danger to others" statutory basis in the notice of hearing and failing to enter a finding to this effect, the board failed to follow all procedural requisites in this matter. I am, therefore, compelled to reverse the expulsion decision. This decision should in no way be read as excusing the pupil's alleged misconduct.

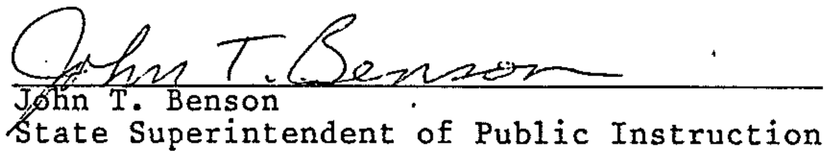
CONCLUSIONS OF LAW

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.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Benjamin D[redacted] by the Maple School District Board of Education is reversed.

Dated this 28th day of December, 1993.



John T. Benson
State Superintendent of Public Instruction