

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

JENNIFER P [REDACTED]

by the Waukesha School District Board
of Education

DECISION
AND
ORDER

94-EX-07

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 February 4, 1994, order of the Waukesha School District Board of Education to expel Jennifer P [REDACTED] from the Waukesha School District for the remainder of the 1993-94 school year. This appeal was filed by Jennifer's father, James P [REDACTED] and was received by the Department of Public Instruction on February 15, 1994.

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), 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 letter dated January 21, 1994, from the Waukesha School District administration. The letter advised a hearing would be held on February 2, 1994, which could result in Jennifer's expulsion from school for the remainder of the 1993-94 school year or beyond. This letter was sent separately to Jennifer and her parents. The letter indicated the reason for the expulsion hearing was based upon "your assisting in setting a fire at school on 1-14-94." The letter also stated a "copy of the offenses and other information are (attached or will be sent to you prior to the hearing mentioned below)." There was no attachment to the letter concerning the offense or other information. A copy of sec. 120.13, Wis. Stats., was attached to the letter. The letter further advised that Jennifer's student records including all discipline and behavioral record may be placed on file as evidence during the hearing.

The hearing was conducted in closed session on February 2, 1994. Jennifer and her parents appeared at the hearing and were represented by legal counsel. An audio tape recording of the expulsion hearing was made and is part of the record.

At the hearing the school administration representative read a memorandum dated February 2, 1994, into the record. This memorandum contained Jennifer's school history, attendance,¹ and discipline and behavior records, and contained a recommendation for

¹ When the Department developed its initial recommended forms for Notice of Expulsion Hearing and Expulsion Order in 1991, the Notice form included the word "attendance." The Wisconsin School Boards Association subsequently recommended that the word be deleted. Section 118.16(4)(b), Stats., provides "[n]o public school may deny a pupil credit in a course or subject solely because of the pupil's unexcused absences from school." Arguably, if a school cannot fail a pupil in a course as a type of discipline for unexcused absences, it could not expel for unexcused absences. Because of the

expulsion. The memorandum also contained her grades and her attendance for the 1993-94 school year (see Footnote 1). This memorandum referred to Jennifer's involvement in assisting in the setting of a fire in a locker on January 13, 1994.² The memorandum also made reference to Jennifer's involvement in an earlier locker fire on October 27, 1993. The memorandum also noted that while being questioned by school officials after the January 13, 1994, fire, Jennifer produced a pocket knife which she claimed she carried for protection. Jennifer, her parents, and their attorney were given an opportunities to ask questions and to respond to the allegations.

After the hearing the school board deliberated in closed session. The school board decided to expel Jennifer for the remainder of the 1993-94 school year. A minute sheet dated February 2, 1994, detailed the board of education closed session. This minute sheet recorded the school board's conclusion that Jennifer should be expelled for the remainder of the 1993-94 school year. The minute sheet recorded the school board's conclusion that the expulsion was based on endangering the health and safety of others and that the interest of the school demands her expulsion.

The record also contains a letter dated February 3, 1994, advising Jennifer and her parents of Jennifer's expulsion for the remainder of the 1993-94 school year. The letter

sensitivity with which the Legislature has chosen to treat how unexcused absences may be related to grading and the limitations it has placed on that use as a manner of discipline, the Department in mid-1992 modified its recommended Notice form deleting the reference to attendance. The Department believes better practice calls for avoidance of references to lack of attendance as a part of the basis to expel.

² The expulsion notice refers to Jennifer's involvement in setting a fire in school on January 14, 1994. The testimony and record refer to the date of this misconduct as January 13, 1994. The notice of expulsion refers to the date of January 14, 1994.

stated the reason for the expulsion was based upon "your endangering the health and safety of others by assisting in setting a fire at school on January 14, 1994." Attached to the letter was a "Expulsion Order" containing "Findings of Fact." The school board found Jennifer did assist in setting a fire at school on January 14, 1994, and the interest of the school demands her expulsion.

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 facts of this case present an issue of the school board's consideration of misconduct not referred to in the notice of hearing. In this case the notice of the expulsion hearing contained an allegation that Jennifer was involved in assisting the setting of a fire on January 14, 1994, in a locker at school. However, evidence was submitted by the school administration throughout the hearing concerning Jennifer's involvement in setting another locker fire on October 27, 1993, and her possession of a pocket knife. These two additional incidents were not referred to in the notice of hearing dated January 21, 1994. These two incidents were detailed in the school district administration's memorandum which was read into the record and constituted a substantial portion of the school district's case for expulsion.

The State Superintendent's office has consistently emphasized the importance of appropriate notice in an expulsion hearing. The required statutory notice "specifying the particulars of the alleged refusal, neglect, or conduct" is intended to insure that the student is sufficiently apprised of all of the charges to be able to adequately defend against them. Kevin M. v. Oak Creek-Franklin School District Board of Education, Decision and Order No. 181 (09/13/91).

This office has also warned against school boards' consideration of misconduct not referred to in the notice of hearing in deciding whether a noticed, expellable offense has been proven. Benjamin L. v. Maple School District Board of Education, Decision and Order No. 214 (12/28/93).

Although prior conduct of a student may be relevant to the issue of whether a pupil should be expelled or for how long, unnoticed prior conduct should not be considered in deciding whether an expellable offense has been proven. Jerrett N. v. Baraboo School District Board of Education, Decision and Order No. 183 (12/23/91).

In this case Jennifer had no reason to believe she would have to defend against any specific conduct other than the noticed incident of January 14, 1994. Although the notice of hearing referred to "a copy of the offenses and other information . . . ," there was no attachment to the notice. The record does not indicate any such attachment or notice containing further information as the basis for seeking the expulsion. A discussion of the unnoticed prior conduct permeated this hearing. Although the school board attempted to refocus its attention solely on the noticed offense of January 14, 1994, it was not sufficient to offset the tenor of the entire hearing. The use of unnoticed prior conduct to demonstrate whether an expellable offense has been proven violates the student's right to adequate notice.

The appeal letter in this case raises other issues dealing with the sufficiency of the evidence, the credibility of the information presented, and the harshness of the expulsion length. Because this case is reversed on other grounds, it is unnecessary to consider these issues.

Based on the error outline above, I must reverse this expulsion decision. I do so reluctantly, and the decision should not be construed as condoning Jennifer's misconduct. However, my statutory duty requires me to insure compliance with procedural detail as outlined in this case. If Jennifer is to be expelled, the process must be repeated and a

proper notice of hearing citing ALL the specific incidents which form the basis for seeking the expulsion included.

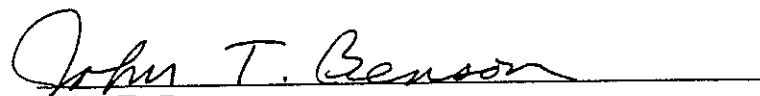
CONCLUSIONS OF LAW

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 Jennifer P [REDACTED] by the Waukesha School District Board of Education is reversed.

Dated this 18th day of April, 1994.


John T. Benson
State Superintendent of Public Instruction