Decision and Order 237

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of DUSTY S[redacted]	DECISION AND ORDER
by the Mukwonago School District Board of Education	94-EX-19

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 Mukwonago School District Board of Education expelling Dusty S[redacted] from the district from on or about April 25, 1994 and for the school years 1994-95, 95-96 and 96-97. This appeal dated June 29, 1994, was filed by Attorney Thomas R. Jones on behalf of Dusty and was received by the Department of Public Instruction on June 30, 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), 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 letter dated April 19, 1994, from the Mukwonago School District administration which was sent certified to Mr. and Mrs. Mark S[redacted] and separately to Dusty. Signed receipts of the certified letters have also been filed. The letter advised that a hearing would be held on April 25, 1994, which could result in Dusty's expulsion. The letter referenced three separate instances in which Dusty, an eighth grader, possessed a gun at Park View Middle School: March 30, April 11 and April 12. A current version of the expulsion statute was included. The letter further indicated that at hearing Dusty could request a closed hearing and be represented by counsel.

The school board record contains a full transcript of the April 25 hearing including the motion and vote after the close of the hearing and executive deliberation. At the hearing the board was represented by Attorney Mark L. Olson, who continues to represent the board on this appeal, and the district's case was presented by district School Superintendent Dr. Paul Strobel. Attorney Thomas R. Jones represented the S[redacted]s. Both parents and Dusty were present.

Dr. Strobel presented evidence to support his recommendation for expulsion including Dusty's signed statement given in a meeting with her mother and principal David Petersen, on or about April 13, 1994. The statement details Dusty's handling of the gun and ammunition on the three separate occasions on school property, twice on the school bus, and firing the gun on two separate occasions away from school. He also presented the school board policy on weapons on school property, buses and

at school events. Dr. Strobel then recommended Dusty be expelled for the remainder of the year and for three more years, one for each day the gun was brought onto school property.

Mr. Jones then presented the S[redacted]s' case which included Dusty's academic records showing a significant drop in her grades in the second trimester, a letter from Dusty's psychotherapist, and a four page letter from himself to the board outlining his view of the case and asking for a less drastic solution than expulsion. Mr. Jones called school guidance counselor Tim McCormick who testified about a student bringing to his attention Dusty and the student's concern about Dusty's mental condition. He testified about his meetings with Dusty, learning about her depression, then subsequently about her suicidal ideation, her apparent suicide attempt which produced marks on her wrists, his discussions with Mrs. S[redacted] and his recommendation for psychotherapy.

Mr. Jones also called Mrs. S[redacted] who discussed briefly Dusty's decline and depression, arranging for psychotherapy, efforts to learn the cause or causes for Dusty's condition and contingency planning for inpatient treatment. Dusty also testified very briefly.

At various times there were questions by board members and Dr. Strobel. In conclusion Mr. Jones argued that Dusty didn't bring the gun to school to harm anyone else and did not directly endanger the safety of others. The gun was not for gang activity but to harm herself. He emphasized her past academic successes, suggested she not return to the eighth grade but be allowed to finish the year on

home study, that she receive psychiatric treatment to insure her ability to safely return to school and that the interests of the school did not require her expulsion. Dr. Strobel indicated arrangements were being made to permit Dusty to complete eighth grade at home and be given credit upon successful completion of her work.

After deliberating in executive session, the board reconvened and a motion was adopted, 5-4, to accept the administration's recommendation based on outlined findings and conclusions. An Order of Expulsion was entered on May 2, 1994, and was sent to Dusty and separately to her parents. In reaching its decision, the school board found that Dusty while at school or while under the supervision of a school authority had engaged in conduct which endangered the property, health, and safety of others. Finally, the school board found that the interests of the school demanded the pupil's expulsion.

The letter of appeal to the department dated June 29 was sent by Attorney Jones and was accompanied by a separate letter dated June 21 from Mr. S[redacted] to the state superintendent. Mr. S[redacted]'s letter refers, for the first time on this record, to Dusty having been one of 14 girls "sexually harassed" by a boy at school and that Dusty and others were interviewed by police and county social services on March 9. After filing this appeal, the S[redacted]s substituted Attorney Kimberly A. Theobald for Attorney Jones.

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.

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

The underlying facts, as outlined above, are essentially uncontested. However, in applying the facts to the law, the appellant raises three arguments seeking reversal. First, she suggests, closely analyzing the facts of the three individual possessions of the weapon and ammunition, that Dusty was very careful for the safety of others, that there was no danger one day when the gun was not loaded and that on another day when it was loaded, it remained safely in her locker. Attorney Theobald argues the interests of the school do not demand Dusty's expulsion. She also refers to other conduct of the administration which would discourage others from cooperating as the S[redacted]s have.

In prior cases the department has found that a school board may properly conclude that possession of a gun on school premises fulfills the statutory ground of conduct endangering the health, property or safety of others, Christopher F. v. Milwaukee Public Schools Board of School Directors, Decision and Order No. 143 (July 2, 1986), Jack P. by the Crandon School District Board of Education, Decision and Order No. 229, (May 3, 1994). I conclude so here.

Secondly, the appellant argues the expulsion of more than three years duration is excessive. She emphasizes that Dusty was a 13 year old honor student who was contemplating suicide, had made at least one suicide attempt by cutting her wrists and wished no harm to others. Attorney Theobald also refers to the information in Mr. S[redacted]'s letter of June 21. In her brief, Attorney Theobald states "Dusty was sexually assaulted on numerous occasions between September, 1993, and March, 1994, by a male fellow student." She submits a letter dated July 20, 1994 from the

county Victim/Witness coordinator indicating a juvenile has been charged with fourth degree sexual assault for conduct occurring between the same above referenced dates. She argues that Dusty was not acting rationally and that she suffered a mental breakdown bought on by the male student. She argues that to punish someone who is not capable of making rational distinctions serves no logical purpose and that "the Board" would do better to work out a cooperative solution with Dusty's parents which would take into account the best interests of all: the students, faculty, staff, Dusty and her parents.

In her reply brief, Attorney Theobald argues the information about repeated sexual assaults was known to the district at hearing, not presented, and was unknown to Dusty's parents and hearing attorney.

The district argues that the purpose for which Dusty brought the gun to school is irrelevant. Attorney Olson also argues that the extenuating circumstances of the now charged sexual assault are not relevant and were not made known to the board during the expulsion process.

When and what exactly about sexual harassment, sexual assault, Dusty's motivation and mental state, the district knew, the board knew, Dusty's parent's knew, Dusty knew or any parties withheld from introduction at the expulsion hearing is not clear on this record. It is clear that the Department has not viewed its jurisdiction in these cases as including the power to remand. Compare sec. 120.13(1)(c) Stats., "approve, reverse or modify the [school board] decision," with sec. 227.57(2) and (4), Stats.

I am not unsympathetic to Dusty's personal circumstances which I agree are tragic. However, I am guided in my review by the applicable statute and interpretations of that statute. The district correctly points out that the State Superintendent, since the decision in Racine, supra, has refrained from exercising his discretion, in deference to local school board authority, to "modify" the length of expulsions. The State Superintendent has upheld permanent expulsions, Jesse K. by the School District of Joint District No. 2 of Sun Prairie, Decision and Order No. 131 (June 17, 1985), Michael C.G. by the Hudson School District Board of Education, Decision and Order No. 219, (February 11, 1994). While Attorney Theobald correctly points out that I am free to depart from certain precedents set by my predecessor in these cases, I will follow his precedents here.[1] However I hasten to add that the school board has considerably more discretion at its disposal. As Attorney Theobald's brief suggests, the board may choose, if it wishes, to reconsider this matter and, in its discretion, directly address those mitigating factors which were not made part of the expulsion hearing record. In fact I strongly encourage them to do so. But I cannot say the length of expulsion here, in light of the record circumstances, rises to a substantive due process level calling for departmental intervention.

---

[1] As to the agency's having followed the dicta in Racine, supra, for 12 years, I agree such allegiance is not required by law but it appears to be permitted. A pending case in the court of appeals, Madison Metropolitan School District v. Wis. DPI and Dreyfus, (Lenny R. G.), App. No. 94-0199, may clarify both jurisdictional and procedural issues left unclear in Racine. Indeed, depending on the outcome of that appeal and possible appeal and cross appeals in the supreme court, even the holding in Racine, let alone department discretion to follow its dicta, may be thoroughly examined. The department looks forward to clarification of these important questions.

Thirdly, the appellant argues the district is obligated to furnish education services to Dusty after her expulsion based on the state constitution education clauses and case law. The district correctly cites Susan Marie H. by the Kenosha Unified School Dist., Decision and Order No. 157, June 28, 1988, and Ricardo S. by the School District of Wisconsin Rapids, Decision and Order No. 145 (September 5, 1986) in which it was pointed out that constitutional rights may be forfeited by misconduct - like the Fifth Amendment guarantee of liberty by conviction of crime and sentence to prison - provided the proper due process rights are observed.

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 Dusty S[redacted] by the Mukwonago District Board of Education is affirmed.

Dated this 26th day of August, 1994.

John T. Benson
State Superintendent of Public Instruction