THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

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| In the Matter of the Expulsion of<br><br>MATTHEW C. M[redacted]<br><br>by the Cedarburg School District Board of Education | DECISION AND ORDER<br>95/96-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 December 12, 1995 order of the Cedarburg School District Board of Education to permanently expel Matthew C. M[redacted] from the Cedarburg School District. This appeal, dated December 15, 1995, was filed by Matthew's parents and was received by the Department of Public Instruction on December 18, 1995.

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 interest of the school district demands that the student be expelled.

## FINDINGS OF FACT

The record contains a letter dated November 16, 1995 from the District Administrator of the Cedarburg School District. The letter advised that a hearing would be held on November 27, 1995 concerning the expulsion of Matthew C. M[redacted] from the Cedarburg School District. The letter was sent separately to Matthew and his parents by regular and certified mail. The letter specifically alleged Matthew possessed, sold and distributed marijuana on school property. A current copy of sec. 120.13(1)(c), Stats., accompanied the letter. The record also contains a complete transcript of the hearing as well as two documents referred to during the hearing.

The hearing was held in closed session on November 27, 1995. Matthew and his parents appeared at the hearing. They were not represented by counsel. At the hearing the school district administration presented evidence concerning the grounds for expulsion. Matthew and his parents were given the opportunity to present evidence, to cross examine all witnesses and to respond to the allegations. The school board policy prohibiting possession, use and sale of drugs was read into the record.

After the hearing, the school board deliberated in closed session. The board found Matthew did engage in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others and also found that Matthew refused to obey school rules. The school board further found that the interests of the school demand the student's expulsion. The order for expulsion containing the Findings of Fact and Conclusions of Law of the school board, dated December 12, 1995, was mailed separately to Matthew and his parents. The order stated Matthew was expelled permanently.

## 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 District.*, 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 District v. Thompson*, 107 Wis. 2d 657, 667, 321 N.W.2d 334 (Ct. App., 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.* In a related context, the court of appeals ruled this dictum has become "embedded in Wisconsin school law." *Madison Metropolitan School District (Lenny G.) v. Wis. D.P.I.*, No. 94-0199, Dist. IV, Dec. 28, 1995, Slip. Op., P. 14. 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 appeal letter in this case raises numerous issues which require consideration.

Matthew argues there was a lack of evidence that he knew the package he delivered to another student contained marijuana and, further, a lack of evidence that the package he delivered actually contained marijuana.

Matthew testified that on November 8, 1995 he accepted a $10 bill from a student and was asked to give it to another student in Matthew's homeroom. Later that day, the student to whom Matthew had given the money asked if Matthew would give a package to the student who paid the $10. Matthew turned the package over to that student the next day at school. Matthew testified that immediately after turning the package over to the other student the student stated, "Oh yeah (sic), by the way this is my drugs that I've been waiting for, and I've also got more coming later on during the day from other people." Matthew further testified that he delivered the package as a favor and did not know it was marijuana. The administration presented evidence that a package found in the possession of the student to whom Matthew admitted making the delivery tested positive for the presence of marijuana.

This argument raised by Matthew challenges the sufficiency of the evidence. It has been repeatedly held that arguments concerning the sufficiency of the evidence are generally beyond the scope of review. *Tracy M. v. Random Lake School District Board of Education*, Decision and Order No. 244 (January 11, 1995); *Brad M. v. Boyceville Community School District*, Decision and Order No. 233 (June 29, 1994); and *Taiwan O.W. v. Kenosha Unified School District Board of Education*, Decision and Order No. 183 (April 7, 1992). Furthermore, the credibility of the witnesses is judged by the school board. It is the province of the board to evaluate the evidence and determine whom they believe, including, for example, a determination of whether or not Matthew knew the package contained marijuana. *William S. v. Tri-County Area School District*

*Board of Education*, Decision and Order No. 132 (June 21, 1985), citing *State ex rel. DeLuca v. Common Council*, 72 Wis. 672, 695, 224 N.W.2d, 689 (1976).

Next, Matthew argues that the board failed to consider whether his status as a student with an exceptional educational need (EEN) played a role in his misconduct. The record indicates that Matthew is currently identified as a child with EEN and he is enrolled in the emotionally disturbed (ED) program.

The record reveals that the district convened a meeting of the required group of people and determined that Matthew's misconduct was not a manifestation of his disability. If Matthew is dissatisfied with the district's determination as to whether his misconduct was a manifestation of his disability, he may use the special education due process appeal procedures provided under subch. V of ch. 115, Wis. Stats., and PI ch. 11, Wis. Adm. Code., to challenge that determination. As the district correctly points out, I am not authorized to review that determination in the context of this expulsion under sec. 120.13(1)(c), Wis. Stats. *Jesse M. v. Tri-County Area School District Board of Education*, Decision and Order No. 266 (January 2, 1996).

Matthew also argues that another student involved in the incident, responsible for more serious misconduct, received a shorter term of expulsion than he did. I am not authorized to review whether the period assessed by a school board for an expulsion is excessive or unduly harsh. *Kelly B. v. School District of Three Lakes*, Decision and Order No. 100 (August 23, 1982); *Roy H. v. Blair School District Board of Education*, Decision and Order No. 159 (September 26, 1988); and *Dustin L.M. v. Cedarburg School District Board of Education*, Decision and Order No. 202 (February 9, 1993).

In his appeal, Matthew urges the department to review numerous documents that were not offered at the expulsion hearing, including a letter written by his parents to Jay Grieger, which, he states, was not given to the Board during the hearing. Matthew and his parents had the opportunity to offer these documents at the expulsion hearing and they failed to do so. Generally, matters not submitted to the school board at the expulsion hearing will not be considered by the State Superintendent on appeal. *Omar C. v. Whitewater School District Board of Education*, Decision and Order No. 258 (August 11, 1995); *Tony R. v. Lake Geneva Joint 1 School District Board of Education*, Decision and Order No. 259 (August 11, 1995).

Matthew further argues that he and his parents were not provided with copies of two documents considered by the board at the hearing. Neither document was offered as an exhibit at the hearing. The district alleges that copies of the documents were provided to Matthew and his parents at the hearing. While the record does contain the two documents referred to, it is unclear whether Matthew or his parents were provided with copies of them. They were not expressly referred to on the record. Each document is less than a half page. One outlines attendance and prior disciplinary information and the other is a four sentence summary of the incident which was the subject of the hearing. From this record I am unable to conclude there was error in not providing the documents to Matthew and his parents. The better practice is to have all documents considered by the board marked as exhibits and copies provided to the pupil and parents.

Matthew also argues that the board president, James Bowen, and the district's attorney, Nancy Pirkey, were not present at the expulsion hearing due to inclement weather. As the district correctly notes, there is no procedural mandate requiring the attendance of the board president or the district's attorney.

One final issue is worthy of discussion, although it was not raised by either party. I note the district expelled Matthew based on conduct that endangered the property, health and safety of others at school and also based on the alternative ground that he violated school rules. Because the record fails to recite the necessary finding that Matthew *repeatedly* violated school rules, I find it was error to base Matthew's expulsion on rule violations. I do not find this omission to constitute reversible error, however, since the ground based on possessing and transferring marijuana as endangering the health and safety of others was adequately proven.

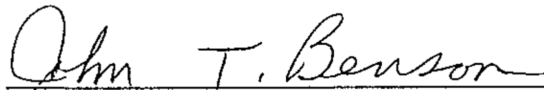
## CONCLUSIONS OF LAW

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. I therefore affirm this expulsion.

## ORDER

IT IS THEREFORE ORDERED that the expulsion of Matthew C. M[redacted] by the Cedarburg School District Board of Education is affirmed.

Dated this 14th day of February, 1996.



John T. Benson
State Superintendent of Public Instruction