THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of MATTHEW C[redacted] by the Lake Geneva-Genoa City School District Board of Education	DECISION AND ORDER 95/96-EX-15

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 14, 1995 order of the Lake Geneva-Genoa City School District Board of Education to expel Matthew C[redacted] a ninth grade student, from the Lake Geneva-Genoa City School District. This appeal, dated January 11, 1996, was filed by Matthew's father and was received by the Department of Public Instruction on January 12, 1996.

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 entitled "Notice of Pupil Expulsion Hearing" dated December 4, 1995 from the District Administrator of the Lake Geneva-Genoa City School District. The letter advised that a hearing would be held on December 14, 1995 concerning the expulsion of Matthew C[redacted] from the Lake Geneva-Genoa City School District. The letter was sent separately to Matthew and his parents by regular and certified mail. The letter alleged that Matthew engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others. The letter specifically alleged Matthew distributed or sold a controlled substance (Ritalin) to students at Badger High School on five or six occasions . A current copy of sec. 120.13(1)(c), Stats., accompanied the letter. The record also contains Matthew's academic and attendance history, copies of the school rules and policies, and numerous other exhibits. Minutes of the school board expulsion hearing and an audio tape of the expulsion hearing are also part of the record.

The hearing was held in closed session on December 14, 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. At the hearing Matthew admitted he engaged in the distribution of his prescription Ritalin to another student at school.

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. 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 14, 1995, was mailed separately to Matthew and his parents. The order stated Matthew was expelled through and including the remainder of the 1995-96 school year. The order also stated Matthew may apply for readmission beginning January 22, 1996 provided he complies with certain conditions.

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 (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 now 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 two issues. First, Matthew argues that the penalty of expulsion is too harsh. It has been a long standing general rule that the harshness of disciplinary measures is a matter of discretion for the local school board. In the absence of unusual circumstances, I have not reviewed this issue since the local school board is in the best position to evaluate the evidence and make the decision on appropriate discipline. *Ernesto G. v. Waukesha School District Board of Education*, Decision and Order No. 269 (January 12, 1996); *Travis M. v. Tri-County Area School District Board of Education*, Decision and Order No. 241 (December 8, 1994); and *Roy H. v. Blair School District Board of Education*, Decision and Order No. 159 (September 26, 1988).

Next, Matthew argues that the board did not consider the fact that his diagnosed attention deficit disorder (ADD) may have contributed to his conduct. The record indicates that when Matthew was in fourth grade he was evaluated to determine if he had an exceptional educational need (EEN). As a result of that evaluation it was determined that Matthew did not have an EEN.

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 *Anita P. v. Janesville School District Board of Education*, Decision and Order No. 124 (February 5, 1985) and *Joe. M. v. Milton School District Board of Education*, Decision and Order No. 125

(February 22, 1985). These decisions were based on the particular requisites and protections under both state and federal law relating to pupils with and *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. If Matthew'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 Matthew. 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, if necessary, for further assistance in understanding Matthew's rights under special education law.

The record also indicates that approximately five years ago Matthew was diagnosed as having attention deficit disorder (ADD). The record does not indicate whether Matthew has been identified as disabled under sec. 504 of the Rehabilitation Act of 1973 because he has ADD.

Although this department is not authorized to enforce sec. 504, it is generally understood that sec. 504 prohibits expulsion of a pupil for conduct which is a manifestation of his disability.

[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.

Matthew's parents may request that Matthew be evaluated under sec. 504 to determine if he is disabled because of his ADD. I am not authorized to review that determination in the context of this expulsion appeal 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).

One final issue is worthy of discussion. I note that the school district provided for Matthew's "probationary" readmission to school prior to the expiration of the period of expulsion provided he and his parents comply with certain conditions.

In the past my predecessor and I have either questioned the validity, or struck down as unenforceable, certain conditions imposed by school districts for early readmission of a student prior to the expiration of the expulsion term. See *Brandon C. v. Florence County School District Board of Education*, Decision and Order No. 251 (June 12, 1995); *Paul O. v. Florence County School District Board of Education*, Decision and Order No. 232 (June 28, 1994), page 4; and cases cited therein back to 1984; *Lori L. v. Baraboo School District Board of Education*, Decision and Order No. 227 (April 22, 1994); and *Jesse F.V. v. Stanley-Boyd School District Board of Education*, Decision and Order No. 189 (April 21, 1992).

In 1991 the Department of Public Instruction issued model expulsion hearing notice forms and expulsion order forms to assist school districts in meeting the requirements of the law. The latter form explained how districts could impose conditions that apply to early readmission, which is the approach the district has employed in the present case.

The legislature is presently considering formalizing this model. 1995 Assembly Bill 980 states in part:

> "...the board may impose conditions on the reinstatement of a pupil who has been expelled from school under par. (a) if the conditions

are related to the reasons for the pupil's expulsion and are specified in the expulsion order under par. (b)."

It is noteworthy that the legislature has suggested that *not all* conditions imposed on a reinstated pupil may be valid. Rather, this proposal indicates, most likely in recognition of constitutional due process considerations, the conditions must have a nexus to the prior misconduct of the pupil. [See *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *United States v. Consuelo-Gonzalez*, 521 F 2d 259 (9th Cir. 1975); *State v. Miller*, 175 Wis. 2d 204, 208-212, 499 N.W. 2d 215 (1993); *Goss v. Lopez*, 419 U.S. 565 (1975); *Buse v. Smith*, 74 Wis. 2d 550, 567, 247 N.W. 2d 141 (1976); education is a fundamental right under the Wisconsin Constitution.] If they do not, they may be invalid and unenforceable.

In this case the district has imposed 11 conditions and three additional subconditions. Imposing conditions on expelled students for readmission to school may be done as a second or last chance offer by a district to a pupil to demonstrate his or her ability to comply with school rules, exhibit respectful behavior and promote a safe school environment.

While I applaud the apparent good will and motivation of the board here, I question three of the board's conditions. The one forbidding "negative contacts" between Matthew and his parents appears unclear as a matter of definition as well as presenting school district monitoring or enforcement issues. The one requiring Matthew "and his family [to] participate in family counseling," while perhaps desirable and presumably relevant in the district's view, raises the important question of whether the district has the requisite jurisdiction over parents to do this, or that leveraging against the pupil in this fashion is constitutionally appropriate or fair. Lastly, the district, without *any* evidence in the record to indicate the nexus between grades and the selling of Ritalin, requires Matthew to maintain a 2.5 GPA.

I am not going to strike these conditions because I want to grant as much deference as possible to the district to creatively craft as salutary a program as it can to address unique pupil circumstances. I want to encourage school boards to give students guilty of misconduct a second chance. Nevertheless, I emphasize that such conditions must be within legal limits. I do not say I will not strike or refuse to give enforcement to questionable readmission conditions in the future. I urge the board to reconsider these three conditions and take whatever measures it deems appropriate.

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 Matthew C[redacted] by the Lake Geneva-Genoa City School District Board of Education is affirmed.

Dated this 12th day of March, 1996.

John T. Benson

John T. Benson
State Superintendent of Public Instruction