THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of RAYMOND A. H[redacted] by the Menominee Indian School District Board of Education	DECISION AND ORDER 95/96-EX-18

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 November 16, 1995 order of the Menominee Indian School District Board of Education to expel Raymond A. H[redacted], an eighth grade pupil, from the Menominee Indian School District through May 23, 1996. This appeal was filed by Raymond's guardians and was received by the Department of Public Instruction on January 25, 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 dated November 10, 1995 from the Superintendent of the Menominee Indian School District. The letter advised a hearing would be held on November 16, 1995 which could result in Raymond's expulsion from school for the remainder of the 1995-96 school year or longer. The letter was sent separately to Raymond and his father. The letter alleged Raymond engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others. Attached to the letter was a lengthy memorandum which included an allegation that Raymond put marijuana "roaches" into another student's folder. The memorandum contained Raymond's academic and disciplinary records for the school year. A copy of sec. 120.13(1)(c), Wis. Stats., was also attached to the letter. The record also contains minutes of the school board expulsion hearing and an audio tape of that hearing.

The hearing was held in closed session on November 16, 1995. Neither Raymond nor his guardians appeared at the hearing. The board received the evidence from the administration concerning the ground for expulsion. The board found Raymond engaged in behavior that endangered the property, health and safety of others while at school and under the supervision of school authorities. The board further found the interests of the school demand Raymond's expulsion. The order of expulsion, containing the Findings of Fact and Conclusions of Law of the school board, was prepared and mailed to Raymond. The order recited that Raymond was expelled from November 16, 1995 through May 23, 1996.

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 filed in this case raises one issue that requires consideration. Raymond argues the school board's decision was unfair because he was not given an opportunity to appear at the hearing. The appeal letter indicates that on November 16, 1995, the scheduled date for the

expulsion, Raymond's guardian talked to a member of the school administration. According to the appeal letter, Raymond's guardian advised the administration Raymond could not be at the hearing because he was incarcerated and the guardian requested a postponement of the hearing. The appeal letter further states the administration representative told Raymond's guardian he would notify the school staff. Raymond's guardians indicate they heard nothing further from the school concerning the request for the postponement. The next time they heard from the school was when they received a letter from the school superintendent dated January 16, 1996. This letter indicated the board's position has not changed and the board's expulsion order remains in effect.

The minutes of the school board meeting corroborate that the board was advised of the phone call from the guardians. The minutes indicate the caller stated she would not be attending the hearing and that Raymond was incarcerated. The minutes are silent regarding any request for postponement, whether it was brought up or how it was decided. Raymond argues, at the very least, his guardians should have been advised that the hearing was either to proceed or not. No legal briefs have been filed by either party and the school administration did not deny or respond to the issues raised in the appeal letter.

Because I find the school board committed a procedural error I must reverse this expulsion decision. The record does not indicate how the school board decided Raymond's request for a postponement of the hearing. The right to a free education in Wisconsin is both constitutional and fundamental. *Buse' v. Smith*, 74 Wis. 2d 550, 567, 247 N.W. 2d 141 (1976). Its withdrawal by a school board is a grave act. A prior decision reversed an expulsion order for failure to reschedule or delay an expulsion hearing in order for the parties to obtain counsel.

Michaelene J. v. Washington School District Board of Education, Decision and Order No. 161 (May 19, 1989). In that decision my predecessor held that the pupil facing expulsion is entitled to a meaningful opportunity to be heard, even where the student admits the conduct charged. *Keller v. Fochs*, 385 F. Supp. 262, 265 (E.D. Wis. 1974). Courts addressing due process in school disciplinary hearings agree that flexibility is required in applying due process. *Goss v. Lopez*, 419 U.S. 565 (1975). As I have previously held, basic fairness and integrity of the fact finding process are the most important considerations. *Chad S. v. Hartford Union High School District Board of Education*, Decision and Order No. 273 (February 9, 1996). In a recent case I cautioned that school boards should carefully respond to a request for a postponement. I urged boards to consider the nature of the request and further urged them to state their reasons for granting or denying such a request. In *Ernestina G. v. Wautoma School District Board of Education*, Decision and Order No. 250 (June 1, 1995) I held, "If no specific reasons for denial [of the request for postponement] appear in the record, it is difficult if not impossible for the State Superintendent to perform the review function." In this case the board failed to respond to the request for the postponement. There is no indication in the record the board even considered Raymond's request for a postponement to permit him an opportunity to attend the hearing.

Further, a review of the record in this case fails to indicate that a copy of the expulsion order was sent separately to Raymond and his parents. The record does indicate a letter dated November 17, 1995 was sent to Raymond. Attached to this letter was a copy of the expulsion order. There is no indication Raymond's parents or guardians were sent a copy of the letter or expulsion order. The appeal letter indicates the parents and guardians did not learn Raymond was expelled until about six weeks after the hearing. A letter from the school administrator to the

father dated January 16, 1996 indicating the board will not reconsider the expulsion is not inconsistent with this point.

The statutory notice requirement of sec. 120.13(1)(c), Wis. Stats., has been held to be mandatory. Failure to send a copy of the expulsion order separately to the parents is reversible error. *Paul R. v. East Troy Community School District Board of Education*, Decision and Order No. 254 (June 21, 1995).

Finally, I note the 1991 copy of the statute attached to the expulsion notice did not contain many of the statutory revisions that have been made to sec. 120.13(1)(c). Care should be taken to attach a full, complete and current copy of sec. 120.13(1)(c), Wis. Stats., to the notice of expulsion hearing.

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 Raymond A. H[redacted] by the Menominee Indian School District Board of Education is reversed.

Dated this 22nd day of March, 1996.

John T. Benson

John T. Benson
State Superintendent of Public Instruction