THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of TYRELL D[redacted] by the Racine Unified School District Board of Education	DECISION AND ORDER 95/96-EX-26

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 action of the Racine Unified School District Board of Education to expel Tyrell D[redacted], a 10 year old fourth grader, from the district effective December 6, 1995 through the 1995-96 school year. This appeal was filed by Attorney Christine Stoneman on behalf of the pupil and the pupil's mother and was received by the Department of Public Instruction on March 18, 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 interests of the school district demand that the student be expelled.

FINDINGS OF FACT

On December 1, 1995 the district delivered a letter dated November 30, 1995 from the district's Assistant Superintendent to the pupil's mother by leaving the letter with an adult at the mother's address. The pupil was not provided with or sent a separate copy of that letter. The November 30, 1995 letter advised that a hearing would be held on December 6, 1995 to consider expulsion of the pupil. The letter indicated that the basis for the proposed expulsion was that the pupil "struck another student in the face with a ruler." The letter also stated that a current copy of sec. 120.13(1)(c), Wis. Stats. appeared on the back of the letter. The record provided by the district in this matter, however, does not include a copy of the statute with the letter.

The board accordingly met on December 6, 1995 to consider the proposed expulsion. The pupil and pupil's mother appeared without counsel. The district presented an oral summary regarding the pupil's alleged misconduct. The pupil agreed that he had hit another student in the eye with a ruler. The pupil reportedly "had good attendance and has not exhibited problematic behavior this year." However, the district also indicated that the pupil's academic standing had been decreasing each of the past three years and that he is not productive academically. The report from his teacher "stressed that he has difficulty concentrating and sitting still." The district also reported an awareness that the pupil's mother was considering having him "see a doctor due to possible Attention Deficit type behavior." At the hearing, the mother confirmed that the pupil was scheduled to see a doctor on December 7, 1995 regarding her concern that the child may be "hyper."

The pupil has attended three schools within the district in the past three years due to family moves. The district indicated that ADD/ADHD may have been suspected at another

school in the district a couple of years ago. The district indicated that the pupil's grandmother was told at the other school to "pick up the ADD forms," but district records did not reflect whether she had done so. The pupil's mother then stated that she had never been contacted by the district regarding an ADD evaluation and that although she and the pupil had lived with the grandmother, the grandmother was not his custodian. A board member then asked whether the district had done anything further to evaluate the child. District staff responded that "an M-team wouldn't do that," that a physician had to do such an evaluation and that the district would only help the parent find a physician for such an evaluation. The record does not reflect any efforts by the district to evaluate the pupil for potential exceptional educational needs or a disability under s. 504 or to explore alternative education programs for the child.

The pupil's mother urged the board to return the pupil to school. Although she agreed the pupil's conduct was serious, she argued that expulsion for the rest of the school year was unduly harsh and unproductive. She suggested assigning the pupil to another school so that the injured child would not be tempted to "take revenge" for the ruler incident. The district then referred to its "zero tolerance" policy regarding pupil misconduct resulting in injury to students. After the hearing, the school board deliberated in closed session and voted five to one to expel the pupil for the remainder of the school year.

The record next contains a letter dated December 7, 1995 from the district to the pupil's mother advising her of the board's decision to expel her child. The pupil was not provided with or sent a separate copy of that letter. The letter states that "it is *alleged* that Tyrell was involved in an incident at Olympia Brown Elementary School on November 14, 1995 that resulted in another student being assaulted with a ruler by Tyrell" (emphasis added). However, the letter

does not contain any board findings with regard to that allegation, nor does the letter contain a finding that the interests of the school demand expulsion.

The attorney for the pupil and his mother filed a brief in this matter pointing out multiple procedural defects, alleging violations of I.D.E.A., s. 504 and state special education laws and asking for reinstatement and compensatory education for the pupil. The district indicated that it would not file a brief.

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.*, 199 Wis. 2d 1, 543 N.W. 2d 843 (1995). 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.

Because the district in this case failed to comply with all statutory requirements under sec. 120.13(1)(c), Wis. Stats., I must reverse this expulsion decision. First, the district failed to provide a separate notice of the expulsion hearing to the pupil. Second, the record does not show that the pupil's mother received a copy of s. 120.13(1)(c) with her notice of hearing. Third, the pupil did not receive a separate copy of the board's expulsion order. Further, the letter informing the mother of the board's expulsion decision did not contain requisite findings regarding the alleged misconduct, nor did it include a finding that the interests of the school demand expulsion. Each of these errors requires reversal. See, e.g., *Russell B. v. Muskego-Norway School District Board of Education*, Decision and Order No. 175, (February 28, 1991); *Phillip C. v. Wausaukee School District Board of Education*, Decision and Order No. 280, (March 22, 1996).

I also feel compelled to comment on a circumstance in which a school board determined that expulsion was the only appropriate measure available to address this 10 year old child's behavior. I recognize that this pupil's alleged conduct was unacceptable and cannot be tolerated. I further recognize that other children must have a safe and stable school environment and that disruptive or assaultive behaviors must be effectively addressed by school officials.

I was recently called upon to review the expulsion of an eight year old child. Because the district had followed proper procedures in that case, I upheld that expulsion. The following comments I made in that case, however, apply to this one as well:

> Depriving a (ten) year old child of an education is a drastic action that should not even be considered until other available options have been tried and have failed. In our democratic society we cherish both the value of the individual and the potential of youth. Schools are in the business of educating children and helping them to realize their potential. We accept that children who come to a school have a very wide range of backgrounds, abilities and needs.
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> Highly structured educational programs do exist for children who have severe behavioral problems....I urge the district to reconsider whether it has fully examined and pursued all available and appropriate options for this child. My staff will, upon request, consult with the district regarding options that are utilized by other school districts in Wisconsin." *Aaron B. v. Westfield School District Board of Education*, Decision and Order No. 261, (September 15, 1995).

Counsel for the pupil and mother argue that the district knew or should have known that the pupil is a child with an EEN and/or a disability under s. 504. She urges me to reinstate the child and to award compensatory education for the approximately six months during which he has been deprived of an education. With regard to a child with an *identified* exceptional educational need, the State Superintendent has reversed an expulsion decision based on a board's failure to consider whether the pupil's handicapping condition was related to the misconduct. 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 in which to challenge the district's application of special education requirements to a particular pupil. See, e.g., *Anita P. v. Janesville School District Board of Education*, Decision and Order No. 124 (February 5, 1985); *Matthew C. v. Lake Geneva-Genoa City School District Board of Education*, Decision and Order No. 277 (March 12, 1996).

Considerations governing special education, and beyond the scope of this appeal, may support postponing an expulsion proceeding pending an EEN or s. 504 evaluation in certain circumstances. I remind the board of its clear obligation under both I.D.E.A. and s. 504 to evaluate a child if it has reasonable cause to believe that the child has an EEN or a disability

under s. 504. Such an evaluation must be provided by the district at no cost to the parent. A child with ADD/ADHD *may* qualify for services under I.D.E.A. and/ or s. 504. A district may not discharge its obligation to evaluate children with a suspected disorder of this nature simply by "helping the parent find a doctor" to do the evaluation. See DPI Exceptional Education/Pupil Services Information Update, Bulletin No. 91.12, November, 1991; Joint OCR/OSEP Policy Letter, March 14, 1994; 21 IDELR 73. While I am not authorized under sec. 120.13(1)(c), Wis. Stats., to direct a district to postpone an expulsion pending such an evaluation, a court does appear authorized to do so. That is precisely what occurred recently in our federal district court in *Jeffery S. v. School Board of the Riverdale School District*, cited by counsel in this case. See 21 IDELR 1164. I am also not authorized in the context of this appeal to award compensatory education to this pupil. Such relief may be sought under the procedures governing special education.

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 Tyrell D[redacted] by the Racine Unified School District Board of Education is reversed.

Dated this 14th day of May, 1996.

John T. Benson
State Superintendent of Public Instruction