THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of DONALD P[redacted] by the Westby Area School District Board of Education	DECISION AND ORDER 95/96-EX-37

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 May 22, 1996 order of the Westby Area School District Board of Education to expel Donald P[redacted], a sophomore student, for the remainder of the 1995-96 school year and for all of the 1996-97 school year. This appeal, dated June 10, 1996, was filed by Donald's attorney, Thomas S. Sleik, and was received by the Department of Public Instruction on June 11, 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 "Notice of Expulsion Hearing" dated May 7, 1996 from the superintendent of the Westby Area School District. The letter advised a hearing would be held on May 15, 1996 which could result in Donald's expulsion from school until his 21st birthday. A copy of sec. 120.13(1)(c), Wis. Stats., was printed on the back of the notice. The notice was sent separately to Donald and his parent. The notice alleged Donald engaged in conduct while at school which endangered the property, health and safety others. The notice specifically alleged Donald purchased marijuana on school premises. The record contains copies of the applicable school board policies, the minutes of the school board expulsion hearing, and audio tapes of the school board expulsion hearing.

The expulsion hearing was held on May 15, 1996. Donald and his parent appeared at the hearing and were represented by counsel, Attorney Thomas S. Sleik. At the hearing the school administration presented evidence on the ground for expulsion alleged in the notice. Donald, his parent and their attorney were given an opportunity to present witnesses, to cross-examine witnesses and to respond to the allegations.

After the hearing, the school board deliberated in closed session. The board found Donald engaged in conduct at school which endangered the property, health or safety of others. The board specifically found Donald purchased and possessed marijuana while on school property. The board further found the best interest of the school demands the student's expulsion. The order of expulsion containing the findings of the board was dated May 22, 1996. It was mailed separately to Donald and his parent. The order stated Donald was expelled for the remainder of the 1995-96 school year and for all of the 1996-97 school year. The board further stated it would

consider the readmission of Donald for the second semester of the 1996-97 school year if Donald completed certain conditions prior to readmission.

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.

Donald argues the expulsion order should be reversed because the school board failed to notify the students of a change in the student discipline policy. The failure of the board to notify the students of this change, Donald argues, is a procedural error which taints the expulsion process.

The evidence at the hearing indicated that the school administration distributed a student handbook at the beginning of the 1995-96 school year. The student handbook recited the school board policy on discipline. The handbook indicated the following:

> Therefore, the possession, use or sale of tobacco, alcohol or other drugs as listed above is strictly prohibited on school grounds, as well as at or before school sponsored activities, and shall be punished by suspension and, for repeated incidents, expulsion.

In November, 1995 the school board revised its policy on suspensions and expulsions. Essentially, the board adopted as its "policy," the statutory grounds for expulsion as stated in sec. 120.13(1)(c), Wis. Stats. There is no evidence in this record that the school board notified the students or the parents of the new policy on suspensions and expulsions. Thus, Donald argues, he was unaware that a first time possession of marijuana on school premises would expose him to a possible expulsion. According to Donald's view, the student handbook discipline policy listed a suspension as a penalty for the first time possession of marijuana. Donald argues the board's failure to notify the students of the change in the discipline policy violated his procedural right to adequate notice.

In response, the school administration argues Donald's admitted conduct in purchasing and possessing marijuana on school premises is a crime and this conduct clearly is a ground for expulsion under sec. 120.13(1)(c), Wis. Stats. Secondly, the school administration argues Donald admitted to two prior acts of using tobacco on school property so that this act of purchasing and

possessing marijuana was a *third* offense exposing him to a possible expulsion under either board policy. Thirdly, the administration argues the State Superintendent's scope of review is limited to a review of whether the school district complied with all of the procedural requirements of sec. 120.13(1)(c), Wis. Stats. Therefore, the administration argues, constitutional questions such as due process cannot be decided by administrative agencies and are reserved for the courts.

The last time a question related to districts observing their own rules arose in an expulsion context, the Deputy State Superintendent noted the irony of districts not following their own rules while expelling children who violate other rules. *Brandon H. v. DeSoto Area School District Board of Education*, Decision and Order No. 206 (May 3, 1993). The Deputy deferred in that case as I will here. The issue is one of constitutional due process advance notice. The district argues I have no jurisdiction to decide constitutional issues. But my predecessor did so on at least one occasion, *Michaelene J. v. Washington School District Board of Education*, Decision and Order No. 161 (May 19, 1989), and the importance of constitutional issues has been discussed in detail in other decisions. *Michael C.G. v. Hudson School District Board of Education*, Decision and Order No. 219 (February 11, 1994); *Jerrett N. v. Baraboo School District Board of Education*, Decision and Order No. 183 (December 23, 1991); *Patrick Lee Y. v. Kenosha Unified School District No. 1 Board of Education*, Decision and Order No. 182 (October 9, 1991).

The case law precedents appear to be mixed, suggesting that some constitutional questions should be raised and decided before some agencies, *Kuechmann v. La Crosse School District*, 170 Wis. 2d 218, 225, 487 N.W. 2d 639 (1992); *Omernick v. DNR*, 100 Wis. 2d 234, 245, 301 N.W. 2d 437 (1981); *Fulton Foundation v. Department of Taxation*, 13 Wis. 2d 1, 11,

108 N.W. 2d 312 (1961). The court has held a state agency has no authority to declare a state law unconstitutional, *Warshafsky v. Journal Company*, 63 Wis. 2d 130, 147, 216 N.W. 2d 197 (1974). The Attorney General has opined that certain state boards may themselves challenge the constitutionality of legislation the board is called upon to implement, OAG 7-92 (March 18, 1992). Most recently in a pre-decision order in *Thompson v. Craney*, 199 Wis. 2d 674 (1996), relying on *Fulton Foundation v. Department of Taxation*, supra, the Supreme Court ruled the Attorney General could represent DPI and argue the unconstitutionality of legislation removing control of the supervision of public education from the State Superintendent; Order dated October 6, 1995.

I understand there may be a difference between cases in which a state agency may challenge legislation it is called upon to implement or enforce in the course of its customary operations and legislation changing the control and fundamental operation of the agency. There may be differences depending on which agencies are involved and the types of issues and rights at stake. The language of the Court of Appeals in *Lenny G.*, supra, reaffirming the language in *Racine Unified School District v. Thompson*, supra, limiting the State Superintendent's review in expulsion matters to procedural issues under the expulsion statute indirectly suggests I should not reverse cases upon constitutional grounds. But I note neither of these cases discusses the other cases cited above which might support broader State Superintendent review authority.

On the state of the briefing and facts of this case I will refrain from ruling on the constitutional due process issue raised. I would be happy to receive further guidance from the courts on this issue. However, I strongly advise districts to always promptly give notice to students and parents by written note, bulletin board, public address announcements, assemblies,

and so forth of any procedural or substantive changes in discipline policies. Failure to do so encourages litigation.

The act committed here was indeed a crime. That may place this case in a different category for advance notice purposes than a "mere" rules violation that does not constitute a crime.

Lastly, there is no evidence of detrimental reliance. An expulsion case involves the serious issue of depriving a child, because of misconduct, of his or her state constitutional right to an education. It also concerns the safety and welfare of other pupils. But as grave as these interests are, and as important as the standards in expulsion proceedings are, the courts do not treat them as being at a level as high as proceedings and due process standards in criminal actions. An expulsion hearing is a quasi-judicial process conducted by a lay administrative board. See *Boykins v. Fairfield Board of Education*, 492 F 2d 697, 701 (5th Cir., 1974) cert. den 420 U.S. 962 (1975) quoted in *Racine*, supra, at 663-664. It is in the nature of a civil, not criminal proceeding. There is no evidence that Donald went forward with the drug purchase, in part because he knew he only risked being suspended under the old rule, and would not have so acted had he known he faced expulsion.

As to the administration's argument that the drug purchase was a third offense and therefore grounds existed to expel for repeated violation of school rules under either policy, the district's notice failed to charge repeated misconduct. It only charged a single act of dangerous conduct. It therefore had authority to expel in this proceeding only for the single dangerous act the notice charged. *Benjamin L. v. Maple School District Board of Education*, Decision and Order No. 214 (December 28, 1993).

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 Donald P[redacted] by the Westby Area School District Board of Education is affirmed.

Dated this 9th day of August, 1996.

John T. Benson
State Superintendent of Public Instruction