

THE STATE OF WISCONSIN  
BEFORE  
THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

Alexander P [REDACTED]

by the Oak Creek Franklin School District  
Board of Education

DECISION AND ORDER  
98/99 EX-01

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 September 10, 1998 order of the Oak Creek Franklin School District Board of Education to expel the above named pupil from the Oak Creek Franklin School District through the 2000-2001 school year. This appeal was filed by the pupil's parents and was received by the Department of Public Instruction on September 24, 1998.

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 Expulsion Hearing" dated August 20, 1998 from the district administrator of the Oak Creek Franklin School District. The letter advised that a hearing would be held on September 1, 1998 which could result in the pupil's expulsion from the Oak Creek Franklin School District. The letter was sent separately to the pupil and his parents. The letter alleged that the pupil engaged in conduct while at school or under the supervision of a school authority which endangered the property, health or safety of others and that he violated sec. 120.13(1)(2m), Stats.<sup>1</sup> and any applicable School Board policy. The letter specifically alleged that Alex possessed a loaded gun at Shorewood High School on May 4, 1998. Minutes of the school board expulsion hearing and a transcript of the hearing are also part of the record.

The hearing was held in closed session on September 1, 1998. The pupil's mother, his social worker and his attorney appeared at the hearing. At the hearing the school district administration presented evidence concerning the grounds for expulsion. The pupil's representatives were given the opportunity to present evidence, to cross-examine witnesses and to respond to the allegations.

After the hearing, the school board deliberated in closed session. The board found the pupil 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, that he violated sec. 120.13(1)(c)2m., Stats., and that he violated applicable board policy. 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 September

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<sup>1</sup>The statute referenced is actually sec. 120.13(1)(c)2m., Stats., however the error in the notice is a scrivener's error and did not result in any prejudice to either party.

10, 1998, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the 2000-2001 school year.

#### 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.

The appeal letter in this case questions the "protocols/procedures" followed by the Oak Creek Franklin School Board in this case. Specifically, the pupil's parents allege that the Oak

Creek Franklin School District used inappropriate procedures by enrolling Alex and then suspending and expelling him and that Alex was punished twice for his offense.

On May 4, 1998, Alex was a student at the Shorewood School District. At about noon on May 4, 1998, four students at Shorewood High School reported to the Assistant Principal that, while on school property, Alex had pulled a gun from behind his back, cocked the gun and pointed it at one of the four students. The Assistant Principal found Alex in the school's parking lot and questioned him about the incident. At that time, Alex denied having a gun, stating that he used a brush, not a gun, to threaten the other student. After questioning by police, Alex later admitted that he brought the gun to school, pulled it out, cocked it and pointed it at the other student. Information obtained from other sources indicated that the gun was either given to or taken by another student who then tossed it over a retaining wall. The gun was not recovered.

On May 4, 1998, Alex and his parents were notified by Shorewood High School that he was suspended for five days for an "expellable" offense. On May 6, 1998, a "Suspension Review Meeting" was held at Shorewood. Three Shorewood administrative staff members (Dr. Ellis, Ms. Dermody and Mr. Warren) and Alex's mother and father attended the review meeting. At the review meeting, Shorewood High School acknowledged its obligation under the "safe schools act"<sup>2</sup> to suspend and expel, for at least one year, any student found guilty of bringing a firearm to school. At the Shorewood suspension review meeting, the option of withdrawing from school rather than conducting an expulsion hearing was discussed. After that discussion, Alex's parents opted to withdraw him from the Shorewood School District.<sup>3</sup> Upon his withdrawal, Shorewood abandoned its expulsion proceedings.

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<sup>2</sup> Codified in Wisconsin Statutes at sec. 120.13(1)(c)2m., Stats.

<sup>3</sup> In the parents' appeal letter, they indicate that the decision to withdraw was in part based upon the family's intention to move to Oak Creek before the beginning of the next school year. The appeal letter also indicates that Shorewood was aware of the family's intentions to move.

Alex was subsequently adjudicated delinquent in juvenile court and placed in juvenile corrections. On August 17, 1998, Alex's parents enrolled him in school at Oak Creek High School, the new resident school district. Upon enrolling and registering, Alex's parents informed Oak Creek that he was in juvenile corrections and expected to be released near the beginning of the school year. On August 18, 1998, Oak Creek notified Alex and his parents that he was suspended from Oak Creek High School pending an expulsion hearing. The reason for the suspension and recommendation for expulsion was the firearm offense committed at Shorewood High School on May 4, 1998. On August 20, 1998, the Oak Creek Franklin School District issued the notice of expulsion hearing. The hearing was held on September 1, 1998. At the hearing, Alex was represented by Attorney Russell Goldstein.<sup>4</sup> The administration presented evidence, and the pupil, through his attorney, admitted to the underlying facts. In his argument to the school board, Mr. Goldstein pointed out that the crime was not committed while Alex was a student at Oak Creek. He also, mistakenly, told the board that Alex had already been expelled, and a subsequent expulsion was not fair.<sup>5</sup>

On appeal, Alex alleges that Oak Creek inappropriately enrolled him and then expelled him. Alex's appeal letter suggests that if Oak Creek was going to expel him, they should have denied him admittance to the school district. At the time Alex's parents enrolled him in school, his family resided in the Oak Creek Franklin School District. Furthermore, Alex was not currently under an expulsion order entered by another Wisconsin public school district. See sec. 120.13(1)(f), Stats. Therefore, Oak Creek had no basis to deny his enrollment and it acted appropriately when it enrolled Alex. See Article X, sec. 3, Wisconsin Constitution.

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<sup>4</sup> Alex was still incarcerated at the time of his expulsion. However, he was represented at the hearing by Mr. Goldstein. His mother and his social worker also attended the hearing.

<sup>5</sup> Despite this inaccurate depiction of the status of Alex's relationship with Shorewood, the record is clear that Shorewood did not expel Alex and that the Oak Creek Franklin School District was aware of this. The record is clear that Shorewood allowed Alex to withdraw rather than be expelled.

The second issue on appeal concerns whether or not Oak Creek could expel Alex for conduct which was committed when he was a resident and student of a different school district. In the August 20, 1998 "Notice of Expulsion Hearing" mailed to Alex and his parents, the Oak Creek Franklin School District listed three criteria for expelling Alex from its schools. All criteria were based upon the facts concerning the May 4, 1998, incident at Shorewood High School. The three criteria listed, are:

1. That he engaged in conduct while at school or while under the supervision of a school authority which has endangered the property, health and safety of others;
2. That he violated sec. 120.13(1)(2m), Stats; and,
3. That he violated "any applicable School Board policy."

The expulsion order issued by the board found that all three criteria had been met and that the interests of the school demanded expulsion.

Alex's conduct on May 4, 1998, violated the "Safe Schools Act", sec. 120.13(1)(c)2m., Stats.

"The school board shall commence proceedings under subd. 3. and expel a pupil from school for not less than one year whenever it finds that the pupil, while at school or while under the supervision of a school authority, possessed a firearm, as defined in 18 USC 921(a)(3) ..." Sec. 120.13(1)(c)2m., Stats.

Alex was a resident and student at Shorewood High School on May 4, 1998. He possessed a firearm while at school. Therefore, Shorewood was obligated by sec. 120.13(1)(c)2m., Stats., to commence expulsion proceedings. While a school board has discretion to modify the requirement in sec. 120.13(1)(c)2m., on a case by case basis, see sec. 120.13(1)(g), Stats. and *Dell C. v. Stevens Point School District*, Decision and Order No. 334 (September 10, 1997), there is no evidence to suggest that the Shorewood School Board exercised that discretion. Rather, the record indicates that the Shorewood administration abandoned the expulsion proceeding when Alex agreed to withdraw from school.

Given Shorewood's failure to follow the mandate of the Safe Schools Act, the question is raised whether the Oak Creek Franklin School District may expel Alex, under the mandatory expulsion statute (sec. 120.13(1)(c)2m., Stats.), for his conduct at Shorewood High School on May 4, 1998. I hold that under the narrow and explicit language of the mandatory expulsion statute, quoted above, that it may.

Of the many criteria available to school districts upon which an expulsion can be based, sec. 120.13(1)(c)2m., Stats., and its counterpart in sec. 120.13(1)(e)2.b., Stats., is the only criterion that *requires* a school board to act. This is contrasted with deference to local control in the areas of other statutory expulsion criteria, such as repeated violation of school rules or endangering the health, safety or property of others and the other criteria found in sec. 120.13(1)(c)1., Stats. and 2., Stats. The level of danger or the gravity of the violation of school rules could be dependent on the community's own standards and experiences. Conduct that may be unacceptable or considered dangerous in one school district may not be considered as serious in another district. Consistent with the Wisconsin tradition of giving great local control to school districts, each district can determine, on an individual basis, what conduct under those criteria warrant expulsion. See e.g. *Kukor v. Grover*, 148 Wis. 2d 469, 96, 436 N.W.2d 568 (1989); *Buse v. Smith*, 74 Wis. 2d 550, 570-72, 247 N.W.2d 141 (1976); 75 OAG 251, 261 (11/14/86), citing 64 OAG 139, 142 (11/6/75).

Sec. 120.13(1)(c)2m., Stats., however, concerns a nationally recognized threat to school safety. Possession of firearms at a school or under the supervision of a school authority is generally viewed as unacceptable in all areas of the state and country. With few exceptions, which are allowed under sec. 120.13(1)(g), Stats., possession of firearms at school or while under the supervision of a school authority is contrary to every community's standards. The federal and state legislatures determined that every student shall be treated with the same

minimum severity for bringing a weapon to school, regardless of the school district he or she attends.

The plain language of the statute is clear.

"The school board shall commence proceedings ... and expel a pupil from school for not less than one year whenever it finds that the pupil, while at school or while under the supervision of a school authority, possessed a firearm,..." Sec. 120.13(1)(c)2m., Stats.

A school board shall commence proceedings; it cannot be absolved of this statutory requirement by the withdrawal of a student. Even if the school board decided not to expel a student pursuant to the authority granted in sec. 120.13(1)(g), Stats., a school board must affirmatively act and make that decision. In this case, there was no action by the Shorewood school board to indicate that Alex was an exception to the rule as required by sec. 120.13(1)(g), Stats. Furthermore, it would be contrary to the statutory language to allow the student to escape the mandatory sanction by merely withdrawing from the school and enrolling in another. "It is the policy of the State of Wisconsin that students cannot drop-out and re-enroll in school at whim." *Bradley B. v. Spooner School District*, Decision and Order No. 107 (February 15, 1983). Because Alex was subject to a "mandatory expulsion" and because the Shorewood School District did not fulfill its statutory obligation, Oak Creek acted within its discretion in expelling Alex.<sup>6</sup>

Because of its unique facts and the narrow language of sec. 120.13(1)(c)2m., Stats., this case allows a school district to expel a student for conduct which was committed when he was a resident and student of a different school. However, this is limited to cases where the conduct is contrary to sec. 120.13(1)(c)2m., Stats., and the first school board did not expel the

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<sup>6</sup> In its brief, the Oak Creek School District suggests that it is required by sec. 120.13(1)(c)2m., Stats., to expel Alex. (October 30, 1998 brief of Oak Creek School District, page 9). My ruling should not be interpreted to require a successor school district to expel a student in all firearms cases. The "Safe Schools Act" was enacted to comply with federal law. The Oak Creek School District has not provided any interpretation of the federal law that would extend the *requirement* to successor school districts when the primary school district did not comply with federal law.



student or exercise its discretion under sec. 120.13(1)(g), Stats. Because of the "withdraw or expel" agreement reached between the first district and the student, the second district was placed in an unenviable position and Alex was left with false hopes of enrolling in another school. School districts must recognize the risk at which they place other school districts and students when these type of "pass-the-buck" agreements are used. School districts must also recognize that if this type of resolution persists, it will only be a matter of time before many other school districts are faced with the same tough decision and added process that was presented to the Oak Creek Franklin School Board. Finally, if agreements like the one in this case continue, the legislature may act to limit school district discretion. I strongly urge all school districts to follow the *mandatory* language of sec. 120.13(1)(c)2m. and 120.13(1)(g), Stats.

Oak Creek also based the expulsion of Alex upon his violation of School Board policy. First, this is not a statutory criterion on which to base an expulsion. Repeated violation of school rules is a permissible criterion, see sec. 120.13(1)(c), Stats. However, to uphold an expulsion based upon that criterion the student must have notice of the school rules. *Jesse M. K. v. Tri County Area School District*, Decision and Order No. 266 (January 2, 1996); *Hope B. v. Randolph School District*, Decision and Order No. 225 (April 12, 1994); *Antonio M. v. Kenosha Unified School District*, Decision and Order No. 176 (April 18, 1991). Furthermore, there must be *repeated* violations. There is no evidence in the record that Alex was given notice of the *Oak Creek Franklin School District Policy*. Nor is there any evidence that the board found *repeated* violations. Therefore, this ground for the expulsion is dismissed.

A third criterion relied upon by the school district was that Alex engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others. Prior to this case, the State Superintendent has never

been asked to interpret *this clause* of the statute in order to allow a school district to expel a student for endangering conduct that was committed by the student when he was enrolled in a different school district. It is not necessary for all grounds alleged in the notice of hearing to be accepted by the board. See *Leo P. v. Whitewater Unified School District*, Decision and Order No. 351 (March 31, 1998); *Justin E. v. Antigo School District Board of Education*, Decision and Order No. 329 (July 24, 1997). The notice of expulsion and the finding of facts and conclusions of law are based upon at least one common statutory ground. Because I have found that the Oak Creek Franklin School Board acted within its authority by expelling Alex based upon the mandatory expulsion language of 120.13(1)(c)2m., Stats., it is not necessary to determine in this case whether the school board had the statutory authority to expel Alex for engaging in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others.

In reviewing the record in this case I find the school district complied with all of the procedural requisites. I therefore affirm this expulsion.

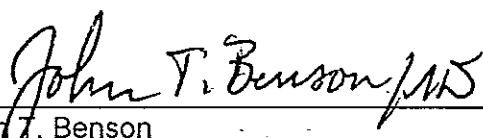
#### CONCLUSIONS OF LAW

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 Alexander P. [REDACTED] by the Oak Creek Franklin School District Board of Education is affirmed.

Dated this 23rd day of November, 1998.

  
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John T. Benson  
State Superintendent of Public Instruction