

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

Shawn C. [REDACTED]

by the Mauston School District
Board of Education

DECISION AND ORDER
98/99 EX-04

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 October 6, 1998 order of the Mauston School District Board of Education to expel the above named pupil from the Mauston School District through the 1998-99 school year. This appeal was filed by the pupil's attorney and was received by the Department of Public Instruction on October 23, 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 September 29, 1998 from the district administrator of the Mauston School District. The letter advised that a hearing would be held on October 6, 1998 which could result in the pupil's expulsion from the Mauston School District. The letter was sent separately to the pupil and his parents by regular and certified mail. The letter alleged that the pupil engaged in conduct while at school or under the supervision of school authority which endangered the property, health or safety of others and that he repeatedly refused or neglected to obey school rules. The letter specifically alleged that Shawn possessed a dangerous weapon (knife) on school grounds on September 21, 1998 and violated school rules between August 27, 1998 and September 22, 1998. Minutes of the school board expulsion hearing and an audio tape of the expulsion hearing¹ are also part of the record.

The hearing was held in closed session on October 6, 1998. The pupil and his parents appeared at the hearing, represented by Attorney Jeffrey Spitzer-Resnick. The school district administration was represented by Attorney Peter Martin. The administration presented evidence concerning the grounds for expulsion. The school board was represented by Attorney Hollenbeck. The pupil and his parents were given the opportunity to present evidence, to cross-examine witnesses and to respond to the allegations.

¹ The audio tape made of the hearing is missing some testimony. However, the district is not required to tape the proceeding. I would urge districts to ensure that, if the hearing is recorded, by video, audio or transcription, the record is complete. The board did keep minutes of the meeting, thus satisfying the requirements of sec. 120.13(1)(c), Stats.

After the hearing, the school board deliberated in closed session. The board found that the pupil engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others and that he repeatedly refused or neglected to obey school rules. The school board found that Shawn is a student with Exceptional Educational Needs (EEN) and has a handicapping condition. The board found that the conduct engaged in by Shawn, specifically possession of a knife at school and five incidents of attacks on other students at school, was not a manifestation of his EEN or handicapping condition. 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 October 6, 1998, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the 1998-99 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 filed by the pupil's attorney raises several issues. First, the pupil alleges that the school district expelled Shawn for repeatedly attacking other students despite the fact that the district administrator specifically testified on the record that this was not the reason why Shawn was referred for expulsion. Second, he alleges that Attorney Hollenbeck had a conflict of interest and violated due process by representing the school board, ruling on objections and advising the school board in closed session. Third, the pupil alleges that Attorney Hollenbeck's previous representation of Shawn's father in another unrelated matter created a conflict of interest. Fourth, the pupil alleges that the length of his expulsion was inappropriate and denied him the right to a free public education. Fifth, he alleges that the school board was improperly constituted because one board member left prior to the decision being made regarding expulsion. Sixth, the pupil alleges that the manifestation determination review team determined only whether his act of bringing a knife to school on September 21, 1998 was a manifestation of his disability, the team did not determine whether his other misconduct between August 27, 1998 and

September 22, 1998 was a manifestation of his disability. Thus the board's finding that the all of the conduct was not a manifestation of his disability was wrong;. Finally, the pupil alleges that the manifestation determination team's determination that his actions of bringing a knife to school was not related to his disability was contrary to the weight of the evidence before the school board.

The first issue raised alleges that Shawn was denied due process because the district administrator testified that he did not consider Shawn's actions of repeatedly attacking other students as a reason to refer Shawn for expulsion. While the district administrator's opinion and recommendation is important for the board to consider, the board is not bound by the district administrator's recommendation. See *Rebecca S. v. Janesville School District Board of Education*, Decision and Order No. 248 (May 8, 1995); *Brad O. V. Madison Metropolitan School District Board of Education*, Decision and Order No. 246 (March 16, 1995). The notice of expulsion hearing sent to Shawn prior to the expulsion hearing informed Shawn that the school board would consider his actions of bringing a knife to school on September 21, 1998 as well as five other referrals between August 27, 1998 and September 22, 1998. Specifically, on August 27, 1998 Shawn was disciplined for picking on a girl on the bus and on the playground. On September 10, 1998 he was disciplined for punching a student in the face while on the playground. On September 14, 1998 Shawn was disciplined for pulling a student by her neck and being disrespectful to the bus driver. On September 21, 1998 Shawn was disciplined for punching a student in the head while he had him in a headlock. On September 22, 1998 Shawn was disciplined for punching and kicking other students in the common area before school. As required, Shawn was given notice prior to the hearing that these incidences would be considered.

Bradley P. v. South Milwaukee School District Board of Education, Decision and Order No. 201 (January 14, 1994); *Christopher K. v. West Allis School District Board of Education*, Decision and Order No. 166 (April 18, 1990); *Bradley B. v. Spooner School District Board of Education*, Decision and Order No. 107, (February 15, 1983). The district administrator's testimony was not determinative of what conduct the school board could or could not consider. The board acted within its authority by considering conduct which was contained in the Notice of Expulsion Hearing.

The student also alleges two types of misconduct on the part of the attorney representing the school board, Attorney Fred Hollenbeck. I find that Attorney Hollenbeck did not engage in any type of misconduct. Attorney Hollenbeck represented the school board. Peter Martin represented the school district administration. At the beginning of the hearing, Mr. Hollenbeck informed the parties that he was representing the board and that he would rule on objections, that the board could cross-examine witnesses and that he would assist the board in deliberations. During the course of the hearing, Mr. Hollenbeck carried out these duties. There is no evidence in this record to indicate that Mr. Hollenbeck had a bias in favor of either the administration or the pupil. No one voiced objection to this procedure at the hearing. In briefs submitted by the pupil's attorney, it is also alleged that Mr. Hollenbeck questioned witnesses and that this was also a violation of due process. However, school board members are allowed to ask witnesses questions. Mr. Hollenbeck's questioning of witnesses on behalf of the school board and providing other legal counsel to the board was not contrary to due process and was not unfair to the pupil. See *Brad A. v. Boyceville Community School District Board of Education*, Decision and Order No. 233 (June 29, 1994).

The pupil also alleges that attorney Hollenbeck had a conflict of interest and/or violated attorney-client privilege because Mr. Hollenbeck had represented Shawn's father in an unrelated matter. Neither the pupil nor his father raised this objection at the expulsion hearing. The pupil's attorney informed the board that Mr. Hollenbeck had previously represented Shawn's father, however, no one objected to Mr. Hollenbeck continuation as counsel to the board. Any argument concerning conflict of interest or violation of attorney-client privilege was waived and will not be considered.² See *Tony R. v. Lake Geneva JI School District Board of Education*, Decision and Order No. 259 (August 11, 1995); *Jennifer C. v. Winter School District Board of Education*, Decision and Order No. 264 (December 6, 1995).

The pupil also alleges that the length of the expulsion was inappropriate. It has repeatedly been held that the decision to expel a pupil and a determination of the length of the expulsion are both within the discretion of the school board as long as the board complies with the procedural requirements set out at sec. 120.13(1)(c) Wis. Stats. *Brandon H. v. DeSoto Area School District Board of Education*, Decision and Order No. 206 (May 3, 1993); *Tony R. v. Lake Geneva Joint No. 1 School District Board of Education*, Decision and Order No. 294 (June 24, 1996); *Troy Y v. Burlington School District Board of Education*, Decision and Order No. 309 (January 21, 1997).

The pupil alleges that the school board was improperly constituted when it made its decision because one board member, who had heard the testimony, left prior to deliberations. When the expulsion hearing began on October 6, 1998, the entire school board was present.

² I also note that Shawn's father is the person who could object to any violation of attorney-client privilege and he did not do that. Furthermore, based upon the evidence in the record and arguments by counsel, it does not appear that Mr. Hollenbeck disclosed any information regarding Shawn's father which was not general knowledge.

Prior to the board going into closed session to vote on the expulsion matter, one board member left and did not participate in deliberations. All board members who did deliberate and decide on the expulsion heard all of the evidence. The member who left did not participate in the deliberations. There is no evidence that this denied the pupil due process or was otherwise unfair to the pupil. The pupil has not cited any statute or case law requiring that all members who hear the evidence also vote on the evidence. There is no statutory requirement that the entire school board hear the expulsion evidence and rule on the expulsion request. In fact, a quorum of a school board may appropriately conduct an expulsion hearing and render the expulsion. A majority of the elected school board members constitutes a quorum. *Tom C. v. Lake Holcombe School District Board of Education*, Decision and Order No. 115 (October 18, 1983). The board's vote is valid.

The pupil also alleges that a manifestation determination was not made regarding his conduct of repeated rule violations between August 27, 1998 and September 22, 1998. It is undisputed that Shawn is a student with exceptional education needs and a student with a handicapping condition. Prior to the expulsion hearing, a manifestation determination review meeting was held. The meeting was held on September 22, and September 28, 1998. At the September 22, 1998 review meeting the following people were present: the school psychologist, the assistant director of special education, the middle school principal, a special education teacher, a guidance counselor, the dean of students, the police liaison officer, the pupil and his father. At the September 28, 1998 meeting, the same people were in attendance with the exception of the pupil and the police liaison officer. The review team developed a written report regarding the manifestation determination. This report was submitted to the school board. The

report indicates that the team only considered the conduct alleging that Shawn possessed a knife on the school bus and at school on September 21, 1998. The manifestation determination review team determined that Shawn's possession of a knife at school was not a manifestation of his disability and that the school district could proceed with disciplinary action in the same manner as it would for a student who is not disabled. There is no indication in the report that the manifestation determination review team also considered Shawn's misconduct between August 27, 1998 and September 22, 1998 that the school district charged in the notice of expulsion. Thus, there was no determination made regarding the incidents between August 27, 1998 and September 22, 1998.

When a student has been identified as an exceptional education needs student or a child with a disability, the school board must refer the case to the IEP team to determine whether there is a causal relationship between the misconduct at issue and the student's handicapping condition. *Anita P. v. Janesville School District Board of Education*, Decision and Order No. 124 (February 5, 1985); *Joe M. v. Milton School District Board of Education*, Decision and Order No. 125 (February 22, 1985); *Glenn P. v. Wauwatosa School District Board of Education*, Decision and Order No. 135 (February 24, 1986). Only if the IEP team determines that there is no causal relationship between the misconduct alleged and the pupil's handicapping condition, may the board expel the student. *William S. v. Suring School District Board of Education*, Decision and Order No. 98 (June 27, 1982); *Brian V. v. Shorewood School District Board of Education*, Decision and Order No. 195 (June 8, 1992); *Marc G. v. Maple School District Board of Education*, Decision and Order No. 213 (December 20, 1993).

Because the manifestation review determination team (IEP team) did not consider the conduct alleged in the notice of expulsion occurring between August 27, 1998 and September 22, 1998, the school board was not authorized to expel Shawn based upon this conduct. *Joe M. v. Milton School District Board of Education*, Decision and Order No. 125 (February 22, 1985); *Anita P. v. Janesville School District Board of Education*, Decision and Order No. 124 (February 5, 1985); and *Matthew C. v. Lake Geneva Genoa City School District Board of Education*, Decision and Order No. 277 (March 12, 1996).

The expulsion order does not make separate findings regarding the two types of misconduct, the knife incident and the attacks on other students. It is not possible to determine from the board's order whether the knife incident, on its own, was considered by the board to be sufficient to warrant expulsion. Therefore, the expulsion must be overturned.

The school district can correct this error without completely rehearing the case. Because the school board may make a conditional decision to expel a child and then refer a case to an IEP team to make the manifestation determination, the school board may refer the matter to the manifestation determination review team to determine whether or not that relationship existed. See *Glenn P. v. Wauwatosa School District Board of Education*, Decision and Order No. 135 (February 24, 1986); *Michael C. G. v. Hudson School District Board of Education*, Decision and Order No. 219 (February 11, 1994). If the IEP team determines that his conduct was not a manifestation of his disability, the board's order could then be reinstated. If the IEP team determines that his conduct was a manifestation of his disability, the school board may not expel Shawn for this conduct. See *William S. v. Suring School District Board of Education*, Decision and Order No. 98, (June 17, 1982). In that case, the board must then reconvene and determine

whether or not Shawn's actions of bringing a knife to school on September 21, 1998 was sufficient to warrant expulsion. The board would not be allowed to consider the other misconduct.

Because the expulsion is overturned on this issue and because Shawn is identified as a child with a disability, he is entitled to services pending the review by the school board. See *Glenn P. v. Wauwatosa School District Board of Education*, Decision and Order No. 135 (February 24, 1986); *Michael C. G. v. Hudson School District Board of Education*, Decision and Order No. 219 (February 11, 1994).

The pupil also states, in his brief, that he disagreed with the IEP team's determination that his possession of a knife was not a manifestation of his disability. The board is bound by the IEP team's determination. . *Joe M. v. Milton School District Board of Education*, Decision and Order No. 125 (February 22, 1985); *Anita P. v. Janesville School District Board of Education*, Decision and Order No. 124 (February 5, 1985); *Glenn P. v. Wauwatosa School District Board of Education*, Decision and Order No. 135 (February 24, 1986). In order to challenge that finding by the manifestation determination team, the pupil must avail himself to the due process appeal procedures provided under sub chapter V of Chapter 115 Wisconsin Statutes and PI Chapter 11 of, Wisconsin Admin. Code. See *Matthew C.. M. v. Cedarburg School District Board of Education*, Decision and Order No. 274 (February 14, 1996); *Jessie M. K. v. Tri County Area School District Board of Education*, Decision and Order No. 266 (January 2, 1996); and *John Michael N. v. Random Lake School District Board of Education*, Decision and Order No. 331 (August 5, 1997).

In reviewing the record in this case I find the school district did not comply with all of the procedural requisites. I therefore reverse this expulsion.

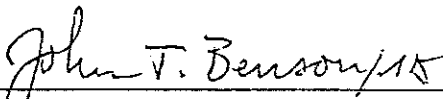
CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school board did not comply with all of the procedural requirements of sec. 120.13(1)(c), Wis. Stats.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Shawn C [REDACTED] by the Mauston School District Board of Education is reversed.

Dated this 29th day of December, 1998.



John T. Benson
State Superintendent of Public Instruction