

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

<p>In the Matter of the Expulsion of</p> <p>Eric H. [REDACTED]</p> <p>by the Central/Westosha Union High School District Board of Education</p>	<p>DECISION AND ORDER 98/99 EX-05</p>
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**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 December 15, 1998 order of the Central/Westosha Union High School District Board of Education to expel the above named pupil from the Central/Westosha Union High 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 January 19, 1999.

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 December 8, 1998 from the district administrator of the Central/Westosha Union High School District. The letter advised that a hearing would be held on December 15, 1998 that could result in the pupil's expulsion from the Central/Westosha Union High School District. The letter was sent separately to the pupil and his parents by regular 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 refused to obey the rules of the school. The letter specifically alleged that on December 1, 1998, Eric possessed a gun while on school grounds and that on October 1, 1998 he was in a physical confrontation with another student while in class. Minutes of the school board expulsion hearing are also part of the record.

The hearing was held in closed session on December 15, 1998. The pupil and his parents appeared at the hearing represented by Attorney Jerold Breitenbach. At the hearing the school district administration presented evidence concerning December 1, 1998 incident involving the gun.<sup>1</sup> The pupil and his parents 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 and that he refused to obey the rules of the school. 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

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<sup>1</sup> The administration did not present witnesses concerning the October 1, 1998 physical confrontation. It appears from the record that an incident report regarding this incident was included in the package of materials concerning Eric academic and behavioral record. The package was submitted by the administration at the hearing. The board did not make a finding regarding this incident.

Law of the school board, dated December 15, 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 in this case raises two issues that require consideration. The pupil argues that the school board had insufficient evidence to justify the expulsion and that the School Board operated under an erroneous interpretation of the law.

The facts of the case are undisputed. On December 1, 1998, Eric went duck hunting before school. After duck hunting, he drove to school. He parked his truck in the school parking lot. He left the cased, unloaded hunting gun in the truck, behind his seat. Another student, who knew Eric had the gun in the truck, told school administrators. Mr. Binsfield, the high school assistant principal asked Eric if he had a weapon on campus. Eric admitted that he did. The gun was found in the truck behind the seat. There was no ammunition in the truck. There was no evidence that Eric threatened anyone with the gun, or that it was removed from the truck.

The expulsion hearing minutes indicate that there was disagreement among the school board whether the law required that Eric be expelled. Both the administration and the pupil's attorney presented information about the applicable state and federal laws. After deliberating, the board voted to expel Eric through the end of the 1998-99 school year.

It has been repeatedly held that arguments concerning the sufficiency of the evidence are generally beyond the scope of review. *Brent S. v. Mondovi School District Board of Education*, Decision and Order No. 290 (May 23, 1996), *Brad A. v. Boyceville Community School District Board of Education*, Decision and Order No. 233 (June 29, 1994), and *Taiwan O. W. v. Kenosha Unified School District Board of Education*, Decision and Order No. 186 (April 7, 1992). Further, a school board's findings will be upheld if any reasonable view of the evidence sustains them. *Daniel A. v. Mauston School District Board of Education*, Decision and Order No. 324 (May 8, 1997) *Courtney R. v. Germantown School District Board of Education*, Decision and Order No. 278 (March 21, 1996) and *Michael Ryan H. v. Clinton Community School District Board of Education*, Decision and Order No. 222 (March 10, 1994).

The term "endanger" means to bring into danger or peril. The concept of "danger" involves harm, damage or the chance of loss or injury or the capability of producing death or great bodily harm. The term embraces the notion of harmful acts or actions that are detrimental or involve loss or damage. *Joshua S. v. Beloit Turner School District Board of Education*,

Decision and Order No. 307 (January 14, 1997), *Adam S. v. East Troy Community School District Board of Education*, Decision and Order No. 304 (November 25, 1996), *Kristin J. V. Mukwanago School District Board of Education*, Decision and Order No. 185 (February 21, 1992).

I have previously found that possession of a weapon at school endangers the health, safety or property of others. For example, in *Jack P. v. Crandon School District Board of Education*, Decision and Order No. 229 (May 3, 1994), *reversed on other grounds*, the pupil was in possession of pellet pistol which was missing its CO<sub>2</sub> cartridge and was unloaded. The school board's finding that this conduct that endangered the health, safety, or property of others was upheld. Similarly, in *Christopher F. v. Milwaukee Public School Board of School Directors*, Decision and Order No. 143 (July 2, 1986), the State Superintendent stated that "the reaction to the presence of a gun on school grounds can create a dangerous situation at school. The property, health, and safety of others may be endangered by the presence of a gun." See also *Demetris S. v. Milwaukee Public School Board of School Directors*, Decision and Order No. 194 (June 8, 1992). Therefore, a reasonable view of the evidence permitted the board to find that the possession of the gun at school endangered the health, safety, or property of others.

The second issue raised by the pupil alleges that the board's decision was based upon a misunderstanding or an incorrect interpretation of the law. The laws the pupil refers to include sec. 120.13(1)(c)2m., Stats., as well as related federal statutes.

**Sec. 120.13(1)(c)2m., Stats., states:**

"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). Annually the school board shall report to the department the information specified under 20 USC 8921(d)(1)(and (2))."

**Sec. 120.13(1)(g), Stats., states:**

"The school board may modify the requirement under pars. (c)2m. and (e)2. b., on a case-by-case basis."

**18 USC 921(a)(3) states:**

The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

**20 USC 8921 (b)(1) (The Gun Free Schools Act of 1994) states:**

Except as provided in paragraph (3), each State receiving Federal funds under this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis.

**20 USC 8921(d)(1) and (2) requires school districts to provide:**

- 1) an assurance that such local educational agency is in compliance with the State law required by subsection (b) of this section; and
- 2) a description of the circumstances surrounding any expulsions imposed under the State law required by subsection (b) of this section, including –
  - A. the name of the school concerned;
  - B. the number of students expelled from such school; and
  - C. the type of weapons concerned.

The "Gun Free Schools Act" has often been referred to as a "zero tolerance" law. State and Federal laws require the school district to expel a pupil found in possession of a firearm while at school or under the supervision of school authority. However, the school board does have the authority to modify this requirement on a case-by-case basis. A school board could decide that the circumstances do not warrant expulsion or do not warrant a one year expulsion. School boards are encouraged to apply the concept of "zero tolerance" judiciously, as some federal courts have found certain applications of zero tolerance to violate a student's substantive due process rights.<sup>2</sup>

The weapon that Eric had in his truck meets the definition of firearm, provided in 18 USC 921. In this case, the school board has made an exception to the rule and expelled for less than

one year. It appears, from the record submitted, that the board knew, understood and applied the relevant state and federal laws.

By innuendo, the pupil suggests that there were procedural irregularities. By affidavit, the pupil's attorney suggests that the District Administrator discussed legal aspects of Eric's expulsion with the school board, in closed session. The board explained, in an affidavit of the District Administrator, that the District Administrator met with the school board prior to the expulsion hearing and reviewed the federal and state laws regarding possession of weapons on school property. He stated that it was a general presentation at the request of the board, but not specific to Eric's case. It is recommended that the district administrator not have "private" conversations with the board regarding an expulsion. See *Russell B. v. Muskego-Norway School District Board of Education*, Decision and Order No. 175 (February 28, 1991); *Marc G. v. Maple School District Board of Education*, Decision and Order No. 213 (December 20, 1993), and *Kimberly K. v. Oak Creek-Franklin School District Board of Education*, Decision and Order No. 268 (January 8, 1996). The information provided suggests that the conversation was held in closed session, but that the discussion was not specific to Eric's case. If this was general information, the preferred method is to have this conversation in the course of the open board meeting. If this was specific to Eric's case, the pupil should have been present. Regardless, I do not find any "procedural error" that requires reversal of the expulsion.

The board's findings cite two grounds for expulsion. Endangering the safety, health or property of others and "refusal to obey the rules of the school". "Refusal to obey the rules of the school is not a basis for expulsion. See sec. 120.13(1)(c), Stats. **Repeated** refusal or neglect to violate school rules is a basis for expulsion. *Id.* However, because there is a common ground for expulsion between the expulsion hearing notice and the expulsion order, the

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<sup>2</sup> Substantive due process is a concept that the courts must resolve.

expulsion will be upheld. *Cf. Justin E. v. Antigo Unified School District Board of Education*, Decision and Order No. 329 (July 24, 1997).

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

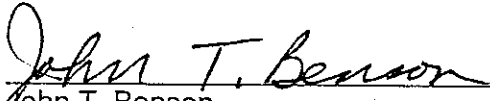
#### CONCLUSIONS OF LAW

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 Eric H [REDACTED] by the Central/Westosha Union High School District Board of Education is affirmed.

Dated this 17th day of March, 1999.

  
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John T. Benson  
State Superintendent of Public Instruction