ATTACHMENT
REVISED
3-26-96

HISTORY - PROBATION CONDITIONS ON PUPILS WHO ARE EXPELLED -
(To accompany DPI presentation on 1995 AB 980)

The Three time periods during which conditions on expelled children might apply:

a. conditions to be met before the pupil is readmitted to school;
b. conditions to be met after the pupil is readmitted but before the term of the expulsion expires;
c. conditions to be met even after the term of expulsion expires.

1. The State superintendent has not questioned the authority of districts to impose conditions reasonably related to the grounds for expulsion if they are in the first two categories, above.

2 Since at least 1984, the State Superintendent has questioned the authority of school districts to impose conditions in the third category: *Teresa Lynn v. Janesville School District Board of Education*, Decision and Order No., 120, (June 1, 1984, Enclosure A.), *Travis P. v. Arrowhead School District Board of Education*, Decision and Order No. 121, (September 13, 1984, Encl. B.). Also see *Michael J. B. v. Palmyra-Eagle Area School District Board of Education*, Decision and Order No. 151, (July 27, 1987), citing OAG 30-87, 6-12-87, Encl. D.

3. In May, 1989, the department wrote in Education Forward in an article entitled "Expulsion Cases Require Close Attention and Accurate Records, p. 14:
"While school board may not have authority to require counseling or assessment, we believe they may structure the participation in appropriate assessment or counseling as an **alternative to expulsion or as a condition for early readmission** to school should the student choose that option." (Emphasis added.)

This interpretation was also discussed in *Lori P. v. School District of Cudahy Board of* Education, Decision and Order No. 169 (May 21, 1990, Encl. E.).

4. In 1991 the department issued recommended Expulsion Hearing Notice forms and Order of Expulsion forms (Encl. F.) which explained conditions for early readmission are acceptable but that once the term of expulsion has expired, full unconditional state constitutional rights to an education are reinstated. More recent decisions have repeated this view. *Miranda V. v. Howard Suamico School District Board of* Education, Decision and Order No. 224, (March 22, 1994, Encl. G.), *Lori L. v. Baraboo School District Board of* Education, Decision and Order No. 227, (April 22, 1994, Encl. H.).

5. The department has expressly approved conditions effective upon reentry to school prior to the expiration of the period of expulsion, that is, in the second category referred to above: *Jesse F. v. Stanley-Boyd School* District, Decision and Order No. 189 (April 21, 1992, Encl. I.), *Demetris S. v. Milwaukee School District*, Decision and Order No. 194 (June 8, 1992, Encl. J), *Jason S. v. Kenosha Unified School District No. 1*, Decision and Order No. 205 (April 19, 1993, Encl. K.), *Brandon H.D. v. De Soto Area School District*, Decision and Order No. 206 (May 3, 1993, Encl. L.), *Barry L. V. Kenosha Unified School District No. 1*, Decision and Order No. 220, 3-7-94, Encl. M).

6. The department has stricken or indicated certain conditions may not be enforced if they are in the third category referred to above: *Paul O. by the Florence County School* District, Decision and Order No. 232 (June 28, 1994, Encl. N.) in which the district sought to require the pupil whose term of expulsion had ended, to continue to perform community service.

Probation Conditions Must be Related to the Reasons for the Pupil's Expulsion See *U.S. v. Consuelo-Gonzalez*, 521 F.2d 259, 262 (9th Cir. 1975), *State v. J.E.B.*, 161 Wis.2d 655, 469 N.W.2d 192 (1991), *State v. Miller*, 175 Wis.2d 204, 208-212, 499 N.W.2d 215 (1993).

1. Are matters like grade point average related to reasons for expulsion automatically or only where the record contains evidence they are?
2. Can school boards impose conditions on parents, or leverage the pupil to require parents to act? *Matthew C. v. Lake Geneva-Genoa School District*, Decision and Order No. 277, (March 12, 1996, Encl. O.).

The Process That is Due If a Pupil Violates a Probationary Condition of his/her Expulsion

1. A free education is a fundamental state constitutional right. *Buse' v. Smith*, 74 Wis.2d 550, 565, 567, 247 N.W.2d 141 (1976). It is thus, for federal constitutional purposes, a property interest which cannot be taken away without compliance with the due process clauses of both constitutions. *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed2d 725, 735 (1975). It follows if the term of the expulsion has expired, the pupil is reinstated to his/her full constitutional rights to free education. This status is unconditional.

2. The probation and parole revocation and rescission cases suggest that if conditions of release (from jail or prison) are breached, even in the felony criminal context, **some review process for revoking or rescinding that conditional release, is due.** *State ex rel. Johnson v. Cady*, 50 Wis.2d 540, 185 N.W.2d 306 (1971), *Morrissey v. Brewer*, 408 U.S. 471 (1972), *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) , *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), *State ex rel. Klinke, v. Dept. of Health and Social Services*, 87 Wis.2d 110, 273 N.W.2d 379 (1978).

   The cases suggest that a lower level of process than was due to support criminal conviction or civil commitment is proper when reviewing violation of probationary conditions of release. In the pupil expulsion context, the department, in one case has required that the same, higher level of process originally due in the expulsion hearing should also apply to review conditions breached after the pupil was returned to school but whose term of expulsion had not expired, *Brandon C. v. Florence County School District*, Decision and Order No. 251, (June 12, 1995, Encl. P.).

3. The pupil suspension statutes presently recognize a lower level of process due in that context. There, suspensions are reviewed by a school administrator or designated teacher not involved in the alleged violation, sec. 120.13(1)(b). The department's amendment to the draft employs this same, lower level of due process review model.

RECOMMENDATIONS:

1. The language of the original bill and sub reflect current law and practice to a point.
2. Add language specifically providing that after the term of expulsion has expired, if new misconduct occurs, the usual process for expulsion applies. (See DPI draft).
3. Add language creating some review process for districts to apply if probation conditions are breached. The current review of suspensions process in s. 120.13(1)(b) is a good model. (See DPI draft).
4. Consider the legal problems of districts imposing conditions on parents.
5. The maximum suspension is 5 days. Conditions must be susceptible of accomplishment within that time frame. If conditions are placed on suspended pupils, per the sub., the sub. should be modified to require they also be reasonably related to the misconduct.

State of Wisconsin
1995 – 1996 LEGISLATURE

LRB–5418/1
PG:skg&kaf:kat

1995 ASSEMBLY BILL 980

March 6, 1996 – Introduced by Representatives KELSO, OLSEN, HAHN, SILBAUGH, SKINDRUD, LADWIG and JENSEN, cosponsored by Senator DRZEWIECKI. Referred to Committee on Education.

AN ACT *to create* 119.25 (2) (c) and 120.13 (1) (h) of the statutes; **relating to:** authorizing a school board to impose conditions on the reinstatement of a pupil who has been expelled from school.

Analysis by the Legislative Reference Bureau

This bill authorizes a school board to impose conditions on the reinstatement of a pupil who has been expelled from school. The conditions must be related to the reasons for the pupil's expulsion and must be specified in the expulsion order.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 119.25 (2) (c) of the statutes is created to read:

119.25 **(2)** (c) An independent hearing panel or independent hearing officer appointed by the board may impose conditions on the reinstatement of a pupil who has been expelled from school under par. (a) if the conditions are related to the reasons for the pupil's expulsion and are specified in the expulsion order under par. (b).

SECTION 2. 120.13 (1) (h) of the statutes is created to read:

120.13 **(1)** (h) A school board, or independent hearing panel or independent hearing officer acting under par. (e), may impose conditions on the reinstatement of

a pupil who has been expelled from school if the conditions are related to the reasons for the pupil's expulsion and are specified in the expulsion order under par. (c) 3. or (e) 3.

(END)

State of Wisconsin
1995 - 1996 LEGISLATURE

LRBs0564/1
PG:skg&kaf:dw

ASSEMBLY SUBSTITUTE AMENDMENT ,

TO 1995 ASSEMBLY BILL 980

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 3

To John Lynch	From Patricia
Co.	Co. Rep. Coleman
Dept.	Phone #
Fax # 267-1290	Fax #

AN ACT *to amend* 120.13 (1) (b); and *to create* 119.25 (2) (c) and 120.13 (1) (h) of the statutes; **relating to:** authorizing a school board to impose conditions on the reinstatement of a pupil who has been expelled from school and to determine the conditions of a pupil's suspension from school.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 119.25 (2) (c) of the statutes is created to read:

119.25 (2) (c) An independent hearing panel or independent hearing officer appointed by the board may impose conditions on the reinstatement of a pupil who has been expelled from school under par. (a) if the conditions are related to the reasons for the pupil's expulsion and are specified in the expulsion order under par. (b).

SECTION 2. 120.13 (1) (b) of the statutes, as affected by 1995 Wisconsin Acts 32, 33 and 75, is amended to read:

120.13 (1) (b) The school district administrator or any principal or teacher designated by the school district administrator also may make rules, with the

consent of the school board, and may suspend a pupil for not more than 5 school days or, if a notice of expulsion hearing has been sent under par. (c) 3. or (e) or s. 119.25 (2) (b), for not more than a total of 15 consecutive school days for noncompliance with such rules or school board rules, or for knowingly conveying any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives, or for conduct by the pupil while at school or while under the supervision of a school authority which endangers the property, health or safety of others, or for conduct while not at school or while not under the supervision of a school authority which endangers the property, health or safety of others at school or under the supervision of a school authority or endangers the property, health or safety of any employe or school board member of the school district in which the pupil is enrolled. Prior to any suspension, the pupil shall be advised of the reason for the proposed suspension. The pupil may be suspended if it is determined that the pupil is guilty of noncompliance with such rule, or of the conduct charged, and that the pupil's suspension is reasonably justified. The school board may determine the conditions of the suspension. The parent or guardian of a suspended minor pupil shall be given prompt notice of the suspension ~~and~~, the reason for the suspension and the conditions of the suspension. The suspended pupil or the pupil's parent or guardian may, within 5 school days following the commencement of the suspension, have a conference with the school district administrator or his or her designee who shall be someone other than a principal, administrator or teacher in the suspended pupil's school. If the school district administrator or his or her designee finds that the pupil was suspended unfairly or unjustly, or that the suspension was inappropriate, given the nature of the alleged offense, or that the pupil suffered undue consequences or penalties as a result of the

suspension, reference to the suspension on the pupil's school record shall be expunged. Such finding shall be made within 15 days of the conference. A pupil suspended under this paragraph shall not be denied the opportunity to take any quarterly, semester or grading period examinations or to complete course work missed during the suspension period, as provided in the attendance policy established under s. 118.16 (4) (a).

SECTION 3. 120.13 (1) (h) of the statutes is created to read:

120.13 (1) (h) A school board, or independent hearing panel or independent hearing officer acting under par. (e), may impose conditions on the reinstatement of a pupil who has been expelled from school if the conditions are related to the reasons for the pupil's expulsion and are specified in the expulsion order under par. (c) 3. or (e) 3.

(END)

DPI RECOMMENDED AMENDMENT TO

ASSEMBLY SUBSTITUTE AMENDMENT,

TO 1995 AB 980

1. On page 1 of the ASA, after line 10 add a new section creating subs. (d) and (e) as follows:

(d) If the conditions under sub. (c) are breached prior to the expiration of the term of expulsion, the pupil may be suspended under s. 120.13(1)(b). Upon such suspension the parent or guardian of a minor pupil shall be given prompt notice of the alleged violation and within 5 school days following commencement of the suspension may have a conference with the school district administrator or his or her designee who shall be someone other than a principal, administrator or teacher in the suspended pupil's school. If the school district administrator or his or her designee finds that the pupil did not breach a board condition, the pupil shall be reinstated under the same conditions or on conditions modified by the board and the suspension shall be expunged from the pupil's record. If the administrator or his or her designee finds the pupil breached a board condition, the administrator or designee may reinstate the expulsion in writing and shall mail separate copies of the decision to the pupil and if the pupil is a minor to the pupil and parent.

(e) If the conditions under sub. (c) are breached after the term of the expulsion has expired, the provisions of ss. 120.13(1)(c) and 119.25(1) and (2) shall apply.

2. On page 3 of the ASA, line 13 add a new section creating subs. (i) and (j) as follows:

(i) If the conditions under sub. (h) are breached prior to the expiration of the term of expulsion, the pupil may be suspended under s. 120.13(1)(b). Upon such suspension the parent or

guardian of a minor pupil shall be given prompt notice of the alleged violation and within 5 school days following commencement of the suspension may have a conference with the school district administrator or his or her designee who shall be someone other than a principal, administrator or teacher in the suspended pupil's school. If the school district administrator or his or her designee finds that the pupil did not breach a board condition, the pupil shall be reinstated under the same conditions or on conditions modified by the board and the suspension shall be expunged from the pupil's record. If the administrator or his or her designee finds the pupil breached a board condition, the administrator or designee may reinstate the expulsion in writing and shall mail separate copies of the decision to the pupil and if the pupil is a minor to the pupil and parent.

(j) If the conditions under sub. (h) are breached after the term of the expulsion has expired, the provisions of s. 120.13(1)(c) shall apply.

STATE OF WISCONSIN CIRCUIT COURT BRANCH I LINCOLN COUNTY

JILL LAZARE,

Petitioner,

vs.

JOHN P. BENSON, SUPERINTENDENT, WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION and MERRILL AREA PUBLIC SCHOOLS

Respondents.

DECISION

Case No. 99-CV-106

The petitioner appeals the expulsion of her son, Matt Lazare, from the Merrill Area Public Schools from February 25, 1999 through the remainder of the 1998-99 school year. This expulsion was based upon the finding that Matt Lazare possessed brass-knuckles while at school, thereby endangering the health and safety of others and that he had engaged in conduct at school and under the supervision of the school authority which endangered the property, health or safety of others.

This decision was appealed to the State Superintendent of Public Instruction. The State Superintendent affirmed the school board's expulsion decision.

AUTHORITY OF STATE SUPERINTENDENT OF PUBLIC INSTRUCTION UPON APPEAL

The initial and perhaps main contention of the appellant is that the State Superintendent is required by statute to perform a more expansive role upon appeal than he or she has in the past and more than was done in this case. In her reply brief, the petitioner states that the school board and Attorney General "... have almost completely missed the critical thrust of Matt Lazare's brief; the State Superintendent of Public Instruction has

substantially failed to carry out his statutory responsibilities to review, approve, reverse or modify expulsion decisions and his constitutional responsibilities to supervise the provision of public education in Wisconsin."

The petitioner follows that opening comment with the following comment on page two "What this appeal seeks is nothing less than shifting the paradigm for student expulsions under § 120.13(1)(c), Wis. Stats. Granted the shift may need the imprimatur of the Court of Appeal, but the case is now before the circuit court."

Both sides cite the 1982 Wisconsin Court of Appeals decision in *Racine Unified School Dist. v. Thompson*, 107 Wis. 2d 657, 667, 321 N.W. 2d 334, 339, as well as the more recent 1994 Wisconsin Court of Appeals decision in *Madison Metropolitan School Dist. vs. Wisconsin Department of Public Instruction, et al.*, 199 Wis. 2d 1, 543 N.W. 2d 843.

In the *Madison Metropolitan* decision, the Court of Appeals recognized and, in effect, affirmed what it admitted was dicta in the *Racine Unified School District* decision which stated as follows:

> "We point out, obiter dicta, that the superintendent's review of a boards expulsion hearing would appear to be limited by the statute which created that appeal, namely § 120.13(1)(c), Stats. The superintendent's review, then, would be one to ensure that the school board followed the procedural mandates of sec. (c) concerning notice, right to counsel, etc."

The petitioner points out that after the *Racine Unified School District* decision, the legislature by 1987 Wis. Act 88 amended § 120.13(1)(c), Wis. Stats., to state that, upon appeal, "the State Superintendent shall review the decision and shall, upon review, approve, reverse or modify the decision."

However, in *Madison Metropolitan School District*, the Court of Appeals, while recognizing its dicta in the *Racine Unified School District* decision and also recognizing the changed language of the statute, said at page 17 of the Wisconsin Reports:

> "Finally, some five years after we announced our *Racine* dicta, the legislature considered the power of the state superintendent to review an expulsion order. It amended subsec. (1)(c) to provide that the superintendent has the authority to "review, approve, reverse or modify" a school board's expulsion decision and created subsec. (1)(e) with the same language. 1987 Wis. Act 88 sec. 3 and 4. Prior to the amendment, the statute did not specify the duties of the state superintendent in an expulsion appeal. *id.* This is no occasion for us to construe the meaning of the language 'review, approve, reverse or modify'."

This Court finds that neither decision sheds much light on the precise issue presented to this Court in this case. It is clear that, upon appeal, the State Superintendent has the obligation to review the school's decision and upon review is given the authority to approve it, reverse it or modify it. The petitioner argues that, at the very least, the word "modify" means that the State Superintendent must not only look at whether the procedural requirements for expulsion were followed by the school board, but must also look at the substance of the evidence and the school board's decision in light of the evidence, and then make a decision. The petitioner argues that the Superintendent cannot play a limited role in the review process but must, in all cases, use the authority given to the full. The petitioner argues that, to do any less, means that local school boards are left in control of the expulsion process and that therefore the rights of students are either violated or seriously trampled on.

This Court finds, that by the 1987 Amendment, the Legislature has given the authority to play a more expansive role in the appeal process. The plain language of the amendment does that. However, this Court holds that the State Superintendent is not required to exercise that authority to the full. This Court finds nothing in wording of the statute

which suggests that the legislature was imposing such a requirement on the State Superintendent when it enacted the 1987 amendment.

In his decision in this case, the State Superintendent states at page 1 of his Decision and Order, that "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." At page 3, the State Superintendent in discussing the scope of his authority to review relies upon and quotes from both the *Racine Unified School District* case and the *Madison Metropolitan School District* decisions.

The expanded authority was given the State Superintendent by the legislature after the *Racine Unified School District* decision. The *Madison Metropolitan School District* decision specifically refused to construe the meaning of the amendment language. The *Madison Metropolitan School District* decision was confined to the issue of whether the Superintendent had any power to act on a suspension (as opposed to an expulsion) decision which was made under subsec. (1)(d) of the statute. It held, the amendment language notwithstanding, that the Superintendent had no such authority and therefore upheld the decision of the circuit court. The Court of Appeals said nothing about either the extent or limit of the Superintendent's power and authority in an expulsion appeal under subsecs. (1)(c) or (e).

For these reasons, this Court finds that the Superintendent's continued reliance upon the language in these two appeals decisions when it comes to the Superintendent's now authority in expulsion decisions is misplaced. However the fact that the Superintendent has the authority to play a more expansive role does not mean that he is required to do so. In

the decision in this case, the Superintendent concluded that, upon a review of the record, all of the procedural requirements of § 120.13(1)(c), Wis. Stats., had been complied with. For that reason, he affirmed the expulsion.

If the Superintendent declines to act to the full extent of his or her authority, then the deference owed by the courts to the Superintendent's decision is confined only to the areas in which the Superintendent has decided to act. The court's owe no deference, as would otherwise be the case, to the overall decision.

That being said, this Court now turns to the decision of the Superintendent, as limited, and to that of the school board itself.

The Superintendent reviewed the record regarding the expelled student's possession of what turned out to be brass knuckles. After reviewing that evidence and the school district's policy regarding the possession of weapons on school property, the State Superintendent found that the board acted properly. This Court agrees.

The record shows that another student brought the brass knuckles to school. During a supervised lunch hour, while seated, this student handed the brass knuckles to Matt Lazare. Matt held them in his hand for a short period of time, trying them on. As the supervising teacher, Ms. Seaman, approached to confiscate what she felt was a suspect item, Matt hid the brass knuckles between his legs and refused to give them to her when she demanded that they be turned over. As the student who brought the brass knuckles into school reached to take them from between Matt's legs, Ms. Seaman grabbed them as well and was able to take possession of them.

This is not solely a question of how long Matt had the brass knuckles in his possession, what he intended to do with them and so forth. Matt did not merely hold the knuckles momentarily to look at them and hand them back to the other student. He kept

them and tried them on in a manner which attracted the attention of other students around him. His actions in refusing to give them to the teacher and hiding them between his legs drew further attention. By his actions, he was clearly exhibiting, to the other students, his approval of the brass knuckles being in school and was further challenging the authority of a teacher in trying to take them from him. The record shows that some students questioned "whether she would be in trouble" when Ms. Seaman was required to reach somewhat between Matt's legs in order to try to take control of the situation. Matt's intentional flaunting of authority in this manner and creating the scene that he did showed that he possessed and used the brass knuckles, defined as a weapon by school district policy, on school property and in a manner which was dangerous and detrimental to other students and the instructional process.

This Court finds that the findings made by the Board in its decision were sufficient. The findings stated that his possession of brass knuckles endangered the health and safety of others. For reasons already stated, the Court concludes that it need not be shown that Matt specifically intended to use the brass knuckles on another in order to substantiate this endangerment.

This Court finds that the notice of the hearing met due process. Matt and his parents were sufficiently notified of the reason for the hearing. Clearly Matthew and his parents knew what the main thrust of the School Board's inquiry would be. They were certainly aware of this in advance and had the opportunity to both know and understand the charges and defend themselves against them.

This Court finds that a four month expulsion for these actions was appropriate. The Board heard everyone who wanted to be heard and then deliberated for some twenty-five minutes. As pointed out by the Superintendent, the expulsion was neither the most severe

nor the most lenient allowed by law. The Court finds that the Board did not act unreasonably.

Hearsay is admissible at an expulsion hearing in accordance with the decision in *Racine Unified School District* cited earlier. Therefore the teachers letters, which went to the length of the expulsion, were properly considered.

This Court finds no legal requirement that the Board was required to provide homebound study for Matt during the expulsion time.

This Court finds, based upon a review of the decisions of the State Superintendent, and of the School Board and after considering the evidence as a whole, that both decisions were justified and appropriate and complied with the requirements of due process. As pointed out by the Wisconsin Supreme Court decision in *State v. Angelia D. B. 211 Wis. 2d 140 564 N.W. 2d 682 at page 150 of the Wisconsin Reports* "In addition, the Court (Supreme Court of the United States) emphasized that the State has a substantial interest in maintaining a safe and proper educational environment in its schools and, therefore, is permitted to exercise a degree of supervision and control that could not be exercised over free adults. (A) proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *T.L.O., 469* U.S. at 339.

DECISION AFFIRMED.

Dated this 11 day of January 2000.

BY THE COURT:

Michael Nolan, Circuit Judge

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Matt L[redacted] by the Merrill Area Public School District Board of Education	DECISION AND ORDER 98/99 EX-11

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 February 25, 1999 order of the Merrill Area Public School District Board of Education to expel the above-named pupil from the Merrill Area Public 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 March 26, 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 February 18, 1999, from the district administrator of the Merrill Area Public School District.[1] The letter advised that a hearing would be held on February 25, 1999, which could result in the pupil's expulsion from the Merrill Area Public 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 that endangered the property, health, or safety of others. The letter specifically alleged that Matt possessed a dangerous weapon (brass knuckles) on school grounds on February 4, 1999. Minutes of the school board expulsion hearing, an audio tape of the expulsion hearing and a transcript of the hearing are also part of the record.

The hearing was held in closed session on February 25, 1999. The pupil and his parents appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. 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 that endangered the property, health, or safety of others. 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 February 25, 1999, was

[1] A notice of expulsion hearing, dated February 9, 1999 was also sent to each party. The notice sent on February 18, 1999 was an amended notice. The amended notice included a description of the conduct.

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 that may be the basis for an expulsion and sets out specific procedures that 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 six issues that require consideration. First, the pupil requests the State Superintendent to use his authority to modify the length of the expulsion. Sec. 120.13(1)(c), Stats., states:

> "...If the school board's decision is appealed to the state superintendent,... the state superintendent shall review the decision and shall, upon review, approve, reverse or modify the decision."

Since the authority to "approve, reverse or modify the decision" was conferred upon the State Superintendent by 1987 Wis. Act 88, sec. 3, the State Superintendent has consistently declined to modify the length of expulsions. 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).[2]

The board found that on February 4, 1999, Matt, an eighth grader at the Prairie Middle School, possessed brass knuckles while at school. Ms. Seaman, a teacher supervising the lunchroom on February 4, 1999, testified that during lunch hour, in the lunchroom, she observed another student (Student A) reach deep into his back pocket and pull out a glimmering object.

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[2] The pupil has requested the State Superintendent to supplement the expulsion record with the expulsion orders of other students at this school who also possessed brass knuckles. The state superintendent on appeal will not consider matters that were not submitted to the school board at the expulsion hearing. *Jeffrey L. v. New Lisbon School District Board of Education*, Decision and Order No. 319 (April 8, 1997); *Matthew M. v. Cedarburg School District Board of Education*, Decision and Order No. 274 (February 14, 1996). Furthermore, the State Superintendent has repeatedly stated that the treatment of other students is not relevant to his review. See *Aron P. v. Sturgeon Bay School District Board of Education*, Decision and Order No. 341 (December 17, 1997); *Nathaniel S. v. Wausau School District Board of Education*, Decision and Order No. 350 (March 25, 1998); *Leo P. v. Whitewater School District Board of Education*, Decision and Order No. 351 (March 31, 1998).

She continued to watch as Student A handed the object to Matt. Matt then held it in his hand. At this point, she could see it was brass knuckles. Matt held them in his hand and tried them on. As she approached him to confiscate the brass knuckles, he hid them between his legs. When she demanded that he give her the brass knuckles, he refused. She asked him three or four times to give her the brass knuckles; he refused. Student A reached over to Matt to grab the brass knuckles. As he did that, the teacher grabbed them as well. She was able to twist her arm around and take the brass knuckles away from Student A.

Police liaison officer Ned Seubert also testified at the expulsion hearing. Officer Seubert testified that he observed the brass knuckles that were found in Matt's possession. He testified that brass knuckles have only one purpose – to wear as a weapon and hurt someone. He stated that brass knuckles can inflict substantial damage to a person by cutting flesh and breaking bones. He stated that it is illegal in Wisconsin to possess brass knuckles. This case has not presented the unique circumstance that requires the State Superintendent to deviate from agency precedence. The board acted within its discretion, and its decision will not be modified.

The second issue presented by the pupil alleges that it was improper for the board to conclude that his conduct endangered the health, safety, or welfare of others. The pupil alleges that, contrary to its policy, the board did not make a case-by-case decision. The school district policy indicates that:

> "No person shall possess, use, or store a weapon on school property,...
>
> A weapon is any object that by its design and/or use can cause bodily injury or property damage. This includes, but is not limited to...metal knuckles,...
>
> Any student violating this policy shall be subject to penalties outlined in state law and suspended and/or expelled from school as determined by the school board on a case-by-case basis..." Merrill Area Public Schools Policy 5131.1.

The pupil states that "a fair reading of the transcript shows that the Board...had already decided before looking at the individual case of Matt [redacted] that any violation, even possession of two minutes was an automatic expulsion." (Appellant's brief, p. 10) This is a bald assertion with no supporting references to the transcript. In fact, there is no evidence in the record to suggest that the school board made a determination before the expulsion hearing that Matt was guilty of the allegations and that he should be expelled until the end of the school year. The record indicates that the board heard all of the evidence, heard statements from all of the parties, and responded to questions from the pupil and his parents before making any decision in this matter.

The pupil also alleges that the board added a statutory requirement that any weapon possession demanded expulsion. (Appellant's brief pp. 11-12) At the hearing, the pupil's parents argued that Matt had no intent to hurt anyone with the brass knuckles, and therefore, did not endanger anyone's safety. The Administration's position was that a finding regarding the pupil's intentions was not required. Instead, the Administration argued that possession, in and of itself, can endanger the safety of others. This interpretation is consistent with prior decisions of the State Superintendent.

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. P. Mukwanago School District Board of Education*, Decision and Order No. 185 (February 21, 1992).

The State Superintendent has consistently upheld decisions involving mere possession of weapons on school grounds. 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 a pellet pistol which was missing its CO_2 cartridge and was unloaded. In *Eric. H. v. Central/Westosha Union High School District Board of Education*, Decision and Order No. 377, (March 17, 1999), the pupil was expelled for endangering safety by possessing an unloaded hunting rifle in his vehicle. In *Jesse K. v. Tri-County School District Board of Education,* Decision and Order No. 266 (January 2, 1996), the pupil was expelled for endangering safety by bringing a knife to school. See also, *Brian V. v. Shorewood School District Board of Education*, Decision and Order No. 195 (June 8, 1992). These decisions do not add a statutory *requirement* that demands expulsion in all cases of weapon possession. Rather, they provide interpretations of "endangering the property, health and safety of others".

The pupil also alleges that the board did not make a specific finding that his conduct endangered the health, safety, property, or welfare of others. The record reveals that the board did find that his conduct endangered the health, safety, and property of others.

> "4. That the student possessed brass knuckles at the Prairie River Middle School on February 4, 1999 and thereby endangered the health and safety of others." Findings of Fact, February 25, 1999 school board order.

> "1. That the student's possession of brass knuckles at the Prairie River Middle School on February 4, 1999, establishes that he engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others." Conclusions of Law, February 25,1999 school board order.

The pupil argues that this conclusion is not supported by the facts and that it was based on a presumption that possession of brass knuckles endangers the safety of others.[3] Evidence of the endangering safety element was presented to the board. The teacher who witnessed the conduct and the police liaison officer's testimony, as described elsewhere in this decision, provide facts upon which the school board could rely. Thus, the board's conclusions are supported by the record and were reasonable.

The third issue presented by the pupil alleges that the board considered conduct that was not contained in the Notice of Expulsion Hearing, dated February 18, 1999. The notice requirement in a due process proceeding is intended to ensure that the parties are sufficiently apprised of the charges so as to be able to defend against them. See *Keller v. Fochs*, 385 F. Supp. 262 (E.D. Wis. 1974); *Bradley B. v. Spooner School District Board of Education*, Decision and Order No. 107 (February 15, 1983); *Michaelene J. v. Washington Island School District Board of Education*, Decision and Order No. 165 (August 1, 1989); *Jennifer P. v. Waukesha School District Board of Education*, Decision and Order No. 226(April 18, 1994).[4] The notice of hearing stated,

> "The expulsion proceedings are based upon your possession of brass knuckles at the Prairie River Middle School on February 4, 1999."

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[3] In his reply brief, the pupil argues that Finding of Fact numbers 4 and 5 are not based upon the facts presented at the hearing. Finding of Fact number 5 states, "That the pupil and his parents do not deny the above misconduct." The pupil states neither he nor his parents admitted that the conduct endangered the safety and health of others. While it is true that the pupil denied that his conduct endangered anyone, only a hyper-technical reading of the order would cause one to draw the conclusion that concedes that point. While the order may be inartfully drafted in this respect, it is clear that the statement contained in number 5 refers to the conduct described in number 4, not to the legal conclusion contained therein. Paragraph number 1 of the Conclusions of Law further clarifies this issue.

[4] The pupil's attorney argues that the notice requirement in sec. 120.13(1)(c), Stats., is analogous to the criminal complaint standard in *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 226(1968). However, due process in a student expulsion hearing need not take the form of a judicial or quasi-judicial trial, and the proceedings cannot be equated to a criminal trial or juvenile delinquency proceeding. *Linwood v. Board of Education,* 463 F.2d 763, 770 (7th Cir. 1972).

At the hearing, there was some discussion regarding whether or not Matt possessed the brass knuckles before February 4. This discussion was a minor part of the hearing. Matt denied that he did, and the school board did not make any findings regarding whether he had previously possessed brass knuckles at school. Ms. Seaman, the teacher who observed Matt when he was in possession of the brass knuckles on February 4, 1999, testified about Matt's lack of cooperation in relinquishing the brass knuckles to her. This particular conduct was not *specifically* contained in the notice. However, it is so intertwined with the "possession of brass knuckles at the Prairie River Middle School on February 4, 1999", that it cannot be reasonably argued that the pupil was not given notice that the circumstances of his possession of the weapon would be considered by the school board. Therefore, I find that the notice of expulsion hearing adequately advised the pupil of what conduct would be considered by the board.

The fourth issue presented by the pupil alleges that Matt was deprived of due process because the board did not apply "ascertainable standard or factors to determine the scope of the length of expulsion and by failing to explain why a four month expulsion was appropriate." (Appellant's brief, p. 15).[5] In essence, the pupil argues that the board's decision was arbitrary. (Appellant's brief, p. 17). While the board adopted the proposed findings and order prepared by the administration, there is no evidence that the board acted arbitrarily. The board heard the testimony of several witnesses, and some of the board members asked questions of the witnesses and the pupil. The record reflects that the board deliberated over the expulsion decision for 25 minutes. Furthermore, the length of expulsion ordered by the board was neither the most severe nor the most lenient allowed by law. The board did not act arbitrarily or unreasonably.

[5] A portion of this argument makes "substantive due process" arguments. These issues are to be resolved by the courts.

The fifth issue presented by the pupil alleges that the board improperly considered written teacher recommendations. The administration presented seven written recommendations from Matt's teachers. Five of them recommended that Matt be expelled, one explicitly recommended not to expel, and one indicated she did not believe he was a threat to anyone. Of the seven teachers, one testified at the expulsion hearing. First, the letters submitted only related to the appropriateness of expulsion; they were not used to prove whether Matt possessed a weapon. Second, hearsay is admissible at expulsion hearings. *Racine Unified School District v. Thompson*, 107 Wis. 2d 657, 668, 321 N.W. 2d 334 (1982). Finally, there is no indication in the record that the board considered these recommendations.

The sixth issue presented by the pupil alleges that the board was required to consider whether to provide homebound study to him during the period of expulsion. The pupil cites sec. 118.15(1)(d), Stats., in support of this contention. While the Department of Public Instruction encourages districts to provide alternative education to expelled students, such a program is not required. *Dale C. v. Central/Westosha School District Board of Education,* Decision and Order No. 137 (May 15, 1986); *Richard S. v. Wisconsin Rapids School District Board of Education*, Decision and Order No. 145 (September 5, 1986); *Brandon G. v. West DePere School District Board of Education*, Decision and Order No. 160 (April 27, 1989); *Barry W. v. Kenosha Unified School District Board of Education,* Decision and Order No. 220 (March 7, 1994).

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 Matt L[redacted] by the Merrill Area Public School District Board of Education is affirmed.

Dated this 19th day of May, 1999.

John T. Benson
State Superintendent of Public Instruction