THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Jeremy S[redacted] by the Hayward Community School District Board of Education	DECISION AND ORDER 98/99-EX-10

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 district administrative action on March 9, 1999 that reinstated the November 20, 1998 order of the Hayward Community School District Board of Education to expel the above named pupil from the Hayward Community School District until the end of the 1998-99 school year. This appeal was filed by the pupil's parent and was received by the Department of Public Instruction on March 25, 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 November 2, 1998 from the district administrator of the Hayward Community School District. The letter advised that a hearing would be held on November 12, 1998 that could result in the pupil's expulsion from the Hayward Community School District. The letter was sent separately to the pupil and his parents by certified mail. The letter alleged that the pupil, a freshman at Hayward High School, engaged in conduct while at school or under the supervision of school authority which endangered the property, health or safety of others. The letter specifically alleged that Jeremy consumed alcohol at school on October 26, 1998. Minutes of the school board expulsion hearing, an audio tape[1] of the expulsion hearing are also part of the record.

The hearing was held in closed session on November 12, 1998. 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 which 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 November 20, 1998, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through

[1] A portion of the audiotape submitted to the State Superintendent was erased. The school district indicated in its cover letter that the first side of the audiotape was inadvertently erased by someone.

the 1998-99 school year with an opportunity for conditional early readmission. Specifically, the order stated:

> "...Jeremy S[redacted] be, and he hereby is, expelled from school through the end of the 1998-99 academic year; provided, however, that enforcement of this Order shall be stayed as a means of permitting Jeremy S[redacted] to re-enroll in school as of Monday, November 30, 1998, if he has by then undergone an AODA assessment and is actively participating in any ongoing counseling and/or treatment recommended as a result of that assessment, and if he has additionally submitted a letter of apology for his actions; provided, further, that in the event Jeremy S[redacted] is readmitted to school after he has complied with those conditions, his continued attendance shall be subject to the requirement that he engage in no further misconduct bringing him to Level Two of the Code of Conduct, but that if he does so nonetheless, then the stay shall be lifted and Jeremy S[redacted]s expulsion shall be reinstated for the remainder of its original term."

The record also contains a letter from Principal Mestelle dated November 18, 1998 to Jeremy indicating he appears to have met the conditions imposed by the board for conditional early reentry to school on November 30. There is nothing in the record to indicate Jeremy did not return to school at that time.

This matter came to the department's attention via a letter dated March 22, 1999 from the pupil's mother stating that her son was expelled March 9 and appealing this action. The customary departmental form letter went out to the parties and the district replied by forwarding the expulsion record from the November expulsion process recited above. The district also forwarded 3 additional items: a one page letter dated March 11, 1999 addressed to the William Trautt, Superintendent of Hayward School District from Assistant Principal Tom Kuklinski; one page of hand-written notes dated March 8, 1999 (unidentified author); and a one page

Disciplinary Referral to the Office form signed by Assistant Principal Thomas Kuklinski on March 11, 1999.[2]

These documents reflect the following :

1. On March 8, 1999, Jeremy was allegedly involved in a fight at school.
2. On March 9, 1999, High School Principal Mestelle contacted Jeremy's mother, apparently by phone, informing her that Jeremy admitted hitting another student on March 8, 1999. Jeremy's mother was also informed that because of the terms of his reinstatement, Jeremy would be withdrawn from school immediately.
3. On March 11, 1999, Assistant High School Principal Tom Kuklinski, , signed the Disciplinary Referral to the Office form, confirming Mr. Mestelle's conversation with Jeremy's mother. Also on March 11, 1999, Mr. Kuklinski wrote a letter to the Hayward School District Superintendent that summarized the above events.
4. The appeal letter from the mother states "If these boys never would have made racial slurs and been pointing and laughing at [Jeremy] this would have never happened."
5. The handwritten note, which appears to have been written by a teacher and mentions Jeremy and appears to recite information from two other students states in part "Matt [the student Jeremy admitted hitting] had a red mark on his right forehand."

[2] While the contents of these documents are recited, I do not rule on their proper admission here and their reference is not necessary to the outcome.

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 one issue. The parent alleges that it is not fair that her son was expelled for the rest of the year. The decision to expel a pupil and the 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). If a school board finds that the pupil engaged in conduct as alleged in the notice of expulsion; that conduct occurred while at school or while under the supervision of a school authority and it endangered the property, health, or safety of others; and that the interests of the school demand expulsion, the board may expel the pupil.

Jeremy had a valid expulsion hearing on November 12, 1998. All of the procedural requirements for that original expulsion process were met.

However, there are remaining important issues: First, is there any required constitutional or statutory process of review of the district's post expulsion administrative decision "revoking" the "probationary status" it had placed Jeremy in by allowing him to return to school prior to the expiration of his period of expulsion but under conditions more strict than applicable to the general student body? Second, if there is such a process, what is it and was it satisfied here? Third, what is the DPI's role?

Based on the *Racine* and *Lenny G.* cases cited above, the department is strictly limited in its expulsion review to statutory procedural error. Because of the importance of the questions and the history of these issues with the legislature, and in an effort to provide some guidance for districts, I will comment in some detail.

These very questions were the subject of 1995 AB 980 and an assembly education committee hearing on March 26, 1996. The original Bill provided that a school board may impose conditions on the reinstatement of a pupil who has been expelled from school if the conditions are related for the reasons for the pupil's expulsion and are specified in the expulsion

order. The Bill failed to provide any process for review of alleged of the breach of the conditions by the pupil. An assembly substitute amendment was introduced which extended that notion of conditions to be imposed on pupils under a suspension. Although at the time maximum number of school days a child could be suspended was five days, there was no limit in the Bill for the number of days any conditions might be applicable and no process specified for review of breach of the conditions. This raised the problem of imposition of conditions for terms longer than the maximum suspension or conditions incapable of satisfaction within short suspension periods. Thus the prospect of "rolling suspensions" resulting in *de facto* expulsions arose. The department appeared for informational purposes at the above referenced legislative committee hearing and presented testimony, a memorandum, and an additional DPI recommended substitute amendment.[2]

The use of conditions, or a type of probation, upon the early return of expelled pupils has been approved under certain circumstances since at least *Expulsion from school District of Jefferson of Eric S.*, Decision and Order No. 90, February 12, 1982. This decision noted that misbehavior occurring after expiration of the expulsion period must follow the full and customary statutory expulsion process. The departmental memorandum addressed the three time periods during which conditions on expelled children might apply: (1) conditions to be met before the pupil is readmitted to school; (2) conditions to be met after the pupil is readmitted but before the term of the expulsion expires; and (3) conditions to be met even after the term of expulsion expires. The memorandum set out the department's history of addressing, in its expulsion appeal decisions, the authority of districts to impose conditions in these categories. It

[2] The original Assembly Bill, original Assembly Substitute Amendment, the DPI recommended substituted amendment, and DPI historical memorandum are attached and incorporated.

took the position that districts had authority to impose conditions in the first two categories but not in the third. It pointed out that a free education is a fundamental state constitutional right under the Wisconsin Constitution and that the U.S. Supreme Court has found a property interest in attendance at public school which cannot be taken away without compliance with certain due process hearing rights. *Goss v. Lopez*, 419 U.S. 565, 42 L. Ed. 2d 725, 735 (1975).

With respect to review of the alleged breach of "probationary" conditions placed on pupils who have committed expellable offenses, the memo analogized to the probation and parole revocation and recission cases from the U.S. Supreme Court. Those cases indicate that in the criminal context a two step hearing process is required: a preliminary, probable cause hearing which can be conducted by a probation officer not involved in the case, and a final revocation hearing by an independent, higher level administrative officer. Both hearings involve the right to an attorney, cross examination, confrontation, ability to present evidence, an independent hearing examiner, and the right of a court review of the final hearing if requested.

Of course, as with courts choosing to employ probation rather than impose more harsh penalties like jail or prison time, school boards may refrain from using conditions on a pupil's return to school prior to the expiration of the expulsion period. Boards may choose to merely expel for a definite period and not allow "early" return and all together avoid the procedural issues connected with breaches of and revoking that conditional status. But as with the criminal probation process, once having discretionarily granted to the person a type of conditional freedom, the public entity must insure that revocation of that status is fair and avoids arbitrary and irrational results.

The department's memo pointed out that a lower level of due process is applied in the state's pupil suspension statutes than is constitutionally applied in probation and parole

revocation matters under the cited applicable case law. See, for example, *Morrissey v. Brewer,* 408 U.S. 471 (1972). The memo recommends adoption of a departmental alternative draft bill which would have employed the same review process as presently exists under the suspension statute, for district review of alleged violations of conditions imposed on expelled children permitted to return to school prior to the expiration of their expulsion period. It did NOT include further departmental review of the district's action. The assembly education committee failed to take action on the original Bill the substitute or the DPI proposal and pursuant to a joint resolution ten days after hearing, the Bill was recorded as "failed to pass."

In *Lenny G.* the court of appeals emphasized that "suspension is a local matter. It occurs at a level different from that at which the state superintendent operates." 199 Wis. at 14. The court went on to say:

> "... the legislature has not expanded the state superintendent's authority to include review of a suspension order under sub. (1)(b), in an expulsion appeal *or otherwise.*" (Emphasis supplied) 199 Wis. 2d at 17.

The legislature has provided five rights to students suspended under sec. 120.13(1)(b):

(1) Prompt notice and reason for suspension given to the parent;

(2) A conference for the pupil and parent within five school days;

(3) The administrative conference shall be with a school district representative who is NOT the principal, administrator or teacher in the child's school;

(4) If it is determined the suspension was unfair or unjust for any reason, the child's record shall be modified to show that no suspension occurred;

(5) A (written) finding on the suspension must be made within 15 days of the conference and communicated to the parties.

In 1995, the legislature added language seeking to expand the general powers of local school boards:

> "The school board of a common or union high school district may do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils and including [the suspension process-the expulsion process]."

It further enacted:

> "The statutory duties and powers of school boards shall be broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers, if the action is not prohibited by the laws of the federal government or of this state."
> sec. 118.001 Stats., 1995 Act 27.

This language has yet to be construed by an appellate court. The legislative fiscal bureau's note to the joint finance committee on these provisions emphasizing their purpose as expanding school board powers, also questioned whether that expansion is as broad as the authors of the provision wished. Nevertheless, there currently are no laws prohibiting school boards from allowing expelled pupils to conditionally return to school prior to the expiration of the assessed period of expulsion. As to the process for reviewing an alleged breach of such conditions, as indicated above, there exists no express statutory process, whether based on the existing statutory suspension process, or any other. This leaves school boards with the state and federal constitutions and their own devices to craft an appropriate and valid review mechanism. I believe today as I did in 1996 that the suspension process outlined in sub. (1)(b) of sec. 120.13 is an appropriate one to extend to reviews of alleged violations of conditions under circumstances like those in this case. Such a review by an independent school administrator, not from the school in which the conditions are alleged to have been violated, may very well satisfy constitutional prerequisites without further state administrative or court review. Ratification by

the school board after a review of the administrator's report would enhance its viability even more securely.

The need for an added level of review than occurred in this case is demonstrated even by the limited facts available here. First, it is most interesting that the allegation of alleged racial slurs made against Jeremy first appear in the mother's letter of appeal. I do not know whether to credit this or not. While one of the documents indicates the principal advised the mother that because the conditions had been breached, the child would not be allowed readmittance, there is no evidence of any other discussion over the phone took place between the two. Secondly, on the page of hand written notes there is the remarkable statement: "Matt had a red mark on his right forehand." Matt is the individual Jeremy is alleged to have hit. Did the writer make a mistake and mean to say that Jeremy had a red mark on his forehand, or had the alleged "victim" actually himself hit someone or something so as to have a red mark on his own forehand? Obviously these are the kinds of factual matters that can be clarified and discussed in a conference with an independent school administrator or a review and ratification or modification by the school board. In this case there was no conference or board review. The phone call and teacher contacts were both with administrators involved in the school or the alleged misconduct. There was no "independent" determination of whether enforcement of the prior expulsion would be just under all the circumstances. There was no written finding made and communicated to the parent within 15 days of the conference.

In the case *Brandon C. by the Florence County School District Board of Education* Decision and Order No. 251, June 12, 1995, the board expelled the pupil for the remaining portion of one school year and the entire portion of the following school year for repeated refusal or neglect to obey school rules. The board conditionally allowed the student to

return to school during that second year and "be allowed to participate unless and until the pupil violates any school rule or rules." In affirming the original expulsion in that case, I directed the district to "follow the requirements of sec. 120.13(1)(b) and (c), Wis. Stats., and follow the school board policy on discipline" in the event the administration wished to discipline the pupil "for a (future) violation of the school rule or rules." Thus I ruled that in such a case as this, if the type of new violation might result in a suspension, the suspension statute should be followed, and if the type of new violation might result in an expulsion, the usual expulsion procedures should apply. This is the department case law precedent in this area. When the department made its recommendation to the assembly education committee in 1996, it pointed it out that use of the suspension review process to review alleged violations of conditions after expulsion, was a lower standard than if the expulsion processes were used in the way they were used to address the underlying original misconduct. The department recommended the lower level of process. As I have pointed out, in this case, based on the less than clear documentation provided, not even that lower level was met. But since the alleged misconduct was used as the foundation to expel Jeremy, regardless of whether the level of misconduct is construed as a Level Two or a Level Three under the school district's policy, under *Brandon C.*, I conclude that the usual and complete school board expulsion process under sec. 120.13(1)(c) should have been employed to address the alleged breach of conditions by the pupil.

The district agrees that it did not even attempt to apply the usual expulsion process to the alleged breach of conditions here. The district believes the board can wholly delegate to administration authority to determine if the probation has been violated, and if so, interpret the board's prior action as mandating effectuation of the expulsion. The district argues that if the full expulsion processes are applied, as a policy matter that approach will create a disincentive

for districts to allow expelled pupils to conditionally reenter school and result in more children being expelled for longer periods of time. I agree this may occur. And I agree this is a very proper policy rationale on which the legislature might wish to base a less rigorous but still constitutional review process for alleged breaches of probationary expulsion conditions. Indeed this is consistent with the department's proposal in 1996. Even though the legislature broadened school district powers in 1995, it has taken a very hands-on approach to the laws governing pupil conduct in the suspension and expulsion areas. Since 1969, the legislature has made no less than 17 changes in these statutory provisions.[3] But, in the absence of legislative enactment of an administratively less burdensome review process, unless there is to be no review, the district and the department are left with the more rigorous, full, statutory expulsion board proceeding. I regret that this is the case. Hopefully it will continue only as an interim matter until the legislature is given another opportunity to address it. If the board wishes to continue to pursue disciplinary measures against the student, it may cure the procedural errors arising from the March 9 expulsion by following all the proper notice and full hearing requirements with respect to that incident as it did with the original incident in November.

CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, as to the original expulsion dated November 20, 1998, I conclude that the school board complied with all of the procedural requirements of sec. 120.13(1)(c), Wis. Stats. I also conclude the board acted properly in staying the effectiveness of its expulsion order subject to certain conditions. However, I conclude the board failed to comply with the necessary procedural expulsion

[3] L. 1969, Ch. 301 §2; L. 1973, Ch. 94 §1; L. 1979, Ch. 202 §1; L. 1979, Ch. 301 §20; 1985 Act 211 §2; 1987 Act 88; 1989 Act 31 §2317b; 1991 Act 269 §650q; 1993 Act 284; 1993 Act 334; 1995 Act 27; 1995

requirements of sec. 120.13 (1)(c) Stats., when the expulsion was "reinstated" on March 9 due to the March 8 misconduct. Accordingly I must reverse that action.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Jeremy S[redacted] by the Hayward Community School District Board of Education and administration after the March 8, 1999 incident, is reversed. The stay ordered by the board in its November 20, 1998 expulsion order is reinstated.

Dated this 20th day of May, 1999.

John T. Benson
State Superintendent of Public Instruction