THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Derek R[redacted] by the Holmen School District Board of Education	DECISION AND ORDER 98/99 EX-26

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 June 4, 1999 order of the Holmen School District Board of Education to expel the above-named pupil from the Holmen School District through the pupil's 21st birthday. This appeal was filed by the pupil's attorney and was received by the Department of Public Instruction on June 22, 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 May 6, 1999, from the director of pupil services of the Holmen School District. The letter advised that a hearing would be held on June 1, 1999 that could result in the pupil's expulsion from the Holmen School District. The letter was sent separately to the pupil and his parents by 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. It also alleged that he engaged in conduct while not at school or not under the supervision of a school which endangered the property, health, or safety of others at school or under the supervision of school authority. The letter alleged that Derek threatened the health and safety of staff. Minutes of the school board meeting are also part of the record.

The hearing was held in closed session on June 1, 1999. The pupil and his parents appeared at the hearing represented by Attorney John Brinkman. 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 June 4, 1999, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through his 21st birthday.

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 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.

Because the board did not comply with statutory and due process requirements, I am compelled to overturn the expulsion. First, the notice of expulsion hearing did not contain the particulars of misconduct. It is well established that a student is entitled to due process at an

expulsion hearing. *Goss v. Lopez*, 419 U.S. 565 (1975); *Racine Unified School District v. Thompson*, 107 Wis. 2d 657, 321 N.W. 2d 334 (1982). It is also well established that notice is an integral part of procedural due process in these situations. A student facing expulsion is entitled to timely and adequate notice of the charges against him so as to allow him a meaningful opportunity to be heard, even where the student unequivocally admits the conduct charged. *Keller v. Fochs*, 385 F. Supp. 262, 265 (E.D. Wis. 1974). Furthermore, sec. 120.13(1)(c)4., Stats., clearly requires specific notice of the misconduct alleged. Expulsions have been repeatedly overturned based upon this error. *Bradley Scott P. v. Menasha Joint School District Board of Education,* Decision and Order No. 197, (August 21, 1992); *Christopher K. v. West Allis School District Board of Education*, Decision and Order No. 166 (April 18, 1990); *Travis V. v. Waterloo School District Board of Education*, Decision and Order No. 144 (July 2, 1986). The notice of expulsion hearing in this case merely alleged that Derek threatened the health and safety of school staff. It did not list the particular misconduct Derek allegedly engaged in that constituted the threat, nor did it state a time frame during which he engaged in this conduct. This does not constitute adequate notice.

Secondly, the minutes of the expulsion hearing are insufficient to allow for meaningful review of the hearing. While there is no statutory explanation of how detailed hearing minutes must be, previous decisions by the State Superintendent have outlined minimum requirements. The record must reflect who was present at the hearing, what evidence was presented in support of allegations of misconduct, and what decision or action the board took based upon the evidence presented. If there is a reasonable view of the evidence submitted that supports the board's findings, those findings will be upheld. *Nathan W. v. Wilmot Union High School District Board of Education*, Decision and Order No. 296 (July 10, 1996). In this case, however, there are not

detailed minutes of the expulsion hearing. The minutes submitted appear to be a sanitized version that is appropriate for publication. These minutes do not reveal who testified, whether the pupil had the opportunity to question witnesses or call witnesses on his own behalf, or even what written documents were submitted to the board. Included with the record, submitted by the district, are several witness statements and police reports. However, the minutes do not reflect whether these are the same documents used at the hearing or whether these are all of the documents used at the hearing. Furthermore, in this case there was nothing else to rely upon to discern what happened at the hearing. There was apparently no audiotape nor transcript made of the hearing. These omissions constitute reversible error. *Nathan W. v. Wilmot Union High School District Board of Education*, Decision and Order No. 296 (July 10, 1996)

The pupil alleges that he asked the board to issue subpoenas for three people. However, the board did not issue them. The pupil submitted, on appeal, a copy of the letter he sent to the district. It was addressed to the District Administrator and stated:

> "We would like to ensure the attendance of (three named witnesses) at the expulsion hearing. Since this is not a court hearing, there is no subpoena power per se. However, since the witnesses are students at your school perhaps you can take the appropriate steps to ensure their attendance. If you have any questions, feel free to contact me at your convenience."

In its brief, the school board acknowledges that it did not issue the subpoenas as requested. The board argues it was not required to issue the subpoenas. It also argues that the decision to issue a subpoena can be made on a case by case basis. There is no evidence, however, that the board did a case by case analysis of this request. The board cites *Michael E. v. Oconomowoc School District Board of Education*, Decision and Order No. 212 (December 3, 1993), to support its contention that the board is not required to issue subpoenas. *Michael E.* did not involve a case where subpoenas were requested. *Michael E.* examined the use of hearsay

statements and credibility issues. Thus, reliance on *Michael E.* is misplaced. While a board is not required to serve subpoenas, failure to *issue* subpoenas is a denial of due process and grounds for reversal. *Chad B. v. Janesville School District Board of Education*, Decision and Order No. 203 (April 1, 1993). The board's failure in this case is reversible error.

The board argues, alternatively, that even if the witnesses were subpoenaed and testified the outcome would not have been different. Because there is a lack of sufficient record to review, there is no way to make this determination.

The pupil raises several other arguments about the admissibility of certain evidence. While it is not necessary for me to decide these issues, it is likely that the board will rehear this case. Therefore, the following is intended as guidance for any future hearings. The pupil argues that evidence removed from his school locker was done illegally. It is not improper for the school board to rely on evidence resulting from the search of a pupil's locker. Expulsion hearings are not criminal proceedings. The exclusionary rule applies to criminal proceedings, not administrative expulsion hearings. *See e.g. In the Interest of Thomas J.W.,* 213 Wis. 2d 264, 276 (Ct. App. 1997); *State v. Carpenter,* 197 Wis. 2d 252, 541, N.W. 2d 05 (1995); *State ex re. Struzik v. DHSS,* 77 Wis. 2d 216, 221 (1977). Furthermore, searches conducted by school officials or police officers who are acting "at the request of or in conjunction with school officials" are subject to a "reasonableness" standard rather than a "probable cause" standard. *State v. Angelia B.,* 211 Wis. 2d 140, 546 N.W. 2d 682 (1997).

The pupil also challenges the use of hearsay information at the expulsion hearing. Because the record is too vague to know exactly what testimony was presented, I can only provided general guidance on this subject. I have repeatedly found that a school board is permitted to consider and base its decision upon the testimony of a school official who relates the

his investigation, including the statements of other people, when there are factors establishing the reliability and probative value of such testimony. *Aron E. P. v. Sturgeon Bay School District Board of Education,* Decision and Order No. 341 (December 17, 1997); *Carlos M. v. West Allis-West Milwaukee School District Board of Education,* Decision and Order No. 242 (December 21, 1994); *Joshua S. v. D.C. Everest School District Board of Education,* Decision and Order No. 170 (June 22, 1990); *John C. B. v. Milwaukee School District Board of Education*, Decision and Order No. 116 (October 31, 1983).

The pupil also alleges that law enforcement records are not admissible at expulsion hearings. Secs. 48.396 and 948.396, Stats., allow law enforcement agencies to share information with school districts. Sec. 118.127(2), Stats., provides that law enforcement records obtained by the school district may not be the *sole* basis for expelling or suspending a pupil. As long as the records are not the sole basis for the expulsion, the records may be used.[1]

Finally, the pupil alleges that the board breached confidentiality requirements by utilizing a psychological evaluation, apparently conducted for use in juvenile court. It is unclear from the record who introduced the psychological evaluation, or how the person obtained a copy of the evaluation. Issues of confidentiality breaches must be addressed to the party who had an obligation to maintain the confidence and failed. It is not appropriately before the State Superintendent during an expulsion appeal.

In reviewing the record in this case, I find the school district did not comply with all of the procedural requisites. Based upon the documents submitted, it appears that Derek is very troubled and in need of assistance and intervention. When a school is faced with the type of

[1] In support of his contention, the pupil cites an Attorney General Opinion from 1987. The statute was amended after the opinion, therefore the opinion does not consider the current statute.

information contained in this case, it must be responsive to the needs and safety of its students and staff. At the same time, however, the school must recognize and protect the rights of the accused student. Because I must comply with the requirements of the statutes in these matters, reversal of this case is mandatory.

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 Derek R[redacted] by the Holmen School District Board of Education is reversed.

Dated this 20th day of August, 1999.

John T. Benson
State Superintendent of Public Instruction