Decision and Order No.: 406

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of John J. D. by Whitehall School District Board of Education	DECISION AND ORDER Appeal No.: 99/00 EX 03

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 order of the Whitehall School District Board of Education to expel the above-named pupil, an eighth grader, from the Whitehall School District. This appeal was filed by the pupil's parents and was received by the Department of Public Instruction on December 15, 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 October 1, 1999, from the district administrator of the Whitehall School District. The letter advised that a hearing would be held on October 18, 1999 that could result in the pupil's expulsion from the Whitehall School District until his 21st birthday. 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 that endangered the property, health, or safety of others. The letter specifically alleged that the pupil possessed, distributed, and sold look-alike drugs to another student on September 28, 1999, on school grounds in violation of School Board Policy 6026, Student Alcohol and/or Other Controlled Substances and Tobacco Products Use. The school board also submitted minutes of the expulsion hearing and exhibits used at the hearing as part of the record.[1]

The hearing was held in closed session on October 18, 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

[1] The parent included, as part of his briefs, exhibits that were not used at the expulsion hearing. This is a review of the expulsion hearing, and therefore records not submitted at the expulsion hearing will not be considered. *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).

interests of the school demand the student's expulsion. The order for expulsion containing the findings of fact and conclusions of the school board, dated October 18, 1999, was mailed separately to the pupil and his parents. In the findings of fact, the board found that the pupil committed the alleged conduct and that the pupil was not a student with a disability under sec. 115, Stats. Based upon this finding, the board concluded that by committing this conduct the pupil had endangered the property, health, and safety of others, and that the interests of the pupil, other pupils, the faculty, and staff of the school required the pupil's expulsion. The Board ordered that the pupil be expelled through his 21st birthday. The order further stated that if the pupil met certain conditions, he could apply for re-admission at the start of the 2000-2001 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 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.

Both parties submitted briefs in this matter. The pupil's father sent two letter briefs to the department, dated January 4, 2000 and January 26, 2000, in this case and raised several issues that require consideration. For purposes of discussion, his allegations can be categorized into the following four categories. First, he alleges that the notice of expulsion hearing did not give adequate notice of the misconduct considered by the school board. Second, he alleges that his son's conduct did not endanger the property, health, or safety of anyone. Third, he alleges that neither his son nor the family had notice of the school board's policy toward "look-a-like" drugs. Finally, he alleges that his son should have been evaluated as an "at-risk" student pursuant to sec. 118.153, Stats., and that he should have been evaluated as a child with special needs.

The parent alleges that the notice of expulsion hearing did not properly advise him of what evidence the administration would present to support the recommendation for expulsion. The parent asserts that the pupil is entitled to more due process in cases involving a serious penalty than when a minor penalty is at stake. The parent cites *Lee v. Macon County Board Of Education*, 490 F. 2d 458 (C.a. Ala. 1974). The procedural due process required for a student facing expulsion or long-term suspension is identified in *Goss v. Lopez*, 419 U. S. 565, 573-76, 95 S. Ct. 729, 735-737, 42 L.Ed. 2d 725 (1975). 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).

The notice alleged that John possessed, sold, and distributed a look-a-like drug on September 28 while at school. It alleged that this conduct endangered the property, health, or safety of others. The notice also informed the pupil and his parents that "if the misconduct cited above is proven, in considering whether to expel the pupil, and if so, for what period of time, the Board may also consider the pupil's complete disciplinary and academic records." These records were available for the pupil's review. Thus, the pupil was provided notice that the records may be used at the hearing and for what purposes.

The record of the proceedings and the findings of facts show that the pupil was found guilty of the noticed misconduct. Prior disciplinary records may be used by the school board to determine whether the interests of the school demand expulsion, whether expulsion is appropriate, and for what length. *Leo P. v. Whitewater Unified School District Board of Education,* Decision and Order No. 351 (March 31 1998*); Kevin M. v. the Oak Creek-Franklin School District Board of Education*, Decision and Order No. 181 (September 13, 1991); *Joshua S. v. D.C. Everest School District Board of Education*, Decision and Order No. 170 (May 22, 1990). In this case, the school board properly provided John notice that his disciplinary and academic records would be discussed at the expulsion hearing. Having provided that notice, the board has complied with sec. 120.13(1)(c), Stats., as well as the requirements in *Goss.*

The second issue alleges that John's conduct (possession of a look-a-like drug) was in the nature of a practical joke, that his son did not possess, sell or distribute marijuana, and, therefore, it did not endanger the property, health, or safety of others. In essence, the parent is arguing that there is insufficient evidence to determine that John's conduct endangered the property,

health, or safety of others. The parent also argues that the evidence or witnesses are not credible or sufficient. The school board is in the best position to judge the credibility of the witnesses. It has been repeatedly held that credibility and sufficiency of the evidence are beyond the scope of review of the state superintendent. *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), and *Kristin J. v. Mukwanago School District Board of Education*, Decision and Order No. 185 (February 21, 1992). Moreover, expulsions based upon possession of look-a-like controlled substances have been upheld. *Jason A. v. DeForest Area School District Board of* Education, Decision and Order No. 327, (June 26, 1997), Miranda *V. v. Howard-Suamico School District Board of Education,*

Decision and Order No. 224, (March 22, 1994), and *Dale C. v. Central Westosha School District Board of Education*, Decision and Order No. 137, (May 15, 1986).

The pupil possessed, sold and distributed a look-a-like drug to another student on school grounds. Specifically, on September 27, 1999, the pupil and a fellow eighth-grade student had a conversation at school about John agreeing to obtain "weed" for the other student. On September 28, 1999, between eighth hour and homeroom, John a handed a bag containing a green leafy substance to the other student. When he did so, he told her it was marijuana with some cocaine mixed in. It was later determined the substance was not marijuana or other controlled substance.

When the school found out about the incident, they contacted John's parents. His parents directed the school not to talk to John outside of their presence. When the parents came to the school, they met with administration and the investigating police officer. The parents informed the school that they wanted to talk to a lawyer before letting John speak to the school officials. An interview with the investigating officer was scheduled the next day at John's attorney's office. The school principal went to the attorney's office intending on being present for the interview. However, when it was explained that his answers would be used at the expulsion hearing, John refused to discuss the incident.

The board was presented with the evidence. It was reasonable for the board to believe that John distributed a look-a-like substance to another student.

The pupil's conduct threatened the safety of unknowing or innocent students. Possession of even look-a-like substances creates the idea that it is permissible to have drugs in school. Problems can also arise when students exchange money at school for illicit purposes. Police officers, in other expulsion cases, have warned of the dangers posed by the possession of look-a-

like drug substances. Thus, it was reasonable to conclude that the pupil's possession of a look-a-like drug substance endangered the property, health, or safety of others.

The parent also asserts that neither his son nor the family was made aware of the school board's policy concerning look-alike drugs. Because the district did not allege that John engaged in repeated violations of school rules, it is irrelevant whether his conduct violated a school policy and whether the pupil had notice of the school policy. See *Joshua R. v. Edgerton School District,* Decision and Order No. 330 (July 29, 1997), *Donald P. v. Westby Area School District Board of Education,* Decision and Order No. 299, (August 9, 1996), and *Kimberly K. v. Oak Creek-Franklin School District Board of Education,* Decision and Order No. 268, (January 8, 1996). 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 120.13(1)(c), Wis. Stats. *Justin S. v. Marshfield School District Board of* Education, Decision and Order No. 361 (May 27, 1998), *Troy Y. v. Burlington School District Board of Education,* Decision and Order No 309 (January 21, 1997); *Jason M. v. West Allis-West Milwaukee School District Board of Education,* Decision and Order No. 294 (June 24, 1996), *Tony R. v. Lake Geneva Joint No. 1 School District Board of Education,* Decision and Order No. 259 (August 11, 1995).

Finally, the parent alleges that John should have been assessed as an "at-risk" student under sec. 118.153, Stats., and that his son should have been evaluated for special needs. The application of sec. 118.153, Stats., to John is not within the scope of an expulsion appeal. If the pupil believes he qualifies for "at-risk" determination, he should contact the local school district.

With regard to a pupil with an ***identified*** exceptional education need, the state superintendent has reversed an expulsion based on a school board's failure to consider whether a

pupil's handicapping condition was related to the misconduct. See *Anita P. v. Janesville School District Board of Education,* Decision and Order No. 124 (February 5, 1985), and *Joe M. v. Milton School District Board of Education,* Decision and Order No. 125 (February 22, 1985). These decisions were based on the particular requisites and protections under both state and federal law relating to pupils with an identified special education need.

With regard to all other aspects of special education law, however, the state superintendent has determined that an expulsion appeal is not the appropriate context within which to challenge a district's application of special education provisions to a particular pupil. Such a challenge is beyond the scope of sec. 120.13(1)(c), Wis. Stats. *Michael L. v. New Richmond School District Board of Education*, Decision and Order No. 326 (June 2, 1997), *Michael P. v. Kenosha Unified School District Board of Education,* Decision and Order No. 172 (October 8, 1990). As there is no evidence in the record that John was identified as a child with a disability, this issue is beyond the scope of this review.[2]

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.

[2] According to materials submitted by the pupil, a special education evaluation was performed after the expulsion. No special education needs were identified.

ORDER

IT IS THEREFORE ORDERED that the expulsion of John J. D. by the Whitehall School District Board of Education is affirmed.

Dated at Madison, Wisconsin on February 15, 2000.

John T. Benson

John T. Benson
State Superintendent of Public Instruction