THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Telsea M by East Troy Community School District Board of Education	DECISION AND ORDER Appeal No.: 99/00 EX 05

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to sec. 120.13(1)(c), Stats., from the order of the East Troy Community School District Board of Education to expel the above-named pupil from the East Troy Community School District. This appeal was filed by the pupil and was received by the Department of Public Instruction on December 30, 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), Stats. The state superintendent's role is to ensure that the required statutory procedures were followed, that the school board's decision was based upon one or more of the established statutory grounds, and that the school board was satisfied that the interest of the school district demands that the student be expelled.

FINDINGS OF FACT

The record contains a letter entitled "Notice of Expulsion Hearing," dated December 14, 1999, from the district administrator of the East Troy Community School District.[1] The letter advised that a hearing would be held on December 22, 1999 that could result in the pupil's expulsion until her 21st birthday from the East Troy Community School District. The letter was sent separately to the pupil and her parents by certified mail. The letter alleged that Telsea violated the school district drug and alcohol policy by possessing drugs while on school property on December 2, 1999. Minutes of the school board expulsion hearing and a transcript of the hearing are also part of the record.

The hearing was held in closed session on December 22, 1999. The pupil and her parents appeared at the hearing with their attorney, Thomas McClure. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil's attorney was 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 engaged 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 December 22, 1999, was mailed separately to the pupil and her parents. The order stated the pupil was expelled through June 12, 2000.

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[1] Two other notices of hearing were also sent to the pupil on December 3. These notices will be discussed in detail in the discussion section of this decision.

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 Distric.*, 186 Wis. 342, 353, 202 N.W. 788 (1925). A school board's power to expel students derives from sec. 120.13(1)(c), 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), 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 three issues that require consideration. First, the pupil alleges that the notice of hearing was defective. Second, the pupil alleges that her suspension

violated statutory requirements and school board policy. Finally, the pupil alleges that her statutory and constitutional due process rights were violated.

The pupil's first allegation concerns the adequacy of the notice. The district mailed a Notice of Expulsion Hearing, dated December 3, 1999, to Telsea and her parents. This notice erroneously advised Telsea that she could be expelled from the East Troy Middle School (she was a high school student); that the hearing would be held at the East Troy Middle School on December 13, 1999 and that the pupil was "guilty of position of drugs while on school property." The district noticed the third error and issued an amended notice dated December 3. The amended notice advised the pupil that the administration believed she was "guilty of possession of drugs while on school property on Thursday, December 2, 1999." This amended notice was mailed to Telsea and her parents. On the day of the hearing, December 13, 1999, Telsea's attorney apparently had a discussion or correspondence with the district's attorney. At this time, the references to the East Troy Middle School were brought to the district's attention. While the district did not believe that the reference to the middle school or the inaccurate location of the hearing were fatal errors, the district decided to cancel the December 13 hearing and issue a new notice. The district then issued the notice dated December 14, 1999, referenced in the "Findings of Fact" of this decision. The pupil's suspension, which began on December 2, 1999, was extended until the December 22 expulsion hearing.

The pupil's attorney argues that the district is not allowed to correct its mistakes by issuing amended notices. As long as the district complies with the notice requirements, e.g., five days notice, the district may issue amended notices. This is consistent with the many cases where the state superintendent has overturned the expulsion but the district is allowed to either correct the error or rehear the case. See *Nicole P. v. Crandon School District Board of*

Education, Decision and Order 193, May 29, 1992; *Clarence S. v. Bonduel School District Board of Education,* Decision and Order 320, April 10,1997; *Adam S. v. East Troy Community School District Board of Education,* Decision and Order 300, August 9, 1996; and *Paul R. v. East Troy Community School District Board of Education,* Decision and Order No. 262, October 9, 1995.

However, even the amended notice dated December 14, 1999, does not comply with the statutory notice requirements. The expulsion statute provides in part:

120.13 School Board Powers.

> **(1) (c) 4.** Not less than 5 days' written notice of the hearing...shall be sent...The notice shall state all of the following:
> a. **The specific grounds under subd. 1., 2. or 2m** and the particulars of the alleged conduct upon which the expulsion proceeding is based. (Emphasis added.)

In *Benjamin L. v. Maple School District Board of Education,* Decision and Order No. 214, December 21, 1993, my predecessor stated in a case involving the bringing of marijuana and alcohol to school:

> "Further, **the statutory basis for the expulsion must be reflected in the notice of expulsion hearing**, must be supported by evidence in the record, and must be reflected in the ultimate findings of the board." Citing *John K. v. Wisconsin Rapids School District Board of Education,* Decision and Order No. 178, (May 17, 1991.)

It has long been precedent in these cases that the notice requirements of the statute are mandatory in nature, and failure to comply with the statute's requirement renders the expulsion void. See *Ryan G. v. Sparta Area School District Board of Education,* Decision and Order No. 325, May 19, 1997; *Christopher K. v. West Allis School District Board of Education,* Decision and Order No. 166, April 18, 1990; and *Travis V. v. Waterloo School District Board of Education,* Decision and Order No. 143, July 2, 1986. Here, no statutory ground for expulsion was cited in

the notice.[2] Because the pupil is statutorily entitled to this notice, reversible procedural error has occurred.

Secondly, the pupil alleges her suspension was contrary to board policy. The Wisconsin Court of Appeals has found that the state superintendent does not have authority to review suspensions. *Madison Metropolitan School District (Lenny G.) v. Wis. D.P.I.*, 199 Wis. 2d 1, 543 N.W. 2d 843 (1995). I would note, however, that the statute allows a district to suspend a student for a total of 15 consecutive school days if a notice of expulsion hearing has been sent.

Thirdly, the pupil alleges her constitutional and statutory due process rights were violated. She complains that an independent investigation was not conducted and that the dean of students did not consider mitigating evidence before deciding to expel. In support of this argument, the pupil cites *Lamb v. Panhandle Community Union School District*, 826 F. 2d 526, 578 (7th Cir. 1987). The dean of students did not decide to expel. The dean of students and the district administrator *recommended* expulsion. The board *decided* to expel. Before the board made this determination, Telsea was given a hearing at which she was afforded the opportunity to provide mitigating evidence.

On December 2, 1999, the dean of students observed Telsea and another student leave the school building during the school day and go to Telsea's car in the parking lot. Telsea got in the driver's seat, and the other student sat in the passenger seat. Due to previous experience with the other student, the dean of students had some concerns that the two were going to the car to smoke either marijuana or tobacco. Because of this concern, he contacted the police to assist with the situation. The dean of students asked the police to search the car, and a bag of marijuana was found in the car near the passenger door. The police also found a commercially

[2] The district did include an allegation that Telsea's conduct was not in compliance with the school district AODA policy. However, the district did not allege "repeated violations of school rules," nor did the district find that Telsea

made marijuana pipe containing some marijuana and an empty baggie just to the right of the hump in the back seat of the car. A small screen, commonly used in smoking marijuana, was found in the car's ashtray. A search of the other student revealed a homemade marijuana pipe, which the student admitted was used to smoke marijuana earlier that day.

After the presentation of this evidence by the dean of students and the police officer, the pupil was given an opportunity to cross-examine each witness and present her own witnesses. Telsea testified and denied that she had any knowledge of the marijuana. She stated that she and the other student went to her car because the other student wanted to buy her car stereo speakers.

There is no evidence that school board was part of the investigation. Therefore, the investigation was independent of the fact finder. Furthermore, the school board was presented with this "mitigating" information and decided to expel

As part of her third argument, the pupil also complains that the other student who was in the car with her was treated differently. She claims this is a violation of due process. 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), 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; and *Troy Y. v. Burlington School District Board of Education*, Decision and Order No. 309, January 21, 1997. 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; and

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repeatedly violated school rules.

Leo P. v. Whitewater School District Board of Education, Decision and Order No. 351, March 31, 1998.

Because of the error in the notice, I find the school district did not comply with all of the procedural requisites. I, therefore, must overturn this expulsion. However, this decision should not be construed to condone the pupil's conduct.

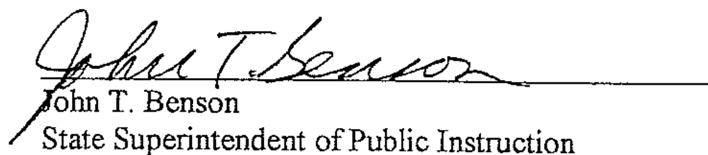
CONCLUSIONS OF LAW

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 Telsea M by the East Troy Community School District Board of Education is overturned.

Dated at Madison, Wisconsin, on February 24, 2000.



John T. Benson
State Superintendent of Public Instruction