Decision and Order No.: 417

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Ryan S. by Barron Area School District Board of Education	DECISION AND ORDER Appeal No.: 99/00 EX 12

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stats. § 120.13(1)(c) from the order of the Barron Area School District Board of Education to expel the above-named pupil from the Barron Area School District. This appeal was filed by the pupil and received by the Department of Public Instruction on April 10, 2000.

In accordance with the provisions of Wis. Adm. Code § PI 1.04(5), 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 § 120.13(1)(c). 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 15, 2000, from the district administrator of the Barron Area School District. The letter advised that a

hearing would be held on February 24, 2000 that could result in the reinstatement of the pupil's previous expulsion from the Barron Area School District through the 1999–2000 school year as well as extend the expulsion through the pupil's 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 which endangered the property, health, or safety of others. The letter specifically alleged that while at school on February 1, 2000, the pupil threatened to rape a female student. The letter also alleged that while at school on February 3, 2000, the pupil grabbed a female student on her right breast. The letter alleged that on November 22, 1999, Ryan was expelled through the end of the 1999-2000 school year and that he was allowed early readmission provided he met several conditions and did not engage in any other incidents of inappropriate touching. The letter alleged that the conduct on February 1 and 3 violated the readmission agreement.

Minutes of the school board expulsion hearing and an audiotape of the expulsion hearing are part of the record. The hearing was held in closed session on February 24, 2000. The pupil's parents appeared at the hearing without counsel. Ryan did not appear at the hearing, because he was placed at Sunburst Youth Home for evaluation. Ryan's mother agreed to proceed without Ryan's presence. 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 that Ryan was identified as a student with a disability recognized by § 504 of the 1973 Rehabilitation Act but that his conduct was not a manifestation of his disability. The board found that 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 found that this conduct also violated the November 22, 1999 expulsion order's conditions of readmission. 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 29, 2000, was mailed separately to the pupil and his parents. The order stated that the pupil's November 22, 1999 expulsion was reinstated through the 1999-2000 school year and that it was extended 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 § 120.13(1)(c), 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 § 120.13(1)(c). 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 two issues. The parent complains that the expulsion was unjust. The parent also raises some concern about why, in November, it was determined that Ryan "did not need the accommodations of the 504 plan" and whether the manifestation meeting in November was held to "cover up their tracks".

Ryan was expelled in November 1999, because he engaged in conduct that endangered the health and safety of others at school. The board found that he inappropriately touched several female students. He was expelled for the 1999-2000 school year but was allowed to apply for early readmission after he had a psychological evaluation and provided he did not engage in similar misconduct. Before the November 1999 expulsion hearing, the IEP team met to conduct a manifestation determination review. The IEP team concluded that Ryan's misconduct was not a manifestation of his disability. It appears, from the notes of the IEP team meeting, that the team also concluded that Ryan did not qualify as a student with a disability under §504 of the 1973 Rehabilitation Act.[1]

To support her argument that the expulsion was unjust, the parent alleges that other boys engaged in similar activity but were not expelled. 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

[1] The information regarding the IEP team meeting and recommendation was provided by the parents with their appeal letter. It was not provided with the "record" that the school district forwarded to the state superintendent, and it does not appear it was used at the expulsion hearing. Normally, the state superintendent does not consider evidence that was not presented at the expulsion hearing. See *Matthew R. v. Burlington Area School District Board of* Education, Decision and Order 383 (May 27, 1999); *Jeffrey L. v. New Lisbon School District Board of Education*, Decision and Order No. 319 (April 8, 1997); and *Matthew M. v. Cedarburg School District Board of Education*, Decision and Order No. 274 (February 14, 1996). However, in this case, it helps to explain the procedural posture of the case and is not relied upon in making the final decision.

the school board as long as the board complies with the procedural requirements set out at Wis. Stats. §120.13(1)(c). *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). Because expulsions are considered on a case-by-case basis, the treatment of other students is not relevant to this 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 *Leo P. v. Whitewater School District Board of Education,* Decision and Order No. 351 (March 31, 1998).

The parent also raises concerns about how the school determined that Ryan no longer qualified as a student with a disability under § 504 of the 1973 Rehabilitation Act. The state superintendent has determined that an expulsion appeal is generally not the appropriate context within which to challenge a district's application of special education provisions to a particular pupil. Such a challenge is generally beyond the scope of Wis. Stats. § 120.13(1)(c).[2] *Michael L. v. New Richmond School District Board of Education,* Decision and Order No. 326 (June 2, 1997); and *Michael P. v. Kenosha Unified School District Board of Education,* Decision and Order No. 172 (October 8, 1990).

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[2] If Ryan does not agree with the decision that was apparently made in November 1999 that he was not a student with a disability under § 504, he must use the administrative remedies available through the United States Department of Education, Office of Civil Rights. In order to challenge a finding by the manifestation determination team, the pupil must avail himself of the due process appeal procedures provided under subchapter V of Chapter 115, Wisconsin Statutes, and PI Chapter 11, Wisconsin Administrative Code. See *Matthew C. M. v. Cedarburg School District Board of Education,* Decision and Order No. 274 (February 14, 1996); *Jessie M. K. v. Tri County Area School District Board of Education,* Decision and Order No. 266 (January 2, 1996); and *John Michael N. v. Random Lake School District Board of Education,* Decision and Order No. 331 (August 5, 1997). Information regarding these two procedures can be obtained from the school district.

However, with regard to a pupil ***identified*** as a student with a disability,[3] 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 *Shawn C. v. Mauston School District Board of Education,* Decision and Order No. 375 (December 29, 1998); *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).

There is some confusion in the hearing record regarding whether Ryan is identified as a student with a disability. According to the record, there was no evidence presented at the expulsion hearing that Ryan was a student with a disability. However, the board's February expulsion order specifically states that Ryan is a student with a disability. Additionally, there is no evidence in the record that a manifestation review was conducted regarding the conduct that occurred on February 1 and 3, 2000. Yet, the order states there was a manifestation review conducted, and it was determined his conduct was not a manifestation of his disability. To further complicate the record, the manifestation review conducted before the November expulsion hearing made a finding that Ryan was not disabled under the definition of § 504.

Due to this confusion, I cannot conclude that the board's findings that Ryan is a student with a disability and that his conduct was not a manifestation of his disability are based on the record. Therefore, I am compelled to overturn the expulsion order.

However, the school district may rectify this error. If Ryan is not disabled, as suggested by the November manifestation review, that information can be presented to the board, and the

[3] The law previously used the term "exceptional education need." While the terms do not have identical meanings, for the purposes used in this decision, the terms are interchangeable.

board can amend its expulsion order to reflect the evidence. On the other hand, if such a determination has not been made, the district may conduct a manifestation review concerning the February conduct. See *Glenn P. v. Wauwatosa School District Board of Education*, Decision and Order No. 135 (February 24, 1986); and *Michael C. G. v. Hudson School District Board of Education*, Decision and Order No. 219 (February 11, 1994). If the IEP team determines his conduct was not a manifestation of his disability, the board could issue a decision and order expelling the pupil without rehearing the evidence. See *Shawn C. v. Mauston School District Board of Education*, Decision and Order No. 375 (December 29, 1998). If the IEP team determines that his conduct was a manifestation of his disability, the school board may not expel Ryan for this conduct. See *William S. v. Suring School District Board of Education*, Decision and Order No. 98, (June 17, 1982).

In reviewing the record in this case, I find the school district did not comply with all of the procedural requisites. I, therefore, overturn 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 did not comply with all of the procedural requirements of §120.13(1)(c).

ORDER

IT IS THEREFORE ORDERED that the expulsion of Ryan S by the Barron Area School District Board of Education is overturned.

Dated at Madison, Wisconsin on June 9, 2000.

John T. Benson
State Superintendent of Public Instruction

APPEAL RIGHTS

Wis. Stats. § 120.13(1)(c) specifies that an appeal from this Decision and Order may be taken within 30 days to the circuit court of the county in which the school is located. Strict compliance with the service provisions of § 227.53 is required. In any such appeal, the State Superintendent of Public Instruction shall be named as respondent.