Decision and Order No.: 423

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Travis J. M. by Deerfield Community School District Board of Education	DECISION AND ORDER Appeal No.: 99/00 EX 20

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 Deerfield Community School District Board of Education to expel the above-named pupil from the Deerfield Community School District. This appeal was filed by the pupil and received by the Department of Public Instruction on July 28, 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 May 5, 2000, from the district administrator of the Deerfield Community School District. The letter advised

that a hearing would be held on May 15, 2000 that could result in the pupil's expulsion from the Deerfield Community School District until his 21st birthday. The letter was sent separately to the pupil and his parents by certified mail. The letter alleged that Travis knowingly conveyed a threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives. The letter specifically alleged that on April 28, 2000, Travis was involved in making a written bomb threat to Deerfield High School. Minutes of the school board expulsion are part of the record.

The hearing was held in closed session on May 15, 2000. 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 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 May 19, 2000, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the 2005-06 school year, with an opportunity for conditional readmission at the beginning of the 2001-02 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 § 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 several issues. First, the pupil alleges that he did not have sufficient time to prepare for the hearing or talk to a lawyer. The pupil also alleges that his father was ill the night of the hearing, thus he had to attend the hearing by himself and was not able to fully present evidence or defend himself. The minutes of the meeting confirm that Travis appeared at the expulsion hearing without any parent. However, there was no request to adjourn the hearing so his father could be present, to prepare for the hearing, or talk to a lawyer. Matters not raised before the board cannot be raised for the first time on appeal. *Tony R. v. Lake*

Geneva J1 School District Board of Education, Decision and Order No. 259 (August 11, 1995) and *Jennifer C. v. Winter School District Board of Education*, Decision and Order No. 264 (December 6, 1995). The notice of expulsion hearing was mailed to Travis ten days before the expulsion hearing. The statute requires that a hearing be held no less than five days after the notice of expulsion hearing is given. See sec. 120.13(1)(c)(4), Stats. These five days include weekends and holidays. *Marc G. v. Maple School District Board of Education*, Decision and Order No. 213, (December 20, 1993); *Joshua K. v. Clinton Community School District Board of Education*, Decision and Order No. 216, (January 31, 1994); *Michael Ryan H.* v. *Clinton Community School District Board of Education*, Decision and Order No. 222, (March 10, 1994). Thus, the school board complied with this procedural requirement.

Travis also alleges that there was no evidence to support the board's finding that his conduct endangered the health, safety, or property of others at school. It has been repeatedly held that arguments concerning the sufficiency of the evidence are generally beyond the scope of review. *Leo P. v. Whitewater Unified School District*, Decision and Order No. 351 (March 31, 1998); *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. *Leo P. v. Whitewater Unified School District*, Decision and Order No. 351 (March 31, 1998); *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). Furthermore, the expulsion statute specifically provides that a threat to damage property is conduct that endangers the health, safety, or property of others. §120.13(1)(c)1.

The pupil also challenges the board's factual finding that Travis' conduct violated a board policy. The pupil's appeal letter states: "Alleged violation of School Board policy #JFC-2 - no notice of what that policy is, in the school handbook." It appears Travis is arguing that he does not know what policy JFC-2 concerns. However, the minutes of hearing indicate the student handbook, including policy JFC-2, was used as an exhibit at the hearing. JFC-2 is the school board's code of conduct and policy concerning the removal of students, by teachers, from the classroom, adopted pursuant to §118.164. The notice of expulsion hearing alleged that Travis violated this policy. A copy of the policy was included with the notice of expulsion hearing. Regardless, the expulsion statute does not require proof that his conduct violated the code of conduct or that he had notice of the code of conduct. Furthermore, neither the state superintendent nor the courts have ever required a school district to provide proof that the pupil was advised of the school policy or rules when the expulsion was based on a bomb threat or conduct endangering the property, health, or safety of others. The only time the district has been required to prove the pupil received the school policy is when the pupil was charged with repeated violation of school rules. See, e.g., *Jesse M. K. v. Tri County Area School District Board of Education*, Decision and Order No. 266 (January 2, 1996); *Hope B. v. Randolph School District Board of Education*, Decision and Order No. 225 (April 12, 1994); *Antonio M. v. Kenosha Unified School District Board of Education*, Decision and Order No. 176 (April 18, 1991).

The pupil also complains that the board did not follow this policy's requirements regarding the long-term removal of students. However, the pupil does not explain which part of the policy was not followed. The state superintendent does not have authority to review a decision to remove a pupil from the classroom pursuant to the code of conduct developed according to § 118.164.[1]

In the appeal letter the pupil also asks, "Why did the School Board decide on a 6 year expulsion rather than the 3 years that the principal suggested?" Since the authority to "approve, reverse or modify the decision" was conferred upon the state superintendent by 1987 Wis. Act 88, sec.3, the state superintendent has consistently declined to modify the length of expulsions. *Troy Y. v. Burlington School District Board of Education,* Decision and Order No. 309 (January 21, 1997); *Tony R. v. Lake Geneva Joint No. 1 School District Board of Education,* Decision and Order No. 294 (June 24, 1996); *Brandon H. v. DeSoto Area School District Board of Education,* Decision and Order No. 206 (May 3, 1993). The school board is in the best position to know and understand what its community requires as a response to school misconduct. It would be inappropriate for me, absent an extraordinary circumstance or a violation of procedural requirements, to second-guess the appropriateness of a school board's determination.

Finally, the pupil states that he disagrees with the conclusions of the district's determination that he is not a child with a disability. 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 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*

[1] Policy JFC-2 states removal from a classroom by a teacher may also include conduct that will result in a decision by administration to suspend or recommend expulsion of the pupil. The procedures are not mutually exclusive.

Unified School District Board of Education, Decision and Order No. 172 (October 8, 1990). Thus, if Travis disagrees with the finding that he is not a child with a disability, he must avail himself of the due process appeal procedures provided under subchapter V, Chapter 115, Wis. Stats., and PI Chapter 11, Wis. Admin. Code.[2]

While none of the pupil's complaints warrant overturning the expulsion, a procedural error related to the grounds alleged in the notice and the grounds found by the school board requires me to overturn the expulsion. In the notice of expulsion hearing, the administration relied upon the expulsion ground related to making or participating in a bomb threat. This is a valid ground for expulsion. However, the board's conclusions of law reference a different, valid ground for expulsion. The board found that his conduct endangered the health, safety, or property of others at school. Because the school district is required to provide the pupil advance notice of the statutory grounds under which it intends to proceed, it cannot make its finding based upon a different statutory ground for which the student did not receive notice.

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

[2] For more information about the parameters of special education and the appeal process, the pupil may contact the Special Education Team at the Department of Public Instruction or consult the department's website at http://www.dpi.state.wi.us/dpi/dlsea/een/index.html.

the ultimate findings of the board. [*Citing John K. v. Wisconsin Rapids School District*, 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 requirements renders the expulsion void. Even where a pupil unequivocally admits misconduct that is grounds for expulsion, the failure to provide the mandated, advance statutory notice calls for reversal. See *Nick N. v. Elcho School District Board of Education,* Decision and Order No. 373 (December 4, 1998); *Justin E. v. Antigo School District Board of Education,* Decision and Order No. 329 (July 24, 1997); *Ryan G. v. Sparta Area School District,* Decision and Order No. 325 (May 19,1997); *John K. v. Wisconsin Rapids School District*, Decision and Order No. 178 (May 17, 1991); *Christopher K. v. West Allis School District*, Decision and Order No. 166 (April 18, 1990); *Travis V. v. Waterloo School District*, Decision and Order No. 143 (July 2, 1986). Because the notice of expulsion and the finding of fact and conclusions of law are not based upon at least one common statutory ground, the expulsion must be reversed.

Nevertheless, it may be possible for the board, without completely rehearing the case, to correct this error. See decisions in *Nick N. v. Elcho School District Board of Education,* Decision and Order No. 373 (December 4, 1998); *Adam S. v. East Troy Community School District Board of Education,* Decision and Order No. 300 (August 9, 1996); *Nichole P. v. Crandon School District Board of Education*, Decision and Order No. 184 (February 7, 1992); and *Nichole P. v. Crandon School District Board of Education*, Decision and Order No. 193 (May 29, 1992).

This decision in no way condones the pupil's conduct or suggests that expulsion is not appropriate. However, because the procedural mandates were not strictly complied with, I am compelled to reverse the expulsion order.

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 Travis J. M[illegible]y the Deerfield Community School District Board of Education is reversed.

Dated at Madison, Wisconsin, on September 25, 2000.

John T. Benson

John T. Benson
State Superintendent of Public Instruction