Decision and Order No.: 444

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Brian P. by Sparta Area School District Board of Education	DECISION AND ORDER Appeal No.: 00/01 EX 18

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 Sparta Area School District Board of Education to expel the above-named pupil from the Sparta Area School District. This appeal was filed by the pupil and received by the Department of Public Instruction on July 18, 2001.

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 18, 2001, from the district administrator of the Sparta Area School District. The letter advised a hearing

would be held May 29, 2001, before an independent hearing officer that could result in the pupil's expulsion from the Sparta Area 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 which endangered the property, health, or safety of others. The letter specifically alleged that on May 14, 2001 at approximately 7:45 am he possessed and transported drug paraphernalia and an illegal substance that was found in a vehicle parked at Sparta High School.

A joint hearing, involving Brian and Drew ("co-defendants" in the action) began on May 29 and was completed on June 13, 2001. Both pupils, their parents and their separate counsel appeared at the hearings. The independent hearing officer appointed by the school board, Attorney Locante, heard evidence from the school district administration concerning the grounds for expulsion. The pupil, his parents and counsel were given an opportunity to present evidence and cross-examine witnesses. Minutes and an audiotape of the expulsion hearing and copies of the exhibits used during the hearing were submitted as part of the record.

Following the hearing, the hearing officer issued a "Findings and Order for Suspension" denying expulsion but ordering a 13 day suspension. This order, signed on July 3, 2001, made specific findings of facts and conclusions of law. In summary, the hearing officer found that prior to school on May 14, 2001, Brian and Drew agreed to meet on May 14, 2001 to obtain aluminum foil to make a smoking device. While en route to school in Drew's car, Brian possessed marijuana. Before entering school, the vial containing a trace amount of marijuana and the used foil pipe were hidden in Drew's car. In the school, the principal detected the odor of marijuana on Drew. When questioned, Drew and Brian admitted to smoking marijuana on the

way to school and storing the remnants in Drew's car. The car was subsequently searched and the pipe and trace marijuana was found.

The hearing officer then concluded that neither Brian nor Drew's conduct endangered the property, health, or safety of others. She concluded that the board had a "Zero Tolerance" policy, but that the policy permitted either suspension or expulsion as a consequence for their actions. Finally, she concluded that expulsion was wholly out of proportion to the offense they committed. As a result, she ordered a 13 day suspension, concluding with the 2000-01 school year. She made no finding that the interests of the school demand expulsion.

On June 29, 2001, the school administration notified Brian and Drew, and their parents, that a school board meeting would be held on July 9, 2001 to review the Findings and Order of the hearing officer. Brian, Drew, their parents and attorneys attended the July 9 board meeting. The board submitted minutes of the meeting. At the meeting, Brian and Drew's attorneys conceded that the marijuana and aluminum pipe were kept in the car on school property. Both Brian and Drew contested the board's authority to reverse or modify the hearing officer's order because it was not an expulsion order. The board concluded, as stated in the minutes of the meeting that Brian and Drew did endanger the health and safety of all students by bringing marijuana and paraphernalia on to school property and by smelling like marijuana in school. They also found that both boys admitted to the board that they engaged in similar conduct on school grounds in the past. The board then ordered an expulsion of nine weeks of school in an odd structure encompassing an entire semester. It appears the board attempted to order a "stayed" term of expulsion and a semester long term of "probation" during which the nine weeks could be ordered to be served.[1]

[1] This is an unconventional expulsion term that does not appear to be authorized by statute. The board subsequently reconvened and entered a more conventional expulsion order.

On July 16, 2001, a letter from the district superintendent, memorializing the board's "modified expulsion order" was sent or given to Brian, Drew, their parents and attorneys. On July 18, 2001, Brian and Drew appealed this written letter to the state superintendent. On August 16, 2001, the district superintendent mailed a letter to Brian, Drew, their parents and attorneys, informing them that a school board meeting would be held on August 21, 2001. At the meeting, the board would further deliberate the "expulsion order" issued by the hearing officer.

Brian and Drew were represented by counsel at the August 21, 2001 hearing. Again, counsel objected to the board's authority to review the case. The objections was based on two issues: That the board did not have authority to review the order because it was not an expulsion order and that because the appeal had already been filed, jurisdiction lay with the state superintendent, not the school board. The board went into closed session and emerged later announcing that it had decided to expel Brian and Drew. An order was subsequently prepared and sent to Brian, Drew, their parents and attorneys.

The board's order, dated August 21, 2001, found Brian and Drew possessed marijuana on the way to school and hid the pipe in a car parked on the high school premises. The board found this conduct endangered the property, health and safety of others. The board also found the interests of the school demanded expulsion. The board expelled Brian and Drew until the end of the first semester of the 2001-02 school year with an opportunity for conditional readmission. The order specified that the board reached this conclusion without altering any credibility findings of the hearing officer.

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) and (e), 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 ensure 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.

This is perhaps the most convoluted procedural history of an expulsion case the superintendent has ever seen. While the board complied with timely notice of the various hearing, its actions after the hearing examiner's decision are confusing and protracted and at times contrary to clear statutory law. The pupil raises one primary issue concerning the school board's authority to review a hearing officer's determination not to expel. Therefore, it is necessary to examine the statutes and board policies involved.[2]

[2] The pupil also makes a due process argument; however, constitutional issues such as due process are generally beyond the scope of the state superintendent's purview.

Wis. Stats. §120.13(1)(e) allows a school board to adopt a resolution to use an independent hearing officer to hear expulsion cases, *instead* of using the procedure specified in 120.13(1)(c)3.[3] The Sparta School Board policy implementing this section "Article 159 – Expulsion Hearing Officer" states:

> "The school board may adopt a resolution, which is effective only during the school year in which it is adopted, authorizing any of the following to determine pupil expulsion from school:
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> 1. A School Board Hearing
> 2. An independent hearing panel appointed by the School Board
> 3. An independent hearing officer or designee appointed by the School Board.
>
> Within 30 days after the date on which an expulsion is issued by the hearing officer or panel, the School Board shall review the expulsion order and shall, upon review, approve, reverse or modify the order. The order of the hearing officer or panel shall be enforced while the School Board reviews the order.
>
> The School Board's decision can be appealed to the state superintendent. The decision of the School Board shall be enforced while the state superintendent reviews the decision."

The pupil argues that because the hearing officer did not order expulsion, that the school board is precluded, both by statute and board policy, to review the hearing officer's determinations. The school board asserts that the general, plenary powers contained in §120.13, give the board authority to review the hearing officer's decision not to expel. The board did not raise or address the application of its school board policy.

In 1995 Wis. Act 27, the legislature added plenary powers to school board's explicit powers.

> §120.13 **School Board Powers** The school board of a common or union high school district may do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils, and including all of the following:...

[3] §120.13(1)(e) is printed in its entirety and attached to this decision.

The Wisconsin Court of Appeals has interpreted this statute and its interaction with more specific statutes in *Pritchard v. Madison Metropolitan School District,* 2001 WI App 62. In that case, the court of appeals concluded that §§120.13 and 118.001[4] allow school boards to offer benefits to a more expansive class of people than is listed in the municipal code, Wis. Stats. §66.185. Thus, §120.13 appears to expand the board's authority. However, *Pritchard* did not analyze the application of these plenary powers as it relates to powers enumerated in §120.13 and the procedural safeguards contained therein. Therefore, it is not clear whether the *Pritchard* analysis would apply to this situation.

In the present case, the school board had a policy implementing §120.13(1)(e). (*Article 159*, quoted above). That particular policy, however, did not incorporate the plenary powers of §§120.13 and 118.001. In fact, on July 25, 2000, the school board met and discussed who shall hear expulsion cases in the district. The board rejected a proposal to allow the school board to be the "hearing officer". On August 22, 2000, the board again discussed who shall hear expulsion cases. The board moved to appoint Attorney Jack Buswell the hearing officer. *Pritchard* did not analyze the application of these plenary powers when a school board policy and subsequent actions have expressly adopted individual powers contained in §120.13 but not the plenary powers. Thus, the *Pritchard* analysis does not apply. By not incorporating or referencing its plenary powers as they relate to the use of hearing officer at expulsion hearings, the board has chosen not to use them. Therefore, the board must abide by the other limited and specific language of the statute. The language of the statute is clear.

> "Upon the ordering by the hearing officer or panel *of the expulsion of a pupil*, the school district shall mail a copy of the order to the school board, the pupil

[4] 118.001 **Duties and powers of school boards; construction of statutes.** The statutory duties and powers of school boards shall be broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers, if the action is not prohibited by the laws of the federal government or of this state.

> and, if the pupil is a minor, the pupil's parent or guardian. Within 30 days after the date on which *the order is issued, the school board shall review the expulsion order* and shall, upon review, approve, reverse or modify the order. The order of the hearing officer or panel shall be enforced while the school board reviews the order. §120.13(1)(e)3. (emphasis added)

In this case, the hearing officer did not order expulsion. Therefore, there was no expulsion or expulsion order. The board argues that "expulsion order" includes an order not to expel. However, this argument does not address the term used in the statutes. §120.13(1)(e) specifically uses the term "expulsion" independent of "expulsion order" in at least two places:

> "...Upon the ordering by the hearing officer or panel *of the expulsion of a pupil,...*" §120.13(1)(e)3.

> "That *if the hearing officer or panel orders the expulsion of the pupil* the school district shall mail a copy of the order to the school board, the pupil and, if the pupil is a minor, to the pupil's parent or guardian." §120.13(1)(e)4.g.

When the statute is clear and unambiguous, the plain meaning must be applied. See *State v. Isaac J.R.*, 220 Wis.2d 251, 255-56, 582 N.W.2d 476 (Ct.App.1998). "Upon the ordering by the hearing officer or panel *of the expulsion of a pupil,"* is clear and unambiguous. Only after the hearing officer orders expulsion do the remaining procedures apply. According to the statute, there was no requirement that the hearing officer issue any type of order, particularly an expulsion order, to relay her decision denying expulsion.

Furthermore, the statute states that the board may use the independent hearing officer option, *instead* of the board hearing procedure under §120.13(1)(c)1. See §120.13(1)(e). In this case, the board used both procedures. The hearing officer heard testimony over two days and issued written findings of facts and conclusions of law. The board held two separate meetings to discuss the hearing officer's decision. At the first meeting on July 9, 2001, the board heard additional evidence through the pupils' attorney. (Evidence that the conduct occurred on school

grounds - a required element that must be found before expulsion can be ordered under §120.13(1)(c)1.) The second meeting on August 21, 2001, occurred more than 30 days after the hearing officer's written order denying expulsion, and finally resulted in a written order of expulsion. Without these supplemental facts, the board would not have had sufficient findings of facts to support an expulsion order.

In conclusion, the plenary powers, which may grant the board authority to review a decision not to expel, were not adopted by the board.[5] Therefore, the board did not have statutory authority to review the decision by the hearing examiner denying expulsion. Furthermore, the board did not have statutory authority to use two expulsion procedures in one case.

This decision does not condone the pupil's conduct. Drug use is a significant threat to pupils and to school safety. The state superintendent routinely supports schools in the effort to make schools drug free. However, the right to an education is a precious right that is protected by both the state constitution and the laws of Wisconsin. The procedural requirements enacted by the legislature must be followed before revoking a pupil's constitutional and statutory right to a free public education. If the statutory procedures are to be changed, the legislature must be the entity to make the change. I do not have that authority.

In reviewing the record in this case, I find the school district did not comply with all of the procedural requisites. I, therefore, reverse this expulsion.

[5] This decision should not be construed as agreeing that the plenary powers of §120.13 allow a school board to alter the specific statutorily required expulsion *procedures*. It seems incongruous that a board could avoid the statutory procedures by merely adopting the broad plenary powers in the introduction to §120.13. This question, however, is left for another day, or perhaps the circuit court.

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) and (e).

ORDER

IT IS THEREFORE ORDERED that the expulsion of Brian P. by the Sparta Area School District Board of Education is reversed.

Dated this 17th day of September, 2001

Anthony S. Evers, Ph.D.
Deputy State Superintendent of Public Instruction

Attachment

Wis. Stats. §120.13(1)(e)

1. The school board may adopt a resolution, which is effective only during the school year in which it is adopted, authorizing any of the following to determine pupil expulsion from school under subd. 2. instead of using the procedure under par. (c)3.:
    a. An independent hearing panel appointed by the school board.
    b. An independent hearing officer appointed by the school board.
2. During any school year in which a resolution adopted under subd. 1. is effective, the independent hearing officer or independent hearing panel appointed by the school board :
    a. May expel a pupil from school whenever the hearing officer or panel finds that the pupil engaged in conduct that constitutes grounds for expulsion under par. (c)1. or 2.
    b. Shall commence proceedings under subd. 3. and expel a pupil from school for not less than one year whenever that hearing officer or panel finds that the pupil engaged in conduct that constitutes grounds for expulsion under par. (c)2m.
3. Prior to expelling a pupil, the hearing officer or panel shall hold a hearing. Upon request of the pupil and, if the pupil is a minor, the pupil's parent or guardian, the hearing shall be closed. The pupil and, if the pupil is a minor, the pupil's parent or guardian, may be represented at the hearing by counsel. The hearing officer or panel shall keep a full record of the hearing. The hearing officer or panel shall inform each party of the right to a complete record of the proceeding. Upon request, the hearing officer or panel shall direct that a transcript of the record be prepared and that a copy of the transcript be given to the pupil and, if the pupil is a minor, the pupil's parent or guardian. Upon the ordering by the hearing officer or panel of the expulsion of a pupil, the school district shall mail a copy of the order to the school board, the pupil and, if the pupil is a minor, the pupil's parent or guardian. Within 30 days after the date on which the order is issued, the school board shall review the expulsion order and shall, upon review, approve, reverse or modify the order. The order of the hearing officer or panel shall be enforced while the school board reviews the order. The expelled pupil or, if the pupil is a minor, the pupil's parent or guardian may appeal the school board's decision to the state superintendent. If the school board's decision is appealed to the state superintendent, within 60 days after the date on which the state superintendent receives the appeal, the state superintendent shall review the decision and shall, upon review, approve, reverse or modify the decision. The decision of the school board shall be enforced while the state superintendent reviews the decision. An appeal from the decision of the state superintendent may be taken within 30 days to the circuit court of the county in which the school is located. This paragraph does not apply to a school district operating under ch. 119.
4. Not less than 5 days' written notice of the hearing under subd. 3. shall be sent to the pupil and, if the pupil is a minor, to the pupil's parent or guardian. The notice shall state all of the following:

a. The specific grounds, under par. (c)1., 2. or 2m., and the particulars of the pupil's alleged conduct upon which the expulsion proceeding is based.
b. The time and place of the hearing.
c. That the hearing may result in the pupil's expulsion.
d. That, upon request of the pupil and, if the pupil is a minor, the pupil's parent or guardian, the hearing shall be closed.
e. That the pupil and, if the pupil is a minor, the pupil's parent or guardian may be represented at the hearing by counsel.
f. That the hearing officer or panel shall keep a full record of the hearing and, upon request, the hearing officer or panel shall direct that a transcript of the record be prepared and that a copy of the transcript be given to the pupil and, if the pupil is a minor, the pupil's parent or guardian.
g. That if the hearing officer or panel orders the expulsion of the pupil the school district shall mail a copy of the order to the school board, the pupil and, if the pupil is a minor, to the pupil's parent or guardian.
h. That within 30 days of the issuance of an expulsion order the school board shall review the order and shall, upon review, approve, reverse or modify the order.
i. That, if the pupil is expelled by the hearing officer or panel, the order of the hearing officer or panel shall be enforced while the school board reviews the order.
j. That, if the pupil's expulsion is approved by the school board, the expelled pupil or, if the pupil is a minor, the pupil's parent or guardian may appeal the school board's decision to the department.
k. That if the school board's decision is appealed to the department, within 60 days after the date on which the department receives the appeal, the department shall review the decision and shall, upon review, approve, reverse or modify the decision.
l. That the decision of the school board shall be enforced while the department reviews the school board's decision.
m. That an appeal from the decision of the department may be taken within 30 days to the circuit court for the county in which the school is located.
n. That the state statutes related to pupil expulsion are ss. 119.25 and 120.13(1).