

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of  Zachariah I  by Sparta Area School District Board of Education	DECISION AND ORDER  Appeal No.: 00/01 EX20
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**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 August 17, 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 March 23, 2001, from the district administrator of the Sparta Area School District. The letter advised a

hearing would be held on April 4, 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 March 16, 2001 at 1:25 p.m. he assaulted another student at Sparta High School. An audiotape and transcript of the expulsion hearing are part of the record. Minutes of school board meetings discussing the independent hearing officer's decision are also part of the record.

The hearing was held in closed session on April 4, 2001. The pupil and his parents appeared at the hearing represented by counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The administration recommended an expulsion for at least one semester, if certain conditions were met. The longest expulsion recommendation was until the first semester of the 2002-03 school year. The pupil and his parents were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations. Numerous witnesses to the assault testified, as well as police officers and school administrators.

On April 6, 2001, the independent hearing officer issued a written decision finding that Zachariah intentionally struck another student on March 16, 2001, at school. The order found that his conduct constituted grounds for expulsion, however, the interests of the school do not demand expulsion. Therefore, the hearing officer dismissed the expulsion proceeding.

On April 17, 2001, the school board met to discuss the hearing officer's decision. The pupil, his parents and attorney were at the hearing. The pupil's attorney and the district's attorney were given an opportunity to address the board. The victim's mother also attended the

hearing and offered information about the injuries her son received as well as information about the juvenile court process Zachariah was facing. She also provided information of a time earlier in the year when Zachariah was reprimanded during a wrestling meet. Mr. Jorgenson<sup>1</sup> gave a statement concerning the first aid he administered to the victim. Neither the victim's mother nor Mr. Jorgenson testified at the hearing before the hearing officer. There is no indication in the record that the board reviewed the transcript of the expulsion hearing. After hearing this information, the board determined to overrule the hearing officer's decision and ordered Zachariah expelled until the second semester of the 2001-02 school year. The board also ruled that Zachariah could re-enroll in school anytime after the first semester if three conditions were met. The board did not issue a written decision, nor did they make a specific finding that the interests of the school demanded expulsion. The school superintendent wrote to Zachariah and his parents informing them of the board's decision. This letter did not indicate the grounds for expulsion nor whether the interests of the school demanded expulsion.

On July 24, 2001, the board met again to discuss the expulsion of Zachariah. Zachariah requested the board to allow him to re-enroll in school prior to school starting. It is not clear whether he met any of the conditions the board had earlier established. The board denied his request.

On August 10, 2001, the board sent a letter to Zachariah and his parents advising them that on August 17, 2001, the board would again deliberate the expulsion. On August 16, 2001, the board sent a revised notice to the pupil and his parents rescheduling the meeting to August 21, 2001. On August 21, 2001, the board met and issued a written order of expulsion. The written order of expulsion included a finding that Zachariah engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or

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<sup>1</sup> It is not clear from the record who Mr. Jorgenson is.

safety of others and that the interests of the school demands expulsion. It expelled Zachariah indefinitely, but allowed him to apply for early admission at the beginning of the second semester of the 2001-02 school year if he met three conditions. These three conditions were slightly different from the three conditions decided upon in April by the board. The board explained that its decision to overrule the hearing examiner's decision was not based upon a different assessment of any witness' credibility.

### 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 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.<sup>2</sup>

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.<sup>3</sup> The Sparta School Board policy implementing this section "Article 159 – Expulsion Hearing Officer"<sup>4</sup> 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:

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 by statute from reviewing the hearing officer's determinations. The school

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<sup>2</sup> 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.

<sup>3</sup> §120.13(1)(e) is printed in its entirety and attached to this decision.

<sup>4</sup>Neither the board nor the pupil submitted the board's policy. However, because I recently reviewed another expulsion involving Sparta School District that occurred during the same school year, I am aware of the policy that was in effect at the time of the expulsion. A copy of that policy is attached to this decision.

board asserts that the general, plenary power contained in §§120.13, 120.12 and 118.001, give the board authority to review the hearing officer's decision not to expel. The board argues that whether the school board policy adopted the plenary powers is irrelevant. The board argues that there is no requirement to adopt the plenary powers in order to assert the power.

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:...

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<sup>5</sup> 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

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<sup>5</sup> **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.

hear expulsion cases in the district.<sup>6</sup> 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. Despite the arguments of the school board, this “legislative” history reveals that the board chose not to adopt the plenary powers. 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 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:

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<sup>6</sup> Information concerning the school board’s resolution to adopt the hearing officer alternative was not provided by either party. However, because I recently reviewed an expulsion involving Sparta School District in which this information was provided, I am aware of the history and procedures involved. A copy of these board minutes will be sent to both parties along with this decision.

“...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 his 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 and issued written findings of facts and conclusions of law. The board held three separate meetings to discuss the hearing officer’s decision. At the first meeting, in April 2001, the board heard additional evidence. The mother of the victim provided information concerning the juvenile or criminal court proceedings, as well as her perceptions and opinions about the injuries to her son. Another witness spoke about the first aid he administered to the victim. Also, there is no evidence that the board reviewed the facts or testimony elicited at the expulsion hearing held by the independent hearing officer. The second meeting, in July 2001, concerned Zachariah’s attempt to be allowed to return to school early. The third 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.



In conclusion, the plenary powers, which may grant the board authority to review a decision not to expel, were not adopted by the board.<sup>7</sup> 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. Physical assaults are violence and cannot be tolerated in schools. The state superintendent routinely supports schools when they expel students for committing physical violence on another member of the school community. 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.

### 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).

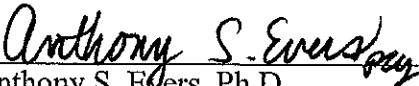
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<sup>7</sup> This decision should not be construed as agreeing that the plenary powers of §120.13 allow a school board to alter the specific statutorily required expulsion *procedures*. It seems incongruous that a board could avoid the statutory procedures 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.

**ORDER**

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

Dated this 16 day of October, 2001

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