Decision and Order No.: 449

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Michael E. K. by Burlington Area School District Board of Education	DECISION AND ORDER Appeal No.: 00/01 EX 23

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 Burlington Area School District Board of Education to expel the above-named 11th grade pupil from the Burlington Area School District. This appeal was filed by the pupil and received by the Department of Public Instruction on November 14, 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 October 16, 2001, from the district administrator of the Burlington Area School District. The letter advised a

hearing would be held on October 29, 2001 that could result in the pupil's expulsion from the Burlington Area School District through 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 the pupil possessed and smoked marijuana in a parked car in the student parking lot at Burlington High School on October 11, 2001. Minutes of the school board expulsion hearing, a copy of exhibits used at the hearing, and an audiotape of the expulsion hearing are part of the record.

The hearing was held in closed session on October 29, 2001 . 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 did engage 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 November 2, 2001, was mailed separately to the parents.[1] The order stated the pupil was expelled through the remainder of the 2001-02 school year, with an opportunity for early readmission at the beginning of the second semester.

[1] While the cover letter is addressed to both Michael and his parents, the board has not provided any evidence it was sent to them separately. However, the pupil is represented by counsel in this appeal and counsel did not raise this objection. More importantly however, as will be explained later in this opinion, the expulsion is reversed and the

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, by his attorney, raises four issues in his appeal letter. The pupil alleges that the notice of the hearing was insufficient; that the student was treated as a regular student even though he qualified for special education needs; that he was inadequately evaluated for special

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board must re-examine the findings. If, on remand, the board decides to expel Michael, it must send separate notices to Michael and his parents.

education needs; and, that the expulsion, by law, cannot exceed 15 days. In a subsequent brief filed by the pupil's attorney, he alleges that the board improperly relied upon hearsay at the expulsion hearing. Finally, in his reply brief, the pupil's attorney addresses the special education issues raised in the appeal letter.[2]

First, I will address the pupil's arguments concerning sufficiency of notice and use of hearsay. The notice in this case contained all statutorily required information. It properly advised him that he had the right to be represented by counsel at the hearing and to present evidence, including witnesses. In his reply brief, the pupil's attorney alleges that the notice did not advise the pupil of a right to cross-examine witnesses. The notice of hearing did not include this information, however the expulsion statute, §120.13(1)(c)4., does not require that this be in the notice of hearing. Furthermore, contrary to the pupil's allegations in his reply brief, the pupil was advised at the beginning of the hearing that "anybody who wants to ask questions may". There was no error in the notice of expulsion hearing.

The pupil's attorney also alleges that the board improperly relied upon hearsay evidence. While the board did rely on a great deal of hearsay, it was not solely based upon hearsay. In fact, the pupil admitted to the principal and the investigating officer that he smoked and possessed marijuana in a parked car in the high school parking lot. That principal testified to the pupil's admissions. The pupil's admissions are not hearsay §908.01(4)(b)1. The board properly relied on the evidence presented at the hearing.

[2] The board objects to the consideration of these arguments contained in the reply brief but not in the initial brief. There pupil's attorney does not provide an explanation as to why these issues, which were the basis for his appeal, were not addressed in his initial brief but saved for his reply brief. In general, this is not fair to the opposing party. However, the state superintendent has never been bound by the issues raised by the parties, but rather she has accepted the responsibility to review the record for compliance when an appeal is made. Furthermore, the special education issue was raised in the appeal letter and was not addressed by the board. Finally, the decision in this case allows the board to review its decision and rectify any errors. Thus, the failure of the pupil's attorney to properly brief the issue is not pivotal in this case.

The pupil also alleges that he is a student with a disability and therefore could not be expelled for his conduct. If a child is identified as disabled, he or she may still be expelled if the conduct was not a manifestation of his or her disability.[3] In this case, there is some evidence in the record that the pupil is disabled and has a §504 plan due to his disability. This is stated in a psychological report that was prepared at the request of the pupil's mother after the alleged misconduct.[4] The report states "Mike is in the 11th grade at Burlington High School in regular education with a 504 accommodation plan due to ADHD." Additionally, the notice of expulsion states, in the last paragraph, "In addition, an expulsion may constitute a change of educational placement." The term "change of educational placement" is a term used in special education law and relates to the place where a child receives his educational services. This evidence leads to the conclusion that Michael is a pupil with a disability under §504.

Although this department is not authorized to enforce §504, it is generally understood that §504 prohibits expulsion of a pupil for conduct which is a manifestation of his disability. *John N. v. Random Lake School District Board of Education*, Decision and Order No. 331 (August 5, 1997). Based upon the conclusion that Michael is disabled under §504, the district was required to conduct a manifestation determination review. There is no evidence that the district conducted such a hearing or determined whether his conduct, i.e. possession and use of marijuana at school on October 11, 2001, is a manifestation of his disability. This review is required and failure to do so, requires the state superintendent to reverse the expulsion. See *Ryan S. v. Barron Area School District Board of Education*, Decision and Order No. 417 (June 9, 2000); *Shawn C. v. Mauston School District Board of Education*, Decision and Order No. 375

[3] However, the board may be required to provide educational services during the expulsion.
[4] The pupil's attorney, at times, seems to object to the psychological report because it is uncertified. However, it is the only direct reference to Michael's status disabled, which, supports one of the pupil's arguments.

(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).

However, the school district may rectify this error. If this unchallenged comment in the psychological report is not true and Michael is not disabled, then the board can be advised of this fact. The board can then reaffirm the expulsion order. On the other hand, if Michael is disabled and has a §504 plan, the district may conduct a manifestation review. See *Shawn C. v. Mauston School District Board of Education*, Decision and Order No. 375 (December 29, 1998); *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 it is determined that 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 *Ryan S. v. Barron Area School District Board of Education*, Decision and Order No. 417 (June 9, 2000); *Shawn C. v. Mauston School District Board of Education*, Decision and Order No. 375 (December 29, 1998). If it is determined that his conduct was a manifestation of his disability, the school board may not expel Michael for this conduct. See *Ryan S. v. Barron Area School District Board of Education*, Decision and Order No. 417 (June 9, 2000); *William S. v. Suring School District Board of Education,* Decision and Order No. 98, (June 17, 1982). If Michael is disabled but the conduct is not a manifestation of this disability, he may be entitled to educational services during the term of his expulsion.[5]

[5] The department's website includes the "Disciplinary Action Advisor". This program leads schools and parents through the procedural requirements for the expulsion of students. Special emphasis is placed on students identified with disabilities or suspected of being disabled. The parties are encouraged to consult this tool at www.dpi.state.wi.us.

The pupil also raises questions about the adequacy of the district's evaluation of Michael to determine special education needs. 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).[6] *Ryan S. v. Barron Area School District Board of Education,* Decision and Order No. 417 (June 9, 2000); *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). Therefore, any challenges to the district's special education evaluation procedures may be addressed using special education appeal procedures.[7] The department maintains an extensive library of materials to explain procedures related to special education complaints or appeals. These materials are easily accessible at the department's website at http://www.dpi.state.wi.us/dpi/dlsea/een/index.html. Or, the pupil or his parents may call the special education team at the Department of Public Instruction to get more information.

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.

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[6] If Michael does not agree with whatever decision is made regarding whether he is disabled 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.

[7] This includes the allegation that the board exceeded the maximum expulsion term as alleged in the pupil's appeal letter.

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 Michael E. K by the Burlington Area School District Board of Education is reversed.

Dated this 15th day of January, 2002

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