

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 UPON
RECONSIDERATION

Appeal No.: 00/01 EX 23

This Decision and Order follows the school board's request reconsideration of the initial decision and order entered on January 15, 2002. The motion for reconsideration was granted on January 22, 2002. This Decision and Order shall replace the decision and order entered on January 15, 2002.

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 and the pupil.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.

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

¹ Upon initial review, the board failed to provide evidence that the expulsion order was sent separately to the pupil and his parents. With its motion for reconsideration, the board provided evidence that it had complied with this requirement. Because the remedy for failure to mail the expulsion order is usually an order requiring the board to mail the order to the appropriate parties and because the board has already done that, therefore there is no error.

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 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,

² The board objects to the consideration of these arguments contained in the reply brief but not in the initial brief. The 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.

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. The pupil also alleges that it was an error not to require the witnesses to testify under oath. While testimony under oath is preferable, there is not statutory or constitutional obligation to do so. I have previously held that a hearing where the witness was not placed under oath and the exhibits were not admitted in strict accordance with the rules of evidence, did not violate the pupil's due process right or diminish the integrity of the hearing. *Aron E. v. Sturgeon Bay School District Board of Education*, Decision and Order No. 341 (December 17, 1997); *Chad S. v. Hartford Union School District Board of Education*, Decision and Order No. 273 (February 9, 1996).

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, under certain circumstances he or she may still be expelled. 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.³ 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

³ 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.

place where a child receives his educational services. This evidence leads to the conclusion that Michael is a pupil with a disability under §504.⁴

The pupil alleges that the board did not have authority to expel Michael because of his §504 status. However, 29 USC §705 (20)(C)(iv), states that an local education agency (LEA) may take disciplinary action pertaining to the use of illegal drugs or alcohol against any student who is an individual with a disability and who is currently engaging in the illegal use of drugs or alcohol to the same extent that such disciplinary action is taken against students who are not disabled. §705(20)(C)(iv) also states that due process procedures in 34 CFR 104.36 do not apply. Thus, federal law allows the board to expel a §504 disabled pupil his use of illegal drugs.⁵ As Michael was expelled for drug use, he was not entitled under these circumstances for protection under §504.

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*

⁴ In its motion for reconsideration, the school board asserted that the child was not subject to §504. As this is new evidence that could have been submitted at the expulsion hearing and upon at the time of the appeal, I have not reconsidered the findings related to the identification of the child as disabled under §504.

⁵ There may be an exception in the law if the pupil was receiving drug abuse treatment during the time of the misconduct. There is no evidence in this record to suggest that he was receiving drug treatment when he engaged in the misconduct.

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. 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/dlse/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 complied with all of the procedural requisites. I, therefore, affirm this expulsion.

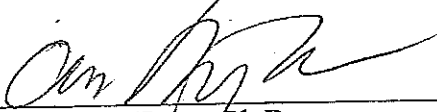
CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school board complied 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 affirmed.

Dated this 13th day of February, 2002



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

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.

