Decision and Order No.: 453

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

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| In the Matter of the Expulsion of<br>Alexander B<br>by Milwaukee School District Board of Education | DECISION AND ORDER<br>Appeal No.: 00/01 EX 27 |

## 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 Milwaukee School District Board of Education to expel the above-named pupil from the Milwaukee School District. This appeal was filed by the pupil and received by the Department of Public Instruction on December 4, 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 November 6, 2001, from the pupil services coordinator of the Milwaukee School District. The letter advised a

hearing would be held on November 13, 2001 that could result in the pupil's expulsion from the Milwaukee School District. The letter was sent separately to the pupil and his parents by messenger and regular 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 October 24, 2001 the pupil possessed marijuana on school grounds.

The hearing was held before an independent hearing panel (IHP) in closed session on November 13, 2001. The pupil and his parent appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and his parent were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations.

After the hearing, the IHP deliberated in closed session. The IHP 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 IHP 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 IHP, dated November 13, 2001, was mailed separately to the pupil and his parents. The order was adopted by the school board at its meeting on November 27, 2001. The order stated that the pupil was expelled until June 6, 2002. Alternative education services were made available to the pupil during the term of his expulsion. A transcript of the hearing was submitted as part of the record.

## 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 and brief in this case raises several issues. The first topic of the pupil allegations are related to the conduct of the independent hearing panel. First, he alleges that the independent hearing panel was comprised of one less person than required. The pupil states that he was told prior to the expulsion hearing that the IHP would have three members. The IHP that heard this case had two members, one was an MPS employee, and the other was a community member. There is no statutory requirement that the IHP have three members. Sec. 119.25 (1).

The use, in this case of two people, rather than three, is not an error. Nor is there any suggestion that this panel was not independent.

Secondly, he alleges that he was confused about who was on the panel and who was representing the administration. While he may have been confused, the record indicates that the panel chairperson required every person present to identify him or herself. Whether the pupil was confused is not relevant.

Third, he alleges that the panel had predetermined the outcome. There is nothing in the record to support this contention. The panel carefully listened to the testimony and asked questions. It also allowed the parties to present any testimony or evidence they wished. After the conclusion of the hearing, the panel convened to closed session. The panel emerged nearly 30 minutes later. The panel adopted a proposed decision and order offered by the administration. This is not indicative of a foregone conclusion but rather a careful, deliberative process.

Fourth, the pupil alleges that he was not allowed to ask one of the witnesses (the academic dean of the high school) any questions. The transcript reveals that the witness answered questions posed by the administration and the panel. However, the chairperson neglected to ask the pupil if he had questions. The transcript also reveals that the pupil and his mother exercised his right to question witnesses and speak on his behalf throughout the hearing. The witness in question could have been called as a witness by the pupil; however, he did not do that. There is no evidence that the pupil was prevented from questioning or presenting any witness.

Finally, the pupil alleges that a district administration representative (Ms. Gill, the student services coordinator), accompanied the panel during deliberations. While it is troublesome that a member of the administration accompanied the panel, the board has

adequately explained her presence. The board indicates, through the affidavit of Ms. Gill, that she was called into the panel deliberations to answer a question concerning the pupil's school assignment following an expulsion, if the panel recommended expulsion. She informed the panel that usually students are re-assigned to a different school following an expulsion. The preferred method to handle a situation where the panel requires more information is to reconvene the parties and ask for the information in open session. However, in this case, there is no evidence of impropriety.

The second topic of the pupil's allegations is related to the decision to expel. These arguments and allegations are based on five theories. First, he alleges he was unfairly singled out for expulsion. The pupil alleges that another boy (Marvin) in the classroom also possessed marijuana. He alleges that the marijuana found on him belonged to Marvin. However, Marvin was not expelled. There are many reasons why one student is expelled while another student is not. It could be related to issues of proof, as the district asserts in this case, or the pupil's prior history or personal factors. Therefore, with respect to the fairness and unevenness of disciplinary measures imposed by schools, I am without authority to address those issues. *Roy H. v. Blair School District Board of Education*, Decision and Order No. 159 (September 26, 1988); *Douglas S. v. Neenah School District Board of Education*, Decision and Order No. 162 (May 23, 1989) and *Danielle W. v. Barron Area School District Board of Education*, Decision and Order No. 310 (January 1997).

Second, he alleges that his conduct did not endanger anyone. The term "endanger" means to bring into danger or peril. The concept of "danger" involves harm, damages, the chance of loss or injury, or the capability of producing death or great bodily harm. These terms embrace the notion of harmful acts or actions that are detrimental or involve loss or damages. *Adam S. v.*

*East Troy Community School District Board of Education*, Decision and Order No. 304 (November 25, 1996); *Justin M. v. Fort Atkinson School District Board of Education*, Decision and Order No. 263 (December 5, 1995); and *Kirsten J. v. Mukwonago School District Board of Education*, Decision and Order No. 185 (February 21, 1992).

The state superintendent has routinely upheld expulsions based upon possession of marijuana on school grounds as conduct that endangers another at school. *Joseph A. v. Milwaukee Public Schools*, Decision and Order No. 436 (June 25, 2001); *Brian M. v. Lodi School District*, Decision and Order No. 425 (October 23, 2000); *Andrew C. v. Milwaukee Public School District,* Decision and Order No. 386 (June 11, 1999); *Julian H. v. Milwaukee Public School,* Decision and Order No. 379 (April 20, 1999); *Shannon T. v. Milwaukee Public School District,* Decision and Order No. 354 (April 16, 1998); *Joshua S. v. Beloit-Turner School District,* Decision and Order No. 307 (January 14, 1997); *Donald P. v. Westby Area School District,* Decision and Order No. 299 (August 9, 1996); *Robin L. v. East Troy Community School District,* Decision and Order No. 253 (June 21, 1995); and *Jared L. v. Menomonee Falls School District*, Decision and Order No. 218 (February 10, 1994).

Third, he alleges that the investigation was incomplete. Specifically, he alleges that after the expulsion hearing he found out information that the police may have questioned "Marvin" if they had known Marvin was a suspect and that the police may not have charged the pupil if they had known about Marvin. This information is not new to the case. The panel heard a significant amount of testimony that another boy named Marvin may have been involved. More importantly, they heard the pupil's admission that he picked up the marijuana blunt and put it in his pocket in an effort to help Marvin stay out of trouble. There is no basis to support the pupil's contention that this "new evidence" would change the outcome of the hearing.

Fourth, he feels it is unfair that the board approved the panel's recommendation before his appeal letter was received by the board. There is no requirement that the school board delay action on an independent hearing panel's recommendation to allow the pupil to appeal the panel's determination. Therefore, there was no error.

Finally, the pupil argues the an ill-advised zero-tolerance policy made the hearing panel, and subsequently the board, decide to expel. Since the authority to "approve, reverse or modify the decision" was conferred upon the state superintendent by 1987 Wis. Act 88, § 3, the state superintendent has consistently declined to modify the length of expulsions. *David D. v. Central High School District of Westosha Board of Education*, Decision and Order No. 429 (January 25, 2001); *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 judge the demeanor of witnesses as well as 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. In reviewing this case, I do not see the extraordinary circumstance or procedural violation that cause me to modify the pupil's expulsion period.

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 Alexander (a.k.a. Andy) B by the Milwaukee School District Board of Education is affirmed.

Dated this 1st day of Feb., 2002

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