Decision and Order No.: 460

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Kristen W by Cedarburg School District Board of Education	DECISION AND ORDER Appeal No.: 02-EX03

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 Cedarburg School District Board of Education to expel the above-named pupil from the Cedarburg School District. This appeal was filed by the pupil and received by the Department of Public Instruction on January 15, 2002.

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 5, 2001, from the district administrator of the Cedarburg School District. The letter advised a

hearing would be held November 14, 2001 that could result in the pupil's expulsion from the Cedarburg School District. The letter was sent separately to the pupil and her parents by certified mail. The letter alleged that the pupil possessed illegal drugs and drug paraphernalia on school property, during the school day, on October 31, 2001.

The hearing was held in closed session on November 14, 2001. The pupil and her parents appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and her 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 27, 2001, was mailed separately to the pupil and her parents. The order stated the pupil was expelled through her 21st birthday. A transcript of the hearing is 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.

In reviewing this case, I find the district made a procedural error that requires me to overturn the expulsion order. Section 120.13(1)(c)4. requires that not less than five days written notice of the hearing 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:

> ...The **specific grounds, under subd. 1., 2., or 2m.**, and the particulars of the pupil's alleged conduct upon which the expulsion proceeding is based...

The notice did not meet this requirement. The notice does not contain any reference to the grounds for expulsion listed in §120.13(1)(c)1., 2., or 2m. It has long been precedent in these cases that the notice requirements of the statute are mandatory in nature, and failure to comply with the statutory requirement renders the expulsion void. See *Telsea M. v. East Troy Community School District Board of Education*, Decision and Order No. 408 (February 24, 2000); *Ryan G. v. Sparta Area School District Board of Education*, Decision and Order No. 325

(May 19, 1997); *Christopher K. v. West Allis School District Board of Education,* Decision and Order No. 166 (April 18, 1990); and *Travis V. v. Waterloo School District Board of Education,* Decision and Order No. 143 (July 2, 1986).

While the notice advised the pupil what specific conduct it considered to be a violation of school policy, it did not identify the specific grounds under subd. 1., 2., or 2m. that was violated. In *Benjamin L. v. Maple School District Board of Education,* Decision and Order No. 214, (December 21, 1993), my predecessor stated in a case involving the bringing of marijuana and alcohol to school:

> Further, **the statutory basis for the expulsion must be reflected in the notice of expulsion hearing,** must be supported by evidence in the record, and must be reflected in the ultimate findings of the board. Citing *John K. v. Wisconsin Rapids School District Board of Education,* Decision and Order No. 178 (May 17, 1991).

Thus, the failure to include the statutory basis for the expulsion requires me to overturn the expulsion. This decision does not condone the pupil's conduct, nor does it suggest the expulsion ordered by the board is inappropriate. However, I must uphold the requirements contained in the statutes.

The board may cure this error by providing proper notice of the expulsion hearing and re-hearing the expulsion. If the board decides to expel, a written order must be prepared and sent to the parent and pupil separately. See *Joshua D. v. Tomorrow River School District*, Decision and Order No. 415 (May 24, 2000); *Nick N. v. Elcho School District Board of Education,* Decision and Order No. 373 (December 4, 1998); *Adam S. v. East Troy Community School District Board of Education,* Decision and Order No. 300 (August 9, 1996); *Nichole P. v. Crandon School District Board of Education*, Decision and Order No. 184 (February 7, 1992); and *Nichole P. v. Crandon School District Board of Education*, Decision and Order No. 193 (May 29, 1992).

Because the district has the option to remedy the error by conducting a new hearing, I will address the issues raised in the appeal filed by the pupil. The appeal letter in this case raises four issues. First, the pupil alleges that the board did not make any findings that her conduct endangered the property, health or safety of others at school. The administration presented evidence at the hearing that several students were in front of the school, but standing on non-school property. An anonymous tip was received that the students were passing around a pipe or some other smoking device. The principal asked a police officer to assist in the investigation. The police officer questioned the students. He also conducted a consensual search of the students' backpack and purses. He found a marijuana pipe in Kristen's purse. Kristen was taken into the school building where a more complete search was conducted. There, the police officer found other drug paraphernalia (a compact which held a mirror and a razor blade, both exhibiting a white powder residue and a hard blue straw containing a white powder residue) and a folded paper containing a white powder substance. The white powder substance was tested by the Wisconsin Crime Lab. It tested positive for heroin. In the course of the investigation, Kristen admitted that she possessed all the contents of her purse while she was at school that day. She stated that the razor blade, mirror and straw were used by her to cut and stir brick marijuana.

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 and other drugs 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); *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). A reasonable view of the evidence presented to the board supports the board's conclusion that Kristen's possession of a marijuana pipe, drug paraphernalia and heroin on school grounds endangered the property, health and safety of others at school.

In conjunction with this argument, the pupil also alleges that her conduct did not occur on school grounds or under the supervision of a school authority. While the discovery of the drugs and paraphernalia were initially made off school grounds, she admitted that she possessed them while at school. She offered an explanation for her possession of heroin (she thought it was cocaine and said she found it lying on the floor in a classroom), however, the board acted within its discretion in finding that she possessed it while on school grounds.

Also, related to this argument, the pupil alleges her *Miranda* rights were violated when the police searched her purse, and therefore the results of the search and seizure must be suppressed. Expulsion hearings are not criminal proceedings. The exclusionary rule, which in

criminal cases may demand the exclusion of illegally obtained evidence, does not apply to administrative expulsion hearings. *See e.g. In the Interest of Thomas J.W.,* 213 Wis. 2d 264, 276 (Ct. App. 1997); *State v. Carpenter,* 197 Wis. 2d 252, 541, N.W. 2d 05 (1995); *State ex re. Struzik v. DHSS,* 77 Wis. 2d 216, 221 (1977). This principle has been consistently applied in expulsion hearings. *Jeremy B. v. Waukesha School District Board of Education,* Decision and Order No. 395 (August 16, 1999); *Leo P. v. Whitewater Unified School District Board of Education,* Decision and Order No. 351 (March 31, 1998); *Michael Ryan H. v. Clinton Community School District Board of Education,* Decision and Order No. 222 (March 10, 1994); *John C. B. v. Milwaukee School District Board of Education,* Decision and Order No. 116 (October 31, 1983).

Secondly, the pupil argues that the administration did not follow its own AODA policy. Whether or not the school district had or followed an AODA policy is irrelevant to my review. See *John J. D. v. Whitehall School District Board. of Education,* Decision and Order No. 406 (February 15, 2000); *Justin S. v. Marshfield School District Board. of Education,* Decision and Order No. 361 (May 27, 1998); *Joshua R. v. Edgerton School District Board of Education,* Decision and Order No. 330 (July 29, 1997); *Donald P. v. Westby Area School District Board of Education,* Decision and Order No. 299, (August 9, 1996). Thus, the school district's policy is not determinative or controlling. Furthermore, the pupil claims that the board policy requires the school to refer a student involved in the possession of illegal drugs at school to other agencies dealing with health, social conditions or treatment of drug abuse. However, the policy also informs students that if they possess or use controlled substances at school or if they come to school under the influence of a controlled substance that they could be expelled. Whether or not the board also referred Kristen to a treatment provider is not relevant.

The pupil also alleges that she should be evaluated for special education services. With regard to a pupil with an ***identified*** exceptional education need, the State Superintendent has reversed an expulsion based on a school board's failure to consider whether a pupil's handicapping condition was related to the misconduct. See *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). These decisions were based on the particular requisites and protections under both state and federal law relating to children with disabilities.

With regard to all other aspects of special education law, however, the State Superintendent has determined that an expulsion appeal is not the appropriate context within which to challenge a district's application of special education provisions to a particular pupil. Such a challenge is beyond the scope of sec. 120.13(1)(c), Wis. Stats. *Michael L. v. New Richmond School District Board of Education*, Decision and Order No. 326 (June 2, 1997); *Michael P. v. Kenosha Unified School District Board of Education,* Decision and Order No. 172 (October 8, 1990). There is no evidence in the record that Kristen was identified as a child with a disability, thus this issue is beyond the scope of this review. Therefore, there is no basis to overturn the board's expulsion hearing. If the pupil believes she is a child with a disability and in need of special education services, she needs to contact the school district to arrange the appropriate evaluation.

Finally, the pupil alleges that the board did not consider other relevant factors such as her previous behavior and grades. In essence, she is asserting that the board's decision was too harsh or unreasonable. 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 the record in this case, I find the school district did not comply with all of the procedural requisites. I, therefore, overturn 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).

ORDER

IT IS THEREFORE ORDERED that the expulsion of Kristen W. by the Cedarburg School District Board of Education is overturned.

Dated this 18th day of March, 2002

Anthony S. Evers /ns

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