Decision and Order No.: 494

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Justin B. by Central /Westosha High School District Board of Education	DECISION AND ORDER Appeal No.: 03-EX 10

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 Central /Westosha High School District Board of Education to expel the above-named pupil from the Central /Westosha High School District. This appeal was filed by the pupil and received by the Department of Public Instruction on March 10, 2003.

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 January 30, 2003, but delivered on February 6, 2003, from the district administrator of the Central /Westosha High School District. The letter advised a hearing would be held on February 11, 2003 that could result in the pupil's expulsion from the Central /Westosha High School District. The letter was delivered to the pupil and his parents. 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 or that he repeatedly refused or neglected to obey school rules. The letter specifically alleged that on January 16, 2003 Justin admitted that on January 15, 2003, as well as other days, he was under the influence of marijuana while on school grounds.

The hearing was held in closed session on February 11, 2003. 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 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 which endangered the property, health, or safety of others and he has refused or neglected to obey school rules. 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 February 11, 2003, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the end of the second semester of the 2003-04 school year. Minutes of the school board expulsion hearing are 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 there from. *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 in this case raises several issues which require consideration. First, he alleges that because the witnesses were not under oath that it is a violation of due process to rely upon their testimony. 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. *Michael K. v. Burlington School District Board of Education,* Decision and Order No. 449 (February 13, 2002); *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).

Secondly, the pupil alleges that the notice of the expulsion hearing did not comply with all of the statutory requirements of §120.13(1)(c). I agree. The notice contained an error regarding the date of the incident. The amended notice claimed that the statement was made on January 16, concerning conduct on January 15.[1] The record indicates that at the hearing, the parties were advised that in fact the statement was made on January 17, concerning conduct that occurred on January 16. The record also indicates that prior to the hearing the administration went over the notice of hearing with the mother. At that time she told them there was a problem with the dates in the notice, yet the administration insisted they were correct. The record further indicates that the conduct, if it was committed, occurred on January 16.

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...

It is well established that a student is entitled to due process at an expulsion hearing. *Goss v. Lopez*, 419 U.S. 565 (1975); *Racine Unified School District v. Thompson*, 107 Wis. 2d 657, 321 N.W. 2d 334 (1982). It is also well established that notice is an integral part of procedural

due process in these situations. A student facing expulsion is entitled to timely and adequate notice of the charges against him or her so as to allow a meaningful opportunity to be heard, even where the student unequivocally admits the conduct charged. *Keller v. Fochs*, 385 F. Supp. 262, 265 (E.D. Wis. 1974). Furthermore, § 120.13(1)(c)4. clearly requires notice of the specific grounds for expulsion and the particulars of the alleged misconduct. Expulsions have been repeatedly overturned for failure to include this in the notice. *Bradley Scott P. v. Menasha Joint School District Board of Education,* Decision and Order No. 197, (August 21, 1992); *Christopher K. v. West Allis School District Board of Education*, Decision and Order No. 166 (April 18, 1990); *Travis V. v. Waterloo School District Board of Education*, Decision and Order No. 144 (July 2, 1986). The failure to accurately describe the allege misconduct in this case is an error that requires reversal. *Randy H. v. Central/Westosha School District Board of Education*, Decision and Order No. 204 (April 6, 1993).[2] The notice of expulsion hearing also fails to include an allegation that the interests of the schools demand expulsion. This, too, is required by §120.13(1)(c) 4.

The order of expulsion issued in this case also contains errors and is insufficient.[3] First, it restates the dates erroneously used in the notice. These dates are inconsistent with the hearing record. Secondly, the grounds for expulsion contained in the order are inconsistent with the statutory grounds and the notice of expulsion hearing. The board found that Justin engaged in

---

[1] The district sent an amended notice. The first notice was also defective as it failed to allege any of the statutory grounds for expulsion contained in §120.13(1)(c).

[2] The school board cites the case of *Michael J. v. Nicolet Union High School District Board of Education*, Decision and Order No. 456 (March 4, 2002) as an example of the State Superintendent accepting an error as a scrivener's error. Citing *Michael J.* to support their contention in this case is misplaced. The mistake in *Michael J.* involved a mistake in the order of expulsion, not the notice of the expulsion hearing. Furthermore, the board was ordered to correct the mistake in the order. There was no allegation that Michael J. did not receive accurate and sufficient notice of his alleged misconduct.

[3] The district did not provide a copy of the expulsion order or proof that the order was mailed separately to the pupil and his parents. However, his attorney does not allege that an order was not sent. In fact, I received the order from

conduct that endangered the property, health or safety of others and that he refused or neglected to obey school rules. Given the notice provided in the case, the board must find that the pupil either engaged in conduct ***while at school or under the supervision of a school authority*** that endangered the property, health or safety of others and/or that he ***repeatedly*** refused or neglected to obey school rules. In addition, there is no evidence in the sparse record provided by the district that Justin was informed of the school rules and consequences of violations of the rules prior to his alleged misconduct. Notice of rules and consequences is required before a pupil may be expelled for repeated neglect or refusal to obey school rules. *Jesse M. K. v. Tri-County Area School District Board of Education*, Decision and Order No. 266 (January 2, 1996); *Hope B. Randolph School District Board of Education*, Decision and Order No. 225 (April 12, 1994); *Antonio M. v. Kenosha Unified School District Board of Education*, Decision and Order No. 176 (April 18, 1991).

The pupil also alleges that it was a violation of his rights when the school board held the hearing in closed session, contrary to his wishes. A school board may close an expulsion hearing to the public under the state's open meetings law without approval of the pupil. A pupil is only entitled to a closed hearing if he requests, not an open hearing. *Marc G. v. Maple School District Board of Education*, Decision and Order No. 213 (December 20, 1993); *Rebecca S. v. Janesville School District Board of Education,* Decision and Order No. 248 (May 8, 1995); Aron *E. v. Sturgeon Bay School District Board of Education,* Decision and Order No. 341 (December 17, 1997); *Matt H. v. Tomorrow River School District Board of Education,* Decision and Order No. 349 (March 23, 1998); *Lyle S. v. Whitewater School District Board of Education,* Decision and Order No. 378 (April 15, 1999).

---

the pupil's attorney as it was attached to his appeal letter. As a reminder to school districts, it is important to send a complete record on appeal. Failure to do so can result in a reversal of the expulsion.

The pupil also disagrees with the conclusion that the alleged misconduct endangered anyone's health, safety or property. Expulsions based upon mere possession of marijuana have routinely been upheld by the state superintendent. *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). It is consistent and reasonable to conclude that being under the influence of a drug while at school can endanger others at school.

Finally, the pupil argues that expulsion under the circumstances is unreasonable. He argues that his psychiatric problems and special needs mitigate his conduct and that he should be given leniency. 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. Absent an extraordinary circumstance or a violation of procedural requirements, I

do not second-guess the appropriateness of a school board's determination. In this case, there are procedural violations that require me to reverse the expulsion. However, this opinion should not be construed as condoning the pupil's conduct, nor does it suggest the expulsion under this factual situation would be inappropriate. However, I must uphold the requirements contained in the statutes. The board may cure the errors by providing proper notice of the expulsion hearing, re-hearing the expulsion, and providing proper notice of the expulsion decision.

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 Justin B by the Central /Westosha High School District Board of Education is overturned.

Dated this 8th day of May, 2003.

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