Decision and Order No.: 507

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Benjamin Zi by Marinette School District Board of Education	DECISION AND ORDER Appeal No.: 04-EX 01

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 Marinette School District Board of Education to expel the above-named pupil from the Marinette School District. This appeal was filed by the pupil and received by the Department of Public Instruction on January 2, 2004.

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 11, 2003, from the attorney for the Marinette School District on behalf of the Marinette School

District. The letter advised a hearing would be held on November 20, 2003 that could result in the pupil's expulsion from the Marinette School District through the pupil's 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 on November 10, 2003, the pupil possessed prescription drugs not prescribed for him and a knife while at the Marinette High School.

The hearing was held in closed session on November 20, 2003. 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 that "caused an unreasonable risk of harm to himself and others." [1] 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 24, 2003, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through his 21st birthday. A transcript of the hearing is part of the record.

[1] Because this case is decided on other grounds, I do not need to determine if this paraphrase of the statutory grounds "endangered the property, health, or safety of others" is sufficient. I recommend that school board follow the language of the statute when making its legal conclusion that conduct meets the statutory grounds for expulsion.

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 in this case alleges that the decision made by the school board was unfair and extreme. In support of this allegation, the pupil alleges that knife that was found in his backpack was actually buried in the bottom of his backpack, covered with crumbs. He

alleges that the principal felt that the pupil was unaware of its presence and meant no harm. The pupil also alleges that the prescription drug he possessed cannot be abused; therefore the health and safety of others were not endangered. He also complains that other students were arrested and charged by the police department, unlike the pupil, but they only received an expulsion until the end of the year. In addition, he states that the disciplinary report that was mailed to him was different than the one provided at the hearing. He claims the expulsion has caused a family hardship because the pupil has had to move to a relative's home in Green Bay in order to receive educational services. Finally, he complains that he received the most severe punishment possible and that he did not expect this.

Because the factual conclusions of the board concerning the pupil's misconduct differed from the allegations contained in the notice of the expulsion hearing, the school board did not give adequate notice to the pupil about the charges that would be considered at this expulsion hearing. The notice of hearing specifically stated that his possession of a prescription drug, without a prescription, and his possession of a knife were the grounds for expulsion. At the hearing, however, the testimony of the high school principal (page 7, line 18 through page 8, line 7) indicates that the principal had evidence that the pupil intended to sell the prescription drug and this intent to sell raised the level of violation. The pupil was not given notice prior to the hearing that the district believed he intended to sell the drugs. He was only given notice that he possessed the drug. Furthermore, the board's findings were based specifically upon the finding that the pupil possessed the drug with the intent to sell it. Because the school district is required to provide the pupil advance notice of the particulars of the misconduct under which it intends to proceed, it cannot make its finding based upon a different act of misconduct for which the student did not receive notice.

The expulsion statute provides in part:

120.13 School Board Powers.

(1) (c) 4. Not less than 5 days written notice of the hearing...shall be sent...The notice shall state all of the following:

a. The specific grounds under subd. 1., 2. or 2m **and the particulars of the alleged conduct upon which the expulsion proceeding is based.** (Emphasis added.)

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 statute's requirements renders the expulsion void. Even where a pupil unequivocally admits misconduct that is grounds for expulsion, the failure to provide the mandated, advance statutory notice calls for reversal. See *Nick N. v. Elcho School District Board of Education,* Decision and Order No. 373 (December 4, 1998); *Justin E. v. Antigo School District Board of Education*, Decision and Order No. 329 (July 24, 1997); *Ryan G. v. Sparta Area School District,* Decision and Order No. 325 (May 19,1997); *John K. v. Wisconsin Rapids School District*, Decision and Order No. 178 (May 17, 1991); *Christopher K. v. West Allis School District*, Decision and Order No. 166 (April 18, 1990); *Travis V. v. Waterloo School District*, Decision and Order No. 143 (July 2, 1986). Because the notice of expulsion and the finding of fact and conclusions of law are not based upon the same act of misconduct, the expulsion must be reversed.

Nevertheless, it may be possible for the board, without completely rehearing the case, to correct this error. For example, the school board could reconvene and consider only the evidence for which the pupil was given notice – possession of the prescription drug and the knife. If the board decides that this misconduct alone endangered the property, health, or safety of others at school, they could expel and determine the appropriate length of the expulsion. Alternatively, the board could start from the beginning and give proper notice to the pupil that

they plan to consider his possession of the drug with intent to sell and the possession of the knife. After giving adequate notice, they may hold another hearing. After hearing the evidence, they could then decide whether, based on this hearing, there is sufficient evidence to conclude the misconduct endangered the property, health, or safety of others at school and the appropriate length of expulsion. See decisions in *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).

This decision in no way condones the pupil's conduct or suggests that expulsion is not appropriate. However, because the procedural mandates were not strictly complied with, I am compelled to reverse the expulsion order.

Because I am reversing the expulsion based upon this procedural violation, I will not address each of the pupil's complaints. However, it should be noted that 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 because 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. *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). Furthermore, in the

past, expulsions based on possession of a knife at school, even a pocket knife, have routinely been upheld by the state superintendent. *Jesse M. K. v. Tri-county Area School District,* Decision and Order No. 266 (January 2, 1996); *Brent S. v. Mondovi School District*, Decision and Order No. 290 (May 23, 1996); *Jesse P. v. Hustiford School District,* Decision and Order No. 293 (June 10, 1996); *Michael L. v. New Richmond School District*, Decision and Order No. 326 (June 2, 1997); *James D. v. Greenfield School District,* Decision and Order No. 352A (April 7, 1998); *Stacey R. v. Milwaukee School District,* Decision and Order No. 362 (June 1, 1998). Similarly, expulsions concerning possession of prescription drugs, without a prescription have been previously upheld by the state superintendent. *Matthew C. v. Lake Geneva-Genoa City School District Board of Education*, Decision and Order No. 277 (March 12, 1996); *Liana D. v. Milwaukee Public School District Board of School Directors*, Decision and Order No. 335 (September 15, 1997); *Jamie B. v. Barron School District Board of Education,* Decision and Order No. 358 (May 14, 1998.).

Finally, because expulsions are considered on a case-by-case basis, the treatment of other students is generally not considered in an expulsion appeal. See *Aron P. v. Sturgeon Bay School District Board of Education*, Decision and Order No. 341 (December 17, 1997*); Nathaniel S. v. Wausau School District Board of Education*, Decision and Order No. 350 (March 25, 1998); and *Leo P. v. Whitewater School District Board of Education*, Decision and Order No. 351 (March 31, 1998).

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.

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 Benjamin Z. by the Marinette School District Board of Education is reversed.

Dated this 1st day of March, 2004.

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