THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Joshua S by Madison Metropolitan School District Board of Education	DECISION AND ORDER Appeal No.: 04-EX 20

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 Madison Metropolitan School District Board of Education to expel the above-named pupil from the Madison Metropolitan School District. This appeal was filed by the pupil and received by the Department of Public Instruction on July 15, 2004[1].

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.

[1] The parties requested extra time to brief this case and agreed to an extended period for the decision; therefore, this decision is not issued within the statutory time of 60 days.

FINDINGS OF FACT

The record contains a letter entitled "Notice of Expulsion Hearing," dated April 21, 2004, from the district administrator of the Madison Metropolitan School District. The letter advised a hearing would be held before an independent hearing officer on May 6, 2004 that could result in the pupil's expulsion from the Madison Metropolitan School District. The letter also advised that if the hearing officer found that the pupil engaged in the conduct as alleged and that the interests of the school demanded expulsion, the pupil could be expelled until his 21st birthday. The letter also stated that if the hearing officer issued an expulsion order, the board would review that order and either approve, reverse or modify the order. 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 on April 19, 2004, the pupil used a pencil to stab a fellow student in the arm.

The hearing was held by the independent hearing officer in closed session on May 6, 2004. The pupil and his parents appeared at the hearing represented by an attorney. 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. A written transcript of the hearing is included in the record.

On May 10, 2004, the independent hearing officer issued a written decision finding that the pupil stabbed another student with a pencil at school. The order found that his conduct constituted grounds for expulsion; however, the interests of the school do not demand expulsion. Therefore, the hearing officer issued a decision that the pupil was not expelled.

On May 17, 2004, the school board reviewed the non-expulsion decision issued by the hearing examiner. The pupil did not appear at the board hearing. In addition to the hearing examiner's decision and documentation, the board was also supplied with a May 13, 2004 background and recommendation packet and a four page, single spaced memorandum from the district administrator to the board. The district administrator's memorandum advocated the administration's position that the board should order an expulsion despite the hearing officer's decision. This memorandum was sent only to the board, the pupil had no knowledge that such a memorandum was being written or submitted. The pupil received the memorandum only after his lawyers filed an open records request of the board following its decision.

After consideration of the record and the district administrator's memorandum, the board reversed the hearing officer's decision by finding that the interests of the school demanded expulsion and ordered that pupil be expelled. The modified findings of fact, conclusions of law and order of expulsion, dated May 17, 2004, were mailed separately to the pupil and his parents. The order stated the pupil was expelled through January 24, 2005 with an opportunity for early readmission on June 1, 2004. The school board submitted minutes of the school board hearing as part of the record. The pupil submitted the district administrator's memorandum to supplement the record.[2]

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*

[2] The minutes reference the memorandum and indicate that they are attached to the minutes. However, the board did not include them when the record was submitted for review. The board does not dispute the authenticity of the copy submitted by the pupil.

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 pupil raises several issues in the appeal. First, he challenges the school board's authority to review a hearing officer's determination not to expel. Wis. Stats. §120.13(1)(e) allows a school board to adopt a resolution to use an independent hearing officer to hear expulsion cases, *instead* of using the procedure specified in 120.13(1)(c)3. The Madison School Board policy reflects this option in Paragraph 17 of Board Policy 4045[3] states:

[3] The Board did not submit this policy as part of the record. However, legal counsel for the state superintendent located the policy on the school district's website.

"17 At the option of the BOARD, instead of using the process described above, the BOARD may adopt a resolution, which is effective only during the school year in which it is adopted, authorizing the appointment of a hearing officer or hearing panel to determine pupil expulsion from school. During any school year in which a resolution has been adopted, the hearing officer or panel appointed by the BOARD may expel a pupil from school whenever the hearing officer or panel finds that the pupil engaged in conduct that constitutes grounds for expulsion in accordance with the grounds that are set forth in this policy.

a. Should the BOARD adopt a resolution authorizing the use of a hearing examiner/panel, pursuant to paragraph 16.a above, the following procedure for assigning a hearing examiner/panel to an expulsion case shall be followed:

1. At the time the pupil has been sent a written notice of her/his expulsion hearing pursuant to paragraph 18 below, the SUPERINTENDENT or her/his designee shall send to the pupil and, if the pupil is a minor, to the pupil's parent/guardian a notice:

a. That the BOARD President or her/his designee shall randomly select and assign a hearing examiner/panel to the pupil's case from among the names of all hearing examiners/panelists authorized and available for such assignment."

The board did not submit evidence that it had passed such a resolution in the 2003-04 school year.[4] Failure to adopt a resolution as required in §120.13(1)(e) is procedural error that requires reversal. *Ryan G. v. Sparta Area School District Board of Education*, Decision and Order No. 325 (May 19, 1997). Given the district's failure to demonstrate compliance, this error requires reversal.

Secondly, the pupil argues that because the hearing officer did not order expulsion, that the school board is precluded by statute from reviewing the hearing officer's determinations. The school board asserts that the general, plenary power contained in §§120.13, 120.12 and 118.001, give the board authority to review the hearing officer's decision not to expel. The board argues that according to *Pritchard v. Madison Metropolitan School District,* 2001 WI App

[4] The state superintendent's legal counsel searched the district's website for evidence of such a resolution. While meeting minutes are posted for the district on the website, no minutes reflect such a resolution. The minutes do reflect the appointment of various Madison area attorneys as Expulsion Hearing Officers.

62, whether the school board policy adopted the plenary powers is irrelevant. The board argues that there is no requirement to adopt the plenary powers in order to assert the power.

The State Superintendent has previously found that *Pritchard* did not apply and that school boards who use hearing examiners do not have authority to overturn a hearing officer decision to not expel a pupil. *Drew K. v. Sparta Area School District Board of Education*, Decision and Order No. 443 (September 17, 2001); *Brian P. v Sparta Area School District Board of Education*, Decision and Order No. 444 (September 17, 2001); and *Zachariah I. v. Sparta Area School District Board of Education*, Decision and Order No. 446 (October 16, 2001).

In 1995 Wis. Act 27, the legislature added plenary powers to school board's explicit powers.

> §120.13 **School Board Powers** The school board of a common or union high school district may do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils, and including all of the following:...

The Wisconsin Court of Appeals has interpreted this statute and its interaction with more specific statutes in *Pritchard v. Madison Metropolitan School District,* 2001 WI App 62. In that case, the court of appeals concluded that §§120.13 and 118.001[5] allow school boards to *offer benefits* to a more expansive class of people than is listed in *the municipal code*, Wis. Stats. §66.185. Thus, §120.13 appears to expand the board's authority. However, *Pritchard* did not analyze the application of these plenary powers as it relates to powers enumerated in §120.13 and the procedural safeguards contained therein.

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[5] 118.001 **Duties and powers of school boards; construction of statutes.** The statutory duties and powers of school boards shall be broadly construed to authorize any school board action that is within the comprehensive meaning of the terms of the duties and powers, if the action is not prohibited by the laws of the federal government or of this state.

In the present case, the school board had a policy implementing §120.13(1)(e). (*Paragraph 17 of 4045, quoted above*). Unlike the situation in *Pritchard* where the board adopted a policy that broadened employee rights, the board did not adopt a policy that broadened student rights. Paragraph 17 of Board Policy 4045 did not incorporate the plenary powers of §§120.13 and 118.001. Rather, it limited the board's authority to situations where the hearing examiner ordered expulsion. "During any school year in which a resolution has been adopted, the hearing officer or panel appointed by the BOARD may expel a pupil from school whenever the hearing officer or panel finds that the pupil engaged in conduct that constitutes grounds for expulsion in accordance with the grounds that are set forth in this policy." Paragraph 17.a. of Board Policy 4045. Furthermore, as discussed above, there is no evidence that the board adopted a resolution to use hearing officers as required in §120.13(1)(e). *Pritchard* did not analyze the application of these plenary powers when a school board policy and subsequent actions have expressly adopted individual powers contained in §120.13 but not the plenary powers. Thus, the *Pritchard* analysis does not apply. By not incorporating or referencing its plenary powers as they relate to the use of hearing officer at expulsion hearings, the board has chosen not to use them. Therefore, the board must abide by the other limited and specific language of the statute. The language of the statute is clear.

> "Upon the ordering by the hearing officer or panel *of the expulsion of a pupil*, the school district shall mail a copy of the order to the school board, the pupil and, if the pupil is a minor, the pupil's parent or guardian. Within 30 days after the date on which *the order is issued, the school board shall review the expulsion order* and shall, upon review, approve, reverse or modify the order. The order of the hearing officer or panel shall be enforced while the school board reviews the order. §120.13(1)(e)3. (emphasis added)
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> "That if the hearing officer or panel orders the expulsion of the pupil the school district shall mail a copy of the order to the school board, the pupil and, if the pupil is a minor, to the pupil's parent or guardian." §120.13(1)(e)4.g.

When the statute is clear and unambiguous, the plain meaning must be applied. See *State v. Isaac J.R.*, 220 Wis.2d 251, 255-56, 582 N.W.2d 476 (Ct.App.1998). "Upon the ordering by the hearing officer or panel *of the expulsion of a pupil,"* is clear and unambiguous. Only after the hearing officer orders expulsion do the remaining procedures apply. According to the statute, there was no requirement that the hearing officer issue any type of order, particularly an expulsion order, to relay his decision denying expulsion. In this case, the hearing officer did not order expulsion. Therefore, there was no expulsion or expulsion order.

Furthermore, the statute states that the board may use the independent hearing officer option, *instead* of the board hearing procedure under §120.13(1)(c)1. See §120.13(1)(e). In this case, the board used both procedures. The hearing officer heard testimony and issued written findings of facts and conclusions of law. At the board meeting, the board accepted and considered additional information, specifically the district administrator's memorandum to the board. In conclusion, the plenary powers, which may grant the board authority to review a decision not to expel, were not adopted by the board.[6] Therefore, the board did not have statutory authority to review the decision by the hearing examiner denying expulsion. Furthermore, the board did not have statutory authority to use two expulsion procedures in one case.

The pupil also alleges that it was unfair for the administration to have *ex parte* communication with the board. He specifically objects to the memorandum from the district administrator to the board. The pupil argues that the memorandum not only indicated the

[6] This decision should not be construed as agreeing that the plenary powers of §120.13 allow a school board to alter the specific statutorily required expulsion *procedures*. It seems incongruous that a board could avoid the statutory procedures by merely adopting the broad plenary powers in the introduction to §120.13. This question, however, is left for another day, or perhaps the circuit court.

administration's recommended course of action to the board but also provided additional "expert opinions" for the board to consider. And, because the memorandum was not sent to the pupil, the pupil was unable to respond.

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property" *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, *2646 (S. Ct. 2004), citing *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) see also id., at 266, 98 S.Ct. 1042, *noting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions."* 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). The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Bunker v. Labor and Industry Review Com'n*, 2002 WI App 216, ¶ 19, 257 Wis.2d 255, 267, 650 N.W.2d 864, 870 (Ct. App. 2002), citing *Rhonda R.D. v. Franklin R.D.*, 191 Wis.2d 680, 701, 530 N.W.2d 34 (Ct.App.1995) (citing Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). A fair and impartial decision maker at the hearing is a necessary component of procedural due process. *See Guthrie v. WERC*, 111 Wis.2d 447, 454, 331 N.W.2d 331 (1983). Whether *ex parte* communication violates due process depends on the type of information conveyed during the *ex parte* communication. Only those that introduce "new and material information to the deciding official will violate the due process guarantee of notice." Marder v. Board of Regents of the University of Wisconsin System, 2004 WI App 177, ¶ 34, citing *Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed.Cir.1999).

The State Superintendent has previously expressed disagreement with the practice of administrators or representatives of administration accompanying the board during deliberations. *Russell B. v. Muskego-Norway School District Board of Education*, Decision and Order No. 175 (February 29, 1991); *Bradley P. v. Menasha Joint School District Board of Education*, Decision and Order No. 197 (August 21, 1992); Marc *G. v. Maple School District Board of Education*, Decision and Order No. 213 (December 20, 1993); *Benjamin L. v. Maple School District Board of Education*, Decision and Order No. 214 (December 28, 1993).

In this case, the board has not explained why the memorandum was not shared with the pupil before the board meeting. While the pupil was invited by the district to submit written comments to the board, he was not invited to attend the closed, executive session. The pupil argues there was no reason for him to submit written arguments as the hearing officer denied the request for expulsion. This is a credible argument. Given the statutory limitations and board policy discussed above the pupil would have no reason to believe the hearing officer's decision could be overturned by the board.

As unfair as the process seems, it is only a procedural due process violation if the administrator's *ex parte* memorandum offered new and material information. The memorandum does not seem to offer new and material information. The memorandum repeats the administration's position on expulsions where the misconduct involves the use of a weapon. It maligns the hearing officer's decision and thought process and offers a hyperbolic hypothesis but it does not offer new information. Thus, in this case, the *ex parte* communication does not appear to violate the pupil's procedural due process rights.

Finally, the pupil alleges that the board refused to consider his self defense claim as a mitigating factor in making its determination. More specifically, the pupil alleges that a school

board policy does not allow the board to consider self-defense. The pupil has not provided a written policy that prohibits consideration of self-defense. In fact, the hearing officer allowed the pupil to submit his evidence and as neither the board nor the hearing officer imposed the most extreme penalty; there is no evidence that the circumstances of the misconduct, including self-defense, were not considered.

This decision does not condone the pupil's conduct. Physical assaults are violence and cannot be tolerated in schools. The state superintendent routinely supports schools when they expel students for committing physical violence on another member of the school community. However, the right to an education is a precious right that is protected by both the state constitution and the laws of Wisconsin. The procedural requirements enacted by the legislature must be followed before revoking a pupil's constitutional and statutory right to a free public education. If the statutory procedures are to be changed, the legislature must be the entity to make the change. I do not have that authority.

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 Joshua S. by the Madison Metropolitan School District Board of Education is reverseed.

Dated this 20th day of October, 2004.

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