Decision and Order No.: 560

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of S P by Watertown School District Board of Education	DECISION AND ORDER Appeal No.: 05-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 Watertown School District Board of Education to expel the above-named pupil from the Watertown School District. This appeal was filed by the pupil's foster mother and received by the Department of Public Instruction on October 26, 2005.

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 September 22, 2004, from the district administrator of the Watertown School District. The letter advised a hearing would be held on September 27, 2004 that could result in the pupil's expulsion from the Watertown School District through the pupil's 21st birthday. The letter was sent separately to the pupil and his parents by mail. There is a receipt showing acceptance of a piece of mail by the pupil and his parents dated September 24, however there is no evidence in the record when this notice was actually sent. The letter alleged that the pupil repeatedly refused or neglected to obey school rules. The letter specifically alleged that on September 17, 2004 he confessed to being one of two individuals who wrote a note stating that the middle school would be destroyed and that he was also involved in posting written notes threatening physical harm to middle school administration and other staff. In addition, he had one rule infraction in the first two weeks of school of the 2004-05 school year, 51 behavioral infractions in the 2003-04 school year and 10 behavioral infractions during the 2002-03 school year.

An amended notice dated September 23, 2004 expanded the grounds for expulsion to also include an allegation that the pupil knowingly conveyed or caused to be conveyed a threat or false information concerning an attempt or allege attempt to destroy school property by means of an explosive and that he endangered the health, safety or property of a employee or school board member of the school district. Again, there is no evidence when this notice was sent. Regardless, the hearing was held less than five days from the date of this notice.

The hearing was held in closed session on September 27, 2004. 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 repeatedly refuse or neglect to obey school rules; knowingly convey or caused to be conveyed a threat or false information concerning an attempt or alleged attempt to destroy school property by means of an explosive; and, endangered the health, safety or property of a employee or school board member of the school district. 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 October 11, 2004, was mailed separately to the pupil and his parents. The order stated the pupil was expelled until his 21st birthday, with an opportunity for early readmission beginning in the 2006-07 school year. An audiotape of the expulsion hearing is part of the record.[1]

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.

[1] The board submitted minutes of the expulsion hearing, however, they do not provide any detail of the hearing.

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, filed by the pupil's foster mother, raises several issues. First, she argues that because the pupil was under 16 at the time of the expulsion, the board could not expel him due to language in Sec. 120.13(1)(c)2. However, the board did not rely on this expulsion ground, therefore this argument is unfounded.

Secondly, she alleges that it is discrimination to expel him because he has emotional and learning disabilities. The district conducted a manifestation determination hearing prior to the pupil's expulsion. The IEP team determined that his most recent threat activity was not a manifestation of his disability. It is not discrimination to expel a student with a disability when it is not a manifestation of his disability. However, it appears the board relied upon conduct other than the most recent threat activity. In fact, some of the misconduct relied upon in the notice of expulsion occurred before he was identified as a child with a disability. This previous misconduct appears to have lead to the special education evaluation. If the board wishes to base the expulsion on all of the misconduct contained in the notice of expulsion hearing, the IEP team must evaluate whether all of the misconduct was a manifestation of his disability.

Thirdly, she alleges that the pupil is not getting adequate services. Apparently, the pupil is attending a different school district. The state superintendent has determined that an expulsion appeal is generally not the appropriate context within which to challenge a district's application of special education provisions to a particular pupil. Such a challenge is generally beyond the scope of Wis. Stats. § 120.13(1)(c). *Ryan S. v. Barron Area School District Board of Education*, Decision and Order No. 417 (June 9, 2000); *Michael L. v. New Richmond School District Board of Education*, Decision and Order No. 326 (June 2, 1997); and *Michael P. v. Kenosha Unified School District Board of Education*, Decision and Order No. 172 (October 8, 1990). Therefore, any challenges to the district's application of the special education provisions may be addressed using special education appeal procedures. The department maintains an extensive library of materials to explain procedures related to special education complaints or appeals. These materials are easily accessible at the department's website at http://www.dpi.state.wi.us/dpi/dlsea/een/index.html. Or, the pupil or his parents may call the special education team at the Department of Public Instruction to get more information.

Fourth, she requests that the period of expulsion be reconsidered and rescinded. She believes it is ludicrous to expel the pupil until his 21st birthday. I note that the pupil is eligible for readmission at the beginning of the next school year. Further, 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 and to determine the length and conditions of expulsion.

In reviewing the record, I find two procedural violations. First, there is no evidence that the notice of expulsion hearing was sent five days before the expulsion hearing. 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 first notice was dated September 22, 2004, the hearing was held on September 27, 2004. If there was evidence that the notice was sent on September 22, it would have been timely. However, there is no evidence of this. The second notice, which expanded the grounds for expulsion, was dated September 23, 2004, less than five days before the hearing. Contrary to the board's explanation in its brief, this is a significant alteration to the notice and the pupil was entitled to five days notice as required by the statute.

Because the board did not comply with the notice requirements of §120.13(1)(c)4., I am compelled to overturn the expulsion. 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).

The second procedural violation concerns the manifestation determination. As explained above, the manifestation determination was limited to the recent threatening conduct. The board's decision was based on all of the misconduct alleged. Further, the notice of expulsion that was sent on September 22 alleged only repeated rule violations as the grounds. The latter notice expanded the grounds, but there is absolutely no evidence that the amended notice was timely.

Due to these violations, I am compelled to reverse the expulsion order. If the district chooses, it may remedy this error by providing proper notice of the expulsion hearing, rehearing the expulsion, and providing proper notice of the expulsion decision. 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). If the board relies upon conduct other than the recent threats, the IEP team must consider the other conduct and determine whether it was a manifestation of the child's disabilities.

Because of this procedural violation, I am required to 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 S P by the Watertown School District Board of Education is reversed.

Dated this 20th day of December, 2005.

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