Decision and Order No.: 635

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of J K by Kenosha Unified School District Board of Education	DECISION AND ORDER Appeal No.: 09-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 Kenosha Unified School District Board of Education to expel the above-named pupil from the Kenosha Unified School District. This appeal was filed by the pupil and received by the Department of Public Instruction on January 7, 2009.

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 26, 2008, from the district administrator of the Kenosha Unified School District. The letter advised

a hearing would be held on December 3, 2008 that could result in the pupil's expulsion from the Kenosha Unified School District through the pupil's 21st birthday. The letter was sent separately to the pupil and his parents via first-class 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, 2008, the pupil, while under the supervision of a school authority purchased Adderall and that on November 11, 2008, the pupil, while under the supervision of a school authority, sold Adderall to another student.

The hearing was held in closed session on December 3, 2008. The pupil and his parents appeared at the hearing with counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil, his parents and his attorney were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations.

After the hearing, the hearing officer deliberated and found that 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 hearing officer 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 Independent Hearing Officer, dated December 3, 2008, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the 2008-09 school year. The school board reviewed the independent hearing officer's order on December 16, 2008, and approved it. The pupil and his parents were advised by letter dated December 19, 2008 of the board's decision. Minutes, an audio tape and exhibits introduced at the 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 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 raises one issue which requires consideration. The pupil's attorney claims that the pupil's conduct did not occur while at school or while under the supervision of a school authority as the school board found.

The record includes testimony from the Dean of Students and the Assistant Principal that Lincoln Park is supervised every day by a school official for approximately half an hour before the beginning of the school day. The testimony indicates the school's general practice includes having a staff member cross the street, leaving school grounds, and standing in Lincoln Park, where he or she observes and converses with students. The Dean of Students' direct testimony indicates that because of the size of the park, the entire park is not supervised at all times. The record does not clearly establish what staff member was at the park at the time or where in the park he or she was. The record also indicates that the pupil admitted that on November 11, 2008 he sold Adderal to another pupil about half an hour before school at Lincoln Park. However, the record does not clearly establish exactly where in the park the student sold the drugs. The record also indicates that the student who purchased the Adderal took the drug to school, consumed two pills while at school and became ill, at school, as a result.

A school board's factual findings will be upheld if any reasonable view of the evidence sustains them. *Leo P. v. Whitewater Unified School District*, Decision and Order No. 351 (March 31, 1998); *Daniel A. v. Mauston School District Board of Education,* Decision and Order No. 324 (May 8, 1997); *Courtney R. v. Germantown School District Board of Education*, Decision and Order No. 278 (March 21, 1996); and *Michael Ryan H. v. Clinton Community School District Board of Education*, Decision and Order No. 222 (March 10, 1994). While opinions may differ regarding whether there was a staff member on the park grounds before school that day, a reasonable view of the evidence sustains the factual finding that a staff member was on park grounds, observing students, when the pupil engaged in the misconduct.

The issue in this case is whether the facts as established meet the legal definition of being "under the supervision of a school authority".[1]

This very issue came before the State Superintendent in 1991, involving the same school and the same park. In that case, *Patrick Lee Y v. Kenosha Unified School District No. 1 Board of Education*, Decision and Order No. 182 (October 9, 1991), the state superintendent found that the park was not under the supervision of the school district because there was no direct evidence that a staff member was on the grounds of Lincoln Park during the fight; it was the regular practice of the school to have a staff member on the park grounds during non-school hours; there was a school board policy proclaiming it will enforce school rules in the park; or that there was any type of agreement between the park's owner (the city) and the school regarding supervision or responsibility over the park. In making these findings, the state superintendent relied upon standard definition of "supervision" from Webster's Ninth Collegiate Dictionary.

While the hearing officer found that there was a staff member physically at the park when the misconduct occurred, the facts do not show that there is any school district policy expressing the district's intent or obligation to enforce school rules upon pupils outside of school hours, off school property, but under the eye of a school staff member. Indeed, students often "cross the sidewalk" to engage in activity that would be against the rules or endanger others at school if it were conducted on school property. Absent a school policy, it is unclear where and when the line of "supervision" is drawn. For example, clearly students who got into a fight at the convenience store before school would not be subject to expulsion. But, the board would argue that if the school decided to place a staff member at the convenience store then the store is under

[1]This entire issue could have been avoided if the school district had provided notice to the pupil that his misconduct occurred not under the supervision of a school authority but endangered the property, health, or safety of others at school. See *A. W. v. Spooner Area School District Board. of Education*, Decision and Order No. 577A, (August 29, 2006) and *Jason Q. v. Hartford Union School District Board of Education*, Decision and order No. 272 (February 9, 1996).

the supervision of the school authority. This is something the local school board needs to decide in policy and then warn students and parents about the extended jurisdiction of the school district's authority.

While there is a bounty of evidence that the pupil engaged in conduct while not under the supervision of a school authority that endangered the property, health, or safety of others at school, the notice advised the pupil that it believed his conduct occurred under the supervision of a school authority. However, there is no evidence in the record to support the finding that the pupil, while under the supervision of a school authority, endangered the property, health or safety of others.

This decision does not condone the pupil's conduct. However, I must uphold the requirements contained in the statutes. In reviewing the record in this case, I find the school district did not comply with all of the procedural requirements. I, therefore, reverse this expulsion.

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 21, 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).

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 J K by the Kenosha Unified School District Board of Education is reversed.

Dated this 6th day of March, 2009

Michael Thompson
Interim Deputy State Superintendent of Public Instruction