Decision and Order No.: 655

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of E S by Kenosha Unified School District Board of Education	DECISION AND ORDER Appeal No.: 09-EX-23

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 September 15, 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 April 7, 2009, from the Chairman of the Administrative Review Committee of the Kenosha Unified School

District. The letter advised a hearing would be held on April 22, 2009 that could result in the pupil's expulsion from the Kenosha Unified School District through his 21st birthday. The letter was sent separately to the pupil and his parent by first-class mail. The letter alleged that the pupil is guilty of repeated refusal or neglect to obey school rules. The letter specifically alleged that the pupil participated in 28 rule infractions, and included specific descriptions for each violation, within the time period of September 5, 2008 through March 26, 2009. The alleged violations include acts of class disruption, harassment, failure to pursue studies, disrespect to school-staff, hall pass abuse, insubordination, vandalism, physical fighting, failure to serve detentions, giving false information, using improper language, hall wandering, improper use of electronic devices, leaving without permission, participating in gang-related activity, having food in class, being uncooperative and threatening students.

The hearing was held before an independent hearing officer on April 22, 2009. The pupil and his parent appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. It is unclear from the record if the pupil and his parent were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations.

After the hearing, the hearing officer found that the pupil repeatedly refused or neglected to obey school rules. 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 hearing officer, dated April 23, 2009, was mailed separately to the pupil and his parent. The order stated that the pupil was expelled through the end of the 2010-2011 school year. The school board reviewed the independent hearing officer's order on April 27, 2009 and modified the order by extending the length of the pupil's term of expulsion through the end of

the 2011-2012 school year and also prohibited the pupil from returning to the same school as the victim of the September 16, 2008 incident. The pupil and his parent were advised by the Report of Review by School Board dated April 30, 2009 of the board's decision. Minutes of the school board expulsion hearing, an audiotape of the expulsion hearing and exhibits introduced at the 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 appeal alleges that the school district committed a procedural violation because it failed to properly identify the pupil as a student with a disability. The appeal further claims that the pupil's acts of misconduct were a manifestation of his disability. 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 special education evaluation procedures 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://dpi.wi.gov/sped/tm-specedtopics.html. Or, the pupil or his parent may call the special education team at the Department of Public Instruction to get more information.

However, upon reviewing the record, I find that the school district failed to comply with all procedural requirements. According to Wis. Stat. § 120.13(1)(e)3., "the hearing officer or panel shall keep a full record of the hearing." The school districted included an audiotape and minutes of the pupil's April 22, 2009 hearing as the record of the hearing. While the audiotape would normally constitute a full record of the hearing, the one provided in this case was

completely inaudible. The department requested that the school district forward a transcript of the hearing. However, the school district also could not understand the audiotape and was unable to prepare a transcript.[1] Instead, the school district forwarded minutes of the hearing alleging that the minutes constitute a full record of the pupil's hearing. School districts have been repeatedly cautioned in the past about relying on audiotapes because they are often inaudible and thus an insufficient record of the hearing. See *John L. v. Greenfield School District Board of Education*, Decision and Order No. 418 (June 26, 2000); and *Dustin F. v. Altoona School District Board of Education*, Decision and Order No. 432 (April 11, 2001). In addition, The Wisconsin Expulsion Digest, written by Gilbert J. Berthelsen, 2009 edition at page 187, even goes so far as to advise districts to use a court reporter that can prepare a transcript.

The minutes provided by the school district are insufficient to allow for meaningful review of the hearing. While there is no statutory explanation of how detailed hearing minutes must be, previous decisions by the state superintendent have outlined minimum requirements. The record must reflect who was present at the hearing, what evidence was presented in support of allegations of misconduct, and what decision or action the board took based upon the evidence presented. *Nathan W. v. Wilmot Union High School District Board of Education*, Decision and Order No. 296 (July 10, 1996); *D. P. v. Flambeau School District Board of Education*, Decision and Order No. 398 (August 20, 1999); *C. M. F. v. Beloit Turner School District Board of Education*, Decision and Order No. 537 (April 13, 2005); and, *D. L. v. Wheatland Center School District Board of Education*, Decision and Order No. 613 (March 27, 2008).

[1]The district is required to provide a transcript when it uses a hearing officer, § 120.13(1)(e)3.

In this case, however, there are no detailed minutes of the expulsion hearing. Specifically, these minutes do not reveal whether the pupil had the opportunity to question witnesses or call witnesses on his own behalf, or even what written documents were submitted to the board. These omissions constitute reversible error. See *D. G. v. New London School District Board of Education*, Decision and Order No. 228 (April 29, 1994); *Nathan W. v. Wilmot Union High School District Board of Education*, Decision and Order No. 296 (July 10, 1996); *A. L. v. Oconto Falls School District Board of Education*, Decision and Order No. 338 (September 24, 1997); *P. X. v. Saint Francis School District Board of Education*, Decision and Order No. 645 (April 28, 2002); and, *R. H. v. Webster School District Board of Education*, Decision and Order No. 624 (June 13, 2008). In addition, the board was unable to comply with the requirements to keep a full record and prepare a transcript as described in § 120.13(1)(e)3. See *B.S. v. Marshall School District Board of Education*, Decision and Order No. 626 (July 11, 2008).

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 E S by the Kenosha Unified School District Board of Education is reversed.

Dated this 13th day of November, 2009

Michael J. Thompson, Ph.D.
Deputy State Superintendent of Public Instruction