Decision and Order No.: 669

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of D B by Cumberland School District Board of Education	DECISION AND ORDER Appeal No.: 10-EX-14

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 Cumberland School District Board of Education to expel the above-named pupil from the Cumberland School District. This appeal was filed by the pupil and received by the Department of Public Instruction on July 19, 2010.

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 May 11, 2010, from the district administrator of the Cumberland School District. The letter advised a hearing

would be held on May 24, 2010 that could result in the pupil's expulsion from the Cumberland School District through the pupil's 21st birthday. The letter was sent to the pupil's mother and father. 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 May 6, 2010, the pupil admitted to violating the district's policy (443.4); possession and distribution of a controlled substance on school property.

The hearing was held in closed session on May 24, 2010. 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. The board recorded the hearing, however, no minutes of the hearing were submitted.

After the hearing, the school board deliberated in closed session. The board found that on May 4, 2010, the pupil did endanger the property, health or safety of any employee or school board member of the district in which the pupil is enrolled. It made no findings of specific conduct. 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 May 24, 2010, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through his 21st birthday with an opportunity for early readmission to an Alternative Education Program, at a place and time to be determined by the administration, for the 2010-2011 school year. An audiotape of the expulsion hearing is 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.

Upon reviewing the record, I find that the school district did not comply with all procedural requirements. First, there is no evidence to reflect that the pupil received a separate copy of the Notice of Expulsion Hearing. The pupil's parents both received separate copies of the notice and each of the notices were also addressed to the pupil. However, Wis. Stat. §

210.13(c)4. explicitly requires that notice "shall be sent to the pupil and, if the pupil is a minor, the pupil's parent or guardian." 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).

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.** While it appears from the record that a notice of expulsion hearing was addressed to the pupil, there is no evidence in the record that the notice was sent separately to the pupil. That statue requires that the notice of expulsion hearing be sent to the pupil AND the parent. When the word "and" is used in a statute, it means both of the stated requirements must be met. *Trojan v. U.W. Board of Regents*, 128 Wis. 2d 270, 273 (1985). Also, when the legislature amended the statute in 1973, it specifically extended to individual pupils the right to prior notice of the hearing. Laws of 1973, ch. 94. Before the 1973 amendment, these individual pupil rights did not exist in the law.

The state superintendent has routinely held the notice requirements in §120.13(1)(c) are mandatory in nature and failure to comply with the statute requires reversal of the expulsion order, even if both the pupil and the parent appear at the expulsion hearing. *See Michelle R. v.*

Suring Public Schools Board of Education, Decision and Order No. 126 (March 7, 1985), citing *Muskego-Norway Consolidated Schools v. WERB*, 32 Wis. 2d 478, 83 (1967); *Paul K. v. Flambeau School District Board of Education*, Decision and Order No. 171 (July 17, 1990); *Russell B. v. Muskego-Norway School District, Decision and Order No. 175 (February 29, 1991); Robert K. v. Manitowoc Public School District Board of Education*, Decision and Order No. 230 (May 3, 1994); *Phillip c. v. Wausaukee School District Board of Education*, Decision and Order No. 280 (March 22, 1996). *Tyrell D. v. Racine Unified School District Board of Education*, Decision and Order No. 288 (May 14, 1996).

Placing two notices in one envelope does not meet these requirements. The state superintendent has previously overturned expulsions where both the pupil's and parent's notice were provided to the pupil. *John K. v. Wisconsin Rapids School District,*, Decision and Order No. 178 (May 17, 1991). Providing two notices in one envelope addressed to the parents is not distinguishable. *Ulysses R. v. South Milwaukee School District Board of Education*, Decision and Order No. 509 (April 17, 2004); *Ryan S. v. Pewaukee School District Board of Education*, Decision and Order No. 445 (September 25, 2001); *Ryan K. v. Pewaukee School District Board of Education*, Decision and Order No. 439 (July 24, 2001); and *Raymond K. v. Phillips School District Board of Education*, Decision and Order No. 435 (June 25, 2001). It has also been determined mailing the student's copy of the notice of hearing to the father's work address does not comply with the statute. *Isaac S. v. Milwaukee Public School District*, Decision and Order No. 187 (April 21, 1992). "To find otherwise would eviscerate the legislature's clear directive that pupil and parental rights are to be treated as distinct and separate in these matters. Although pupil and parental interests may frequently coincide, that is not always the case and the legislature has clearly directed school districts not to assume these interests to be one in the

same." *Isaac S. v. Milwaukee Public School District*, Decision and Order no. 187 (April 21, 1992). Finally, there are strong public policy reasons for the requirement of separate notices. Most expulsions involve teenage students. It is common knowledge among educators and parents that privacy is an important teenage right. In many households, the parents do not open the teenager's mail and the teenager does not open the parent's mail. Thus, when two notices are placed in one envelope addressed only to the parent or the student there is no assurance that the mandatory procedural requirement of sending separate notices has been met.

Secondly, the notice that was provided did not comply with the requirement that the notice inform the pupil and parent of the state statutes related to pupil expulsion. Wis. Stat.§ 120.13(1)(c)4.L. This error, requires reversal as well. See *Alex H. v. Eleva Strum School District Board of Education*, Decision and Order No. 438 (July 20, 2001).

Third, the notice of expulsion hearing failed to contain the particulars of the alleged misconduct. The **notice shall state all** of the following:

> ...The specific grounds, under subd. 1., 2., or 2m., and the particulars of the pupil's alleged conduct upon which the expulsion proceeding is based...

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). It is also well established that notice is an integral part of procedural due process in these situations. A student facing expulsion is entitled to timely and adequate notice of the charges against him or her so as to allow a meaningful opportunity to be heard, even where the student unequivocally admits the conduct charged. *Keller v. Fochs*, 385 F. Supp. 262, 265 (E.D. Wis. 1974). Furthermore, § 120.13(1)(c)4. clearly requires notice of the specific grounds for expulsion and the particulars of the alleged misconduct. Expulsions have been

repeatedly overturned for failure to include this in the notice. *Bradley Scott P. v. Menasha Joint School District Board of Education,* Decision and Order No. 197, (August 21, 1992); *Christopher K. v. West Allis School District Board of Education*, Decision and Order No. 166 (April 18, 1990); *Travis V. v. Waterloo School District Board of Education*, Decision and Order No. 144 (July 2, 1986).

> *Particulars* [of misconduct] are not defined in the statute. However, it is not an ambiguous or unknown term. When interpreting a statute, we must give effect to the ordinary and accepted meaning of the language chosen by the legislature. Wis. Stat. §990.01(1) (1999-2000); Seider v. O'Connell, 2000 WI 76, ¶32, 236 Wis.2d 211, 612 N.W.2d 659. The definition of *particulars* requires items or details of information, not generalizations. *See The American Heritage® Dictionary of the English Language*: Fourth Edition. 2000.[1]

The notice of expulsion hearing in this case stated, as a factual basis for the expulsion, that on May 6, 2010, the pupil admitted to violating the district's policy (443.4); possession and distribution of a controlled substance on school property. It appears, based on the order of expulsion that the actual misconduct occurred on a different day. The particulars as stated in the notice, suggest that the pupil is being expelled because he admitted on May 6 to a violation of school policy. When in reality, he was expelled because of actual conduct that occurred on May 4. This does not constitute adequate notice and requires reversal.

Fourth, the school board did not maintain written minutes of the expulsion hearing as required by 120.13(1)(c)4.f. 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. If there is a reasonable view of the evidence submitted that

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[1] Particular, n. **1.** An individual item, fact, or detail: *correct in every particular.* See synonyms at item. **2.** An item or detail of information or news. Often used in the plural: *The police refused to divulge the particulars of the case.* **3.** A separate case or an individual thing or instance, especially one that can be distinguished from a larger category or class. Often used in the plural: *"What particulars were ambushed behind these generalizations?"* (Aldous Huxley).

supports the board's findings, those findings will be upheld. *Nathan W. v. Wilmot Union High School District Board of Education*, Decision and Order No. 296 (July 10, 1996). While the board submitted an audiotape of the hearing, in this case it is insufficient to replace the minutes. Upon careful review of the audiotape, it is not clear who spoke at the hearing, what documents were considered. For instance, there are portions of the audiotape where it is clear who is testifying. However, there are portions during the hearing where people ask questions and the recording is inaudible as to what the questions are or who is asking the questions. In addition, different documents are referenced within testimony during the hearing, but it is unclear as to what the documents actually are. The district submitted several police reports and administrative reports, however, the audiotape does not reflect whether these are the same documents used at the hearing or whether these are all of the documents used at the hearing. I have repeatedly cautioned school districts against relying on such audiotapes, because they are frequently so garbled or inaudible as to be useless for review purposes. See *John L. v. Greenfield School Distirct Board of Education*, Decision and Order No. 418 (June 26, 2000); *Dustin F. v. Altoona School District Board of Education*, Decision and Order No. 432 (April 11, 2001). This requires reversal.

Finally, the order of expulsion fails to explain the factual findings of the board and statutory grounds for expulsion are different from those provided in the notice of expulsion hearing. The expulsion order simply states that on May 4, 2010, the pupil did endanger the property, health or safety of any employee or school board member of the district in which the pupil is enrolled. It made no specific findings. Further, this conclusion was not the basis for the notice of expulsion. The notice of expulsion alleged that the pupil engaged in conduct, while at school or while under the supervision of a school authority which has endangered the property,

health and safety of others. Because the school district is required to provide the pupil advance notice of the statutory grounds under which it intends to proceed, it cannot make its finding based upon a different statutory ground for which the student did not receive notice. The statutory basis for the expulsion must be reflected in the notice of expulsion hearing, must be supported by evidence in the record, and must be reflected in the ultimate findings of the board. See *T.J.M. v. Deerfield Community School District Board of Education*, Decision and Order No. 423 (Septemer 25, 2000); *B. L. v. Maple School District Board of Education*, Decision and Order No. 214 (December 21, 1993); and, *J. K. v. Wisconsin Rapids School District*, Decision and Order No. 178, (May 17, 1991).

The appeal letter also raised two issues. First, the appeal alleges that there was insufficient evidence. While the record of the school board hearing is unclear, the board did submit reports that presumably would be considered by the board. Within those records, it is clear that the pupil admitted to selling marijuana at school. Whether the school board believes the pupil's confession is an issue of credibility that is determined by the school board. See e.g. *State ex rel. DeLuca v. Common Council*, 72 Wis. 2d 672, 242 N.W. 2d 689 (1976); *State ex rel. Wastlewski v. Board of School Directors*, 14 Wis. 2d 243, 111N.W. 2d 198 (1961). See also *Jeremy B. v. Waukesha School District Board of Education*, Decision and Order 395 (August 16, 1999); *Tracy M. v. Random Lake School District Board of Education*, Decision and Order No. 244 (January 11, 1995); and *Kathleen W. v. Tri-County Area School District Board of Education*, Decision and Order No. 130 (May 10, 1985).

The pupil also alleges that another student was treated less harshly, even though that student was delivering methamphetamine. Because expulsions are considered on a case-by-case basis, the treatment of other students is not relevant to this review. 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. This decision does not condone the pupil's conduct, nor does it suggest the expulsion ordered by the board is inappropriate. However, I must uphold the requirements contained in the statutes.

If the district chooses, it may remedy these errors 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). Sample forms to be used for expulsion cases are available to the public and can be found on the department's website at: http://www.dpi.wi.gov/sspw/compulattnd.html.

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 D B by the Cumberland School District Board of Education is reversed.

Dated this 15th day of September, 2010

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