

N.D.A.G. Letter to Sanstead (Nov. 19, 1990)

November 19, 1990

Dr. Wayne G. Sanstead
Superintendent of Public
Instruction
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Dr. Sanstead:

Thank you for your October 8, 1990, letter concerning the responsibility of a school board to make arrangements for the education of a student expelled from that board's school system under N.D.C.C. § 15-29-08(13), and whether those responsibilities are different if the student is not between the ages in the compulsory attendance law.

The North Dakota Constitution provides that "the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota" N.D. Const. art. VIII, § 1. The constitution further provides that the "legislative assembly shall provide for a uniform system of free public schools throughout the state" N.D. Const. art. VIII, § 2. See also Special Educ. Div. of the Dept. of Pub. Instruction v. G.H., 218 N.W.2d 441 (N.D. 1974) (all children have a right to a free public school education).

The creation of school districts and of a system of uniform schools therein satisfies these constitutional provisions. Dickinson Pub. School Dist. v. Sanstead, 425 N.W.2d 906 (N.D. 1988).

Our Legislative Assembly has implemented these constitutional requirements in various provisions found in N.D.C.C. tit. 15. The school board of a public school district is required to establish a system of free public schools which furnishes school privileges equally and equitably for all children of legal school age residing within the district. N.D.C.C. § 15-29-08(1). The legal school age for attendance at public schools is established by N.D.C.C. § 15-47-01. That section provides that the public schools "shall be equally free, open, and accessible at all times to all children between the ages of six and twenty-one." Attendance is compulsory for each educable child who is seven to 16 years of age. N.D.C.C. § 15-34.1-01.

The right to a free public school education is not unlimited. The school board of a public school district has the power to adopt, amend, and repeal rules for the "government and instruction of pupils, and for their suspension, expulsion, or transfer from one school to another." N.D.C.C. § 15-29-08(13). However, a pupil may not be "suspended or expelled [from a school] except for insubordination, habitual indolence, or disorderly conduct." *Id.* A

suspension may not be for more than 10 days, and an expulsion may not "be in effect beyond the end of the current term of school." Id.

In an early case, the North Dakota Supreme Court interpreted the relationship between the predecessors of N.D. Const. art. VIII, 1, N.D.C.C. § 15-29-08(13), and a school board rule prohibiting the use of heel plates on the shoes of students attending school in a public school district. In Stromberg v. French, 236 N.W. 477 (N.D. 1931), the Supreme Court noted that the North Dakota Constitution imposed a duty on the Legislature to make provision for the establishment and maintenance of a system of public schools. The court noted that although the duty was imposed, the constitution placed no restrictions upon the Legislature as to its performance. Citing other authority, the court noted that the Legislature therefore could enact any legislation in regard to the conduct, control, and regulation of the public free schools which did not deny the citizen the constitutional right to enjoy life and liberty, to pursue happiness and to acquire property. Recognizing this, the court stated that boards of education have a very broad discretion with respect to the conduct and regulation of schools conducted by them. Rules necessary for proper conduct and management of schools are left to the discretion of the board. A board's acts will not be interfered with nor set aside by the courts unless there is a clear abuse of the power and discretion conferred. Stromberg, 236 N.W. at 479.

Interpreting a student's entitlement to a public education as a protected property interest, the United States Supreme Court has determined that due process rights apply, even to a suspension from school of 10 days or less. Goss v. Lopez, 419 U.S. 565 (1975). In Goss, the Supreme Court interpreted an Ohio statute which provided for free education of all children between the ages of six and 21. The Court acknowledged that Ohio was not constitutionally obligated to establish and maintain a public school system, but that it had done so and required students to attend. The Court noted that the student in that case was thus entitled to a public education under state law and that a compulsory attendance law also applied. The Court ruled that Ohio could not withdraw the right to a public school education on grounds of misconduct without a fundamentally fair procedure to determine whether the misconduct had occurred.

In describing the nature of the due process requirements for the suspension of the student in the Goss case, the Court noted that a short suspension is a far milder deprivation than expulsion. Yet, the Court ruled that at the very minimum the student facing a suspension must be given some kind of notice and afforded some kind of hearing. The Court described this requirement as the right to receive an oral or written notice of the charges against the student and, if he denies them, an explanation of the evidence the authorities have and the opportunity to present his side of the story. The Court did not require a trial type proceeding and noted that there need be no real delay between the time of the notice and the time of the opportunity for the student's response. The Court also held that a student whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school if the necessary notice and rudimentary hearing followed soon after.

The Court in Goss made it clear that the ruling dealt with suspensions not exceeding 10

days and that longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.

Other courts have ruled that expulsion procedures for students in high school are unconstitutional if they fail to provide a hearing at which the student can be represented by counsel, present witnesses on his own behalf, and cross-examine adverse witnesses. These safeguards must be incorporated into a hearing held before or shortly after a child is expelled or suspended for a prolonged or indefinite period of time. The Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040 (1973)

In Dillon v. Pulaski County Special School District, 594 F.2d 699 (1979), the United States Court of Appeals for the 8th Circuit found a denial of due process in a school expulsion matter in an Arkansas high school. In Dillon the student was refused the right to call as a witness the accusing teacher who had observed the conduct resulting in his expulsion.

Thus, due process is required when there is an expulsion from school even in those cases where the right to a public education is not established by a state constitution.

The information you have provided concerns the expulsion of a ninth grade student from a North Dakota public school. You also describe a "policy and/or procedure" which may provide the opportunity for a hearing, to be represented by counsel, to present evidence, and to cross-examine witnesses and evidence presented against the student. You do not state whether the student in this case denied the allegations. This would be significant in making a determination of the actual provision of due process at a requested hearing as compared to the school procedures noted. The opportunity for confronting and cross-examining evidence against the student is not clear from the procedure described. Also, the opportunity for the student to present his side of the story prior to the five-day suspension is also not specifically provided by the procedure listed. Additionally, in light of the compulsory attendance law in North Dakota, N.D.C.C. § 15-34.1-03, I do not believe that a student within the age limitations for compulsory attendance could merely withdraw from a school without complying with other limitations of compulsory attendance. N.D.C.C. § 15-34.1-03.

Our compulsory attendance law places requirements on the parent, guardian, or other person having control over an educable child to send or take the child to a public school in the relevant school district. N.D.C.C. § 15-34.1-01. Enforcement of the compulsory attendance law is to be pursued by the school board, school superintendent, principal, truant officer, and teacher with respect to all children who are offered school facilities by the district. N.D.C.C. § 15-34.1-04. A school district which has expelled a student for misconduct would not offer its school facilities to that student and would not be in a position to report the fact of the student's failure to attend to the state's attorney.

N.D.C.C. ch. 15-40.2 provides for the transfer of students between school districts by agreement of the districts, as well as the written application of the parent or guardian for transfer of a student to another school district and the payment of tuition by the sending district. The district applied to has 60 days from receipt of the application by a parent

within which to render a decision concerning its agreement to pay tuition. N.D.C.C. §§ 15-40.2-01 and 15-40.2-05. If there is a disagreement between the parent and the sending district concerning the payment of tuition by the district to another school district, the parent may petition a three person committee for a decision on that subject or may pay the tuition themselves. N.D.C.C. §§ 15-40.2-05 and 15-40.2-06. These provisions apply to any pupil, apparently meaning any of those eligible to attend school as Provided in § 15-47-01.

Consequently, it is my opinion that the expulsion of a North Dakota high school student, if accomplished under appropriate procedures extended by the school district in compliance with due process limitations, does not place responsibility on the school district to arrange for education at an alternate location. The student's age does not change this requirement.

The parent of the expelled student may proceed under N.D.C.C. ch. 15-40.2 for transfer of the student and tuition payment by the sending school district which has expelled the student. However, there is only an ethical, not a legal, responsibility for that district to pay tuition, absent a ruling by the dispute resolution committee provided for in that chapter.

Sincerely,

Nicholas J. Spaeth

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