

**LETTER OPINION
2003-L-27**

May 5, 2003

Honorable David P. O'Connell
Senate Minority Leader
Senate Chamber
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Dear Senator O'Connell:

Thank you for your letter asking about school board authority to delegate to school administration or a hearing officer the expulsion of a student for a weapons violation.

All North Dakota school district boards are required to adopt rules regarding suspending and expelling students. N.D.C.C. § 15.1-19-09(1). Those rules must provide for a procedural due process hearing before making the determination to expel a student. Id.¹

¹ Court cases have determined that once a state has provided for the right to education, it "may not withdraw that right on grounds of misconduct absent, fundamentally fair procedures to determine whether the misconduct has occurred." Goss v. Lopez, 419 U.S. 565, 574 (1975). In order to comport with due process requirements, expulsion procedures must provide the student with a meaningful opportunity to be heard. Linwood v. Board of Education, 463 F.2d 763, 769-70 (7th Cir. 1972). The expulsion proceedings need not "take the form of a judicial or quasi-judicial trial." Id. at 770. If the student is given notice of the charges against him, notice of the time of the hearing, and a full opportunity to be heard, the expulsion procedures do not offend due process requirements. Betts v. Board of Education, 466 F.2d 629, 633 (7th Cir. 1972). In its opinion, the court in Linwood reviewed the procedural rules of the school board in question and found them to be constitutionally adequate. The court stated:

The Board's rules of procedure mandated, and the appellant received, timely and adequate notice of the charges, with a reasonable opportunity to prepare for and meet them, an orderly hearing in keeping with the nature of the subject matter involved; the right to be represented by counsel, to call and examine witnesses, to cross-examine the opposing witnesses; and

Each school district board is also required to adopt a policy prohibiting students from possessing weapons on school property or at a school function and providing for punishment of any student violating the policy. N.D.C.C. § 15.1-19-10(1). The portion of the statute requiring the weapons policy to prohibit a student from possessing a firearm is as follows:

2. The weapons policy must prohibit the possession of a firearm by a student on school property and at school functions and provide for the punishment of any student found to be in violation. Punishment must include immediate suspension from school and expulsion for at least one year. The policy must authorize the school district superintendent or the school principal, if the school district does not have a superintendent, to modify an expulsion under this section on a case-by-case basis in accordance with criteria established by the board. Before expelling a student, a school board, within ten days of the student's suspension, shall provide the student with a hearing before the school board at which time the school board shall take testimony and consider evidence, including the existence of mitigating circumstances.

N.D.C.C. § 15.1-19-10(2) (emphasis added).

A school district superintendent's duties are to supervise the general operation of the school district and the provision of education to students, visit schools of the district, supervise school personnel, prepare and deliver reports requested by the board, and to perform any other duties requested by the board. N.D.C.C. § 15.1-14-01. A school board may delegate some of its powers and duties to a school superintendent, such as its authority to hire school district personnel. N.D.A.G. 2002-L-71.² Other powers, however, it may not delegate.

The North Dakota Supreme Court has determined that under certain circumstances where statutes are specific in requiring certain activity by the school board, delegation to a superintendent is not authorized. In a case involving the discharge of school teachers, the

consideration of the evidence by an impartial tribunal with action based thereon.

Linwood v. Board of Education, 463 F.2d at 770.

² Similarly, a school board may delegate certain powers to its business manager. N.D.A.G. Letter to Stastney (Jan. 4, 1990).

North Dakota Supreme Court interpreted former N.D.C.C. § 15-47-38 (now N.D.C.C. § 15.1-15-08) to require that a school board conduct the discharge hearing. The school superintendent may be in attendance, but the school board was not allowed to delegate the board's duties to its superintendent to conduct the discharge proceeding. Schuck v. Montefiore Public School District No. 1, 626 N.W.2d 698, 702 (N.D. 2001). The relevant language of the former section was:

The teacher must be informed in writing of the time and place for a special meeting of the school board to be held on the question of the teacher's discharge prior to a final decision on the matter. . . . At the meeting with the board, if the teacher has informed the board in writing at least two days prior thereto that the teacher will contest the charges brought against the teacher, the board must sustain the charges with evidence produced at the hearing with witnesses who are subject to cross-examination by the teacher or the teacher's representative. . . . The meeting must be an executive session of the board unless both the school board and the teacher requesting the meeting shall agree that it is to be open to other persons or the public. . . .

N.D.C.C. § 15-47-38(2) (repealed 2001) (emphasis added).

The language quoted previously in this opinion from N.D.C.C. § 15.1-19-10(2) concerning the school board's responsibility for expulsion proceedings involving firearms is even more specific that the school board itself must conduct the hearing than was the language interpreted in the Schuck case. In light of that language and the Supreme Court's decision in Schuck, the school board must conduct expulsion hearings involving firearms itself. The same degree of specificity, however, is not contained in N.D.C.C. §§ 15.1-19-09 or 15.1-19-10 with respect to weapons that are not firearms.

Section 15.1-19-09(1), N.D.C.C., allows a school board to delegate the conduct of an expulsion hearing for a non-firearm weapon to its administration or a hearing officer. However, N.D.C.C. § 15.1-19-10(3) provides for the "board" to expel a student under the section. The "section" is all of N.D.C.C. § 15.1-19-10, which includes the imposition of punishment for firearms and other weapons. Therefore, even though a school board can constitutionally authorize its administration or a hearing officer to conduct an expulsion hearing for weapons other than firearms, N.D.C.C. § 15.1-19-10(3) requires the administration or hearing officer to communicate the decision to the school board so the board can make the ultimate decision. Whether that communication takes the form of an appeal "on the record" or some other process of review by the board may be determined by the board according to its rules.

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It is therefore my opinion that hearings conducted to expel a student for possessing a firearm on school property or at school functions must be conducted by the school board itself. Expulsion hearings for possessing other weapons, pursuant to rules adopted by the board providing for due process, may be conducted by authorized school personnel or a hearing officer, but the school board must make the final decision on expulsion. The school board's rules may determine the type of process it uses to review an expulsion hearing for possession of weapons other than firearms conducted by those it authorizes, which may take the form of an appeal "on the record."³

Sincerely,

Wayne Stenehjem
Attorney General

rel/pg

³ H.B. 1237, 2003 N.D. Leg., signed by the Governor on March 31, 2003, modifies many of the provisions in N.D.C.C. §§ 15.1-19-09 and 15.1-19-10.