THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of
WILLIAM S[redacted]
by the Tri-County Area School Board

DECISION
AND
ORDER
85-EX-04

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to §120.13(1)(c), Wis. Stats., from the March 14, 1985 decision and order of the Tri-County Area School Board to expel permanently William S[redacted], a high school senior. This appeal was filed on April 5, 1985. In accordance with the provisions of Wisconsin Administrative Code PI 1.04(3), this decision is confined to a review of the record of the school board hearing and the procedural standards required by §120.13(1)(c), Wis. Stats.

FINDINGS OF FACT

On February 15, 1985 William (Bill) and his parents, Mr. and Mrs. Rolland J[redacted], were individually notified by letter from Mr. Thomas Whalley, Acting District Administrator, that a hearing would be held before the Tri-County school board on February 25, 1985 to consider Bill's expulsion. The notice indicated that Bill and another student, Kathleen W., were "charged with the breaking of school district rules and engaging in conduct as follows: Engag-

ing in petting and sexual activity on January 15, 1985 on the athletic bus returning from Iola-Scandinavia." The notice also gave the time and place of hearing, indicated expulsion would be considered and included copies of §120.13(1)(c), Wis. Stats., and relevant parts of the Student Handbook concerning due process.

A hearing was held before the school board on February 25, 1985. Bill and his parents, Mr. and Mrs. Rolland J[redacted], Mr. Wayne S[redacted] and Mrs. Doreen S[redacted], were present at the hearing. They were not represented by counsel. During the hearing the board heard testimony from the school principal, the two basketball coaches, the school bus driver, a student witness, and Kathleen. Bill did not testify. The board also received certain documents as exhibits. These exhibits included several typewritten transcriptions of handwritten statements which students had given the coaches and principal and a diagram of the inside of the school bus. The principal, Ms. Arndt, testified that she took statements from two cheerleaders who indicated they saw Kathy and Bill engage in sexual intercourse in the bus on January 15th. Ms. Arndt testified that one student was sitting in the seat directly in front of Bill and Kathy and the other was sitting kitty-corner across from them (Tr. 17). At the hearing Ms. Arndt refused to identify the cheerleaders whose statements she had taken (Tr. 15). Ms. Arndt further testified that she was satisfied the witnesses were telling the truth and that it was her opinion that this sort of conduct [i.e.,

engaging in sexual intercourse] endangered the health and safety of the students involved as well as other students (Tr. 25).

Assistant basketball coach James Fazen testified that two basketball players told him that they personally witnessed Bill and Kathy "screwing" in the back of the bus (Tr. 27 and 28). Mr. Fazen also testified that he had every reason to believe the players were telling him the truth and further, that in his opinion, such activity would be harmful to the health and welfare of the students involved and other students (Tr. 27).

Head basketball coach John Sherman testified that around February 7 or 8, 1985 some of his basketball players told him that Bill and Kathy had engaged in sexual intercourse on the bus on January 15th (Tr. 36-37). Subsequently, Mr. Sherman asked the students he coached who could have witnessed the incident to write down what they saw. The students were given the option to write "No comment" if they chose. Mr. Sherman testified that some of the students who had told him they saw Kathy and Bill have sexual intercourse chose not to submit written statements to that effect (Tr. 39).

A student, Steve G., testified that on January 15, 1985 he was sitting directly in front of Bill and Kathleen and stated he did not witness any petting or sexual activity (Tr. 48-49). Under cross-examination he further testified that he really did not pay much attention, and really did not look, but he believed if Bill and Kathleen had been doing anything other than "laying hands", he would have known just by movement or sound (Tr. 50).

Stats., which establishes certain categories of offenses which may be the basis for an expulsion and sets out specific procedures which must be followed in the expulsion process. As far as grounds for expulsion, the statute states in relevant part,

> The school board may expel a pupil from school whenever it finds . . . that the pupil engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health, or safety of others, . . . and is satisfied that the interest of the school demands the pupil's expulsion.

§120.13(1)(c), Wis. Stats.

In reviewing an appeal of an expulsion decision, the Wisconsin Court of Appeals has indicated that the scope of the state superintendent's review is limited by the language of §120.13(1)(c), Wis. Stats. In Racine Unified School District v. Thompson, 107 Wis. 2d 657, 667, 321 N.W.2d 334 (1982), the Court of Appeals opined in dicta that, "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." Thus, it is incumbent upon the state superintendent in reviewing an expulsion decision to ensure that the required statutory procedures were followed, and that the board's decision is based upon one of the established statutory grounds.

A review of the record in this case indicates that the Tri-County Area School Board complied with all the procedural require-

ments of §120.13(1)(c), Wis. Stats., including notice, right to counsel, and right to a closed hearing. Accordingly, I conclude that there were no procedural violations of the statute in this expulsion process.

As to the grounds for the expulsion, the board's order indicated that it found that the sexual activity, which it concluded had taken place, endangered the health or safety of the students involved as well as other students and that the interest of the school demanded the students' expulsions.

In his letter of appeal, the appellant raised several issues concerning his expulsion. First, he alleged that the hearing was not fairly conducted and he was denied the ability to defend himself against the charges. Second, he challenged the fact that he was not given the opportunity to confront the witnesses against him, since the names of the two students who provided written statements to the principal were not revealed. Third, he alleged that he had no notice that the rules of the school would prohibit conduct such as that of which he was accused. Fourth, he contends that the evidence in the record does not support the Board's findings that he conducted himself in a manner justifying expulsion. Fifth, in his brief the appellant alleges that the Board did not act impartially because the attorney for the school district presented the district's case and also provided counsel to the Board. Sixth, he contends that the Board's decision should not be based purely on hearsay

evidence, especially when there was no evidence presented as to the reliability of the hearsay statements. Each of these allegations will be addressed separately.

First, a review of the record and transcript in this case reveals no evidence that the hearing was not fairly conducted or that the appellant was denied the ability to defend himself. Throughout the hearing the appellant and his parents were given opportunities to ask questions of the witnesses (T. 25, 34, 40, 44, 58) and only once did they avail themselves of this opportunity (T. 34). The appellant apparently chose to make no statement or testify on his own behalf. However, nothing in the record indicates he was denied an opportunity to do so. Accordingly, I conclude this first allegation is without merit.

Second, appellant contends that the school's refusal to identify the authors of the written statements submitted into evidence deprived him of his right to confront the witnesses against him. Case law from the federal courts in this circuit has specifically held that students involved in expulsion proceedings are not entitled to the same due process protections provided in a criminal trial or juvenile delinquency proceeding. See Keller v. Fochs, 385 Fed. Supp. 262, 265 (E.D. Wis. 1974), citing Linwood v. Bd. of Educ., 463 F.2d 763, 770 (7th Cir., 1972). I can find no authority for the proposition that a student has the right to confront the witnesses against him in an expulsion hearing. To the contrary, there is authority that it is permissible for school officials to rely

upon hearsay evidence in such proceedings. See Racine v. Thompson, supra. Accordingly, I conclude this second allegation is without merit.

Third, appellant contends he had no notice that behavior, such as that of which he was accused, was prohibited by school rules. The statute governing student expulsions does not require that the conduct alleged violate school rules. Rather, the school board may expel a pupil whom it has found "engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others at school or under the supervision of a school authority . . ." §120.13(1)(c), Stats. Common sense dictates that a school board cannot condone students having sexual intercourse while on a school bus returning from a school-sponsored activity. Under the circumstances of this case, I do not believe the appellant can be heard to complain that he had no notice that sexual intercourse while on a school bus could result in some form of discipline. See Korf v. Ball State University, 726 F.2d 1222, 1227 (7th Cir. 1984) in which the court rejected a similar due process claim of inadequate notice.

Fourth, appellant contends the record does not support the board's findings that he conducted himself in a manner justifying expulsion. In reviewing the findings of an administrative board sitting as the trier of fact, the Wisconsin Supreme Court has held that the findings of such a body "are conclusive if any reasonable

view of the evidence sustains them . . ." State ex rel. DeLuca v. Common Council, 72 Wis. 2d 672, 695 (1976). Thus, if there is any reasonable view of the evidence which will sustain the Tri-County School Board's findings, those findings must be upheld.

The school board heard conflicting testimony as to whether sexual intercourse took place between Kathleen and Bill on the school bus on January 15, 1985. The principal and coaches testified that several students had related that they [the students] personally saw the sexual activity. On the other hand, Kathleen denied that any sexual activity took place and Steve G. testified he did not witness any sexual activity between Bill and Kathleen. Given this conflicting evidence, it was solely within the province of the school board to judge the credibility of the witnesses and to determine who they believed. DeLuca, supra at 695; State ex rel. Wasilewski v. Board of School Directors, 14 Wis. 2d 243, 260, 111 N.W.2d 198 (1961).

Further, it was not improper for the board to rely upon the hearsay evidence presented by the principal and two basketball coaches. In Racine Unified School District v. Thompson, 107 Wis. 2d 657 (Ct. Apps. 1982), the Wisconsin Court of Appeals was persuaded that hearsay statements from school teachers or staff members were admissible in a school disciplinary hearing and could be found to have "sufficient probative force upon which to base, in part, an expulsion." Id. at 664. The Racine court also indicated it was

particularly persuaded by the rationale used by the federal Fifth Circuit Court of Appeals in Boykins v. Fairfield Board of Education, 492 F.2d 697 (5th Cir. 1974), cert. den. 420 U.S. 962 (1975).

In Boykins the 5th Circuit noted that it was disinclined to impose upon a board of laypeople the duty of observing and applying the rules of evidence, and concluded that, "the rights at stake in a school disciplinary hearing may be fairly determined upon the 'hearsay' evidence of school administrators charged with the duty of investigating the incidents." Id. at 701.

In the case at hand, the school principal and coaches were charged with investigating the allegations against Kathleen and Bill. Their investigations consisted of talking to the basketball players and cheerleaders who were on the bus on the day in question and eliciting the students' oral and written statements as to their personal knowledge of the events.

Based on the circumstances of this case, and the nature of the conduct in question, I believe it was appropriate for the school board to base its decision to expel entirely on the hearsay testimony presented by the principal and coaches as to the statements made by other students, and I conclude the record supports the board's findings and conclusions.

Fifth, the appellant alleges that the attorney for the school district acted improperly by assisting the school administrators in presenting their case and giving advice to the school board.

I can find nothing in the record which indicates that the attorney acted improperly in this matter.

Sixth, the appellant challenges the use of hearsay evidence at the hearing. This issue has been discussed above.

The school district has raised an issue as to the timeliness of appellant's appeal. As noted above, the school board issued its decision to expel Bill on March 14, 1985. An appeal was filed with the state superintendent on April 5, 1985. The appeal the state superintendent received indicated that a copy of the appeal had been mailed to the superintendent of schools for the Tri-County School District. Section 120.13(1)(c), Stats., dictates no timeline within which appeals to the state superintendent must be filed. Further, there is no statutory requirement that the appellant send a copy of the appeal to the respondent school district. Even if the school district did not receive its copy of the appeal letter, they were advised by letter on April 24, 1985 that an appeal had been filed with the state superintendent. Based on the record and the statute, I conclude the appeal was timely filed.

ORDER

IT IS THEREFORE ORDERED that the permanent expulsion of William S[redacted] by the Tri-County Area School Board be and is hereby affirmed.

Dated and mailed 21st this day of June, 1985.

Herbert J. Grover
State Superintendent of Public Instruction