Decision and Order No.: 424

THE STATE OF WISCONSIN
BEFORE
THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Barrett S by Fox Point J2 School District Board of Education	DECISION AND ORDER Appeal No.: 99/00 EX 21

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 Fox Point J2 School District Board of Education to expel the above-named fourth-grade pupil from the Fox Point J2 School District. This appeal was filed by the pupil's mother and received by the Department of Public Instruction on August 10, 2000.

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 June 21, 2000, from the district administrator of the Fox Point J2 School District.[1] The letter advised that a hearing would be held on July 18, 2000 that could result in the pupil's expulsion from the Fox Point J2 School District. The letter was sent separately to the pupil and his parents by certified mail. 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 and that he repeatedly violated school rules. The letter specifically alleged that on June 7, 2000, he threatened to kill other students, and that he maintained a written hit list of students he intended to kill. A written summary of the rule violations was also sent to the pupil and his parents. The repeated rule violations covered conduct from 1994 to the present. It included bringing matches to school on two occasions and lighting them on one occasion; jumping on, kicking, punching, choking, or hitting other students on approximately seven occasions; threatening to kill another student; and using profanity at school and on the school bus. A transcript of the hearing is also part of the record.

The hearing was held in closed session on July 18, 2000. The pupil's 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.

After the hearing, the school board deliberated in closed session. The board found the pupil did engage in conduct while at school or while under the supervision of a school authority

[1] The first notice was sent on June 16, 2000 and advised the parents and Barrett that the expulsion hearing was scheduled for June 26, 2000. There is no explanation in the record for the adjournment to July 18, 2000 as referenced in the June 21, 2000 notice.

which endangered the property, health, or safety of others, and that he repeatedly violated school rules. 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 July 20, 2000, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the 2003-2004 school year, with an opportunity for probationary readmission beginning at the first semester of the 2001-2002 school year.

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 did not raise any issues other than asking the state superintendent to review the expulsion. In a subsequent brief, the pupil's mother raises several concerns. Most concerns appear to be related to a conflict between the pupil's mother, the district administrator, and the board. The pupil's mother alleges the district administrator "lied to the board" when she recommended expulsion. This allegation apparently references the fact that the administration recommended expulsion, even though some witnesses testified they did not think Barrett would carry out his threats. Barrett wrote a list of students he intended to kill. When questioned, he was able to articulate a method he could use to carry out these threats. Whether or not he actually intended to carry out these threats is immaterial. The statute allows a school board to expel a pupil who has made threats to endanger the health, safety, and property of others. See §120.13(1)(c)1.

Since the authority to "approve, reverse or modify the decision" was conferred upon the state superintendent by 1987 Wis. Act 88, § 3, the state superintendent has consistently declined to modify the length of expulsions. It has repeatedly been held that the decision to expel a pupil and a determination of the length of the expulsion are both within the discretion of the school board as long as the board complies with the procedural requirements set out at § 120.13(1)(c). *Michael M. v. Appleton Area School District Board of Education*, Decision and Order No. 411 (April 25, 2000); *Troy Y. v. Burlington School District Board of Education,* Decision and Order No. 309 (January 21, 1997); *Tony R. v. Lake Geneva Joint No. 1 School District Board of Education,* Decision and Order No. 294 (June 24, 1996); *Brandon H. v. DeSoto Area School District Board of Education,* Decision and Order No. 206 (May 3, 1993). The school board is in

the best position to judge the demeanor of witnesses as well as to know and understand what its community requires as a response to school misconduct. It would be inappropriate for me, absent an extraordinary circumstance or a violation of procedural requirements, to second-guess the appropriateness of a school board's determination. In reviewing this case, I do not see the extraordinary circumstance or procedural violation that cause me to reverse or modify the pupil's expulsion.

The pupil's mother also alleges that the district administrator recommended expulsion and the board voted for expulsion because she ran against many of the board members. The parents never asked any board members to recuse themselves based on this alleged bias. Furthermore, the law presumes that school board members, as public officials, will discharge their legal duties in accordance with the authority conferred upon them and that they will act fairly, impartially, and in good faith. See *Heine v. Chiropractic Examining Board,* 167 Wis. 2d 187 (Ct. App., 1992), citing *State ex rel. Wasilewski v. Board of School Directors,* 14 Wis. 2d 243, 266 (1961), *appeal dismissed and cert. denied,* 370 U.S. 720 (1962). There is nothing in the record to indicate the board did not act fairly, impartially, and in good faith. The pupil's parents were allowed to question witnesses, testify before the board, and make oral arguments concerning the appropriateness of the administration's recommendation. As evidence of the board's attentiveness, several members of the board actively participated in the hearing by asking questions.

The parent's allegations concerning the district administrator's conduct are similarly unfounded. The district administrator presented the administration's evidence to the board. Presenting the administration's evidence to the board is the district administrator's duty. The pupil's parent also alleges that the district administrator recommended that the parent withdraw

the pupil from the school district and enroll him in a different school district. The parent also complains that the district administrator informed another school district to which Barrett applied under open enrollment, § 118.51, that Barrett was expelled.[2] Neither of these allegations are contained in the expulsion record. My review is limited to the record before the board. *Chadwynn N. v. Random Lake School District Board of Education*, Decision and Order No. 345 (January 26, 1998); *Jeffrey L. v. New Lisbon School District Board of Education*, Decision and Order No. 319 (April 8, 1997); *Matthew M. v. Cedarburg School District Board of Education*, Decision and Order No. 274(February 14, 1996).

The parent suggests in her letter that a police officer was present for the hearing, but that his presence was not noted in the minutes or transcript. The police officer was listed as present (Tr. p. 7), and no one objected to his presence. Thus, I cannot determine whether his presence was inappropriate. Very likely, he was present in the event the board had questions concerning the police department's investigation into the threats.

The parent also finds fault with the evidence presented at the hearing concerning the status of Barrett's special education testing. The elementary school principal testified that in April 2000 the school recommended a special education referral, but the parents refused permission to conduct the evaluation. The pupil's mother testified she is trying to get an appointment with a neuropsychologist, but there is a one year waiting list for an appointment. With regard to a pupil with an ***identified*** special education need, the state superintendent has reversed an expulsion based on a school board's failure to consider whether a pupil's handicapping condition was related to the misconduct. See *Anita P. v. Janesville School District*

[2] It should be noted that, if Barrett had enrolled in another public school under the open enrollment program, that school district would have received his pupil records. Upon receipt of those records, the new district would have learned of his expulsion. Once Barrett was expelled by a Wisconsin public school, any public school in Wisconsin could refuse his admission during the term of his expulsion. §120.13(1)(h).

Board of Education, Decision and Order No. 124 (February 5, 1985) and *Joe M. v. Milton School District Board of Education,* Decision and Order No. 125 (February 22, 1985). These decisions were based on the particular requisites and protections under both state and federal law relating to pupils identified as a child with a disability.

With regard to all other aspects of special education law, however, the state superintendent has determined that an expulsion appeal is not the appropriate context within which to challenge a district's application of special education provisions to a particular pupil. Such a challenge is beyond the scope of § 120.13(1)(c). *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). There is no evidence in the record that Barrett was identified as a child with a disability. Thus, this issue is beyond the scope of this review.[3]

Finally, the parent claims she was unable to raise many of these issues at the expulsion hearing because she was not represented by an attorney. She claims the school board should have adjourned the hearing to give her time to hire a lawyer or, alternatively, they should have dismissed the expulsion. An expulsion hearing is not a formal, legalistic hearing. While an attorney may assist parents and pupils, it is not required. Furthermore, the hearing was adjourned from June 26 to July 18. Beginning with the first notice of hearing on June 16, 2000, Barrett and his family had over thirty days to prepare for the hearing. On July 13, Barrett's father called the school to tell them that he had retained an attorney, Alan Eisenberg. He stated Mr. Eisenberg was not available on the evening of July 18 and would not be available for at

[3] For more information about the parameters of special education and the appeal process, the pupil may contact the Special Education Team at the Department of Public Instruction or consult the department's website at http://www.dpi.state.wi.us/dpi/dlsea/een/index.html.

least a month. The district administrator responded with a letter to Barrett's mother and father requesting Mr. Eisenberg to provide a letter confirming that he represented Barrett or his father and that neither Mr. Eisenberg nor any other member of his firm was available for the July 18 hearing. She also requested that Mr. Eisenberg provide a list of weekday evenings between August 1 and August 15 that he would be available. She informed the parents this information would be considered by the school board on July 18. If the board denied the request for adjournment, the hearing would go forward. Barrett's father did not present any of the requested information, nor did he or anyone else ask for an adjournment of the hearing. In light of this information, the actions of the school board were reasonable.

In reviewing the record in this case, I find the school district did comply with all of the procedural requisites. I, therefore, affirm this expulsion.

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 comply with all of the procedural requirements of § 120.13(1)(c).

ORDER

IT IS THEREFORE ORDERED that the expulsion of Barrett S by the Fox Point J2 School District Board of Education is affirmed.

Dated at Madison, Wisconsin, on October 6, 2000.

John T. Benson
State Superintendent of Public Instruction