Decision and Order No.: 476

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Andrew K. by Southern Door County School District Board of Education	DECISION AND ORDER Appeal No.: 02-EX21

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 Southern Door County School District Board of Education to expel the above-named pupil from the Southern Door County School District. This appeal was filed by the pupil and received by the Department of Public Instruction on June 10, 2002.

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 April 9, 2002, from the district administrator of the Southern Door County School District. The letter advised a

hearing would be held on April 23, 2002 that could result in the pupil's expulsion from the Southern Door County 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 engaged in conduct while not at school or not under the supervision of school authority which endangered the property, health, or safety of others at school or under the supervision of school authority. The letter specifically alleged three incidences of sexual assault. One occurred in the spring of 2000 off school grounds to a girl under the age of 16 who attended Southern Door County School District. Another occurred at school in the spring of 2001 to the same girl who was still under age 16. The third occurred at school on September 7, 2001 to a different girl under the age of 16.

The hearing was held in closed session on April 23, 2002. The pupil and his parents appeared at the hearing represented by Attorney Appel. 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 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 that he engaged in conduct while not at school or not under the supervision of school authority which endangered the property, health, or safety of others at school or under the supervision of school authority. 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 April

23, 2002, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through age 21. Minutes of the school board expulsion hearing, copies of exhibits presented at the hearing, and an audiotape of the expulsion hearing are part of 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.

The appeal letter in this case raises two issues. Attorney Appel alleges, on behalf of the pupil and his parents, that the expulsion period was unduly harsh because Andrew was the victim of sex discrimination. Mr. Appel claims that the alleged victim of the September 7, 2001 incident consented to sexual intercourse with Andrew and therefore was not "raped". Thus, Andrew and that victim are similarly situated, i.e. both under age and engaging in sexual intercourse at school. He argues that punishing Andrew and not the alleged victim is discrimination and violates the equal protection clause under the Constitution. However, the pupil does not argue that the two assaults involving the other victim were consensual. The pupil's argument must be rejected for the following reasons. First, whether or not the victim consented is a factual issue that could have been explored at the expulsion hearing. The victim's credibility was explored through the various witnesses. Andrew had an opportunity, which he did not take advantage of, to provide his explanation for his behavior. The board was presented with the sworn testimony (a transcript of a preliminary hearing concerning these charges) of the victim. Factual decisions and credibility determinations are within the board's discretion. See e.g. *State ex rel. DeLuca v. Common Council*, 72 Wis. 2d 672, 242 N.W. 2d 689 (1976); *State ex rel. Wasilewski 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).

Secondly, sexual intercourse with a child under the age of 16 does not require lack of consent. See Wis. Stats. §948.02(2). Therefore, whether the victim consented does not affect the validity of the charges. Thirdly, even if the victim of the September 7 incident consented,

there is no evidence that the other victim consented. Therefore, Andrew and that victim are not similarly situated. Finally, as stated earlier, the state superintendent has limited authority in expulsion appeals. Allegations of pupil discrimination under Wis. Stats. §118.13, as alleged in this case, are subject to the procedures and requirements contained in §118.13 and Wis. Adm. Code §PI 9. These procedures require the pupil to use and exhaust the pupil discrimination complaint procedures at the local level before the state superintendent can accept an appeal. Therefore, if the pupil wants to pursue these arguments any further, he must avail himself of the district procedures. If the district makes a decision that the pupil does not agree with, he may appeal as described in §PI 9.08.

The pupil also alleges that there is no evidence to support the finding that he engaged in conduct while not at school or while not under the supervision of a school authority that endangered the health, safety or property of others at school or under the supervision of a school authority. The school district argues that the incident which occurred in the spring of 2000 off school grounds endangered the victim, who was a student at Southern Door County School District. The district argues that because she was a student at the district that she was under the supervision of a school authority. A similar argument was previously rejected by the state superintendent. In *Timothy W. v. Greenfield School District Board of Education,* Decision and Order No. 315 (March 21, 1997), the pupil pulled a knife on and threatened another student. However, the conduct occurred after they exited the school bus. The state superintendent found that when the conduct occurs off school grounds, it must affect those at school or under the supervision of school authority. A person who happens to be a student at the same school does not satisfy the statutory requirement. In another case the state superintendent upheld the expulsion when a drug deal took place off school grounds, but the drugs were used or possessed

at school. *Jason Q. v. Hartford Union High School District Board of Education,* Decision and No. 272 (February 9, 1996). In yet another case, a student who vandalized a bus used to transport students has been found to endanger others at school because the unavailability of the bus was dangerous due to inclement weather. *Christopher W. v. Tomah Area School District Board of Education,* Decision and Order No. 247 (April 20,1995.)

Therefore, the ground for this expulsion based upon conduct occurring off school grounds, must be stricken from the findings. This should not be interpreted as condoning the actions of the pupil. Nor does it suggest that a sexual assault occurring off school grounds can never endanger someone at school or under the supervision of a school authority. There could be circumstances and facts that could be presented to a school board to support such a finding. In this case, there were not. However, because the remaining ground for expulsion is valid and was provided in both the notice and the findings of the school board, this error is harmless. *Eric H. v. Central/Westosha Union High School District Board of Education,* Decision and Order No. 377 (March 17, 1999); *Cf. Justin E. v. Antigo Unified School District Board of Education*, Decision and Order No. 329 (July 24, 1997).

In reviewing the record in this case, I find the school district complied 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 complied with all of the procedural requirements of §120.13(1)(c).

ORDER

IT IS THEREFORE ORDERED that the expulsion of Andrew K. by the Southern Door County School District Board of Education is affirmed.

Dated this 1ST day of AUGUST, 2002

Anthony S. Evers, Ph.D.
Deputy State Superintendent of Public Instruction