Decision and Order No.: 514

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of Jack M by Mercer School District Board of Education	DECISION AND ORDER Appeal No.: 04-EX08

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 Mercer School District Board of Education to expel the above-named pupil from the Mercer School District. This appeal was filed by the pupil and received by the Department of Public Instruction on March 11, 2004.

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 February 22, 2004, from the district administrator of the Mercer School District. The letter advised a hearing

would be held on March 1, 2004 that could result in the pupil's expulsion from the Mercer School District through the pupil's 21st birthday. The letter was sent separately to the pupil and his parents. 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. The letter specifically alleged that the pupil engaged in a series of incidents of harassing female peers as reported in a letter dated February 18, 2004 as well as previous incidents at school of threatening a student with a knife, possession of razor blades, agitating/battery of a classmate, sexual comments to a female peer and exposing himself to female students, all of which resulted in suspensions and some referrals to authorities.

The hearing was held in closed session on March 1, 2004. The pupil's mother appeared at the hearing represented by an attorney. The pupil chose not to attend the hearing. 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 which endangered the property, health, or safety of others. 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 March 3, 2004, was mailed separately to the pupil and his parents. The order stated the pupil was expelled until the beginning of the 3rd quarter of the 2004-05 school year with an opportunity to apply for early readmission on or after July 1, 2004. Minutes 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 several issues. First, the appellant alleges that the notice of expulsion hearing did not contain sufficient notice of the statutory grounds and particulars of misconduct. The **notice shall state all** of the following:

> ...The specific grounds, under subd. 1., 2., or 2m., and the particulars of the pupil's alleged conduct upon which the expulsion proceeding is based...

It is well established that a student is entitled to due process at an expulsion hearing. *Goss v. Lopez*, 419 U.S. 565 (1975); *Racine Unified School District v. Thompson*, 107 Wis. 2d 657, 321 N.W. 2d 334 (1982). It is also well established that notice is an integral part of procedural due process in these situations. A student facing expulsion is entitled to timely and adequate notice of the charges against him or her so as to allow a meaningful opportunity to be heard, even where the student unequivocally admits the conduct charged. *Keller v. Fochs*, 385 F. Supp. 262, 265 (E.D. Wis. 1974). Furthermore, § 120.13(1)(c)4. clearly requires notice of the specific grounds for expulsion and the particulars of the alleged misconduct. Expulsions have been repeatedly overturned for failure to include this in the notice. *Bradley Scott P. v. Menasha Joint School District Board of Education,* Decision and Order No. 197, (August 21, 1992); *Christopher K. v. West Allis School District Board of Education*, Decision and Order No. 166 (April 18, 1990); *Travis V. v. Waterloo School District Board of Education*, Decision and Order No. 144 (July 2, 1986).

Particulars [of misconduct] are not defined in the statute. However, it is not an ambiguous or unknown term. When interpreting a statute, we must give effect to the ordinary and accepted meaning of the language chosen by the legislature. Wis. Stat. §990.01(1) (1999-2000); Seider v. O'Connell, 2000 WI 76, ¶32, 236 Wis.2d 211, 612 N.W.2d 659. The definition of *particulars* requires items or details of information, not generalizations. *See The American Heritage® Dictionary of the English Language*: Fourth Edition. 2000.[1] Proper notice must

[1] Particular, n. **1.** An individual item, fact, or detail: *correct in every particular.* See synonyms at item. **2.** An item or detail of information or news. Often used in the plural: *The police refused to divulge the particulars of the case.* **3.** A separate case or an individual thing or instance, especially one that can be distinguished from a larger category or class. Often used in the plural: *"What particulars were ambushed behind these generalizations?"* (Aldous Huxley).

inform the pupil of the time frame during which the misconduct occurred, where the misconduct occurred, and a description of the conduct to be considered. *Ulysses R. v. South Milwaukee School District Board of Education*, Decision and Order No. 509 (April 17, 2004); *Ryan S. v. Pewaukee School District Board of Education*, Decision and Order No. 445 (September 25, 2001); *Ryan K. v. Pewaukee School District Board of Education*, Decision and Order No. 439 (July 24, 2001). There is no requirement that the notice list every witness or detail of the misconduct. The notice of expulsion hearing described the nature of the misconduct and referenced documents that had been given to the parent just days before. Thus, while the notice generally referred to misconduct, it specifically referred to documents that described the misconduct in sufficient detail as to provide adequate notice. Those documents were already in the parent's possession when the notice was sent. Furthermore, the pupil was represented by an attorney at the hearing and the attorney never objected to nor raised the adequacy of the notice. I find the notice did state the statutory grounds and particulars of misconduct.

Secondly, the appellant argues that there was insufficient evidence to support a finding that the pupil's misconduct endangered the property, health, or safety of others. In support of this contention, the appellant argues the board improperly relied solely upon hearsay evidence and that reliance on hearsay violates the pupil's constitutional rights. School Board expulsion hearings are not subject to rules of evidence, as such, hearsay is admissible in expulsion hearings and may be relied upon by school boards. *Racine Unified School District v. Thompson*, 107 Wis. 2d 657, 668, 321 N.W. 2d 334 (1982); *Timothy W. v. Greenfield School District Board of Education*, Decision and Order No. 315 (March 21, 1997); *Christopher W. v. Tomah Area School District Board of Education*, Decision and Order No. 247 (April 21, 1995); *Kathleen W. v. Tri-County Area School District Board of Education*, Decision and Order No. 130 (May 10,

1985). The State Superintendent has repeatedly found that a school board is permitted to consider and base its decision upon the testimony of a school official who relates the results of his investigation, including the statements of other people, when there are factors establishing the reliability and probative value of such testimony. *Carlos M. v. West Allis-West Milwaukee School District Board of Education,* Decision and Order No. 242 (December 21, 1994); *Joshua S. v. D.C. Everest School District Board of Education,* Decision and Order No. 170 (June 22, 1990); *John C. B. v. Milwaukee School District Board of Education*, Decision and Order No. 116 (October 31, 1983).

First of all, it is not entirely clear that everything the board heard was hearsay. Some statements were attributed to the pupil – these statements clearly are not hearsay, §908.01(4)(b), and included admissions to some of the conduct. Other testimony was received from the parents of the female victims. Based upon the limited record made when these statements were admitted, it is possible that some of the statements made by the girls to the parents could qualify as an exception to hearsay as an excited utterance on §908.03(2). Secondly, the pupil did not appear or testify. As this is not a criminal proceeding and there was no indication that one was pending, it is permissible for the board to consider his absence as it judged the credibility, reliability, and probative value of the testimony of those that did testify. See *Michael H. v. Clinton Community School Board of Education*, Decision and Order No. 222 (March 9, 1994); *John B. v. Milwaukee Public School Board of Education,* Decision and Order No. 116 (October 31, 1983).

In further support of the allegation that there is insufficient evidence to support the board's findings, the appellant alleges that he was denied his right to cross-examine witnesses. The record does not support this contention. The pupil's attorney was given ample opportunity

to cross-examine the witnesses who testified. The appellant also argues that he had a right to cross-examine the other students accusing the pupil of misconduct. There is no authority for this proposition. *Courtney R. V. Germantown School District Board of Education*, Decision and Order No. 278, (March 21, 1996); *William S. v. Tri-County School Board of Education*, Decision and Order No. 132 (June 21, 1985). Nor does the student have a right to know the identity of the student witnesses before the hearing. T*imothy W. v. Greenfield School District Board of Education,* Decision and Order No. 315 (March 21, 1997); *Nicholas K. v. Hudson School District Board of Education*, Decision Order No. 305 (December 5, 1996). At the hearing, the parents of some of the female victims did testify and thus identify their daughters.

The appellant also argues that he was not given an opportunity to answer charges before the expulsion hearing. The pupil was given adequate opportunity to answer the charges in front of the school board. He chose not to attend, thus foregoing that opportunity. The record suggests that he was given the opportunity to discuss the charges prior to the board hearing. Regardless, that is a procedure used for suspension from school and the state superintendent does not have the authority to review suspensions. *Madison Metropolitan School District (Lenny G.) v. Wis. D.P.I.*, 199 Wis. 2d 1, 543 N.W. 2d 843 (1995).

Next, the appellant argues that even if the testimony was properly admitted and considered by the board that there was insufficient evidence to support a finding that it constituted conduct that endangered the health, safety or property of others. It has been repeatedly held that arguments concerning the sufficiency of the evidence are generally beyond the scope of review. *Leo P. v. Whitewater Unified School District*, Decision and Order No. 351 (March 31, 1998); *Brent S. v. Mondovi School District Board of Education*, Decision and Order No. 290 (May 23, 1996); *Brad A. v. Boyceville Community School District Board of Education*,

Decision and Order No. 233 (June 29, 1994); and *Taiwan O. W. v. Kenosha Unified School District Board of Education*, Decision and Order No. 186 (April 7, 1992). Further, a school board's findings will be upheld if any reasonable view of the evidence sustains them. *Leo P. v. Whitewater Unified School District*, Decision and Order No. 351 (March 31, 1998); *Daniel A. v. Mauston School District Board of Education,* Decision and Order No. 324 (May 8, 1997); *Courtney R. v. Germantown School District Board of Education*, Decision and Order No. 278 (March 21, 1996); and *Michael Ryan H. v. Clinton Community School District Board of Education*, Decision and Order No. 222 (March 10, 1994).

The parents of the female victims testified to the harm caused to their daughters as a result of the sexual harassment perpetrated by the pupil. Thus, there was evidence of causing actual harm to the health and safety of pupils. Furthermore, expulsions have been upheld for sexual harassment of pupils. *Dustin P. v. Flambeau School District Board of Education*, Decision and Order No. 398 (August 20, 1999); *Courtney R. v. Germantown School District Board of Education,* Decision and Order No. 278 (March 21, 1996). In addition, the pupil was charged with other conduct, such as battery and possession of a knife which also clearly endanger the health, safety, or property of others.

It is within the board's discretion to give weight to the evidence and arguments, as it deemed appropriate and to judge the credibility of witnesses. *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).

Finally, the appellant argues that the board should have considered a less extreme sanction. 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. *David D. v. Central High School District of Westosha Board of Education*, Decision and Order No. 429 (January 25, 2001); *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. Furthermore, the board is not required to consider other sanctions. Despite this, the board did allow for early conditional reinstatement. There is not an extraordinary circumstance or procedural violation that causes me to modify the pupil's expulsion period.

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 Jack M by the Mercer School District Board of Education is affirmed.

Dated this 7th day of May, 2004.

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