Decision and Order No.: 613

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of D L by Wheatland Center School District Board of Education	DECISION AND ORDER Appeal No.: 08-EX-04

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 Wheatland Center School District Board of Education to expel the above-named pupil from the Wheatland Center School District. This appeal was filed by the pupil and received by the Department of Public Instruction on January 28, 2008.

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 May 16, 2007, from the Dean of Students of the Wheatland Center School District. The letter advised a hearing

would be held on May 22, 2007 that could result in the pupil's expulsion from the Wheatland Center School District through the pupil's 21st birthday. The letter was sent separately to the pupil and his parent by certified mail, regular mail and hand delivery. 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 repeatedly refused or neglected to obey school rules. The letter specifically alleged the pupil refused to obey school rules on 25 days between September 15, 2006 and April 30, 2007, and brought a toy gun onto the school bus and into the school building on May 8, 2007, and without disclosing that it was a toy gun, showed the toy gun to another student and said "Hey, look at this!"

The hearing was held in closed session on May 22, 2007. The pupil and his parent appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and his parent 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 repeatedly refuse or neglect to obey school rules and engaged 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 was mailed separately to the pupil and his parent.[1] The order stated the pupil was expelled until the end of the 2008-2009 school year with an

[1] The Findings, Conclusions and Order of Expulsion is undated. However, the Certified Mail Receipts included in the record indicate that The Findings, Conclusions and Order of Expulsion was mailed June 4, 2007.

opportunity for early conditional readmission. Minutes of the school board 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 pupil has raised several issues which require consideration.[2] First, he alleges error related to whether the pupil was a child with a disability. The pupil's father alleges that he requested the pupil be tested for a learning disability at the initial expulsion hearing but that his request was denied. However, there is no evidence of this request in the expulsion hearing record. The record does include an Initial Evaluation Notice and Consent Regarding Need to Conduct Additional Assessments form dated October 23, 2006 in which the father refused to give his consent for the school district to perform an initial evaluation for special education eligibility on his son. The pupil's father also claims that since the expulsion the pupil has been diagnosed with a disabling condition that directly contributed to or caused the incidents resulting in the pupil's expulsion. Whether or not the pupil is now diagnosed with a disabling condition that he was not diagnosed with before the expulsion is not relevant to my review of the appeal. The state superintendent has determined that an expulsion appeal is generally not the appropriate context within which to challenge a district's application of special education provisions to a particular pupil. Such a challenge is generally beyond the scope of Wis. Stats. § 120.13(1)(c). *Ryan S. v. Barron Area School District Board of Education*, Decision and Order No. 417 (June 9, 2000); *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). Therefore, any challenges to the district's special education evaluation procedures may be addressed using special education appeal procedures. The department maintains an extensive library of materials to explain procedures related to special education complaints or appeals. These materials are easily accessible at the

[2]The pupil was granted early reinstatement to school with conditions following the expulsion hearing. This reinstatement was revoked by the board due to violations of the conditions. The pupil's father disagrees with this decision; however, the state superintendent has no authority to review that decision. Wis. Stat. §120.13(1)(h)6.

department's website at http://dpi.wi.gov/sped/tm-specedtopics.html. Or, the pupil or his parent may call the special education team at the Department of Public Instruction to get more information.

Second, the pupil alleges that there are insufficient facts to support the board's decision to expel. He claims that his actions did not constitute disrespect or disregard for school rules and that exhibits used at the hearing were incomplete and inaccurate. The record reflects that, at the expulsion hearing, the pupil and his father were given an opportunity to ask questions, cross-examine witnesses, make statements, submit evidence and give testimony. Based upon the record, there is no evidence that either the pupil or his parent raised any issue related to whether the documentation was incomplete or inaccurate at the hearing. Matters not brought before the board cannot be raised for the first time on appeal. *Travis J.M. v. Deerfield Community School District Board of Education*, Decision and Order No. 423 (September 25, 2000); *Matthew R. v. Burlington Area School District Board of Education*, Decision and Order No. 383 (May 27, 1999); *Tony R. v. Lake Geneva J1 School District Board of Education*, Decision and Order No. 259 (August 11, 1995); and, *Jennifer C. v. Winter School District Board of Education*, Decision and Order No. 264 (December 6, 1995).

Furthermore 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 notice of expulsion includes 25 detailed occurrences explaining how the pupil did not obey school rules and an instance where the pupil brought a toy gun to school without disclosing that the gun was a toy. This information was provided to the board at the expulsion hearing. The 25 instances occurred during a seven month period and included swearing, fighting, inappropriate behavior on the school bus and not bringing the appropriate materials to class. Furthermore, the record shows that the pupil was informed of the school rules prior to his misconduct. To support his argument that the information provided to the board was inaccurate or incomplete, the pupil claims that many of the instances provided in the record were not committed by him, but by his brother. The record includes a list and description of offenses pertaining to the pupil at issue and his brother is named in a few of the incidents. However, the inclusion of his brother in the description of the incident does not support the conclusion that the pupil was not also involved in the misconduct. In fact, the pupil testified at the hearing and although he disagreed with the severity of his conduct or some of the details of some infractions he did not dispute his involvement in any infraction.

The pupil also alleges that the incident involving the toy gun did not endanger the property, health, or safety of others. Expulsions based on possession of a toy gun or "look-a-like gun" have been upheld as conduct that endangered the property, health, or safety of others. *See*

e.g. D. N. v. Germantown School District Board of Education, Decision and Order No. 586 (February 6, 2007).

Therefore, it was reasonable for the board to determine that the pupil repeatedly refused or neglected to obey school rules and that he engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health, or safety of others.

Third, the pupil claims the school board minutes of the expulsion hearing are inaccurate because they do not reflect a conversation at the expulsion hearing where board members stated they did not agree with the expulsion but felt they had no choice. The record reflects that the school board deliberated during the hearing and made findings that the pupil engaged in the alleged misconduct, that the misconduct met the statutory grounds for expulsion, and determined that the interests of the district do demand the pupil's expulsion. The record is not required to be a verbatim transcript of the hearing. The record must reflect who was present at the hearing, what evidence was presented in support of allegations of misconduct, and what decision or action the board took based upon the evidence presented. *Nathan W. v. Wilmot Union High School District Board of Education*, Decision and Order No. 296 (July 10, 1996). Thus, even if the board or a member of the board made such a statement there is no requirement that it be in the minutes.

Fourth, the pupil also alleges the board was biased against him because his father filed a lawsuit against the district.[3] He alleges that the board members and administration convened

[3] Although not part of the hearing record, it appears that the pupil's father filed a notice of claim, not a lawsuit, against the district in March 2007. According to the district's attorney, this notice of claim was not reviewed by the board until June 26, 2007. The pupil's father did not pursue the claim within the statutory requirements.

before the expulsion hearing and discussed a lawsuit that his father initiated against the Wheatland Center School Administration. As a result of this meeting, the pupil alleges that when the school board ordered the expulsion, there was a direct correlation between the lawsuit and the expulsion. The board submitted the general meeting minutes as well as the minutes of the expulsion hearing. The general meeting minutes of the board do not indicate that any other board business was discussed prior to the pupil's expulsion hearing. The board called the meeting to order at 6:00 p.m. and then convened into closed session to hold the pupil's expulsion hearing. Following the pupil's expulsion hearing, the board reconvened in open session until the board heard another expulsion hearing in closed session approximately two hours later. 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). In this case, I find the pupil's assertion of bias or conflict insufficient to overcome this presumption. The record contains no evidence of actual bias or conflict, nor does it reflect circumstances that would lead to a high probability of bias or conflict. *See Nicholas E. v. Lodi School District Board of Education*, Decision and Order No. 303 (October 17, 1996); *Kathleen W. v. Tri-County Area School Board of Education*, Decision and Order No. 130 (May 10, 1985).

Fifth, the pupil claims that the length of expulsion is in direct conflict with Wheatland Center School District's expulsion policy and that the act of bringing a toy gun to school is, by district policy, a suspension type offense, not an expellable offense. The school board's policies in this situation are irrelevant to my determination. I am not authorized to review, approve or

disapprove of school policy: I am only authorized to review expulsion decisions to ensure that the pupil has been provided adequate procedural due process. 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). *Joshua R. v. Edgerton School District,* Decision and Order No. 330 (July 29, 1997); *Troy Y. v. Burlington School District Board of Education,* Decision and Order No 309 (January 21, 1997); *Jason M. v. West Allis-West Milwaukee School District Board of Education,* Decision and Order No. 294 (June 24, 1996); and *Tony R. v. Lake Geneva Joint No. 1 School District Board of Education,* Decision and Order No. 259 (August 11, 1995). Furthermore, the expulsion was not solely based upon the pupil bringing a toy gun to school. There were several other instances provided within the record that outlined 25 different occasions where the pupil refused and/or neglected to obey school rules over the course of that school year.

Finally, the pupil alleges he was not correctly notified by the school district of the laws pertaining to notification. He provides no explanation of this assertion. Based upon my review of the record, the entire proceeding, including the notice of hearing, complied with all statutory requirements.

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 D L by the Wheatland Center School District Board of Education is affirmed.

Dated this 27th day of March, 2008.

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