Decision and Order No.: 626

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of B S by Marshall School District Board of Education	DECISION AND ORDER Appeal No.: 08-EX-18

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 Marshall School District Board of Education to expel the above-named pupil from the Marshall School District. This appeal was filed by the pupil and received by the Department of Public Instruction on May 14, 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 October 23, 2007, from the district administrator of the Marshall School District. The letter advised a hearing would be held on November 5, 2007 that could result in the pupil's expulsion from the Marshall School District through the pupil's 21st birthday. The letter was sent separately to the pupil and her parent 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. The letter specifically alleged that on October 16, 2007, the pupil was in the possession of and used marijuana on school grounds during the school day.

The hearing was held in closed session on November 5, 2007. The pupil and her parent appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and her 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 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 November 13, 2007, was sent separately to the pupil and her parent by certified mail. The order stated the pupil was expelled through the 2008-2009 school year. Minutes and exhibits introduced at 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 which require consideration. The pupil claims that the district violated procedural requirements by holding her expulsion hearing in closed session although neither the pupil nor her parent requested that it be closed. The procedures used by the board comply with sec. 19.85(1)(f), Stats. and are consistent with

previous holdings of the state superintendent. The state superintendent is authorized to address the open or closed nature of the proceeding only if the pupil or the pupil's parent demands a closed meeting and that demand is denied. *C. R. v. Germantown School District Board of Education*, Decision and Order No. 278 (March 21, 1996); *B. L. v. Maple School District Board of Education*, Decision and Order No. 214 (December 28, 1993); *M. G. v. Maple School District Board of Education*, Decision and Order No. 213 (December 20, 1993); *A. P. v. Sturgeon Bay School District Board of Education*, Decision and Order No. 341 (December 17, 1997).

The pupil alleges that the district did not provide adequate notice to the public of the Special School Board Meeting. In expulsion proceedings, the only notice the district is required to give is five days notice of the expulsion hearing to the pupil as well as to the pupil's parent(s). In this case, the district sent the notice of expulsion hearing separately to the pupil and her parent via certified mail on October 23, 2007. Therefore, the district did not violate this procedural requirement. Whether the district erred when providing notice to the public for this meeting is beyond the authority of an expulsion appeal. Complaints concerning violation of an open meetings law can be made to the county's District Attorney.

The pupil claims that the minutes of the expulsion hearing are insufficient. Specifically, the pupil complains about the quality of the minutes and that they do not include a motion approving the 'official minutes.' Districts are required to submit minutes that allow for a meaningful review of the hearing, reflect who was present, and what evidence was presented in support of the allegations of misconduct. The school board is not required to include a motion approving the minutes. In this case, the minutes do allow for a meaningful review of the hearing, reflect who was present, and also what evidence was presented. After reviewing the record, I find that the minutes are sufficient.

In addition, the pupil complains that she was denied access to an audio recording or transcript of the expulsion hearing. Correspondence dated March 28, 2008 indicates that the administrator informed the pupil that minutes were kept of the expulsion hearing and that an audio recording was not made. Wisconsin Stat. sec. 120.13(1)(e) requires that a transcript be prepared and given to the pupil and her parent only when the board uses an independent hearing officer or panel to hear the expulsion hearing. The board heard the expulsion hearing, therefore it was not required to prepare a transcript.

The pupil also claims the Notice of Expulsion Hearing dated October 30, 2007 contained inaccuracies. The pupil alleges copies of statutes 119.25 and 120.13(1) were referenced in the letter but not provided. Wisconsin Stat. § 120.13(1)(c)4 only requires a statement in the notice of expulsion hearing that the state statutes related to pupil expulsion are §§ 119.25 and 120.13(1). The district complied with this requirement.

In addition, the pupil complains about the wording and punctuation in the notice of hearing. Specifically, the pupil alleges that by omitting a comma, the meaning of the language became distorted and the reader was lead to believe that she had only 60 days to file an expulsion appeal. It is true that the notice of hearing is missing a comma; however, the meaning of the sentence does not change. Regardless, the appeal was accepted by the State Superintendent and therefore the missing comma had no effect on the proceedings.

The pupil also claims that the district violated procedural requirements by denying her request for copies of hearing exhibits that she made prior to the hearing. There is no requirement that the district provide copies of hearing exhibits to the pupil and her parent prior to the hearing. The district is only required to provide copies of all documents presented to the board to the

pupil and parent at the hearing. In this case, the pupil and her parent received a copy of the hearing exhibits at the hearing. Therefore, there was no error.

The pupil alleges that there is insufficient evidence to support the board's decision to expel because the board was presented with hearsay. The pupil claims that interviews of witnesses submitted as evidence at the hearing were inadequate because they were in the form of interview notes. Because the interviews were submitted in the form of notes, the pupil alleges that she did not have the opportunity to cross-examine or refute certain testimony given by the school principal. She also objected because they are hearsay. 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).

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).

The school principal testified at the expulsion hearing. He testified as to what the student witnessed and told him during the investigation. This includes: a student witness who indicated that she saw the pupil roll a marijuana cigarette in the bathroom; a student witness indicating that she saw the pupil provide the materials to construct a marijuana cigarette in the bathroom; a Student Behavior Referral for the pupil indicating that she was seen with a group of students smoking where the remains of a marijuana cigarette was later found; and, a student witness confirming that the pupil was with the group of students smoking where the remains of a marijuana cigarette was later found. Thus, a reasonable view of the evidence supports the board's findings.

The pupil also alleges that her conduct did not endanger the property, health, or safety of others. The record includes statements identifying the pupil as a person at the scene where a marijuana cigarette was found on school grounds. In addition, evidence at the hearing indicates that the pupil was seen providing the materials to construct a marijuana cigarette and rolling a

marijuana cigarette in a bathroom at school. Merely being in possession of drugs at school is the basis for expulsion as it endangers the health, safety and welfare of others. *M. C. v. Lake Geneva-Genoa City School District Board of Education*, Decision and Order No. 277 (March 12, 1996); *L. D. v. Milwaukee Public School District Board of School Directors*, Decision and Order No. 335 (September 15, 1997); *J. B. v. Barron School District Board of Education*, Decision and Order No. 358 (May 14, 1998); *A. B. v. Edgerton School District Board of Education*, Decision and Order No. 558 (September 27, 2005). Therefore, it was reasonable to conclude the pupil's conduct endangered the property, health, or safety of others at school.

The pupil also alleges that the school board did not follow their own policies and procedures when deciding upon expulsion for her conduct. 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).

The pupil alleges that the board did not follow the expulsion period timeframe that was recommended by the district's attorney and principal. However, a pupil's expulsion period is determined by the school board. While school officials may offer suggestions or

recommendations pertaining to the length of a student's expulsion period, the school board is not required to follow them. Therefore, the school board did not err by determining a different expulsion period than recommended by the principal and district's attorney.

The pupil also claims that there are inconsistencies in the punishments given to other students involved in the same incident. Because expulsions are considered on a case-by-case basis, the treatment of other students is not relevant to this review. See *Aron P. v. Sturgeon Bay School District Board of Education*, Decision and Order No. 341 (December 17, 1997); *Nathaniel S. v. Wausau School District Board of Education*, Decision and Order No. 350 (March 25, 1998); and *Leo P. v. Whitewater School District Board of Education*, Decision and Order No. 351 (March 31, 1998). Furthermore, 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. In reviewing this case, I do not see the extraordinary circumstance or procedural violation that causes me to modify the pupil's expulsion period.

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 B S by the Marshall School District Board of Education is affirmed.

Dated this 11th day of July, 2008.

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