Decision and Order No.: 705

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of K[redacted] W[redacted] by Racine Unified School District Board of Education	DECISION AND ORDER Appeal No.: 13-EX-03

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 120.13(1)(c) from the order of the Racine Unified School District Board of Education to expel the above-named pupil from the Racine Unified School District. This appeal was filed by the pupil's parent and received by the Department of Public Instruction on June 3, 2013.

In accordance with the provisions of Wis. Admin. Code Ch. PI § 1.04(5), this Decision and Order is confined to a review of the record of the expulsion hearing. The state superintendent's review authority is specified in Wis. Stat. § 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 13, 2013, from the interim principal of the pupil's high school. The letter advised that a hearing would be held on May 21, 2013, that could result in the pupil's expulsion from the Racine Unified School District up to the pupil's 21st birthday. The letter was sent separately to the pupil and his 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 the pupil was in possession of marijuana and passed the marijuana to another student during class hours.

The hearing was held in closed session on May 21, 2013. 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.

At the end of the hearing, the hearing examiner found that 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 hearing examiner 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 hearing examiner, dated May 24, 2013, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through the end of the 2013-14 school year. On June 17, 2013, the school board affirmed the hearing examiner's expulsion order in all respects. An audiotape of the expulsion hearing, copies of correspondence, and all ofthe hearing's exhibits 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 Wis. Stat. § 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 Wis. Stat. § 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 ensure 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. In her letter, the pupil's parent asserts that an expulsion to the end of the 2013-14 school year is too harsh of a punishment. The state superintendent has consistently and repeatedly upheld expulsions based upon possession of marijuana. *See e.g., Brian M. v. Lodi School District,*

Decision and Order No. 425 (October 23, 2000); *Andrew C. v. Milwaukee Public School District,* Decision and Order No. 386 (June 11, 1999); *Julian H. v. Milwaukee Public School,* Decision and Order No. 379 (April 20, 1999); *Shannon T. v. Milwaukee Public School District,* Decision and Order No. 354 (April 16, 1998); *Joshua S. v. Beloit-Turner School District,* Decision and Order No. 307 (January 14, 1997); *Donald P. v. Westby Area School District,* Decision and Order No. 299 (August 9, 1996); *Robin L. v. East Troy Community School District,* Decision and Order No. 253 (June 21, 1995); and *Jared L. v. Menomonee Falls School District,* Decision and Order No. 218 (February 10, 1994). Further, 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 and hearing examiner are in the best position to judge the demeanor of witnesses as well as to know and understand what the 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 an extraordinary circumstance or a procedural violation that cause me to modify the pupil's expulsion period.

The pupil's parent also asserts that the hearing examiner's bias resulted in an unfair hearing. Specifically, the pupil's parent points to numerous comments made by the hearing examiner during the hearing, especially towards the end of the hearing, including: the examiner's

digression about the school district "goofing" with grades of basketball players; his comments that the pupil would "never go to college"; and his statements that the pupil's low-handing pants were "disrespectful to everyone in the room."

It is settled law that due process requires a fair and impartial decision-maker. *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970). If a decision-maker is not fair or impartial, due process is violated. *Guthrie v. Wisconsin Employment Relations Comm'n,* 111 Wis. 2d 447, 454, N.W.2d 331, 335 (1983). At the same time, the law presumes that public officials, including hearing examiners, will discharge their duties 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); *Buker v. Labor & Indus. Review Comm'n,* 2002 WI App 216, ¶ 19, 257 Wis. 2d 255, 267.

In this case, I find that the appellant's assertion of bias insufficient to overcome this presumption. There is no denying that the hearing examiner made comments that were unwarranted and unprofessional. However, viewing the record as a whole, I find that the hearing officer was not biased. First, the hearing officer conducted the vast majority of the hearing in a professional, courteous manner. Second, the comments in question appear to be the result of the hearing examiner's exasperation at the pupil's lengthy discipline record, which was 16 pages in length, and the pupil's academic record. The comments do not appear to be the result of an impermissible bias. Finally, a number of the comments were directed at school principal, not the pupil. For example, the hearing examiner was critical of the school permitting the pupil to play basketball despite poor grades.

The pupil's parent also asserts that parts of the audio recording of the hearing were taped over. Having listened to the entire audio record provided by the school district, I do not find that the audio recording was tampered with. It is not apparent that any portion of the audio recording was recorded over. Rather, the only breaks in the audio recording are from when the hearing examiner went off the record. For example, there was a break in the audio recording when the hearing examiner went off the record to review a five-page police report of the incident that led to the pupil's expulsion. In addition, the audio recording includes many of the remarks that the pupil's parent claims were recorded over, including the less than professional comments from the hearing examiner. Finally, the hearing examiner signed an affidavit in which he swore – under oath – that he did not record over any portion of the audio record. Considering the above, I conclude that the audio recording provided to the state superintendent was not inappropriately edited or modified.

The pupil's parent also raises concerns about other students' written statements being used against the pupil at the expulsion hearing. The state superintendent has previously held that a student is not entitled to learn the identity of student witnesses prior to an expulsion hearing. *Nicholas K. by the Hudson School Dist.,* (305) Dec. 5, 1996 (p. 5); *Timothy W. by the Greenfield School Dist.,* (315) March 21, 1997 (p. 6); *Luke D. by Durand School Dist.* (483) Feb. 14, 2003. Further, it is settled that a student does not have the right confront the witness against him in an expulsion hearing, including witness statements made in writing. *William S. by the Tri-County Area School Bd.,* (132) June 21, 1985 (p. 8); *Courtney R. by the Germantown School Dist.,* (278) Mar. 21, 1996 (p. 7); *Nocholas K. by the Hudson School Dist.,* (305) Dec. 5, 1996 (p. 4); *Tomothy W. by the Greenfield School Dist.,* (315) March 21, 1997 (p. 6). As such, it was

permissible for the school district to present written statements from other students against the pupil.

In reviewing the record in this case, I find the school district did comply with all of the procedural requirements. I further find that the pupil's parent does not raise any issue that warrants reversal of the school district's expulsion order. Therefore, I affirm the pupil's 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 K[redacted] W[redacted] by the Racine Unified School District Board of Education is affirmed.

Dated this 30th day of July 2013

Michael J. Thompson, Ph.D.
Deputy State Superintendent of Public Instruction

APPEAL RIGHTS

Wis. Stats. § 120.13(1)(c) specifies that an appeal from this Decision and Order may be taken within 30 days to the circuit court of the county in which the school is located. Strict compliance with the service provisions of § 227.53 is required. In any such appeal, the State Superintendent of Public Instruction shall be named as respondent.

PARTIES TO THIS APPEAL ARE:

K[redacted] W[redacted]
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