Decision and Order No.: 739

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of K[redacted] F[redacted] by Chippewa Falls Area Unified School District Board of Education	DECISION AND ORDER Appeal No.: 16-EX-05

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 Chippewa Falls Area Unified School District Board of Education to expel the above-named pupil ("KF") from the Chippewa Falls Area Unified School District. This appeal was filed by KF's guardian, his grandmother ("Appellant"), and was received by the Department of Public Instruction on May 31, 2016.

In accordance with the provisions of Wis. Admin. 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 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

On March 4, 2016, a middle school counselor noticed that Student A recently skipped some of her classes and "seemed more down than usual." The counselor asked Student A what was wrong. Student A revealed that KF, another middle school student, made repeated unwanted sexual contact with Student A on February 29, 2016. Student A also disclosed that KF inappropriately touched her several times throughout February 2016. Both the school district and local law enforcement conducted an investigation. The school district interviewed KF that same day. As a result of its investigation, the school district discovered the following:

- KF touched Student B's buttocks twice and made inappropriate sexual comments to Student B;
- KF touched Student C's buttocks and made inappropriate sexual comments to Student C;
- KF used his school email address to create an account on a "pornographic webcam site";
- On February 17 and 18, 2016, KF used school district IT systems to send inappropriate sexual comments to multiple female classmates; and
- On Monday, March 7, 2016, (i.e., three days after the school district interviewed him about the February 29 incident) Student D reported that KF used Facebook to solicit nude pictures of her over the prior weekend.

After the investigation, the school district began expulsion proceedings against KF. By a letter dated March 16, 2016, the school district notified KF and his family of the expulsion hearing. The letter advised that a hearing would be held on March 31, 2016, that could result in KF's expulsion from the school district through KF's 21st birthday. The letter was sent separately to KF, his parents, and his guardian by certified mail. The letter alleged that KF engaged "in conduct which endangers the property, health, or safety of himself and/or others while under the

supervision of a school authority." The letter cited the aforementioned conduct as a basis for its expulsion recommendation to the school board.

The expulsion hearing was held in closed session on March 31, 2016. KF and his guardian appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. KF and his guardian 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 school board found: that KF 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; that KF had not been found to be a child with a disability; and that the interests of the school demand KF's expulsion. The order for expulsion containing the findings of fact and conclusions of law of the school board, dated April 12, 2016, was mailed separately to KF, his parents, and his guardian. The order stated KF was expelled through his 21st birthday. The order also permitted reinstatement if KF satisfied a variety of conditions, including completing community service, completing counseling, and undergoing a threat assessment. Minutes of the school board expulsion hearing and a digital recording of the expulsion hearing are part of the record.

DISCUSSION

The expulsion statute – Wis. Stat. § 120.13(1)(c) – gives school boards the authority to expel a student when specific substantive standards are met and specific procedures have been followed. Madison Metro. Sch. Dist. v. Burmaster, 2006 WI App. 17, ¶ 19, 288 Wis. 2d 771. In reviewing an expulsion decision, the state superintendent must ensure, among other things, 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 interest of the school district demand the pupil's expulsion.

The Appellant argues that the expulsion should be reversed because the school district allegedly failed to comply with the requirements of the federal Individuals with Disabilities Education Act ("IDEA"). With limited exceptions, an expulsion appeal is not the appropriate context within which to challenge a school district's application of special education provisions to a particular student.[1] R.M. by the Oak Creek-Franklin Joint School District, (711) January 30, 2014. Such challenges are beyond the scope of the state superintendent's review when there is no evidence in the record that the student was identified as a child with a disability. Robert M. by the Arcadia School District, (353), April 6, 1998. Nevertheless, the Appellant argues that the school district should have known that KF was a child with a disability before the expulsion proceedings occurred and, as a result, KF should have been afforded the protections of IDEA.

Under the IDEA, a child with a disability is afforded certain procedural protections prior to an expulsion proceeding. *See* 34 C.F.R. §§ 300.530 – 300.537. The IDEA also affords protections to a student not yet determined to be a child with a disability. 34 C.F.R. § 300.534. Specifically, if a school district had knowledge that a student is a child with a disability before the expellable offense occurred, the student may assert the procedural protections of the IDEA. 34 C.F.R. § 300.534(a). A school district is deemed to have such knowledge if any of the following apply: (1) the student's parent expressed concern in writing to the student's teacher, the school's administrative personnel, or the school's supervisory personnel that the student is in need of special education or related services; (2) the student's parent requested an evaluation of the student; or (3) the student's teacher or other district personnel expressed concern to the director of special

[1] Individuals may pursue complaints about compliance with the IDEA using the specific procedures available under Subchapter V of Wis. Stat. Ch. 115.

education or other appropriate school personnel about the pattern of behavior demonstrated by the student. *Id.* If a school district lacks such knowledge, it may discipline the student the same way it would discipline a child without a disability. 34 C.F.R. § 300.534(d).

The Appellant points to four things that should have put the school district on notice. First, the Appellant alleges that the school district had documentation regarding KF's stay at a treatment facility. Second, KF had a Section 504 accommodation evaluation and plan. Third, the Appellant submitted to the school board a copy of a letter, dated March 21, 2016, from KF's treating physician. Fourth, the Appellant alleges that she expressed concerns about the KF's "erratic" behavior to KF's teachers.

Despite the Appellant's claims, there is no evidence in the record that the school district had – or should have had – knowledge that KF was a child with a disability.[2] Importantly, the record contains a document titled "Basis of Knowledge of Disability." The document was prepared by the school district's director of pupil services and special education after a "thorough file review." In the document, the director specifically stated that she reviewed KF's Section 504 evaluation and plan. Based on the review, the director determined that KF was not a child with a disability. Besides the Appellant's unsupported allegations, there is nothing in the record or the parties' submissions to suggest that the director's review was incomplete or its conclusions incorrect.

In addition, the Appellant's other allegations, if true, do not establish that the school district had – or should have had – knowledge that KF was a child with a disability. For example, the doctor's letter was prepared and submitted to the school board after KF's misconduct occurred.

[2] On appeal, the Appellant submitted a number of documents to the State Superintendent. However, new evidence may not be submitted for the first time on appeal. A.B. by the Milwaukee Public School Dist. (657) March 4, 2010.

Again, in order for the IDEA's protections to apply, the school district had have knowledge before the expellable offense occurred. 34 C.F.R. § 300.534(a). Similarly, the Appellant's allegation that she expressed concerns to the KF's teachers also fails. Even if one assumes that the Appellant's statements were requests for special education or services, such requests had to be in writing. *Id.* There is no evidence in the record of the requests, or that they were in writing.

Because there is no evidence in the record that the district had – or should have had – knowledge of KF's disability prior to expulsion, I decline to reverse or modify the school board's expulsion order. S.R. by the Chippewa Falls Area Unified School District, (723) Feb. 25, 2015. The record demonstrates that the school district and school board complied with all of the requirements of the IDEA and the expulsion statute.

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 requirements of Wis. Stat. § 120.13(1)(c) and 34 C.F.R. §§ 300.530 – 300.537.

ORDER

IT IS THEREFORE ORDERED that the expulsion of K[redacted] F[redacted] by the Chippewa Falls Area Unified Board of Education is affirmed.

Dated this 2nd day of August 2016

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

APPEAL RIGHTS

Wis. Stat. § 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 Wis. Stat. § 227.53 is required. In any such appeal, the State Superintendent of Public Instruction shall be named as respondent.

PARTIES TO THIS APPEAL ARE:

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