

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

K [REDACTED] G [REDACTED]

by West Allis-West Milwaukee
School District Board of Education

DECISION AND ORDER

Appeal No.: 17-EX-02

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 West Allis-West Milwaukee School District Board of Education to expel the above-named pupil from the West Allis-West Milwaukee School District. This appeal was filed by the pupil's mother ("Appellant") and was received by the Department of Public Instruction on February 20, 2017.

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) and (e). 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 established statutory grounds, and that the school board was satisfied that the interest of the school district demands that the pupil be expelled.

FINDINGS OF FACT

The record contains a letter entitled "Notice of Expulsion Hearing," dated December 2, 2016, from the principal of Nathan Hale High School. The letter advised that a hearing would be held on December 7, 2016, that could result in the pupil's expulsion from the West Allis-West Milwaukee School District. The letter was sent separately to the pupil and her parents by certified mail. The letter alleged that the pupil engaged in conduct while not at school or while not under the supervision of a school authority which endangered the property, health, or safety of others at school or under the supervision of a school authority. The letter specifically alleged that on November 17, 2016, the pupil came to school and then left the premises. While off the premises, the pupil distributed Adderall to other students and smoked marijuana. Upon her return to the building, she was found in possession of two controlled substances, Adderall and Pliva, and a bag of marijuana.

The hearing was held before a hearing officer pursuant to Wis. Stat. § 120.13(1)(e) on December 7, 2016. The appointed hearing officer was the school board's regular attorney. The pupil and her parents appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and her parents were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations.

The hearing officer found that the pupil did engage in conduct while not at school or while not under the supervision of a school authority which endangered the property, health, or safety of others. The hearing officer further found that the interests of the school district demand the pupil's expulsion. The hearing officer's order for expulsion containing the findings of fact and conclusions of law, dated December 9, 2016, was mailed separately to the pupil and her parents.

The order stated the pupil was expelled through the 2018-19 school year. The order also permitted early reinstatement at the beginning of the 2018-19 school year if the pupil complied with found conditions. On December 12, 2016, the school board reviewed the hearing officer's order and voted to accept it.

DISCUSSION

The expulsion statute, Wis. Stat. §§ 120.13(1)(c) and (e), 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. Under Wis. Stat. § 120.13(1)(e), a school board may appoint an independent hearing officer to determine whether to expel a pupil. In reviewing an expulsion decision, the state superintendent must ensure, among other things, that the required statutory procedures were followed, that the expulsion is based upon one of the established statutory grounds, and that the school board and independent hearing officer are satisfied that the interest of the school demands the pupil's expulsion.

The appellant raises two issues on appeal. First, the appellant argues that the expulsion violated Wis. Stat. § 120.13(1)(e)1. because the school district failed to provide an impartial independent hearing officer to preside over the expulsion hearing, serve as the finder of fact, and issue a final decision. Specifically, appellant argues that the school board failed to appoint an independent hearing officer as required by statute, because the district appointed the school district's own attorney whose ongoing representation of the school district in other legal matters compromised his independence.

Both the appellant and school district highlight the state superintendent's decision in *Brad A. by the Boyceville Comm. Sch. Dist. Bd. of Educ.*, (233) June 29, 1994, as supportive of the

parties' respective arguments. In *Brad A.*, the state superintendent held that a school district attorney may serve as a hearing officer at an expulsion hearing. *Id.* However, the role of the "hearing officer" considered in *Brad A.* is much different than the role of the independent hearing officer under consideration in this appeal. In *Brad A.*, the attorney serving as "hearing officer" was acting merely as a facilitator of the hearing and had no part in the decision to expel the pupil. The decision to expel was made solely by the school board. The responsibilities of the hearing officer in *Brad A.* reflect the common practice in which a school district will utilize its attorney to act as the "director" of an expulsion hearing and an advisor to the board as to questions of law. However, the board retains the sole responsibility to serve as the finder of fact, to determine whether the interest of the school demands expulsion and, if necessary, to determine the terms and conditions of the expulsion order. As such, the *Brad A.* case does not resolve the issue as to whether the district's regular attorney may serve as an *independent* hearing officer.

The state superintendent previously discussed the meaning of "independent" for purposes of Wis. Stat. § 120.13(1)(e)1. in *Ryan G. by the Sparta Area Sch. Dist. Bd. of Educ.*, (325) May 19, 1997. In *Ryan G.*, the school district selected its own district administrator to act as the independent hearing officer. The state superintendent reversed the expulsion based on a number of procedural errors unrelated to the independence of the hearing officer. However, the state superintendent further opined that the word "independent" was intended by the legislature to modify "hearing officer" in part to exclude the use of district administrators as hearing officers within the administrator's own district. The state superintendent argued that this modification was made "precisely because they were perceived as insufficiently independent." The state superintendent went on to recommend that school districts appoint hearing officers "whose independence is beyond question."

The appointment of a school district's regular attorney as hearing officer raises issues of independence similar to those discussed in *Ryan G.* Even if the school district's regular attorney did not confer with the district in regard to this matter outside of the hearing itself, an established and ongoing attorney-client relationship with the school district creates an impermissible risk of bias that undermines the independence of the attorney when acting as a hearing officer. This risk is inherent, in that the attorney's working relationship with school district administration may influence the attorney's ability to objectively assess facts presented by that same administration, to evaluate the administration's recommendation as to whether the interest of the school district demands expulsion, and to decide whether to accept or modify the administration's recommended expulsion term and/or conditions. Similarly, the judgment of the school board to review the expulsion order drafted by the school board's regular attorney may be unduly influenced by the trust and deference the school board may afford to the attorney's expulsion decision, given the likelihood that the school board routinely affords trust and deference to its selected legal counsel. As a result of this inherent and impermissible risk of bias, the hearing officer in this matter cannot be deemed independent, and the decision to expel must be reversed.

The second issue raised on appeal is that the school district failed to provide the pupil and her parents with adequate notice of the significant interests at stake, as well as adequate notice or opportunity to appeal a statutorily invalid condition of early reinstatement. Pursuant to Wis. Stat. § 120.13(1)(e), these notices are not required. A school district's compliance with the statutory procedures contained in Wis. Stat. § 120.13 ensures that the requirements of procedural due process have been met. *B.R. by the Hamilton School Dist.*, (555), August 5, 2005. Although the Wisconsin Department of Public Instruction does suggest that schools include the possible term of expulsion in the expulsion hearing notice, the relevant statutory provision merely

requires notice that “the hearing may result in the pupil’s expulsion.” Wis. Stat. § 120.13(1)(e)4.c. There is no statutory requirement that notice of an appeal of a condition of early reinstatement be provided in the notice of expulsion hearing or in the expulsion order. As such, there were no procedural errors in the school district’s expulsion hearing notification.

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 failed to comply with the statutory requirements to appoint an independent hearing officer as set forth in Wis. Stat. § 120.13(1)(e).

ORDER

IT IS THEREFORE ORDERED that the expulsion of K [REDACTED] G [REDACTED] by the West Allis-West Milwaukee School District Board of Education is reversed.

Dated this 20th day of April, 2017



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] G [REDACTED]

D [REDACTED] G [REDACTED]

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