

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

J ■■■ O ■■■

by Oshkosh Area School District
Board of Education

DECISION AND ORDER

Appeal No.: 17-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 Oshkosh Area School District Board of Education (School Board) to expel the above-named pupil from the Oshkosh Area School District (District). This appeal was filed by the pupil's parents (Appellants) and received by the Department of Public Instruction on April 7, 2017.

Pursuant to 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 demands that the student be expelled.

FINDINGS OF FACT

The expulsion order on appeal is a modified version of a previous order of expulsion reversed in *J. O. by the Oshkosh Area Sch. Dist. Bd. Of Educ.*, (741) September 9, 2016. As the underlying facts are the same, I will adopt the previous Findings of Fact included in that decision.

The order now on appeal was issued by an independent hearing officer appointed by the School Board pursuant to Wis. Stat. § 120.13(1)(e) (Independent Hearing Officer). The Independent Hearing Officer previously ordered the pupil's expulsion on May 20, 2016 (Original Expulsion Order). The School Board approved the Original Expulsion Order on May 25, 2016. The pupil's parents appealed the Original Expulsion Order to the state superintendent, and the order was reversed on September 19, 2016. On September 28, 2016, the District notified the pupil and the pupil's parents that the District would hold an expulsion hearing before the Independent Hearing Officer on October 5, 2016. However, on October 4, 2016, the District notified the pupil and the pupil's parents that the scheduled expulsion hearing would be postponed, pending reconsideration of the Original Expulsion Order. The Independent Hearing Officer then issued a Modified Findings of Fact, Conclusions and Order of Expulsion on October 10, 2016 (Modified Expulsion Order), based on the hearing record created prior to the Original Expulsion Order. The Modified Expulsion Order was subsequently approved by the School Board on October 12, 2016.

In the Modified Expulsion Order, the Independent Hearing Officer 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 and safety of others at school, and did engage in conduct while not at school and while not under the supervision of a school authority which endangered the property, health and safety of others. The Independent Hearing Officer further found that the

interests of the District demand expulsion. The Modified Expulsion Order was mailed separately to the pupil and the pupil's parents. The order stated that the pupil was expelled through age 21.

The School Board voted to approve and adopt the Modified Expulsion Order on October 12, 2016. The School Board notified the pupil and the pupil's parents of the approved Modified Expulsion Order by separate letters sent on October 12, 2016.

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 Appellants raise two main issues on appeal. Appellants first argue that reversal of the Original Expulsion Order bars the School Board from proceeding with the pupil's expulsion, and instead, the School Board may only appeal the reversal to circuit court. No part of Wis. Stat. § 120.13(1) requires the School Board to appeal the reversal before advancing the expulsion process. The ability to appeal the decision itself to circuit court does not foreclose the School Board's ability to pursue additional expulsion proceedings. At no point has the School Board expressed a disagreement with the determination that the Original Expulsion Order included a procedural error and, as a result, an appeal of that decision to circuit court would be meaningless. *Paul R. by the East Troy Comm. Sch. Dist.* (262) October 9, 1995.

Similarly, the concept of double jeopardy does not bar the Independent Hearing Officer or School Board from correcting a procedural error and ordering the pupil's expulsion based on the record of the original expulsion hearing. The concept of double jeopardy, that a person should not be prosecuted for a criminal offense after being acquitted of that offense, is generally inapplicable to the state superintendent's review of expulsion hearings. *Nicole P. by the Crandon Sch. Dist. Bd. of Educ.*, (193) May 29, 1992. In the absence of a decision resembling an acquittal, double jeopardy does not apply. The determination of a pupil's guilt or innocence is left to the school board and is generally beyond the state superintendent's scope of review. *State ex. Rel DeLuca v. Common Council*, 72 Wis. 2d 672 (1976); *R.W. by the Kenosha Sch. Dist. Bd. of Educ.*, (631) September 25, 2008.

The reversal of the Original Expulsion Order was not due to the sufficiency of evidence against the pupil. Instead, the reversal was because of a procedural error, in that the Original Expulsion Order failed to include an explicit finding of statutory grounds for expulsion. The Modified Expulsion Order represents the correction of procedural error, and not what could be characterized as continued prosecution after an acquittal.

In light of the above, the Appellants' characterization of the Modified Expulsion Order as a "redo" is not accurate. The state superintendent has repeatedly held that the reversal of an expulsion order does not foreclose the ability of the school board to correct procedural errors and continue the expulsion process. *See Nicole P. by the Crandon Sch. Dist. Bd. of Educ.*, (193) May 29, 1992; *Jared L. by the Northland Pines Sch. Dist. Bd. of Educ.* (283) March 29, 1996; *Adam S. by the East Troy Community Sch. Dist. Bd. of Educ.*, (304) November 25, 1996; *Justin P. by the Cornell Sch. Dist. Bd. of Educ.*, (328) June 26, 1997. The Original Expulsion Order was overturned based on a procedural error that occurred after the expulsion hearing held on May 17, 2016. There

is no dispute that the hearing and associated notice of hearing complied with all statutory requirements. The Decision and Order did not invalidate the hearing or the record created by that hearing. Furthermore, Wisconsin law does not impose a time limit on the Independent Hearing Officer or the School Board as to when an expulsion order may be issued following an expulsion hearing. Because the expulsion hearing remained valid following the Decision and Order, the Independent Hearing Officer was authorized by Wis. Stat. § 120.13(1)(e)3. to issue the Modified Expulsion Order based on a reconsideration of the original expulsion hearing record.

The Appellants second argument is that the Modified Expulsion Order fails to establish that the pupil engaged in one of the statutory grounds for expulsion. Specifically, the Appellants argue that the only facts on the record are of a threat being made by the pupil's friend, not the pupil, and that the evidence did not establish that the pupil made a threat that endangered others.

Absent extraordinary circumstances, it is inappropriate for a state superintendent to second-guess a school board's decision. *C.T. by the Milwaukee Public Schools*, (718) May 22, 2014. An independent hearing officer properly appointed by a school board has the discretion to give weight to the evidence and arguments. *Aaron R. by DC Everest Sch. Dist. Bd. of Educ.*, (472) July 18, 2002; *State ex rel. DeLuca v. Common Council*, 72 Wis. 2d 672 (1976). Findings will be upheld if any reasonable view of the evidence sustains them. *T.S. by the West Allis-West Milwaukee Sch. Dist. Bd. of Educ.*, (684) May 20, 2011; *L.P. by the Whitewater Unified Sch. Dist. Bd. of Educ.*, (351) March 31, 1998.

As established by the record, the pupil actively re-posted an image on social media depicting the pupil holding a gun, along with a caption parroting a phrase the Umpqua Community College school shooter had posted on social media before killing nine people. The photo and caption could reasonably be interpreted as a threat to the safety of pupils and school staff. I find

that a reasonable view of the evidence sustains the Independent Hearing Officer's findings that the pupil engaged in conduct that satisfies the statutory grounds for expulsion and that the interests of the school demands expulsion.


CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the Independent Hearing Officer and School Board complied with all of the procedural requirements of Wis. Stat. § 120.13(1)(c) in regard to the Modified Expulsion Order.

ORDER

IT IS THEREFORE ORDERED that the expulsion of J [redacted] O [redacted] by the Oshkosh Area School District Board of Education is affirmed.

Dated this 6th day of June, 2017

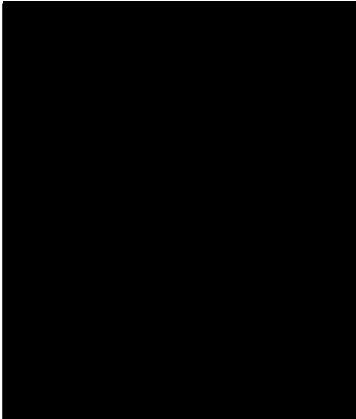


Michael J. Thompson, Ph.D.
Deputy State Superintendent of Public Instruction

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:



Stan Mack II
Oshkosh Area
PO Box 3048
Oshkosh, WI 54903-3048

COPIES MAILED TO:



James R. Macy
vonBriesen & Roper
2905 Universal St. Suite 2
Oshkosh, WI 54904

