Decision and Order No.: 759

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of L[redacted] C[redacted] by Racine Unified School District Board of Education	DECISION AND ORDER Appeal No.: 18-EX-03

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 120.13(1)(e) 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 was received by the Department of Public Instruction on January 22, 2018.

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)(e).

FINDINGS OF FACT

The record contains a letter entitled "Notice of Expulsion Hearing," dated November 27, 2017, from the Assistant Principal of Mitchell Middle School. The letter advised that a hearing would be held on December 5, 2017, that could result in the pupil's expulsion from the Racine Unified School District through 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 authorities which endangered the property, health, or safety of others. The letter specifically alleged that on November 21, 2017, the pupil had whipped female students with a belt.

The hearing was held in closed session before an independent hearing officer on December 5, 2017. 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.

On December 5, 2017, the independent hearing officer issued a decision. The hearing officer found that the pupil did engage in conduct while at school or while under the supervision of school authorities which endangered the property, health, or safety of others. The recording of the hearing does not indicate that the hearing officer found that the interest of the school demands the pupil's expulsion.[1] The order for expulsion containing the findings of fact and conclusions of law of the hearing officer, dated December 5, 2017, was mailed separately to the pupil and his parent. The order stated that the pupil was expelled through the end of the 1st semester of the 2018-19 school year with the possibility of conditional reinstatement at the start of the 2nd semester of the 2017-18 school year to the Turning Point Academy.

On December 18, 2017, the School Board reviewed the independent hearing officer's decision. The School Board affirmed the Expulsion Order in all respects. An audio recording of the expulsion hearing and the report of review by the School Board are part of the record.

DISCUSSION

The expulsion statute – Wis. Stat. § 120.13(1)(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. ¶ 19, 288 Wis. 2d 771. In

[1] Although the order for expulsion does contain this finding, the hearing officer explicitly stated an alternative, and impermissible, basis for determining that the pupil should be expelled. See Discussion for further analysis.

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. *M.M. by the Shawano Sch. Dist.*, (755) January 24, 2018.

The decision must be reversed because the hearing officer failed to comply with Wis. Stat. § 120.13(1)(c) and (e). Having received an appeal, the state superintendent is obligated to review the record of the expulsion proceeding for compliance with Wis. Stat. § 120.13(1)(c) and (e). *See D.N. by the Milton Sch. Dist.* (475) July 26, 2002 (even though the appeal letter raises no issues, state superintendent is obligated to review the expulsion record).

Statutory grounds to expel a student may not be based upon allegations that were not specifically included in the hearing notice. *C.M. by Pulaski Cmty. Sch. Dist.*, (701) Dec. 5, 2012; *Joshua S. by D.C. Everest Sch. Dist.*, (170) May 22, 1990. Academic, attendance and disciplinary records not specified in the hearing notice as the basis for expulsion may only be considered for purposes of determining whether the interest of the school demand the pupil's expulsion. *See J.S. by the Beloit Turner Sch. Dist.*, (706) September 27, 2013; *K.B. by the Sch. Dist. of Three Lakes* (100) August 23, 1982.

At the conclusion of the hearing, the hearing officer stated that he based his decision to expel the pupil on the incident *and* the student's background records, which he said indicate that the pupil "needs to get his act together so that he can be successful in school." The hearing officer found statutory grounds for expulsion based on allegations that were not contained in the notice of hearing. Furthermore, even if the background records were properly noticed, that a pupil "needs

to get his act together so that he can be successful in school" is not one of the statutory grounds for expulsion under Wis. Stat. § 120.13(1)(c).

Even if the hearing officer properly found statutory grounds for expulsion, the hearing officer is separately required to find that the interest of the school demands the pupil's expulsion. There is no mention in the hearing record that the hearing officer considered this standard during the hearing, or that the hearing officer was satisfied that the standard had been met. Because the hearing record does not indicate that such a finding was made, but simply that the pupil needs to be expelled to "get his act together," the requirements of Wis. Stat. § 120.13(1)(c) and (e) have not been met. For these reasons, the expulsion decision must be reversed.

The appellant raises several additional issues that require consideration. First, the appellant argues that the independent hearing officer prevented her from questioning her witness and failed to ask the witness any questions. Due process requires that a pupil have an opportunity to present evidence to refute the charges against the pupil and to present a mitigating argument. *Lamb v. Panhandle Cmty. Unit Sch. Dist.*, 826 F.2d 526, 528 (7th Cir. 1987); *Betts v. Bd. of Educ.*, 466 F.2d 629 (7th Cir. 1972); *Luke D. by the Durand Sch. Dist.*, (483) February 14, 2003.

After reviewing the hearing record, it is apparent that the independent hearing officer denied the pupil and the pupil's parent the opportunity to present evidence. At the outset of the hearing, the hearing officer stated that the format of the hearing would be that the information would be presented by the school administrator in four parts. After each part, the hearing officer would stop to allow the pupil and the pupil's parents to ask questions. When the witness statements were first introduced, the hearing officer asked a question regarding how the incident began. The pupil's parent attempted to answer and provide an explanation but the hearing officer stopped her and told her she would get a chance to speak later. Once the administrator presented the evidence,

the hearing officer asked the pupil and the pupil's parent if they had any questions. While the hearing officer did allow the pupil and the pupil's parent to ask questions, the hearing officer explicitly prevented them from providing testimony, presenting evidence, and questioning their witness. Because the hearing officer only allowed the pupil and the pupil's parent to ask questions and prevented them from presenting evidence.

In addition, in the recording of the hearing, the appellant is heard asking her witness a question regarding the events leading up to the incident that led to the pupil's expulsion. The hearing officer interrupted the appellant, asked the witness to identify herself, and asked if the witness was one of the students that had provided a statement following the incident. Once the hearing officer verified that the witness had provided a written statement, he read that statement aloud and then moved on. The hearing officer did not ask the witness any further questions and did not permit the appellant to ask the witness any questions.

The hearing officer denied the pupil and the pupil's parents the opportunity to present evidence to refute the charges and present a mitigating argument. The hearing officer violated the pupil's right to due process, and this denial constitutes an independent basis to reverse the decision ordering expulsion.

Because this case must be reversed for the reasons discussed above, I will only briefly address other issues raised. First, the appellant argues that the hearing officer failed to comply with the requirements of Wis. Stat. § 120.13(1) because no written minutes were taken during the hearing. The requirement regarding written minutes is found in Wis. Stat. § 120.13(c) and only applies to expulsion hearings by the school board. The hearing officer is required by Wis. Stat. § 120.13(1)(e)3 to provide the school board with a transcript of the proceedings, which was done

here. Because the hearing officer was not required to keep written minutes under Wis. Stat. § 120.13(1)(e), there was no procedural violation.

Second, the appellant argues that the recording is insufficient because the hearing officer stopped the recording several times while he "went off the record." Based on the start and stop time of the hearing and the recording, there is insufficient evidence in the record to suggest that the hearing officer stopped the recording for a significant period of time or that the recording is deficient.

Third, the appellant argues that the hearing officer failed to follow the administration's recommendation concerning the length of the expulsion. 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. *B.S. by the Marshall Sch. Dist.*, (626) July 11, 2008. The hearing officer and the school board did not err by issuing a different expulsion period than the one recommended by the administration.

Finally, the appellant argues that the expulsion decision is improper because the hearing officer was biased against the pupil because of the pupil's race. There is a legal presumption that public officials act fairly, impartially, and in good faith. *K.W. by the Racine Unified Sch. Dist.*, (705) July 30, 2013; *K.W. by the Tri County Area Sch. Bd.* (130) May 10, 1985, *citing State ex rel. Wasilewski v. Bd. of Sch. Dirs.*, 14 Wis. 2d 243, 111 N.W.2d 198 (1961). Absent any evidence in the record to establish the contrary, the presumption must hold. *K.W. by the Tri County Area Sch. Bd.* In the recording, several statements were made by the hearing officer that could indicate bias against the pupil. Specifically, the hearing officer made several comments about the pupil ending up in prison like other expelled pupils and expressed his own opinion that the police should have been involved following the incident. Although these statements were inappropriate, I cannot find

that they are so egregious as to overcome the legal presumption articulated in *K.W. by the Tri County Area School Board.*

If the pupil believes he was discriminated against, the pupil or the pupil's parent may file a complaint through the complaint procedure outlined in the district's non-discrimination policy. Wis. Stat. § 118.13. If the pupil or the pupil's parent has exhausted the school district's complaint procedure and is not satisfied with the outcome, an appeal may be filed with the state superintendent under Wis. Stat. § 118.13 and Wis. Admin. Code § PI 9.

CONCLUSION 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 procedural requirements of § 120.13(1)(e).

ORDER

IT IS THEREFORED ORDERED that the expulsion of L[redacted] C[redacted] by the Racine Unified School District Board of Education is reversed.

Dated this 20th day of March, 2018

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

APPEAL RIGHTS

Wis. Stat. § 120.13(1)(e) specifies that an appeal from the 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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