

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

T ■■■ M ■■■

by Monona Grove School District
Board of Education

DECISION AND ORDER

Appeal No.: 18-EX-17

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 School Board of the Monona Grove School District (“School Board”) to expel the above-named pupil (“Pupil”) from the Monona Grove School District (“School District”). This appeal was filed by the Pupil and received by the Department of Public Instruction (“DPI”) on August 2, 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)(c).

FINDINGS OF FACT

By a letter dated January 16, 2018, the School District issued a “Notice of Pupil Expulsion Hearing,” sent separately to the pupil, his mother, and his father. The notice alleged that the Pupil “engaged in a sexual act at the high school involving another student and did so without receiving consent.” The notice also contained the statutory basis for expulsion: engaging in conduct while

at school or while under the supervision of a school authority which endangers the property, health, or safety of others.

On January 23, 2018, the expulsion hearing was held in closed session before an independent hearing officer (IHO). The night before the hearing, the Pupil's attorney filed several motions, including motions to: exclude hearsay statements contained in the associate principal's interview notes; exclude the Pupil's own statements made during the interviews; and require the School District to prove its case by a clear and convincing evidence standard rather than by a preponderance of the evidence. The IHO denied the motions, but granted a fourth motion not at issue in this matter. At the hearing, the associate principal, school social worker, and principal testified for the School District. The Pupil's mother and a teacher testified for the Pupil. Nineteen exhibits were entered into evidence.

On January 26, 2018, the IHO issued her recommendation. As part of that recommendation, the IHO made a number of factual findings, including:

- The Pupil engaged in sexual activity with the other student;
- The Pupil admitted to engaging in the conduct;
- The Pupil's conduct injured the other student;
- The Pupil texted the other student afterwards, stating: "...ik u probs dont wanna listen to me rn and your probaly gonna see this text and not care and not look at it but im truly sorry for what I did and Im really sorry" [sic]; and
- The Pupil's assertion that the sexual act was consensual was not credible.

Based on the above findings, the IHO determined that the Pupil did engage in conduct while at school or while under the supervision of a school authority that endangered the property, health or safety of others. The IHO also determined that the interests of the school demanded that the pupil be expelled. The IHO recommended that: the Pupil be expelled through the conclusion of the 2020-21 school year; the school district provide educational services to the Pupil throughout the term of the expulsion; and the Pupil is eligible for early reinstatement by the start of the 2019-

20 school year if the Pupil completes a number of conditions, including an assessment by a licensed counselor and, once reinstated, a school schedule that does not share any classes or activities with the victim.

On February 14, 2018, the School Board met in closed session to review the record and the IHO's recommendation. The School Board unanimously approved the recommendation, with one member abstaining. By a letter dated February 20, 2018, the School Board issued a "Notice of Expulsion Order." The notice was sent separately to the Pupil and his parents.

The record in this matter contains a transcript of the hearing, the prehearing motions, and the exhibits introduced at the hearing. Legal counsel for the School Board and the Pupil also submitted written arguments to the DPI.

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. This necessarily includes reviewing whether the pupil's due process rights were violated.

The Pupil raises five issues on appeal which require consideration. First, the Pupil generally argues that the Pupil's constitutional rights were violated when the Pupil wasn't afforded "circuit-court-like safeguards." But the due process rights of students facing expulsion are not the same as the due process afforded to a defendant in a criminal trial or a juvenile court delinquency

proceeding. *Coronado v. Valleyview Pub. Sch. Dist.* 365-U, 537 F.3d 791, 798 (7th Cir. 2008); *Linwood v. Bd. of Educ.*, 43 F.2d 763 (7th Cir. 1972); 67B Am. Jur. 2d Schools § 337 (Discussing relevant case law). Compliance with the statutory procedures in Wis. Stat. § 120.13 ensures the requirements of procedural process have been met. *B.R. by Hamilton Sch. Dist.*, (555) Aug. 5, 2005.

Second, the Pupil argues that the Pupil's due process rights were violated because the School District relied on inadmissible hearsay evidence. At the hearing, the IHO permitted the associate principal to testify about statements made to him by others during the investigatory interviews. The associate principal's notes were also admitted into evidence. It has long been held that an administrative hearing decision may be based, in part, on uncorroborated hearsay. *Gehin v. WI Grp. Ins. Bd.*, 2005 WI 16, ¶ 69 (Hearsay admissible in administrative hearings but does not alone constitute substantial evidence). The same rule applies to expulsion decisions by school boards. *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657 (Ct. App. 1982) (School boards may rely on hearsay provided by school staff). This is consistent with decisions by courts in other jurisdictions. *See e.g., West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 2d 1223, 1230 (D. Kan. 1998), *aff'd*, 206 F.3d 1358 (10th Cir. 2000). And this rule has been consistently applied by the State Superintendent in expulsion decisions. *See e.g., Carlos M. by West Allis-West Milwaukee Sch. Dist.*, (242) Dec. 21, 1994; *see also* Decision Nos. 257, 383, 395, 404, 405, 419, 428, 441, 492, 499, 506, 510, 513, 514, 542, 555, 593, 599, 600, 616, 626, 634, 640, 654, 683, 699, and 702.

Here, the IHO did not commit error by admitting hearsay evidence and basing her decision, in part, on that testimony. The hearsay testimony was provided by school staff and there was no indication of bias on the staff's part. The IHO specifically mentioned in the hearing that, while she was admitting the hearsay, she would consider the reliability of the statements when giving weight

to each statement. More importantly, the hearsay was not the only evidence the IHO relied upon. For example, the Pupil's own statements were admitted as evidence.¹

Third, the Pupil argues that the statements he made during the course of the School District's investigation should not be admitted because they are unreliable considering circumstances surrounding the questioning, namely that the school resource officer was present. I disagree. The associate principal conducted the interview in question, not the school resource officer. The Pupil was not in custody. As such, the Pupil's reliance on *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), and *Miranda v. Arizona*, 384 U.S. 436 (1966) is misplaced. It was within the IHO's discretion to give weight to the probative value of these statements. *Aaron r. by D.C. Everest Sch. Dist.*, (472) July 18, 2002.

Fourth, the Pupil alleges that the IHO applied an improper standard of proof. Specifically, the Pupil alleges that the IHO should have applied a clear and convincing standard of proof rather than a preponderance of the evidence. The State Superintendent has consistently held that the proper standard of proof in an expulsion hearing is a preponderance of the evidence. *See e.g., Earl N. by Milw. Pub. Sch. Dist.*, (111) Mar. 3, 1983. This is consistent with the established case law on student expulsions. *See Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1119 (E.D. Wis. 2001) (Discussing the standard of proof necessary to satisfy due process). Therefore, the IHO did not err by finding that the Pupil committed the misconduct by a preponderance of the evidence.

Fifth, the Pupil alleges that the IHO did not properly find a factual basis to declare that the interest of the school demanded the Pupil's expulsion. School boards have wide discretion in determining whether the interest of the school demands expulsion. *D.S. by Cedar Grove-Belgium*

¹ Those statements were not hearsay pursuant to Wis. Stat. § 908.01(4)(b).

Area Sch. Dist., (522) July 11, 2005. Here, the determination was reasonable considering the severity of the offense and the evidence in the record. Among other evidence, the IHO heard testimony from the high school principal about why the school administration recommended expulsion and why the needs of the school demanded the Pupil's expulsion. The principal testified about why the school does not tolerate any type of sexual activity at school, and that this case was especially serious due to the activity being non-consensual.

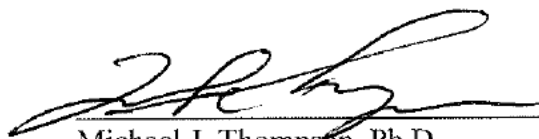
CONCLUSIONS OF LAW

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 procedural requirements of Wis. Stat. § 120.13(1)(c) and that the Pupil's due process rights were not violated.

ORDER

IT IS THEREFORE ORDERED that the expulsion of T [REDACTED] M [REDACTED] by the Monona Grove School District Board of Education is AFFIRMED.

Dated this 26th day of September, 2018



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

RDN

Parties to this appeal are:



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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.

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