Decision and Order No.: 785

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Lake Geneva-Genoa City Union High School District Board of Education	DECISION AND ORDER Appeal No.: 19-EX-07

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 Lake Geneva-Genoa City Union High School District Board of Education (board) to expel the above-named pupil from the Lake Geneva-Genoa City Union High School District (district). This appeal was filed by the pupil's mother and received by the Department of Public Instruction on August 12, 2019.

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

The record contains a letter entitled "Notice of Expulsion Hearing," dated June 19, 2019, from the district administrator of the district. The letter advised that a hearing would be held on July 8, 2019 that could result in the pupil's expulsion from Badger High School for a period of time to be determined by the board. The letter was sent separately to the pupil and his mother by

certified mail. The letter alleged that the pupil engaged in conduct which endangered the property, health, and safety of others. The letter specifically alleged that the pupil came to school under the influence of a substance and that his behavior was a repeated offense.

The hearing was held in closed session on July 8, 2019. The pupil and his mother appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and his mother 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 board concluded that the pupil engaged in conduct while under the supervision of a school authority which endangered the property, health, and safety of others at school. The board did not explicitly find that the pupil came to school under the influence of a substance or that the interests of the school demanded the student's expulsion. The order stated the pupil was expelled from Badger High School for the 2019-2020 school year, with probationary readmittance on January 20, 2020. The order of expulsion containing the findings of fact and conclusions of law of the school board, dated July 8, 2019, was not mailed to the pupil or his mother. An audio recording of the expulsion hearing is part of the record. No minutes were provided as 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 appeal letter in this case raises five issues which require consideration. First, appellant states that as of August 8, 2019 when she mailed the appeal, she had not received any formal written notice of the school board's decision. She states that she received only a phone call from Vice Principal Mike Giovingo several days after the hearing and that she requested formal and written documentation of the board's decision at that time. The hearing record submitted by the district contains no evidence that the pupil or his mother were sent the expulsion order. The district did not file a response to the appeal and therefore has not challenged appellant's statement that she did not receive the expulsion order. Wis. Stat. § 120.13(1)(c)3 requires the school district to mail a copy of the expulsion order separately to the pupil and her parents. *Z.Y. v. Wauwatosa Sch. Dist. Bd. of Educ.*, Decision and Order No. 690 (Jan. 11, 2012); *Phoua X. v. Saint Francis Sch. Dist. Bd. of Educ.*, Decision and Order No. 465 (Apr. 28, 2002). In this case, appellant should have received a copy of the expulsion order with the record in this appeal.[1] Even if appellant did receive belatedly a copy of the expulsion order in this way, there is no evidence that the expulsion order was ever sent separately to the pupil. Failure to comply with this statutory requirement requires reversal. *James R. v. West Bend Sch. Dist. Bd. of Educ.,* Decision and Order No. 396 (Aug. 17, 1999); *Tyrell D. v. Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 288 (May 14, 1996).

Next, appellant contends that the notice of expulsion hearing failed to describe the particulars of the alleged misconduct including dates, places and the exact nature of the

[1] The district was directed to send a copy of the record to appellant in the DPI's August 16, 2019 letter setting a briefing schedule in this matter. The DPI also directed the district to send the record to appellant in a phone call on August 20, 2019. However the email and cover sheet submitting the record to the DPI do not indicate that the district sent appellant a copy.

misconduct. The notice of expulsion hearing described the misconduct to be considered as follows:

> [Pupil] came to school under the influence of a substance. [Pupil] has engaged in conduct which has endangered the property, health and safety of others; and therefore, the interest of the District demands [pupil]'s expulsion. This behavior is a repeated offense.
>
> The above conduct is in violation of Section 120.13, Wisconsin Statutes, School Board Policy 447.3 and Badger High School Student-Parent Handbook.
>
> If this conduct is proven, in considering whether to expel [pupil], the School Board will also consider his complete disciplinary, academic and attendance records.

The notice of expulsion hearing in this case merely alleged that the pupil "came to school under the influence of a substance." This does not constitute adequate notice. The notice of expulsion hearing must state "the particulars of the pupil's alleged conduct upon which the expulsion proceeding is based." Wis. Stat. § 120.13(1)(c)4.a. Although it is not defined in the statute, *particulars* is not an ambiguous or unknown term. When interpreting a statute, we must give effect to the ordinary and accepted meaning of the language chosen by the legislature. Wis. Stat. § 990.01(1); *Seider v. O'Connell*, 2000 WI 76, ¶32, 236 Wis. 2d 211, 228, 612 N.W.2d 659, 667-68. The definition of *particulars* requires items or details of information, not generalizations. *See The American Heritage® Dictionary of the English Language*: Fourth Edition. 2000.[2]

Proper notice must inform the pupil of the time frame during which the misconduct occurred, where the misconduct occurred, and a description of the conduct to be considered. *L.W. by the Iowa-Grant Sch. Dist. Bd. of Educ.*, Decision and Order No. 720 (Aug. 19, 2014);

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[2]Particular, n. **1.** An individual item, fact, or detail: *correct in every particular.* See synonyms at item. **2.** An item or detail of information or news. Often used in the plural: *The police refused to divulge the particulars of the case.* **3.** A separate case or an individual thing or instance, especially one that can be distinguished from a larger category or class. Often used in the plural: *"What particulars were ambushed behind these generalizations?"* (Aldous Huxley).

A.S. v. Milwaukee Public Sch. Dist. Bd. of Educ., Decision and Order No. 674 (Dec. 21, 2010). The purpose of this notice is to allow a student to adequately prepare for the expulsion hearing. *A.S. by the Milwaukee Public Sch. Dist. Bd. of Educ.*, Decision and Order No. 674 (Dec. 21, 2010). In this case, the notice does not state the date or time that the alleged misconduct occurred and does not adequately describe the conduct to be considered. For example, the notice does not describe the substance that the pupil was alleged to be under the influence of nor does it state that the substance was illegal. Because the notice failed to include the particulars of the alleged misconduct, the school board did not give adequate notice to the pupil about the charges that would be considered at this expulsion hearing and the expulsion must be reversed. *See C.M. v. Pulaski Comm. Sch. Dist. Bd. of Educ.*, Decision and Order No. 701 (Dec. 5, 2012); *A.S. v. Milwaukee Public Sch. Dist. Bd. of Educ.*, Decision and Order No. 674 (Dec. 21, 2010).

In addition, the "particulars" of the pupil's alleged misconduct outlined in the notice states that "[t]his behavior is a repeated offense." However, there are no details about the particulars of the earlier violation. This may not be fatal in this case because the earlier violation is not mentioned in the expulsion order. I note, however, that despite the absence of any reference to the earlier violation in the order, it was discussed at length at the hearing as a reason justifying expulsion following the second alleged violation. Because I am reversing the expulsion on other grounds, I need not address this point further.

Third, appellant contends that Wisconsin law requires a formal hearing but that the expulsion hearing in this case began with the school board president stating that it would be "informal" in nature. Appellant argues that "[t]his led to lost opportunity to present all relevant information and even limited my ability to question witnesses as there was no formal process

followed. Another meeting was set to begin for them in just 40 minutes. This hearing was conducted as a mere formality in which the outcome was determined prior to it even beginning."

At the beginning of the hearing, the board president described the procedures to be followed:

> This will be conducted as an informal hearing and no strict rules of evidence will apply. The board will only hear testimony from witnesses called by the administration or from [the pupil] or his representatives. While the formal rules of evidence will not be enforced, and the board will consider all testimony presented, it will limit repetitive testimony. The representatives of the parties may make such objections to testimony or documentation as they see fit and I as the Board president will consider such objections. The administration must show that the charges set forth in the notice of expulsion are supported by the evidence. The charges must be supported only by the evidence presented here today.

At the hearing, appellant was provided the opportunity to question witnesses and made several legal and factual arguments to the board members. There was no mention during the recorded part of the hearing that there was another meeting following the expulsion hearing and there was no indication in the recording that the hearing was being rushed to a conclusion. Appellant did not object to the close of the hearing at the time or suggest that she had additional evidence or argument that she wished to present or witnesses that she wanted to question. The board president referred to the hearing as "informal" in the sense that the rules of evidence would not apply. This was not error. *See Racine Unified Sch. Dist. v. Thompson*, 107 Wis.2d 657, 664-665, 321 N.W.2d 334, 337-38 (Ct. App. 1982) (holding that hearsay statements were admissible in expulsion hearing and noting that "a lay board cannot be expected to observe the niceties of the hearsay rule").

Fourth, appellant contends that one of the school board members had a conflict of interest and should have removed himself from the hearing because he knew appellant, her son and her ex-husband personally. She contends, without citation, that "statute dictates that no one should be part of the decision making body for an expulsion, in this case the school board, that knows

[the pupil] personally." Neither appellant nor the pupil raised an objection at the hearing to the board member's participation. Matters not raised before the board cannot be raised for the first time on appeal. *M.B. v. Hudson Sch. Dist. Bd. of Educ.*, Decision and Order No. 614 (Mar. 31, 2008).

Furthermore, the law presumes that school board members, as public officials, will discharge their legal duties in accordance with the authority conferred upon them and that they will act fairly, impartially and in good faith. *See State ex rel. Wasilewski v. Bd. of Sch. Directors,* 14 Wis. 2d 243, 266, 111 N.W.2d 198, 211 (1961). In this case, I find the pupil's assertion of bias or conflict insufficient to overcome this presumption. At the beginning of the hearing, all board members were asked whether they could make their decision based solely on the evidence presented at the hearing, and each member individually responded yes. The record contains no evidence of actual bias or conflict, nor does it reflect circumstances that would lead to a high probability of bias or conflict. *See M.B. v. Hudson Sch. Dist. Bd. of Educ.*, Decision and Order No. 614 (Mar. 31, 2008); *Nicholas E. v. Lodi Sch. Dist. Bd. of Educ.*, Decision and Order No. 303 (October 17, 1996).

Finally, appellant contends that the pupil's rights were violated by the school's resource officers and vice principal when they questioned him without appellant's consent or the pupil's informed consent. Appellant cites *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011) for the proposition that school officials must be considered "protective guardians" when students are subjected to on-campus interrogations by police officers and that Vice Principal Giovingo did not offer the pupil such protection. In addition, the police officers did not tell the pupil that he had the right to refuse to speak with them or to contact his mother. In *J.D.B.*, the Court does not suggest that school officials are protective guardians and appellant cites no other support for that

proposition. "Miranda warnings are not a requisite of due process but a condition to the admissibility in a criminal prosecution of statements obtained from a defendant questioned while in custody or otherwise significantly deprived of his freedom of action." *Betts v. Bd. of Educ. Of the City of Chicago*, 466 F.2d 629, 631 n.1 (7th Cir. 1972). Expulsion hearings are not criminal proceedings. The exclusionary rule, which in criminal cases may demand the exclusion of illegally obtained evidence, does not apply to administrative hearings such as expulsion hearings. *See, e.g., In the Interest of Thomas J.W.,* 213 Wis. 2d 264, 276, 570 N.W.2d 586, 590 (Ct. App. 1997); *State ex re. Struzik v. DHSS,* 77 Wis. 2d 216, 221, 252 N.W.2d 660, 662 (1977). This principle has been consistently applied in expulsion hearings. *D.S. v. Merrill Area Sch. Dist. Bd. of Educ.,* Decision and Order No. 682 (May 16, 2011); *Jeremy B. v. Waukesha Sch. Dist. Bd. of Educ.*, Decision and Order No. 395 (Aug. 16, 1999). The board was free to determine whether the admission was reliable. This is a credibility determination that is solely within the discretion of the board. The district did not commit a procedural violation by interviewing the pupil without a parent present and without telling him that he was free to leave.

In addition to the concerns raised by appellant and addressed above, the expulsion order is insufficient. An expulsion order or record must indicate that the board found the pupil guilty of the alleged misconduct, that the conduct meets a statutory standard for expulsion and that the interests of the school demand expulsion. *See James R. v. West Bend Sch. Dist. Bd. of Educ.,* Decision and Order No. 396 (Aug. 17, 1999); *Douglas G. v. New London Sch. Dist. Bd. of Educ.*, Decision and Order No. 228 (Apr. 29, 1994). Although the hearing record contains information regarding the misconduct presented to the board, there is no indication in the expulsion order as to what conduct the board *found* that the pupil engaged in to meet the statutory grounds for expulsion. This constitutes reversible error. *See James R. v. West Bend Sch. Dist. Bd. of Educ.,*

Decision and Order No. 396 (Aug. 17, 1999); *Douglas G. v. New London Sch. Dist. Bd. of Educ.*, Decision and Order No. 228 (April 29, 1994). The only factual finding in the expulsion order related to the underlying misconduct states:

> 3. [The pupil], a Badger High School student was *charged* with coming to school under the influence of a substance. This information set into motion a thorough investigation by administration. This behavior caused a major disruption to the educational process at Badger and created a health and safety issue for students and staff.

(Order of Expulsion at 2 (emphasis added).) The finding of fact mentioned solely the charge – which, as discussed above, was not described with sufficient particularity – and failed to make a finding that the charge was substantiated.

In addition, Wis. Stat. § 120.13(1)(c)1 requires the board to determine, at the expulsion hearing, whether the interests of the school demand the student's expulsion. The order of expulsion does not contain such a determination, statement or finding. This failure requires reversal of the expulsion. *See C v. West Bend Sch. Dist. Bd. of Educ.,* Decision and Order No. 592 (May 4, 2007)*; J.P. v. Cornell Sch. Dist. Bd. of Educ.*, Decision and Order No. 328 (June 26, 1997).

In addition to the reversible errors, another error causes me concern. The board failed to submit written minutes of the expulsion hearing. Wis. Stat. § 120.13(1)(c)3 requires school boards to keep written minutes of expulsion hearings. I have previously overturned expulsions because the school board failed to provide adequate hearing minutes or provided an incomplete record. *See Nathan W. v Wilmot Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 296 (July 10, 1996); *Douglas G. v. New London Sch. Dist. Bd. of Educ.*, Decision and Order No. 228 (April 29, 1994). Because an audio recording of the hearing was submitted, this omission is not necessarily fatal. However, I caution school boards against *relying* on audio recordings to memorialize an expulsion hearing. *See, e.g., Donald K. v. Little Chute Area Sch. Dist. Bd. of*

Educ., Decision and Order No. 490 (Apr. 22, 2003). Quite often the recordings are indecipherable. If the board keeps detailed minutes of the hearing or transcribes the hearing, these problems are not fatal.

In reviewing the record in this case I find the school district did not comply with all of the procedural requirements. I therefore reverse this expulsion.

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 all of the procedural requirements of Wis. Stat. § 120.13(1)(c).

If the district chooses, it may remedy this error by providing proper notice of the expulsion hearing and rehearing the expulsion. *J.L. v. Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 783 (Aug. 8, 2019); *Z.Y. v. Wauwatosa Sch. Dist. Bd. of Educ.*, Decision and Order No. 690 (Jan. 11, 2012).

ORDER

IT IS THEREFORE ORDERED that the expulsion of [redacted] by the Lake Geneva-Genoa City Union High School District Board of Education is reversed.

Dated this 1st day of October, 2019

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.