Decision and Order No.: 786

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Madison Metropolitan School District Board of Education	DECISION AND ORDER Appeal No.: 19-EX-08

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 120.13(1)(e)3 from the order of the Madison Metropolitan School District Board of Education to expel the above-named pupil from the Madison Metropolitan School District. This appeal was filed by the pupil's attorney and received by the Department of Public Instruction on September 16, 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 hearing. The state superintendent's review authority is specified in Wis. Stat. § 120.13(1)(e)3.

FINDINGS OF FACT

The record contains a letter entitled "Expulsion Proceeding Against [the pupil]," dated July 16, 2019, from the Coordinator of Progressive Discipline of the Madison Metropolitan School District. The letter advised that a hearing would be held on July 30, 2019 that could result in the pupil's expulsion from the Madison Metropolitan School District through his 21st

birthday. The letter was sent separately to the pupil and his mother by certified mail. The letter alleged that the pupil engaged in conduct while at school or under the supervision of a school authority which endangered the property, health, or safety of others. The letter specifically alleged that the pupil engaged in non-consensual sexual conduct with another student in a gender-neutral bathroom at La Follette High School on Saturday, January 12. The letter explained that the hearing would be conducted by a hearing officer appointed by the school board pursuant to Wis. Stat. § 120.13(1)(e).

The hearing was held on July 30, 2019. The pupil's attorney appeared in person and the pupil and his mother appeared by telephone. At the hearing, the school district presented evidence concerning the grounds for expulsion. The pupil's attorney was given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations. In a stipulation and proposed order signed July 30, 2019, the pupil agreed that he would not object to the admission of the district's evidence and would stipulate that the district had met its burden of showing that the pupil engaged in expellable conduct on January 12, 2019 and that the interests of the school demand his expulsion. The district agreed to recommend that the pupil be expelled through the end of the 2019-2020 school year, with an opportunity for readmission at the end of the first semester of the 2019-2020 school year if all of the following early readmission criteria are met:

a. Completion of all therapeutic and behavioral treatment at Lad Lake;

b. Active participation in sex offender treatment provided by Dane County;

c. Verification of [the pupil]'s readiness to return to a school environment by Dane County's sex offender treatment provider;

d. Completion of an IEP review/revise process prior to [the pupil]'s return to a MMSD school that includes a revised Behavior Support Plan;

e. Completion of a Safety and Support Plan that is conducted with the active involvement of [the pupil], building student services staff, building administration, and his youth justice worker.

The hearing officer found that the pupil engaged in conduct while at school or while 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 demand the student's expulsion. The order for expulsion containing the findings of fact and conclusions of law of the hearing officer, dated August 7, 2019, was mailed separately to the pupil, his mother and his attorney. The order stated the pupil was expelled for the length of time and with the early readmissions conditions stated in the July 30, 2019 stipulation between the school district and the pupil.

The decision of the independent hearing officer was reviewed by the school board on August 19, 2019. The board voted to approve the decision, findings of fact and conclusions of law and to modify the order. The board modified the order to expel the pupil for three semesters, until the first day of the second semester of the 2020-2021 school year with an opportunity for early reinstatement as early as the first day of summer school following the 2019-2020 school year. The school board's order was mailed separately to the pupil, his mother and his attorney. The notice of expulsion hearing, decision of the hearing officer, order of the school board, hearing transcript and hearing exhibits are part of the record. No minutes, recording or transcript of the school board meeting at which the board modified the decision of the independent hearing officer are part of the record.

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, 786. 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 demands the pupil's expulsion.

The appeal in this case raises three issues which require consideration. First, the pupil contends that the school board's modification of the hearing officer's decision violated his constitutional right to due process because the modification occurred in a closed session that the pupil was not allowed to attend. Second, the pupil contends that the board's modification of the hearing officer's decision in a closed session that the pupil was not allowed to attend violated Wis. Stat. § 120.13(1). Third, the pupil argues that the board's modified expulsion order was arbitrary and capricious.

The pupil's constitutional argument is based on a contention that the process used by the school district resulted in two expulsion decisions, first the one issued by the hearing officer and second the order from the school board, which, the pupil contends, was a separate expulsion for an additional semester. The pupil concedes that he received all statutorily and constitutionally required process before the hearing officer issued his decision. However, he contends that when the school board extended the length of the expulsion ordered by the hearing officer, it constituted a reversal of the hearing officer's decision not to expel the pupil for the fall semester of the 2020-2021 school year. Wis. Stat. § 120.13(1)(e)3 does not authorize a school board to reverse a hearing officer's decision not to expel a student. *Madison Metro. Sch. Dist. v. Burmaster*, 2006 WI App 17, ¶ 2, 288 Wis. 2d 771, 774. However, in this case, the school board did not overturn a decision to not expel the pupil because the hearing officer did expel the pupil. Instead, the school board modified the length of the expulsion ordered by the independent

hearing officer. The pupil received all constitutionally required process at the hearing conducted by the independent hearing officer. Consistent with due process, the hearing officer could have rejected the parties' stipulation and ordered the expulsion for the time period later ordered by the school board. The school board's issuance of such order based on the testimony and evidence introduced at the hearing does not constitute a violation of due process.

In his reply brief, the pupil suggests that even if the board action was not a separate decision but was instead the second stage of a continuing expulsion process, the board still had to provide due process at the meeting in which it reviewed the hearing officer's order. However, all process due the pupil had already been provided. Following the receipt of all constitutionally and statutorily required procedural protections, the pupil was found to have engaged in conduct that was grounds for expulsion and that the interest of the school required expulsion. He had already been deprived of his right to education. No additional process was required when the school board reviewed the hearing officer's order.

The pupil also suggests that the school board was constitutionally required to record in some manner its discussion or the reasons for its decision to allow for meaningful review of the expulsion proceedings. There is no support in the law for that contention. A transcript was created of the hearing before the independent hearing officer. If the hearing had been held before the school board, the school board's deliberations would have been held in closed session with no record of its discussion required. There is no reason for the school board's deliberations following a hearing before an independent hearing officer to be treated any differently.

The pupil argues that he should have been allowed to attend the school board meeting because the board might have information before it that the pupil did not know about. The theoretical possibility that a rogue school board might unlawfully consider information outside

the record presented to the independent hearing officer does not require that a pupil be allowed to be present for a school board's closed deliberations. I do have concerns with the Madison Metropolitan School Board's expulsion policy, attached as Exhibit 1a to the district's brief, which provides:

> II. BOARD OF EDUCATION Standard of Review of Hearing Officer/Panel Decisions
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> 1. The BOARD will review:
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> a. Whether the record contains sufficient evidence to support the decision by the hearing officer/panel, and if necessary, the BOARD may add, delete or modify findings as appropriate; and
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> b. The hearing officer's/panel's conclusion that the interest of the school demands the expulsion of the student; and
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> c. The supplemental information contained in the Expulsion Off-Campus Instruction Form and the Case Summary from the Office of Legal Services on the issue of the length of the expulsion and the terms and conditions of early readmission.

This policy suggests that the board may consider supplemental information that was not provided to the pupil. Such ex parte consideration of additional information might give rise to a due process violation. However, in this case, the district has stated that the school board did not receive, review, discuss or consider any supplemental information. Therefore, I need not determine whether provision of supplemental information to the board in a different case might be inconsistent with due process.

The pupil's statutory argument also fails. When, as in the present case, an independent hearing officer is appointed by the school board to determine pupil expulsion, the procedure under Wis. Stat. § 120.13(1)(c)3 explicitly does not apply. *See* Wis. Stat. § 120.13(1)(e)1 (school board may authorize independent hearing officer to determine pupil expulsion "instead of using the procedure under par. (c)3") (emphasis added). Because the right for the pupil to be

represented by counsel before the school board and the requirement that the school board keep written minutes of the hearing is found in Wis. Stat. § 120.13(1)(c)3, they do not apply to the present case. The pupil received all process required at the hearing before the independent hearing officer, requirements that are set forth in Wis. Stat. § 120.13(1)(e)3 and 4 and which include the right to be represented by counsel at the hearing before the hearing officer and to a complete record of the hearing proceeding. The applicable statute provides that "Within 30 days after the date on which the order is issued, the school board shall review the expulsion order and shall, upon review, approve, reverse or modify the order. The order of the hearing officer or panel shall be enforced while the school board reviews the order." Wis. Stat. § 120.13(1)(e)3. I have previously affirmed an expulsion where, as here, the school board rejected a hearing officer's recommendation adopting an agreement between the pupil and the administration as to the length and conditions of the expulsion period. *K.K. by Madison Metro. Sch. Dist. Bd. of Educ.*, Decision and Order No. 670 (Sep. 23, 2010). The school board's review of the order issued by the hearing officer is not a hearing and there is no statutory right for the pupil to be present during the review.

The state superintendent has the authority to "approve, reverse, or modify" the school board's decision. Wis. Stat. § 120.13(1)(e)3. However, the state superintendent has consistently held that it would be inappropriate, absent an extraordinary circumstance or a violation of procedural requirements, to second-guess the appropriateness of a school board's determination. *C.T. by the Milwaukee Public Schools*, Decision and Order No. 718 (May 22, 2014); *A.M. by the West Allis-West Milwaukee Sch. Dist. Bd. of Educ.*, Decision and Order No. 703 (Feb. 18, 2013). This is true whether the hearing is conducted by the school board itself or by an independent hearing officer and reviewed by the school board. *Id.* In reviewing this case, I do not see an

extraordinary circumstance or procedural violation that might cause me to modify the pupil's expulsion period.

The pupil did not object to the admission of the district's exhibits at the hearing, one of which was a memorandum dated May 22, 2019 in which La Follette High School Principal Sean Storch stated, "[d]ue to the length of time between the date of the behavior and when it was reported to the school, I recommend that in this instance the quarter in which the expulsion hearing occurs be used to determine the length of the expulsion."[1] Principal Storch recommended that the pupil be expelled for three semesters, until the first day of the second semester of the 2020-2021 school year. In another exhibit, an expulsion recommendation affidavit dated June 19, 2019, the Expulsion Review Committee made the same recommendation. That is, Principal Storch and the Expulsion Review Committee recommended the same length of expulsion contained in the modified order issued by the school board. Principal Storch testified at the hearing as to why, at the time of the hearing, he changed his recommendation to agree with the lesser recommendation agreed to by the district and the pupil. The district's attorney provided a lengthy explanation to the hearing officer as to how the parties' recommendation was reached but also explained that the district reserves the right in cases where behavior is not reported until later to apply the behavior education plan using the date when the behavior was reported. This testimony and explanation is documented in the hearing transcript considered by the school board.

The pupil concedes that the district's behavior education plan provides that for behavior involving nonconsensual sexual contact with another student, the length of the expulsion is three semesters from the date the student's behavior occurred, with eligibility for reinstatement after

[1] The behavior occurred on January 12, 2019 and was not fully described to school officials until April 23, 2019.

the pupil served two semesters. Because the behavior was not reported for over three months, by seeking to have the expulsion backdated to the date the behavior occurred, the pupil suggests that the three months during which he had the right to attend school before his behavior was reported should nevertheless count as part of his expulsion. It was not arbitrary and capricious for the school board to reject this calculation.

The school board adopted the following paragraphs from the hearing officer's decision:

> 23. Based on the information gathered from the District's investigation, Principal Storch recommended the Student's expulsion. (Exh. 4f). On June 19, 2019, the Expulsion Review Committee issued its report. The Committee's recommendation followed the BEP toolkit for Level 5 behavior of non-consensual sexual contact and/or conduct with another students.
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> 24. However, Paragraph 4 of the July 30 Stipulation modifies the Expulsion Review Committee's recommendation regarding the length of the expulsion and the terms and conditions for early reinstatement…

That is, the school board adopted the hearing officer's finding that the Expulsion Review Committee's application of the behavioral education plan toolkit resulted in a longer expulsion than that agreed to by the parties. The school board's rejection of the parties' stipulation and its adoption of the expulsion length initially recommended by Principal Storch and by the Expulsion Review Committee is not an exceptional circumstance that would justify my modification of the school board's order.

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)(e) and the due process requirements of the United States and Wisconsin constitutions.

ORDER

IT IS THEREFORE ORDERED that the expulsion of [redacted] by the Madison Metropolitan School District Board of Education is affirmed.

Dated this 7th day of November, 2019

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

APPEAL RIGHTS

Wis. Stat. § 120.13(1)(e) 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.