Decision and Order No.: 787

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Goodman-Armstrong Creek School District Board of Education	DECISION AND ORDER Appeal No.: 19-EX-09

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 Goodman-Armstrong Creek School District Board of Education to expel the above-named student from the Goodman-Armstrong Creek School District. This appeal was filed by the student and received by the Department of Public Instruction on October 17, 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)(e)3.

FINDINGS OF FACT

The record contains a letter with the subject "Notice of Expulsion Hearing" dated March 7, 2019, from the district administrator of Goodman-Armstrong School District. The letter advised that a hearing would be held on March 20, 2019 that could result in the student's expulsion from the Goodman-Armstrong Creek School District through the student's 21st

birthday. The letter was sent separately to the student and her parents by certified mail. The letter alleged that the student 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 she engaged in physical assault of another student on September 14, 2018, physical assault of another student on December 18, 2018, and threats of physical violence against other students via social media on May 7, 2019.

The hearing was held in closed session on March 20, 2019. The student and her mother appeared at the hearing with counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The student, her mother and her counsel 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 found that the student did: (1) repeatedly refuse or neglect to obey the rules; (2) engage in conduct while at school or while under the supervision of a school authority which endangered the property, health, or safety of others; and (3) while not at school or while not under the supervision of a school authority, engage in conduct which endangered the property, health, or safety of others at school or under the supervision of a school authority. The school board further found that the interests of the school demand the student's expulsion. The order for expulsion containing the findings of the school board, dated March 21, 2019, was mailed separately to the student and her parents. The order stated the student is expelled through her 21st birthday. Minutes of the school board expulsion hearing and an audio recording of most of the hearing are part of the record.[1]

[1] The final portion of the hearing was not captured in the audio recording. The district administrator and counsel for the school board submitted affidavits stating that this was due to unexpected equipment failure and no parties were

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. School Dist. v. Burmaster*, 2006 WI App. 17, ¶ 19, 288 Wis. 2d 771. In reviewing an appeal of an expulsion decision, the state superintendent's review is limited to that set out in § 120.13(10(c). In *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 667, 321 N.W. 2d 334 (1982), the court of appeals *in dicta* stated: "The superintendent's review, then, would be one to insure that the school board followed the procedural mandates of subsection (c) concerning notice, right to counsel, etc." In a related context, the court of appeals ruled this dictum has now become "embedded in Wisconsin school law." *Madison Metro. Sch. Dist. v. Wis. D.P.I.*, 199 Wis. 2d 1, 543 N.W. 2d 843 (1995). It is, therefore, incumbent upon the state superintendent in reviewing an expulsion decision to ensure 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 demands the student's expulsion.

The appeal in this case raises four issues that require consideration. First, appellant argues that the school board did not present sufficient evidence to meet the statutory grounds for expulsion under Wis. Stat. § 120.13(1)(c)1. She argues the evidence was insufficient because the district did not "call witnesses with firsthand knowledge of the allegations." Appellant's Brief in Support of Appeal, p. 8.

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aware at the time that the recording had stopped. The district provided all recordings in its possession to the appellants and the state superintendent. When an expulsion hearing is conducted by the school board, and not a hearing examiner or panel, the statute only requires that written minutes be kept. Wis. Stat. § 120.13(1)(c)(4)f. The minutes are sufficiently detailed to allow a meaningful review in this case. Therefore, the fact that the audio recording is incomplete is not a statutory violation. *D.J.S. by Hartford Union High Sch. Dist.*, Decision and Order No. 550 (July 8, 2005) (p. 5).

The state superintendent has repeatedly held that arguments concerning the sufficiency of evidence are generally beyond the scope of review. *L.P. by the Whitewater Unified School Dist.*, Decision and Order No. 351 (Mar. 31, 1998). Furthermore, a school board's findings will be upheld if any reasonable view of the evidence sustains them. *Id.*

The record shows the district presented testimony from school employees who personally witnessed each of the two alleged physical assaults. One employee testified to observing the student violently assault another student with "a swinging punch and hair pulling" on September 14, 2018. A second school employee testified that on December 18, 2018, the student "punched (another student) in the face," resulting in a bloody nose. This testimony is consistent with the school's disciplinary records introduced at the hearing, and has not been contested by the student either at the hearing or as part of this appeal.

The board also heard testimony regarding an additional incident. The school district administrator and a district bus driver testified that on March 7, 2019, these employees received reports that the student posted a threat to four individuals, three of whom were district students, on her Snapchat "story." The post reads in part: "I am so sick of people well only a few people they need to learn to step down or step off. And don't mess with the wrong people. These are the initials for a few people I'm mad at..." The district administrator testified that one of the threatened students came to her at school worried that the post was naming her as a target for physical violence. The district administrator testified that this post affected the school environment and the safety and welfare of students.

The board has discretion to give weight to the evidence and arguments as it deems appropriate and to judge the credibility of witnesses. *D.S. by Nicolet Union High School Dist.*, Decision and Order No. 702 (January 18, 2013). In this case, the record contains sufficient

supportive evidence to reasonably conclude that the student engaged in conduct meeting the three statutory expulsion grounds included in the notice.

Second, appellant argues that the board failed to properly consider alternatives to expulsion, and that expulsion was not the most appropriate action for this student. Under *Thompson*, the state superintendent is without authority to review the appropriateness, severity or harshness of discipline. *Kelly B. by Sch. Dist. of Three* Lakes, Decision and Order No. 100 (August 23, 1982); *Lavell A. by Kenosha Unified Sch. Dist.*, Decision and Order No. 147 (January 12, 1987) (p. 7-9). These are matters within the discretion of the school board, as long as it complies with the procedural requirements. *Id.*

Third, appellant argues that she was not afforded due process. Specifically, she argues that the school district violated her due process rights by holding the hearing without her father present, failing to consider mitigating circumstances, failing to provide an impartial tribunal, considering hearsay evidence, limiting access to pertinent district policies, and violating open meetings laws.

A student is entitled to due process at an expulsion hearing. *Goss v. Lopez,* 419 U.S. 565, 573-76 (1975); *Thompson, supra; Michaelene J. by the Washington Island Sch. Dist.*, Decision and Order No. 161 (May 17, 1989) (p. 8). Due process in a student expulsion hearing "need not take the form of a judicial or quasi-judicial trial;" the context cannot be equated with court proceedings such as a criminal trial or juvenile delinquency matter. *Linwood v. Board of Ed.*, 463 F.2d 763, 770 (7th Cir. 1972); *Courtney R. by Germantown Sch. Dist.*, Decision and Order No. 278 (Mar. 21, 1996) (p. 7).

Appellant argues she was denied due process because her father was absent from the hearing. The record contains a restraining order against the father which was in place at the time

of the hearing. The order prohibits him from harassing Goodman-Armstrong Creek School District, including its employees or school board members. The order also prohibits him from "contact that harasses or intimidates" these entities, or from entering a place temporarily occupied by them. Appellant's attorney asked the board beforehand about including the father, and at the hearing reiterated his objection to the board holding the hearing without the father present. Counsel for the board responded to the request before the hearing by providing a written consent for the father to attend the hearing and moving the location of the hearing away from school premises to a community center. Based on the above, I find that the district took reasonable measures to accommodate attendance at the hearing by the father and did not commit procedural error in this regard.

Appellant also argues that the board violated her rights by not calling a fellow student who reported feeling threatened by the student's social media post, and that the district had to make this student available for cross-examination. However, the student does not have a due process right to cross-examine other students that accused the pupil of misconduct who are not called at the hearing. *Courtney R.*, *id.*

Appellant next argues the board's refusal to allow cross-examination on the subject of mitigating circumstances denied the student the opportunity to be heard in a meaningful manner. She alleges that the school board refused to allow her counsel to explore mitigating circumstances around an incident that the district allegedly used as a basis for this expulsion. Counsel for appellants did try to cross-examine the district administrator regarding whether it was possible the student's violence was a reaction to the other student bullying her sister. The record indicates that the board president and counsel did not allow this line of questioning, on the basis that the district administrator could not speculate as to the motivations of the student, but

that the student could offer testimony as to mitigating circumstances. The student had the opportunity to testify to these mitigating circumstances, but declined. Therefore, the board did not exclude evidence offered by appellants concerning mitigating circumstances, because none was offered.

Appellant also contends that the school board was biased and thus the hearing lacked an impartial tribunal. Students have a right to a fair and impartial tribunal as a fundamental requirement of due process. *T.J. by Wittenberg-Bernamwood Sch. Dist.*, Decision and Order No. 717 (May 21, 2014) (p. 5). Due process requires that biased board members abstain from participating in expulsion proceedings. *R.B. by Black River Falls Sch. Dist.*, Decision and Order No. 742 (Sept. 23, 2016) (p. 5). As public officials, school board members are presumed to act in accordance with the duties of their office and act fairly, impartially, and in good faith. *Nicholas E. by Lodi Sch. Dist.*, Decision and Order No. 303 (Oct. 17, 1996) (p. 7).

As evidence that the board president was disqualified by bias or conflict, appellant first points to the board president's "substantive testimony" at the hearing and to other legal proceedings involving the parties. This claim is not supported by the audio recording of the expulsion hearing. The president asked occasional questions during witness testimony, with appellant's counsel's audible verbal assent. Hearing examiners often ask questions to elicit testimony in expulsion proceedings and the practice does not indicate bias. *K.E. by Monona Grove Sch. Dist.*, Decision and Order No. 726 (May 22, 2015). Near the end of cross-examination of the district administrator, the board president supplemented the district administrator's answer to a question about the process of policy development in the school district. The board president also stated at one point that he objected to the way counsel for the

appellant characterized the school board's handling of counsel's request for access to board policies. These remarks are not sufficient evidence to overcome the presumption of impartiality.

Appellant asserts, without authority, that "because of the voluntary statements, offered for substantive consideration, the case law requires the recusal of an arbiter who provides testimony." Appellant's Reply Brief, p. 4. Expulsion hearings are not judicial proceedings requiring courtroom procedural formalities. Lay boards of education conducting expulsion proceedings are not bound by the technical niceties of the rules of evidence or procedure. *Sean H. by Milwaukee Pub. Sch. Dist.*, Decision and Order No. (106) (Feb. 10, 1983) (p. 3); *Thompson, supra.*

Appellant further argues that the board president was biased in this case because the parents filed a FERPA complaint against the district, which was pending with the U.S. Department of Education at the time of the expulsion hearing. The FERPA complaint concerns the education of the student's sibling, not the student in this case. The board member who was personally implicated in the complaint recused himself and did not participate in the expulsion hearing. Another board member recused herself at appellant's request, because she was the bus driver the day of the March 7, 2019 incident.

Appellant also implies that the board members were biased because the district sought and obtained a restraining order against the father. No evidence was offered except the family's speculation. The record reflects that each remaining board member, including the president, affirmed the ability to be impartial in the expulsion. The bare assertion of bias is insufficient to overcome the presumption of impartiality where, as here, the record contains no evidence of actual bias nor does it reflect circumstances which would lead to a high probability of bias or conflict. *Jennifer L. by Milwaukee Pub. Sch. Dist.*, Decision and Order No. 336 (Sept. 15, 1997).

Regarding the consideration of hearsay, it is well established that hearsay evidence is admissible in an expulsion hearing and may be relied upon by the school board. *See, e.g., Christopher W. by Tomah Area Sch. Dist.*, Decision and Order No. 247 (Apr. 21, 1995) (p. 6). Appellants argue that only hearsay of school officials or employees may be considered, citing *Racine Unified Sch. Dist. v. Thompson, supra.* Not so. The *Thompson* court specifically declined to exclude hearsay or to import the "technical rules of evidence into administrative hearings conducted by laymen." *Id.* at 663-4. The opinion affirmed the reversal of the state superintendent's order "because... (it) was in error in finding hearsay inadmissible at the expulsion hearing." *Id.* at 667. The hearsay was admissible, not because it was the testimony of school officials, but because it had "sufficient probative force" and indicators of reliability. *Id.* at 664.

The school board is authorized to rely upon any evidence with probative value, including hearsay statements gathered from students in the course of investigation. *Timothy W. by Greenfield Sch. Dist.*, Decision and Order No. 315 (Mar. 21, 1997) (p. 6). To show a violation that rises to the level of a deprivation of due process, a student must demonstrate that the school board relied extensively on hearsay testimony of a speculative and unsubstantiated nature. *Jason M. by Germantown Sch. Dist.*, Decision and Order No. 179 (June 27, 1991) (p. 8). Appellant has not met this standard. The decision in this matter was not solely based on unsubstantiated hearsay, as the board also considered the exhibits in the record and the testimony of eyewitnesses presented at the hearing. The school board did not err in admitting, and relying in part, on hearsay evidence.

Regarding the provision of district policies, it is incumbent upon the school board to provide the student and parent with access to all information it considers in an expulsion

decision. *See Matthew C.M. by Cedarburg Sch. Dist.*, Decision and Order No. 274 (Feb. 14, 1996). The rules were hardly touched upon in the minutes or recording of the hearing. However, since the notice includes allegations that the student did "repeatedly refuse or neglect to obey the rules," and the expulsion order includes a finding she did so, the superintendent can infer that the board considered the district's policies and rules concerning student conduct. Thus, it must provide this information to the student and parents, and it did. The district maintains its policies on its website for public access, and this constitutes sufficient notice to students and parents of the district's standards of conduct and expectations of compliance with rules. As to the promulgation and content of the policies, they are irrelevant to expulsion appeal determinations as the state superintendent is not authorized to review, approve or disapprove of school policy. *Curtis O. by St. Croix Central Sch. Dist.*, Decision and Order No. 489 (Apr. 17, 2003); *C.S. by Edgerton Sch. Dist.*, Decision and Order No. 731 (Oct. 7, 2015).

Regarding alleged violations of open meetings laws, the law does not authorize review by the state superintendent of alleged violations of open meetings laws in an expulsion proceeding. *Marc G. by Maple Sch. Dist.*, Decision and Order No. 213 (Dec. 20, 1993) (p. 7). I note that the school district need not hold or notice a separate meeting to draft an expulsion order decided upon in a prior meeting.

Fourth and finally, appellant questions whether the school board made sufficient findings to support the statutory grounds for expulsion. The order is deficient in its findings, but not for the reason cited. The expulsion statute creates a two-part test for determining whether expulsion is permissible in a particular case. First, the board must determine that the student engaged in misconduct which falls within the alternative statutory grounds for expulsion. If the board does so, the second requirement before expulsion is permissible is a finding that, in view of such

conduct, the interests of the school demand expulsion. *Richard W., Jr., by Central High Sch. Dist. of Westosha*, Decision and Order No. 122 (Sept. 13, 1984) (pp. 4-5).

Appellant states that the expulsion order "made no specific findings regarding the second prong of the expulsion analysis under Wis. Stat.§ 120.13(1)(c)(1)." Appellant's Brief in Support of Appeal, p. 4. To the contrary, the order's finding #7 is "that the Board has weighed the interests of the pupil and the pupil's fellow students, faculty, and staff and has found that the appropriate remedy is expulsion and that the interests of the School do demand the student's expulsion." This finding is satisfactory. *See Todd N. by Elmwood Sch. Dist.*, Decision and Order No. 477 (Aug. 22, 2002).

However, the board failed to find that the student engaged in an act which provides statutory grounds for expulsion. This failure is reversible error. *Nick N. by Elcho Sch. Dist.*, 373 (Dec. 4, 1998). The board must determine what events took place and whether such conduct constitutes grounds for expulsion, and if so the specific grounds. The findings must be consistent with the charges contained in the notice. *Douglas G. by New London Sch. Dist.*, Decision and Order No. 228 (Apr. 29, 1994).

While the hearing record indicates evidence was presented to the board regarding the student's misconduct, neither the order nor the minutes indicate what conduct the board found the student actually engaged in that meets the statutory grounds for expulsion. *James R. by West Bend Sch. Dist.*, Decision and Order No. 396 (Aug. 17, 1999) (p. 4). The findings of fact in the expulsion order contain no specifics about the student's conduct except a single date and a recitation of the statutory language alone. The board did not make any conclusion of law finding the student guilty of misconduct fulfilling the statutory grounds which would authorize expulsion. The board may choose to correct this technical error by making the necessary findings

and sending the expulsion order to the student and her parents. *Clarence S. by Bonduel Sch. Dist.*, Decision and Order No. 320 (Apr. 10, 1997).

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).

ORDER

IT IS THEREFORE ORDERED that the expulsion of [redacted] by the Goodman-Armstrong Creek School District Board of Education is reversed.

Dated this 16 day of December, 2019

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

APPEAL RIGHTS

Wis. Stats. § 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.

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