Decision and Order No.: 788

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Fox Point-Bayside School District Board of Education	DECISION AND ORDER Appeal No.: 19-EX-10

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 Fox Point-Bayside School District Board of Education to expel the above-named pupil from the Fox Point-Bayside School District. This appeal was filed by the pupil's attorney and received by the Department of Public Instruction on November 11, 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 October 16, 2019, from the superintendent of the Fox Point-Bayside School District. The letter advised that a hearing would be held on October 21, 2019 that could result in the pupil's expulsion from the Fox Point-Bayside School District through his 21st birthday. The letter was sent separately to the

pupil and his parents by certified mail. The letter alleged that the pupil engaged in conduct while not at school or while not under the supervision of a school authority which endangered the property, health, or safety of others at school or under the supervision of a school authority and/or that the pupil endangered the property, health or safety of any employee or school board member of the school district in which he was enrolled. The letter specifically alleged:

> Over the summer including during approximately the last week of August before the start of the 2019-2020 school year, you made several statements to another student that you were not excited for the school year to begin and that you should shoot it out so school did not have to start.
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> On or about October 2, 2019, you showed another student a gun, that looked like a pistol, over Facetime while at home, and stated, "This one is for the French teacher tomorrow." Then, on October 8, 2019, at a church mentor's house, when the group was taking turns discussing one good thing and one bad thing from their week, you stated that it [sic] a good thing that you had not shot the French teacher yet.

The hearing was held in closed session on October 21, 2019. The pupil and his parents appeared at the hearing with counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil, his attorney and his parents were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations.

At the hearing, the school district presented testimony from three administrators, Superintendent Jeff Dellutri, Director of Teaching, Learning and Special Services Jennifer Ganske and Bayside Middle School Principal Jodi Hackl. Ms. Ganske was in charge of conducting the school district's investigation and testified regarding conversations that she had with two unnamed students, Student A and Student B, about the allegations. Ms. Ganske also spoke with the pupil's French teacher. Ms. Ganske discussed a written statement from another unnamed student, Student C, that had been provided to Associate Principal Joseph Stiglitz. Principal Hackl testified that she spoke with Student D about statements Student D heard the

pupil make at a church mentor night. The pupil's attorney cross-examined the school district's witnesses and presented testimony from the pupil and the pupil's father.

After the hearing, the school board deliberated in closed session. The board found that the pupil did engage in conduct while not at school or while not under the supervision of a school authority which endangered the property, health, or safety of others at school or under the supervision of a school authority; and that the pupil endangered the property, health or safety of any employee or school board member of the school district in which the pupil is enrolled. The school board further found that the interests of the school district demand the pupil's expulsion. The order for expulsion containing the findings of fact and conclusions of law of the school board, dated October 21, 2019, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through his 21st birthday. A transcript of the hearing is 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 brief in this case raises two issues which require consideration. First, the pupil contends that he was denied due process at the expulsion hearing when he was not allowed to confront witnesses with personal knowledge of his alleged conduct and when he was not allowed

to cross-examine witnesses as to the indicia of unreliability of the hearsay testimony they offered. Second, the pupil contends that the school board acted in an arbitrary and capricious manner when it extended the duration of his expulsion until age 21.

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., 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 are admissible in expulsion hearing and noting that "a lay board cannot be expected to observe the niceties of the hearsay rule"); *Goodman-Armstrong Creek Sch. Dist. Bd. of Educ.*, Decision and Order No. 787 (Dec. 16, 2019); *B.S. v. Marshall Sch. Dist. Bd. of Educ.*, Decision and Order No. 626 (July 11, 2008). The state superintendent has repeatedly found that a school board is permitted to consider and base its decision upon the testimony of a school official who relates the results of his or her investigation, including the statements of other people, when there are factors establishing the reliability and probative value of such testimony. *See, e.g., D.S. v. Nicolet Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 702 (Jan. 18, 2013); *B.S. v. Marshall Sch. Dist. Bd. of Educ.*, Decision and Order No. 626 (July 11, 2008); *Carlos M. v. West Allis-West Milwaukee Sch. Dist. Bd. of Educ.*, Decision and Order No. 242 (Dec. 21, 1994). 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. v. Greenfield Sch. Dist. Bd. of Educ.*, Decision and Order No. 315 (Mar. 21, 1997).

Although the state superintendent's review is primarily limited to ensuring compliance with the due process requirements covered by Wis. Stat. § 120.13(1)(c), *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 667, 321 N.W.2d 334, 339 (Ct. App. 1982), the state superintendent must also ensure that basic due process was afforded in the expulsion hearing.

See Racine Unified Sch. Dist. Bd. of Educ., Decision and Order No. 783 (Aug. 8, 2019); *P.L.Y. v. Kenosha Unified Sch. Dist No. 1 Bd. of Educ..,* Decision and Order No. 182 (Oct. 9, 1991) (state superintendent must address constitutional error. The state superintendent has noted previously that there is no authority for the proposition that the pupil has a right to cross-examine the other students accusing him of misconduct. *J.M. v. Mercer Sch. Dist. Bd. of Educ.*, Decision and Order No. 514 (May 7, 2004). Federal courts have confirmed that due process does not require that a student be able to cross-examine his student accusers or to know their identities. *See, e.g.*, *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 924-25 (6th Cir. 1988); *Antone v. Lakeview Pub. Schs.*, No. 12-cv-11888, 2012 WL 5817931, at *4 (E.D. Mich. Sep. 11, 2012) ("Considerations of due process … did not require Lakeview to allow C.Y. to confront her accusers."). As the Court of Appeals for the Sixth Circuit explained:

> The value of cross-examining student witnesses in school disciplinary cases, however, is somewhat muted by the fact that the veracity of a student account of misconduct by another student is initially assessed by a school administrator – in this case, the school principal – who has, or has available to him, a particularized knowledge of the student's trustworthiness. The school administrator generally knows firsthand (or has access to school records which disclose) the accusing student's disciplinary history, which can serve as a valuable gauge in evaluating the believability of the student's account. Additionally, the school administrator often knows, or can readily discover, whether the student witness and the accused have had an amicable relationship in the past.
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> In this turbulent, sometimes violent, school atmosphere, it is critically important that we protect the anonymity of students who "blow the whistle" on their classmates who engage in drug trafficking and other serious offenses. Without the cloak of anonymity, students who witness criminal activity on school property will be much less likely to notify school authorities, and those who do will be faced with ostracism at best and perhaps physical reprisals. Giving due weight to the important interest a student accused of serious misconduct has in his public education, we conclude that the necessity of protecting student witnesses from ostracism and reprisal outweighs the value to the truth-determining process of allowing the accused student to cross-examine his accusers.

Newsome, 842 F.2d at 924-25 (citations omitted).

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. v. Germantown Sch. Dist.*, Decision and Order No. 179 (June 27, 1991). The pupil has not met this standard. The school board in this matter heard not only unsubstantiated hearsay, but also the testimony of the pupil presented at the hearing. The school board did not err in admitting, and relying in part, on hearsay evidence. The pupil was provided an opportunity to cross-examine the witnesses who were present at the expulsion hearing. The pupil does not have a due process right to cross-examine students who have accused the pupil of misconduct if they are not called at the hearing. *Goodman-Armstrong Creek Sch. Dist. Bd. of Educ.*, Decision and Order No. 787 (Dec. 16, 2019); *J.M. v. Mercer School Dist. Bd. of Educ.*, Decision and Order No. 514 (May 7, 2004).

The school district's presentation of evidence at the expulsion hearing was based on the hearsay accounts of Superintendent Dellutri, Ms. Ganske and Principal Hackl. The pupil notes that Ms. Ganske declined, under cross-examination, to reveal any personally identifiable information about Student A, including his grade level. Despite this refusal, the transcript contains at least 18 pages of cross-examination of Ms. Ganske by the pupil's attorney. (Tr. At 55-69, 71-74.) During that cross-examination, Ms. Ganske answered questions regarding how Student A came to provide her with the information, the exact language that Student A used, and potential inconsistencies between various of Student A's statements. Ms. Ganske also answered questions regarding the pupil's statements to her regarding the allegations. In response to a question from the pupil's attorney as to how she concluded that Student A was telling the truth, Ms. Ganske responded:

> Well, I have other students that have verified similar statements were made, and I also believe student A to have been telling the truth because he was confident in

> his answer. He didn't waiver. He had to – unfortunately, he had to be – he had to go through this story three different times. And every single time that he shared his concerns, the concerns were shared in utilizing the exact same language that he had used the first time that he discussed it, which – and then, like I said, there were other students that had very similar stories, which made the likelihood of student A telling the truth to be a higher likelihood.

(Tr. At 59.)

Earlier during the proceeding, Ms. Ganske testified, over the pupil's objection, as to the reasons that she believed Student A and Student B over the pupil, noting that the pupil "seemed a little bit dismissive when talking to me, and I didn't see that he was remorseful in making any statements. So, for example, when he did admit to making a statement in regards to the church mentor meeting, where he did say that one of the good things was that he hadn't shot the French teacher yet, he claimed that I could ask anybody and that they would think it was a joke." (Tr. at 37.) The pupil's attorney was also able to probe the testimony of Ms. Hackl through cross-examination and to clarify for the school board that Dr. Dellutri did not speak directly to any of the students about the allegations. (Tr. at 52-53, 69-71.) Finally, the pupil testified himself and the school board was able to directly assess his credibility. During his testimony, the pupil admitted to at least one of the statements upon which the expulsion was based and explained that when he made the statement, he thought he was "making a humorous statement to make my peers laugh." (Tr. at 103.)

The pupil cites *State v. Huntington*, 216 Wis. 2d 671, ¶ 24, 575 N.W.2d 268 (1998) and *State v. Sorenson*, 143 Wis. 2d 226, 245-46, 421 N.W.2d 268 (1988) for the proposition that courts should weigh various factors before admitting the hearsay statements of child accusers. The pupil contends that his right to due process was denied when he was not allowed to fully test the hearsay evidence against him under the *Sorenson* factors. *Huntington* and *Sorenson* were criminal cases involving sexual assault of a child. Even if those factors do apply to a civil case, a

proposition for which the pupil cites an unpublished Wisconsin court of appeals decision, they still are not required in an expulsion hearing at which the rules of evidence do not apply.

The pupil cites *Antonio M. v. Kenosha Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 176 (Apr. 18, 1991) and *Ryan G. v. Sparta Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 325 (May 19, 1997) for the proposition that the school district's use of unsubstantiated and prejudicial hearsay testimony in the absence of cross-examination deprived Alexander of due process. Those cases do not support a finding of a due process violation here. In the present case, the testifying administrator spoke directly to the student providing the information. In contrast, in *Ryan G.*, the hearsay was quadruple hearsay and had moved from an unnamed informant, to one officer, to another officer who wrote the complaint to the principal to the examiner. Also unlike the present case, the hearsay evidence was from a police informant and not from a student known to the testifying administrator. Regardless, even in *Ryan G.*, the State Superintendent did not find that the hearsay evidence in that case should not have been admitted but solely cautioned districts about reliance on multiple level hearsay from unnamed undercover informants. Similarly, *Antonio M.* involved double hearsay and concluded solely that "the extensive use of hearsay evidence involving speculation without the opportunity for cross examination raises at least the possibility of due process deprivations." *Antonio M.* at 9. In the present case, the pupil was allowed to challenge the evidence put forward by the school district and received the process required by the Constitution.

As a separate argument, the pupil contends that the duration of the expulsion is arbitrary and capricious and that it is not supported by substantial evidence. The pupil notes that the school district stops offering classes after grade 8 and contends that the board acted arbitrarily and capriciously when it voted to expel the pupil until age 21.

The decision to expel a student and for how long are within the complete discretion of the school board as long as it complies with all the procedural requirements of Wis. Stat. § 120.13(1)(c). *I.B. v. Nicolet UHS Sch. Dist. Bd. of Educ.*, Decision and Order No. 716 (Feb. 14, 2014); *Peter F. v. Suring Sch. Dist. Bd. of Educ.*, Decision and Order No. 471 (July 18, 2002). Those requirements were met in this case. 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. v. Milwaukee Pub. Schs.*, Decision and Order No. 718 (May 22, 2014); *A.M. v. West Allis-West Milwaukee Sch. Dist. Bd. of Educ.*, Decision and Order No. 703 (Feb. 18, 2013). 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 Findings of Fact and Order issued by the school board states:

> 8. That the Board has weighed the interests of the pupil, any mitigating circumstances such as the pupil's age and the seriousness of the offense, and the interests of the pupil's fellow students, faculty, and staff, and has found that the appropriate remedy is expulsion and that the interests of the District demand the pupil's expulsion.

The school board is not required to – and did not - specify the specific interests that it found to require expulsion. The board is not required to justify the length of the expulsion. The board need only be "satisfied that the interest of the school demands the pupil's expulsion." Wis. Stat. § 120.13(1)(c)1.

The pupil has cited no precedent for the proposition that a school district may only expel a student for the period of time that the student might be expected to be enrolled in that district. The state superintendent has no authority to read such a requirement into the law. The state superintendent may not consider a student's claim that the punishment imposed has served its

purpose and is no longer necessary. *David G. v. Westosha Sch. Dist. Bd. of Educ.*, Decision and Order No. 109 (Feb. 25, 1983) (citing *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657).

In reviewing the record in this case, I find the school district complied with all of the procedural requisites. I, therefore, affirm 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 complied with all of the procedural requirements of Wis. Stat. § 120.13(1)(c) and the due process requirements of the United States and Wisconsin constitutions.

ORDER

IT IS THEREFORE ORDERED that the expulsion of [redacted] by the Fox Point-Bayside School District Board of Education is affirmed.

Dated this 10th day of January, 2020

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

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.