Decision and Order No.: 791

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Kenosha Unified School District Board of Education	DECISION AND ORDER Appeal No.: 20-EX-02

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 Kenosha Unified School District Board of Education to expel the above-named student from the Kenosha Unified School District. This appeal was filed by the student and received by the Department of Public Instruction on February 10, 2020.

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 dated December 2, 2019 from the district administrator of the Kenosha Unified School District. The letter advised that a hearing would be held on December 10, 2019 that could result in the student's expulsion from the Kenosha Unified School District through the student's 21st birthday. The letter was sent separately to the student and his parents

by certified mail. The letter alleged that the student engaged in conduct while at school or under the supervision of school authority which endangered the property, health, or safety of others. The letter specifically alleged that at Mahone Middle School on November 19, 2019, the student showed another student a picture of a gun with his lanyard wrapped around it. The letter also alleged that the student told the same student the next day at school that he was going to shoot a different Mahone student. Based on this threat, school authorities conducted a search of the student's locker and found a "Death Book" containing threatening images, symbols, and words.

The hearing was held by an independent hearing officer (IHO) in closed session on December 10, 2019. The student and his mother, sister, and sister's boyfriend appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The student and his family were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations.

After the hearing, the IHO found that the student did engage in conduct while at school or while under the supervision of a school authority which endangered the property, health, or safety of others. The IHO further found that the interests of the school demand the student's expulsion.

The school board affirmed the IHO's decision on December 16, 2019 and expelled the student through the 2021-22 school year with the option of reinstatement to Kenosha eSchool at the beginning of the 2020-21 school year with the approval of the Program's Director and under the terms and conditions required by the Director. Conditional reinstatement requires that there be no further violations of the school board's policy banning threats and assaults. The order for expulsion, dated December 16, 2019, was mailed separately to the student and his parent.

Written minutes are part of the record, along with an audio recording of the hearing which is inaudible due to apparent equipment failure.

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 expulsion decision, the state superintendent must 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 three issues that require consideration. First, the appellant argues that the expulsion order should be overturned because it was based in part on "evidence that was proven false at the hearing." Specifically, he claims that Exhibit 3, the "Death Book" found in his locker, was mischaracterized as threatening other students. He says the board falsely claimed the blacked-out words in Exhibit 3 were student names. Exhibit 3 contains drawings of swastikas and guns, and extensive unredacted descriptions of violence, such as, "Well I found the fucking teen that shot my friend. Well let's say he is sleeping with the fishes. I shot him in the dick, the legs/arms and when he was in pain I shot him in the fucking neck to let him to die." Ex. 3 p. 1. The appellant does not dispute that Exhibit 3 was written by him and found in his locker at school. Nor does he dispute the evidence that he showed another student a picture of a gun with his lanyard wrapped around it, and told the student he "was going to shoot [redacted name]." Ex. 5. He admits this in his written statement and writes that he said it "as a joke." Ex. 4. The Dean of Students who investigated the appellant's threat submitted testimony that the threat

was immediately worrisome because in the week leading up to the threat, there were instances of physical and verbal conflict between the appellant and the student he threatened to shoot. Ex. 2.

A school board's findings will be upheld if any reasonable view of the evidence sustains them. *Leo P. v. Whitewater Unified Sch. Dist.*, Decision and Order No. 351 (March 31, 1998). The board adopted the IHO's findings that the appellant showed another student a picture of a gun with his lanyard wrapped around it. The IHO and the board also found that next day at school, the appellant told the same student that he was going to shoot a different Mahone student. Finally, the IHO and the board found that a "Death Book" was found in the appellant's locker, containing images of guns, swastikas, profanity, shootings, gang affiliations, and killings. After reviewing the record, I find a reasonable view of the evidence supports the findings and the decision to expel.

Second, the appellant claims that his due process rights were violated by (1) the allowance of district representatives into the hearing room before the appellant and his family were admitted, and (2) the lack of a "formal opportunity to present [his] case" during the hearing. In essence, the appellant alleges that the IHO was biased against him. The law presumes that public officials will discharge their legal duties fairly, impartially, and in good faith. *Heine v. Chiropractice Examining Board,* 167 Wis. 2d 187 (Ct. App. 1992), citing *State ex rel. Wasilewski v. Board of School Directors*, 14 Wis. 2d 243, 266 (1961), *appeal dismissed and cert. denied*, 370 U.S. 720 (1962). Although inappropriate, allowing one party to enter the hearing room prior to the hearing and not the other party is insufficient evidence of bias to overcome this presumption.

The minutes note that the IHO began the hearing with a hearing overview, and the appellant agrees that "we were informed that (the District) would present their case first and we

would present our case second with both parties having the ability to cross examine witnesses." The appellant states he only got to give a "closing argument," not to present his case. The minutes state that "family representatives read letter from [local] Division of Children and Family Services (Exhibit 17)" before the IHO rendered a decision. Exhibit 17 was entered into the hearing record. The record thus supports the conclusion that the appellant received the opportunity to present his case.

Third, the appellant argues that the student cannot be expelled because he is "severely academically impaired." Since the hearing, he has "visited medical professionals to understand the full extent of" the alleged disability. The state superintendent's review does not encompass the separate determination of whether the conduct in this incident was a manifestation of the student's disability.

The state superintendent has determined that an expulsion appeal is generally not the appropriate context within which to challenge a district's application of special education provisions to a particular pupil. Such a challenge is generally beyond the scope of Wis. Stat. § 120.13(1)(c). *R.S. by the Barron Area School Dist.*,(417) June 9, 2000. Therefore, any challenges to the district's special education evaluation procedures may be addressed using special education appeal procedures.

One procedural issue concerns me. Wis. Stat. § 120.13(1)(c)3. requires school boards to keep written minutes of expulsion hearings. Additionally, when (as here) the board opts to conduct the hearing through an independent hearing officer appointed by the board under Wis. Stat. § 120.13(1)(e)1.b., "the hearing officer or panel shall keep a full record of the hearing. The hearing officer or panel shall inform each party of the right to a complete record of the proceeding. Upon request, the hearing officer or panel shall direct that a transcript of the record

be prepared and that a copy of the transcript be given to the pupil and, if the pupil is a minor, the pupil's parent or guardian." Wis. Stat. § 120.13(1)(e)3. I have previously overturned expulsions because the school board failed to provide adequate hearing minutes or an incomplete record. *See Nathan W. v. Wilmot Union High School Dist.*, Decision and Order No. 296 (July 10, 1996); *Douglas G. v. New London School Dist.*, Decision and Order No. 228 (April 29, 1994).

In this case, the minutes submitted are scant and the audio recording failed. At a minimum, minutes must reflect who was present at the hearing, what evidence was presented in support of allegations of misconduct and what decisions or actions the board took based upon the evidence presented. *Nathan W., supra*; *B.B. by Peshtigo School Dist.*, Decision and Order No. 660 (May 13, 2010). In this case, because the minutes are minimally sufficient to enable a meaningful review, I will not overturn the expulsion on this basis. However, I strongly encourage detailed minutes and I caution school boards against relying solely on audio recordings of expulsion hearings. Such recordings are frequently incomplete or inaudible, and therefore useless in determining what occurred at the hearing. *Donald K. by Little Chute Area School Dist.*, Decision and Order No. 490 (Apr. 22, 2003); *John L. by Greenfield Sch. Dist.*, Decision and Order No. 418 (June 26, 2000) (p. 2, footnote 1); *Dustin L.F. by Altoona Sch. Dist.*, Decision and Order No. 432 (Apr. 11, 2001) (p. 2, footnote 1).

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).

ORDER

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

Dated this 9th day of April, 2020

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.

COPIES MAILED TO:

[redacted]

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