Decision and Order No.: 795

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Racine Unified School District Board of Education	DECISION AND ORDER Appeal No.: 20-EX-05

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 120.13(1)(e) from the order of the Racine Unified School District Board of Education affirming an independent hearing officer's order to expel the above-named pupil from the Racine Unified School District. This appeal was filed by the pupil's attorneys and received by the Department of Public Instruction on May 4, 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 expulsion 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 "Notice of Expulsion Hearing," dated October 11, 2019, from Gifford School Assistant Principal Scott Campbell. The letter advised that a hearing would be held on October 22, 2019 that could result in the pupil's expulsion from the Racine Unified School District through his 21st birthday. The letter was sent separately to the pupil, his

mother and his father. The letter alleged that the pupil engaged in conduct while at school or while under the supervision of school authority which endangered the property, health, or safety of others. The letter specifically alleged that on October 2, 2019, the pupil showed a sexually explicit picture of female genitals from a SnapChat story to another student during class.

The hearing was held before an independent hearing officer on October 22, 2019. The pupil and his mother, father and grandmother appeared at the hearing with counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and his parents were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations.

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 pupil's expulsion. The order for expulsion containing the findings of fact and conclusions of law of the hearing officer, dated October 22, 2019, was mailed separately to the pupil, his mother and his father. The order stated the pupil was expelled through the end of the 2019-2020 school year and that he may be early reinstated for the second quarter of the 2019-2020 school year to a comprehensive middle school on the condition that he not posess a cell phone or other electronic device at any time. The decision of the independent hearing officer was reviewed by the school board on November 18, 2019. The board affirmed the expulsion order issued by the hearing officer and notified the pupil and his parents of that approval by mail on November 18, 2019. An audio recording of the expulsion hearing is 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 district demands the pupil's expulsion.

The appeal brief in this case raises three issues which require consideration. First, the pupil contends that the hearing record does not support expulsion under the district's Code Book of Rights and Responsibilities. Specifically, the pupil contends that the hearing examiner referenced his personal experience and underlying assumptions to determine that the pupil's conduct caused a total loss of 100 hours of instructional time and thus rose to the level of an expellable offense under the district policy. The school district's application of its policies in this situation is irrelevant to my determination. I am not authorized to review, approve, or disapprove of school policy; I am only authorized to review expulsion decisions to ensure that the pupil had been provided adequate procedural due process. *N.K. v. Marshall Sch. Dist. Bd. of Educ.*, Decision and Order No. 620 (May 15, 2008). The pupil contends that the district failed to prove that the pupil engaged in conduct that actually caused harm and that harm was an assumption, unsupported by any evidence. However, the pupil concedes that he caused at least one hour of lost instructional time. This admitted loss of one hour instructional time is harm to the property interest in education of the five or six students who were distracted from class by the pupil. I note that the Findings of Fact do not explicitly rely on a violation of the district's code of

conduct or find that the pupil caused 100 hours of instructional time to be lost. Instead, the relevant findings of fact state:

> 4. That on 10/2/19 this 13 year old, 7th grade student at Gifford K-8 School, while at school and while under the supervision of a school authority, showed a sexually explicit picture from a SnapChat story to another student during class. The image was of a female genitals.
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> 5. That based on the conduct described in paragraph 4 above, 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.

As already discussed, whether the district met its own code of conduct's standard for expulsion requiring a loss of 100 hours of instructional time is not for the state superintendent to review. All that is relevant to my review is that the pupil endangered the property, health, or safety of others. The pupil admits there was some loss of instructional hours. This is sufficient to support the hearing examiner's conclusion that that there was evidence introduced that the pupil's conduct endangered the property of others. A school board's findings will be upheld if any reasonable view of the evidence sustains them. *Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 783 (Aug. 8, 2019); *C.B. v. Germantown Sch. Dist. Bd. of Educ.*, Decision and Order No. 763 (June 12, 2018); *E.C. v. Oconomowoc Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 737 (June 14, 2016).

In addition, the pupil's admitted conduct of showing another student a picture of female genitals so obviously endangers the other student that specific evidence to that effect is not required. The pupil's showing the photograph to Witness A certainly may have caused emotional/psychological distress or undue embarrassment to Witness A. *See C.A. v. Merrill Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 692 (Feb. 15, 2012) (affirming finding of endangerment where pupil exposed his genitals to other students during class). This conclusion is supported by the fact that Witness A was disturbed enough by the image that she reported to a

teacher that the pupil showed her an inappropriate picture in class. (Hearing Ex. B.) The pupil's intent in showing Witness A the picture is irrelevant to whether his conduct endangered her property, health or safety.

Next, the pupil contends that because he has a constitutional right to attend public school, strict scrutiny should apply to this review of his expulsion hearing. He cites *Vincent v. Voight*, 2000 WI 93, to argue that strict scrutiny should apply but that case does not support that proposition. The pupil further contends that if strict scrutiny applies, the hearing examiner's inclusion of facts unsupported by the record and shifting the burden to the pupil to rebut the assumption renders the district's expulsion practices unconstitutional. The state superintendent's review is primarily limited to ensuring accordance with the due process requirements contained in Wis. Stat. § 120.13(1)(c) and (e). *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 667, 321 N.W.2d 334, 339 (Ct. App. 1982); *Madison Metro. Sch. Dist. v. Wis. Dep't of Public Instruction*, 199 Wis. 2d 1, 16-17, 543 N.W.2d 843, 849-50 (Ct. App. 1995). The pupil has not suggested that any requirement of Wis. Stat. § 120.13(1)(c) or (e) was not met in this case. The facts introduced at the hearing, including the pupil's admission to having engaged in the conduct and having caused one hour of lost instructional time, support his expulsion under Wis. Stat. § 120.13(1)(c)1. The pupil's argument that the District's expulsion practices, as applied to the pupil, were unconstitutional is based on an assumption that the pupil could be expelled only if the pupil's conduct caused 100 hours of lost instruction time. Neither Wis. Stat. § 120.13(1)(c)1 nor the Wisconsin Constitution require such a finding and it is not my role to ensure the district's compliance with its code of conduct. The pupil's own admissions support the findings of fact made by the hearing examiner and those admissions are sufficient basis for expulsion under the

Wisconsin statutes and the Wisconsin Constitution. Therefore, I need not address the pupil's arguments regarding burden of proof and standard of review.

Third, the pupil contends that due process required additional protections in this case because additional safeguards could be provided with no "onerous fiscal or administrative burden on the Government." This is not the due process standard. Due process in a student expulsion hearing does not have to take the form of a judicial or quasi-judicial trial, and the due process required in an expulsion hearing cannot be equated to that required in a criminal trial or juvenile delinquency hearing. *See, e.g., Linwood v. Board of Educ.*, 463 F.2d 763, 770 (7th Cir. 1972). In this case, the pupil's argument revolves around the application of a district policy and the evidence used to support the hearing examiner's application of that policy. This is not something that I have the power to review. The pupil's position is further weakened by the fact that he admits engaging in the conduct. As discussed by the Court of Appeals for the Seventh Circuit:

> As to what process is due, it is important that the plaintiff unequivocally admitted the misconduct with which she was charged. In such a circumstance, the function of procedural protections in insuring a fair and reliable determination of the retrospective factual question whether she in fact [engaged in the alleged conduct] is not essential. *See Morrissey v. Brewer*, 408 U.S. 471, 472-480, 486-490, 92 S. Ct. 2593, 2594-2600, 2603-2605, 33 L.Ed.2d 484 (1972). However, due process may also contemplate affording the plaintiff an opportunity to be heard on the question of what discipline is warranted by the identified offense. *See id.* 408 U.S. at 471, 480, 92 S. Ct. at 2598-2600, 2603- 2605. Although the meting out of disciplinary punishment is a matter left largely to the discretion of the school authorities, since a penalty which is tantamount to expulsion was involved, and since that penalty was discretionary rather than prescribed, the school authorities were plainly required to give the plaintiff and her parent some opportunity to present a mitigative argument.

Betts v. Bd. of Educ. of City of Chicago, 466 F.2d 629, 633 (7th Cir. 1972). Here, both the pupil's attorney and the pupil's mother had the opportunity to and did make extensive mitigative argument at the expulsion hearing.

Finally, I address the district's argument that this appeal is moot because the pupil was early reinstated in November and the period of expulsion has run before the issuance of this decision. Although the pupil was allowed back to school, there is no evidence that the expulsion has been removed from his school records. "An issue is moot when its resolution will have no practical effect on the underlying controversy." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis.2d 685, 688. As long as the expulsion remains on his school records, it could potentially harm the pupil. *Raymond I.C. v. Mineral Point Sch. Dist. Bd. of Educ.*, Decision and Order No. 440 (July 27, 2001). Therefore, this appeal is not moot.

CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the hearing officer and the school board complied with all of the procedural requirements of Wis. Stat. § 120.13(1)(e).

ORDER

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

Dated this 1st day of July, 2020

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

APPEAL RIGHTS

Wis. Stat. § 120.13(1)(e)3 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.

Parties to this appeal are:

[redacted]

and

[redacted]

[redacted]

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