Decision and Order No.: 800

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Cedarburg School District Board of Education	DECISION AND ORDER Appeal No.: 20-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 Cedarburg School District Board of Education to expel the above-named pupil from the Cedarburg School District. This appeal was filed by the pupil's attorney and received by the Department of Public Instruction on November 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 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 Pupil Expulsion Hearing," dated September 18, 2020, from the superintendent of the Cedarburg School District. The letter advised that a hearing would be held on September 28, 2020 that could result in the pupil's expulsion from the Cedarburg 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 while under the supervision of a school authority which endangered the property, health, or safety of others. The letter specifically alleged:

> Possession of illegal substance on school grounds.
>
> After it was reported by one of [the pupil]'s teachers, that he and a friend were found alone in a small side room within the metals lab during passing time, and then later suspiciously taking turns standing outside of the bathroom while the other was in the bathroom, [the pupil] was interviewed by Mrs. McNerney and Officer Butzler. [The pupil] stated that they were not doing anything they should not be doing at school. Due to the concern about his suspicious behavior, a routine search of [the pupil]'s belongings was conducted by Mrs. McNerney. During the search an unfolded paper clip with some burnt residue was found in [the pupil]'s backpack. [The pupil] eventually stated that, "The paper clip found was something he had forgotten in my backpack from summer. During the summer I used it to take dabs. The paper clip in question was found in my backpack. Dabs are a form of concentrated THC." Officer Butzler tested the residue from the paper clip and it tested positive for THC. [The pupil]'s mother was contacted regarding [the pupil] being in possession of drug paraphernalia.

The hearing was held in closed session on September 28, 2020. The pupil and his mother appeared at the hearing with counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and his mother, through 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 pupil engaged in conduct while at school, and while under the supervision of a school authority, which endangered the property, health, or safety of others. The school board further determined that the interests of the school demanded the pupil's expulsion. The order for expulsion containing the findings of fact and conclusions of law of the school board, dated October 1, 2020, was mailed separately to the pupil and his mother. The order stated the pupil was expelled through his 21st birthday and may apply for probationary readmittance for the second semester

of the 2020-2021 school year under certain conditions. A transcript of the expulsion 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 letter in this case alleges that there was insufficient evidence to support the finding that the pupil endangered the property, health, or safety of others at school. Specifically, appellant contends that the school district failed to offer any evidence that possessing a paperclip with THC residue on it endangers the property, health or safety of others. Appellant notes that the pupil did not use the paperclip to take drugs on the day in question, the pupil did not injure or threaten anyone with the paperclip residue and the pupil did not attempt to sell the paperclip with burnt THC residue as a drug to another student.

In this case, there is no allegation that the pupil used drugs at school or under the supervision of school authorities. The notice of expulsion indicated that the district was recommending expulsion for "[p]ossession of illegal substance on school grounds." Even if the trace amount of burnt THC on the paperclip constituted such possession, that possession must still endanger the property, health or safety of others to support the pupil's expulsion. Endanger means "to bring into danger or peril" or "to create a dangerous situation." *Endanger definition*,

Merriam-Webster, https://www.merriam-webster.com/dictionary/endanger (last visited Dec. 10, 2020). The district offered no evidence that the paperclip endangered anyone and has provided no such explanation in its brief on this appeal.

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). In the present case, no reasonable view of the evidence sustains the board's finding that the pupil's possession of a paperclip with burnt THC residue endangered the property, health or safety of others. In its brief, the district contends that "possession of drugs, even in trace amounts, is an expellable offense." (Br. of Resp't at 10.) However, the district fails to provide any explanation as to how the possession of a trace amount of burnt THC endangers the property, health or safety of others. Instead, the district's position appears to be that because the board stated that it concluded the pupil's conduct constituted conduct "while at school or while under supervision of school authority, which endangers property, health or safety of others," the state superintendent should simply accept the board's conclusion despite the lack of any specific evidence of endangerment.

The district relies on a former state superintendent's decision in *N.P. v. Wisconsin Dells Sch. Dist. Bd. of Educ.*, Decision and Order No. 719 (June 23, 2014). In that case, during a scheduled "K-9 sniff" in March 2014, law enforcement officers found trace amounts of "marijuana shake" in the truck that N.P. drove to school. N.P. stated he had stopped smoking marijuana two weeks earlier due to start of the baseball season. The state superintendent noted that state superintendents have consistently held that possession of marijuana, even in very small amounts, meets the statutory grounds for expulsion. *N.P. v. Wisconsin Dells Sch. Dist. Bd. of*

Educ., Decision and Order No. 719 (June 23, 2014). However, in *N.P.*, in contrast to the present case, there was evidence in the record to support the board's finding of endangerment, including testimony that marijuana possession endangers students. Also in contrast to the present case, N.P. admitted having smoked marijuana during the school year, although it is unclear from the decision whether N.P. admitted to doing so at school. To the extent the decision in *N.P.* suggests that no evidence of specific endangerment by the pupil is required to expel, I decline to follow that decision.

None of the findings of fact in the board's order suggested that the pupil engaged in conduct that endangered the property, health or safety of others. Despite this, paragraph 1 of Conclusions of the Board stated that "[the pupil], as evidenced by the above-described misconduct, engaged in conduct while at school, and while under the supervision of a school authority, which endangered the property, health or safety of others." Simply stating the legal standard as a conclusion is insufficient to support an expulsion. In some cases, endangerment may be so obvious that an explicit finding is unnecessary, such as a finding that a student was dealing drugs at school. This is not such a case. Appellant argued at the hearing that there was no endangerment to property, health or safety of others and the school board, aware that endangerment was being challenged, failed to explain in its order what endangerment it found the pupil to have engaged in.

In the alternative, appellant contends that extraordinary circumstances exist that justify the state superintendent reversing the pupil's expulsion. Specifically, appellant contends that the conduct cited by the district for the pupil's expulsion is so minimal as to render his expulsion with the most severe punishment possible extreme and extraordinary. Because the expulsion must be reversed for other reasons, I need not address this alternative argument.

Finally, an issue not raised by appellant must be addressed. Proper notice must inform the pupil of the time frame during which the misconduct occurred, where the misconduct occurred, and a description of the conduct to be considered. *Lake Geneva-Genoa City Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 785 (Oct. 1, 2019); *L.W. by the Iowa-Grant Sch. Dist. Bd. of Educ.*, Decision and Order No. 720 (Aug. 19, 2014); *C.M. v. Pulaski Comm. Sch. Dist. Bd. of Educ.*, Decision and Order No. 701 (Dec. 5, 2012). In this case, the notice does not state the date or time that the alleged misconduct occurred. Therefore, the school board did not give adequate notice to the pupil about the charges that would be considered at the expulsion hearing and the expulsion must be reversed. *See Lake Geneva-Genoa City Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 785 (Oct. 1, 2019) (notice did not state date or time that the alleged misconduct occurred and did not adequately describe the conduct to be considered); *N.B. v. Pulaski Comm. Sch. Dist. Bd. of Educ.*, Decision and Order No. 730 (Sep. 25, 2015) (notice contained the wrong date for the misconduct); *D.C. v. Howard-Suamico Sch. Dist. Bd. of Educ.*, Decision and Order No. 687 (June 14, 2011) (notice failed to state the day or location of the alleged acts of misconduct or how the pupil refused to obey school rules).

In reviewing the record in this case, I find the school district failed to comply with all of the procedural requisites. I, therefore, reverse 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 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 Cedarburg School District Board of Education is reversed.

Dated this 17th day of December, 2020

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

APPEAL RIGHTS

Wis. Stat. § 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 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]

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