Decision and Order No.: 803

THE STATE OF WISCONSIN
BEFORE
THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Wisconsin Dells School District Board of Education	DECISION AND ORDER Appeal No.: 21-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 Wisconsin Dells School District Board of Education to expel the above-named pupil from the Wisconsin Dells School District. This appeal was filed by the pupil and received by the Department of Public Instruction on February 5, 2021.

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 of [the Pupil]", dated March 20, 2019, from the district administrator of the Wisconsin Dells School District. The letter advised that a hearing would be held on March 26, 2019 that could result in the pupil's expulsion from the Wisconsin Dells School District through his 21st birthday. The record reflects that the letter was sent separately to the pupil and his parents by certified mail and first-class mail on March 20, 2019, and that several attempts were made to deliver the certified letters before they were returned to the district. The letter alleged that the pupil 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 the pupil was "UNDER THE INFLUENCE OF AND POSSESSION OF THC OIL, while on high school premises on Monday, March 18, 2019."

The hearing was held in closed session on March 26, 2019. Neither the pupil nor his parents appeared at the hearing. A teacher who had worked extensively with the pupil's family appeared at the hearing and made a statement in support of the pupil. At the hearing, the school district administration presented evidence concerning the grounds for expulsion.

After the hearing, the school board deliberated in closed session. The board found that the pupil 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 school board further found that the interests of the school demand the student's expulsion. The order for expulsion containing the findings of fact and conclusions of law of the school board, dated March 27, 2019, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through his 21st birthday. Minutes of the school board expulsion hearing and a recording of the expulsion hearing are 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. These parameters of the state superintendent's

role on review are well-settled and, as noted by the Wisconsin Supreme Court, "embedded in Wisconsin school law". *Madison Metro. Sch. Dist. v. Wisconsin Dept. of Pub. Instruction*, 199 Wis.2d 1, 17, 543 N.W.2d 843 (1995).

The appeal letter and briefs in this case raise several issues which require consideration. Generally, Appellant argues that his constitutional right to attend public school required the district to provide him with procedural protections that were not offered in this matter. Specifically, Appellant asserts: that he did receive proper notice of the expulsion hearing and the subsequent order; the district improperly relied on hearsay testimony at the expulsion hearing; and the district failed to meet its burden to prove he actually endangered the health, safety, or property of others.

Given their constitutionally-protected interest in an education, students must be afforded procedural due process when that interest is threatened by expulsion. *See generally Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975). However, due process in a student expulsion hearing "is not to be equated… with that essential to a criminal trial or a juvenile court delinquency proceeding." *Linwood v. Bd. of Ed. of City of Peoria*, 463 F.2d 763, 770 (7th Cir. 1972). The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Bunker v. Lab. & Indus. Rev. Comm'n*, 2002 WI App. 216, ¶ 12, 257 Wis.2d 255. A district's compliance with the statutory procedures set forth in Wis. Stat. § 120.13(1)(c) provide the student the meaningful opportunity to be heard in meaningful manner. Therefore, when a district complies with the statutory procedures set forth in the expulsion statute, the requirements of procedural due process are met. *B.R. v. Hamilton Sch. Dist. Bd. of Educ.*, Decision and Order No. 555 (Aug. 5, 2005). Appellant has argued at length that an even stricter standard should be applied, which affords greater procedural protections.

The State Superintendent declines to disturb the long-standing, and well-reasoned, standard articulated in case law and previous expulsion decisions that compliance with the statutory procedures of Wis. Stat. § 120.13(1)(c) affords students the necessary procedural due process in expulsion matters.

With respect to Appellant's specific arguments, the district complied with the requisite procedures for providing notice of the expulsion hearing. Wis. Stat. § 120.13(1)(c)4. requires that a written notice of the expulsion hearing be sent to the pupil and a minor pupil's parents not less than five days prior to the hearing. Evidence in the record confirms that the expulsion hearing notice was mailed by certified mail and first-class mail on March 20, 2019, to the pupil and the pupil's parents at their last known address. Appellant has not disputed that the address to which the notices were sent was the correct address on file with the district. It is undisputed that the two separate certified mailings were both ultimately returned to the district without being claimed by either the pupil or his parents. However, the statute requires only that notice be sent, not that notice must be received and reviewed. As long as the district sends the notice of hearing in some manner within the proper timeframe, the district is in compliance with the requirements of the statute. *Kyle J.W. v. Viroqua Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 413 (Apr. 27, 2000); *Jamie L.W. v. Hudson Sch. Dist. Bd. of Educ.*, Decision and Order No. 419 (June 15, 2000).

In the record on appeal, there is a significant dispute over whether the pupil and his mother received actual notice of hearing in some other way beyond the mailed notice of hearing. Again, the district satisfied the requirements of the statute by mailing the notice within the statutory timeframe. Further, both Appellant and the district have offered exhibits or evidence that was not before the board during the expulsion hearing. Evidence and exhibits presented for

the first time during an appeal are generally not considered by the State Superintendent. *B.R.,* Decision and Order No. 555; *S.R. v. Chippewa Falls Area Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 723 (Feb. 25, 2015). This dispute over actual notice merits discussion only to determine if there were some other exigent circumstances of which the board was aware at the time of the hearing that made postponement of the hearing appropriate in the interest of fairness. *See Michael C.G. v. Hudson Sch. Dist. Bd. of Educ.,* Decision and Order No. 219 (Feb. 11, 1994). The pupil's mother asserts that: she only learned of the date and time of the hearing a few days prior to the hearing from her son's teacher; she was on her way to attend the expulsion hearing when her car suffered a flat tire; when she arrived she met with the teacher that had appeared at the hearing and was told the meeting was already over; and she was told by the teacher the results of the hearing and that she would receive further information by mail. The district has produced an email from the school principal to the pupil's mother a week before the hearing identifying the date and probable time for the expulsion hearing. In the same email, the principal offered to meet with the pupil prior to the hearing to discuss his options and other issues. Ultimately, however, the record is significant for what it does not reflect: a request for postponement of the hearing from the pupil or his mother; a request from the mother after she appeared late to the hearing that it be reopened or other action taken to afford her an opportunity to be heard; or any indication that the board was aware at the time they held the expulsion hearing that circumstances existed which should delay the hearing in the interest of fairness for the student. The recording of the expulsion hearing reflects that the principal testified she had communicated about the hearing with the pupil's mother. The Notice of Expulsion was entered as an exhibit. The teacher who had communicated with the pupil's mother also testified at the hearing and confirmed the mother was aware of the hearing and had asked the teacher to attend.

The teacher did state that she believed the mother planned to attend and the mother's absence from the hearing was probably not intentional, but did not assert any request on behalf of the family for delay or other action. On review, the State Superintendent will not second-guess the appropriateness of a school board's determination absent extraordinary circumstances. *C.T. v. Milwaukee Pub. Sch.*, Decision and Order No. 718 (May 22, 2014). Here, where the school board had no indication emergency circumstances had prevented the mother from appearing and heard testimony and received evidence regarding notice provided to the pupil and his mother of the hearing, it was reasonable for the board to hold the hearing as scheduled. Extraordinary circumstances are not present that require the State Superintendent to second-guess the board's determination.

Second, Appellant argues that the district improperly relied on hearsay testimony from a "non-school district official"; specifically the testimony of the School Resource Officer (SRO) who investigated the incident that led to the pupil's expulsion. Expulsions can be based on the hearsay testimony of school officials. *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 668 321 N.W.2d 334 (1982). The State Superintendent has repeatedly found that there is no reason to distinguish between testimony from school personnel that conduct investigations and police officers who conduct investigations. *Christopher W. v. Tomah Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 247 (Apr. 21, 1995). A school board may base its decision on such testimony when there are factors establishing the reliability and probative value of such testimony. *D.S. v. Nicolet Union Sch Dist. Bd. of Educ.*, Decision and Order No. 702 (Jan. 18, 2013). Appellant has not offered any argument reflecting some lack of reliability or value specifically in the testimony of the SRO in this matter; he simply asserts any hearsay testimony offered by the SRO must be disregarded simply because the SRO is not technically a "school

official". Again, the State Superintendent declines to disturb the findings in a long line of previous expulsion cases that the inherent reliability and value in testimony from police officers who conducted the investigation into the circumstances leading to the expulsion is indistinguishable from the testimony of school officials that may have also conducted the investigation.

Finally, Appellant argues that the district failed to prove how his conduct actually endangered the health, safety, or property of others. Specifically, Appellant asserts the district failed prove how much THC he consumed and, therefore, failed to offer evidence Appellant endangered anyone. In support of this argument, Appellant relies on expulsion Decision and Order No. 800, where the State Superintendent reversed an expulsion. *See Cedarburg Sch. Dist. Bd. of Educ.*, Decision and Order No. 800 (Dec. 17, 2020). The findings of a school board are upheld by the State Superintendent only when a reasonable view of the evidence sustains them. *Kathleen W. v. Tri-Cty. Area Sch. Bd*., Decision and Order 130 (May 10, 1985). In *Cedarburg*, the pupil was expelled based on his possession of a paperclip with THC residue; the board found that such conduct endangered the property, health or safety of others. There was no allegation that the pupil <u>used</u> THC while at school. In reversing, the State Superintendent noted that the district had failed to offer any evidence how this particular possession of the trace amount of THC on the paperclip endangered anyone. Therefore, no reasonable view of the evidence sustained the finding and reversal was merited on those particular facts.

The facts of the instant case are distinguishable. It was alleged Appellant was under the influence of THC at school. Evidence was presented at the hearing – through the SRO's written report and his testimony – that Appellant admitted using THC at school and that the "dab pen" confiscated from Appellant tested positive for THC. Appellant's argument that Decision and

Order No. 800 stands for the proposition that districts must be able to prove some minimum level of drug use to show a pupil endangered the property, health or safety of others is incorrect. The board's findings simply must be supported by reasonable evidence. Here, there was evidence that Appellant used THC while on school grounds and that he possessed a dab pen that contained THC. The board's finding that such conduct endangered the property, health or safety of others is reasonable given such evidence.

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 substantive and procedural requirements of Wis. Stat. § 120.13(1)(c).

ORDER

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

Dated this 1st day of April, 2021

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]

Terrance Slack
District Administrator
Wisconsin Dells School District
811 County Road H
Wisconsin Dells, WI 53965-9636

COPIES ALSO PROVIDED TO:

[redacted]

Matthew Giesfeldt
Student Expulsion Prevention Project
17 South Fairchild Street, 2nd Floor
Madison, WI 53703

Chad Wade
Strang, Patteson, Renning, Lewis & Lacy
43 West 6th Avenue
Oshkosh, WI 54902