

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

██████████

by Somerset School District
Board of Education

DECISION AND ORDER

Appeal No.: 21-EX-07

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 Somerset School District Board of Education to expel the above-named pupil from the Somerset School District. This appeal was filed by the pupil’s father and received by the Department of Public Instruction on December 10, 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 Proposed Expulsion,” dated October 19, 2021, from the principal of Somerset High School. The letter advised that a hearing would be held on October 28, 2021 that could result in the pupil’s expulsion from the Somerset School District through her 21st birthday. The letter was sent separately to the pupil and her parents by certified mail. The letter alleged that the pupil was guilty of repeated refusal or neglect to obey

school rules and that she 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:

On October 11, 2021, an assistant principal from Stillwater High School contacted Somerset High School Assistant Principal, Trent Probst via email regarding SnapChat messages being sent from Somerset High School students to students at Stillwater High School from that morning. Multiple students from Stillwater High School were students of color. He provided Mr. Probst with screenshots of multiple messages that he believed met the threshold of racial harassment and threatening behavior. Upon review the screenshots that were sent to Mr. Probst on October 11, 2021 and on October 12, 2021, there was evidence to prove that [the pupil] had significant involvement in the incident and that she had sent multiple messages that contained the following content:

- Multiple uses of the words "niggers" and "nigga" (2)
- Multiple references to encouraging the Stillwater students to "pull up" (2)
- Multiple uses of the word "faggot" (4)
- Reference to the Stillwater students "and all the people there are crazy ash (as shit) like they will shoot you on sight" (1)
- Posted stickers of the confederate flag (2) .
- Multiple references to "smoke" (pot/weed) (2)
- Posted a derogatory meme with yearbook pictures of four of our Somerset High School students with significant cognitive disabilities stating "LOL..I fight the retards in my school. Cause I care" (1)
- Sent a voice recording referencing a gun since she was hunting (per [the pupil]). Stillwater student stated, "saying your gonna shoot us and then sending a gun kinda sounds like a threat"
 - [The pupil]'s response, "maybe it is"
 - Two other Somerset High School students confirmed that in addition to the voice recording, she also sent a picture of the gun. We were not able to locate that picture.

In addition:

- [The pupil]'s conduct in sending these messages to students from another school as well as to other Somerset students led the District to reasonably forecast that they would cause a disruption at Somerset, and they actually did lead to a disruption to the learning environment.
 - [The pupil] stated in the group chat that she was in school.
- This conduct violates the following School Board Policies:
 - #5517 Student Anti-Harassment
 - #5517.01 Bullying
- This conduct violates the following Somerset High School student handbook policies:
 - Profanity (pg. 8)
 - Bullying (pg. 11)
 - Proper Language/Respect for All (pg. 14)

- Harassment (pg. 19)

When questioned by staff about the SnapChat messages, [the pupil]'s responses were as follows:

- She stated that she did not remember what she wrote in the chat. When presented with the evidence of what she wrote, she stated, "oh, ya I guess I put that", "it was a joke, the whole group chat was a joke to me".

The hearing was held in closed session on October 28, 2021. The pupil and her parents appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and her parents 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 or while under the supervision of a school authority which endangered the property, health, or safety of others. The board also found that the pupil repeatedly violated school rules and endangered the property, health or safety of others. The school board further found that the interests of the school demand the pupil's expulsion. The order for expulsion containing the findings of the school board, dated October 28, 2021, was mailed separately to the pupil and her parents. The order stated the pupil was expelled until her 21st birthday and that she would be eligible for early reinstatement as early as the start of the first semester of the 2023-2024 school year under specified conditions. Minutes of the school board expulsion hearing and a video 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.

The appeal letters in this case raise five issues which require consideration. First, appellants argue that the expulsion decision was unfair and that the pupil's actions were not severe enough to warrant expulsion. 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). *Muskego-Norway Sch. Dist. Bd. of Educ.*, Decision and Order No. 804 (June 28, 2021); *St. Croix Falls Sch. Dist. Bd. of Educ.*, Decision and Order No. 793 (May 15, 2020); *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). The school board is in the best position to know and understand what its community requires as a response to school misconduct. It would be inappropriate for me, absent an extraordinary circumstance or a violation of procedural requirements, to second-guess the appropriateness of a school board's determination. *Muskego-Norway Sch. Dist. Bd. of Educ.*, Decision and Order No. 804 (June 28, 2021); *St. Croix Falls Sch. Dist. Bd. of Educ.*, Decision and Order No. 793 (May 15, 2020); *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 this case, there was a procedural violation, which is discussed below.

Second, appellants complain that the pupil was punished more severely than other students who participated in the group Snapchat. Because expulsions are considered on a case-by-case basis, the treatment of other students is not relevant to this review. *Muskego-Norway Sch. Dist. Bd. of Educ.*, Decision and Order No. 804 (June 28, 2021); *St. Croix Falls Sch. Dist.*

Bd. of Educ., Decision and Order No. 793 (May 15, 2020); *J.H. v. West Bend Sch. Dist. Bd. of Educ.*, Decision and Order No. 721 (Aug. 18, 2014). As a general rule, and one that applies in this case, I do not have the authority to address issues of fairness and unevenness of disciplinary measures. *Muskego-Norway Sch. Dist. Bd. of Educ.*, Decision and Order No. 804 (June 28, 2021); *St. Croix Falls Sch. Dist. Bd. of Educ.*, Decision and Order No. 793 (May 15, 2020); *J.H. v. West Bend Sch. Dist. Bd. of Educ.*, Decision and Order No. 721 (Aug. 18, 2014).

Third, appellants challenge the evidence on various technical grounds. However, school boards conducting expulsion proceedings are not bound by the technical rules of evidence. *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 663-664, 321 N.W.2d 334, 337 (Ct. App. 1982). 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) (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). Further, the pupil admitted much of the alleged conduct, so that even if the hearsay rule applied, it would not bar admission of the evidence.

Fourth, appellants contend that expulsion is not in the pupil’s best interest. However, the best interest of the pupil is not an element that must be considered by the school board. *Chequamagon Sch. Dist. Bd. of Educ.*, Decision and Order No. 805 (Aug. 10, 2021); *W.T. v. Beloit Turner Sch. Dist. Bd. of Educ.*, Decision and Order No. 591 (May 4, 2007).

Finally, appellants contend that the pupil’s “conduct was not carried out at school or under the supervision of school authorities as she was out of town. It begs the issue of off

campus free speech rights as well as an examination of her federal rights stated in the first amendment.” The undisputed evidence at the hearing was that the pupil was not at school when she engaged in the group Snapchat on October 11, 2021. The United States Supreme Court recently confirmed that a school may regulate some off-campus speech by a student, including “serious or severe bullying or harassment targeting particular individuals; [and] threats aimed at teachers or other students.” *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2045 (2021). Wis. Stat. § 120.13(1)(c)1 allows a school board to expel a pupil if it “finds that the pupil while not at school or while not under the supervision of a school authority engaged in conduct which endangered the property, health or safety of others at school or under the supervision of a school authority.” Thus, the fact that pupil’s conduct occurred when she was not at school does not preclude expulsion. However, the statutory provision allowing expulsion for conduct while not at school was not cited in the Notice of Proposed Expulsion. A school board’s findings will be upheld if any reasonable view of the evidence sustains them. *Muskego-Norway Sch. Dist. Bd. of Educ.*, Decision and Order No. 804 (June 28, 2021); *St. Croix Falls Sch. Dist. Bd. of Educ.*, Decision and Order No. 793 (May 15, 2020); *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). Because no reasonable view of the evidence supports a finding that the pupil was at school when she engaged in the conduct described in the notice of expulsion hearing, and because a statutory violation precludes reliance on the other statutory ground cited for her expulsion, the expulsion must be reversed.

The notice of expulsion hearing provided to the pupil failed to comply with the requirements of Wis. Stat. § 120.13(1)(c)4. It has long been precedent that the notice requirements of the statute are mandatory in nature, and failure to comply with the statutory

requirements renders the expulsion void. *See, e.g., Alex H. v. Eleva-Strum Sch. Dist. Bd. of Educ.*, Decision and Order No. 438 (July 20, 2001). “[A] student facing expulsion is entitled to timely and adequate notice of the charges against him so as to allow him a meaningful opportunity to be heard.” *Keller v. Fochs*, 385 F. Supp. 262, 265 (E.D. Wis. 1974). 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. *Janesville Sch. Dist. Bd. of Educ.*, Decision and Order No. 797 (July 27, 2020); *Lake Geneva-Genoa City Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 785 (Oct. 1, 2019); *A.S. v. Milwaukee Public Sch. Dist. Bd. of Educ.*, Decision and Order No. 674 (Dec. 21, 2010). The purpose of this notice is to allow a student to adequately prepare for the expulsion hearing. *Janesville Sch. Dist. Bd. of Educ.*, Decision and Order No. 797 (July 27, 2020); *A.S. by the Milwaukee Public Sch. Dist. Bd. of Educ.*, Decision and Order No. 674 (Dec. 21, 2010). Among other things, the notice of expulsion hearing must state “[t]he specific grounds, under subd. 1., 2. or 2m, and the particulars of the pupil’s alleged conduct upon which the expulsion proceeding is based.” Wis. Stat. § 120.13(1)(c)4.a. Where a school board relies on multiple grounds in reaching its expulsion decision, the pupil must be fairly and specifically notified of the underlying conduct supporting each ground. *Joseph F. v. Almond-Bancroft Sch. Dist. Bd. of Educ.*, Decision and Order No. 191 (May 13, 1992).

The notice of expulsion hearing cited two grounds under subd. 1: that the pupil was guilty of repeated refusal or neglect to obey school rules and 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. With respect to the first, repeated refusal or neglect to obey school rules, the notice of expulsion hearing failed to include the particulars of the pupil’s

alleged conduct that would support a finding of such violation. Instead, the notice described one incident, involving a group Snapchat the pupil participated in on October 11, 2021. In order to support a finding the pupil was guilty of repeated refusal or neglect to obey school rules, the notice must describe each of the incidents that the district believes together constitute repeated refusal or neglect to obey school rules. The fact that the student sent multiple messages in the October 11, 2021 group chat does not make her participation in the chat a repeated refusal to follow school policy. Evidence to support a conclusion that the pupil engaged in violation of school rules related to bullying and harassment on multiple occasions other than October 11, 2021 was introduced at the hearing and stated in the board's Findings of Fact. However, the expulsion cannot be affirmed on the ground of repeated refusal because the pupil did not receive the statutorily-required notice of the particulars of her alleged conduct prior to the expulsion hearing.

The second basis for expulsion cited in the notice is 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 school board's Findings of Fact and Expulsion Order made the following findings:

2. That on October 11, 2021, the Student engaged in bullying and harassment of students at another School District, and students at the Somerset School District were included on these messages during the school day. In these messages, the Student made threats, used the word "faggot," posted stickers of the Confederate Flag in response to other students using the N word, posted a derogatory meme with pictures of three Somerset High School Students with cognitive disabilities, using the word "retard," and made reference to the fact that she had a gun and responded that it may be a threat that she was going to shoot the students from the other School District. This conduct violates Board Policies 5517 (Student Anti-Harassment) and 5517.01 (Bullying).

...

7. That based on the conduct described in Paragraph 2 above, the Student engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health, or safety of others.

Despite paragraph 7's statement that it was finding based on the conduct described in paragraph 2 that the pupil engaged in the conduct while at school or while under the supervision of a school authority, paragraph 2 does not make a finding that the pupil was at school or under the supervision of a school authority when she engaged in the conduct. The evidence introduced at the expulsion hearing was undisputed that the pupil was not at school when she engaged in the group Snapchat that was the subject of the Notice of Proposed Expulsion. Somerset High School Principal Shannon Donnelly, who presented the district's case, testified that the pupil was not in school the day she participated in the group Snapchat. The pupil and her parents confirmed that the pupil was not at school that day.

The district correctly points out that a student may be expelled for conduct while not at school. This is true but does not save the expulsion because the district failed to provide notice to the pupil that she was subject to expulsion for conduct while not at school. Because the school district is required to provide the pupil advance notice of the statutory grounds on which it intends to proceed, it cannot make its finding based upon different statutory grounds for which the student did not receive notice. *Travis J.M. v. Deerfield Cmty. Sch. Dist. Bd. of Educ.*, Decision and Order No. 423 (Sep. 25, 2000). In this case, the board cited the same statutory ground, conduct while at school, in the notice and the order despite the lack of any evidence that the pupil was at school when she engaged in the conduct. The statutory basis for the expulsion must be reflected in the notice of expulsion hearing, must be supported by evidence in the record and must be reflected in the ultimate findings of the board. *Travis J.M. v. Deerfield Cmty. Sch. Dist. Bd. of Educ.*, Decision and Order No. 423 (Sep. 25, 2000). Because the statutory basis for the expulsion ("conduct while at school") was not supported by evidence in the record and

because the statutory basis that might have been supported by evidence in the record (“pupil while not at school...engaged in conduct”) was not cited in the notice of expulsion hearing, the expulsion must be reversed.

The district contends that the pupil waived any challenge to the district’s compliance with statutory procedures by failing to raise such a challenge. However, the state superintendent’s role in an expulsion appeal includes ensuring that the required statutory procedures were followed. Waiver might apply if the pupil had agreed to proceed with the hearing on the scheduled date following an acknowledgement by the district of the errors in the notice of expulsion hearing and an offer by the district to issue a corrected notice of expulsion hearing for a new date. That did not happen, and the pupil and her parents repeatedly pointed out that the pupil was not at school when she participated in the group Snapchat. The district is correct that bullying, harassment and conduct that endangers the health or safety of others are valid grounds for expulsion; however, even where there is no dispute as to the conduct that occurred, an expulsion must be reversed, where, as here, the proper notice was not provided to the pupil. *Travis J.M. v. Deerfield Cmty. Sch. Dist. Bd. of Educ.*, Decision and Order No. 423 (Sep. 25, 2000).

In reviewing the record in this case, I find that the school district did not comply with all of the procedural requirements. I therefore reverse this expulsion. If the district chooses, it may remedy the errors by providing proper notice of the expulsion hearing and rehearing the expulsion. *Janesville Sch. Dist. Bd. of Educ.*, Decision and Order No. 797 (July 27, 2020); *J.L. v. Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 783 (Aug. 8, 2019).

This decision does not condone the pupil’s conduct, nor does it suggest that the expulsion ordered by the board is inappropriate. However, I must uphold the requirements contained in the statutes.

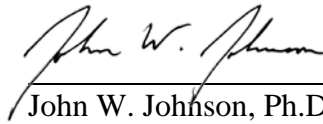
CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school board did not 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 Somerset School District Board of Education is reversed.

Dated this 7th day of February, 2022



John W. Johnson, 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]
[REDACTED]
[REDACTED]

[REDACTED]
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