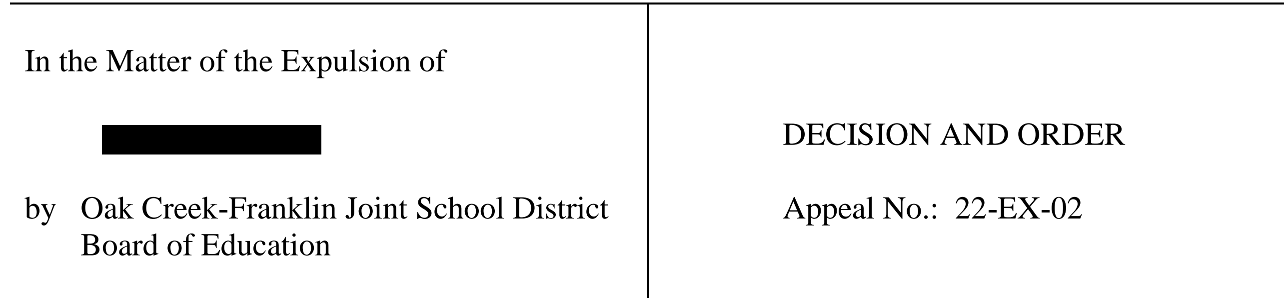
Decision and Order No.: 810

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION



In the Matter of the Expulsion of [redacted] by Oak Creek-Franklin Joint School District Board of Education	DECISION AND ORDER Appeal No.: 22-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 Oak Creek-Franklin Joint School District Board of Education to expel the above-named pupil from the Oak Creek-Franklin Joint School District. This appeal was filed by the pupil's father and received by the Department of Public Instruction on March 16, 2022.

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 dated December 22, 2021, from the principal of Oak Creek East Middle School in the Oak Creek-Franklin Joint School District. The letter advised that a hearing would be held on January 12, 2022 that could result in the pupil's expulsion from the Oak Creek-Franklin Joint School District through her 21st birthday. The letter was sent

separately to the pupil, her mother and her father by certified mail. 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 in a notebook that was turned in to the office on December 17, 2021, the pupil "had written a kill list containing the names of multiple Oak Creek East Middle School students, and detailed descriptions of preparations, including monitoring and planning. At that time, [the pupil] was also in possession of a knife in her backpack while at school."

The hearing was held in closed session on January 12, 2022. The pupil and her parents appeared at the hearing with counsel and a student advocate. 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 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 pupil's expulsion. The order for expulsion containing the findings of fact and conclusions of law of the school board, dated January 12, 2022, was mailed separately to the pupil and her parents on January 18, 2022. The order stated the pupil was expelled through age 21. Minutes of the school board expulsion hearing and an audio 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.

Appellant raises four issues which require consideration. First, appellant contends that the school district did not comply with the suspension statute, Wis. Stat. § 120.13(1)(b). Violations of the suspension statute are outside the scope of the state superintendent's review. *R.B. v. Black River Falls Sch. Dist. Bd. of Educ.*, Decision and Order No. 742 (Sep. 23, 2016) (citing *Madison Metro. Sch. Dist. v. Wisconsin Dep't of Pub. Instruction*, 199 Wis. 2d 1, 13, 543 N.W.2d 843, 848 (Ct. App. 1995)). I have no authority to review a suspension order in an appeal from an expulsion order. *Madison Metro. Sch. Dist.*, 199 Wis. 2d at 17, 543 N.W.2d at 850. Therefore, even if the allegations are true, they do not provide a basis to overturn the expulsion. *R.B. v. Black River Falls Sch. Dist. Bd. of Educ.*, Decision and Order No. 742 (Sep. 23, 2016).

Second, appellant points to language in the notice of expulsion hearing to contend that the expulsion hearing should not have taken place before the special education determination was completed. The relevant paragraph in the notice states:

> At this time, [the pupil] is not a pupil with an identified disability, however, a referral for evaluation for special education has been made. Should such an evaluation result in a determination that [the pupil] is a pupil with an identified disability, an expulsion may constitute a significant change of placement. Under such a circumstance, prior to the time of the expulsion hearing, a manifestation determination review will be convened in order to determine if there is a relationship between any identified disability and the misconduct which has resulted in the recommendation for expulsion. Dr. Ted Gennerman, Director of Student Services, will be in contact to arrange for special education evaluation, and any subsequent process such as a manifestation determination review. You will be notified shortly of the time, date, and place of such a review, should it be necessary, and you are requested to attend.

I do not read the above paragraph to require that an evaluation for special education be completed before the expulsion hearing is held. Instead, it states that if an evaluation determines, prior to the time of the expulsion hearing, that the pupil has an identified disability, then a manifestation determination review would occur.

The state superintendent has consistently held that an expulsion appeal is not the appropriate context within which to challenge a school district's application of special education provisions to a particular student. *Oshkosh Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 808 (Mar. 16, 2022); *Middleton-Cross Plains Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 794 (June 26, 2020); *R.M. v. Oak Creek-Franklin Joint Sch. Dist. Bd. of Educ.*, Decision and Order No. 711 (Jan. 30, 2014). Such challenges are beyond the scope of the state superintendent's review when, as is the case here, there is no evidence in the record that the pupil was identified as a child with a disability prior to the expulsion hearing. *Oshkosh Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 808 (Mar. 16, 2022); *Middleton-Cross Plains Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 794 (June 26, 2020); *S.R. v. Chippewa Falls Area Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 723 (Feb. 25, 2015). If a school district had knowledge that a student is a child with a disability <u>before</u> the expellable offense occurred, the student may assert the procedural protections of the Individuals with Disabilities Education Act (IDEA). *K.F. v. Chippewa Falls Area Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 739 (Aug. 2, 2016) (citing 34 C.F.R. § 300.534(a)). If a school district lacks such knowledge, it may discipline the student the same way it would discipline a child without a disability. *K.F. v. Chippewa Falls Area Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 739 (Aug. 2, 2016) (citing 34 C.F.R. § 300.534(d)). There is no evidence in the record that the district had – or should have had – knowledge prior to December 17, 2021 that the pupil had a

disability, nor does appellant make such allegation. Therefore, failure to conduct a special education evaluation or a manifestation determination prior to the expulsion hearing is not a basis for reversal of the expulsion.

Next, appellant makes evidentiary objections to the hearing, arguing that the district rested its case before introducing any evidence or calling any witness and further objects that the district was allowed to call a witness after it had rested its case. Appellant protests that "[t]o make an error of this magnitude cannot be undone by turning your back on the rule of evidence, and honestly the hearing should have ended here." However, the rules of evidence do not apply to expulsion hearings. The recording of the hearing is clear that the district presented testimony from the district superintendent and the school principal and submitted exhibits before resting its case. That the exhibits were not admitted into evidence until after the administration had rested its case does not preclude the board's consideration of those exhibits. Further, because an expulsion hearing does not follow formal procedural rules, there was no error in the board hearing additional testimony from the associate principal after the administration had rested its case.

Appellant alleges, without citation, that "[m]any supreme court cases say that a student cannot be expelled on hearsay alone." I am unaware of any such decision. Hearsay is admissible in expulsion hearings and may be relied upon by school boards. *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 668, 321 N.W. 2d 334, 340 (Ct. App. 1982); *D.S. v. Nicolet Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 702 (Jan. 18, 2013). In addition, a school board may base its decision to expel entirely on hearsay testimony presented by administrators or other staff. *See, e.g.*, *William S. v. Tri-Cty. Area Sch. Bd.*, Decision and Order No. 132 (June 21, 1985). "Basic fairness and integrity of the fact-finding process are the guiding stars. Important as

they are, the rights at stake in a school disciplinary hearing may be fairly determined upon the 'hearsay' evidence of school administrators charged with the duty of investigating the incidents. We decline to place upon a board of laymen the duty of observing and applying the common-law rules of evidence." *Racine Unified Sch. Dist.*, 107 Wis. 2d at 663-64, 321 N.W.2d at 337 (quoting *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701 (5th Cir. 1974)) (emphasis in original). Regardless, because the associate principal testified that the pupil admitted to her that the notebook was the pupil's, the admission is not hearsay. *See* Wis. Stat. § 908.01(4)(b)1.

Arguments concerning the sufficiency of the evidence are generally beyond the scope of review. *Oshkosh Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 808 (Mar. 16, 2022); *T.S. v. West Allis-West Milwaukee Sch. Dist. Bd. of Educ.*, Decision and Order No. 684 (May 20, 2011). A school board's findings will be upheld if any reasonable view of the evidence sustains them. *Oshkosh Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 808 (Mar. 16, 2022); *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). In this case, a reasonable view of the evidence supports the board's findings.

Finally, appellant objects to Attorney Christine Hamiel writing the district's response brief on this appeal because he contends that she acted as prosecution, judge and represented the jury and because he believes the briefs should come from the pupil and Oak Creek East Middle School. Wis. Stat. § 120.13(1)(c)3 allows an expelled pupil to appeal the school board's decision to the state superintendent. Thus, the parties to an expulsion appeal are the pupil (and the parents of a minor pupil) and the school board. Attorney Hamiel represented the school board at the expulsion hearing, and she continues to represent the board in defending the board's decision on

this appeal. Contrary to appellant's assertion, there is no ethical issue with her continued representation of the board.

In reviewing the record in this case, I find the school district complied with all of the procedural requisites. I, therefore, affirm this expulsion.

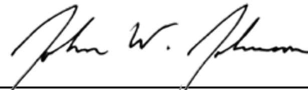
CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the school board 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 Oak Creek-Franklin Joint School District Board of Education is affirmed.

Dated this 13th day of May, 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:

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