Decision and Order No.: 820

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Appleton Area School District Board of Education	DECISION AND ORDER Appeal No.: 22-EX-14

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 Appleton Area School District Board of Education to expel the above-named pupil from the Appleton Area School District. This appeal was filed by the pupil's mother and received by the Department of Public Instruction on September 23, 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 entitled "Notice of Expulsion Hearing," dated August 10, 2022, from an assistant superintendent of the Appleton Area School District. The letter advised that a hearing would be held on August 22, 2022 that could result in the pupil's expulsion from the Appleton Area School District until the age of 21. The letter was sent separately to the pupil and his parents by certified mail on August 11, 2022. The letter alleged that the pupil (1)

engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health, or safety of others at school; (2) endangered the property, health or safety of a school authority or endangered the property, health, or safety of any employee or school board member of the school district; and (3) repeatedly refused or neglected to follow school rules. The letter specifically alleged that on May 10, 2022,

> It was reported to Student Services that [the pupil] was in possession of a vaping pen at North High School. [The pupil] was brought to the office and was asked about this, as well as asked if he had anything on him he should not – drugs or weapons. He said no. While searching through his backpack, a black circle container with a wax substance was found and it tested positive for THC. When asked, [the pupil] responded that it was his and he had forgotten it was in his backpack.

The letter also described several other incidents under the heading "Repeated Refusal or Neglect to Follow School Rules."

The hearing was held in closed session on August 22, 2022. The pupil and his parents 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.

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 at school and which endangered the property, health or safety of a school authority or endangered the property, health or safety of any employee or school board member of the school district. The school board further found that the interests of the district demand the pupil's expulsion. The order of expulsion containing the findings of fact and conclusions of law of the school board, dated August 26, 2022, was mailed separately to the pupil and his parents on August 29, 2022. The order stated the pupil was expelled until the end of the 2023-2024 school year, with the ability to request early readmission

to two specified schools provided certain conditions were met. The order also referred the matter back to the district's Special Education Services to determine appropriate services for the pupil regarding his 504 Plan. Minutes 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 demands the pupil's expulsion.

The appeal letter in this case raises several issues which require consideration. The most significant is the contention that the board's attorney did not allow the pupil to discuss family health issues at the hearing. Appellant contends that this denied the pupil the opportunity to be heard and that the school board was not able to consider the pupil's family circumstances. In addition to ensuring compliance with the due process requirements in Wis. Stat. § 120.13(1)(c), the state superintendent must ensure that basic due process was afforded in the expulsion hearing. *See Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 783 (Aug. 8, 2019); *P.L.Y. by the Kenosha Unified Sch. Dist No. 1 Bd. of Educ.,* Decision and Order No. 182 (Oct. 9, 1991) (state superintendent must address constitutional error). The expulsion statute covers many basic due process rights, including the right to counsel, but the statute is not an exhaustive list of fundamental due process rights. For example, the statute does not specify that pupils have a right

to be heard, a fundamental requisite of due process. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). The notice of expulsion hearing stated that "[i]f it is found that the violation occurred, the Board may consider information relative to grades, attendance, disciplinary problems, family circumstances, or other information which may help the Board in determining the appropriate penalty or length of expulsion." However, the pupil was not allowed to introduce testimony about his family circumstances, including the health of his family members. As the Court of Appeals for the Seventh Circuit has explained,

> 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., 466 F.2d 629, 633 (7th Cir.1972). This includes the opportunity to present mitigative evidence: "when a penalty that is 'tantamount to expulsion' is involved, the school authority must afford the student an opportunity to present evidence and argument in mitigation." *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1012 (7th Cir. 2002) (citing *Lamb v. Panhandle Cmty. Unit Sch. Dist. No. 2*, 826 F.2d 526, 528 (7th Cir. 1987); *Betts*, 466 F.2d at 633). In the present case, the pupil was not allowed to present mitigative evidence regarding his family circumstances to the board before it made the decision to expel. This violated the pupil's due process rights and requires reversal of the expulsion.

Second, appellant contends that the school district did not follow procedural requirements with the pupil's suspension and expulsion, denying the pupil due process rights specified in Wis. Stat. §§ 120.13(1)(b) and 120.13(1)(c). Specifically, appellant contends that the district did not provide notice that the pupil's suspension was extended past 15 days and complains that the pupil was not given the option to move forward with the expulsion hearing, denying him the opportunity to attend summer school. The record indicates the initial expulsion hearing date was

postponed in order to conduct a special education evaluation and a manifestation determination. The next scheduled expulsion hearing date was postponed to accommodate the pupil's attorney. Regardless the reason for the delay in holding the expulsion hearing, the number of days the pupil was suspended is irrelevant to this expulsion appeal. Violations of the suspension statute are outside the scope of the state superintendent's review. *Oak Creek-Franklin Jt. Sch. Dist. Bd. of Educ.*, Decision and Order No. 810 (May 13, 2022); *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)).

Third, appellant contends that the district decided to recommend the pupil be expelled because the pupil's parents expressed to school administrators concerns about an associate principal targeting the pupil for random drug tests. The law presumes that school staff members, as public officials, will discharge their legal duties in accordance with the authority conferred upon them and that they will act fairly, impartially and in good faith. *See Heine v. Chiropractic Examining Bd.,* 167 Wis. 2d 187, 194 n.3 (Ct. App. 1992); *Danielle A.W. v. Baron Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 310 (Jan. 31, 1997). The record contains no evidence to rebut this presumption of good faith.

Fourth, appellant raises several complaints related to the pupil's 504 plan and the manifestation determination. 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. *Chequamegon Sch. Dist. Bd. of Educ.*, Decision and Order No. 812 (June 2, 2022); *Oshkosh Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 808 (Mar. 16, 2022); *R.M. v. Oak Creek-Franklin Joint Sch. Dist. Bd. of Educ.*, Decision and Order No. 711 (January 30, 2014). Even outside the expulsion context, the state

superintendent has no enforcement authority with respect to 504 plans, which are enforced by the United States Department of Education Office for Civil Rights.

Fifth, appellant contends that an agenda and notice of public hearing for the expulsion hearing were not posted on the school board website or on the door going into the meeting as required by Wisconsin open meeting law. Whether the district erred when providing notice to the public for this meeting is beyond the authority of an expulsion appeal. *B.S. v. Marshall Sch. Dist. Bd. of Educ.*, Decision and Order No. 626 (July 11, 2008). The open meetings law is enforced through the procedures set out in Wis. Stat. § 19.97.

Sixth, appellant contends that "[t]he school board members present for [the pupil]'s hearing were selected by the attorney who represents the district, and two of the most recently elected and progressive members were not present and may not have been invited." The record contains no evidence to support appellant's suggestion that not all board members were invited to the hearing and appellant does not suggest that the board lacked a quorum. Further, the pupil's attorney failed to object at the hearing to proceeding with only the four board members who were present. Appellant has not suggested that any of the board members present at the hearing had a conflict of interest, and the record confirms that board members were asked at the beginning of the hearing whether they could hear the matter in an unbiased manner.

Seventh, appellant contends that the district failed to prove at the expulsion hearing that the pupil's possession of a container with THC wax was a danger to any other students. The evidence at hearing was that the pupil possessed enough THC wax for personal use. State superintendents have repeatedly upheld expulsions based on possession of marijuana, even in small amounts. *N.P. v. Wisconsin Dells Sch. Dist. Bd. of Educ.*, Decision and Order No. 719 (June 23, 2014); *Joshua S. v. Beloit-Turner Sch. Dist. Bd. of Educ.*, Decision and Order No. 307

(Jan. 14, 1997). Merely being in possession of drugs at school endangers the health, safety and welfare of others. *B.S. v. Marshall Sch. Dist. Bd. of Educ.*, Decision and Order No. 626 (July 11, 2008).

Eighth, appellant contends that Associate Principal Patrick Lee made false statements during the expulsion hearing regarding the pupil's number of unexcused absences and tardies and complains that the pupil was not given advance notice of these particulars in the notice of expulsion. The pupil's attorney had the opportunity to cross-examine Mr. Lee about his testimony and to point to any inconsistencies in the exhibits. Any challenge to the accuracy of testimony must be made at the hearing, where the board may evaluate the credibility of the witnesses and evidence presented by each side. The expulsion notice is only required to include particulars "of the pupil's alleged conduct upon which the expulsion proceeding is based." Wis. Stat. § 120.13(1)(c)4.a. The expulsion proceeding was not based on the pupil's attendance record and, therefore, details of that record were not required to be contained in the notice of expulsion hearing. The notice did alert the pupil that attendance could be considered by the board in determining the appropriate penalty or length of expulsion. This was adequate notice that the pupil's attendance record might be considered.

Ninth, appellant contends that the district's expulsion recommendation that was presented to the board was vague and lacked particulars. She also contends that the recommendation falsely stated that the pupil had violated a prior deferred expulsion agreement even though the pupil never had a prior deferred expulsion agreement. The order of expulsion does not mention the November 10, 2021 agreement titled "Voluntary Agreement of [the pupil] and the Appleton Area School District," making clear that the pupil was not expelled for violation of that agreement. Furthermore, and regardless whether the agreement was a "deferred expulsion

agreement," the district's recommendation to the board is irrelevant for purposes of this appeal. The decision to expel and for how long is made by the school board, not school officials. Although school officials may offer suggestions or recommendations pertaining to the length of a students' expulsion period or any conditions for early reinstatement, the school board is not required to follow them. *B.S. v. Marshall Sch. Dist. Bd. of Educ.*, Decision and Order No. 626 (July 11, 2008).

Tenth, appellant objects to the early reinstatement condition that the counseling center at which the pupil completes an alcohol and other drug abuse assessment be acceptable to the district administration, arguing that it is not within the district's scope as an educator, that the pupil's parents should be able to select any licensed provider in good standing with the applicable regulatory agency and that the pupil's doctor does not agree with the district's plan for the pupil to see a new provider. The pupil's advocates made their objection to this early reinstatement condition clear at the hearing and the board chose to include the condition in the expulsion order. The board was not required to provide an early reinstatement option and the pupil is not required to take advantage of that option. "A school board … may specify one or more early reinstatement conditions in the expulsion order under par. (c)3. … if the early reinstatement conditions are related to the reasons for the pupil's expulsion." Wis. Stat. § 120.13(1)(h)2. The challenged condition is related to the reason for the pupil's expulsion. I decline to modify the condition that requires an alcohol and other drug abuse assessment at a center that is acceptable to district administration.

Finally, appellant makes several complaints about the notice of expulsion hearing. Appellant points out that the notice cites Wis. Stat. § 120.13(1)(c), the expulsion statute, but attaches a copy of Wis. Stat. § 120.13(1)(b), relating to suspensions. A copy of the expulsion

statute is not required to be provided with a notice of expulsion hearing. Therefore, although irrelevant to the notice of expulsion hearing, there was no violation of law when the suspension statute was attached to the notice. Wis. Stat. § 120.13(1)(c)(4)L. requires the notice of expulsion hearing to state "[t]hat the state statutes related to pupil expulsion are ss. 119.25 and 120.13(1)." The notice of expulsion hearing in this case complied with this requirement.

Appellant notes that the notice of expulsion hearing lists "several relatively minor behavior incidents" dating back to elementary school and argues that these prior incidents should not have been detailed in the notice because many were related to his disability. These incidents were listed in the notice of expulsion hearing as support for the district's contention that the pupil engaged in repeated refusal or neglect to follow school rules. At the hearing, however, the school board's attorney directed the board not to consider those incidents as a basis for expulsion because no manifestation determination review had been held with respect to the incidents. In accordance with that direction, the board made no findings about these prior incidents in the expulsion order.

Appellant also contends that the notice of expulsion lacks certain particulars, including the time or location where the alleged offense occurred, the name of the member of the administration who walked the pupil to the office and searched him, the name of the individual who reported the pupil, and that the subject of the search (a vaping pen) was not found. The name of the administrator who walked the pupil to the office and searched him is irrelevant to the allegation that the pupil's backpack contained THC wax. The offense noticed was "use/possession of drugs" and the notice clearly indicates that the pupil was found to have possessed THC wax. The notice does not imply that a vaping pen was found. In many situations, the time and location of the alleged offense must be stated in a notice of expulsion in order to

provide adequate notice of the particulars of the pupil's alleged conduct under Wis. Stat. § 120.13(1)(c)4.a. Such situations include allegations that a pupil made a threat or engaged in an assault. In this case, the notice did not allege a discrete incident that occurred at a discrete time and location but instead alleged that the pupil had THC wax in his backpack when it was searched in the student services office. Thus, the notice contained an adequate description of the location of the pupil's offense. Because the pupil stated that he had forgotten the THC was in his backpack, it is reasonable to assume that it was in his backpack during the entire time he had been at school that day. In this circumstance, the lack of a specific time stated in the notice of expulsion hearing does not violate Wis. Stat. § 120.13(1)(c)4.a. and is not a basis for reversal of the expulsion.

Appellant contends that the July 26, 2022 notice of expulsion hearing was not sent by certified mail to the pupil, but only to the pupil's parents. Although sending the notice by certified mail is best practice, Wisconsin law requires solely that the notice be sent and does not require that it be sent by certified mail. *See* Wis. Stat. § 120.13(1)(c)4 ("Not less than 5 days' written notice of the hearing under subd. 3. shall be sent to the pupil and, if the pupil is a minor, to the pupil's parent or guardian."). Even if the July 26, 2022 notice had not been sent to the student, the error would have been harmless because a later notice, dated August 10, 2022, was sent in accordance with the statutory requirement. At the hearing, the pupil's attorney stated that there was no issue with respect to the issuance of notices, and the record contains a certificate of service and a photocopy of a certified mail receipt indicating that the August 10, 2022 notice of expulsion hearing was sent by certified mail to both the pupil and his parents.

Appellant contends that Exhibit 13 that was introduced at the hearing and admitted into evidence is different than a similar document provided to the parents previously. Both documents

are titled "Voluntary Agreement of [the Pupil] and the Appleton Area School District" and are unsigned and undated. They appear to have no substantive difference in content but are printed on different district letterhead and contain the name of different administrators below the blank signature line. The time to object to the authenticity of Exhibit 13 was at the hearing, and the pupil's attorney failed to make any objection to Exhibit 13.

Appellant suggests that the district falsely represented to the school board that the pupil signed the alcohol and drug policy of West High School, a school the pupil never attended. Again, the time to raise an objection to exhibits was at the hearing, and the pupil's attorney failed to do so. Appellant also contends that the pupil did not violate the district's alcohol and drug policy because he did not know that the THC was in his backpack and the policy prohibits a student from knowingly possessing drugs. The board did not make a finding that the pupil knowingly possessed THC and, instead, found that the pupil said that he had forgotten the THC wax was in his backpack. The legal basis for expulsion did not require the board to find that the pupil violated a district policy. Whether the district followed its policy is irrelevant to my review. *Justin S. v. Marshfield Sch. Dist. Bd. of Educ.*, Decision and Order No. 361 (May 27, 1998).

Appellant contends that Exhibits 14, 15 and 16 were entered into evidence by the district and relate to special education. Appellant contends that it was unfair that the district discussed multiple special education issues, but the family was not allowed to discuss special education issues. The pupil's attorney failed to object to the receipt of Exhibits 14, 15 and 16 at the hearing. As already discussed, challenges to the district's application of special education provisions are not appropriate at an expulsion hearing. Also as already discussed, the pupil has a right to present mitigating evidence at an expulsion hearing. That evidence may include evidence as to his mental health.

One issue not raised by appellant warrants mention. The board concluded that "[t]he conduct of [the pupil] constitutes conduct while at school or while under the supervision of a school authority, which endangered the property, health or safety of others at school and which endangered the property, health or safety of a school authority or endangered the property, health or safety of any employee or school board member of the school district." (emphasis added). The underlined language, standing alone, is not a basis for expulsion. Instead, a school board may expel a pupil whenever it "finds that a 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 any employee or school board member of the school district in which the pupil is enrolled." Wis. Stat. § 120.13(1)(c)1 (emphasis added). The statute contains no provision for expulsion for conduct that "endangered the property, health or safety of a school authority." The record contains no evidence that the pupil engaged in conduct while not at school that endangered a school employee or school board member. Instead, the pupil's misconduct occurred at school and this basis for expulsion does not apply. Because the expulsion order cited a separate statutory basis for expulsion, this error would not require reversal if the expulsion were not already being reversed for another reason.

In its appeal brief, the district asserts that the "long-standing law of the State does not allow for the State Superintendent to substitute its judgment over the School Board's decision." To the contrary, the state superintendent has the authority to "approve, reverse, or modify" the school board's decision. Wis. Stat. § 120.13(1)(c)3.[1] However, because the school board is in the best position to know and understand what its community requires as a response to school

[1] This authority was provided through the enactment of 1987 Wisconsin Act 88, after issuance of the decision in *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 321 N.W.2d 334 (Ct. App. 1982) that is quoted by the district.

misconduct, the state superintendent has historically held that it would be inappropriate to second-guess the appropriateness of a school board's determination. *See, e.g.*, *Sun Prairie Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 811 (May 26, 2022); *Madison Metro. Sch. Dist. Bd. of Educ.*, Decision and Order No. 786 (Nov. 7, 2019).

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. If the school district chooses, it may remedy this error by rehearing the expulsion and allowing the pupil an opportunity to present mitigating evidence and argument.

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 due process.

ORDER

IT IS THEREFORE ORDERED that the expulsion of [redacted] by the Appleton Area School District Board of Education is reversed.

Dated this 15th day of November, 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]

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