Decision and Order No.: 832

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Madison Metropolitan School District Board of Education	DECISION AND ORDER Appeal No.: 23-EX-06

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 120.13(1)(e) from the order of the Madison Metropolitan School District Board of Education to expel the above-named pupil from the Madison Metropolitan School District. This appeal was filed by the pupil's attorney and received by the Department of Public Instruction on May 8, 2023.

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)(e).

FINDINGS OF FACT

The record contains letters dated June 9, 2022, from the Special Assistant to the Superintendent & Interim Coordinator of Progressive Discipline of the Madison Metropolitan School District. The letters advised that a hearing would be held via Zoom on June 17, 2022[1]

[1] The hearing was later rescheduled for July 7, 2022.

that could result in the pupil's expulsion from the Madison Metropolitan School District through his 21st birthday. One letter was sent to the pupil and the other letter was sent to the pupil's parents by certified mail. The letters 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 letters specifically alleged that "[o]n May 9, 2022, during 6th period [the pupil] engaged in non-consensual intercourse with another student in the PE Boy's locker room near the Spectator Gym."

The hearing was held via Zoom before an independent hearing officer on July 7, 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's attorney was given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations.

The hearing officer found that the pupil engaged in conduct while at school which endangered the property, health, or safety of others by engaging in non-consensual sexual contact with another student. The hearing officer found that the interests of the school demand the pupil's expulsion. The order for expulsion containing the findings of fact of the hearing officer, dated July 29, 2022, was mailed to the pupil's attorneys. The order stated the pupil was expelled through the 2022-2023 school year. The expulsion order issued by the independent hearing officer was reviewed and modified by the school board on August 22, 2022, and the school board's order dated August 23, 2022 was mailed separately to the pupil, his parents and his attorneys. The order stated the pupil was expelled. A separate "Modified Order" stated that the pupil was expelled until the end of the 2022-2023 school year, with an opportunity for early reinstatement as early as the start of the first semester of the 2023-2024 school year, if he

complied with listed conditions. An audio recording of the expulsion hearing and a transcript of the hearing are part of the record.

DISCUSSION

The expulsion statute –Wis. Stat. § 120.13(1)(c) and (e) – 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 brief in this case raises three issues which require consideration. The pupil contends the district violated the pupil's due process rights by (1) failing to provide sufficient procedural protections; (2) creating a definition of sexual assault or nonconsensual sexual contact that does not exist anywhere in the law or in the district's own Behavior Education Plan (BEP) to expel the pupil; and (3) suppressing and failing to disclose to the pupil, his parents and his attorneys exculpatory, highly relevant witness statements that were known to the district because they were made in front of the assistant principal assigned to investigate this matter.

First, the pupil contends that because he has a constitutional right to attend public school, strict scrutiny should apply to this review of his expulsion. He points to dicta in *Vincent v. Voight*, 2000 WI 93, to argue that strict scrutiny should apply. The pupil further contends that if strict scrutiny applies, the hearing examiner's use of a standard of sexual assault or nonconsensual sex that does not exist anywhere in the law and the district's suppression of exculpatory evidence renders the district's expulsion practices, as applied to the pupil,

unconstitutional. Because the pupil's arguments regarding the definition of consent used by the hearing officer and the suppression of exculpatory evidence do not support reversal of the expulsion under any standard of review, I need not determine the appropriate standard of review.

The state superintendent's review is primarily limited to ensuring accordance with the due process requirements contained in Wis. Stat. § 120.13(1)(c) and (e). *Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 795 (July 1, 2020); *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 667, 321 N.W.2d 334, 339 (Ct. App. 1982); *Madison Metro. Sch. Dist. v. Wis. Dep't of Public Instruction*, 199 Wis. 2d 1, 16-17, 543 N.W.2d 843, 849-50 (Ct. App. 1995). The pupil's argument that the district's expulsion practices set forth in the BEP, as applied to the pupil, were unconstitutional is based on an assumption that the pupil could be expelled only if the pupil's conduct violated the district's BEP. Neither Wis. Stat. § 120.13(1)(c)1. nor the Wisconsin Constitution require such a finding and it is not my role to ensure the district's compliance with its code of conduct. *Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 795 (July 1, 2020). The pupil argues that no legal authority "supports the proposition that an unwanted ejaculation during otherwise consensual sex is a violation of any law or any legal standard of consent." This argument misses the point. A student may be expelled for many types of conduct that do not violate any law but do endanger another person. Sexual intercourse, whether consensual or not, with another student endangers the other student within the meaning of Wis. Stat. § 120.13(1)(c)1. and constitutes grounds for expulsion. *See, e.g.*, *Q.H. v. Monona Grove Sch. Dist. Bd. of Educ.*, Decision and Order No. 765 (July 24, 2018) (stipulation that student engaged in a sexual act at school with another student, whether consensual or not, constitutes grounds for expulsion under Wis. Stat. § 120.13(1)(c)1.); *Nicole R. v. Granton Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 301 (Sep. 19, 1996) (finding it

reasonable for district to conclude that student's conduct of having sexual intercourse with another student during school hours and on school property endangered the health and safety of pupils).

The pupil contends that the notice of expulsion hearing was inadequate. The notice alleged that "[o]n May 9, 2022, during 6th period [the pupil] engaged in non-consensual intercourse with another student in the PE Boy's locker room near the Spectator Gym." The notice also alleged that the pupil "violated Wisconsin State Statute 120.13(1), WI Statute 940.225(3)(b)(3m)(4)(b)(c) and the Behavior Education Plan (BEP), Category – Non-Consensual, specifically, Engaging in non-consensual sexual intercourse, including oral sex and/or penetration." Although the pupil is correct that the notice included an inaccurate citation to "WI Statute 940.225(3)(b)(3m)(4)(b)(c)," the notice adequately specified the part of Wis. Stat. § 120.13(1) that it alleged the pupil violated:

> The school administration believes proof of the above misconduct supports a finding 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 district's failure to cite the more specific subdivision, Wis. Stat. § 120.13(1)(c)1., is not a reversible error. *R.A. v. Nicolet Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 773 (Jan. 2, 2019). The pupil contends that the notice did not adequately state the basis for the expulsion, noting that the hearing officer ordered the pupil's expulsion based on a determination that the pupil's ejaculation inside of Student A constituted a "non-consensual" event. Although the notice did not include a specific allegation of nonconsensual ejaculation, ejaculation is closely tied to the notice's allegations of "non-consensual intercourse" and "Engaging in non-consensual sexual intercourse, including oral sex and/or penetration." The notice adequately

described the particulars of the pupil's alleged conduct for purposes of Wis. Stat. § 120.13(1)(c)4.a.

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 Appleton Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 820, (Nov. 15, 2022); *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); *see also Milwaukee Pub. Schs. Bd. of Sch. Dirs.*, Decision and Order No. 751 (Sep. 5, 2017). However, due process in a student expulsion hearing does not have to take the form of a judicial or quasi-judicial trial, and the due process required in an expulsion hearing cannot be equated to that required in a criminal trial or juvenile delinquency hearing. *See, e.g., Linwood v. Board of Educ.*, 463 F.2d 763, 770 (7th Cir. 1972); *Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 795 (July 1, 2020). "As long as the student is given notice of the charges against him, notice of the time of the hearing and a full opportunity to be heard, the expulsion procedures do not offend due process requirements." *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007, 1010–11 (7th Cir. 2002) (quoting *Betts v. Bd. of Educ.*, 466 F.2d 629, 633 (7th Cir.1972)).

The pupil contends that hearsay evidence should be inadmissible under the test for determining how much process is due set out by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1972). Even though testimony from witnesses with firsthand

knowledge might provide better evidence, there is longstanding precedent that hearsay is admissible in Wisconsin expulsion proceedings. The Wisconsin Court of Appeals has held "that a student's right to due process in an expulsion hearing is satisfied even though some of the testimony presented was hearsay given by members of the school staff." *Racine Unified Sch. Dist.*, 107 Wis. 2d at 659, 321 N.W.2d at 335 (reversing state superintendent's order that had found hearsay inadmissible at expulsion hearing). I do not have the authority to overrule the court's conclusion.

Hearsay has historically been allowed in expulsion hearings because of an assumption that "in the absence of an allegation of bias, we can conceive of no reason why school staff would fabricate or misrepresent [hearsay witness] statements of this sort." *Racine Unified Sch. Dist.*, 107 Wis. 2d at 664, 321 N.W.2d at 338. "Basic fairness and integrity of the fact-finding process are the guiding stars." *Id.* at 663, 321 N.W.2d at 337 (quoting *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701 (5th Cir. 1974)). Thus, hearsay testimony may be considered sufficient evidence to support an expulsion where factors establishing the reliability and probative value of such testimony are present. *G.H. v. Sch. Dist. of Elmbrook Bd. of Educ.*, Decision and Order No. 769 (Aug. 14, 2018). Although school districts are strongly encouraged to do so, there is no general requirement that the district provide copies of exhibits to the pupil prior to the expulsion hearing, let alone a complete record of the district's investigation. *G.H. v. Sch. Dist. of Elmbrook Bd. of Educ.*, Decision and Order No. 769 (Aug. 14, 2018). However, if a school district possesses evidence that exonerates a pupil of the alleged misconduct or is otherwise clearly exculpatory, due process may require the school district to disclose that information, or to abandon the expulsion process altogether. *Q.H. v. Monona Grove Sch. Dist. Bd. of Educ.*,

Decision and Order No. 765 (July 24, 2018); *see also G.H. v. Sch. Dist. of Elmbrook Bd. of Educ.*, Decision and Order No. 769 (Aug. 14, 2018).

In the present case, the "Detailed Summary of all Interviews" in the Recommendation for Expulsion completed by the assistant principal omitted exculpatory statements by two different witnesses that could have cast doubt on Student A's testimony at the hearing. The pupil learned about those statements only after he had already been expelled, when he received the district's Title IX investigative report. The Title IX investigative report was completed by a different district investigator but was based on the same interviews attended by the assistant principal. The witness statements omitted from the assistant principal's report were relevant to the issue whether Student A consented to sexual intercourse. However, the expulsion was not based on a finding that the entire sexual interaction was nonconsensual. Instead, the expulsion was based on nonconsensual ejaculation. At hearing, the pupil admitted to ejaculating in Student A without Student A's consent. The hearing officer explicitly declined to make a finding as to whether any of the acts of sexual contact between the pupil and Student A were consensual with the exception of one act:

> 9. The testimony of [the pupil] and [Student A] in this matter often directly contradict each other which makes it difficult to determine if any acts were non-consensual except for one act.
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> …
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> 11. Based on [the pupil]'s testimony, a non-consensual event took place on school property during the school day. Whether the ejaculation was voluntary, involuntary or any other reason is irrelevant to the determination of consent. It was [the pupil]'s responsibility to ensure his actions did not exceed the scope of the consent. His breach of the agreement regarding ejaculation is sufficient to support a finding that his action was non-consensual and a violation of the BEP.

Therefore, the expulsion was based on the pupil's admission and the omitted exculpatory witness statements were not relevant to any factual finding upon which the expulsion was based. If the

expulsion decision had been based on a finding that no part of the sexual intercourse between the pupil and Student A was consensual, then the district's failure to disclose may have been a due process violation. However, the expulsion was based on an admitted nonconsensual act. I cannot say that any due process violation here was material.

The pupil argues strenuously that the district and the hearing examiner used a standard that does not exist in law and contends that no legal authority holds that an unwanted ejaculation during otherwise consensual sex is a sexual assault or a nonconsensual sexual act subject to legal censure. As discussed above, the school district's application of its policies – in this case, its Behavior Education Plan - in this situation is irrelevant to my determination. My role is to ensure that the pupil was provided adequate procedural due process, not to review, approve, or disapprove of school policy. *Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 795 (July 1, 2020); *N.K. v. Marshall Sch. Dist. Bd. of Educ.*, Decision and Order No. 620 (May 15, 2008). Whether the district followed its Behavior Education Plan is not for the state superintendent to review. The pupil admits ejaculating inside another student without consent. This is sufficient to support the hearing examiner's conclusion that that there was evidence introduced that the pupil's conduct at school endangered the health or safety of another.

The pupil contends that whether he ejaculated intentionally matters. Intent may matter with respect to whether the pupil committed a crime or whether the pupil violated the district's Behavior Education Plan. However, intent is not relevant to whether "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." Wis. Stat. § 120.13(1)(c)1. Whether Student A consented to the pupil's ejaculation or not, and whether the pupil intended to ejaculate or not, the pupil's ejaculation endangered the health of Student A. Although the hearing officer and the

school board could have chosen, consistent with state law, not to expel the pupil, it is undisputed that the pupil ejaculated inside another student without her consent. Thus, the pupil engaged in conduct that supports his expulsion under Wis. Stat. § 120.13(1)(c)1.

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)(e).

ORDER

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

Dated this 6th day of July, 2023

John W. Johnson, Ph.D.
Deputy State Superintendent of Public Instruction

APPEAL RIGHTS

Wis. Stat. § 120.13(1)(e)3. 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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