

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

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In the Matter of the Expulsion of



by New Berlin School District  
Board of Education

DECISION AND ORDER

Appeal No.: 23-EX-12

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**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 New Berlin School District Board of Education to expel the above-named pupil from the New Berlin School District. This appeal was filed by the pupil's mother and received by the Department of Public Instruction on April 27, 2023.<sup>1</sup>

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 January 13, 2023, from the superintendent of the New Berlin School District. The letter advised that a hearing would be held on January 23, 2023 that could result in the pupil's expulsion from the New Berlin School District through his 21st

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<sup>1</sup> The original appeal received April 27, 2023 was inadvertently misfiled upon receipt by the department. Appellant emailed a copy of the appeal to the department on May 19, 2023, and the May 19, 2023 date was used to calculate the 60 day deadline for issuance of this decision.

birthday. The letter was sent separately to the pupil and his parents by regular and certified mail. The letter alleged that the pupil engaged in conduct while not at school or while not under the supervision of a school authority which endangered the property, health, or safety of others at school or under the supervision of a school authority. The letter specifically alleged that:

on December 16, 2022, students at Heritage Christian Schools reported to administration that [the pupil] was heard saying, "it's raping time!" to other students. Heritage Christian Schools' administration began an investigation which revealed that on multiple dates throughout the months of September and October, [the pupil] made several sexually suggestive comments to at least eight (8) students and inappropriately touched at least eight (8) students.

The letter listed specific comments allegedly made and conduct allegedly engaged in by the pupil.

The hearing was held in closed session on January 23, 2023. The pupil and his parents appeared at the hearing with counsel. An interpreter was also present. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil, his parents and his attorney 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 not at school or while not under the supervision of a school authority which endangered the property, health, or safety of others at school or under the supervision of a school authority. 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 23, 2023, was mailed separately to the pupil and his parents. The order stated the pupil was expelled until his 21st birthday. 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.

The appeal letter in this case raises several issues which requires consideration. Appellant contends that the district did not have justification or jurisdiction to suspend the pupil. She notes that the pupil had already received consequences for his conduct while a student at the Heritage Christian Academy and that the district is penalizing the pupil a second time for conduct that did not have a direct relationship to any student attending a district school. Finally, she asks for an opportunity for the pupil to be in school and to move on from his poor decisions.

The key question raised by the appeal is whether the district can expel the pupil for conduct he engaged in at a non-district school before the pupil enrolled in the district. The relevant statutory language reads as follows:

The school board may expel a pupil from school 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 others at school or under the supervision of a school authority...

Wis. Stat. § 120.13(1)(c)1. The school board is constrained by the articulated statutory grounds for expulsion. Relevant to this case, in the terms “at school” and “the supervision of a school authority”, as used in Wis. Stat. § 120.13(1)(c)1., the word “school” refers to a school governed by the school board, rather than simply any public or private school. *OO v. Nicolet Union High*

*Sch. Dist. Bd. of Educ.*, Decision and Order No. 775 (Jan. 10, 2019). Therefore, in this matter, the school board must find that the pupil engaged in conduct which endangered the property, health or safety of others at a New Berlin school or under the supervision of a New Berlin school authority. It is insufficient to find that the pupil endangered others at the private school alone.

*OO v. Nicolet Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 775 (Jan. 10, 2019). By relying on the “conduct while not at school” basis for expulsion, the district concedes that the pupil’s conduct while at the private school was not “conduct at school” for purposes of Wis. Stat. § 120.13(1)(c)1. The phrase “at school” in Wis. Stat. § 120.13(1)(c)1. means the same thing when it refers to the pupil’s location as when it describes the location of the others who the pupil endangered.

The district relies on two previous state superintendent decisions to support its expulsion of the pupil for conduct he engaged in before enrolling in the district, *OO v. Nicolet Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 775 (Jan. 10, 2019) and *Alexander P. v. Oak-Creek Franklin Jt. Sch. Dist.*, Decision and Order No. 372 (Nov. 23, 1998). Neither decision supports the pupil’s expulsion. In *Alexander P.*, the state superintendent explicitly limited the decision to the unique facts of the case and the narrow language of Wis. Stat. § 120.13(1)(c)2m., which applies only to students who possess a firearm at school. *Alexander P. v. Oak-Creek Franklin Jt. Sch. Dist.*, Decision and Order No. 372 (Nov. 23, 1998). Unlike Wis. Stat. § 120.13(1)(c)1., which allows but does not require a school board to expel a student in certain circumstances, Wis. Stat. § 120.13(1)(c)2m. requires a school board to commence expulsion proceedings and expel a student who possessed a firearm at school. This case does not involve a firearm and *Alexander P.* does not support the pupil’s expulsion here.

In the other decision cited by the district, the student posted a Snapchat message in which he posed with an Airsoft gun with text stating, “Florida 2.0 coming soon.” The message was posted five days after the school shooting in Parkland, Florida and shortly before the student discussed enrollment with the Nicolet Union High School District. *OO v. Nicolet Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 775 (Jan. 10, 2019). In the decision, the state superintendent recognized that a reasonable view of the evidence did not require the school board to assume that a threat to execute a school shooting exclusively endangered the private school that the pupil was attending when he made the threat. No part of the student’s threat to execute a school shooting was limited to a specific school. Therefore, the school board could reasonably conclude that the pupil engaged in conduct which endangered others at school. The expulsion was based on the past threat made by the student that endangered others at a district school, not on a concern that the student might make similar threats in the future once he was enrolled in the district.

In contrast, in the present case, the record contains no evidence that the pupil’s conduct endangered anyone in a New Berlin school. The expulsion order explained the basis for its finding that the pupil’s conduct met the statutory basis for expulsion:

That based on the conduct described in paragraph 5 above and from the facts at hearing, including testimony that: (1) [the pupil]’s behavior was severe, pervasive, and impacted many students over approximately two and one half months; (2) that [the pupil]’s behavior escalated during that time period and created an environment of fear, intimidation, and uncertainty; (3) that [the pupil]’s conduct was a crime of opportunity, not focused on a singular target, but rather included multiple victims at will, victimizing students at random by choosing a location where there was not direct adult supervision by design to sexually assault, sexually harass, and bully other students; and (4) that [the pupil] merely being present in school provides [the pupil] with an opportunity to victimize students given his propensity for victimizing peers at random in a school environment, the pupil has engaged in conduct while not at school or while not under the supervision of a school authority which endangered the property, health or safety of others at school or under the supervision of a school authority.

In its brief, the district contends that: “Administration showed [the pupil]’s propensity for victimizing student peers at random in a school environment would likely occur in any school environment”; the pupil’s conduct “creates an unsafe and fearful environment in other schools if [the pupil] has the opportunity to be present” and “was a crime of opportunity that endangers students at any school where [the pupil] is present, including New Berlin”; the pupil’s conduct “could reasonably occur with any peers and impact any peers he comes across in any school regardless of where the other students are enrolled”; and the pupil’s conduct “would occur at any school” and “would threaten any school community he attends” such that the board could reasonably conclude that the pupil “is a danger to New Berlin students.”

Whether the district’s assertions are true is irrelevant to whether the pupil’s conduct endangered students in the New Berlin school district. Unlike a threat to bomb an unnamed school, no evidence in the record suggests that the pupil endangered anyone who was not present with the pupil in the boys’ locker room at Heritage Christian Schools when the conduct occurred. The district’s fear that the pupil may engage in similar conduct in a New Berlin school does not support a finding that the pupil endangered anyone in a district school. There is no factual basis in the record for the district’s assertion that the board could reasonably conclude that the pupil’s conduct impacted students in New Berlin. “Propensity” and “would likely occur” do not support expulsion in the absence of past conduct that endangered students at district schools. Although the statute does not use the term “a direct relationship,” the statute requires that the pupil endangered “others at school or under the supervision of a school authority.” This means that the pupil must have endangered others at a district school. The district’s fear that the pupil may endanger district students in the future does not meet the statutory requirement to have

endangered others in the district in the past. Therefore, the district lacks a statutory basis to expel the pupil.

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). In this case, a reasonable view of the evidence sustains the school board's findings as to the specific conduct of the pupil at Heritage Christian Schools. However, no reasonable view of the evidence supports a conclusion that the pupil endangered any student of the district through that conduct. At an expulsion hearing, it is the district's burden to convince the board that the pupil's conduct endangered district students. Contrary to the district's suggestion, it was not the pupil's burden to demonstrate that his "conduct has ceased/been successfully treated."

No school board is required to enroll a pupil during the term of his or her expulsion from another school district in Wisconsin, from a public school in another state or from an independent charter school. *See Wis. Stat. § 120.13(f)*. In contrast, the statutes do not allow a school board to refuse enrollment to a student because the student has been expelled from a private school. The district may not avoid this legislative choice by seeking to expel the pupil from the district for the pupil's conduct at a private school that did not endanger any district students.

In reviewing the record in this case, I find the school district did not comply with all of the statutory requirements. I, therefore, reverse this expulsion. This does not condone the pupil's conduct. However, I must uphold the requirements contained in the statutes.

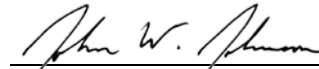
**CONCLUSIONS OF LAW**

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 requirements of Wis. Stat. § 120.13(1)(c).

**ORDER**

IT IS THEREFORE ORDERED that the expulsion of [REDACTED] by the New Berlin School District Board of Education is reversed.

Dated this 17th day of July, 2023



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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]

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