Decision and Order No.: 835

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Two Rivers Public School District Board of Education	DECISION AND ORDER Appeal No.: 23-EX-08

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 Two Rivers Public School District Board of Education to expel the above-named pupil from the Two Rivers Public School District. This appeal was filed by the pupil's mother and received by the Department of Public Instruction on May 22, 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)(c).

FINDINGS OF FACT

The record contains a letter dated March 23, 2023, from the district administrator of the Two Rivers Public School District. The letter advised that a hearing would be held on April 3, 2023 that could result in the pupil's expulsion from the Two Rivers Public School District through the age of 21. The letter was sent separately to the pupil, his mother and his father by certified and regular mail. The letter alleged that the pupil engaged in conduct while at school or

while under the supervision of a school authority which endangered the property, health, and safety of others. The letter specifically alleged that "on Tuesday, March 7, 2023, [the pupil] was in the mens' [sic] bathroom near the 8th grade classrooms at L.B. Clarke Middle School with one other student and possessed a vaping device and the contents of the device tested positive for THC."

The hearing was held in closed session on April 3, 2023. Neither the pupil nor his parents appeared at the hearing. At the hearing, the school district administration presented evidence concerning the grounds for expulsion.

After the hearing, the school board deliberated in closed session. The board found that the pupil to be guilty of endangering the property, health, and safety of students and staff while at school. 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 is dated April 5, 2023. The order stated the pupil was expelled for the remainder of the 2022-2023 school year and through 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 demands the pupil's expulsion.

As an initial matter, I address an argument made by the district. The district cites the general rule that matters not raised before the board cannot be raised for the first time on appeal to argue that none of appellant's arguments should be considered because she failed to attend the expulsion hearing. Expelled students and parents, including those who did not attend the expulsion hearing, have a statutory right to appeal the expulsion. Wis. Stat. § 120.13(1)(c)3. I will not consider factual evidence, whether related to the conduct that was the basis for the expulsion or submitted for purposes of mitigation, that is introduced for the first time on appeal. *Loyal Sch. Dist. Bd. of Educ.*, Decision and Order No. 822 (Dec. 6, 2022). However, I will consider arguments made by appellant.

The appeal letter in this case raises several issues which require consideration. First, appellant contends that the pupil's conduct was directly related to his disability. 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); *Middleton-Cross Plains Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 794 (June 26, 2020). In this case, the record shows that a manifestation hearing was held prior to the expulsion hearing and the pupil's conduct was found to not be related to his disability. Any challenges to the district's compliance with special education requirements may be addressed using the special education appeal process.

In a related argument, appellant contends that the school failed to implement certain guidelines that were intended to make situations such as the one for which the pupil was expelled less likely to occur. As an example, appellant states that the pupil was supposed to be monitored

when using the bathroom and was not supposed to have access to certain bathrooms in order to reduce his interaction with students that he was getting in trouble with related to vaping devices. Appellant complains that the pupil was used to having direction and guidance from his special education teachers and a safe room to go to for help or to calm down and that he did not have these things at the district. Appellant contends that the pupil's IEP plan required the school to search the pupil every morning when he entered the building and that the school failed to do that. Any failure by the school to search the pupil does not make the school responsible for the pupil's possession of a vaping device at school. To the extent that appellant is challenging the district's implementation of the pupil's IEP, such challenge must be brought using special education procedures, not the expulsion appeal process.

Appellant states that the pupil used the vaping devices to calm his crippling anxiety and depression and as a form of social currency, and she provides mitigating background information about the pupil's family life and past trauma. The expulsion hearing was the pupil's opportunity to challenge the evidence presented by the district and to present any additional evidence that the pupil or appellant wanted the board to consider. New evidence may not be submitted for the first time on appeal. *Loyal Sch. Dist. Bd. of Educ.*, Decision and Order No. 822 (Dec. 6, 2022).

In her reply brief, appellant complains that she was not given proof that the pupil's vaping devices tested positive for THC and that she was not shown the vaping devices that the pupil was allegedly caught with. At the expulsion hearing, the district administration submitted evidence, including testimony from a police officer, that the pupil's vaping device contained THC. The expulsion hearing was appellant's opportunity to see and to contest the evidence put forward by the district.

Appellant contends that expulsion is an excessive punishment and that the pupil was punished enough by suspensions and fines. She notes that he is far behind his peers in academics and that "[h]e deserves a proper education and a chance to be successful just like his peers." The state superintendent has the authority to "approve, reverse, or modify" the school board's decision. Wis. Stat. § 120.13(1)(c)3. However, because the school board is in the best position to know and understand what its community requires as a response to school misconduct, the state superintendent has historically chosen not to second-guess the appropriateness of a school board's determination. *See, e.g.*, *Appleton Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 820 (Nov. 15, 2022); *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). I see no extraordinary circumstance here that would prompt me to overrule the determination of the board that expulsion is an appropriate response to the pupil's actions. A school district has the discretion to offer alternative education. The Department of Public Instruction encourages districts to provide alternative education to expelled students, but such a program is not required. *D.R. v. Milwaukee Pub. Sch. Dist. Bd. of Educ.,* Decision and Order No.700 (Dec. 19, 2012).

Finally, appellant contends that the pupil did not harm anyone. The evidence introduced at hearing supports the board's finding that the pupil possessed a vaping device that contained THC at school. State superintendents have repeatedly upheld expulsions based on possession of marijuana, even in small amounts. *Appleton Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 820 (Nov. 15, 2022); *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. *Appleton Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 820 (Nov. 15, 2022); *B.S. v. Marshall Sch. Dist. Bd. of Educ.*, Decision and Order No. 626 (July 11, 2008).

In reviewing the record in this case, I find that 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 Two Rivers Public School District Board of Education is affirmed.

Dated this 21st day of July, 2023

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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