Decision and Order No.: 842

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Williams Bay School District Board of Education	DECISION AND ORDER Appeal No.: 23-EX-17

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 Williams Bay School District Board of Education to expel the above-named pupil from the Williams Bay School District. This appeal was filed by the pupil's father and received by the Department of Public Instruction on August 31, 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 entitled "Notice of Expulsion Hearing," dated May 11, 2023, from the district administrator of the Williams Bay School District. The letter advised that a hearing would be held on May 18, 2023 that could result in the pupil's expulsion from the Williams Bay School District through his 21st birthday. The letter was sent separately to the pupil and his parents by certified 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, or safety of others. The letter specifically alleged that:

> On Wednesday, May 10, 2023, at approximately 1:45 PM, [redacted] possessed two vape pens and a pocketknife that was in his backpack which was stored in his gym locker located in the Williams Bay High School locker room. One of those pens contained tetrahydrocannabinol (THC).

The hearing was held in closed session on May 18, 2023. The pupil and his parents appeared at the hearing without 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 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 May 18, 2023, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through his 21st birthday, with an option for early reinstatement on May 22, 2023 if he met certain conditions. 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.

The appeal letter in this case raises six issues which require consideration. First, appellant complains that the pupil's right to counsel was violated because he was unable to obtain an attorney due to the short time between his receipt of the notice and the hearing. Although appellant's statements at the hearing indicated that he tried diligently to find an attorney prior to the hearing, nothing appellant said at the hearing suggested that he was requesting a postponement to continue his search for an attorney. This is not a situation where an attorney had agreed to represent the pupil but was unavailable on the hearing date. Instead, the pupil's parents stated at the hearing that they had been unable to find any attorney who would accept an expulsion case in Walworth County. A pupil has no right to have an attorney provided to him by the school district or any other entity. *Stephanie T. v. Milwaukee Sch. Dist. Bd. of Educ.*, Decision and Order No. 348 (Mar. 3, 1998). Thus, to exercise his right to an attorney, the pupil is responsible for finding an attorney who is willing and able to represent him. Although I encourage school boards to carefully consider a request for postponement of an expulsion hearing for the purpose of securing legal counsel, no such request was made in this case. Even if it had been, it is within the discretion of the school board to deny a request for a postponement that is not made until the expulsion hearing itself. *Brandon C. v. Florence Cnty. Sch. Dist. Bd. of Educ.*, Decision and Order No. 251 (Jun. 12, 1995). Although unfortunate, appellant's lack of knowledge that he could have requested a postponement of the hearing to continue contacting attorneys is not a violation of due process or a basis for reversal of the expulsion.

Second, appellant complains that the district administrator repeatedly refused to provide requested surveillance video footage prior to the hearing, and that this prevented the pupil from offering relevant evidence on his behalf. The board states that the request was denied because it was unreasonably broad and lacked specificity and because the pupil would not be considered the record subject in any of the requested footage. I have no authority to enforce the public records laws or to review the denial of a request for records under those laws. *See* Wis. Stat. § 19.37. A pupil has no statutory right to discovery before an expulsion hearing. Even for exhibits that will be used by the district administration at an expulsion hearing, there is no requirement that the district provide copies of the exhibits to the pupil prior to the expulsion hearing. *Madison Metro. Sch. Dist. Bd. of Educ.*, Decision and Order No. 832 (July 6, 2023); *G.H. v. Sch. Dist. of Elmbrook Bd. of Educ.*, Decision and Order No. 769 (Aug. 14, 2018). Appellant complains that the administration did not present the requested footage in the expulsion hearing or investigation and that this prevented the pupil from presenting a defense and violated his right to due process. If a school district is aware of 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. *Madison Metro. Sch. Dist. Bd. of Educ.*, Decision and Order No. 832 (July 6, 2023); *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 this case, the record contains no evidence as to what the requested video footage may have shown. In its brief, the board represents that no surveillance camera footage was used in the investigation or at the expulsion hearing. Thus, this is not an instance where the district was aware of clearly exculpatory evidence. Under these facts, the district's failure to provide the footage to the pupil did not violate the pupil's right to due process.

Third, appellant states that the board refused to allow the hearing to be held on a different day, despite the fact that the pupil did not receive five days' notice of the hearing. The relevant statute does not require that the notice be received five days prior to the hearing. Instead, Wis. Stat. § 120.13(1)(c)4. requires that a written notice of the expulsion hearing be sent to the pupil and a minor pupil's parents not less than five days prior to the hearing. The statute's use of "sent" clarifies the relevant timeline: the notice must be sent, as opposed to received, at least 5 days before the hearing. *Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 783 (Aug. 8, 2019). Evidence in the record confirms that the expulsion hearing notice was sent by certified mail on May 11, 2023 to the pupil and the pupil's parents and that appellant picked up the notice at the post office on May 15, 2023. Thus, the notice was sent seven days prior to the hearing and the pupil and appellant received more than three days' notice of the hearing. Under these facts, neither the statute nor due process required the board to grant a postponement on the basis that notice was untimely received.

Fourth, appellant contends that the pupil was deprived of due process because he did not know that he could have asked for witnesses to be subpoenaed and was told that the witnesses he wanted to call would not be available. A pupil has no right to cross-examine witnesses accusing the pupil of the misconduct if they are not called as witnesses. *J.M. v. the Mercer Sch. Dist. Bd. of Educ.*, Decision and Order No. 514 (May 7, 2004). Although it is unfortunate that appellant did not know that he could request that the board subpoena witnesses, I cannot conclude that the failure of the notice of expulsion hearing to describe that option violated due process. Appellant also challenges the admission of hearsay and contends that the inability to cross examine the witness violated the pupil's right to due process. 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. v. Thompson*, 107 Wis. 2d 657, 659, 321 N.W. 2d 334, 335 (Ct. App. 1982) (reversing state superintendent's order that had found hearsay inadmissible at expulsion hearing). Thus, 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); *Oak Creek-Franklin Jt. Sch. Dist. Bd. of Educ.*, Decision and Order No. 810 (May 13, 2022); *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).

Fifth, appellant contends that he identified two of the three board members as having a conflict of interest but the board's attorney dismissed his concerns. In reviewing an expulsion appeal, the state superintendent must ensure that the school board was fair and impartial. *T.J. v. Wittenberg-Birnamwood Sch. Dist. Bd. of Educ.*, Decision and Order No. 717 (May 21, 2014). If a decision-maker is not fair or is not impartial, due process is violated. *Guthrie v. Wis. Empl't Relations Comm'n,* 111 Wis. 2d 447, 454, 331 N.W.2d 331, 335 (1983). At the same time, "[t]here is a presumption that public officials discharge their duties or perform acts required by law in accordance with the law and the authority conferred upon them, and that they act fairly, impartially, and in good faith." *State ex rel. Wasilewski v. Bd. of Sch. Dirs. of City of Milwaukee*, 14 Wis. 2d 243, 266, 111 N.W.2d 198, 211 (1961). *See also Heine v. Chiropractic Examining Bd.,* 167 Wis. 2d 187, 194 n.3, 481 N.W.2d 638, 641 n.3 (Ct. App. 1992) (citing *Wasilewiski)*;

Buker v. Labor & Indus. Review Comm'n, 2002 WI App. 216, ¶ 19, 257 Wis. 2d 255, 650 N.W.2d 864 ("There is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings."). To overcome the presumption that the board member properly discharged their duty, the record must either contain evidence of actual bias or reflect circumstances that would lead to a high probability of bias or conflict. *I.J. v. New Lisbon Sch. Dist. Bd. of Educ.*, Decision and Order No. 774 (Jan. 7, 2019). There is no evidence in the record that meets this standard. The analysis in the *I.J. v. New Lisbon Sch. Dist. Bd. of Educ.* decision is helpful:

> Here, the only evidence presented relevant to this question is that the board member's daughter is in the same class as the pupil, and that the board member is Corporation Counsel for the Juneau County Department of Human Services where the student has a pending legal matter unrelated to the expulsion. This evidence does not support a finding of actual bias, and the appellant fails to demonstrate how these circumstances could create a high probability of bias or conflict, as opposed to the mere possibility of bias or conflict. There is insufficient evidence in the record to overcome the presumption that the school board member appropriately discharged their duty in this matter.

I.J. v. New Lisbon Sch. Dist. Bd. of Educ., Decision and Order No. 774 (Jan. 7, 2019).

Appellant contends that being a neighbor is a "clear conflict," but the only concerns appellant raised at the hearing included that the pupil serves the board members meals at the restaurant where the pupil works, that the pupil's family sees the board members at functions they attend and that some of the board members walk past the pupil's house on a regular basis. These concerns do not satisfy the legal standard required to show bias for purposes of an expulsion hearing. Although appellant raises other allegations related to bias in his appeal briefs, none of those allegations are supported by the record created at the expulsion hearing and the allegations appear to be of information that was known to appellant at the time of the hearing. 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). Finally, appellant notes that his neighbor said, "I

believe I can be impartial" and contends that the board member's use of the word "believe" should be understood as uncertainty on the part of the board member as to whether he could actually be impartial. I disagree. Appellant states that he "didn't have any advanced notice that they planned to plant these people on the panel," but the notice of expulsion hearing stated, "A hearing has been scheduled before the Board of Education for Thursday, May 18, 2023…" and the identities of members of the board of education were public knowledge prior to the hearing.

Sixth, appellant raises several objections related to the board's attorney. Appellant alleges that the board's attorney was biased against the pupil, stating that the attorney accepted payment from the school to advise the school, issued a letter telling "the entire school" and the school board that they were not allowed to talk with appellant and told appellant that he would only talk with appellant's attorney even though appellant does not have an attorney. Appellant complains that the board's attorney "has harassed me and my family for over a year." Appellant failed to raise any of these concerns at the hearing. Matters not raised before the board cannot be raised for the first time on appeal. *D.B. v. Clintonville Sch. Dist. Bd. of Educ.*, Decision and Order No. 696 (May 16, 2012).

Appellant further contends that the attorney's representation of the board on this appeal shows bias. 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. An attorney's representation of a school board at both an expulsion hearing and in a subsequent appeal of the board's decision at that hearing is not evidence of bias. *See, e.g.*, *Oak Creek-Franklin Jt. Sch. Dist. Bd. of Educ.*, Decision and Order No. 810 (May 13, 2022).

Appellant objects to the fact that the board's attorney stayed in the room with the board while it deliberated following the hearing and, according to appellant, "continued to argue for the expulsion of [the pupil], putting pressure directly on the IHO to move to expel him" while the family was forced to wait outside the room while deliberations were occurring. Appellant contends that the attorney's "mere presence in the deliberation is a violation of due process." Appellant refers to the attorney as "the school's attorney," but the attorney made clear at the start of the expulsion hearing that he was acting as the attorney for the school board, and not as the attorney for the administration. Although a school board's attorney may not vote on whether to expel, the attorney but may be present during the board's deliberations in order to answer any legal questions that may arise. Appellant quotes *Katherine G. v. West Allis-West Milwaukee Sch. Dist. Bd. of Educ.*, Decision and Order No. 747 (Apr. 20, 2017) for the proposition that a school district's regular attorney may not serve as the independent hearing officer. In the present case, the attorney facilitated the expulsion hearing and advised the school board during the board's deliberations, but did not act as an independent hearing officer pursuant to Wis. Stat. § 120.13(1)(e)1.b. In *Katherine G.*, the state superintendent explicitly distinguished the role of hearing facilitator and board advisor from that of an independent hearing officer:

> In *Brad A.*, the attorney serving as "hearing officer" was acting merely as a facilitator of the hearing and had no part in the decision to expel the pupil. The decision to expel was made solely by the school board. The responsibilities of the hearing officer in *Brad A.* reflect the common practice in which a school district will utilize its attorney to act as the "director" of an expulsion hearing and an advisor to the board as to questions of law. However, the board retains the sole responsibility to serve as the finder of fact, to determine whether the interest of the school demands expulsion and, if necessary, to determine the terms and conditions of the expulsion order.

Katherine G. v. West Allis-West Milwaukee Sch. Dist. Bd. of Educ., Decision and Order No. 747 (Apr. 20, 2017) (discussing *Brad A. v. Boyceville Comm. Sch. Dist. Bd. of Educ.*, Decision and Order No. 233 (Jun. 29, 1994)). Furthermore, because appellant did not raise any objection to the

attorney's representation of the board at the hearing, appellants' arguments against the attorney's participation in the hearing were waived. *Shawn C. v. Mauston Sch. Dist. Bd. of Educ.*, Decision and Order No. 375 (Dec. 29, 1998).

A final point merits clarification. Appellant refers to the board members as "the 3 independent people selected for the jury of the hearing." Wisconsin statutes provide two options for an expulsion hearing; the hearing may be held either: (1) by a school board pursuant to Wis. Stat. § 120.13(1)(c)3. or (2) by an independent hearing officer or independent hearing panel pursuant to Wis. Stat. § 120.13(1)(e). In this case, the school board heard the expulsion itself and there was no independent hearing officer or panel.

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 Williams Bay School District Board of Education is affirmed.

Dated this 25th day of October, 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]

William White
District Administrator
Williams Bay School District
500 W Geneva Street
Williams Bay, WI 53191

COPIES MAILED TO:

[redacted]

[redacted]

Brian P. Goodman
Boardman & Clark LLP
1 S Pinckney St., Suite 410
P.O. Box 927
Madison, WI 53701-0927