Decision and Order No.: 853

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Burlington Area School District Board of Education	DECISION AND ORDER Appeal No.: 24-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 Burlington Area School District Board of Education to expel the above-named pupil from the Burlington Area School District. This appeal was filed by the pupil's attorney and received by the Department of Public Instruction on June 17, 2024.

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) and has been delegated to me under Wis. Stat. § 15.02(4).

FINDINGS OF FACT

The record contains a letter entitled "Notice of Expulsion Hearing," dated May 10, 2024, from the superintendent of the Burlington Area School District. The letter advised that a hearing would be held on May 20, 2024 that could result in the pupil's expulsion from the Burlington Area School District through his 21st birthday. The letter was sent separately to the pupil, his

mother and his father by certified mail. The letter alleged that the 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 and that the pupil engaged in conduct which endangered the property, health or safety of an employee or a school board member of the school district. The letter specifically alleged that

> [on] May 4, 2024, [the pupil] was online gaming with student A and student B. All students were in their personal homes. Student B does not attend Karcher Middle School however, Student A does attend Karcher Middle School. In the verbal exchange, students discussed Karcher Middle School staff. According to [the pupil] and Student A, Student B has no connection to Karcher Middle School except through the online communication between [the pupil] and Student A. Additionally, Student B lives in Missouri. An online search was conducted to obtain the Karcher Middle School staffs' personal phone numbers. [The pupil] and Student A listened while Student B called the first teacher, Mrs. Barb Berezowitz, starting at approximately 9:00 P.M. After 3 unanswered phone calls, the 4th phone call resulted in a voicemail message which threatened to kill Mrs. Berezowitz's whole family. [The pupil] then stayed online with Student A and Student B to participate in another phone call to the second teacher at Karcher, Mrs. Dina Weis at approximately 9:20 P.M. Student B left a voicemail threatening that [the pupil] will come to school to kill Mrs. Dina Weis in class tomorrow. At approximately 9:40 P.M. a third Karcher teacher was called. A voicemail was left for Mrs. Laura Hoffman. This voicemail was left by student B and indicated that Student A (his full name was used) was going to kill the staff member's family in front of her, eat her alive after curb stomping her, and having mice eat her. It was also stated that she will have a painful death.

The hearing was held in closed session on May 20, 2024. 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.

After the hearing, the school board deliberated in closed session. The board found that the pupil did engage 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 and 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. 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 was mailed separately to the pupil, his mother and his father on May 24, 2024. The order stated the pupil was expelled through age 21. 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 several issues which require consideration. First, appellant contends that his due process rights were violated by the school's failure to provide threat assessments and mental evaluations prior to the expulsion hearing and by the use of anonymous hearsay statements from teachers. The state superintendent's review is primarily limited to ensuring compliance with the due process requirements contained in Wis. Stat. § 120.13(1)(c). *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). In addition, 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. v. 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)).

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. *Madison Metro. Sch. Dist. Bd. of Educ.*, Decision and Order No. 832 (Jul. 6, 2023); *G.H. v. Sch. Dist. of Elmbrook Bd. of Educ.*, Decision and Order No. 769 (Aug. 14, 2018). In addition, there is no due process requirement that the district provide the pupil with documents that are not introduced in the expulsion hearing. Because the district did not introduce into evidence the

complete threat assessments or mental evaluations of the pupil, the district did not violate due process by failing to provide those to the pupil at or before the hearing. 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. Typically, hearsay statements are attributable to individuals who are identified by name. In this case, however, the challenged anonymous teacher statements address solely the impact the voicemails had, not the pupil's actions. Therefore, although it is preferable for the identity of a hearsay declarant to be identified, in the present case, the anonymous nature of the hearsay is not a basis for reversal.

Second, appellant contends that due process requires a heightened standard of proof, specifically clear and convincing evidence, and that the district failed to introduce substantial evidence to support the expulsion. Appellant specifically cites the district's failure to provide any detailed threat assessment reports or evaluations during the expulsion hearing. At the expulsion hearing, the district administration described the threat assessment process and its result, the names of the individuals on the threat assessment team, the types of information considered by the team and the reasons that the team determined that the pupil was a medium threat. Appellant's attorney had the opportunity to cross-examine the district's witnesses about the threat assessment determination but chose not to. The school district is only required to establish its case against the student by a preponderance of the evidence. *T.M. v. Monona Grove Sch. Dist. Bd. of Educ.*, Decision and Order No. 772 (Sep. 26, 2018); *M.M. v. Shawano Sch. Dist. Bd. of Educ.*, Decision and Order No. 755 (Jan. 24, 2018); *Earl N. v. Milwaukee Sch. Dist., Bd. of Sch.*

Dirs., Decision and Order No. 111 (Mar. 3, 1983). The board has wide discretion in determining whether the interest of the school demands expulsion. Conduct that endangers the health, safety or property of others is more than sufficient to establish that the interest of the school demands expulsion. *Oshkosh Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 808 (Mar. 16, 2022); *T.S. v. West Allis-West Milwaukee Sch. Dist. Bd. of Educ.*, Decision and Order No. 684 (May 20, 2011). In this case, the pupil participated in making death threats to teachers at his school. Thus, it was not unreasonable for the school board to determine that the interest of the school demands expulsion.

Third, appellant contends that expulsion is a "grossly disproportionate punishment given the circumstances of the incident and the lack of reliable evidence presented during the hearing." 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). In addition, arguments concerning the sufficiency of the evidence are generally beyond the scope of review. *T.S. v. West Allis-West Milwaukee Sch. Dist. Bd. of Educ.*, Decision and Order No. 684 (May 20, 2011); *A.D. v. Silver Lake J1 Sch. Dist. Bd. of Educ.*, Decision and Order No. 665 (June 28, 2010). 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). Appellant argues that "the school failed to provide clear and convincing evidence linking him directly to the alleged prank calls, relying instead on vague allegations and a superficial threat assessment labeled him as a 'medium' threat without substantiation." To the contrary, appellant's own testimony on direct examination linked him directly to the calls. I see no circumstance here that would prompt me to overrule the determination of the board that expulsion is an appropriate response to the pupil's actions.

Fourth, appellant contends that the pupil's conduct did not meet the statutory basis for expulsion, arguing that the pupil did not pose a serious threat and did not endanger anyone. Wis. Stat § 120.13(1)(c)1. sets out the statutory bases for expulsion and provides, "In this subdivision, conduct that endangers a person or property includes making a threat to the health or safety of a person or making a threat to damage property." Thus, making any threat to the health or safety of a person constitutes endangerment as used in the expulsion statute, regardless whether the threat is serious or whether any action to fulfill that threat is taken or was ever intended to be taken. Appellant contends that the evidence showed only that the pupil stayed online and listened to threatening calls to teachers at the pupil's school and that being a bystander to these calls does not amount to endangerment. This minimizes the pupil's role. Evidence was introduced at hearing that the pupil participated in providing Student B with the names of teachers at the pupil's school, that the pupil thought it would be funny to call the teachers and that the pupil failed to do anything to report or mitigate the threat even after Student B stated in one voicemail that the pupil was making the threat. The board found that the pupil discussed Karcher Middle School staff with Student B and participated in the phone call in which Student B threatened that the pupil will come to school to kill a teacher in class tomorrow. Based on these facts, I conclude

that a reasonable view of the evidence supports the board's conclusion that the pupil engaged in conduct for which Wis. Stat. § 120.13(1)(c)1. allows expulsion.

Fifth, appellant contends that the district failed to establish that the pupil had knowledge of the specific content of the calls nor that he anticipated the calls would escalate to death threats. However, the pupil admitted at the hearing that he stayed online for the second and third calls even after the first call contained a death threat. Regardless, intent or knowledge of the consequences 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." *Madison Metro. Sch. Dist. Bd. of Educ.*, Decision and Order No. 832 (Jul. 6, 2023) (quoting Wis. Stat. § 120.13(1)(c)1.) As already discussed, the pupil participated in the voicemails left by Student B. A school board may consider a student's lack of intent or knowledge when determining whether to expel, but intent and knowledge are not relevant to whether the student engaged in expellable conduct under the statute.

Sixth, appellant contends that a school board member who participated in the pupil's expulsion hearing had a conflict of interest because she had a previous professional relationship with Student A that led the board member to recuse herself from Student A's expulsion hearing. The law presumes that school board 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 State ex rel. Wasilewski v. Bd. of Sch. Dirs.,* 14 Wis. 2d 243, 266, 111 N.W.2d 198, 211 (1961); *Lake Geneva-Genoa City Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 785 (Oct. 1, 2019). At the beginning of the pupil's expulsion hearing, all board members were asked whether they could make their decision based solely on the evidence presented at the hearing, and each member individually responded yes. Appellant describes the

board member's relationship with Student A as a "previous professional relationship" (emphasis added) and has not alleged that the board member had any information from that previous relationship about the specific incidents at issue in the pupil's expulsion hearing. Based on these facts, I find the pupil's assertion of bias or conflict insufficient to overcome the presumption of impartiality.

In his reply brief, appellant alleges that instead of deliberating immediately after the pupil's expulsion hearing, the board first heard the expulsion hearing for Student A and deliberated regarding the pupil only after the conclusion of Student A's hearing. The hearing minutes contained in the record confirm this timeline, without specifying the identity of the student who was the subject of the second expulsion hearing. Appellant has provided no evidence that the board considered information obtained outside the pupil's expulsion hearing when the board decided to expel the pupil. Although best practice would be for the board to deliberate on the first hearing before the start of the second hearing, this is not a basis for reversal of the pupil's expulsion.

Finally, appellant contends that public policy should require school districts to refrain from disciplinary actions "based solely on unconfirmed off-school incidents" and require police investigations for off-campus incidents. In authorizing school boards to expel students for conduct "while not at school or while not under the supervision of a school authority," Wis. Stat. § 120.13(1)(c)1., the legislature made the public policy determination that out-of-school conduct may be the basis for expulsion if the procedural requirements of the statute, including notice and a hearing, are met and the school board makes the requisite findings. Notably, the statute does not require a police investigation. In the present case, the pupil participated in threats to kill teachers at school. Public policy requires that school districts ensure the safety of their pupils and

staff and, therefore, supports expulsion both when a student's out-of-school conduct endangers teachers and when a student's out-of-school conduct endangers anyone at a school.

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.

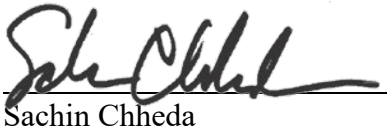
CONCLUSIONS OF LAW

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 Burlington Area School District Board of Education is affirmed.

Dated this 13th day of August, 2024



Sachin Chheda
Executive Director, Office of State Superintendent
Department 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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