New Hampshire Department of Education

Student/Bedford School Board

SB-FY-09-11-005

Hearing Officer Report and Recommendations

Introduction

This is an expulsion case. The student was caught on school grounds in possession of drugs and drug paraphernalia. When was caught, the student admitted to selling drugs on school grounds, but said had not done so for the past two weeks. The school board voted to expel the student for the remainder of the school year. The parents appeal the board's decision and ask the state board to order the local school board to conduct a new hearing.

The parents' main contention is really that the local school board should have issued some less severe penalty because their child just made an error in judgment and has been punished enough. At the hearing before me, the parents, represented by counsel, made allegations that they were denied due process at the local school board hearing, but none of those allegations seemed to be prejudicial to the parents or the student, nor justify overturning the expulsion decision or ordering the local school board to conduct a new expulsion hearing.

Proposed Findings of Fact

1. On October 16, 2008, the student was caught on school grounds in possession of marijuana, $1,100 cash, and a pipe. See Exhibit 9.

2. When questioned by school assistant principals, the student stated that the cash was from ... summer job and that does not appear to be in dispute. Why the student would have that much cash on ... at school was not addressed in the record, or the hearing before me.

3. When questioned by school assistant principals, the student admitted to selling drugs at school, but said ... had not done so for the past two weeks. See Exhibit 9.

4. The school called the police. The student was arrested. A subsequent search at the police station revealed some pills and a scale. See Exhibit 9.

5. The school district has policies that prohibit the possession, use, and sale/distribution of drugs at school. See Exhibits 7 and 8. The parents and student do not argue that they were unaware of these policies.

6. On October 17, 2008, the assistant principal suspended the student for 10 days. See Exhibit 2. The assistant principal sent a letter to the parents notifying them of the decision. See Exhibit 2.

7. On October 28, the superintendent sent a letter to the parents notifying them that there would be a formal hearing before the school board on November 6, 2008 to consider expulsion of the student for the remainder of the school year. See Exhibit 3.

8. The October 28, 2008 letter from the superintendent also informed the parents that the superintendent was extending the student's out of school suspension until the time of the hearing. The letter also notifies the parents of their rights at the expulsion hearing pursuant to RSA 193:13 and Ed 317. See Exhibit 3.

9. The superintendent acknowledged at the hearing before the hearing officer that he should have conducted a long term suspension hearing pursuant to RSA 193:13(I)(b) before extending the out of school suspension. The superintendent contends that he did not have the hearing because he did not believe that he had the discretion to readmit the student prior to the board hearing because of the language of school policies regarding drug possession and distribution at school. See Exhibits 4 and 7

10. The school board held a hearing on November 6, 2008. The parents and the student were present. They were given a chance to examine witnesses and to present information to the board. The student and parents testified and/or addressed the board.

11. The school board voted to expel the student for the remainder of the school year. The superintendent notified the parents of the decision by letter dated November 7, 2008. See Exhibit 1.

Discussion

The parents contend that the school district committed the following procedural violations during the suspension and expulsion process:

1) Extending the student's short term suspension beyond 10 days without providing the student with a hearing before instituting the long term suspension;

2) Failing to tape record the expulsion hearing to make a record for appeal;

3) Failing to provide the parents with the superintendent's recommendation for expulsion before the hearing as required by Ed 317.04(d)(3);

4) Failing to tell the parents that they should retain an attorney prior to the hearing and in phone conversations prior to the hearing, the superintendent allegedly made it seem like the hearing was just "a procedural matter" and not a big deal that the parents should worry about.

5) Allowing the superintendent to participate in the deliberations of the expulsion decision with the local school board when the board went into deliberations after the evidence had been presented.

Long Term Suspension

The parents correctly note that the law requires the student to be readmitted to school after a short term suspension prior to an expulsion hearing unless a long term suspension is imposed. Ed 317.04(d)(3)(c). Here, the superintendent imposed a long term suspension without a hearing in violation of RSA 193:13(I)(b). The result was that the student did not attend school for five days in between the time the short term suspension ended, and the expulsion hearing. The parents claim that this violation justifies either overturning the expulsion or ordering a new hearing. Neither remedy seems appropriate and the parents did not provide any legal support for their proposed remedies.

Given the subsequent decision to expel the student, the long term suspension violation did not prejudice the student. This is not a case where there are any disputes about the underlying discipline issue where the student would have produced evidence to try and establish that ... did not commit the acts for which ... was disciplined if there had been a hearing prior to the expulsion hearing. Additionally, if a long term suspension hearing had been held, and the superintendent decided to continue the suspension (as he did without holding the hearing) the student's recourse would have been to appeal to the local school board and that appeal would have been heard at the same time as the expulsion hearing. The parents did not raise the long term suspension issue before the local school board at the expulsion hearing. Given the circumstances, the failure to hold a hearing does not warrant overturning the expulsion decision, nor ordering the local school board to conduct a new expulsion hearing as the parents are requesting.

However, having said that, the school district should not be permitted to circumvent state law with policies that lead its superintendent to believe that he or she does not have the authority to reinstate a student prior to school board action when state law says that the student must be readmitted prior to expulsion unless a long term suspension hearing is held. (See Exhibit 4 and 7 and proposed findings of fact above). As a result, I recommend that the state board find that the local school district must amend its policies to come into compliance with the law on this point.

Other Claimed Procedural Violations

The parents contend that the school district violated due process by not tape recording the expulsion proceeding. State law does not require expulsion proceedings be tape recorded and the parents have not provided any cases or other authority suggesting that verbatim records or tape recordings of expulsion hearings are required to meet due process requirements, or state law.

The parents contend that the superintendent did not provide them with his recommendation for expulsion before the hearing as required by Ed 317.04(d)(3). The superintendent testified that he did not make a recommendation to the school board for expulsion and that he instead let the school board decide from a range of options with expulsion being one of them. The superintendent's letter informing the parents of the expulsion hearing did clearly put them on notice that the expulsion hearing was a hearing to consider whether or not to expel the student. The letter states "I am writing to inform you

that … has been referred to me … for violating [the school's] code of citizenship. As a result, a formal hearing has been scheduled … to consider the expulsion of ... for the remainder of the school year." See Exhibit 3.

While there is not a specific recommendation by the superintendent to expel as noted in Ed 317.04(d)(3), the letter meets the intent of the requirement which is to put the parents on notice of the expulsion and the reasons for the potential expulsion. In that light, the failure to provide a recommendation did not prejudice the student or parents and does not warrant overturning the expulsion or requiring the school board to conduct another expulsion hearing.

The parents also claim that the superintendent did not tell the parents that they should retain an attorney prior to the hearing and in phone conversations prior to the hearing he allegedly made it seem like the hearing was just "a procedural matter " and not something that the parents should worry about. At the hearing before me, the superintendent testified that he did not feel comfortable telling the parents whether they should retain an attorney or not as that is a choice for them to make. He did not tell the parents to not obtain an attorney. He did not tell them that he thought that they did not need an attorney. When the parents asked if they needed an attorney, he replied that it was up to them to decide. The letter notifying the parents of the expulsion hearing states that the parents have the right to retain counsel and have counsel present to present evidence and examine witnesses. See Exhibit 3. The parents have not provided any legal authority suggesting that the superintendent was obligated to do anything more than what he did regarding the right to counsel.

The parents also contend that the expulsion hearing was tainted by the superintendent participating in the deliberations of the expulsion decision with the local school board when the board when into deliberations after the evidence had been presented. At the hearing before me, no evidence was presented showing that the superintendent actually participated in the deliberations. The superintendent testified that he was in the room, but was not asked any questions by the board and did not provide any information to the board at that time.

Proposed Rulings of Law

1. Under RSA 193:13, local school boards may expel students for (1) neglecting or refusing to conform to the reasonable rules of the school, and/or for (2) committing an act of gross misconduct.

2. The evidence presented at the local school board hearing establishes that the student neglected or refused to conform to the reasonable rules of the school by possessing and selling marijuana on school grounds.

3. The state board's review of a local school board decision to expel a student is generally limited to reviewing the information in the record to determine if the local school board's decision was arbitrary and capricious, a gross abuse of discretion, or unsupported by substantial evidence.

4. The school board's decision to expel the student is supported by substantial evidence as the student was caught on school grounds possessing marijuana and admitted selling drugs at school in the past. Given that evidence, the decision to expel is not arbitrary and capricious or a gross abuse of discretion.

5. Any procedural errors that occurred did not prejudice or harm the student and do not justify overturning the expulsion or requiring a new expulsion hearing. *See e.g. Hampton School Dist*., SB 024-95 (procedural violation that does not harm or prejudice student does not warrant overturning school board decision to expel or suspend); *Milton School District.,* SB FY 02-03-29 (same).

Recommendations

I recommend that the state board find as follows:

1. The local school board's decision to expel the student is supported by substantial evidence and is not arbitrary and capricious, or a gross abuse of discretion.

2. The school district should amend its policies to ensure that students are not suspended for longer than 10 days without first having a long term suspension hearing, or an expulsion hearing as required by RSA 193:13 and Ed 317.04.

3. Encourage the parties to work together to help the student obtain access to educational services during his expulsion and to develop a plan for readmission next school year pursuant to RSA 193:13(II).

12/31/08
Date

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Scott F. Johnson
Hearing Officer