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DISTRICT IV

July 22, 2021

To:

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Circuit Court Judge
Waushara County Courthouse
Electronic Notice

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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2018AP2444 J.S. and T.L.S. v. Wisconsin Department of Public Instruction and Wautoma Area School District Board of Education (L.C. # 2018CV116)

Before Fitzpatrick, P.J, Kloppenburg, and Graham, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

J.S. and his father appeal a circuit court order affirming a decision by the State Superintendent of Public Instruction (the Superintendent), which affirmed an expulsion decision by the Wautoma Area School District Board of Education (the Board). Based upon our review

of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

In May 2018, a high-school student overheard a troubling conversation between two students and reported it to the principal, who identified J.S. as one of the speakers. When the principal questioned J.S., he revealed that he and another student had been discussing school shootings and which students and staff members they would shoot if they were gunmen. J.S. further revealed that, during the conversation, he identified specific students and staff members that he would shoot. The principal called local law enforcement, who conducted an investigation. There was no evidence that J.S. had actually acquired a gun or brought any weapon to school.

In a letter dated May 15, 2018, the Wautoma Area School District (the District) informed J.S. that he had been suspended from school, pending an expulsion hearing before the Board. The District explained that the reason for the proposed expulsion was the above-described conversation, and that the purpose of the hearing was to determine whether J.S. had engaged in conduct which endangered the property, health, or safety of others while at school or while under the supervision of school authorities. *See* WIS. STAT. § 120.13(1)(c)1. (authorizing a school board to expel students under such circumstances).

A District administrator and the principal testified at the hearing before the Board. The administrator testified about the suspension letter, and the principal testified about the incident and subsequent investigation. J.S. did not testify or call any witnesses.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Soon thereafter, the Board issued its findings of fact and an expulsion order. The Board concluded that J.S. "did engage in conduct that did endanger the health and safety of others while under the supervision of school authorities on May 10, 2018, in that the student, on school premises, during school hours, did make specific statements threatening physical harm to school staff and other students." The Board "weighed the interests of the student and the student's fellow students, faculty, and staff," and it "found that the appropriate remedy is expulsion and that the interests of the School do demand the student's expulsion." Accordingly, J.S. was expelled from the District.

J.S. appealed the expulsion decision to the Superintendent, who affirmed the decision, finding that "a reasonable view of the evidence sustains the board's findings." J.S. then filed a petition for judicial review in the circuit court and argued, among other things, that the expulsion order was based on insufficient evidence and violated his constitutional rights. The circuit court affirmed, and J.S. appeals.

We review the Superintendent's decision, rather than the decision of the circuit court. ***Madison Metro. Sch. Dist. v. Burmaster***, 2006 WI App 17, ¶11, 288 Wis. 2d 771, 709 N.W.2d 73. The issue before the Superintendent was whether J.S.'s statements about shooting specific individuals constituted "making a threat to the health or safety of a person" under WIS. STAT. § 120.13(1)(c)1. The Superintendent considered the evidence at the hearing and concluded that the evidence was sufficient to meet that standard.

In his opening brief, J.S. argues that his expulsion is unconstitutional because the evidence is insufficient to show that his statements constituted a "true threat" as that term is

defined in ***State v. Douglas D.***, 2001 WI 47, 243 Wis. 2d 204, 626 N.W.2d 725, and other cases addressing First Amendment rights.

This argument is misguided. The "true threat" standard does not apply in this context, and ***Douglas D.*** actually supports affirming the Superintendent's decision rather than reversing it. In ***Douglas D.***, our supreme court determined that the First Amendment precluded a juvenile delinquency adjudication based on threatening speech that did not constitute a "true threat." ***Id.***, ¶¶30-32. Nevertheless, the court specifically stated that schools may discipline students for speech that fell short of a true threat and could not be prosecuted under criminal statutes. ***Id.***, ¶¶44-46. As the court explained, "[b]y no means should schools interpret this holding as undermining their authority to utilize their internal disciplinary procedures to punish speech …. Although the First Amendment prohibits law enforcement officials from prosecuting protected speech, it does not necessarily follow that schools may not discipline students for such speech." ***Id.***, ¶42. Accordingly, the "true threat" analysis is not relevant to the facts of this case.[2]

Apart from his argument about the "true threat" standard, J.S. does not provide any meaningful argument to show that there is *not* substantial evidence to support the Superintendent's decision. J.S. argues that his statements should not have been taken seriously because they were "hypothetical," but this argument merely demonstrates that J.S. disagrees with how the school officials interpreted his statements. Judicial review of an agency's findings of

[2] In his reply brief, J.S. cites additional out-of-jurisdiction cases that address the "true threat" standard in different contexts. If J.S. means to argue that we should disregard the clear guidance from our supreme court in ***State v. Douglas D.***, 2001 WI 47, 243 Wis. 2d 204, 626 N.W.2d 725, his argument is addressed to the wrong court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (providing that this court lacks the authority to overrule or modify prior supreme court or court of appeals decisions).

fact is highly deferential, ***Holt & Krause, Inc. v. Department of Natural Resources***, 85 Wis. 2d 198, 204, 270 N.W.2d 409 (1978), and we will not substitute our judgment for the agency's if the agency's factual findings are supported by substantial evidence, ***Cadott Education Ass'n v. Wisconsin Employment Relations Commission***, 197 Wis. 2d 46, 52, 540 N.W.2d 21 (Ct. App. 1995). We conclude that the Superintendent's decision is supported by substantial evidence.

Based on the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals