Decision and Order No.: 717

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of T[redacted] J[redacted] by Wittenberg-Birnamwood School District Board of Education	DECISION AND ORDER Appeal No.: 14-EX-01

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 Wittenberg-Birnamwood School District Board of Education to expel the above-named pupil (hereinafter "T.J.") from the Wittenberg-Birnamwood School District. This appeal was filed by T.J.'s father (hereinafter "appellant") and received by the Department of Public Instruction on March 19, 2014. 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.

FINDINGS OF FACT

In December of 2013, the Shawano County Sheriff's Office received a complaint from the family of a student who attended the Wittenberg-Birnamwood School District. The complaint alleged that an individual using an online alias had received inappropriate images of the student through social media websites. In the course of investigating the complaint, the Sheriff's Office determined that at least eight Wittenberg-Birnamwood High School students

were threatened and coerced by this individual into sending inappropriate photos through various social media platforms. As part of the investigation, T.J. was interviewed by the Sheriff's Office. The Sheriff's Office also executed a search warrant, which resulted in the seizure of T.J.'s cell phone and other items. On January 28, 2014, T.J. admitted that he was the individual who had coerced the students into sending the inappropriate photos.

On January 31, 2014, T.J. and T.J.'s mother met with Jill Sharp, principal of the Wittenberg-Birnamwood High School. Thereafter, T.J. did not attend school. That same day, T.J.'s school and gym lockers were emptied. While emptying T.J.'s gym locker, school personnel discovered a four inch hunting knife.

By a letter dated February 10, 2014, Ms. Sharp provided notice of the expulsion hearing. The letter advised that a hearing would be held on February 24, 2014, that could result in the pupil's expulsion from the Wittenberg-Birnamwood School District through T.J.'s 21st birthday. The letter was sent separately to T.J, his mother, and his father by certified mail. The letter alleged that the pupil's misconduct met three of the statutory grounds for expulsion: (1) repeated refusal or neglect to obey school rules; (2) engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health, or safety of others; and (3) 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. The expulsion notice letter also contained a summary of the school district's investigation of the pupil, including the specific details of T.J.'s misconduct.

On February 24, 2014, the expulsion hearing was held in closed session. Seven of the school board's nine members were present for the hearing. Of the nine school board members, two were related to one of T.J.'s victims. Specifically, the victim's mother was a school board

member, but the school district asserts that the mother was not present during the hearing. In addition, the school board chairman, who presided over the hearing, is the victim's uncle.[1] T.J. attended the hearing with his mother and his grandfather. T.J. was not represented by counsel. During the hearing, T.J. and his family did not object to the chairman's participation.

At the hearing, the school district administration presented evidence concerning the grounds for expulsion. T.J., his mother, and his grandfather were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations. The evidence included a letter of apology submitted by T.J. At the end of the hearing, the school administration recommended that T.J. be expelled through the 2014-15 school year, with early reinstatement possible as early as the fall of 2014. The family requested that school district forego expulsion and recommend T.J. to another school district for enrollment.

After the hearing, the school board deliberated in closed session. In a unanimous decision, the board found that T.J. 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 student's expulsion. The order for expulsion containing the findings of fact and conclusions of law of the school board, dated February 24, 2014, was mailed separately to the pupil and his parents.[2] The order stated the pupil was expelled through to the pupil's 21st birthday.

[1] The appellant alleges that the chairman is the victim's uncle. The school district does not deny this. Rather, the school district alleges that (1) the chairman is a "distant relative" of the victim and (2) he is not the victim's mother's brother. In response, the appellant states that the chairman is actually the brother-in-law of the victim's mother, hence the victim's uncle. In addition, the chairman and the victim's mother share the same last name.

[2] The appellant argues that the order of expulsion's findings of fact contain two inaccurate dates. However, the record shows that the school board considered the correct dates. As such, the two inaccurate dates are most likely simple drafting errors.

DISCUSSION

The appellant makes several arguments why T.J.'s expulsion should be overturned. First, the appellant argues that the respondent failed to comply with the various requirements of the suspension statute, Wis. Stat. § 121.13(b). Because violations of the suspension law are outside the scope of the state superintendent's review, Madison Metro. Sch. Dist. v. Wisconsin Dep't of Pub. Instruction, 199 Wis. 2d 1, 13, 543 N.W.2d 843, 848 (Ct. App. 1995), it is unnecessary for me to determine whether or not the school district complied with the suspension statute. Michael Ryan H. by the Clinton Community School Dist., (222) Mar. 9, 1994.

Second, the appellant argues that the school board disciplined T.J. based solely on the information provided by law enforcement, in violation of Wis. Stat. § 118.127(2). The record demonstrates that the school board considered a variety of sources of information during the expulsion hearing, including the school district's own investigation, T.J.'s note of apology, and the testimony of witnesses. Because the school board considered information from a variety of sources, the school board did not violate Wis. Stat. § 118.127(2).

Third, the appellant asserts that the school board failed to consider written testimony submitted by T.J.'s father, in violation of due process. T.J.'s father did not attend the expulsion hearing. However, T.J., T.J.'s mother, and T.J.'s grandfather did attend. The school board provided them with an opportunity to testify and present evidence, which they did. As such, I find that T.J.'s due process right to be heard was not violated.

Fourth, the appellant argues that T.J. was denied a fair and impartial hearing as a result of a victim's relatives sitting on the school board. The school district admits that the school board chairman is a relative of the victim. The school district also asserts that the victim's mother, the other relative serving on the school board, was not present at the hearing. Because the school

board clerk did not take a roll of the school board members, it is not possible to determine from the record whether or not the victim's mother participated. Regardless, the record is clear that the school board chairman participated in the hearing.

Pupils facing expulsion are entitled to due process. Racine Unified Sch. Dist. v. Thompson, 107 Wis. 2d 657, 662 (Ct. App. 1982). The expulsion statute covers many basic due process rights, including the right to counsel and notice of charges, but it does not cover other fundamental due process rights. *See* Wis. Stat. § 120.13(1)(c). 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). Similarly, the statute does not specify that pupils have a right to a fair and impartial tribunal, another basic requirement of due process. Withrow v. Larkin, 421 U.S. 35, 46 (1975); Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1115 (E.D. Wis. 2001); Guthrie v. WERC, 111 Wis.2d 447, 454 (1983); Baldwin v. Labor & Indus. Review Comm'n, 228 Wis. 2d 601, 621 (Ct. App. 1999).

While the state superintendent's review is primarily limited to ensuring accordance with the due process requirements covered by Wis. Stat. § 121.13(1)(c), Racine Unified Sch. Dist., 107 Wis. 2d at 667, the state superintendent must also ensure that basic due process was afforded in the expulsion hearing. *See* Patrick Lee by the Kenosha Unified School Dist., (182) Oct. 9, 1991 (State superintendent must address constitutional error). *See also* Antonio M. by the Kenosha Unified School Dist., (161) May 17, 1989 (Pupils have a right to testify and a right to remain silent); Bradley Scott P. by the Menasha Joint School Dist., (197) Aug. 21, 1992 (A student facing expulsion is entitled to a meaningful opportunity to be heard); Joshua S by the Madison Metro. Sch. Dist., (525) Oct. 20, 2004 ("A fair and impartial decision maker at the hearing is a necessary component of procedural due process."); Michaelene J. by the Washington

Island School Dist., (161) May 17, 1989 (Due process requires that an expulsion hearing be conducted by impartial board members). Therefore, I conclude that in reviewing an expulsion appeal, it is the state superintendent's obligation to ensure that the school board was fair and impartial.

Having determined the state superintendent's scope of review, it still must be determined whether the school board chairman's participation violated T.J.'s right to a fair and impartial hearing. There is a presumption that public officials, including school board members, will discharge their duties fairly, impartially, and in good faith. K.W. by the Racine Unified School Dist., (705) July 30, 2013, citing Heine v. Chiropractic Examining Board, 167 Wis.2d 187 (Ct. App., 1992). However, an administrative decision can violate due process either by bias in fact on the part of the decision maker, or when the risk of bias is impermissibly high. Nu-Rock Nursing Home, Inc. v. State Dep't of Heath & Soc. Servs., 200 Wis. 2d 405, 415-16 (Ct. App. 1996); *see also* Withrow, 421 U.S. at 47 ("Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'").

I find it particularly troubling that the school board chairman, who presided over the expulsion hearing, is related to one of T.J.'s victims. Simply put, it is very difficult for a victim's relative to be an impartial decision maker. The Wisconsin Supreme Court recognized this difficulty when it held that a criminal defendant's due process and Sixth Amendment rights were violated when the relative of a witness served on the jury:

> We have no doubt that Daniel Wineke honestly believed that he could remain impartial. However, it is a unique individual that could remain unaffected by the testimony of a relative by blood or marriage to the third degree, one way or the other. Due process requires that a criminal defendant receive "[a] fair trial in a fair tribunal...." In circumstances, such as here, the mere probability of bias is so high

> that in order to assure a defendant the fundamental fairness to which the defendant is entitled, we must imply bias and exclude the juror as a matter of law.

State v. Gesch, 167 Wis. 2d 660, 667-68 (1992) (internal citations omitted). T.J. is not a criminal defendant. However, the same reasoning applies to the case at hand. While the school board chairman may have acted fairly, impartially, and in good faith, his relation to T.J.'s victim created an impermissibly high risk of bias, thus violating T.J.'s right to a fair and impartial tribunal.[3] [4]

Citing two decisions of previous state superintendents, the school district argues that a school board member is not necessarily biased "merely because of a distant relationship." These cases are factually distinguishable. In Robert M. by the Kiel School Dist., the school board member in question was distantly related by marriage to the expelled pupil. Robert M. by the Kiel School Dist., (149) April 30, 1987. This would indicate bias in *favor* of the expelled pupil. By contrast, the school board chairman is related to one of T.J.'s victims, not T.J. himself. As such, the bias would most likely be *against* T.J. In Nicholas E. by the Lodi School Dist., the school board member in question was related to a child who harassed the expelled pupil. Nicholas E. by the Lodi School Dist., (303) Oct. 17, 1996. However, the harassment was not the focus of the hearing. *Id.* By contrast, T.J.'s conduct with the school board chairman's relative (and T.J.'s interaction with the other victims) was a primary focus of the hearing.

Citing Nicholas E., the school district also argues that T.J. failed to object to the school board chairman's participation at the hearing and, as a result, T.J. cannot raise it in this appeal.

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[3] Even though the school board unanimously voted to expel T.J., the risk of a single biased member of a tribunal is enough to taint the entire proceeding. *See* Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1117 (E.D. Wis. 2001).

[4] The appellant also argues that members of the school board contacted members of the D.C Everest Area School Board regarding T.J.'s admission to D.C. Everest High School, thus evincing evidence of bias in fact. Nothing in the record supports this allegation.

Again, that case is factually distinguishable. In Nicholas E., the pupil was represented by counsel. By contrast, T.J. was unrepresented at the expulsion hearing. In order to waive a constitutional right, the waiver must be knowing and intelligent. Patrick Lee by the Kenosha Unified School Dist., (182) Oct. 9, 1991 *citing* Johnson v. Zerbst, 304 U.S. 458 (1938). The record does not show that T.J. knowingly and voluntarily waived his right to an impartial tribunal. Further, previous state superintendents have held that plain constitutional error not objected to in a hearing may be raised by a pro se litigant on appeal. For example, in Patrick Lee, the state superintendent reasoned that "if a judicial reviewing body can notice a plain error not objected to by trial counsel in a fully adversarial criminal trial, McClellan v. State, 84 Wis. 2d 145, 267 N.W.2d 843, 851 (1978), this agency can certainly notice such constitutional error in a pro se pupil expulsion case." *Id.*

In conclusion, I do not condone T.J.'s conduct. Based on the record, the school board had ample evidence to conclude that T.J. endangered his classmates. Regardless of the seriousness of T.J.'s conduct, the school board still must provide T.J. with basic due process, including the right to a fair and impartial tribunal. As Justice Marshall succinctly stated:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done" by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (internal citations omitted). Because the school board violated T.J.'s right to a fair and impartial tribunal, the proper remedy is for the

school board to hold a new expulsion hearing without the participation of the victim's relatives. Therefore, I must reverse T.J.'s expulsion by the Wittenberg-Birnamwood School District Board of Education.

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 violated T.J.'s due process right to an impartial tribunal.

ORDER

IT IS THEREFORE ORDERED that the expulsion of T[redacted] J[redacted] by the Wittenberg-Birnamwood School District Board of Education is reversed.

Dated this 21st day of May, 2014

Brian Pahnke
Assistant State Superintendent

APPEAL RIGHTS

Wis. Stats. § 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 § 227.53 is required. In any such appeal, the State Superintendent of Public Instruction shall be named as respondent.

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