

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of

J [REDACTED] B [REDACTED]

by Milwaukee Public Schools Board of
School Directors

DECISION AND ORDER

Appeal No.: 17-EX-06

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 119.23(2)(b) from the order of the Milwaukee Public Schools Board of School Directors to expel the above-named pupil (“pupil”) from the Milwaukee Public Schools (“MPS”). This appeal was filed by the pupil’s attorney and received by the Department of Public Instruction on July 6, 2017.

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. §§ 119.25(2) and 120.13(1).

FINDINGS OF FACT

On April 3, 2017, several students attacked a classmate at MacDowell Montessori School. The victim was severely injured as a result of the altercation. There is a factual dispute whether the pupil tried to stop the fight or participated in it.

On April 19, 2017, Eric Coleman, Student Services Coordinator for MPS, sent a letter titled “Notice of Student Expulsion Hearing” to the pupil and his mother. On April 27, 2017, Mr.

Coleman sent a revised notice. The revised notice stated that a hearing before an independent hearing officer (IHO) would be held on May 2, 2017, that could result in the pupil's expulsion from the Milwaukee Public Schools for a length determined by the IHO. The letter alleged that the pupil engaged in conduct while at school or under the supervision of school authority which endangered the property, health, or safety of others. The letter specifically alleged that the pupil battered another student.

The hearing was held on May 2, 2017. The pupil and his parents appeared at the hearing with counsel, Attorney Merkwae. At the hearing, the school district's attorney presented the evidence for expulsion. The evidence included testimony by Brian Hayes, the assistant principal of MacDowell Montessori School, and Mr. Coleman. It also included video stills of the school's security footage. The pupil and his parents were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations. However, as discussed in detail below, Attorney Merkwae was not allowed to enter into evidence a video alleged to depict the altercation, which was captured on another student's cell phone.

After the hearing, the IHO deliberated alone in a separate room for approximately 10 minutes. When the IHO returned the hearing room, the pupil, his parents, Attorney Merkwae, and MPS's attorney were present. Mr. Coleman and Mr. Hayes were in the hallway outside of the hearing room. The IHO then left the hearing room and entered the hallway. After a brief conversation, all three individuals returned. The IHO then delivered his decision, finding 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 IHO 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 IHO, dated May 2, 2017, was mailed separately to the pupil and

his mother. The order stated the pupil was expelled through January 15, 2018. A digital audio recording of the hearing is part of the record.

DISCUSSION

State law 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 IHO'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 demand the pupil's expulsion. In this case, the school board's expulsion authority is delegated to the IHO. Wis. Stat. § 119.25(2)(b).

The appeal in this case raises two issues which require consideration. First, the appellant argues that the pupil's due process rights were violated when the IHO excluded video evidence of the fight. I agree.

In reviewing an expulsion decision, the state superintendent must ensure that basic due process was afforded in the expulsion hearing. *T.J. by Wittenberg-Birnamwood Sch. Dist.* (717), May 21, 2014. The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Joshua S. by Madison Metro. Sch. Dist.*, (525) Oct. 20, 2004, (citing *Bunker v. LIRC*, 2002 WI App 216, ¶ 19). As a result, school districts have a constitutional obligation to consider mitigating evidence before deciding whether to expel a student. *Betts v. Bd. of Ed. of City of Chicago*, 466 F.2d 629, 633 (7th Cir. 1972)

Here, Attorney Merkwae attempted to introduce a video another student took on a cell phone. When laying the foundation for admitting the video, Attorney Merkwae mentioned that the

quality of the video prevented anyone from being able to identify specific students. However, the IHO excluded the video based on a lack of a “media release”:

Atty. Merkwae: I'd like to offer a video into evidence. I know that with student – for student privacy purposes, students can't be identified. The video is completely grainy. No students are identifiable at all. I think it certainly shows the first – how the beginning of the fight occurred, and I think it's really relevant to James's involvement.

IHO Fisher: And the video is...

Atty. Merkwae: Ah, on my computer.

IHO Fisher: Is that permissible?

Mr. Coleman: I'm not aware if it is or if it's not. I know, generally, during the regular proceedings it's, it's not.

Mr. Hayes: I mean – you would need a media release even if you can't see the face.

Atty. Merkwae: Even if you can't see the face?

Mr. Coleman: Yeah.

IHO Fisher: Right.

This was a clearly erroneous conclusion. First, both federal and state student confidentiality laws cover records *maintained* by an educational agency. Wis. Stat. § 118.125(1)(d); 99 C.F.R. § 99.3. A video taken and maintained by a student on his or her cell phone is not covered by student confidentiality laws. This should have been clear to the IHO. After all, the video was in the possession of Attorney Merkwae, not the school. Second, it is unclear why it was permissible for the school district enter into evidence video stills of security footage of the fight, but it was not permissible for the cell phone video to be admitted.

The respondent argues that this was not reversible error because Attorney Merkwae did not object to the IHO's ruling, and the IHO, as a layman, cannot be expected to know and apply the rules of evidence. In other words, formal courtroom procedure should apply to Attorney Merkwae, but not the IHO. Besides being contradictory, this argument fails because appointing a layman as a hearing officer does not absolve the school district of its constitutional obligation to consider mitigating evidence.

There are situations where it is harmless error for a school board or IHO to exclude evidence, such as when the evidence is duplicative or immaterial. However, that is not the case here. In order to expel a student, school districts must establish by a preponderance of the evidence that the accused student committed the misconduct. *See e.g., Butler v. Oak Creek-Franklin Jt. Sch. Dist.* 172 F. Supp. 2d 1102 (E.D. Wis. 2001); *C.L. by Clayton Sch. Dist.*, (599) June 29, 2007. The video recording of the fight is highly relevant. The pupil claims he was trying to hold another student back from fighting. The school district's blurry stills of security footage suggest that the pupil kicked the victim. The witness statements from other students offer varying accounts of the pupil's involvement in the fight. The cellphone video could have helped clarify what happened in a very chaotic and violent situation. The IHO committed reversible error by not admitting the video.

While the expulsion decision must be reversed on this basis alone, I will still review the appellant's other argument because it raises an important issue in expulsion proceedings: whether *ex parte* communication results in reversible error. The state superintendent has held that *ex parte* communications can create an impermissibly high risk of bias, thus warranting reversal. This risk is especially acute when an administrator has *ex parte* communications with the school board while the board is deliberating. *Joseph S. by the Oak Creek Sch. Dist.* (403) Oct. 1, 1999. There was no such risk here. The IHO deliberated alone and reached his decision. Only after he reached his decision did he leave the hearing room and speak with the two administrators about the pupil's placement options. While this conversation was unadvisable and easily avoidable, it did not result in reversible error.


CONCLUSIONS OF LAW

Based upon my review of the record in this case and the findings set out above, I conclude that the pupil's due process rights were violated and that the IHO did not comply with all of the procedural requirements of Wis. Stat. §§ 119.25(2)(b) and 120.13(1)(c).

ORDER


IT IS THEREFORE ORDERED that the expulsion of J [REDACTED] B [REDACTED] by the Milwaukee Board of School Directors is overturned.

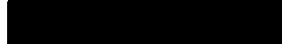
Dated this 5th day of September 2017



Michael J. Thompson, Ph.D.
Deputy State Superintendent of Public Instruction

Parties to this appeal are:


c/o Amanda Merkwae
Legal Action of Wisconsin
230 West Wells St, Rm 800
Milwaukee, WI 53203


c/o Amanda Merkwae
Legal Action of Wisconsin
230 West Wells St, Rm 800
Milwaukee, WI 53203

Darienne Driver
District Administrator
Milwaukee Public Schools
PO Box 2181
Milwaukee, WI 53201-2181

Calvin Fermin
Office of the City Attorney
200 East Wells St, Rm 800
Milwaukee, WI 53202

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.