

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

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In the Matter of the Expulsion of



by Racine Unified School District  
Board of Education

DECISION AND ORDER

Appeal No.: 19-EX-05

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**NATURE OF THE APPEAL**

This is an appeal to the State Superintendent of Public Instruction pursuant to Wis. Stat. § 120.13(1)(e) from the order of the Racine Unified School District Board of Education affirming an independent hearing officer's order to expel the above-named pupil from the Racine Unified School District. This appeal was filed by the pupil's mother and received by the Department of Public Instruction on June 10, 2019.

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 hearing. The state superintendent's review authority is specified in Wis. Stat. § 120.13(1)(e)3.

**FINDINGS OF FACT**

The record contains a letter entitled "Notice of Expulsion Hearing," dated March 15, 2019, from the Dean of Students of Case High School in the Racine Unified School District. The letter contained information that a hearing would be held on March 25, 2019 that could result in the pupil's expulsion from the Racine Unified School District through the pupil's 21st birthday.

The letter contained allegations 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. Specifically, the letter contained allegations that another student gave the pupil a vape pen containing THC at school and that the pupil smoked the vape pen loaded with THC at school. The letter was sent separately to the pupil and his parents on March 18, 2019. Despite being sent to the correct address for the pupil and his parents, the letter was not received by the pupil or his parents before the hearing. The letters were returned to the school by the post office with the notation "Return to Sender Not Deliverable as Addressed Unable to Forward." The post office sticker returning the letters is dated March 26, 2019. The pupil and his mother learned of the hearing on March 25, 2019 an hour before the hearing was to start when the pupil arrived at school and was told about the hearing.

The hearing was conducted by an independent hearing officer in closed session on March 25, 2019. The pupil and his mother appeared at the hearing without counsel. At the hearing, the school district administration presented evidence concerning the grounds for expulsion. The pupil and his mother were given the opportunity to present evidence, to cross-examine witnesses, and to respond to the allegations. The pupil admitted to having the vape pen but denied smoking the pen or "taking a hit" from the pen at school.

The independent hearing officer found that 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. The independent hearing officer further found that the interest of the school demands the student's expulsion. The independent hearing examiner issued a Findings of Fact and Expulsion Order dated March 25, 2019. The order stated the pupil was expelled from March 25, 2019 through the end of the 2019-2020 school year and that the pupil may be early reinstated

to an alternative site first semester of the 2019-2020 school year. The order was mailed separately to the pupil and his parents.

After the hearing, the Findings of Fact and Order issued by the independent hearing officer was reviewed by the school board on April 15, 2019. The board affirmed the Expulsion Order in all respects. The school board's report of review of the order was mailed separately to the pupil and his parents. The notice of expulsion hearing, expulsion order, report of review by school board, recording of the expulsion hearing, and hearing exhibits are part of the record. Upon receiving the appeal in this matter, the DPI established a briefing schedule. None of the parties filed a brief.

### DISCUSSION

The appeal letter in this case raises one issue. The pupil's mother contends that she was not given fair notice of the expulsion hearing because the notices sent to her and the pupil were returned to the school by the post office with the notation "Return to Sender Not Deliverable as Addressed Unable to Forward." The appellant states that she appeared at the hearing but was not prepared to present evidence to dispute the expulsion and did not have the opportunity to consult with an attorney.

A school board's findings will be upheld if any reasonable view of the evidence sustains them.<sup>1</sup> *C.B. by the Germantown Sch. Dist.*, Decision and Order No. 763 (June 12, 2018); *E.C. by Oconomowoc Area Sch. Dist. Bd. of Educ.*, Decision and Order No. 737 (June 14, 2016). The independent hearing officer's second written finding of fact requires comment. That finding includes the statements that, "on 3/18/19, a School District representative, Savonte Walker, by letter dated 3/15/19, notified the pupil, [], and the pupil's Father, [] and Mother, [], that the pupil

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<sup>1</sup> The school board may adopt a resolution allowing an independent hearing officer appointed by the school board to determine pupil expulsion instead of the school board. Wis. Stat. § 120.13(1)(e)1.

had been referred to the School Board for expulsion proceedings...Further the pupil, [], and the pupil's Father and Mother received five (5) days' notice of the expulsion hearing." Reading "notify" to imply that the notice was received, neither statement has support in the record. During the hearing, the hearing officer appeared to accept the mother's testimony that she did not receive the written notice and that she first learned about the hearing an hour before the hearing. Indeed, the hearing officer told her that she could appeal the fact that she did not receive the notice in a timely manner. The appellant included with her appeal photocopies of envelopes indicating that the notices were not delivered by the post office, and the school district has not challenged the authenticity of those documents. Therefore, to the extent that the second finding of fact states or implies that the pupil, his father or his mother received written notice of the expulsion hearing prior to the hearing, I find that it is not supported by any reasonable view of the evidence.<sup>2</sup>

Although the state superintendent's review is primarily limited to ensuring accordance with the due process requirements covered by Wis. Stat. § 120.13(1)(c)<sup>3</sup>, *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 667, 321 N.W.2d 334, 339 (Ct. App. 1982), the state superintendent must also ensure that basic due process was afforded in the expulsion hearing. *See P.L.Y. by the Kenosha Unified Sch. Dist No. 1 Bd. of Educ.*, Decision and Order No. 182 (Oct. 9, 1991) (state superintendent must address constitutional error); *S.M.H. by Kenosha Unified Sch. Dist.*, Decision and Order No. 157 (June 28, 1988). 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

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<sup>2</sup> I note also that written finding of fact 4 is inconsistent with the oral findings of fact stated by the hearing officer during the hearing. The only finding by the hearing officer at the conclusion of the hearing was that the pupil had a vape pen loaded with THC marijuana oil while at school. Earlier, when the pupil denied smoking the vape pen at school, the hearing officer said that he would base his decision solely on the fact that the pupil was in possession of (1) something he should not have been in possession of and (2) containing THC. Because the outcome of this appeal is determined by the procedural deficiency of notice, I need not address this inconsistency.

<sup>3</sup> In this case, because the school board authorized an independent hearing officer to determine pupil expulsion, the statutory procedural requirements are contained in Wis. Stat. § 120.13(1)(e).

rights. *See* Wis. Stat. § 120.13(1). 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).

It is well established that notice is an integral part of procedural due process at an expulsion hearing. *Id.* at 579, 584.

[A] student facing expulsion is entitled to timely and adequate notice of the charges against him so as to allow him a meaningful opportunity to be heard. Even in that situation wherein a student unequivocally admits the conduct charged at an expulsion hearing, and procedural protections thus serve a more limited function in terms of insuring a fair and reliable question of guilt of the conduct charged, the Seventh Circuit Court of Appeals will look to the existence of adequate notice of the charges and sufficient opportunity to prepare for the hearing on review of alleged due process violations.

*Keller v. Fochs*, 385 F. Supp. 262, 265 (E.D. Wis. 1974).

No part of Wis. Stat. § 120.13(1)(e)4 eliminates the fundamental due process requirement that a student facing expulsion receive adequate notice. The expulsion statute requires that “Not less than 5 days’ written notice of the [expulsion] hearing shall be sent to the pupil and, if the pupil is a minor, to the pupil’s parent or guardian.” Wis. Stat. § 120.13(1)(e)4. The specific grounds for expulsion and the particulars of the alleged misconduct must be included in the notice. *Id.* Wis. Stat. § 120.13(1)(c) was amended in 1973 to specifically extend to individual pupils, and not just their parents, the right to prior notice of the hearing. L.1973, ch. 94; *S.S. by West Allis Sch. Dist. Bd. of Educ.*, Decision and Order No. 559 (Oct. 7, 2005). The statutory changes in 1973 manifest a clear legislative intent to extend to the individual pupil the right to prior notice of hearing, the right to notice of the expulsion decision and the right to appeal. *M.S. by Milwaukee Public Schs. Bd. of Sch. Directors*, Decision and Order No. 128 (May 10, 1985). Although the statute uses the word “sent,” it is clear that the legislative intent was to ensure that both pupil and parent receive prior notice of the hearing. The statute’s use of “sent” clarifies the relevant timeline - the notice

must be sent, as opposed to received, at least 5 days before the hearing - and does not omit the fundamental requirement that the notice be received prior to the hearing.

In other words, Wis. Stat. § 120.13(1)(e)4 is not designed to give schools additional paperwork, but is intended to ensure pupils and parents receive timely information prior to an expulsion hearing. Expulsions have been repeatedly overturned for failure to include the specific grounds for expulsion and the particulars of the alleged misconduct in the notice. *C.M. by Pulaski Cmty. Sch. Dist. Bd. of Educ.*, Decision and Order No. 701 (Dec. 5, 2012); *A.S. by Milwaukee Public Sch. Dist. Bd. of Educ.*, Decision and Order No. 674 (Dec. 21, 2010); *R.H. by Webster Sch. Dist. Bd. of Educ.*, Decision and Order No. 624 (June 13, 2008). The information required by statute to be in the notice has value only if it is received by the pupil and parent. Courts describing the statutory requirements have assumed receipt of the notice is required. *See, e.g., Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 665–67, 321 N.W.2d 334, 338–39 (Ct. App. 1982) (listing procedural standards required by Wis. Stat. § 120.13(1)(c) as including “[t]he student is entitled to notice of a hearing”).

In this case, although the pupil and his mother received oral notice in time to be present at the hearing, they did not receive notice in time to review the specific allegations against the pupil, to prepare evidence to contest the expulsion or to consult with or hire an attorney. Because they did not receive the written notice of hearing until they received it as an exhibit at the hearing, they were denied the opportunity to review all of the information required to be contained in the notice by Wis. Stat. § 120.13(1)(e)4. I need not determine how much advance notice of hearing is constitutionally required to conclude that the one-hour oral notice provided to the pupil and his mother was not enough. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 563–64 (1974) (holding that minimum due process for an inmate in a prison disciplinary proceeding includes at least 24 hours'

advance written notice of the charges against him “in order to inform him of the charges and to enable him to marshal the facts and prepare a defense”).

It is worth emphasizing that in this case, the school district did nothing wrong in its drafting and mailing of the notice. However, this fact does not mean the student received due process. This is not a situation where the pupil or his parents refused to accept service of the notice or failed to pick up a notice that was sent by certified mail. Furthermore, the pupil’s mother did not waive the procedural deficiency; she told the hearing officer that they had not received written notice of the hearing and that they had not known about the hearing until an hour before it started. Because the pupil did not receive adequate notice about the charges that would be considered at the expulsion hearing, the expulsion must be reversed. *C.M. by Pulaski Cmty. Sch. Dist. Bd. of Educ.*, Decision and Order No. 701 (Dec. 5, 2012); *B.Z. by Marinette Sch. Dist. Bd. Of Educ.*, Decision and Order No. 507 (Mar. 1, 2004).

### **CONCLUSIONS OF LAW**

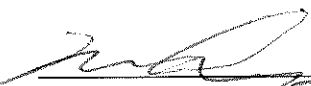
Based upon my review of the record in this case and the findings set out above, I conclude that the school board did not comply with all of the procedural requirements of Wis. Stat. § 120.13(1)(e) and the due process requirements of the United States and Wisconsin constitutions.

If the district chooses, it may remedy this error by providing proper notice of the expulsion hearing and rehearing the expulsion. *A.S. by Milwaukee Public Sch. Dist. Bd. of Educ.*, Decision and Order No. 674 (Dec. 21, 2010); *S.S. by West Allis Sch. Dist. Bd. Of Educ.*, Decision and Order No. 559 (Oct. 7, 2005).

**ORDER**

IT IS THEREFORE ORDERED that the expulsion of [REDACTED] by the Racine Unified School District Board of Education is reversed.

Dated this 6th day of August, 2019



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



## **APPEAL RIGHTS**

Wis. Stat. § 120.13(1)(e) 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.