Decision and Order No.: 797

THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of [redacted] by Janesville School District Board of Education	DECISION AND ORDER Appeal No.: 20-EX-07

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 Janesville School District Board of Education affirming an independent hearing officer's order to expel the above-named pupil from the Janesville School District. This appeal was filed by the pupil's mother and received by the Department of Public Instruction on June 3, 2020.

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

FINDINGS OF FACT

The record contains a letter dated April 25, 2019 from the superintendent of the Janesville School District. The letter advised that a hearing would be held on May 7, 2019 that could result in the pupil's expulsion from school through his 21st birthday. The letter was sent separately to the pupil and his mother by certified mail. The letter alleged that "[the pupil] did on

April 24, 2019 engage in conduct, while in school, which endangered the property, health, and safety of others by intimidating a witness, assulting [sic] another student, and violating existing pre-expulsion conditions."

The hearing was held in closed session before an independent hearing officer on May 7, 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 hearing officer found that the pupil engaged in conduct while in school which endangered the property, health, or safety of others. The hearing officer 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 hearing officer, dated May 7, 2019, was mailed separately to the pupil and his parents. The order stated the pupil was expelled through his 21st birthday without the possibility of early reinstatement. The decision of the independent hearing officer was reviewed by the school board on May 14, 2019. The board affirmed the expulsion order issued by the hearing officer and notified the pupil and his mother of that approval by mail on May 15, 2019. An audio recording of the expulsion hearing and minutes of the school board meeting at which the board affirmed the expulsion order are part of the record.

DISCUSSION

The expulsion statute –Wis. Stat. § 120.13(1)(c) and (e) – 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, 786, 709 N.W.2d 73, 80. In reviewing an expulsion decision, the state superintendent

must ensure, among other things, that the required statutory procedures were followed, that the school board'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.

The appeal letter in this case raises three issues which require consideration. First, the pupil and his mother list various treatments the pupil has attended since his expulsion. Actions taken or treatment received by the pupil following conduct that is grounds for expulsion are not a basis for the state superintendent to reverse an expulsion. Next, they blame the school for the assault that resulted in the pupil's expulsion, arguing that the school failed to remove the victim from the pupil's class despite his mother's request and despite the fact that the school knew the victim had been taunting the pupil for two to three months prior to the assault. The pupil's mother also alleged that a school staff member "knew something was going to happen the day before" and failed to contact her. No action or failure to act by the school caused the pupil to assault another student. These statements and failure to accept responsibility for the pupil's intentional and planned assault of another student are concerning.

Finally, both the pupil and his mother indicate that he would like to attend Rock River Charter School or Rock University High School, which are both part of the Janesville School District. In response, the district states that it has provided several educational options at different district programs to the pupil since his expulsion. The pupil has no right to attend the school of his choice in a district from which he has been expelled.

Three issues not raised by the pupil must be addressed. The state superintendent's review of an expulsion is primarily limited to ensuring accordance with the due process requirements contained in Wis. Stat. § 120.13(1)(c) and (e). *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d 657, 667, 321 N.W.2d 334, 339 (Ct. App. 1982); *Madison Metro. Sch. Dist. v. Wis. Dep't of*

Public Instruction, 199 Wis. 2d 1, 16-17, 543 N.W.2d 843, 849-50 (Ct. App. 1995). However, the state superintendent must also ensure that basic due process was afforded in the expulsion hearing. *See Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 783 (Aug. 8, 2019); *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). 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 rights. 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). Due process in a student expulsion hearing does not have to take the form of a judicial or quasi-judicial trial, and the due process required in an expulsion hearing cannot be equated to that required in a criminal trial or juvenile delinquency hearing. *See, e.g., Linwood v. Board of Educ.*, 463 F.2d 763, 770 (7th Cir. 1972). "Basic fairness and integrity of the fact-finding process are the guiding stars." *Racine Unified Sch. Dist. v. Thompson*, 107 Wis. 2d at 663, 321 N.W.2d at 337 (quoting *Boykins v. Fairfield Bd. of Educ*., 492 F.2d 697, 701 (5th Cir. 1974)). It is a tenet of due process and a matter of basic fairness that video evidence relied on by a hearing officer be introduced as an exhibit in the hearing so that it may be seen and responded to by the pupil. In this case, the hearing officer watched a video of the incident prior to the hearing. The video was not shown at the hearing, was not included in the expulsion packet and was not part of the expulsion hearing record provided for this appeal. The hearing officer provided no information regarding how she came to view the video outside and prior to the expulsion hearing, how she authenticated the video or why she found it appropriate to consider the video when it was not part of the hearing record.

The April 25, 2019 notice of the expulsion hearing stated, "A set of the materials to be used at the expulsion hearing will be sent to you prior to the meeting." The video was not included in the expulsion packet that was sent to the pupil in advance of the hearing and entered into evidence at the hearing. The hearing officer's consideration of the video is particularly concerning given that the pupil and his mother, who said she had seen a video of the incident from a distance not during the expulsion hearing, disputed what the hearing officer said that the video showed. Due process requires that a material piece of evidence such as a video of the incident be shared with the pupil and entered into evidence before a hearing examiner may consider that evidence at an expulsion hearing.

In addition, a statutory violation requires reversal of the expulsion. The notice of expulsion hearing provided to the pupil failed to comply with the requirements of Wis. Stat. § 120.13(1)(e)4. It has long been precedent that the notice requirements of the statute are mandatory in nature, and failure to comply with the statutory requirements renders the expulsion void. *See, e.g., Alex H. v. Eleva-Strum Sch. Dist. Bd. of Educ.*, Decision and Order No. 438 (July 20, 2001). Among other things, the notice of expulsion hearing must state "the particulars of the pupil's alleged conduct upon which the expulsion proceeding is based." Wis. Stat. § 120.13(1)(e)4.a. The notice of expulsion hearing in this case merely alleged that the pupil engaged in expellable conduct "by intimidating a witness, assulting [sic] another student, and violating existing pre-expulsion conditions." This does not constitute adequate notice. "[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." *Keller v. Fochs,* 385 F. Supp. 262, 265 (E.D. Wis. 1974). Proper notice must inform the pupil of the time frame during which the misconduct occurred, where the misconduct occurred, and a description of the conduct to be

considered. *Lake Geneva-Genoa City Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 785 (Oct. 1, 2019); *A.S. v. Milwaukee Public Sch. Dist. Bd. of Educ.*, Decision and Order No. 674 (Dec. 21, 2010). This entails providing detailed information about the conduct, not simple generalizations. *Eric Paul H. by Mischicot Sch. Dist. Bd. of Educ.*, Decision and Order No. 459 (Mar. 11, 2002). The purpose of this notice is to allow a student to adequately prepare for the expulsion hearing. A.*S. by the Milwaukee Public Sch. Dist. Bd. of Educ.*, Decision and Order No. 674 (Dec. 21, 2010).

In the present case, the notice does not state the time that the alleged misconduct occurred, does not specify the location in the school where the alleged misconduct occurred and does not adequately describe the conduct to be considered. For example, the notice does not describe how the pupil intimidated a witness, how the pupil assaulted another student or what pre-expulsion conditions the pupil violated. The notice does not state whether the witness who was intimidated and "another student" who was assaulted were the same person. The notice does not state whether three incidents would be considered at the hearing or whether the hearing would involve a single incident that was by itself intimidation of a witness, assault and violation of pre-expulsion conditions. Because the notice failed to include the particulars of the alleged misconduct, the school district did not give adequate notice to the pupil about the charges that would be considered at his expulsion hearing and the expulsion must be reversed. *See Lake Geneva-Genoa City Union High Sch. Dist. Bd. of Educ.*, Decision and Order No. 785 (Oct. 1, 2019); *A.B. v. Milwaukee Academy of Science Charter School*, Decision and Order No. 697 (June 18, 2012), (reversing expulsion for not adequately apprising pupil of what would be considered at expulsion hearing where notice of expulsion hearing described pupil's misconduct as "04/25/2012: Assault/Fighting").

Finally, the notice must also state the following:

> f. That the hearing officer … shall keep a full record of the hearing and, upon request, the hearing officer … shall direct that a transcript of the record be prepared and that a copy of the transcript be given to the pupil and, if the pupil is a minor, the pupil's parent or guardian.

Wis. Stat. § 120.13(1)(e)4.f. The only reference to a record of the hearing contained in the notice is the statement "Electronic minutes will be kept of the hearing." This sentence does not comply with Wis. Stat. § 120.13(1)(e)4.f. Failure to include the required statement requires reversal. *Z.Y. v. Wauwatosa Sch. Dist. Bd. of Educ.*, Decision and Order No. 690 (Jan. 11, 2012); *Alex H. v. Eleva-Strum Sch. Dist. Bd. of Educ.*, Decision and Order No. 438 (July 20, 2001).

In reviewing the record in this case, I find that the school district did not comply with all of the procedural requirements. I therefore reverse this expulsion. If the district chooses, it may remedy the errors by providing proper notice of the expulsion hearing and rehearing the expulsion. *J.L. v. Racine Unified Sch. Dist. Bd. of Educ.*, Decision and Order No. 783 (Aug. 8, 2019); *Z.Y. v. Wauwatosa Sch. Dist. Bd. of Educ.*, Decision and Order No. 690 (Jan. 11, 2012); *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).

This decision does not condone the pupil's conduct, nor does it suggest that the expulsion ordered by the hearing officer and affirmed by the board is inappropriate. However, I must uphold constitutional due process and the requirements contained in the statutes.

CONCLUSIONS OF LAW

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

ORDER

IT IS THEREFORE ORDERED that the expulsion of [redacted] by the Janesville School District Board of Education is reversed.

Dated this 28th day of July 2020

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

APPEAL RIGHTS

Wis. Stat. § 120.13(1)(e)3 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.
Parties to this appeal are:

[redacted]

[redacted]5

Steve Pophal
Superintendent
Janesville School District
527 S. Franklin St.
Janesville, WI 53548

COPIES MAILED TO:

[redacted]

[redacted]

Steve Pophal
Superintendent
Janesville School District
527 S. Franklin St.
Janesville, WI 53548