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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-670**

In the Matter of the Expulsion of N. Y. B.
from Anoka Hennepin Independent School District No. 11

**Filed April 20, 2010
Reversed
Collins, Judge***

Minnesota Department of Education

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Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Collins,
Judge.

UNPUBLISHED OPINION

COLLINS, Judge

Relator N.Y.B. challenges the school board's decision to expel her for one
calendar year, arguing that (1) relator was deprived of procedural due process, (2) the

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

school board impermissibly relied on “post hoc” reasoning to support its decision, (3) the school board failed to comply with this court’s previous remand instructions to provide a foundation explaining its decision, and therefore the decision is arbitrary and capricious, and (4) the school board and commissioner’s decisions were based on materials outside the record. Because we conclude that N.Y.B. was deprived of procedural due process and was thereby prejudiced, we reverse.

FACTS

This court previously heard a certiorari appeal in this case, and the present certiorari appeal is from the school board’s decision after remand. The facts underlying the expulsion and the procedural posture leading up to our previous decision are summarized at *In re Expulsion of N.Y.B.*, 750 N.W.2d 318, 320-322 (Minn. App. 2008). On June 10, 2008, we remanded the case stating:

We cannot affirm the school board’s decision to expel N.Y.B. for one calendar year because the school board failed to explain its decision, as required by the [Pupil Fair Dismissal Act, Minn. Stat. §§ 121A.40-.56 (2006)]. But we also cannot hold, as N.Y.B. urges, that the school board’s decision was either arbitrary and capricious or unsupported by substantial record evidence. We, therefore, remand and direct the school board to explain its decision in “sufficient detail” to comply with Minn. Stat. § 121A.47, subd. 13. At a minimum, this decision should include (1) the school board’s basis for determining the relative egregiousness of N.Y.B.’s physical aggression, (2) the factual context of any incidents with which N.Y.B.’s conduct was compared, (3) an explanation of the school board’s determination of how N.Y.B.’s conduct compares with the other incidents, and (4) an explanation of how the school board reached its conclusion about the relative seriousness of N.Y.B.’s conduct after considering the mitigating circumstances presented by N.Y.B.

N.Y.B., 750 N.W.2d at 326-27.

The school board on remand issued an October 13, 2008 resolution explaining its decision to expel *N.Y.B.* The resolution contained a five-page attached exhibit providing the school board's foundation for its decision and addressing the four areas highlighted by this court. Initially, with respect to the relative egregiousness of *N.Y.B.*'s physical aggression the school board stated in part:

Based on its review of *N.Y.B.*'s actions on December 13, 2006, the Board determined that *N.Y.B.* was the aggressor and engaged in a violent act of assault causing injury of another student, disrupting the educational environment of the school, and creating an unsafe learning environment. *N.Y.B.* acknowledged that she had verbal exchanges with the student whom she assaulted but that the student had never touched her and that the student was facing away from *N.Y.B.* when *N.Y.B.* struck her over the head with a cafeteria tray. The lunch tray is a firm, heavy, hard plastic that is difficult to break. The victim did not engage in a fight.

. . . .

. . . Physical aggression towards other students and the necessity of restraining students to prevent harm to others raises the level of seriousness. The assault in the cafeteria occurred when approximately 500 students were eating lunch. The act was witnessed by a large number of students, disrupted the educational setting, and compromised the safety of students and staff. . . .

Although the factors noted above were the foundation of the School Board's basis for determining the relative egregiousness of *N.Y.B.*'s physical aggression, it should also be noted that the Board discussed and considered the fact that this incident, and the manner in which the tray was used, was also within the definition of a weapon because it was a device or instrument used to produce bodily harm. However, the School Board chose not to specifically highlight that policy

violation because it was not in the original notice to N.Y.B. and because the Board did not want to “pile on” the charges.

Next the school board detailed the factual context of other expulsions it relied on to determine the appropriate expulsion period for N.Y.B. The school board described the factual circumstances in four incidents leading to expulsion for five students. First, J.M. and P.B. were expelled for fighting and failing to stop fighting when a teacher intervened. A teacher was knocked to the ground in the incident. The district court expelled J.M. and P.B. for one year even though this was their “first act of physical aggression.” Second, I.W. was expelled for one year for intentionally missing a shuttle bus in order to confront another student and then assaulting the student. It was also I.W.’s first act of physical aggression. Third, J.W. was expelled for one year for following another student home and hitting the student from behind with a skateboard. The school board characterized J.W.’s conduct as an assault and as a violation of the school’s weapon policy. The school board did not state whether it was J.W.’s first offense. Fourth, M.M. was expelled for one year for fighting with another student in front of a class. M.M. was involved in another fight the previous year. The school board stated in conclusion:

It should be noted that while some of these incidents were not specifically discussed in detail during the February 12, 2007 School Board meeting, the types of behaviors exhibited in these cases were discussed as a means toward determining an appropriate consequence for N.Y.B. Specifically, the consequences given for assault and/or acts of physical aggression of a type similar to N.Y.B.’s.

Next, in providing an explanation of the school board’s determination of how N.Y.B.’s conduct compares with the other incidents, the school board stated in part:

N.Y.B. had two specific expellable offenses. First, was N.Y.B.'s assault with the lunch tray (used as a weapon). The second offense occurred when N.Y.B. was being escorted down the hall, broke away and attempted to harm the other student and again having to be physically restrained as a means towards ending the conflict. Because the School Board had expelled students for one calendar year for committing assaults of a similar or less egregious nature, School Board members felt that anything less than a calendar year consequence for N.Y.B. would be inconsistent with its past practice in similar or less severe cases.

Finally, in regard to the fourth consideration of how the school board reached its conclusion about the relative seriousness of N.Y.B.'s conduct after considering mitigating circumstances, the school board stated in part:

[T]he Board determined that N.Y.B.'s mitigating factors did not offset the egregiousness of her behavior—by using an object to assault another student in the school cafeteria as well as break away from administrative staff to again attempt to attack the other student and therefore having to be restrained. In short, although the Board considered N.Y.B.'s mitigating circumstances, such factors did not outweigh its analysis of the seriousness of N.Y.B.'s conduct and ultimately, the consequences it deemed were consistent with its policy.

N.Y.B. appealed to the commissioner of education, arguing that (1) the school board violated her right to due process because it based its decision on a separate and uncharged violation of the student discipline policy (the weapon provision) and (2) the school board's explanation was insufficient because it described only five of the 22 expulsions previously relied upon. N.Y.B. argued to the commissioner that her due-process rights were violated because she waived her rights to an evidentiary hearing based solely on the alleged violations of paragraph III. B.6 of the District Student

Discipline Policy, Code of Student Conduct, which prohibits “[v]iolations against persons . . . include[ing] . . . verbal and/or non-verbal intimidation/threats; . . . assault; fighting . . .” and paragraph III. B.8 which prohibits disruptive acts “including disobedience, disruptive and disrespectful behavior, defiance of authority, . . . [and] insubordination.” Prior to the October 13, 2008 resolution, the only reference to the weapon policy came after N.Y.B. waived her right to an evidentiary hearing and at the February 12, 2007 school board meeting. Although there was no transcript of the proceeding, the principal at the February 12, 2007 school board meeting apparently read the following statement into the record: “Rapids High School is recommending that [N.Y.B.] be expelled for one year for violations of the policies that prohibit students from assaulting others, using objects as weapons, and engaging in disruptive behaviors that endanger the safety of others.”

The commissioner determined that the school board violated N.Y.B.’s due-process rights because:

The District failed to provide notice to [N.Y.B.], as required by Minn. Stat. § 121A.47, subd. 2, that it considered her actions were in violation of the District’s weapon policy. However, the School Board included that violation in its amended resolution three separate times. Accordingly, it is necessary to remand the decision to the School Board to amend the resolution to strike any references to [N.Y.B.’s] violation of the District’s weapon policy and describing [N.Y.B.’s] use of the lunch tray as a weapon.

The commissioner then remanded the matter to the school board with the instruction that it “provide a written explanation in sufficient detail to apprise the parties and the Commissioner of the MDE of the basis and reason for the decision to expel [N.Y.B.] for

one calendar year which does not contain references to the District's weapon policy or that [N.Y.B.] used the cafeteria tray as a weapon." The school board did not seek review of the commissioner's remand decision.

The school board issued a new resolution on January 26, 2009, which was virtually identical to the October 2008 resolution. The only material difference between the two resolutions was the redaction of the language referencing the district's weapon policy. N.Y.B. again appealed the decision to the commissioner. The commissioner affirmed the resolution on March 12, 2009. This certiorari appeal followed.

D E C I S I O N

This court's review of the commissioner's decision is governed by Minn. Stat. § 14.69 (2008). Minn. Stat. § 121A.50 (2008). Under section 14.69 this court:

may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

The party challenging an administrative decision bears the burden of proving the agency's decision meets one of the statutory criteria for reversal. *Markwardt v. State Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

This court has held that “[j]udicial intervention in the public-school system requires restraint” and therefore this court “generally defer[s] to a school board’s judgment on matters of student discipline.” *N.Y.B.*, 750 N.W.2d at 323. But because the commissioner acts in a quasi-judicial appellate capacity, we do not afford the same level of deference to the commissioner’s decision. *Id.* We review the commissioner’s decision to determine if the commissioner “reached a legally correct outcome when applying the appropriate standard of review to the record before it.” *Id.* at 325. The commissioner’s review is governed by Minn. Stat. § 121A.49 (2008), which is essentially the equivalent of Minn. Stat. § 14.69, governing the appellate court review:

[T]he commissioner may affirm the decision of the agency, may remand the decision for additional findings, or may reverse or modify the decision if the substantial rights of the petitioners have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the school district;
- (3) made upon unlawful procedure, except as provided in section 121A.48;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record submitted; or
- (6) arbitrary or capricious.

The commissioner or the commissioner’s representative shall make a final decision based upon the record.

Minn. Stat. § 121A.49. Because *N.Y.B.* waived an evidentiary hearing without stipulating to the evidence in the record, the record on review consists only of “the

decision-making meeting, including anything presented for the board’s consideration.”
N.Y.B., 750 N.W.2d at 324.

I.

Respondent argues that the school board’s decision to expel *N.Y.B.* is not at issue on appeal and that the only issue on appeal is the length of the expulsion. In support of this argument respondent cites the following language in our previous *N.Y.B.* decision:

We cannot affirm the school board’s decision to expel *N.Y.B.* for one calendar year because the school board failed to explain its decision, as required by the PFDA. But we also cannot hold, as *N.Y.B.* urges, that the school board’s decision was either arbitrary and capricious or unsupported by substantial record evidence. We, therefore, remand and direct the school board to explain its decision in “sufficient detail” to comply with Minn. Stat. § 121A.47, subd. 13.

Id. However, respondent ignores the concluding language of the opinion:

The school board failed to explain why relator’s conduct warranted an expulsion for one calendar year in sufficient detail to satisfy Minn. Stat. § 121A.47, subd. 13 (2006). Because *we are unable to exercise meaningful appellate review of the expulsion decision* without that explanation, we remand with instructions to the school board to supply such information as set forth in Section I, *supra*.

Id. at 328 (emphasis added). We did not affirm the school board’s decision regarding the expulsion, but instead remanded the case in order to allow the school board to explain its decision so that, in the event of any subsequent appeal, the appellate courts are able to afford meaningful review of the decision.

II.

N.Y.B. argues that the school board's decision should be reversed because it violated her constitutional rights to due process because she was not given notice that the district considered her in violation of the weapon policy. The school district did not appeal the commissioner's finding of a constitutional violation and prejudice resulting from the violation. A final decision of the commissioner is binding on the parties if not appealed. Minn. Stat. § 121A.49; *see also* Minn. Stat. 14.63 (2008) (stating all final decisions must be appealed by certiorari appeal within 30 days). Although the school board did not appeal the commissioner's decision, and is therefore bound by that decision, we engage in an analysis of the constitutional violation because a good-faith violation of the Pupil Fair Dismissal Act that does not result in prejudice is not a basis for reversal. Minn. Stat. 121A.48 (2008); *N.Y.B.*, 750 N.W.2d at 327 (citing *In re Welfare of D.T.N.*, 508 N.W.2d 790, 797 (Minn. App. 1993), *review denied* (Minn. Jan. 14, 1994)). On appeal the school district has argued that the constitutional violation, if any, was minimal and did not prejudice N.Y.B.

Education is both a fundamental right under the Minnesota Constitution and a property interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *N.Y.B.*, 750 N.W.2d at 327 (citing Minn. Cons. art. XIII, § 1; *Goss v. Lopez*, 419 U.S. 565, 574, 95 S. Ct. 729, 736 (1975)). Therefore a public school may not deny due process "to any public school pupil involved in a dismissal proceeding which may result in suspension, exclusion, or expulsion." Minn. Stat.

§ 121A.42 (2008). The requisite level of due process in an expulsion proceeding is determined by balancing these factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In re Expulsion of E.J.W., 632 N.W.2d 775, 780 (Minn. App. 2001) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976)). But it is well established that, at minimum, due process requires notice and an opportunity to be heard. See *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 1020 (1970) (recognizing that procedural due-process protections include reasonable notice); *Contos v. Herbst*, 278 N.W.2d 732, 742 (Minn. 1979) (“At a minimum the due process clause requires that deprivation of property be preceded by notice and an opportunity for a hearing appropriate to the case.”).

Respondent argues that N.Y.B. was afforded notice of the weapon policy charge prior to the proceedings before the school board because she was given a written copy of the statement that was going to be read by the principal which recommended expulsion for one year “for violations of the policies that prohibit students from assaulting others, using objects as weapons, and engaging in disruptive behaviors that endanger the safety of others.” But this court held in *E.J.W.*, that notice given during the proceeding was insufficient notice to meet the requirements of due process. In *E.J.W.* the student was not given notice of witnesses’ names, which the student was entitled to under the Pupil Fair

Dismissal Act, until the middle of the evidentiary hearing. 632 N.W.2d at 780. This court examined the *Eldridge* factors and determined that the failure of the school district to provide the student with the names of witnesses before the hearing deprived the student of the opportunity “to investigate and compel [the witnesses’] presence by subpoena if that was deemed necessary to present an adequate defense.” *Id.* at 780-81. The court in *E.J.W.* did not find persuasive the district’s argument that the student could have requested a continuance, and affirmed the commissioner’s determination that there had been a violation of the student’s right to due process. *Id.* at 780-81, 783.

Just as in *E.J.W.*, in order to determine the requisite process required in expulsion cases, we first examine “the private interest that will be affected by the official action.” *Id.* at 780 (quotation omitted). Here, the interest is N.Y.B.’s constitutionally protected “fundamental right” to a public school education. *See id.* (“Education is a fundamental right.”) (citing Minn. Cons. art. XIII, § 1). The Supreme Court has further observed that expelling a student such as N.Y.B. and depriving her of the ability to attend a school “could seriously damage the [student’s] standing with [her] fellow pupils and [her] teachers as well as interfere with later opportunities for higher education and employment.” *Lopez*, 419 U.S. at 575, 95 S. Ct. at 736.

We next examine “the risk of an erroneous deprivation” of N.Y.B.’s right to an education through the failure of the school board to provide her notice of the weapon-policy violation until the moments prior to the hearing and “probable value, if any, of additional or substitute procedural safeguards.” *E.J.W.*, 632 N.W.2d at 780 (quotation omitted). N.Y.B. is entitled to notice prior to the hearing of the school’s “intent to take

action” which must include a complete statement of the facts, a list of the witnesses, and a description of their testimony. Minn. Stat. § 121A.47, subd. 2 (2008). A review of the notices sent to N.Y.B. reveals that the district at no time prior to the moments leading up to the expulsion hearing indicated that the school viewed N.Y.B.’s use of the lunch tray as implicating the school’s weapon policy. The timing of the school board’s disclosure is significant, because not only did it effectively prevent N.Y.B.’s attorney from preparing a defense to such a charge, it also came *after* N.Y.B. waived her right to an evidentiary hearing. Because N.Y.B. had waived her right to an evidentiary hearing without awareness of the school board’s intention to enhance the seriousness of their allegations by asserting a weapon-policy violation, and because N.Y.B. was not afforded a meaningful opportunity to respond to the assertion for lack of due notice, the risk of an erroneous deprivation of N.Y.B.’s constitutional right to education was significant.

Respondent contends that the risk of deprivation as a result of the last-minute disclosure was not significant, because N.Y.B. could have been expelled for the violations of sections III.B.6 or III.B.8 without the additional weapon-policy violation allegation. However, the school board had discretion under the school district’s policies to suspend or expel N.Y.B. for a period between ten days and one year. The allegation that the tray was used as a weapon, in conjunction with the school board’s later admission that it considered the fact that the incident was one involving a weapon when determining the relative seriousness of the aggression-policy violation, raised N.Y.B.’s risk of being deprived of education for the maximum period allowed by law, and therefore was not insignificant.

We also examine as part of the second *Eldridge* factor the “probable value, if any, of additional or substitute procedural safeguards.” *E.J.W.*, 632 N.W.2d at 780 (quotation omitted). The value of timely notice to N.Y.B. is significant, as discussed above. The failure of the school board to provide N.Y.B. notice that it considered her conduct as implicating the school’s weapon policy deprived N.Y.B. of the full knowledge necessary to knowingly waive her right to an evidentiary hearing and deprived her of the ability to meaningfully address the allegations against her at the school board hearing.

The third *Eldridge* factor is the “[g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *E.J.W.*, 632 N.W.2d at 780 (quotation omitted). This factor weighs heavily in favor of finding that due process requires prior notice because (1) notice is already required under the statutes; (2) the school board provided multiple notices to N.Y.B., they were merely lacking this element; and (3) there appears to be no additional “fiscal” or “administrative” burden than is already required under the rules. In cases when the school board wishes to add an additional allegation prior to any hearing and after the initial notice has been provided the student, the added burden on the school district would be the requirement that the district provide additional notice in a time that allows the student to respond. We conclude that the requirement that the school district provide timely notice to the student of the intended policy basis for expulsion is not unduly burdensome.

Based on the three *Eldridge* factors and the understanding that basic due process requires, at a minimum, notice and opportunity to be heard, the school board’s failure to

provide N.Y.B. with timely notice of the weapon allegation was a clear violation of N.Y.B.'s right to due process, and such violation, on its face, prejudiced her. We must go on to address whether the school board's mere redaction of the references to the weapon allegation is sufficient to remedy the due-process violation.

III.

Under the Pupil Fair Dismissal Act, when making an expulsion, the decision “must be based on the record, must be in writing, and must state the controlling facts on which the decision is made in sufficient detail to apprise the parties and the commissioner of education of the basis and reason for the decision.” Minn. Stat. § 121A.47, subd. 13 (2008). On remand, this court instructed the school board to supply specific information explaining the basis for the school board's expulsion decision, and we identified four specific areas where more detail was required. *N.Y.B.*, 750 N.W.2d at 326-27. When an appellate court remands in order to afford a quasi-judicial agency the opportunity to provide findings and an explanation sufficient to afford meaningful judicial review, the decision making body is not permitted to rely on reasons that were unrelated to the original decision. *See Interstate Power Co. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 579-80 (Minn. 2000) (stating that a county is limited on remanding to protect an individual subject to the decision from post-hoc review).

N.Y.B. argues that since the school board articulated on remand that it “considered the fact that this incident, and the manner in which the tray was used, was also within the definition of a weapon because it was a device or instrument used to produce bodily harm,” it cannot now so simply absolve itself from its reliance on this improper

consideration. The school board's original resolution after remand relied on the weapon finding in several places including (1) the above-mentioned consideration of the tray as within the definition of a device or instrument used to produce bodily harm; (2) noting that the school board expelled two students on the same day as N.Y.B. for a fight that involved punching another in the face with a fist and, in restraining the students, causing a teacher to fall to the ground, but did not involve "us[ing] an object as a weapon"; (3) equating N.Y.B.'s conduct to that of J.W., a student whose hitting of another student with a skateboard was considered a violation of both the aggression and weapon policy¹; and (4) referring to the first expellable offense as "N.Y.B.'s assault with the lunch tray (used as a weapon)." After the commissioner determined that the reliance on the weapon allegation amounted to a due-process violation, the school board simply passed a nearly identical, amended resolution with only the references to the use of an object as a weapon removed.

The school board's admission that this was a factor cannot be undone by mere removal of the references to the use of a tray as a weapon. Under *Interstate Power* the school board cannot come up with "new" justifications unrelated to its original decision. Mere redaction of the references to the impermissible weapon-policy factor does not negate the fact that the school board reached its decision, in part, in violation of N.Y.B.'s due-process rights. Absent a due-process violation, the school board's articulated basis

¹ J.W. was also accused of following the student home to commit this assault, which presumably factored into the school district's imposition of a consequence. And though J.W. was suspended for one year, he was allowed to return to school on probation so he could transition from middle school into high school.

for expulsion would appear to support the school board's decision to expel N.Y.B. because we afford school districts wide latitude in determining the appropriate discipline in their schools. But in the face of a constitutional due-process violation, the school board must demonstrate how this constitutional violation did not prejudice N.Y.B. A mere redaction of the offending language does not undo the violation and does not provide a basis for this court to determine that the school board's initial consideration and apparent reliance on the weapon policy was harmless.

Because the school board explicitly stated that it considered the weapon allegation, because the school board referenced the use of the tray as a weapon multiple times in its resolution as justification for the one-year expulsion, and because it is impossible to determine if N.Y.B. would have been subject to a shorter expulsion time without the weapon allegation, we conclude that the due-process violation cannot be considered harmless or without prejudice and requires a reversal of the commissioner's decision.²

Reversed.

² Because we are reversing on the basis of the constitutional due-process violation, we do not address appellant's additional challenges to the school board's final resolution.