Must students testify in student and employee disciplinary hearings?

By Bruce W. Smith

Educators are well-acquainted with the concept of due process in both student disciplinary and employee disciplinary matters. In a nutshell, a student has the right to due process before being suspended or expelled from school; and an employee who has a contractual or statutory right to continuing employment (i.e., is not “at will”) has a right to due process before being terminated from employment.

One of the elements of due process in certain proceedings is the right to confront and cross-examine witnesses. This right, to the extent it exists, often conflicts with the strong preference of administrators and school boards to avoid requiring students to testify against their peers or employees. Expulsion hearings and employee termination hearings are generally held by school boards; the accused person often is represented by an attorney who will want to cross-examine the student witnesses. The very prospect of appearing and testifying in one of these hearings is intimidating, and students often reasonably fear that they will be retaliated against or ostracized for testifying against another student or a popular employee. Significantly, even if administrators want students to testify, they have no power to compel them to do so because school boards have no power to subpoena witnesses.

When a student is the only witness to the conduct which is the reason for discipline and the student does not testify, the administrator who has interviewed the student will ordinarily testify and report what the student said. This is hearsay; the attorney for the accused student or employee will object to admission of the hearsay because the attorney will have no opportunity to test the reliability of the testimony through cross-examination, and the school board, as fact finder, will have no basis to judge the credibility of the witness.

Hearsay in student expulsion hearings

In Maine, two federal court decisions have stated that accused students in an expulsion hearing have the right to confront and cross-examine the witnesses against them – Carey v. Maine School Administrative District No. 17 and Keene v. Rodgers. In the M.S.A.D. No. 17 case, however, the Court ruled that the admission of written statements by students at an expulsion hearing did not violate the
expelled student’s due process rights because the student had confessed to his misconduct. Thus the hearsay statements of the students were “mere corroboration” of the confession. If there had been no confession, reliance of the school board solely on hearsay statements might have been a due process violation, but the Court did not have to decide that question.

Based on decisions from other jurisdictions, we have good reason to believe that student hearsay statements may be sufficient to support a student expulsion. In the very recent case of Brown v. Plainfield Community Consolidated District 202, a federal district court in Illinois ruled that a student who was expelled based in part on the unworn statements of three unnamed students was not denied due process. The student had been accused of sexually harassing a teacher, and the teacher did testify at the expulsion hearing. In rejecting the claim that the accused student had the right to cross-examine the student witnesses, the Court found:

1) cross-examination of student witnesses would duplicate the disciplinary investigation by school officials and, thus, would have minimal value in safeguarding the right to a fair hearing: (2) protecting the anonymity of student witnesses who report misconduct is vital to maintain order in school; and (3) the administrative burden and cost of tasking school administrators with overseeing the process of cross-examination would divert time and resources from the school’s educational mission.

In reaching its conclusion, the Court in Brown relied upon earlier federal court decisions from other jurisdictions.

In sum, although the Carey case suggests that expelling a student based on hearsay alone may pose a due process problem, there is a strong drift of federal authority that allows the use of student hearsay evidence in student disciplinary hearings. At the end of this article, some suggestions for reducing the risk of a due process violation due to use of student hearsay will be discussed.

Hearsay in employee disciplinary hearings

The judicial decisions concerning use of student hearsay statements in employee termination hearings tend to parallel the decisions concerning student expulsion hearings. The courts generally hold that there is no outright prohibition on use of hearsay in employee disciplinary hearings, although concerns about its reliability and whether it is supported by direct evidence remain.

Elvin v. City of Waterville is the leading Maine case on the subject. In Elvin, a teacher was dismissed for having a sexual relationship with a student from a different school district. The student did not testify at the school board dismissal hearing, but his affidavit was admitted as evidence. The teacher argued on appeal that her right to due process was denied because she did not have a chance to cross-examine the student. The Maine Supreme Court rejected the argument, holding that hearsay is admissible in administrative proceedings such as a school board hearing, if it is the kind of information “on which responsible persons are accustomed to rely on in serious affairs.” The Court also noted that the Board had no subpoena power to compel the student to testify.

Although Elvin appears to be very supportive of the use of student hearsay statements, it should also be noted that the teacher herself did testify and that she admitted to having a sexual relationship with the student. So, the question remains, would the result have been the same if the student hearsay evidence was the only evidence of the teacher’s guilt?

As in the case of student hearings, courts from other jurisdictions have found student hearsay statements to be admissible in employee dismissal hearings, but it would be going too far to say that courts have uniformly approved of dismissing employees based solely on student hearsay evidence. In one case, the Court said there was no due process violation when a bus driver was dismissed based only
upon written unnamed student statements alleging sexual harassment. The Court gave the following reasons for allowing the hearsay to be considered, which are instructive: the students were frightened of the driver; there were ten different statements, each in the students’ own words; the statements were given to a police investigator; the students were each interviewed separately; in these circumstances, “there is no chance that all of the children fabricated their stories.”

In sum, student hearsay statements are also admissible in employee dismissal hearings. Our view, however, is that courts will be somewhat more reluctant to approve of dismissal of an employee than expulsion of a student based exclusively on student hearsay. As a practical matter, employees tend to have more aggressive legal or union representation than do students, and use of hearsay is more likely to be attacked at the hearing or appealed in employee cases than in student discipline cases. Accordingly, in employee dismissal cases, administrators are advised to avoid relying only on hearsay to prove the employee's misconduct, if possible.

Conclusion

Although court decisions generally allow student hearsay statements to be admitted in school board expulsion and employee termination hearings, there is an uneasiness about reliance upon hearsay that is not shown to be reliable or that is not corroborated by direct evidence. In addition, the requirements of due process sometimes clash with our natural inclination to protect children from having to participate in adversarial proceedings such as expulsion and employee dismissal hearings. It is not always easy to strike a balance, but the accompanying suggestions should help administrators to make the difficult choices involved in protecting children while affording due process to accused students or employees.

Endnotes

5. 522 F.Supp. 2d 1075, citing: Newsome v. Batavia Local School District, 842 F.2d 920, 924(6th Cir. 1988) (high school student threatened with expulsion based on statements of classmates did not have due process right to learn their identities); B.S v. Board of School Trustees, Fort Wayne Community School District., 255 F.Supp.2d 891, 900 (N.D.In. 2003) (student did not have procedural due process right to obtain names and cross-examine student witnesses at expulsion hearing); Caston v. Benton Pub. Schs., No. 00-215, 2002 WL 562638 (E.D.Ark. Apr. 11, 2002) (school did not violate student's due process rights by refusing to let him cross-examine adverse student witnesses at his expulsion hearing); Witvoet v. Herscher Comm. Unit Sch. Dist. 2, No. 97-2243, 1998 WL 1562916 (C.D.Ill. May 27, 1998) (student had no right under federal due process principles to confront or cross-examine his accuser at expulsion hearing); L.Q.A. v. Eberhart, 920 F.Supp. 1208, 1219 (M.D.Ala.1996) (no due process violation where school board considered written statements from student witnesses who were not subject to cross-examination at expulsion hearing), aff'd, 111 F.3d 897 (11th Cir.1997).
7. 573 A.2d 381 (Me. 1990).
8. Green v. Board of School Commissioners of City of Indianapolis, 716 F.2d 1191, 1193 (7th Cir. 1983).