THE STATE OF WISCONSIN

BEFORE

THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of the Expulsion of BRANDON H. D[redacted]	DECISION AND ORDER
by the De Soto Area School District Board of Education	93-EX-03

NATURE OF THE APPEAL

This is an appeal to the State Superintendent of Public Instruction pursuant to sec. 120.13(1)(c), Wis. Stats., from the January 30, 1993, order of the De Soto Area School District Board of Education to expel Brandon D[redacted], a tenth grade student, from the De Soto Area Junior/Senior High School until the commencement of classes in the fall semester of the 1994-95 school year. This appeal was filed by Brandon's mother, Vickie L. D[redacted], and was received by the Department of Public Instruction on March 2, 1993.

In accordance with the provisions of sec. PI 1.04(5), Wis. Adm. Code, 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 sec. 120.13(1)(c), Wis. Stats. The State Superintendent's role is to ensure that the required statutory procedures were followed, that the school board's decision was based upon one or more of the established statutory grounds, and that the school board was satisfied that the interests of the school district demand that the student be expelled.

FINDINGS OF FACT

The record contains a letter from John Oxley, District Administrator of De Soto Area School District, dated January 19, 1993, which indicated that an expulsion hearing was to be held on January 25, 1993. It appears a separate copy of that letter was sent to Brandon D[redacted] and to his parents. The record also contains a Notice of Pupil Expulsion Hearing dated January 19, 1993, in a format similar to one recommended by the Department, signed by principal Martin P. Kirchhof, which cites the grounds for expulsion as repeated refusal or neglect to obey school rules. Enclosed with the Notice is a copy of 12 pages of Discipline Infraction Reports and a summary cover sheet showing the district's application of it's eight step "Supervised Time-out and Attendance Center" disciplinary program, the eighth step of which authorizes expulsion. The incidents include such misconduct as refusal to take physical education class, leaving a classroom without permission, throwing corn (kernels) at other pupils in class, swearing at teachers, using the "F" word, and infractions involving cutting into the lunch line and refusing to go to the end of the lunch line.

Brandon's mother also supplied lengthy materials on his behalf in response to the Department's general letter for briefing. These corroborate certain uncontested hearing evidence that Brandon was previously evaluated by an M-Team, was identified as having an exceptional educational need (EEN), and received special education for a learning disability from 4th grade through 7th grade at which time an M-Team removed him from the learning disabilities resource program. Certain of the materials additionally indicate Brandon has had two corrective eye surgeries, has a visual tracking problem, and has

certain dyslexic-related processing deficits. Brandon was in and out of the district's basic skills program. There is reference to consistent low academic achievement or failure but average ability in certain areas. The district offered evidence that Brandon was last evaluated by an M-Team in September 1992 and was determined not to have an EEN at that time. He was in the district's at-risk program during the 1991-1992 year and again in 1992-1993 when notice for expulsion was issued.

The hearing was held before the board in open session on January 25, 1993, and the record contains the tapes of the hearing and further reflects the minutes of the closed session into which the board convened after hearing. The Findings and Order of Pupil Expulsion recite the grounds in the notice of hearing and the evidence offered in support of the finding of repeated refusal and neglect to obey school rules. Also referenced is the evidence of two school psychologists who reviewed Brandon's disciplinary file, were present during hearing, and opined that Brandon's conduct did not indicate reason to believe he has any exceptional educational needs as legally defined at this time. Finally the order includes a finding that the interests of the district demand Brandon's expulsion.

On appeal Brandon's mother argues that the decision to expel was unwarranted on the facts and that the duration of the expulsion is excessive and exceeds the maximum "school year" expulsion called for the student handbook. The Notice of Expulsion refers to board authority to expel for the pupil's entire primary and secondary education career. The board-adopted handbook definition of expulsion, first cited on appeal, reads:

Expulsion: An action taken by the school board to prohibit an enrolled pupil from further attendance for a period of time that shall not extend beyond the school year.

In response, the district submitted an affidavit from the principal which in part relates that he did not draft the policy, that he always (mistakenly) believed a board could expel only through the end of the year in which the violation occurred, that he is the principle drafter of the handbook, that it is intended as a guide and its contents are not to be inflexible, that the rules were intended to serve as guides for establishing a student code of conduct for discipline purposes, and that the board adopted the booklet in the fall of 1992 without discussion of length of expulsion or any other discussion. He indicated he doubts the board was even aware the limitation existed.

DISCUSSION

School districts are limited-purpose municipal corporations and have only such powers as are conferred specifically by statute or are necessarily implied therefrom. Iverson v. Union Free High School Dist., 186 Wis. 342, 353, 202 N.W. 788 (1925). A school board's power to expel students derives from sec. 120.13(1)(c), Wis. Stats., which establishes certain categories of offenses which may be the basis for an expulsion and sets out specific procedures which must be followed in the expulsion process.

In reviewing an appeal of an expulsion decision, the Wisconsin Court of Appeals has stated that the scope of the State Superintendent's review is limited to that set out in sec. 120.13(1)(c), Wis. Stats. In Racine Unified School Dist. v. Thompson, 107 Wis. 2d 657, 667, 321 N.W.2d 334 (1982), the court of appeals *in dicta* stated: "The

superintendent's review, then, would be one to insure that the school board followed the procedural mandates of subsection (c) concerning notice, right to counsel, etc." Id. It is therefore incumbent upon the State Superintendent in reviewing an expulsion decision to ensure 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 interests of the school district demand the pupil's expulsion.

In reviewing the record in this case I find that the De Soto School District complied with all of the applicable procedural requisites and I am therefore compelled to affirm the expulsion. However, the parents of Brandon and the record raise additional issues worthy of comment.

First, I agree with counsel for the district that this record supports the board finding that Brandon does not presently have an exceptional educational need. Both the latest M-Team information and the opinions of the school's experts offered at hearing indicate that Brandon is not currently identified or suspected of having an exceptional education need as legally defined.

During the hearing, Brandon's mother asked that he again be evaluated for an EEN. The attorney for the board indicated that subject was not then before the board and the board had "no jurisdiction to consider" that request. No further information was provided the parent on this subject, at least as far as is discernable from the tape recording and record. The following information is provided in the event the parents have not already been advised of the appropriate provisions of the applicable Departmental rule and law. In Michael P. D. v. Kenosha Unified School Dist., Decision and Order No. 172

(October 8, 1990), the Department made clear a parent may request a current M-Team evaluation even after a child's expulsion. Section PI 11.03(2)(a), Wis. Adm. Code, indicates such referral should be in writing and include the reasons why the person believes the child is a child with an EEN. A school district cannot refuse a proper referral. Section PI 11.03(2)(f), Wis. Adm. Code. Upon consent of the parent an M-Team must be appointed. Sections PI 11.04(1)(a)l. and (2)(a), Wis. Adm. Code. It is for the M-Team to determine the scope and nature of the evaluation.

Second, the decision whether to expel a pupil, and if so, for how long, are matters left to the discretion of the board where the provisions of sec. 120.13(1)(c), Wis. Stats., are otherwise complied with. Lavel A. v. Kenosha Unified School Dist., Decision and Order No. 147 (January 12, 1987), Susan Marie H. v. Kenosha Unified School Dist., Decision and Order No. 157 (June 18, 1988). A board may expel a regular education student for the entire period "between the ages of 4 and 20 years" encompassed in the provision in Art. X, sec. 3 of the Wisconsin Constitution. Jesse K. v. Joint District No. 2 of Sun Prairie (and others), Decision and Order No. 131 (June 17, 1985), Dustin M. v. Cedarburg School Dist., Decision and Order No. 202 (February 9, 1993). On such matters this Department is not permitted to substitute its judgment for that of the locally elected officials. However, as the state Department statutorily charged with "supervision" of K-12 education, this Department is in a unique position to observe implementation of educational policy trends on a statewide and even a national basis. With my many years as a school superintendent and a history of supporting teaching staff in their trying and difficult positions with the most challenging of difficult children, and considering the

standards presently existing statewide in the education community, I must say that in my view this record fails to support the lengthy expulsion imposed.

In the present case the district offered evidence that Brandon was socially maladjusted rather than emotionally disturbed. The evidence also indicated those diagnoses may not be mutually exclusive. There was also information introduced on the subject of various childhood disorders including aggressive and non-aggressive conduct disorders. There were limited allegations in this case of aggressive acting out, and no no reliance was placed on a statutory ground which included the element of dangerousness. Four of the eight incidents upon which the district relied for expulsion involved the same teacher. In this case there was no offer of conditional early reinstatement to school nor an offer to provide even limited home bound instruction. Particularly in cases not involving conduct dangerous to health or safety some districts find short periods of expulsion, of less than a semester, serve to satisfy the needs of those concerned. Some districts, in commendable recognition of the continuing needs of expelled pupils, routinely as a matter of policy make conditional early reentry available each term to all expelled pupils. I urge the board here to consider whether a creatively crafted conditional early reentry offer or a type of home bound instruction through the basic skills or other mutually acceptable instructor might be salutary to all concerned.

Third, the board violated its own handbook definition of expulsion when it chose to expel for a period longer than that set out in the board-adopted student handbook. Because the period statutorily at risk was properly noticed, the Department does not find statutory error. However, since reliance is placed on the language of a Department-

recommended form, further comment is appropriate. The intent behind the language in the Departmental form was to advise pupils and parents of the outside limits of the law, particularly in districts where the expulsion notice forms included no mention of ANY PERIOD of expulsion that was at stake, not as a blanket override of a shorter duly-adopted local rule as was effectively accomplished here. Is it not incongruous for a board to adopt and impose rules of discipline on pupils subjecting violators to expulsion but not feel similarly constrained with respect to the rules the board places on itself?[1]

My decision should not be read as excusing or condoning Brandon's misconduct in any way. I recognize the extremely difficult task a school district faces in addressing the needs of particularly challenging students. These tasks may be even more difficult in rural or more economically-stressed districts where resources are limited. I also recognize that disruptive students detract from and diminish the quality and quantity of teaching for non-disruptive students. Nevertheless, I strongly urge the members of the board and the school administration to join together to offer Brandon another educational opportunity.

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[1] Failure of a governmental body to observe its own rules is not a per se due process violation, Levitt v. U. of Texas - El Paso, 759 F. 2d 1224, 1230 (5th Cir. 1985), accord U.S. v. Caceres, 440 U.S. 741, 59 L. Ed. 2d 733, 744 (1979), but can be in a given case. Assuming this agency may rule on constitutional issues under certain circumstances, Fulton Foundation v. Department of Taxation, 13 Wis. 2d 1, 11, 108 N.W.2d 312 (1961), OAG 7-92 (3-18-92), and Michaelene J. v. Washington School Dist., Decision and Order No. 161, p. 11 (May 19, 1989), it will refrain from doing so here in light of the actual notice given, the timing of the objection, and the record as a whole.

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 complied with all of the procedural requirements of sec. 120.13(1)(c), Wis. Stats., with regard to Brandon's expulsion.

ORDER

IT IS THEREFORE ORDERED that the expulsion of Brandon H. D[redacted] by the De Soto School District Board of Education is affirmed.

Dated this 3rd day of May, 1993.

Lyle C. Martens /AS

Lyle C. Martens
Deputy Superintendent of Public Instruction
By Delegation of the Interim State Superintendent of Public Instruction