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ABSTRACT

On January 22, 1974, the South Dakota State Board of Education, after a year's study and deliberation, adopted a resolution defining the nimimal standards for procedural due process guaranteed a public school student when he is suspended or expelled from school. Under the resolution the due process procedure adopted by each school district must consist of no less than the following minimum standards: (1) adequate notice of the charges; (2) reasonable opportunity to prepare for and meet the charges, (3) an orderly hearing adapted to the nature and circumstances of the situation, and (4) a fair and impartial decision. The report describes the historical and constitutional foundations of the concept of due process and provides guidelines for applying the concept. (Author/JF)

STANDARDS AND GUIDELINES FOR PROVIDING DUE PROCESS OF LAW TO THE SOUTH DAKOTA STUDENT

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Department of Education and Cultural Affairs

DIVISION OF ELEMENTARY AND SECONDARY EDUCATION

Don Barnhart
State Superintendent

FOREWARD

Dear Fellow South Dakota:

This set of standards on due process is the second publication by this office dealing with the South Dakota student. The first, "A Guide to Student Rights and Responsibilities in South Dakota", (1972) received wide acclaim as a valuable resource for students, parents, teachers, administrators, school boards and communities.

This handbook was developed because education is the most important function of state and local governments, and because the 14th Amendment to the Constitution prohibits the State from depriving any person of life, liberty or property without due process of law. It is designed to assist the local school board in developing rules and procedures for granting due process to a student who is suspended or expelled from school for a period of time extending into the fourth school day.

The specific standards adopted by the State Board of Education are listed in a resolution adopted by the Board and printed on page 6 of this handbook. All other material is for informational purposes only. It is recommended that each school board use the services of an attorney before officially adopting its due process guidelines.

The emerging democratic school in which students are involved in decision-making and mutual problem-solving is important to nurture as this nation approaches her 200th birthday. The student plays a unique role in sustaining our democratic society. As a student learns and grows in the rights discovered in a free public education, the student discovers that rights are always accompanied by responsibilities. When the student's realization of freedom with responsibility matures, the notion blossoms and becomes that of self-governing citizens forming a self-governing community. In short, the student must be given the chance to become the kind of citizen the First Amendment to the Constitution demands. The founders of this country realized the necessity of having citizens who could think, and think for themselves.

Once again, our goal is to assist the local school district in the formulation of policies affecting students. We recognize the importance of education to developing self-governing citizens. On this alone does Democracy's survival depend.

Warm wishes,

Don Barnhart

DON BARNHART
State Superintendent

PREFACE

On January 22, 1974, the South Dakota State Board of Education, after study and deliberation extending over a year's time, adopted a resolution defining the minimal standards for procedural due process guaranteed a public school student when suspended or expelled from school. Under the resolution, the due process procedure adopted by each school district must consist of no less than the following minimum standards:

1. Adequate notice of the charges; and

2. Reasonable opportunity to prepare for and meet the charges; and

3. An orderly hearing adapted to the nature and circumstances of the situation; and

4. A fair and impartial decision.

No one observing the course of educational affairs in South Dakota over a period of time was surprised at such a pioneering declaration. The resolution was just another link in a chain of events stretching all the way back to the adoption of the Constitution in 1889. The Constitution of 1889 was notable for its detailed provision for "a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all." The Legislative arm of the government was directed to provide forthwith and in perpetuity for "all suitable means to secure to the people the advantages and opportunities of education."

Like the founders, later generations of South Daktans maintained a stable faith in education, not only to insure the security of a republican form of government, but also to provide to the child an opportunity to grow in the morality and intelligence essential to his citizenship and success in adult life. So important was their faith in education as a necessity that by the late 1960's, South Dakotans were backing that faith by dedicating one-third of all state expenditures to educational purposes. **(Encyclopedia Britannica, 1973 ed., Vol. 20, p. 1015c).**

However, disturbing developments were taking place in the late 1960's -- developments in which basic fundamental rights were at issue. Where the State has undertaken to provide an education, said the United States Supreme Court, that educational opportunity must be offered to each and all **on an equal basis.** Nor may the State deprive an individual of such an important right without first bringing into play the full force and effect of "the law of the land," a term dating back to Magna Carta. What rights do students have to educational opportunities provided by the State?

The State Legislature in 1973 answered this question in part by enacting SDCL 13-32-4. The statute authorized the State Board of Education to establish minimum standards for hearing procedures for the protection of students' rights and directed that each school district in the State must provide procedural due process hearings for students in accordance with state and federal constitutional guarantees.

These guarantees of educational opportunity are based on teamwork between the school district board and the State Board of Education. Each district board decides what grounds it will use for suspension or expulsion of a child from its public schools. Where that exclusion extends into the fourth school day, the district board may utilize the guidelines contained in pages 27-31 of this handbook in developing its own due process procedure. However, in all cases the procedure must conform to the four elements contained in the resolution of the State Board of Education on page six of this handbook.

The requirement that no individual shall be deprived of life, liberty or property **without due process of law** provoked a larger number of lawsuits than has any other part of the Constitution. Hopefully, such expensive and time-consuming litigation will diminish where local school district boards make available to children and their parents a functional due process procedure.

The forward-looking leadership which is part and parcel of South Dakota history continues unabated. So far as this writer has been able to determine, no such standards and guidelines exist at the State level in any of the other 49 states. Such a fine and fair expression of educational opportunity **will succeed,** not only because it is in line with the proud heritage of educational equality which forms the warp and woof of the State's past, but also because it is essentially just and proper and a **reasonable** means of coping with the future. This, to me, interprets the true meaning of due process of law!

March 1974

M. CHESTER NOLTE

Denver University

PART I
INTRODUCTION

EDUCATION . . . is a highly – prized American birthright . . .

EDUCATION IS A PRINCIPAL INSTRUMENT IN AWAKENING THE CHILD TO CULTURAL VALUES, IN PREPARING HIM FOR LATER PROFESSIONAL TRAINING, AND IN HELPING HIM TO ADJUST NORMALLY TO HIS ENVIRONMENT. IN THESE DAYS, IT IS DOUBTFUL THAT ANY CHILD CAN REASONABLY BE EXPECTED TO SUCCEED IN LIFE IF HE IS DENIED THE OPPORTUNITY OF AN EDUCATION. SUCH AN OPPORTUNITY, WHERE THE STATE HAS UNDERTAKEN TO PROVIDE IT, IS A RIGHT WHICH MUST BE MADE AVAILABLE TO ALL ON EQUAL TERMS.

Mr. Chief Justice Warren for a Unanimous Court in **Brown v. Board of Education**, 347 U.S. 483 (1954)

THE FOUNDING FATHERS. . . were convinced of its merit . . .

THE STABILITY OF A REPUBLICAN FORM OF GOVERNMENT DEPENDING ON THE MORALITY AND INTELLIGENCE OF THE PEOPLE, IT SHALL BE THE DUTY OF THE LEGISLATURE TO ESTABLISH AND MAINTAIN A GENERAL AND UNIFORM SYSTEM OF PUBLIC SCHOOLS WHEREIN TUITION SHALL BE WITHOUT CHARGE, AND EQUALLY OPEN TO ALL; AND TO ADOPT ALL SUITABLE MEANS TO SECURE TO THE PEOPLE THE ADVANTAGES AND OPPORTUNITIES OF EDUCATION.

South Dakota Constitution
Article VIII, 1 (1889)

THE SUPREME COURT SPEAKS . . .

THE FOURTEENTH AMENDMENT, AS NOW APPLIED TO THE STATES, PROTECTS THE CITIZEN AGAINST THE STATE ITSELF AND ALL OF ITS CREATURES – BOARDS OF EDUCATION NOT EXCEPTED. THESE HAVE, OF COURSE, IMPORTANT, DELICATE, AND HIGHLY DISCRETIONARY FUNCTIONS, BUT NONE THAT THEY MAY NOT PERFORM WITHIN THE LIMITS OF THE BILL OF RIGHTS. THAT THEY ARE EDUCATING THE YOUNG FOR CITIZENSHIP IS REASON FOR SCRUPULOUS PROTECTION OF CONSTITUTIONAL FREEDOMS OF THE INDIVIDUAL, IF WE ARE NOT TO STRANGLE THE FREE MIND AT ITS SOURCE AND TEACH YOUTH TO DISCOUNT IMPORTANT PRINCIPLES OF OUR GOVERNMENT AS MERE PLATITUDES.

Mr. Justice Jackson for the Majority in **West Virginia State Board of Education v. Barnette**, 319 U.S. 624, 637 (1943)

THE LEGISLATURE ANSWERS . . .

AN ACT

ENTITLES, An act to amend SDCL 13-32-3, relating to the authority of school boards to discipline students and provide for a hearing.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

That SDCL 13-32-4 be amended to read as follows:

13-32-4. The school board of every school district shall assist and cooperate with the teacher in the government and discipline of the schools. The board may suspend or expel from school any pupils insubordinate or habitually disobedient, and the person in charge of the school may temporarily suspend any such pupils. Such expulsion shall not extend beyond the end of the current school year. **The state board of education is authorized to establish standards for hearing procedures for the protection of students' rights. Each school district board shall provide procedural due process hearings for students in accordance with such standards when the suspension or expulsion of a student extends into the fourth school day.** (SL 1973, ch99.)

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E STATE BOARD OF EDUCATION COMPLIES. . .

Pursuant to the authority of SDCL 13-32-4, the following rules were adopted by the state board of education on August 9, 1974:

ARTICLE 24:07
STUDENT DUE PROCESS

CHAPTER 24:07:01
DEFINITIONS OF TERMS

Terms used in this article, unless the context plainly requires otherwise, mean:

(1) "Board," the duly constituted board of a school district;

(2) "Expulsion," a denial to a student to participate in any school activity for a period of time;

(3) "Long term," a suspension or expulsion of a period of four school days or more;

(4) "Parent," a parent or guardian;

(5) "Principal," the person designated to be in charge of an attendance center in a school district;

(6) "Short term," a suspension or expulsion for a period of three school days or less;

(7) "Superintendent," a superintendent of a school district or his authorized designee;

(8) "Suspension," a denial to a student to participate in any school activity for a period of time.

General Authority: SDCL 13-32-4. Law Implemented: SDCL 13-32-4.

CHAPTER 24:07:02
SHORT TERM HEARING PROCEDURE

If a short term suspension or expulsion is anticipated because of a student's misconduct, the principal or superintendent shall give oral or written notice to the student and the parents if available as soon as possible after discovery of the alleged misconduct. Such notice shall state the rule, regulation or policy allegedly violated, the time and place where a hearing will be conducted by the superintendent or principal. The student will be given an opportunity to answer the charges and present evidence in his behalf. The superintendent or principal shall render a decision as soon as possible after the hearing.

General Authority: SDCL 13-32-4. Law Implemented: SDCL 13-32-4.

CHAPTER 24:07:03
LONG TERM HEARING PROCEDURE

24:07:03:01 **Written report of incident.** If a long term suspension or expulsion is anticipated because of a student's misconduct, the principal will file a written report with the superintendent by the end of the school day following the day of discovery of the alleged misconduct. The report shall set forth the known details of the incident or incidents and the known parties involved.

General Authority: SDCL 13-32-4. Law Implemented: SDCL 13-32-4.

24:07:03:02 **Notice of hearing.** If the superintendent deems that there are grounds for a long term suspension or expulsion, he shall notify the president of the school board as soon as possible that a hearing may be required. Within two school days from the day on which he receives the notice of the alleged misconduct, the superintendent shall give notice of hearing to each board member, the student and the student's parents and such notice shall contain the following minimum information:

(1) The rule, regulation, or policy allegedly violated;
(2) A summary of the current evidence;
(3) A list of proposed witnesses;
(4) A tentative date, time and place for the hearing;
(5) A description of the hearing procedure;
(6) The reason for the disciplinary proceedings;
(7) A statement that the evidence and some of the student's records are available at the school for examination by the student, his parents, and his representative;
(8) A statement that the student may present witnesses and shall submit to the superintendent prior to the hearing a list of such witnesses and details of the evidence to be presented in the student's behalf.

General Authority: SDCL 13-32-4. Law Implemented: SDCL 13-32-4.

24:07:03:03 **Right of waiver.** The student or his parents, when applicable, may waive the right to a hearing by written notification to the superintendent at least twenty-four hours prior to the time set for the hearing. If the hearing is not waived, the hearing shall be held on the date, time

nd place set forth in the notice unless a different date, time and place is agreed to by the parties.

General Authority: SDCL 13-32-4. Law Implemented: SDCL 13-32-4.

24:07:03:04 **Hearing procedure.** The school board shall constitute the hearing board. The presiding board member shall have authority to limit unproductively long or irrelevent questioning. The hearing shall be an open hearing unless a request is made by either party that the hearing be closed. The board may provide for making a record of any information orally presented at the hearing and shall provide for such a record when requested by the student.

General Authority: SDCL 13-32-4. Law Implemented: SDCL 13-32-4.

24:07:03:05 **Decision of board.** The decision of the board must be based solely on the evidence presented at the hearing and should state substantial findings of fact on which the board's decision rests.

General Authority: SDCL 13-32-4. Law Implemented: SDCL 13-32-4.

24:07:03:06 **Right of appeal.** An adverse decision to the student by the school board may be appealed to a court of law.

General Authority: SDCL 13-32-4. Law Implemented: SDCL 13-32-4.

SCHOOL BOARDS ARE MEMBERS OF THE DECISION-MAKING TEAM . . .

In a federal form of government such as ours, educational decision-making is a shared responsibility at local, state, and federal levels. Ideally, decisions should be made as close to the problem as possible. Thus, local control of education is a cherished American right. In 1923, however, the Supreme Court ruled that educational decisions were subject to supervision by the Courts.[1] Later rulings by the Supreme Court were to the same effect,[2] resulting in constant supervision of educational decisions by courts of law. The net effect has been to limit local and state control of educational matters, as expressed in a 1972 case on compulsory attendance.[3]

However strong the State's interest in universal compulsory attendance, it is by no means absolute to the exclusion or subordination of all other interests.

The leading case on student behavior is one which arose in 1969 in Iowa.[4] When students were suspended for wearing black armbands in school to publicize their opposition to the war in Vietnam, the Supreme Court held that the State, in the form of school officials, had over-stepped its powers, using in part these words which now control the operation of the public schools:

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[1] In Meyer v. Nebraska, 262 U.S. 390 (1923) a state statute which prohibited the teaching of German to children below the eighth grade was held by the Court to be unconstitutional as a contracting "of the spectrum of knowledge."

[2] In Pierce v. Society of Sisters, 268 U.S. 510 (1925) the Court held that an Oregon statute which required all children to attend public schools only was an illegal use of legislative power; in West Virginia State Board of Education V. Barnette, 319 U.S. 624 (1943) the court furthered its control of local boards by saying that members of Jehovah's Winesses could not be required to salute the flag as a condition of attendance at the public school and in Epperson v. State of Arkansas, 393 U.S. 99 (1968) the Court struck down a state statute which subjected teachers who taught Darwin's theory of evolution to criminal prosecution.

[3] Wisconsin v. Yoder, 92 S.Ct. 1526 (1972) where the Court excepted children of the Amish faith from full enforcement of the state's compulsory attendance statute.

[4] Tinker v. Des Moines School District, 393 U.S. 503 (1969).

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In the absence of a specific showing of Constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

The test which the Supreme Court now uses to determine the substantive rights of children in schools is called the "balancing" test, or the "balancing of the interests" test. Its operation goes something like this. A governmental agency, such as the school board or the legislature, enacts a policy or law which in turn is challenged on the grounds that it is an overreach of the State's power to control the individual. The claim is that the rule in question unnecessarily limits the individual's rights or deprives that individual of some constitutionally guaranteed right "without due process of law." Unlike the cases prior to **Tinker**, which required the plaintiffs to show that their rights were being denied them, the new "balancing" test adopted by the courts now holds that the burden of proof that the rule is necessary falls upon the school officials themselves." In the absence of a specific showing of Constitutionally valid reasons to regulate their speech," said the Court in **Tinker**,[5] students in public schools are entitled to freedom of expression of their views."

The "interests" which the student has are those protected by the First and Fourteenth Amendment -- freedom of speech, religion, assembly, press, and petition, as well as the right to due process and equal protection of the laws. Where those interests are limited, denied, or affected and that limitation, denial or effect is through action by State officials, the State must show cause why the enforcement of the rule is necessary, and that it cannot protect the State's "interests" unless it is allowed to limit individual freedoms in the way it is now doing.

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[5] Id., at 511.

This is not to say that individual freedoms cannot be limited by the State; like all other constitutional freedoms, individual freedoms in school are not absolute. However, since local boards must show factually (not through opinion) that it is necessary to limit individual freedoms in order to protect its "interests" in an orderly school system, the Board's case will founder and fail if it cannot meet this burden of proof.

Boards ordinarily can prevail if they can show, as a matter of fact, that unless individual freedom is limited, one of the following "interests" will be affected: (1) there will be a substantial disruption of the on-going program of studies at the school; or (2) there will be an invasion of the rights of others; or (3) there will be created a clear and present danger; or (4) there will be a threat to the health, welfare and good order of the school itself. Since the board must present facts to support its contention, any **a priori** (in advance) fear that the freedom will result in disorder is not constitutionally permissible. As the Court said in **Tinker**, where the board had based its decision on exclusion for wearing black armbands in school, mere fear is not enough of a basis on which to deny anyone a constitutionally guaranteed right.

> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.[6]

[6] Id., at 408-9

As with the student's right to freedom of expression, so the Court has said that the State may not limit an individual's right to academic freedom,[7] to attend desegrated schools,[8] to free exercise of his religion,[9] and to due process of law.[10] It is this latter right which gave rise to this handbook.

Nor may the State, by means of an official act of its agencies, "stigmatize" an individual for life. This is especially true where local board action may work to stamp a child as "incorrigible", "mentally retarded", or "feeble minded." In Wisconsin, a state statute provided that the names of alcoholics should be posted in taverns and liquor stores to prevent sales to them of alcoholic beverages. The Supreme Court held that such a statute stigmatized the individual, and caused him to lose his good name.

> Where the State attaches a badge of infamy to a citizen, due process of law comes into play. Where a person's good name, reputation or honor or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.[11]

The net effect of these court rulings is not that the government may not limit individual freedoms; it does mean that the government cannot do so without due process of law. The remaining pages of this handbook show how local boards are equal partners with the State Board of Education in assuring students that their due process rights shall be forever secure.

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[7] Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[8] Brown v. Board of Education, 347 U.S. 483 (1954).

[9] Sherbert v. Verner, 83 S.Ct. 1790 (1963).

[10] In re Gault, 87 S.Ct. 1428 (1967).

[11] Wisconsin v. Constantineau, 91 S.Ct. 507 (1972).

PART II
SUBSTANTIVE DUE PROCESS

WHAT IS MEANT BY DUE PROCESS OF LAW?

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

Due process of law means different things in differing situations, and consists of what the Supreme Court says it consists of. What may constitute due process of law in one situation may not be sufficient in another situation. Therefore, your Legislature has instructed the State Board of Education to be more specific in delineating what due process of law shall consist of in the schools of the State of South Dakota.

This is a task not unlike that of trying to delineate general guidelines pertaining to the admonition, "Do unto others as you would have them do unto you." Since what you would do in any given situation depends upon the circumstances, a universal rule of thumb applicable to due process of law in any and all situations is difficult, if not indeed impossible, to promulgate.

Nevertheless, the intent of the Legislature in SDCL 13-32-4 is clear: students' constitutional rights to fairness and reasonable treatment must be protected by local boards and the State Board of Education. The State Board is required[2] to "establish standards for hearing procedures for the protection of students' rights." In turn, each local board "shall provide procedural due process hearings for students in accordance with such standards when the suspension or expulsion of a student extends into the fourth school day."[3]

Accordingly, the State Board, shortly after Senate Bill No. 83 was signed into law by Governor

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[1] U.S. Constitution, Amendment, XIV (1868).

[2] Opinion of Gordon O. Hayes, legal advisor to the Board, October 23, 1973.

[3] SDCL 13-32-4 (1973).

Richard Kneip.[4] instituted a series of statewide discussions of the best ways to implement the Legislative intent. Meetings were held in which parents' groups, school board members, principals, superintendents, and students were brought together to discuss what language should be used. This feedback was helpful in drafting the procedural guidelines which appear in Part III of this handbook. A Task Force of 12 representatives of the people was instituted and held meetings on August 2nd and October 15th, 1973. In all, some 170 principals, superintendents, board members, teachers and students were involved in seven area meetings, and the procedures went through several drafts before being approved in principle by the State Board of Education.

Attorneys at law who participated in the discussions leading to these standards were questioned on the advisability of having a hearing panel or individual fact-finder conduct the hearing instead of the local Board of Education. Their advice was that since South Dakota statutory law currently makes provision for the local Board of Education **alone** to expel or suspend a student for a period exceeding three school days, that the Board must have the final determination of that right. It was the considered opinion of most of the attorneys, however, that current statutory law does not preclude the possibility of using some form of hearing panel or individual other than the local Board of Education, so long as that body were advisory only to the Board.

Thus, the local Board of Education, at its discretion, if it believes that the best interests of the student would be better served, may empower a fact-finding individual or panel to hold the hearing and gather information to be used by the Board as a basis for its decision. This individual or panel would conduct the hearings as described in the procedural standards set forth in Part III of this booklet.

At the conclusion of the hearing, the chairman of the hearing committee, or the individual fact-finder, would then provide, within three days' time, a written report of the facts elicited at the hearing to the president of the local Board of Education, who in turn would call a meeting of the

[4] March 27, 1973.

B to consider a verdict. The Board of Education, acting entirely upon information contained in the report thus submitted, would take the necessary action either to suspend or expel the student for the remainder of the semester, provided, however, that nothing contained herein shall be in conflict with the provisions of the hearing standards as set forth on page six of this booklet.

Selection of the individual fact-finder or members of a fact-finding panel shall proceed upon the reasonable assurance to the Board that these individuals are sufficiently qualified to conduct an impartial hearing in an expeditious manner, consistent with the rights of the student. By mutual consent, a tri-partite hearing panel may be selected in the following manner: (1) The Board of Education shall choose one member; (2) the student, his parent or guardian shall choose the second; and (3) the two individuals so chosen shall choose the third member, who shall act as chairman. The written report to the Board of Education of the hearing panel's findings of fact may or may not be accompanied by a recommendation to the Board on the disposition of the case, provided, however, that any such recommendation shall be advisory only and not binding upon the Board of Education.

Such an arrangement is eminently fair, because it allows the local board to decide how conservative or how liberal it will be in assessing penalties against a student for disobedience to one of its rules or policies. Since community standards of conduct differ, this arrangement should allow for local option on the grounds for suspension or expulsion, while proceeding under standardized due process guidelines in all instances.

RESOLUTION

WHEREAS, the Legislature, under SDCL 13-32-4, requires that each school district board shall provide procedural due process hearings for students in accordance with standards developed by the State Board of Education, such standards to apply when the suspension or expulsion of a student extends into the fourth school day,

NOW, THEREFORE, BE IT RESOLVED, That the State Board of Education hereby directs each school district board to adopt and implement substantive rules and regulations pertaining to the suspension or expulsion of a student extending into the fourth school day, which the school district board shall deem appropriate and which contains the four conditions as listed on page six of this handbook.

NOTE: Although the State Board of Education was not authorized in SDCL 13-32-4 to establish a procedure for suspensions of less than three days, it is recommended that each school district adopt and have a written procedure to follow for these cases.

JE PROCESS AND THE RULE OF THREE . . .

Three requirements govern the question of whether or not a student is afforded due process of law in school. First, there must be a fair and reasonable rule which is broken or disobeyed. Second, the rule must apply equally to all students in the school. Third, if punishment is meted out for violation of a reasonable and fair rule, that procedure by which the punishment is assessed must be fair, reasonable and impartial.

The rule must be fair. When all the facts surrounding the enforcement of the rule are taken into account, a rule is fair and legal if the board can demonstrate factually (in contrast with opinion) that it is necessary to limit individual freedoms in the interests of an overriding public purpose to be served. For example, where a board was able to support a dress and appearance code for students on a factual basis, the court allowed the rule to stand. Other boards have been able to show that certain rules were needed to avoid substantial disruption of the school program,[5] to prevent the invasion of the rights of others,[6] to protect school property,[7] or to alleviate a clear and present danger to the health, safety, and welfare of the student body.[8] But where proof of the need was lacking, or where the rule was so vague and standardless that it left the individual uncertain as to the conduct it prohibited, or left teachers and administrators free to decide, without any legally fixed standards, what was prohibited and what was not in each particular case, the courts have held that such a rule cannot stand.

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[5] Blackwell v. Issaquena Co. Bd. of Education, 363 F.2d 749 (1966) in which a board was allowed to ban the wearing of freedom buttons in school where their use led to a substantial disruption of the orderly routine of the school.

[6] Tucker v. Eng, N.J. Commissioner of Education Decision, 1972, in which a student's suspension for extorting money from other students was upheld.

[7] Betts v. Board of Education, City of Chicago, 466 F.2d 629 (1972) in which a school board was upheld in disciplining a student who activated a false fire alarm.

[8] In re State in the Interest of G.C., 296 A.2d 102 (1972) in which a student was punished for illegal possession of dangerous drugs for sale to other students.

The student must also know beforehand that what he has done will be likely to cause a penalty to be assessed. Thus, boards should involve the students, teachers, parents, and others in the formulation of the rules under which the school will operate. If a rule is changed, it cannot be done unilaterally, resulting in punishment where before no punishment was assessed for that particular act. The essence of due process is **fairness** and **reasonableness** in everything that the board does.

> The essence of due process is the rule that all persons are entitled to be informed as to what the State commands or forbids.[9]

A rule which prohibits a youth from expressing a difference of opinion with those in authority violates freedom of speech and expression. Said the U.S. Supreme Court, in holding that a student had been unfairly dealt with:

> Freedom to differ is not limited to things that do not matter much, but the test of substance is the right to differ as to things which touch the heart of the existing order.[10]

The rule must apply equally to all. A rule is unfair if it applies only to certain individuals and not to others. Some of the hair rules for boys in school have been declared unenforceable because they apply only to boys and not to girls in the same school. The same would apply to a rule that girls could not wear slacks made of blue denim where boys in the same school did not come under such a rule. Corporal punishment rules for boys but not for girls suffer from the same infirmity. In Idaho, a board rule which prohibited female students from wearing slacks, pantsuits, and culottes was held to be in excess of the board's powers to invade the privacy of its female students.[11] However, since circumstances alter cases, this might not be considered an invasion of privacy if the board could illustrate the need for such a rule in that particular situation.

It is well settled that a rule which in effect makes punishable guilt by association is unfair.

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[9] Gaughen v. Smith, 471 F.2d 47 (1972).

[10] Street v. New York, 89 S.Ct. 1354 ( ).

[11] Johnson v. Jt. School District No. 60 Bingham County, 508 p.2d 547 (1973).

nce unconstitutional.[12] And due process condemns obtaining a confession by secret inquisitorial processes, such as physical or psychological pressures, since due process both requires procedural safeguards and condemns compulsion.[13]

A rule which is unnecessarily broad is suspect on its surface and the Board must justify the need if it is to prevail. In Indiana, a rule provided for loss of participation in interscholastic athletics for a period of one year by students who did not attend school in the district in which their parents lived. The court said that the rule was an unconstitutional restriction on the student's right to travel, and that, although the state's interest in maintaining the amateur nature of high school athletics was quite narrow, its rule was broad, and could not stand.[14] Similarly a rule which prevented married students from participating in extra-curricular athletics was based on the board's desire to discourage teenage marriages. The court said that although the board's motives were of the highest, it could not obtain a legal end by the use of illegal means. "What greater invasion of marital privacy can there be than one which could totally destroy the marriage itself?" the court asked, in ordering the boy reinstated to the eligibility list in baseball.[15]

Sometimes rules are entirely lacking, giving rise to differing treatment for different individuals. In Florida, a court held that a summary suspension for ten days was not illegal, but an additional thirty-day suspension by the superintendent was excessive.[16] And in Omaha, the board was ordered to file within the next ten days a definite set of standards and regulations so that all people involved "in the administration of the problem children may know what is expected and when they are to act, all as explained and ordered herein."[17]

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[12] Elfbrandt v. Russell, 86 S.Ct. 1238 (1966).

[13] Gallegos v. Colorado, 82 S.Ct. 1209 ( ).

[14] Sturrup v. Mahan, 290 N.E.2d 64 (1972).

[15] Davis v. Meek, 344 F.Supp. 298 (1972).

[16] Williams v. Dade Co. Sch. Bd., 441 F.2d 299 (1971).

[17] Graham v. Knutzen, 351 F.Supp. 642 (1972).

The practice of reducing students' grades for non-academic violations is also viewed with a jaundiced eye by federal courts.[18] In New York, the board voted to revoke a student's letter where, outside the season, and after he had won the athletic award, the student was caught by the coach drinking beer, although he was of legal drinking age at the time of discovery.[19] Other boards have been barred from prohibiting a student from participating in graduation exercises although she was eligible to receive her diploma,[20] and from discriminating by meting out punishment along racial lines.[21]

The rule must be enforced in a fair manner. Finally, where a rule is fair and equitable, the board may still fall short of due process requirements if the manner in which punishment is assessed against the student is unfair, arbitrary, or capricious. The standard for determining whether or not one has been afforded procedural due process is whether he has been treated with **fundamental fairness** in the light of the total circumstances.[22] While each case involving due process is different from every other case, the following have been declared by the courts of law as minimal essentials of procedural due process in student suspension and expulsion cases:

1) adequate and timely notice and an opportunity to prepare a defense;

2) an opportunity to be heard at a meaningful time and in a meaningful manner; and

3) the right to a speedy and impartial hearing on the merits.[23]

While the hearing must have **probative** value (based on proof),[24] a fair hearing before school officials does not contemplate a trial as in a court, it being sufficient that the student is given every fair opportunity of showing his innocence.[25] Ordinarily, the courts will not interfere to overthrow a deci-

[18] Minorics v. Bd. of Education, N.J. Comm. of Educ. Decision, (1972).

[19] O'Connor v. Bd. of Educ., 316 N.Y.S.2d 799 (1970).

[20] Ladson. Bd. of Educ., 323 N.Y.S.2d 545 (1971).

[21] Griffin v. DeFelice, 325 F.Supp. 143 (1971).

[22] Buttney v. Smiley, 281 F.Supp. 280 (1968).

[23] Birdwell v. Hazelwood Sch. Dist., 352 F.Supp. 613 (1972).

[24] , 148 N.W.2d 378 (1967).

[25] Cornette v. Aldridge, 408 S.W.2d 935 ( ).

sion of the board but the court may inquire into the basis of authority for a board's action and the effect it will have on the student and on the school as a whole.[26]

Generally, the more serious the punishment, the more careful must the board be in allowing for fairness, impartiality, and reasonableness in all that it does. Thus, the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.[27]

Although the three minimal essentials of procedural due process listed above constitute the lowest common denominator, in some cases the courts have held that a student has additional guarantees depending upon the nature of the charges. In a case in which a juvenile was sentenced to a reform school without a due process hearing, the Supreme Court held these rights to be "minimal" under the circumstances:

1) Notice of charges;

2) Right to counsel;

3) Right to confrontation and cross-examination;

4) Privilege against self-incrimination;

5) Right to a transcript of the proceedings; and

6) Right to appeal.[28]

Somewhere between the "minimal" requirements of notice, opportunity to be heard, and the right to a hearing, and the more stringent requirements outlined in **Gault**, lie the areas of normal school board operation. The important thing to remember is that due process of law is not for adults alone; that is, the school may not have one set of standards for children, another for adults.

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[26] Moran v. Sch. Dist. No. 7, Yellowstone Co., 350 F.Supp. 1180 (1972).

[27] Birdwell v. Hazelwood Sch. Dist., supra.

[28] In re Gault, 87 S.Ct. 1428 (1967).

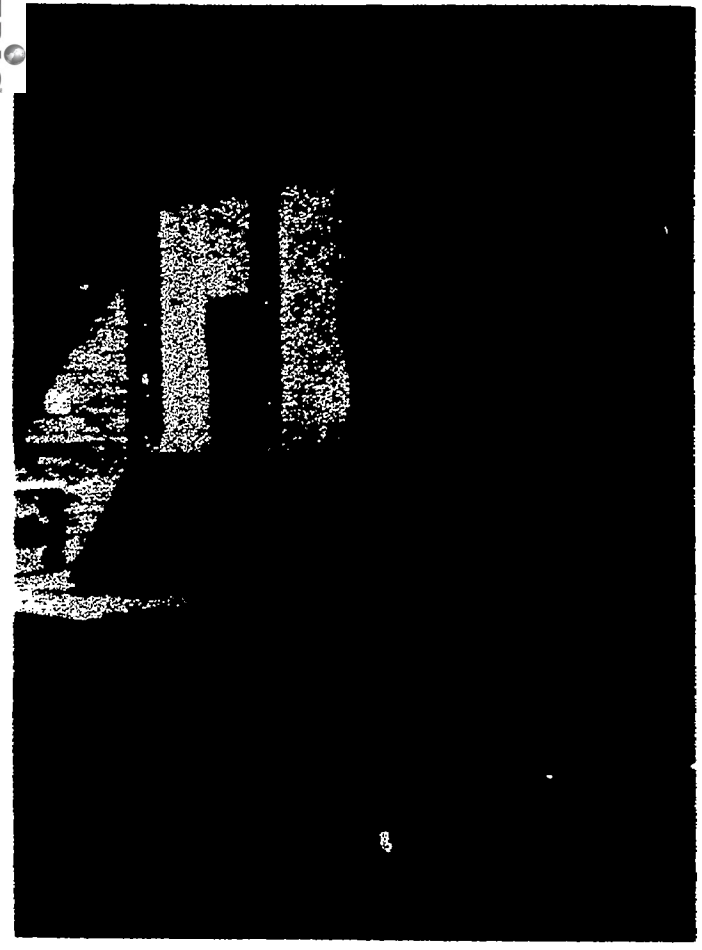
Children are 'persons', according to the Supreme Court, and they do not shed their constitutional rights at the schoolhouse gate.[29]

It was generally agreed by those who participated in the discussion of these standards that exclusion from a single class for a period extending beyond three (3) school days would be termed long-term suspension or expulsion and would require due process in the same manner as would be necessary if the student were excluded from the entire school program.

The leadership of the South Dakota High School Activities Association indicated that they regard extra-curricular activities as a part of the general curriculum and therefore, anyone excluded from an activity for disciplinary reasons should also be given due process as described in Part III of this handbook.

The following set of guidelines has been developed by the State Board of Education for the use of local boards in according due process procedural rights to students in response to the legislative mandate.

[29]Tinker v. Des Moines School Board, 393 U.S. 503 (1969).



PART III

PROCEDURAL DUE PROCESS

STATE BOARD OF EDUCATION GUIDELINES FOR HEARING PROCEDURES FOR LONG-TERM SUSPENSION OR EXPULSION OF STUDENTS .....

GUIDELINES FOR HEARING PROCEDURES FOR LONG-TERM SUSPENSION OR EXPULSION OF STUDENTS

Pursuant to

SDCL 13-32-4

NOTE: A local school district board may wish to use the following model as the district's procedure for providing for a hearing procedure or the district board may modify the procedure to meet local needs.

A. Definition of Terms

(1) "Expulsion" shall mean denial to a student to take part in any school activity for a period of time as determined by the school board, but in no instance shall expulsion extend beyond the end of the current school year.

(2) "Suspension" shall mean temporary denial to a student to attend school or to take part in any school activity or function. Suspension may be invoked by school personnel having charge of the school. "Short-term suspension" shall mean a period of three school days or less. "Long-term suspension" shall mean a period of four school days or more.

(3)"Insubordination" shall mean failure to comply with reasonable rules, regulations, policies, orders or instructions given by the school board via authorized personnel who act on behalf of the school board in a single instance.

(4) "Habitual disobedience" shall mean a repeated failure to comply with reasonable rules, regulations, policies, or instructions given by the school board via its authorized personnel who act on behalf of the board on three or more separate occasions.

B. Minimum Hearing Procedure for Long-term Suspension or Expulsion

The following shall constitute the minimum hearing procedure to be followed prior to a long-term suspension or expulsion of a student:

(1) Charge. A written charge shall be filed by the principal with the superintendent or his designee no later than the end of the school day following the day of discovery of alleged misconduct.

(2) **Notice.** If the superintendent or his designed deem that there are grounds for a long-term suspension or expulsion, he or his designee shall notify the president of the school board that a hearing will be required, and within four school days, notice will be given to each member, student, and his parent or guardian, the notice to contain the following information:

(a) the rule allegedly violated and the acts of the student thought to have violated the rule;

(b) the penalty which ordinarily accompanies a violation such as this where the hearing is waived;

(c) a tentative time, date and place for the hearing;

(d) a description of the hearing procedure to be used, including whether the board will be represented by an attorney;

(e) notification that written statements about the alleged misconduct and some of the student's records are available at the school for examination by the student, his parents, or his representative.

(f) a statement that before long-term suspension or expulsion can be invoked, the student has a right to a hearing which may be waived if he and the parents agree to forego it by furnishing the superintendent or his designee a signed statement to that effect. The student and his parent(s) shall notify the school superintendent or his designee within twenty-four hours after receipt of notice as to whether they will waive the hearing. If no notification is received, the hearing schedule will be observed, except that at any time during the procedure, the hearing may be waived by the student.

(3) **Hearing schedule.** If the hearing is not waived, the hearing shall be scheduled within three days after notification is received as noted in (2) on the previous page.

(4) **Nature of the hearing.** The school board shall provide a hearing consistent with the rights of the student.

(5) **Group hearing.** When more than one student is charged with violating the same rule and it is known that they have acted in concert, and the facts are basically the same for each of the students, a single hearing may be conducted for all of them if the board believes that the following conditions exist:

(a) A single hearing will probably not result in confusion, and

(b) No student will have his interests substantially prejudiced by a group hearing.

If, during the hearing, the board finds that a student's interests will be substantially prejudiced by the group hearing, it may order a separate hearing for that student.

(6) **Witnesses and testimony.** The superintendent or his designee shall make available in his office at least two days prior to the hearing the signed statements of all persons on whose information are based the charge against the student and the penalty ordinarily accompanying a violation of this nature. These statements may be examined and copied by the student, parents or representative. If the superintendent or his designee later receive further information that will be employed in the hearing, he must notify the student of it and make copies available prior to the hearing. These statements shall set out with some particularity the information known to the persons making them.

(7) **Student records.** Besides having access to the written statements of potential witnesses, the student, his parents, or his representative shall have access to his previous behavior record and his academic record. If the school superintendent deems it necessary, the information contained in such records may be furnished to the parents or the student's representative only on condition that they be explained and interpreted to the parents or the representative by a person trained in their use and interpretation.

(8) **Attendance at hearing.** The board of education may limit attendance at the hearing to the board members, the superintendent or his designee, the principal, the school district's attorney, if requested by the board, the student, the parents and the student's representative. If the school board's attorney is to be present, the student may be represented by legal counsel; otherwise, any adult of his choice may suffice to meet the needs of due process of law. Witnesses shall be present only when they are giving information to the board. At the discretion of the board, the student may be temporarily excluded with the concurrence of the student's parents, or with the concurrence of the representative at such times as the student's psychological or emotional problems are being discussed. No one shall be present with the board when it has received the case during its deliberation in reaching a verdict.

(9) **Testimony.** The student shall have the right to speak in his own defense and may be

questioned on his testimony, or he may choose not to testify, in which case he shall not be threatened with punishment or later punished for refusal to testify, nor shall such refusal in any way be construed as an indication of guilt.

(10) Record. The hearing board shall provide for making a record of any oral information presented to it at the hearing. Statements and other written matter presented to the board shall be kept on file.

(11) Burden of proof. It shall be the superintendent's or his designee's duty to present to the hearing board at the hearing the signed statements of all persons having information bearing on the student's alleged misconduct. These shall be the selfsame statements that previously were available to the student in the school office and those statements that the student has submitted to that office. The superintendent or his designee shall also submit a copy of subsections (a) and (b) of the notice given to the student's representative, or the parents under Section (2).

Further, at the request of the board, the student, his parents, or the student's representative, the superintendent or his designee shall submit to the hearing board the student's record of previous behavior and his academic record. If the superintendent, his designee or the hearing board deem it necessary, the information contained in such records shall be explained and interpreted to the board by a person trained in their use and interpretation.

The superintendent or his designee shall caution the hearing board about the need for confidentiality of all records and statements submitted to the board.

(12) Oral testimony. The hearing shall consist of oral testimony if any be offered, and a review of the statements and records presented by the superintendent or his designee under Section (10) above. But if the superintendent, the student, or the board requests that any witness appear in person and answer questions, that witness must do so or his statements may not be considered or relied upon by the board.

(13) Questioning of witnesses. Members of the hearing board, the superintendent or his designee, the school district's attorney, the student, his parents or his representative may question witnesses about any matters logically relevant to the charge against the student and the proper disposition of the matter at hand. The presiding board members shall have the authority to limit unproductively long or irrelevant questioning.

(14) Parents' role. The parents or legal guardian should be present at the hearing and should have an opportunity to make a statement to the board on their feelings about the proper disposition of the case and to answer questions. Any statements they make need not be filed with the superintendent or his designee in advance of the meeting.

(15) Representation. If the student's parents think his interests can be better protected at the hearing through representation by another adult, who may be an attorney, the student may be so represented and the non-parent adult may act with the right to present witnesses, question witnesses, make statements, and otherwise assist the student. If the non-parent adult is an attorney, the superintendent of schools or his designee is to be notified 24 hours in advance of the hearing subject to Section 6 above.

(16) Postponements. If the parents of a minor student cannot be notified or cannot be present at the hearing because of extenuating circumstances, the school board shall postpone the hearing until notification of the parents is possible, provided, however, that if the postponement shall extend beyond seven school days for good and sufficient cause the student shall be admitted to school until the hearing is held and a ruling made.

(17) Effect of reaching age 18. If the student has reached the age of majority (age 18) at the time the alleged acts took place, he is then authorized to make decisions, sign documents, and obtain representation on his own behalf, and may elect to be represented by his parent or guardian.

(18) Failure to appear. If the student, his parent or guardian, or his representative do not waive their right to a hearing or request postponement for good and sufficient cause, including causes in Sections 16 and 17 and are not present at the time and place scheduled in the hearing notice, the hearing shall proceed without them.

(19) Subpoena power. If the hearing board finds it necessary to have a witness appear before it and the witness refuses after being requested to appear, the hearing board may use the subpoena power to compel the presence of the witness.

(20) Majority vote required. On the question whether the student violated a reasonable rule on misconduct, the board shall reach its decision by a majority vote of the board. The decision must be based solely on the evidence presented at the hearing and should state findings of fact on which the board's decision rests. If no misconduct is found, the matter is terminated and no further action may be taken against the student.

When a finding of misconduct is found, even if a rule on misconduct has not been violated, the board's report shall include a decision to the superintendent of schools or his designee, but shall in no case exceed the ordinary penalty outlined in Section 2 (b) above. It is understood that the entire scope of aids are to be maid available to the student, including counseling attempts and grievance procedures where available for his rehabilitation. The decision should be in terms of educative needs, rather than in terms of the punitive measures which apply.

(21) **Appeal.** A decision adverse to the student may be appealed to a court of law.

(22) **Review of expulsion during first semester.** If a student is expelled from school during the first semester of any given school year, his expulsion must be automatically reviewed by the school board before the beginning of the second semester unless the expulsion originally took effect within three weeks of the beginning of the second semester. This review may lead to a recommendation that the student shall be reinstated for the second semester.

(23) **Absence on expulsion not a violation of compulsory attendance.** If a student is suspended or expelled from school in accordance with the provisions of these guidelines, his absence from school shall not be deemed a violation of the statutes of the State of South Dakota relating to compulsory attendance at school.

PART IV
IMPLEMENTING DUE PROCESS

NOTE: These are sample forms which may be used by a school district. Any school board may develop its own forms but a set of forms similar to these should be used to carry out the due process procedure.

Exhibit A

Date_____

TO: _____ TO: _____

(parent or guardian) (student)

_____ _____

_____ _____

_____ _____

NOTICE OF HEARING

RE: Proposed Long-term Suspension or Expulsion From School

Information has been presented to me indicating that_____may be guilty of sufficiently serious violations of the policies, rules and regulations of this school district to require the school board to consider either a long-term suspension or expulsion from school according to procedures adopted by the school district, pursuant to SDCL 13-32-4.

Specifically, the above-named student is charged with _____

_____

Preliminary evidence and statements thus far indicate that specifically the above-named student did_____

_____

e specific penalty being recommended to the school board is_____

_____

A hearing before the School Board of School District No.____of_____ _____, South Dakota has been set for the following time and place for the purpose of affording a full discussion of the charges and allowing the student or his parent or representative to refute those charges.

Date and time of hearing: _____

Location of hearing: _____ _____

The student, his parent, guardian, or representative may see a statement of the charges and the supporting statements in the office of the Superintendent of Schools or his designee on or after_____. Statements supporting the student's case must be in the hands of the Superintendent or his designee 24 hours before the hearing begins.

If the student, his parent, guardian or representative wish to waive the hearing, and accept the recommended penalty as stated above, the enclosed waiver form must be returned to the office of the Superintendent of Schools within 24 hours of receipt of this notice. If such waiver is not received, the hearing shall be held as scheduled above. Enclosed is a copy of SDCL 13-32-4 and the Hearing Procedures of School District No._____of _____, South Dakota.

_____

Superintendent of Schools

cc: Each School Board Member
cc: File

Exhibit B

Date _____

_____
Name of Student

AUTHORIZATION TO REVIEW RECORDS - RE: Hearing regarding Long-term Suspension or Expulsion from school.

I certify that I am the parent or guardian of _____
Name of Student

and do hereby authorize School District No. _____ of _____,

South Dakota to permit _____ to view the school

records of the above-named student, including academic and disciplinary records.

Signature of Parent or Guardian

Address

Note: If student is 18 years of age or older, he may sign above in lieu of parent or guardian.

Exhibit C

WAIVER OF HEARING FORM

Date _____

_____
Name of Student

Superintendent of Schools
School District No. _____
_____, South Dakota

RE: Waiver of Hearing

I certify that I am the parent/guardian of _____ and that I have received the following items from you:

(a) Notice of hearing on proposed long-term suspension or expulsion from school of above named student;

(b) A copy of SDCL 13-32-4; and

(c) The Hearing Procedures of School District No. _____ of _____, South Dakota.

I request that the hearing specified in the hearing notice be waived, with the understanding that by so waiving the hearing, the recommended penalty will automatically become effective upon action of the School Board of this school district.

_____

Signature of Parent or Guardian

_____

Address

Note: If student is 18 years of age or older, he may sign above in lieu of parent or guardian.

Exhibit D

FINDINGS OF FACT AND RESULTANT ACTION FORM

Date _____

TO: _____ TO: _____

Parent or Guardian Student

_____ _____

_____ _____

RE: Findings of Fact and Resultant Action - from hearing concerning Long-term Suspension or Expulsion from schoo

_____

Name of Student

1. A hearing was conducted by the School Board of School District No. _____ of _____, South Dakota, or ___, at _____regarding the proposed Long-term Suspension or Expulsion from school of the above-na student.

As a result of this hearing, the School Board of School District No. _____ of _____, South Dakota has determined the following to be fact: _____

_____

_____

3. As a result of finding the above list to be fact, the School Board of School District No._____ of _____ South Dakota has instructed the Superintendent of Schools of the School District to carry out the following action:

_____

_____

4. The decision of this School Board is appealable through the proper courts of the State of South Dakota.

5. An automatic review of this decision (a) will be made by the School Board on _____ (b) is not necessary. Said Student is eligible for re-enrollment on _____.

Signed _____

_____

Superintendent

School District No. _____

_____, South Dakota

NOTE OF APPRECIATION

For their thoughtful and energetic efforts which led to the final completion of these standards and guidelines, the Division of Elementary & Secondary Education and the State Board of Education expresses their appreciation to:

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James Parke, President
David W. Meade, Executive Secretary

School Administrators of South Dakota
Dr. James Hansen, President
Dr. Keith Thomson, Executive Secretary

South Dakota Education Association
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