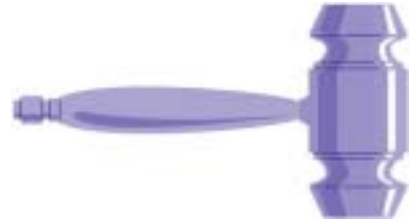


# Legal Corner



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## Student Discipline – Just the Basics



Principals and assistant principals are often the generals and the foot soldiers in the battle of maintaining proper student conduct and decorum in our schools. In order for principals and assistant principals to be effective in the pursuit of orderly schools, they must be aware of and act in accordance with the applicable rules. If principals or assistant principals do not do what they should do under “*applicable law*,” they will not be able

to do what they want to do. For example, a three-day suspension may be overturned by the courts if the principal fails to do what he or she should do in terms of the required process that must be provided to the student before the suspension is imposed.

It is essential for principals and assistant principals to understand what the “*applicable law*” is comprised of with respect to student discipline. **A short list of the “applicable law” is the following:**

1. The United States constitution, particularly, the First Amendment, the Fourth Amendment and the Fourteenth Amendment;
2. The Individuals with Disabilities Education Act (“IDEA”) and Section 504 of the Rehabilitation Act as to children with disabilities or children thought to be disabled;
3. The Pennsylvania Constitution;
4. The Public School Code;
5. The regulations of the State Board of Education;
6. The standards of the Secretary of Education;
7. The policies of the school entity; and
8. The school’s Code of Student Conduct.

Allow me to suggest that before any discipline is imposed by any principal or assistant principal, he or she must be aware of and comply with the requirements set forth in each source of applicable law. If you, as a reader of this article, have no understanding, for example, of what the Fourth Amendment is and how it applies to student discipline, then you need training. If you, as a reader of this article, have no knowledge of how the Pennsylvania Constitution applies to

student discipline, then you need training. If you, as a reader of this article, have not read the entire policy manual of your school district, then you need to do so in order to ensure that what you do is in compliance with the policy manual. In light of these observations, in the short space available for this article, I will attempt to highlight the *basics of student discipline*.

The United States Constitution grants numerous substantive and procedural rights to students that protect them in the context of student discipline. The Free Speech clause of the First Amendment means that a school district cannot discipline a student for expressive conduct that is “protected.” Therefore, whenever a principal or assistant principal is contemplating the discipline of a student who has engaged in expressive conduct (such as where a student publishes a web site that contains threatening or profane language) or who has refused to engage in a school activity (such as the Pledge of Allegiance), an assessment must be made whether the speech is protected by the Free Speech clause of the First Amendment. If protected, discipline may not be imposed as a result of the protected expressive conduct. It is beyond the scope of this article to define the line between “*protected*” and “*unprotected*” speech; suffice it to say, all principals and assistant principals must have a sense for what is protected and what is not before imposing discipline.

Under the Free Exercise clause of the First Amendment, students have the right to engage in certain religious activity, or the right to refrain from engaging in certain activities in school because of their religious beliefs. For example, a student in your school may be distributing religious materials in your school. Can the student be disciplined or is the student’s distribution of the materials protected?

The Fourth Amendment provides that government may only engage in “reasonable” searches and seizures. As it applies to public schools, and as a general rule, no search may be conducted unless there is a “reasonable” suspicion that the search will turn up contraband or evidence of wrongdoing. Moreover, where there is reasonable suspicion to allow a search to be conducted, the “scope” of the search must be reasonable. For example, rarely, if ever, will a “strip search” of a student be considered to be reasonable. I would

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recommend that no principal or assistant principal ever make the determination to conduct a “strip search” -- the potential of legal liability is too great. Indeed, even if the police are involved in the situation and the police recommend a “strip” search, I recommend against it. Nor should a principal or assistant principal allow the police to conduct a strip search in school.

The Pennsylvania Constitution has been interpreted to provide privacy rights to students that are broader than the privacy rights afforded by the United States Constitution. This means that searches, such as suspicionless drug or alcohol testing, that may be allowed under the Fourth Amendment may not necessarily be allowed under the Pennsylvania Constitution.

The Fourteenth Amendment provides that no person shall be deprived of “life, liberty, or property, without due process of law.” The right to attend public school has been held to be a “property” right for purposes of the Fourteenth Amendment. Therefore, public schools may not deprive a student of public education without providing “due process” to the student.

Due process has both a substantive component and a procedural component. In general, the substantive component of due process means that disciplinary rules must meet certain minimal standards. For example, the rules may not be so vague as to make it difficult for students to know what is or is not prohibited. For example, one court held that a rule that prohibits students from being “under the influence” of drugs or alcohol is too vague and is therefore void under the due process clause of the Fourteenth Amendment.

Procedurally, the due process clause requires notice and an opportunity to respond to allegations be provided to students before they are deprived of their right to a public education. Generally, there is no deprivation of education unless there is an exclusion from school. In order to ensure that public schools comply with procedural due process requirements, the State Board of Education promulgated and adopted somewhat detailed regulations highlighting the notice and hearing requirements associated with different types of exclusions from schools. See, 22 Pa.Code §§12.3, 12.6, 12.7 and 12.8.1. **Those regulations provide the following basic concepts:**

- Public school entities may adopt reasonable and necessary rules governing the conduct of students in school and must adopt a “code of student conduct,” which must be published and distributed to students and parents. 22 Pa.Code §12.3.
- A suspension for up to 10 school days may be imposed only after the student has been informed of the reasons for the suspension and given an opportunity to respond, unless it is clear that the health, safety or welfare of the school community is threatened if there is any delay in imposing the suspension. 22 Pa.Code §12.6(b)(1)(ii).
- Parents must be notified immediately of any suspension. 22 Pa.Code §12.6(b)(1)(iii).

- An “informal hearing” is required if the suspension is from 4 to 10 days in length. 22 Pa.Code §12.6(b)(1)(iv).
- An exclusion that lasts longer than 10 school days is defined as an expulsion. 22 Pa.Code §12.6(b)(2).
- Before any expulsion, there must be a formal hearing before the school board. 22 Pa.Code §12.8.
- Before an in-school suspension, a student must be given notice of the reasons for the suspension and an opportunity to respond. 22 Pa.Code §12.7(a).
- If the in-school suspension is to last more than 10 days, there must be an “informal hearing” before the 11<sup>th</sup> day. 22 Pa.Code §12.7(c).

As made clear under the foregoing regulations, notice and an opportunity to be heard is required for purposes of both regulatory and due process requirements. However, it is not enough to provide the required notices and hearings -- it is also imperative that principals and assistant principals be able to prove that they provided the required notices and hearings. **I recommend that a form be developed and used for all suspensions that contain the following fields:**

- (i) Demographic information containing name, date of birth, age, grade level, school assignment, date of “hearing” or opportunity to be heard, name and address of parent/guardian, student phone number;
- (ii) Summary of the incident(s);
- (iii) Whether the student: (a) is currently on probation, (b) was ever on probation, (c) is attending any other public school entity, (d) ever had professional counseling outside of school, (e) has been identified as a student with disabilities, or (f) is on any medication that may effect behavior;
- (iv) School history;
- (v) Activities;
- (vi) Recent academic performance;
- (vii) Attendance record;
- (viii) Disciplinary record;
- (ix) Other relevant information;
- (x) Resolution recommended by principal or assistant principal; and
- (xi) The identity of the participants in the “hearing” or opportunity to be heard.

It would not be a bad idea to have the parent and/or student sign and date a copy of the document attesting to the accuracy of the information.

Perhaps one of the most confusing and therefore least understood of all of the issues regarding special education students is discipline. The misunderstandings run the gamut from the mistaken belief that it is “illegal” to discipline a student eligible for special education, to the opposite end of the spectrum where special education status is regarded as irrelevant when meting out discipline. The current law lies



somewhere in the middle, providing eligible students with certain protections not afforded to non-disabled peers when discipline is necessary. Below are the highlights for both categories of special education students, those under Individuals with Disabilities Education Act ("IDEA") and those

protected under Section 504 of the Rehabilitation Act ("Section 504").

The IDEA provides protection for both students with disabilities and students who are thought to be students with disabilities with regard to disciplinary removals, i.e. suspensions and expulsions. Obvious removals are out of school suspensions and expulsions. It may be trickier to determine whether an in-school suspension is considered a "removal." It depends on whether the student's program is implemented (including certified staff) while suspended. If the full program -- with certified staff -- is not implemented in the in-school suspension, then each such day counts as a removal. A removal for more than 10 consecutive days or a series of removals that constitute a pattern because they cumulate to more than 10 school days is considered a change in placement. 34 CFR § 300.520.2. In all events, however, an exclusion in excess of 15 school days is defined in the Pennsylvania regulations as a change in placement. 22 Pa. Code §14.143.

The term "change in placement" is a critical term. IDEA 97 established extensive procedural safeguards to protect students with disabilities from school initiated unilateral changes in placement. Barring parental agreement, any removal from school in excess of the limits stated above is a "change of placement." From an administrative perspective, it is important that someone keeps track of the number of days of exclusion to which each student with disabilities has been subjected to so that the limitations are not exceeded.

There are two other points to be made regarding changes in placement. If a student is a danger to himself or others,

and parents will not agree to a change in placement, the school district can seek an expedited hearing to allow a hearing officer to determine placement. Lastly, a unilateral change in placement to an appropriate interim setting for no more than 45 days is allowed for offenses involving weapons or drugs. The parent may seek a hearing contesting the placement, but the interim setting is pendent until a decision is rendered.

If the limits for exclusions are going to be exceeded, the school district must first comply with a number of procedural and substantive requirements. The school district must convene an IEP team meeting to develop a behavioral assessment plan if the school district had not previously conducted a functional behavioral assessment; or review an existing behavioral assessment plan if one was previously developed, and thereafter as soon as practicable develop or revise and implement appropriate behavior interventions to address the behavior. If a removal to an alternative interim setting or a removal that constitutes a change in placement is contemplated, the IEP team must determine whether the child's behavior was a "manifestation" of the student's disability. This process is called a "manifestation determination" and the requirements are explicitly spelled out in the IDEA. **The school district must do the following:**

- Not later than the date the decision to take action is made, the school district must notify the parents, and provide the procedural safeguards notice;
- Immediately, if possible, but no later than 10 school days after the date the decision to take action is made, a review by the IEP team must be conducted concerning the relationship between the child's disability and the behavior subject to disciplinary action;
- The IEP team must conduct a review that takes into account, in terms of the behavior, all relevant information, including evaluations, observations and the Child's IEP and placement;
- **The IEP team must make a determination:**
  - In relation to the behavior, whether the child's program (IEP, placement supplementary services, behavior intervention strategies) were provided and appropriate;

- Whether the child's disability impaired the ability of the child to understand the impact and consequences of his/her behavior; and
  - Whether the child's disability impaired the student's ability to control the behavior.
- If the IEP team finds that the child's IEP was not appropriate, that the child's IEP was not being implemented in all respects, that the child's disability impaired his/her ability to understand the consequences or impact his/her behavior or that the student's disability impaired the child's ability to control his/her behavior, then the IEP team must conclude that the child's misconduct was a "manifestation" of the child's disability and the school district may not discipline the child;
  - If the IEP team finds that the behavior was not a manifestation of his/her disability, the student may be disciplined just as any non-disabled student would be. 34 CFR § 300.523.

Not only does the IDEA protect students who have been identified as students with disabilities, but it also protects students who are thought to be students with disabilities. IDEA provides that a child who has not yet been identified as a child with disabilities may have essentially the same rights as a child with disabilities if the school district has "knowledge" of a disability. The school district will be deemed to have "knowledge" under any one of the following circumstances: (i) if the parent expressed a concern in writing to school personnel that the child requires special education and related services; (ii) if a teacher has expressed a concern to school personnel about the behavior or performance of the child; (iii) if a parent requested an evaluation; or (iv) if the behavior or performance of the child demonstrates a need for special education. In such a case, a comprehensive evaluation will have to be conducted on an expedited basis and if it is determined that the child is a child with disabilities and that the misconduct was a manifestation of his/her exceptionality, then no discipline will be allowed to be imposed. On the contrary, an IEP with an appropriate behavior management plan will have to be developed and implemented.

IDEA is not the only federal law protecting students with disabilities. Section 504 of the Rehabilitation Act of 1973 also protects students with disabilities. IDEA mandates that students with disabilities who are in need of specially

designed instruction be provided with a free appropriate public education. ("FAPE") Section 504, on the other hand, provides that students with disabilities, whether they need specially designed instruction or not, are protected from unlawful discrimination. Pursuant to the regulations of the State Board of Education, if a child with disabilities needs specially designed instruction, Chapter 14 applies. However, if a child with disabilities does not need specially designed instruction, but needs one or more accommodations in order to attend school, Chapter 15 applies. Although these distinctions exist, for purposes of discipline, the federal Office of Civil Rights has determined that children with disabilities, regardless of whether they need specially designed instruction, may have similar, but not identical, rights with respect to discipline. Section 504 has also been interpreted by the Office for Civil Rights to require a manifestation determination where disciplinary removals constitute a "change in placement." 34 CFR § 104.35(a). Unlike IDEA, however, there are no detailed procedures. The team may need to supplement the evaluation data before making this decision. If the team decides that there is a connection between behavior and the student's disability, the student cannot be suspended for more than 10 days or expelled. If the team concludes there is no connection, the student would be subject to the school's regular disciplinary procedures. Also unlike IDEA, the appropriateness of the services or programming that is provided to the student with respect to his/her behavior at the time of the misconduct is not a factor.

It is unfortunate that student discipline is an issue that administrators must address every day. This article hopefully will help school administrators to better understand some of the very basic requirements pertaining to student discipline.

#### **Footnotes**

1. The citation to the "Pa.Code" is a reference to the compilation of regulations of all of Pennsylvania's state agencies, including the Pennsylvania Department of Education and the State Board of Education. The education related regulations are found in volume 22 of the Pa.Code.
2. The reference to "CFR" is a reference to the compilation of regulations of all of the federal agencies. It stands for the "Code of Federal Regulations." Many of the education related federal regulations are found in volume 34 of the CFR.