

Student Discipline: Due Process & Civil Rights Considerations

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Legal Requirements and Considerations

- 14th Amendment Due Process
 - 14th amendment prohibits the government and its administrative agencies from depriving an individual of life, liberty or property without due process of law
 - This prohibition has been extended to schools and student discipline (particularly removals from school due to suspension)
 - Goss v. Lopez, 419 U.S. 565 (1975)
 - Supreme Court established due process must be provided when suspended from school
 - At a minimum, students must be given NOTICE and an OPPORTUNITY TO BE HEARD
 - Drew a distinction between long term suspensions (more than 10 days) and short term suspensions (10 days or less) – long term suspensions may require more formal procedures

Due Process: Short Term Suspensions

- Student must be given oral or written notice of the charges
- Student must be given an opportunity to present his/her side of the story and/or an explanation for his/her behavior
- No delay is necessary between the time notice is given and the opportunity that the student is given to be heard
- Students not entitled to counsel, not entitled to confront and cross examine witnesses or to call his own witnesses
- Exception to prior notice requirement – if a student's presence poses a continuing danger to persons or property or an ongoing threat of disruption

Due Process in Practice: Short Term Suspensions

- Decision made by school administrator
- Prior to suspending the student, school administrator must give student NOTICE and OPPORTUNITY TO BE HEARD
 - Notice - meet with the student, notify the student of what he/she is accused of doing and the information that the school has to believe that the student engaged in such behavior
 - Opportunity to be heard - give the student an opportunity present his/her side of the story
- After meeting with student, issue written notice to parent detailing length and reason for suspension

Due Process: Long Term Suspensions/Expulsions

- Notice
 - Statement of the specific grounds for discipline and nature of the evidence on which the proposed disciplinary action is based
 - Courts are split on whether this has to be in writing, whether the names of witnesses and the thrust of their testimony must be included
 - There must be sufficient time between the notice and hearing
 - No consensus on what amount of time is sufficient - depends on nature and complexity of the charge, the type of evidence needed to answer the charge and its availability, and the time needed to gather witnesses
 - Amount of time should be “reasonable”
 - School policies should include a standard period of time for disciplinary hearings but allow flexibility under exceptional circumstances

Due Process: Long Term Suspensions/Expulsions

- Hearing (Opportunity to be Heard)
 - More formal than what is required for short term suspensions, but not overly formal
 - Final decision maker must be impartial
 - Can be a school official
 - Should not be personally biased
 - Schools should avoid using investigator as final decision maker
 - Right to counsel
 - No right to cross-examination absent compelling circumstances
 - Decision maker can only consider evidence presented at the hearing, which the student had an opportunity to respond to
 - Student must be allowed to present evidence, including evidence of mitigating factors
- Burden of proof = substantial evidence or preponderance of the evidence

Due Process In Practice: Long Term Suspensions/Expulsions

- Recommendation made by school administrator
- Two layers of notice and opportunity to be heard
 - Prior to recommendation and
 - Prior to final decision
- Prior to Recommendation
 - meet with student in the same way you would with short term suspension
 - if necessary, conduct investigation into circumstances of the student's behavior and any explanation provided by the student; student may be suspended pending investigation and recommendation for further disciplinary action
 - Investigation must be completed promptly (within 3 days = best practice)
- Written notice to parent of recommendation for long term suspension/expulsion and reason for recommendation; notice must explain information that is being relied on as a basis for the recommendation

Due Process in Practice: Long Term Suspensions/Expulsions

- Prior to final determination
 - Hearing must be held promptly after recommendation (5 days = best practice); a different administrator (who wasn't involved in investigation/recommendation) will serve as impartial decision maker
 - Student suspended pending results of hearing
 - At the hearing
 - School administrator or designee will present information relied upon to support recommendation
 - Student will be given an opportunity to respond to that information and present any information he/she wants considered; this can include mitigating evidence
 - Student may be represented by an attorney
- Final decision will be made promptly after hearing (2 school days = best practice); parent will be notified in writing of the final determination

Students with Disabilities

- Manifestation determination review must occur before a child's placement can be changed as a result of a disciplinary removal
 - Removal of more than 10 days = change in placement
- The manifestation determination review examines the relationship between the child's disability and misconduct
- A student cannot be removed as a result of disciplinary action if the student's behavior is a manifestation of his/her disability
- FAPE must be provided to students who are suspended or expelled (IDEA)
- An FBA and BIP may be necessary (IDEA)

Police Intervention

- Under Section 504 and IDEA, schools can call the police when a student's behavior warrants such a call, but don't apply such a practice in a discriminatory fashion

Discipline of Pre-K Students

- DC law amended to prohibit suspensions and expulsion of Pre-K students
 - Schools may suspended a Pre-K age student for up to 3 days if the student willfully caused or attempted to cause bodily injury unless the injury was caused in self defense
 - Schools may suspend a Pre-K age student for up to 3 days if the student threatened serious bodily injury to another person unless the threat was made in self defense
 - Expulsion completely prohibited

Discipline of Pre-K Students

- Definitions

- Pre-K Age – These prohibitions apply to children 3 or 4 years of age, and children who turn 5 after September 30th of the upcoming school year
- Out of school suspension - Any removal of a student from school attendance for an entire school day or longer
 - Sending a student home early for the day is permissible
- Bodily injury - A cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary
- Serious bodily injury - Bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty

Penalties for Truancy

- Students should also be afforded due process before they are suspended, expelled or involuntarily withdraw/unenrolled

Civil Rights Issues

- Federal civil rights laws prohibit discrimination on the basis of race, color, national origin, sex, and disability
- Schools must identify, avoid and remedy discriminatory disciplinary practices to ensure all students are provided with equal educational opportunities

Civil Rights Issues

- Intentional Discrimination
 - School has discipline policy that is discriminatory on its face – explicitly treats students differently based on race, national origin, color, disability, or sex
 - School has discipline policy that is neutral on its face but school administers the policy in a discriminator manner
 - Similarly situated students of different races are disciplined differently for the same offense
 - Selective enforcement of a facially neutral policy against students of one race
 - School policy is adopted with the intent to target students of a particular race for invidious reasons
 - Teachers or administrators act based on racially discriminatory motives

Civil Rights Issues

- Unintentional Discrimination – aka Disparate Impact
 - Schools violate federal civil rights laws when they implement facially neutral policies and practices that have an unjustified adverse impact against students on the basis of race, color, national origin, disability or sex
 - Three part test
 - Is there an adverse impact – look for disproportionality
 - Is the discipline policy necessary to meet an important educational goal
 - Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of an adverse impact
 - Examples of policies that can raise disparate impact concerns
 - Mandatory consequences
 - Policies that prevent students who are involved in the juvenile justice system from enrolling
 - Policies that impose out of school suspensions or expulsions for truancy

Civil Rights Issues

- Information that DOJ and OCR examine when investigating these issues
 - Written policies and unwritten practices
 - Data indicating number of referrals to administrators and/or law enforcement
 - Discipline incident reports
 - Student discipline records and discipline referral forms
 - School discipline data disaggregated by subgroup, offense, other relevant factors
 - Interviews

Search and Seizure

- Student has the right to freedom from unreasonable search and seizure of his/her property
- School administrators have a right under the law to search students and/or their property whenever there is reasonable suspicion students have something that violates school rules or endangers others
- Students may be searched to maintain the ongoing educational process, to maintain order, and/or to protect people and property
- Searches may include the student and his/her locker, desk, bedroom, school-owned computing resources and personal belongings
- There shall be no strip searches; students shall never be asked or required to disrobe

Student Discipline

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Key Elements of a Disciplinary Code

Statement of Shared Principles

Articulate a set of best practices

Clarify the rights of students/parents and responsibilities of charter schools

Develop a framework for suspension and expulsion procedures

Provide notice and clarity for the charter community about disciplinary expectations

- Note affirmatively that student discipline must comport with the penalties set forth in the discipline code

Key Elements of a Disciplinary Code

Suspension and Expulsion

Identify legal authorities (federal, state, any local) and ensure discipline policies comply with these requirements

- Investigation procedures (maintain written policy)
- Who conducts?
 - Ensure consistency, transparency, and impartiality
 - Interviewing protocol
 - Allow students to provide written statements
 - Should not require that students provide written statements

Key Elements of a Disciplinary Code

- Model witness statement form
- Preservation of evidence (maintain written policy)
- Removal of student from school (practices and communication with family)
 - Ensure that procedures comply with *Goss v. Lopez* and any applicable state and local laws
 - Restrict prehearing removals to circumstances that comply with *Goss*

Key Elements of a Disciplinary Code

General Topics to Consider in Shaping Discipline Policies

Sharing of code with families and students – actual notice of rules

Free speech

Evidentiary rules

- Hearsay
- Parties sharing evidence they will rely on and witness lists
- School sharing results of investigation

Competing protections – accused and witnesses

Key Elements of a Disciplinary Code

Mandatory reporting of abuse

Calls to law enforcement

Calls to Emergency Medical Service (EMS)

Search and seizure

3 Rules for Lawful Discipline Practices

1. Have an explicit, lawful disciplinary code that is provided to families
2. Implement it faithfully as a day to day practice
3. Implement it faithfully even in crises

Hypothetical 1: Throwing Chairs

Bobby, a 7th grade regular education student at Springsteen Charter Academy in Freehold, suddenly throws a chair at his teacher, Ms. Wisdom. He tries to explain that he saw a spider on her arm and wanted to save her from it but she silences him and sends him straight to the Principal, Mr. Right. Mr. Right suspends him for 5 days, informing Bobby's mom by phone. Bobby serves out the suspension at home.

Two weeks later Bobby throws another chair at Ms. Wisdom, also hitting the teaching assistant, Ms. Collateral Damage. He is taken to Mr. Right who invites Bobby and Bobby's mom to his office that afternoon for what he calls a disciplinary hearing. When she arrives Mr. Right listens to what Wisdom and Collateral Damage have to say and also to Bobby's side of things (he says he saw more spiders) and then Mr. Right decides to impose a two week suspension. Bobby serves out the suspension at home.

Hypothetical 2: Fighting

Sophie is a 5th grade student at Bon Jovi Prep. She has an IEP for SLD and was found fighting in the girls room, using a pencil to stab another girl. The school has a zero tolerance policy for violence and immediately suspends her. Earlier in the school year she was suspended for 5 days for other infractions. The school follows proper notice and due process steps, conducts a hearing and finds her responsible. The hearing officer calls for expulsion.

Hypothetical 3: Testimony?

A serious incident has occurred at Sinatra Charter High School – Lisa, a female 9th grade student was found by a teacher in the girl's room with torn clothes and bruises on her body. She said that Michael, an 11th grade boy, forced himself on her, attempting to rape her. She said he ran when she screamed and fought him off.

The school investigated, found her claims to be credible (although Michael denied any wrongdoing) and called the police. After arresting and processing him, the police released Michael and he returned to school several days later. The school then initiated an expulsion proceeding.

Lisa's attorney says she is terrified of Michael and does not want to testify in front of him. The attorney offers Lisa's written statement as evidence. Michael's attorney says Michael has the right to face his accuser and says the statement cannot be admitted. The hearing officer doesn't know what to do.