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# **Disrupting the School-To-Prison Pipeline: Navigating New York Education Law and Representing Students in Due Process Proceedings**

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**Friday, September 16, 2016**

**Albany Marriott**

***CLE Course Materials and NotePad<sup>®</sup>***

*Complete course materials distributed in electronic format online in  
advance of the program.*

Sponsored by the

New York State Bar Association and the Committee on Legal Aid

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New York State Bar Association**

# Lawyer Assistance Program 800.255.0569



## Q. What is LAP?

- A.** The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

## Q. What services does LAP provide?

- A.** Services are **free** and include:
- Early identification of impairment
  - Intervention and motivation to seek help
  - Assessment, evaluation and development of an appropriate treatment plan
  - Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
  - Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
  - Information and consultation for those (family, firm, and judges) concerned about an attorney
  - Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

## Q. Are LAP services confidential?

- A.** Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

### Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

## Q. How do I access LAP services?

- A.** LAP services are accessed voluntarily by calling 800.255.0569 or connecting to our website [www.nysba.org/lap](http://www.nysba.org/lap)

## Q. What can I expect when I contact LAP?

- A.** You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

## Q. Can I expect resolution of my problem?

- A.** The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

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## Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?
2. Is it difficult for me to maintain a routine and stay on top of responsibilities?
3. Have I experienced memory problems or an inability to concentrate?
4. Am I having difficulty managing emotions such as anger and sadness?
5. Have I missed appointments or appearances or failed to return phone calls?  
Am I keeping up with correspondence?
6. Have my sleeping and eating habits changed?
7. Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?
8. Does my family have a history of alcoholism, substance abuse or depression?
9. Do I drink or take drugs to deal with my problems?
10. In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?
11. Is gambling making me careless of my financial responsibilities?
12. Do I feel so stressed, burned out and depressed that I have thoughts of suicide?

There Is Hope

**CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT**

The sooner the better!

**Patricia Spataro, LAP Director**

**1.800.255.0569**

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# New York State Bar Association

## FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form-you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees: please complete, sign and return this form along with your evaluation, to the registration staff **before you leave** the program.

**You MUST turn in this form at the end of the  
program for your MCLE credit.**

<p><b>Disrupting The School-To-Prison Pipeline: Navigating New York Education Law and Representing Students in Due Process Proceedings</b> <b>Friday, September 16, 2016   New York State Bar Association's Committee on Legal Aid, Albany Marriott, Albany, NY</b></p>
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Name:

(Please print)

I certify that I was present for the entire presentation of this program

Signature:

Date:

**Speaking Credit:** In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.



# NEW YORK STATE BAR ASSOCIATION

## Live Program Evaluation (Attending In Person)

Please complete the following program evaluation. We rely on your assessment to strengthen teaching methods and improve the programs we provide. The New York State Bar Association is committed to providing high quality continuing legal education courses and your feedback is important to us.

Program Name:

Program Code:

Program Location:

Program Date:

1. What is your overall evaluation of this program? Please include any additional comments.

☐ Excellent ☐ Good ☐ Fair ☐ Poor

Additional Comments \_\_\_\_\_

2. Please rate each Speaker's Presentation based on **CONTENT** and **ABILITY** and include any additional comments.

	CONTENT				ABILITY			
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**Additional comments (CONTENT)**

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**Additional comments (ABILITY)**

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3. Please rate the program materials and include any additional comments.

☐ Excellent   ☐ Good   ☐ Fair   ☐ Poor

**Additional comments**

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4. Do you think any portions of the program should be **EXPANDED** or **SHORTENED**? Please include any additional comments.

☐ Yes – Expanded   ☐ Yes – Shortened   ☐ No – Fine as is

**Additional comments**

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5. Please rate the following aspects of the program: **REGISTRATION; ORGANIZATION; ADMINISTRATION; MEETING SITE** (if applicable), and include any additional comments.

	Please rate the following:				
	Excellent	Good	Fair	Poor	N/A
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Meeting Site (if applicable)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Additional comments**

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6. How did you learn about this program?

☐ Ad in legal publication   ☐ NYSBA web site   ☐ Brochure or Postcard  
☐ Social Media (Facebook / Google)   ☐ Email   ☐ Word of mouth

7. Please give us your suggestions for new programs or topics you would like to see offered

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NEWYORK STATE BAR ASSOCIATION

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## NYSBA Partnership Conference Presentation Outline

Friday, September 16th

9:00am - 10:45am

2 MCLE credits in Areas of Professional Practice for both experienced and newly-admitted

attorneys.

### *Disrupting the School-to-Prison Pipeline: Navigating New York Education Law and Representing Students in Due Process Proceedings*

Susan M. Young, Esq., Staff Attorney, Legal Services of Central New York

Diane E. Inbody, Esq., Staff Attorney, Long Island Advocacy Center

Wendy L. Gildin, Esq., Staff Attorney, Long Island Advocacy Center

Ashley Patronski, Esq., Staff Attorney, Legal Assistance of Western New York

#### I. Overview: How school disciplinary process feeds the School- to -Prison Pipeline and prevents access to education

- Education as a civil right
- Effect of “zero tolerance policies”
- Statewide suspension trends
- Disproportionality of suspensions on minority and other subgroups

#### II. Disciplinary Due Process

- Education Law Section 3214
- Principal’s Suspension
- Superintendent Hearing
- Manifestation Determinations and the role of the CSE

#### III. Advocacy Tips (discovery, codes of conduct, childhood trauma)

#### IV. Unique Concerns for English Language Learners (ELL) and students with disabilities

#### V. Appeal Process

- BOE appeals
- Appeal to Commissioner



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**Disrupting the School-To-Prison Pipeline:  
Navigating New York Education Law  
and Representing Students in Due  
Process Proceedings**

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# **DISRUPTING THE SCHOOL-TO-PRISON PIPELINE: NAVIGATING NEW YORK EDUCATION LAW AND REPRESENTING STUDENTS IN DUE PROCESS PROCEEDINGS OUTLINE**

## **SCHOOL-TO-PRISON PIPELINE**

**I. School-To-Prison Pipeline:** The "school-to-prison pipeline" refers to the policies and practices that push schoolchildren, especially our most at-risk children, out of classrooms and into the juvenile and criminal justice systems. This pipeline reflects the prioritization of incarceration over education.

**A. Changing Security Procedures:** Recent security measures have also turned schools into mini detention centers where search and seizure greet you at the front door. These prison-like conditions are mainly utilized in poor, urban, and predominately minority schools. Many are equipped with barbed wire, bricked up windows, and metal detectors. These schools are regularly met with “lock down” drills where police raid the facilities. These practices make students feel like prisoners. Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through A Structural Racism Framework*, 36 Fordham Urb. L.J. 1009, 1030 (2009).

### **B. Zero Tolerance Policies**

1. Lacking resources, facing incentives to push out low-performing students, and responding to a handful of highly-publicized school shootings, schools have embraced zero-tolerance policies that automatically impose severe punishment regardless of circumstances.

2. Schools rely on suspension, expulsion, citations, and arrest in order to handle disciplinary issues such as bringing a cell phone or iPod to class.

3. Zero tolerance policies were originally created in order to handle more serious issues such as bringing a weapon into the school. Over time, these policies have expanded to include more frivolous claims such as:

- Bringing scissors into the school.
- Bringing a cell phone or iPod into the school.
- Smoking cigarettes.
- Inappropriate language.
- Talking back to authority figures.
- Fighting.

### **C. Suspension Trends**

1. The U.S. Department of Education's Office for Civil Rights revealed that in 2013-2014 (the most recent data available), 2.8 million K-12 students received one or more out-of-school suspensions. This was a nearly a twenty percent decrease from the year 2011-2012, as more schools begin to adopt alternative ways of addressing non-violent student behavior.

2. Students of color, students with disabilities, or English language learners who are, on average, generally disciplined more than their peers. (U.S. DOE, Civil Rights Data Collection Center)

3. Students who are suspended from school are 3 times more likely to be incarcerated compared to their peers. This likelihood increases even further for children who have dropped out.



## **D. Disproportionality of Suspensions on Minority and Other Subgroups**

### **1. Other findings of the CRDC:**

- Black preschool students are 3.6 times as likely to be suspended as are white preschool students.
- In K-12 classes, black students are nearly four times as likely to be suspended as are white students. Black students are nearly twice as likely to be expelled- removed from school with no services- as are white students.
- Students with disabilities are more than twice as likely as students without disabilities to be suspended in K-12 settings.
- These suspensions lead to children falling behind, and eventually to dropping out. These children then have a much higher chance of committing a crime.

## **E. Syracuse City School District and Discipline**

**1. Investigation:** In 2014 the New York Attorney General filed a 44 page investigation into the Syracuse City School District following many complaints from parents including:

- a. Thirty-five percent of all students were removed from class and sent to a principal to be disciplined in the 2011-2012 school year.
- b. Racial disparities existed throughout the disciplinary process. Forty-four percent of black students were taken out of class and referred for discipline compared to 26 percent of white students. Twenty-five percent of blacks received at least one out of school suspension, compared to 12 percent of

whites. Blacks were recommended for superintendent's hearings, a precursor to long-term suspensions, at twice the rate of whites. Blacks also were more likely than whites to be disciplined for non-violent conduct.

- c. Students and parents did not get written notices of short-term suspensions as required by law. Administrators also routinely failed to describe the charges when providing written notice to parents.
- d. The district failed to provide adequate safeguards for children with disabilities. By law schools cannot discipline students based on conduct that stems from the child's disability. Review meetings must be conducted when children with disabilities are suspended for 10 or more days. The district failed to ensure that teachers and psychologists most familiar with the children attended these meetings.
- e. Only 5.3% of suspensions involving children with disabilities were found by the District to be a manifestation of the child's disability. This was due, in part, to a lack of representation amongst those knowing of the child's disability, and lack of consideration of the child's IEP already in place.

**2. Changes Pursuant to Assurance of Discontinuance:** The Attorney General's office called for changes to the District's disciplinary policies. This would limit suspensions to only the most severe and disruptive behaviors. This would also include teaching the educators of the district to reinforce positive student behavior rather than subject them to the discipline system. The Syracuse CSD has since changed its policies in response to the

investigation by adopting a new code of discipline, establishing training for staff on alternative approaches, and hiring an independent monitor to oversee progress.

#### **E. Strategies to Combat the School-to-Prison Pipeline**

1. Establish supportive and productive relationships with students and their families in a cultural and linguistically competent manner
2. Maintain and demonstrate abiding high expectations
3. Model social emotional competence and integrate social emotional learning strategies/activities/programs and other restorative justice initiatives into the academic curriculum throughout the school year
4. Provide a safe and supportive learning environment
5. Implement developmentally appropriate, engaging, effective and challenging instruction
6. Use positive behavioral approaches as opposed to reactive or punitive approaches that may create or escalate problem behavior.

Jane G. Cogshall, David Osher, Greta Colombi, *Enhancing Educators' Capacity to Stop the School-to-Prison Pipeline*, 51 Fam. Ct. Rev. 435, 439 (2013)

## **II. Helpful Resources:**

### **A. Articles:**

1. International Review of Law and Economics, *School Suspension and the School-to-Prison Pipeline*.
  - a. Provides a study (year 2015) showing the impact of a suspended out of school student on the probability of committing an offense.

- b. Account for the amount of crimes committed by students on school days where he/she were not in school due to suspension vs. days children normally have off from school. Takes into account gender, race, primary language, and age.
  - c. The results show that youth who are suspended out of school on days when school is in session have a statistically significantly higher probability of committing an offense than youth who are not.
- 2. Jane G. Cogshall, David Osher, Greta Colombi, Enhancing Educators' Capacity to Stop the School-to-Prison Pipeline, 51 Fam. Ct. Rev. 435 (2013)
  - a. “Speaks of the importance of teachers forming relationships with parents and children in order to decrease suspensions. “Educators--teachers and school administrators--can affect children's trajectory into and through the pipeline to prison in at least four ways: (1) through their relationships with children and youth, (2) through their attitudes and social emotional competence, (3) by contributing to the conditions for learning and (4) through their responses to student behavior. Although these factors are analytically distinguishable, they interact. And although we cite the empirical literature, our recommendations are also consistent with focus groups and interviews we have conducted with students, teachers and families, across the country. Each of these four ways is explored in turn.”

## **B. Law Review Articles:**

1. Michael R. Mastrangelo, Fighting for Educational Stability in the Face of Family Turmoil, 17 CUNY L. Rev. 33 (2013).

2. Deborah N. Archer, Introduction: Challenging the School-to-Prison Pipeline, 54 N.Y.L. Sch. L. Rev. 867 (2010).

**C. ABA Journal:**

1. Stephanie Francis Ward, Racial Imbalance Feeds School-to-Prison Pipeline, ABA J., April 2014, at 66.
  - a. “Black students are 3.5 times more likely to be expelled than white students, said Nancy Heitzeg, a sociology professor at St. Catherine University in St. Paul, Minn. She noted that more than 70 percent of students involved in school-related arrests or referred to law enforcement are black or Latino. Many of them, she added, have special needs addressed through individualized education plans.”

**D. Cases:**

1. *Williams v. State of California*, No. 312236 (Cal. Super. Ct., S.F. County 2000).
  - a. It is important to note that Williams is not a case that challenges the pipeline in its entirety. The legal strategy advanced in Williams focuses primarily on showing that the pipeline's economic dimension cumulatively results in students of color being denied an equal and adequate education.
    - a. Students in this predominantly minority school were forced into a prison-like atmosphere. They were forced through metal detectors and dog “sniff” tests. Attorneys argued that these horrible conditions led to students being denied an adequate education. Building conditions and inadequate school materials also played a major factor. This often led to crime related activity

b. More information on the case in Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through A Structural Racism Framework*, 36 Fordham Urb. L.J. 1009, 1039 (2009)

## SCHOOL DISCIPLINE AND DUE PROCESS

### I. *Goss v. Lopez*, 419 U.S. 565 (1975):

**A. Right to Education Is a Property Right:** Students suspended from school are entitled to ‘at least minimal due process protection.’ This requires students be given notice of the charges as well as an opportunity to present their version in a hearing. The Court established that education is a property right, thereby linking education to the 14<sup>th</sup> Amendment’s protection against the deprivation of “life, liberty, or property” without due process. The Court held that protected property interests are created and defined by state statutes or rules. *See Board of Regents v. Roth*, 408 U.S. 564 (1972). Thus, because the state in this case had provided a mandatory education to children, such education was a property right and could not be taken away without due process of law.

**B. Minimum Amount of Due Process:** The *Goss* Court established the minimum amount of procedure required for suspensions of 10 days or less. It held that the student must be given oral or written notice of the charges, followed by an explanation of the evidence and an opportunity for the student to present his side of the story. However, the Court noted that such suspensions do not require the student be given an opportunity to secure counsel, call witnesses, or cross-examine witnesses.

**1. Exception:** The *Goss* Court made an exception to these requirements where the student poses an immediate danger to the school or is disrupting the academic

process. In these cases, the Court held that the school may immediately remove the student and then provide notice and hearing as soon as practicable. Finally, the Court noted that its holding only applied to suspensions of 10 days or less, and that longer suspensions may require more formal procedures.

## **EDUCATION LAW SECTION 3214**

**I. Statute and Regulations:** In New York, Education Law §3214 and the Commissioner's Regulations at 8 N.Y.C.R.R. §100.2(l) outline a school district's authority to discipline students.

### **II. Authority to Suspend and Charge In General**

- A. **Short-Term Suspensions:** In New York, school principals only have the authority to suspend a student out of school for up to five school days. N.Y. Educ. Law §3214(3)(b)(1).
- B. **Long-Term Suspensions:** For any suspension exceeding five days, schools must hold a fair hearing (commonly known in some areas in New York as a Superintendent's Hearing). Educ. Law §3214(3)(b). The Superintendent of Schools may personally hear and determine the proceeding or may designate another person to serve as the hearing officer to conduct the hearing. The student has the right to be represented by counsel 3214(3)(c), has the right to question witnesses and present other evidence on his/her behalf. The Hearing Officer has the authority to issue subpoenas for documents and/or witnesses. (See *infra* for section on Superintendent's Hearings)
- C. **Codes of Conduct:** All Districts must have a Code of Conduct which outlines the various infractions and range of potential penalties. Educ. Law §2801(2); 8 N.Y.C.R.R.

§100.2(1)(2)(i). New York City has a city school-wide Code of Conduct which is approved by the chancellor of the city school district. Educ. Law §2801(3). The Code of Conduct must also describe the levels of progressive discipline. All district must post the Code on their website, provide age-appropriate versions to all students, provide each teacher with a complete copy, mail a summary to parents at the beginning of the school year and make complete copies available to anyone upon request. Educ. Law §2801(4); 8 N.Y.C.R.R. §100.2(1)(2)(iii)(b). Education Law §3214 provides for two specific charges (all other violations are an offset of one of these):

1. **Insubordination**- a student ‘knowingly fails to comply with school personnel or the school’s Code of Conduct’. Critics argue that there is great latitude within this charge for school personnel to use their discretion. This may result in the disparate treatment of minority subgroups and students with disabilities.
2. **Endangerment**- a student ‘willfully places at risk or endangers the health, safety, morals or welfare of others.’

D. **Off-Campus Conduct**: Districts have the authority to suspend students for incidents which technically occur off school grounds including those on school buses, in BOCES programs and school sponsored events (field trips, prom). Decisions have also upheld student suspensions for online activity.

## **PRINCIPAL’S SUSPENSION**

### **I. Principal’s Suspension or Short-Term Suspension**

- A. A principal may suspend a student for up to 5 days. Educ. Law 3214(3)(b). A suspension may be imposed if the student is insubordinate, disorderly, violent, disruptive or whose



conduct otherwise endangers the safety, moral, health or welfare of others. Educ. Law 3214(3)(a).

**B. Written Notice of Short-Term Suspensions:** The school district must provide the student with timely written notice of the charged misconduct. 8 NYCRR §100.2 [1] [4].

1. Charges must be "sufficiently specific to advise the student of the activities or incidents which have given rise to the suspension." *Bd of Educ. of Monticello CSD v. Commissioner of Education, et. al.*, 91 NY2d 133 (1977). A notice should state the date, time and location of the incident as well as a description of the actions of the student which rise to the level of a violation of the School District Code of Conduct.

2. Written notice of the short term suspension shall be provided by personal delivery, express mail delivery or equivalent means reasonably calculated to assure receipt of the notice within 24 hours of the decision to propose a suspension. 8 NYCRR §100.2[1][4].

3. Notification shall also be provided by telephone where possible. However notification to parent or persons in parental relation by telephone cannot be substituted for notice as provided in 2 above.

4. Notification of suspension must be written in the dominant language of the parent or persons in parental relation to the student. 8 NYCRR §100.2[1][4].

**C. Informal Conference with Principal:** The Notification of suspension must also inform the parent/ persons in parental relation of their right to request an informal conference. Educ. Law §3214(3)(b).

1. Informal conference is held with principal who is proposing the suspension as s/he has the authority to terminate or reduce the suspension.

2. The conference also provides parents with a statutory right to question complaining witnesses. Educ. Law §3214(3)(b)(1). Parents should also request to see any statements written by the student as well as any video recording that may depict the incident. Schools may refuse to show the video under the premise that it is a violation of the privacy rights of any other student in the video. Technology can now black out or obscure any other students' faces. Additionally if the video is maintain or overseen by the district security detail it may thereby render the video a school record available to the student and the parent.

3. As a result of the conference the principal is given an opportunity to decide whether the original decision to suspend the student was correct or should be modified. *Appeal of F.W.*, 48 Ed Dept Rep 399, Decision No. 15,897.

4. The informal conference must take place prior to the suspension of the pupil.  
8 NYCRR §100.2[1][4]

5. Exceptions to the right of a pre-suspension informal conference:

- a. If the student poses a continuing danger to persons or property **and/or**,
- b. The student poses an ongoing threat of disruption to the academic process

6. If the informal conference is unable to be held prior to suspension it must take place as soon after the suspension as is reasonably practicable. *Appeal of H.B.*, Decision No. 15,536.

- a. Initially it is the principal's decision whether the informal conference can be held before or after the suspension. The issue of whether or not the student poses an ongoing threat has been subject to appeal.

- b. Example 1: Student causes significant property damage therefore to continue to allow him to remain in the school would pose a continuing danger. A conference would be held after suspension.
- c. Example 2: Student attends a school dance and is questioned about alcohol use. Student is subsequently suspended after admitting to ingesting " a drink" prior to arrival at the dance. The informal conference is postponed because principal argued that the student posed a threat to disruption to the academic process . On appeal, the decision to postpone the informal conference was "belied by the evidence" *Appeal of P.B.*, Decision No.16,553.

### **ADVOCACY TIPS**

- 1. Informal conference can be used to obtain discovery that may not be required to be produced at the Superintendent's Hearing.
- 2. The conference should involve an exchange of information from the principal to the family and the family to the principal. Be sure to not let the principal inhibit witnesses, block information or withhold production of possible evidence, i.e. Video tape.

## **SUPERINTENDENT'S HEARINGS**

### **I. SUPERINTENDENT'S HEARINGS**

#### **A. The Importance of Due Process**

- 1. Persons over the age of 5 and under the age of 21 who have not yet obtained a high school diploma may attend the public schools of the District in which they reside. N.Y. Educ. Law §3202(1).

2. A student has a legitimate entitlement to a public education as a property interest protected by the Due Process Clause, and therefore that right may not be taken away for misconduct without the minimum procedures required by that Clause. *Goss v. Lopez*, 419 U.S. 565 (1975).
3. In New York, no student may be suspended in excess of 5 school days without an opportunity for a hearing. N.Y. Educ. Law §3214(3)(c). This hearing is sometimes called a Superintendent's Hearing, a §3214 hearing, a student disciplinary hearing or a long-term suspension hearing.
  - a. Exceptions to hearing requirements: For some type of suspensions, due process does not require a full, formal hearing. Unlike the property interest which attaches to the right to a public education, students do not have a property interest in the other aspects of education. There is no right to a formal hearing when a student is suspended from transportation services, or when a student is placed on in-school suspension. *Appeal of R.D.*, Dec. No. 14,837 (2003). Similarly, a suspension from extra-curricular activities requires only a minimum of due process. *Sala v. Warwick Valley CSD*, 2009 U.S. Dist. LEXIS 67353. Instead, an opportunity for the student and parents to discuss the suspension and a reasonable belief by the district that the student engaged in the claimed misconduct is sufficient. *Appeals of E.R.*, Dec. No. 15,389 (2006).
  - b. Reasonable notice:

- i. Timing of the notice of hearing: The district must give reasonable notice of the hearing to the student and the parents. N.Y. Educ. Law §3214(3)(c). The purpose of the notice is to ensure that the student's right to minimal due process is protected. *Appeal of a Student Suspected of Having a Disability*, Dec. No. 14, 678 (2002). There is no statutory requirement that the district provide notice within a certain period of time prior to the hearing. However, notice provided the day before the hearing has been deemed to be insufficient as a matter of law, because it did not provide sufficient notice for the student or parents to obtain counsel. *Carey v. Savino*, 91 Misc. 2d 50, 397 NYS2d 311 (1977). However, notice provided by telephone two days before and written notice received prior to the hearing has been deemed sufficient where the parents were present at the hearing and did not request an adjournment. *Appeal of a Student Suspected of Having a Disability*, Dec. No. 14, 678 (2002).
- ii. Contents of the notice of hearing: The district is required to provide "fair notice" of the charges against the student so that an adequate defense can be prepared and presented. *Bd of Educ. of Monticello CSD v. Commissioner of Educ.*, 91 NY2d 133 (1997). While it is not necessary that the charges in a disciplinary proceeding be as specific as those required in a

criminal proceeding, they must be, at a minimum, sufficient to apprise the student and the student's counsel of the conduct against which they have to defend. *Appeal of Jeffrey and Miriam Herzog*, Dec. No. 13,505 (1995). Notice which simply repeats the Code of Conduct provision or just states that the student violated school rules is not considered reasonable. *Monticello CSD v. Comm. Of Education*, 91 N.Y.2d 133 (1997).

- iii. The notice of the hearing must be in the dominant language of the student and person in parental relationship to the student. *Appeal of R.A.*, Dec. No. 16,131 (2010). In addition, the parents are entitled to an interpreter at the hearing itself if one is needed.

c. Postponement of the Hearing

- a. At the request of the student or parent: If reasonable notice of the hearing has been provided to the student and parent, a request by the student or parent to postpone the hearing may result in the student's out-of-school suspension continuing until the hearing can be held. *Appeal of F.W.*, Dec. No. 15,897 (2009); *Appeal of Pickney*, Dec. No. 13,860 (1998). Common reasons for parents to request postponement of the hearing are the parents' unavailability, the desire to seek an attorney or the unavailability of witnesses for the student.

- b. At the request of the district: If the district requests postponement of the hearing, the student must be permitted to return to school after the 5<sup>th</sup> day of suspension until the hearing can be held.

## **B. Requirements of a Fair Hearing**

1. The Education Law §3214(c) (1) provides the following due process rights to the student and parents during the course of the hearing:
  - a. The right to representation by an attorney or advocate;
  - b. The right of the accused student to testify;
  - c. The right to present witnesses and other evidence;
  - d. The right, under most circumstances, to cross-examine the witnesses against the student.
2. The Right to Cross-Examine Witnesses
  - a. A superintendent's hearing held in the absence of witnesses to the event which form the basis for the suspension is inconsistent with the statutorily guaranteed right to question witnesses. It is improper for a hearing officer to consider a witness's written statement unless the witness is made available for cross-examination. *Ross v. Disare*, 500 F. Supp. 928, 929 (SDNY 1977); *Appeal of Marion Johnson*, Dec. No. 13,234 (1994).
  - b. Merely playing back the recorded testimony of the complaining witnesses' testimony is insufficient compliance with the statute, as a tape recording cannot be cross-examined. *Appeal of Florence Parker*, Dec. No. 13,351 (1995). A district cannot assert that the

“complaining witness” is the school district and not an individual with first-hand knowledge of the incident, thereby circumventing the accused’s right to confront the witnesses against him. *Appeal of Marion Johnson, supra*.

c. Exceptions to the Right to Cross-Examine Witnesses

- i. A district’s decision not to identify or produce for cross-examination the students whose written statements were admitted at the hearing was upheld where the right to cross-examination was outweighed by the district’s interest in protecting the identities of the students. *D.F. v. Bd. Of Syossett CSD*, 386 F. Supp. 2d 119 (E.D.N.Y. 2005), *aff’d*, 180 Fed. Appx 232, U.S. App LEXIS 3430, cert. den 549 U.S. 1179 (2007).
- ii. Admission of a written statement without the opportunity to cross-examine may be harmless error if the other evidence relied on by the hearing officer is sufficient to sustain the charges. *Appeal of N.H and E.H.*, Dec. No. 15,756 (2008); *Appeal of M.A.*, Dec. No. 15,663 (2007); *Appeal of R.C.*, Appeal No. 14,740 (2002).

3. Duty of District to Keep Record of Hearing

- a. The district is required to maintain an intelligible record of the hearing. However, a stenographic transcript is not required, and a tape recording is sufficient. N.Y. Educ. Law §3214(3)(c)(1).



Discipline imposed pursuant to Education Law §3214(3) must be based upon the evidence contained in the record produced at the superintendent's hearing. *Appeal of A.G.*, Decision No. 14,681 (2002). If an intelligible record of the hearing is not maintained, it is impossible for a board of education or the Commissioner to accurately determine on an appeal whether the record supports the superintendent's decision. *Appeal of A.R.*, Dec. No. 14,996 (2003).

4. Hearing Conducted by Superintendent or Hearing Officer

- a. The Superintendent may conduct the hearing. The Superintendent or the Board of Education may also appoint a hearing officer to conduct the hearing. In that event, the hearing officer decision is only a recommendation, and the Superintendent may accept or reject any part of the recommendation. N.Y. Educ. Law §3214(c)(3).
- b. The hearing office has the authority to administer oaths and to issue subpoenas. N.Y. Educ. Law §3214(c)(3).
- c. An attorney from the law firm which represents the school district may serve as the hearing officer. Such an appointment does not constitute a cognizable deprivation of due process. *D.F. v. Bd. Of Syossett CSD*, 386 F. Supp. 2d at 127.
- d. Neither the statute nor regulations require that the Superintendent issue a decision within a certain amount of time. However, a delay

in rendering a decision until after the short-term suspension expires is improper unless the student is returned to school in the interim. Continued suspension is improper, and the Commissioner will expunge from the student's record the days of suspension between the hearing or end of the short-term suspension and the issuance of the Superintendent's decision. *Appeal of T.B.* Dec. No. 16,385; *Appeal of L.P.*, Dec. No. 16,252 (2011).

5. Right of Student and Parent to Waive Right to Hearing

- a. Under certain conditions, students along with their parents may waive a student's due process rights under Education Law §3214. *Appeal of a Student With a Disability*, Dec. No. 16,343 (2012); *Appeal of A.S. and S.K.*, Dec. No. 15,122 (2004). For such a waiver to be valid, however, it must be "voluntary, knowing and intelligent". *Appeals of McMahon and Mosely, et al.*, Dec. No. 13,976 (1998). The district must provide the student and parents with a written document clearly and concisely stating all of the rights to be waived, as well as the consequences of waiving such rights *Appeal of A.S. and S.K.*, Dec. No. 15,122 (2004); *Appeal of a Student with a Disability*, Dec. No. 14,818 (2002).

**C. Conduct of the Superintendent's Hearing**

1. Bi-Furcated Hearing: First, the hearing officer must determine, based on the testimony and evidence presented, whether the student is guilty or not-guilty of the charged misconduct. If there is a finding of guilt, the hearing

should proceed to the penalty phase. Additional procedural protections are provided to students with disabilities and students presumed to have a disability. (See discussion of Manifestation Determination Reviews *infra.*)

## 2. Phase 1: Determination of Guilt

- a. Burden of Proof on the District. At the hearing, the burden of proof rests on the school district, and the student is entitled to the presumption of innocence. *Matter of Montero*, 10 Ed Dept Rep 49 (1970).
- b. Standard of Proof. The decision to suspend a student from school pursuant to Education Law §3214 must be based on competent and substantial evidence that the student participated in the misconduct *Bd. of Educ. of Monticello CSD v. Commissioner of Educ., et al.*, 91 NY2d 133 (1997); *Mandel v. Bd. of Educ.*, 662 N.Y.S. 2d 598 (2<sup>nd</sup> Dept. 1997). A hearing officer may draw a reasonable inference if the record supports the inference. *Bd. of Educ. of Monticello CSD. v. Commissioner of Educ., et al.*, 91 NY2d 133 (1997); *Appeal of C.R.*, Dec. No. 15,834 (2008).
- c. Type and Quality of Evidence. In order to prove guilt, a district must present substantial evidence consisting of “proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted

reasonably--probatively and logically". *Matter of the Bd. of Educ., v. Mills*, 293 A.D.2d 133 (3<sup>rd</sup> Dept. 2002).

- i. Admission of guilt. A hearing officer may find a student guilty of the charged misconduct based solely on the student's admission of guilt. *Appeal of D.M.*, Dec. No. 15,747 (2008); *Appeal of C.H.*, Dec. No. 14,139 (1999). *See Appeal of a Student Suspected of Having a Disability*, Dec. No.16,912 (2016).
- d. Hearsay evidence. Hearsay evidence is admissible in disciplinary hearings, and hearsay alone may constitute competent and substantial evidence. *Bd. of Educ. of Monticello CSD. v. Commissioner of Educ., et al.*, 91 NY2d 133 (1997); *Appeal of a Student Suspected of Having a Disability*, Dec. No. 14,192 (1999). Therefore, the testimony of the principal and another student that the accused admitted the wrong-doing was sufficient to sustain a finding of guilt. *Appeal of John Hamet*, Dec. No. 13,692 (1996).
- e. Evidence suppressed by a court of law. If a student is being suspended for possession on school grounds of any weapon as defined in § 265.01 of the Penal Law, the hearing officer may consider the admissibility of the evidence even if a court has previously determined that the evidence was obtained as a result of an illegal search or seizure. N.Y. Educ. Law §3214(c)(1); *Matter of Juan C. v. Cortinez*, 89 N.Y2d 650 (1997).

- f. Exclusionary rule and searches performed by district employees.

*Safford USD #1 v. Redding*, 557 U.S. 364 (2009) (Strip search of 13 year old student accused of providing banned pain pills to fellow students was ruled unconstitutional); *N.J. v. TLO*, 469 U.S. 325 (1985) (Court upheld search of student's purse because the school officials had reasonable grounds to believe that the search would produce relevant evidence of violation of a school rule).

The age and sex of the student, as well as the seriousness of the alleged infraction must be taken into account when considering the reasonableness of a school search. *Id.*

- g. Off-campus conduct. Students may be disciplined for conduct that occurs outside of the school if the conduct may endanger the health or safety of pupils within the educational system or may adversely affect the educational process *Matter of Coghlan v. Bd. of Educ. of Liverpool CSD.*, 692 N.Y.S.2d 558, citing *Pollnow v. Glennon*, 594 F.Supp. 220, 224 (SDNY 1984), *affd* , 757 F.2d 496 (1985); *Appeal of Orman*, Dec. No. 14,389 (2000); *Appeal of Mangaroo*, Dec. No. 13,050 (1993).

### 3. Phase 2: Determination of Penalty

- a. Standard: The penalty must be proportionate to the severity of the offence. *Appeal of Student Suspected of Having a Disability*, Dec. No. 16,912 (2016); *Appeal of K.M.*, Dec. No. 16,320 (2011).  
Discipline imposed pursuant to Education Law §3214(3)(c) must

be based upon the evidence contained in the record produced at the superintendent's hearing. *See Appeal of Snowberger*, Dec. No.

11,386. Materials outside the hearing record should not be considered by the superintendent in his determination on penalty.

In an appeal to the Commissioner of Education, the test to be applied is whether the penalty is so excessive as to warrant substitution of the Commissioner's judgment for that of the board.

*Appeal of Cynthia and Robert W.*, Dec. No. 13,899 (1998).

b. Anecdotal record of prior misconduct.

- i. The anecdotal record of a student's prior misconduct may be introduced at a disciplinary hearing after a finding of guilt has been made, and only for the purpose of determining a penalty. *Appeal of K.M.*, Dec. No. 16,320 (2011); *Appeal of Lucy Lewis*, Dec. No. 13,135 (1994).

- a. If the anecdotal record is admitted prior to the penalty phase, the Commissioner may consider it to be harmless error if the anecdotal record was not considered in the determination of guilt, or if even excluding the anecdotal record, the punishment was rational and reasonable. *Appeal of a Student with a Disability*, Dec. No. 16,434 (2012).

- ii. Notice. The district must give the student and parent notice of the contents of the anecdotal record in advance

whenever the record will be considered in affixing a penalty. *Appeal of a Student Suspected of Having a Disability*, Dec. No. 14,678 (2002).

c. Inappropriate penalties

- i. Permanent expulsion. Permanent expulsion from school is an extreme penalty, “educationally unsound”, and should not be employed except under extraordinary circumstances. *Appeal of a Student Suspected of Having a Disability*, Dec. No. 16,912 (2016). Such a punishment is only appropriate when the student “exhibits an alarming disregard for the safety of others” and where it is necessary to protect other students. *Appeal of a Student Suspected of Having a Disability*, Dec. No. 16,912 (2016); *Appeal of Y.M.*, Dec. No. 14,968 (2003) (expulsion not appropriate for the charge of being under the influence of marijuana on school grounds despite the previous 80 referrals for misconduct).
- ii. Involuntary transfer to another school. In a disciplinary hearing, it is improper for a district to impose a transfer from one high school to another as the penalty for the misconduct. *Appeal of Reeves*, Dec. No. 13,857 (1998). If a district proposes to involuntarily transfer a student from one school to another, it must follow the process set forth in Education Law §3214(5). The focus of a disciplinary

hearing is different than an involuntary transfer hearing; the purpose of the latter is to determine whether the proposed transfer is beneficial to the student. *Id.*

- iii. Counseling. A district is without authority to condition a student's return to school following a suspension on participation in counseling. *Appeal of Jayme K.*, Dec. No. 14,434 (2000); *Appeal of Christopher and Gigi B.*, Dec. No. 14,338 (2000) (improper for district to condition student's return to school on participation in anger management counseling). However, it may be appropriate for a school superintendent to recommend that the student attend counseling, as long as the student's return to school is not conditioned on such counseling. *Appeal of John Hamet*, Dec. No. 13,692 (1996). Education Law §3214(e) provides that where a pupil has been suspended for cause, the suspension may be revoked by the board of education whenever it appears to be for the best interest of the school and the pupil to do so. A district may shorten a student's period of suspension based on the student's voluntary participation in counseling. *Appeal of B.L.G.*, Dec. No. 16,101 (2010).
- iv. Community Service. A school district has no authority to require that a student participate in community service as a



penalty in a disciplinary hearing. *Appeal of Susan Alexander*, Dec. No. 13,689 (1996).

#### **D. Spensieri Contracts or Contracts of Conduct**

1. The Commissioner has approved the use of “Spensieri agreements” or “contracts of conduct” for students who are facing a long-term suspension following a disciplinary hearing. *Appeal of Spensieri*, Dec. No. 14,419 (2000).
2. The agreement or contract serves to stay an original suspension to permit a student to return to school immediately. The Commissioner has approved a contract of conduct which required the student to abide by all school rules, diligently complete all courses, and to refrain from the behavior which caused the initial suspension. Parents are entitled to written notice of any alleged violation of the conditions of return to school, and an opportunity to request a conference with the Superintendent to contest the determination the contract of conduct was violated. *Id.*

#### **E. Alternative Instruction**

1. Education Law §3214(3)(e) provides in pertinent part: "Where a pupil has been suspended and is of compulsory attendance age, immediate steps shall be taken for his attendance upon instruction elsewhere..." The term "immediate" does not mean instantaneous; however, a school district should act reasonably promptly with due regard for the nature and circumstances of the particular case. *Turner v. Kowalski*, 49 AD2d 943 (2d Dept 1975).

2. The alternative instruction must be “substantially equivalent” to the instruction received by the student prior to the suspension. *Appeal of Deborah F*, Decision No. 14,813 (2002).

## **Manifestation Determination Review**

### **I. What is a Manifestation Determination Review (“MDR”)?**

- A. The MDR is a review of the relationship between a student’s disability and the behavior subject to disciplinary action. 8 NYCRR § 201.4(a))
- B. Determines if the conduct is a manifestation of the disability. 8 NYCRR § 201.4(a)
- C. Must be made immediately, if possible, but in no case later than 10 school days after:
  1. Placement in Interim Alternative Education Setting (“IAES”) (by superintendent or Impartial Hearing Officer (“IHO”) 8 NYCRR §201.4(a)(1-2) or
  2. Suspension that constitutes a disciplinary change in placement 8 NYCRR § 201.4(a)(3).
  3. Remedy for failure to comply with 10 day rule is expungement of the suspension from the student’s record *Appeal of D.W.*, 52 Ed Dept Rep, Dec. No. 16, 436 (2012).
- D. Advocacy Tips:
  1. Requesting an MDR after the equivalent of 10 days of “disciplinary removal” from the educational setting.
  2. Parental coaching on this issue.

### **II. Who Requires an MDR?**

- A. Any student who has or is suspected of having a qualifying disability under the Individuals with Disabilities Education Act (“IDEA”) is entitled to an MDR.

### **III. When Are MDRs Required?**

- A. During a disciplinary change in placement that exceeds 10 days.
- B. Parent must receive written notification prior to any manifestation team meeting to ensure the opportunity to attend. 8 NYCRR § 201.4(b).

### **IV. Who Is Required to Attend an MDR?**

- A. Representative of the school district knowledgeable about the student and the interpretation of information about child behavior,
- B. The parent,
- C. Relevant members of the Committee on Special Education (“CSE”) as determined by the parent and the school district.

### **V. What Questions Does an MDR Answer?**

- A. Whether the behavior or conduct in question was:
  - 1. Caused by or had a direct and substantial relationship to the student’s disability, or 8 NYCRR § 201.4(c)(1), or
  - 2. The direct result of the school district’s failure to implement the student’s individual educational program (IEP). 8 NYCRR § 201.4(c)(2)

### **VI. What is the determination based on?**

- A. Review of all relevant information in the student’s file including:
  - 1. The student’s IEP 8 NYCRR § 201.4(c),
  - 2. Teacher observations 8 NYCRR § 201.4(c), and
  - 3. Relevant information provided by the student’s parents 8 NYCRR § 201.4(c)

### **VII. What happens if it is determined that there is a manifestation?**

- A. The student returns to school. 8 NYCRR § 201.4(d)(2)(ii)

1. The school will conduct a functional behavioral assessment and implement a BIP. 8 NYCRR § 201.4(d)(2)(i).
2. The student can move to a different placement upon agreement of the parties. 8 NYCRR § 201.4(d)(2)(ii).
3. If manifestation is a result of school's failure to implement IEP, the school district must take immediate steps to remedy the deficiencies. 8 NYCRR § 201.4(e).

**VIII. What happens if it is determined that there is no manifestation?**

- A. The disciplinary removal can continue. The parent may enter into a conversation with the school about the possibility of transferring to a different program.

**IX. Can an MDR determination be appealed?**

1. An MRD may be appealed administratively through the impartial hearing process.

**X. Advocacy Tips**

A. Familiarize yourself with the student

1. See Attached "Client Meeting Form".
2. Medical diagnoses/medications and associated limitations
  - a. Confirm permission to disclose these items

B. Familiarize yourself with the student's IEP

C. Think about whether the student might be a student who is presumed to have a disability for discipline purposes

- a. Expedited evaluations

## **UNIQUE CONCERNS OF ENGLISH LANGUAGE LEARNERS AND STUDENTS WITH DISABILITIES**

### **I. Unique Concerns of English Language Learners (ELL)**

A. English Language Learners are disproportionately subject to disciplinary actions by school districts.

1. English Language Learners (ELL):\_students who are unable to communicate fluently or learn effectively in English, who often come from non-English-speaking homes and backgrounds, and who typically require specialized or modified instruction in both the English language and their academic courses. [www.pewtrust.com](http://www.pewtrust.com)

2. Although ELL comprise only 8% of the total school age population, they comprise 18.78% of the total number of students disciplined. USDOE.

3. White students on the other hand, comprise 62% of the total school age population yet only account for 13.49% of the disciplinary proceedings.

4. Black students comprise approximately 30% of the school age population state wide and comprise 17.66% of the disciplinary proceedings by the school districts.

B. The ELL's inability to proficiently understand and communicate in English results in several negative outcomes when compared with their English speaking peers:

1. ELL have only a 34% graduation rate.

2. Only 4% of the ELL will graduate with a Regents diploma with distinction.

3. Over 27% will drop out before completing three years of high school.

C. There are several factor which contribute to these negative outcomes.

1. ENL and Bi-lingual classes are often taught by less experienced and/or less qualified teachers.

2. School districts are only now beginning to provide curriculum and instruction that effectively evaluates, tracks and assesses the effectiveness of ENL and bi-lingual education. The recent overhaul of Part 154 of the Commissioner's Regulations established specific criteria to assess on admission, the English proficiency of the ELL. The regulations also have required the creation of research-based bilingual programs of instruction that provides a language arts component, an English as a new language component and a bilingual content area (i.e., math, science and social studies) instructional component.
3. Lack of cultural immersion programs results in lack of appreciation for or understanding of school rules and policies. This lack of understanding coupled with limited English proficiency results in disproportionate disciplinary incidents among ELL.
4. When a suspension occurs, there is often a delay in the delivery of or lack of sufficiently trained tutors for home instruction, thereby adding to the ELL difficulty in learning the language and curriculum.
5. Districts fail to provide correspondence such as suspension letters in the native language of the parent of the ELL.
6. Districts fail to provide interpreter services at school meetings and disciplinary proceedings thereby further alienating the families from the process.
7. Parents of ELL students are unfamiliar or untrusting of the special education evaluation process which leads to students whose learning is significantly hindered due to an unidentified disability.

## **II. Unique Concerns of Student with Disabilities**

- A. Students with disabilities are disproportionately subject to disciplinary actions by school districts.

1. Students with a disability comprise approximately 32% of the school-aged population yet contribute to almost 68% of the disciplinary proceedings.
2. The most common cause of a disciplinary incident is a failure by the school to implement and follow the student's IEP. This then subjects the student with a disability to be expected to function in the classroom and during unstructured time without the assistance of IEP accommodations .
3. Manifestation hearings are not being held or are being waived. The Manifestation determination provides the best forum to examine the incident in the context of the student's disability. When done properly, the IEP is examined and changes made to insure against further disciplinary incidents.
4. Families lack of knowledge of the disciplinary process and the importance of the manifestation determination, often result in uninformed "agreements" to resolve the disciplinary incident.

## **APPEALS FOLLOWING A SUPERINTENDENT'S HEARING**

### **I. Appeals to the Board Of Education**

#### **A. Board Appeals in General**

1. An initial appeal from a long-term suspension lies with the Board of Education. N.Y. Educ. Law §3214(c)(1). An appeal of a Superintendent's decision on a long-term suspension directly to the Commissioner will result in dismissal for failure to exhaust administrative remedies. *Appeal of a Student with a Disability*, Dec. No. 16,464 (2013).

2. The Board must base its decision solely on the record before it. *Id.* In addition, the Board may only consider issues which were raised at the disciplinary hearing. *Appeal of T.B.*, Dec. No. 16,385 (2012). Issues not raised at the disciplinary hearing and before the Board of Education will not be considered in a later appeal to the Commissioner of Education. *Id.*; N.Y. Educ. Law §3214(c)(1).
3. The student and parent do not have a statutory right to attend and present arguments at the executive session of the Board when their appeal is being discussed. *Appeal of R.F. and D.F.*, Dec. No. 16,369 (2012). However, §3214 does not preclude a Board from permitting parents and student to present arguments in support of their appeal during executive session.
4. Section 3214 does not set forth the time period in which a student and parent must appeal a Superintendent's decision to the Board. Each Board is able to set a time frame to appeal following a disciplinary hearing decision. However, such discretion is not unfettered. For example, the Commissioner found that a rigid 10 day appeal time frame without a provision to excuse delay in appropriate circumstances is improper. *Appeal of M.T.*, Dec. No. 15,854 (2008).

## **I. Appeals to the Commissioner Of Education**

### **A. Appeals to the Commissioner in General**

1. Education Law §310 provides that persons considering themselves aggrieved by an action taken at a school district meeting or by school authorities may appeal to the Commissioner of Education for review of such action. An appeal



to the Commissioner pursuant to Education Law §310 must be commenced within 30 days of the decision or action complained of, unless any delay is excused by the Commissioner for good cause. 8 NYCRR §275.16. The Commissioner strictly enforces the 30 day time limit. *Appeal of D.C.*, Dec. No. 14,684 (Except in unusual circumstances, ignorance of the appeal process does not afford a sufficient basis to excuse a delay in commencing an appeal).

2. Procedures for the presentation and defense of appeals to the Commissioner are contained in §§ 275 and 276 of the regulations of the Commissioner of Education.
3. Burden of Proof. In an appeal to the Commissioner, the petitioner has the burden of establishing the facts which supports the requested relief and the burden of demonstrating a clear legal right to the relief sought. *Appeal of T.C.*, Dec. No. 15,186 (2005).

**B. Pleadings (8 N.Y.C.R.R. §§275, 276)**

1. An appeal is commenced by the service and filing of a notice of petition, verified petition and accompanying exhibits, including affidavits, if any. The notice of petition must follow the format set forth by the Commissioner. (See attached sample notice of petition). The notice of petition and petition must be personally served. 8 N.Y.C.R.R. §275.(11).
2. The verified petition must set forth a clear statement of the facts and actions complained of. The petition must also include a demand for relief. 8 N.Y.C.R.R. §275.10. It has consistently been held that when a petition is not

properly verified, the appeal must be dismissed. *Appeal of Davis*, Dec. No. 14,207 ( )

3. The school district (or BOCES) must serve and file a verified answer within 20 days after service of the petition. The verified answer may be served by mail. 8 N.Y.C.R.R. §§275.11(a); 275.12.
4. The petitioner may serve and file a verified reply to any affirmative defenses or new material asserted in the answer. The reply must be served within 10 days after service of the answer, or within 14 days if the after the postmark date if served by mail. 8 N.Y.C.R.R. §275.14.
5. Service. The notice of petition and verified petition must be personally served on each named respondent. Service on a school district must be made personally by delivering a copy of the notice of petition and petition to the district clerk, any trustee or member of the Board of Education, the Superintendent or to a person in the office of the Superintendent who has been designated by the Board to accept service. 8 N.Y.C.R.R. §275.8(a). All subsequent people may be served upon the adverse party or upon such party's attorney by mail. 8 N.Y.C.R.R. §275.8(b).
6. Within 5 days after the service, the original pleading along with an affidavit of services shall be sent to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234. 8 N.Y.C.R.R. §275.9(a). A filing fee of \$20 must be sent with the original notice of petition and verified petition. 8 N.Y.C.R.R. §275.9 (c).

7. Memorandum of Law. The petitioner shall serve a memorandum of law, if any, within 20 days after service of the answer or 10 days after the service of the reply, whichever is later. 8 N.Y.C.R.R. §276.4(a). The respondent must serve a copy of any memorandum of law within 30 days after service of the appeal or 20 days after service of the reply, whichever is later. *Id.*

**C. Request for a Stay (8 N.Y.C.R.R. §276.1)**

1. A stay of the district's action must be specifically requested in the verified petition. If the petition requests a stay, the notice of petition must include the following paragraph: "Please take further notice the within petition contains an application for a stay order. Affidavits in opposition to the application for a stay must be served on all other parties and filed with the Office of Counsel within three (3) business days after service of the petition."
2. The petition must set forth the facts and law upon which the stay should be granted.
3. The affidavits in opposition to the stay must be served within 3 business days after service of the petition and the original affidavit must be sent to the Office of Counsel by personal delivery, express mail delivery or equivalent means reasonably calculated to assure receipt within 24 hours of service.

**D. Mootness.** The Commissioner of Education only decides matters in actual controversy and will not render a decision on a state of facts which no longer exist or in which subsequent events have laid to rest. *Appeal of L.H.*, Dec. No. 15,005 (2003); *Appeal of D.T. and M.M.*, Dec. No. 14,916 (2003).

- a. For example, if a suspension has already been served or the student has graduated, the Commissioner will find that a challenge to a guilty determination or to the length of suspension is moot.
- b. However, if the appeal also requests that the student's records be expunged, a current controversy remains and the appeal will not be dismissed as moot.

*Appeal of T.C.*, Dec. No. 15,186 (2005).

- E. The Commissioner lacks authority under Section 310 to award attorney's fees to the prevailing party (*Appeal of Raymond Stewart*, Dec. No. 13,279 (1994)) or to award money damages (*Appeal of a Student Suspected of Having a Disability*, Dec. No. 15,895 (2009)) or to censure or reprimand a board of education or district staff. (*Appeal of T.C.*, 15,186 (2005)).

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**Disrupting the School-To-Prison Pipeline:  
Navigating New York Education Law and  
Representing Students in Due Process  
Proceedings**

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**Biographies**



Wendy Gildin

Wendy Gildin is an education attorney with the Long Island Advocacy Center (LIAC), a not-for-profit organization dedicated to protecting the legal rights of students and individuals with disabilities. She currently serves as an advisor to the Suffolk County Felony Youth Part on education law matters and assisting youth with school reentry following incarceration. She also represents students at school meetings, suspension hearings, and State Education Department hearings and appeals.

Prior to her position at LIAC, Wendy had her own practice representing children in special education matters across New York City and Long Island. She has served on the NYS Appellate Division, Second Department Attorney for the Child (AFC) panel representing children in the Suffolk County Courts as well as a Staff Attorney for the Nassau County Legal Aid Society's Criminal Court Bureau. She is a graduate of Touro College, Jacob D. Fuchsberg Law Center.

Ms. Gildin has served as a guest lecturer in law schools and conferences and appeared as a commentator on special education matters on the Fox 5/WNYW Television Network.

Diane E. Inbody

DIANE E. INBODY is an Education Attorney with the Long Island Advocacy Center (LIAC), a not-for-profit organization dedicated to protecting the legal rights of students with disabilities.

After graduating from Hofstra Law School where she was an editor of the Labor Law Review, Diane worked as a staff attorney for Mental Hygiene Legal Services providing representation at discharge and drug administration hearings for residents at Kings Park Psychiatric Center. She worked as an associate for Ahmuty, Demers and McManus concentrating in insurance defense and was named one of the firm's first female partners. Diane later joined the firm of Feeney, Gayoso and Fitzpatrick LLP as trial counsel.

Currently Diane represents students at school meetings, administrative hearings and suspension and impartial hearings. She serves as the "in court" educational advocate for students charged with juvenile delinquency offenses in Suffolk County Family Court. Diane also handles appellate proceedings on both the local and state level in the areas of student discipline and residency.

She has lectured on special education law, student discipline, the CSE process and accessing transitional services at Nassau and Suffolk Bar Association Seminars, school district in-services and mental health association trainings.

Diane is admitted to practice law in New York, the federal courts for Eastern and Southern District as well as U.S. Court of Claims. She was recently selected to serve on the Cornell Cooperative Family Health and Wellness Advisory Board.

Ashley Patronski

Ashley Patronski, J.D., is a Staff Attorney at Legal Assistance of Western New York who works on the organization's Education Advocacy Project and also does work in the areas of prisoner re-entry advocacy and public benefits. Ms. Patronski has worked in various capacities in the civil legal services sector for 4 years.

Susan Young

Susan Young is a staff attorney at Legal Services of Central New York in Syracuse, New York. Ms. Young has primarily practiced in the field of education law over 20 years, and has represented both children and adults in administrative proceedings and state and federal court.

Currently, her practice focuses on access to education, discipline, school residency, and the rights of English Language Learners in school. Ms. Young has conducted numerous trainings on the right to education and the rights of persons with disabilities, and has co-authored a chapter on special education hearings in the New York State Bar Association's book *Disability Law and Practice*. Most recently, she was co-counsel on a federal court case challenging a school district's practice of funneling newly-arrived refugee students over the age of 16 into segregated and inferior education programs. Ms. Young received her B.A. in Political Science from the State University of New York at Albany, and her J.D. from the Washington College of Law, American University.



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# Appendix

## Client Meeting Form

## **Client Meeting Form**

*This form is intended to assist you in interviewing the student and parent but is not meant to be an exhaustive list of questions. Remember that this meeting has two important purposes: to help you prepare the best defense possible for the hearing and to help the student and parent feel comfortable with you and understand what will happen at the hearing. Be sure to conclude the interview by asking the student and parent if they have any questions and explaining to them what steps you plan to take.*

### **Initial Information**

1. Describe our role and that we are on client's side and are going to defend client.
2. Explain confidentiality.
3. Have student and parent complete Consent Form and Release of Information Form.
4. Explain process. We're going to start by asking some basic questions and talk a little about school. Then we'll ask parent to step outside while we talk to student about the incident and then we'll invite the parent back in and continue talking. We also want to make sure to answer your questions and see what we can do to help you. We may take some notes to help us prepare for the hearing.

### **Basic Information**

**Name:** \_\_\_\_\_

**Nickname/preferred name:** \_\_\_\_\_

*Please get any information missing from the Call Intake Form.*

### **School Information**

**Grade Level:** \_\_\_\_\_

\_\_\_\_\_

**Favorite Subject(s):** \_\_\_\_\_

**Why?:** \_\_\_\_\_

**School and after-school activities, hobbies, sports:**

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**Favorite teachers/counselors/coaches at school:**

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**Career Plans:**

**What do you want to do after high school? / What do you want to be when you grow up?**

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**What is something that you've done that you're proud of?**

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**Alternative School Site:** \_\_\_\_\_

**How many hours a day?:** \_\_\_\_\_



**Are you getting regular classroom work and homework?:\_\_\_\_\_**

**Does parent have suspension packet yet? If so, leave packet with us.**

**Is the student receiving special education services (does the student have an Individualized Education Program aka IEP)?**

**Has the parent requested that the child be evaluated?**

**Would the parent like for the student to begin receiving special education services?**

**Do you have any initial questions for us?**

**ASK THE PARENT TO LEAVE THE ROOM SO WE CAN SPEAK WITH THE STUDENT ALONE IN ORDER TO PRESERVE CONFIDENTIALITY  
REMIND STUDENT ABOUT CONFIDENTIALITY.**

**ASK THE STUDENT TO DESCRIBE INFORMATION REGARDING THE ALLEGED INCIDENT, AND WHAT FOLLOWED:**

**Information Regarding the Alleged Incident**

***Ask the student to describe what happened:***

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***Be sure that you get the following information during the interview:***

**Where:** \_\_\_\_\_

**When:** \_\_\_\_\_

**Who was around when the incident occurred?**

**Names:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Who was involved in the incident?**

**Names:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**How many people observed the incident?** \_\_\_\_\_

**Was anyone employed by the school involved such as a teacher/School Safety Agent/or other person in authority?**

**YES**

**NO**

**Did you know or know of the complaining witness before this incident?**

**YES**

**NO**

**Was this your first encounter with the complaining witness?**

**YES**

**NO**

**If no, describe the nature of prior encounters.**

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*You may want to repeat the client's description of the alleged incident to make sure you have the details correct. You may want to ask the student to draw a picture or act out what happened to clarify*

**School Actions Following the Alleged Incident**

**What did the school do next?** \_\_\_\_\_

**Did any school official ask you to make an oral/spoken statement about what happened?**

**YES**

**NO**

**Did any school official ask you to make a written statement about what happened?**

**YES**

**NO**

**If yes, who asked you to make the statement? Did they tell you that you *had* make a statement?**

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**Who was in the room when you made the statement?**

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**What did you say?** \_\_\_\_\_

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**Do you know if the school asked anyone else for a statement?**

**YES**

**NO**

**If yes, whom did the school ask and under what circumstances?**

---

**Did the school officials take anything from you?**

**YES**

**NO**

**If yes, what? Description.**

---

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**Did you sustain any injuries?**

**YES**

**NO**

**If yes, what were the injuries?**

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**If yes, did you tell a school official that you were hurt?**

**YES**

**NO**

**What if anything, did the school official say or do in response to this information?**

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**Did you have to seek medical treatment?**

**YES**

**NO**

**Did anyone else involved in the incident sustain injuries?**

**YES**

**NO**

**Name(s) and Injuries:**

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**Did anyone else involved in the incident seek medical treatment?**

**YES                      NO**

**Name(s):**

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**Was any part of the incident caught on a surveillance camera?**

**YES                      NO**

**Anything else we should know to best defend you?**

**REVIEW SUSPENSION PACKET.** *Ask student about any inconsistencies between student's story and the witness statements. Tell student what the charge is.*

**INVITE THE PARENT BACK INTO THE ROOM:**

**Parent Questions**

**How did you find out that the student was suspended?**

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**Who (if anyone) called to explain that the student was suspended?**

**Name(s)/Position:** 

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**Was there a meeting following notification of the student's suspension?**

**YES**

**NO**

**If yes, who was at the meeting and what was said?**

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**Did the school ever explain the incident to you/tell you what they believe happened?**

**YES**

**NO**

**What, if anything, did the school say regarding the incident?**

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**Court Involvement/Prior Suspensions**

**Did this suspension result in a criminal case?**

**YES**

**NO**

**If so, do you already have an attorney?**

**YES**

**NO**

**Were any other students involved in this alleged incident suspended?**

**YES**

**NO**

**If yes:**

**Do you know if these other individuals have had suspension hearings yet?**

**YES**

**NO**

Did you testify at another student's hearing? YES NO

Do you know the outcome of the other hearings? \_\_\_\_\_

Do you know if the other students suspended have representation? If so, we may want to contact the other student's advocate with the permission of our client's parent and the other advocate's client.

YES NO

Were any other students involved arrested? YES NO

Have you been involved in prior incidents at this school?

YES NO

Have you ever been suspended before? YES NO

If yes, when? \_\_\_\_\_  
\_\_\_\_\_

Were you previously suspended for an incident involving the same complaining witness?

YES NO

Have you ever received special education services? YES NO

#### EXPLAIN THE PROCEDURES OF THE HEARING

##### **Discuss:**

- 1. Review School's Charge:** *This is what school would have to prove during a hearing.*
- 2. Hearing Office:** *Make sure parent knows how to find hearing office and has your cell #. Explain that student and parent will arrive, sign in, and then sit in waiting room. Emphasize they should arrive early so that you have more time to prepare with them and because the hearing may be called earlier if all parties arrive early. Explain that they may have to stay all day and should*

*bring food and something to do.*

3. **No Contest Option:** *Explain that we can have a hearing or can plead no contest. Describe the case---specific pros and cons (e.g., Did student write a statement stating he did exactly what the charge says? If so, student may want to plead no contest.) You can feel free to postpone the final decision if the parent and student want more time to consider this.*
4. **Pre---Hearing Conference:** *Explain that the purpose of the pre---hearing conference is to describe the different options that we have already described (e.g., no contest).*

**Is parent willing to waive the pre-hearing conference?** YES NO

5. **Hearing:** *Explain what happens during the hearing. We usually waive our opening statement or make a brief statement because we don't want the school to know our argument. First, the school presents witnesses who will testify and the school offers evidence (e.g., witness statements). We can question the school's witnesses. Then we can present witnesses and the school questions them.*
6. **Evidence for Hearing:** *Is there anyone we should try to have testify at the hearing? A student witness can only testify with consent from his/her parent. Is there any additional evidence that parent can collect before the hearing? What evidence? If a written statement from an additional witness, parent should observe person handwrite the statement and sign and date the statement. Parent should fax the statement to us if possible and bring original to hearing. If parent can't fax, parent should bring original and 4 copies to hearing if possible.*
7. **Will Student Testify?** *No need to make a final decision during the interview, but make sure the student knows you're going to need to practice with him/her over the phone and before the hearing if student is going to testify. Pros:*
  - a. Student can tell his/her version of what happened. (Consideration: Are there other ways of telling this story? Did student make a statement that is different from what he is now saying happened?)*Cons:*
  - a. School can cross-examine student.
  - b. It is difficult to testify. Everyone gets nervous in front of the hearing officer.
  - c. If student has a criminal case, testimony can be used against him/her there.
  - d. May not be necessary since school has burden of proving the charges and there may be other ways for us to challenge the charges.



**8. Will Parent Testify?** *We may want the parent to testify about procedures the school failed to use in informing parent about suspension. Or we may want parent to testify to introduce additional evidence that parent collects (e.g., If parent gets a written statement from another student witness, parent will need to testify as to how the parent got the statement in order to introduce the statement into evidence.).*

**9. Disposition:** *Explain what happens during disposition phase. During this phase, we want to ask for a shorter suspension if the hearing officer upholds the suspension. We want to give the hearing officer a full picture of student, and show that student is more than what happened during this one day. We will not get a decision on the suspension during the hearing, so we have to do the disposition phase without knowing whether or not the hearing officer will uphold the suspension. During this phase, we can also request services such as counseling or a school transfer if the parent wants, though school transfers are rarely granted.*

**10. Letters for Disposition:** *Are there any members of the community who know the student and would be willing to write a recommendation for the student: Remind the parent and student that this recommendation letter should not have ANY information regarding the incident. Ask about the teachers/coaches whom the student mentioned at the beginning of the interview.*

YES

NO

Name(s)/Positions: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*It is ideal for the parent to take responsibility for requesting and collecting any letters. The parent can fax the letters to us and bring the originals or bring 4 copies and the originals to the hearing.*

**11. School Records:** *If parent did not bring suspension packet (with school records), ask about the student's grades and attendance.*

**12. Affect:** *Emphasize that student and parent should look their best, should sit up during hearing, should be respectful of hearing officer, if there's something they want to tell us to write it down or whisper to us.*

**13. Answer questions.**

**14. Review next steps and to---do list including any evidence/letters the parents will collect.**

**Copy suspension packet if you do not already have it!**

**Appendix**  
**Selection from 8 NYCRR Part 201**

a student should be suspended from instruction for more than five consecutive school days.

- (r) *Suspension* means suspension pursuant to Education Law section 3214(3)(a) through (d).
- (s) *Weapon* means a weapon, device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than two and one-half inches in length.

### **201.3 CSE responsibilities for functional behavioral assessments and behavioral intervention plans.**

If the manifestation team pursuant to section 201.4 of this Part, makes the determination that the conduct subject to the disciplinary action was a manifestation of the student's disability, the CSE must either:

- (a) conduct a functional behavioral assessment, unless the school district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or
- (b) if a behavioral intervention plan has already been developed, review the behavioral intervention plan and modify it as necessary to address the behavior.

### **201.4 Manifestation determinations.**

- (a) *General requirement for manifestation review.* A review of the relationship between the student's disability and the behavior subject to disciplinary action to determine if the conduct is a manifestation of the disability must be made immediately, if possible, but in no case later than 10 school days after:
  - (1) a decision is made by a superintendent of schools to change the placement of a student to an interim alternative educational setting pursuant to section 201.7(e) of this Part; or
  - (2) a decision is made by an impartial hearing officer to place a student in an interim alternative educational setting pursuant to section 201.8 of this Part; or
  - (3) a decision is made by a board of education, district superintendent of schools, building principal or superintendent pursuant to section 201.7(a) or (b) of this Part to impose a suspension that constitutes a disciplinary change in placement.

- (b) *Individuals to carry out review.* A review described in subdivision (a) of this section shall be conducted by a manifestation team in a meeting, which shall include a representative of the school district knowledgeable about the student and the interpretation of information about child behavior, the parent and relevant members of the CSE as determined by the parent and the school district. The parent must receive written notification prior to any manifestation team meeting to ensure that the parent has an opportunity to attend. The notification shall inform the parent of the purpose of the meeting, the names of the individuals expected to attend and inform the parent of his or her right to have relevant members of the CSE participate at the parent's request.
- (c) *Conduct of review.* The manifestation team shall review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if:
  - (1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or
  - (2) the conduct in question was the direct result of the school district's failure to implement the IEP.
- (d) *Determination.* (1) The conduct must be determined to be a manifestation of the student's disability if the manifestation team determines that a condition in either paragraph (c)(1) or (2) of this section was met.
  - (2) If the manifestation team determines that the conduct was a manifestation of the student's disability, the CSE shall:
    - (i) conduct a functional behavioral assessment and implement a behavioral intervention plan for such student in accordance with section 201.3 of this Part; and
    - (ii) except as provided in section 201.7(e) of this Part, return the student to the placement from which the student was removed, unless the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan.
- (e) *Deficiencies in IEP.* If the manifestation team determines the conduct in question was the direct result of the school district's failure to implement the IEP, the school district must take immediate steps to remedy those deficiencies.

**201.5 Students presumed to have a disability for discipline purposes.**

- (a) *General provision.* The parent of a student who has violated any rule or code of conduct of the school district and was not identified as a student with a disability at the time of such behavior may assert any of the protections set forth in this

# Appendix

## Developing Safe and Supportive Schools

# **Developing Safe and Supportive Schools**



## **BUFFALO PUBLIC SCHOOLS STANDARDS FOR COMMUNITY-WIDE CONDUCT AND INTERVENTION SUPPORTS 2015 - 2016**

Dr. Kellnor Cash  
Interim Superintendent of Schools

[www.buffaloschools.org](http://www.buffaloschools.org)

Adopted by the Buffalo Board of Education on July 8, 2015

## LEVELS OF INTERVENTIONS AND RESPONSES

	<p><b>Example of Classroom Interventions and Responses</b></p> <p>These interventions aim to teach correct and alternative behavior so students can learn and demonstrate safe and respectful behavior. Teachers are encouraged to try a variety of teaching and classroom management strategies. Teachers should use these responses in a graduated fashion.</p> <ul style="list-style-type: none"> <li>• Establish relationships with students</li> <li>• Contact parent via telephone, e-mail or text message</li> <li>• Verbal correction</li> <li>• Reminders and redirection (e.g. role play)</li> <li>• Written reflection or apology</li> <li>• Seat change</li> <li>• Parent or guardian conference</li> <li>• Parent or guardian accompany student to school</li> <li>• Daily progress sheet on behavior</li> <li>• In-class time out</li> <li>• Establish buddy teacher system</li> <li>• Loss of classroom privileges</li> <li>• Teacher or student conference</li> <li>• Detention</li> </ul> <p><b>Examples of Student Support Team Interventions and Responses</b></p> <p>These interventions often involve support staff, both school based and within the broader community, and aim to engage the student's support system to ensure successful learning and consistency of interventions, and change the conditions that contribute to the student's inappropriate or disruptive behavior. Staff should use these responses in a graduated fashion.</p> <ul style="list-style-type: none"> <li>• Parent or guardian notification</li> <li>• Community conferencing</li> <li>• Mentoring program</li> <li>• Peer mentoring</li> <li>• Referral to school-based health or mental health clinic</li> <li>• Referral to community organization</li> <li>• Referral to after-school program</li> <li>• Service to school</li> <li>• Conflict resolution</li> <li>• Restorative Justice</li> <li>• Community mediation</li> <li>• Short-term behavioral progress report</li> </ul>
	<p><b>Examples of Administrative Interventions and Responses</b></p> <p>These interventions can involve the school administration and aim to correct behavior by stressing the seriousness of the behavior while keeping the student in school. Staff should use these responses in a graduated fashion.</p> <ul style="list-style-type: none"> <li>• Change in schedule or class</li> <li>• Parent or guardian notification</li> <li>• Restorative Justice strategies, including school and community service</li> <li>• Loss of privilege</li> <li>• Restitution</li> <li>• Detention</li> <li>• Conflict resolution</li> <li>• Peer mediation</li> <li>• Reprimand by appropriate administrator</li> <li>• Referral to Student Support Team (SST) for consideration of necessary intervention</li> <li>• Revision to IEP (for students with disabilities)</li> <li>• Community conferencing</li> <li>• Assignment of work projects</li> <li>• Mentoring</li> <li>• FBA/BIP</li> </ul>
	<p><b>Examples of Suspension and Referral Responses</b></p> <p>These interventions may involve the short-term removal of a student from the school environment because of the severity of the behavior. The duration of the short-term suspension, if issued, is to be limited as much as practicable while adequately addressing the behavior. Staff should use these responses in a graduated fashion.</p> <ul style="list-style-type: none"> <li>• Parent or guardian notification</li> <li>• In-school suspension</li> <li>• Short-term suspension (one to five days)</li> <li>• Referral to SST</li> <li>• Referral to substance abuse counseling</li> <li>• Referral to the Credit Recovery Program</li> <li>• Restorative Justice strategies, including school and community service</li> <li>• Referral to IEP team (students with disabilities)</li> <li>• Revision to IEP (student with disabilities) as needed</li> <li>• Develop Functional Behavioral Assessment and Behavior Intervention Plan</li> <li>• Referral to community organizations, including community conferencing and community mediation</li> </ul>
<p><b>LEVEL 4</b></p>	<p><b>Example of Extended Suspension and Referral Responses</b></p> <p>These interventions involve the removal of a student from the school environment because of the severity of the behavior. They may involve the placement of the student in a safe environment that provides additional structure to address behavior. These interventions focus on monitoring the safety of the school community and ending self-destructive and dangerous behavior. Staff should use these responses in a graduated fashion.</p> <ul style="list-style-type: none"> <li>• Parent or guardian notification</li> <li>• Extended suspension</li> <li>• Functional Behavioral Assessment</li> <li>• Community conferencing</li> <li>• Referral to community organizations</li> <li>• Expulsion (serious behavioral infractions)</li> <li>• Referral to IEP team (students with disabilities) for Manifestation determination</li> <li>• Alternative education placement by the Central Processing Office</li> <li>• Behavioral Intervention Plan</li> <li>• Community mediation</li> <li>• Referral to substance abuse counseling</li> <li>• Permanent expulsion</li> <li>• Restorative Justice strategies, including school and community service</li> </ul>



## INAPPROPRIATE AND DISRUPTIVE BEHAVIORS AND LEVELS OF RESPONSE

### KEY: USE LOWEST LEVEL INDICATED FIRST

**Level 1:** Classroom Support and Student Support Team -- may be appropriate when student has no prior incidents and interventions have not been put in place

**Level 2:** Appropriate Administration -- may be appropriate when supports have been put in place in the classroom to address behavior but the behavior has continued to negatively affect the learning of the students and others

**Level 3:** Short Term Suspension -- may be appropriate when interventions and supports have been put in place but the behavior is escalating (repeated offenses)

**Level 4:** Request for Long Term Suspension -- may be appropriate when student's behavior seriously affects the safety of others in the school

INAPPROPRIATE OR DISRUPTIVE BEHAVIOR	LEVEL 1	LEVEL 2	LEVEL 3	LEVEL 4	MAY BE REFERRED TO POLICE
<b>Disrespectful Behavior</b>					
• Making inappropriate gestures, symbols or comments, or using profane or offensive language	•	•			
• Using verbal insults or put-downs, or lying to, misleading or giving false information to school staff	•	•	•		
• Using verbal insults or put-downs, or lying to, misleading or giving false information to school staff that leads to emotional or physical harm to another person	•	•	•	•	•
<b>Dress Code Violation</b>					
Refer to dress code standards listed on page 30	•	•			
<b>Drugs or Controlled Substance</b> (at school, school-sponsored activities or when involved in incidents affecting the safety or welfare of the school community)					
• Under the influence		•	•	•	•
• Using or possessing			•	•	•
• Distributing or selling				•	•
<b>Extortion</b> (i.e., taking or attempting to take from another -- money or property -- by threat of force, express or implied)					
• Pre-k to grade 4		•	•		
• Grades 5 to 12			•	•	•
<b>False Activation of a Fire Alarm</b>					
• Pre-k to grade 4		•	•	•	•
• Grades 5 to 12		•	•	•	•

## INAPPROPRIATE AND DISRUPTIVE BEHAVIORS AND LEVELS OF RESPONSE

### KEY: USE LOWEST LEVEL INDICATED FIRST

**Level 1:** Classroom Support and Student Support Team – may be appropriate when student has no prior incidents and interventions have not been put in place

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**Level 3:** Short Term Suspension – may be appropriate when interventions and supports have been put in place but the behavior is escalating (repeated offenses)

**Level 4:** Request for Long Term Suspension – may be appropriate when student's behavior seriously affects the safety of others in the school

INAPPROPRIATE OR DISRUPTIVE BEHAVIOR	LEVEL 1	LEVEL 2	LEVEL 3	LEVEL 4	MAY BE REFERRED TO POLICE
<b>Tardiness</b>					
• Persistent or excessive tardiness to class or school	•	•			
<b>Technology Acceptable Use Policy Violation</b>					
• Refer to page 31 of these Standards for details	•	•			
<b>Threat Against School Personnel, Written or Verbal</b>					
• Pre-k to grade 4	•	•	•	•	•
• Grades 5 to 12		•	•	•	•
<b>Theft</b>					
• Less than \$500		•	•		
• Greater than \$500 (It is recommended that police not be contacted for students in pre-k or kindergarten.)			•	•	•
<b>Tobacco Possession or Use</b>					
• School staff is required to refer students to appropriate substance abuse counseling.	•	•			
<b>Trespassing</b>					
• Being on school property without permission, including while suspended or expelled; Includes breaking and entering		•	•	•	•
<b>Unauthorized Sale or Distribution</b> (i.e., unauthorized or unapproved selling or distributing of goods not otherwise included in this code)					
• Items with little monetary value (under \$50)	•	•			
• Items with significant monetary value		•	•		

# Appendix

## The Truth About ACEs

# THE TRUTH ABOUT ACEs

## WHAT ARE THEY?

ACEs are  
ADVERSE  
CHILDHOOD  
EXPERIENCES

The three types of ACEs include:

### ABUSE



Physical



Emotional



Sexual

### NEGLECT



Physical



Emotional

### HOUSEHOLD DYSFUNCTION



Mental Illness



Substance Abuse



Mother's Mental Health



Father's Mental Health



Divorce

## HOW PREVALENT ARE ACEs?

The ACE study<sup>1</sup> revealed the following estimates:

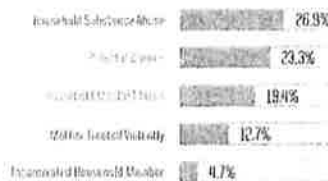
### ABUSE



### NEGLECT



### HOUSEHOLD DYSFUNCTION



Of 17,000 ACE study participants:



## WHAT IMPACT DO ACEs HAVE?

As the number of ACEs increases, so does the risk for negative health outcomes.

0 ACEs 1 ACE 2 ACEs 3 ACEs 4+ ACEs

Possible Risk Outcomes:

### BEHAVIOR



Lack of physical activity



Smoking



Alcoholism



Drug use



Poor diet

### PHYSICAL & MENTAL HEALTH



Low educational attainment



Diabetes



Depression



Suicide attempts



Injury



Heart disease



Cancer



Stroke



COPD



Osteoporosis

Appendix

Sample Notice of Petition to  
Commissioner

**STATE OF NEW YORK  
STATE EDUCATION DEPARTMENT**

**In the Matter of (PETITIONER'S NAME),  
on behalf of (CHILD'S NAME) from  
action of the Board of Education  
of the \_\_\_\_\_ School  
District regarding student discipline.**

**NOTICE OF PETITION**

**NOTICE:**

You are hereby required to appear in this appeal and to answer the allegations contained in the petition. Your answer must conform with the provisions of the regulations of the Commissioner of Education relating to appeals before the Commissioner of Education, copies of which are available at [www.counsel.nysed.gov](http://www.counsel.nysed.gov) or from the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234.

If an answer is not served and filed in accordance with the provisions of such rules, the statements contained in the petition will be deemed to be true statements, and a decision will be rendered thereon by the Commissioner.

Please take notice that such rules require that an answer to the petition must be served upon the petitioner, or if he be represented by counsel, upon his counsel, within 20 days after the service of the appeal, and that a copy of such answer must, within five days after such service be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234.

Date

Signature

Name

Address

To: School District