

BUFFALO PUBLIC SCHOOLS

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**STUDENT DISCIPLINE
AND
SUSPENSIONS**

- PRESENTED BY -

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1) What is the legal framework for discipline and suspension of students?

In *Goss v. Lopez*, 419 U.S. 565 (1974), the United States Supreme Court held that a suspension from attendance at school for a period of ten days implicated a property interest that could not be lost without due process. The concept of “due process” is derived from the Fourteenth Amendment to the United States Constitution.

- a) Section 1 of the Fourteenth Amendment states:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

- b) The Fourteenth Amendment does not itself establish liberty or property interests. The courts look to specific state or federal enactments in order to find substantive rights. In public schools, property interests are established in the various statutes that provide for a free public education.
- c) A student over five and under twenty one years of age is entitled to attend public school pursuant to §3202 of the NYS Education Law. Thus, in schools in New York State, the right to attend school cannot be taken away without the administration of “due process.” According to the Court in *Goss v. Lopez*, at a minimum, due process for students subject to suspension includes oral or written notice of the charges against the student, and, if the charges are denied, an explanation of the evidence the authorities have and an opportunity to present his/her side of the story. In New York, Section 3214 of the Education Law provides for additional due process rights afforded students subject to suspension and transfer.¹ Regulations of the Commissioner of Education require certain procedures to be followed when notifying parents concerning student suspensions of five days or less.²

¹ See “Supplemental Materials,” pp. A-1 through A-9.

² See 8 NYCRR 100.2(1)(4), “Supplemental Materials,” p. C-1.

- d) Parents seeking to challenge suspensions in New York have certain options. Education Law §310 authorizes appeals to the Commissioner of Education.³ Article 78 of the Civil Practice Law and Rules provides for a special proceeding in New York State Supreme Court. However, neither an appeal to the Commissioner of Education nor a special proceeding in a court can result in a damage award. For this reason, many litigants have sought to impose liability on school administrators and school board members by resorting to an action brought under federal law in accordance with 42 U.S.C. §1983.

Section 1983 states:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.....”

Section 1983 is often favored because it provides for monetary damages. A companion statute, §1988 (enacted in 1976) provides that a prevailing party may be entitled to a reasonable attorney’s fee.

- e) Compliance with the procedural requirements of the statutes and regulations governing student discipline proceedings is critical if school officials are seeking to avoid or limit liability.

2) Under NYS Education Law §3214, which students can be suspended?

Students who are insubordinate, or disorderly, or violent or disruptive, or whose conduct otherwise endangers the safety, morals, or welfare of others, may be suspended.⁴ School districts are not authorized to suspend students for truancy.⁵

³ Any person believing himself or herself to be aggrieved by an official act of any officer or school authority, or by any action taken at a meeting concerning any matter under the Education Law or pertaining to the schools of the state, may appeal to the Commissioner of education (NYS Education Law § 310). All appeals to the Commissioner must be brought within 30 days after the decision or act complained of.

⁴ Education Law §3214(3).

⁵ *Appeal of Ackert*, 30 Ed. Dept. Rep. 31 (1990).

3) Who may suspend a student?

Under NYS law, a board of education and the superintendent of schools has the authority to suspend a student. A principal or *acting* principal may suspend a student for five days or less. An *assistant* principal has no authority to suspend for any length of time (unless also designated by the board to serve as *acting* principal in the *absence* of the principal).⁶

The Commissioner of Education has consistently held that while a school principal may suspend a student from school, the Education Law does not authorize the principal to delegate this authority to an assistant principal.

- a) For example, in one case before the Commissioner, a “hall principal” had notified a parent that his daughter had been suspended for five days for bringing a razor blade to school. Although the principal had subsequently reviewed and signed the suspension notice, the Commissioner found no evidence that the principal was even aware of the hall principal’s decision to suspend the student two days earlier.
- b) In another case, an assistant principal had signed the student’s disciplinary referral form, contacted the parent, and instructed the parent on the conditions of the suspension, all apparently without consulting the principal. The Commissioner found that the assistant principal had improperly “imposed” the suspension; the fact that the principal had signed the letter to the parent the following day did not establish that he “imposed” the suspension.
- c) In both of the above cases, the Commissioner ordered that the short-term suspensions be annulled and expunged from the student’s records.⁷

4) What additional procedures are required at the building level if additional suspension over 5 days is desired (“long-term suspension”)?

NYS Education Law §3214 provides that no student may be suspended in excess of five school days unless such student and the person in parental relation shall have had an *opportunity* for a fair hearing, upon reasonable notice, at which such student shall have the right of representation by counsel, with the right to question witnesses against such student and to present witnesses

⁶ *Appeal of Knapp*, 39 Ed. Dept. Rep. 453 (1999); *Ross vs. Disare*, 500 F. Supp. 928 (S.D.N.Y. 1977).

⁷ *Appeal of A.L., Jr.*, Decision No. 14,883 (2003); *Appeal of E.R.*, Decision No. 14,565 (2001).

and other evidence on his behalf.⁸ The person in parental relation can waive the right to a §3214 hearing as long as the waiver is made intelligently, knowingly and voluntarily.⁹

- a) As noted previously, school officials should submit a request for a §3214 hearing (“long-term suspension”) to the Office of Pupil Personnel Services as soon as possible, preferably on the day of the misconduct. But first determine that a §3214 hearing is really warranted (*i.e.* additional suspension beyond 5 days is in fact the desired outcome), and consider whether the District will actually be able to prove the charges against the accused student at his/her hearing.

If the only witness to the alleged misconduct is another student whom the District is reluctant to have testify, or is unavailable, and the accused student has not made any admissions, there will be no one at the hearing qualified to testify from personal knowledge as to what happened. The charge will not be upheld. Although they are an important part of the investigation, written statements of witnesses (without the person present at the formal suspension hearing to testify) cannot be used as the *sole* basis for the case.

- b) In the event that student witnesses will be needed to testify in the District’s case against the accused student, the parents of the student witnesses should be notified in advance of the hearing that their child is being requested to testify. The parent should be given the opportunity to accompany their child to the hearing if they wish, and to remain in the hearing room while their child testifies. The law itself does not require a school district to obtain a parent’s “permission” for their child to serve as a witness, as the hearing officer does have authority to issue a subpoena to compel the student’s appearance. NOTE however that Buffalo Public School’s own procedures call for such permission to be obtained.
- c) Once the “long-term suspension” hearing is scheduled, written notice of the hearing and charges brought against the student by the Superintendent must be provided to parents as soon as possible prior to the hearing date.

In the Buffalo Public Schools, this notice of hearing and charges from the Superintendent is coordinated through the Office of Pupil Personnel Services. This Office prepares the notice based on the description of the charges as

⁸ Education Law §3214(3)(c).

⁹ *Appeal of McMahon*, 38 Ed. Dept. Rep. 22 (1998).

originally drafted and provided by the building principal. In addition to the specific charges against the student, certain other information is required to be included in this written notice [see Sample Notice of Hearing and Charges for Long Term (Over 5 Days) Suspension, *below*].

5) *How should the charges be drafted?*

The Commissioner of Education has held that “the charges must be reasonably specific to advise the student and his/her parents or counsel of the activities or incidents which have given rise to the proceeding and which form the basis for the hearing.”¹⁰ Do not *merely* repeat the “statutory” grounds for suspension of students.

- a) *Briefly* describe only the accused student’s specific acts of misconduct; do not include narrative explanations of the entire event from start to finish. A detailed narrative of events is not a “charge.” Always keep in mind that whatever elements are included in the charge, must be proved by direct testimony of witnesses and/or physical evidence at the hearing.
- b) It is requested by the Office of Pupil Personnel Services that the following template be used for each of the charge(s):

That on or about [DATE], a student at [NAME OF SCHOOL] did allegedly [BRIEFLY DESCRIBE EXACTLY WHAT THE STUDENT DID].

Many school districts follow the above with a statement to the effect of:

Such misconduct constitutes [*the “category” of conduct the above acts fall into, i.e., disorderly conduct, violent conduct, conduct which endangers the safety, morals, health or welfare of others, etc.*] prohibited by Section [number] of the District’s Code of Conduct.

- c) Use direct, simple terms such as: hit; took [*ex. computer equipment*] without permission; made a false statement about a teacher to the effect of [repeat the statement]; lied; left class without permission; failed to follow the following instructions [repeat the instructions]; lit a fire in a garbage can; possessed a gun or knife; possessed 25 bags of marijuana; gave 6 Loretab pills to a male student, etc.

¹⁰ *Matter of Dennis*, 19 Ed. Dept. Rep. 235 (1979).

- d) Even if the district has initiated criminal charges related to the same acts of misconduct, and local law enforcement officials discuss the student's acts in terms of potential violations of the Penal Law, do *not* use these legal terms in drafting the charges for the formal suspension hearing (*i.e.*, in the charge, do not use terms such the following to describe the student's behavior: assault, menace, arson, sexual harassment, defamation, theft, robbery, felony, misdemeanor, *etc*).

The use of technical or legal terms in the charge itself may require the presentation of direct evidence of the student's state of mind and/or specific acts that would otherwise be unnecessary in a suspension hearing to prove that the student violated a school rule. Only include a charge that alleges the student's "intent" to do a particular act if such intent can actually be proved by direct testimony at the hearing (*ex.* A school administrator is able to testify that when she questioned the accused student, the student admitted to her that when he brought the marijuana to school he intended to sell it). Further, what the student did may be a violation of the District's Code of Conduct, but may not fall under the definition of technical or legal terms as found in the Penal Law.

- e) Do not equivocate. Avoid stating "I think," "It is believed that...", "It appears that..."
- f) If the student hit someone, state whom he or she hit. If a student touched another student in an inappropriate place, be specific as to the place. Use accurate terms (don't say "punch" if the witnesses will be testifying that it was a "slap").
- g) If the student used inappropriate language, state what was said – verbatim – and describe to whom the language was directed or who was present. Don't be shy; the hearing officers have heard it all before.
- h) Refer to adult staff members by their actual names and positions, but if other students need to be referred to in the charges, describe them by using the terms "a female student" or "a male student" instead.
- i) If another student or staff member was injured as a result of the accused student's misconduct, indicate that in the charge (*i.e.*, "... pushed a male student to the ground, causing the male student to suffer bruising and bleeding on his head..."). Remember that if included as an element of the charge, it must be established at the hearing that this in fact occurred (through testimony of the victim, testimony of the school nurse, *etc.*). If the District cannot produce such evidence of injury, do not include it in the charge.

6) What happens at the long-term suspension hearing?

- a) The law requires that a transcript or record be made of the hearing.¹¹ A tape recording is sufficient. All portions of the tape must be audible.¹²
- b) The Commissioner of Education presumes the student is innocent.¹³ The District has the burden of proof and presents its evidence and testimony first.¹⁴
- c) Student disciplinary hearings need not be conducted under the formal rules of evidence, but determinations must be supported by competent and substantial evidence that the student participated in the objectionable conduct.¹⁵ Hearsay evidence is admissible at a student suspension hearing; however, do not rely *solely* on hearsay evidence to establish the district's case (unless it is an admission by the accused student).
- d) All evidence (physical and documentary) should be brought to or made available for the hearing. If requested, ensure that enough copies of documents are produced for this purpose. The student's parent or other representative is entitled to a copy of all documents submitted for consideration by the hearing officer. If requested, include as exhibits copies of policies/codes violated, and be prepared to establish through testimony how the particular student and his/her parent were put on notice of those policies/codes, *i.e.*, reviewed at assembly in beginning of school year and school records establish that student was present that day; etc.

7) What documentation or other materials are typically submitted for consideration to the hearing officer at the long-term suspension hearing?

¹¹ *Matter of Labriola*, 20 Ed. Dept. Rep. 74 (1980).

¹² *Matter of Rose*, 10 Ed. Dept. Rep. 4 (1970); *Matter of Watson*, 10 Ed. Dept. Rep. 90 (1971); *Matter of Labriola*, 20 Ed. Dept. Rep. 74 (1980).

¹³ *Matter of Rose*, 10 Ed. Dept. Rep. 7 (1970).

¹⁴ *Matter of Dennis*, 19 Ed. Dept. Rep. 235 (1979).

¹⁵ *Matter of Ablicocco*, 21 Ed. Dept. Rep. 166 (1981); *Matter of Rodriguez*, 8 Ed. Dept. Rep. 214 (1969); *Appeal of Homick*, 34 Ed. Dept. Rep. 150 (1994).

The following documents may be introduced into evidence depending on the nature of the specific charges and the circumstances; school officials should ensure that they are made available for a long-term suspension where applicable:

- a) The parental notice generated by the building principal stating the misconduct and underlying initial short term suspension,¹⁶
- b) Any statements written by witnesses, victims, or accused students.¹⁷ Include notes or statements of interviews with the involved students made by school officials,¹⁸
- c) If still in the District's possession, any weapons or contraband substances confiscated from the accused student. Also bring a photocopy of the weapon. If a knife, make the photocopy next to a ruler to show size of the blade,
- d) Police statements, if available,¹⁹
- e) The school handbook or code of conduct (pertinent sections only, specifying specific behavior that is prohibited),²⁰ and

¹⁶ Make sure notice complies with Education Law regarding content (must include description of the incident, parent's right to request informal conference with building principal and right to question complaining witnesses at such informal conference); has been delivered appropriately (delivered either personally, by express mail or an equivalent means reasonable calculated to ensure receipt within 24 hours of the decision to propose suspension; notice shall also be by telephone where the school has been provided with a telephone number); and that the notice and opportunity for the informal conference has taken place before the proposed suspension unless the student's presence in school poses a continuing danger to persons or property or an ongoing threat of disruption to the academic process.

¹⁷ Make sure these are dated and signed.

¹⁸ If kept in a "log" fashion, redact (copy, black out then recopy) sections that pertain to other students or incidents.

¹⁹ As with other written statements, if the police testimony is crucial to prove the case (*ex.*, the accused student admitted the misconduct to the police officer but not in the presence of any school official; the police officer confiscated contraband from the accused student, took it to police headquarters for testing, and the district no longer has the substance in its possession), do not rely on the written statement as the sole evidence. The police officer must be present to testify.

²⁰ Bring the version of this that is most likely to have been seen by students. Do not bring the "Board Policy" version only, if students never are given that particular version. Be prepared to testify as to how the accused student was notified of the contents of the Code of Conduct.

- g) Student “anecdotal record” of previous disciplinary history. The student’s anecdotal record may be considered for purposes of fashioning an appropriate penalty.²¹ The anecdotal record may only be considered *after* a finding of guilt on the charge.²² The hearing officer is not authorized to consider grades, progress reports or attendance for purposes of making a penalty recommendation.²³

8) *What are some potential outcomes of a long-term suspension hearing?*

- a) Permanent suspensions are rare. A permanent suspension is an extreme penalty that is generally educationally unsound except under extraordinary circumstances, such as where the student exhibits “an alarming disregard for the safety of others” and where it is necessary to safeguard the well-being of other students.²⁴
- b) Generally, a school district may not “condition” reentry to school following a suspension. In other words, *after serving* a suspension, a student cannot be placed on “probation” allowing the school to suspend him/her for future acts of misconduct without another due process hearing.²⁵
- c) Generally, a hearing officer is not authorized to recommend community service, counseling, psychiatric evaluations, alcohol and drug abuse assessments, etc. as elements of a proposed penalty. When a District does provide a due process hearing, it does not, however, have to actually implement a recommendation for a suspension that results from that hearing. The district may enter into a contract of conduct with the student, in which the district holds the suspension in abeyance and the student is re-admitted on probation. In the event there is a further act of misconduct during the term in which the suspension is in abeyance, the District can re-impose the underlying suspension without the need

²¹ *Matter of Watson*, 10 Ed. Dept. Rep. 90 (1971); *Matter of Cousins*, 10 Ed. Dept. Rep. 245 (1971).

²² *Matter of Dennis*, 19 Ed. Dept. Rep. 235 (1979); *Appeal of Homick*, 34 Ed. Dept. Rep. 150 (1994).

²³ The Commissioner has held it is not appropriate to impose a suspension based on a student's attendance and grades. *Appeal of a Student with a Disability*; Decision No. 13,723 (December 31, 1996).

²⁴ *Appeal of Dale C.* Decision No. 14,423 (August 4, 2000).

²⁵ *Matter of Labriola*, 20 Ed. Dept. Rep. 74 (1980). Compare to *Matter of Gressler*, 14 Ed. Dept. Rep. 414 (1975).

for an additional due process hearing.²⁶

In a 2003 case, the Commissioner of Education had held that such a contract of conduct may not include community service, negative drug screen results, drug assessments, or counseling, as none of the conditions in the contract may impose any special rules or regulations on the student that are not similarly imposed on fellow students.²⁷

But see, Chapter 170 of the Laws of 2006, which amended Education Law §3214 to authorize a board of education, following a student's suspension from school, to condition a student's early return to school and suspension revocation on the student's voluntary participation in counseling or specialized classes, including anger management or dispute resolution, where applicable.

²⁶ (*Appeal of Spensieri*, 40 Ed Dept Rep 51, 8/04/00).

²⁷ *Appeal of L.H.*, Dec. No. 15,005 (December 23, 2003).

EXAMPLES OF CHARGES DRAFTED USING THE REQUESTED TEMPLATE

That on or about <DATE> a student at <NAME OF SCHOOL>, did allegedly hit Mr. John Smith, a teacher at said school, causing Mr. Smith to break his glasses and cut the left side of his cheekbone.

That on or about <DATE> a student at <NAME OF SCHOOL>, did allegedly grab Ms. Jane Smith, a teacher at said school by the arm, threw a textbook in her direction, and used abusive language towards her to the effect of, "You bitch; I'm not fucking doing anything you say."

That on or about <DATE> a student at <NAME OF SCHOOL>, did allegedly threaten Mr. John Smith, a teacher at said school by holding a razor blade at his throat.

That on or about <DATE> a student at <NAME OF SCHOOL> did allegedly have in his possession a weapon (*i.e.*, a knife with a 4" blade).

That on or about <DATE> a student at <NAME OF SCHOOL> did allegedly have in his/her possession a weapon (*i.e.*, a 35 mm gun).

That on or about <DATE> a student at <NAME OF SCHOOL> did allegedly have in his possession unlawful drugs (*i.e.*, 2 bags of marijuana), and distributed some or all of these drugs to a male student.