



STUDENT DISCIPLINE RIGHTS AND PROCEDURES:

A GUIDE FOR ADVOCATES

SECOND EDITION

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DISCLAIMER

The information provided in this guide helps explain the laws affecting the rights of students in school discipline cases in New Jersey, but should not be construed as legal advice. This manual is provided for educational and informational purposes only, and contains general information that may not reflect current or complete legal developments. Readers are encouraged to seek appropriate legal advice from a licensed attorney on the particular facts and circumstances at issue for students undergoing school discipline.

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INTRODUCTION

To be both fair and effective, student discipline law and policy must balance two separate rights of students: the constitutional right to a public education, and the right to a safe and orderly learning environment. Procedures and laws to protect students from arbitrary and wrongful discipline are necessary, as are procedures and laws to allow schools to discipline disruptive and dangerous students.

In 2003, at least partly in response to the reform efforts of the Education Law Center and other advocacy and policy organizations, the New Jersey Department of Education recognized that there were problems with state policy and law on student discipline and began the process of developing a new student discipline code.¹ The state regulations adopted in 2005 have gone a long way toward establishing fairer, more uniform discipline rules in New Jersey, setting forth due process requirements for removal from school and establishing limits on school district authority to expel students.

This manual is designed to help parents and advocates represent students in discipline cases. It sets forth the current state of New Jersey law and policy governing student discipline, and points out the areas in which reform is still needed. The manual is divided into two parts: Part I sets forth the law and procedures that apply to all students involved in a discipline case; Part II sets forth the additional laws and procedures that apply to students with disabilities who are, or may be, eligible for special education. Discipline of students with disabilities is governed by the general education laws and by the additional requirements of the federal and state special education laws.

PART I: GENERAL EDUCATION LAWS AND PROCEDURES

SOURCES OF STUDENT DISCIPLINE LAW

There are numerous sources of law governing student discipline, all of which are discussed throughout this manual. First and foremost, the New Jersey Constitution guarantees every child between the ages of five and 18 the right to a “thorough and efficient public education,”² a right obviously impacted by school suspension and expulsion. Second, state and federal statutes govern some aspects of student discipline, although, with the exception of the federal special education statute, these statutes are not comprehensive. For example, N.J.S.A. 18A:37-1, *et seq.*, grants New Jersey school administrators and school boards authority to suspend and expel students, but is very general in its terms, and only sets forth some of the grounds for student discipline.

Third, there are state regulations on student discipline. This manual incorporates the rules setting general standards for the exclusion of students from school for disciplinary reasons and the delivery of educational services to students who are excluded from school, as well as special rules governing the discipline of students with disabilities.

Fourth, numerous state and federal court decisions address student discipline, filling the gaps left by statutes and regulations and providing the primary source of law on some issues. Fifth, New Jersey commissioner of education and state board of education decisions establish law on student discipline in New Jersey.³

Finally, all school districts are required to have a code of student conduct to govern student behavior and discipline within the district.⁴ These rules should specify

prohibited behaviors and the consequences for violating school rules. In addition, the code should establish standards, policies and procedures for positive student development. School staff, students and parents must be given a copy of the code of conduct annually.⁵

CODE OF STUDENT CONDUCT

All school districts are required to implement a code of student conduct based upon parent, student and community input reflecting locally determined and accepted core ethical values. The board of education shall establish a process for the annual review and update of the code of conduct again taking into account parent, student and community involvement. This annual process must take into account the findings of annual reports of student conduct, including suspensions and expulsions, and incidences reported under the Electronic Violence and Vandalism Reporting System.⁶

The code of conduct shall achieve several purposes, including, but not limited to: (1) preventing problem behaviors, (2) establishing parameters for the intervention and remediation of student problem behaviors and (3) establishing parameters for school responses to violations of the code of conduct.⁷ The code of conduct shall include a description of comprehensive behavioral supports that promote positive student development and must take into account the students' abilities to fulfill the behavioral expectations established by the school district.⁸

The code of conduct shall include a description of the school responses to violations of school rules that, at a minimum, shall be graded according to the severity of

the offenses, the developmental ages of the student offenders and the students' histories of inappropriate behaviors.⁹ There shall be a list of actions the school district may take. The code of student conduct must also describe the school district's policies and procedures related to intimidation, harassment and bullying.¹⁰

The chief school administrator of each school district is required to report annually on the implementation of the code of student conduct, both to the district board of education at a public meeting, and to the New Jersey Department of Education in the format prescribed by the Commissioner.¹¹ The report to the district board must address the effectiveness of the code.

A SCHOOL'S DUTY TO PREVENT SUSPENSION AND EXPULSION

Inappropriate student behavior and violation of school rules can have many causes, including an undetected disability, lack of challenging class work, peer conflicts, bullying, emotional problems and a stressful home or community environment. In most instances, corrective remedial measures and intervention strategies, such as parent conferences, school-based counseling, peer mediation, conflict resolution, referral to appropriate social services, and positive behavioral supports (which may include a behavior modification plan) could help correct inappropriate behavior before suspension and expulsion become an issue. In addition, schools should provide professional development opportunities for teachers to learn skills and strategies to manage the classroom and reduce inappropriate behaviors and conflict. Because the right to a public education is grounded in the state constitution, corrective intervention and prevention

strategies should be every school district's first responses to a violation of school rules. See discussion of defenses to school discipline on pp. 40-48 of this manual.

Under state regulation, all schools must have a comprehensive system for the planning and delivery of intervention and referral services for all students who are experiencing learning, behavior or health difficulties in school.¹² Schools are required to use a multi-disciplinary team approach consisting of the student's parents and various school professionals – for example, teachers, school social worker, guidance counselor, school psychologist, school administrator - to identify students with learning, behavioral or health needs; gather relevant information; develop action plans which provide for appropriate school and community interventions and referrals to community resources; set goals and outcomes for students; assess achievement of goals and outcomes under the action plan at least annually; and modify each plan, as appropriate, to achieve goals and outcomes.¹³ School staff are also required to make a referral for a special education evaluation when they reasonably believe a student's continued inappropriate behavior may stem from a disability.¹⁴ Further, appropriate school personnel must refer a student for evaluation and substance abuse treatment when they suspect the student's abuse of substances poses a threat to his or her health and well-being.¹⁵ Substance abuse evaluation and referral are discussed in more detail on pp. 24-26 of this manual.

If a school disregards its duty to intervene and provide services to a student who is experiencing behavioral problems in schools, the student may challenge the school's decision to impose suspension or expulsion on the ground that the school failed in its

affirmative duty to prevent exclusion of the student through the provision of appropriate services and referrals. See discussion of defenses to student discipline on pp. 40-48 of this manual.

GROUNDS FOR SUSPENSION AND EXPULSION

Under New Jersey statute,¹⁶ a student may be suspended or expelled for “good cause,” which includes, but is not limited to, any of the following conduct:

- continued and willful disobedience
- open defiance of authority
- stealing
- damaging school property
- occupying or causing others to occupy the school building without permission
- causing other students to skip school
- possessing, using or being under the influence of illegal drugs or alcohol in the school building or on school grounds
- harassment, intimidation, or bullying¹⁷
- trying to injure or injuring another student, a teacher, someone who works for the school, or a school board member
- conviction or adjudication of delinquency for possession of a gun, or committing a crime while armed with a gun, on school property, on a school bus, or at a school function
- knowingly possessing a gun while on school property, on a school bus, or at a school

function

The statutory list of grounds for suspension and expulsion fails to provide sufficient notice of the types of conduct that could lead to removal from school, primarily because it is not intended to cover the entire range of behaviors that constitute “good cause” for removal. Students are often suspended or expelled for reasons not listed in the statute, and have been disciplined for conduct that occurred off school grounds if he or she poses a threat of harm to him or herself, to others in the school, or to school property.¹⁸ Additionally, the commissioner of education has held that a school board may impose discipline for conduct that occurred at a prior school, although the board must first enroll the student, hold a hearing and make its own determination regarding an appropriate form of discipline.¹⁹ The commissioner has in the past upheld expulsion/suspension for reasons not contained in a district’s student code of conduct, finding that any act may subject a pupil to punishment where the act is detrimental to good order and to the best interest of the school or where it adversely affects school discipline.”²⁰ Basic principles of due process, as well as provisions of the state discipline code, however, would require, at a minimum, notice of offenses that could lead to exclusion from school.²¹

Moreover, case law and the state discipline code have imposed significant limitations on a school district’s authority to expel students. Expulsion cannot be imposed unless a school district has fully complied with procedural due process requirements and has already provided alternative education to a student who has then committed another

expellable offense. See discussion of Procedural Requirements for Long-Term Suspension and Expulsion and Alternative Education at pp. 17-21 and 50-54 of this manual.

DISTINCTIONS BETWEEN SUSPENSION AND EXPULSION

Different rights and procedural safeguards have been developed by the courts to protect a student's right to due process of law under the 14th Amendment to the United States Constitution. These rights and procedures, discussed fully in the following sections of this manual, vary depending on whether the removal from school is a short-term suspension, a long-term suspension or an expulsion. A short-term suspension is removal of a student from his or her regular education program for up to 10 days, but not the cessation of educational services. A suspension of more than 10 days is known as a long-term suspension. An expulsion occurs when a student's educational services are discontinued altogether, either permanently or for a specified long-term period, such as one year.²²

Short- or long-term suspension may be imposed in-school or out-of-school. In-school suspension involves removing the student from his or her regular school program and placing him or her with a supervising adult in a room in the school building. Most districts provide instruction to students during in-school suspension, in which case the adult supervising the suspension must be a certified teacher.²³ The commissioner of education has ruled that a student placed on in-school suspension must be provided with all of the procedural protections normally granted in out-of-school suspension cases,

since both involve the temporary deprivation of a pupil's right to attend the regular school program.²⁴

NOTE: A student has all of the rights and procedural protections discussed in this manual whenever a school acts to exclude him or her from school, regardless of whether the school refers to its action as a suspension or expulsion. For example, a school administrator may verbally advise a student to leave school and not return until a certain condition is met, such as obtaining a psychological evaluation, or to return only if accompanied by a parent for a meeting regarding the student's behavior. In these situations, and in any case in which the school prohibits the student's attendance, the student's right to an education is impacted and the procedural protections discussed in the following sections of this manual must be provided to the student.

REQUIREMENTS FOR SUSPENSION OF 10 DAYS OR LESS

A principal or his or her designee has the authority to impose a short-term suspension.²⁵ The Due Process Clause of the 14th Amendment to the U.S. Constitution has been interpreted to require the provision of the following procedural protections to a student facing short-term suspension:

- 1) Oral or written notice of what the student is accused of doing and the factual basis for the accusation.
- 2) An explanation of the evidence on which the charges are based, if the student denies the charges.
- 3) An informal hearing or meeting with the superintendent, principal, or other

school administrator before the student is removed from school, during which time the student has the opportunity to explain the student's side of the story and request leniency in punishment.²⁶

The informal hearing must take place even when a school staff member has witnessed the student's action and may immediately follow the notice to the student of the accusation. In exceptional cases where a student's presence in school poses a continuing danger or ongoing threat, the student may be immediately removed from school and provided the necessary notice and hearing as soon after as practicable.²⁷

New Jersey's regulations impose additional requirements, both procedural and substantive, that apply to short-term suspensions. First, the regulations specifically require that a student's parents receive oral or written notification of the student's removal from his or her educational program prior to the end of the school day in which the school has decided to suspend the student.²⁸ This notice must include an explanation of the specific charges, the facts on which the charges are based, the provisions of code the student is accused of violating, the student's due process rights, and the terms and conditions of the suspension.

Second, the regulations mandate the provision of academic instruction, either in school or out of school, within five school days of the suspension.²⁹ The services provided must address the Core Curriculum Content Standards.

Third, the regulations authorize school districts to deny participation in extracurricular activities, school functions, sports or graduation exercises as disciplinary

sanctions, provided such measures are designed to maintain the order and integrity of the school environment.³⁰

PROCEDURAL REQUIREMENTS FOR LONG-TERM SUSPENSION AND EXPULSION

Only a board of education - not a principal, superintendent or other school district employee - may impose a long-term suspension or expulsion.³¹ The board must hold a formal hearing on the proposed discipline, accept testimony and evidence and render a decision that may be appealed to the commissioner of education. Educational services that are comparable to the services provided in public schools for students of similar grades and attainments must be provided within five school days of the suspension, and must continue pending a final determination on any necessary appeal.³² State statute and case law interpreting the Due Process Clause of the 14th Amendment to the U.S. Constitution have established procedural protections for students facing long-term suspension or expulsion. As currently codified in state regulations, the following procedural protections are required:

- 1) Prior to removal from school, all of the procedural protections provided to a student facing short-term suspension (notice, information concerning the charges against the student, an opportunity to meet with a school administrator to explain his or her side of the story). However, if a student causes a serious disruption to the school or presents a danger to him or herself, or other people or property, he or she may be removed

immediately, and the notice and informal hearing may be provided immediately following removal.³³

- 2) Immediate notification to the student's parents of the student's removal from school and appropriate supervision of the student while waiting for the student's parents to remove him or her during the school day.³⁴
- 3) Within two school days of the suspension, written notice to the parents that includes the specific charges, the facts on which the charges are based and the student's due process rights. This written notice must also include a statement – which ELC believes may be subject to legal challenge – that “further engagement by the student in conduct warranting expulsion... shall amount to a knowing and voluntary waiver of the student's right to a free public education, in the event that a decision to expel the student is made by the district board of education.”³⁵ It is ELC's understanding that while the State Board has required the provision of alternative education to students who are expelled from school, see discussion of Alternative Education at pp. 50-54 of this manual, the Department is seeking to limit that right and to allow the automatic expulsion of any student who commits a second expellable offense.
- 4) A formal hearing to be held before the local board of education within 30 calendar days of suspension. This 30-day time frame for a formal hearing, set by regulation, and for certain offenses by statute, may be subject to

challenge as inadequate due process protection.³⁶

- 5) Before the hearing, in addition to the required written notice of the specific charges, the board of education must provide:
 - no later than five days prior to the formal hearing, a list of the witnesses who will appear against the student at the hearing as well as a statement or affidavit containing the facts to which the witnesses will testify;³⁷
 - information on the student's right to bring an attorney to the hearing and on legal resources available in the community.³⁸
 - a manifestation determination for a student with a disability.³⁹
- 6) At the hearing, the student must be given the opportunity to:
 - defend him or herself by explaining his or her side of the story;
 - present witnesses to testify on his or her behalf;
 - present signed statements by witnesses on his or her behalf;
 - face and question the witnesses for the school district, whenever there is a question of fact.⁴⁰
- 7) If the determination of facts or recommendations is delegated by the local school board to a committee of the board, a school administrator or an impartial hearing officer, then the school board as a whole must receive and consider a detailed written report of the hearing before taking any final action against the student.⁴¹

- 8) The decision of the board must, at a minimum, be based on the preponderance of competent and credible evidence.⁴² This means that non-hearsay evidence must establish that it is more likely than not that the student committed the offense charged.
- 9) Within five school days after the close of the hearing, the student's parents must receive a written statement of the board's decision that includes⁴³:
 - the charges considered;
 - a summary of all the evidence considered;
 - factual findings and legal determinations regarding each charge;
 - identification of the educational services that will be provided to the student;
 - the terms and conditions of the suspension;
 - the right to appeal.

In accordance with case law, discipline hearings are held at a session closed to the public in order to protect the privacy of the pupil and his or her family. However, the board of education must take its final vote on the discipline action in public, discussing the case using only the pupil's initials to avoid violation of the student's privacy rights.⁴⁴

NOTE: A student who has not received all due process protections described above, and who has not received alternative education cannot legally be expelled from school.⁴⁵ The current regulations would permit the expulsion of a student who has received all due process protections, who received alternative education in response to a

first expellable offense, and who then commits a second expellable offense. ELC's position is that the expulsion of a student is unconstitutional unless the school district can prove that a complete deprivation of educational services is the narrowest means available to achieve school safety and order. See discussion of the constitutional right to a public education on p. 41 of this manual.

DISCIPLINE RULES FOR ASSAULT AGAINST SCHOOL PERSONNEL, ASSAULT WITH A WEAPON, GUN POSSESSION AT SCHOOL AND GUN CONVICTION

Under New Jersey statutes, additional procedures and rules apply to three distinct student offenses: (1) assault against school personnel or a school board member;⁴⁶ (2) assault with a weapon against school personnel, a school board member or another student;⁴⁷ (3) possession of a firearm at school, on a school bus, or at a school function, or conviction or adjudication of delinquency for an offense involving a firearm at school, on a school bus, or at a school function.⁴⁸ A student accused of one of these three offenses is first entitled to all of the procedural protections discussed in the preceding section of this manual required for all students facing long-term suspension and expulsion, such as notice and a formal hearing. In addition, for any of these offenses:

- 1) The school must immediately suspend the student from school until the school board holds a formal hearing.⁴⁹ Under state statute, the school does not have the option of allowing the student to remain in school until the hearing.
- 2) One Year Removal For Guns: Under the Zero Tolerance for Guns Act,⁵⁰ a

board of education is required to order a one-year removal from school for any student who is found to have possessed a firearm at school, on a school bus or at a school function, or who has been convicted, or adjudicated delinquent, of a firearm offense while at school, on a school bus, or at a school function.⁵¹ However, the school district's chief administrator is authorized to exercise his or her discretion to shorten this time period, depending upon the facts of the case.⁵² The board of education is required to place the student in an alternative education program, discussed in this manual at p. 51, during the period of removal. Aside from case-by-case exceptions, the Zero Tolerance for Guns Act clearly requires, at a minimum, the student's one-year removal from school with the provision of alternative education, and does not prohibit expulsion. However, any attempt to permanently terminate all educational services to a student who commits a firearm offense must be undertaken in accordance with current state law, which greatly limits, if not eliminates, the authority of school boards to do so. See discussion of permanent expulsion and alternative education on pp. 50-54 of this manual.

- 3) Return to The Regular Education Program Following Suspension/Removal: For a student who committed an assault (without a weapon) against school personnel or a school board member, the board of education determines the length of suspension and the student's readiness to return to school.⁵³ For a

student who committed an assault with a weapon or a firearms offense, the district's chief administrator, not the school board, makes the determination of whether the student is ready to return to the regular education program, or should instead remain in an alternative program or receive home instruction or other out-of-school instruction.⁵⁴ Under state regulation, the chief administrator makes this determination based on consideration of the following factors: the nature and severity of the offense; the board of education's removal decision; the results of any relevant testing, assessment or evaluation of the student; and the recommendation of the principal or other director of the alternative school or home or other instruction program in which the student participated during the period of removal.⁵⁵

DISCIPLINE FOR BEHAVIOR OFF SCHOOL GROUNDS

Schools can prohibit conduct off school grounds only if it is “reasonably necessary for the physical or emotional safety, security, and well-being” of that student, other students, staff or school grounds *and* the conduct “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.”⁵⁶ To impose consequences on a student, there must be a nexus between the conduct and the orderly operation of the school.⁵⁷ A consequence for conduct off school grounds means “any result that follows from a student's violation of the code of conduct,” including suspension from extracurricular activities or a mandatory conference with the student and her parents.⁵⁸

The New Jersey Superior Court, Appellate Division, has invalidated a school board policy that sought to control student conduct at all times and places (commonly known as a 24/7 policy) without requiring a connection between the alleged violation and school order or safety.⁵⁹ This means, for example, that a school board cannot use an arrest made off school grounds to prohibit a student's participation in extracurricular activities, or to suspend a student, without showing how the student's conduct "materially and substantially interferes" with the discipline necessary to operate the school.

Due process rights related to discipline of behavior off school grounds are the same as other disciplinary actions. For a discussion of discipline resulting from speech that occurs off school grounds see pp. 48-50 of this manual.

REMOVAL FROM SCHOOL DUE TO SUSPECTED SUBSTANCE ABUSE

Local Board Discipline Policies

Local boards of education are required to have comprehensive policies and procedures for evaluation, intervention, prevention, referral to treatment and continuity of care for students whose use of alcohol or other drugs has affected their school performance, or who, while at school, possess, consume or are suspected of being under the influence of alcohol, controlled dangerous substances, intoxicating chemicals (*e.g.*, glue), improperly used over-the-counter or prescription medications, and anabolic steroids.⁶⁰ The local board is required to seek public input in the annual review of its substance abuse policies and procedures and to annually disseminate them to school staff, students, and parents.⁶¹ State regulations require that these policies and procedures

include the discipline of students who use or possess alcohol or other intoxicating substances at school or at a school function.⁶² These policies and procedures must contain due process requirements and provide sanctions graded according to the severity of the offense, nature of the student's problem and the student's needs.⁶³

Overall, the state statute and regulations relating to substance abuse are aimed at prevention and intervention services to support and help a student with a substance abuse problem. For example, the "continuity of care" requirement mandates that local boards have policies and procedures to ensure that a student in a treatment program receives an educational program, and that a student returning to school from such a program receives supportive services.⁶⁴ Additionally, for a student referred for a medical examination because of suspected substance abuse in school or at a school function (discussed in detail below), the school's substance awareness coordinator, or other professional staff trained in the assessment of substance abuse, is required to perform an alcohol and drug assessment. The purpose of this assessment is to determine the student's need for educational programs, supportive services and treatment beyond the services provided in the regular school program.⁶⁵ Further, if at any time a trained substance abuse professional finds that a student's use of alcohol or other substances poses a danger to his or her health and well-being, the professional must initiate a referral for substance abuse treatment.⁶⁶ In accordance with federal regulation, school districts must protect the confidentiality of students' alcohol and drug abuse records and information provided by an elementary or secondary school student in a drug or alcohol counseling program

indicating the substance abuse of a person in the student's household.⁶⁷

Removal from School and Medical Examination

State law mandates the removal and medical examination of a student suspected of being currently under the influence of alcohol, controlled dangerous substances, any intoxicating chemicals (*e.g.* glue), or improperly used over-the-counter or prescription medications, while at school or a school function. Whenever a member of the school staff suspects that a student may be under the influence of one of these substances, he or she must immediately report his or her suspicion to the school principal, or the principal's designee, and the school nurse, school physician, or substance awareness counselor, and complete a substance abuse incident report.⁶⁸ The principal or principal's designee, in turn, must notify the student's parents and the chief school administrator, and arrange for the immediate examination of the student to determine whether he or she is under the influence and to provide appropriate health care.⁶⁹ The examination may be conducted by the school physician or a doctor selected by the student's parents. If the school physician or student's doctor is not immediately available, the student must be taken to the nearest hospital emergency room, accompanied by a member of the school staff, and the student's parents, if available.⁷⁰ If the student is examined by a doctor chosen by his or her parents, the parents are responsible for the cost of the examination; if the student is examined by the district's school physician or at the emergency room, the board of education assumes the cost.⁷¹

The mandatory medical examination, which may include urine or blood tests for

drugs and alcohol, do not require the student's consent if conducted upon reasonable suspicion that the student is intoxicated.⁷² Federal courts that reviewed two such cases in New Jersey found that the blood and urine tests—when conducted properly by medical staff—did not violate the students' constitutional rights.⁷³ The next section will further discuss drug testing and search and seizure regulations.

Within 24 hours of the examination, the physician is required to issue a written report of his or her findings to the parent of the student, the principal, and the district's chief school administrator.⁷⁴ If a written report of the examination is not issued within 24 hours, the student must be returned to school until the school receives a positive diagnosis of alcohol or other drug use.⁷⁵ If the written report finds that alcohol or drug use do not interfere with the student's mental and physical ability to perform in school, the student must be immediately returned to school.⁷⁶ If there is a positive diagnosis of alcohol or other substance use that interferes with the student's mental or physical ability to perform in school, the student must be removed from school until the parents, principal and chief school administrator obtain a written report from a physician certifying that substance abuse no longer interferes with the student's ability to perform in school.⁷⁷ The written report must be prepared by a physician who has examined the pupil to diagnose whether alcohol or other drug use interfere with school performance.⁷⁸

Students may encounter problems if removed from school for suspected substance abuse. First, some students may experience delay in returning to school because their doctor does not feel qualified to certify whether substance abuse interferes with the

student's physical and mental ability to perform in school. Additionally, because the law does not specify whether the school district or parents bear the cost of the second, follow-up examination and report certifying the student's fitness to return to school, a student may experience delay returning to school if the school district refuses to pay and the parents cannot afford the follow-up examination. A student who cannot afford a follow-up examination and report can argue that the follow-up procedures should follow the requirements set forth in the law for the initial examination: the district pays when it chooses the physician and the parents pay when they choose the physician.⁷⁹ Finally, because the law does not impose a time frame by which the school district must obtain the follow-up examination and report, a student may experience delays in returning to school. Parents can either insist that the school district act immediately to obtain the follow-up report, or obtain the report at their own expense.

In cases involving suspected use of anabolic steroids, districts are required to arrange for a medical examination of the student by a doctor of the parents' choice, or, if that doctor is not available, by the school physician.⁸⁰ Unlike suspected abuse of alcohol and other intoxicating substances, schools are not permitted to arrange an examination at a hospital emergency room or to remove the student from school. The school's substance awareness coordinator or other trained professional is required to assess the extent of the student's involvement with anabolic steroids and to refer the student for treatment in cases where the student's health and well-being are endangered.⁸¹

Parents should be aware that under state law, refusal or failure to cooperate with

either a medical examination based on suspected substance abuse or a referral for treatment for substance abuse may subject them to criminal prosecution under the compulsory education and child neglect laws.⁸²

SEARCH AND SEIZURE

The issue of searching students for illegal contraband - drugs, alcohol and weapons - or evidence of a breach of the law or school rules, involves a balancing of a school's duty to maintain a safe and orderly learning environment and a student's right to privacy. The law governing student search and seizure is complex and constantly evolving. The following is a summary of the general principles.

Search Based on Reasonable Suspicion

In *New Jersey v. T.L.O.*,⁸³ the U.S. Supreme Court ruled that the Fourth Amendment prohibition against unreasonable searches and seizures applies in public schools. The Court devised a two-part test for evaluating the legality of a student search. First, was the search justified at its inception? Second, was the search conducted in an appropriate manner, that is, was the actual search reasonable in its scope, duration, and intensity? A search is constitutionally justified at its inception if school officials have reasonable grounds - based on all of the circumstances - for suspecting the search will reveal evidence that the student has violated, or is violating, either the law or school rules. Reasonable suspicion is a subjective measure that is based on specific facts; it requires less evidence than the probable cause standard used by police, but more than a mere hunch or unsubstantiated rumor.

A search by school officials will be reasonable in its scope and intensity when it is reasonably related to the objectives of the search, and is not excessively intrusive in light of the age and gender of the student and the nature of the suspected infraction. In *Safford Unified Sch. Dist. #1 v. Redding*,⁸⁴ the U.S. Supreme Court held that the search of a thirteen-year-old girl's underwear for pain relief pills was unreasonable without evidence that the pills were dangerous or that they were being carried in the girl's underwear, despite the principal's reasonable suspicion that the girl was distributing the pills to students. Nonetheless, this search would clearly violate New Jersey statute, which expressly prohibits any teaching staff, principal or other educational personnel from conducting a strip search or body cavity search of a pupil under any circumstance.⁸⁵

Under the Supreme Court's ruling in *New Jersey v. T.L.O.*, school officials are granted greater latitude than police when conducting a search and seizure. Upon reasonable suspicion that a student has violated, or is violating, the law or school rules, school officials may search, among other items, a student's outer clothing, purse, backpack, locker, or a vehicle parked on school grounds.⁸⁶ When police and other law enforcement authorities, including those regularly stationed in a school, are involved in a search and seizure, the higher standard - probable cause to conduct a search - will apply.

A school official may always ask for permission to conduct a search, even if the official does not have reasonable grounds to believe that the search would reveal evidence of an offense or infraction. The law is not settled on whether a student below the age of majority can properly give informed consent to a search. A strong argument

exists that school officials must obtain consent from the student's parent. If a parent consents to the search – that is, if he or she provides clear and unequivocal consent and knowingly and voluntarily waives constitutional rights⁸⁷ – the student cannot later challenge the search on the basis of lack of reasonable grounds to conduct the search. Additionally, because a student has the right to refuse to consent to a search, his or her refusal to give permission to a search should not be considered evidence of guilt or reasonable grounds to conduct a search.

Local boards of education are required to have policies and procedures to address situations in which staff have reasonable suspicion that a student unlawfully possesses controlled dangerous substances, drug paraphernalia, alcoholic beverages, firearms or other deadly weapons.⁸⁸ These policies and procedures must contain specific procedures for, and responsibilities of, staff in initiating and conducting searches and seizures of pupils and their property.⁸⁹ Additionally, local boards must have policies and procedures to ensure cooperation between school staff and law enforcement authorities in all matters relating to the possession, distribution and disposition of unlawful drugs and weapons, including specific procedures for summoning appropriate law enforcement authorities onto school property to conduct law enforcement investigations, searches, seizures, and arrests.⁹⁰

Suspicionless Searches

In contrast to searches of specific individuals or locations, general or suspicionless searches are targeted against an identifiable group of students, such as student athletes, or

are planned events designed to respond to serious security and discipline problems, and to discourage students from bringing or keeping dangerous weapons, drugs, alcohol, and other prohibited items on school grounds. These suspicionless programs are sometimes referred to as sweep, dragnet or blanket searches. The U.S. Supreme Court has upheld under the federal Constitution one school district's policy of random drug testing of all high school student athletes⁹¹ and another school district's policy mandating drug testing of all students involved in extra-curricular activities.⁹² In both cases, the Court found the policies were necessary based on the school district's evidence that other measures had failed to address rampant drug use among students. The New Jersey Supreme Court has upheld on state constitutional grounds a school district policy requiring all students who participate in extracurricular activities or hold a campus parking permit to consent to random, suspicionless drug testing.⁹³ A lower New Jersey court upheld a school policy requiring all students participating in a voluntary field trip to submit to suspicionless searches of their hand luggage before boarding a school bus.⁹⁴

The legal issues concerning the appropriate use of drug testing and other searches of students are not settled, and are beyond the scope of this manual. A parent encountering a problem with a school search may want to contact the New Jersey office of the American Civil Liberties Union (ACLU), located in Newark, at (973) 642-2086.

REFERRAL TO LAW ENFORCEMENT

Boards of education must have specific procedures for summoning law enforcement on to school property for the purpose of conducting an investigation,

searches, seizures and arrests.⁹⁵ Under state regulation, the chief school administrator, not the principal or any other school staff, is required to summon the county prosecutor or other law enforcement official designated by the county prosecutor, in the following specifically defined circumstances:

1. School staff has reason to believe a student has unlawfully possessed or in any way been involved in the distribution of a controlled dangerous substance, including anabolic steroids, or drug paraphernalia, on or within 1,000 feet of school property.⁹⁶
2. School staff has reason to believe that a firearm or other deadly weapon has been brought onto school property, or that a student or other person is in unlawful possession of a firearm or other deadly weapon, whether on or off school property, or that any student or other person has committed an offense with or while in possession of a firearm, whether or not such offense was committed on school property or during school hours.⁹⁷ In other words, any time school staff learns, in the course of their employment, of unlawful possession of a gun or other deadly weapon by any person, or commission of a crime with a firearm by any person, the chief school administrator is required to notify law enforcement.
3. School staff has reason to believe that a student has threatened, is planning, or otherwise intends to cause death, serious bodily injury, or significant bodily injury to another person “*under circumstances in which a*

reasonable person would believe that the student genuinely intends at some time in the future to commit the violent act or carry out the threat.”⁹⁸ Note that under state regulation, before summoning law enforcement, school staff must have a reasonable belief that the student actually intends to cause at least significant harm to another person.

4. School staff has reason to believe that a crime involving sexual penetration or criminal sexual conduct has been committed on school property, or by or against a student during school operating hours or during a school-related function or activity.⁹⁹
5. School staff has reason to believe that a bias-related act, formerly known as a hate crime, involving an act of violence has been or is about to be committed against a student, or there is otherwise reason to believe that a life has been or will be threatened.¹⁰⁰ In such a case, the chief school administrator must notify both the local police department and the bias investigation officer of the county prosecutor’s office. A bias crime is defined as an act "predicated upon prejudices, including race, color, ethnicity, national origin, ancestry, religion, gender, sexual orientation, gender identity or expression, mental, physical or sensory disability...."¹⁰¹

State regulation also requires school districts to establish a memorandum of understanding with law enforcement authorities defining the rights and obligations of students, school staff, and law enforcement officials regarding police activities on school

property or at school functions.¹⁰² Based on the most recent version of that memorandum, in addition to the above requirements, school officials must also report the following to law enforcement authorities:

- Signs of gang activity or recruitment on school grounds.¹⁰³
- Suspected “Bias” crimes and “Bias-Related” acts, even if not violent or criminal in nature.¹⁰⁴
- Hazing incidents that involve a criminal offense.¹⁰⁵
- Harassment, intimidation or bullying incidents that involve a criminal offense or invoke another mandatory reporting provision (e.g. for drugs, weapons, violence, or sexual offenses).¹⁰⁶

As part of the current climate of zero tolerance for students, many schools call in the police to respond to non-criminal and non-dangerous student behavior. In recent years, one New Jersey school called the police, and the police, in turn, arrested two eight-year-old students for playing a game of cops and robbers at recess with paper guns. In another district in the state, police, responding to a school complaint, conducted a midnight arrest of a middle school student for shooting a classmate with a rubber band while saying, “I’m going to shoot you.” Boards of education are required to have specific procedures for summoning law enforcement onto school property, and parents and students can influence board policy and procedures by getting involved in the board’s process for establishing these procedures.

LOSS OF PRIVILEGES AND COMMUNITY SERVICE

Student discipline sometimes involves loss of a student privilege, such as participation in an extracurricular activity or a graduation ceremony. Many school boards have a separate code of conduct for student athletes that specifically conditions participation in a school sport on compliance with all school and district rules and regulations. Since a student does not have a right under state law, to participate in extracurricular activities, or even to attend a graduation ceremony, the Due Process Clause of the 14th Amendment does not apply, and schools are not required to provide any procedural protections when imposing a loss of privilege that does not directly impact a student's education. A student does have the right to appeal to the commissioner of education a school board decision to revoke a privilege. Appeal procedures are discussed on pp. 56-62 of this manual. However, the commissioner of education has consistently upheld revocation of a privilege as a form of student discipline, provided the board of education has not acted arbitrarily or unreasonably.¹⁰⁷

The commissioner of education has also upheld a board of education decision requiring a student to perform community service as a part of student discipline.¹⁰⁸

WHAT TO DO AT A BOARD OF EDUCATION DISCIPLINE HEARING

A parent, family friend, lay advocate or lawyer may act as an advocate for a student at a board of education discipline hearing. There are three general goals to be accomplished, either separately or in combination, for the student at the hearing:

- establishing the student's innocence;
- challenging the board's authority to impose discipline if it has failed to follow

proper procedures or to exhaust alternatives to removal from school;

- requesting lenient or alternative discipline instead of long-term suspension or expulsion.

The board may find that the student did not commit the offense, in which case the suspension or expulsion proceeding should be dismissed. If, on the other hand, the board finds that the student did commit the offense, it may do one of the following:

- find that the offense does not warrant removal from school and reinstate the student to the general education program (except in cases involving a gun offense, where the law mandates a one-year removal from school, as discussed on p. 21 of this manual);
- continue the suspension for a specific period of time;
- remove the student from the general education program; or
- expel the student from an alternative education program.

NOTE: The state board of education has held that a board of education must provide alternative education to a student following expulsion, but the current state regulations permit the discontinuance of all educational services once a student has been provided alternative education and a second expellable offense is committed.¹⁰⁹ See discussion of alternative education on pp. 50-54 of this manual.

Regarding the student's first objective at a hearing - establishing his or her innocence – the school district bears the burden of proving by a preponderance of evidence that the student committed the offense; the student does not bear the burden of

establishing his or her innocence.¹¹⁰ Accordingly, the district must present witnesses and evidence against the student, and cannot call the student as a witness against him or herself. The board of education cannot base its decision on hearsay evidence – that is, testimony based on what the witness was told by someone else, rather than what he or she saw or knows first hand. Also, the witness must appear in person before the board to present his or her testimony; the board cannot simply rely on a witness’s written statement, unless there are “compelling circumstances” excusing the witness’s attendance.¹¹¹ If the board hears only hearsay evidence, the student should ask that the discipline complaint be dismissed.

The student, or his or her representative, has the right to question the district’s witnesses in an effort to establish the student’s innocence.¹¹² The student also has the right to put on his or her own witnesses and evidence to counter or contradict the board’s evidence. A parent must decide whether his or her child will testify at the hearing. If the student was arrested for the same incident involved in the disciplinary proceeding, it may not be in his or her interest to testify. Statements made at the discipline hearing can be used against the student in the criminal case. If the student has an attorney in the criminal case, he or she should be consulted before the student testifies at the board of education hearing.

If the student was not arrested, a parent must still decide whether the student’s testimony will help or hurt. If the student is innocent and can clearly explain what happened, it might help to have him or her explain the incident. On the other hand, if the

student is charged with something he or she did do, is confused about the facts, or simply is unable to clearly explain the incident, his or her testimony could hurt the case. The student must tell the truth when he or she testifies, and will have to admit guilt. Having the student testify could make it easier for the school to prove its case.

There is no New Jersey case that has decided whether a public school student's failure to testify at a suspension or expulsion hearing can be used against her. The Fifth Amendment protects individuals from having their silence used against them in any criminal proceeding, and may be asserted in non-criminal proceedings when a witness' testimony might implicate her in a crime.¹¹³ Generally, in non-criminal proceedings an "adverse inference" can be drawn from an individual's silence.¹¹⁴ Some states have specified that an "adverse inference" can be drawn from a student's silence at a disciplinary hearing if there is additional evidence of guilt.¹¹⁵ An adverse inference means that the student's silence may be "one factor pointing towards a guilty finding."¹¹⁶ Until a New Jersey court decides otherwise, if a student does not testify at the disciplinary hearing, he or she can make the argument that the Fifth Amendment applies to disciplinary hearings and that silence should not be used against the student.

The second objective at a hearing may be to show that the school or board of education committed procedural errors that entitle the student to a dismissal of the complaint. For example, if the principal did not hold a preliminary hearing (meeting with the student and student's parent) at the time of, or immediately following, the suspension, and the student was not given the opportunity to explain his or her side of the story, the

student can urge that the complaint be dismissed due to the school's violation of his or her due process rights. See discussion of procedural defenses on p. 46 of this manual.

The third objective at the hearing may be to show that the form of discipline proposed by school administrators is inappropriate for the particular student, or too harsh in relation to the offense. For example, the student may be able to show that he or she is generally a good student with no other history of disciplinary violations; he or she did not intend to cause harm, danger or disruption; or he or she is willing to participate in programs or services to remedy the inappropriate behavior – for example, substance abuse counseling or a behavioral intervention plan or, in the event of a student who committed a dangerous offense, an alternative school program. If the student shows that the proposed discipline is either inappropriate or too harsh, and the board ignores this showing and imposes the discipline, the student will have strong legal arguments on appeal that the board violated his or her constitutional right to a public education, or that the board's action was arbitrary, capricious and unreasonable. See discussion of substantive defenses in the following section of this manual.

DEFENSES TO STUDENT DISCIPLINE

School discipline cases historically have been analyzed under a standard that is deferential to school boards - whether the board's action was arbitrary, capricious or unreasonable. A constitutional standard of review, however, is more advantageous to students than an arbitrary and capricious standard of review, because it places a more stringent burden of proof on the board of education. Moreover, constitutional challenges

to long-term suspension and expulsion are more appropriate since exclusion from school clearly impacts the constitutional right to a public education.

Constitutional challenges may be raised against the local board of education and the commissioner of education and state board of education when there is an appeal from a local board decision. The education clause, by its very language, guarantees a state system of public education. The state may delegate the operation of schools to local school districts, but districts act as an instrumentality of the state in fulfilling the state's obligation for assuring a thorough and efficient system of public education.¹¹⁷ The fact that the state has delegated authority to local districts does not relieve it from its constitutional mandate to assure a thorough and efficient education for all students.¹¹⁸ The state may, therefore, be held responsible for constitutional violations at the district level. See discussion on p. 66 of this manual. At the same time, local boards of education, as participants in a state system of public education, share responsibility with the state for assuring a thorough and efficient education to children within its district,¹¹⁹ and are equally accountable for constitutional claims.

The commissioner of education routinely declines to decide constitutional claims in student discipline cases, and New Jersey courts have yet to decide a discipline case on state constitutional grounds. The state board of education, however, has ruled that an expelled student is entitled to an alternative education program under the state constitution. See discussion of alternative education on pp. 51-54 of this manual. State constitutional arguments can be raised by advocates in every long-term suspension and

expulsion case.

The Constitutional Right to a Public Education

The education clause of the New Jersey Constitution guarantees every child age five to 18 the right to a “thorough and efficient” public education. In interpreting this clause, the New Jersey Supreme Court has designated education a fundamental right.¹²⁰ Long-term suspension and expulsion obviously implicate this fundamental right. Under a test developed by the Supreme Court, whenever a governmental entity - in the case of student discipline, a school district or board of education - acts to restrict or infringe upon a fundamental right, that entity bears the burden of proving: (1) on a balancing of the governmental and private interests, infringement on the right is necessitated by a substantial governmental interest; and (2) the governmental entity has utilized the narrowest means available to achieve its interest.¹²¹ Applying this test in the context of student discipline, there can be no dispute that school safety and order – the governmental interests at stake - are substantial interests comparable to a student’s right to a public education. The more difficult question, and the analysis that could lead to invalidation of the discipline action, is the second prong of the test – whether long-term suspension or expulsion is the narrowest means available to achieve school safety and order.

Unless the student’s conduct is patently dangerous to others or exceedingly disruptive to the learning environment – that is, conduct that clearly impedes school safety and order - the school board will be unable to meet its burden of proving that

excluding the student from school is the narrowest means available. Further, in most cases involving long-term suspension and expulsion, there are methods available to help the student correct inappropriate behavior, short of removal from school. School officials bear the burden of showing that they first assessed the student's individual needs – through psychological, academic and other assessments - and provided programs, services and referrals to address those needs. In other words, if the school district could have helped the student correct inappropriate behavior with intervention and prevention services, but instead resorted to long-term suspension and expulsion, it cannot meet its burden of showing that it used the narrowest means available to achieve its interests. The long-term suspension or expulsion should, therefore, be invalidated. Similarly, in the rare case of a student who is too dangerous or disruptive to be educated in the general school program, use of the narrowest means available would require the student's placement in an alternative education program, rather than expulsion without educational services.

A second constitutional argument concerning equal educational opportunity is available under the education clause. In the school funding context, the New Jersey Supreme Court invalidated the state's reliance on local property taxes to fund public schools, finding that the disparity in educational quality between poor urban districts and wealthier suburban districts caused inequality in educational opportunity in violation of the education clause.¹²² In the area of student discipline, there remains inequality in how students are treated, with educational rights varying from district to district throughout the state, because the state has not gone far enough to establish uniform standards and

laws governing suspension and expulsion. Some districts employ discipline policies that emphasize intervention, prevention and engagement of students in school, while others, despite state regulations that promote intervention and remediation of problem behaviors, automatically resort to suspension and expulsion. Similarly, some districts have a policy that requires placement of suspended students in an alternative education program, while others rely on out-of-school services. A student facing long-term suspension or expulsion, particularly in a district that does not employ alternative strategies and programs for addressing student discipline, or does not place students in an alternative education program, could argue that the unequal treatment of students throughout the state violates the education clause.

The Constitutional Right to Equal Protection of the Law

Equal protection of laws is another fundamental guarantee of the New Jersey Constitution.¹²³ In analyzing equal protection claims, New Jersey courts have applied a balancing test that looks to the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.¹²⁴ When an important personal right - such as public education - is affected, the government entity must show not only that there is an “appropriate governmental interest suitably furthered by the differential treatment,”¹²⁵ but also that there is “a real and substantial relationship between the classification and the governmental purpose which it purportedly serves.”¹²⁶

There are classifications that could give rise to an equal protection challenge in a discipline case against both the board of education, as an instrumentality of the state, and

the state itself: (1) those students who reside in districts that routinely impose long-term suspension and expulsion in response to disciplinary infractions, as compared to students who reside in districts that employ alternative methods of discipline that emphasize engagement of students in the educational process and prevention and intervention; and (2) those students who reside in districts that offer alternative education programs to students removed from the general school program, as compared to those students who reside in districts that offer out-of-school services only to any student removed from the general school program. The board of education and the state in these examples may be unable to meet their burden of showing: (1) an appropriate governmental interest suitably furthered by the differential treatment; and (2) a “real and substantial relationship” between expulsion or long-term suspension and the governmental purpose of safe and orderly schools. See discussion on a similar burden of proof under the education clause of the state Constitution in the proceeding section of this manual.

The Right to Non-arbitrary School Board Action

A board of education's decision in a discipline case must be reversed on appeal if it was arbitrary, capricious or unreasonable.¹²⁷ Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration of and disregard for circumstances.¹²⁸ Under this standard, the student bears the burden of proving by a preponderance of evidence that the board of education's action was arbitrary and capricious.¹²⁹ The fact that the board may have acted within its statutory authority in ordering the discipline does not shield it from a finding that its decision was arbitrary and

capricious.¹³⁰

Applying an arbitrary and capricious standard of review, the commissioner of education has recognized that “[t]ermination of a pupil’s right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible.”¹³¹ To avoid a finding of arbitrary and capricious action, a board’s decision should be grounded on “competent advice” from “its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources.”¹³² Moreover, expulsion should be used “as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation.”¹³³

The Right to Procedural Due Process

The failure of school officials and a board of education to comply with due process protections, discussed in this manual at pp. 40-48, may provide a defense to a suspension/expulsion decision. The commissioner of education has held that denial of due process protections is grounds for reversal of the suspension or expulsion decision of a board of education, *and for the student’s immediate reinstatement to school.*¹³⁴

Defending Against Zero Tolerance

Zero tolerance school discipline policies are intended to send a strong message that certain behaviors will not be tolerated by punishing all offenses severely, regardless of the individual student’s intent, facts or circumstances. Suspension and expulsion under zero tolerance may be subject to challenge under either a constitutional or an arbitrary

and capricious standard of review. Under the education clause, student discipline must be narrowly tailored to achieve school safety and order, as discussed on p. 8 of this manual, and under the equal protection clause, discipline must bear a “real and substantial” relationship to school safety and order, as discussed on p. 44 of this manual. There is an emerging consensus among education policy and school violence experts that zero tolerance policies are not effective in promoting school safety and order.¹³⁵ A student facing suspension or expulsion under a zero tolerance policy may be able to argue, therefore, that the school district cannot meet its burden of proving that the removal is either “narrowly tailored” or “substantially related” to school safety and order.

A student can also argue that zero tolerance is incompatible with the standard established by the commissioner of education under an arbitrary and capricious standard of review, discussed on p. 46 of this manual. A student can argue that this standard, which allows the use of long-term suspension and expulsion only as a last resort and only after an assessment by, and the recommendation of, the school district’s professional staff, is contrary to zero tolerance’s approach of punishing all offenses alike, regardless of individual circumstances.

Finally, discipline imposed in accordance with a zero tolerance policy can be challenged as inconsistent with state regulatory requirements. New Jersey’s regulations mandate that school district discipline must, at a minimum, be “graded according to the severity of the offenses, consider the developmental ages of the student offenders and students’ histories of inappropriate behaviors.”¹³⁶ In other words, districts in this state are

required to consider a student's individual circumstances in determining disciplinary action and cannot impose a blanket punishment, without consideration of those circumstances.

The Constitutional Right to Free Speech

When school discipline is imposed based on student speech or other student expression of an idea, such as wearing a T-shirt or armband, students may be able to defend against such discipline by asserting their constitutional right to freedom of speech. The First Amendment of the United States Constitution protects conduct intended to express an idea.¹³⁷ Children do not lose their First Amendment right to freedom of speech when they enter the school building.¹³⁸ However, the U.S. Supreme Court has recognized the need to control student expression in schools, consistently with the U.S. Constitution.¹³⁹ The younger the child, the more authority the school has to control student speech.¹⁴⁰ Limited categories of speech that are not protected by the First Amendment at all include fighting words, threats, obscenity, and imminent incitement to lawlessness.¹⁴¹

The general standard for when a school can prohibit speech is if the school reasonably believes that the student behavior will cause a "substantial disruption of or material interference with school activities."¹⁴² The belief that such a disruption or interference will occur must be "specific and significant," as opposed to a "remote apprehension of disturbance."¹⁴³ There are three exceptions to this standard that allow a school to prohibit speech when there is no substantial disruption or material interference.

The first exception applies to the regulation of “lewd,” “vulgar,” “indecent,” and “plainly offensive” speech that occurs in the school building.¹⁴⁴ The second exception allows a school to control speech “in school-sponsored expressive activities,” for example, the school newspaper, if the restriction is “reasonably related to legitimate pedagogical concerns.”¹⁴⁵ The third exception is that a school may restrict speech at school events if the speech is “reasonably viewed as promoting illegal drug use.”¹⁴⁶ When one of these exceptions applies, or if there is no specific and significant reason to believe that student expression will substantially disrupt or materially interfere with school activities, then a student can argue that imposing discipline violates his or her constitutional right to free speech.

School harassment policies that restrict speech must be consistent with the First Amendment and the general standard for a school’s ability to prohibit speech.¹⁴⁷ However, a school has some latitude to determine what type of student behavior will cause a substantial disruption or material interference given the specific circumstances of the school environment at that time.¹⁴⁸ For example, where a school has experienced problematic race relations between students it may prohibit materials considered to be “racially divisive.”¹⁴⁹ A school’s harassment policy is considered unconstitutionally overbroad if it restricts speech that intends to cause a disruption in situations when the school does not reasonably believe it will cause a disruption.¹⁵⁰ A policy restricting speech that creates a “hostile environment” without requiring a “threshold showing of severity or pervasiveness” is also unconstitutionally overbroad.¹⁵¹ Schools have a

“compelling interest in promoting an educational environment that is safe and conducive to learning.”¹⁵² To achieve this, schools have the capacity to proscribe harassment, intimidation and bullying consistently with these standards.¹⁵³ The Third Circuit Court of Appeals governing New Jersey has noted that “there is no constitutional right to be a bully.”¹⁵⁴

Speech that occurs on the internet, off school grounds and outside school hours, is subject to restriction only if there is a “sufficient nexus” between the student behavior and a substantial disruption of or material interference with school activities.¹⁵⁵ Such a nexus was not found to exist in two Third Circuit cases where students, outside of school, created fake internet profiles of their school principals on social networking websites.¹⁵⁶ In those cases, the court ruled that the student could not be punished for off-campus speech because no connection to a substantial disruption of the school environment could be shown.

ALTERNATIVE EDUCATION AND HOME INSTRUCTION DURING LONG-TERM SUSPENSION, EXPULSION AND REMOVAL

Alternative education programs are non-traditional schools that address the individual learning styles and behavioral and social needs of students who are disruptive, disaffected or at risk of school failure, or who have been removed from the general school program for disciplinary reasons.¹⁵⁷ Alternative schools are required to follow New Jersey’s educational standards – the Core Curriculum Content Standards – and to develop for every student a goal-oriented, individualized program that addresses the

student's learning, behavioral and social needs.¹⁵⁸

The Right to Alternative Education for Students Removed from School

The right to alternative education is now established in New Jersey law. In 2002, the state board of education ruled, in a case titled *P.H., et al., v. Board of Educ. of Borough of Bergenfield*,¹⁵⁹ that the state constitution requires a board of education to provide a student an education in an alternative program following expulsion from school. Prior to the ruling in *P.H.*, in *State ex rel. G.S.*,¹⁶⁰ a court in a juvenile proceeding ruled that the state constitution obligated the state, in particular the Department of Education and the Division of Youth and Family Services, to provide an alternative education program to a student who had been expelled by his local board of education. Additionally, the State's 31 poor urban school districts, known as the *Abbott* districts, have been required by the New Jersey Supreme Court's ruling in *Abbott v. Burke*¹⁶¹ to provide alternative education programs for middle and high school students who are too disruptive or disaffected to function in the regular school environment. Since 2005, all school districts in the state have been required by regulation to offer appropriate educational services to all students removed from general education, either through placement in an approved alternative education program or through provision of home instruction or other out-of-school instruction.

Even with the state board's ruling in *P.H., et al., v. Board of Educ. of Borough of Bergenfield*, which was made in the context of an individual student's appeal of permanent expulsion without further educational services, securing a placement in an

alternative school will continue to be a problem for students who have been removed from school on disciplinary grounds. School boards, many of which face financial constraints, may choose to ignore the state board ruling and continue to suspend and expel students without further educational services. Moreover, because the state does not fund or support alternative programs, the statewide supply of such programs is inadequate to meet the needs of all students who require alternative placements. Some county education commissions and local districts operate alternative programs, yet there are not enough programs. Even for districts that want to place an expelled or suspended student in an alternative program, or for students who successfully appeal the termination of educational services to the commissioner, finding an appropriate alternative program is a challenge.

Students who face expulsion and long-term suspension without educational services should appeal their school board decision to the commissioner of education, using the procedures described in this manual at p. 56. The appeal should cite the state board's decision in *P.H., et al., v. Board of Educ. of Borough of Bergenfield*, and raise claims under the state constitution. See discussion of state constitutional challenges to student discipline on pp. 40-50 of this manual. The appeal should also challenge denial of alternative education under an arbitrary and capricious standard of review, since the commissioner of education has employed this standard on occasion to order alternative education for expelled and suspended students.¹⁶²

When faced with an expulsion or long-term suspension without further educational

services, it is important to bear in mind that moving a student from the general school program to an alternative school should be a last resort when other interventions have failed to correct problem behavior. As discussed on p. 10 of this manual, schools have an affirmative duty to provide programs and services to address a student's inappropriate behavior before they consider suspension and expulsion. Moreover, research shows that grouping students with antisocial behaviors in a segregated setting increases the risk of delinquent behavior for these students.¹⁶³ Accordingly, long-term suspension and expulsion, and placement in an alternative school should be considered only in the rare case where the student's behavior is either dangerous to others or so disruptive that it cannot be addressed in the general school program. Unless the student's behavior falls into one of these two categories, the focus of the appeal to the commissioner of education should be on challenging the school board's expulsion or suspension decision, and the request for alternative education should be raised only as an alternative position.

Placement in an alternative education program is explicitly required by state statute and regulation for students who are removed from school for one year for (1) assault with a weapon against school personnel or another student; and (2) possession of a gun on school property, on a school bus, or at a school function, or conviction or adjudication of delinquency for a crime involving a gun on school property, on a school bus, or at a school function.¹⁶⁴ The statutory requirement for mandatory one-year removal for these offenses is discussed on p. 21 of this manual. For such students, if placement in an alternative education program is not available, the student must be provided with

home instruction or another suitable program until a placement becomes available.¹⁶⁵

Home Instruction

While requiring the provision of educational services within five school days of a suspension, the state regulations permit school districts to meet this requirement through home instruction that is comparable to the educational services “provided in the public schools for students of similar grades and attainments.”¹⁶⁶ Under Department of Education regulations, home instruction for students removed from school for disciplinary reasons need be at least 10 hours per week on three separate days of the week of 1:1 instruction, with at least an additional 10 hours per week of additional “guided learning experiences” (that is, structured tasks assigned to be performed without the teacher present).¹⁶⁷ Alternatively, districts may provide home instruction in small groups whose student to teacher ratio does not exceed 10:1. When small group instruction is provided, it must consist of at least 20 hours per week of “direct instruction that may include guided learning experiences” on no fewer than three separate days.¹⁶⁸ The regulations are not explicit about the proportion of direct instruction to guided learning experiences for small groups, but, logically, the direct instruction should exceed the 10 hours of direct instruction required for 1:1 instruction. The law governing home instruction requires that a parent or other adult (age 21 or older) designated by the parent be present during all periods of instruction,¹⁶⁹ making the provision of home instruction very difficult for students with working parents.

Every student who is placed on home instruction for more than 30 days must have

an Individualized Program Plan (IPP) developed, in consultation with the student's parent and a multidisciplinary team of professionals, that addresses both educational and behavioral goals for the student, recommends placement in an appropriate educational program, and includes supports for transition back to the general education setting. Unlike an alternative education program, home instruction itself does not provide the supervision and support offered in a school setting and, in practice, often does not address a student's behavioral problems. In addition, students receiving home instruction are not usually provided with art, music, computer lab, physical education and other valuable courses that are required under New Jersey's educational standards – the Core Curriculum Content Standards. All students removed from school for disciplinary reasons, including those placed on home instruction, are entitled to an education that meets these standards.¹⁷⁰

Each school district is required to maintain a summary record, provided annually to the county superintendent of schools, that documents the number of students, categorized by age, grade, and gender, who are receiving home or other out-of-school instruction because they could not be placed in the setting recommended as most appropriate by the student's IPP.¹⁷¹ The record must include the number of weeks on home instruction and the reasons for the delay in placement in a school program.

A student placed on home instruction following long-term suspension or expulsion can argue that home instruction does not provide a thorough and efficient education, as guaranteed under the state constitution, because it (1) does not incorporate the full

requirements of the Core Curriculum Content Standards, and (2) fails to address the student's social and emotional needs, as required by state regulation. See discussion on p. 23 of this manual of school's duty to address social and emotional problems that interfere with a student's ability to perform in school. A student can appeal a school board's decision to the commissioner of education for an order directing placement in an alternative education program.

APPEALING A STUDENT DISCIPLINE DETERMINATION

A student has the right to appeal to the commissioner of education and court the discipline decision of a school administrator or board of education. A student may appeal if the discipline violated the right to a public education or other rights granted under state and federal law and the state and federal constitutions. Additionally, a student may appeal if the discipline constituted arbitrary and capricious school board action. The various legal defenses to student discipline are discussed in this manual at pp. 40-50. **NOTE:** Until 2008, the New Jersey State Board of Education reviewed all decisions of the commissioner before an appeal could be filed in court, but that extra level of administrative review was eliminated by a change in state law.

The commissioner of education has jurisdiction over all school law controversies and disputes.¹⁷² Accordingly, a party to a discipline case must exhaust administrative remedies before bringing a case to court. This means that in all discipline cases, the party must file an appeal with the commissioner and obtain an administrative ruling before filing a complaint in court. If the student is not challenging the imposition of discipline

and seeks solely to vindicate a federal constitutional right that was violated in the course of the discipline - such as the right to free speech or to be free from an unreasonable search - it may be appropriate to file a complaint against school officials directly in court. However, if the student is contesting the discipline itself, the proper recourse is an administrative appeal to the commissioner, even if the student's case includes constitutional claims.¹⁷³

Department of Education regulations do not require acceleration and speedy decision-making for suspension and expulsion cases. While students are entitled to receive educational services pending the outcome of their appeal,¹⁷⁴ they can be excluded from school for months or longer while appeals are decided. An unfavorable decision of a local school board is first appealed to the commissioner of education.¹⁷⁵ The commissioner's decision is the final agency decision that, if unfavorable, may be appealed to the Superior Court of New Jersey, Appellate Division.^{176,177}

Unfortunately, the Department of Education's regulations do not recognize that the constitutional right to a public education is at stake in student discipline cases, and that prompt agency decision-making is needed to protect this right. Discipline cases follow the general rules for resolution of an administrative complaint – transmittal of the complaint to the Office of Administrative Law (OAL) for a fact-finding hearing, a recommended decision by an administrative law judge (ALJ) within 45 days of the OAL hearing and any subsequent date set by the ALJ for submission of legal briefs, and a final decision by the administrative agency within 45 days of the initial decision. The general

administrative rules do not specify a time frame for the scheduling and conclusion of a hearing. A student may move for acceleration of the hearing under the general administrative rules,¹⁷⁸ but these rules only shorten the process by a month or two; they do not result in a prompt decision for a child who has been excluded from school. A student may also move for emergent relief, seeking an interim ruling pending a final agency decision,¹⁷⁹ but the commissioner rarely, if ever, grants a student reinstatement to school as an emergent remedy pending a full hearing on the appeal. See discussion of emergent relief on p. 61 of this manual.

Steps for Appeal

A principal's decision to suspend a student for 10 days or less, or to impose a loss of privilege, may be appealed to the district superintendent and then the board of education, in accordance with local school board procedures. A board of education's decision upholding a short-term suspension or loss of privilege, or imposing a long-term suspension or expulsion, may be appealed to the commissioner of education. Unless a board of education has established a procedure to review such decisions, a superintendent's decision regarding a student's readiness to return to the regular education program following removal for a gun offense, discussed in this manual at p. 21, may be appealed directly to the commissioner of education.¹⁸⁰

A decision by the commissioner is a final agency decision that may be appealed to the New Jersey Superior Court, Appellate Division within 45 days of the commissioner's decision.¹⁸¹

Relief Available in Appeal to Commissioner

Typically, an appeal of a school board discipline decision will seek an order overturning or modifying that decision. For example, if a parent alleges that permanent expulsion without educational services violates the student's constitutional right to an education, or that the expulsion was imposed without constitutional due process protections, the petition of appeal may seek an order setting aside the expulsion and reinstating the student to school. On the other hand, if the parent agrees that the student's conduct was so disruptive or dangerous that it warranted removal from the general school program, the petition of appeal may seek an order requiring the school board to place the student in an appropriate alternative education program.

The petition may seek other types of prospective relief as well, including an order requiring the school to develop an action plan to address the student's behavioral problems, as required by state regulation.¹⁸² See discussion on p. 68 of this manual concerning the Department of Education regulation mandating the provision of intervention and referral services for students experiencing behavioral problems in school. Additionally, the petition may seek compensatory education for the period of time the student was improperly denied educational services. For example, if the student was wrongfully suspended for a period of three months, he or she has the right to the equivalent of three months of educational services. Compensatory education is particularly important when the student faces loss of credit and grade retention due to wrongful suspension or expulsion.

A party to an appeal to the commissioner may not receive all of the relief to which he or she is entitled, and may need to preserve some claims for later court action. The commissioner has jurisdiction over all controversies and disputes arising under the school laws,¹⁸³ including authority to decide constitutional claims, at least in the first instance.¹⁸⁴ The commissioner does not, however, have authority to award full relief for violation of federal constitutional rights¹⁸⁵ – namely, damages and attorney’s fees under the Civil Rights Act.¹⁸⁶ In other words, a party is required to bring all school law claims before the commissioner. Yet, if the claims include federal civil rights violations, the party will not receive all of the relief to which he or she would be entitled if the case had been brought in court. For example, the commissioner may set aside a long-term suspension upon a finding that the school board failed to provide minimum due process protections as required under the 14th Amendment to the U.S. Constitution, but may not award the prevailing party damages or attorney’s fees to which he or she may be entitled under the Civil Rights Act. To comply with the requirement that the commissioner decide all school controversies, while at the same time preserving all possible claims and remedies, a party must note in the petition to the commissioner the presence of the additional claims or relief to which he or she is entitled. By noting the claims, a party preserves them for a subsequent court action.¹⁸⁷

NOTE: A student with a disability may have additional claims for relief under the special education laws. Special education rights and procedures are discussed in Part II of this manual.

Moving for Emergent Relief

Because the administrative rules do not provide for speedy decision-making by the commissioner, a student may want to file a motion for emergent relief with the petition of appeal to the commissioner. A motion for emergent relief is a mechanism by which a party may obtain an interim or temporary remedy until a full factual hearing is held and a final decision is entered. A motion for emergent relief must be filed with a legal brief or letter memorandum that sets forth the factual and legal basis for a temporary remedy. In particular, the student must demonstrate that he or she meets the following legal standard:

1. He or she will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying his or her claim is settled;
3. He or she has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, he or she will suffer greater harm than the school board will suffer if the requested relief is not granted.¹⁸⁸

Applying this standard, the commissioner is unlikely to order a student's reinstatement to school or to stay an expulsion decision on an emergent basis, unless the facts clearly indicate that the school board's decision was wrong. Examples of the type of emergent relief the commissioner may be more likely to grant include a request that the school board provide the student with minimum due process protections, such as a hearing before the board, if the board ordered expulsion without following basic procedural requirements, or a request that the school board provide an alternative education program pending a final decision, if the board expelled the student without

further educational services. In *P.H. v. Board of Education of the Borough of Bergenfield*,¹⁸⁹ an appeal of a commissioner decision upholding a permanent expulsion without further educational services, the state board of education entered emergent relief requiring the board of education to provide an alternative education program to the student pending its final decision in the expulsion case. In ordering emergent relief, the state board found “... it obvious that a child ... suffers irreparable harm when he is deprived of an education for even a brief period of time.” The state board in *P.H.* ordered that the school board immediately assess the student’s alternative education needs, identify an effective alternative program that meets the state’s educational standards (the Core Curriculum Content Standards) and assume all costs, including transportation costs, for the student’s placement in the program until it entered a final decision in the case. The state board’s final decision in *P.H.*, upholding a student’s constitutional right to an alternative education program following expulsion from the general school program, is discussed in this manual at p. 51.

Filing an Appeal with the Commissioner

An appeal to the Commissioner of Education must be filed within 90 days of the school board’s action.¹⁹⁰ In accordance with Department of Education regulations,¹⁹¹ filing an appeal requires:

(1) Preparing a document known as a “petition.” A sample petition is set forth in Appendix A on p. 96 of this manual. A petition must include the name and address of the person filing the appeal (known as the petitioner), and the fact that the petition is being

filed “on behalf of” a student. A petition must include the name and address of the “respondent.” The respondent in a discipline case would be the board of education imposing the discipline and, in the event the student decides to raise constitutional challenges against the state, the commissioner of education. See discussion of constitutional defenses to student discipline on p. 40 of this manual. A petition must also contain a statement of the specific allegations and essential facts supporting those allegations, which explain why the petitioner is disputing the school board's determination. This statement must be verified by oath. If possible, the petitioner should also identify the section of the law under which the petition is brought. For example, if the petition relates to discipline for an alleged assault on a teacher, the petition must cite the relevant statute, N.J.S.A. 18A:37-2.1.

(2) Serving the petition on the respondent board of education. Once the petition is prepared, the petitioner must make copies for the board, the commissioner, and him or herself. The board must receive a copy of the petition. To confirm proper service of the petition, the petitioner is required to file a “proof of service” with the petition. A sample proof of service is set forth in Appendix B on p. 100 of this manual. After serving a copy of the petition on the local board of education, the original and two copies of the petition and proof of service must be filed with the commissioner at the following address:

State Commissioner of Education
c/o Director of Controversies and Disputes
New Jersey Department of Education
P.O. Box 500
Trenton, NJ 08625-0500

If possible, a copy of the papers should also be sent by facsimile transmission to the controversies and disputes office at fax number (609) 292-4333. That office can be reached by telephone at (609) 292-5705 regarding questions about filing.

The local board of education will have 20 days from the date of service to respond to the petition. Once the board's answer is served on the petitioner and filed with the commissioner, the case will be scheduled for a hearing before an administrative law judge (ALJ). The ALJ makes an initial decision within 45 days of the hearing and any subsequent date he or she sets for the submission of legal briefs. The commissioner reviews the initial decision and must render a final decision within 45 days.

GRADES AND ACADEMIC CREDIT

Teachers may not lower grades or marks as punishment for absences due to suspension.¹⁹² A student must be given the opportunity to make up the work missed due to suspension, and teachers must grade the make-up work as if it had been completed on time.¹⁹³ Additionally, absences due to suspension cannot be included in the computation to determine compliance with school attendance policy.¹⁹⁴

RECORDS

School districts are not required to record an incident of suspension or expulsion in a student's records, although they are permitted to keep such a record.¹⁹⁵ If a district maintains a record of disciplinary action taken against a student, it must provide the record to any school to which the student transfers.¹⁹⁶ Conversely, schools must request a

new student's discipline record from his or her prior school.¹⁹⁷ Schools are not allowed to deny enrollment to a student based on a disciplinary infraction at a prior school. The school board must admit the student and conduct a hearing in accordance with due process requirements to determine an appropriate discipline for the conduct at the prior school.¹⁹⁸ The school board may, however, admit the student and impose an interim suspension pending the hearing.¹⁹⁹

If a student believes he or she has been unjustly or incorrectly disciplined, or that the record of the discipline is inaccurate, he or she may have the reference to the incident expunged from his or her school records, or modified.²⁰⁰ To appeal a school record, the parent of a student must write a letter of appeal to the district's superintendent, setting forth the issues and requested action. The superintendent must respond to the letter within 10 days. If the parent or adult pupil is not satisfied with the superintendent's response, he or she may appeal to either the board of education or the commissioner of education within 10 days. The decision of the board of education may be appealed to the commissioner in accordance with the procedure and form described in this manual at pp. 56-62.

Regardless of the outcome of a student's appeal of discipline records, he or she has the right to place a statement in his or her record commenting upon the record and setting forth any reason for disagreement with the action of the school district or board of education.

CORPORAL PUNISHMENT

Under New Jersey law, school staff may not use physical force to discipline a student unless it is reasonable and necessary to prevent physical injury to others, to obtain possession of weapons or other dangerous objects, to defend oneself, or to protect persons or property.²⁰¹

LIABILITY FOR UNCONSTITUTIONAL ACTION

School authorities may be liable for money damages in a suit brought by a student under the federal Civil Rights Act.²⁰² If a school board member or school official knew, or reasonably should have known, that the imposition of discipline violated the student's constitutional rights, such as due process or free speech, or if he or she acted with malicious intent to cause deprivation of such rights, he or she may be held liable for damages.²⁰³ The requirement that a party first exhaust administrative remedies with the commissioner of education before filing a court action is discussed on p. 59 of this manual.

PART II: SPECIAL EDUCATION LAWS AND PROCEDURES

Part II of this manual explains the special procedures and services available to students with disabilities involved in discipline matters. These rights are provided under the Individuals with Disabilities Education Act (IDEA),²⁰⁴ the federal law governing special education. IDEA has extensive substantive and procedural requirements for the full range of issues that arise in special education, including identification, program development and placement. For a detailed discussion of special education law and procedures, see the Education Law Center's manual titled *The Right to Special Education*

in New Jersey: A Guide for Advocates.

IDEA recognizes that the behavior of students with disabilities is sometimes the result of their disabilities, and that schools often exclude children simply because they have a behavior disorder. IDEA aims to keep children with disabilities in school to the maximum extent possible, and offers great protections in the area of discipline. The law also recognizes that it is in the interest of society to continue to educate children with disabilities, even after expulsion or long-term suspension. For this reason, IDEA grants a child with a disability the right to a free appropriate public education (FAPE) and educational services, even after expulsion and suspension.²⁰⁵

The rules on special education discipline are very complex. Unfortunately, this complexity sometimes leads school districts to discipline children without following the rules. It is, therefore, very important that parents and advocates learn and understand these rules, and demand their school district's full compliance. These rules apply to all situations in which a school district bars a child from attending school or participating in his or her current education program due to an alleged violation of school rules or behavioral problems, even if the school does not call the action a "suspension" or "expulsion."

It is also important to keep in mind that children with disabilities are entitled to all of the procedural due process protections that every child must receive when facing a short- or long-term removal from school, as explained in Part I of this manual.

THE RIGHT TO POSITIVE BEHAVIORAL INTERVENTIONS AND STRATEGIES AND SPECIAL PROTECTIONS IN SCHOOL DISCIPLINE AND BEHAVIOR PROGRAMS

Children who are eligible for special education services are entitled to special procedures related to student behavior and school discipline. As discussed below, services and procedures required under IDEA are designed to ensure that (1) challenging behaviors are addressed through positive behavioral interventions, (2) children are not improperly disciplined for conduct related to their disabilities, and (3) children with disabilities receive FAPE even if properly excluded from school for disciplinary reasons.

School districts must also comply with general due process procedures and standards that apply to all children who engage in misconduct.²⁰⁶ These general education due process procedures and standards are set forth in New Jersey's Student Conduct regulations.²⁰⁷ The regulations set forth basic requirements applicable to all children subject to discipline, as well as some additional protections for children with disabilities which exceed those available under federal law. At a minimum, due process requires in all cases of a long-term suspension - a suspension of more than ten consecutive school days - prior written notice and a full hearing before the school district board of education in which the student may contest the facts that led to the suspension and challenge the recommended disciplinary action.²⁰⁸ The due process protections available to all children in the context of student discipline are discussed in detail in Part I of this manual.

PRESCHOOL CHILDREN WITH DISABILITIES MAY NOT BE SUSPENDED

Children with disabilities in preschool may never be suspended or expelled from

school.²⁰⁹

SCHOOL DISTRICTS' OBLIGATION TO USE POSITIVE STRATEGIES TO ADDRESS CHALLENGING BEHAVIORS

Under IDEA, each child with a disability must have a written plan, called an Individualized Education Program (“IEP”), that has been developed by a team consisting of the child’s parent, teachers, and other professionals, and that sets forth the special education programs and related services the child will receive.²¹⁰ Whenever the behavior of a child with a disability interferes with the learning of the child or others, the child’s IEP team must consider for inclusion in the child’s IEP “positive behavioral interventions and supports” and “other strategies” (which are often described in a “behavioral intervention plan”) to address that behavior.²¹¹ A child with a disability must be re-evaluated whenever the child’s functional performance, including behavior, warrants a reevaluation.²¹² Any evaluation of the child must assess all areas of suspected disability, including social and emotional status, and identify all special education and related service needs, even if not commonly linked to the category under which the child is classified.²¹³ Such evaluations should assist the IEP team in determining what services or accommodations are necessary to enable the child to be educated with his or her non-disabled peers,²¹⁴ and, where appropriate, must include a “functional behavioral assessment.”²¹⁵ Evaluation reports must appraise the child’s current functioning, analyze the instructional implications of that appraisal and include a statement regarding the relationship between the child’s behavior and academic functioning.²¹⁶

In addition to positive strategies and interventions, the IEP should include any modifications to the Code of Student Conduct which are necessary for the student.²¹⁷

FUNCTIONAL BEHAVIORAL ASSESSMENT AND BEHAVIORAL INTERVENTION PLAN

The purpose of a “functional behavioral assessment” (FBA) is to understand the causes of a child’s challenging behavior in order to assist the IEP team in developing “positive behavioral interventions and supports” to address that behavior. The first step in understanding the behavior is to objectively and accurately describe the behavior and the social and environmental context in which it occurs. This description must be based on a systematic collection of information from observations and interviews. For example, if the concern is aggressive behavior, it will be important to know what form the behavior takes, when and where the behavior occurs and whether any environmental factors typically precede the behavior. Once there is an accurate description of the behavior and the context in which it occurs, a hypothesis or understanding of the causes and function of the behavior for the child can be developed. The hypothesis statement should include a description of the specific setting, event, and the “triggers” that precede the behavior, an operational and measurable definition of the behavior, and the function of the behavior. An example of a behavior’s function is a child using an inappropriate behavior to communicate frustration.

The FBA is generally conducted in a collaborative fashion, bringing together input from the child and a variety of individuals who work and interact with the child. It uses a

child-centered approach based on the understanding that behavior serves a particular function for each child and that effective interventions must be tailored to address the function played by the behavior, within the context in which the individual child lives and learns and in light of the child's unique strengths and needs. An FBA should be conducted by a professional who can demonstrate (e.g., through a specialized degree or credential) experience, knowledge and skill in positive behavior support, which includes training in applied behavior analysis.

Once the FBA is complete, the IEP team will develop a "behavioral intervention plan" (BIP) for the child, which will include positive strategies to address the behavior. The BIP can include a variety of program accommodations, modifications, supports and services to improve the child's behavior. The BIP should be designed to accomplish four outcomes: (a) improve environmental conditions to prevent problem behaviors; (b) teach the student new skills to enable the student to achieve the same function in a socially appropriate manner; (c) reinforce desired behaviors, including newly-taught replacement skills; and (d) use strategies to defuse problem behavior effectively and in ways that preserves the student's dignity. For example, for a child who runs out of class to avoid frustration, a plan might use a combination of strategies to reduce or eliminate environmental factors that cause frustration and help the child to learn or use different behaviors to communicate when frustrated.

CHANGES IN PLACEMENT IN RESPONSE TO CHALLENGING BEHAVIORS

If school district officials believe that a child's program or placement is not

appropriate because of behavioral or discipline problems, their first response should be to work with the IEP team, including the parents, to review, and if appropriate, revise the child's program or placement, to ensure that it meets the needs of the child without disrupting the learning environment for other children. If the child's parent does not agree to the program or placement changes proposed by the school district, he or she can contest the changes through mediation or due process. As in all other situations where there is a dispute between the school district and parent, there can be no change in the classification, IEP, or placement of the child during the pendency of mediation or due process, provided the parental request for mediation or due process is made in writing within 15 calendar days of the school district's written notice of a proposed action. This is referred to as the child's right to "stay put" during the pendency of a dispute. The child's placement may change during the pendency of mediation or due process only if the parent and school district agree to a change, or an ALJ orders a change.

Often, school districts will circumvent the special education and general education due process rights of children with disabilities who engage in challenging behavior or violate a school district's code of student conduct by coercing a parent to consent to a change of placement to home instruction. Schools will tell a parent that if the parent does not consent to home instruction, the child will be "expelled" from school for an indefinite or extensive period of time. However, parents should know that, in no case, under IDEA, can a school district discontinue educational services to a child with a disability for more than ten school days in a given school year.²¹⁸ Moreover, under State Student Conduct

regulations, whenever a child with a disability is suspended from school for more than five consecutive school days, the child must be provided educational services that afford the child FAPE and are consistent with the child's IEP.²¹⁹ In addition, whenever a child with a disability is suspended for more than ten consecutive school days, educational services must be provided in an "interim alternative educational setting."²²⁰

Consequently, a parent should never feel the need to consent to placement of a child on home instruction for fear that challenging the student's suspension or expulsion from school might lead to the complete discontinuation of educational services to the child.

SCHOOL DISTRICT AUTHORITY TO EXERCISE DISCRETION WHEN DISCIPLINING CHILDREN WITH DISABILITIES

School district officials always retain the authority to consider on a case-by-case basis any unique circumstances when determining whether or not it is appropriate to impose a disciplinary action or order a change of placement for a child with a disability who has violated a school district code of conduct.²²¹ This is true for any disciplinary action being considered, even if school district officials claim they do not have discretion under so called "zero tolerance" policies, including those mandated by State law.²²²

NOTIFICATION OF SUSPENSIONS TO PARENTS AND CASE MANAGERS

On the date on which a decision to suspend a child is made, the school district must notify the parents of the decision, and of all IDEA procedural safeguards, by providing the parents with a copy of *Parental Rights in Special Education (PRISE)*.²²³ In addition, at the time the child is being removed, the school principal is required to

provide a written statement of the reasons for the suspension to the child's parents and case manager.²²⁴

SCHOOL DISCIPLINE MUST BE CONSISTENT WITH THE CHILDREN'S IEPS

A school district's code of student conduct must be implemented in accordance with a child's IEP.²²⁵ Consequently, it is very important for the IEP of a child with behavioral problems to address the behavior through positive behavioral interventions and set forth to what extent the child might require an accommodation in the school district's general code of student conduct. For example, for some children, suspension from school without services even for one or two days might never be appropriate.

PROCEDURES AND SERVICES FOR SHORT-TERM SUSPENSIONS

Unless otherwise specified in a child's IEP, school district officials may suspend a child with a disability for up to ten consecutive school days, just as they would suspend a nondisabled child, under general standards and procedures applicable to short-term suspensions, without following special discipline procedures that apply to longer suspensions, so long as the suspension does not constitute a "change in placement"²²⁶ (see discussion of change in placement below).

In New Jersey, all children, including children with disabilities, are entitled to receive educational services within five school days of any suspension.²²⁷ These educational services must include academic instruction that addresses New Jersey's Core Curriculum Content Standards, and, for a child with a disability, the services must be

provided in a manner consistent with the child's IEP.²²⁸ The services may be provided through an "alternative education program" or "home or out-of-school instruction" which meet, respectively, criteria set forth in N.J.A.C. 6A:16-9.2 and 10.2, both of which provisions are set forth in Appendix I of this Manual.²²⁹

A school district may not ever deprive a child with a disability of educational services for more than a total of ten school days in a given year.²³⁰ If a school district subjects a child to a short-term suspension which results in the suspension of the child for a total of more than ten days in a given year, but is not a "change in placement" (see discussion below regarding "change in placement"), the school district must provide the child with educational services to the extent needed for the child to receive FAPE, but such services may be provided in another setting.²³¹ The extent of services required during any such suspension may be determined by school district officials in consultation with at least one of the child's teachers and case manager,²³² although school districts should be encouraged to involve parents in such decisions.

PROCEDURES AND SERVICES FOR LONG-TERM SUSPENSIONS

A school district may impose a long-term suspension of more than ten school days on a child with a disability under the same standards and procedures which apply to non-disabled children, so long as (1) the child's IEP does not provide otherwise, and (2) the child's conduct is determined not to be a "manifestation" of the child's disability.²³³ During any period of suspension of five days or more, the school district must provide educational services to the child with a disability which enable the child to receive FAPE

consistent with the child's IEP, although in an alternative educational setting.²³⁴ Such services may be provided through an "alternative education program" or "home or out-of-school instruction" which meet, respectively, criteria set forth in N.J.A.C 6A:16-9.2 and 10.2, both of which provisions are set forth in Appendix A of this Manual, as long as the requirements of the child's IEP are also met.²³⁵

A meeting must be convened within ten school days of any decision to suspend a child for more than ten days because of a violation of a school district's code of student conduct to determine if the child's conduct was a manifestation of the child's disability.²³⁶ The child's conduct must be determined to be a manifestation of the child's disability if (1) it was "caused by, or had a direct and substantial relationship to" the child's disability, or (2) it was "the direct result of the [school district]'s failure to implement the IEP."²³⁷ If the child's conduct is determined to be a manifestation of the child's disability, the IEP team must immediately return the child to the placement from which he was suspended, unless (1) "special circumstances" (discussed below) exist which justify the child's immediate placement in an "interim alternative educational setting," or (2) after development of a new, or review of the old, "behavioral intervention plan," the parent and the school district agree to a change of placement.²³⁸

The determination of whether a child's conduct was a manifestation of the child's disability must be made by a representative of the school district, the parent and "relevant" members of the IEP team, as determined by the parent and school district.²³⁹ In making this determination, this group must review and consider all relevant information

in the child's file, including the child's IEP, any teacher observations and relevant information provided by the parents.²⁴⁰

Whenever a child is suspended for more than ten consecutive school days, the child must receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavioral violation so that it does not happen again.²⁴¹ Moreover, whenever a child's behavior is determined to be a manifestation of the child's disability, the child's IEP team **must** ensure that a functional behavioral assessment is conducted and the IEP must develop a behavioral intervention plan, unless a functional behavioral assessment had already been completed and a behavioral intervention plan had been developed before the behavior that resulted in the suspension occurred, in which case the IEP team must review the child's behavioral intervention plan, and modify it as necessary to address the behavior.²⁴²

If it is determined that a child's behavior was not a manifestation of the child's disability, the child may be suspended for more than ten consecutive school days, provided (1) the child is afforded the same protections that apply to all children, and (2) the child continues to receive, in an interim alternative educational setting, educational services which enable the child to receive FAPE and are consistent with the child's IEP.²⁴³

SCHOOL DISTRICT AUTHORITY TO IMPOSE 45-DAY INVOLUNTARY PLACEMENTS IN INTERIM ALTERNATIVE EDUCATIONAL SETTINGS

School district officials may, without regard to whether the behavior was a manifestation of the child's disability, place a child with a disability for not more than 45 calendar days in an interim alternative educational setting if the child, while at school, on school premises, or at a school function: (1) carries or possesses a weapon; (2) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance; or (3) inflicts serious bodily injury upon another person.²⁴⁴ A school district's authority to remove a child whose conduct is a manifestation of the child's disability for more than ten consecutive school days without following general IEP procedures is strictly limited to the three special circumstances specified above, which are limited by specific definitions of the terms "dangerous weapon," "serious bodily injury," "controlled substance" and "illegal drug" under federal law.²⁴⁵ The definitions for these terms are set forth in Appendix J of ELC's special education manual.

As with any suspension or removal for more than ten consecutive days, when a child is removed to a 45-day interim educational setting due to weapons, drugs or serious bodily injury, the child is entitled to a full hearing before the school district, at which time he or she can contest the facts that led to the removal.²⁴⁶ While the school district does not have authority to review the school district's compliance with the special education laws (those issues are appealed through the due process procedures), the school district must conduct a hearing and determine (1) whether the child did in fact commit the

alleged offense; and (2) whether the proposed expulsion or long-term suspension is allowed under, and in accordance with, written school district policy. For further discussion of a child's due process protections, see p. 84 of this manual.

ADMINISTRATIVE LAW JUDGE AUTHORITY TO IMPOSE 45-DAY INVOLUNTARY PLACEMENTS IN INTERIM ALTERNATIVE EDUCATIONAL SETTINGS

Upon the request of a school district, an Administrative Law Judge ("ALJ") may order a change in placement of a child with a disability to an interim alternative educational setting for not more than 45 calendar days if the ALJ determines that maintaining the current placement of the child is "substantially likely to result in injury to the child or others."²⁴⁷

PROCEDURES AND SERVICES FOR SHORT-TERM SUSPENSIONS THAT CONSTITUTE CHANGES IN PLACEMENT

A child removed from school for disciplinary reasons is subject to a disciplinary **"change in placement"** if the child is suspended for more than ten consecutive days, or if the child is subject to a series of suspensions that constitute a "pattern" because: (1) the series of suspensions total more than ten school days in a school year, (2) the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of suspensions, and (3) additional factors are relevant such as the length of each suspension, the total amount of time the child has been suspended, and the proximity of the suspensions to one another.²⁴⁸

Within ten days of any decision to impose a short-term suspension which

constitutes a change in placement, the school district must conduct a manifestation determination in the same manner as if the child had been suspended for more than ten days.²⁴⁹ If the child's conduct is determined to be a manifestation of the child's disability, the same protections that apply to a child recommended for a long-term suspension would apply to the child.²⁵⁰ If the child's conduct is not a manifestation of the child's disability, the short-term suspension can be imposed against the child as any other short-term suspension, except, as discussed above, the child cannot be denied educational services.²⁵¹ The determination of whether a short-term suspension constitutes a pattern of removal and therefore a change in placement is made on a case-by-case basis by the school district, but that determination is subject to review through due process and judicial proceedings.²⁵²

All long-term suspensions are considered a change in placement and are subject to the protections discussed above.

PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE FOR SPECIAL EDUCATION SERVICES

A child is entitled to all of the discipline procedural protections discussed in this manual, even if he or she is not classified as eligible for special education, if the school district knew or should have known that the child has a disability.²⁵³ A school district is deemed to have knowledge that a child is a child with a disability if, **before** the behavior that precipitated the disciplinary action occurred, (1) the parent expressed concern in writing to school district supervisory or administrative personnel, or a teacher of the

child, that the child is in need of special education and related services, (2) the parent of the child requested a special education evaluation of the child, or (3) the teacher of the child, or other personnel of the school district, expressed specific concerns directly to the director of special education or to other supervisory personnel about a pattern of behavior demonstrated by the child.²⁵⁴ A child is also to be considered as “potentially a student with a disability,” and provided all the special education discipline protections, if it has been determined that an evaluation of the child is warranted.²⁵⁵

A school district is **not** considered to have knowledge that a child has a disability if (1) the parent of the child has not allowed the child to be evaluated for eligibility for special education services, (2) the parent has refused special education services, or, (3) the child was evaluated and it was determined that the child was not a child with a disability.²⁵⁶

If it is determined that an evaluation is warranted after a child is subject to disciplinary action, the evaluation must be conducted on an expedited basis.²⁵⁷ If it is determined that the child is a child with a disability, the child is entitled to all the IDEA services and procedural protections available to children with disabilities subject to discipline.²⁵⁸

PARENTAL APPEALS OF MANIFESTATION DETERMINATIONS AND DISCIPLINARY CHANGES IN PLACEMENT

A parent may request an expedited due process hearing to challenge a school district’s manifestation determination or any disciplinary change in placement, including

a school district's unilateral decision to place a child in a 45-day interim alternative educational setting, placement of a child during any suspension that constitutes a change in placement, determination of whether a suspension constitutes a pattern of exclusion, and determination of whether a school district should be deemed to have knowledge that a child is a child with a disability or whether a child should be treated as "potentially a student with a disability."²⁵⁹ An expedited hearing of a manifestation determination or disciplinary change in placement must be completed within 20 **school days** of when the request for the hearing is filed,²⁶⁰ and the ALJ must issue a decision within ten **school days** after the hearing is completed, **without exception or extensions.**²⁶¹

Unless the parents and the school district agree in writing to waive the resolution meeting required whenever a due process hearing is requested, a resolution meeting must occur within seven days of receiving notice of the due process complaint,²⁶² and the due process hearing may then proceed, unless the matter has been resolved to the satisfaction of both parties within 15 **days** of receipt of the due process complaint.²⁶³ Before an expedited hearing, the parties must complete the exchange of relevant records and information at least two **business days** before the hearing.²⁶⁴

NO "STAY PUT" PENDING DISCIPLINARY APPEALS

Pending the appeal of a manifestation determination or disciplinary change in placement, the child must remain in the interim alternative educational setting unless the period of removal expires before the appeal is decided.²⁶⁵ In other words, "stay put," which is described in ELC's special education manual at p. 72, is not available while

appeals of manifestation determinations or disciplinary changes in placement are pending.

THE RIGHTS OF CHILDREN IN OUT-OF-DISTRICT PLACEMENTS

A child with a disability placed by a school district in an out-of-district placement is entitled to all of the discipline procedural protections granted to children in public schools.²⁶⁶ Whenever a child is subject to a short-term removal, discussed in this manual at p. 74, the principal of the out-of-district school must send written notice, including the reasons for the removal, to the child's case manager.²⁶⁷ In the case of a disciplinary "change of placement," discussed in this manual at p. 71, or long-term removal, discussed in this manual at p. 75, the out-of-district school may not take disciplinary action alone, but may only pursue a disciplinary change of placement in conjunction with the child's school district, and all of the procedural requirements of IDEA and New Jersey's Student Conduct regulations must be met.²⁶⁸ An out-of-district school may not unilaterally terminate a child's placement.²⁶⁹

CHALLENGING SCHOOL DISTRICT ACTION

Under IDEA and state law, the parent of a child with a disability has the right to resolve a dispute with a school district through an impartial third person. A parent can bring a complaint over any issue relating to identification, evaluation, classification, educational placement, or the provision of FAPE.²⁷⁰ These rights are called due process or procedural rights.²⁷¹ With regard to student discipline in particular, a parent has the right to challenge an interim educational program, a manifestation determination, a

decision by the school district that a removal is not part of a pattern of exclusion, a unilateral long-term removal for which the district did not obtain an ALJ order, or any noncompliance with the discipline procedures of IDEA.

IDEA provides for three types of complaint resolution: mediation; an administrative due process hearing, which can be expedited in discipline cases and can include a request for emergency relief; and complaint investigation. The New Jersey Department of Education has developed a form for requesting each type of complaint. These forms are located at Appendices N, O, and P of ELC's special education manual, and on the Department's website. Most student discipline disputes are resolved through expedited due process proceedings, where speedy relief may be obtained, rather than through mediation and complaint investigation. For this reason, the following section of this manual will focus on administrative due process hearings. A full discussion of IDEA's extensive procedural rights, including mediation and complaint investigation procedures, can be found in the Education Law Center's manual titled *The Right to Special Education in New Jersey: A Guide for Advocates*.

Expedited Due Process Hearing

A due process hearing is a formal, trial-like hearing before an ALJ at the New Jersey Office of Administrative Law (OAL). The ALJ in a due process hearing listens to and accepts evidence and legal arguments from both the parent and the school district, and issues a decision that is final and binding on both parties.²⁷² The decision must be implemented without delay, even if one of the parties files an appeal of the decision.²⁷³

The New Jersey Department of Education has the authority to enforce a due process hearing decision.²⁷⁴ The parent and the school district each have the right to appeal an adverse decision to either the New Jersey Superior Court or federal district court.²⁷⁵

Due process hearings in student discipline disputes are expedited.²⁷⁶ This means that the resolution period is shorter and the timeframes for conducting a hearing and issuing a decision are faster than those in other special education disputes.²⁷⁷ The resolution meeting, or if requested by both parties, mediation, must be scheduled within seven **calendar** days and completed within 15 **calendar** days of receipt of a request for an expedited hearing.²⁷⁸ The parties must complete the exchange of relevant records and information at least two **business** days before the hearing.²⁷⁹ The hearing must be conducted and completed within 20 **school** days of receipt of the request for an expedited hearing, and the ALJ must issue a final written decision within ten **school** days of the completion of the hearing, without exceptions or extensions.²⁸⁰ Note, as discussed in this manual at p. 87, a parent could file for an emergent relief hearing in such instances, but emergent relief hearings require parents to bear the heavier burden of showing that the child suffered “irreparable harm,” and it is not clear that such hearings will be scheduled and concluded any faster than the expedited hearings discussed in this Section.

Requesting a Hearing

A parent may request an expedited due process hearing to contest any school board action relating to discipline. A board of education must request an expedited due process hearing when it seeks to remove a child from school on the ground that he or she

is substantially likely to cause injury to him or herself or others.²⁸¹ A due process hearing is requested by writing to:

Director, Office of Special Education Programs
New Jersey Department of Education
P.O. Box 500
Trenton, New Jersey 08625-0500²⁸²

The request, also known as a “petition,” must include the student’s name, address, and date of birth; the name of the school the student attends; a description of the problem at issue, including relevant facts; a proposed resolution of the problem; and the relief sought.²⁸³ The due process petition must note that a copy of the request has been sent to the other party (the school board).²⁸⁴ The Department of Education’s form for requesting a due process hearing is located at Appendix N of ELC’s special education manual.

A request for a due process hearing must be filed within two years of the date the parent knew or should have known about the alleged action or failure to act complained of in the due process petition.²⁸⁵ The two-year limit may be extended, however, if the school district specifically misrepresented to the parent that the problem complained of was resolved or the school district withheld information that it was required to provide the parent.²⁸⁶

For information on the pre-hearing procedures for responding to a due process hearing request, the filing of a sufficiency petition, the scheduling of a resolution meeting, and the transmittal to the Office of Administrative Law, please see Education Law Center’s manual titled *The Right to Special Education in New Jersey: A Guide for*

Advocates.

Emergency Relief

Emergency relief is available when a student needs a speedy resolution of a dispute in order to avoid some serious harm.²⁸⁷ Emergency relief may be requested as part of an expedited due process hearing by completing the Department of Education's request for emergency relief form, located in Appendix O of ELC's special education manual. If the parent has already requested due process and the case has been transmitted to the OAL, he or she may request emergency relief through a written application to OAL.²⁸⁸ A parent's request for emergency relief must be supported by an affidavit or notarized statement setting forth the basis for the request.²⁸⁹ The parent must provide a copy of the request to the other party (the school board), and the request for emergency relief must note that a copy was sent.²⁹⁰

To prevail in an application for emergency relief, a parent must prove: (1) the child will suffer irreparable harm if the relief is not granted; (2) the legal right underlying the child's claim is settled; (3) the child has a likelihood of prevailing on the merits of the underlying claim; and (4) when the equities and interests of the parties are balanced, the child will suffer greater harm than the school board will suffer if the requested relief is not granted.²⁹¹ The most common way for a parent to demonstrate irreparable harm to the child is by showing that there has been an interruption or termination of educational services to the student.

NOTE: If the board of education acts unilaterally to remove a student from school

in violation of his or her right to stay-put, the student is not required to satisfy the criteria for emergency relief. Rather, the student should file a motion for emergency enforcement of the right to stay-put. This right, discussed on p. 72 of ELC's special education manual, prohibits school officials from unilaterally changing a student's placement during the pendency of a dispute. The right to stay-put is violated if school officials fail to provide notice of a change in placement and an opportunity to request mediation or due process before imposing expulsion, long-term suspension or any ban on a student's attendance at school for a period of more than 10 days.²⁹² Because the right to stay-put operates as an automatic injunction,²⁹³ a parent can move on an emergency basis for enforcement of this right without having to prove the criteria for emergency relief. The only exceptions to the right to stay-put are clearly delineated in IDEA: (1) a school board may impose a 45-day removal for a student who possesses a weapon or illegal drugs at school or a school function, as discussed on p. 21 of this manual; and (2) a hearing officer may impose a 45-day removal if the school board proves in an expedited due process hearing that the student is substantially likely to cause injury to him or herself or others, as discussed on p. 78 of this manual. Even in situations in which school officials conduct a manifestation determination, as discussed on p. 81 of this manual, and determine that the student's behavior was not related to his or her disability, they must comply with the notice requirements of IDEA before imposing a long-term suspension or expulsion.

A board of education may move for emergency relief as part of an expedited due process hearing to remove a student who is alleged to be substantially likely to cause

injury to him or herself or others. To prevail in its application, a board must meet the standard imposed on any other party requesting emergency relief: irreparable harm; settled legal claim; likelihood of prevailing on the merits of the claim; and, on a balancing of equities and interests, greater harm than that experienced by the opposing party if the requested relief is not granted.²⁹⁴ In order to show likelihood of prevailing on the merits of its claim, the board must establish in its application for emergency relief the specific criteria set forth in IDEA for the removal of a student alleged to be substantially likely to cause injury to him or herself or others, as discussed on p. 78 of this manual. A student may be able to successfully defend a school board's application for removal on the ground that it has not established each element of the statutory bases for removal.

The Right to Discover Evidence Prior to the Hearing

While a party to a due process hearing does not have the right to the type of formal discovery normally allowed in court cases, such as formal interrogatories, formal admissions and depositions of witnesses, the parent and school officials may request information and records from each other prior to the hearing.²⁹⁵ In a student discipline case, all responses to these requests must be completed no later than two business days before the expedited hearing.²⁹⁶ Each party to the hearing must disclose to the other party any documentary evidence and summaries of testimony intended to be introduced at the hearing.²⁹⁷ This requirement includes the obligation to disclose all evaluations and expert recommendations that the party intends to use at the hearing. At the request of a party, the ALJ must exclude any evidence at a hearing that was not disclosed at least two business

days before an expedited hearing - unless the ALJ decides that the evidence could not have been disclosed within that time.²⁹⁸

Burden of Proof

The school board in a due process hearing bears the burden of proof.²⁹⁹ In a discipline case, the school board must prove, for example, that the student committed the alleged offense, or that the student is substantially likely to cause injury to him or herself or others. If the board is proceeding on the ground that the student is substantially likely to cause injury to him or herself or others, it must prove the appropriateness of the interim educational setting; the student's IEP; the behavioral intervention plan; and the functional behavioral assessment. See p. 78 of this manual for a discussion of the statutory criteria for removal of a student alleged to be substantially likely to cause injury. The school board also bears the burden of proving the appropriateness of its manifestation determination. In sum, there is no presumption of correctness for the school board's action.³⁰⁰ However, in many cases, a parent will need expert testimony in order to rebut the school board's showing of appropriateness.

Due Process Hearing Relief

IDEA requires that, in most cases, a party alleging violation of the law first seek relief through an administrative due process hearing.³⁰¹ Some relief under IDEA – namely monetary damages, attorney's fees and reimbursement of litigation costs – is only available through court, but in most cases the parties must first exhaust their legal claims in a due process hearing.

A due process hearing provides a parent an opportunity to challenge and correct the imposition of student discipline that violates the requirements of IDEA. A parent entering into due process should carefully consider the range of available remedies and specifically request the remedies he or she wants in the application for due process.

Depending upon the facts of the case, a parent in a discipline case may be entitled to seek the following types of relief in a due process hearing: (1) prospective relief; (2) compensatory education; and (3) reimbursement of the costs of special education services and programs. Prospective relief requires the school district to undertake an affirmative, future act. For example, if the school unilaterally changed the student's placement to home instruction without complying with IDEA's discipline or other procedural requirements, the parent may want to seek prospective relief requiring the student's return to his or her previous - or stay-put - placement, with the provision of specific services to address any behavioral problems. If the school imposed a long-term suspension without first conducting a manifestation determination, the parent may want to seek an order requiring that the school immediately reinstate the student and immediately conduct the determination in accordance with the criteria set forth in IDEA. If the school imposed a long-term removal without first conducting a functional behavioral assessment and developing a behavioral intervention plan, the parent may want to seek an order requiring the district to hire an expert qualified to conduct such an assessment and develop such a plan.

Compensatory education may be awarded in a due process hearing to make up for

education lost when a student was improperly removed from his or her educational program in violation of IDEA's discipline requirements.³⁰² The student may be awarded compensatory education for a period equal to the period of deprivation.

Reimbursement of the cost of special education services and programs provided to the student at the parent's expense is also available to a parent in a due process hearing if the ALJ rules that the school district is responsible for and should have provided such services and programs.

It has generally been recognized that an ALJ in a due process hearing does not have the authority to award monetary damages, attorney's fees or costs associated with litigation. While the Third Circuit Court of Appeals has ruled that monetary damages are not available under IDEA,³⁰³ damages may be available in some cases under Section 504 of the Rehabilitation Act or under the Americans with Disabilities Act. A parent may also file for reimbursement of attorney's fees in court if a school district refuses to pay those fees once the parent has prevailed at a due process hearing. For more information on taking a special education case to court, see the Education Law Center's manual titled *The Right to Special Education in New Jersey: A Guide for Advocates*.

NOTE: A student with a disability who has been improperly disciplined may have claims against the school board under both IDEA and the general education laws based on the same incident or set of facts. In such a case, the student should file two separate complaints: (1) a due process request with the Office of Special Education Programs ("OSEP") setting forth the IDEA claims; and (2) a petition with the commissioner of

education setting forth the general education claims, in accordance with the law and procedures explained in Part I of this manual. Under federal law, the commissioner of education does not have authority to rule on special education claims and an ALJ in a special education due process hearing does not have authority to rule on general education claims. It is advisable, therefore, that a party file two separate complaints, with a request in the cover letters to the Director of OSEP and the Director of the Bureau of Controversies and Disputes that the two complaints be consolidated for purposes of a fact-finding hearing at the Office of Administrative Law (“OAL”) since the claims are based on the same underlying facts. Anytime that a petition to the Commissioner is filed that also raises issues under the special education laws, the petition must indicate that and must state whether a complaint has also been filed with OSEP.³⁰⁴ Under Department of Education procedures, such a case will be filed with Controversies and Disputes and with OSEP, and will be forwarded to OAL to be handled as a special education case, unless an Administrative Law Judge finds that the case should also be decided under general education rules and procedures.³⁰⁵

Student’s Placement During Due Process Proceeding

As discussed in this manual at p. 82, a student does not have the right to remain in his or her current educational placement (the placement prior to suspension or removal) while a due process case to challenge a manifestation determination or disciplinary change in placement is pending.³⁰⁶ If a parent is challenging the interim educational setting or the manifestation determination of a student placed by the district in a 45-day

interim educational setting due to illegal drugs, weapons, or infliction of serious bodily injury, or placed by a hearing officer in such a setting after a determination that the student is substantially likely to cause injury to him or herself or others, the student remains in the interim educational setting until the expiration of the 45 days, or a decision by the ALJ on the parent's appeal, whichever occurs first, unless the parent and the district agree to another placement.³⁰⁷

If, at the end of a 45-day interim educational setting, the school district proposes a new educational placement to which the parent does not agree, the parent may request a due process hearing to contest the change in placement. In this case, while the due process case is pending, the child must be returned to his or her educational program prior to the 45-day removal,³⁰⁸ unless the school district requests emergency relief and the ALJ finds, under the standards discussed in this manual at p. 78, that the child is likely to cause substantial injury and that placement in an interim educational setting is appropriate for an additional 45 days.³⁰⁹

Specific Hearing Rights

In order to make sure that the due process hearing allows the parent to present his or her side of the disagreement effectively and fairly, IDEA and state law guarantee the following rights applicable to an expedited hearing in a discipline case:

- The right to an impartial ALJ to conduct the hearing and make the decision.³¹⁰
- The right to have the hearing scheduled at a time and place which is reasonably convenient to the parent.³¹¹

- The right to have a full record of the hearing.³¹²
- The right to have disclosed at least two business days before the expedited hearing any documentary evidence and summaries of testimony the school district intends to introduce at the hearing.³¹³
- The right to be accompanied and advised by a lawyer and by individuals with special knowledge or training about children with disabilities.³¹⁴
- The right to present documents, to call witnesses, and to confront and cross-examine witnesses presented by the school district.³¹⁵
- The right to prevent the school district from presenting evidence it did not provide at least two business days before the expedited hearing, unless the ALJ finds that it could not have been disclosed at that time.³¹⁶
- The right to require any school district official or employee with knowledge of the case to attend the hearing.³¹⁷
- The right to a written decision, which includes the reasons supporting it, not later than 10 school days after the expedited hearing is complete, without exception or extensions.³¹⁸
- The right to have the ALJ's decision carried out immediately, even if the school district loses and plans to appeal the decision, unless the school district can persuade a state or federal court judge that implementing the decision may be harmful to the child or other children.³¹⁹

APPENDIX A

N.J.A.C. 6A:3-1.4 Format of petition of appeal

(a) A petition shall include the name and address of each petitioner; the name and address of each party respondent; a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws; the relief petitioner is seeking; and a notarized statement of verification or certification in lieu of affidavit for each petitioner. The petition should also cite, if known to petitioner, the section or sections of the school laws under which the controversy has arisen. A petition should be presented in substantially the following form:

<i>(YOUR NAME & YOUR STUDENT'S NAME),</i> PETITIONER(S). v. <i>(NAME OF DISTRICT BOARD OF EDUCATION),</i> RESPONDENT(S).	: : : :	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY PETITION
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Petitioner, *(your name, on behalf of your student's name)*, residing at *(your address)*, hereby requests the Commissioner of Education to consider a controversy which has arisen between petitioner and respondent whose address is *(Board of Education's address)*, pursuant to the authority of the Commissioner to hear and determine controversies under the school law (N.J.S.A. 18A:6-9), by reason of the following facts:

1. (Here set forth in as many itemized paragraphs as are necessary the specific allegation(s), and the facts supporting them, which constitute the basis of the controversy.)

WHEREFORE, petitioner requests that (here set forth the relief desired).

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

_____ on behalf
of _____

PETITIONERS, :

v.

PETITION

BOARD OF EDUCATION

RESPONDENT(S) .

Petitioner, _____,

residing at _____,

hereby requests the Commissioner of Education to consider a controversy which has arisen

between petitioner and respondent whose address is

_____, pursuant to the authority of the

Commissioner to hear and determine controversies under the school law (N.J.S.A. 18A:6-9), by

reason of the following facts:

1.

2.

3.

4.

5.

WHEREFORE, petitioner requests that _____

_____.

Date: _____ X _____

VERIFICATION

_____, of full age, being duly sworn upon his or her
oath
according to law deposes and says:

- 1. I am the petitioner in the foregoing matter.
- 2. I have read the petition and verify that the facts contained therein
are true to the best of my knowledge and belief.

X _____

Sworn and subscribed to before me this
____ _ day of _____, 20

X _____

APPENDIX B

(YOUR NAME) on behalf of (YOUR STUDENT’S NAME),	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
PETITIONERS,	:	
v.	:	
(NAME OF SCHOOL DISTRICT) BOARD OF EDUCATION	:	PROOF OF SERVICE
RESPONDENT(S).	:	

I, (your name), hereby certify that on (month, day, year), I served the within Petition by hand delivery/regular mail/certified mail* to the (name of school district) Board of Education, located at (address of local school board).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: _____

(Your signature) _____

*Circle appropriate option

_____ on
behalf of _____

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

PETITIONERS,

v. _____

PROOF OF SERVICE

BOARD OF EDUCATION,

RESPONDENT.

I, _____,
hereby certify that on _____, 20____, I served the within Petition by
hand delivery / regular mail / certified mail* to the
Board of Education, located at _____.

I certify that the foregoing statements made by me are true. I am aware that if any of the
foregoing statements made by me are willfully false, I am subject to punishment.

Date: _____ X _____

*Circle appropriate option

ENDNOTES

¹¹ New Jersey Department of Education Student Discipline Discussion Paper (January 2003), available at <http://www.state.nj.us/njded/code/title6a/chap29/code.pdf>

² N.J. Const. Art. VIII, sec. 4, para. 1:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

See also N.J.S.A. 18A:38-1, *et seq.* (granting a student between the ages of five and twenty a statutory entitlement to enroll in the school district in which he or she resides).

³ Commissioner and State Board of Education decisions prior to 1992 are published in a series of volumes entitled New Jersey School Law Decisions (S.L.D.). Decisions from 1992 through July 10, 1997 are published in New Jersey Administrative Reports (N.J.A.R.2d). Decisions from July 1, 1997 to present are available from the Department of Education's website, www.state.nj.us/njded/legal.

⁴ N.J.A.C. 6A:16-7.1.

⁵ N.J.A.C. 6A:16-7.1(a)(4).

⁶ N.J.A.C. 6A:16-7.1(a)(3).

⁷ N.J.A.C. 6A:16-7.1(b).

⁸ N.J.A.C. 6A:16-7.1(c)(4).

⁹ N.J.A.C. 6A:16-7.1(c)(5).

¹⁰ N.J.A.C. 6A:16-7.9.

¹¹ N.J.A.C. 6A:16-7.1(a)(5)-(6).

¹² N.J.A.C. 6A:16-8.1.

¹³ N.J.A.C. 6A:16-8.2.

¹⁴ N.J.A.C. 6A:14-3.3.

¹⁵ N.J.S.A. 18A:40A-9, *et seq.*; N.J.A.C. 6A:16-4.3(a)(14).

¹⁶ N.J.S.A. 18A:37-2; N.J.S.A. 18A:37-2.1; N.J.S.A. 18A:37-8.

¹⁷ New Jersey's Anti-Bullying Bill of Rights Act of 2011, N.J.S.A. 18A:37-13, *et seq.*, added harassment, intimidation, and bullying as potential grounds for suspension or expulsion.

¹⁸ *R.R. v. Bd. of Educ. of Shore Reg'l High Sch. Dist.*, 109 N.J. Super. 337, 344 (Ch. Div. 1970) (holding that student may be disciplined for behavior off school grounds if behavior poses a direct danger to self or others).

¹⁹ *R.B. v. Bd. of Educ. of Greater Egg Harbour Reg'l High Sch. Dist.*, 96 N.J.A.R.2d (EDU) 594 (N.J. Adm. 1996) (holding that board of education may not simply rely on discipline decision of prior school, but may impose interim suspension pending its own discipline hearing and determination).

²⁰ *F.McB. v. Bd. of Educ. of Twp. of Washington*, 96 N.J.A.R.2d (EDU) 298, 306 (N.J. Adm. 1995) (upholding student's suspension from school band and requirement that student undergo a psychological exam before readmission to band, based on an alleged threat of harm to band leader, even though school's code of student conduct did not specify such conduct as grounds for suspension from band).

²¹ N.J.A.C. 6A:16-7.1(c)(3)(i).

²² N.J.A.C. 6A:16-1.3 (defining expulsion as "the discontinuance of educational services or the discontinuance of payment of educational services for a student").

²³ *David Dowding v. Bd. of Educ. of Twp. of Monroe*, 1990 S.L.D. 1711, 1713 (State Board of Education decision).

²⁴ *R.W. v. Somerville Bd. of Educ.*, 1988 S.L.D. 2333, 2350-2351.

²⁵ N.J.S.A. 18A:37-4.

²⁶ *Goss v. Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 740 (1975).

²⁷ *Goss v. Lopez*, 419 U.S. at 582.

²⁸ N.J.A.C. 6A:16-7.2(a)(3).

²⁹ N.J.A.C. 6A:16-7.2(a)(5).

³⁰ N.J.A.C. 6A:16-7.1(a).

³¹ N.J.S.A. 18A:37-5.

³² N.J.A.C. 6A:16-7.2(a)(5)(i), -7.3(a)(9), -7.5(b)(2).

³³ N.J.A.C. 6A:16-7.2(a)(2)(ii).

³⁴ N.J.A.C. 6A:16-7.3(a)(3)-(4).

³⁵ N.J.A.C. 6A:16-7.3(a)(5)(iv).

³⁶ See N.J.A.C. 6A:16-7.3(a)(10)(iii).

The requirement of a hearing before the board of education within 21 days of the student's removal from school was established in 1970 in the case *R.R.*, supra. In holding that a 21-day time period satisfied constitutional due process requirements, the court specifically found that the time frame set forth in N.J.S.A. 18A:37-5 - a suspension/expulsion hearing by "the second regular meeting of the board of education... after such suspension" - did not satisfy constitutional due process. The Legislature never amended N.J.S.A. 18A:37-5 to conform to the decision in *R.R.* In 1995, the Legislature enacted a statute extending the hearing timeframe to 30 days for student offenses involving firearms and assault with a weapon against school personnel, apparently ignoring the constitutional standard set by the court in *R.R.*

Subsequent to the decision in *R.R.*, the United States Supreme Court decided *Goss*, supra, which established a student's due process protections for a short-term suspension (10 days or less). The Court in *Goss* found that for any exclusion from school beyond 10 days, more formal procedures, including a hearing, were required. Although the Court did not specify a timeframe for provision of these procedures, it follows from the Court's reasoning that the additional procedural protections must be provided within 10 days of the student's removal from school, if the student's exclusion from school is to extend beyond this time period. Thus, the decision in *Goss* strongly suggests that a board hearing 21 or 30 days after a student's removal from school violates the federal constitution.

In 1976, the United States Supreme Court decided *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976), which established a three part balancing test to resolve the issue of what process is due a person facing a deprivation of property: "[t]he specific dictates of due process generally require ... consideration of three distinct factors: first, the private interest affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedures would entail." 424 U.S. at 335, 96 S. Ct. at 903. Applying this test to the student discipline context: First, the fundamental nature of the constitutional right to a public education is firmly established in New Jersey law, and the private interest at stake is one recognized to be of great importance. *E.g.*, *Levine v. Institutions and Agencies Dept. of New Jersey*, 84 N.J. 234, 258 (1980); *Robinson v. Cahill*, 69 N.J. 133, 147 (1975) (Robinson IV); see also *Abbott v. Burke*, 149 N.J. 145 (1997) (Abbott IV); *Abbott v. Burke*, 153 N.J. 480 (1998) (Abbott V). Second, there is significant risk of erroneous deprivation of this fundamental right as the discipline hearing is delayed, and a speedy hearing within 10 days would significantly protect the right. Third, school boards should be able to decide long-term suspension/expulsion cases immediately without any burden.

New Jersey courts have not addressed the issue of what constitutes a timely student discipline hearing since the decisions in *Goss* and *Mathews v. Eldridge*. The 21- and 30-day timeframes appear to be constitutionally deficient under federal case law.

³⁷ N.J.A.C. 6A:16-7.3(a)(6); *R.R.* supra, 109 N.J. Super. at 349; *Tibbs v. Bd. of Educ. of Township of Franklin*, 114 N.J. Super. 287, 293-294 (App. Div. 1971), *aff'd* 59 N.J. 506 (1971).

³⁸ N.J.A.C. 6A:16-7.3(a)(8); *R.R.* supra, 109 N.J. Super. at 349; *Tibbs*, supra, 114 N.J. Super. at 293-294.

³⁹ N.J.A.C. 6A:16-7.3(a)(7).

⁴⁰ N.J.A.C. 6A:16-7.3(a)(10)(ii); *Tibbs*, supra, 114 N.J. Super. at 293-296.

⁴¹ N.J.A.C. 6A:16-7.3(a)(10)(i); *R.R.*, supra, 109 N.J. Super. at 349; *L.T. v. Long Branch City Bd. of Educ.*, 96 N.J.A.R. 2d.

(EDU) 125, 131.

⁴² N.J.A.C. 6A:16-7.3(a)(10)(iv).

⁴³ N.J.A.C. 6A:16-7.3(a)(11).

⁴⁴ *M.W. v. Bd. of Freehold Reg'l High Sch. Dist.*, 1975 S.L.D. 127, 132.

⁴⁵ *M.R. v. Bd. Of Trustees of Hoboken Charter Sch.*, Commissioner Slip Opinion, OAL Dkt. No. EDU 9662-09, March 22, 2010 (converting expulsion to long-term suspension where there was no evidence of prior long-term suspension or receipt of alternative education services).

⁴⁶ N.J.S.A. 18A:37-2.1.

⁴⁷ N.J.S.A. 18A:37-2.2.

⁴⁸ N.J.S.A. 18A:37-7.
⁴⁹ N.J.S.A. 18A:37-2.1 (assault against school personnel or school board member); N.J.S.A. 18A:37-2.2 (assault with a weapon); N.J.S.A. 18A:37-7 (firearms offense).
⁵⁰ N.J.S.A. 18A:37-7, *et seq.*
⁵¹ The Zero Tolerance for Guns Act was enacted to conform to the federal Gun Free Schools Act, 20 U.S.C. § 7151. A firearm is defined in federal law to mean:
(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.
18 U.S.C. § 921(a)(3).
⁵² N.J.S.A. 18A:37-9.
⁵³ N.J.S.A. 18A:37-2.1.
⁵⁴ N.J.S.A. 18A:37-2.5; N.J.S.A. 18A:37-11.
⁵⁵ N.J.A.C. 6A:16-5.5(i) (firearms); N.J.A.C. 6A:16-5.6(i) (assault with a weapon).
⁵⁶ N.J.A.C. 6A:16-7.6; *Tinker*, 393 U.S. at 507; *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2010).
⁵⁷ *G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Regional High Sch. Dist.*, 2012 WL 3000230, at *11 (N.J. Super. A.D.); *R. R. v. Bd. of Ed. of Shore Regional High Sch. Dist.*, 109 N.J. Super. 337, 344 (Ch.Div. 1970).
⁵⁸ *G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Regional High Sch. Dist.*, 2012 WL 3000230, at *8; N.J.A.C. 6A:16-7.6.
⁵⁹ *G.D.M. v. Bd. of Educ. of the Ramapo Indian Hills Regional High Sch. Dist.*, 2012 WL 3000230 (N.J. Super. A.D.).

⁶⁰ N.J.S.A. 18A:40A-9, *et seq.*; N.J.A.C. 6A:16-3.1, *et seq.*
⁶¹ N.J.A.C. 6A:16-4.2.
⁶² N.J.A.C. 6A:16-4.1(a).
⁶³ N.J.A.C. 6A:16-4.1(c)(2).
⁶⁴ N.J.A.C. 6A:16-3.1(a)(3); N.J.A.C. 6A:16-4.1(c)(7)(ii).
⁶⁵ N.J.A.C. 6A:16-4.3(a)(12).
⁶⁶ N.J.A.C. 6A:16-4.3(a)(14).
⁶⁷ N.J.A.C. 6A:16-3.2.
⁶⁸ N.J.S.A. 18A:40A-12; N.J.A.C. 6A:16-4.3(a)(1).
⁶⁹ N.J.A.C. 6A:16-4.3(a)(2).
⁷⁰ N.J.A.C. 6A:16-4.3(a)(5). The law does not specify what steps a school must take to determine whether a parent is available, but presumes that the school will undertake all reasonable steps to contact the student's parents before proceeding to the hospital.
⁷¹ N.J.A.C. 6A:16-4.3(a)(4)-(53)-().
⁷² N.J.S.A. 18A:40A-12; N.J.A.C. 6A:16-4.3(a).
⁷³ *Gutin v. Washington Twp. Bd. of Educ.*, 467 F. Supp. 2d 414 (D.N.J. 2006) (finding that school officials who suspected boy of being under the influence of drugs did not violate his state or constitutional rights by taking him to a hospital for a urine drug test without his consent); *Hedges v. Musco*, 204 F.3d 109 (3d Cir. 2000) (N.J.) (school officials and medical staff did not violate girl's constitutional rights by submitting her to urine and blood drug tests upon reasonable suspicion she was intoxicated).
⁷⁴ N.J.A.C. 6A:16-4.3(a)(7). If a doctor of the parents choosing examined the student and the report is not issued within 24 hours of the referral, the parent must submit written proof of the medical examination within 24 hours. The written proof must contain the name, address, phone number and signature of the examining physician and indicate that the report is pending and the date by which it will be provided. N.J.A.C. 6A:16-4.3(a)(8).
⁷⁵ N.J.A.C. 6A:16-4.3(a)(9).
⁷⁶ N.J.A.C. 6A:16-4.3(a)(10).
⁷⁷ N.J.A.C. 6A:16-4.3(a)(11)(i)-(ii).
⁷⁸ N.J.A.C. 6A:16-4.3(a)(11)(ii).

79 N.J.A.C. 6A:16-4.3(a)(4)-(5).
80 N.J.S.A. 18A:40A-12(b); N.J.A.C. 6A:16-4.3(b)(2).
81 N.J.A.C. 6A:16-4.3(b)(5)-(64)-().
82 N.J.A.C. 6A:16-4.3(d); N.J.S.A. 18A:38-25, 31 (Compulsory Education Act); N.J.S.A 9:6-1, *et seq.*, and
N.J.A.C. 6A:16-11 (child neglect laws).
83 *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985).
84 *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009).
85 N.J.S.A. 18A:37-6.1.
86 *See, e.g., State v. Best*, 201 N.J. 100 (2010) (applying the reasonable suspicion standard to assistant
principal's search for drugs in a student's car parked in a school lot).
87 *State v. Johnson*, 68 N.J. 349 (1975).
88 N.J.A.C. 6A:16-6.2.
89 N.J.A.C. 6A:16-6.2(b)(5).
90 N.J.A.C. 6A:16-6.1(a); N.J.A.C. 6A:16-6.2(b)(2).
91 *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (finding that student athletes have less of a privacy
interest than the general school population).
92 *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Pottawatomis Cnty. v. Earls*, 536 U.S. 822, 122 S.
Ct. 2559 (2002).
93 *Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 176 N.J. 568 (2003).
94 *Desilets v. Clearview Reg'l Bd. of Educ.*, 265 N.J. Super 370 (App. Div. 1993).
95 N.J.A.C. 6A:16-6.2(b)(2).
96 N.J.A.C. 6A:16-6.3(a).
97 N.J.A.C. 6A:16-6.3(b).
98 N.J.A.C. 6A:16-6.3(c).
99 N.J.A.C. 6A:16-6.3(d).
100 N.J.A.C. 6A:16-6.3(e).
101 A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials 8.4
(2011 Revisions).
102 N.J.A.C. 6A:16-6.2(b)13-15.
103 A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials 8.3
(2011 Revisions).
104 A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials 8.4
(2011 Revisions). Such acts include those "predicated upon prejudices, including race color, ethnicity, national
origin, ancestry, religion, gender, sexual orientation, gender identity or expression, mental, physical or sensory
disability, or by any other distinguishing characteristic tear at the fabric of our society, pose grave risks to the
physical and emotional well being of children, and can quickly lead to retaliation and an escalation of violence both
on and off school grounds."
105 A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials 8.5
(2011 Revisions). Hazing is a tradition-based process used by groups to maintain a hierarchy and involves activities
that are "physically and psychologically stressful" and can be "humiliating, demeaning, intimidating and
exhausting." Hazing is an independent offense under N.J.S.A. 2C:40-3, but hazing conduct may also constitute
crimes such as assault, harassment, threats, robbery and sexual offenses.
106 A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials 8.6
(2011 Revisions). New Jersey's Anti-Bullying Bill of Rights Act of 2001, N.J.S.A. 18A:37-13, *et seq.*, primarily
addresses the obligations of schools and districts in preventing bullying and does not establish a new criminal
offense, although bullying conduct may constitute independent offenses such as harassment or assault.
107 *See, e.g., C.S. v. Bd. of Educ. of Lower Camden Cnty Reg'l. High Sch.*, Commissioner Slip Opinion, OAL
Dkt. No. EDU 605-98, July 8, 1998 (finding student's drug possession a legitimate basis on which to bar attendance
at graduation ceremony).
108 *J.E., et al., v. New Milford Bd. of Educ.*, Commissioner Slip Opinion, OAL Dkt No. EDU 9514-00,
December 1, 2000 (upholding imposition of 20 hours of scrubbing defaced desks, cleaning school grounds and
collecting leaves for failing to report vandalism which students witnessed).

- ¹⁰⁹ N.J.A.C. 6A:16-7.5(a)(2), -7.3(a)(5)(iv); *M.R. v. Bd. of Trustees of Hoboken Charter Sch.*, Commissioner Slip Opinion, OAL Dkt. No. EDU 9662-09, March 22, 2010 (converting expulsion to long-term suspension where there was no evidence of prior long-term suspension or receipt of alternative education services).
- ¹¹⁰ *H.A. v. Bd. of Educ. of Warren Hills Reg'l Sch. Dist.*, 1976 S.L.D. 336, 340.
- ¹¹¹ *Tibbs*, supra, 114 N.J. Super. at 293-296.
- ¹¹² *Tibbs*, supra, 114 N.J. Super. at 293-296.
- ¹¹³ *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1125 (E.D. Wis. 2001).
- ¹¹⁴ *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (holding the Fifth Amendment does allow an adverse inference to be drawn against parties in non-criminal proceedings when they refuse to testify in response to probative evidence offered against them).
- ¹¹⁵ *Butler*, 172 F. Supp. 2d at 1126; *Boynton v. Casey*, 543 F.Supp. 995, 997 (D. Me. 1982). *But see Gonzales v. McEuen*, 435 F.Supp. 460, 471 (C.D. Cal. 1977) (holding that inferring guilt from a student's silence violates that students' Fifth Amendment rights) and *Caldwell v. Cannady*, 340 F.Supp.835 (N.D. Tex., 1972) (holding "one cannot be denied his Fifth Amendment right to remain silent merely because he is a student. Further, his silence shall under no circumstances be used against him as an admission of guilt). *Caldwell* was decided before the seminal U.S. Supreme Court case on this issue, *Baxter v. Palmigiano*.
- ¹¹⁶ *Morale v. Grigel*, 422 F. Supp. 988, 1003 (D.N.H. 1976).
- ¹¹⁷ *E.g., Abbott v. Burke* 100 N.J. 269, 290 (1985) (*Abbott I*) (in evaluating whether the State has satisfied its "constitutional obligation under the thorough and efficient education clause, the Court recognizes the paramount requirement that at all times the State secures 'the common educational rights of all,'" quoting *Robinson v. Cahill*, 62 N.J. 473, 515 (*Robinson I*); see also N.J.S.A. 18A:4-10 (vesting general supervision and control of public education in the state board); N.J.S.A. 18A:4-23 (empowering the commissioner to supervise all schools receiving support or aid from state appropriations); and N.J.S.A. 18A:7A-34 (authorizing removal of district board of education and creation of a state-operated school district upon determination that local school district has failed to assure a thorough and efficient system of education).
- ¹¹⁸ *Robinson I*, supra, 62 N.J. at 520; see also *In re the Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch.*, 164 N.J. 316, 322 (2000) (determination to enlist local school districts to meet obligation permissible so long as state ensures that means chosen to deliver educational services fulfills constitutional obligation) (citing *Robinson I*, supra, 62 N.J. at 508-09 & 509 n.9); *Abbott IV*, supra, 149 N.J. at 182 ("The State ... cannot shirk its constitutional obligation under the guise of local autonomy.").
- ¹¹⁹ N.J.S.A. 18A:11-1 (requiring board to "[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct...of the public schools of the district").
- ¹²⁰ *Levine*, supra, 84 N.J. at 258 ("[T]he right to a free public education is ... expressly guaranteed [in our Constitution] and, thus, as defined by this Court ... does constitute a fundamental right"); *Robinson IV*, supra, 69 N.J. at 147 ("...the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution.").
- ¹²¹ See *Doe v. Poritz*, 142 N.J. 1, 90 (1995) (applying balancing test to statute that infringed on the right to privacy and finding that "even if the governmental purpose is legitimate and substantial ... the invasion of the fundamental right ... must be minimized by utilizing the narrowest means which can be designed to achieve the public purpose").
- ¹²² *Robinson I*, supra, 62 N.J. at 513.
- ¹²³ Equal protection of laws is one of the fundamental guarantees of the New Jersey Constitution, N.J. Const. Art. 1, para. 1. See *Right to Choose v. Byrne*, 91 N.J. 287, 310 (1982); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 79 (1978). See also *Barone v. Dept. of Human Servs., Div. of Med. Assistance and Health Servs.*, 107 N.J. 355, 367 (1987).
- ¹²⁴ *Greenberg v. Kimmelman*, 99 N.J. 552, 567 (1985); *Brown v. City of Newark*, 113 N.J. 565, 573-74 (1989); *Barone*, supra, 107 N.J. at 368 (quoting *Taxpayers' Ass'n of Weymouth Twp. v. Weymouth Twp.*, 80 N.J. 6, 43 (1976), cert. denied sub nom, *Feldman v. Weymouth*, 430 U.S. 977 (1977)).
- ¹²⁵ *Planned Parenthood of Central New Jersey, et al., v. Farmer, et al.*, 165 N.J. 609 (2000); *Taxpayers' Ass'n*, supra, 80 N.J. at 43; *Borough of Collingswood v. Ringgold*, 66 N.J. 350, 370 (1975), appeal dismissed, 426 U.S. 901 (1976); see also *Right to Choose v. Byrne*, supra, 91 N.J. at 309.
- ¹²⁶ *Taxpayers' Ass'n*, supra, 80 N.J. at 43.

¹²⁷ *Boyle v. Riti*, 175 N.J. Super. 158, 166 (App. Div. 1980); *Thomas v. Morris Twp. Bd. of Educ.*, 89 N.J. Super. 327, 332 (App. Div. 1965), *aff'd* 46 N.J. 581 (1966); *Kopera v. West Orange Bd. of Educ.*, 60 N.J. Super. 288, 294 (App. Div. 1960).

¹²⁸ *Worthington v. Fauver*, 88 N.J. 183, 204 (1982) (quoting *Bayshore Sewerage Co. v. Dept. Env't. Prot.*, 122 N.J. Super. 184, 199 (Ch. Div. 1973)).

¹²⁹ See, e.g., *Atkinson v. Parsekian*, 37 N.J. 143, 149 (1962); *SSI Med. Servs., Inc. v. State Dept. of Human Servs., Div. of Med. Assistance and Health Servs.*, 284 N.J. Super. 184, 188 (App. Div. 1995).

¹³⁰ See, e.g., *C.S. v. Bd. of Educ. of the Twp. of Piscataway*, 97 N.J.A.R. 2d (EDU) 573.

¹³¹ *Scher v. Bd. of Educ. of Borough of West Orange*, 1968 S.L.D. 92.

¹³² *Scher*, supra, 1968 S.L.D. at 96.

¹³³ *Scher*, supra, 1968 S.L.D. at 97.

¹³⁴ *L.T. v. Long Branch Bd. of Educ.*, 96 N.J.A.R. 2d (EDU) 125; *C.F. v. City of Wildwood Bd. of Educ.*, 96 N.J.A.R.2d (EDU) 619, 622 (finding that “more harm would inure to the public than would to the board if [the student] was not awarded emergent relief in that due process requirements apply to students enrolled in publicly funded schools and such students can have no confidence in the laws if statutory and constitutional procedures are not properly applied to them”). See also, *R.R.*, supra, 109 N.J. Super. at 349 (ordering student’s reinstatement following long-term removal based on violation of due process protections).

¹³⁵ Kingery, Paul, *Zero Tolerance: The Alternative is Education (2001)*; <http://www.hamfish.org/resources/record/37/>; Skiba, Russ, et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment (2001)*; <http://www.indiana.edu/~safeschl/cod.pdf>.

¹³⁶ N.J.A.C. 6A:16-7.1(c)(5); N.J.A.C. 6A:16-7.1(b)(6). See also N.J.A.C. 6A:16-7.3(c)(1).

¹³⁷ *Spence v. State of Wash.*, 18 U.S. 405, 409 (1974).

¹³⁸ *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that school officials were not able to prohibit speech consistent with the First Amendment where the “record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities”)

¹³⁹ *Id.* at 507.

¹⁴⁰ *S.G. v. Sayreville Bd. of Educ.*, 333 F.3d 417, 423 (3d Cir. 2003)(holding that a school’s prohibition of a five-year old’s statement, “I’m going to shoot you,” “was a legitimate decision related to reasonable pedagogical concerns and therefore did not violate” First Amendment rights)

¹⁴¹ *U.S. v. Stevens*, 533 F.3d 218, 224 (3d Cir. 2008) (Citations omitted); see *S.G.*, 333 F.3d at 423.

¹⁴² *Tinker*, 393 U.S. at 507.

¹⁴³ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001)

¹⁴⁴ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986)(holding that the school was permitted to impose sanctions on a high school student for his “lewd,” “vulgar,” and “indecent” speech in front of a school assembly)

¹⁴⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)(holding that a high school did not violate the First Amendment by controlling the “content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”)

¹⁴⁶ *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that “restrict[ing] student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use” does not violate the First Amendment)

¹⁴⁷ *Sypniewski*, 307 F.3d at 259.

¹⁴⁸ *Id.* at 265.

¹⁴⁹ *Id.*

¹⁵⁰ *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 216-17 (3d Cir. 2001).

¹⁵¹ *Id.*

¹⁵² *Id.* at 217.

¹⁵³ *Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 572 (4th Cir. 2011); *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002) (holding that given the history of racial discrimination in the school, the harassment policy was not overbroad, except as it bans material that “creates ill-will,” nor is it too vague as it is “specific enough to give fair notice to students and to provide school officials with standards by which to enforce the policy, nor is its content discriminatory by focusing on racial issues).

¹⁵⁴ *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d at 264.

- ¹⁵⁵ *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 214(3d Cir. 2010); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011); *Kowalski*, 652 F.3d at 573-74.
- ¹⁵⁶ *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2010); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011).
- ¹⁵⁷ N.J.A.C. 6A:16-1.3.
- ¹⁵⁸ N.J.A.C. 6A:16-1.3.
- ¹⁵⁹ *P.H., on behalf of M.C., v. Bd. of Educ. of Bergenfield, et al.*, State Board of Education Slip Opinion, SB#60-00 and 27-01 (consolidated), decided July 2, 2002. The Bergenfield Board of Education's appeal of the state board decision to the Superior Court, Appellate Division was dismissed as moot in 2005, Dkt. No. A-6566-01T3.
- ¹⁶⁰ *State ex rel. G.S.* 330 N.J. 383 (Ch. Div. 2000).
- ¹⁶¹ *Abbott V*, supra 153 N.J. at 515. Although the New Jersey Supreme Court authorized the elimination of certain *Abbott* remedies under the School Funding Reform Act of 2008, the Court has recognized the continuation of supplemental programs, such as alternative education programs. *Abbott v. Burke*, 199 N.J. 140, 173 n.15 (2009) (*Abbott XX*).
- ¹⁶² See *C.S.*, supra, 97 N.J.A.R.2d at 573 (finding it unreasonable for board of education to expel 12-year-old student without “consider[ing], investigat[ing], and effectively utiliz[ing] the local- and county-based alternative education options which are available,” and noting that “alternative education programs are specifically designed to serve the dual purposes of removing the disruptive student from the regular education program, thus, permitting the district to maintain an educational climate that is both safe and conducive to learning, and assisting the alternative education student to continue her educational program in a public school setting, satisfy credit-year curriculum requirements and develop more responsible patterns of behavior.”); see also, with regard to long-term suspension, *T.M. v. Bd. of Educ. of Lower Camden Reg'l High Sch. Dist.*, 1977 S.L.D. 284; *H.A. v. Bd. of Educ. of Warren Hills Reg'l Sch. Dist.*, 1976 S.L.D. 336; *R.B. v. Bd. of Educ. of Trenton*, 1974 S.L.D. 415; *Diggs v. Bd. of Educ. of City of Camden*, 1970 S.L.D. 225.
- ¹⁶³ *Juvenile Crime, Juvenile Justice*, National Research Council and Institute of Medicine (2001). Washington, DC: National Academy Press, p. 153.
- ¹⁶⁴ N.J.S.A. 18A:37-2.2; N.J.S.A. 18A:37-8; N.J.A.C. 6A:16-9.3(a)(3).
- ¹⁶⁵ N.J.S.A. 18A:37-2.2; N.J.S.A. 18A:37-8; N.J.A.C. 6A:16-9.3(a)(3).
- ¹⁶⁶ N.J.A.C. 6A:16-7.3(a)(9).
- ¹⁶⁷ N.J.A.C. 6A:16-10.2(d)(3).
- ¹⁶⁸ N.J.A.C. 6A:16-10.2(d)(3)(i).
- ¹⁶⁹ N.J.A.C. 6A:16-10.2(e).
- ¹⁷⁰ See *Abbott v. Burke*, 149 N.J. 145, 166-168 (1997) (finding that the CCCS are an integral component of a constitutionally adequate education); N.J.A.C. 6A:8-1.3 (the CCCS “describe the knowledge and skills all New Jersey children are expected to acquire”); N.J.A.C. 6A:16-10.2(d)(4) (requiring program of home or out-of-school instruction to meet CCCS).
- ¹⁷¹ N.J.A.C. 6A:16-10.2(g).
- ¹⁷² N.J.S.A. 18A:6-9.
- ¹⁷³ See, e.g., *Desilets v. Clearview Reg'l Bd. of Educ.*, 137 N.J. 585, 595-597 (1994); *Abbott I*, supra, 100 N.J. at 300; *Paterson Redevelopment Agency v. Schulman*, 78 N.J. 378, 387 (1979); *Brunetti v. Borough of New Milford*, 68 N.J. 576, 590 (1975).
- ¹⁷⁴ N.J.A.C. 6A:16-7.5(b)(1).
- ¹⁷⁵ N.J.S.A. 18A:6-9; N.J.A.C. 6A:7.3(b).
- ¹⁷⁶ N.J.S.A. 18A:6-9.1(a).
- ¹⁷⁷ N.J. Ct.R. 2:2-1, *et seq.*
- ¹⁷⁸ N.J.A.C. 1:1-9.4.
- ¹⁷⁹ N.J.A.C. 6A:3-1.6.
- ¹⁸⁰ See N.J.S.A. 18A:37-11.
- ¹⁸¹ N.J.S.A. 18A:6-9.1(a); N.J.R. 2:4-1(b).
- ¹⁸² N.J.A.C. 6A:16-8.1, *et seq.*
- ¹⁸³ N.J.S.A. 18A:6-9.
- ¹⁸⁴ See, e.g., *Desilets*, supra, 137 N.J. at 595-597; *Paterson Redevelopment*, supra, 78 N.J. at 387; *Brunetti*,

supra, 68 N.J. at 590.

¹⁸⁵ *Balsley v. North Hunterdon Reg. 'l Sch. Dist. Bd. of Educ.*, 117 N.J. 434, 442-443442 (1990) (no authority to award attorney's fees); *J.A. v. Bd. of Educ. for Dist. of South Orange and Maplewood*, 318 N.J. Super. 512, 526 (App. Div. 1999) (no authority to award monetary damages).

¹⁸⁶ Damages and attorney's fees may be available for violation of federal civil rights under 42 U.S.C. §§1983 and 1988.

¹⁸⁷ See *Christian Bros. Inst. v. N. New Jersey Interscholastic League*, 86 N.J. 409, 416 (1981) (finding plaintiff barred from asserting federal civil rights claims in subsequent lawsuit should have noted claims in administrative complaint before Division on Civil Rights).

¹⁸⁸ N.J.A.C. 6A:3-1.6; *Crowe v. DeGioia*, 90 N.J. 126 (1982).

¹⁸⁹ *P.H., on behalf of M.C., v. Bd. of Educ. of Bergenfield, et al.*, State Board of Education Slip Opinion, SB# 27-01, decided September 5, 2001.

¹⁹⁰ N.J.A.C. 6A:3-1.3.

¹⁹¹ N.J.A.C. 6A:3, *et seq.*

¹⁹² *Wetherell v. Bd. of Educ. of Twp. of Burlington*, 1978 S.L.D. 794, 798; *Wermuth v. Bd. of Educ. of Livingston*, 1965 S.L.D. 121.

¹⁹³ *Babbit v. Moran*, 1974 S.L.D. 145.

¹⁹⁴ *C.G. v. Bd. of Educ. of David Bready High Sch.*, 1980 S.L.D. 1178.

¹⁹⁵ N.J.A.C. 6:3-6.3.

¹⁹⁶ N.J.S.A. 18A:36-25.1(b).

¹⁹⁷ N.J.S.A. 18A:36-19a.

¹⁹⁸ *R.B. v. Bd. of Educ. of Greater Egg Harbour Reg'l High Sch. Dist.*, 96 N.J.A.R.2d (EDU) 594 (N.J. Adm. 1996).

¹⁹⁹ *Id.*

²⁰⁰ N.J.A.C. 6:3-6.7.

²⁰¹ N.J.S.A. 18A:6-1.

²⁰² 42 U.S.C. §1983.

²⁰³ *Wood v. Strickland*, 95 S. Ct. 992, 1001 (1975).

²⁰⁴ 20 U.S.C. § 1400, *et seq.*

²⁰⁵ 20 U.S.C. § 1412(a)(1)(A).

²⁰⁶ 20 U.S.C. §§ 1415(k)(1)(B) and (C); 34 C.F.R. § 300.530(c); N.J.A.C. 6A:14-2.8(a), 16-7.2(c) and 16-7.3(g)(1).

²⁰⁷ N.J.A.C. 6A:16-7.1, *et seq.*

²⁰⁸ *R.R. v. Bd. of Educ. of Shore Reg. High Sch. Dist.*, 109 N.J. Super. 337 (Ch. Div. 1970); *Tibbs v. Bd. of Educ. of Twp. of Franklin*, 114 N.J. Super. 287 (App. Div. 1971), *aff'd* 59 N.J. 506 (1971); N.J.A.C. 6A:16-7.3 and 7.4.

²⁰⁹ N.J.A.C. 6A:14-2.8(a)(1).

²¹⁰ 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); N.J.A.C. 6A:14-2.3(k)2.

²¹¹ 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); N.J.A.C. 6A:14-3.7(c)(4).

²¹² 20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); N.J.A.C. 6A:14-3.8(a).

²¹³ 20 U.S.C. §§ 1414(b)(3)(B) and (C); 34 C.F.R. §§ 300.304(c)(4) and (6); N.J.A.C. 6A:14-3.4(f).

²¹⁴ 20 U.S.C. § 1414(b)(2)(A)(ii); 34 C.F.R. § 300.304(b)(1)(ii); N.J.A.C. 6A:14-3.4(a)(2).

²¹⁵ 20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1); N.J.A.C. 6A:14-3.4(f)(4).

²¹⁶ N.J.A.C. 6A:14-3.4(h)(1) and (2).

²¹⁷ 20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); N.J.A.C. 6A:14-3.7(e)4 and 16-7.1(a)7.

²¹⁸ 20 U.S.C. §§ 1415(k)(1)(C) and (G); 34 C.F.R. §§ 300.530(b)(2), (c) and (g).

²¹⁹ N.J.A.C. 6A:16-7.2(a)(5)(i),-7.2(a)(5) (ii), 7.3(a)(9)(i) and 7.3(a)(9)(iii).

²²⁰ 20 U.S.C. §§ 1415(k)(1)(C) and (G); 34 C.F.R. §§ 300.530(d)(1) and (2).

²²¹ 20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. § 300.530(a); N.J.A.C. 6A:14-2.8(b).

²²² 20 U.S.C. §§ 7151(b)(1) and (c); N.J.S.A. 18A:37-8; N.J.A.C. 6A:16-5.5(c) (both federal and State zero tolerance for guns statutes specifically require that mandatory removals be subject to modification on a case-by-case basis by the chief school administrator and that the provisions of the acts be construed in a manner consistent with

the provisions of IDEA).

- 223 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h).
224 N.J.A.C. 6A:14-2.8(a).
225 N.J.A.C. 6A:16-7.1(a)(7).
226 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. §§ 300.530(b) and 300.530(e); N.J.A.C. 6A:16-7.1(a)(7).
227 N.J.A.C. 6A:16-7.2(a)(5)(i).
228 N.J.A.C. 6A:16-7.2(a)(5)(ii).
229 N.J.A.C. 6A:16-7.2(a).
230 34 C.F.R. § 300.530(b)(12).
231 34 C.F.R. §§ 300.530(b)(2) and (d)(4).
232 34 C.F.R. § 300.530(d)(4).
233 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c); N.J.A.C. 6A:16-7.1(a)(7).
234 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. §§ 300.530(c), (d)(1) and (d)(2); N.J.A.C. 6A:16-7.3(a)(9)(i) and
(iii).
235 N.J.A.C. 6A:16-7.3(a)(9).
236 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. 300.530(e)(1); N.J.A.C. 6A:14-2.8(d) and 16-7.3(a)(7).
237 20 U.S.C. §§ 1415(k)(1)(E)(i) and (ii); 34 C.F.R. §§ 300.530(e)(1) and (2).
238 20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2).
239 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).
240 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).
241 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).
242 20 U.S.C. §§ 1415(k)(1)(F)(i) and (ii); 34 C.F.R. § 300.530(f)(1).
243 20 U.S.C. §§ 1415(k)(1)(C) and (D)(i); 34 C.F.R. §§ 300.530(c) and (d)(1)(i).
244 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g); N.J.A.C. 6A:14-2.8(f). Although IDEA itself permits
the involuntary removal of the student under special circumstance for up to 45 **school** days, New Jersey's special
education regulations limit a school district's authority to involuntarily remove a student to 45 **calendar** days.
245 20 U.S.C. §§ 1415(k)(1)(G) and (7); 34 C.F.R. § 300.530(g); N.J.A.C. 6A:14-2.8(f) (citing the definitions
of these terms at 18 U.S.C. § 930(g)(2), 18 U.S.C. § 1365(h)(3), 21 U.S.C. § 812(c), Schedules I - V and 20 U.S.C.
§§ 1415(k)(7)(B), all of which are set forth in Appendix J of ELC's special education manual).
246 N.J.A.C. 6A:14-2.7 and 2.8; N.J.A.C. 6A:16-7.3(a)(10).
247 20 U.S.C. § 1415(k)(3)(B)(ii)(II); 34 C.F.R. § 300.532(b)(2)(ii); N.J.A.C. 6A:14-2.8(f).
248 34 C.F.R. §300.536(a).
249 34 C.F.R. §300.530(e)(1).
250 34 C.F.R. § 300.530(f).
251 34 C.F.R. § 300.530(b)(2).
252 34 C.F.R. § 300.536(b).
253 20 U.S.C. § 1415(k)(5); 34 C.F.R. § 300.534.
254 20 U.S.C. § 1415(k)(5)(B); 34 C.F.R. § 300.534(b).
255 N.J.A.C. 6A:14-3.3(f).
256 20 U.S.C. § 1415(k)(5)(C); 34 C.F.R. § 300.534(c).
257 20 U.S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. § 300.534(d)(2)(ii).
258 20 U.S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. § 300.534(d)(2)(iii).
259 20 U.S.C. § 1415(k)(3); 34 C.F.R. § 300.532(a).
260 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2); N.J.A.C. 6A:14-2.7(o)2.ii.
261 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2); N.J.A.C. 6A:14-2.7(o)(4).
262 34 C.F.R. § 300.532(c)(3)(i).
263 34 C.F.R. § 300.532(c)(3)(ii).
264 N.J.A.C. 6A:14-2.7(o)(3).
265 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.533; N.J.A.C. 6A:14-2.7(u).
266 N.J.A.C. 6A:14-7.1(c), 7.6(e), 7.6(f) and 6A:16-1.2.
267 N.J.A.C. 6A:14-7.6(e).
268 N.J.A.C. 6A:14-7.6(f) and 6A:16-1.2.

269 N.J.A.C. 6A:14-7.6(f) and 7.7(a).
270 20 U.S.C. § 1415(b)(6); 34 C.F.R. §§ 300.506(a)(1), 300.507(a)(1); N.J.A.C. 6A:14- 2.6(a), -2.7(a).
271 20 U.S.C. § 1415; 34 C.F.R. § 300.500 - 517; N.J.A.C. 6A:14-2.6, -2.7.
272 34 C.F.R. § 300.510(i)(1); N.J.A.C. 6A:14-2.7(f).
273 N.J.A.C. 6A:14-2.7(f).
274 N.J.A.C. 6A:14-2.7(n).
275 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.510(b); N.J.A.C. 6A:14-2.7(vp).
276 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(1); N.J.A.C. 6A:14-2.7(o)(1).
277 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2); N.J.A.C. 6A:14-2.7(o)(2)(ii) and (iii).
278 N.J.A.C. 6A:14-2.7(h)(2), (h)(5) and (o)(2)(iii).
279 N.J.A.C. 6A:14-2.7(o)(3).
280 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2); N.J.A.C. 6A:14-2.7(o)(2)(ii) and (4).
281 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.521.
282 N.J.A.C. 6A:14-2.7(c).
283 20 U.S.C. § 1415(b)(7); 34 C.F.R. § 300.507; N.J.A.C. 6A:14-2.7(c).
284 N.J.A.C. 6A:14.2.7(c).
285 20 U.S.C. § 1415(f)(3)(c); 34 C.F.R. § 300.511(e); N.J.A.C. 6A:14-2.7(a)(1).
286 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f); N.J.A.C. 6A:14-2.7(a)(1)(i) and (ii).
287 N.J.A.C. 6A:14-2.7(r).
288 N.J.A.C. 6A:14-2.7(s).
289 N.J.A.C. 6A:14-2.7(r).
290 N.J.A.C. 6A:14-2.7(r).
291 N.J.A.C. 6A:14-2.7(s)(1).
292 20 U.S.C. § 1415(j).
293 *Honig v. Doe*, 108 S. Ct. 592, 605 (1988); *Drinker v. Colonial Sch. Dist.*, 78 F.3d. 859, 864 (3d Cir. 1996).
294 N.J.A.C. 6A:14-2.7(s)(1).
295 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.509(a), (b); N.J.A.C. 1:6A-10.1(d).
296 20 U.S.C. § 1415(f)(2); 34 C.F.R. § 300.509(a); N.J.A.C. 1:6A-10.1(a), -14.2(d)(1).
297 20 U.S.C. § 1415(f)(2)(A); 34 C.F.R. § 300.509(b)(1); N.J.A.C. 1:6A-10.1(b).
298 20 U.S.C. § 1415(f)(2)(B); 34 C.F.R. § 300.509(b)(2); N.J.A.C. 1:6A:10-1(c), -14.2(d)(1).
299 N.J.S.A. 18A:46-1.1.
300 N.J.A.C. 1:6A-14.1(d).
301 20 U.S.C. § 1415(f), -(i)(2)(A).
302 *See M.C. on behalf of J.C. v. Central Reg'l Sch. Dist.*, 81 F. 3d 389, 397 (3d Cir. 1996).
303 *Chambers v. Sch. Dist. of Philadelphia Bd. of Educ.*, 587 F.3d 176 (3d Cir. 2009).
304 N.J.A.C. 6A:3-1.3(e).
305 N.J.A.C. 6A:3-1.3(e)(1).
306 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.533; N.J.A.C. 6A:14-2.7(u).
307 20 U.S.C. § 1415(k)(7)(A); 34 C.F.R. § 300.526(a).
308 20 U.S.C. § 1415(k)(7)(B); 34 C.F.R. § 300.526(b).
309 34 C.F.R. § 300.526(c)(1)-(3).
310 20 U.S.C. § 1415(f)(3); 34 C.F.R. § 300.508; N.J.A.C. 6A:14-2.7(a).
311 34 C.F.R. § 300.511(d).
312 20 U.S.C. § 1415(h)(3); 34 C.F.R. § 300.509(a)(4).
313 N.J.A.C. 6A:14-2.7(o)(3).
314 20 U.S.C. § 1415(h)(1); 34 C.F.R. § 300.509(a)(1).
315 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.509(a)(2).
316 20 U.S.C. § 1415(f)(2)(B); 34 C.F.R. § 300.509(b)(2).
317 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.509(a)(2).
318 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(c)(2); N.J.A.C. 6A:14-2.7(o)(4).
319 N.J.A.C. 6A:14-2.7(f).