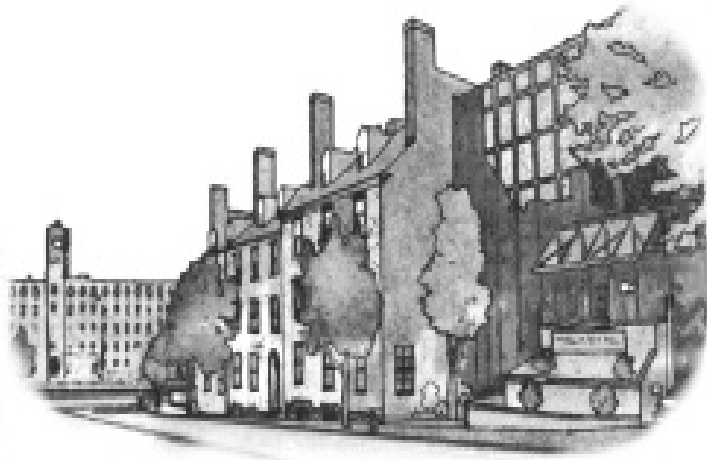


The Discipline of Student Discipline

Understanding the due process requirements and legal criteria for disciplining students, including students with educational disabilities

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***Wadleigh, Starr & Peters, P.L.L.C.
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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the law pertaining to the discipline of students. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

The Discipline of Student Discipline

I.	OVERVIEW.....	1
II.	THE GENERAL DISCIPLINARY FRAMEWORK.....	1
	A. Understanding Due Process.....	1
	B. Your Duty to Publish.....	2
	C. The Statutory Framework for Long-Term Suspensions and Expulsions: NH RSA 193:13.....	3
	D. Pupil Safety and Violence Prevention.....	3
III.	REPORTING A STUDENT DISCIPLINARY MATTER.....	4
	A. The Scope of a Principal’s Authority.....	4
IV.	REPORTABLE EVENTS.....	4
	A. “Grey” Areas and the Exercise of Discretion in Reporting.....	5
V.	DUE PROCESS: SHORT-TERM SUSPENSIONS.....	5
VI.	SUPPLEMENTAL DISCIPLINE: LONG-TERM SUSPENSIONS.....	6
VII.	FULL FAITH AND CREDIT.....	7
VIII.	SUPPLEMENTAL DISCIPLINE: EXPULSION.....	7
	A. Expulsion and Firearms.....	8
	B. The Zeroing out of “Zero Tolerance”.....	8
IX.	APPRISING A STUDENT OF THEIR RIGHTS.....	9
X.	THE DISCIPLINARY REVIEW HEARING.....	9
XI.	INVESTIGATING A DISCIPLINARY MATTER.....	10
XII.	PREPARING FOR A DISCIPLINARY HEARING.....	12
XIII.	PRESENTING A CASE FOR STUDENT DISCIPLINE.....	13
	A. Presentation Outline.....	13
XIV.	ALTERNATIVE SCHOOLING.....	15
XV.	DISCIPLINING THE STUDENT WITH EDUCATIONAL DISABILITIES: Understanding the Additional Federal Protections Afforded the Student with an Educational Disability.....	15
	A. Understanding the Federal Presumption: Preservation of a FAPE.....	15
	B. The Consequences of Discipline Without Preserving a FAPE.....	15

C.	The Practical Reduction of the Long-Term Suspension Option.	16
D.	Long-Term Suspension Checklist.	16
E.	The Traditional Disciplinary Options: Short-Term Suspensions and Short-Term Alternative Educational Settings.	17
F.	Cumulative Suspensions in Excess of Ten (10) School Days in the School Year.	18
G.	The Components of the Manifestation Determination Review Meeting.	19
	1. Who attends the Meeting?	19
	2. What Material Should the Team Consider?	20
	3. Information to Consider in a Manifestation Determination Review Meeting.	20
	4. How does the Team make a Manifestation Determination?	20
H.	Two Examples of Court Decisions Regarding Manifestation.	21
	1. ADD and Risk-Taking/Thrill-Seeking Behavior Add up to a Manifestation.	21
	2. Not All Juvenile Behavior Is a Manifestation.	21
I.	The Components of the Functional Behavioral Assessment and the Behavior Intervention Plan.	22
	1. What is a Functional Behavioral Assessment?	22
	2. What is a Behavior Intervention Plan?	22
	3. So what happens during the meeting?	22
	4. Parents Are Entitled to IEEs When They Disagree with a Functional Behavioral Assessment.	22
J.	Disciplining Students with Disabilities who bring Weapons or Drugs to School.	23
	1. Checklist for a Drug or Weapon Case: Student Identified with an Educational Disability.	24
	2. The Requirements for the 45 Day Interim Alternative Educational Placement.	25
	3. Alternative Placement in Cases Where the Student Presents a “Likely Danger to Themselves or Others”	25
K.	Disciplining Students Not Yet Identified as Educationally Disabled.	26
	1. The IDEA standard: “Knew or Should Have Known”.	26
	2. Court Cases Involving the Definition of “Knew or Should Have Known”.	26
	a. The Definition of “Knew or Should Have Known.	26
	b. Prior School District Evaluation Finding That Student Does Not Meet IDEA Relieves District of IDEA Compliance.	27
	c. District’s Awareness of Student’s Disruptive and Inattentive Behaviors and Poor Academic Performance Are Sufficient to Place District on Notice of Suspected Disability and Warrants Setting Aside Expulsion Due to the District’s Failure to Make a Timely Assessment.	27
XVI.	CONCLUSION.	28

THE DISCIPLINE OF STUDENT DISCIPLINE:

A guide to understanding the due process requirements and legal criteria for disciplining students, including students with educational disabilities

I. OVERVIEW

Student discipline, once defined exclusively by the educator, is now increasingly defined by the law. The goal of this material is to provide the educator and the administrator with the tools necessary to fairly and effectively discipline students with educational disabilities, as well as to protect the educator and the administrator from the consequences of uneducated disciplinary decisions. In doing such, we will review the procedural safeguards and substantive changes that our courts and legislature have injected into the process of discipline.

II. THE GENERAL DISCIPLINARY FRAMEWORK

The State Legislature, our courts and the local school district have all had a hand in the development of the framework within which student discipline is administered. This section is designed to equip you with a general working knowledge of the laws which will affect the manner in which you investigate, prepare and present a student disciplinary matter.

A. Understanding Due Process.

Section 1 of the Fourteenth Amendment to the United States Constitution states that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” US Constitution, Amendment XIV, Section 1. (The State of New Hampshire ratified the Fourteenth Amendment on July 6, 1866). In the case of Wood v. Strickland, 95 S. Ct. 992, *re-hearing denied* 95 S. Ct. 1589 (1975) the US Supreme Court held that the right to education is a property right and a liberty and thus no school district can deny a student that right without granting the student “due process of law.” Both expulsion and long-term suspension result in deprivation of a student’s property right and liberty right in a free public education. Therefore, it is imperative that the district ensure that students receive due process of law in the context of a suspension or expulsion decision.

Fundamentally, due process of law means fairness. Fairness is ensured through the procedures whereby all parties are given an equitable opportunity to tell their story.

All laws pertaining to student discipline are written with the general goal of ensuring that students receive due process of law. In the context of a student

suspension or expulsion, this includes the following fundamental rights:

1. Timely notice of the reasons for the discipline;
2. An opportunity to prepare a defense;
3. An opportunity to present a defense;
4. The right to be represented by an attorney;
5. The right to a fair and impartial hearing;
6. The right to examine witnesses and present evidence;
7. The right to an impartial and fair decision; and
8. The right of appeal.

The role of the principal and administrator in student discipline is to ensure the student is treated fairly throughout the disciplinary process without compromising the educational goal of achieving a positive learning environment in the school. From a practical perspective, this includes following minimum protections such as:

1. Promptly letting the student and parent know why they are being disciplined;
2. Promptly informing the student and parent of the nature of the discipline;
3. Providing the student and parent with an opportunity to defend their conduct;
4. Interviewing witnesses who may “exonerate” the student; and
5. Fairly disclosing information to the student which may assist them in preparing a defense.

B. Your Duty to Publish.

Fundamental to the concept of due process is that students know the rules and regulations of the school district. This is traditionally done through dissemination of the Student Handbook to each student at the commencement of the school year as well as a requirement that they sign and return a form indicating that they have read through the Student Handbook. Your principals should take particular care to ensure that students who are admitted during the school year are provided with a Student Handbook and that the school confirms that the student has read through the Handbook.

In addition, it is recommended that announcements be made throughout the school year with regard to the availability of Student Handbooks in the student office as well as announcements which reiterate key components of the Student Handbook. For example, a number of principals hold student assemblies during which they review the district’s “zero tolerance” policy with regard to knives, guns, and drugs. Other schools review the Student Handbook in the context of their social studies class or home room.

Particular care should be taken with regard to students who are in an English as

Second Language (E.S.L.) program to ensure that they understand the Code of Conduct.

C. The Statutory Framework for Long-Term Suspensions and Expulsions: NH RSA 193:13.

NH RSA 193:13 addresses the two types of cases which come before the School Board. Those two cases are:

1. Appeals from the decision of the superintendent to levy a long-term suspension; and
2. A hearing in any case where the superintendent recommends expulsion.

There is no right of appeal or board level hearing with regard to a **short-term suspension**. A short-term suspension is defined by NH RSA 193:13 as any suspension up to 10 school days. A **long-term suspension** is any suspension in excess of 10 school days. NH RSA 193:13 permits an appeal to the board in the case of a long-term suspension.

D. Pupil Safety and Violence Prevention.

The year 2000 legislative session resulted in the legislature adopting the "Pupil Safety and Violence Prevention Act of 2000." Set forth in NH RSA 193-F:1 et. seq., the legislation was adopted to "protect our children from violence by dealing with harassment, including 'bullying,' in our public schools." NH RSA 193-F:2. Under NH RSA 193-F:3(I)(a) each local school board is required to adopt a pupil safety and violence prevention policy which addresses pupil harassment and bullying.

The new law imposes a duty upon any school employee or employee of a company under contract with a school or school district who has witnessed or has reliable information that a pupil has been subjected to insults, taunts or challenges, whether verbal or physical in nature, which are likely to intimidate or provoke a violent or disorderly response to report the incident to the principal or the principal's designee who is in turn obligated to report the incident to the superintendent.

The local school board is obligated to define the reporting requirement and is permitted to "provide opportunities for educators to have the knowledge and skills to prevent and respond to acts" of bullying. NH RSA 193-F:3(III). The statute also provides a school employee or employee of a company under contract with a school or school district who has reported violations to the principal or has intervened to prevent an incident of bullying with immunity from any cause of action alleging failure to remedy the incident of bullying. A school employee or employee of a company under contract with a school or school district making a good faith report will not be subject to liability

for making the report.

This new provision of law explicitly states that no specific curriculum is required to implement a policy against bullying, but the act implies that one component of intervention will be education for educators as well as students.

III. REPORTING A STUDENT DISCIPLINARY MATTER

A. The Scope of a Principal's Authority.

NH RSA 193:13 limits the scope of the principal's authority (upon written designation) to meting out short-term suspensions. All long-term suspension and expulsion cases should be preceded by a 10-day suspension. Tardy reporting creates a procedural and mechanical difficulty when the student infraction warrants more severe discipline. For example, the failure on the part of a principal to immediately report a knife or gun incident to the superintendent could result in a student being permitted to return to school during the time period in which they are pending a hearing before the board.¹ Ed. 317.04 (d)(3)(c) provides that a "pupil shall be entitled to return to school after the short-term suspension has expired and pending the expulsion hearing."

Therefore, the first important decision that any principal is called upon to make is whether or not the disciplinary event is a reportable event. The following **Checklist** in Section IV should assist your principals in determining their duty to report. However, **no checklist can encompass all circumstances, and therefore, whenever the principal believes that a disciplinary matter requires either a long-term suspension or expulsion the report should immediately be made to the superintendent, but in no circumstances should the principal take longer than 24 hours in which to report an incident.**

IV. REPORTABLE EVENTS

The following disciplinary events should be immediately reported to the superintendent:

- Any event in which the principal believes there should be a long-term suspension or expulsion;

¹Criminal acts must also be promptly reported to the Police in accord with the Safe School Zones Act. NH RSA 193-D:1 et. seq. Effective January 1, 2001 if the criminal act involves a student victim, the principal is also required to immediately notify the person responsible for the student's welfare, that a report was made to the local law enforcement authority. NH RSA 193-D:4(1).

- Possession of a pellet gun, bb gun, rifle, paint ball gun, pistol or other dangerous weapon;
- Possession of a knife of any length;
- All acts of theft, destruction or violence including: Homicide, first or second degree assault, simple assault resulting in personal injury, sexual assault of any nature, criminal mischief, unlawful possession or sale of a firearm or other dangerous weapon, arson, burglary, robbery, theft, sale or possession of a controlled drug, any bomb threat, any threat to engage in any of the above-recited acts;
- Gross misconduct;
- Documented long-term neglect or refusal to conform to the reasonable rules of the school.

A. “Grey” Areas and the Exercise of Discretion in Reporting.

On occasion, a disciplinary matter may fall within a grey area as to whether or not the principal should make a report. In those cases, the principal should consult with the superintendent as to whether or not the matter may merit a long-term suspension or expulsion. In addition, the principal should use their discretion in determining whether or not an act rises to the level of “gross misconduct,” or whether or not a student has engaged in “neglect or refusal to conform to the reasonable rules of the school.”

The State Regulations provide some definitions to assist the principal in determining whether or not they are dealing with a case of gross misconduct or neglect or refusal to follow the rules of the school. Under Ed. 317.02(d) “gross misconduct” means an act which: a) results in violence to another’s person or property; b) poses a direct threat to the safety of others in a safe school zone; or c) is identified in RSA 193-D:1, I (the “Safe Schools Act”). “Neglect” is defined in Ed 317.02 (e) as “the failure of a pupil to pay attention to an announced, posted or printed school rule.” “Refusal” means “the willful defiance of a pupil to comply with an announced, posted or printed school rule.” Ed. 317.02(g).

V. DUE PROCESS: SHORT-TERM SUSPENSIONS

- Is the suspension levied for gross misconduct or refusal to conform to the reasonable rules of the school?
 - Will the Student’s actions be considered by an objective third party to constitute gross misconduct?
 - Has the student failed to conform to a reasonable rule?

- Have you met with the student and informed her of the reason for the suspension?
- Have you informed the student in writing of the charges against them and given an explanation of the evidence against them?
- Have you given the student an opportunity to present his/her side of the story?
- Have you issued a letter to the student and their parents or legal guardian explaining the disciplinary action that you are taking?
- Have you reviewed the case to determine whether the matter should be referred to the superintendent for further disciplinary action?
- Have you considered whether there is a need to refer the student for evaluation?
- Does this matter have to be reported to law enforcement under the Safe School Zones Act?

VI. SUPPLEMENTAL DISCIPLINE: LONG-TERM SUSPENSIONS

The school board, “or a representative designated in writing of the school board,” may, following a hearing, continue the suspension of a pupil for a period **in excess of ten (10) school days**. The board’s “designee may be the superintendent or any other individual, but may not be the individual who suspended the pupil for the first 10 days. NH RSA 193:13(l)(b). Any suspension in excess of ten (10) school days is considered a **long term suspension**. The July 1997 amendments to RSA 193:13 permit the superintendent to levy suspensions in excess of the traditional twenty (20) day long-term suspension. Your student disciplinary policies should be amended to reflect this statutory change.

School principals have an integral role in the process of supplemental discipline. Failure to immediately refer an appropriate case to the superintendent for supplemental discipline, may interrupt continuity in the disciplinary process, producing such untoward results as a student returning to school pending an expulsion or long-term suspension hearing.

Before any long term suspension of a pupil, the superintendent holding the hearing should provide written communication to the pupil and at least one of the pupil’s parent or guardian, delivered in person or by mail to the pupil’s last known address, of the charges and an explanation of the evidence against the pupil. In addition, the notification to the pupil should contain the Superintendent’s written recommendation for

student action to correct the disciplinary problem. The letter must apprise the student of her right to appeal the long term suspension within ten (10) days to the board and should contain a written decision which includes the legal and factual basis for the superintendent's conclusion that the pupil should receive a long term suspension.

When the superintendent has imposed a suspension in excess of ten (10) school days (unless that suspension has been imposed by the board) the parent or guardian of the student has the right to appeal that suspension to the board. However, the board need not hear such an appeal unless the superintendent has received the appeal in writing within ten (10) days after he or she has issued their suspension decision.

VII. FULL FAITH AND CREDIT

School districts must give full faith and credit to another district's long-term suspension or expulsion. However, except in cases of expulsion under the Gun Free Schools Act of 1994, the superintendent in the enrolling district may modify the suspension or expulsion.

VIII. SUPPLEMENTAL DISCIPLINE: EXPULSION

Any student may be expelled from a school district by the board for the following:

1. Gross misconduct;
2. Neglect or refusing to conform to the reasonable rules of the school;
3. An act of theft, destruction or violence as defined in N.H. RSA 193-D:1; or
4. Possession of a pellet, BB gun, rifle, or paintball gun or dangerous weapon.
5. Possession of a firearm in a Safe School Zone.

Many school districts have a "zero-tolerance" policy on knives in the school and consider a knife to be a dangerous weapon.

When a pupil has been expelled they shall not attend school in the district until restored by the board. Any expulsion decision is subject to review by the board if a request for review is made by the parent or guardian prior to the start of each school year. Any parent or guardian of an expelled student has the right to appeal any such expulsion by the board to the State Board of Education. The written notice issued by the board with regard to any expulsion shall set forth in writing the period for the expulsion and if the expulsion is for possession of a firearm in a safe school zone, the

expulsion shall be for a period of not less than 12 months.

A. Expulsion and Firearms.

If a pupil brings or possesses a firearm in a safe school zone without written authorization from the superintendent the following protocol should usually apply:

1. The superintendent suspends the pupil for a period not to exceed ten (10) days, pending a hearing by the board;
2. The board holds a hearing within ten (10) days to determine whether: the student was in violation of N.H. RSA 193:13 (III) and therefore is subject to expulsion; and
3. The superintendent makes a determination whether to modify the expulsions.

Any pupil who brings or possess a firearm as defined in Section 921 of Title XVIII of the United States Code in a Safe School Zone as defined in N.H. RSA 193-D:1 without written authorization from the superintendent or designee of the superintendent shall be expelled from the district by the board for a period of not less than 12 months. The board must uphold a policy that a pupil expelled from school in another State under the provisions of the Gun Free Schools Act of 1994 shall not be eligible to enroll in the district for the period of their expulsion.

The board must hold a formal hearing before any expulsion. Such hearing may be held either before or after any short term suspension has expired. If the hearing is held after the expiration of a short term suspension, the pupil shall be entitled to return to school after the short term expulsion has expired and pending the expulsion hearing, unless the Superintendent has implemented a long term suspension.

B. The Zeroing out of “Zero Tolerance”.

Many districts have a “zero tolerance,” policy with regard to knives, drugs and guns. Recently the Sixth Circuit Court of Appeals ruled that school boards must consider intent when meting out student discipline. Circuit Judge Ronald Lee Gilman wrote, “No student can use a weapon to injure another person . . . if the student is totally unaware of its presence. Indeed, the entire concept of possession . . . implies knowing or conscious possession.” While the Sixth Circuit decision is not binding on the First Circuit, it is reasonable to assume that courts will look askance at school boards which do not consider intent when determining whether or not there has been a violation warranting long-term suspension or expulsion. NH RSA 193:13 does not explicitly include a “conscious possession” element. However, it is reasonable to assume that a court would interpret the statue as requiring some level of knowing possession.

IX. APPRISING A STUDENT OF THEIR RIGHTS

In order for parents and students to participate meaningfully in a disciplinary hearing they must be apprised of their due process rights. The best way to do such is to provide the parents and student with a written notice of their procedural rights in conjunction with the superintendent's recommendation for an expulsion hearing.

X. THE DISCIPLINARY REVIEW HEARING

In accord with NH RSA 193:13 (VII) the school board may authorize a subcommittee to act as the Disciplinary Review Committee, (DRC). The role of the school board or subcommittee is to hear all appeals of long-term suspensions and to conduct all expulsion hearings.

As a general rule, a hearing will be conducted within 10 days of your original short-term suspension decision.

The hearing is held in accord with the hearing procedures promulgated by the State Department of Education. The hearing is conducted in non-public session unless the parent, guardian or student requests that the hearing be held in public. An audio tape recording should be made of the hearing. The taped record should be made available to the parent and student at their request.

The parent or guardian and student should be provided with a letter from the superintendent which gives written notice of the hearing date, a written statement of the charges and the nature of the evidence against the pupil, the superintendent's written recommendation for board action and a description of the process used by the superintendent to reach his/her recommendation. In order for the superintendent's letter to be meaningful, it is incumbent upon the principal to provide the superintendent with detailed information as to the nature of the charges and the evidence that supports the charges. The superintendent's letter and supporting Fact Sheets are made part of the record of the hearing.

The student, together with a parent or guardian, may waive the right to a hearing and admit to the charges made by the superintendent. The school board should treat a parental or student request for a hearing as a statement that the parent or student wishes to be heard on the disciplinary matter.

In the case of an appeal of a long-term suspension, the hearing is initiated by a request on the part of the parent. In those cases, the principal should be furnished a copy of the parent's appeal for his/her review and response. In those cases where the administration is recommending disciplinary action, the principal should begin the hearing by providing the school board with the evidence in support of the charges as well as a description of the reason for recommending expulsion. As discussed further,

this evidence may consist of witness testimony, records, reports, student records and an investigative report by the principal.

After presentation of the administration's evidence and recommendation the student and his/her parent or guardian have an opportunity to present any defense or reply. The student is also permitted to ask questions of the administration's witnesses and may do such either on their own or through their attorney. The principal/administrator may also question witnesses presented by the parent or student.

At the close of the hearing the principal, the parent and student are permitted to make closing statements. The parent and student's closing statement precedes the closing statement by the principal/superintendent.

After presentation of the case, the student, parents, witnesses and the administration are excused from the hearing. The board deliberates privately. All parties should remain outside while the board deliberates. This is done in case the board requires an answer to new questions that arise during deliberation. When deliberation has concluded, the parties are either released from the hearing and notified of the decision in writing or are called back into the hearing and immediately notified of the decision.

The board is required by law to base its decision on a dispassionate and fair consideration of "substantial evidence" that the student committed the act for which expulsion or long-term suspension is to be imposed and that such acts are, in fact, a proper reason for expulsion. The administration and the parent will be notified in writing of the decision of the board. If the decision is for expulsion, the written decision will state that the student has been expelled and will set forth the length of the expulsion. If the decision is to mete out a long-term suspension, the decision will set forth the term of the suspension.

In those cases where the board elects to administer discipline, the decision will include the legal and factual basis for the decision. That type of decision will also set forth any action the student may take to be restored by the board and will include a statement that the pupil has a right to appeal the decision to the State Board of Education. That right of appeal must be exercised within twenty (20) calendar days of receipt of the written decision of the committee.

XI. INVESTIGATING A DISCIPLINARY MATTER

Thorough investigation is the key to ensuring that the legitimate goal of fostering discipline among students is balanced with the goal that every student receive due process. The quality of the investigation is critical to the quality of any presentation before the board.

A minimally satisfactory investigation should include the following:

- Ascertaining whether the student has an educational disability;
- An interview with the student;
- An interview with all student witnesses;
- An interview with all teacher/staff witnesses;
- When the police are involved, a discussion with the investigating police officer;²
- An inventory of the findings of any administrative search;
- Collection of any physical evidence or photographs;
- An interview with the parents/guardian/caretaker;
- A review of the student's disciplinary file;
- A determination as to whether or not the student was aware of the rules of the school; and
- A determination as to whether the student read through and understood the Student Handbook.

The discipline of students with educational disabilities involves additional unique considerations. **Every disciplinary investigation should include an inquiry as to whether or not the student is identified as educationally disabled or whether there is any reasonable basis to conclude that the student should be identified as educationally disabled.** In those circumstances, the principal should immediately request a "Manifestation Determination Meeting," contact the Office of Student Services and consult the guidelines for the discipline of educationally disabled students.

If the disciplinary infraction warrants such, the principal may consider using the following additional investigatory tools: a) taking written statements from teachers/staff; and b) taking written statements from student eye witnesses.

The end result of an investigation should be a typewritten report to the appropriate superintendent. This typewritten report should be furnished as early as possible before the hearing should include each element of the investigative checklist as well as the following components:

²A decision should immediately be made to determine whether there has been a criminal act. If so, the police should immediately become involved.

1. A statement of the date of infraction;
2. A thorough recitation of the facts;
3. The legal basis for the disciplinary action; and
4. Any mitigating circumstances.

The report should be written in such a manner that it can be disseminated to the parent and student without breaching student confidentiality or any confidential personnel issue. The report should be accompanied by any documentary exhibits including witness statements, and should contain all "Expulsion Checklist Items" (if not previously submitted). In those cases where the police have not taken possession of a weapon, the weapon and any other physical exhibits should be furnished to the assistant superintendent for schools as soon as possible. In those cases involving physical damage to property, photographs will be of assistance to the School Board.

The report should also contain a fair and accurate description of any mitigating factors which might support a lesser punishment. If for example, a student is found to have been in possession of a knife in their backpack but another student admits that they secreted the knife in the student's backpack without that student's knowledge, that mitigating circumstance should be contained in the body of the principal's investigative report.

XII. PREPARING FOR A DISCIPLINARY HEARING

There is some modest preparation required in order to prepare for a disciplinary hearing. The principal/superintendent should ensure that the following checklist items are satisfied prior to the hearing:

- Schedule the attendance of teacher and staff witnesses;
- Marshaling of any physical or photographic exhibits;
- Procurement and review of past disciplinary records;
- Procurement of student cumulative file; and
- Preparation of oral presentation.

Each of the above-recited check list items have a significant role in the subsequent preparation of a disciplinary case to the school board. A principal may consider that the presence of teacher or staff witnesses could be an imposition on the teacher, staff member and school board, however, where credibility is at issue, it is imperative the teacher or staff member who actually observed an incident or conversation be present to testify on the basis of first-hand knowledge. For example, if a student testifies that a teacher gave him/her permission to bring a knife to school and that teacher is not present at the hearing, the School board has no basis for

determining whether or not that student is telling the truth.

Similarly, the marshaling of physical exhibits will be critical to your presentation. For example, the very nature of a knife may affect the manner in which the Board treats a violation. A two-inch single edged blade in a personal fingernail kit may very well be viewed differently than a set of brass knuckles with a knife blade.

In cases of gross misconduct and neglect or refusal to follow the reasonable rules of the school, it is extremely important that the principal be familiar with the students' past disciplinary record. That record is best proven through the actual written disciplinary records of the school. It is not uncommon for members of the board to question a principal regarding a student's disciplinary record and it can be embarrassing when the principal is unable to elaborate on that record.

The student's cumulative file may also have a bearing on the case. For example, if a parent suggests that their son/daughter was evaluated in the past and found to be educationally disabled, that information is critical information which the Board needs to know before it can move forward with a disciplinary decision.

Finally, preparation of the oral presentation is the capstone to this process. The contents of the oral presentation are discussed further below.

XIII. PRESENTING A CASE FOR STUDENT DISCIPLINE

The goal of the board is to fairly determine whether or not it is more probable than not that a student be engaged in a violation of the Code of Conduct. The standard of proof is not a "reasonable doubt" standard, but rather the civil standard whereby the administration must demonstrate that it is more probable than not that the student violated the Code of Conduct in a manner requiring discipline. In this regard, the School board weighs the evidence much like a judge or jury would weigh the evidence in a civil case.

Whether or not the administration meets its burden of proof depends on the quality of the evidence presented at the hearing. The following general format will assist the principal in designing their presentation.

A. Presentation Outline.

- Introduction;
 1. Name; and
 2. Position and schools.

- Summarize the case in one sentence;
 1. E.g., "On September 5, 1999 Tim Doe brought a hunting knife with a five-inch blade to school in violation of the Code of Conduct's

- 2. prohibition against knives on campus”; or
E.g., “On September 5, 1999 Suzie Q brought an unloaded revolver to school in violation of the law and the Code of Conduct’s prohibition against guns in schools.”
- Provide a narrative report;
 1. Identify the initial source of information “the tip” regarding the violation;
 2. E.g., Student report; teacher/staff report; personal eye witness;
 3. E.g., “On the afternoon of September 5, 1999 a student Jane Doe informed me that while at lunch in the cafeteria she saw a knife fall out of Tim Doe’s back pack”;
 4. Describe your subsequent investigation in a chronological fashion;
 5. Describe each individual contact and conversations with the violating student;
 6. Describe the results of any administrative search;
 7. Describe the results of any eye witness interviews; and
 8. If appropriate present the knife or other weapon to the Board for its inspection.
- A statement as to whether or not the student was aware of the Code of Conduct;
- Describe your disciplinary decision, citing the relevant provision of the Code of Conduct or the law;
- Set forth the short-term suspension start and finish date;
- Identify the date of your report to the Assistant Superintendent;
- Discuss your contact and conversation with the parents/guardians;
- Introduce corroborating witnesses;
 1. Allow the witness to first provide a narrative; and
 2. To the extent necessary question the witness to elicit facts missing from their narrative.
- Discuss any mitigating or exacerbating factors;
 1. The presence or lack of an adverse disciplinary record;
 2. Any significant academic achievements;
 3. The general character and citizenship of the student; and
 4. Any facts that may be favorable to the student’s case.
- Conclusion;
 1. Recommend the course of discipline that you are seeking

2. describing the rationale behind that recommendation; and
Be prepared to answer any questions posed by parents, students, and the School board.

- Be prepared to ask questions of the parents, student, and student's witnesses.

XIV. ALTERNATIVE SCHOOLING

NH RSA 193:13 (V) explicitly states that, "Nothing in this section shall be construed to prevent the local school district that expelled the student from providing educational services to such students in an alternative setting." Even students expelled under the Gun Free Schools Act of 1994 are eligible to be educated in an alternative setting. As evident from the expulsion data in the State of New Hampshire, there is a need for school districts to create and offer alternative schooling to students.

XV. DISCIPLINING THE STUDENT WITH EDUCATIONAL DISABILITIES: Understanding the Additional Federal Protections Afforded the Student with an Educational Disability

A. Understanding the Federal Presumption: Preservation of a FAPE.

The Individuals with Disabilities Education Improvement Act [IDEIA] as amended in 2004 requires that all children with disabilities be afforded a "free appropriate public education." The IDEIA is predicated on the goal of preserving the requirement of a FAPE. The presumption extends to students who have suspended or expelled by a school district. 20 USC Sec. 1412(a)(1)(A) explicitly states that local school districts must ensure that a FAPE is available to "*children with disabilities who have been suspended or expelled from school.*" (emphasis added)

B. The Consequences of Discipline Without Preserving a FAPE.

Educators who administer discipline without consideration of the IDEIA protections afforded children with disabilities can produce the following adverse consequences for the District:

- ⊗ Denial of an education to a child who is statutorily entitled to an education;
- ⊗ Financial and programmatic exposure for Compensatory Education awards;
- ⊗ In an egregious case, potential exposure for civil rights violations;

- ⊗ Litigation and legal fees;
- ⊗ Transaction costs associated with administrative hearings;
- ⊗ A complaint investigation with the Office for Civil Rights and the risk of an adverse finding.

C. The Practical Reduction of the Long-Term Suspension Option.

Long-term suspensions constitute a Change in Placement and must be preceded by: a Manifestation Determination Review; Functional Behavioral Assessment, Behavior Intervention Plan, and Parental Assent. As demonstrated by the “Hypothetical Long-Term Suspension” checklist, the long-term suspension does not exist as a practical disciplinary action for an educationally disabled student, except in the rare case of parental investment in the disciplinary action.

A principal does not have the latitude to suspend any student beyond ten (10) days for a single infraction. However, the principal may inadvertently cause the superintendent to run afoul of the law if she recommends a long-term suspension for an identified student without understanding that a long-term suspension is considered a *disciplinary action involving a change in placement for more than ten (10) school days*. See e.g. 20 USC Sec. 1415(k)(1)(C).

Any removal from school in excess of ten (10) days triggers a panoply of procedural rights and rules that reduce the likelihood that an educationally disabled student will ever be the subject of a long-term suspension. The simple rule of thumb to follow is that a long-term suspension will **always** require the provision of a FAPE, will **always** have to be preceded by a finding that the disciplined behavior was **not a manifestation** of the educational disability, will always have to be preceded by a **functional behavioral assessment** and will always have to be preceded by parental assent to a change in placement. In short, there are so many procedural hurdles to be surmounted before implementing a long-term suspension, that long-term suspensions will frequently **not** be a viable disciplinary action for an educationally disabled student. The following Hypothetical Procedural Checklist for Long-term suspensions illustrates these requirements:

D. Long-Term Suspension Checklist.³

- Step One: Long-Term suspension is contemplated for an educationally disabled student.

³ Do NOT attempt this process without consulting the Special Education Director.

- ❑ Step Two: Parents are **notified** that a long-term suspension is being contemplated and they are apprised of all their disciplinary due process rights, and their IDEA rights, including the fact that a long-term suspension would constitute a change in placement to which they have the right to disagree and trigger the “stay-put” provisions of the IDEA;
- ❑ Step Three: Within ten (10) days a **manifestation determination review** must be conducted which results in a determination that the student’s behavior was NOT a manifestation of their educational disability. If the behavior is a manifestation, then there can be no long-term suspension and any change in placement must be by agreement;
- ❑ Step Four: Within ten (10) business days after the eleventh day or after commencing a removal that constitutes a change in placement, the IEP team must conduct a **functional behavioral assessment**, develop and implement a behavior intervention plan to address the causal behavior. If student has an existing behavior intervention plan, that plan must be reviewed and modified, within ten days, if at least one IEP team member desires a revision to the plan.
- ❑ Step Five: The parents must **agree** to the change in placement, which must be preceded by an IEP Team meeting with the parents. (In the event of parental disagreement stay-put will be triggered and the goal of a long-term suspension will be effectively stymied.)
- ❑ Step Six: The superintendent would have to be furnished with the recommendation for long-term suspension, the student’s special education records, the manifestation determination results, and evidence of the parental assent to the change in placement.

PRACTICE POINTER: The IDEIA amendments effectively and practically eliminate the option of a long-term suspension for an educationally disabled student except in rare circumstances.

E. The Traditional Disciplinary Options: Short-Term Suspensions and Short-Term Alternative Educational Settings.

The traditional disciplinary options afforded the principal with regard to IDEIA students are the short-term suspension or the alternative educational setting. They are defined as follows:

1. Short-Term Suspension. A suspension of a student for up to ten school (10) days in any school year.

2. Alternative Educational Setting. A change in placement for ten school (10) days or less to an “interim” alternative educational setting, e.g. an in-school suspension, library suspension, tutored at-home suspension. The interim setting should be designed to implement the IEP.

Either of these disciplinary options may be used for up to **ten school days in any school year** without convening an IEP Team, without engaging in a manifestation determination, without conducting a functional behavioral assessment, and without developing or reviewing a behavior intervention plan.

School personnel may now remove a child with a disability who violates a code of conduct from their current placement to:

1. An appropriate interim alternative educational setting;
2. Another setting; or
3. Suspension for not more than ten (10) days

to the extent such alternatives are applied to children without disabilities.

F. Cumulative Suspensions in Excess of Ten (10) School Days in the School Year.

The greatest area of difficulty for the principal is the case in which an educationally disabled student has cumulative suspensions which exceed ten days in a given school year.

Cumulative suspension refers to a pattern based on such factors as the length of each removal, total amount of time student is removed, and proximity of removals to one another. In some cases, where a student’s suspensions are remote and short in duration, the decision may be made not to treat the suspensions as cumulative. This will usually be the exception rather than the rule.

In proposing federal regulations, the US Department of Education has observed, *“It is important for purposes of school safety and order to preserve the authority that school personnel have to be able to remove a child for a disciplinary infraction for a short period of time, even though the child already may have been removed for more than ten (10) school days in that school year, as long as the pattern of removals does not itself constitute a change of placement of the child.”* See Comments to proposed 34 CFR 300.530. However, “discipline must not be used as a means of disconnecting a child with a disability from education.” The cumulative suspension is also the most likely event to create exposure on the part of a school district to compensatory education, costly out-of-district placements, and a reallocation of district resources.

The following procedures should be followed with any suspension decision that results in a cumulative suspension in excess of ten school days:

CUMULATIVE SUSPENSION PROCEDURE

- Student disciplinary record is checked to determine previous suspensions;
- Within ten (10) school days of the offending behavior an IEP Team must be convened to conduct a **manifestation determination review** of the relationship between the child's disability and the behavior subject to the disciplinary action;
- The suspension decision should, when possible, be deferred until after the **manifestation determination review**. If the student's behavior is not a manifestation of their educational disability, then they may be disciplined in excess of ten (10) days **but steps must be taken to provide a FAPE. The parents must be apprised of their rights to appeal this decision to an impartial due process hearing.**
- If the **manifestation determination** is affirmative; that the behavior is a manifestation of the disability, then **suspension is not an option** and placement can only be changed through the IEP Team process. Regardless of the determination the Team should consider whether program or placement require modification;
- Within ten (10) school days of the behavior that leads to discipline an IEP Team is convened to consider behavioral interventions. This includes conducting a **functional behavioral assessment** and developing a **behavioral intervention plan** which consists of an assessment plan and appropriate behavioral interventions to address the behavioral problem. If a plan has already been developed, the goal of the meeting is to review the plan and modify it as necessary;
- Reentry planning. Consider what steps need to be taken to facilitate reentry post suspension.

G. The Components of the Manifestation Determination Review Meeting.

1. Who attends the Meeting?

The Manifestation Determination Review Meeting is conducted by the LEA , parent and relevant members of the IEP Team. Parents **MUST** be invited to attend the Manifestation Determination Review Meeting. The LEA must give the parent(s) five (5) days notice of the Manifestation Meeting.

2. What Material Should the Team Consider?

The IEP Team should consider “all relevant information,” including, but not limited to, the material listed in the following checklist:

3. Information to Consider in a Manifestation Determination Review Meeting.

- Relevant information provided by the parents;
- Evaluation and diagnostic results;
- Prior disciplinary history;
- Description of the behavior;
- Observations of the student;
- The child’s IEP;
- The placement.

4. How does the Team make a Manifestation Determination?

During the manifestation meeting, the Team will review the information set forth above to determine whether:

- The conduct in questions was caused by the child’s disability; or,
- whether the conduct in question had a direct and substantial relationship to the child’s disability; or,
- if the conduct in question was the direct result of the local educational agency’s failure to implement the child’s IEP.

If any of the above inquiries are answered in the affirmative, then the child’s conduct shall be determined to be a manifestation of the child’s disability.

If the Team determines that the child’s conduct was a manifestation of his disability, the Team shall:

- Conduct a functional behavioral assessment, and implement a behavioral intervention plan for the child, provided that the Local Educational Agency had not conducted the assessment prior to the determination;

- ❑ If the child has already had a behavioral intervention plan, then the Team shall review the plan and modify it, as necessary to address the behavior;
- ❑ Except under “special circumstances,” the child must be returned to the placement from which he was removed, unless the parent and Local Educational Agency agree to a change of placement as part of the modification of the behavioral intervention plan.

With every meeting, but particularly in the event there is a determination of no manifestation, the parents must be apprised of their rights under the IDEA to appeal this decision to an impartial due process hearing.

H. Two Examples of Court Decisions Regarding Manifestation.

1. ADD and Risk-Taking/Thrill-Seeking Behavior Add up to a Manifestation.

Richland Sch. Dist. v. Thomas P., 32 IDELR ¶ 233 (W.D. WIS 2000). In this unusual case, a student committed forty-thousand dollars worth of vandalism at two elementary schools. The school conducted a manifestation determination prior to the recommended expulsion. Because the student was diagnosed as learning disabled, the school determined that the student’s behavior had nothing to do with his disability. Subsequently, the boy was evaluated and diagnosed by a clinical psychologist with ADD and dysthymia. The clinical psychologist concluded that these disabilities led to his involvement in the criminal incident. At the hearing officer level, the officer set aside the expulsion. A Federal Court affirmed the officer’s decision based on testimony by the clinical psychologist that young men with ADD are chemically attracted to risk-taking and thrill-seeking behavior and do not think about the consequences.

2. Not All Juvenile Behavior Is a Manifestation.

Randy M. v. Texas City Ind. Sch. Dist., 32 IDELR ¶ 168 (S.D. TX 2000). A young man with a learning disability and his friend allegedly ripped off the break-away pants of a female student. The district’s IEP team concluded that the action was not a manifestation of the boy’s learning disability. The team recommended suspension and placement in an alternative school. The parents sought due process and injunctive relief to terminate the suspension. The school district prevailed at the hearing level and the parents appealed that decision to Federal Court. The Federal Court affirmed the hearing officer’s decision, and ruled that the district was “justified in taking stern and aggressive remedial action.”

I. **The Components of the Functional Behavioral Assessment and the Behavior Intervention Plan.**

1. **What is a Functional Behavioral Assessment?**

The Functional Behavioral Assessment [FBA] is a creature of the law. Before the IDEA was amended in 1997 the educational community did not devote much air time to the concept. Defining an FBA is more difficult than nailing Jell-O to a wall. One article defined the FBA as . . . *“an approach that incorporates a variety of techniques and strategies to diagnose the causes and to identify likely interventions intended to address problem behaviors. In other words, functional behavioral assessment looks beyond the overt topography of the behavior, and focuses instead, upon identifying biological, social, affective, and environmental factors that initiate, sustain, or end the behavior in question.”* See *“Addressing Student Problem Behavior: An IEP Team’s Introduction to Functional Behavioral Assessment and Behavior Intervention Plans,”* The Center for Effective Collaboration and Research, (January 16, 1998).

The Proposed Special Education Regulations would define “functional behavioral assessment” as “an assessment of a student’s behavior as it applies to an incident that resulted in the student receiving a suspension or series of suspensions.” Proposed Ed. 1102.45.

2. **What is a Behavior Intervention Plan?**

A Behavior Intervention Plan includes, *“positive strategies, program or curriculum modifications, and supplementary aids and supports required to address the disruptive behaviors in question.”* New Hampshire’s Proposed Regulations would define “Behavior Intervention Plan” as the positive behavior interventions and support incorporated in the student’s IEP.” Proposed Ed. 1102.14.

3. **So what happens during the meeting?**

The IEP Team conducts the FBA, develops an assessment plan and a behavior intervention plan. If a behavior intervention plan is already in place, the purpose of the meeting is to review and amend the plan to make it more responsive to the student’s needs.

4. **Parents Are Entitled to IEEs When They Disagree with a Functional Behavioral Assessment.**

34 IDELR ¶ 34 (OSEP Opinion, June 7, 2000). OSEP has taken the position that a functional behavioral assessment is “a re-evaluation under Part B.” OSEP has reasoned that parents who disagree with a functional behavioral assessment

are entitled to an IEE. If the IEE is requested, the LEA must without unnecessary delay either initiate due process to show that its evaluation (functional behavioral assessment) was appropriate, or ensure that the IEE is publicly funded unless the LEA demonstrates in a hearing that the evaluation sought by the parent does not meet agency criteria.

J. Disciplining Students with Disabilities who bring Weapons or Drugs to School.

In cases involving students with disabilities who bring weapons or drugs to school, the principal should issue an immediate ten day short-term suspension, and initiate the process through the superintendent and the Student Services Department for determining whether the student should be placed in an **interim alternative educational setting** for up to **45** school days, without regard to whether the behavior is a manifestation of the child’s disability.

The 45 day interim alternative placement is available for the following violations:

- Student carries or possesses a “weapon” to school or a school function;
- Student knowingly possesses or uses drugs at school or a school function; or
- Student sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function; or
- Student inflicts serious bodily injury upon another person while at school, on school premises, or at a school function.

Serious bodily injury is defined as “bodily injury which involves:

- Substantial risk of death;
- Extreme physical pain;
- Protracted and obvious disfigurement; or,
- Protracted loss or impairment of the function of a bodily member, organ or mental faculty.” 34 CFR 300.530(i)(3).

The district must notify the parents of the decision, and of their procedural safeguards, on the date on which the disciplinary decision is made. The district’s decision is appealable, but the child will remain in the alternate setting pending appeal.

The 45 day interim alternative placement gives the IEP Team time to determine whether there will be a long-term change in placement. As discussed below, whether or not the student is also subjected to discipline, i.e., expulsion or long-term suspension, is a function of the manifestation determination review process. However, regardless of the determination, a student with disabilities, even the student who brings a gun to school, **will always be entitled to a FAPE**. The only result to be determined is where that FAPE will be provided.

The following check list will assist the principal in addressing the disciplinary and IDEA issues involved in a weapon or drug case:

1. **Checklist for a Drug or Weapon Case: Student Identified with an Educational Disability.**
 - Ten (10) day suspension decision is made by the principal;
 - Student Service and superintendent are immediately notified and furnished with a written report;
 - Local Law Enforcement is immediately notified in accord with the Safe School Zones Act, NH RSA 193-D:1 et seq, and provided with copies of the student's special education and disciplinary records;
 - IEP Team is immediately convened, but in no case later than ten (10) business days to meet with the parents and engage in the following:
 - Manifestation Determination Review;**
 - Functional Behavioral Assessment;** and
 - determination of a 45 day **interim alternative educational placement.**
 - Parents must be apprised of their IDEA rights during this Team Meeting;
 - If the Team makes a "no manifestation" determination, the determination should be immediately reported and referred to the superintendent for further disciplinary action. The superintendent should be furnished with copies of the student's special education and disciplinary records;
 - In the case of a "no manifestation" decision, the student may be

expelled under a district's zero-tolerance disciplinary policy. However, the IEP Team must propose and offer an alternative long-term placement which provides a FAPE. The Team should meet before the expiration of the 45 days to determine a long-term FAPE placement during the suspension/expulsion. If the parent appeals this proposed placement, the student returns to the local school under stay-put.

- If the parents appeal the "no-manifestation" decision then there is an expedited Hearing at the State Department of Education, the student stays in the interim alternative placement pending the decision of the Hearing Officer, but may return to the local school after day 45, even if subject to discipline such as expulsion, unless the Hearing Officer has ruled in favor of the district;
- If the Team makes a Manifestation Determination, then there is no discipline beyond the ten days and placement may only be changed through the IEP Team process;
- After 45 days the student must return to the school if there has been a manifestation determination, unless the Team process results in a change in placement;

2. The Requirements for the 45 Day Interim Alternative Educational Placement.

The 45 day interim alternative educational setting must:

-be selected so as to enable the student to continue to participate in the general curriculum, although in another setting, and to continue to receive the services and modifications called for in the student's IEP such that she will meet her IEP goals; and

-include services and modifications designed to prevent recurrence of the behavior.

3. Alternative Placement in Cases Where the Student Presents a "Likely Danger to Themselves or Others".

In some cases, a student who has not violated the drug or weapon prohibition presents a potential danger to themselves or to others if they remain in their current placement. In those circumstances, the School District's first step should be to convene the IEP Team and seek the assent of the parents to a change in placement on an expedited basis. However, if the parents disagree, the District may seek an order

from a Hearing Officer granting it permission to engage in a 45 day interim placement during the pendency of the appeal regarding the Team’s placement decision. The Administration should be involved in the decision whether or not to seek such an emergency order.

K. Disciplining Students Not Yet Identified as Educationally Disabled.

1. The IDEA standard: “Knew or Should Have Known”.

Whether or not a student not yet identified as disabled is entitled to the IDEA protections turns on whether the District had knowledge or should have known that the student was educationally disabled before the behavior that gave rise to the discipline.

You and the District will be imputed to have “knowledge” if:

- The parent wrote to you expressing concern that their child was in need of special education;
- The student’s behavior demonstrated a need for special education;
- There is a pending request for an evaluation to determine eligibility; or
- A teacher or other district personnel had expressed concern about the behavior to the Special Education director or other qualified professionals, e.g., Guidance Counselor.

The IDEA prevents circumvention of student discipline by a post-event request for evaluation. If such a request is made, the District may still suspend or expel, but:

- The evaluation must be expedited; and
- If the student is identified, a FAPE must be provided despite suspension or expulsion.

2. Court Cases Involving the Definition of “Knew or Should Have Known”.

a. The Definition of “Knew or Should Have Known.”

Board of Educ. of the Hartland Consolidated Schs., (Michigan) 34 IDELR ¶ 28 (SEA Opinion, March 17, 2000). An eleven-year-old student brandished a knife in his class at two students who were teasing him. The district expelled the student. There was no manifestation determination by the district, since the student

had not been identified as disabled. The parents argued to the hearing officer that the district knew or should have known that their son was a student in need of special education and eligible for special education services, and that on that basis his expulsion was unlawful. The hearing officer heard cumulative testimony which convinced him that a history of vast behavioral issues demonstrated the need for special education services and thus the district had the “knowledge” that the student was in need of special education services. On that basis, the hearing officer concluded that the District violated the IDEA when it expelled him without following the IDEA’s disciplinary provisions.

b. Prior School District Evaluation Finding That Student Does Not Meet IDEA Relieves District of IDEA Compliance.

Cabot Sch. Dist. (AK), 34 IDELR ¶ 78 (SEA Opinion, November 5, 2000). A student was expelled from the school district for violating its drug policy by carrying ADHD medication in her school backpack. She had previously been expelled and then allowed to return to school for providing students with an over-the-counter laxative medication as a joke. The parents argued that the district knew or should have known that their daughter was a student with a disability. However, the district argued that a previous evaluation determining that the student did not qualify as educationally disabled under the IDEA was presumptive evidence that the district could not have been vested with knowledge that this student was a student with a disability.

The hearing officer found particularly persuasive the fact that a pre-expulsion evaluation had been conducted which did not appear to establish any disability or need for special education and related services. The hearing officer specifically noted that the mother did not challenge that examination or that decision by a subsequent request for due process prior to the expellable offense.

c. District’s Awareness of Student’s Disruptive and Inattentive Behaviors and Poor Academic Performance Are Sufficient to Place District on Notice of Suspected Disability and Warrants Setting Aside Expulsion Due to the District’s Failure to Make a Timely Assessment.

Jurupa Unified School District, 34 IDELR ¶ 53. This thirteen-year-old ADHD student had been enrolled in the district since kindergarten. He was expelled near the end of the seventh grade for making remarks threatening to cause physical harm to a teacher. The father testified that his son had been “very hyper,” a constant talker, and always “on the move” since the age of four or five. There was frequent contact between the teachers, principals and parents with regard to the behavioral problems that this student presented. In addition to the disruptive behaviors, the student began to experience academic difficulties in the third grade.

The father testified that he always thought that something was wrong with his son, but that no one at the school ever advised him to have his son assessed or taken to a doctor for diagnosis or treatment. On that basis the father contended that the district should have known several years prior to the student's expulsion, in July 2000, that he had a disability based upon both his behavior and failing grades. The hearing officer was persuaded by the evidence and concluded that the district knew of the student's disruptive and inattentive behavior and poor academic performance prior to the time of his expulsion, and thus the student was entitled to the protection of the IDEA. On that basis, the hearing officer ruled that the expulsion was in error and reversed it.

XVI. CONCLUSION

Student discipline must be founded on principles of fairness. School districts which adhere to the state and federal standards will make great strides in the quest to instill students, parents and faculty with a sense of fairness and predictability.