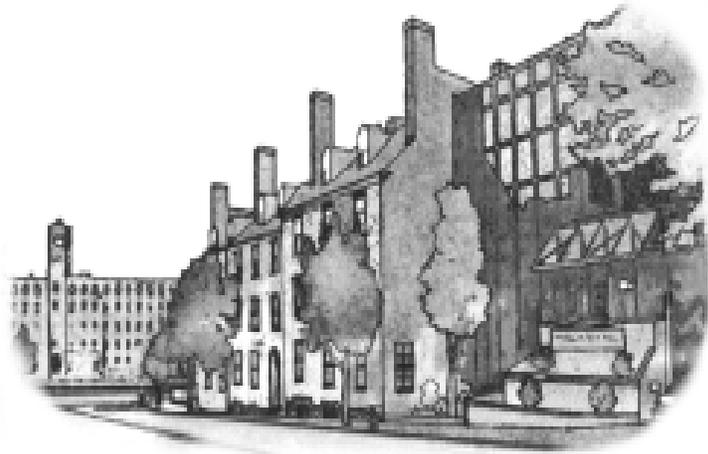


# The Role of the School Board in Student Related Matters

January 18, 2012



***Wadleigh, Starr & Peters, P.L.L.C.***  
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Dean has extensive experience representing school districts in the areas of general school law and federal special education law. Dean handled the litigation which led to the establishment of the Manchester School District as a distinct corporate entity. Dean has authored numerous articles in the field of school law and speaks both locally and nationally on federal special education law and other school law issues. Since the adoption of more comprehensive Anti-Bullying laws he has spoken extensively on the implications of the new laws. He is certified as a mediator and has served as a court-appointed mediator in over 80 cases. He is AV rated and was recently selected by his peers as one of the Best Lawyers in America in the field of municipal law.

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## A Word of Caution

No two legal matters are exactly alike. This material is designed to provide School Board members with a broad understanding of the law pertaining to the role of the School Board member in student related matters. 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.

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## OVERVIEW

The purpose of this material is to review the school board's role in student related matters. This material does not cover all aspects of the law, and you are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

### I. The Board's Policy Making Authority

NH RSA 189:15 permits a school board, unless otherwise provided by statute or state board regulations, to establish local regulations for:

- Student attendance;
- Management of schools;
- Classification of schools; and
- Discipline of schools.

These regulations become "binding upon pupils and teachers" when recorded in the official records of the school board. See NH RSA 189:15.

*Practice Pointer: Local boards have authority to set local policy, but must do such in accord with state law.*

Ed 303.01 sets forth the "substantive duties" of the local school board. These duties include the following:

- Provide, through documented planning and public meetings and quorum votes, accommodation for all pupils in approved schools or other facilities in accord with state law;
- Provide required transportation;
- Provide safe and healthy school buildings and learning environments;
- Consult with the superintendent and in accord with statutes and state board regulations to determine the educational goals of the district, and develop long-range plans and identify measurable goals and short-term objectives;
- Require the implementation of educational programs designed to reflect the board's goals and objectives, reviewing such programs and making public the results of its investigation;

- Exercise all powers and duties required by law;
  - This includes the adoption of policies and procedures relative to:
    - Absenteeism and attendance;
    - Promoting school safety;
    - Discipline;
    - Character and citizenship;
    - Meeting the instructional needs of each student with different talents;
    - Student hazing;
    - Student harassment/bullying;
    - The earning of credits;
    - Providing alternative means of earning credit toward a high school diploma (such as through extended learning opportunities and distance education);
    - Meeting the special physical health needs of students; and,
    - Behavior management and intervention for students.
- Adopt a rule to ensure that there is no unlawful discrimination; and,
- Establish a policy on sexual harassment.

*Practice Pointer: The state imposes clear regulatory obligations on a school board to form educational policies.*

The Superintendent serves as the executive officer of the School District and is responsible for the overall administrative and leadership services of the school administrative unit. Ed 302.01. To that end, the Superintendent's responsibilities include, but are not limited to, the following:

- Planning and managing the administrative and leadership services of the school district/school administrative unit subject to statutory requirements, these rules, and the policies of the District;
  - The administrative and leadership services shall be defined and directed by the governing body employing the Superintendent.
  - Local School District services include, but are not limited to:
    - Personnel;
    - Finance;

- Communication/community relations;
  - Student service;
  - Maintenance/capital improvement;
  - Curriculum;
  - Instruction;
  - Assessment;
  - Short and long range planning;
  - Governance for student achievement;
  - Policy research;
  - Implementation, and review; and
  - Overall leadership on educational issues.
- Developing and maintaining a system of public schools, staffed by certified educators, qualified professionals, and persons providing support services, subject to statutory requirements, these rules, and the policies of the local districts(s).
- Providing, developing and implementing procedures to achieve educational objectives within the local school district or districts with the school administrative unit.
- Nominating for school administrative unit board appointment one or more assistants, including assistant superintendents, and business administrators. The superintendent may assign duties for the efficient management of the school administrative unit.
- Nominating all certified staff and appoint other employees in accordance with state law, the rules of the state board and school board policies;
- Directing and supervising the work of all employees of the district or districts within the school administrative unit and shall have all powers necessary to make such direction effective, as outlined in RSA 194-C:4. While the superintendent has ultimate responsibility, he/she may delegate powers and duties to other personnel;

- Selecting and purchasing textbooks and all other supplemental materials and supplies in accordance with the policies of the school board and the state board and see that the same are distributed to the school, accurately accounted for and economically used;
- Developing and recommending to the school board or boards within the school administrative unit the annual budget for the support of the educational program and for the operation and maintenance of schools within the district or districts and the school administrative unit in accordance with school board policy;
- Developing and maintaining an accounting system and financial reporting procedures for all funds in accordance with local school board policy, and local and state laws;
- Developing an educational plan including curriculum, instruction, and assessment programs for the district or districts and for recommending a program of studies suitable to the needs of the pupils and the community in accordance with local school board policies, state statutes and state board rules;
- Removing a teacher or other employee of the district in accordance with RSA 189:31;
- Recommending the dismissal of certified staff to the board, which has the authority to dismiss in accordance with RSA 189:13;
- Providing for temporary staff to fill vacancies and provide supplies immediately needed for the operation of the schools;
- Maintaining records and filing reports as required by the state board of education and the local school boards;
- Admitting pupils to the resident school district in accordance with the laws of the state and the rules of the state board and policies of the local board;
- Directing pupils to assigned classes and grades, consistent with local school board policies;
- Maintaining a safe environment for pupils free of hazardous conditions;
- Evaluating personnel and programs in accordance with local school board policies;
- Implementing state board rules, which apply in the area of the

superintendents jurisdiction;

- Developing and recommending to the school board or boards within the school administrative unit an annual maintenance program and long-term capital improvement plan;
- Implementing and recommending to the school boards or boards within the school administrative unit a community relations and communications program; and
- Implementing and reviewing school district policies.

Ed 302.01; 302.02; see also RSA 194-C:4.

## **II. Duty with Regard to Long-term Suspensions and Expulsions**

The board is required to hear all appeals of long-term (in excess of 10 school days) suspensions. In addition, any and all expulsion decisions must be made by the board after a hearing. See NH RSA 193:13. The School Board may delegate that authority to a subcommittee in accord with NH RSA 193:13(VII).

The minimum due process requirements for an expulsion are as follows:

- A formal hearing shall be held before any expulsion. The hearing may be held either before or after the short-term suspension has expired and pending the expulsion hearing. If the hearing is held after the expiration of the short-term suspension, the pupil shall be entitled to return to school after the short-term suspension has expired and pending the expulsion hearing;
- Written notice to the pupil and at least one of the pupil's parents/guardian, delivered in person or by mail to the pupil's last known address, of the date, time, and place for the hearing before the school board, as well as a written statement of the charges and the nature of the evidence against the pupil and the Superintendent's written recommendation for school board action and a description of the process used by the Superintendent to reach his/her recommendation;
- The written notice described above must be delivered at least five (5) days prior to the date of the hearing;
- The hearing must meet the following requirements:
  - The pupil, together with a parent/guardian, may waive the

right to a hearing and admit to the charges made by the Superintendent;

- If the pupil is 18 years of age or older, the concurrence of a parent or guardian shall be unnecessary, unless the pupil is subject to a guardianship order which would prevent him/her from waiving the right to a hearing;
  - Formal rules of evidence shall not apply, however, school officials shall present evidence in support of the charge(s) and the accused pupil or his/her parent/guardian shall have an opportunity to present any defense or reply;
  - The hearing shall be either public or private, at the request of the pupil or his/her parent/guardian; and,
  - During the hearing, the pupil, parent/guardian or counsel representing the pupil shall have the right to examine any and all witnesses;
- The decision of the board shall be based on a dispassionate and fair consideration of substantial evidence that the accused pupil committed the act for which expulsion is to be imposed, and that such acts are, in fact, a proper reason for expulsion;
  - The decision shall state whether the pupil is expelled and the length of the expulsion. If the pupil is expelled, it must also state the legal and factual basis for the decision and any action the student may take to be restored by the board; and,
  - A statement that the pupil has the right to appeal the decision to the State Board of Education.

Ed 317.04(d)(3)-(e).

In addition, District policies may contain additional due process requirements.

#### **A. Limitations on Disciplining Students with Disabilities**

The disciplinary options available to educators and school boards are curtailed to some extent by the Individuals with Disabilities Education Act and Section 504. The philosophy behind this curtailment is that educationally disabled students should not be disciplined for wrongful acts that are a manifestation of their educational disability, and that they should receive a free, appropriate public education (“FAPE”) even if subject to long-term suspension or expulsion. You should be aware of the following rules:

- Rule: The “Ten School Day” rule

A student with a disability may be suspended or moved to an alternative setting for up to 10 school days, (as with a nondisabled student), without convening an IEP team to determine whether the misconduct was related to the student’s disabilities. This is based on the concept that a suspension, or series of suspensions totaling less than 10 school days, does not constitute a change in placement. The school need not provide services during such a “short-term” suspension or removal, unless services would be provided to a non-disabled student during such suspension or removal.

- Rule: The “Cumulative Suspension” rule

If a student is subjected to a series of removals that constitutes a pattern because they amount to more than 10 days in a school year, and/or because of the length of each removal, the total amount of time removed, and the proximity of the removals to each other, then the student will be considered to have been subjected to a change in placement. A change in placement requires the school to continue to provide services necessary for the student to progress in the curriculum and to advance toward achieving the goals of the student’s IEP.

- Rule: Changes in placement never occur without “Manifestation Determinations, FBAs and BIPs”

In any suspension of more than ten school days, or removal that constitutes a change in placement, the school must:

(a) no later than the date on which the decision to take the suspension or removal action is made, notify the parents of the decision and provide a procedural safeguards notice;

(b) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take the suspension or removal action is made, conduct an IEP team meeting for the purpose of determining whether there is a relationship between the student’s disability and behavior (**manifestation determination**);

(c) within 10 business days of removing the child, convene the IEP team to conduct a “**functional behavioral assessment**”, if it has not already done so;

(d) the IEP team must then meet to develop or revise and implement a “**behavioral intervention plan**” to address the behavior that caused the suspension.

(e) except under “special circumstances” the child must be returned to the placement from which she was removed, unless the parent and the LEA agree to a change in placement as part of the modification of the behavioral intervention plan.

### **III. Admission of Non-Resident Pupils, Manifest Educational Hardship/Change in School Assignment, and Bullying**

As indicated above, the School Board is responsible for developing various policies pertaining to student matters. This includes, but is not limited to, policies pertaining to student attendance, admission of non-resident pupils, bullying, and manifest educational hardship.

The Board is required to adopt a policy pertaining to truancy and student attendance. See RSA 189:34. The Board is also required to appoint a truant officer for the District. Id. In addition, the Board may adopt attendance regulations. See RSA 189:15 (“The school board may, unless otherwise provided by statute or state board regulations, prescribe regulations for the attendance upon, and for the management, classification and discipline of, the schools; and such regulations, when recorded in the official records of the school board, shall be binding upon pupils and teachers”).

In accord with policy Students 106, Admission and Tuition of Nonresident Students, “[n]o person shall attend school or send a student to the school in any district of which he/she is not an inhabitant without the consent of the district or of the School Board.” Thus, the Board is responsible for determining whether a non-resident pupil may attend school in the district. In addition, as a general rule, non-resident pupils will be charged tuition; the tuition is set by the Board.

The Board may also hear appeals of requests for a change in school assignment due to a manifest educational hardship. See Policy Students 104, Manifest Educational Hardship. A parent who seeks a change in school assignment based on a manifest educational hardship must first apply to the Principal of the school that he/she wants his/her child to attend. If the request is denied by the Principal, the parent may appeal to the Superintendent. If the parent is dissatisfied with the Superintendent’s decision, he/she may appeal to the School Board. The Board is required to hold a hearing on the request.

Recently, the State Board of Education indicated that it has jurisdiction to hear appeals of bullying issues arising under RSA 193-F. As a result, the School Board may become involved in hearing appeals pertaining to bullying issues.

### **IV. Obligations Under the Family Educational Rights and Privacy Act [“FERPA”]**

FERPA provides that student records and personally identifiable information are

presumptively confidential.

A student's educational record is defined as "those records that are:

- (1) Directly related to a student; and
- (2) Maintained by an educational agency or institution or by a party acting for the agency or institution."

34 C.F.R. 99.3.

Personally identifiable information includes, but is not limited to:

- The student's name;
- The name of the student's parent or other family members;
- The address of the student or student's family;
- A personal identifier, such as the student's social security number, student number, or biometric record;
- Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;
- Other information that, alone or in combination, is liked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or,
- Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.

34 C.F.R. 99.3.

The Individuals with Disabilities Education Act ("IDEA") also requires that all information pertaining to a student's educational disability remain confidential. See 1119.02.

In addition, the State's Right to Know Law, RSA 91-A, specifically exempts the following student-related records from disclosure to the public.

- Personal school records of pupils;

- Test questions;
- Scoring keys;
- Other student examination data;
- Medical files; and,
- Unique pupil identification information collected in accord with RSA 193-E:5.

NH RSA 91-A:5.

*Practice Pointer: Board members should preserve the confidentiality of all student educational information.*

*Practice Pointer: Board members should refrain from any discussion regarding a student's educational disability, and should never reveal the fact that a student has an educational disability.*

## **V. The Limited Role of the Board in Matters Involving the Individuals with Disabilities Education Act [IDEA] and Section 504**

### **A. The IDEA**

The fundamental concept behind the IDEA is that every student is entitled to a **free appropriate education at public expense [FAPE]**. The Act does not require a school to maximize the potential of each disabled child commensurate with the opportunity provided non-disabled children. Rather, Congress sought primarily to identify and evaluate disabled children, and to provide them with access to a free public education. A School District satisfies the requirement to provide a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.

Teachers are a key component to ensuring that the instruction is truly personalized. Without teachers actually implementing the student's individualized education program [IEP], there is a greatly reduced likelihood of truly affording a FAPE. The "appropriateness" standard is a floor rather than a ceiling.

#### **1. What is a "FAPE?"**

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the

disabled child, supported by such unique needs for the disabled child, supported by such services as are necessary to permit the child “to benefit” from the instruction. These supporting services are usually referred to as “related services.”

As a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State’s educational standards, approximate the grade levels used in the State’s regular education, and comport with the child’s **Individualized Educational Program [IEP]**. Ed 1102.02(s).

Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a “free appropriate public education” as defined by the Act.

A court’s inquiry in suits brought under the IDEA is twofold. First, has the School District complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits? The Court’s inquiry is really no different than the inquiry that every teacher should make when providing instruction to a student who has been identified as having an educational disability: **Is what I’m doing reasonably calculated to enable this student to make educational progress?**

## 2. The Individualized Education Program Team

The IEP is developed by the IEP Team, which consists of:

- The parents of the child;
- Not less than one regular education teacher of the child;
- Not less than one special education teacher of the child;
- A representative of the public agency who:
  - Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - Is knowledgeable about the general education curriculum; and
  - Is knowledgeable about the availability of resources of the public agency;
- An individual who can interpret the instructional implications of evaluation results;
- At the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and,
- Whenever appropriate, the child with a disability.

34 C.F.R. 300.321(a).

When a parent and the District have a dispute about a special education matter, Federal and State law require that the dispute be heard in the first instance by an administrative hearing officer appointed by the State Department of Education.

School Board members are not members of the IEP Team and are not involved in making decisions about a student's IEP or placement.

## **B. Section 504**

Section 504 protects students and employees from discrimination on the basis of disability regardless of whether the disability is an educational disability. The key theme to Section 504 is the requirement that the district provide reasonable accommodation to insure that individuals with disabilities have equal access and opportunity to the programs of the district. The primary vehicle used to implement Section 504 is known as the "Section 504 Plan;" a plan which is designed to provide the necessary accommodations to the student or employee.

The Section 504 plan is designed by the Section 504 team, which consists of a group of individuals knowledgeable about the student and his/her educational needs, the meaning of the evaluation data, and the placement options. 34 C.F.R. 104.35(c). As with the IDEA, members of the school board do not participate on the Section 504 Team.

## **VI. Parental Complaints**

At times, school board members may receive communications from parents pertaining to student-related matters. Such communications should be handled in accord with applicable District policies, such as Community 103, Public Concerns and Complaints. In accord with that policy, when a board member receives a complaint, he/she should reference the communication or complaint to the Superintendent or his/her designee. In the event that the matter is not resolved by the Superintendent, the parent may appeal the decision to the School Board.