

Please be aware that, since publication of this Manual, New Jersey has adopted student conduct regulations and Congress has amended the discipline provisions of the Individuals with Disabilities Education Act (IDEA). While the general constitutional and New Jersey statutory protections described in ELC's discipline manual have not changed, some important changes in law have been made by adoption of the State regulations and the amendment of IDEA. ELC is currently in the process of updating its discipline manual to incorporate these changes. Upon completion, the update will be made available on our website, www.edlawcenter.org. In the meanwhile, current state discipline regulations are available on the New Jersey Department of Education's website at <http://www.nj.gov/njded/code/current/title6a/chap16.pdf> and information about changes in IDEA can be found at <http://www.wrightslaw.com/idea/idea.2004.all.pdf>.

You may also consider consulting the Discipline Sections of ELC'S newly updated manual, "The Right to Special Education in New Jersey: A Guide for Advocates," which can be found on ELC'S website at http://www.edlawcenter.org/ELCPublic/Publications/PDF/Rights_SpecialEducation_Guide.pdf

Student Discipline Rights and Procedures

A G U I D E F O R A D V O C A T E S



Education Law Center



Sponsored by New Jersey State Bar Foundation



Education Law Center

Giving our kids a fighting chance

Acknowledgments

This manual was written by Ellen Boylan, Esq., senior attorney at Education Law Center. Elizabeth Athos, Esq., senior attorney at Education Law Center; Jennifer Weiser, Esq., Skadden Fellow at Education Law Center and Diana MTK Autin, co-executive director of the Statewide Parent Advocacy Network, contributed to this manual.

About the Education Law Center

Education Law Center (ELC) was established in 1973 to advocate on behalf of New Jersey's public school children for access to an equal and adequate education under state and federal laws. ELC works to improve educational opportunities for low-income students and students with disabilities through public education, policy initiatives, research, communications, and when necessary, legal action.

ELC currently operates two projects to improve education for New Jersey's children: the Student Rights Project (SRP) and the Abbott Schools Initiative (ASI). SRP provides free legal representation to school children who are denied access to an adequate or appropriate public education. The types of cases accepted by SRP include: special education for children with disabilities, school discipline, school district admissions, and other violations of individual student rights. SRP is the only legal services program in New Jersey, and one of very few across the country, that specializes in education law.

The Abbott Schools Initiative (ASI) works to assure the full, effective, and timely implementation of the programs and reforms ordered by the New Jersey Supreme Court in the landmark *Abbott v. Burke* rulings. ELC represents the plaintiffs in the *Abbott* case—more than 340,000 preschool and school-age children in 30 urban school districts across the state. *Abbott* has been called “the most significant education case since the Supreme Court’s desegregation ruling nearly 50 years ago” (*NY Times*, 2002) and, along with *Brown v. Board of Education*, the most important court ruling in New Jersey in the 20th century (*NJ Lawyer*, 2000).

For more information, contact:

Education Law Center

60 Park Place, Suite 300

Newark, NJ 07102

973-624-1815

Fax: 973-624-7339

TTY: 973-624-4618

Web site: www.edlawcenter.org

Introduction 3

Part I: General Education Laws and Procedures 4

Sources of Student Discipline Law 4

A School’s Duty to Prevent Suspension and Expulsion 4

Grounds for Suspension and Expulsion 5

Distinctions Between Suspension and Expulsion 6

Procedural Requirements for Suspension of 10 Days or Less 6

Procedural Requirements for Long-Term Suspension and Expulsion 7

**Discipline Rules for Assault Against School Personnel,
Assault with a Weapon, Gun Possession at School
and Gun Conviction** 8

Removal from School Due to Suspected Substance Abuse 9

 Local Board Discipline Policies 9

 Removal from School and Medical Examination 9

Search and Seizure 11

 Search Based on Reasonable Suspicion 11

 Suspicionless Searches 12

Referral to Law Enforcement 12

Loss of Privileges and Community Service 13

What to Do at a Board of Education Discipline Hearing 14

Defenses to Student Discipline 15

 The Constitutional Right to a Public Education 16

 The Constitutional Right to Equal Protection of the Law 17

 The Right to Non-Arbitrary School Board Action 17

 The Right to Procedural Due Process 17

 Defending Against Zero Tolerance 18

**Alternative Education and Home Instruction During
Long-Term Suspension, Expulsion and Removal** 18

 The Right to Alternative Education for Students Removed from School 19

 Home Instruction 20

Appealing a Student Discipline Determination 20

 Steps for Appeal 21

 Relief Available in Appeal to Commissioner 22

 Moving for Emergent Relief 22

 Filing an Appeal with the Commissioner 23

Grades and Academic Credit	24
Records	24
Corporal Punishment	25
Liability for Unconstitutional Action	25
Part II: Special Education Laws and Procedures	26
School District’s Affirmative Obligation to Address Behavioral Problems	26
Functional Behavioral Assessment and Behavioral Intervention Plan	27
The Right to “Stay-Put” During Discipline Procedures	27
Important Distinction between Short-Term Suspension and Suspension as a Change in Placement	28
Procedures and Services for Short-Term Suspensions	29
Procedures and Services for Change-in-Placement Suspension (Long-Term Removal or Expulsion)	30
Change-in-Placement Following Manifestation Determination	30
Change-in-Placement for Illegal Drugs or Weapons	31
Change-in-Placement Ordered by a Hearing Officer	32
Students Not Yet Eligible for Special Education	33
The Rights of Children in Out-of-District Placements	33
Challenging School District Action	33
Expedited Due Process Hearing	34
Requesting a Hearing	34
Emergency Relief	34
The Right to Discover Evidence Prior to the Hearing	35
Burden of Proof	36
Due Process Hearing Relief	36
Student’s Placement During the Due Process Proceeding	37
Specific Hearing Rights	38
Appendix A: Format of Petition Appeal	39
Appendix B: Proof of Service	40
Appendix C: New Jersey Department of Education Request for Mediation/Due Process Hearing/Expedited Due Process Hearing	41
Appendix D: New Jersey Department of Education Request for Emergency Relief Hearing	43
Endnotes	45

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.

The New Jersey Department of Education has recognized that there are problems with state policy and law on student discipline and has begun the process of developing a new student discipline code.¹ Schools are permitted to suspend and expel students at any age and for a variety of reasons,² and are not obligated by state statute or regulation to provide alternative education to those students who are removed from school.³ Schools may employ “zero tolerance” policies that punish all offenses, regardless of the individual student’s circumstances, motive or intent, or the actual harm caused by the offense.⁴ Because there are no state standards or guidelines governing student discipline, the rate of suspension, expulsion and placement in alternative education programs varies greatly from district to district,⁵ and the right to a public education, guaranteed by the state constitution, depends on whether the student resides in a district with discipline policies that emphasize keeping students engaged in school, or in a district that deals with discipline issues by expelling students. The Education Law Center and other advocacy and policy organizations are working to reform state student discipline law and policy.

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 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 special education laws.

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,”⁶ 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 limited state regulations on student discipline which cover only discipline of special education students, discussed in this manual at pp. 26–38, and removal of students for possession of a firearm, assault with a weapon and assault against school personnel or school board members, discussed in this manual at p. 8.

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 many issues. For example, student due process rights, which are grounded in the 14th Amendment to the United States Constitution, have been established not by statute, but by U.S. Supreme Court and New Jersey state court decisions.

Fifth, New Jersey commissioner of education and state board of education decisions establish law on student discipline in New Jersey, and are the sources most often looked to by school administrators and school boards.⁷

Finally, all school districts are required to have a code of student conduct to govern student behavior and discipline within the district.⁸ These rules should specify prohibited behaviors and the consequences for violating school rules. Students must be given a copy of the code of conduct annually.⁹

“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.”

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 and 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. 15–18 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.¹⁰ 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. 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.¹¹ 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.¹² Substance abuse evaluation and referral are discussed in more detail on pp. 9-10 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. 15-18 of this manual.

GROUNDS FOR SUSPENSION AND EXPULSION

Under New Jersey statute,¹³ 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
- 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. In fact, a court has held that a student may be suspended or expelled 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.¹⁴ Additionally, the commissioner of education has held that a school board may impose expulsion for conduct that occurred at a prior school,

“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.”

although the board must first enroll the student, hold a hearing and make its own determination regarding an appropriate form of discipline.¹⁵ The commissioner has also 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.”¹⁶ Basic principles of due process, however, would require, at a minimum, notice of offenses that could lead to exclusion from school.

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. A suspension of more than 10 days is known as a long-term suspension. An expulsion occurs when a student is barred from attending school either permanently or for a specified long-term period, such as one year.

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.¹⁷ 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.¹⁸

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.

PROCEDURAL REQUIREMENTS FOR SUSPENSION OF 10 DAYS OR LESS

A principal or his or her designee has the authority to impose a short-term suspension.¹⁹ 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 and his or her parent have the opportunity to explain the student's side of the story and request leniency in punishment. The hearing may immediately follow the notice.²⁰

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.²¹ 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. State statute and case law interpreting the due process clause of the 14th Amendment to the U.S. Constitution require that a student facing long-term suspension or expulsion be provided the following procedural protections:

- 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.
- 2) A formal hearing to be held before the local board of education or a committee of the board within 21 days of suspension,²² unless the discipline case involves assault against school personnel, assault with a weapon, or an incident with a gun, in which case the hearing must be held within 30 days of suspension, as discussed on p. 8 of this manual.²³ The 21- and 30-day time frames for a formal hearing have been set by case law and statute, respectively, and may be subject to challenge as inadequate due process protection.²⁴
- 3) Before the hearing, the board of education must provide the student with written notice of:
 - the specific charges that would allow the school to suspend or expel him or her;²⁵
 - the witnesses who will appear against him or her at the hearing as well as a report of the facts to which the witnesses will testify;²⁶
 - the student's right to defend him or herself and to bring an attorney to the hearing.²⁷
- 4) 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, unless "compelling circumstances" bar the production of a witness.²⁸
- 5) If a committee of the school board holds the discipline hearing, 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.²⁹

- 6) The discipline hearing must be 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 the pupil's initials only, to avoid violation of the student's privacy rights.³⁰

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;³¹ (2) assault with a weapon against school personnel, a school board member or another student;³² (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.³³ 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 three offenses:

- 1) The school must immediately suspend the student from school until the school board holds a formal hearing.³⁴ Under state statute, the school does not have the option of allowing the student to remain in school until the hearing.
- 2) The school board must hold a formal hearing within 30, not 21, calendar days of the suspension.³⁵
- 3) The school board's decision on the imposition of discipline must be made within five days of the close of the hearing.³⁶
- 4) **One Year Removal For Guns:** Under the Zero Tolerance for Guns Act,³⁷ 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.³⁸ 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.³⁹ The board of education is required to place the student in an alternative education program, discussed in this manual at p. 19, during the period of removal. Note that under current law, some school boards believe they have the authority to permanently expel a student for a firearms offense, and are not required to order a one-year removal with placement in an alternative education program. The Zero Tolerance for Guns Act clearly requires, at a minimum, the student's one-year removal with the provision of alternative education, and the question of a board's authority to permanently terminate all educational services remains unsettled. See discussion of permanent expulsion and alternative education on pp. 18–20 of this manual.
- 5) **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.⁴⁰ 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.⁴¹ 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.⁴²

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.⁴³ The local board is required to seek public input in the formulation of its substance abuse policies and procedures.⁴⁴ 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.⁴⁵ 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 student's needs.⁴⁶

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 receive an educational program, and that a student returning to school from such a program receive supportive services.⁴⁷ 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.⁴⁸ 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.⁴⁹ A student faced with suspension or expulsion related to drugs or alcohol can defend the exclusion from school on the ground that the state's statutory policy of requiring help and treatment for a student who abuses drugs and alcohol requires that school to maintain educational services for a student while providing all necessary services and support to address the problem.

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 or school physician.⁵⁰ The principal or principal's designee, in turn, must notify the student's parents and the chief school administrator, and arrange for

“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.”

the immediate examination of the student to determine whether he or she is under the influence.⁵¹ 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.⁵² 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.⁵³

Within 24 hours of the examination, the physician is required to issue a written report of his or her findings to the parents of the student, the principal, and the district's chief school administrator.⁵⁴ 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.⁵⁵ If the written report finds that alcohol and 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.⁵⁶ If there is a positive diagnosis of alcohol or other substance use that interferes with the student's mental and 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.⁵⁷ 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.⁵⁸

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 procedures 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. 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.⁵⁹ 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.⁶⁰

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.⁶¹

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.*,⁶² 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. State statute 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.⁶³

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. 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 rights⁶⁴ — 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.⁶⁵ 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. 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.⁶⁶

“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.”

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 U.S. Constitution one school district's policy of random drug testing of all high school student athletes⁶⁷ and another school district's policy mandating drug testing of all students involved in extra-curricular activities.⁶⁸ 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 recently 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.⁶⁹

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.

“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.”

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.⁷⁰ 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.⁷¹
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.⁷² 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.”*⁷³ 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.⁷⁴
5. School staff has reason to believe that 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.⁷⁵ 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 hate crime is defined as "any criminal offense where the person or persons committing the offense acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, disability, religion, sexual orientation, or ethnicity."⁷⁶

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. 20–24 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.⁷⁷

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.⁷⁸

"Student discipline sometimes involves loss of a student privilege, such as participation in an extracurricular activity or a graduation ceremony."

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 three things:

- find that the offense does not warrant removal from school and reinstate the student to the regular education program (except in cases involving a gun offense, where the law mandates a one-year removal from school, as discussed on p. 8 of this manual);
- continue the suspension for a specific period of time;
- expel the student from the regular education program.

NOTE: The state board of education has held that a board of education must provide alternative education to a student following expulsion, and that issue is currently pending in court. See discussion of alternative education on p. 18 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.⁷⁹ 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.⁸⁰ 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.⁸¹ 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. The student has a constitutional right to not testify against him or herself, and the school bears the burden of proving the case against the student. Having the student testify could make it easier for the school to prove its case.

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 pp. 17–18 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.⁸² 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.⁸³ In the student discipline area, the state acknowledges that it has not set state policy or uniform standards to guide local action.⁸⁴ The state may, therefore, be held responsible for constitutional violations at the district level. See discussion on pp. 16–17 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,⁸⁵ 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, recently ruled that an expelled student is entitled to an alternative education program under the state constitution. See discussion of alternative education on p. 18 of this manual. State

“...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.”

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.⁸⁶ 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.⁸⁷ 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.⁸⁸ In the area of student discipline, there is great inequality in how students are treated, with educational rights varying from district to district throughout the state, because the state lacks 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 automatically resort to suspension and expulsion. Similarly, some districts have a policy that requires placement of suspended/expelled students in an alternative education program, while others end all educational services for these students. 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.⁸⁹ 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.⁹⁰ 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,”⁹¹ but also that there is “a real and substantial relationship between the classification and the governmental purpose which it purportedly serves.”⁹²

There are many 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; (2) those students who reside in districts that impose long-term suspension and expulsion without the provision of alternative education services, as compared to those students who reside in districts that provide alternative education to any student removed from the general school program; and those students who reside in districts that do not provide alternative education to students excluded from school, as compared to students who are adjudicated delinquent in a juvenile proceeding for whom, by state statute, the court must provide an educational 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.⁹³ Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration of and disregard for circumstances.⁹⁴ 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.⁹⁵ 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.⁹⁶

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.”⁹⁷ 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.”⁹⁸ 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.”⁹⁹

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. 6–8, may provide a defense to a

“...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.”

“Suspension and expulsion under zero tolerance may be subject to challenge under either a constitutional or an arbitrary and capricious standard of review.”

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.*¹⁰⁰

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. 16 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. 17 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.¹⁰¹ 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. 17 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.

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.¹⁰² 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.¹⁰³

The right to alternative education is not firmly established in New Jersey law. It was not until 2002 that the state board of education ruled for the first time, in a case titled *P.H., et al., v. Board of Educ. of Borough of Bergenfield*,¹⁰⁴ 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.*,¹⁰⁵ 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. Aside from these two cases, however, the state Legislature, the Department of Education and the courts have yet to recognize a right to continued public education following long-term suspension and expulsion, except for students residing in the state’s 30 poorest school districts. These districts, known as the *Abbott* districts, are required by the New Jersey Supreme Court’s ruling in *Abbott v. Burke*¹⁰⁶ to provide alternative education programs for middle and high school students who are too disruptive or disaffected to function in the regular school environment. No other districts in the state are required by

statute, regulation or case law to have alternative education programs. Consequently, students facing expulsion may have all future educational services terminated and students subject to long-term suspension may receive no education during the period of exclusion from school.

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. Local districts turn to state statutes and Department of Education regulations for guidance and, presently, neither requires that a school board place a student in an alternative program following expulsion or long-term suspension. 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.

The New Jersey Department of Education is considering the adoption of regulations establishing the right to alternative education for students removed from school on disciplinary grounds.¹⁰⁷ In the interim, students facing expulsion and long-term suspension without educational services will have to appeal their school board decision to the commissioner of education, using the procedures described in this manual at p. 23–24. 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. 16–17 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.¹⁰⁸

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 pp. 4–5 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.¹⁰⁹ 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.

The Right to Alternative Education for Students Removed from School

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.¹¹⁰ The statutory requirement for mandatory one-year removal for these offenses is discussed on p. 8 of this manual. While state statute may be interpreted to permit a school board to permanently expel a student who commits one of these offenses, if the board opts to impose a one-year removal instead, it must also provide alternative education. 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.¹¹¹

Home Instruction

Some districts opt to provide home instruction to students who have been suspended long-term or expelled. Unlike an alternative education program, home instruction does not address a student's behavioral problems and does not provide the supervision and support offered in a school setting.¹¹² Under Department of Education regulations, home instruction for students removed from school for disciplinary reasons need be only 10 hours per week.¹¹³ 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.¹¹⁴ The law governing home instruction requires that a parent or other adult designated by the parent be present during all periods of instruction,¹¹⁵ making the provision of home instruction very difficult for students with working parents.

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. 4-5 of this manual of a 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.

“A student has the right to appeal the discipline decision of a school administrator or board of education to the commissioner of education, the state board of education and court.”

APPEALING A STUDENT DISCIPLINE DETERMINATION

A student has the right to appeal the discipline decision of a school administrator or board of education to the commissioner of education, the state board of education and court. 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. 15-18.

The commissioner of education has jurisdiction over all school law controversies and disputes.¹¹⁶ 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.¹¹⁷

Department of Education regulations do not require acceleration and speedy decision-making for suspension and expulsion cases. Consequently, students are excluded from school for months or longer while appeals are decided. Delay in decision-making in discipline cases is attributable to a variety of procedures. First, unlike other areas of administrative law, a multi-tiered administrative appeal process is mandated by state statute in education cases. An unfavorable decision of a local school board is first appealed to the commissioner of education.¹¹⁸ The commissioner’s decision, if unfavorable, must then be appealed to the state board of education.¹¹⁹ The state board’s decision, not the commissioner’s decision, is the final agency decision that may be appealed to the Superior Court of New Jersey, Appellate Division.¹²⁰ This process can add delay to cases that require a speedy decision.

Further, 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. As a result, ALJs routinely take six to nine months to issue an initial decision in a discipline case. A student may move for acceleration of the hearing under the general administrative rules,¹²¹ 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,¹²² 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 pp. 22–23 of this manual.

Delay in decision-making at the commissioner level is continued at the state board level, where there are no time frames for decision-making. A student dissatisfied with a commissioner ruling must appeal that decision to the state board and wait several months or more before receiving a final agency decision that may be appealed to court.

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. 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. 8, may be appealed directly to the commissioner of education, and does not go before the board of education.¹²³

A decision by the commissioner may be appealed to the state board of education within 30 days of the decision.¹²⁴ A decision by the state board of education is a final agency decision that may be appealed to the New Jersey Superior Court, Appellate Division within 45 days of the state board decision.

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.¹²⁵ See discussion on pp. 4-5 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,¹²⁶ including authority to decide constitutional claims, at least in the first instance.¹²⁷ The commissioner does not, however, have authority to award full relief for violation of federal constitutional rights¹²⁸ — namely, damages and attorney's fees under the Civil Rights Act.¹²⁹ 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 preserve 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.¹³⁰

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 and state board, a student may want to file a motion for emergent relief with the petition of appeal to the commissioner, or with an appeal to the state board in the event the commissioner rules against the student. 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.¹³¹

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*,¹³² 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 pp. 18-19.

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.¹³³ In accordance with Department of Education regulations,¹³⁴ filing an appeal requires:

- (1) Preparing a document known as a "petition." A sample petition is set forth in Appendix A on p. 39 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 and state board of education. See discussion of constitutional defenses to student discipline on p. 16-17 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

"...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."

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. 40 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.¹³⁵ 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.¹³⁶ Additionally, absences due to suspension cannot be included in the computation to determine compliance with school attendance policy.¹³⁷

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.¹³⁸ 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.¹³⁹ Conversely, schools must request a new student’s discipline record from his or her prior school.¹⁴⁰ 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.¹⁴¹ The school board may, however, admit the student and impose an interim suspension pending the hearing.¹⁴²

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.¹⁴³ To appeal a school record, the

“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.”

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. 23-24.

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.¹⁴⁴

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.¹⁴⁵ 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.¹⁴⁶ The requirement that a party first exhaust administrative remedies with the commissioner of education before filing a court action is discussed on pp. 20-21 of this manual.

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),¹⁴⁷ 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.¹⁴⁸

The rules on special education discipline are very complex. 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 participating in his or her current education program due to 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.

SCHOOL DISTRICT'S AFFIRMATIVE OBLIGATION TO ADDRESS BEHAVIORAL PROBLEMS

Under IDEA, school districts must address a student's challenging behavior before disciplining the child. School districts are required to have qualified teachers, social workers, counselors, psychologists and other professionals who are trained to develop and implement positive behavior strategies and plans for children with disabilities.¹⁴⁹ Additionally, every student's Individualized Education Program (IEP) — the yearly plan for the student's educational program and services — must address his or her behavioral issues. The IEP team — consisting of the student's parents, at least one member of the school's child study team (school psychologist, school social worker and learning disabilities specialist), the student's case manager, the student's teacher (both special education and general education teacher, assuming the student has both) and other specialists, depending on the nature of the student's disability — is required to explore the need for strategies and support systems, including positive behavioral interventions, to address any behavior that may impede the education of the child or the education of his or her peers.¹⁵⁰ A failure to consider and address behavioral problems in developing and implementing a child's IEP violates IDEA's requirement for FAPE.

In addition to positive strategies and interventions, the behavioral section of the IEP should address whether and under what circumstances the child may be subject to loss of privileges or short-term suspensions for violation of school rules.

School districts are required to conduct a functional behavioral assessment (FBA) and implement a behavioral intervention plan for children with behavioral problems in school.¹⁵¹ An FBA is a study of the relationship between a student's challenging behavior, his or her disability and the school environment. The purpose of an FBA is to determine:

1. in what environment and under what circumstances the behavior occurs;
2. why the behavior occurs, or the behavior's function for the student (what the student gets out of the behavior); and
3. when the behavior is most likely and least likely to occur.

The general idea of an FBA is to respond to things going on in the classroom or other school environments (*i.e.*, lunch room, hallway, cafeteria), including the teacher's response to the behavior, and whether controlling or changing the environment will lead to changes in the challenging behavior. A psychologist or other professional trained in behavior assessment and behavioral plans should conduct the FBA. The IEP team, working with the behavioral expert, uses the information gathered through the FBA to develop an appropriate behavioral intervention plan. Examples of behavioral interventions include providing social skills instruction, helping a student gain self-awareness of problem behavior, teaching the student strategies to change or redirect the behavior and creating environmental modifications.

THE RIGHT TO STAY-PUT DURING DISCIPLINE PROCEEDINGS

If school officials believe that a child's discipline problems may be caused in part by an inappropriate placement, their first response should be to work with the parents and teacher through the IEP process to develop a more appropriate program that meets the needs of the child and improves the learning environment for other students. The law requires that a parent be told about any actions or plans school officials are considering for his or her child's placement so he or she can participate as an equal partner. In general, unless the school board's action falls within one of the discipline exceptions discussed in the following pages, school officials must give written notice within 15 calendar days of an IEP team decision about a student's placement or the provision of FAPE, and at least 15 calendar days before implementing a proposed change.¹⁵²

If the child's parent does not agree to the program or placement changes proposed by the school district, he or she may contest the changes through mediation or due process, discussed in this manual at pp. 33-37. As in all other situations when 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 proposed action.¹⁵³ 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. The right to stay-put applies for the vast majority of students facing discipline.¹⁵⁴ The following discipline procedures under IDEA, which allow school districts to impose, in very limited circumstances, long-term suspension and expulsion without agreement from the parents, are basically exceptions to the stay-put rule.

“The nature of the procedures and the educational services a school district must provide to a student with a disability depends on whether the suspension is a short-term removal or a change in placement.”

The nature of the procedures and the educational services a school district must provide to a student with a disability depends on whether the suspension is a short-term removal or a change in placement. A change in placement removal is essentially a long-term suspension, a series of short-term suspensions that constitute a pattern of removal, or an expulsion. A student is entitled to greater procedural protections and services if the removal is a change in placement rather than a short-term removal.

A **short-term** removal is a suspension of 10 or fewer consecutive school days (school days in a row), and additional removals of 10 or fewer days in the same school year for separate incidents of misconduct, as long as the removals beyond the first 10 days do not form a pattern of exclusion, as described below.¹⁵⁵

A **change-in-placement** suspension is any removal of more than 10 consecutive school days or a series of removals that amount to more than 10 school days in a school year if they form a pattern of exclusion from school.¹⁵⁶ A determination of whether a suspension is part of a pattern of exclusion must be made on a case-by-case basis, in consideration of such factors as the length of each removal, the total amount of time of removal, and the proximity of the removals to one another. If multiple removals of 10 or fewer days is not found to be a pattern of exclusion, they are considered short-term suspensions. New Jersey’s special education regulations exclude parents from the decision of whether a series of removals constitutes a pattern of exclusion, and instead leave the determination to school administrators acting in consultation with the student’s case manager.¹⁵⁷ While federal law does not specify the parties responsible for making this decision, the procedural rights granted under IDEA indicate that the decision should be made at a meeting of the IEP team, which includes the child’s parent.¹⁵⁸ A parent faced with what appears to be a pattern of exclusion should request an immediate IEP meeting with the child study team, so a joint determination about whether a series of suspensions constitutes a pattern of exclusion may be made. A parent also has the option to request mediation, due process or emergency relief, discussed on pp. 33–37 of this manual, to challenge a school district’s determination of whether a series of removals constitutes a pattern of exclusion.

EXAMPLES:

Short-Term Suspension: A child with a disability violates school rules by fighting with another student. In accordance with district policy, the child may be suspended for up to 10 consecutive school days.

Short-Term Suspension: The same child who has already been suspended for 10 school days faces another five-day suspension for violation of school rules three months after the initial suspension. A school administrator, in consultation with the student’s case manager, reviews the facts of the suspensions and decides that the second removal does not constitute a change in placement.

Change-in-Placement: The same child who already had a 10-day suspension and a five-day suspension in the school year is faced with another 10-day suspension two weeks after the last suspension. The school principal, in consultation with the student’s case manager, decides that the third removal, which results in a total of 25 days out of school in a three and a half month period, is a change in placement, thereby entitling the child to the greater procedural protections granted for long-term suspensions.

Change-in-Placement: A child is suspended for 15 days for fighting. The suspension of more than 10 consecutive school days constitutes a change in placement.

For all suspensions, including those of 10 days or less, the school principal is required to provide the child's special education case manager with a written description of the incident and the reasons for the suspension.¹⁵⁹ School officials may suspend a child with a disability for 10 consecutive school days or less without offering any educational services, (if services are not provided to a child without a disability in similar circumstances),¹⁶⁰ and without following the detailed discipline procedures that apply to change in placement removals.¹⁶¹ Additionally, school officials may suspend a child for more than 10 non-consecutive days in a school year without following the procedures for long-term discipline, as long as the suspension beyond 10 days in the school year is not part of a pattern of exclusion from school and does not amount to a change in placement.

However, for any suspension that amounts to more than 10 days in a school year, regardless of whether it is considered a change in placement, the school district must provide educational services.¹⁶² Thus, in the previous short-term suspension examples, no educational services are required in the first example, and educational services are required in the second example during the second suspension of five days. As long as the suspension is not part of a pattern of exclusion from school, a school administrator, such as the principal, acting in consultation with the child's special education teacher and case manager, decides the level of educational services necessary to enable the child to appropriately progress in the general curriculum and advance toward achieving the goals set out in the IEP.¹⁶³ While state and federal regulations allow school officials to make this decision without input from the student's parents, parents should insist on an IEP team meeting to discuss educational services during periods of suspension, and may request mediation and due process to challenge the level or appropriateness of the services to be provided during the period.

Whenever a school district imposes a series of short-term suspensions that add up to more than 10 days in the school year, the IEP team must meet to develop a behavioral assessment plan, if the district has not already conducted a functional behavioral assessment and implemented a behavioral intervention plan for the child, even though the team does not have to meet to determine educational services. A behavioral assessment plan is a plan for how the FBA will be conducted. This meeting must take place within 10 business days of the 11th day of suspension in the school year. Again, in the previous short-term suspension examples, the IEP team does not have to meet after the 10-day suspension given in the first example, but is required to meet in the second example because the second suspension of five days culminates to more than 10 days out of the school year. The meeting must take place within 10 business days of the first day of the second suspension. Then, as soon as practicable after developing the plan and conducting the assessment, the IEP team must meet to develop appropriate behavioral interventions necessary to address the child's behavior.¹⁶⁴ If the same child being removed for the 11th cumulative day in a school year already has a behavioral intervention plan, the IEP team must meet within 10 business days of the removal to review the plan and its implementation, and to modify the plan as necessary to address the child's behavior.¹⁶⁵ If there are additional suspensions in the school year, the IEP team does not have to meet again to review and revise the behavioral plan, unless the additional suspension amounts to a change in placement, or any team member, including the parent, requests a meeting.¹⁶⁶

The IEP team does not have to meet to conduct a manifestation determination, discussed below, for a removal of less than 10 days, or a removal that amounts to more than 10 non-consecutive days in a school year, as long as the suspension beyond 10 days is not part of a pattern of exclusion from school and does not amount to a change in placement. Of course, a parent may request an IEP meeting at any time to ask for services to address behavior issues, and the school district must honor any reasonable request for such a meeting.

"...for any suspension that amounts to more than 10 days in a school year, regardless of whether it is considered a change of placement, the school district must provide educational services."

School districts are allowed to impose a change in placement (suspension for more than 10 consecutive school days, or suspension for more than 10 non-consecutive days in a school year which is part of a pattern of exclusion) for discipline reasons, without a parent's consent, in three narrow circumstances, and only if they comply with very specific procedural requirements. A district may impose a change in placement if:

- The IEP team conducts a **manifestation determination** and finds that the student's inappropriate behavior was not caused by or related to his or her disability;
- The student brings a **weapon** to school or a school function (a weapon is defined as a dangerous object that is used for, or readily capable of, causing death or serious bodily injury), or knowingly uses, possesses, sells, or solicits **illegal drugs** while at school or a school function;
- The district requests an expedited due process hearing and proves by substantial evidence that the student is **substantially likely to cause injury** to him or herself or others in the current educational placement.

In every case in which a school district imposes a change in placement, the IEP team must meet within 10 business days of the removal, or the decision to impose removal, and perform two separate functions: (1) develop a behavioral assessment plan and behavioral intervention plan, or, in the case of a child who already has a behavioral intervention plan, review and modify the plan as necessary to address the child's behavior;¹⁶⁷ and (2) conduct a manifestation determination,¹⁶⁸ discussed below. The IEP team can perform these two functions at one or more meetings, as necessary.¹⁶⁹

1. Change in Placement Following Manifestation Determination

Essentially, a school district is allowed to impose a long-term expulsion or suspension for a child with a disability only if the child's breach of school rules was not caused by or related to his or her disability. IDEA and case law¹⁷⁰ under Section 504 of the Rehabilitation Act¹⁷¹ recognize that if a child's disability is the cause of his or her inappropriate conduct, the child should not be punished with long-term removal or expulsion from school. The process of assessing the relationship between a child's disability and the behavior that is the subject of the discipline is called a manifestation determination.¹⁷²

If a school district is considering long-term removal of a child, and that removal amounts to a change in placement, it must, on the day it makes a decision to take such action, send the parent a written notice of its decision with a copy of the procedural safeguards notice (PRISE).¹⁷³ The district must schedule a meeting of the IEP team to determine whether the child's behavior was a manifestation of his or her disability no later than 10 school days from its decision to pursue long-term removal.¹⁷⁴ The manifestation determination must be conducted by the IEP team and other qualified personnel, and must take place at a meeting.¹⁷⁵

In making a manifestation determination, the IEP team must consider all relevant information, including evaluations, diagnostic results, information supplied by the parent, observations of the child, the child's IEP and the child's placement.¹⁷⁶ The team may find that the behavior that is the subject of the discipline is **not** a manifestation of the child's disability, **only** if it finds:

- In relationship to the behavior, the child's IEP and placement were appropriate, and that special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the IEP and placement;
- The child's disability did not impair his or her ability to understand the impact and consequences of his or her behavior; **and**
- The child's disability did not impair his or her ability to control the behavior.¹⁷⁷

"...a school district is allowed to impose a long-term expulsion or suspension for a child with a disability only if the child's breach of school rules was not caused by or related to his or her disability."

If the IEP team finds that any of these standards were not met, the behavior must be considered a manifestation of the child's disability, and the school district may not impose an expulsion, long-term suspension, or any removal that amounts to a change in placement.¹⁷⁸ However, for a student involved with weapons or illegal drugs, the school district may impose a 45-day removal to an appropriate interim alternative educational setting, as discussed below, even if the behavior was related to the student's disability. Similarly, where there is substantial evidence that the student is likely to cause injury to him or herself or others, as discussed below, an ALJ may impose a 45-day removal to an appropriate interim alternative educational setting, regardless of whether the behavior was a manifestation of the child's disability. The school district must take immediate steps to remedy any problems with the child's IEP or placement, or in their implementation, which are discovered in the course of the manifestation determination.¹⁷⁹

If the IEP team determines that the child's behavior was not a manifestation of his or her disability, it may take steps to discipline the child in the same manner in which children without disabilities are disciplined; that is, the child may be suspended or expelled in accordance with the policies and procedures of the district board of education.¹⁸⁰ The IEP team must transmit the child's special education records to the board of education for its consideration during the discipline proceedings.¹⁸¹

The school district must continue to provide FAPE to children with disabilities who are expelled or suspended long-term.¹⁸² The IEP team, which includes the child's parent, is responsible for determining the services necessary to enable the child to appropriately progress in the general curriculum and advance toward achieving the goals of the IEP. The IEP team also determines where those services will be provided.¹⁸³

2. Change in Placement for Illegal Drugs or Weapons

A school district may impose a removal, without agreement from the parent, to an appropriate interim alternative educational setting for not more than 45 days if a child brings a weapon to school or a school function, or knowingly uses, possesses, sells or solicits illegal drugs while in school or at a school function.¹⁸⁴

For purposes of a 45-day removal under IDEA, an illegal drug is defined as a controlled substance,¹⁸⁵ and does not include cigarettes or alcohol, and a weapon is defined as a dangerous object that is used for, or readily capable of, causing death or serious bodily injury.¹⁸⁶ The definition of weapon specifically excludes a pocket knife with a blade of less than two inches.

The IEP team, which includes the child's parent, determines the appropriate interim alternative educational setting.¹⁸⁷ The educational setting must enable the child to continue to progress in the regular school curriculum, although in another setting, and to continue to receive the services and modifications, including those described in the child's current IEP, that will allow him or her to meet the goals established in the IEP.¹⁸⁸ Additionally, the interim setting must include services and modifications to address the behavior that led to the removal, and to prevent the behavior from recurring.¹⁸⁹

Remember: For any change in placement removal, including a 45-day removal to an interim educational setting for illegal drugs or weapons, the IEP team must meet within 10 days of the removal to develop or review and modify a behavioral intervention plan and to conduct a manifestation determination. If the IEP team determines that the student's involvement with weapons or illegal drugs was not a manifestation of his or her disability, he or she may be expelled or suspended long-term, as any other child would be under school district policy (although the district must continue to provide FAPE). On the other hand, the IEP team may determine that the student's involvement with illegal drugs or weapons was a manifestation of his or her disability, in which case the student cannot be

“It is impermissible for a school district to act on its own to bar a child from school on the ground that he or she poses a threat of harm to him or herself or others.”

expelled or suspended long-term. The IEP team should, of course, address the student’s behavior through changes in his or her IEP or placement.

As with any suspension or removal for more than 10 consecutive days, when a child is removed to a 45-day interim educational setting due to weapons or drugs, the due process clause of the U.S. Constitution requires that the student be granted a full hearing before the board of education, at which time he or she can contest the facts that led to the removal. See discussion of due process rights on pp. 7–8 of this manual.

3. Change in Placement Ordered by a Hearing Officer

The third and final basis on which a district may impose a change in placement removal, without agreement from the parent, is when the placement is ordered by an ALJ in a due process hearing. An ALJ has the authority to order a child’s placement in an appropriate interim alternative educational setting for not more than 45 days if a school district requests an expedited due process hearing and proves by substantial evidence that the child is likely to cause injury to him or herself or others in the current educational setting.¹⁹⁰ It is impermissible for a school district to act on its own to bar a child from school on the ground that he or she poses a threat of harm to him or herself or others. If a district believes a child does not belong in school because he or she may cause harm, it must obtain an order from an ALJ allowing the removal. An ALJ may order such a removal only if he or she:

- determines that the school district has met its burden of proving that the student’s presence in school is “substantially likely to result in injury to the child or to others;”
- considers the appropriateness of the student’s current placement;
- considers whether the school district has made reasonable efforts to minimize the risk of harm in the student’s current placement, including the use of supplementary aids and services;
- determines that the interim alternative educational setting being proposed by school personnel, in consultation with the student’s special education teacher, will enable the student to continue to progress in the curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the student’s current IEP, that will allow the student to meet the goals set out in the IEP. Additionally, the interim setting must include services and modifications to address the behavior that led to the removal, and to prevent the behavior from recurring.¹⁹¹

If the school district has not done everything reasonably possible to change the student’s behavior, or to protect the student and others from possible injury, the ALJ should not order removal to the interim educational setting, and should instead order the district to implement appropriate interventions and strategies for addressing the student’s behavior. For example, the ALJ may order the district to assign an aide to accompany the student throughout the day, or to allow the student a supervised “time out” from the classroom when his or her behavior escalates. Similarly, the ALJ should not order placement in the interim educational setting if the setting does not offer the student the services and modifications required under the child’s current IEP, will not allow the student to progress and meet the goals of the IEP, or does not offer a program or services that address the student’s challenging behavior.

There has been a great deal of litigation on student removal from school on the ground that the student is substantially likely to cause injury to him or herself or others. A summary of some of the relevant case law is contained in the endnotes of this manual.¹⁹²

A student is entitled to all of the discipline procedural protections discussed in Part II of 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 student has a disability before the time of the violation of school rules.¹⁹³

A school district is considered to have knowledge that a student has a disability if: (1) the parent expressed concern to school personnel, in writing, that the student has a disability and needs special education (unless that parent does not know how to write or has a disability that prevents him or her from writing, in which case verbal notice is sufficient); (2) the behavior or performance of the student demonstrates that he or she has a disability and needs special education; (3) the parent submitted a written request for an evaluation; or (4) a teacher of the student or other district personnel expressed concern about the student's performance or behavior to the director of special education for the school district, student study team members, or school administrators responsible for referring students for evaluation.¹⁹⁴ A school district is not considered to have knowledge that a student has a disability if it conducted an evaluation, determined that the student did not have a disability, and provided the parent with written notice of this determination.¹⁹⁵

If a parent requests a special education evaluation for a non-classified student after the student has been suspended or expelled, the school district must conduct the evaluation on an expedited basis.¹⁹⁶ If the student is determined not to have a disability, he or she is not entitled to any educational services during the time of removal, unless the school district normally provides services to students who have been suspended or expelled.¹⁹⁷ If the student is found to have a disability, the school district must provide FAPE to the student to the extent required under IDEA's discipline rules.

THE RIGHTS OF CHILDREN IN OUT-OF-DISTRICT PLACEMENTS

A student 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 students in public schools in the district.¹⁹⁸ Whenever a student is subject to a short-term removal, the principal of the out-of-district school must send written notice, including the reasons for the removal, to the student's case manager. In the case of a change of placement or long-term removal, the out-of-district school may take disciplinary action only in conjunction with the student's school district, and all of the procedural requirements of IDEA, as discussed in the preceding pages of this manual (*e.g.*, meeting of the IEP team within 10 days, manifestation determination, etc.), must be met.¹⁹⁹ An out-of-district school may not unilaterally terminate a student's placement.²⁰⁰

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.²⁰¹ These rights are called due process or procedural rights.²⁰² 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 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 pp. 42–45 of this manual. 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). In a due process hearing the ALJ listens to and accepts evidence and legal arguments from both the parent and the school district. Within 45 days of the request for due process, the ALJ writes a formal written decision that must summarize the evidence in the case and explain the reasons for the decision.²⁰³ The ALJ's decision is final and binding on both parties.²⁰⁴ The decision must be implemented without delay, even if one of the parties files an appeal of the decision.²⁰⁵ The New Jersey Department of Education has the authority to enforce a due process hearing decision.²⁰⁶ 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.²⁰⁷

Due process hearings in student discipline disputes are expedited. This means that the Department of Education must schedule the hearing at the OAL within 10 days of the filing of the due process request, and no extension beyond 45 days for final decision is allowed.²⁰⁸ Although these procedures are expedited in relation to all other due process hearings, they do not provide a quick remedy to a student suffering immediate harm, such as a student improperly expelled from school or inappropriately placed in an interim alternative educational setting. In order to receive immediate relief, a student suffering irreparable harm must also request emergency relief, as discussed below.

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.²⁰⁹ 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 08625-0500

The request must include the student's name and address; 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.²¹⁰ The due process request must note that a copy of the request has been sent to the other party (the school board).²¹¹ The Department of Education's form for requesting a due process hearing is located at p. 41 of this manual.

Emergency Relief

Emergency relief is available when a student needs a speedy resolution of a dispute in order to avoid some serious harm.²¹² 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 on pp. 43–44 of this 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.²¹³ A parent's request for emergency relief must be supported by an affidavit or notarized statement setting forth the basis for the request.²¹⁴ 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.²¹⁵

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.²¹⁶ 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. 27 of this 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.²¹⁷ Because the right to stay-put operates as an automatic injunction,²¹⁸ 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. 31 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. 32 of this manual. Even in situations in which school officials conduct a manifestation determination, as discussed on p. 30 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.²¹⁹ 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. 32 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

“A due process hearing provides a parent an opportunity to challenge and correct the imposition of student discipline that violates the requirements of IDEA.”

and depositions of witnesses, the parent and school officials may request information and records from each other prior to the hearing.²²⁰ In a student discipline case, all responses to these requests must be completed no later than two business days before the expedited hearing.²²¹ 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.²²² 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.²²³

Burden of Proof

The school board in a due process hearing bears the burden of proof.²²⁴ 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. 32 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.²²⁵ 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.²²⁶ Some relief under IDEA — namely monetary damages, attorney’s fees and reimbursement of expert and other 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.²²⁷ 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, such as expert witness fees. However, the Third Circuit has ruled that monetary damages in IDEA cases may be sought through court.²²⁸ A parent may also file for reimbursement of attorney's and expert'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 must file two separate complaints: (1) a due process request 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 necessary, therefore, that a party file two separate complaints, although he or she should request that the two complaints be consolidated for purposes of a fact-finding hearing at the Office of Administrative Law. The party should note the filing of the other complaint and request consolidation of the complaints for the hearing in a cover letter to the respective division within the Department of Education. Accordingly, the cover letter to the director of the Office of Special Education Programs, with whom a due process request is filed, should note that a petition concerning the same incident or set of facts has been filed with the commissioner of education and request consolidation, and the cover letter to the director of controversies and disputes, with whom a petition to the commissioner is filed, should note that a due process request has been filed with the Office of Special Education Programs and request consolidation.

Student's Placement During Due Process Proceeding

A student's placement during a due process proceeding depends on the nature of the school board action being contested. If the parent is challenging a manifestation determination, the student remains in his or her current educational placement (the placement prior to suspension or removal) while the due process case is pending,²²⁹ unless an ALJ orders placement in a 45-day interim educational setting on the ground that the student is substantially likely to cause injury to him or herself or others, or the student was placed by the district in a 45-day interim educational setting due to illegal drugs or weapons. 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 or weapons, 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.²³⁰

"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."

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,²³¹ unless the school district requests emergency relief and the ALJ finds, under the standards discussed in this manual at p. 32, that the child is likely to cause substantial injury and that placement in an interim educational setting is appropriate for an additional 45 days.²³²

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:

- The right to an impartial ALJ to conduct the hearing and make the decision.²³³
- The right to have the hearing scheduled at a time and place which is reasonably convenient to the parent.²³⁴
- The right to have a verbatim record of the hearing.²³⁵
- The right to see and make copies of all records the school district will present at the hearing at least five days before the hearing itself, or in the case of an expedited discipline hearing, at least two days before the hearing.²³⁶
- The right to be accompanied and advised by a lawyer and by individuals with special knowledge or training regarding children with disabilities.²³⁷
- The right to present documents, to call witnesses, and to cross-examine witnesses presented by the school board.²³⁸
- The right to prevent the school board from presenting evidence it did not provide at least five days before the hearing, or in the case of an expedited discipline hearing, at least two days before the hearing, unless the ALJ finds that it could not have been disclosed.²³⁹
- The right to require any school official or employee with knowledge of the case to attend the hearing.²⁴⁰
- The right to receive the ALJ's decision and the reasons supporting it within 45 days of the request for due process.²⁴¹
- The right to have the ALJ's decision carried out immediately, even if the school board loses and plans to appeal the decision, unless the school board can persuade a state or federal court judge that implementing the decision may be harmful to the child or other children.²⁴²

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:

(Your Name & Your Student's Name)
(NAME OF PETITIONER(S)),
PETITIONERS(S).

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

v.

(Name of District Board of Education)
(NAME OF RESPONDENT(S)),
RESPONDENT(S)

PETITION

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).

Date: *(Your signature)* _____
Signature of petitioner or
representative

VERIFICATION

(Your name)
(Name of petitioner), 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.

(Your signature) _____
Signature of Petitioner

Sworn and subscribed to before me this
_____ day of _____, _____

(Signature of notary public or other person authorized to administer an oath or affirmation)

APPENDIX B: NEW JERSEY DEPARTMENT OF EDUCATION PROOF OF SERVICE

(Your name) on behalf of
(Your student's name),
PETITIONERS(S).

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

v.

(Name of school district)
BOARD OF EDUCATION,
RESPONDENT(S)

PROOF OF SERVICE

I, *(your name)*, hereby certify that on *(month day)*, 20 *(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

Date: _____

To: Barbara Gantwerk, Director
Office of Special Education Programs
NJ Department of Education
P.O. Box 500
Trenton, NJ 08625-0500

From: _____
(Name of parent or school district submitting the request)

Address: _____

Phone:(_____)_____-_____
Fax:(_____)_____-_____

Please check whether you will be represented by _____ an attorney or assisted by
_____ an advocate.

Name of attorney or advocate: _____

Address: _____

Phone:(_____)_____-_____
Fax:(_____)_____-_____

I am/we are requesting (check one):
 Mediation only Mediation and a due process hearing
 Mediation and an expedited due process hearing
 Due process hearing only Expedited due process hearing only

On behalf
of: _____
(Child's name) *(Date of birth)*

Child's Address (If different from parent's address):

District of Residence: _____

School the student attends: _____

You may request an emergency relief hearing as part of your request for either a due process hearing or an expedited hearing, if you believe an immediate decision is required and you will suffer irreparable harm if the relief is not granted. Complete the additional emergency relief request form and attach to this form.

Please describe the nature of the problem and any facts relating to the problem. (Attach additional pages if necessary.):

Please describe how this problem could be resolved.(Attach additional pages if necessary.):

Signature of party submitting request:_____

Please check to verify that a copy of this request was sent to other party:

Name of other party:_____

Address:_____

Phone:(____) _____ - _____

Note to parent(s) requesting a due process hearing: The IDEA Amendments of 1997 require parent(s) or their attorneys to provide the information contained within this form to the NJ Department of Education and the district of residence. Failure to provide this information may result in a reduction in the award of attorneys' fees. (20 U.S.C.1415 (b)(7),(i)(3)(F) (Revised 7/00.)

Emergency relief may be requested when an immediate decision is required and the petitioner would suffer irreparable harm if the relief is not granted. These circumstances include, but are not limited to, disputes where the student's program will be terminated, the student will be denied participation in a school function or disciplinary action is being proposed.

Please note: To meet the requirements for requesting emergency relief, complete each page of this three-page form and have the form notarized. Facsimile transmissions (faxes) will not be accepted.

To: Barbara Gantwerk, Director
Office of Special Education Programs
NJ Department of Education
P.O. Box 500
Trenton, NJ 08625-0500

From: _____
(Name of parent or school district submitting the request)

Address: _____

Phone:(_____)_____-_____
Fax:(_____)_____-_____

Please check whether you will be represented by _____ an attorney or assisted by _____ an advocate.

Name of attorney or advocate: _____

Address: _____

Phone:(_____)_____-_____
Fax:(_____)_____-_____

On behalf of: _____
(Child's name) (Date of birth)

Child's address (If different from parent's address): _____

District of Residence: _____

School the student attends: _____

Request for emergency relief — Part 2

Please describe the nature of the problem and any facts relating to the problem.
(Attach additional pages if necessary.):

Please describe how this problem could be resolved. (Attach additional pages if necessary.):

_____ Please check to verify that a copy of this request was sent to other party:

Name of other party: _____

Address: _____

_____ Phone:(_____)_____-_____

Request for emergency relief — Part 3

Date: _____

Name of petitioner: _____, 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, 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.

Signature of Petitioner: _____

Sworn and subscribed to before me this _____ day of _____, _____.

Signature of notary public or other person authorized to administer an oath or affirmation

1. 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. New Jersey Department of Education Student Discipline Discussion Paper, *supra*, at p. 2.
3. In 2002, the state board of education ruled, for the first time, that the education clause of the state constitution requires a school board to provide an alternative education program to a student who has been expelled from the district. *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. At the time of this publication, the Bergenfield Board of Education has appealed the ruling to superior court, Appellate Division.
4. New Jersey Department of Education Student Discipline Discussion Paper, *supra*, at pp. 6-7.
5. New Jersey Department of Education Student Discipline Discussion Paper, *supra*, at p. 2.
6. 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 children in the state between the ages of five and 18.
See also N.J.S.A. 18A:38-1, *et seq.* (granting a student between the ages of five and 20 a statutory entitlement to enroll in the school district in which he or she resides).
7. Commissioner and state board of education decisions prior to 1992 are published in a series of volumes titled 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.
8. N.J.A.C. 6A:16-5.1.
9. N.J.A.C. 6A:16-5.1(d).
10. N.J.A.C. 6A:16-7.1.
11. N.J.A.C. 6A:14-3.3.
12. N.J.S.A. 18A:40A-9, *et seq.*; N.J.A.C. 6A:16-4.3(a)(13).
13. N.J.S.A. 18A:37-2; N.J.S.A. 18A:37-2.1; N.J.S.A. 18A:37-8.
14. *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).
15. *K.B. v. Greater Egg Harbour Reg'l High Sch. and Bd. of Educ.*, 96 N.J.A.R.2d (EDU) 594 (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).
16. *McB v. Washington Township Bd. of Educ.*, 96 N.J.A.R.2d (EDU) 298, 306 (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).
17. *David Dowding v. Bd. of Educ. of Township of Monroe*, 1990 S.L.D. 1711, 1713 (state board of education decision).
18. *R.W. v. Somerville Bd. of Educ.*, 1988 S.L.D. 2333, 2350-2351.
19. N.J.S.A. 18A:37-4.
20. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975).
21. N.J.S.A. 18A:37-5.
22. *R.R., supra*, 109 N.J. Super. at 350.
23. N.J.S.A. 18A:37-2.1(a), -2.4(b), -10(b).

24. 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 time frame 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 time frame 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. Cabill*, 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 time frames appear to be constitutionally deficient under federal case law.

25. *R.R. supra*, 109 N.J. Super. at 349.
 26. *R.R. supra*, 109 N.J. Super. at 349; *Tibbs v. Bd. of Educ. of Township of Franklin*, 114 N.J. Super. 287, 293-94 (App. Div. 1971), *aff'd* 59 N.J. 506 (1971).
 27. *R.R. supra*, 109 N.J. Super. at 349; *Tibbs, supra*, 114 N.J. Super. at 293-94.
 28. *Tibbs, supra*, 114 N.J. Super. at 293-96.

29. 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.
30. *M.W. v. Bd. of Freehold Reg'l High Sch. Dist.*, 1975 S.L.D. 127, 132.
31. N.J.S.A. 18A:37-2.1.
32. N.J.S.A. 18A:37-2.2.
33. N.J.S.A. 18A:37-7.
34. 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).
35. N.J.S.A. 18A:37-2.1(a) (assault against school personnel or school board member); N.J.S.A. 18A:37-2.4(b) (assault with a weapon); N.J.S.A. 18A:37-10(b) (firearms offense).
36. N.J.S.A. 18A:37-2.1(a); N.J.S.A. 18A:37-2.4(c); N.J.S.A. 18A:37-10(c).
37. N.J.S.A. 18A:37-7, *et seq.*
38. 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).
39. N.J.S.A. 18A:37-9.
40. N.J.S.A. 18A:37-2.1.
41. N.J.S.A. 18A:37-2.5; N.J.S.A. 18A:37-11.
42. N.J.A.C. 6A:16-5.5(g) (firearms); N.J.A.C. 6A:16-6.5(g) (assault with a weapon).
43. N.J.S.A. 18A:40A-9, *et seq.*; N.J.A.C. 6A:16-3.1, *et seq.*
44. N.J.A.C. 6A:16-4.2.
45. N.J.A.C. 6A:16-4.1(a).
46. N.J.A.C. 6A:16-4.1(c)(2).
47. N.J.A.C. 6A:16-4.1(c)(6).
48. N.J.A.C. 6A:16-4.3(a)(11).
49. N.J.A.C. 6A:16-4.3(a)(13).
50. N.J.S.A. 18A:40A-12; N.J.A.C. 6A:16-4.3(a)(1).
51. N.J.A.C. 6A:16-4.3(a)(2).
52. N.J.A.C. 6A:16-4.3(a)(4). 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.
53. N.J.A.C. 6A:16-4.3(a)(3)-(4).
54. 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)(7).
55. N.J.A.C. 6A:16-4.3(a)(8).
56. N.J.A.C. 6A:16-4.3(a)(9).
57. N.J.A.C. 6A:16-4.3(a)(10)(ii)-(iii).
58. N.J.A.C. 6A:16-4.3(a)(10)(ii).
59. N.J.A.C. 6A:16-4.3(b)(1)-(2).
60. N.J.A.C. 6A:16-4.3(b)(4)-(5).
61. N.J.A.C. 6A:16-4.3(d).

62. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985).
63. N.J.S.A. 18A:37-6.1.
64. *State v. Johnson*, 68 N.J. 349 (1975).
65. N.J.A.C. 6A:16-6.1(b)(4).
66. N.J.A.C. 6A:16-6.1(a)-(b)(2).
67. *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).
68. *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomis County v. Earls*, 122 S. Ct. 2559 (2002).
69. *Joye v. Hunterdon Central Regional High School*, 176 N.J. 568 (2003).
70. N.J.A.C. 6A:16-6.2(b)(2).
71. N.J.A.C. 6A:16-6.3(a).
72. N.J.A.C. 6A:16-6.3(b).
73. N.J.A.C. 6A:16-6.3(c).
74. N.J.A.C. 6A:16-6.3(d).
75. N.J.A.C. 6A:16-6.3(e).
76. A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials (1999).
77. *See, e.g., C.S. v. Bd. of Educ. of Lower Camden County 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).
78. *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).
79. *H.A. v. Bd. of Educ. of Warren Hills Regional Sch. Dist.*, 1976 S.L.D. 336, 340.
80. *Tibbs, supra*, 114 N.J. Super. at 293-96.
81. *Tibbs, supra*, 114 N.J. Super. at 293-96.
82. *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. Cabill*, 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).
83. *Robinson I, supra*, 62 N.J. at 520; see also *IMO the Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch., et al.*, 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").
84. New Jersey Department of Education Student Discipline Discussion Paper, *supra*, at p. 2.
85. 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").

86. *Levine, supra*, 84 N.J. at 258 (“the 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”).
87. *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”).
88. *Robinson I, supra*, 62 N.J. at 513.
89. 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. Department of Human Servs., Div. of Medical Assistance and Health Servs.*, 107 N.J. 355, 367 (1987).
90. *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 Township v. Weymouth Township*, 80 N.J. 6, 43 (1976), *cert. denied sub nom, Feldman v. Weymouth*, 430 U.S. 977 (1977)).
91. *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.
92. *Taxpayers’ Ass’n, supra*, 80 N.J. at 43.
93. *Boyle v. Riti*, 175 N.J. Super. 158, 166 (App. Div. 1980); *Thomas v. Morris Township 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).
94. *Worthington v. Fauver*, 88 N.J. 183, 204 (1982) (quoting *Baysshore Sewerage Co. v. Department Env’t. Prot.*, 122 N.J. Super. 184, 199 (Ch. Div. 1973)).
95. See, e.g., *Atkinson v. Parsekian*, 37 N.J. 143, 149 (1962); *SSI Medical Servs., Inc. v. State Dept. of Human Servs., Div. of Medical Assistance and Health Servs.*, 284 N.J. Super. 184, 188 (App. Div. 1995).
96. See, e.g., *C.S. v. Bd. of Educ. of the Township of Piscataway*, 97 N.J.A.R. 2d (EDU) 573.
97. *Scher v. Bd. of Educ. of Borough of West Orange*, 1968 S.L.D. 92.
98. *Scher, supra*, 1968 S.L.D. at 96.
99. *Scher, supra*, 1968 S.L.D. at 97.
100. *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).
101. 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>.
102. N.J.A.C. 6A:16-1.3.

103. N.J.A.C. 6A:16-1.3.
104. *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. At the time of this writing, the Bergenfield Board of Education has appealed the state board decision to superior court, Appellate Division. On December 3, 2003, on remand from the Appellate Division, the state board ruled that the school residency statute, N.J.S.A. 18A:38-1, required Bergenfield Board of Education to provide M.C. with an alternative education program until he graduates or reaches age 20, whichever occurs first. ELC anticipates that the board of education will appeal this ruling and consolidate it with the original appeal.
105. *State ex rel. G.S.* 330 N.J. 383 (Ch. Div. 2000).
106. *Abbott V, supra* 153 N.J. at 515.
107. New Jersey Department of Education Student Discipline Discussion Paper, *supra*, at p. 9.
108. *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.
109. Juvenile Crime, Juvenile Justice, National Research Council and Institute of Medicine (2001). Washington, DC: National Academy Press, p. 153.
110. N.J.S.A. 18A:37-2.2; N.J.S.A. 18A:37-8; N.J.A.C. 6A:16-8.3.
111. N.J.S.A. 18A:37-2.2; N.J.S.A. 18A:37-8; N.J.A.C. 6A:16-8.3.
112. Compare, definition of “home instruction” with definition of “alternative education program” in N.J.A.C. 6A:16-1.3.
113. N.J.A.C. 6A:16-9.1(b)(3).
114. *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:16-9.2(b)(5) (requiring program of home or out-of-school instruction to meet CCCS).
115. N.J.A.C. 6A:16-9.1(b)(7).
116. N.J.S.A. 18A:6-9.
117. *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).
118. N.J.S.A. 18A:6-9.
119. N.J.A.C. 6A:4-1, *et seq.*
120. N.J. Ct.R. 2:2-1, *et seq.*
121. N.J.A.C. 1:1-9.4.
122. N.J.A.C. 6A:3-1.6.
123. *See* N.J.S.A.18A:37-11.
124. N.J.A.C. 6A:4-1.3.

125. N.J.A.C. 6A:16-7.1.
126. N.J.S.A. 18A:6-9.
127. See, e.g., *Desilets, supra*, 137 N.J. at 595-597; *Paterson Redevelopment Agency v. Schulman*, 78 N.J. 378, 387 (1979); *Brunetti, supra*, 68 N.J. at 590.
128. *Balsley v. North Hunterdon Reg'l Sch. Dist. Bd. of Educ.*, 117 N.J. 434, 442-442 (1990) (no authority to award attorney's fees); *J.A. v. Bd. of Educ. of South Orange/Maplewood*, 318 N.J. Super. 512, 526 (App. Div. 1999) (no authority to award monetary damages).
129. Damages and attorney's fees may be available for violation of federal civil rights under 42 U.S.C. §§1983 and 1988.
130. See *Christian Bros. Inst. v. Northern 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).
131. N.J.A.C. 6A:3-1.6; *Crowe v. DeGioia*, 90 N.J. 126 (1982).
132. *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.
133. N.J.A.C. 6A:3-1.3.
134. N.J.A.C. 6A:3, et seq.
135. *Wetherell v. Bd. of Educ. of Township of Burlington*, 1978 S.L.D. 794, 798; *Wermuth v. Bd. of Educ. of Livingston*, 1965 S.L.D. 121.
136. *Babbit v. Moran*, 1974 S.L.D. 145.
137. *C.G. v. Bd. of Educ. of David Brearley High Sch.*, 1980 S.L.D. 1178.
138. N.J.A.C. 6:3-6.3.
139. N.J.S.A. 18A:36-25.1(b).
140. N.J.S.A. 18A:36-19a.
141. *K.B. v. Greater Egg Harbour Reg'l High Sch. and Bd. of Educ.*, 96 N.J.A.R.2d (EDU) 594.
142. *Id.*
143. N.J.A.C. 6:3-6.7.
144. N.J.S.A. 18A:6-1.
145. 42 U.S.C. §1983.
146. *Wood v. Strickland*, 95 S. Ct. 992, 1001 (1975).
147. 20 U.S.C. § 1400, et seq.
148. 20 U.S.C. § 1412(a)(1)(A)
149. 20 U.S.C. §§ 1412 (A)(14), 1453(c)(3)(D)(v).
150. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346 (a)(2)(D); N.J.A.C. 6A:14-3.7(c)(3).
151. 20 U.S.C. § 1415(k)(1)(B)(i); 34 C.F.R. § 300.520(b)(1)(i), (ii).
152. 20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a)(1); N.J.A.C. 6A:14-2.3(d), (f)(1), (2).
153. 20 U.S.C. § 1415(j); N.J.A.C. 6A:14:14-2.3(f)(2).
154. 20 U.S.C. § 1415(j).
155. 20 U.S.C. § 1415(k)(1)(A)(i); 34 C.F.R. § 300.520 (a)(1)(i).
156. 34 C.F.R. § 300.519; N.J.A.C. 6A:14-2.8(b).
157. N.J.A.C. 6A:14-2.8 (b)(2)(i).
158. See 34 C.F.R. § 300.501(a)(2)(granting parents the right to participate in a meeting with the school district with respect to the educational placement of the child and the provision of FAPE to the child).
159. N.J.A.C. 6A:14-2.8(a).
160. 34 C.F.R. § 300.121(d)(1); N.J.A.C. 6A:14-2.8(a)(1).

161. 34 C.F.R. § 300.520(a)(1).
162. 34 C.F.R. § 300.121(d)(2); N.J.A.C. 6A:14-2.8(d).
163. 34 C.F.R. § 300.121(d)(3)(I); N.J.A.C. 6A:14-2.8(d)(1).
164. 34 C.F.R. § 300.520(b)(2).
165. 34 C.F.R. § 300.520(b)(1)(ii).
166. 34 C.F.R. § 300.520(b)(1)(ii).
167. 20 U.S.C. § 1415(k)(1)(B)(i),(ii); 34 C.F.R. § 300.520 (b)(1),(2).
168. 20 U.S.C. § 1415(k)(4)(A); 34 C.F.R. § 300.523(a)(2).
169. 34 C.F.R. § 300.523(e).
170. *S-1 v. Turlington*, 635 F.2d 342 (4th Cir. 1981).
171. 29 U.S.C. § 794.
172. 20 U.S.C. § 1415(k)(4).
173. 34 C.F.R. § 300.523(a)(1).
174. 34 C.F.R. § 300.523(a)(2).
175. 34 C.F.R. § 300.523(b).
176. 34 C.F.R. § 300.523(c)(1).
177. 34 C.F.R. § 300.523(c)(2)(I)(iii).
178. 34 C.F.R. § 300.523(d).
179. 34 C.F.R. § 300.523(f).
180. 34 C.F.R. § 300.524(a).
181. 34 C.F.R. § 300.524(b).
182. 20 U.S.C. § 1412(a)(1)(A); N.J.A.C. 6A:14-1.1(b)(1).
183. 34 C.F.R. § 300.121(d)(3)(ii); N.J.A.C. 6A:14-1.1(d)(2).
184. 20 U.S.C. § 1415(k)(1)(A)(ii)(I)-(II); 34 C.F.R. § 300.520(a)(2)(I)(ii).
185. 20 U.S.C. § 1415(k)(10)(A), incorporating 21 U.S.C. § 812(c).
186. 20 U.S.C. § 1415(k)(10)(D), incorporating 18 U.S.C. § 930(g)(2).
187. 34 C.F.R. § 300.522(a).
188. 34 C.F.R. § 300.522(b)(1).
189. 34 C.F.R. § 300.522(b)(2).
190. 20 U.S.C. § 1415(k)(2)(A).
191. 20 U.S.C. § 1415(k)(2)(A)-(D); 34 C.F.R. § 300.521(a)-(d).
192. **Proving Substantially Likely to Cause Injury:**
 - a. *Light v. Parkway G-2 Sch. Dist.*, 41 F.3d 1223 (8th Cir. 1994) (test of whether there is a substantial risk of injury is an objective one; school district met test by documenting 11 to 19 aggressive acts per week over a two-year period, including biting, hitting, kicking, throwing objects).
 - b. *Texas Indep. Sch. Dist. v. Jorstad*, 752 F. Supp. 231, 238 (S.D. Tex. 1990) (court granted injunctive relief finding that student posed a “severe and on-going threat of imminent danger to himself and to others” and that the student behaved in a “virtually constant” manner that was dangerous to himself and others).
 - c. *Horry County Sch. Dist. v. PE*, 29 IDELR 354 (D.S.C. 1998) (student with “long history of self-injurious behavior and harm to others, including head-banging, rectal digging, biting, hurling of objects, hitting, kicking, clawing, spitting, overturning furniture, destroying property and making threatening statements, including threatening to kill staff and other students” was “presently, and ... at all times relevant to this proceeding, substantially likely to injure herself and others in a local school setting”).

- d. *School Dist. of Philadelphia v. Stephan M. and Theresa M.*, 25 IDELR 506, 508 (E.D. Pa. 1997) (school district failed to meet burden of proving substantially likely to cause injury where student had only one incident of misconduct — using a razor blade to cut the hand of another student who had provoked her — and no other record of disciplinary infractions).
- e. *Phoenixville Area Sch. Dist. v. Marquis B.*, 25 IDELR 452 (E.D. Pa. 1997) (hitting three other students and shoving principal against the wall in a three-month period, while “clearly not appropriate” did not “rise to the level of demonstrating a substantial likelihood of causing injury in the immediate future”).
- f. *Clinton County R-III Sch. Dist. v. C.J.K.*, 896 F. Supp. 948, 950 (W.D. Mo. 1995) (injunctive relief removing student denied where student made repeated threats of violence to school officials and other students, but never acted on threats).
- g. *M.P., by D.P. v. Governing Bd. of the Grossmont Union High Sch. Dist.*, 858 F. Supp. 1044, 1050 (S.D. Cal. 1994) (knocking down bookshelf, fighting with another student, throwing modeling clay, insubordination and bringing a gun to school [prior to 1997 IDEA amendments] were insufficient to demonstrate substantial likelihood of injury to self or others).
- h. *Cabot School Dist.*, 27 IDELR 304 (SEA Ark. 12/9/97) (a verbal threat to kill assistant principal did not meet standard of substantially likely to cause injury).
- i. *Scranton School Dist.*, 29 IDELR 133 (SEA Pa. 6/22/98) (aggressive acts, including threatening and foul language, throwing furniture, punching at teacher and throwing a box of Jell-O at teacher, never resulted in injury to anyone; therefore, district did not meet burden of proving substantially likely to cause injury).
- j. *East Orange Bd. of Educ. v. A.M.J. and A.N.J.*, OAL Dkt No. EDS 5115- 99 (May 11, 1999) (shouting obscenities, leaving class without permission, and kicking chairs, while clearly not appropriate, do not constitute physical threats or dangerousness).

Proving Reasonable Efforts to Minimize Risk of Harm:

- a. *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223 (8th Cir. 1994) (school district met burden of proving that it had done all it reasonably could do to reduce risk of injury where student was accompanied throughout the school day by one full-time teacher and a full-time teacher’s assistant, and extensive training and support had been provided to the teacher and aide, including assistance of inclusion facilitators, behavior management specialists, special education consultants, and crisis prevention trainers).

Appropriateness of Interim Alternative Educational Setting:

- a. *Oregon City Sch. Dist.*, 28 IDELR 96 (SEA Or. 4/23/98) (although district met burden of proving student substantially likely to cause injury, school district ordered to return student to his placement prior to removal because proposed interim placement, one-on-one instruction with virtually no contact with peers and other educators, did not meet IDEA requirements for an interim placement).
- b. *Hempfield Sch. Dist.*, 27 IDELR 406 (SEA Pa. 10/20/97) (hearing officer rejected interim setting because school district failed to prove that setting included services and modifications designed to address the “target behaviors”).
- c. *Palisade Park Bd. of Educ. v. J.M.*, OAL Dkt. No. EDS 9677-99 (September 17, 1999) (home instruction not an appropriate interim placement as it is “not designed as a dumping ground for children who are too disruptive to remain in mainstream classes”).

193. 20 U.S.C. § 1415(k)(8)(A); N.J.A.C. 6A:14-3.3(f); *Doe by Doe v. Bd. of Educ. of Elyria City Schs.*, 28 IDELR 286 (6th Cir. 1998).

194. 20 U.S.C. § 1415(k)(8)(B)(i)-(iv); 34 C.F.R. § 300.527(b)(1)-(4).
195. 34 C.F.R. § 300.527(c).
196. 20 U.S.C. § 1415(k)(8)(C)(ii); 34 C.F.R. 300.527(d)(2)(ii).
197. 34 C.F.R. § 300.527(d)(2)(ii).
198. 20 U.S.C. § 1412(a)(10)(B)(ii); 34 C.F.R. § 300.401(c); *B.H. v. Paterson Sch. Dist. and Windsor Academy*, OAL Dkt. No. EDS 1345-00 (February 4, 2000) (holding that OAL had jurisdiction over private school for children with disabilities, and private school was bound by procedural requirements of IDEA).
199. N.J.A.C. 6A:14-7.6(d).
200. *B.H. v. Paterson Sch. Dist. and Windsor Academy*, OAL Dkt. No. EDS 1345-00 (February 4, 2000).
201. 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).
202. 20 U.S.C. § 1415; 34 C.F.R. § 300.500 - 517; N.J.A.C. 6A:14-2.6, -2.7.
203. 20 U.S.C. § 1415(f); 34 C.F.R. §§ 300.509, 300.511; N.J.A.C. 6A:14-2.7(e).
204. 34 C.F.R. § 300.510(i)(1); N.J.A.C. 6A:14-2.7(f).
205. N.J.A.C. 6A:14-2.7(f).
206. N.J.A.C. 6A:14-2.7(n).
207. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.510(b); N.J.A.C. 6A:14-2.7(p).
208. N.J.A.C. 6A:14-2.7(g), (h).
209. 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.521.
210. 20 U.S.C. § 1415(b)(7); 34 C.F.R. § 300.507; N.J.A.C. 6A:14-2.7(c).
211. N.J.A.C. 6A:14-2.7(c).
212. N.J.A.C. 6A:14-2.7(h), (l).
213. N.J.A.C. 6A:14-2.7(m).
214. N.J.A.C. 6A:14-2.7(l).
215. N.J.A.C. 6A:14-2.7(l).
216. N.J.A.C. 6A:14-2.7(m) (1).
217. 20 U.S.C. § 1415(j).
218. *Honig v. Doe*, 108 S. Ct. 592, 605 (1988); *Drinker v. Colonial School Dist.*, 78 F.3d. 859, 864 (3d Cir. 1996).
219. N.J.A.C. 6A:14-2.7(m), (1).
220. 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.509(a), (b); N.J.A.C. 1:6A-10.1(d).
221. 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).
222. 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).
223. 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).
224. *Lascari v. Bd. of Educ.*, 116 N.J. 30 (1989); *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204 (3d Cir. 1993).
225. N.J.A.C. 1:6A-14.1(d).
226. 20 U.S.C. § 1415(f), -(i)(2)(A).
227. *See M.C. on behalf of J.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996).
228. *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995).
229. 34 C.F.R. § 300.524(c).
230. 20 U.S.C. § 1415(k)(7)(A); 34 C.F.R. § 300.526(a).
231. 20 U.S.C. § 1415(k)(7)(B); 34 C.F.R. § 300.526(b).
232. 34 C.F.R. § 300.526(c)(1)-(3).
233. 20 U.S.C. § 1415(f)(3); 34 C.F.R. § 300.508; N.J.A.C. 6A:14-2.7(a).
234. 34 C.F.R. § 300.511(d).
235. 20 U.S.C. § 1415(h)(3); 34 C.F.R. § 300.509(a)(4).
236. 20 U.S.C. § 1415(f)(2)(A); 34 C.F.R. § 300.509(b)(1).

- 237. 20 U.S.C. § 1415(h)(1); 34 C.F.R. § 300.509(a)(1).
- 238. 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.509(a)(2).
- 239. 20 U.S.C. § 1415(f)(2)(B); 34 C.F.R. § 300.509(b)(2).
- 240. 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.509(a)(2).
- 241. 20 U.S.C. § 1415(h)(4); 34 C.F.R. § 300.511(a); N.J.A.C. 6A:14-2.7(e).
- 242. N.J.A.C. 6A:14-2.7(f).

The New Jersey State Bar Foundation, founded in 1958 as the charitable and educational arm of the New Jersey State Bar Association, is an organization dedicated to promoting free law-related education and giving all New Jersey residents a basic understanding of the legal system. Programs sponsored by the Foundation include seminars on such topics as wills, landlord-tenant matters, divorce, special education, real estate, disability law and health issues. Dedicated to providing programs for children and teachers, the Foundation sponsors mock trial competitions for elementary, middle and high school students, and training sessions for teachers on conflict resolution and peer mediation, as well as teasing and bullying. For students, the Foundation publishes a legal newspaper for kids titled, *The Legal Eagle* and a newsletter promoting tolerance called, *Respect*. Both publications are produced three times a year.

Other publications published by the Foundation include *Law Points for Senior Citizens*; *Legal Consequences of Substance Abuse*; *AIDS and the Law in New Jersey*; *Disability Law: A Legal Primer* (fourth edition), cosponsored with the Essex County Bar Association; *Students' Rights Handbook*, cosponsored with the American Civil Liberties Union of New Jersey; and *You Have the Right! Your Rights as a Young Person in New Jersey*, cosponsored with the Association for Children of New Jersey. Some of these publications are available in Spanish and all are available in alternative formats for individuals with disabilities. For more information or copies of program materials, visit the Foundation online at www.njsbf.org or call 1-800 FREE LAW.

This publication is provided as a public education service to help explain laws in New Jersey. It does not constitute legal advice, which can only be given by an attorney.

This booklet is made possible with funding from the IOLTA Fund of the Bar of New Jersey.



Created and Written by the Education Law Center
60 Park Place, Suite 300
Newark, New Jersey 07102
(973) 624-1815
TTY: (973) 624-4618
Fax: (973) 624-7339
E mail: elc@edlawcenter.org
Web site: www.edlawcenter.org



Sponsored by the New Jersey State Bar Foundation
One Constitution Square
New Brunswick, New Jersey 08901-1520
1-800 FREE LAW • (732) 249-5000
Web site: www.njsbf.org