STUDENT DISCIPLINE GUIDE

CHAPTER 1 – STUDENT SUSPENSION PROCESS

Are there Constitutional Protections for Students Subject to Discipline?

The right to due process in disciplinary proceedings is applicable in all instances where the behavior of the student is being evaluated for possible suspension or expulsion.[i] The Fourteenth Amendment forbids the State from depriving any person of life, liberty, or property without due process of law.[ii] Students facing suspension are entitled to protection under this Due Process Clause because suspensions deprive students of two rights: a property interest in educational benefits which the State chose to provide with compulsory attendance laws, and a liberty interest in their reputations.[iii] The basic requirements of due process are notice and an opportunity to be heard.

The student shall always be treated with fundamental fairness, has a right to be fully informed about his/her alleged breach of behavior, and shall be provided with an opportunity to respond to such charges. The level of due process required is dependent upon the length of the suspension, generally a ten (10) day threshold. A short-term in-school suspension that does not exclude a student from the educational process, i.e. the student remains in the school setting and is required to complete academic requirements, may not require any procedural due process.[iv]

What are the Grounds for Suspension?

A principal's authority to suspend students is inherent in his/her responsibility for the operation of the school[v] and is also codified in statute. T.C.A. § 49-6-3401 requires "good and sufficient" reasons for suspension from attendance and provides a non-exhaustive list of qualifying offenses.[vi] Qualifying behavior may be any "conduct prejudicial to good order or discipline."[vii] Off campus behavior may be grounds for suspension if the student is legally charged, adjudicated delinquent, or convicted of a felony.[viii]

A principal may suspend a student from classes or activities without suspending them from school pursuant to an in-school suspension policy adopted by the Board. Good and sufficient grounds for in-school suspension include, but are not limited to, behavior that adversely affects safety and well-being of others, disrupts a school activity, or is prejudicial to good order and discipline in school.[ix] See Chapter 2 for further explanation of behaviors justifying suspension.

What About Short-Term or In-School Suspensions?

Most discipline problems not leading to long-term suspension (more than ten (10) days) or expulsion are resolved at the building level through an informal hearing involving the student, parent/guardian, and teacher or building administrator. Except in an emergency, the student shall be advised of the misconduct and allowed to give an explanation prior to suspension.[x] Any suspension other than an in-school suspension of one day or less requires a principal to notify the parent/guardian and the Director of Schools within twenty-four (24)

hours. The notice shall include the length (shall be less than ten (10) days for informal hearing), cause, and conditions of readmission, e.g. meeting with the parent(s)/guardian(s).[xi] If the suspension is more than five (5) days, the principal shall develop a plan for improving behavior.[xii]

What About Long-Term Suspensions?

Suspensions for more than ten (10) days require a higher level of due process. A principal may suspend a student unconditionally for a such a period of time or upon such terms and conditions they deem reasonable. A principal shall immediately notify the parent(s)/guardian(s) (oral or written) of the right to appeal the suspension. The student, parent/guardian, or teacher acting on the request of the student may then file an appeal with the school within five (5) days of said notice.

The appeal will be heard by the local Board or to a Disciplinary Hearing Authority (DHA). The statute does not specify who may determine whether the local Board or the DHA will hear the appeal. The local Board should adopt a policy requiring initial appeal to the DHA if it does not want to hear all appeals itself.

If appointed, the DHA shall consist of at least one licensed employee of the school district. The total number of members for the DHA should not exceed the number of members of the Board. The hearing shall be held no later than ten (10) days after the beginning of the suspension.[xiii] After the hearing, the local Board or the DHA, whichever hears the appeal, may affirm the suspension, remove it unconditionally or upon such terms and conditions it deems reasonable, assign the student to an alternative program, or suspend the student for a specified period of time.[xiv]

Formation and Operation of the DHA

The only requirements in state law regarding composition of the DHA are that the DHA consist of at least one licensed employee of the school district and that the total membership not exceed the number of members on the local Board. Based on State Board of Education Policy and TSBA model policy, we recommend as a best practice that the Director of Schools nominate DHA members to the Board for approval and that the Director selects a Chair to preside over the meetings. The Chair should be responsible for scheduling the hearing, maintaining order and structure of the hearing, and preparing the minutes. Board members should not serve on the DHA.[xv] Hearings should not be held with less than three (3) members of the DHA present.

At the outset of the meeting, the Chair should call the meeting to order. The DHA, the administration, and the student should introduce themselves on the record and in that order. The offense, proposed suspension, and date of appeal should be included in the record. The administrator will then present his case. It is not necessary to present witnesses or even disclose the source of statements. Remember, this is not an adversarial legal proceeding requiring conformity to the Tennessee Rules of Evidence. Although there are constitutional due process implications, courts have stopped short of construing the protection in this context as affording students a right to have counsel participate in the proceedings or the right to cross examination.[xvi] The student may have an attorney present, but the Board is not

required to allow attorney participation at the hearing.

DHA members can and should ask questions during the proceeding. After each side has presented their case, the Chair may adjourn for private deliberations or deliberate in the hearing room unless the student or parent/guardian has requested an open meeting. The DHA shall summarize the facts forming the basis of the decision, and such facts shall have been adduced at the hearing. Since student discipline information is protected under state and federal law, Boards should consult their local attorney to determine specifically how a hearing shall be conducted to protect the privacy rights of the student. Upon conclusion, the Chair will close the hearing.

Is the DHA Decision Subject to Appeal?

Yes. If the appeal is heard by the DHA, a written record of the hearing, including of the summary of the facts and reasons for the decisions, shall be made. The parent/guardian or student then has five (5) days to request review of the decision by the local Board, or the decision becomes final. The Board may grant or deny the request and may affirm or overturn the DHA decision with or without a hearing, provided that the Board may not impose a more severe penalty without an additional hearing. A disciplinary hearing before the Board is a closed meeting unless an open meeting is requested by the parent/guardian or student.[xvii]

What About Zero Tolerance Offenses?

Zero tolerance offenses require expulsion for not less than one year unless modified by the Director of Schools on a case-by-case basis and shall include possession of a firearm or controlled substance on school property and aggravated assault or assault resulting in bodily injury upon an employee of the school district. Expulsion for a zero tolerance offense does not prevent assignment of such students to an alternative school. Local Boards may include other zero tolerance offenses in its disciplinary policies and procedures.[xviii]

A student may appeal a zero tolerance offense in the same manner as other long-term suspensions. However, jurisdiction of the Board on appeal is limited to guilt or innocence and whether due process was followed, and it shall sustain or reverse the DHA on the record. In all other cases on appeal to the Board from the DHA, the Board may grant a hearing or decide it on the record.

Does TN Still Permit Corporal Punishment?

Yes. Any teacher or principal may use corporal punishment in a reasonable manner against any student for good cause in order to maintain discipline and order provided that the local Board had adopted a policy permitting the use of such punishment. If a student has a disability (has an IEP under IDEA), written permission of the parent/guardian is required. The principal shall notify the parent/guardian any time corporal punishment is used.[xix]

Miscellaneous Provisions

If a suspension occurs during the last ten (10) days of a semester, the student may take final exams and submit required work necessary to complete the course. Students under in-school suspension shall be included in attendance record.[xx] If a student is determined to have acted reasonably in self-defense or defense of another under imminent threat of death or serious bodily injury, then the principal may choose not to take any disciplinary action.[xxi]

CHAPTER 2 – DETERMINING WHETHER BEHAVIOR WARRANTS DISCIPLINE

T.C.A. § 49-6-3401 provides a non-exhaustive list of good and sufficient reasons for suspensions as follows:

- Willful and persistent violation of the rules of the school;
- Immoral or disreputable conduct or vulgar or profane language;
- Violence or threatened violence against the person of any personnel attending or assigned to any public school;
- Willful or malicious damage to real or personal property of the school or the property of any person attending or assigned to the school;
- Inciting, advising, or counseling of others to engage in any of the acts enumerated in subdivisions (a)(1)-(4);
- Marking, defacing, or destroying school property;
- Possession of a pistol, gun, or firearm on school property;
- Possession of a knife and other weapons, as defined in § 39-17-1301 on school property;
- Assaulting a principal, teacher, school bus driver, or other school personnel with vulgar, obscene, or threatening language;
- Unlawful use or possession of barbital or legend drugs, as defined in § 53-10-101;
- One (1) or more students initiating a physical attack on an individual student on school property or at a school activity, including travel to and from school or a school activity;
- Making a threat, including a false report, to use a bomb, dynamite, any other deadly explosive, or destructive device, including chemical weapons, on school property or at a school sponsored event; and
- Any other conduct prejudicial to good order or discipline in any public school.

The Student and Employee Safe Environment Act of 1996 requires each local Board to adopt a discipline policy to apply to students which shall be posted on its website. Each policy shall address:

- Language used by students;
- Respect for all school employees;
- Fighting, threats, bullying, cyberbullying, and hazing by students;
- Possession of weapons on school property or at school functions;

- Transmission by electronic device of any communication containing a credible threat to cause bodily injury or death to another student or school employee;
- Damage to the property or person of others;
- Misuse or destruction of school property;
- Sale, distribution, use, or being under the influence of drugs, alcohol, or drug paraphernalia;
- Student conduct on school property, conduct in classes, and conduct on school buses; and
- Other subjects that a local Board of Education chooses to include.[xxii]

School districts are free to adopt discipline policies and codes of conduct that expand upon these lists so long as the prohibited conduct can fairly be determined to be prejudicial to good order within the school. While the application of many of these statutory reasons to a particular situation may be clear, others are subject to differing interpretations and have resulted in court opinions that provide further explanation.

Freedom of Speech and Expression

Suspensions often arise in the context of student speech and expression that have First Amendment implications. Students do not shed their constitutional rights under the First Amendment to freedom of speech or expression at the schoolhouse gate.[xxiii] However, these rights often conflict with the comprehensive authority of school officials to control conduct in schools. Courts apply different legal standards depending on the circumstances in interpreting censorship or discipline that affect First Amendment rights.

First, school officials cannot censor student speech unless school officials reasonably forecast that the speech will cause material and substantial disruption of school activities or collide with the rights of another. Mere apprehension of disturbance is not enough to justify discipline. In *Tinker v. Des Moines*, students were suspended for refusing to remove black armbands worn in protest of the Vietnam war. The U.S. Supreme Court established the "material and substantial disruption" standard in ruling the suspension unconstitutional because school authorities had no reason to anticipate that wearing armbands would substantially interfere with the work of the school or infringe upon the rights of other students. [xxiv]

In *Melton v. Young*, the Sixth Circuit Court of Appeals applied the same standard in holding that a suspension resulting from wearing a Confederate flag patch did not violate the student's First Amendment rights when there was clearly a substantial disruption, i.e. the school was in fact closed on two occasions and much controversy had centered around the use of the Confederate flag as a school symbol. Notably, the Melton case was decided in 1969 amid heightened racial tensions.[xxv]

Second, Courts have upheld suspensions for language that is vulgar, lewd, and plainly offensive. In *Bethel Sch. Dist. v. Fraser*, the U.S. Supreme Court held that discipline for language used in a nominating speech at a student assembly did not violate the student's First Amendment rights when the language was offensively lewd and indecent and a disciplinary rule and warnings from teachers gave adequate notice that such speech would be subject to discipline.[xxvi]

In sum, if a school official is disciplining a student for exercising speech or expression, there should be a factually based determination that the behavior will disrupt school activities, interfere with the rights of others, or contain vulgar, lewd, and plainly offensive language. Discipline policies should include prohibitions of such language and clearly define the resulting disciplinary action.

Students and Tobacco

Vaping has become increasing common in schools across the state. Students often have the false impression that it is either not harmful or less harmful than smoking tobacco which is not the case. Vaping products often contain substantially more nicotine than traditional tobacco. Many of these products can also be filled with marijuana and other illegal drugs. Administrators have difficulty detecting use of vaping products as they are often vaporless and odorless and come in a variety of disguises, e.g. USB drives, functional pens, etc., making them easy to conceal.

The Prevention of Youth Access to Tobacco and Vapor Products Act makes it unlawful for a minor to possess a tobacco product which includes visible and non-visible vapor products.[xxvii] The tobacco product shall be seized as contraband at the time of issuance. The issuance of a citation does not impair the authority of the principal to impose other penalties when such possession violates school disciplinary policy or otherwise interferes with the order and discipline in school.[xxviii]

Harassment, Intimidation, and Bullying

School districts are required to have a policy prohibiting harassment, intimidation, bullying, and cyber-bullying.[xxix] Harassment, intimidation, or bullying is defined as any act that substantially interferes with a student's education, and if taken place on school grounds either (1) physically harms a student or their property, (2) places student in reasonable fear of such harm, (3) causes emotional distress, or (4) creates a hostile educational environment.[xxx] Action taken place off school property or outside of school activities may also violate the bullying policy if it is directed specifically at a student and has the effect of creating a hostile environment or disruption to the learning process.[xxxi] Cyber-bullying is any bullying undertaken through the use of electronic devices.

The bullying policy shall include the remedial action and procedure for reporting which can include anonymous reporting.[xxxii] The principal/designee shall initiate an investigation within forty-eight (48) hours and initiate appropriate intervention within twenty (20) days.[xxxiii] Annual notice of bullying policies to teachers and students is required. Any harassment, intimidation, and bullying shall be reported to the parent/guardian immediately.

Preventing bullying is clearly necessary for a healthy educational environment and student learning. Compliance with the bullying policy and procedures are also important to protect the Board. The school district can be held liable for damages resulting from an assault if it is aware of the harassment or bullying and fails to undertake appropriate intervention. In *Moore v. Houston County Bd. of Educ.*, the Court of Appeals found the Board liable when administrators failed to follow the district's bullying policy (insufficient investigation) and

the attack was reasonably foreseeable based on the information reported to administrators. In that case, the action was deemed foreseeable even when the bully was not the one that actually inflicted the injury.[xxxiv] The law does not impose a legal duty upon teachers and school districts to anticipate and foresee the hundreds of unexpected student acts that occur daily in our public schools; however, there is a legal duty of safeguarding students from reasonably foreseeable dangerous conditions including dangerous acts of fellow students.[xxxv]

Government entities, including Boards, are immune from suit for any injury that may result from its activities.[xxxvi] The immunity is removed for an injury proximately caused by a negligent act of any employee within the scope of employment unless the injury arises out of the performance or failure to perform a discretionary function.[xxxvii] Decisions that rise to the level of planning or policy-making are considered discretionary acts requiring judicial restraint and do not give rise to tort liability, while decisions that are merely operational do give rise to tort liability.[xxxviii] Merely implementing preexisting policies and regulations are considered to be operational in nature. Generally, administrators charged with implementing existing policy are not exercising a discretionary function, and thus, a Board can be held liable for damage resulting from failure to properly implement or follow policy.[xxxix] Administrators should be aware of the potential liability of the school district and the importance of following all bullying procedures.

Reckless Endangerment

School districts may choose to impose heightened discipline, e.g. suspension for greater than ten (10) days, when behavior amounts to reckless endangerment. Generally, a person can be found to have violated the rule proscribing reckless endangerment if the person is aware of, but consciously disregards, the possibility that his or her conduct may create a substantial risk of death or serious injury to another person. These cases often involve the use of an automobile on school grounds. Districts should be cognizant of situations with an inherent risk of serious injury, particularly student use of vehicles, and include such language in their discipline policies.[xl]

Students with Disabilities

Students with a disability and an Individualized Education Program (IEP) are afforded certain procedural protections under the Individuals with Disabilities Education Act (IDEA). An IEP is the primary mechanism for assuring that a disabled student receives a free appropriate public education – the purpose of IDEA. IDEA does not eliminate a school's ability to discipline disabled students for their misbehavior, but it does create additional procedural safeguards.

Pursuant to IDEA, if a student with a disability is removed from the classroom for longer than ten (10) consecutive days for disciplinary reasons, the school shall conduct a manifestation determination to determine whether the behavior resulted from the disability or whether it resulted from a failure to implement the student's IEP. Within ten (10) school days of a change of placement due to violation of code of conduct, the school district, parent/guardian, and IEP team shall review all relevant information to determine (1) if there was a direct and substantial relationship between the conduct and disability or (2) if the

conduct was the result of the school district's failure to implement the IEP. If the answer to either of these questions is affirmative, the conduct is determined to be a manifestation of the disability, and the IEP team and the school district shall follow additional procedural requirements in 20 U.S.C.A. § 1451, including conducting a functional behavioral assessment and implementing a behavioral intervention plan. If the conduct is not a manifestation of the disability, then the relevant disciplinary procedures for students without a disability should apply. [xli]

Discrimination

The principal of each school shall apply the code of conduct uniformly and fairly to each student at the school without partiality or discrimination.[xlii] Each local Board of Education may choose to adopt different but consistent discipline policies or codes of conduct to apply to different classes of schools, such as elementary, middle, junior high, and senior high schools under its jurisdiction. The policies and codes of conduct shall be uniform to the extent of maximum consideration for the safety and well-being of students and employees.[xliii]

Closing

Every teacher is authorized to hold every student accountable for any disorderly conduct which authority extends to all school activities.[xliv] A school employee, in exercising lawful authority, may use reasonable force when necessary under the circumstances to correct or restrain a student or prevent bodily harm to another and enjoys immunity from civil liability in an action resulting from any harm in doing so.[xlv] Although decisions of local school officials are afforded a presumption of good faith[xlvi], teachers and administrators shall closely follow school discipline policies to ensure compliance with the law.

ENDNOTES

[i] *Goss v. Lopez,* 419 U.S. 565 (1975).
[ii] U.S. Const. amend. XIV, § 1.
[iii] *Goss v. Lopez,* 419 U.S. 565, 581 (1975).
[iv] *Laney v. Farley*, 501 F.3d 577 (6th Cir. 2007).
[v] *Carter v. Taylor*, 409 F. Supp. 1162 (E.D. Tenn. 1975).
[vi] T.C.A. § 49-6-3401(a)
[vii] T.C.A. § 49-6-3401(a)(13)
[viii] T.C.A. § 49-6-3401(a)(14)
[ix] T.C.A. § 49-6-3401(b)(1)
[x] T.C.A. § 49-6-3401(c)(1)
[xi] T.C.A. § 49-6-3401(c)(2)
[xii] T.C.A. § 49-6-3401(c)(3)
[xiii] T.C.A. § 49-6-3401(c)(4)
[xiv] T.C.A. § 49-6-3401(c)(5)
[xv] TN State Board of Education Policy 6.317
[xvi] *Goss v. Lopez,* 419 U.S. 565 (1975).
[xvii] T.C.A. § 49-6-3401(c)(6)
[xviii] T.C.A. § 49-6-3401(g)
[xix] T.C.A. § 49-6-4103
[xx] T.C.A. § 49-6-3401(d)
[xxi] T.C.A. § 49-6-3401(i)
[xxii] T.C.A. § 49-6-4002
[xxiii] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)
[xxiv] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)
[xxv] *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972)
[xxvi] *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)
[xxvii] T.C.A. § 39-17-1501 et. seq.
[xxviii] Tenn. Op. Att'y Gen. No. 00-110 (June 20, 2000)
[xxix] T.C.A. § 49-6-4503
[xxx] T.C.A. § 49-6-4502
[xxxi] T.C.A. § 49-6-4502
[xxxii] T.C.A. § 49-6-4503(b)(4-5)
[xxxiii] T.C.A. § 49-6-4503
[xxxiv] *Moore v. Houston Cty. Bd. of Educ.*, 358 S.W.3d 612, 616 (Tenn. Ct. App. 2011)
[xxxv] *Mason v. Metro Gov't of Nashville*, 189 S.W.3d 217 (Tenn.Ct.App.2005)
[xxxvi] T.C.A. § 29-20-201
[xxxvii] T.C.A. § 29-20-205
[xxxviii] *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73 (Tenn. 2001)
[xxxix] *Moore v. Houston Cty. Bd. of Educ.*, 358 S.W.3d 612, 616 (Tenn. Ct. App. 2011)
[xl] *Heyne v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715, 739–40 (Tenn. 2012)
[xli] 20 U.S.C. § 1415(k)(1)
[xlii] T.C.A. § 49-6-4004
[xliii] T.C.A. § 49-6-4005
[xliv] T.C.A. § 49-6-4102
[xlv] T.C.A. § 49-6-4107; § 49-6-4006
[xlvi] *Link v. Metro. Nashville Bd. of Pub. Educ.*, No. M2013-00422-COA-R3CV, 2013 WL 6762393, at *6 (Tenn. Ct. App. Dec. 19, 2013)