



**FAIRNESS IN SCHOOL DISCIPLINE
IN PENNSYLVANIA:**

**A GUIDE FOR ATTORNEYS AND ADVOCATES
WHO REPRESENT STUDENTS**

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I. INTRODUCTION

A. Overview

This handbook discusses the law on school discipline in Pennsylvania, which derives from the United States and Pennsylvania Constitutions; federal and state statutes, regulations, and case law; and policies of the Pennsylvania Department of Education, school districts, and individual schools. We focus on the following topics:

- The behavior that can result in school discipline, and the types of punishments that can be imposed.
- Disciplinary procedures at the school and district level.
- Judicial review of disciplinary action.
- Special considerations for students with disabilities.
- Related issues: search and seizure, self-incrimination.

In discussing these issues, we have provided a sampling of important case law as well as constitutional statutory and regulatory citations. However, this handbook is not a comprehensive inventory of all cases decided on these subjects. Our purpose here is simply to point the attorney representing a student in useful directions.

Also, because our focus is on representing the student in a disciplinary *case*, we do not discuss ways in which the law can be used to help *prevent* disciplinary situations from arising. Thus, for example, the issue of how to use special education law to ensure that a student with behavior problems learns more acceptable behavior is beyond our scope. However, the Education Law Center has information available on some of these issues; *see* ELC's website at www.elc-pa.org.

B. A “roadmap” for the student’s attorney in a disciplinary case

Some readers may wish to turn at this point to Appendix A, where we provide a list of questions that the attorney may wish to consider in analyzing a discipline case. All of the questions are discussed in detail in this handbook, in more or less (though not precisely) the order that they appear in Appendix A. Again, this “roadmap” is meant as a general guide, and is not exhaustive.

C. The players: school boards, districts, charter schools, approved private schools, the State Board of Education, and the State Department of Education

In Pennsylvania, *school boards* are the elected or appointed officials who govern each of the state’s 501 *school districts*. Thus, they have overall authority over the disciplinary process. They also have certain non-delegable responsibilities in the process, including the duty to adopt disciplinary rules and the duty to decide expulsion cases.

Most other powers and duties are typically delegated by school boards to school officials, such as superintendents and principals. In this handbook, we focus on the role of school boards when it is important to do so; more often, however, we simply refer generically to “school districts” or “school officials.”

Pennsylvania also has public schools that serve more than one school district, including some *area vocational-technical schools* and *joint schools*. These schools have their own school boards, and operate by the same rules, with respect to student discipline, as other public schools and districts.

In addition, Pennsylvania has many public *charter schools*, which function essentially as one-school districts and are governed by their own boards. With respect to school discipline, charter schools are subject to most of the same legal requirements as traditional public schools. Federal and state constitutional provisions, and federal statutory law, make no distinctions for charter schools in this regard. In addition, the state Charter School Law, 24 P.S. §§ 17-1732-A and 17-1749-A, makes clear that most of the key state-law provisions on discipline – 24 P.S. §§ 5-510, 13-1317,

13-1317.2, and 1318, as well as 22 Pa. Code Ch. 12 – apply equally to charter schools.¹

The state Charter School Law does exempt charters from the requirements of 22 Pa. Code Chs. 14 (special education) and 15 (protected handicapped students). However, this exemption is not as significant as it may appear; Pennsylvania amended the law in 2008 to ensure that charter schools and cyber charter schools are in compliance with federal regulations concerning discipline of students with disabilities, as required for receipt of federal funds. 22 Pa. Code § 711.61 (for more information, *see* Section V). Charters are also exempt from 24 P.S. § 5-511, pertaining to school athletics, publications, and extra-curricular organizations.

Some students with disabilities are placed by their school districts in *approved private schools* (or, occasionally, other private schools). In this situation, the student’s home district retains responsibility for his or her education, including the duty to comply with state and federal law concerning school discipline. Approved private schools are also prohibited from suspending or expelling a student without complying with these legal requirements. 22 Pa. Code § 171.18.

Two other players require mention. The *State Board of Education* promulgates regulations, codified at Title 22 of the Pennsylvania Code of Regulations. These include regulations on school discipline, most of which are discussed below. The *State Department of Education* administers the state’s public education system. Although the Department has no direct role in the disciplinary process, the Department does issue “Basic Education Circulars,” which contain its interpretations of applicable legal requirements in various areas. A few of these “BECs” relate to discipline and are discussed below.

¹ For some reason, “cyber-charters” – which “deliver a significant portion of instruction ... through the Internet or other electronic means,” 24 P.S. § 17-1703-A – are not subject to § 13-1317 but they are subject to §§ 13-1317.2, 13-1318, and 22 Pa. Code Ch. 12. 24 P.S. § 17-1749-A.

D. English language learners

Pennsylvania has a growing population of students and families whose native language is not English (“English language learners”). Obviously, these students have the same rights as all other children in the disciplinary process. In addition, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 34 C.F.R. Part 100, prohibiting discrimination based on national origin, is interpreted by the Office for Civil Rights of the U.S. Department of Education as requiring that schools provide non-English-speaking parents with adequate notice concerning school programs and activities, presumably including disciplinary procedures.² *See also* 20 U.S.C. § 1703(f) (obligation of schools to remove language barriers). The Pennsylvania Department of Education has underscored this obligation in its Basic Education Circular, *Educating Students With Limited English Proficiency (LEP) and English Language Learners (ELL)*, in the section entitled “Communication with Parents.”³

Thus, a school’s failure to make its rules available in a language that the student understands could provide a basis for challenging disciplinary action. The same is true of a school’s failure to translate important disciplinary notices, or to provide interpreter services, if needed, at disciplinary hearings.

Further, for students eligible for special education, federal law specifically requires that all notices to parents (including required notices in the disciplinary context) are provided in the parent’s native language, unless this is clearly not feasible. 20 U.S.C. § 1415(b)(4).

² *See, e.g.*, <http://www.ed.gov/about/offices/list/ocr/eeolep/index.html> (last visited September 14, 2009).

³ *Available at* [http://www.portal.state.pa.us/portal/server.pt/community/pa_codes/7501/educating_students_with_limited_english_proficiency_\(lep\)_and_english_language_learners_\(ell\)/507356](http://www.portal.state.pa.us/portal/server.pt/community/pa_codes/7501/educating_students_with_limited_english_proficiency_(lep)_and_english_language_learners_(ell)/507356) (last visited April 07, 2010).

II. BEHAVIOR THAT CAN RESULT IN SCHOOL DISCIPLINE, AND PUNISHMENTS THAT CAN BE IMPOSED

A. In general, school boards have broad authority to decide what behavior will lead to discipline, and to impose suspension, expulsion, transfer, and other punishments

Under state law, school boards have considerable power to regulate student conduct. The major statutory provisions are 24 P.S. §§ 5-510, 13-1317, and 13-1318, which provide:

24 P.S. § 5-510. The board of school directors in any school district may adopt and enforce such reasonable rules and regulations as it may deem necessary and proper, regarding the management of its school affairs and the conduct and deportment of all superintendents, teachers, and other appointees or employees during the time they are engaged in their duties to the district, as well as regarding the conduct and deportment of all pupils attending the public schools in the district, during such time as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school....

24 P.S. § 13-1317. Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

24 P.S. § 13-1318. Every principal or teacher in charge of a public school may temporarily suspend any pupil on account of disobedience or misconduct, and any principal or teacher suspending any pupil shall promptly notify the district superintendent or secretary of the board of school directors. The board may, after a proper hearing, suspend such child for such time as it may determine, or may permanently expel him....

In addition, two statutes authorize school districts to establish “alternative education programs for disruptive students,” and to transfer students to those programs. 24 P.S. §§ 19-1901-C *et seq.*, 19-1901-E *et seq.* Such transfers are authorized only for students at the middle and high school level; elementary students are not included. 24 P.S. § 19-1901-C(6); *Bender v. Exeter Township School District*, 63 Pa. D.&C. 4th 414, 425-6 (Berks Co. Ct. C. P.), *aff’d mem.*, 839 A.2d 486 (Pa. Commw. Ct. 2003).

Finally, 24 P.S. § 5-511 empowers school boards to regulate school athletics, publications, and organizations, and to “provide for the suspension, dismissal, or other reasonable penalty” for violations.

State regulations further elaborate on the types of punishments that can be imposed. *See* Appendix B for full regulatory language.

- Suspension is exclusion from school for a period of one to 10 consecutive school days. 22 Pa. Code § 12.6(b)(1).
- In-school suspension is exclusion from classes but not from school. The regulations contain no time limit. 22 Pa. Code § 12.7.
- Expulsion is “exclusion from school by the board of education for a period exceeding 10 school days and may be permanent expulsion from the school rolls.” 22 Pa. Code § 12.6(b)(2).

While suspension, expulsion and transfer to an alternative program for disruptive students are specifically authorized by law, they are probably not the *only* punishments that can be imposed. The general grant of authority to the school board to “enforce such reasonable rules and regulations as it may deem necessary and proper, ... regarding the conduct and deportment of all pupils,” 24 P.S. § 5-510, has been read to include punishments other than those specifically enumerated. *Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117, 121 (Pa. Commw. Ct. 2000) (exclusion from graduation ceremony). And another statute – 24 P.S. § 5-511, relating to extracurricular activities – expressly authorizes “other reasonable penalt[ies]” as well as suspension and expulsion.

For all of these reasons, it is often stated, and certainly true, that school boards have broad discretion to determine disciplinary policies and punishments. *Hamilton v. Unionville-Chadds Ford School District*, 714 A.2d 1012, 1014 (Pa. 1998). However, this discretion is subject to a number of limitations, which are discussed in the following section.

B. The broad authority of school boards is limited in a number of respects

1. The denial of a diploma and corporal punishment are prohibited

Two types of punishment, denial of a diploma and corporal punishment, are prohibited in Pennsylvania schools.

Under 24 P.S. § 16-1613, schools must award a diploma to each student who satisfactorily completes his studies. Therefore, schools lack authority to withhold a diploma as punishment. *Ream v. Centennial School District*, 765 A.2d 1195, 1197 (Pa. Commw. Ct. 2001); *Shuman v. Cumberland Valley School District Board of Directors*, 536 A.2d 490, 492 (Pa. Commw. Ct. 1988).

Corporal punishment is explicitly prohibited under all circumstances. 22 Pa. Code § 12.5(a). Teachers may use force under certain situations, for example, to stop a fight or in self-defense. *Id.* at 12.5(b).

2. Weapons offenses must be punished

In one major area, the law *requires*, subject to certain exceptions, that discipline be imposed. Under 24 P.S. § 13-1317.2 (often referred to as “Act 26”), schools must expel for at least one year any student who possesses a weapon in school, at a school function, or on “any public conveyance providing transportation to a school or school-sponsored activity.” The term “weapon” includes, but is not limited to, “any knife, cutting instrument, cutting tool, nunchaku, firearm, shotgun, rifle, and any other tool, instrument or implement capable of inflicting serious bodily injury.” 24 P.S. § 13-1317.2(g).

Clearly, then, school boards must prohibit the possession of the weapons specifically listed in Act 26 (and must do so via written school rules, as discussed in the next section). Less clear is the question of what items other than those actually named are “capable of inflicting serious bodily injury” and therefore included within the scope of the statute. Often, school boards resolve this problem by simply repeating the statutory language, *i.e.*, prohibiting the possession of any item that is capable of inflicting serious injury. As a result, students have been punished under Act 26 for possessing implements such as nail files and even pencils. In *Picone v. Bangor Area School District*, 936 A. 2d. 556 (Pa. Commw. Ct. 2007), a student was expelled for using a soft air pellet gun, and argued that the pellet gun was not a weapon under Act 26 because his actions did not evidence intent to inflict serious bodily injury. The court rejected his argument that the weapons definition should include intent and the manner in which an object is used, holding that as long as the object was “capable of inflicting serious injury,” it was a weapon. There are, as of yet, no court decisions determining whether Act 26 or any specific district’s weapons code might in some circumstances be void for vagueness (see subsection 5, below).

Act 26 does exclude from coverage any weapon that is being used as part of a school-sanctioned program, as well as any weapon that is “unloaded and is possessed by an individual while traversing school property” on the way to a hunting area, with school permission. 24 P.S. § 13-1317.2(d). In addition, one Pennsylvania court has held that a replica of a weapon – in that instance a firearm – is not a weapon. *G.S. v. West Shore School District*, 28 Pa. D. & C. 4th 465, 471 (Cumberland County Ct. C.P. 1993). However, this case was decided prior to Act 26, and the expulsion was upheld on other grounds.

Act 26 contains another important exception, which is that “the superintendent of a school district or an administrative director of an area vocational-technical school may recommend modifications of such expulsion requirements [*i.e.*, the one-year expulsion requirement] on a case-by-case basis.” 24 P.S. § 13-1317.2(c). *See, e.g., Picone v. Bangor Area School District*, 936 A. 2d. 556 (Pa. Commw. Ct. 2007) (reduction of one-year expulsion to one marking period by Superintendent). This provision is an important safety valve in an otherwise rigid scheme, and it has been enforced by the courts. *Lyons v. Penn Hills School District*, 723 A.2d 1073 (Pa. Commw. Ct. 1999) (overturning expulsion because school board’s

“zero tolerance” policy denied the superintendent and board the right to exercise discretion).

3. *Prohibited behavior and possible punishments must be set forth in published school rules*

State law requires that school boards “adopt a code of student conduct which shall include policies governing student discipline and a listing of students’ rights and responsibilities as outlined in this chapter.” 22 Pa. Code § 12.3(c); *and see* § 12.6 (board must “define and publish the types of offenses that would lead to exclusion from school”). Although the statutes and regulations say that rules must be adopted by school “boards,” the Pennsylvania Supreme Court has held that individual schools can also promulgate rules, at least so long as they are not inconsistent with those of the board. *Hamilton v. Unionville-Chadds Ford School District*, 714 A.2d 1012, 1015 (Pa. 1998).

Under 22 Pa. Code §§ 12.3(c) and 12.6, school rules must be published and distributed to students and parents, and available in the school library. By strong implication, therefore, school districts can punish only that behavior that has, in fact, been prohibited by published rules. To be sure, the applicable statute and regulations do not literally say this, and there seems to be no case law exactly on point – probably because, given basic concepts of Due Process, the proposition is so obvious that it is assumed. In *Hamilton*, for example, the state Supreme Court clearly assumed that, in order to uphold the expulsion, it was necessary to find that the behavior in question was covered by a school rule. *See also Schmader v. Warren County School District*, 808 A.2d 596, 599 (Pa. Commw. Ct. 2002). In summary, if no rule prohibiting the behavior in question has been promulgated, a challenge to disciplinary action is likely to succeed.

Further, since the published rules must “include policies governing student discipline,” it seems reasonable to argue that the rules must define the possible punishments as well as the activities for which punishment may be imposed. (The Pennsylvania Supreme Court appears to have assumed as much in *Hamilton*, where the student argued that he was subject to two sets of rules that prescribed different punishments for the same offense.) However, in *M.T. for A.T. v. Central York School District*, the Commonwealth Court held that a student who violated the school’s computer use policy could be expelled for the year even though the

District's Code of Conduct stated that a violation of the computer use policy would result in the denial of computer privileges or, at a maximum, a ten day suspension. 937 A. 2d 538 (Pa. Commw. Ct. 2007), *appeal denied*, 597 Pa. 723 (Pa. 2008). The Court relied on other language in the Code which stated that the suggested punishments listed in the Code were only a guide and that an individual case could warrant a modification of the listed penalties.

4. *Rules and disciplinary actions must be reasonable, and must not be arbitrary or capricious*

Under 24 Pa. Code § 5-510, school rules must be reasonable. State regulations elaborate on this requirement, 22 Pa. Code § 12.3(b):

Governing boards may not make rules that are arbitrary, capricious or outside their grant of authority from the General Assembly. A rule is generally considered reasonable if it uses a rational means of accomplishing some legitimate school purpose.

Thus, school rules and disciplinary action taken under them may be subject to challenge on the ground that it was unreasonable (or “arbitrary and capricious”) for the district to prohibit the behavior in question, or that an unreasonable punishment was imposed. Examples of cases applying this principle are *Katzman v. Cumberland Valley School District*, 479 A.2d 671, 675 (Pa. Commw. Ct. 1984) (unreasonable to reduce student's grades for entire marking period as punishment for her having drunk a glass of wine while on school trip, because punishment misrepresented her academic achievement); *Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117, 121 (Pa. Commw. Ct. 2000) (exclusion from graduation ceremony not arbitrary or capricious where student had consumed alcohol at school prom); *Bender v. Exeter Township School District*, 63 Pa. D.&C. 4th 414, 425 (Berks Co. Ct. C. P.), *aff'd mem.*, 839 A.2d 486 (Pa. Commw. Ct. 2003) (transfer to alternative school for minor misbehavior was arbitrary and capricious); *Rudi v. Big Beaver Falls Area School District*, 74 Pa. D. & C.2d 790, 792 (Beaver Co. Ct. C.P. 1976) (expulsion was excessive punishment for vandalism of a school building other than that attended by students, where students had already served forty days' suspension).

5. *School rules must not be unconstitutionally vague*

The Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes an additional requirement: school rules must not be impermissibly vague—that is, they must give a person adequate warning that his conduct is prohibited, and they must set out adequate standards to prevent arbitrary and discriminatory enforcement. *Chicago v. Morales*, 527 U.S. 41, 56 (1999). A rule may be either vague on its face – *i.e.*, “impermissibly vague in all of its applications,” *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982) – or vague as applied to a particular set of facts. And while the United States Supreme Court has held that school rules “need not be as detailed as a criminal code,” *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 686 (1986), courts in Pennsylvania and many other states have occasionally held rules void for vagueness.

Recent applications of the vagueness requirement in Pennsylvania include *Schmader v. Warren County School District*, 808 A.2d 596, 600 (Pa. Commw. Ct. 2002) (prohibition against “behavior that may be harmful to others” not vague as applied to child who failed to inform school authorities of a danger); *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446, 459 (W.D. Pa. 2001) (rule prohibiting “verbal/written abuse of a staff member” held unconstitutionally vague); *Brian A. v. Stroudsburg Area School District*, 141 F.Supp.2d 502, 511 (M.D. Pa. 2001) (requirement to “conform to reasonable standards of socially acceptable behavior” and to “respect the rights, person and property of others” not vague as applied to student who made bomb threat); and *J.S. v. Blue Mountain School District*, 2008 WL 4279517 (M.D.Pa. Sept. 11, 2008), *argued*, No. 08-4138 (3rd Cir. June 10, 2009) (*appeal pending*) (policy that applies “during those times when students are under the direct control and supervision of school district officials” is sufficiently narrow). For an example of a case from another jurisdiction in which a rule concerning off-grounds misbehavior was held unconstitutionally vague, see *Packer v. Board of Education of the Town of Thomaston*, 717 A.2d 117 (Conn. 1998).

Although the two concepts sometimes arise in the same case and seem to run together, it is helpful to distinguish *vagueness* – a Due Process concept – from *overbreadth*, which involves the right to freedom of expression under the First Amendment. Overbreadth is discussed in subsection 7f, below.

6. *Rules may not exceed the authority conferred on districts by state statute*

School districts have sometimes argued that they have “inherent” powers, and that unless a statute expressly forbids a district from adopting a particular policy, it may adopt the policy. However, the courts have rejected this argument, holding that districts have only the powers granted them expressly or by necessary implication, and that these powers may not be exceeded “regardless how worthy the purported goal.” *Barth v. School District of Philadelphia*, 143 A.2d 909, 911 (Pa. 1958); *Giacomucci v. Southeast Delco School District*, 742 A.2d 1165, 1174 (Pa. Commw. Ct. 1999). This principle applies to the area of school discipline, *Hoke v. Elizabethtown Area School District*, 833 A.2d 304, 310 (Pa. Commw. Ct. 2003).

The courts have applied this principle, or something resembling it, to a number of disciplinary fact patterns – not always with consistent results. We describe some of these fact patterns below.

a. *Punishment for misconduct that occurred before the student enrolled in the district*

In *Hoke*, the district’s policy provided that, if a student sought to enroll in the district after having been expelled by another public or private school, “full faith and credit” would be given to the expulsion. *Hoke*, 833 A.2d at 307. Also, if the student had withdrawn from a previous school in order to avoid expulsion, the district would hold a hearing to determine whether it should impose punishment. *Id.* at 308. The Commonwealth Court held that, in view of 24 P.S. § 5-510 (empowering school districts to regulate conduct of students “during such time as they are under the supervision of the board of school directors”) and § 13-1317 (“during the time they are in attendance”), the district did not have statutory authority to discipline a student for behavior that occurred before he enrolled in the district. *Id.* at 310.

As the *Hoke* court noted, however, there is one situation in which the legislature *has* expressly authorized a school district to impose discipline for misbehavior occurring before the child was enrolled in the district. Under 24 P.S. § 13-1317.2(e.1):

A school district receiving a student who transfers from a public or private school during a period of expulsion for an act or offense involving a weapon may assign that student to an alternative assignment or provide alternative education services, provided that the assignment may not exceed the period of expulsion. *Id.* at 317.

Obviously, this provision applies only to situations in which the student was actually expelled by a prior school; and it is not exactly a “full faith and credit” provision, since it does not authorize the new district to exclude the child from school entirely. It does, however, allow the district to place the student in an alternative program.

b. Misconduct en route to or from school

Unlike misconduct that occurs before the student enrolls in the district, misconduct occurring on the way to or from school is expressly made subject to school discipline. 24 P.S. §§ 5-510, 13-1317. Thus, students who smoked marijuana on the school bus could be punished. *Abremski v. Southeastern School District*, 421 A.2d 485, 488 (Pa. Commw. Ct. 1980).

It is, of course, possible to imagine cases in which there could be a debate over whether the student was actually on the way to or from school – for example, a situation in which a student left school and stopped over at a friend’s house on the way home.

c. Activity that occurs off school grounds and/or outside of school hours

Still evolving are the principles that apply when a district seeks to punish a student for activity that occurs off school grounds, and/or outside of school hours. The current state of the law might be summarized as follows.

- Off-grounds and/or off-hours misconduct that also involves in-school misbehavior can be punished.

- Off-grounds and/or off-hours misconduct that occurs at a school-sponsored event can be punished.
- Off-grounds and/or off-hours misconduct that has a substantial impact on the school program or property *may* be punishable – but the cases are divided.
- Punishment for off-grounds and/or off-hours misconduct that has no demonstrable connection to the school program or property has not been upheld in any recent cases. The *Hoke* decision provides support for the argument that such behavior is not subject to school discipline.

(i) *Misbehavior that occurs off-grounds and/or outside of school hours, but that is accompanied by in-school misconduct.* Where there is in-school misconduct, punishment can be imposed, even if some misconduct also occurred off grounds or outside of school hours. The cases include *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002) (discipline upheld where student created offensive website off grounds, but accessed it while at school, creating “an upheaval” among staff and students there); *Schmader v. Warren County School District*, 808 A.2d 596 (Pa. Commw. Ct. 2002) (child A, outside of school, gave a dart to child B, who said he wanted to use it to hurt another student; discipline was allowed against child A for failing, once he got to school, to warn school authorities of danger); *Giles v. Brookville Area School District*, 669 A.2d 1079 (Pa. Commw. Ct. 1995) (upholding discipline where agreement to make a drug sale was made on grounds, though the actual sale took place off campus); and *J.S. v. Blue Mountain School District*, 2008 WL 4279517 (M.D.Pa. Sept. 11, 2008), *argued*, No. 08-4138 (3rd Cir. June 10, 2009) (*appeal pending*) (affirming expulsion for an offensive website created off grounds that “had an effect on campus”). But in *Layshock*, the school could not punish the student for the off-grounds creation of a website accessed at school, as that Court held both that the website created much less disruption in school than the one in *J.S. v. Bethlehem* and that “[t]he mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web.” *Layshock v. Hermitage School Dist.*, 496 F.Supp.2d 587, 597 (W.D. Pa. 2007), *argued*, No. 07-4465 (3rd Cir. Dec. 10, 2008) (*appeal pending*).

(ii) *Misbehavior at a school-sponsored event.* Because the School Code allows schools to regulate behavior “during such time as [pupils] are under the supervision of the board of school directors,” 24 P.S. § 5-510, it seems clear that misbehavior at a school-sponsored event is punishable – even if the event occurs off grounds and/or after school hours. Examples of such cases are *Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117 (Pa. Commw. Ct. 2000) (drinking at school prom); *Katzman v. Cumberland Valley School District*, 479 A.2d 671 (Pa. Commw. Ct. 1984) (punishment reversed as unreasonable, but court appeared to assume that some punishment could be imposed for drinking on school field trip); and see *Westhafer v. Cumberland Valley School District*, No. 2000-8799 (Cumberland Co. Ct. C. P., Jan. 10, 2001) (hazing of another student at summer wrestling camp that, while not specifically school-sponsored, was attended by students “as part of [district’s] wrestling team” could be punished).

Students arriving at school-sponsored events are also considered under the board’s supervision. See *Billman v. Big Spring School District*, 27 Pa. D. & C.3d 488 (Cumberland County Ct. C. P. 1983) (students arriving at school dance were under influence of alcohol; court upheld school district’s authority to suspend from extracurricular activities).

(iii) *Misbehavior that occurs on grounds, but outside of school hours.* The cases involving misconduct on school property, outside of school hours, are somewhat inconsistent. However, the only case to be decided after the Commonwealth Court’s decision in *Hoke* favors the student.

Thus, discipline was *struck down* in *D.O.F. v. Lewisburg Area School District*, 868 A.2d 28 (Pa. Commw. Ct. 2004). In that case, the student used marijuana on school property 1½ hours after a school concert on a Friday night. The Commonwealth Court adopted the trial court opinion, *D.O.F. v. Lewisburg Area School District*, No. 03-403 (Union Co. Ct. C. P., Feb 2, 2004), which cited *Hoke* for the proposition that being on school property does not necessarily constitute being “under school supervision.” However, discipline was *upheld* in an earlier case, *Appeal of McClellan*, 475 A.2d 867 (Pa. Commw. Ct. 1984) (student consumed alcohol in school parking lot after school hours; court did not specifically address extent of school’s authority).

(iv) *Misbehavior that occurs off school grounds and outside of school hours.* Obviously, these are the cases with the most tenuous connection to school – and, at least until recently, it was unusual to hear of a district attempting to impose punishment in such cases.

In considering such cases, it is worth noting again that, if discipline is to be imposed, the conduct must be prohibited by a published school rule. In cases that do not involve at least some misbehavior at school (or a school event), it is especially important to review the school's rules to determine whether students have been clearly placed on notice that off-grounds, out-of-school conduct may subject them to discipline.

As for the case law in this area, the decisions are inconsistent. Thus, discipline was *reversed* in *Fuska v. Windber Area School District*, 55 Somerset Legal J. 438 (Somerset Co. Ct. C. P. 1999) (school board exceeded its authority by expelling a student for possession of an unlit marijuana cigarette off school grounds, even though misconduct occurred during school hours), and in the non-precedential decision of the Commonwealth Court in *Hampton Township School District v. Robinson*, 807 A.2d 344 (Pa. Commw. Ct. 2002) (reversing expulsion of student who consumed alcohol off school grounds).

Most recently, in *Latour v. Riverside Beaver School District*, 2005 WL 2106562 (W.D. Pa., Aug. 23, 2005), the court granted a preliminary injunction reinstating a student who had been expelled for writing and distributing rap songs off grounds. In this case, which was decided under the First Amendment, there was no on-grounds misconduct – and actually, as the court apparently saw it, no off-grounds misconduct either.

On the other hand, discipline was *upheld* in *Miller v. Solanco School District*, No. CI-03-11435 (Lancaster Co. Ct. C. P., Jan. 27, 2004) (student stole school bus during evening hours, with result that bus was damaged and out of service for several days, creating significant problems for school district); and *Fenton v. Stear*, 423 F.Supp. 767 (W.D. Pa. 1976) (student used offensive language in referring to teacher, off school grounds; minimal analysis). There are also two cases approving suspensions from extracurricular activities (which may be an area in which the school has greater latitude). *Del Pino v. Southern York County School District*, No. 2001-SU-00982-07 (York Co. Ct. C. P., March 9, 2001) (students suspended from extracurricular activities after attending private party where

alcohol was served); *King v. Hempfield School District*, 8 Pa. D&C 4th 48 (Lancaster Co. Ct. C. P. 1990) (similar facts).

The Commonwealth Court's recent decision in *Hoke* seems to strengthen the argument that discipline cannot be imposed in cases involving purely off-grounds, outside-school-hours misconduct – since students in these cases would appear to be no more “under the supervision” of school authorities than was the plaintiff in that case. However, there have been no cases on the issue subsequent to *Hoke*.

7. *Student expression is protected by the First Amendment as well as state regulations*

Pennsylvania has promulgated regulations concerning student expression. Under 22 Pa. Code § 12.9(b), “[s]tudents have the right to express themselves unless the expression materially and substantially interferes with the educational process, threatens serious harm to the welfare of the school or community, encourages unlawful activity or interferes with another individual’s rights.” The regulations establish students’ rights, subject to certain limitations, to use various modes of communication, such as “publications, handbills, announcements, assemblies, group meetings, buttons, armbands and any other means of common communication,” and address the issue of school publications. 22 Pa. Code § 12.9.

Further, Pennsylvania regulations have long provided that students may not be required to recite the Pledge of Allegiance or salute the flag. 22 Pa. Code § 12.10. (A recent state statute, 24 P.S. § 7-771(c), requiring schools to notify parents when students exercise their “option” not to recite the Pledge or salute the flag has been declared unconstitutional. *Circle School v. Pappert*, 381 F.3d 172, 174 (3rd Cir. 2004).)

On the other hand, Pennsylvania has enacted a statute permitting schools to adopt dress codes and uniform requirements. 24 P.S. § 13-1317.3.

Obviously, these provisions implicate the First Amendment, and the courts invariably turn to First Amendment cases as well as the regulations in matters involving student expression. While a thorough treatment of

First Amendment law in the school context is beyond the scope of this handbook, we will summarize some of the key concepts.

- a. *In general, students have a right to freedom of speech if they do not cause a substantial disruption of the school or interfere with the rights of others*

The general rule of school speech is that schools can regulate speech only if it substantially disrupts school operations or interferes with the rights of others. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker*, the Supreme Court held that public high school students could not be punished for wearing black armbands to school to protest the Vietnam War. The Court found that their conduct was protected political speech, and there was no evidence that the armbands disrupted the school or interfered with the rights of other students.

In school speech cases, a court must balance the school's authority and the student's right to expression. In *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002), the Pennsylvania Supreme Court upheld the expulsion of a student whose website made offensive and derogatory comments about a teacher. The statements caused sufficient distress, disruption, and low morale in the school, and the teacher suffered severe anxiety and was unable to finish the school year. By contrast, a recent case, also involving a derogatory website, *Layshock v. Hermitage School Dist.*, 496 F.Supp.2d 587 (W.D. Pa. 2007), *argued*, No. 07-4465 (3rd Cir. Dec. 10, 2008) (*appeal pending*) came out the other way. This court held that the school could not punish the student for the creation of the website, as the website created much less disruption in school than the one in *J.S.* Additionally, although Layshock accessed the website at school, his punishment was not based on his in-school activities, which were *de minimus*. *Id.* at 601, 597 ("The mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web.").

Another example of an application of *Tinker* from the Third Circuit is *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir. 2002), where a school district was enjoined from punishing a

student, under its “racial harassment” policy, for wearing a “redneck” t-shirt. Despite evidence of racial tension and disruption at the school, the court held, the district failed to establish that the term “redneck” was tied to the racial tension in the past or that there was a “well-founded fear of genuine disruption” based on that term.

Similarly, there was no “material and substantial disruption” in a case in which a student wrote rap songs, which were published on the internet or sold in the community. The court found that although three students had withdrawn from the school, the withdrawals were not the direct result of the student’s songs. The fact that some students talked about the incident and wore t-shirts in support of the student did not rise to the level of substantial disruption, and in any case, the disruption was caused by the school’s punishment, not by the songs themselves. The court also noted that there was no evidence of any fights or disruption of classroom instruction. *Latour v. Riverside Beaver School District*, 2005 WL 2106562 (W.D. Pa., Aug. 23, 2005) (granting preliminary injunction reinstating student).

Examples of student expression cases from other jurisdictions include *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir.) (upholding suspension of student who drew a confederate flag, given history of disruption at school related to flag); *Chalifoux v. New Caney Independent School District*, 976 F. Supp. 659 (S.D. Texas 1997) (wearing of rosaries could not be prohibited as “gang-related” apparel, because no reason to anticipate disruption); and *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992) (students could pursue First Amendment claim that they could not be punished for wearing “scab” buttons during a teachers’ strike, because buttons were not inherently disruptive).

Moreover, on the issue of dress codes and uniforms, it is worth noting that school uniform policies that are content-neutral – *i.e.*, that require all students to wear the same types of clothing and prohibit all messages on that clothing – have been upheld in other jurisdictions. *See, e.g., Littlefield v. Forney Independent School District*, 268 F.3d 275 (5th Cir. 2001). There are no decisions on the constitutionality of Pennsylvania’s school uniform statute, 24 P.S. § 13-1317.3.

Tinker involved high school students. Where elementary school students are concerned, however, the Third Circuit has been less willing to

afford First Amendment protections – even where disruption does not seem to be an issue. *S.G. v. Sayreville Board of Education*, 333 F.3d 417 (3d Cir. 2003) (upholding suspension of five-year-old who stated “I’m going to shoot you” while playing cops and robbers on the playground; according to the court, this was not “expressive” speech); *Walker-Serrano v. Leonard*, 325 F.3d 412 (3d Cir. 2003) (upholding summary judgment against third-grader who sought to circulate a petition protesting class trip to the circus); *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003) (school could prohibit kindergarten student from handing out gifts with a religious message at school parties).

b. Lewd (and perhaps “socially inappropriate”) speech is not protected

In *Bethel School District v. Fraser*, 478 U.S. 675 (1986), the Court upheld the suspension of a student who gave a lewd speech during a school assembly to endorse a fellow student in student elections. This case has been interpreted in some Third Circuit decisions as setting forth the rule that lewd or vulgar speech is not protected for school students. *See, e.g., Sypniewski*, 307 F.3d at 253; *see also S.G. v. Sayreville Board of Education*, 333 F.3d at 421-22 discussed above (citing *Fraser*, court referred to school’s right to enforce “socially appropriate” behavior). *But see Morse v. Frederick*, 551 U.S. 393, 303 (2007) (upholding punishment of student speech but stating that *Fraser* “should not be read to encompass any speech that could fit under some definition of ‘offensive.’”).

The Third Circuit is currently considering a case involving a website created by a student about her principal. The District Court found that the website fell under *Fraser*’s “limits on sexually explicit, indecent or lewd speech,” and thus the school’s decision to expel the student did not violate her First Amendment rights. *J.S. v. Blue Mountain School District*, 2008 WL 4279517 (M.D.Pa. Sept. 11, 2008), *argued*, No. 08-4138 (3rd Cir. June 10, 2009) (*appeal pending*). The Third Circuit is also considering a similar case of a “lewd, profane and sexually inappropriate” website, but the District Court did not apply *Fraser* because it first found that the school district did not have authority to punish the off-grounds behavior. *Layshock v. Hermitage School Dist.*, 496 F.Supp.2d 587 (W.D. Pa. 2007), *argued*, No. 07-4465 (3rd Cir. Dec. 10, 2008) (*appeal pending*), discussed above.

- c. *Schools may regulate speech reasonably viewed as promoting drug use, and may be able to regulate speech promoting other illegal conduct*

In a recent case, the Supreme Court upheld a school district's suspension of a student for displaying a banner reading "BONG HiTS 4 JESUS," which the Court said could reasonably be viewed as advocating illegal drug use. *Morse v. Frederick*, 551 U.S. 393 (2007). The Court stated that because of the importance of schools' interest in preventing drug use and the special characteristics of the school environment, the student's punishment did not violate the First Amendment. Thus schools can regulate such speech, at least when it does not have a political message. *See id.* at 2636 (Alito, J., concurring).

Although the majority of the justices in *Morse* emphasized that their focus was on speech promoting illegal drug use, and expressly declined to adopt a rule permitting schools to forbid "offensive" speech, *see Morse*, 551 U.S. at 409 (majority), 422-25 (conurrence), one case in the Eastern District of Pennsylvania has already extended the *Morse* rationale to speech not involving drug use. In *Miller v. Penn Manor School District*, 588 F. Supp. 2d 606 (E.D. Pa. 2008), a student wore a T-shirt that advocated hunting and killing terrorists. The Court found that this was not a constitutionally protected political message but instead an endorsement of violence and illegal vigilantism that schools can censor.

- d. *Where speech occurs in a school-sponsored publication, school may prohibit statements that are inconsistent with legitimate pedagogical concerns*

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court held that a school can regulate the content of a school-sponsored student newspaper as long as its actions are reasonably related to legitimate pedagogical concerns. *Cf. Burch v. Baker*, 861 F.2d 1149 (9th Cir. 1988) (distinguishing *Hazelwood* in context of an "underground" student newspaper that would not be seen as school-sponsored speech).

e. *Speech that constitutes a “true threat” does not receive First Amendment protection*

Speech that constitutes a “true threat” falls outside the scope of the First Amendment; but whether a statement constitutes such a threat depends on the context. *Watts v. United States*, 394 U.S. 705 (1969). A recent application of this principle in Pennsylvania is found in *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002), where the student’s website gave reasons why a particular teacher “should die,” showed an image of the teacher’s severed head, and solicited money for a hitman. The court considered the nature of the statements (such as whether they were conditional and whether they were communicated directly to the victim), the context in which they were made, and the reaction of listeners. The website was not a true threat, the court held, because it was not a serious expression of intent to do harm. Further, the fact that the school district did not punish the student until months after the website was posted and allowed him to continue to attend school and extracurricular activities belied the district’s allegation that the speech was a true threat. (The student nevertheless lost the case, on the ground that the speech was disruptive.)

Similarly, no “true threat” was found in the case of a student who wrote and published rap songs, because the evidence showed that “while some rap songs contain violent language, it is violent imagery and no actual violence is intended.” *Latour v. Riverside Beaver School District*, 2005 WL 2106562 (W.D. Pa., Aug. 23, 2005) (granting preliminary injunction reinstating student).

However, a statement referencing Columbine did constitute a “true threat” that fell outside the bounds of political speech. *Johnson v. New Brighton Area School Dist.*, 2008 WL 4204718 (W.D. Pa. Sept. 11, 2008). A student, purportedly as a joke, alluded to “pulling a Columbine” in response to an insult from another student. The Court found that a school can discipline a student who utters the term “Columbine” with malice or anger, as the term “can readily be viewed at a minimum as ‘fighting words’ or a ‘true threat’ or ‘advocating conduct harmful to other students.’” *Id.* at 26-27.

Examples of cases from other circuits include *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002) (expulsion upheld for student who wrote letter stating that he wanted to rape and murder a

classmate; “true threat” because student intended to communicate the letter and reasonable recipient would have viewed it as a threat); *Lovell v. Poway Unified School District*, 90 F.3d 367 (9th Cir. 1996) (upholding suspension of student who allegedly stated to school counselor that she was “going to shoot her” if the counselor did not make requested changes to her schedule).

f. School discipline policies cannot be unconstitutionally overbroad

A school policy may be unconstitutionally overbroad if the policy’s existence inhibits protected speech to a substantial extent. Examples of recent applications of this principle in Pennsylvania include *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243 (3d Cir. 2002) (prohibition against speech that “creates ill will” was overbroad); *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001) (school policy prohibiting speech that offended a person because of that person’s race, sex, language, sexual orientation, or values, was overbroad because it outlawed speech that posed no threat of disruption); *Flaherty v. Keystone Oaks School District*, 247 F. Supp.2d 698 (W.D. Pa. 2003) (prohibition against speech that was abusive, offensive, or inappropriate was overbroad); *Killion v. Franklin Regional School District*, 136 F. Supp.2d 446 (W.D. Pa. 2001) (prohibition against “verbal abuse” of a school staff member, without further specificity or limitation, was overbroad); and *Miller v. Penn Manor School District*, 588 F. Supp. 2d 606 (E.D. Pa. 2008) (district policy prohibiting certain religious expression and anything that was a “distraction to the educational environment” was overbroad). An example from another circuit is *Newsom v. Albemarle County School Board*, 354 F.3d 249 (4th Cir. 2003) (prohibition against wearing clothing containing “messages that relate to weapons” was unconstitutionally overbroad).

g. School officials have less authority over out-of-school speech.

The above analyses generally apply only to school speech—that is, speech that takes place on school grounds or at school-sponsored events. Compare *Morse v. Frederick*, 551 U.S. 393 (2007) with *Layshock v. Hermitage School Dist.*, 496 F.Supp.2d 587 (W.D. Pa. 2007), argued, No.

07-4465 (3rd Cir. Dec. 10, 2008) (*appeal pending*). Thus, in *Killion v. Franklin Regional School District*, 136 F. Supp.2d 446 (W.D. Pa. 2001), the court overturned punishment for offensive statements composed off-grounds; even though another student printed the statements and brought them to school, there was no evidence of threats, substantial disruption, or an expectation of disruption at school. Similarly, in *Flaherty v. Keystone Oaks School District*, 247 F. Supp.2d 698 (W.D. Pa. 2003), the court's conclusion that a prohibition against offensive speech was overbroad was based in part on the fact that it could reach off-grounds speech.

Layshock v. Hermitage School Dist., 496 F.Supp.2d 587 (W.D. Pa. 2007), *argued*, No. 07-4465 (3rd Cir. Dec. 10, 2008) (*appeal pending*), applied this principle to a website created off-campus. Because the site did not cause a substantial disruption, the *de minimus* accessing of the site from school did not provide grounds for discipline. On the other hand, in *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002), the fact that the offensive website was created off grounds did not insulate the student, because he also accessed the website from school and caused substantial disruption there. *See also J.S. v. Blue Mountain School District*, 2008 WL 4279517 (M.D.Pa. Sept. 11, 2008), *argued*, No. 08-4138 (3rd Cir. June 10, 2009) (*appeal pending*), discussed above.

8. *Other constitutional limitations, such as the Free Exercise Clause, substantive Due Process rights, and the Equal Protection Clause, may also apply to school disciplinary decisions*

The constitutional issues mentioned in the preceding sections – *i.e.*, the Due Process requirement that students receive clear notice of prohibited behavior and the First Amendment issues discussed above – are perhaps the most important substantive constitutional limitations on school disciplinary action. (Of course, there are also *procedural* Due Process issues, which are discussed in detail in the next section.)

Obviously, however, other constitutional issues can arise as well. For example, in *Chalifoux v. New Caney Independent School District*, 976 F. Supp. 659 (S.D. Texas 1997), students' right to wear rosaries was protected by the Free Exercise clause. However, while schools must allow students to express religious beliefs, they can restrict parental or student speech that promotes a specific religious message in a pedagogical context,

particularly in an elementary classroom. *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. Pa. 2009) (school’s restriction of mother’s effort to read Bible passages in kindergarten “show and tell” classroom activity did not violate free speech rights).

Substantive Due Process has also been invoked to limit disciplinary action, occasionally successfully, as in *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000) (expulsion for possession of a weapon, when student did not know he had the weapon, violates substantive due process because unrelated to legitimate state interest).

Where a particular student or subgroup of students receives disparate treatment, Equal Protection claims have sometimes been raised – although they tend to be difficult. *Rinker v. Sipler*, 264 F.Supp.2d 181 (M.D.Pa. 2003) (student claimed that because he was punished when other students were not, Equal Protection was violated; court held punishment had rational basis, hence no violation).

III. DISCIPLINARY PROCEDURES AT THE SCHOOL AND DISTRICT LEVEL

In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that procedural Due Process must be afforded to students facing school discipline. The student plaintiffs in *Goss* were facing suspensions of up to ten days; they were entitled, the Court held, to notice of the charges against them and an opportunity to be heard. The Court also suggested that longer suspensions or expulsions might require more formal procedures.

In response, Pennsylvania adopted regulations setting out the procedures to be followed in disciplinary cases. These procedures vary in formality depending on the seriousness of the disciplinary action.

Note that students with disabilities have additional procedural (as well as substantive) rights. *See* Section V, below.

A. Suspensions

1. General Rules

Regulations promulgated by the State Board of Education set out the basic rules concerning suspensions. *See* Appendix B for full regulatory language.

(1) A suspension is an exclusion from school for one to ten school days in a row, 22 Pa. Code § 12.6(b)(1). Any exclusion for more than ten consecutive school days is considered an expulsion, and can be imposed by the board of school directors only after a formal hearing. 22 Pa. Code §§ 12.6(b)(2) and 12.8.

(2) A suspension may be imposed by a principal or other person in charge of a school. 22 Pa. Code § 12.6(b)(1)(i).

(3) A student may not be suspended until he or she has been informed of the reasons for the suspension and given the opportunity to respond. Prior notice need not be given when it is clear that the health, safety or welfare of the school community is threatened. In such circumstances, the notice and opportunity to be heard must take place as soon as possible after the suspension. 22 Pa. Code § 12.6(b)(1)(ii).

(4) The student's parents and the superintendent of the school district must be notified immediately in writing of the suspension. 22 Pa. Code § 12.6(b)(1)(iii).

Since any exclusion from school for 10 days or less is defined to be a suspension, these procedural requirements apply even if (as occasionally happens) the school sends the child home without using the “suspension” label. *See Big Beaver Falls Area School Dist. v. Jackson*, 624 A.2d 806, 808 (Pa. Commw. Ct. 1993).

State regulations provide that students “shall have the responsibility to make up exams and work missed while being disciplined by suspension and shall be permitted to complete these assignments within guidelines established by the governing board.” 22 Pa. Code § 12.6(b)(1)(vi).

2. *Suspensions of 1-3 days*

Suspensions of one to three days, sometimes called temporary suspensions, must be imposed in accordance with the procedures outlined above. A suspension for part of a day constitutes one day of suspension.

3. *Suspensions of 4-10 days*

Whenever a suspension exceeds three consecutive days, the parents and student have the additional right to an “informal hearing” with the appropriate school official, in accordance with the following procedures:

- (1) The parents and student must receive written notification of the reasons for the suspension.
- (2) They must have sufficient advance notice of the time and place of the hearing.
- (3) The student has the right to question any witnesses present at the hearing.
- (4) The student has the right to speak and to produce witnesses on his/her own behalf.
- (5) The informal hearing must be held within the first five days of the suspension.

22 Pa. Code §§ 12.6(b)(1)(iv), 12.8(c).

The purpose of the informal hearing is to enable the student to meet with the appropriate school officials, to explain the circumstances surrounding the event, and to show why the student should not be suspended. 22 Pa. Code § 12.8(c). It is also meant to encourage the student's family and the principal to discuss ways to prevent future incidents of misconduct. 22 Pa. Code § 12.8(c)(1).

Failure to comply with the prescribed procedures has been held to invalidate the disciplinary action.⁴ *Mifflin County School District v. Stewart*, 503 A.2d 1012 (Pa. Commw. Ct. 1986) (invalidating suspension that was not preceded by written notice of charges); *Mullane v. Wyalusing Area School District*, 30 Pa. D. & C.4th 179 (Bradford Co. Ct. C.P. 1996) (invalidating suspensions not preceded by written notice and informal hearing). However, because a more recent decision, *In re J.A.D.*, 782 A.2d 1069 (Pa. Commw. Ct. 2001) holds that suspension decisions are not appealable (*see* Section IV-B, below), and because it is almost impossible in any event to obtain judicial review before a suspension runs its course, a meaningful remedy is probably unlikely even in cases of illegal suspension.

4. *Suspension from transportation or extracurricular activities*

Although suspension is defined as “exclusion from school,” 22 Pa. Code § 12.6(b), students are occasionally excluded from only a specific *part* of the school program, *e.g.*, a course, bus transportation, or extracurricular activities. Under the reasoning of *Goss v. Lopez*, 419 U.S. 565 (1975), even exclusion from a single course would appear to require procedural Due Process. Similarly, exclusion from transportation should presumably be treated as a suspension if it has the effect of excluding the student from part or all of the school program. *Cf. Rose v. Nashua Board of Education*, 506 F. Supp. 1366 (D. N.H. 1981), *aff’d*, 679 F.2d 279 (1st Cir. 1982) (finding school district’s practice of temporarily suspending bus routes when discipline problems on the bus became unmanageable to be reasonable, in part, because the district provided notice of the suspension to parents and a right to a post-suspension appeal).

Exclusions from extracurricular activities present a somewhat different picture. The state regulations do not define the procedures to be followed here; and while some courts have found that students have a protected interest in extracurricular activities, that interest has not always been held to require the same level of Due Process as an exclusion from school. *See, e.g., Spitler v. Eastern Lebanon County School District*, No. 2000-0137 (Lebanon Co. Ct. C. P., Dec. 13, 2000) (while participation in

⁴ *But see Morrell v. Chichester*, 2005 WL 1875526 (E.D. Pa. 2005) (student did not have federal constitutional right to cross-examine a witness in a discipline hearing).

extracurricular activities is not a right, it is a privilege that cannot be withheld “without at least a modicum of procedural fairness”); *Billman v. Big Spring School District*, 27 Pa. D. & C.3d 488 (Cumberland County Ct. C.P. 1983) (students suspended from extracurricular activities for one year were afforded due process where students’ parents initiated a meeting with the principal to discuss the incident and written notice of the suspensions and the reason for their imposition was sent).

As with out-of-school suspensions, meaningful remedy may be hard to obtain in cases involving suspension from transportation or extracurricular activities.

5. *In-school suspension*

Another form of punishment is in-school suspension, where a student is excluded from regular classes but still expected to attend school. Pennsylvania regulations require that before a student may be assigned to in-school suspension, the student must be informed of the reasons for the suspension and given the opportunity to explain the situation. 22 Pa. Code § 12.7(a). The student’s parents must also be informed of the in-school suspension. 22 Pa. Code § 12.7(b).

If a student receives an in-school suspension of more than 10 consecutive days, the student and family must be offered an informal hearing with the principal, similar to the hearing for a 4- to 10-day out-of-school suspension, before the eleventh day of in-school suspension. 22 Pa. Code § 12.7(c), 12.8(c).

The school district must make some provision for the student's education while the student is assigned to in-school suspension. 22 Pa. Code § 12.7(d). Thus, a student may not be assigned to an in-school suspension and be forbidden to read, study or do homework or make-up work for the entire school day.

Remedy is difficult to obtain in in-school suspension cases, for the reasons noted in the preceding sections.

B. Disciplinary transfers to alternative programs or other schools

Most disciplinary transfers in Pennsylvania are to alternative programs, and most alternative programs are “disruptive student programs” or “private alternative education institutions for disruptive students” within the meaning of 24 P.S. §§ 19-1901-C and 19-1901-E respectively. Programs fall within these categories if they serve students from middle schools, junior high schools, senior high or area vocational-technical schools, and receive alternative education grant funds from the Department of Education.

A list of these programs is found on the website of the Department of Education, www.pde.state.pa.us. The Department has also issued a Basic Education Circular setting forth its interpretation of the legal requirements applicable to disruptive student programs.⁵

A student whom school officials propose to transfer to an alternative school for disruptive students has a right to an informal hearing in conformity with 22 Pa. Code § 12.8(c) – the same sort of hearing that must be provided in cases of suspensions of over three days (see Section III-A, above). 24 P.S. §§ 19-1902-C(2); 19-1902-E(2). In Philadelphia, a recently-updated consent decree provides for a more formal procedure. *Dunmore v. School District of Philadelphia*, No. 72-43 (E.D. Pa., June 28, 2004) (approving consent decree providing for independent hearing officer, right to present evidence and question witnesses, record, and written decision).

The hearing “should precede placement;” however, “[w]here the student’s presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, the student may be immediately removed from the regular education curriculum with notice and a hearing to follow as soon as practicable.” *Id.* The hearing requirement has been enforced in at least one reported decision. *Bender v. Exeter Township School District*, 63 Pa. D.&C. 4th 414 (Berks Co. Ct. C. P.), *aff’d mem.*, 839 A.2d 486 (Pa. Commw. Ct. 2003) (reversing transfer where principal simply announced that child would be transferred).

⁵ Available at http://www.portal.state.pa.us/portal/server.pt/community/purdon's_statutes/7503/alternative_education_for_disruptive_youth/507342 (last visited April 07, 2010).

As in the suspension context, the purpose of the hearing is to enable the student to explain the circumstances surrounding his or her misbehavior and, presumably, to show why he or she should not be transferred. *See* 22 Pa. Code § 12.8(c). Presumably, moreover, the hearing provides an opportunity for the student to argue that he or she does not meet the definition of a “disruptive” student, which depending on the circumstances may require more than a single act of misbehavior.⁶

The requirement that a hearing be provided in disciplinary transfer cases has a basis in both the federal and Pennsylvania Constitutions. *Jordan v. School District of the City of Erie*, 583 F.2d 91, 96 – 97 (3d Cir. 1978) (federal Constitution requires hearing on proposed disciplinary

⁶ The statute defines a “disruptive student” as follows:

A student who poses a clear threat to the safety and welfare of other students or the school staff, who creates an unsafe school environment or whose behavior materially interferes with the learning of other students or disrupts the overall educational process. The disruptive student exhibits to a marked degree any or all of the following conditions:

- (i) Disregard for school authority, including persistent violation of school policy and rules.
- (ii) Display or use of controlled substances on school property or during school-affiliated activities.
- (iii) Violent or threatening behavior on school property or during school-affiliated activities.
- (iv) Possession of a weapon on school property, as defined under 18 Pa.C.S. § 912 (relating to possession of weapon on school property).
- (v) Commission of a criminal act on school property or during school-affiliated activities.
- (vi) Misconduct that would merit suspension or expulsion under school policy.
- (vii) Habitual truancy.

No student who is eligible for special education services pursuant to the Individuals with Disabilities Education Act (Public Law 91-230, 20 U.S.C. § 1400 *et seq.*) shall be deemed a disruptive student for the purposes of this act, except as provided for in 22 Pa. Code § 14.35 (relating to discipline).

transfers); *D.C. v. School District of Philadelphia*, 879 A.2d 408 (Pa. Commw. Ct. 2005) (law requiring that students returning from delinquency placements be assigned to alternative schools violated Pennsylvania Constitution by not affording opportunity for hearing). Thus, a hearing is required even in the case of a disciplinary transfer to an alternative school that does not happen to be a “disruptive student program” or “private alternative education institution for disruptive students” within the meaning of 24 P.S. §§ 19-1901-C and 19-1901-E.

Disciplinary transfers from one school to another *regular* school have also been the subject of constitutional litigation. In *Everett v. Marcuse*, 426 F.Supp. 397 (E.D. Pa. 1977), the court held that the Due Process clause applied. A consent decree in that case requires an informal hearing in which the student may present evidence and question witnesses. *Everett v. Marcuse*, No. 75-2 (E.D. Pa., July 21, 2004).

C. Expulsions

1. Expulsion procedures – overview

The procedures for expelling a student are as follows. See Appendix B for full regulatory language.

(1) All expulsions require a formal hearing. 22 Pa. Code § 12.6(b)(2).

(2) During the period prior to the hearing and decision of the school board, the student shall be placed in his/her regular class, unless an informal hearing is held at which it is determined that the student constitutes a threat to the health, morals, welfare or safety of others, and it is not possible to hold the formal hearing within the period of a suspension. However, where the student has been so excluded, the period of exclusion, even in an emergency situation, is limited to 15 days unless a formal hearing is held or the parties agree otherwise, and the student must be provided with an alternative education (which may include home study) in the interim. 22 Pa. Code §§ 12.6(c), (d). *But see Jarmon v. Batory*, C.A. 94-0284, 1994 WL 313063, at 10 (E.D. Pa. June 29, 1994) (student’s due process rights were not violated

where she was kept out of school for almost a month prior to the expulsion hearing).

(3) The formal hearing is either held before the entire board of school directors or before a panel of the board, whose findings are then transmitted to the full board for approval. 22 Pa. Code § 12.8(b) (authorizing board to delegate hearing function to a committee).

(4) The school district must send written notification of the charges to the student's parents by certified mail, in advance of the hearing. The family must also receive at least three days' notice of the time and place of the hearing. 22 Pa. Code §§ 12.8(b)(1),(2). The expulsion hearing must be held within 15 days of the notice of the charges unless the parties otherwise agree, or unless certain extraordinary circumstances are present. *Id.* at 12.8(b)(9).

(5) The student has the right to be represented by counsel. 22 Pa. Code § 12.8(b)(4).

(6) The hearing must be held in private, unless the student or parent requests a public hearing. 22 Pa. Code § 12.8(b)(3).

(7) The student has the right to be presented with the names of the witnesses against him/her, and copies of the statements or affidavits of those witnesses. The student can request that any of these witnesses appear in person and answer questions or be cross-examined. 22 Pa. Code §§ 12.8(b)(5), (6).

(8) The student has the right to testify and present witnesses on his/her own behalf. 22 Pa. Code § 12.8(b)(7).

(9) The hearing must be recorded, either by a stenographer or a tape recorder. A free transcript of the hearing must be provided to an indigent student. 22 Pa. Code § 12.8(b)(8).

2. *Evidentiary issues at the expulsion hearing*

At the expulsion hearing, school authorities have the burden of proving by a preponderance of the evidence that the student violated a school rule. *A.B. v. Slippery Rock Area School District*, 906 A.2d 674, 677 n. 5 (Pa. Commw. Ct. 2006). However, school officials need not rely exclusively, or at all, on direct evidence to prove their case; circumstantial evidence may be used so long as the "preponderance" standard is met. *Id.* at 678. In *A.B.*, this rule was invoked to uphold an expulsion that seems to have been based on surprisingly little evidence (child was found to have made bomb threat even where it was unclear that she had written the note in question, or that she had been the person who left it in the bathroom). Because of decisions such as *A.B.*, it is important that the attorney representing the child focus with great care on the facts of the case, and bring out all possible discrepancies between what is alleged and what has actually been proved.

An expulsion hearing is an administrative hearing under Pennsylvania law, 2 Pa.C.S.A. §§551 *et seq.*, and hearsay evidence is admissible at administrative hearings if it is of "reasonably probative value." 2 Pa.C.S.A. § 554. However, "properly objected to hearsay evidence is not competent, in and of itself, to support a finding in an administrative hearing;" in other words, there must also be corroborating evidence on the point. *Davis v. Civil Service Commission of the City of Philadelphia*, 820 A.2d 874, 879 (Pa. Commw. Ct. 2003), *citing DiSalvatore v. Municipal Police Officers' Commission*, 753 A.2d 309 (Pa. Commw. Ct. 2000). In at least two (unpublished) cases, this argument became the basis for reversal of expulsion decisions. *See Spence v. Punxsutawney Area School District*, No. 50-2000 CD (Jefferson County Ct. of C.P. July 17, 2000) (reversing expulsion of student charged with making a bomb threat because school board relied on only one hearsay statement to find that the student had made a threat); *and see In Re: M.S. v. Midd-West School District*, No. 1069 CD (Pa. Commw. Ct. Dec. 19, 2008) (reversing expulsion of student accused of smoking marijuana because the district provided only uncorroborated hearsay testimony as evidence).

3. *Impartiality issues*

Impartiality can also be an issue at expulsion hearings. Thus, an impermissible appearance of bias is created if the attorney for the school board and the attorney for the school district are the same person, or if the two attorneys work closely with one another. *See English v. North East*

Board of Education, 22 Pa. Commw. 240, 243 – 44 (Pa. Commw. Ct. 1975) (school board solicitor's acting as both judge and prosecutor is improper); *Pittsburgh Board of Public Education v. M.J.N. by N.J.N.*, 524 A.2d 1385 (Pa. Commw. Ct. 1987) (“[W]hen the legal staff of a public agency consists of two attorneys, one which supervises the other, and while one acts in his customary capacity as advisor to the Board the other acts as prosecutor, impermissible commingling has occurred.”).

The actions of the school superintendent (or other witnesses) at the expulsion hearing can also create impartiality problems. Although no reported cases have addressed this issue in the context of a student disciplinary hearing, several cases have held that, where a superintendent testified against a *teacher* during a disciplinary proceeding and then was present at the school board’s deliberations on the matter, an appearance of bias was created. See *Occhipinti v. Board of School Directors*, 408 A.2d 1189 (Pa. Commw. Ct. 1979) (impermissible commingling where superintendent testified against teacher in an employee disciplinary hearing, then was present during board’s deliberations); *Department of Education v. Oxford Area School District*, 356 A.2d 857 (Pa. Commw. Ct. 1976) (similar holding). Further, an unpublished Commonwealth Court decision held that the mere presence of an adverse witness – in that case, again, the superintendent – during the board’s deliberations violated the student’s right to an impartial hearing. *Raffensberger v. Hempfield School District*, No. 2376 C.D. 1997 (Pa. Commw. Ct., July 13, 1998).

4. *The hearing decision*

As we have noted, an expulsion decision by a school board is an “adjudication” of a local agency. 2 Pa.C.S.A. § 101. Therefore, expulsion hearings must be conducted in accordance with 2 Pa.C.S.A. §§ 551 *et seq.*, which requires, at § 555, that the hearing result in a written adjudication containing “findings and reasons,” and that the adjudication be served upon the parties in person or by mail. The decision must be accompanied by notice of the right to appeal. 22 Pa. Code 12.8(b)(1)(x).

If the hearing was held before a committee of the school board, the decision is not final until it has been approved by the full board. 22 Pa. Code § 12.8(b).

In Section IV, we discuss the procedures and timelines for judicial review of expulsion decisions.

5. *Obligations and rights of a student who has been expelled*

A student who has been expelled, but who is under age 17, is still subject to the compulsory school law, which means that her family must make arrangements for her education. The family can satisfy this obligation by sending the child to a public school that will accept her (*e.g.*, a charter school, or a public school in another district to which the parents pay tuition), or a private school. 24 P.S. §§ 13-1326, 13-1327; 22 Pa. Code § 12.6(e). Home schooling is another option, *see* § 13-1327.1.

State regulations address the situation in which parents are unable to arrange for alternative schooling for an expelled child. If they provide written evidence to the district, within 30 days, that they are “unable to provide the required education,” the district must “make provision for the student’s education” within 10 days or “take action in accordance with [the Juvenile Act] to ensure that the child will receive a proper education.” 22 Pa. Code §§ 12.6(e)(2), (e)(3). Students with disabilities must be provided with an education consistent with the IDEA. (See *infra*, p. 46.) In practice, districts tend to arrange for educational services in this situation, rather than initiate juvenile proceedings.

However, while some districts offer a full-time educational program (*e.g.*, in an alternative school) in these circumstances, others offer only a minimal option, such as five hours of home instruction per week. There is, to date, only one case construing the phrase “make provision for the student’s education” in 22 Pa. Code § 12.6(e)(2). *Abremski v. Southeastern School District*, 421 A.2d 485, 488 – 89 (Pa. Commw. Ct. 1980). In that case, the students were expelled for part of a marking period; the court found that the district had met its obligation to make provision for the students’ education through a combination of “assigned home study and weekly in-school counseling.” It is possible that more might be required in the context of a longer expulsion.

Abremski also states in *dicta*, at 489 n. 2, that the students had waived their challenge to the adequacy of the post-expulsion program, because they had not raised the issue at the hearing before the school board.

This seems counter-intuitive, since at the time of the hearing, the students did not know for certain that they would be expelled, much less that they would later turn to the board to “make provision” for their education. But a student facing expulsion may wish to raise the issue conditionally, or perhaps seek a subsequent hearing from the board if a disagreement arises concerning the extent of the educational services to be provided.

Finally, there is the question of what happens when a student is expelled from district A, moves to district B, and applies for admission there. The only clear statutory provision is 24 P.S. § 13-1317.2(e.1), which states that if the expulsion was for a weapons offense, the new district “may assign that student to an alternative assignment or provide alternative education services, provided that the assignment may not exceed the period of expulsion.”

This leaves open the question of whether, if the expulsion was for some other sort of offense, the new district can assign the student to an alternative school (suggested answer: no, on the basis that, had the legislature so intended, it would have so specified in § 13-1317.2(e.1)). Also unresolved is the issue of whether, in either instance, the new district can choose to “honor” the expulsion – *i.e.*, not accept the student at all. On this last point, the Commonwealth Court decision in *Hoke v. Elizabethtown Area School District*, discussed in Section II of this handbook, suggests that the district does not have that option.

IV. JUDICIAL REVIEW OF DISCIPLINARY DECISIONS

A. Original actions in federal or state court

Judicial review of disciplinary decisions may be available, depending on the circumstances, via an original action or appeal. We begin with the “original action” route, though it is probably less often available than the appeal route discussed in the next section.

Typically, original actions in school discipline cases are filed in federal court and involve a federal question (usually constitutional). Examples of such cases are found in the discussions, above, of First Amendment issues and of vagueness problems under the Due Process Clause.

Some of these federal cases reflect a choice of forum – that is, the student could have asserted his federal claim in a state-court appeal, but has chosen the federal route instead. Certainly there can be advantages in choosing the federal forum, *e.g.*, the opportunity to proceed *de novo* and the sometimes greater familiarity of federal judges with federal issues. There is also the issue of the statute of limitations, which is 30 days for an appeal to state court, as compared with – at least in some situations – two years for an action under 42 U.S.C. § 1983, *see, e.g., Garvin v. City of Philadelphia*, 354 F.3d 215, 220 (3d Cir. 2003). At the same time, there can be disadvantages to selecting the federal forum, *e.g.*, where the student also has substantial state claims; while the federal court is permitted to hear such claims under 28 U.S.C. § 1367 (supplemental jurisdiction), the court also has discretion to decline jurisdiction over them.

Moreover, as we discuss further below, not all discipline decisions are directly appealable to state court. When a direct appeal is *not* available, an original federal court action may become the only option – again, assuming the presence of a federal question. For example, in the case of a suspension, which may not be reviewable in state court, a federal suit may be appropriate, as in *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446 (W.D. Pa. 2001). Similarly, a disciplinary transfer from one regular school to another – an action from which there is almost certainly no direct appeal – became the subject of a federal suit in *T.W. v. School District of Philadelphia*, 2003 WL 1848705 (E.D. PA 2003), *vacated*, 100 Fed.Appx. 127, 2004 WL 1369014 (3d Cir. 2004).

An original action may also be available to enjoin *threatened* disciplinary action – for example, in a First Amendment case. *Tinker* itself was such a case, as was *Saxe v. State College Area School District*, also discussed in Section II, above.

Depending on the circumstances, it may also be possible to bring cases involving threatened disciplinary action in *state* court – which is a desirable option, obviously, if no federal question is presented, and perhaps in other situations as well. An example of such a case is *Hoke v. Elizabethtown Area School District*, 833 A.2d 304 (Pa. Commw. Ct. 2003), in which the court enjoined the district from holding an expulsion hearing on a matter over which, the student maintained, it had no jurisdiction.

B. Appeals to state court

Appeals in discipline cases are to the local court of common pleas under 42 Pa.C.S.A. § 933(a)(2) (providing for review of local agency action). From the court of common pleas, appeals go to Commonwealth Court under 42 Pa.C.S.A. 762(a)(4)(i) (providing for review of decisions of courts of common pleas in cases arising under school codes), and finally – by petition for allowance of appeal – to the Supreme Court of Pennsylvania. For a sample notice of an appeal of an expulsion decision to the local court of common pleas, see Appendix C.

Because the jurisdiction of courts of common pleas is limited, under § 933(a)(2), to review of local agency action “under Subchapter B of Chapter 7 of Title 2 [Pa.C.S.A.],” and because that subchapter pertains to “adjudications” of local agencies, only disciplinary decisions that qualify as “adjudications” are reviewable on direct appeal. Under 2 Pa.C.S.A. § 101, an “adjudication” is a decision “affecting personal or property rights, privileges, immunities, duties, liabilities or obligations”

While *expulsions* constitute reviewable adjudications (see below), lesser penalties may not. For example, while the Commonwealth Court upheld a district’s imposition of three days of after-school detention in *Schmader v. Warren County School District*, 808 A.2d 596 (Pa. Commw. Ct. 2002), the court also stated – in what was perhaps an alternative holding – that the punishment was not reviewable in court. *Id.* at 600.

Similarly, the Commonwealth Court has held that review is unavailable for *suspensions* of ten days or less. *In re J.A.D.*, 782 A.2d 1069, 1071 (Pa. Commw. Ct. 2001) (stating that Pennsylvania regulations do not provide for appeal of a suspension); *Burns v. Hitchcock*, 683 A.2d 1322, 1324 (Pa. Commw. Ct. 1996) (suspension is not an adjudication because, under state regulations, it is imposed by the principal rather than by the district). While the Commonwealth Court has also been known to overturn a suspension, *Mifflin County School District v. Stewart*, 503 A.2d 1012 (Pa. Commw. Ct. 1986), it seems probable that the current state of the law is that suspensions are not reviewable.

Also unappealable, according to a recent ruling by the Commonwealth Court, is the decision to transfer a student to an alternative school. *Tyson v. School Dist. of Philadelphia*, 900 A.2d 990 (Pa. Commw. Ct. 2006), *appeal denied*, 591 Pa. 686, 917 A.2d 316 (Pa. Feb 21, 2007).

However, the court in *Tyson* left open the question of whether a disciplinary transfer can be challenged by means of an original action. *Id.* at 990 n. 6; see *Bender v. Exeter Township School District*, 63 Pa. D.&C. 4th 414 (Berks Co. Ct. C. P.), *aff'd mem.*, 839 A.2d 486 (Pa. Commw. Ct. 2003) (reversing transfer as unauthorized by law as well as arbitrary and capricious).

As we have noted, it is well established that *expulsion* decisions are subject to review under the Local Agency Law. Under 42 Pa.C.S.A. § 5571, the period for filing an appeal is 30 days from “entry” of the expulsion decision, *i.e.*, the written decision required by 2 Pa.C.S.A. § 555. (While the term “entry” is not clearly defined, prudence dictates that it be interpreted as the date that the expulsion order is officially adopted.) Depending on local practice, the appeal may be initiated by the filing of either a Notice of Appeal or a Petition for Review.

An expulsion decision is not automatically stayed pending appeal. However, a stay (often termed a “supersedeas”) can be granted if the student establishes “(1) a likelihood of success on the merits of the appeal; (2) irreparable injury if a stay is denied; (3) issuance of a stay will not substantially harm other interested parties; and (4) issuance of a stay will not adversely affect the public interest.” *Yatron v. Hamburg Area School District*, 631 A.2d 758, 761 (Pa. Commw. Ct. 1993).

Assuming that the school board has made a complete record, including findings and reasons, the court will ordinarily not consider any issues or evidence not raised below. See *Abremski v. Southeastern School District Board of Directors*, 421 A.2d 485, 488 n. 2 (Pa. Commw. Ct. 1980). If the record is incomplete, the court has the option of remanding the case for further action, or hearing the case *de novo*. 2 Pa.C.S.A. § 754(a); *Pittsburgh Board of Education v. M.J.N.*, 524 A.2d 1385, 1387 (Pa. Commw. Ct. 1987). Note that the record is not incomplete because someone failed to raise an issue; rather, the requirement is that the issue was raised, but the record not developed, as in *M.J.N.*, or that no record at all was made of the proceedings, as in *Tomlinson v. Pleasant Valley School District*, 479 A.2d 1169 (Pa. Commw. Ct. 1984) and *McKeesport Area School Dist. v. Collins*, 423 A.2d 1112 (Pa. Commw. Ct. 1980).

If a full record exists, the court must uphold the school board’s decision unless (1) the decision violated the student’s constitutional rights; (2) the decision was not in accordance with the law; or (3) findings of fact

made by the board are not supported by substantial evidence. 2 Pa.C.S.A. § 754(b).

Thus, defects in the hearing procedure are among the issues that can be raised on appeal; *see* Section III, above, for a more detailed discussion of procedural requirements. For examples of such appeals, *see Big Spring School District v. Hoffman*, 489 A.2d 998 (Pa. Commw. Ct. 1985) (board failed to make written findings or give reasons); *Norristown Area School District v. A.V.*, 495 A.2d 990 (Pa. Commw. Ct. 1985) (board did not record hearing, made no findings of fact, and issued a delayed adjudication without findings or reasons); *Yatron v. Hamburg Area School District*, 631 A.2d 758, 762 (Pa. Commw. Ct. 1993) (remanding case to school board for new penalty hearing because board should not have considered acts of vandalism not set forth in original notice of charges).

Further, questions concerning the scope of the district's disciplinary authority, constitutional issues, and other legal issues can all be raised on appeal, assuming they were raised in some manner below. *See* Section II, above, for discussion of substantive legal issues that can form the basis for a challenge to disciplinary action; note that these can include the claim that the disciplinary action was arbitrary and capricious. *See* Section III, above, for discussion of the substantial evidence standard, hearsay issues, and the like.

Courts of common pleas have the authority to affirm, modify, vacate, reverse, set aside *or* remand a district's decision. 42 Pa.C.S.A. § 706; 2 Pa.C.S.A. § 754(b). Obviously, if the student succeeds on an issue that could not be remedied on remand – such as a claim that the disciplinary action violated her constitutional rights – the discipline must be reversed, modified or set aside. The situation is trickier, however, if the issue involves only a procedural violation. In these situations, Commonwealth Court has routinely required that the case be remanded *to the school board* for a new hearing – rather than directing the common pleas court to decide the matter. *See, e.g., Yatron*, 631 A.2d at 762 (requiring remand where board heard evidence of unrelated acts of vandalism and student had no notice that these incidents would be considered); *Norristown Area School District v. A.V.*, 495 A.2d 990 (Pa. Commw. Ct. 1985) (requiring remand to school district for new hearing and adjudication in expulsion case where student was not given proper hearing on the issue).

V. SPECIAL CONSIDERATIONS FOR STUDENTS WITH DISABILITIES

A. Overview

Students with disabilities have all of the substantive and procedural rights discussed in the preceding sections of this handbook. In addition, federal laws – mainly the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, 34 C.F.R. Part 300, but also Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, 34 C.F.R. Part 104 – provide these students with certain substantive rights and procedural protections. State regulations, 22 Pa. Code Chs. 14 and 15, also provide some additional rights. Some of these rights are also afforded to students who show indications of a possible disability, but have not yet been “identified.”

This section provides a brief summary of these additional rights. However, because this is a complex and much-litigated area on which other publications are available,⁷ we attempt no more than an overview here.

As a threshold matter, there are two operative legal definitions of disability. Most “children with disabilities” are students who have gone through the evaluation process defined by the IDEA and state regulations, have been found to have one of the disabilities listed in the IDEA (*e.g.*, mental retardation, learning disability, vision impairment), and have been identified as needing special education. A smaller number of children, while not in need of special education, have disabilities within the somewhat broader definition of Section 504 and its implementing regulations, 34 C.F.R. Part 100, and need some sort of special accommodations or services in school. These children may have been identified as “protected handicapped students” under 22 Pa. Code Ch. 15, although this is not required in order for a student to assert rights under § 504.

Both of these groups of children have access to administrative hearing procedures (often known as “due process procedures”) to resolve disputes over the programs, services and placements provided to them.

⁷ *E.g.*, various publications of the Education Law Center, available at www.elc-pa.org; also, CLE publications of the Pennsylvania Bar Institute.

Impartial hearing officers appointed by the state, rather than local school boards or officials, preside over due process hearings. In the case of a child eligible for special education, the hearing decision can be appealed to an administrative appeals panel and, from there, to *federal or state* court. A “protected handicapped student” can proceed directly from the hearing to court, unless the student is seeking relief that is also available under the IDEA. *See* 20 U.S.C. § 1415(l). In this case, IDEA’s administrative remedies must be exhausted before an action is brought. *Centennial Sch. Dist. v. Phil L.*, 559 F. Supp. 2d 634 (E.D. Pa. 2008).

These procedures – which are not available to students without disabilities – become important in the disciplinary context, because they can sometimes be used to challenge disciplinary action. This is because some disciplinary actions are considered to be “changes in placement,” which are among the issues that the administrative hearing procedures are designed to address.

In some circumstances, a student’s request for a hearing will actually block a proposed disciplinary placement until the hearing decision is issued; that is, the hearing must take place before the proposed “change in placement” is implemented. In other, more urgent situations, school officials can implement the disciplinary placement – *e.g.*, transfer to an alternative school – without awaiting a hearing officer’s order, but the student can obtain a later hearing to challenge the decision. *See* subsection B, below, for more detail.

Since students with disabilities also have all of the hearing rights that state law provides to other students (*see* Section III, above), there are actually situations in which *multiple* hearings may be available. For example, a student might be entitled to an expulsion hearing before the school board (to determine whether he committed the offense), as well as a special education hearing (to determine whether the student’s behavior was a manifestation of his disability, whether the proposed post-expulsion program would be “appropriate,” and so forth). In practice, this seldom happens – because the parties are able to simplify the issues so that only one hearing is needed, or for some other reason.

In the following sections, we describe more specifically the rights of (1) students with disabilities who are eligible for special education and (2) students who do not need special education, but who have disabilities within the meaning of § 504.

B. Rights of students eligible for special education

The rights and procedures discussed in this section arise primarily from the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* This statute was substantially amended in 2004 by Pub. L. 108-446, 118 Stat. 2647 (2004). This discussion takes into account, at least in a general sense, the 2004 amendments and federal regulations issued in August, 2006. These regulations, codified at 34 C.F.R. Part 300, took effect on October 14, 2006. In addition, the following discussion incorporates applicable state regulations.

This is, however, only a brief summary of a complex legal area. More detail concerning school discipline for students with disabilities is available from many sources, including the Education Law Center.

1. Suspensions of 10 days or less

For children eligible for special education, *suspensions* of up to 10 days are generally permitted, and are not considered to constitute a “change in placement” for which parental consent (or the approval of a hearing officer) is necessary. 34 C.F.R. § 300.530(b)(1). Students must, however, be given the opportunity to make up exams and work missed during a suspension. 22 Pa. Code § 12.6(b)(1)(vi).

There are, however, several exceptions to this general rule. First, a suspension will be considered to be a change in placement if it results in the child being excluded from school for *more than 15 cumulative days over the course of the school year*. 22 Pa. Code § 14.143(a). Thus, for example, if a child has already had two five-day suspensions and the school proposes to suspend him for another seven days, the seven-day suspension constitutes a change in placement. As such, it cannot be implemented unless either the parents consent or a hearing officer grants approval. Note, however, that this exception does not apply if the child attends a public charter school, since charter schools are not subject to 22 Pa. Code Ch. 14. 24 P.S. § 17-1732-A(b); 22 Pa. Code § 711.61(b).

Also, under Pennsylvania law, *any* suspension of a child with mental retardation – even for a day – constitutes a change of placement requiring parental or hearing officer approval. 22 Pa. Code § 14.143(b). This exception *does* apply to children attending charter schools. 22 Pa. Code § 711.61(c).

2. *Transfer to an “interim alternative educational setting”*

The law is more complex with respect to transfers to an “interim alternative educational setting” – typically, an alternative school. First, the IDEA provides that school officials may transfer a child to an alternative setting of *up to ten days* whenever the child has violated a code of student conduct, “to the extent such alternatives are applied to children without disabilities.” 34 C.F.R. § 300.530(b)(1). While this means that children with disabilities have no particular *federal* rights in situations involving transfers of ten days or less, they do still have the rights available to all students under state law and discussed in earlier sections of this handbook, *e.g.*, the right not to be transferred unless the school has the authority to punish the conduct in question, the right to a hearing, and so forth.

For transfers of *more than ten days*, these state law requirements still apply – but within an overlay of IDEA rights and procedures. These include the following:

- If the child, either at school, on school premises, or at a school function, (i) carries or possesses a weapon, or (ii) knowingly possesses, uses, or sells illegal drugs or a controlled substance, or (iii) has inflicted serious bodily injury on another person, school officials may transfer the student to an alternative setting for up to 45 days, whether or not the parents consent. 34 C.F.R. 300.530(g). The terms “weapon,” “illegal drug,” “controlled substance,” and “serious bodily injury” are defined through cross-references to other federal statutes, and do not necessarily mean what one might assume. 34 C.F.R. § 300.530(h)(i). For example, a “weapon” does not include a pocket knife with a blade of less than 2 ½ inches, and “serious bodily injury” is defined in fairly extreme terms. 18 U.S.C. § 930(g)(2) (weapon); 18 U.S.C. § 1365(h) (serious bodily injury).
- If none of the above conditions exists, but school officials believe that maintaining the child in his or her current placement “is substantially likely to result in injury to the child or to others,” the school can request a hearing before

a special education hearing officer for permission to transfer the child. 34 C.F.R. § 300.532(a).

- In all of these situations, the alternative setting chosen for the child must be determined by the child’s Individualized Education Program (IEP) team, which includes the parents. The setting must be sufficient to enable the child to continue to participate in the general education curriculum and progress toward the goals on his or her IEP. 34 C.F.R. § 300.531.
- Also, in these situations, “as appropriate,” the child must also receive a “functional behavioral assessment, and behavior intervention services and modifications, that are designed to address the behavior violation so that it does not recur.” 34 C.F.R. § 300.530(d)(ii).
- In addition, in all of these situations, the school must conduct a “manifestation determination” within ten days of the decision to transfer the child. 34 C.F.R. § 300.530(e). The manifestation determination is a decision, made by the student’s IEP (individualized education program) team as part of the disciplinary process, concerning whether the child’s misconduct was a “manifestation” of his or her disability. A manifestation is found if the misconduct “was caused by, or had a direct and substantial relationship to,” the disability, or “was the direct result of the [local education agency’s] failure to implement the IEP [individualized education program].” 34 C.F.R. § 300.530(e)(1)(i), (ii).
- If a manifestation is found, the IEP team must conduct a functional behavioral assessment of the child, and review and (if necessary) revise the child’s behavioral intervention plan. 34 C.F.R. §300.530(f)(1)(i), (ii). In addition, the child must be *returned* to the placement from which he or she was removed – unless the removal was based on the child’s possession of a weapon or illegal drugs or infliction of serious bodily injury. 34 C.F.R. § 300.530(f)(2), (g).

- If, on the other hand, no manifestation is found, the child may be subjected to the same disciplinary procedures that apply to other students. 34 C.F.R. § 300.530(c). Thus, the child would remain in the alternative placement (assuming he or she has already been placed there), or (if the placement has not yet occurred) could be transferred at that point. If no manifestation is found, the student must continue to receive educational services so as to enable him or her to participate in the general education curriculum, although in another setting. 34 C.F.R. § 300.530(d)(i).

A parent can request a special education hearing if he or she disagrees with school officials' decision on any of these points. If the child is already in an alternative placement because of weapons, drugs, or "serious bodily injury," he or she remains there pending the outcome of the hearing or the expiration of the term of discipline, whichever comes first. 34 C.F.R. § 300.533.

3. *Expulsion*

Expulsions of children with disabilities are legally possible. This is because, if a child's misconduct is determined not to be a manifestation of his or her disability, discipline may be applied "in the same manner and for the same duration in which the procedures would be applied to children without disabilities." 20 U.S.C. § 1415(k)(1)(C). Thus, where the misconduct is such that the child would be expelled if he or she had no disabilities, and if the manifestation issue has been resolved against the child, an expulsion can occur.

In practice, however, expulsions of children with disabilities are rare. Moreover, even if expelled, the student cannot be excluded from educational services. Instead, under 20 U.S.C. § 1412(a)(1), the school district must continue to provide a free, appropriate public education for as long as the child is eligible for special education (age 21 or graduation, whichever occurs first). This is a more extensive entitlement than that of a regular education student, who, if expelled, only has the right to have the school district "make provision" for the student's education until the student reaches age 17.

4. *Injunctive orders changing a child's placement*

The special rights and procedures discussed in this section are also subject to the principle that, even where school officials must ordinarily obtain parental consent or a hearing officer's order before moving ahead with discipline, the school always has one additional option. That is the option of going directly to court for an injunction changing the child's placement on an emergency basis, pending the outcome of the administrative hearing process and any appeals. *See Honig v. Doe*, 484 U.S. 305, 326 – 28 (1988) (court intervention is proper where current placement is “substantially likely to result in injury” to child or others). Such cases are rare, because courts are reluctant to override the administrative process, and the standard that school officials must meet is high. *See, e.g., Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 – 28 (8th Cir. 1984); *Phoenixville Area School District v. Marquis B.*, 1997 WL 67793 (E.D. Pa. 1997); *School District of Philadelphia v. Stephan M.*, 1997 WL 89113 (E.D. Pa. 1997), *on reconsideration*, 1997 WL 109586 (E.D. Pa. 1997).

C. **Rights of students with disabilities who *may be* eligible for special education**

The IDEA provides that, if certain criteria are met, a child who has not yet been identified as eligible for special education can “assert any of the protections” available to identified students. 20 U.S.C. § 1415(k)(5). These criteria, any one of which will suffice, can be summarized as follows: (1) the parent has previously expressed concern in writing to school officials that the child needs special education; (2) the parent has requested a special education evaluation; or (3) the teacher or other school staff has expressed concern about the behavior of the child to special education officials. *Id.*; 34 C.F.R. § 300.534(b).

These provisions can provide a basis for challenging disciplinary action for a child who shows signs of needing special education. For example, if the parent has requested an evaluation but the school has not yet acted on the request, and if in the meantime the school proposes to expel the child, § 1415(k)(5) would allow the child to request a special education hearing – thereby blocking the expulsion. (In practice, the district – if pressed – would probably agree to keep the child in school at least pending the outcome of the evaluation.) If a request is made for an evaluation of the

child during the period in which the child is subjected to disciplinary measures, the evaluation must be expedited. 34 C.F.R. § 300.534(d)(2)(i).

Note, however, that § 1415(k)(5) ordinarily does *not* come into play if the issue of the child's special education eligibility is raised for the first time *after* the misbehavior has occurred. In that situation, the family could still initiate the special education evaluation process; but the proposed discipline could not be blocked in the meantime. If the child were ultimately found to be eligible for special education, he would presumably have the right to return to school and receive special education services.

D. Rights of students with disabilities who are not eligible for special education

As we noted at the outset, there are also students who, while not in need of special education, have a disability within the meaning of § 504 of the Rehabilitation Act – and as a result need some sort of special accommodations in school. Often, these are children who have been identified as “protected handicapped students” under 22 Pa. Code Ch. 15.

The elaborate rules set forth in the IDEA relating to suspensions, alternative school placements, and transfers of children in special education do not apply to these “§ 504 students.” However, § 504 regulations do require some due process protections, including notice, an opportunity to examine records and be heard in an impartial hearing, and a review process. While districts can comply with this requirement by offering § 504 students the same procedures as IDEA-eligible students, they do not have to go that far. For example, a recent case addressed whether a § 504 student is entitled to a manifestation hearing. While the case turned on administrative exhaustion, in dicta the court stated it would not “engraft an IDEA procedural protection [i.e. a manifestation hearing] onto the Rehabilitation Act's statutory scheme.” *Centennial Sch. Dist. v. Phil L.*, 559 F. Supp. 2d 634, 645 (E.D. Pa.2008). The court left open the question of whether a procedure “similar” to the IDEA process might be required, however.

Moreover, there is older case law to the effect that children who are disabled within the meaning of § 504 cannot be punished for misconduct that is a manifestation of the disability, *e.g.*, *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981). This principle seems consistent with the essential anti-discrimination thrust of § 504. In addition, the Office for Civil Rights

(OCR) in the United States Department of Education has advised that a manifestation determination concerning alleged misbehavior must be conducted prior to proceeding with an expulsion hearing against a Section 504-protected student. *See Washington (CA) Unified Sch. Dist.*, 29 IDELR 486 (OCR 1998).⁸

Thus, it is still unclear exactly which disciplinary procedures must be afforded to students who are protected only under Section 504. However, there is certainly room to argue the substantive point that such a student cannot be punished for behavior that results from a disability, and to debate the level and nature of procedural protection required.

VI. RELATED ISSUES: SEARCH AND SEIZURE, SELF-INCRIMINATION

Because issues of search and seizure and of self-incrimination arise in some discipline cases, we discuss them here. This is an evolving area, especially with regard to whether the Pennsylvania Constitution provides greater protection than the Constitution of the United States.

A. Searches of individually targeted students must meet a “reasonable suspicion” (as opposed to “probable cause”) test, and must be reasonable in scope

The Fourth Amendment applies to searches of students by school officials – but the rules are somewhat less stringent than in other contexts. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). When school officials target a specific student (or her possessions) for search, two requirements must be met. The first is that the search must be justified at its inception; ordinarily, this criterion is met “when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” *Id.* at 341 – 42. This standard is obviously less demanding than the “probable cause” standard that applies to most searches by municipal police officers. Moreover, school officials are not required to obtain a warrant. *Id.* at 340 – 41.

⁸ “IDELR” stands for Individuals with Disabilities Education Law Report, and this citation can be found by subscribing to www.specialedconnection.com.

The second requirement is that the search be reasonable in scope, *i.e.*, that “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* at 342.

Applying these requirements, the Supreme Court in *T.L.O.* upheld the search of a student’s purse where an administrator had learned that the student had been seen smoking in the bathroom. The search was reasonable at its inception, and it was also reasonable to further search the purse once rolling papers were discovered. *Id.* at 346 – 48.

The Supreme Court recently crafted a higher standard for strip searches because of their extremely intrusive nature. In *Safford Unified School District #1 v. Redding*, 129 S.Ct. 2633 (U.S. June 25, 2009), a student was suspected of distributing common painkillers and was subjected to a strip search after a search of her bag and outer clothing turned up nothing. The Court found that the strip search was unconstitutional because the school did not have reasonable suspicion of danger or evidence to suspect contraband was hidden in an intimate place.

With respect to individualized searches, the search-and-seizure clause of the Pennsylvania Constitution, Art. I, § 8, has been held – at least by the Superior Court – to impose the same requirements as the United States Constitution. *Commonwealth of Pennsylvania v. J.B.*, 719 A.2d 1058, 1066 (Pa. Super. 1998). This holding may be debatable, however, given the later decisions of the Pennsylvania Supreme Court in *In re F.B.* and *Theodore v. Delaware Valley School District*, regarding generalized searches (see below).

Examples of recent applications of these standards in Pennsylvania are *In re A.D.*, 844 A.2d 20 (Pa. Super. 2004) (allowing search of several students seated near purse from which money had been found to be missing); *Rinker v. Sipler*, 264 F. Supp. 2d 181 (M.D. Pa. 2003) (upholding search of student who smelled of marijuana, looked stoned and was incoherent). These cases illustrate not only the situations in which a “reasonable suspicion” may be found, but also the scope of the search that may be permitted. Both cases involved searches of portions of the students’ clothing, and in *Rinker*, the student was required to lower his pants and allow the administrator to run his hands around the inside of his underwear. *Id.* at 184.

Other examples are *Hedges v. Musco*, 204 F.3d 109 (3d Cir. 2000) (blood and urine tests for drugs and alcohol were reasonable when a teacher and a nurse reasonably suspected that the student was under the influence); *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000) (unreasonable to require pregnancy test of student athlete); *Bartram v. Pennsbury School District*, 1999 WL 391480 (E.D. Pa. 1999) (search of student's locker was reasonable given that he was late to school and smelled of marijuana); *In re Dumas*, 515 A.2d 984, 986 (Pa. Super. 1986) (unreasonable to search locker after finding cigarettes on student's person, because no reason to believe there would be additional cigarettes in locker).

The somewhat relaxed standards of *T.L.O.* and the state constitution also apply to searches by school police, so long as they are not acting as the "agents" of municipal police. See *In re D.E.M.*, 727 A.2d 570 (Pa. Super. 1999). *D.E.M.* provides an example of what this can mean in practice. There, the police conveyed an anonymous tip to school officials, then absented themselves. The school officials proceeded to conduct a search, which was upheld on "reasonable suspicion" grounds (even though, presumably, it would not have been lawful had the police themselves conducted it). So long as the police do not "coerce, dominate or direct the actions of school officials," the court held, there is no constitutional violation – even if the police provide information with the intent to instigate a search. *Id.* at 574.

While it is difficult to establish a violation of the "reasonable suspicion" standard, the courts are apparently willing – in the context of a juvenile or criminal proceeding – to suppress evidence in situations where that standard has been violated. See, e.g., *In re A.D.* and *In re D.E.M.* (where court assumes that, had the "reasonable suspicion" standard not been met, the evidence would have been suppressed); *Dumas* (suppressing evidence). See also *In re J.N.Y.*, 2007 WL 2178455 (Pa. Super. 2007) (holding that an unverified tip given to an administrator did not provide "reasonable suspicion" to search a student for possession of marijuana pipes).

However, there is no authority for the proposition that a similar exclusionary rule exists in the context of a school disciplinary proceeding; and indeed, a Pennsylvania regulation expressly states that no such rule exists, at least with respect to evidence illegally seized from school lockers. 22 Pa. Code § 12.14. Thus, while evidence illegally seized by school officials can be suppressed in juvenile court, and while civil remedies (such

as a prospective injunction against systemic violations of students' privacy rights) may also be available, it appears that search-and-seizure violations will seldom afford a basis for upsetting a disciplinary decision.

The "reasonable suspicion" standard applies only to searches – not to questioning. *D.E.M.* at 571 ("school officials do not need reasonable suspicion, supported by specific and articulable facts, before merely detaining and questioning a student about a rumor concerning his possession of a gun on school property").

Finally, the Third Circuit recently decided that physical seizures of students, *i.e.* the detaining of a student while an investigation into allegations of misconduct is conducted, are to be analyzed under the reasonableness standard. *Shuman v. Penn Manor School Dist.*, 422 F.3d 141 (3d Cir. 2005) (school's confinement of a student to a conference room for four hours was reasonable in light of the seriousness of the allegations of sexual misconduct).

B. Generalized searches that do not target a particular student are permitted if they are reasonable in light of the privacy interests at stake

In this section, we discuss generalized searches, not targeted to a specific individual – such as the use of metal detectors, locker searches, and drug tests.

In *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), the Supreme Court upheld a school policy requiring random urinalysis of students participating in athletics. In evaluating the reasonableness of the search, the Court noted that the privacy interests at stake were minimal, and that the concerns at stake – use of drugs by athletes – were "immediate" and effectively addressed by the policy. Subsequently, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), the Supreme Court approved a policy requiring students to consent to drug testing in order to participate in extracurricular activities.

However, the Pennsylvania Supreme court has held that Article I, § 8 of the state Constitution – the search-and-seizure clause – provides somewhat greater protection to students. Thus, in *In re F.B.*, 726 A.2d 361, 368 (Pa. 1999), *cert. denied*, 528 U.S. 1060 (1999), the court considered the

use of metal detectors at a school entrance. The court held that Art. I, § 8 requires a “greater degree of scrutiny” than does the Fourth Amendment, and also added a consideration not present in *Acton* – whether notice of the nature and purpose of the search has been given. *Id.* at 668 – 71. Even so, the search was upheld.

Subsequently, in *Theodore v. Delaware Valley School District*, 836 A.2d 76 (Pa. 2003), the state Supreme Court held (in a decision on preliminary objections) that a school’s drug testing policy was not necessarily lawful under the Pennsylvania Constitution. The policy called for random, suspicionless drug and alcohol testing of students who participated in extracurricular activities or had parking permits. The court noted that, if the Fourth Amendment were the only issue, the policy would pass muster under *Earls*. However, the Pennsylvania Constitution requires stricter scrutiny; and given (among other things) the lack of a record showing the existence of a drug problem in the district’s schools, or the efficacy of the proposed means of dealing with such a problem, it was not yet appropriate to conclude that the policy met state constitutional requirements.

The Pennsylvania Supreme Court has also addressed the issue of locker searches. *Commonwealth of Pennsylvania v. Cass*, 709 A.2d 350 (Pa. 1998). There, school officials had drug-sniffing dogs check all the lockers; those identified by the dogs as containing drugs were then searched. The search was proper under *Acton*, the court held, because the expectation of privacy of lockers – which are owned by the school and can be accessed by school officials – is minimal; the canine sniff was not itself a search, and opening the lockers was “minimally intrusive”; and there was ample reason for the school to be concerned about drug use and the method used was practical. The court also approved the search under the Pennsylvania Constitution, even stating at one point that that document affords no greater protection than the Fourth Amendment. *Id.* at 365. This dictum seems questionable given the subsequent decision in *Theodore*, which noted that *Cass* was only a plurality opinion. However, *Theodore* seems to convey approval of the holding in *Cass* – suggesting that challenges to locker searches will likely continue to face difficulty.

C. School police, but not school officials, must give *Miranda* warnings

In *In re R.H.*, 791 A.2d 331 (Pa. 2002), the Pennsylvania Supreme Court considered – in the context of a juvenile delinquency case – whether a student suspected of vandalism was entitled to receive *Miranda* warnings before being questioned by a school police officer. Stating that “school police are constitutionally indistinguishable from municipal police,” the court held that *Miranda* warnings were required. As a result, the evidence was suppressed with respect to the juvenile proceeding.

The situation differs if school officials, but not school police, are involved in the questioning of a student. *See G.C. v. Bristol Township School District*, 2006 WL 2345939 (E.D. Pa. 2006) (school officials who question a student about behavior that may violate school rules need not provide *Miranda* warnings). Interviews conducted by school officials are also exempt from the requirements of the Protection of Pupil Rights Amendment (PPRA), 20 U.S.C. § 1232h, which allows a student to refuse surveys or interviews regarding illegal, anti-social, self-incriminating or demeaning behavior. *Haas v. West Shore School Dist.*, 915 A.2d 1254, 1259 (Pa. Commw. Ct. 2007).

Any illegal or prohibited materials seized during any student search (not just a locker search) may be used as evidence against the student in a school disciplinary proceeding. 22 Pa. Code § 12.14.

APPENDIX A

“Roadmap” for the attorney representing a student in a disciplinary case

- Does the school have the *authority* to impose discipline for this behavior, and to impose this punishment?
 - Do state statutes and regulations provide, expressly or by necessary implication, authority for the proposed discipline, and does the discipline meet the test of “reasonableness”?
 - If so, is the school’s authority to impose discipline in this situation, or to impose this punishment, curtailed by federal statute (as, *e.g.*, in the case of students with disabilities or English language learners)?
 - Is the school’s authority curtailed by the Pennsylvania or United States Constitutions (*e.g.*, the First Amendment)?
 - Assuming that the school has the necessary state-law authority to impose this discipline, and that there are no federal statutory or federal or state constitutional impediments, did the school adopt and promulgate a rule stating that this behavior could result in punishment?
 - Was the rule sufficiently clear to pass the Fourteenth Amendment’s “vagueness” test?
- Has the school followed the required *procedures* in determining whether to impose this discipline?
 - Have the necessary notices been issued and hearings offered? Have applicable time limits for scheduling the hearing been met?
 - At the hearing, are the required procedures followed (informal hearing procedures for suspensions and transfers to alternative schools, formal hearing procedures for expulsions)?

- Especially at a formal hearing, is there compliance with the impartiality requirements and evidentiary rules?
- If the student or his parents are not fluent in English, are interpretation services provided?
- If the student has, or shows signs of having, a disability, does the district comply with the additional federal and state statutes and regulations applicable to such students, including procedures for administrative hearings and appeals?
- Once the school- and district-level procedures are complete, is *judicial review* available?
 - Can the decision be appealed under the Local Agency Law?
 - Alternatively, or in addition, can an original action be filed to challenge the decision in federal or state court?
 - In the case of a student with (or showing signs of having) a disability, is judicial review available under federal and state special education law?
 - What is the time period for seeking judicial review (this depends, of course, on the route selected)?
 - What will be the standard of review?
- If expelled, does the student have a *right to continued educational services*?
 - Is there an automatic right to continued services?
 - If not, can services be obtained pending judicial review?

APPENDIX B

Pennsylvania School Discipline Regulations

§ 12.6. Exclusions from school.

(a) The governing board shall define and publish the types of offenses that would lead to exclusion from school. Exclusions affecting certain students with disabilities shall be governed by § 14.143 (relating to disciplinary placements) and 34 CFR 300.519—300.529 (relating to discipline procedures).

(b) Exclusion from school may take the form of suspension or expulsion.

(1) Suspension is exclusion from school for a period of from 1 to 10 consecutive school days.

(i) Suspensions may be given by the principal or person in charge of the public school.

(ii) A student may not be suspended until the student has been informed of the reasons for the suspension and given an opportunity to respond. Prior notice of the intended suspension need not be given when it is clear that the health, safety or welfare of the school community is threatened.

(iii) The parents or guardians and the superintendent of the district shall be notified immediately in writing when the student is suspended.

(iv) When the suspension exceeds 3 school days, the student and parent shall be given the opportunity for an informal hearing consistent with the requirements in § 12.8(c) (relating to hearings).

(v) Suspensions may not be made to run consecutively beyond the 10 school day period.

(vi) Students shall have the responsibility to make up exams and work missed while being disciplined by suspension and

shall be permitted to complete these assignments within guidelines established by the governing board.

(2) Expulsion is exclusion from school by the governing board for a period exceeding 10 school days and may be permanent expulsion from the school rolls. Expulsions require a prior formal hearing under § 12.8.

(c) During the period prior to the hearing and decision of the governing board in an expulsion case, the student shall be placed in his normal class except as set forth in subsection (d).

(d) If it is determined after an informal hearing that a student's presence in his normal class would constitute a threat to the health, safety or welfare of others and it is not possible to hold a formal hearing within the period of a suspension, the student may be excluded from school for more than 10 school days. A student may not be excluded from school for longer than 15 school days without a formal hearing unless mutually agreed upon by both parties. Any student so excluded shall be provided with alternative education, which may include home study.

(e) Students who are under 17 years of age are still subject to the compulsory school attendance law even though expelled and shall be provided an education.

(1) The initial responsibility for providing the required education rests with the student's parents or guardian, through placement in another school, tutorial or correspondence study, or another educational program approved by the district's superintendent.

(2) Within 30 days of action by the governing board, the parents or guardians shall submit to the school district written evidence that the required education is being provided as described in paragraph (1) or that they are unable to do so. If the parents or guardians are unable to provide the required education, the school entity shall, within 10 days of receipt of the notification, make provision for the student's education. A student with a disability shall be provided educational services as required by the Individuals With Disabilities Education Act (20 U.S.C.A. § § 1400—1482).

(3) If the approved educational program is not complied with, the school entity may take action in accordance with 42 Pa.C.S. Chapter 63 (relating to the Juvenile Act) to ensure that the child will receive a proper education. See § 12.1(b) (relating to free education and attendance).

§ 12.7. Exclusion from classes—in-school suspension.

(a) A student may not receive an in-school suspension unless the student has been informed of the reasons for the suspension and has been given an opportunity to respond before the suspension becomes effective.

(b) Communication to the parents or guardian shall follow the suspension action taken by the school.

(c) When the in-school suspension exceeds 10 consecutive school days, an informal hearing with the principal shall be offered to the student and the student's parent or guardian prior to the 11th school day in accordance with the procedures in § 12.8 (relating to hearings).

(d) The student's school entity has the responsibility to make provision for the student's education during the period of the in-school suspension.

§ 12.8. Hearings.

(a) *General.* Education is a statutory right, and students shall be afforded due process if they are to be excluded from school. In a case involving a possible expulsion, the student is entitled to a formal hearing.

(b) *Formal hearings.* A formal hearing is required in all expulsion actions. This hearing may be held before the governing board or an authorized committee of the board, or a qualified hearing examiner appointed by the board. When a committee of the board or a hearing examiner conducts the hearing, a majority vote of the entire governing board is required to expel a student. The following due process requirements shall be observed with regard to the formal hearing:

(1) Notification of the charges shall be sent to the student's parents or guardians by certified mail.

(2) At least 3 days' notice of the time and place of the hearing shall be given. A copy of the expulsion policy, notice that legal counsel

may represent the student and hearing procedures shall be included with the hearing notice. A student may request the rescheduling of the hearing when the student demonstrates good cause for an extension.

(3) The hearing shall be held in private unless the student or parent requests a public hearing.

(4) The student may be represented by counsel, at the expense of the parents or guardians, and may have a parent or guardian attend the hearing.

(5) The student has the right to be presented with the names of witnesses against the student, and copies of the statements and affidavits of those witnesses.

(6) The student has the right to request that the witnesses appear in person and answer questions or be cross-examined.

(7) The student has the right to testify and present witnesses on his own behalf.

(8) A written or audio record shall be kept of the hearing. The student is entitled, at the student's expense, to a copy. A copy shall be provided at no cost to a student who is indigent.

(9) The proceeding shall be held within 15 school days of the notification of charges, unless mutually agreed to by both parties. A hearing may be delayed for any of the following reasons, in which case the hearing shall be held as soon as reasonably possible:

(i) Laboratory reports are needed from law enforcement agencies.

(ii) Evaluations or other court or administrative proceedings are pending due to a student invoking his rights under the Individuals With Disabilities Education Act (20 U.S.C.A. § § 1400—1482).

(iii) In cases in juvenile or criminal court involving sexual assault or serious bodily injury, delay is necessary due to the condition or best interests of the victim.

(10) Notice of a right to appeal the results of the hearing shall be provided to the student with the expulsion decision.

(c) *Informal hearings.* The purpose of the informal hearing is to enable the student to meet with the appropriate school official to explain the circumstances surrounding the event for which the student is being suspended or to show why the student should not be suspended.

(1) The informal hearing is held to bring forth all relevant information regarding the event for which the student may be suspended and for students, their parents or guardians and school officials to discuss ways by which future offenses might be avoided.

(2) The following due process requirements shall be observed in regard to the informal hearing:

(i) Notification of the reasons for the suspension shall be given in writing to the parents or guardians and to the student.

(ii) Sufficient notice of the time and place of the informal hearing shall be given.

(iii) A student has the right to question any witnesses present at the hearing.

(iv) A student has the right to speak and produce witnesses on his own behalf.

(v) The school entity shall offer to hold the informal hearing within the first 5 days of the suspension.

APPENDIX C

Sample Notice of Appeal of Expulsion Decision

In the Court of Common Pleas
of _____ County – Civil Division

Appeal of *(name of student)*,)
by his parent, *(name of parent)*)
)
) No.
From a decision of the)
(name of district) School District,)
a local agency)

NOTICE OF APPEAL

(Name of student), by his parent, *(name of parent)*, hereby appeals from the decision of the *(name of school district)* School District, sent to *(name of parent)* on *(date)* expelling *(name of student)*. A copy of the decision is attached.

Date:

(Signature)
*(Parent's name, address, etc. if pro
se/otherwise attorney info)*