

KROKIDAS & BLUESTEIN

ATTORNEYS

WEBINAR FOLLOW-UP QUESTIONS: STUDENT DISCIPLINE

Thank you for participating in the Student Discipline Webinar, hosted by the Massachusetts Charter Public School Association on September 20, 2016. The primary subject of the webinar was the student discipline regulations that apply when a “Big Four” offense is not involved, but we also reviewed the disciplinary procedures applicable to “Big Four” offenses. Lastly, we briefly summarized the steps that must be taken when a disciplinary offense is committed by a student who requires an Individualized Education Program or a plan based on Section 504 of the Rehabilitation Act (a “student with a disability”). We hope that you found the information helpful.

If you were not able to attend, or if you want to refresh your memory, a copy of our slides is available [here](#). Please share this link with your colleagues who were unable to attend, but would like to know more about the subject.

At the end of the presentation, we provided time for questions and answers. This client alert summarizes answers to those questions, and provides some additional material requested by webinar participants.

Please consider contacting Krokidas & Bluestein in the future if you need additional legal advice and guidance, whether on the student discipline regulations or other issues. More information is available online about the broad services offered by our [education practice at Krokidas & Bluestein](#), so please let us know if we can be helpful.

Best Regards,
Elka T. Sachs (ets@kb-law.com)

I. TIMING OF MANIFESTATION DETERMINATION MEETING

If the proposed removal of a student with a disability would constitute a change in placement, a meeting must be held to determine whether the student’s conduct was a manifestation of his or her disability within 10 days of the decision to impose the discipline. The determination must be made at this meeting, within the 10 day timeframe.

Two types of removals constitute a change in placement and, if imposed, necessitate a manifestation determination:

- (1) A suspension of more than 10 consecutive days; and
- (2) A suspension, regardless of consecutive length, that would result in the student having a history of more than 10 aggregate removal days in the school year, which is part of a series of removals:
 - a. In which each removal was prompted by substantially similar behavior; and
 - b. That suggests the student has been subject to a pattern of removals, when considering additional factors such as the length of each removal, the aggregate amount of time the child has been removed, and the proximity of the removals to one another,.

Each time discipline that constitutes a change in placement is imposed on a student with a disability, a manifestation determination must be conducted within the 10-day timeframe.

II. EMERGENCY REMOVAL

“Materially and Substantially Disruptive”

Removing a student on an emergency basis allows a school to conduct the preliminary hearing with the principal *after* the student is removed. An emergency removal is only permissible if the student is charged with a disciplinary offense and the principal¹ determines that:

- (1) The continued presence of the student:
 - a. poses a danger to persons or property; or
 - b. materially and substantially disrupts the order of the school; and
- (2) There is no available alternative to alleviate the danger or disruption.

Unfortunately, we cannot locate any judicial or administrative guidance that outlines the scope of what constitutes a material and substantial disruption. Therefore, a principal must exercise reasonable discretion when determining whether an emergency removal is warranted.

Removing a Student via Ambulance for Behavioral/Mental Health Concerns

According to [DESE guidance](#), the emergency removal rules do not apply to removals that are solely for the purpose of securing medical or clinical treatment for a student.

III. TIMING OF WRITTEN HEARING DETERMINATIONS

¹ A charter school’s board of trustees is required to designate a person in the code of conduct as the “principal” for the purpose of properly implementing the student discipline regulations. Similarly, the board of trustees must designate someone as the “superintendent” for the same purpose.

Principal Hearing Determinations

In connection with any short- or long-term suspension, or an emergency removal, the principal must hold a hearing and give written notice of his or her determination, which must include (among other things) the reasons for the determination. The regulations do not speak to when this written notice need be given, and we have not located relevant guidance. However, we assume that this written notice should be provided to the parent and student within a reasonable time frame. Note that the school cannot impose a suspension until this written determination is provided.

For an emergency removal, principals are required to make an oral determination on the same day of the hearing. Then, no later than the following school day, the principal must provide the student and parent with a written decision.

Superintendent Hearing Determinations

A student may appeal a principal hearing determination to the superintendent. The student discipline regulations require the superintendent to issue a written decision within five calendar days of the hearing.

IV. APPEAL RIGHTS

A student is only entitled to appeal a suspension to the superintendent if the removal constitutes a long-term suspension. A suspension is long-term if, in the given school year, the student has served more than 10 aggregate days of suspension, including all in-school suspension, emergency removal, and short-term suspension days. The appeal right is triggered by any suspension above the ten-day limit.

V. TIME-OUTS

No exclusionary time-out can exceed 30 minutes unless the principal approves an extension prior to the expiration of the first 30 minutes. However, DESE has stated that a “principal may not routinely approve such requests but must consider the individual circumstances, specifically whether the student continues to be agitated [in order] to determine whether [a] time-out beyond 30 minutes is justified.”

Note that, pursuant to the physical restraint regulations, schools are required to develop and implement written restraint prevention and behavior support policies and procedures, which must be reviewed each year, provided to program staff, and made available to parents of enrolled students.

The physical restraint regulations provide that the space used for a time-out must be clean, safe, sanitary, and appropriate for the purpose of calming. We have not located any additional guidance on this point.

VI. BIG FOUR OFFENSES AND ALCOHOL

Typically, no student can be sentenced to more than an aggregate of 90 suspension days in a given school year. However, if a student commits one of the “Big Four” offenses, a school can impose a suspension, which may be more than 90 days, or indefinite in length.

A student commits a Big Four offense if he or she:

- (1) Is found on school grounds, or at a school-sponsored or school-related event in possession of a dangerous weapon;
- (2) Is found on school grounds, or at a school-sponsored or school-related event in possession of a controlled substance;
- (3) Assaults educational staff on school grounds, or at a school-sponsored or school-related event; or
- (4) (i) (a) is charged with, convicted of, or admits guilt to a felony, or (b) if a felony delinquency complaint is filed against him or her, and (ii) the principal determines that the student’s continued presence would have a substantial detriment on the general welfare of the school.

Massachusetts does not define alcohol as a controlled substance. Mass. Gen. Laws c. 94C. Conversely, marijuana is, and the Supreme Judicial Court has confirmed that a student may be expelled or suspension if found with it on school grounds, or at a school-sponsored or school-related event. Commonwealth v. Humberto H., 466 Mass. 562, 567 (2013).

VII. INTERIM ALTERNATIVE EDUCATIONAL SETTINGS AND ALCOHOL

There are special circumstances in which schools may remove a student to an interim alternative educational setting for up to 45 days without conducting a manifestation determination. For example, a school may do so if, while at school, on school premises, or at a school function under the jurisdiction of a state or local educational agency, the student:

- (1) Knowingly possesses or uses illegal drugs; or
- (2) Sells or solicits the sale of a controlled substance.

Alcohol is neither a controlled substance, nor an illegal drug. Again, marijuana is a controlled substance. Marijuana is also considered an illegal drug, so long as the student does not legally possess or use it under the supervision of a licensed healthcare provider.

VIII. GOODWIN V. LEE PUBLIC SCHOOLS

Section 16 of Chapter 76 of the Massachusetts General Laws provides that a student who was wrongfully excluded from school may recover monetary damages in a tort action against the town or, in the case of a regional school district. Though this avenue for recovery is infrequently used, the Supreme Judicial Court [recently issued an opinion](#) reminding schools of the statute. In this case, the student is seeking compensation for grief and stigmatization that she allegedly suffered after being unlawfully excluded from her last year of high school. The case is not yet resolved.