

Considerations for Long-Term Suspensions and Expulsions under RSA 193:13

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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with a broad understanding of the law pertaining to student discipline. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

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I. OVERVIEW

Student discipline, once defined exclusively by the educator, is now increasingly defined by the law. In fact, New Hampshire's statute governing student discipline, RSA 193:13 was recently amended with significant changes. The goal of this material is to provide administrators with an overview of the due process requirements for short and long-term suspensions, as well as expulsions, and the tools necessary to fairly and effectively discipline students. In doing such, we will review the procedural safeguards and substantive changes that our courts and legislature have injected into the process of discipline, along with the disciplinary requirements of the IDEA and Section 504. This material does not cover all aspects of the law, and you are encouraged to seek advice from your district's legal counsel regarding any specific case.

II. THE GENERAL DISCIPLINARY FRAMEWORK

The State Legislature, our courts and the local school district have all had a hand in the development of the framework within which student discipline is administered. This section is designed to equip you with a general working knowledge of the laws which will affect the manner in which educators investigate, prepare and present a student disciplinary matter.

A. Understanding Due Process

Section 1 of the Fourteenth Amendment to the United States Constitution states that:

no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US Constitution, Amendment XIV, Section 1 (emphasis added). (The State of New Hampshire ratified the Fourteenth Amendment on July 6, 1866). The US Supreme Court held that, where a state mandates attendance at school, the right to education is a property right and a liberty and thus no school district can deny a student that right without granting the student due process of law. Goss v. Lopez, 419 U.S. 565 (1975).

In New Hampshire, the Legislature has imposed a duty on the school board "to provide, at district expense, elementary and secondary education to all pupils who reside in the district until such time as the pupil has acquired a high school diploma or has reached age 21, whichever occurs first; provided, that the board may exclude specific pupils for gross misconduct or for neglect or refusal to conform to the reasonable rules of the school..." RSA 189:1-a. For students with educational disabilities, there is an obligation to provide an education to the student inclusive of their 21st year, if they do not have a high school diploma.

Both expulsion and long-term suspension result in deprivation of a student's property right and liberty right in a free public education. Therefore, it is imperative that the district ensure that students receive due process of law in the context of a suspension or expulsion decision.

Fundamentally, due process of law means fairness. Fairness is ensured through the procedures whereby all parties are given an equitable opportunity to tell their story.

All laws pertaining to student discipline are written with the general goal of ensuring that students receive due process of law. In the context of a student suspension or expulsion, this includes the following fundamental rights:

1. Timely notice of the reasons for the discipline;
2. An opportunity to prepare a defense;
3. An opportunity to present a defense;
4. The right to be represented by an attorney;
5. The right to a fair and impartial hearing;
6. The right to examine witnesses and present evidence;
7. The right to an impartial and fair decision; and
8. The right of appeal.

The role of the principal and administrator in student discipline is to ensure the student is treated fairly throughout the disciplinary process without compromising the educational goal of achieving a positive learning environment in the school. From a practical perspective, this includes following minimum protections such as:

1. Promptly letting the student and parent know why they are being disciplined;
2. Promptly informing the student and parent of the nature of the discipline;
3. Providing the student and parent with an opportunity to defend their conduct;
4. Interviewing witnesses who may "exonerate" the student; and
5. Fairly disclosing information to the student which may assist them in preparing a defense.

B. The Duty to Publish

Fundamental to the concept of due process is that students know the rules and regulations of the school district. This is traditionally done through dissemination of the Student Handbook to each student at the commencement of the school year as well as a requirement that they sign and return a form indicating that they have read through the Student Handbook. Administrators should take particular care to ensure that students who are admitted during the school year are provided with a Student

Handbook and that the school confirms that the student has read through the Handbook.

In addition, it is recommended that announcements be made throughout the school year with regard to the availability of Student Handbooks in the student office as well as announcements which reiterate key components of the Student Handbook, including provisions related to discipline.

Practice Pointer: Particular care should be taken with regard to students who are in an English as Second Language (E.S.L.) program to ensure that they understand the Code of Conduct.

RSA 193:13 requires that school districts adopt discipline policies that “contain a system of supports and consequences designed to correct student misconduct and promote behavior within acceptable norms.” RSA 193:13, XI. The policies must:

- a. “Include a graduated set of age appropriate responses to misconduct that may include, but are not limited to, parent conferences, counseling, peer mediation, instruction in conflict resolution and anger management, parent counseling and training, community service, rearranging class schedules, restriction from extra curricular activities, detention, in-school supports and consequences, out-of-school suspension, and expulsion.
- b. Set forth standards for short term suspensions up to 5 days, short term suspension up to 10 days, long term suspensions up to 20 days, and expulsion. Such standards shall make reference to the nature and degree of disruption caused to the school environment, the threat to the health and safety of pupils and school personnel, and the isolated or repeated nature of incidents forming the basis of disciplinary action.”

This policy must also explain how parents and students will receive notice of the requirements of RSA 193:13; at a minimum, the policy must be available to parents at the beginning of each school year, and must be posted on the district’s website and in the student handbook. RSA 193:13, XII. If the District does not maintain a student handbook or website, then it must be available “in a manner designed to ensure parental notification.” Id.; see also Ed 317.03(b).

III. THE STATUTORY FRAMEWORK FOR DISCIPLINE: NH RSA 193:13

RSA 193:13 addresses three types of student discipline:

1. Short-term suspensions;
2. Long-term suspensions; and
3. Expulsions.

The balance of this material is focused on considerations specific to long-term suspensions and expulsions. However, for reference, a short-term suspension is one that removes a student from school for up to 10 consecutive school days. See RSA 193:13, I(a). In addition, conduct which may result in a short-term suspension includes:

1. Behavior that is detrimental to the health, safety, or welfare of pupils or school personnel; or
2. Repeated and willful disregard of the reasonable rules of the school that is not remediated through imposition of a district's graduated sanctions.

Id. The Department of Education has promulgated regulations that set forth the minimum due process requirements for short-term suspensions. Ed 317.04(e)(1)-(4).

A. Long-Term Suspensions

A **long-term suspension** is any suspension **in excess of 10 school days**, however, long-term suspensions are limited to "up to 10 additional consecutive school days." See RSA 193:13, I(b). Conduct which may result in a long-term suspension includes:

1. An act that constitutes an act of theft, destruction, or violence as defined by RSA 193-D;¹
2. Bullying pursuant to school district policy when the pupil has not responded to targeted interventions and poses an ongoing threat to the safety or welfare of another student; or
3. Possession of a firearm, BB gun, or paintball gun.

Id.

¹ "Act of theft, destruction, or violence' means an act set forth in the following statutes regardless of the age of the perpetrator:

(a) Any of the offenses enumerated in RSA 189:13-a, V.

(b)(1) Any first or second degree assault under RSA 631.

(2) Any simple assault under RSA 631:2-a.

(c) Criminal mischief under RSA 634:2.

(d) Unlawful possession or sale of a firearm or other dangerous weapon under RSA 159.

(e) Arson under RSA 634:1.

(f) Burglary under RSA 635.

(g) Robbery under RSA 636.

(h) Theft under RSA 637.

(i) Illegal sale or possession of a controlled drug under RSA 318-B.

(j) Criminal threatening under RSA 631:4." RSA 193-D:1.

As previously noted, each district must adopt a policy that includes the standards for long-term suspension (11-20 school days). Examples of such conduct could include:

- Any substantial threat to the school community
- Persistent and continual disregard of district policies
- An act of theft, destruction or violence as defined in RSA 193-D
- Bullying pursuant to school district policy when the student has not responded to targeted interventions and poses an ongoing threat to the safety or welfare of another student
- Possession of a firearm, BB gun, paintball gun or look-alike weapon
- Sale of drugs (on or off campus)
- Sexual assault, other than a felony if committed by an adult
- Possession of a knife or other weapon on campus or at a school activity
- Physical injury to staff or another student
- Any misconduct which is pending the Superintendent's recommendation for an expulsion hearing.

The school board, "or a representative designated in writing," has the authority to, following a hearing, continue a short-term suspension of a pupil for a period **in excess of 10 school days, but not for more than an additional 10 days.** RSA 193:13, I(b). The board's "designee may be the superintendent or any other individual, but may not be the individual who suspended the pupil for the first 10 days..." *Id.* (emphasis added). However, as noted above, "[a]ny time a pupil is suspended more than 10 school days in any school year, upon the pupil's return to school the school district shall develop an intervention plan designed to proactively address the pupil's problematic behaviors." RSA 193:13, V (emphasis added).

***Practice Pointer:** School principals have an integral role in the process of supplemental discipline. Failure to immediately refer an appropriate case to the superintendent for supplemental discipline may interrupt continuity in the disciplinary process, such that the student returns to school pending an expulsion or long-term suspension hearing.*

The Department of Education's regulations provide that, before any long-term suspension of a pupil, the individual (or school board) holding the hearing must provide written communication to the pupil and at least one of the pupil's parents or guardian, delivered in person or by mail to the pupil's last known address, of the charges and an explanation of the evidence against the pupil. See Ed 317.04(f)(2).

The regulations contain the following minimum due process requirements for long-term suspension hearings:

- The pupil, together with a parent or guardian, may waive the right to a hearing and admit to the charges made by the superintendent. (If the pupil is 18 years of age or older, the concurrence of a parent or guardian shall

be unnecessary unless the pupil is subject to a guardianship that would prevent the pupil from waiving the right to a hearing);

- Formal rules of evidence shall not be applicable, however, school officials shall present evidence in support of the charge(s) and the accused pupil or the parent or guardian shall have an opportunity to present any defense or reply;
- The hearing shall be either public or private and the choice shall be that of the pupil or parent or guardian;
- During the hearing, the pupil, parent, guardian, or counsel representing the pupil shall have the right to examine any and all witnesses; and
- A continuance of a hearing on the request of a parent or pupil over the age of 18, without the consent of the superintendent or chartered public school director, shall be conditioned on the pupil's continued exclusion from attendance.

Ed 317.04(f)(3); Ed 317.04(j).

If, after the hearing, the school board or its designee decides to impose a long-term suspension, the board or its designee must provide the pupil or his/her parent/guardian with a written decision, which includes the legal and factual basis for the conclusion that the pupil should receive a long-term suspension. Ed 317.04(f)(3).

The letter must also apprise the student of his/her right to appeal the long-term suspension. If the hearing was held by the superintendent or other designee, the student may appeal the decision to the school board within ten (10) days. RSA 193:13, I(c); Ed 317.04(f)(4). In the event of such an appeal, the board shall hold a hearing where it has the *discretion* to hear evidence or simply rely on the record of the prior hearing. RSA 193:13, I(c). A student then has the right to appeal the decision of this hearing to the State Board within 20 days from receipt of the decision. Ed 317.04(f)(5), (l). Any suspension imposed shall be enforced while the appeal is pending unless the school board chooses to stay the suspension while the appeal is pending. RSA 193:13, I(c).

***Practice Pointer:** In the case of an appeal of a long-term suspension to the school board, the hearing is initiated by a request on the part of the parent. In those cases, the principal should be furnished a copy of the parent's appeal for his/her review and response.*

B. Expulsions

Expulsion is defined by the regulations as “the denial of a pupil's attendance following a suspension at school for any of the reasons listed in RSA 193:13[.]” Ed 317.02(a). Any student may be expelled from a school district by the school board for “an act that poses an ongoing threat to the safety of students or school personnel” and that constitutes:

1. A repeated act of the kind that can form the basis for a long-term suspension, above;
2. Any act of physical or sexual assault that would be a felony if committed by an adult;
3. An act of violence pursuant to RSA 651:5, XIII; or
4. Criminal Threatening pursuant to RSA 631:4, II(a).

RSA 193:13, II.

Prior to expelling a student, the Board must consider the following factors:

1. The pupil's age.
2. The pupil's discipline history.
3. Whether the pupil is a student with a disability.
4. The seriousness of the violation or behavior committed by the pupil.
5. Whether the school district has implemented positive behavioral plans as provided for under RSA 193:13, V.
6. Whether a lesser intervention would properly address the violation or behavior committed by the pupil.

RSA 193:13, III-a. As these factors demonstrate, the State legislature has made it clear that expulsion is to be a measure of last resort, and that school boards should endeavor to institute lesser forms of punishment, as well as additional supports for the student, prior to expulsion.

When a pupil has been expelled, they shall not attend school in the district until restored by the board. RSA 193:13, III. Any expulsion decision is subject to review by the board if a request for review is made by the parent or guardian prior to the start of each school year. RSA 193:13, III-b. Any parent or guardian of an expelled student has the right to appeal any such expulsion by the board to the State Board of Education at any time while the expulsion remains in effect. Id. Any further appeal of a State Board of Education's decision shall be in accordance with RSA 541. Id.

1. Expulsion and Firearms

Any pupil who brings or possesses a firearm as defined in Section 921 of Title XVIII of the United States Code in a Safe School Zone as defined in RSA 193-D:1 without written authorization from the superintendent or designee of the superintendent shall be expelled from the district by the board for a period of not less than 12 months. RSA 193:13, IV.

If a pupil brings or possesses a firearm in a Safe School Zone without written authorization from the superintendent, the following protocol should usually apply:

1. If a student is subject to expulsion and a firearm is involved, the superintendent must contact local law enforcement officials.
2. The superintendent or his/her designee suspends the pupil for a period not to exceed ten (10) days, pending a hearing by the board;
3. The board holds a hearing within ten (10) days to determine whether the student was in violation of RSA 193:13, II and therefore is subject to expulsion; and
4. The superintendent makes a determination whether to modify the expulsions.

See Ed 317.03(d)-(e); RSA 193:13.

The board must uphold a policy that a pupil expelled from school in another State under the provisions of the Gun Free Schools Act of 1994 shall not be eligible to enroll in the district for the period of their expulsion. RSA 193:13, VI. If the out-of-state expulsion is for an indefinite period of time, the pupil or their parent or guardian has the right to petition the pupil's school board for enrollment upon establishing residency. Id. Any denial of such a request is subject to the same review as an expulsion by the board. Id.

2. The Expulsion Hearing

The school board must hold a formal hearing before any expulsion; the regulations contain specific requirements pertaining to prior notice of the hearing, along with hearing procedures. The expulsion hearing is held in accord with the hearing procedures promulgated by the State Department of Education. See Ed 317.04(g). It may be held either before or after the short-term suspension has expired; however, if it is held after the expiration of the short-term suspension, the pupil is entitled to return to school pending the expulsion hearing unless the student is still serving a long-term suspension. Ed 317.04(g)(3).

At least five (5) days prior to the hearing, the parent or guardian and student must be provided with a letter from the school board which gives written notice of:

- The hearing date, time, and place;
- A statement of the charges and the nature of the evidence against the pupil;
- The superintendent's written recommendation for board action and a description of the process used by the superintendent to reach his/her recommendation.

Ed 317.04(g)(4)-(5). The letter must be delivered in person or by mail to the pupil's last known address. Ed 317.04(g)(4). Parents/students should also receive a notice setting forth the hearing procedures.

Practice Pointer: For the school board's letter to be meaningful, it is incumbent upon the principal to provide the superintendent with detailed information as to the nature of the charges and the evidence that supports the charges, which the superintendent should thereafter provide to the school board. The school board's letter and supporting Fact Sheets are made part of the record of the hearing.

The student, together with a parent or guardian, may waive the right to a hearing and admit to the charges made by the superintendent. Ed 317.04(j)(1). If the student is 18 years of age or older, the student may waive the hearing, unless he/she is subject to a guardianship. Ed 317.04(j)(2). The school board should treat a parental or student request for a hearing as a statement that the parent or student wishes to be heard on the disciplinary matter.

The hearing must be conducted in accord with the following procedures:

- The hearing shall be either public or private and the choice shall be that of the pupil or his parent or guardian.
- Formal rules of evidence shall not apply; however, school officials shall present evidence in support of the charges, and the accused pupil or his/her parent/guardian shall have an opportunity to present any defense or reply.
- The pupil, his/her parent/guardian, or the pupil's attorney shall have the right to examine any and all witnesses, and to present any defense or reply. The principal/ administrator may also question witnesses presented by the parent or student.

- A continuance of a hearing on the request of a parent or pupil over the age of 18, without the consent of the superintendent, shall be conditioned on the pupil's continued exclusion from attendance.

Ed 317.04(j).

Practice Pointer: An audio tape recording should be made of the hearing.

Typically, the expulsion hearing proceeds as follows. The Superintendent or his designee begins by providing the Board with the evidence in support of the charges as well as a description of their reason for recommending expulsion. This evidence may consist of witness testimony, records, reports, student records and an investigative report by the principal. As noted above, the pupil, his/her parent/guardian, or the pupil's attorney can question these witnesses, and can present witnesses of their own. At the close of the hearing the principal, the parent and student are permitted to make closing statements. The parent and student's closing statement precedes the closing statement by the principal/superintendent.

After presentation of the case, the student, parents, witnesses, and the administration are excused from the hearing. The board deliberates privately. All parties should remain outside while the board deliberates. This is done in case the board requires an answer to new questions that arise during deliberation. When deliberation has concluded, the parties are either released from the hearing and notified of the decision in writing or are called back into the hearing and immediately notified of the decision.

The goal of the board is to fairly determine whether or not it is more probable than not that a student be engaged in a violation of the Code of Conduct. Unless the district's policy states otherwise, the standard of proof is not a "reasonable doubt" standard, but rather the civil standard whereby the administration must demonstrate that it is more probable than not that the student violated the Code of Conduct in a manner requiring discipline. In this regard, the school board weighs the evidence much like a judge or jury would weigh the evidence in a civil case.

The board is required by law to base its decision on a dispassionate and fair consideration of "substantial evidence" that the student committed the act for which expulsion is to be imposed and that such acts are, in fact, a proper reason for expulsion. Ed 317.04(h).

The administration and the parent will be notified in writing of the decision of the board. The written decision must include the following information:

- The factual basis for the decision including the specific statutory reference prohibiting that act as listed in RSA 193:13, II;

- The board's consideration of each of the factors for expulsion as set forth in RSA 193:13, III;
- That the expulsion runs until the school board or board of trustees later reviews it and restores the pupil's permission to attend school;
- Any action the pupil may take to be restored by the board; and
- That the pupil has the right to appeal the decision to the state board.

Ed 317.04(i).

C. Full Faith and Credit

School districts must give full faith and credit to another district's long-term suspension or expulsion. However, except in cases of expulsion under the Gun Free Schools Act of 1994, the superintendent in the enrolling district may modify the suspension or expulsion. See RSA 193:13, I(b); RSA 193:13, III-c; RSA 193:13, VI; RSA 193:13, IX.

With respect to expulsions, any school district or chartered public school can choose to admit an expelled pupil at their sole discretion. See RSA 193:13, III-c. However, any such decision is not binding on any other school district or chartered public school until the pupil is reinstated by the pupil's local school board. Id.

D. Alternative Schooling and Access to Assignments

RSA 193:13, IV explicitly states that, "Nothing in this section shall be construed to prevent the local school district that expelled the student from providing educational services to such students in an alternative setting." Even students expelled under the Gun Free Schools Act of 1994 are eligible to be educated in an alternative setting.

Furthermore, RSA 193:13, V requires all school districts to make educational assignments available to suspended pupils during periods of suspension. For any student who is suspended for more than 10 days in a school year, the school district or chartered public school must develop an "intervention plan" designed to proactively address the pupil's problematic behaviors. Id. For suspensions in excess of 20 cumulative days within any school year (not including expulsions), students must be provided "alternative education services" designed to enable the pupil to advance from grade to grade. Id. The statute makes it clear that "[n]o pupil shall be penalized academically solely by virtue of missing class due to suspension." Id.

In addition, if the pupil who is facing a long-term suspension or expulsion has been identified as educationally disabled, then he/she has certain additional rights under both federal and state law. This includes the right to a free appropriate education at public expense, even if the school district has determined that the student's behavior is not a manifestation of his/her educational disability. 34 C.F.R. 300.530(d)(1) (the

student must “continue to receive educational services . . . so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP.” In addition, the child must also receive “as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.”). If the disciplinary removal constitutes a change in placement, then the student’s IEP Team will determine an appropriate placement for the student for the duration of his/her long-term suspension or expulsion. 34 C.F.R. 300.530(d)(5).

State regulations provide that when a student with disabilities has been removed for more than 10 days in a school year, “in addition to providing services necessary to enable the child to continue to participate in the general education curriculum, . . . the LEA shall provide service necessary to provide the child with a disability an opportunity to progress in the general education curriculum consistent with the child’s IEP.” Ed 1124.02. If the services are provided in the child’s home, they must consist of a minimum of 10 hours per week of instruction, including special education and related services. Id.

IV. CONCLUSION

Student discipline must be founded on principles of fairness. School districts which adhere to the state and federal standards will make great strides in the quest to instill students, parents and faculty with a sense of fairness and predictability.

Students who are facing long-term suspensions or expulsion are entitled to due process. The key to the long-term suspension or expulsion hearing is fairness – did the procedures ensure that the student was given an equitable opportunity to tell his/her story?