

Student

Discipline

Thrun Law

February 8,

2017

MASB

Put R/W documents in CABO

Shykwam

on or before May 1st
Form to order sample
handbook circulating around

School Law Workshop on Student Discipline



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Caution



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Topics

- Code of Conduct
- Off-Campus Misconduct
- Due Process
- Search & Seizure
- Suspension & Expulsion
- New §1311c (restorative practices)
- New §1311d (pre-expulsion factors)
- New Seclusion & Restraint
- Discipline of Students with Disabilities
- Cyberbullying

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Code of Conduct Required

- Shall develop and implement
- Shall enforce
 - In a classroom
 - Elsewhere on school premises
 - On a school bus
 - On other school-related vehicles
 - At school sponsored activity or event whether or not held on school premises

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Off-Campus Misconduct

General power to provide for safety and welfare of pupils while

- at school,
- at a school sponsored activity, or
- en route to or from school or a school sponsored activity

§11a(3)(b) & §601a(1)(b)

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Nexus Required (connection)

To discipline students for out-of-school behavior, there must be a relationship or connection between:

- the misconduct
- and
- school operations

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did activity begin at school or spill over to school the next day

pen campus?

Case for
↓ Nexus

Regional H.S (NJ) (1970)

No authority to suspend or expel unless out-of-school conduct "*materially and substantially interferes with the requirements of appropriate discipline in the operation of the school*"

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Substantial Disruption

- Substantial disruption in school operations
- Foreseeable risk of substantial disruption in school operations
- Material and substantial interference in school operations

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Constitutional Due Process

Under the Fourteenth Amendment to the U.S. Constitution, a state may not "*deprive any person of life, liberty, or property without due process of law.*"

- Substantive due process
- Procedural due process

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Goss v Lopez 419 US 565 (1975)

- School attendance is a **property interest** protected by due process
- Harm to reputation may implicate **liberty interests** *- in their social name in their reputation*
- Exclusion from school violates due process without "*some kind of notice of the charges and an opportunity to refute them*"
- Suspension over **10 days** "*may require more formal procedures*"

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Dialogue

"[O]nce school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands."

① Notice of what not allowed - Handbook
② Notice of charge opportunity to Refute the charge

C.B. v Driscoll, 82 F3d 383, 386 (CA 11, 1996)

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Notice for Long-Term Removal

- Charges
- Summary of facts
- Recommended consequences
- Procedural rights
- Date, time, place of hearing
- Status pending hearing
- Student Handbook/Board Policy

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→ degree of depth 1st w/ amount of time out of school.

Does this hold true for anonymous parent reports

Board Policies

- Check Board Policies and Handbooks!
- May impose more procedural requirements than imposed by Constitution or statute

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Anonymous Student Statements

Student does *not* have due process right to review statement of anonymous witness when "essential facts" of the allegations are provided

Sufficient for Admin. to determine scope of investigation and outcome of investigation

Paredes v Curtis
864 F2d 426, 430 (CA 6, 1988)

Note: Do **not** base discipline determination solely on hearsay

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Attorneys

"Students do not have a due process right to an attorney at expulsion hearings, let alone a right to be notified that they are entitled to an attorney."

C.Y. v Lakeview Pub Schs
No. 13-1791 (CA 6, 2014)

But: Board Policy may permit the student to have an attorney at the hearing

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Full & Fair Investigation

- Suspend judgment until investigation is complete
- * Do not investigate *to prove* what is alleged to have happened but rather to discern *what happened*
- Interview all with knowledge
- Consider tangible evidence
- Make credibility determinations

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Interviews

- Complainant
 - And all witnesses s/he identifies
- Accused
 - And all witnesses s/he identifies
- Others who may have knowledge (Consider where/when)
 - Classroom Teacher?
 - Food Service Staff?
 - Bus Driver?
 - Coach?

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Open-Ended Questions

- Who?
- What happened?
- When did it happen? Once or recurring?
- Where did it happen?
- Why? (Motivations?)
- How did you respond or what did you do?
- Any witnesses?
- Did you tell anyone? Who and when?
- Do you have any notes, pictures, videos, or other evidence?

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Level of Proof → Preponderance of Evidence
was it substantiated by the evidence → all evidence tips scale one way or other that is a "preponderance" 3
Not reasonable doubt standard

Even if a criminal investigation underway - school still has to do their own investigation independent of the police investigation
 Don't Suspect School Administration

Preserve Tangible Evidence

- Surveillance video
- Text messages
- Screenshots of FaceBook or Snap Chat
- Voicemail messages
- Handwritten notes
- Graffiti
- Tobacco, cigarettes, paraphernalia
- Caution: Contact law enforcement re: evidence of sexting or other inappropriate images
- Caution: Turn over drugs and weapons to law enforcement
 - Take pictures or make photocopies of weapons, drugs, graffiti, vandalism
 - Use ruler to establish length of knife blade

do NOT use internet to transmit any images related to ~~school~~ photography - hand them + lawyers paper copies

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ."

US Const, Am IV

Legal Standards

- Reasonable expectation of privacy?
- Search standard
 - "Probable cause" for law enforcement
 - "Reasonable suspicion" for school officials
- Illegal search consequences
 - Exclusion of "tainted" evidence
 - Civil rights violation

what if student refuses a search?

New Jersey v TLO (1985)

- Reasonable suspicion, not probable cause, is needed for school officials to search students
- Was the search
 - Justified at inception?
 - Reasonable in scope?

2 part TEST

School Code Sec. 1306 Locker Searches

- No privacy expectation
- Principal may search locker/contents
 - Without reason
 - Without notice
- Law enforcement may assist
- Policy required
 - Copies to student, parent, MDE

check if policy handbook

Doe v Little Rock Sch Dist (CA 8, 2004)

- Students removed personal items from pockets and placed purses/backpacks on desks
- While students were in the hall, school officials searched their belongings
- Marijuana found in Doe's purse
- Search unconstitutional because no individualized suspicion

Does this include contents of the locker?

if reasonable suspicion
 safer to get the items out of locker bring to office, call student in + then search it.

best if student consents to search

→ Can you determine code violation w/o searching the phone

Doe Court Ruling

"Full-scale searches that involve people rummaging through personal belongings concealed within a container are manifestly more intrusive than searches effected by using metal detectors or dogs."

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Klump v Nazareth SD (ED Pa, 2006)

- Rule prohibited students from using cell phones
- Administrators may seize phone
- Search of stored information subject to T.L.O. reasonableness standard

① reasonable to search
② reasonable to in scope

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G.C. v Owensboro Pub Schs (CA 6, 2013)

- Teacher confiscated student's cell phone for texting in class
- AP looked "to see if there was an issue with which I could help him so that he would not do something harmful to himself or someone else."
- School officials lacked reasonable grounds under TLO and Klump to search text messages on cell phone

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Sixth Circuit Ruling

*"A search is justified at its inception if there is reasonable suspicion that a search will uncover evidence of further wrongdoing or of injury to the student or another. **Not all infractions involving cell phones will present such indications.** Moreover, even assuming that a search of the phone were justified, the scope of the search must be tailored to the nature of the infraction and must be related to the objectives of the search."*

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Sixth Circuit Ruling

"Under our two-part test, using a cell phone on school grounds does not automatically trigger an essentially unlimited right enabling a school official to search any content stored on the phone that is not related either substantively or temporally to the infraction."

G.C. v Owensboro Pub Schs (CA 6, 2013)

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US v Place (1983)

- Trained drug dogs sniffed luggage
- Limited intrusion of property in a public place discloses only presence of narcotics
- Not a "search"

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if dog hits on the locker then you have permission to search in locker. (belonging's reasonable suspicion & even) (prob. cause)

B.C. v Plumas Unified Sch Dist (CA 9, 1999)

- Students required to exit classroom and walk by a drug-sniffing dog
- No drugs found
- Dog-sniff of individual students was a
 - Highly intrusive search
 - Unreasonable

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Myers v State of Indiana (Ind, 2005)

- Students do not have an expectation of privacy for odors emanating from vehicles
- Dog sniff of property not a "search"
- Dog alert establishes probable cause
- Firearm seized by school officials could be used as evidence in criminal proceeding against student

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Vehicle Search

- Parking lot patrols
- Plain view
- Canine
- Reasonable suspicion
- Vehicle entry
 - Permission
 - Law enforcement

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Student Vehicles

- Privilege (not a right) to park on school property
- Registration form
- Conduct standards
- Searches

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Car in P. Lot
Not a reasonable expectation of privacy in regard to a car brought on campus

Is this in our policy/handbook?

MacIneirghe v East Islip SD (ED NY, 2007)

- Court upheld search and saliva test of 10th grader who went to school parking lot with friend allegedly to smoke marijuana
- "Schools continue to have a strong if not compelling interest, in ensuring that their students are not using drugs."

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Voluntary Activities = Consent?

- Implied consent
 - Voluntary participation
 - Privilege
 - Give up privacy
- Express consent
 - Tickets
 - Consent forms

Put right on tickets if do so.

Can't require a breathalyzer/search as pre-condition for coming to school, but can do so for activities that a voluntarily attended by student & a privilege and a privilege

if don't have a drug + alcohol problem in school or among athletes then don't do this; unnecessary

Vernonia Sch Dist, 47J v Acton (1995)

- Drug-testing program for student athletes is "reasonable and hence constitutional"
- Program was "unobtrusive"
- Athletes had "low expectations" of privacy
- School drug problems were significant

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Indep Sch Dist No. 92 v Earls (2002)

- School policy allowing suspicionless random drug testing of students involved in competitive extracurriculars did not violate the Fourth Amendment
- Students "voluntarily" subjected themselves to search by participating in extracurricular activities

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another kid videotapes anyone that is at educational record

Legal Issues

- Reasonable expectation of privacy?
 - Location
 - Activity
 - Notice
- Is it a search?
- Electronic eavesdropping
- Collective bargaining agreement

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Public v Private Area

- Videotaping in **public** area is **not**
 - Violation of privacy right
 - Illegal search
- Public area
 - Hallway
 - Bus
- Private area
 - Locker room
 - Bathroom

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also some things in classroom are FERPA protected so not able to use it
 Videos in classrooms? → may impact teacher work conditions so may have to bargain

FERPA
 Parents have right to see kids educational record
 A student's educational record is private
 How to reconcile these 2 if more than 1 student involved.

(Educational Record) Videotaping

Videotaping in public areas does not violate any constitutional right of privacy, nor does it constitute an illegal search or seizure.

US v Concepcion (CA 7, 1991)
 US v Taketa (CA 9, 1991)

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Brannum v Overton Cty Sch Bd (CA 6, 2008)

- Video surveillance of locker rooms violated Fourth Amendment as an unreasonable "search"
- No immunity to principal and AP who installed the equipment and viewed/retained the tape

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Parent requesting to see a video of a discipline issue → No consensus on this

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Education record of their student, why no way to redact record you may want to see

best we have is showing to not disclose identity of students in the video if they are involved discipline going on
 If just in hall then Not a problem

Legal Landscape
Pre- §1311c and §1311d

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Revised School Code § 1311(1)

“...the school board, or the school district superintendent, a school building principal, or another school district official if designated by the school board, may authorize or order the suspension or expulsion from school of a pupil guilty of **gross misdemeanor or persistent disobedience** if in the judgment of the school board or its designee, as applicable, the interest of the school is served by the authorization or order.”

MCL 380.1311(1)

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“Gross Misdemeanor”

- Criminal act *not* required
- Gross misconduct or misbehavior

Holman v School Trustees
77 Mich 605 (1889)

- Something more than a trivial offense

Kloberdanz v Swan Valley
Mich App No. 256208 (2006)

- *Something more than negligence (not an accident)*

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Mandatory Permanent Expulsion Subject to Possible Reinstatement

1. Dangerous weapon
2. Criminal sexual conduct
3. Arson
4. Physical assault to employee, volunteer, or contractor

Big 4

*= Permanent Expulsion
≠ 180 day Expulsions*

No presumed date where have right to return

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Out of all Public Schools

- Another school district *shall* exclude during period of expulsion for “Big 4”
- Another school district *may* exclude during period of expulsion for physical assault of another pupil
- Exceptions: Appropriate Alt Ed, SDA

Strict Discipline Reader

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1. **RSC § 1311(2) – Weapon, CSC, Arson**

“If a pupil possesses in a weapon free school zone a weapon that constitutes a **dangerous weapon**, commits **arson** in a school building or on school grounds, or commits **criminal sexual conduct** in a school building or on school grounds, the school board, or the designee of the school board as described in subsection (1) on behalf of the school board, **shall expel** the pupil from the school district **permanently**, subject to **possible reinstatement** under subsection (5).”

MCL 380.1311(2)

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Revised School Code § 1313(4)

"As used in this section, **'dangerous weapon'** means a firearm, dagger, dirk, stiletto, knife with a blade over 3 inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles."

very define

MCL 380.1313(4)

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Firearm Defined

(Federal)

- As defined in federal law-18 USC §921
- Any weapon (including a starter gun) which will, or is designed to, or may readily be converted to expel a projectile by the action of an explosion.

Not a mandatory expulsion under state law

Not bb guns or paintball guns (pneumatic guns (spring, gas, air))

- but can still expel under local policy but not from all public schools in state

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Pneumatic Gun Defined

- Any implement, designed as a gun, that will expel a BB or pellet *by spring, gas, or air*.
- Includes a paintball gun that expels by *pneumatic pressure* plastic balls filled with paint for the purpose of marking the point of impact

MCL 123.1101(d)

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Davis v Hillsdale C/S (COA 1997)

- Statute governing weapon free school zones did not preclude school district in its broad discretion from establishing policy mandating permanent expulsion of student for possession of BB gun on school property
- But student not expelled *from all public schools in the state* per Section 1311(2)

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Weapon Offense

- Secure weapon
- Determine facts about possession/intent
 - Item for use or delivery as weapon
 - Item knowingly possessed
 - Knowledge that item was weapon
 - Permission to have weapon at school
- Determine if "dangerous weapon"
- Photograph weapon
- Contact law enforcement

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"Clear and Convincing" Proof

- Board not required to expel (but may)
- If student proves in a **clear and convincing** manner one of the statutory exemptions for weapon possession:
 - Is it clear?
 - Are you convinced?

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Could have a broader list but not a mandatory permanent expulsion.

exception: if have a pellet gun w/ rifle barrel & propelled by gas is considered "dangerous weapon"

How measure blade => blade itself

board designee → debate that board has to make determination
board makes his determination

debate that board has to make determination
Admin can make's recommendation but Board determines based on student presenting clear & convincing manner

Weapon Expulsion Exemptions

1. Item not possessed for use as weapon, or for direct/indirect delivery to another for use as weapon
2. Weapon not knowingly possessed
3. Student did not know or have reason to know that item was "dangerous weapon"
4. Weapon possessed at direction or express permission of school or police

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Seal v Morgan (CA 6, 2000)

- "**** suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest."

if didn't know have it does not make building unsafe by expelling him

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student must prove in a clear and convincing manner (higher standard of proof than preponderance of evidence)

Arson/CSC

→ criminal sexual conduct

- School Code does not define
- "Bootstraps" the Michigan Penal Code
- Arson: felony violation of Penal Code
- CSC: violation of Penal Code for CSC 1, 2, 3, 4

MCL 380.1311(11)

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Mandatory Expulsion

"If a pupil ... commits arson ... or **criminal sexual conduct** in a school building or on school grounds, the school board, or the designee ... **shall expel** the pupil from the school district **permanently**, subject to possible reinstatement under subsection (5)."

MCL 380.1311(2)

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Arson/CSC Defined

"Arson" means a felony violation of ... the Michigan penal code"
"Criminal sexual conduct" means a violation of ... the Michigan penal code...."

So ... when does the mandate to expel apply?

MCL 380.1311(11)(a)(b)

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Arson/CSC: How to Proceed?

- No requirement to wait for criminal adjudication
- Consider disciplinary action for Code of Conduct violation only and provide the following written notice:

Because the conduct approximates that described in Revised School Code Section 1311(2), the District reserves the right to further review this matter and impose disciplinary consequences consistent with Section 1311(2) if the student pleads guilty or no contest to, or is convicted of arson/criminal sexual conduct.

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debate on this

Some school boards - if conduct is as described in penal code then we will perm. expel

Other boards issue a discretionary expulsion + state conduct law

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leading to this mirrors criminal violation if guilty criminal violation then go back + permanently expel (reserve right to expel permanently if criminal violation.)

→ Not every physical interaction is an assault

Physical Assault Defined

"Intentionally causing or attempting to cause physical harm to another through force or violence"

MCL 380.1310(3)(b)
MCL 380.1311a(11)(b)

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against an adult

Causing Phys. Harm and Intent of Phys. Harm

Sec. 1311a(1) – Physical Assault

- If a pupil enrolled in grade 6 or above
- commits a **physical assault**
- at school
- against a person employed by or engaged as a volunteer or contractor by the school
- the school board (or designee)
- shall expel the pupil from the school district permanently,
- subject to possible reinstatement under subsection (5)."

MCL 380.1311a(1)

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Permanent Expulsion

Against another student

Physical Assault Against Student

- If a pupil enrolled in grade 6 or above
- commits a **physical assault**
- at school
- against another pupil
- the school board (or designee)
- shall suspend or expel up to 180 school days

MCL 380.1310(1)

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180 suspension of expulsions

Verbal Assault/Bomb Threat

- Student in grade 6+ commits
- Verbal assault, or
- Bomb threat or similar threat directed at school building, event, or property
- Board shall suspend or expel the pupil from the school district for a period of time as determined in the discretion of the school board.

MCL 380.1311a(2)

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no definition for this statute

avoid verbal assault in language - be more descriptive in policy threatening, vulgar, etc.

Smith v Mt. Pleasant P/S (E.D. Mich 2003)

- "Verbal assault" statute found unconstitutionally vague and overbroad
- "Verbal assault" not adequately defined
- Imposes restrictions so vague and broad that it chills speech in violation of 1st Amendment
- Nonetheless may discipline pupil for:
 - Lewd and vulgar remarks (Frazer)
 - Substantially disruptive speech (Tinker)

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Permanent Record

"If an individual is permanently expelled pursuant to this section, the expelling school district shall enter on the individual's permanent record that he or she has been permanently expelled pursuant to this section."

RSC § 1311(3) Weapon, CSC, Arson
RSC § 1311a(3) Assault, Bomb Threat

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If a kid withdraws to avoid discipline follow through w/ hearing nevertheless b/c if live in district can come back at anytime unless expelled.

Timeline for when reinstatement permissible

Open Meetings Act

- Sec. 8(b) permits closed session for student discipline at parent request
- Board decision must be made in open session
- Minutes shall *not* include personally identifiable information that violates FERPA
 - PA 305 of 2004
 - Effective August 11, 2004

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legis. packet

Reinstatement

Offense	Grades K-5	Grades 6 & Above
Firearm or Weapon Threat		
• Petition for Reinstatement	After 60 school days	After 150 school days
• Reinstatement	Possible after 90 school days	Possible after 180 school days
Possession of Other Dangerous Weapon		
• Petition for Reinstatement	Anytime	After 150 school days
• Reinstatement	Possible after 10 school days	Possible after 180 school days
Arson		
• Petition for Reinstatement	Anytime	After 150 school days
• Reinstatement	Possible after 10 school days	Possible after 180 school days
CSC		
• Petition for Reinstatement	Anytime	After 150 school days
• Reinstatement	Possible after 10 school days	Possible after 180 school days
Physical Assault of Teacher, Contractor or volunteer		
• Petition for Reinstatement	N/A	After 150 school days
• Reinstatement	N/A	Possible after 180 school days

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New Sections Effective 8/1/17

The impact of new provisions

Not in effect until 8-1-17

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Jennifer

Law basically in place but added extra steps

Mandatory Factors

Before suspending or expelling a student, (school) must consider:

- Age (Notice that it is not grade)
- Disciplinary history
- Disability
- Seriousness of behavior
- Whether behavior posed safety risk
- Restorative practices
- Whether lesser interventions would address behavior

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School board

When?

School must consider factors before suspending or expelling under Revised School Code sections:

- 1310 - *phy. assault against another pupil*
- 1311(1) - *gross misd. pers. dir. op.*
- 1311(2) - *weapon, arson/CSC*
- 1311a - *physical assault against adult*

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basically any time a suspension

Section 1310

- Physical assault against another pupil
- Grade 6 and above

"Shall suspend or expel the pupil from the school district for up to 180 school days."

↑

law the same, but now have to look at the factors

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We do that we have to look at the factors

Section 1311(1)

- Gross misdemeanor or persistent disobedience
- Interest of school served by suspension or expulsion

"May authorize or order the suspension or expulsion from school..."

*if interest of school served by that discipline
interest = could be safety*

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Section 1311(2)

- Weapon
- Arson
- Criminal Sexual Conduct

"Shall expel the pupil from the school district permanently, subject to possible reinstatement..."

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legislatures didn't say how we consider these factors

Section 1311a

- Physical assault against employee, volunteer, or contractor
- Grade 6 or above

"Shall expel the pupil from the school district permanently, subject to possible reinstatement..."

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Factors

- Expulsions under sections 1310, 1311(1), 1311(2), and 1311a subject to consideration of new factors
- No long-term suspension or expulsion before consideration of factors *

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*have to consider ALL of the factors
what will be our process & documentation for this*

~~consider no still~~
~~consider~~

*if expel a student for 180 days → means can re enroll once served his time
if expelled permanently then can put conditions upon returning*

"Discretion" under 1310d

"[T]his section applies to give the [school] discretion over whether or not to suspend or expel a pupil under section 1310, 1311(1), 1311(2), or 1311a."

*Ph. Ass adult
Ph student
Rev. Dis
Gross Misd
Permanent
gives board discretion*

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Rebuttable Presumption 1310d

A rebuttable presumption is one that may be overcome if the evidence demonstrates that the presumption is incorrect.

a presumption that susp./exp. Not appropriate and can overcome that presumption with evidence

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that says so

evidence in this case is the consideration of the factors

presumption holds for 10 days or only

No presumption if < 10 day

More than 10 Days

"In exercising this discretion with regard to a suspension of more than 10 days or an expulsion, there is a rebuttable presumption that a suspension is not justified unless the [school] can demonstrate that it considered each of the factors..."

Board must go in assuming that

MCL 380.1310d(2)

10 or Fewer Days

"For a suspension of 10 or fewer days, there is no rebuttable presumption, but the [school] shall consider each of the factors..."

So don't assume of the but that suspension inappropriate but still have to consider the factors

MCL 380.1310d(2)

Not necessarily applies to teacher sending a kid to office who suspension does apply to suspension

Suspension inappropriate & must consider factors and only suspend if factors consideration overrides presumption

Firearms

Section 1310d factors not required when expelling a student "for possessing a firearm in a weapon free school zone."

Factors have to be considered.

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Weapon Exceptions

School need not expel if pupil establishes in a clear and convincing manner 1 of the following:

- Not possessed as weapon, or for delivery for use as a weapon
- Not knowingly possessed
- Pupil did not know it was a weapon
- Weapon possessed at suggestion, request of, or with permission by school or police

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Same as before

State law allows, but Fed. law would trump

FYI if student does this BOE may expel or not still, but not

The burden here is ON the Student/Parent to convince BOE in clear & convincing manner

What Now?

- Revise board policies, student and staff handbooks, internal operating procedures
- Educate staff
- Document consideration of factors!

Review all school Disc. Policies & student & staff handbooks & contract

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Example 1

recommended to expel if prima exception.

A general education high school student brings a gun to school for use as a weapon. Administration recommends that the Board expel the student permanently. What must the Board do?

permanently expel unless student presents clear & convincing evidence of an exception.

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Adm. can recommend but student has to prove

BOE needs to develop guidance on what it means to consider

Internal operating procedures - Principals, Asst. Princ., Super. BOE Knowledge & Process

Best practice have a form w/ all factors on it & complete that w/ v box for each after considering all factors & still recommend susp. usually have to be articulated

THIS DOES NOT APPLY IN-school suspension, but might advise a name to in-school detention

A "lesser intervention" could be a in-school detention

Do NOT make Restorative Justice the blanket lesser intervention

Answer 1 *final*

- Hold hearing according to current practices
- If student presents clear and convincing evidence that exception applies, board may choose not to expel
- Otherwise, Board must expel permanently without considering factors

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Example 2 *b/c there are some offense too serious for this i.e. series CSC perhaps*

A 7th grade general education student physically assaults a teacher while trying to get past the teacher to enter a fight. What must the Board do?

Typically: mandatory permanent expulsion

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3 days

Answer 2

- Presumption that permanent expulsion is not appropriate *so have to*
- **Consider factors before making decision**
- Document consideration of factors
- If factors overcome presumption that expulsion is not appropriate, Board may expel

BOE decision

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Example 3

A 9th grade general education student is caught possessing tobacco in school. The student code of conduct states that the principal should suspend for 3 school days. What should the principal do?

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< 10 days

Answer 3

- Principal may suspend for 3 days after considering factors
- Document consideration of factors
- No presumption that suspension is inappropriate

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Example 4

A 10th grade general education student is caught drinking at a school function. The handbook requires that students caught drinking at school functions be suspended for 15 days. May the school suspend for 15 days?

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Answer 4

- School may suspend student for 15 days if the school first considers the factors
- Rebuttable presumption that suspension is not appropriate
- Be able to show factors were considered and explain why a 15-day suspension was appropriate despite the presumption that suspension is not appropriate

7-10 days

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Caution!

- Factors allow consideration of student's disciplinary history
- OCR has increased investigations of racial disparities in student discipline
- Consideration of discipline history in determining current discipline could increase disparities

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Restorative Practices

- New MCL 380.1310c
- School "shall consider using restorative practices as an alternative or in addition to suspension or expulsion under this act."
- "If a [school] suspends or expels a pupil under this act, the [school] shall consider using restorative practices in addition to suspension or expulsion."

shall consider + shall use

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(in the statute)

Victim-Offender Conferences

Victim-offender conferences that:

- Are initiated by victim
- Are approved by victim's parent or victim (if victim is at least 15)
- Are attended voluntarily by the victim, a victim advocate, the offender, members of school community, supporters of victim and offender
- Provide opportunity for offender to accept responsibility

R.P.T.

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Friend
Parent
Teacher
counselor

↓
Permission
Step 5
to avoid
FERPA
penalator

"Restorative Practices Team"

Attendees at conference may require offender to:

- Apologize
- Participate in community service, restoration, or counseling
- Pay restitution (if applicable)

what if person does not comply then can put

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Should be the First Consideration

when dealing with these types of misbehavior

- Interpersonal conflicts
- Bullying
- Verbal and physical conflicts
- Theft
- Property damage
- Class disruption
- Harassment and cyberbullying

*

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OCR is very clear that when dealing w/ Title IX issues (sex. ass.) doing this usually inappropriate b/c reporting + victimizes victim only exception would be if victim requests it w/ a your success stories or encouragement

restoration

item needs to have a place where suspension considered restorative

Roy
Don't ever do

Caution!

- Victim-offender conferences must not be required for allegations of sexual harassment, unless fully initiated by the victim
- Use caution in selecting team for sexual harassment cases – less is more!
- Do not “encourage” victim to participate if victim is unwilling!
- Potential for re-victimization
- Decreases reporting

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Corporal Punishment Prohibition
MCL 380.1312

- Prohibits discipline by deliberate (corporal punishment) infliction of physical pain.
- Excepts pain from reasonable athletic training activities.

Seclusion + Restraint → last ditch effort only in emergency situation

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Reasonable Physical Force Permitted:

- To maintain order *catch all
- To prevent physical harm
- To obtain possession of weapon or dangerous objects
- To protect property

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Review Standard for Challenged Conduct

- Statutory: Deference to reasonable, good faith judgments
- Review Under IDEA
- Constitutional Standards
- Child Protection Law *most important related to this*

if there are situations need to use force you are dealing w/ an explosive situation not a normal situation that can reflect upon the act - have to act immediately so unless go unhinged / every you will be protected

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Restraint and Seclusion

- Frequency of Use in Special Education Population: 24%
- Frequency of Improper Use Unknown
- Source: Lt. Gov. Calley's Special Education “Listening Tour”

perhaps advised by data of audience

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School Code Amendments Concerning Restraint and Seclusion

- Public Act Nos. 394-402 of 2016
- Approved by the Governor December 28, 2016
- Effective March 29, 2017

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has to be a in re view
→
can allow initiative

applies to corporal punishment but not so much to restraint + seclusion

Goal of legislation: stop seclusion + restraint except in some very unique situations

Structure of Restraint and Seclusion Legislation

- Prohibitions
- Policy
- Documentation and Communication

• Adds Revised School Code Sections 1307-1307h

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Purposes of Restraint and Seclusion Legislation

- Ensure those techniques are used only as a last resort
- Promote use of positive behavioral intervention strategies while eliminating use of restraint and seclusion
- Promote pupil dignity, safety, and well-being

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Absolute Prohibitions

- Everything that's already prohibited by law
- All restraints, other than "emergency physical restraints"
 - Mechanical (Harness) (include bus harness)
 - Chemical (pepper spray, sedatives)
 - Prone Restraints (pinning kid down)
 - All Others (CPI OK)
- All seclusion, other than "emergency seclusion"

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Restraint Defined

- An action that prevents or significantly restricts student movement
- Does not include:
 - Calming or comforting
 - Minimum necessary contact to escort or assist with task
 - Prevention of dangerous impulsive behavior (if kid is going to run in front of street can stop him)

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Seclusion Defined

- Confinement in a room or other space from which the pupil is physically prevented from leaving
- Does not include:
 - Emergency lockdown drills
 - Other emergency security procedures necessary for pupil safety

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^{define} "Emergency" Restraint and Seclusion

- Last resort safety interventions
- Cannot be used as a convenience
- Cannot be used if less restrictive alternatives exist

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Timeout Room ok if nothing keeps students from leaving NOT seclusion then

"Emergency" Restraint and Seclusion, cont.

- Cannot be used as a substitute for "adequate" staffing
- Cannot be used if contraindicated medically or "based on" student's disability, per records available to school

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"Emergency" Restraint and Seclusion, cont.

- Only for use when safety of individuals threatened *Not properly*
- Must be an "essential" action
- Restraints generally may not be imposed for more than 10 minutes
- Seclusion generally not longer than 15 minutes for elementary students; 20 minutes for middle and high school students

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Time limits
if exceed why document why + bring in new person to D dynamic

"Emergency" Restraint and Seclusion, cont.

Must always:

- Involve "key personnel" to protect student interests
- Continually monitor the student
- To extent practicable, ensure student can communicate
- Document observations

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who know about restraints + seclusion + appropriate handling SW SS teacher

"Emergency" Restraint and Seclusion, cont.

If statutory time limits are exceeded, must:

- Bring in additional support staff
- Produce documentation explaining why time limits exceeded

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Communication of Seclusion or Restraint

- Immediately orally report to building administration and parent/guardian
- Reasonably attempt further debriefing and consultation with parent/guardian
- Provide documentation to parent/guardian within the earlier of 1 school day or 7 calendar days

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Follow-Up Procedures

If student poses a "substantial risk" of causing a future emergency, school personnel are "encouraged" to:

- Conduct a functional behavioral assessment *FABA*
- Create a positive behavioral intervention and support plan *BIP*
- Create a team to implement the behavioral plan

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if do so then have to consider do could have need to or else
Even for ED Gen. Ed.

*Lawyer says
do this
for sure
so not called
grossly negligent
& lose your
immunity
- take this
as a mandate*

Follow-Up Procedures, cont.

Emergency intervention plan encouraged:

- Describe procedures and legal limits on their use
 - Include all known medical data in determination
 - Have the procedures peer reviewed
 - Communication in detail, orally and in writing, with parents
 - Create a team to do the above

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Personnel Training

- Awareness training for all personnel having pupil contact in a "comprehensive training framework"
- Specific mandatory and recommended training for "key personnel"
- Inform substitute teachers of restraint and seclusion procedures

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Training of Key Personnel

Mandatory Training:

- Types, effects, and risks of restraint and seclusion
- Identification of student behavioral triggers
- Strategies to ensure student dignity
- De-escalation techniques and safety considerations

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Training of Key Personnel, cont.

Mandatory Training:

- Instruction in restraint and seclusion techniques
- Instruction on relevant state policies
- Effects upon students of restraint and seclusion, and monitoring same
- CPR, First Aid, and obtaining medical assistance

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Training of Key Personnel, cont.

Suggested Training:

- Mediation and conflict resolution
- Social skills
- Positive behavioral intervention and support strategies

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Data Collection and Publication

Schools Must:

- Collect data regarding use of restraint and seclusion
- Collected data must be reported by race, age, gender, disability status, medical condition, identity of school personnel, and of school and program
- Should analyze internally
- Must report to state as directed
- State will make aggregate, redacted data available

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ROB

New Legislation

- MCL 380.1307 through MCL 380.1307h
- Effective March 29, 2017
- Requires MDE to develop a state policy on seclusion and restraint by December 1, 2016
- Requires local districts/ISDs/PSAs to adopt and implement consistent policy by start of 2017-2018 school year
- Failure to comply may result in civil and criminal penalties

MDE Policy and Guidance

- State Board of Education adopted policy in 2006
- Unclear if/when MDE intends to update policy in light of new legislation
- MDE has comprehensive guidance: http://www.michigan.gov/documents/mde/StandardsforSeclusion-Restraint_247533_7.pdf

SPECIAL EDUCATION DISCIPLINE

Michigan Law Does Not "Trump" IDEA

"This section does not diminish the due process rights under federal law of a pupil who has been determined to be eligible for special education programs and services."

So w/ Big U have to follow IDEA for 504 or SE kids.

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Topics

- 10 Day Rule
- Counting Days of Removal
- Change of Placement
- Educational Services
- Manifestation Determinations
- Special Circumstances
- Students Not Yet Eligible
- Related Issues

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Overarching Principles

- Students with disabilities are general education students first—
 - Entitled to same due process protections (fair investigation, notice, hearing)
 - Subject to the same standards (e.g., suspension or expulsion) unless disability related
- Never, ever, ever forget about FAPE
- Counting is hard - 10 days

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Key Discipline Concepts

- "10 day rule"
- "Day of removal"
- "Change of placement"

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"The 10-Day Rule"

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, **for not more than 10 school days** (to the extent such alternatives are applied to children without disabilities).

IDEA 20 USC 1415(k)(1)(B)

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10-Day Rule – What it Means for School Officials

- Disabled students may be removed for not more than 10 cumulative days in a school year w/o IDEA implications
- MDR not required
- Educational services not required (unless non-disabled students receive services)
- IEP, FBA, and BIPs not required but should be considered as appropriate

*Gen. Ed. Access
Special Ed. Services*

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"Removal" defined

- Removal of a student with a disability from instruction for disciplinary reasons,
- Without the opportunity to continue to
 - Progress in the general ed curriculum,
 - Receive services specified in IEP, and
 - Participate with nondisabled students, to the extent they would have in their current placement

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Partial Day Removals

- Removals for any part of the day counts as a full day of removal
- Partial day removals should also be considered when determining if there is a pattern of behavior that constitutes a change of placement

*Partial Day = Full Day
even if 1 hour a day*

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In School Suspension (ISS)

- ISS doesn't count as a day of removal if student:
 - has opportunity to progress in general education curriculum;
 - continues to receive IEP services; and
 - continues to participate with non-disabled students as otherwise would
- Document the services and supports student receives while in ISS

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*do their work in a different place
gets speech if speech day
Not 2 Sep. places for SE + GE student*

ISS Staffing Requirement

- Staff must be physically present in same location as student
- Staff must be certified teacher or meet MDE criteria on the use of non-certified personnel
 - www.michigan.gov/documents/March_06-NonCertifiedPersonnel_155395_7.pdf

who under direct supervision of a certified teacher

if placed in creating lessons than no teacher lesson, teacher grading lesson, teacher just delivering them ok.

Transportation Suspensions

- If transportation is included in IEP, the suspension counts as day of removal unless school provides alternative transportation
- If transportation is not included in IEP, the suspension doesn't count as day of removal and parent has same obligation to get child to/from school as any other parent
- Consider behavior at IEP meeting

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Former MDE Guidance

- Day of removal begins when the student is directed to leave school by school officials
- If school imposes conditions on student's return to school, each day student is out until condition is met is a day of removal (e.g. student may return to school after parent meeting, psych eval, etc.)
- If student is removed at school's request, it counts as a day of removal

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if parent volunteers to get kid & not told to be placed then not removal

Additional Removals After 10

School personnel may remove a disabled child who violates a code of student conduct . . . , for not more than 10 consecutive school days . . . **and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement).**

IDEA Regulation 300.530(b)(1).

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135

*can remove more than 10 days, but certain conditions must be in place
- don't have to change placement*

Additional Removals - What it Means for School Officials

- May remove a disabled student from school for more than 10 cumulative days in a school year (if not a change of placement)
- **BUT**, school must provide educational services to enable student to continue to participate in gen ed curriculum and progress on IEP goals
 - Nature of services are determined by school official in consultation with one of the student's teacher

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- doesn't need to be an iep team b/c not a change in placement

What Constitutes a Change of Placement?

- Removals for more than 10 consecutive days in a single school year
- Removals for more than 10 cumulative days in a school year **and** there is a pattern of removal
- Placement in an IAES for weapons, drugs, serious bodily injury, or dangerousness

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"Pattern of Removal"

- Series of removals that total more than 10 school days in a year;
- Student's behavior is substantially similar to behavior in previous incidents; and
- Such other factors as:
 - Length of each removal
 - Total amount of time removed
 - Proximity of removals to each other

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Chronic behavior leading to 10 cumulative

When do Serial Chronic removals become a Pattern?

"School Law Workshop on Student Discipline"

© 2017 - Thrun Law Firm, P.C. for MASB

10 days due to fighting vs. 3-5 different offenses

MDE Example

- OHI student with ADHD is suspended for talking back to teacher, again for walking out of class without permission, and again for getting into a fight
- If school concludes after reviewing available data that all three incidents have same cause (impulsivity), then behavior is substantially similar

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Document Pattern of Removals

- School should have written procedures for determining a pattern of removal
 - Procedures should include who constitutes the team to make the decision
- School should be prepared to provide evidence of its decision making process

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Change of Placement - What it Means for School Officials

- 10 days consec.
10 days
Or one of special
circumstances*
- School officials must adhere to certain IDEA procedural requirements when a change of placement is contemplated
- Failure to follow the IDEA procedures may result in requests for hearings, comp ed, attorney's fees, etc.

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Procedural Requirements for Change of Placement

- Provide educational services ✓
- Provide FBA or behavioral intervention services, as appropriate, to prevent behavior recurrence *Fuba*
- Conduct a manifestation determination ✓
- Provide notice of removal and procedural safeguards

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Educational Services for Change of Placement

- Provide educational services to enable student to continue to participate in general education curriculum, although in another setting, and progress toward IEP goals
- Setting and services are determined by the student's IEP team

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USDOE Guidance on Ed Services 52 IDELR 231 (OSERS, 2009)

- May not limit educational options to home-based instruction
- Must consider students' unique needs
- Need not provide all services from IEP

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Doesn't necessarily have to be face-to-face

“Individualized” Services Required

- Services should not be “one size fits all”
- Extent of services should be determined by length of removal, extent student has been removed in the past, student’s needs, and IEP goals
- Homebound rule does NOT apply

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Michigan Health Academy (SEA Mich, 2008)

- Parent challenged MDR and IAES
- School provided 1 hr. tutoring, 2x per week
- Student’s most recent IEP provided for 25 hours/wk. in self-contained LD classroom
- ALJ: Student’s conduct was not a manifestation of her disability but IAES was insufficient to meet student’s needs
- ALJ ordered school to increase IAES services within 5 days of decision

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St. Joseph Public Schs (SEA Mich, 2010)

- IEP Team proposed IAES of 6-10 hours per week of 1:1 instruction and enrollment in an on-line high school curriculum.
- ALJ: “[T]he IAES . . . was not adequate to allow the Student to participate in the curriculum where the record showed that the minimum hours of instruction promised did not demonstrate any knowledge or consideration of the amount of time needed for instruction in Student’s weakest subject area, the minimum hours of instructional time needed for all subject areas did not address any time to provide needed supports, and where there is no promised coordination with Student’s on-line independent learning opportunity.”

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Windemere Park Charter Academy (SEA Mich, 2010)

- IEP Team proposed IAES of 3.75 hours per week of direct instruction and additional time on tests; student’s prior IEP included intensive sp. ed. and supports.
- ALJ: “[T]he Student is not receiving anything near the educational services that his May 15, 2009 IEPT determined he needed and that he was receiving before his expulsion. Further, the services he is receiving do not occur daily, and in some instances, not all core subjects are covered during each of the three sessions per week. . . . The [District] is to increase the Student’s instructional time to four hours, daily, five days a week. The Student is to receive instruction in each of the four core academic subjects The Student is also to be provided [additional supplemental aids].”

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student has to have access to English Science math 533 WC

Additional Considerations for Educational Services

- Address core curriculum requirements
- Provide credit for work successfully completed
- Include student in state/district assessments
- Need not replicate all services child would receive in typical classroom

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Reiser v Fairfax Co Sch Bd (ED Va, 2005)

- Student expelled for behavior unrelated to disability
- District recommended placement in alternative learning center
- Parents challenged placement because program didn’t provide “equal” services
- Court held district not required to duplicate every program, club, etc., provided in student’s general ed setting.

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→ Do NOT Discipline a student for misconduct that they cannot control

What is a MDR?

- Looks at the relationship between the disability and the misconduct
- Conducted by school, parent, and relevant members of IEP team (as determined by school and parent)
- Held within 10 school days of any decision to change student's placement

Δ placement happens ^{when} 10 consec. 10 consecutive / a pattern of behavior

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What the MDR is not...

- An investigation into the misconduct
 - This is not the time to discuss whether the conduct occurred, whether the assistant principal is biased against the student, etc.
- The student disciplinary hearing
 - The MDR does not decide the student's discipline or review the appropriateness of the disciplinary recommendation

investigation already done

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Conducting the MDR

- The team shall review "all relevant information in the student's file" to determine whether the misconduct is a manifestation of the student's disability
- Relevant information includes but is not limited to:
 - Student's IEP ^{AD}
 - Any teacher observations of student
 - Relevant information provided by parents
 - Document information considered by the team

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to sign someone to ahead of time file review & parent that at MDR.

on MDR term & looked 507 what at

Other Information to Consider

- Investigation reports re: incident
- Police reports
- Photographs or videos
- Student and witness statements

This type of information can provide insight into the conduct's relationship to the student's disability(ies), e.g., was the conduct related to student's ADHD and impulsivity or was there planning and forethought

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planning intention

Manifestation Questions

- Was the conduct in question caused by, or did it have a direct and substantial relationship to, the student's disability; or
- Was the conduct in question a direct result of the school's failure to implement the student's IEP
- If answer is yes to either question, the conduct is a manifestation of the disability

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When Conduct is a Manifestation

- IEP team must conduct FBA/implement BIP or * review/modify BIP
- School officials must return student to placement from which student was removed unless:
 - Student is in special circumstances IAES for up to 45 school days (drugs/weapons/serious bodily injury offenses); or
 - School and parent agree to change placement; or
 - ALJ or court orders otherwise
- School must take immediate steps to remedy any IEP deficiencies

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must have a direct nexus between act + disability
Not indirect

When Conduct Is Not a Manifestation

- School officials may apply relevant disciplinary procedures for nondisabled students
- IEP team must determine services needed during removal to allow student to
 - participate in the general ed curriculum (although in a different setting)
 - progress on IEP goals
- FBA or behavior services must be provided as needed to prevent behavior recurrence

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Manifestation Determinations and Section 504

- Manifestation determinations are required for 504 students when:
 - removal for more than 10 consecutive days; or
 - pattern of removal
- If conduct is a manifestation, student must return to pre-disciplinary placement
- If conduct is not a manifestation, may apply relevant disciplinary procedures for non-disabled students
- Educational services are not required during the period of removal (unless provided to non-disabled students)

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Current Drug or Alcohol Users

- May take disciplinary action against 504 students, without going through the manifestation process, when the infraction results from the student's current illegal use of drugs or alcohol
- Exception does NOT apply to IDEA-eligible students

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"Special Circumstances"

"School personnel may remove a student to an interim alternative educational setting for not more than **45 school days** without regard to whether the behavior is determined to be a manifestation of the child's disability [if special circumstances exist]. . . ."

IDEA Reg. 300.530(g)

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What are the "Special Circumstances?"

- Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function
- Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function
- Inflicts serious bodily injury upon another person while at school, on school premises, or at a school function

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Weapon

"Weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury."

- Excludes pocket knife with blade less than 2-1/2 inches

Note: Revised School Code definition of "dangerous weapon" is different

- "Firearm, dagger, dirk, stiletto, knife with a blade over 3 inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles"

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Handwritten mark

Handwritten mark

Does NOT apply to possession

504 student

not i.e. student

*gun controlled substance which harm
still have to follow all of the procedures*

504 student discipline policy

for manifestation perm. expulsions has to be 3 inches

Lunch - "On Campus" open - how do we define lunch time in terms of on or off campus & no need to define in policy

Illegal Drugs

- Includes drugs or substances under Schedules I-V of the Controlled Substances Act, 21 USC 812(c)
- Excludes "legally possessed or used" drugs

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Serious Bodily Injury

Serious bodily injury is defined as bodily injury which involves:

"substantial risk of death, extreme pain, protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."

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Bisbee Unified Sch Dist (SEA AZ, 2010)

- Student lunged at principal and kicked him while being restrained
- District placed student in a 45 day IAES
- HO: Serious bodily injury exception is limited to severe injuries; placement in IAES was improper
 - Principal felt "sharp pain"; went home to rest
 - Didn't seek medical treatment although knee was swollen
 - Drove 200 miles the next day
 - Received cortisone treatment 3 weeks later

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Student with a Disability (SEA KS, 2010)

- District removed student to IAES after he struck aide in the head with closed fist 4 times
- Aide felt pain, had headaches and blurred vision but walked unassisted to school nurse, spent an hour in the hospital but released and given no pain medication
- HO: Aide didn't suffer severe extreme pain or serious injury

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IAES – What it Means for School Officials

- School officials may remove student to IAES for up to 45 school days under special circumstances
- IAES may be used regardless of whether the behavior was a manifestation (but must still do MDR)
- IEP team determines the setting and appropriate services
 - Services provided to allow student to participate in general ed curriculum and progress toward IEP goals
 - FBA or behavior intervention services provided to prevent recurrence, as appropriate

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Removal of Dangerous Student

- School may request an expedited hearing to seek an IAES for up to 45 school days if keeping student in current placement is "substantially likely to result in injury to the student or others"
- School has burden of proof
- Procedure may be repeated as needed
- Court order to remove student is another option

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Letter to Huefner (OSEP, 2007)

- Student assaults teacher
 - Manifestation of disability
 - No weapon used or serious bodily injury
- Law (and parent): return student to class
- School: no way, due to safety concerns
- OSEP: School can pursue an expedited hearing or go to court for Honig injunction

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→ show danger + school was alternate plan

Stay Put, Hearings, and Appeals

- Old rule: Student returns to pre-disciplinary placement pending hearing
- IDEA 2004: Student remains in the setting established by the school pending the hearing officer's decision or the expiration of the discipline placement (whichever comes first) unless parent and school agree otherwise

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Expedited Hearings

- For challenges to IAES placement, MD, or removal of dangerous student
- Resolution session held w/in 7 days of receiving notice of due process complaint
- Hearing held within 20 school days of date complaint/hearing request filed
- Decision rendered no later than 10 school days after hearing

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Calendar

Students Not Yet Eligible

"A child who has not been determined to be eligible for special education and related services..., and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred."

20 USC 1415(k)(5)(A)

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if school should have known student had a disability or then method say / say / student

Students Not Yet Eligible- What it Means for School Officials

- Students who have not yet been identified eligible for sp. ed. are entitled to IDEA protections if school had knowledge that the student might be disabled before the misconduct occurred
- Student files should be reviewed for "red flags" prior to imposing discipline

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Before misconduct occurred

What Constitutes "Knowledge?"

- Parent expressed concern in writing to supervisor, administrator, or teacher that student needs sp.ed. and related services
- Parent requested sp. ed. Evaluation
- Student's teacher or other personnel expressed specific concern about a pattern of behavior directly to district sp. ed. director or other supervisory personnel

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Even if none of these happen + parent says yes but you still want testing then have to do it

Follow these procedures + Expedite a sp. ed evaluation

What if student had previous disability + parent denied services

or if determined ineligible in previous testing then

off the hook

then school is off the hook for knowledge

No Knowledge Deemed

- If parent did not permit a sp. ed. evaluation
- If parent refused sp. ed. Services
- If student was evaluated but determined ineligible

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If School Had "Knowledge"

- Student entitled to same protections as students with disabilities
- Conduct evaluation
- Provide services to enable student to continue to participate in general ed curriculum, although in another setting, after 10th day of removal
- Conduct MDR if student is found eligible

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If No Prior "Knowledge"

- Student may be subjected to same disciplinary procedures as non-disabled student
- Expedite evaluation
- Educational services not required during removal unless similarly situated non-disabled students would receive services

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Referrals to Law Enforcement

- IDEA does NOT prohibit referral of student who commits a crime
- School officials must ensure transmittal of special ed records to law enforcement agency consistent with FERPA

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Parent Revokes Consent for Special Education?

- Regular discipline procedures apply
- Treat student as general education student
- No manifestation review required
 - OSERS Guidance (52 IDELR 231)

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Discipline Checklist - Summary

- Special ed. or 504 eligible? If not, do you have knowledge of disability?
- Number of days removed to date?
- Change of placement?
- Manifestation determination required?
- Educational and other services? If required, who determines?
- Procedural protections provided?


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Cyberbullying

- Did it occur at school
- Distinguishing speech that is just uncomfortable vs. bullying

"The Matt Epling Safe School Law"

- Added Sec. 1310b to RSC
- Requires anti-bullying policy by June 6, 2012
- PA 478 of 2014 amended statutory definition of bullying to include cyberbullying
- By September 30, 2015, policies must include **cyberbullying** as form of bullying ✓



Matt Epling

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Policy Requirements

Statements prohibiting:

- Bullying of student
- Retaliation or false accusation against
 - Target of bullying
 - Witness
 - Person with reliable information

MCL 380.1310b(5)(a)(b)

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Policy Requirements

Provision indicating that

- All students are protected under policy
- Bullying is equally prohibited without regard to subject matter or motivating animus

MCL 380.1310b(5)(c)

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Immunity from Liability

"A school employee, school volunteer, pupil, or parent or guardian who **promptly reports** in good faith an act of bullying to the appropriate school official designated in the... policy and who makes this report in **compliance with procedures** set forth in the policy is immune from a cause of action for damages arising out of the reporting itself or any failure to remedy the reported incident."

MCL 380.1310b(7)

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"Bullying"

"any written, verbal, or physical act, or any electronic communication, that is intended or that a reasonable person would know is likely to harm 1 or more pupils either directly or indirectly by doing **any** of the following..."

MCL 380.1310b(8)(b)

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Bullying/Cyberbullying Factors

"(i) **Substantially interfering** with educational opportunities, benefits, or programs of 1 or more pupils.

(ii) **Adversely affecting** the ability of a pupil to participate in or benefit from the ... school's educational programs or activities by placing the pupil in reasonable fear of physical harm or by causing substantial emotional distress."

MCL 380.1310b(10)(b)(c)

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Bullying/Cyberbullying Factors

"(iii) Having an actual and substantial **detrimental effect** on a pupil's physical or mental health.

(iv) Causing **substantial disruption** in, or substantial interference with, the orderly operation of the school."

MCL 380.1310b(10)(b)-(c)

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Cyberbullying "At School"

- Definition of cyberbullying is essentially the same as bullying
- And ... the Legislature did **not** change the definition of "at school"

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"At School"

"In a classroom, elsewhere on school premises, on a school bus or other school-related vehicle, or at a school-sponsored activity or event whether or not it is held on school premises...."

MCL 380.1310b(10)(a)

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"At School"

"Includes conduct using a **telecommunications** access device or telecommunications service provider that occurs off school premises **if** the telecommunications access **device** or the telecommunications **service** provider **is owned by or under the control of the school...."**

MCL 380.1310b(10)(a)

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Lawyer thinks this may remain Not

if it is school's google Drive but at home network is it at school?

Internet Harassment

"Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of **cell phones or the Internet...."**

OCR Dear Colleague Letter (Oct. 26, 2010)

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Student Off-Campus Speech

- School must show conduct has direct impact on school
- Without nexus, court may overturn discipline
- No First Amendment protection
 - Substantial disruption
 - True threat
- Some parodies are protected speech

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Is Harassment Protected?

"There is no categorical 'harassment exception' to the First Amendment's free speech clause."

Judge Samuel Alito
Saxe v State College Area Sch Dist
(CA 3, 2001)

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J.C. v Beverly Hills Unified SD (CD Cal, 2009)

- School suspended student (2 days) for filming and posting video of friends making mean/sexual comments about 8th-grade girl
- Court ruled school violated student's First Amendment speech rights because conduct was off campus and had no "substantial disruption" at school
 - \$1 nominal damages
 - \$107,150 for student's attorney fees

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J.C. Court Ruling

"Unfortunately for the School, good intentions do not suffice here.... The Court cannot uphold school discipline of student speech simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments."

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No "Uber" Censorship

"This Court does not wish to see school administrators become censors of students' speech at all times, in all places, and under all circumstances...."

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Kowalski v Berkeley Co Schs (CA 4, 2011)

- Student posted on MySpace that classmate was a "slut" with "herpes" and invited 100 "friends" to comment
- Victim did not want to return to school
- Student suspended for 5 days, and 90 days of "social suspension"
- Court rules for school because Kowalski "expected" her speech to "reach the school or impact the school environment"

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Substantial Disruption

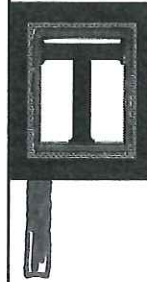
"Kowalski used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District's recognized authority to discipline speech which materially and substantially interfer[es] with the requirements of appropriate discipline in the operation school and collides with the rights of others."

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Range of Responses

- Consider restorative practices
- Meet with students and parents
- Provide counseling/training
- Implement no contact orders
- Report to police and internet provider
- Monitor both bully and victim
- Watch for retaliation
- Revoke privileges – *careful!*
- Impose discipline – *careful!*
- Document ... document ... document

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be aware → there are apps that can
create fake texts

Can't tell unless phone
forensically analyzed

(a case of teacher-st. relationship
+ student made fake text

w/ incriminating content against
teacher + ^{teacher} looked like guilty
but not once
phone
forensically
analyzed

Today's Presenters

Robert A. Dietzel joined Thrun Law Firm in 2008. He graduated from Michigan State University (B.A., with honors, 2001) and the Michigan State University College of Law (J.D., *summa cum laude*, 2004). He was a Dean King Scholar, a Senior Editor of the Law Review, and the recipient of several jurisprudence awards. He also participated in the Masters in Education Law program at Franklin Pierce Law Center.

Before joining the firm, Rob was an assistant attorney general with the Michigan Department of Attorney General. He represented the Governor, the Superintendent of Public Instruction, the State Board of Education, the Michigan Department of Education, the State Office of Administrative Hearings and Rules, and the Michigan School for the Deaf.

For several years, Rob served as an adjunct professor of legal research and writing at the Thomas Cooley Law School. He currently teaches Educational Law and Policy at the University of Michigan-Flint.

With extensive experience in both administrative law and litigation, Rob regularly represents public school clients in state and federal courts, in the Tenure Commission, and in state and federal tribunals on special education, disability rights, and pupil accounting matters. He has also successfully represented clients in jury trials and in Michigan's appellate courts.

Rob regularly presents to public school officials on special education, disability rights, and general school law. He is the author of a published law review article on school vouchers.

Rob enjoys spending time with his two daughters and is a proud member of the firm's recreational softball team.

Michele R. Eaddy joined Thrun Law Firm in 2001 after more than 10 years of legal experience representing school districts. Her practice at Thrun focuses primarily in the areas of special education, student issues, labor and employment, and general school law matters. Michele received her Juris Doctor from the University of Illinois College of Law in Urbana-Champaign in 1988 and her undergraduate degree from the University of Michigan in Ann Arbor in 1985.

Michele has represented school districts in state and federal courts and before various state and federal administrative agencies, including the Office for Civil Rights, Michigan Department of Education, Michigan Administrative Hearings System, and the Michigan Department of Civil Rights. She is a frequent presenter on special education law, Section 504, and disability law related topics to schools and educational organizations. Michele also serves as a Section 504 hearing officer and is a certified mediator.

Michele is a member and past president of the Michigan Council of School Attorneys, past president of the Women Lawyers Association of Michigan – Mid-Michigan Region, and past member of the State Bar of Michigan District E Character & Fitness Committee.

As proud graduate of the University of Michigan living in Spartan country, Michele is active in the U-M Club of Greater Lansing having served as a past president, board member, and regional clubs council representative to the U-M Alumni Association. She also served as a past chairperson and board member of the Boys & Girls Club of Lansing and was named the Boys & Girls Club of Lansing's Volunteer of the Year in 2001.

Michele lives in the Lansing area with her husband and daughter.

Margaret M. Hackett graduated from the University of Notre Dame (B.A., *magna cum laude*, 1979) and the University of Michigan Law School (J.D., 1981), after which she was privileged to clerk for the Honorable Cornelia G. Kennedy on the United States Court of Appeals for the Sixth Circuit. Meg is admitted to practice in the State of Michigan and the District of Columbia. She practiced law for 25 years before joining the Thrun Law Firm in 2007, including 12 years as in-house counsel for educational institutions.

Meg's practice is varied and draws upon her extensive experience as in-house counsel across practice areas. This breadth of experience uniquely positions Meg to provide multi-faceted counsel to educational institutions embarking on novel and complex initiatives and transactional matters. To the extent that her practice can be categorized, Meg focuses on general school law, labor and employment law, public school academies, the law of higher education, and special education law. She is a frequent speaker on a variety of topics of interest to school officials.

Meg is a member of the Michigan School Boards Association (MSBA) Council of School Attorneys and currently serves on its Board of Directors; the National School Boards Association (NSBA) Council of School Attorneys; the National Association of College and University Attorneys (NACUA); the American Bar Association (ABA); the Federal Bar Association (FBA); the Grand Rapids Bar Association (GRBA); and the Women Lawyer's Association of Michigan (WLAM), having served as a past president of the WLAM Western Region. Meg is a Life Member of the Sixth Circuit Judicial Conference and holds Martindale-Hubbell's highest rating of "AV Preeminent".

Meg lives on a farm and raises pasture-fed livestock and poultry. She enjoys music and participates in the music ministry at her church. She is on the Board of Directors of the YWCA West Central Michigan and is a sustaining member of the Justice Foundation of West Michigan.

Roy H. Henley joined Thrun Law Firm in 1993 after serving as an assistant prosecutor. Roy has practiced primarily in the areas of litigation, labor and employment, special education, construction, and general school law. Mr. Henley received his J.D. from Case Western Reserve University in 1986, where he was a member of the National Moot Court Team and a winner of the Dunmore Distinguished Advocate Award. Before attending law school, he graduated with a B.A. from the University of Michigan's College of Literature, Science, and the Arts, where he received Class Honors.

As a litigator, Roy has first chaired various labor, employment, construction, special education, and civil rights disputes on behalf of public school and higher education clients at all state and federal court levels, the State Tenure Commission, in the Michigan Administrative Hearing

System, the Michigan Employment Relations Commission, and in arbitration and mediation. In a manner consistent with the philosophy that an ounce of prevention is worth a pound of cure, he also provides counsel in the above areas and in general school law. Roy has also drafted and negotiated contracts and other agreements which further the goals of Michigan public educational entities.

Roy is admitted to practice in the United States Supreme Court and all other state and federal courts having jurisdiction in Michigan. He is a member in good standing of the National Council of School Attorneys, the Michigan Council of School Attorneys, the American Bar Association, the Michigan State Bar Association, and the Ingham County Bar Association.

He is a frequent speaker and lecturer on a wide variety of school law topics for organizations including the Michigan Council of School Attorneys, the Michigan School Business Officials, the Michigan Association of School Administrators, and the Michigan Association of Schools Boards. Roy also coauthored, with Kirk C. Herald, a revised chapter in the National School Boards Association book entitled *Religion and the Public Schools: Striking a Constitutional Balance (3d Ed)*.

Roy lives in the Lansing area with his wife and two sons. He enjoys skiing, hiking, scuba diving, and the performing arts.

Jennifer K. Starlin joined Thrun Law Firm in 2010. She assists public school districts, intermediate school districts, public school academies, and community colleges with student issues, special education issues, and employment matters. She regularly provides general counsel and advice to public schools and municipalities. As a trial lawyer, Jennifer has defended clients in state and federal courts on a variety of student and employment matters. She has also represented clients in a number of special education administrative hearings across the state. Jennifer successfully represented a private client in an employment matter, achieving a large verdict in the trial court and a favorable decision from the Michigan Court of Appeals. She has also negotiated with state and federal agencies to assist public schools with compliance matters.

Jennifer frequently speaks on school law topics for individual public school clients and various associations, such as the Michigan Association of Administrators of Special Education, the Michigan Association of School Boards, and the Michigan School Business Officials.

She is admitted to practice in the state and federal courts in the state of Michigan. Jennifer is a member of the National and Michigan Councils of School Attorneys, the American Bar Association, and the Ingham County Bar Association.

Jennifer lives in the Lansing area. She is an avid Michigan State University fan and enjoys traveling and playing on the firm's recreational softball league. She is a member of the St. John Student Parish in East Lansing.

