

NEW SCHOOL CODE REQUIREMENTS FOR STUDENT DISCIPLINE

Introduction/Synopsis

The Revised School Code's student discipline provisions were amended, effective August 1, 2017, to allow school boards and their designees more discretion when suspending or expelling students for misconduct under the Revised School Code. The amendments are part of a statewide move away from zero-tolerance policies that result in high suspension and expulsion rates, and a move toward restorative practices, which emphasize repairing the harm to the victim and the school community caused by a student's misconduct.

The amendments to the Revised School Code have added a definition for "expel," which is excluding a student from school for 60 or more school days, and "suspend," which is excluding a student from school for fewer than 60 school days. (Section I, Revised Suspension and Expulsion Definitions, p 2).

There is still an important distinction between suspensions of more than 10 days and suspensions of 10 or fewer days with respect to a student's due process rights. A student suspended for 10 or fewer days has fewer due process rights than a student who is expelled or suspended for more than 10 days. For example, students who are expelled or suspended for more than 10 days have the right to appeal a disciplinary decision to the superintendent or Board of Education, as provided by the student handbook. In addition, the new student discipline provisions in the Revised School Code provide that when a school board or other decisionmaker fails to consider the 7 factors before expelling a student or suspending the student *for more than 10 days*, there is a rebuttable presumption that the student's discipline is not appropriate. This rebuttable presumption does not exist for suspensions of 10 or fewer days. (Section IV, Method for Considering the Factors, pp 4-5).

The amendments to the Revised School Code require school boards, superintendents, school principals, or their designees to consider each of the discretionary 7 factors when suspending or expelling a student for any act of misconduct under the Revised School Code, *other than possession of a firearm*. The 7 factors must still be applied for suspensions and expulsions for possessing a dangerous weapon, other than firearms. These 7 factors do not apply when a student is disciplined in accordance with a board policy or student handbook provision. (Section II, Factors Requiring Consideration, p 2).

One of the 7 factors that must be considered is whether restorative practices will be used to address the violation or behavior committed by the student. Restorative practices are practices that emphasize repairing the harm to the victim and the school community caused by a student's misconduct. (Section VI, Restorative Practices, pp 6-7).

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A student may still present evidence of 1 of the 4 mitigating factors when charged with possession of a dangerous weapon, including a firearm. Because possession of firearms on school grounds is so serious, it appears the Legislature has intended to permit consideration of only the 4 mitigating factors, and not the 7 discretionary factors that were recently added to the Revised School Code. (Section V, Special Considerations for Offense of Possessing a Dangerous Weapon, pp 5-6).

To prove the 7 factors have been considered, the factors should be stated and analyzed in the disciplinary decision. If the board or its designee does not consider the factors, there is a rebuttable presumption that the discipline is not appropriate when the discipline is a suspension of more than 10 days or an expulsion. (Section IV, Method for Considering the Factors, pp 4-5).

I. Revised Suspension and Expulsion Definitions

The changes to the student discipline statutory provisions added definitions for the terms “expel” and “suspend,” creating clarification between these two terms:

“Expel” means to exclude a pupil from school for disciplinary reasons for a period of 60 or more school days. MCL 380.1310d(5)(a).

“Suspend” means to exclude a pupil from school for disciplinary reasons for a period of fewer than 60 school days. MCL 380.1310d(5)(c).

II. Factors Requiring Consideration

“Before suspending or expelling a pupil [under the Revised School Code], the board of a school district[], or a superintendent, school principal, or other designee[], shall consider each of the following factors:”

- 1) Age of the student;
- 2) Disciplinary history of the student;
- 3) Whether the student has a disability;
- 4) Seriousness of the violation or behavior;
- 5) Whether the violation threatened the safety of students or staff;
- 6) Whether restorative practices will be used to address the violation; and
- 7) Whether lesser intervention would properly address the violation.

[MCL 380.1310d(1).]

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III. Statutory Acts of Misconduct Affected

Each of the factors listed above must be considered before suspending or expelling a student under the Revised School Code for one of the following offenses:

- Physical assault of another student at school if student is in grade 6 or above (MCL 380.1310);
- Gross misdemeanor (MCL 380.1311(1));
- Persistent disobedience (MCL 380.1311(1));
- Possession of a dangerous weapon, *other than a firearm*, in a weapon free school zone (MCL 380.1311(2));
- Arson in a school building or on school grounds (MCL 380.1311(2));
- Criminal sexual conduct in a school building or on school grounds (MCL 380.1311(2));
- Physical assault against a school employee, volunteer, or contractor (MCL 380.1311a(1));
- Verbal assault against a school employee, volunteer, or contractor (MCL 380.1311a(2));¹ and
- Making a bomb threat or similar threat directed at a school building, school property, or a school-related event (MCL 380.1311a(2)).

Note: consideration of these factors is required only for suspensions and expulsions under the Revised School Code, *not* for suspensions or expulsions under Board Policy or a Student Code of Conduct.

¹ The United States District Court for the Eastern District of Michigan has found unconstitutional the Revised School Code provision requiring that a school board suspend or expel a pupil who commits verbal assault against a school employee, volunteer, or contractor, “for a period of time as determined in the discretion of the school board or its designee.” *Smith v Mt Pleasant Pub Schs*, 285 F Supp 2d 987 (ED Mich, 2003). The Court determined the statute is vague and overbroad because it is not limited to “school-sponsored speech, speech that is vulgar or profane, or speech that would substantially disrupt school operations or abridge the rights of other students or teachers.” *Id.* at 995. While a school district may suspend or expel a student for verbal assault pursuant to its Board Policies or Student Handbook if the definition of “verbal assault” is sufficiently narrow, the lack of a statutory definition precludes discipline for this offense pursuant to the Revised School Code. See *id.* at 997-998.

IV. Method for Considering the Factors

- The “method used for consideration of the factors is at the sole discretion” of the board, superintendent, school principal, or other designee. See MCL 380.1310d(1), (4).
- The factors must be considered for expulsions and suspensions for any time period for offenses under the Revised School Code.
 - There is a *rebuttable presumption that an expulsion or suspension of more than 10 days is justified* if the board can demonstrate it considered each of the 7 factors listed above. See MCL 380.1310d(2). This presumption can be rebutted if the student or student’s parent demonstrates, by a preponderance of the evidence, that the school board or its designee did not consider all of the 7 factors as required by law.
 - There is no rebuttable presumption for suspensions of 10 or fewer. See MCL 380.1310d(2).²
- Consequently, we recommend:
 - If the student disciplinary matter is heard during a closed session, consideration of the 7 factors is documented in the closed meeting minutes or the Board’s resolution imposing discipline, with the student’s name redacted.
 - If the student disciplinary matter is heard during an open session, consideration of the 7 factors is documented in the meeting minutes or in the Board’s resolution imposing discipline (with the student’s name redacted).
- The Open Meetings Act (the “OMA”), MCL 15.268(b), provides that a public body may meet in a closed session to “consider the dismissal, suspension, or disciplining of a student if the public body is part of the school district, intermediate school district, or institution of higher education that the student is attending, and if the student or the student’s parent or guardian requests a closed hearing.”

² MCL 380.1310d(2) states that it gives school boards discretion over whether or not to suspend or expel a pupil under the Revised School Code, and “[i]n exercising this discretion with regard to **a suspension of more than 10 days or an expulsion**, there is a rebuttable presumption that a suspension or expulsion is not justified unless the board or board of directors, or its designee, can demonstrate that it considered each of the factors listed under subsection (1). For a **suspension of 10 or fewer days**, there is no rebuttable presumption, but the board or board of directors, or its designee, shall consider each of the factors listed under subsection (1).” While the reason for this distinction is not provided in the statute, it may be to give greater deference to the school board or its designee when it makes disciplinary decisions involving suspensions of 10 or fewer days.

- In addition, the Family Educational Rights and Privacy Act (“FERPA”) prohibits disclosure of students records or information contained in such records without express parental consent (or, if the student is 18 or older, the student’s consent). 20 USC 1232g(b).
- If information protected by FERPA such as a student’s grades, behavior, and prior discipline is likely to be discussed at the board hearing, then FERPA and Section 8(h) of the OMA enable the board to conduct a closed hearing even if no request for a closed hearing has been made by the parent or student – provided the parent or student, when applicable, has not requested to proceed in an open session.³

V. Special Considerations for Offense of Possessing a Dangerous Weapon

Possession of a *Firearm* in a Weapon Free School Zone

- Because of the heightened scrutiny given when a student possesses a firearm at school, the 7 factors listed above are *not* considered when a student possesses a firearm in a Weapon Free School Zone.
- The factors *are* considered when a student is charged with possessing a dangerous weapon other than a firearm (i.e., a dagger, dirk, stiletto, knife with a blade over 3 inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles).

Potential Exceptions to Expulsion for Possession of a Dangerous Weapon (Including a Firearm)

- “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. MCL 380.1313(4).
- “Firearm” means (A) 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 explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.” 18 USC 921(a)(3) (cited by MCL 380.1311(12)(d)).

As before August 1, 2017, the Revised School Code continues to provide that “a school board is not required” to expel a student for possessing a dangerous weapon (whether a firearm or otherwise), if the student establishes “in a clear and convincing manner” one of the following:

³ Section 8(h) of the OMA states that a public body may meet in a closed session to “consider material exempt from discussion or disclosure by state or federal statute.” MCL 15.268(h).

- (a) The object or instrument possessed by the pupil was not possessed by the pupil for use as a weapon, or for direct or indirect delivery to another person for use as a weapon.
- (b) The weapon was not knowingly possessed by the pupil.
- (c) The pupil did not know or have reason to know that the object or instrument possessed by the pupil constituted a dangerous weapon.
- (d) The weapon was possessed by the pupil at the suggestion, request, or direction of, or with the express permission of, school or police authorities.

[MCL 380.1311(2).]

Presumption that Expulsion for Possession of a Weapon (including a Firearm) is *Not* Justified

There is now a rebuttable presumption that a student *should not be expelled* for possession of a dangerous weapon if:

- 1) The student has no history of suspension or expulsion; and
- 2) The school board or its designee determines *in writing* that at least 1 of the following conditions has been established in a clear and convincing manner:
 - (a) The object or instrument possessed by the pupil was not possessed by the pupil for use as a weapon, or for direct or indirect delivery to another person for use as a weapon.
 - (b) The weapon was not knowingly possessed by the pupil.
 - (c) The pupil did not know or have reason to know that the object or instrument possessed by the pupil constituted a dangerous weapon.
 - (d) The weapon was possessed by the pupil at the suggestion, request, or direction of, or with the express permission of, school or police authorities.

See MCL 380.1311(2).

VI. Restorative Practices

The legislative changes also require school boards to consider using “restorative practices” as an alternative or in addition to suspension or expulsion for the offenses listed above. Restorative practices are defined as:

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“Restorative practices” means practices that emphasize repairing the harm to the victim and the school community caused by a pupil’s misconduct. [MCL 380.1310c(3)(b).]

Whether restorative practices will be used to address the violation is a factor school boards must consider before suspending or expelling a student for an offense under the Revised School Code. The amendments suggest that such practices should be the first consideration to remediate interpersonal conflicts, bullying, verbal and physical conflicts, theft, property damage, class disruption, and harassment and cyberbullying.

Pursuant to MCL 380.1310c(2), restorative practices may include victim-offender conferences that are:

- Initiated by the victim;
- Approved by the victim’s parent or, if the victim is at least 15 years old, by the victim;
- Attended voluntarily by the victim, a victim advocate, the offender, members of the school community, and supporters of the victim and the offender; and
- Opportunities for the offender to accept responsibility for the harm caused to those affected by the misconduct and to participate in setting consequences to repair the harm.

The conference attendees, known as the “restorative practices team,” may require the offender to apologize; participate in community service, restoration, or counseling; and pay restitution, as applicable to the circumstances. The consequences and the time limit for their completion must be set forth in an agreement signed by all participants.

Additional information on restorative justice is available on MDE’s website at http://www.michigan.gov/mde/0,4615,7-140-74638_72831_72836-362904--,00.html.