

Advocating on Your  
Child's Behalf:

A Parent's  
Guide to CT & NY  
Education Law



**MAYA MURPHY**  
REPRESENTING EXCELLENCE

As part of a firm-wide project, this guidebook was created by Attorney Joseph Maya and Attorney Lauren Jacobson in order to assist parents and children with understanding their rights in the educational context in Connecticut and New York. If you have any education law questions, please contact our Managing Partner, Joseph Maya, at 203-221-3100 or by email at [JMaya@mayalaw.com](mailto:JMaya@mayalaw.com). Our website can be viewed at [www.Mayalaw.com](http://www.Mayalaw.com).

Joseph C. Maya, Esq.  
[jmaya@mayalaw.com](mailto:jmaya@mayalaw.com)

Lauren A. Jacobson, Esq.  
[ljacobson@mayalaw.com](mailto:ljacobson@mayalaw.com)

266 Post Road East  
Westport, CT  
203.221.3100

[mayalaw.com](http://mayalaw.com)

261 Madison Ave  
New York, NY  
212.282.5700

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## I. Introduction

This is not a law book. In fact, it is not even a book. It is an “owner’s manual” for parents of children attending Connecticut and New York public and private schools in grades K-12 and post-secondary education. It is the authors’ hope and expectation that this manual will not gather dust on a bookshelf. It is intended to be a practical (but comprehensive) reference and, over time, to become dog-eared, coffee-stained, and perhaps even tear-stained, as parents and students navigate the inevitable vicissitudes of education together.

We have sought to address those particular issues most likely to confront students and, therefore, be of concern to parents. We have eschewed discussion of esoteric areas of education law that do not necessarily rise to the level of parental “need to know.” This is intended to be a reassuring reference for when parents and students require the educational essentials.

As parents, many of the lawyers at Maya Murphy, P.C. have experienced first-hand in their own families the ever-expanding intersection of educational policy and rule of law, and the conflicts that sometimes result. As educational attorneys, we have an in-depth understanding and appreciation of the respective rights and obligations of students and school administrators. Through training and experience, we are especially qualified to act as knowledgeable advisors and zealous advocates to protect student rights and thereby preserve (at least to the extent evolutionarily possible), parents’ peace of mind. This manual will assist you in understanding pertinent “school law,” identifying and illuminating particular issues as they may relate to your children, and, most importantly, point you to Maya Murphy, P.C. as a ready and available resource to best serve you and

your children.



## II. Every Student Succeeds

The Every Student Succeeds Act (ESSA), was signed into law on December 10, 2015 and took effect in the 2017-18 school year, and replaced and updated the No Child Left Behind Act of 2001 (NCLB). The ESSA made many changes to educational policy, with provisions addressing a wide variety of issues, including testing, teacher quality, and low-performing schools. Moreover, it shifted much of the decision-making power from the Federal government to states and school districts. “Whereas No Child Left Behind prescribed a top-down, one-size-fits-all approach to struggling schools, this law offers the flexibility to find the best local solutions – while also ensuring that students are making progress,” said Education Secretary Arne Duncan.<sup>1</sup>

The ESSA eliminates the accountability system that punishes states if not enough students are proficient in reading and in math, a system which resulted in a culture of overtesting. Instead, under the ESSA, states create their own accountability systems, deciding for themselves how to fix failing schools and close achievement gaps, and then submit their plans to the Education Department with disclosure of the names of peer-reviewers. A state may request a hearing if the Education Department rejects its plan. As for accountability goals, states pick their own big, long-term goal and smaller, interim goals, but these goals must address proficiency on tests, English-language proficiency, and graduation rates.

States must incorporate at least four indicators into their accountability systems

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<sup>1</sup> Camera, Lauren, “No Child Left Behind Has Finally Been Left Behind.” *US News and World Report* (December 9, 2015), <https://www.usnews.com/news/articles/2015/12/09/congress-replaces-no-child-left-behind-shifts-power-to-states>.

which must include academic achievement, another academic indicator, English language proficiency, and an additional indicator of school quality. For high schools, graduation rates will also need to be factored in, which could take the place of a second academic indicator. The first three indicators must each carry substantial weight, and together, carry much more weight than the additional measure of school quality. Additionally, schools must set an expectation that all groups that are furthest behind close gaps in achievement and graduation rates. States must further explain what will happen to a school's rating if less than 95% of all students, or any group of students, participate in the state assessment.

Under the ESSA, three categories of schools must receive support and intervention: Comprehensive Support and Improvement Schools, Targeted Support and Improvement Schools, and Additional Targeted Support and Improvement Schools.<sup>2</sup> The first category, Comprehensive Support and Improvement Schools, includes the lowest performing 5% of Title I schools, as well as all high schools with graduation rates below 67%. For these schools, the districts must work with teachers and school staff to come up with an "evidence plan." States must then monitor the turnaround effort, and if the schools continue to fail to meet the criteria, after no more than four (4) years, the states must intervene. The second category, Targeted Support and Improvement Schools, includes schools where one or more groups of students are consistently underperforming according to the ratings. These schools must develop "comprehensive improvement plans." The third category, Additional Targeted Support and Improvement Schools,

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<sup>2</sup> U.S. Department of Education, *Every Student Succeeds Act, Accountability, State Plans, and Data Reporting: Summary of Final Regulations*, <https://www2.ed.gov/policy/elsec/leg/essa/essafactsheet170103.pdf> (2016).

includes schools that have one or more groups of students whose performance would place them in the bottom 5% of Title I schools. These schools, like those in the second category, must develop improvement plans that are approved by their district, and also must address resource inequities. Moreover, if these schools do not meet a set “exit criteria” after a state-determined period of time, they will become Comprehensive Support and Improvement Schools.<sup>3</sup>

In accordance with the ESSA, states must test reading and math in grades three (3) through eight (8), as well as in high school, and break out the data for whole schools as well as different “subgroups” of students. When breaking out the data, states cannot combine different sets of students into “super subgroups” for accountability purposes. The ESSA maintains the federal requirement for 95% participation in these tests, but with the permission of the U.S. Department of Education, up to seven (7) states can apply to implement local tests for a limited time. Also, Districts can use local, nationally recognized tests in high schools, such as the SAT or ACT, with state permission. Challenging academic standards must be adopted by the states. While the Common Core Standard may satisfy this requirement, the U.S. Secretary of Education is prohibited from forcing or encouraging states to pick any particular set of standards.

Regarding English-language learners, under the ESSA, accountability moves from Title III to Title I, making them more of a priority. During these students’ first year, their test scores will not count towards a school’s rating, but they will still need to take assessments, the results of which will be publicly reported. After their first year, the states must incorporate English-language learners’ results for reading and math, using

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<sup>3</sup> Id.

some measure of growth. In their third year, their proficiency scores will be treated like any other students'.

The ESSA included a \$1.6 billion block grant which consolidated dozens of programs, including some involving physical education, school counseling, education technology, and Advanced Placement. Districts that received more than \$30,000 must spend at least 20% of the latter on at least one activity that helps students become well-rounded, and another 20% on at least one activity that keeps students safe and healthy. Some programs will persist as separate line items, such as the 21<sup>st</sup> Century Community Learning Centers.

The ESSA preserved the Preschool Development Grant program, which is jointly administered by the Department of Human Services and the Education Department, and is focused on program coordination, quality, and increasing access to early-childhood education. The ESSA also created a new evidence-based research and innovation program, similar to the Investing in Innovation program, as well as reservations for gifted and talented education, Ready to Learn television, and arts education. The Teacher and School Leader Innovation Program, provides grants to districts that want to experiment with performance pay and other teacher-quality improvement strategies.

### **III. Special Education: A Parent's Guide to Becoming an Advocate**

The following will provide a simple, yet comprehensive overview for parents regarding laws and regulations affecting the education of your child who may be impaired by a disability. Parental awareness of a child's special needs is the best way for the child to exceed expectations and achieve maximum potential. Special education laws and regulations are designed to protect and provide for students with disabilities and ensure that they receive the proper services and necessary assistance for a meaningful educational experience. This Section will help families understand and appreciate key concepts and procedures and be effective advocates for their children in the special education process.

As a parent, you know what is best for your child. Knowledge of your child's special education rights will help ensure that their unique needs are met. It is critical to be knowledgeable about laws, regulations, and school procedures impacting your child's access to the general curriculum prescribed by the school district. The following will provide you with an overview of specific federal laws, such as the federal Individuals with Disabilities Education Act (IDEA) and Connecticut and New York state laws pertaining to special education. Such legislation protects students with disabilities and ensures that they receive a Free Appropriate Public Education (FAPE). Being an active voice on the Planning & Placement Team (PPT)/Individualized Education Program Team (IEP Team) and providing valuable input to formulate your child's Individualized Education Program (IEP) will impact your child's future success.

This guide will provide you with the essential knowledge and tools to optimize your child's educational opportunities. Each child is different and you may want to consult with

an attorney to ensure that your child's educational requirements are properly assessed and fully met.

### **What is the Individuals with Disabilities Education Act (IDEA)?**

The Individuals with Disabilities Education Act (IDEA) was enacted by Congress in 1975 as the Education for All Handicapped Children Act. This legislation imposes legal obligations upon local Boards of Education regarding special education students. IDEA requires that "all children with disabilities have available to them a free appropriate public education [(FAPE)] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living..."<sup>4</sup> The IDEA further dictates:

The term "free appropriate public education" means special education and related services that--

**(A)** have been provided at public expense, under public supervision and direction, and without charge;

**(B)** meet the standards of the State educational agency;

**(C)** include an appropriate preschool, elementary school, or secondary school education in the State involved; and

**(D)** are provided in conformity with the individualized education program Required under section 1414(d) of this title."<sup>5</sup>

The IDEA provides that your public school district, referred to in the IDEA as the Local Education Agency (LEA), is responsible for ensuring that each child with a disability within their district receives special education and related services designed to meet their

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<sup>4</sup> U.S.C.A. §1400(d).

<sup>5</sup> U.S.C.A. §1401(9).

unique individual needs. In view of the varying needs of each child impaired by a disability, no specific standard is established to determine if the school district is providing an “appropriate” education. The U.S. Supreme Court addressed the definition of FAPE in *Board of Education of Hendrick Hudson Central School District v. Rowley*, where it held that a school district did not have to provide a full-time sign language interpreter as a necessary part of an appropriate public education program.<sup>6</sup> The school district’s only obligation was to meet the requirements of the IDEA and to provide individual instruction intended to confer a “reasonable educational benefit, not maximum educational opportunities” to children with disabilities.<sup>7</sup>

In March 2017, this FAPE requirement was expanded in *Andrew F. v. Douglas County School District*, where the U.S. Supreme Court held that school districts must give students with disabilities the chance to make meaningful, “appropriately ambitious” progress.<sup>8</sup> The case began when Andrew F.’s parents removed him from his local public school, where he made little progress, and placed him in a private school, where they said he made “significant” academic and social improvement. In 2012, Andrew’s parents filed a complaint with the Colorado Department of Education to recover the cost of tuition at the school. The lower courts ruled in favor of the School District, finding that the intent of the IDEA is to ensure handicapped children have access to public education, not to guarantee any particular level of education. The parents appealed and the Supreme Court overturned the lower court’s decision. The Supreme Court held that schools must

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<sup>6</sup> See *Board of Education of Hendrick Hudson Central School District v. Rowley* 458 U.S. 176 (1982).

<sup>7</sup> *Id.*

<sup>8</sup> *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (U.S. Mar. 22, 2017).

provide students an education that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."<sup>9</sup> Chief Justice John Roberts stated, "[i]t cannot be right that the IDEA generally contemplates grade-level advancement for children with disabilities who are fully integrated in the regular classroom, but is satisfied with barely more than *de minimus* progress for children who are not."<sup>10</sup> By expanding the FAPE requirement, this landmark case drastically expands the rights of special-education students in the United States, creates a nationwide standard for special education, and empowers parents to act as advocates for their children in schools.

The word "free" means that the cost of providing special education and related services is the responsibility of the public school district in which the child resides and cannot be passed along to a child's parent. FAPE is an unqualified right and a school district will not be excused from providing specific special education needs to a particular child because of expense.

While your child's disability may not be covered under the IDEA, it may be covered under Section 504 of the Rehabilitation Act of 1973. Section 504 is a federal civil rights statute that protects the rights of persons with disabilities participating in programs and activities, such as public schools, that receive federal financial assistance. Section 504 defines a disabled individual as one who has a "physical or mental impairment which substantially limits one or more major life activities."<sup>11</sup> Section 504 also covers individuals who are regarded as, or who have a record of, having such impairment. Of note, Section

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> 34 C.F.R. 104.3 (caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working).



504 provides protection for individuals with any type of disability, not just one that effects the individual's ability to learn. It also has a child find mandate by requiring school districts to locate, identify, and evaluate all children with disabilities residing within their jurisdiction.

In order to qualify for special education under IDEA, an individual's disability must have an effect on his or her ability to learn. IDEA provides coverage for students age three through the time frame the student no longer needs the services or the school year in which the individual turned 21, whichever is earlier. Section 504's coverage is much broader than IDEA's, and individuals who are IDEA eligible are automatically covered under Section 504. However, an individual may be eligible for Section 504 coverage, yet not eligible for special education and related services under the IDEA.

You should consult one of our attorneys at Maya Murphy P.C. to determine whether, or to what extent, your child falls under Section 504, the IDEA, or both.

### **How will I know if my child is eligible for Special Education services?**

Connecticut law defines a child requiring special education as, "a child who meets the criteria for eligibility for special education pursuant to the Individuals with Disabilities Education Act, 20 USC 1400, et seq., as amended from time to time..."<sup>12</sup> Meanwhile, New York law defines a "child with a disability," or a "student with a disability," as "a person under the age of twenty-one who is entitled to attend public schools...and who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education."<sup>13</sup>

Special education services eligibility under IDEA requires that your child be

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<sup>12</sup> Conn. Gen. Stat. §10-76(a)(5).

<sup>13</sup> NY Educ L §4401.

between the ages of three and twenty-one years old. Both Connecticut and New York school districts are obligated to provide special education and related services to children five years of age or older until the earlier of either high school graduation or the end of the school year in which your child turns 21 years of age.<sup>14,15</sup> In addition, a child must have one or more of the following disabilities as determined by the IDEA:

- Autism;
- Deaf-blindness;
- Deafness;
- Developmental delay (for 3 to 5-year-old children);
- Emotional disturbance;
- Hearing impairment;
- Intellectual disability;
- Orthopedic impairment;
- Other health impairments (limited strength, vitality or alertness due to chronic or acute health problems such as lead poisoning, asthma, attention deficit disorder (ADD), attention deficit hyperactivity disorder (ADHD), diabetes, a heart condition, hemophilia, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome);
- Physical impairment;
- Specific learning disability;
- Speech or language impairment;

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<sup>14</sup> Conn. Gen. Stat. §10-76(d)(b).

<sup>15</sup> NY Educ L §4402(5).

- Traumatic brain injury; or
- Visual impairment (including blindness).

If a formal evaluation determines that your child is impaired by one of these disabilities and it is adversely affecting your child's educational performance, a specific educational program must be developed to meet his or her unique educational needs. This is known as an IEP, a cornerstone of special education that we will explain further in the following pages.

Children requiring special education in Connecticut include not only children with disabilities but also those who are found to be especially gifted and talented. The pertinent statute states, "[a] child requiring special education means any exceptional child who . . . has extraordinary learning ability or outstanding talent in the creative arts, the development of which requires programs or services beyond the level of those ordinarily provided in regular school programs but which may be provided through special education as part of the public school program."<sup>16</sup> While the gifted and talented identification and evaluation of students is mandatory, the provision of services for identified students is not required and is left to the discretion of the school district. Although gifted and talented children may be offered special education in the State of Connecticut, it is not a requirement.<sup>17</sup>

Meanwhile, in New York, under Chapter 53 of the Laws of 1980, students who are entering a public school for the first time must be screened to evaluate whether or not they are gifted.<sup>18</sup> The screening must include an assessment of language development

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<sup>16</sup> Conn. Gen. Stat. §10-76(a)(5).

<sup>17</sup> Id.

<sup>18</sup> NY Laws of 1980, Ch. 53.

and must be conducted in the student's native language. If the student is found to be possibly gifted, results of the screening must be reported to the school superintendent and to the pupil's parent or guardian. If the student is referred for further consideration to a gifted program, the school must inform the parent and seek approval. As in Connecticut, there is no requirement in New York for gifted children to be offered a special education program.

### **Who refers my child to Special Education?**

Connecticut requires each school district to reach out and identify children from birth to twenty-one years of age who may be eligible for special education services. The IDEA covers all children with disabilities residing in the state, including those who are homeless or wards of the state, and children with disabilities attending private schools, irrespective of the severity of their disability. It is the obligation of the school district to identify children in need of special education from birth on. This duty is called "child find."<sup>19</sup> After "finding" a child with a disability, the school district must initiate an evaluation of that child to fulfill their duty under the IDEA.

A referral to special education services is the first step in determining whether a child is entitled to receive special education and related services in Connecticut. The referral takes the form of a written request that a child be evaluated if he or she is suspected of having a disability and may be in need of special education and related services. If your child is over the age of three (3) and you believe he or she may have a disability, as a parent, you may submit a written request to the director of special education of your school district. If someone other than a child's parent refers a child to

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<sup>19</sup> 20 U.S.C.A. §1412(3)(A).

special education, such as a teacher or a school administrator, the parent must receive written notice of such referral.

In Connecticut, those who may make a referral for an evaluation are the student, provided they are 18 years of age or older, a parent or guardian, the state educational agency, the local educational agency or individuals from other agencies, including physicians or social workers, having parental permission to make a referral.

In New York, students suspected of having a disability are referred to a multidisciplinary team called the Committee on Special Education or the Committee on Preschool Special Education. The Committee then arranges for an evaluation of the student's abilities and needs, and based on evaluation results, the Committee decides if the student is eligible to receive special education services and programs.

### **What is Informed Consent? When is my consent as a parent required?**

Informed consent means that, as a parent, you must be given full and complete disclosure of all relevant facts and information pertaining to your child regarding certain proposed activities by your local educational agency. Consent remains voluntary and may be withheld or withdrawn at any time as it pertains to an initial evaluation of your child.

Written parental consent directed to your child's school district is required when:

- (a) your child undergoes an Initial Evaluation to determine his or her eligibility for special education and related services,
- (b) before your child is placed in special education services,
- (c) before your child is placed in private placement, and
- (d) before your child is

reevaluated.<sup>20</sup> However, a parent's failure to give consent to a Reevaluation may be overridden if the school district can show that a good-faith effort was made to obtain consent and the child's parent failed to respond.<sup>21</sup>

Consent to an Initial Evaluation must be in writing and may only be given following full disclosure of all information needed for you to make a knowledgeable decision pertaining to your child's educational needs. This written consent does not carry over and constitute consent to placing your child in special education. Separate written consent is required following an Initial Evaluation if your child is found to be eligible for special education and related services.<sup>22</sup>

If a parent disagrees with a proposed special education activity, the school district must still ensure that your child receives a FAPE. However, if you refuse to give written consent for the school district to conduct either an Initial Evaluation or a Reevaluation, the school district may proceed on its own and initiate a due process hearing in order to move forward with the recommended evaluations. On the other hand, if a parent does not consent to special education services placement, even if a child is eligible, the school district may not initiate a due process hearing as a means of obtaining authority to place your child in special education.<sup>23</sup>

### **What is the evaluation process used to determine my child's Special Education requirements?**

#### *What is an Initial Evaluation?*

In conducting an Initial Evaluation, the LEA, shall:

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<sup>20</sup> 20 U.S.C. §1414(a)(1)(D).

<sup>21</sup> 34 C.F.R. §300.300.

<sup>22</sup> 20 U.S.C. §1414(a)(1)(D).

<sup>23</sup> 34 C.F.R. §300.300.

use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining – (i) whether the child is a child with a disability; and (ii) the content of the child’s individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum...<sup>24</sup>

An evaluation study will include a review of information collected by the school district through formal and informal observations, and a review of schoolwork, standardized tests and other information provided by your child’s teachers and other school personnel.

Additional requirements in the evaluation assessment under the IDEA provide that:

- (A)** assessments and other evaluation materials used to assess a child under this section —
  - i.** are selected and administered so as not to be discriminatory on a racial or cultural basis;
  - ii.** are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;
  - iii.** are used for purposes for which the assessments or measures are valid and reliable;
  - iv.** are administered by trained and knowledgeable personnel; and

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<sup>24</sup> 20 U.S.C. 1414(b)(1)-(3), 1412(a)(6)(B).

- v. are administered in accordance with any instructions provided by the producer of such assessments;
- (B)** the child is assessed in all areas of suspected disability;
- (C)** assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and
- (D)** assessments of children with disabilities who transfer from one school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.<sup>25</sup>

As a parent, you will receive written notice of the particular tests and procedures that will be used in conducting your child's evaluation. It is important to have an active voice in the initial evaluation process and to share any and all relevant information you have regarding your child's skills, abilities and needs.

The LEA conducting the Initial Evaluation is required to determine whether your child has a disability within 60 days of receiving parental consent for the evaluation and, if he or she is eligible, the LEA is to determine the special educational needs of your child.<sup>26</sup> As a parent, if you fail or refuse to produce your child for an Initial Evaluation, the sixty-day time constraint will not be applicable.

Following the initial evaluation, the child's PPT/IEP Team will meet to evaluate the data and determine whether your child meets the necessary criteria to receive

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<sup>25</sup> 20 U.S.C. §1414(B)(3).

<sup>26</sup> 20 U.S.C. §1414(a)(1)(C)(i).



special education and related services. As a parent, you will be provided with a written report of the evaluation that was conducted.

*What is an Independent Educational Evaluation (IEE)?*

If you disagree with the school district's evaluation you may request an Independent Educational Evaluation, referred to as an IEE. Upon a request for an IEE, the LEA must provide information to parents as to where you may obtain an IEE, and the necessary criteria in conducting an evaluation. An IEE is conducted by a qualified examiner, who is not an employee of the local educational agency, such as your child's private therapist. Moreover, a parent is not required to inform the school district in advance of plans to obtain an IEE.

Although parents should work alongside their LEA to resolve any disagreements pertaining to evaluations, there are times when an independent evaluation will be necessary to resolve such disagreements. Parents have the right to an IEE at the LEA's expense unless the LEA challenges the need for an IEE. If the LEA challenges the IEE, they must, "without unnecessary delay," file for a due process hearing to demonstrate that its evaluation was appropriate or that the IEE did not meet the requisite evaluation criteria. If the LEA files for a due process hearing and its evaluation is found to be sufficient, you still have the right to obtain an IEE, but not at public expense. A parent is only entitled to one IEE at public expense each time the LEA conducts an evaluation with which the parent disagrees. If, however, a hearing officer requests an IEE during the course of a due process hearing, the evaluation shall be conducted at the expense of the agency.

If an IEE is conducted at public expense, the criteria under which the evaluation is obtained, including the location and qualifications of the examiner, must be the same as

the criteria that the LEA utilizes when it conducts its evaluation. However, the results of an IEE, irrespective of who pays for it, must be considered by the school district when designing your child's educational program.<sup>27</sup>

*What is a Re-evaluation? When and why will my child be re-evaluated?*

The IDEA mandates that a Re-evaluation must occur at least once every 3 years, unless the parent and the LEA agree that a Re-evaluation is not necessary.<sup>28</sup> Either parents or LEAs may request a Re-evaluation, though the LEA must first obtain written parental consent before conducting a Re-evaluation. Failure to provide the consent needed for your child's school district to conduct a Re-evaluation may lead to the LEA filing for a due process hearing or seeking other dispute resolution proceedings in order to conduct the Re-evaluation.

The purpose of conducting a Re-evaluation is to reassess the educational needs of your child and determine whether your child continues to have a disability, to evaluate the levels of academic achievement and developmental needs of your child, to determine whether special education and related services are still needed for your child, and to determine whether your child's IEP needs to be modified.

In conducting a Re-evaluation, your child's PPT/IEP Team will review existing reports and data to decide if additional testing is needed to determine whether your child is still eligible and continues to need special education and related services.

**What is my child's "IEP Team" or "Planning and Placement Team"?**

Under Connecticut and New York law, the team of individuals working to develop your child's IEP is a critical component in determining your child's special education

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<sup>27</sup> 34 C.F.R. §300.502.

<sup>28</sup> 20 U.S.C. §1414(a)(2)(B).

needs and the services to be provided. The IDEA and New York law refer to this resource as the Individualized Education Program Team (“IEP Team”), while Connecticut law calls it the Planning and Placement Team, or PPT. Whether you live in Connecticut or New York, your child’s PPT/IEP Team will be involved in most every request or decision made pertaining to your child, including: determining whether your child should be evaluated, deciding which evaluations will be given to your child, and whether your child is eligible for special education and related services. As a parent, you will be asked to participate as a member of the PPT/IEP Team. Parents should participate if possible, since you can provide unique and valuable insight into your child’s special education needs. The IDEA requires that the PPT/IEP Team be composed of the following:

- (i)** the parents of a child with a disability;
- (ii)** not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii)** not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- (iv)** a representative of the local educational agency who--
  - (I)** is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (II)** is knowledgeable about the general education curriculum; and
  - (III)** is knowledgeable about the availability of resources of the local educational agency;
- (v)** an individual who can interpret the instructional implications of evaluation

results, who may be a member of the team described in clauses (ii) through (vi);  
**(vi)** at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and  
**(vii)** whenever appropriate, the child with a disability.<sup>29</sup>

A member of the PPT/IEP Team shall not be required to attend an IEP meeting, however, if you and the LEA agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.<sup>30</sup> Further, a member of the PPT/IEP Team may be excused from attending a meeting when the meeting involves a modification to, or discussion of, the member's area of the curriculum or related services, if you and the LEA consent to the excusal and the member provides input into the development of the individualized education program prior to the meeting.<sup>31</sup>

As a parent, you have the right to understand the proceedings of the PPT/IEP Team meeting, and if necessary, the school district must arrange for a language interpreter or a sign language interpreter. Additional parental rights at a PPT/IEP Team meeting include a conference telephone call if you are unable to attend the meeting in person, tape recording of meetings (all participants must be informed that the meeting is being taped), and the right to invite any advisors of your choosing, including counsel, at your own expense.<sup>32</sup>

A PPT/IEP Team meeting may be conducted without a parent in attendance if the

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<sup>29</sup> 20 U.S.C. §1414(d)(B).

<sup>30</sup> 20 U.S.C. §1414(d)(C)(i).

<sup>31</sup> 20 U.S.C. §1414(d)(C)(ii).

<sup>32</sup> 34 C.F.R. §300.322(c) and (d).

LEA is unable to convince you to attend. The school district must keep detailed records of its attempt to make an arrangement for a mutually agreed upon time and place to conduct the meeting. These records should include telephone calls made or attempted along with the results of those calls, copies of correspondence sent to you, including any responses they received, and detailed records of visits made to your home or place of employment and the results of those visits.<sup>33</sup>

When scheduling a PPT/IEP Team meeting, the school district must work with you as a parent in scheduling the meeting at a mutually agreeable time and place. Both Connecticut and New York law require the school district to notify a child's parent at least five (5) school days prior to the meeting in order to allow for attendance.<sup>34,35</sup> Written notice of the PPT/IEP Team meeting must be provided to a child's parent and include the purpose, time and location of the meeting, along with who will be in attendance. The school district must also inform you of your right to bring other individuals who have knowledge of or expertise concerning your child. Further, the school district must give notice that if your child is sixteen years old or younger and it is found by the PPT/IEP team to be appropriate, he or she may attend the meeting, provided the purpose of the meeting pertains to your child's postsecondary goals.<sup>36</sup>

### **What is my child's Individualized Education Program (IEP)?**

Once it is determined that your child is eligible for special education services under the IDEA, an individualized education program will be developed to meet the

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<sup>33</sup> 34 C.F.R. §300.322(d).

<sup>34</sup> Conn. Gen. Stat. §10-76(d)(8).

<sup>35</sup> NYCRR 200.5(c).

<sup>36</sup> 34 C.F.R. §300.322.

particular needs of your child. The term “Individualized Education Program” or “IEP” is a written plan detailing your child’s special education program as designed by the PPT/IEP Team. As a parent and member of your child’s PPT/IEP Team, it is vital that you influence and help develop your child’s IEP. The PPT/IEP Team must consider the strengths of your child, the concerns you have in enhancing the education of your child, the results of the initial or most recent evaluation of your child and the academic, developmental and functional needs of your child.<sup>37</sup> Taking these factors into account allows for the PPT/IEP Team to create a specialized IEP geared toward providing your child with the best opportunity to satisfy their individual needs.

*How is my child’s IEP developed? What requirements must my child’s IEP satisfy?*

A PPT/IEP Team meeting to develop your child’s IEP must be conducted within 30 days following a determination that your child is eligible and in need of special education and related services. Subsequent to the development of your child’s IEP, special education and related services must be made available in accordance with his or her IEP.

Detailed components of the content required in your child’s IEP are set out in the IDEA as follows:

- A statement of your child’s present levels of academic achievement and functional performance, including how your child’s disability affects his or her involvement and progress in the general education curriculum;
- A statement of measurable annual goals, including academic and functional goals designed to meet your child’s educational needs pertaining

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<sup>37</sup> 34 C.F.R. §300.324.

to their disability and to ensure that your child be involved in and make progress in the general curriculum and meet other educational needs that result from his or her disability;

- A description of how your child's progress in meeting their annual goals will be measured and when periodic reports on the progress of your child meeting his or her annual goals will be provided;
- A statement of the special education and related services to be provided to your child. This statement shall also include any supplemental aids and services to be provided to your child, as well as a statement of the program modification or supports for school personnel that will be provided for your child:
  - To advance appropriately toward him or her attaining their annual goals,
  - To be involved in and make progress in the general education curriculum,
  - To participate in extracurricular and other nonacademic activities, and
  - To be educated and participate with other children with disabilities and nondisabled children;
- An explanation of the extent, if any, to which your child will not participate with nondisabled children in the regular class and other school activities;
- A statement of any individual appropriate accommodations necessary to measure through State and district-wide assessments the academic achievement and functional performance of your child. However, if the

PPT/IEP Team determines that your child requires an alternate assessment they must state why and in which way the student will be assessed;

- A statement of when the projected date for the beginning of special education services is to begin, along with the anticipated frequency, location and duration of those services; and
- A statement effective no later than the first PPT/IEP Team meeting that occurs after your child attains the age of 16, and updated annually thereafter regarding appropriate measurable postsecondary goals related to training, education, employment and where applicable, independent living skills. Moreover, at least one year prior to your child reaching the age of majority under State law, a statement must be made that your child has been informed of his or her rights, if any, under the IDEA that will transfer to him or her upon reaching the age of majority.<sup>38</sup>

Although the above requirements must be included in your child's IEP, this list is not all-inclusive. Additional means in achieving the best possible educational plan for your child should be included whenever necessary. PPT/IEP Teams must satisfy each child's unique needs and if necessary develop further activities beyond the expressed requirements to fully develop a child's IEP.<sup>39</sup> As a parent, you must receive a copy of your child's IEP at no cost within five (5) school days following any PPT/IEP Team meeting held to develop or revise your child's IEP.<sup>40</sup>

Your LEA must ensure that your child's IEP is accessible to each regular education

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<sup>38</sup> 20 U.S.C. §1414(d)(1)(A)(i)(I)-(VII).

<sup>39</sup> 20 U.S.C. §1414(d)(1)(ii).

<sup>40</sup> Connecticut State Department of Education, "A Parent's Guide to Special Education in Connecticut", [https://portal.ct.gov/-/media/SDE/Special-Education/Parents\\_Guide\\_SE.pdf](https://portal.ct.gov/-/media/SDE/Special-Education/Parents_Guide_SE.pdf).



teacher, special education teacher and related service provider responsible for implementing the plan. Each teacher and provider must be informed of their specific responsibilities as it pertains to your child's IEP and the specific accommodations, modifications, and support that must be provided for your child in accordance with their IEP needs.<sup>41</sup>

*Will my child's IEP be reviewed? What is the process of revising my child's IEP?*

The IDEA sets forth rules concerning the review and revision of your child's IEP. The LEA must ensure that the PPT/IEP Team reviews your child's IEP periodically, but not less than annually, to determine whether the annual goals for your child are being achieved.<sup>42</sup> Moreover, the LEA is required to revise the IEP to appropriately address:

- Any lack of expected progress toward the annual goals,
- Any lack of expected progress in the general curriculum,
- The results of any evaluation,
- Information about your child provided by you as his or her parent, or
- Your child's anticipated needs.<sup>43</sup>

The IDEA requires that your child's regular education teacher, consistent with their membership on the PPT/IEP Team, participate in the review and revision of his or her IEP.<sup>44</sup> In modifying your child's IEP following an annual IEP meeting, a parent and the LEA may agree to not convene an additional IEP meeting to modify your child's IEP and instead develop a written document to amend the current IEP.<sup>45</sup> Within five (5)

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<sup>41</sup> 34 C.F.R. §300.323(d)(1)-(2).

<sup>42</sup> 20 U.S.C. §1414(d)(4)(A)(i).

<sup>43</sup> 20 U.S.C. §1414(d)(4)(A)(ii).

<sup>44</sup> 20 U.S.C. §1414(d)(4)(B).

<sup>45</sup> 20 U.S.C. §1414(d)(3)(D).

school days, parents should be provided with a copy of the revised IEP including any amendments.

*What will happen to my child's IEP if he or she is to transfer schools?*

If you are planning to move to a different school district within Connecticut or New York or are being transferred to a new job out of state, there are procedures and regulations that the new LEA must follow to allow for a smooth transition pertaining to your child's IEP. If your child had an IEP in effect and you enroll your child in a new school in your state, the new school must provide FAPE, which includes services comparable to those provided by your child's prior school as described in his or her IEP. The new school district must adhere to your child's IEP from their prior school until the new school adopts it as its own IEP, or develops, adopts and implements a new IEP that meets all the requirements described in the IDEA and applicable state law.<sup>41</sup> Similar procedures and requirements apply to your child's IEP if you are relocating to a new state. However, the school district in your new state may conduct their own evaluation in accordance with the IDEA to determine if it is necessary to develop, adopt and/or implement a new IEP, in accordance with the IDEA and the new state's law.<sup>46</sup>

In transitioning your child from one school to another, the new school must take reasonable steps to promptly obtain your child's records, which include his or her IEP and any other supporting documents relating to your child's special education needs. Your child's former school district must take reasonable steps to respond to the records request from the new school that your child is enrolled in.<sup>47</sup>

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<sup>46</sup> 20 U.S.C. §1414(d)(C)(i)(I).

<sup>47</sup> 20 U.S.C. §1414(d)(C)(i)(II).

## **What are Related Services?**

Under the IDEA, the term “related services” means transportation, and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education.<sup>48</sup>

The following are examples of related services:

- speech-language pathology and audiology services;
- interpreting services;
- psychological services;
- physical and occupational therapy;
- recreation, including therapeutic recreation;
- social work services;
- counseling services, including rehabilitation counseling; and
- orientation, mobility and medical services (except that such medical services shall be for diagnostic and evaluation purposes only).

Your child’s need of related services will be determined by your child’s PPT/IEP Team and services shall be implemented as part of his or her IEP. Your child’s school district is responsible for the costs of implementing related services pertaining to your child’s needs as part of its requirement to provide a FAPE, which, by definition, includes related services.

## **What is Assistive Technology?**

The term “Assistive Technology Device” means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized,

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<sup>48</sup> 20 U.S.C. §1414(d)(C)(ii).

that is used to increase, maintain, or improve functional capabilities of a child with a disability.<sup>49</sup> These devices can range from specialized drinking cups to more sophisticated technologies, such as computers and motorized wheelchairs.

The term “Assistive Technology Service” means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. Assistive technology services include:

- the evaluation of the needs of your child, including a functional evaluation of your child in his or her customary environment;
- purchasing, leasing, or otherwise providing for the acquisition of Assistive Technology Devices for your child;
- selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing Assistive Technology Devices;
- coordinating and using other therapies, interventions, or services with Assistive Technology Devices, such as those associated with existing education and rehabilitation plans and programs;
- training or technical assistance for your child, or, where appropriate, your child’s family; and
- training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of your child.<sup>50</sup>

As part of the school district’s obligation to provide your child with a FAPE,

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<sup>49</sup> 20 U.S.C.A. §1401(26)(a).

<sup>50</sup> 20 U.S.C.A. §1401(1)(A).

assistive technology and services may be required to ensure accommodation of your child's individual needs. If the school district pays for the device then it is the property of the district. If your child's device was purchased through Medicaid or private insurance, then it belongs to your child.

**Where will my child be placed if he or she requires Special Education services?**

After the PPT/IEP Team develops your child's IEP, the next step is to determine the specific placement of your child to receive his or her special education. A major component of your child's placement is that he or she be placed, to the maximum extent appropriate, with his or her non-disabled peers. The IDEA requires that states receiving federal funds for special education in public or private institutions educate your child with children who are not disabled, and that special classes, separate schooling, or other methods of removal from the regular educational environment pertaining to children with disabilities occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This is referred to as the least restrictive environment (LRE).<sup>51</sup>

In placing your child, the LEA must ensure that the decision is made in conjunction with a parent and any other individuals who have knowledge about your child, and in conformity with the LRE provision. A child's placement is to be determined annually in accordance with their IEP and be as close as possible to their home.<sup>52</sup> Unless your child's IEP requires otherwise, he or she should attend the same school as if he or she were not disabled. When selecting the LRE, significant consideration must be given to any

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<sup>51</sup> 20 U.S.C.A. §1401(2)(A)-(F).

<sup>52</sup> 20 U.S.C. §1412(5)(A).

potential harmful effects that this placement may have on your child or on the quality of required special education services.<sup>53</sup> The PPT/IEP Team must consider assistance of an aide, modified instruction or other supplementary aids and services that will allow for your child to be educated in a regular classroom setting.

First, the PPT/IEP Team should consider the benefits that each potential setting will provide your child. The PPT/IEP Team should not only weigh the academic benefits for each placement scenario but other factors as well, such as communication with teachers and students. Secondly, the PPT/IEP Team should review whether placing your child in a regular education setting would lead to disruption. Factors in determining the potential for disruption include the child's social skills and whether your child's presence will divert the attention of the teacher away from the other students in the class. Lastly, the PPT/IEP Team may consider the cost of supplementary aids and services required to support your child in the regular classroom setting. The school district, however, cannot use the cost of providing supplemental aids or services as justification for not providing your child with an education in the least restrictive environment.

*What if my child is placed in private school or referred to a private school? Am I eligible for reimbursement if my child attends a private school?*

Due to the cost of enrolling a child in private school, major issues surrounding reimbursement for such placement may arise between parents and the school district. The school district is obligated to provide your child with FAPE, which embraces the possibility that enrollment in a private school may be

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<sup>53</sup> 34 C.F.R. §300.116(b)(1)-(3).

necessary to meet your child's needs.

If your school district determines that your child's special education requirements would be met in a private school, they may make the appropriate referral. Prior to referring your child for private school placement, the LEA must develop an IEP for your child. The public school must ensure that a representative of the private school attends this meeting and if they are unable to attend, your child's public school must use other methods to ensure their participation, such as individual or conference telephone calls.<sup>54</sup> The school board must concur with the initial finding that placement in a private institution is necessary and proper, and that no state institution is available to meet your child's needs.<sup>55</sup> The school district must pay the reasonable cost of your child's enrollment. The LEA is not required to pay for the cost of your child's education, including special education and related services, if a FAPE otherwise has been made available to your child and as a parent you have elected to place your child in private school.<sup>56</sup> Most issues pertaining to elective private school placement arise between parents and the school district regarding the availability of an appropriate education and the question of financial reimbursement. Disagreements on these matters are subject to the due process procedures, discussed in greater detail below. As a parent of a child with a disability, you have the right to enroll your child in private school as you see fit. However, if your public school district concludes that they are able to provide an appropriate education for your child, a dispute over reimbursement is likely to arise.

Enrollment of your child in private school without the LEA's consent or referral

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<sup>54</sup> 34 C.F.R. §300.116(d).

<sup>55</sup> 34 C.F.R. §300.325(a).

<sup>56</sup> Conn. Gen. Stat. Ann. §10-76(d)(d).

may lead to a dispute as to the need for this enrollment in order to provide an appropriate education for your child. If a hearing officer finds that the agency has not made FAPE available to your child and private school placement was appropriate, you will be entitled to full reimbursement for the cost of enrolling your child in a private school.<sup>57, 58</sup> Although a hearing officer after a hearing may find that you are entitled to full reimbursement by your school district for the cost of private school placement, reimbursement may nevertheless be reduced or denied.

The following are grounds for when your public school district can reduce or deny reimbursement for enrollment in private school following a hearing officer's decision that private school placement was nonetheless appropriate. The first ground is if you failed to inform your child's public school at the last PPT/IEP Team meeting you attended (prior to removing your child), that you were rejecting the placement proposed by the public school agency to provide FAPE to your child. You must have stated your concerns and intent to enroll your child in private school at public expense. This information must be provided in writing by a parent at least ten (10) business days prior to the removal of your child from his or her public school. The second ground is if prior to the removal of your child from the public school, the LEA had informed you of its intent to evaluate your child and you failed to make your child available for an evaluation. The final ground is if there is a judicial finding of parental unreasonableness in enrolling your child in private school without the public school's acquiescence.<sup>59</sup> Adhering to the aforementioned requirements will allow the public school district the opportunity to address your concerns and make any

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<sup>57</sup> NY Educ. Law §4401.

<sup>58</sup> 34 C.F.R. §300.148(d)(1)-(3).

<sup>59</sup> 34 C.F.R. §300.530(e).



necessary changes to your child's program prior to you removing your child.

Under certain circumstances, the school district will not be entitled to a reduction or full abatement of reimbursement for the cost of enrolling your child in a private school. If you can show that: (a) the school prevented you from providing them with notice of your decision to remove your child; (b) compliance with the notice requirement would likely have resulted in physical or emotional harm to your child; or (c) you are unable to read and write in English, reimbursement will not be reduced or declined for failure to adhere to the notice requirements.

**What happens if my child is already enrolled in private school when he or she is designated eligible to receive special education?**

The LEA with jurisdiction over the district where the private school is located is responsible for administering the IDEA requirements for private school children with disabilities. In particular, this includes an obligation that the LEA locate, identify, evaluate, and spend a proportionate amount of IDEA federal funds to provide equitable special education and related services to eligible disabled private school children in that district. This includes a requirement for the LEA to provide direct services to disabled children or through a contract with a third party.

Every disabled private school child that has been designated eligible to receive special education and related services must have a "services plan." The LEA, which not necessarily the district where the private school is located, is required to ensure that a representative of the private school attend each meeting to develop the services plan for each disabled private school child. To the extent appropriate, the services plan for each disabled private school child should meet the applicable individualized education program content requirements. Additionally,

the plan should be developed, reviewed, and revised according to the requirements related to the IEP team, parent participation, and when IEPs must be in effect. While a LEA is not required to provide transportation from a disabled private school child's home to the private school, in the event services are required elsewhere, the LEA is required to provide transportation from the school or the home to a site other than the private school.

**Is my child with a disability obligated to adhere to the same disciplinary rules as any other non-disabled student?**

The code of student conduct that your child's school district has in place applies to all students, including students who receive special education and related services. A more detailed look at disciplinary procedures can be found in the Discipline section of this publication, but the following will provide you with an overview of certain obligations that both you as a parent and the school district must fulfill when your child has been disciplined due to behavior that may or may not have been disability-related.

Your child's PPT/IEP Team, of which you are a part, will meet to review the relationship between your child's behavior and his or her disability. This is known as the "Manifestation Determination." The PPT/IEP Team determines if your child's behavior was caused by or had a direct and substantial relationship to his or her disability. The PPT/IEP Team will also determine whether your child's behavior was caused by the school district's failure to implement his or her IEP. If the PPT/IEP Team determines that your child's disability did not cause the subject behavior, then your child will be disciplined as would any other child who behaved in that particular manner. The Manifestation Determination must be conducted within ten (10) days of any decision to

change the placement of your child due to a violation of the code of student conduct.<sup>60</sup>

If the PPT/IEP Team finds that your child's behavior was a manifestation of his or her disability or was due to a failure to implement his or her IEP, then your child may not be removed from their current educational setting. Thereafter, the PPT/IEP Team must conduct a Functional Behavioral Assessment and implement a Behavioral Intervention Plan.<sup>61</sup> A Functional Behavioral Assessment looks at why your child behaved the way he or she did by collecting data to determine the possible causes of the problem and identify strategies to address your child's behavior. The Behavioral Intervention Plan, which is also developed by your child's PPT/IEP Team, must be designed to teach your child appropriate behaviors and eliminate behaviors that impede on his or her ability to learn, as well as that of other students in your child's class.

In the event a behavior is found to not be a result of a child's disability, school personnel may remove your child from his or her current educational placement and into another appropriate interim educational setting for a maximum of 10 consecutive school days.<sup>62</sup> Your child's PPT/IEP Team will determine what an appropriate interim educational plan setting will be.<sup>63</sup> Your child still must continue to receive educational services, so as to continue participation in the general education curriculum and to progress toward meeting the goals set out in his or her IEP.<sup>64</sup>

There are three circumstances permitting your child's school district to place your child in an interim educational setting for up to 45 days, irrespective of whether your child's behavior was found to be a manifestation of his or her disability:

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<sup>60</sup> 34 C.F.R. §300.530(f)(1)(i)-(ii).

<sup>61</sup> 34 C.F.R. §300.530(b)(1).

<sup>62</sup> 34 C.F.R. §300.531.

<sup>63</sup> 34 C.F.R. §500.530(d)(1)(i).

<sup>64</sup> 34 C.F.R. §300.530(g)(i)-(iii).

- He or she carries a weapon to school or a school function, or is in possession of a weapon in school or at a school function;
- He or she knowingly possesses or uses illegal drugs, or sells or solicits the sale of controlled substances while at school or a school function; or
- He or she inflicts serious bodily injury upon another person while at school, or at a school function.

Moreover, a hearing officer may place your child in an interim educational setting if he or she determines that keeping your child in his or her current placement is substantially likely to result in an injury to your child or to others.<sup>65</sup> If you disagree with any decision regarding the placement of your child following a disciplinary finding or Manifestation Determination, you have the right to initiate a due process hearing.<sup>66</sup> Pending a decision by the hearing officer, unless you and the school district agree otherwise, your child will remain in the disciplinary placement until the earlier of the issuance of a decision or expiration of the placement.<sup>67</sup> In addition, the hearing officer may return your child to the placement from which he or she was removed if the hearing officer determines that removal was not valid or your child's behavior was a manifestation of his or her disability.<sup>68</sup>

The LEA is responsible for arranging the expedited due process hearing and must do so within 20 school days of the date the complaint requesting the hearing was filed.

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<sup>65</sup> 34 C.F.R. §300.532(a).

<sup>66</sup> 34 C.F.R. §300.533.

<sup>67</sup> 34 C.F.R. §300.532(f)(2).

<sup>68</sup> 34 C.F.R. §300.532(c)(2).

The hearing officer must make a determination within 10 school days after the hearing is held.<sup>69</sup> Decisions as to an expedited due process hearing pertaining to any of the matters in dispute are appealable.<sup>70</sup>

The following will set forth in more detail the procedural requirements that a due process proceeding entails, as well as the procedures for other alternative dispute resolution methods that, as a parent, you have at your disposal.

## **What is a Due Process Hearing and Alternative Dispute Resolution?**

### **What is a Due Process Hearing?**

A due process hearing is a legal proceeding that ensures fairness in the decision-making process regarding your child. As a parent, if you disagree with a proposed or refused action pertaining to your child's education, you or the school district may initiate a due process hearing to resolve the disagreement.

In Connecticut and New York, you may file a due process complaint within 2 years of the time the school district proposes or refuses to: (a) consider or find that your child is disabled; (b) evaluate your child; (c) place your child in a school program that meets his or her unique individual needs; or (d) provide your child with a free appropriate public education (FAPE) that meets your child's needs.<sup>71</sup> If your school district has not provided you with a copy of your rights to bring a complaint, then according to the Connecticut State Department of Education, the two-year limit shall not begin until you receive a copy.<sup>72</sup> This procedural safeguard manual may be available on the Department of

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<sup>69</sup> 34 C.F.R. §500.532(5).

<sup>70</sup> 34 C.F.R §300.507(a)(1)-(2).

<sup>71</sup> Conn. Gen. Stat. Ann. §10-76(H)(4).

<sup>72</sup> 34 C.F.R. §300.504(b).

Education website.<sup>73</sup>

Whether you live in Connecticut or New York, you must forward a copy of the due process complaint to the appropriate state educational agency, which in Connecticut is the Due Process Unit of the Bureau of Special Education, and in New York is the NY State Education Department. The complaint must include the name of your child, the address of the residence of your child, the name of the school your child is attending, a description of the nature of the problem, including any related facts of which you are aware, and a proposed resolution to the problem.<sup>74</sup>

The party receiving a request for a hearing has 15 days from the date of receiving the due process complaint to notify the hearing officer and the other party if they believe the request for the hearing does not include the required information as stated above.<sup>75</sup> The hearing officer has 5 days to make a determination as to the adequacy of the hearing request and whether it meets the necessary requirements. If the hearing officer finds the complaint to be inadequate, you will have to file a new complaint. If the complaint is found to be adequate, your child's school district must, within 10 days, send to you: an explanation of why the school proposed or refused to take the action raised in the complaint, a description of other options that the PPT/IEP Team considered and the reasons why those options were rejected, a description of each evaluation procedure, assessment, record or report the school used as the basis for the proposed or refused action, and a description of any other relevant facts the school relied upon in its proposed or refused action.<sup>76</sup>

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<sup>73</sup> 34 C.F.R. §300.508(b)(1)-(6).

<sup>74</sup> 34 C.F.R. §300.508(d)(1).

<sup>75</sup> 34 C.F.R. §300.508((e)(i)-(iv).

<sup>76</sup> 34 C.F.R. §300.510(a)(2).

Within 15 days of the school district receiving notice of the due process complaint and prior to the initiation of a hearing, the LEA must convene a meeting with you and other relevant members of the PPT who have specific knowledge of the facts identified in the complaint. The purpose of this meeting is for you, as a parent, to discuss the due process complaint, so that the LEA has the opportunity to potentially resolve the dispute without having to begin a due process hearing.<sup>77</sup> This meeting need not be held if both you and the school district agree in writing to waive the meeting.<sup>78</sup> If the LEA has not resolved the issues expressed in the due process complaint to your satisfaction within 30 days following receipt of notice of the complaint, the due process hearing may begin. A final decision must be made by the hearing officer no later than 45 days after the expiration of the 30-day period, or adjusted time-periods if you failed to participate in the resolution meeting in a timely manner.<sup>79</sup>

A hearing officer may grant specific extensions of time beyond the 45-day period for certain reasons at the request of either party.<sup>80</sup> The hearing must be conducted at a time and place that is convenient for both you and your child. A copy of the final decision must be mailed to each of the parties. Both you and the school district have the right to be accompanied and advised by counsel during the course of a due process hearing. Both parties may also be accompanied by individuals with special knowledge or training with respect to children with disabilities. Both parties may present evidence, as well as confront, cross-examine and compel the attendance of witnesses. Moreover, parties are precluded from introducing evidence at the hearing that has not been disclosed to the

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<sup>77</sup> 34 C.F.R. §300.510(a)(3)(i).

<sup>78</sup> 34 C.F.R. §300.510(a)(3)(i).

<sup>79</sup> 34 C.F.R. §300.515(a)(1).

<sup>80</sup> 34 C.F.R. §300.515(c).

other party at least five (5) business days before the hearing. The hearing will be recorded and upon your request, you may be provided, at no cost, with a written or electronic copy of the hearing, as well as the hearing decision.<sup>81</sup>

*Where will my child be placed during a proceeding with my child's school?*

While a due process proceeding is pending, your child shall remain in his or her current educational setting as of the time the hearing was requested, unless you and the school district agree otherwise. This provision is known as "Stay-Put."<sup>82</sup> There are, however, a few exceptions to the Stay-Put provision. If you have filed for a due process hearing with respect to a disagreement over the removal of your child from his or her placement and into an interim alternative education setting for matters related to weapons, drugs or infliction of serious bodily harm, your child will remain in the interim alternative education setting while the hearing is pending. Additionally, Stay-Put does not apply if you are challenging a Manifestation Determination, as a placement may change during these proceedings.

*What is Mediation?*

Mediation is an alternative process in which you may resolve a dispute that arises with your school district as it pertains to your child's special education rights. Mediation is voluntary, and both you and the school district must agree to enter into the mediation process. The mediation process must be held at a time and place that is convenient to the parties involved in the dispute.<sup>83</sup>

During mediation, the mediator will be present to help you and the school district

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<sup>81</sup> 34 C.F.R. §300.512(a)(1)-(5).

<sup>82</sup> 34 C.F.R. §300.518(a).

<sup>83</sup> 34 C.F.R. §300.506(b)(1).



resolve any disputes that are pending. If a dispute is resolved through the mediation process, both parties must execute a legally binding agreement that sets forth the resolution. This document is enforceable in court.<sup>84</sup> Any discussions that occur during the mediation process, however, are confidential and may not be used as evidence in any subsequent due process hearings or civil actions.<sup>85</sup> If the parties are unable to resolve the dispute through mediation, either party may proceed with a due process hearing.

The Connecticut State Department of Education, Bureau of Special Education, as well as the New York State Education Department, maintain a list of qualified mediators who are knowledgeable in laws and regulations pertaining to special education and related services. An individual who serves as a mediator must not be an employee of the school district that is involved in the education and care of your child and must not have a personal or professional interest that conflicts with their ability to be objective.<sup>86</sup> The state will bear the cost of the mediation process.<sup>87</sup> As in the case of a due process hearing, both parties, at their own cost, may be accompanied by an attorney to help in the mediation conference.

### *What is an Advisory Opinion?*

In Connecticut, another alternative dispute resolution mechanism is an advisory opinion. This is a non-binding opinion issued by a hearing officer after consideration of a presentation given by both you and the school district. Since an advisory opinion is non-binding, you may pursue other avenues to resolve the matter, but it may be helpful in

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<sup>84</sup> 34 C.F.R. §300.506(b)(7).

<sup>85</sup> 34 C.F.R. §300.506(b)(8).

<sup>86</sup> 34 C.F.R. §300.506(c)(1)(i)-(ii).

<sup>87</sup> 20 U.S.C.A. §1415(e)(2)(D).

settling the dispute without having to go through a formal hearing process or mediation proceeding.

According to the Connecticut State Department of Education, no recording will be made of the advisory opinion process and the confidential opinion may not be used in future proceedings. You and the school district may both be accompanied by an attorney, as well as up to two witnesses that may participate in the advisory opinion process.

### *What is the Special Education Complaint Resolution Process?*

When a Connecticut or New York education agency fails to comply with the Individuals with Disabilities Education Act (“IDEA”) or with a requirement of the Connecticut or New York laws regarding special education, an aggrieved individual, or someone acting on his/her behalf (the “complainant”) can file a written complaint with the Connecticut State Department of Education or New York State Education Department. This complaint must be filed within one (1) year of the time in which you believe your child’s school district violated the law. Such complaints can be regarding disagreements over any matter concerning the identification, evaluation, or placement of a student or the provision of a free and appropriate public education to a student.

Complaints must state how your child’s school district is failing to follow the IDEA or applicable Connecticut, or New York state law enacted to protect children with disabilities and recount the facts that form the basis of the complaint. Written complaints may be received by the Department of Education that are also the subject of a special education due process hearing or contain multiple issues, one or more of which are part of a due process hearing. However, any special education complaint issues that are also

a part of a due process hearing will be set aside and not reviewed until after the conclusion of the due process hearing. Further, if an issue raised in a complaint has been previously decided through a special education due process hearing involving the same complainant and the same education agency, the hearing decision is binding and, therefore, will not be addressed by way of the complaint. Complaints alleging the failure of an education agency to implement a decision from a special education due process hearing can be reviewed and resolved through this complaint process.

Additionally, the complaint resolution process provides an opportunity for a complainant and education agency to voluntarily engage in mediation. Mediation services are available through the Bureau of Special Education to assist a complainant and education agency to reach an agreement. Once the State Department of Education concludes the review of the complaint, the education consultant, who is a member of the Bureau of Special Education, will issue a written final decision within sixty (60) days of your request. In the event that the decision indicates that the education agency has failed to comply with a requirement of the IDEA and/or with a requirement of the Connecticut or New York laws regarding special education, any corrective actions that must be taken by the education agency in order to achieve compliance with said requirement(s) will customarily be included in the decision. The corrective actions shall be appropriate to the needs of the child who was the subject of the complaint, and may include compensatory services or monetary reimbursement, and may address, if applicable, the appropriate future provision of services for all children with disabilities who are the responsibility of the education agency. While there is no review or appeal of a written final complaint decision, a parent or school district, may raise the same issues through a due process hearing and/or mediation.

*What are my rights to an appeal? May I bring a civil action if I disagree with a decision?*

After a decision is made in a due process hearing, there are two possible avenues of appeal. First, if the hearing was conducted by a public agency other than the state educational agency, you may appeal to the appropriate state agency. The state agency will then review the record, evidence and other items relating to the initial hearing and make a final decision.<sup>88</sup> The state agency decision is final unless one of the parties opts for the second avenue, which is to bring a civil action in either Connecticut or New York state or federal court. The party who brings such an action must do so within 90 days from the date of the decision of the hearing officer or the state review official.<sup>89</sup>

On February 22, 2017, the U.S. Supreme court ruled in favor of a family that sued a Michigan school district under federal disabilities laws after the district barred a service dog for a child with cerebral palsy. The high court held that a student or family suing a school district over a disability-related issue does not always have to go through, or, “exhaust,” all the procedures under the IDEA before going to court. The Court stated, “if, in a suit brought under a different statute, the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA’s procedures is not required.”<sup>90</sup>

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<sup>88</sup> 34 C.F.R. §300.514(b)(1)-(2).

<sup>89</sup> 34 C.F.R. §300.516(a)-(b).

<sup>90</sup> Fry v. Napoleon Community Schools, 2015 U.S. App. LEXIS 13876 (6<sup>th</sup> Cir. Aug. 5, 2015).

## IV. School Discipline

### Introduction

It is now well-established that out-of-school sanctions have an adverse academic and social impact on students. Out-of-school suspensions and expulsions contribute to poor performance in school, higher drop-out rates, and increased misbehavior at school.<sup>91</sup> One report found that students who had been subjected to out-of-class disciplinary sanctions tend to score lower on the Connecticut Mastery Test (CMT) and Connecticut Academic Proficiency Test (CAPT).<sup>92</sup> According to another study, eighty-nine percent of sixteen and seventeen-year-old students in the juvenile justice system had previously been suspended or expelled from school.<sup>93</sup>

Fortunately, the number of out-of-school suspensions in both Connecticut and New York has decreased in recent years. In Connecticut, from 2013 to 2018, the total number of suspensions (both in-school and out of school) was reduced by nearly 22% percent from approximately 104,216 to 81,501.<sup>94</sup> Meanwhile, in New York City, suspensions plummeted by 14 percent in the 2018-19 academic year from the previous year.<sup>95</sup>

Nevertheless, suspension and other forms of discipline are far from extinct, and it is therefore important for parents to understand their child's legal rights when facing disciplinary action. This section will provide parents with an overview of laws, regulations

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<sup>91</sup> Alexandra Dufresne, Annemarie Hillman, et. al, *Teaching Discipline: A Toolkit for Educators on Positive Alternatives to Out-of-School Suspensions*, Connecticut Voices on Children 1 (2010).

<sup>92</sup> Conn. St. Dep't of Ed., *Guidelines for In-School and Out-of-School Suspensions* 4 (2010).

<sup>93</sup> Connecticut Appleseed, *Keep Kids in School: Improving School Discipline*, 4 (2010).

<sup>94</sup> Conn. St. Dep't of Ed., *Report on Student Discipline in Connecticut Public Schools* (Feb. 2019).

<sup>95</sup> NYC Department of Education, *Local Law 93 of 2015 (Previously Local Law 6 of 2011) – Biannual Report* (2019).

and guidelines governing suspension, expulsion, and removal from class. The first part will discuss the Connecticut and New York state laws on school suspensions. While the statutes give school administrators discretion in this area, both states have demonstrated a preference for in-school suspensions and have outlined strict guidelines for out-of-school suspensions. Knowledge of these laws and guidelines is essential because parents can refer to them to avoid or shorten a suspension during the informal hearing stage, which we will also discuss in detail.

We will next address expulsion, a more serious disciplinary measure. In Connecticut, expulsion is any suspension lasting more than ten (10) consecutive days; meanwhile, in New York, the term expulsion is only used to refer to the permanent ban of a child from a particular school (New York refers to every other type of ban as a “suspension”). Although the expulsion/long-term suspension factors schools have to consider are the same as those for short suspensions, there are a few key differences. First, the U.S. Congress and both New York and Connecticut legislatures have mandated expulsion/long-term suspensions for students in certain situations. Second, the expulsion/long-term suspension hearing is more formal, giving parents and students the right to cross-examine witnesses, submit evidence, and retain an attorney at their own expense. Finally, we will conclude with a discussion on removal of students from the classroom.

While this section is intended to provide parents with a comprehensive understanding of school discipline laws and regulations so they can advocate on behalf of their child, each case is different. Parents may want to consult with an attorney early on in the process to help them craft a strategy tailored to the particular circumstances of their

child's case.

### **What are the laws in Connecticut on school suspensions?**

The Connecticut General Assembly has defined suspension as exclusion from school privileges and transportation for no more than ten days.<sup>96</sup> Under Section 10-233b of the Connecticut General Statutes, school administrators can suspend students only if the conduct:

1. violates publicized policy of the local or regional board of education;
2. seriously disrupts the educational process; or
3. endangers persons or property.<sup>97</sup>

If the student's conduct occurred on school grounds, then it needs to satisfy only one of the elements.<sup>98</sup> If the student's conduct occurred off-campus, then administrators can suspend students only if the misbehavior violates publicized policy and seriously disrupts the educational process. We will discuss each of the elements in detail below so parents can better understand what kind of student conduct could result in suspension.

#### **What conduct qualifies as "violation of publicized policy?"**

The Connecticut General Assembly has authorized local or regional boards of education to prescribe disciplinary rules and policies for the schools they oversee. Individual schools, in accordance with these policies, will typically list prohibited conduct in school handbooks. The school administration may suspend a student if he or she engages in such prohibited conduct.

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<sup>96</sup> Conn. Gen. Stat § 10-233a(a).

<sup>97</sup> Id. § 10-233b.

<sup>98</sup> Id.

If your child is suspended under the publicized policy category, you can first consult the school handbook to determine whether his or her conduct violates any articulated school disciplinary rule. You will likely be able to make a stronger case for your child during suspension hearings (which we will discuss in more detail later in the section), if you can show that his or her conduct is neither prohibited by the school, nor violates any school rules. There are three things to keep in mind in the process. First, Connecticut courts have held that school rules have to be clear and understandable so students and parents can reasonably understand what conduct is prohibited.<sup>99</sup> Second, under the Connecticut statutes, school districts must inform parents and students at least annually of board policies related to student conduct, which is usually done through student handbooks.<sup>100</sup> Finally, any school rule must have some rational relationship with its intended purpose. It is worth noting that this is not a difficult standard for the board or the school to meet since it does not have to show that the rule is the best approach, but only that there is some reasonable connection between the two.

*What kind of behavior qualifies as “serious disruption of the educational process?”*

According to guidelines issued by the Connecticut State Department of Education, a student’s conduct is not a serious disruption of the educational process unless it substantially interferes with the operation of a class, study hall, library, or any meeting involving students and school staff.<sup>101</sup> The Department has noted that recurring or cumulative disruptions, even if not considered serious if taken separately, can amount

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<sup>99</sup> Crossen v. Fatsj, 309 F. Supp. 114 (D. Conn. 1970).

<sup>100</sup> Conn. Gen. Stat. § 10-233e.

<sup>101</sup> CT State Dep’t of Educ., *Guidelines for In-School and Out-of-School Suspensions*, at 9.



to a serious disruption of the educational process.<sup>102</sup> In making this determination, the Department suggests that administrators should consider the frequency, number, and severity of the offenses.<sup>103</sup>

For conduct that occurs off school grounds, the Connecticut Supreme Court has held that there has to be a concrete relationship between the off-campus conduct and the school's operation.<sup>104</sup> Moreover, the General Assembly has set forth the following criteria that administrators may consider in determining whether a student's conduct is a serious disruption: (1) whether the incident occurred close to the school; (2) whether other students or a gang were involved; (3) whether the conduct involved violence, threats of violence, or unlawful use of a weapon and whether there were injuries; and (4) whether the conduct involved the use of alcohol.<sup>105</sup>

*What kind of behavior qualifies as "endangerment of persons or property?"*

The State Department of Education has defined "endangerment of persons or property" as conduct that exposes a student to an injury, risk, or a harmful situation.<sup>106</sup> Under this definition, fighting, bullying, possession of firearms or controlled substances, or damage to personal or school property would satisfy this requirement.

*What if my child has a school disciplinary history or has never been suspended?*

Administrators may consider a student's past disciplinary record when determining the length of a suspension or whether a suspension is warranted in the first place. If your child has never previously been suspended or expelled, the school administrator has

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<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> Packer v. Thomason Bd. of Educ., 246 Conn. 89, 110 (1998).

<sup>105</sup> Conn. Gen. Stat § 10-233c(a) (2010).

<sup>106</sup> CT State Dep't of Educ., *Guidelines for In-School and Out-of-School Suspensions*, at 10.

discretion under the law to waive or shorten the suspension.<sup>107</sup> Instead, school officials may require the student to complete an administration-specified program, which parents would not have to pay for.<sup>108</sup> Conversely, the school administration may also hand down a harsher suspension period if your child has a record of past suspension, expulsion, or removal from class.<sup>109</sup>

*What action is the State taking to minimize the academic impact of school suspensions?*

Under Connecticut law, an in-school suspension consists of exclusion from the regular classroom, but not from school altogether, for no more than ten consecutive days. Based upon data showing that out-of-school suspensions actually perpetuate misbehavior and increase the likelihood that students will end up in the juvenile justice system, the General Assembly moved to increase the use of in-school, suspensions, as opposed to out-of-school suspensions, as a disciplinary tool. Currently, all suspensions must be in school unless:

- The student poses such a danger to persons or property or is a serious disruption to the educational process that he or she should be out of school; or
- It is appropriate based on a student's past disciplinary problems, specifically if the administration tried to address the student's behavior through means other than suspension or expulsion.<sup>110</sup>

The Connecticut State Department of Education has also recommended that

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<sup>107</sup> Conn. Gen. Stat. § 10-233c(b) (2010).

<sup>108</sup> Id. § 10-233c(e)

<sup>109</sup> Id.

<sup>110</sup> *Id.* § 10-233c(g).

administrators should consider the following mitigating factors before moving ahead with out-of-school suspensions:

- **Age, Grade, and Developmental Stage of Student:** A younger child may not have the developmental maturity to understand that his or her conduct is inappropriate in a school setting. Alternative behavioral support programs educating him or her about this fact could be a more effective and less severe form of discipline.
- **The Student's Reasons for Engaging in Misbehavior:** If the student did not intend to harm someone or something, but was acting out of frustration, then an out-of-school suspension may be unwarranted because it would not effectively address the underlying problems. Examples of mitigating reasons include teasing by peers and family issues.
- **The Student's Past Disciplinary Problems and Likelihood of Recurrence:** If the student does not have a disciplinary history, then an out-of-school suspension could be unnecessarily harsh. Instead, an in-school suspension or another behavioral support program could be equally as effective in punishing and deterring the student from engaging in such misconduct in the future. But if the student does have a history of disciplinary problems, an out-of-school suspension could be the next logical step in addressing the student's behavior.
- **The Risk of Loss of Instruction:** If a student is disengaging from class, an out-of-school suspension may compromise academic

performance and actually exacerbate the student's lack of interest in school.

- **Cultural Factors:** A student could misbehave due to misunderstandings and different interpretations of events based on race, ethnicity, and linguistic differences.
- **Extent of Parental Support in Addressing Student's Misbehavior:** Administrators should consult with parents whenever a student is misbehaving in school. If there is not a history of such collaboration, then the school should involve parents in addressing a student's misconduct before moving on to more serious measures.<sup>111</sup>

If the school administration does proceed with an in-school suspension, the pupil can, depending on the administration's preference, serve the suspension in the school or in a different school under the jurisdiction of the local or regional board of education.<sup>112</sup>

### **What are my child's legal rights before a suspension in Connecticut?**

In *Goss v. Lopez*, the United States Supreme Court set forth a student's procedural legal rights before he or she could be suspended.<sup>113</sup> In that case, eight students had been suspended following an outbreak of student unrest without a hearing to determine the underlying facts resulting in the suspension.<sup>114</sup> The Court noted that students facing suspension were entitled to notice of the reasons for the suspension and

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<sup>111</sup> CT State Dep't of Educ., *Guidelines for In-School and Out-of-School Suspensions*, at 11-12.

<sup>112</sup> Conn. Gen. Stat. § 10-233c(g).

<sup>113</sup> *Goss v. Lopez*, 419 U.S. 565, 569 (1975).

<sup>114</sup> *Id.*

an informal hearing to tell their side of the story.<sup>115</sup>

*What are the school's notice requirements? What can I do to prepare for the hearing?*

The Connecticut General Assembly, consistent with the decision in *Goss*, requires school officials to notify parents within twenty-four hours regarding the proposed suspension.<sup>116</sup> Before the suspension, absent an emergency, the student is entitled to notice of the reasons for the suspension and an informal hearing in front of the administrator to explain his or her side of the story.<sup>117</sup> Under the Connecticut statutes, an emergency exists if the student poses an unwarranted danger to a person or property, or a disruption to the educational process. If this is the case, then the hearing must be held as soon after the suspension as possible.

The hearing is the best opportunity for the student to persuade the school administration to dismiss or shorten the length of the suspension. To that end, parents may want to rely upon the information mentioned above in helping their child craft a strategy during the give-and-take with the school administrator. For instance, students may point out that their conduct did not fall under the list of prohibited conduct warranting suspension, or that the misbehavior did not constitute a serious disruption of the educational process.

Even if the student's misbehavior was inappropriate within a school setting, students may also invoke the mitigating factors identified by the State Department of Education to receive an in-school suspension and/or to shorten the length of the suspension. The particular approach to contesting a suspension will depend on the facts

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<sup>115</sup> Id.

<sup>116</sup> Conn. Gen. Stat. § 10-233c(c).

<sup>117</sup> Conn. Gen. Stat. § 10-233c(a).

and circumstances of the student's case.

*What are my child's rights after the hearing?*

In Connecticut, if the administration authorizes a suspension after a hearing, parents cannot appeal the decision. However, the school must give the student the opportunity to complete homework, including examinations, which he or she missed during the suspension period.<sup>118</sup> Under the law, schools also cannot use out-of-school suspensions to discipline students more than ten (10) times or fifty (50) days during the school year, whichever comes first, without convening a more formal hearing.<sup>119</sup> The limit for in-school suspensions is fifteen (15) times or fifty (50) days during the school year.

If the administration imposes an in-school suspension, parents should note that the Department of Education has issued guidelines on what they consider effective in-school suspension programs. First, the program should have a strong academic focus.<sup>120</sup> To that end, the Department recommends that administrators group students together by age or grade and have the group supervised by a qualified individual.<sup>121</sup> School officials should also keep the student-to-teacher ratio low and have certified teachers in essential areas such as math or reading to provide instruction to students.<sup>122</sup> Along with providing students with an academically oriented program, administrators must allow students to receive and complete schoolwork from their regular classroom.<sup>123</sup>

Second, the program should include a strong counseling component so students can get the necessary support to correct their inappropriate behavior. Accordingly,

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<sup>118</sup> Id. § 10-233c(d).

<sup>119</sup> Id. § 10-233c(a).

<sup>120</sup> CT State Dep't of Educ., *Guidelines for In-School and Out-of-School Suspensions*, at 17.

<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> Id.

guidance counselors, social workers, or psychologists should be available to students in the in-school suspension room. Quality programs should help the student manage his or her emotions, handle challenging situations more effectively, and develop positive relationships with both students and teachers.<sup>124</sup>

### **What is the law in Connecticut for school expulsion?**

Under Section 10-233d of the Connecticut General Statutes, expulsion is an exclusion from school for a period of ten or more days. As with suspension, a student can be expelled by the local or regional school board if his or her conduct: (1) violates publicized policy; (2) seriously disrupts the educational process; or (3) endangers persons or property.<sup>125</sup> For actions which occurred off school grounds, not on school transportation vehicles, or not at any school-sponsored activity, the student's conduct has to have both violated publicized policy and seriously disrupted the educational process. The local board can consider: (1) whether the conduct occurred close to the school; (2) whether other students or a gang were involved; (3) whether the conduct involved violence, threats, unlawful use of a weapon, and any injuries; and (4) whether the conduct involved the use of alcohol.<sup>126</sup>

### **What conduct qualifies for "mandatory expulsion?"**

The Connecticut General Assembly enacted legislation mandating expulsion for students who have engaged in specific dangerous conduct. If a student possesses a firearm or another weapon while on school grounds or at a school-sponsored activity, the

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<sup>124</sup> Id.

<sup>125</sup> Conn. Gen. Stat. § 10-233d(b).

<sup>126</sup> Conn. Gen. Stat. § 53a-3.

school must expel that student for no less than one calendar year under state and federal law. The federal law, the Guns-Free School Act, defines “firearm” as:

- Any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive;
- The frame or receiver of any such weapon;
- Any firearm muffler or silencer; or
- Any destructive device, including a bomb, grenade, rocket, missile, mine, or similar device.<sup>127</sup>

Building on the federal law, the Connecticut General Assembly requires mandatory expulsion for no less than one calendar year for a student in possession of a firearm, deadly weapon, dangerous instrument, or martial arts weapon while on school grounds, subject to exceptions on a case-by-case basis.<sup>128</sup> Listed below are the definitions for each of the terms:

- **Deadly weapon:** Any weapon, whether loaded or unloaded, from which a shot may be discharged, or a switchblade knife, gravity knife, billy, blackjack, bludgeon, or metal knuckles.
- **Dangerous instrument:** Any instrument capable of causing death or serious injury.
- **Martial Arts Weapon:** A nunchaku, kama, kasari-fundo, octagon sai, tonfa, or Chinese star.<sup>129</sup>

The requirements for mandatory expulsion differ if the conduct occurred off school

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<sup>127</sup> 18 U.S.C §921(a).

<sup>128</sup> Conn. Gen. Stat. § 10-233d(a)(2).

<sup>129</sup> Conn. Gen. Stat. § 53a-3.



grounds. In such cases, the school must recommend expulsion for the student only if that student carries a pistol without a permit or uses a firearm, instrument, or weapon in the commission of a crime.

Moreover, the board must expel a student for at least one calendar year if the student is engaged in the sale or distribution of a controlled substance, irrespective of the amount, on or off school grounds.<sup>130</sup> Drugs such as marijuana, cocaine, heroin, and hallucinogenic substances would fall under the definition of controlled substances. Parents can consult student handbooks for a more extensive list of prohibited controlled substances.

### **What are my child's legal rights before expulsion in Connecticut?**

The General Assembly has mandated that, unless there is an emergency, a student facing expulsion should be entitled to a formal hearing in front of a hearing board within ten (10) days after the proposed expulsion.<sup>131</sup> As with suspension, an emergency exists if the student facing expulsion poses an unwarranted danger to a person or property, or such a serious disruption to the educational process that the school has to delay the hearing until after the suspension. Since school expulsion is a more serious form of discipline, only local or regional school boards can make the decision to expel a student.<sup>132</sup> The following section will provide an overview of the procedures during expulsion proceedings, so parents can gain a better understanding of their child's legal rights.

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<sup>130</sup> Conn. Gen. Stat. § 10-233d(e).

<sup>131</sup> *Id.* § 10-233d(a)(3).

<sup>132</sup> *Id.* § 10-233d(a).

*What are the school's notice requirements? What can I do to prepare for the hearing?*

When the administration recommends a student for expulsion, the local or regional school board must provide parents with written notice within twenty-four hours detailing the date and time of the expulsion hearing, a plain statement of the matters at hand, and a list of free or reduced-fee legal services in the area.<sup>133</sup> In addition, the board must provide all documentary evidence that the administration plans to use during the hearing.

To prepare for the hearing, parents can carefully examine the school record stating the facts of the matter, talk to school witnesses to see what they are going to say, and arrange for additional witnesses, especially ones that can testify favorably on your child's character and tell your child's side of the story at the hearing.

*What are my child's legal rights at the hearing?*

At the hearing, two issues will be decided: (1) whether the child should be expelled; and (2) if so, the length of the expulsion. Under Section 10-233d, at least three members of the local board of education have to preside over the expulsion proceedings.<sup>134</sup> Alternatively, the school board can delegate the duty to an impartial hearing officer provided the officer is not a member of the appointing board.<sup>135</sup> In both cases, neither the board members nor the hearing officer can discuss the case outside the hearing. Should the administration elect to retain an attorney to represent it in proceedings, it cannot choose an attorney that represents both the local board of education and the administration.

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<sup>133</sup> Id. § 10-233d(a)(3).

<sup>134</sup> Id. § 10-233d(a).

<sup>135</sup> Id. § 10-233d(b).

Generally, the administration will begin the proceedings by laying out the underlying facts leading to expulsion. Then, both the administration and the student will have an opportunity to present evidence and cross-examine witnesses. Following the presentation of evidence, the members of the board can ask both parties questions concerning the expulsion. Before the board makes a final decision on whether the student should be expelled, both sides can present additional arguments opposing or supporting the expulsion.

The hearing officer can recommend one of the following three results. First, they can decide not to expel the student, thereby allowing the child to return to school immediately after the hearing. Second, the board can recommend your child's expulsion. If the board adopts this recommendation, the child, for the duration of the expulsion, will be ineligible to attend any other schools within the district or participate in any on or off campus school activities. The board can review the student's disciplinary history to decide on the length of the expulsion but cannot consider it for purposes of determining whether to move forward with the expulsion. For instance, if a student has been expelled only once, the board has discretion to shorten (or even waive) the expulsion. Finally, the board can recommend "suspended expulsion." In this case, the student is legally expelled, but is permitted to stay in school on a probationary status. The administration, however, can thereafter invoke the expulsion if the student engages in a further act of misconduct.

*What are my child's legal rights after the hearing?*

Under the Connecticut statutes, parents are to receive a decision within twenty-four hours of the hearing. Should the board proceed with the expulsion, parents cannot appeal the decision, but have some options for their child. First, if your child is under sixteen

years old, then the local board must provide him or her with an alternative educational program during the course of the expulsion.<sup>136</sup> If your child is between the ages of sixteen and eighteen, then the board must provide your child with an alternative educational opportunity if he or she wants to continue school and meets specified conditions set by the board.<sup>137</sup> Schools do not have to provide alternative educational opportunities if the student has been expelled previously, or was expelled for possession of a firearm or a controlled substance.<sup>138</sup> While administrators have discretion in designing alternative educational programs, eligible students are entitled to at least two hours of tutoring per day and instruction in the core subjects of English, mathematics, social studies, and science.<sup>139</sup>

Second, parents can apply for their child to be enrolled in another school. However, the potential receiving school can reject your child's application by adopting the decision of the previous school without a new hearing on the matter. It can also hold an informal hearing to determine whether the prospective student would be expelled under that school's rules and policies.<sup>140</sup>

Third, the parent can apply on behalf of their child for early readmission to the school. The law does not prescribe criteria for a child's early readmission. Instead, readmission decisions are at the discretion of the local board, or a superintendent, who may themselves prescribe specific criteria for readmission.<sup>141</sup>

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<sup>136</sup> Id. § 10-233d(e).

<sup>137</sup> Id.

<sup>138</sup> Id.

<sup>139</sup> Id.

<sup>140</sup> Id. § 10-233d(h).

<sup>141</sup> Id. § 10-233d(j).

As a closing note, notice of the expulsion and the nature of the misconduct must be on the student's cumulative educational record. Pursuant to statute, if the student graduates from high school, then the administrator must expunge the expulsion from the student's record unless the student was in possession of a firearm or a deadly weapon.<sup>142</sup> Alternatively, if the board shortened or waived the expulsion, then it can choose to expunge the expulsion from the student's record if he or she completes an administration-specified program.<sup>143</sup>

### **What are my child's legal rights when he or she is removed from class in Connecticut?**

Removal is defined as exclusion from a classroom for all or part of a single class period given that such exclusion does not extend beyond ninety minutes.<sup>144</sup> A teacher can remove a child from class if that student deliberately causes a serious disruption of the educational process within the classroom.<sup>145</sup> If a teacher decides to proceed with this action, he or she has to send the student to a designated area and immediately inform the principal of the student's name and the specifics of the incident.<sup>146</sup> Generally, the school is not obligated to provide the student with an informal hearing before removal. Students, however, are entitled to an informal hearing if the teacher removes the student more than six times during the school year or twice a week, whichever comes first.

### **What are the laws in New York on school suspensions?**

New York Education Law §3214 states, "[t]he board of education, board of trustees

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<sup>142</sup> Conn. Gen. Stat. § 10-233d(f).

<sup>143</sup> Id.

<sup>144</sup> Id. § 10-233a(b).

<sup>145</sup> Conn. Gen. Stat. §10-233b.

<sup>146</sup> Id. § 10-233b(a)

or sole trustee, the superintendent of schools, district superintendent of schools or principal of a school may suspend the following pupils from required attendance upon instruction: A pupil who is insubordinate or disorderly or violent or disruptive, or whose conduct otherwise endangers the safety, morals, health or welfare of others.”<sup>147</sup>

In New York, a suspension cannot be longer than five days without due process. Whereas Connecticut refers to an expulsion as a suspension longer than 10 days, New York only uses the term expulsion to refer to a permanent exclusion from the school, which is an extreme penalty and is usually only imposed if the student poses a serious danger to others. Any ban that is not permanent is referred to as a suspension in New York, and in some circumstances, a suspension may last for over a year. For instance, under New York Education Law §3214(d), any student who is determined to have brought a weapon to school must be suspended for at least one calendar year.<sup>148</sup>

#### What constitutes a “disruptive pupil”?

A disruptive pupil is “an elementary or secondary student under twenty-one years of age who is substantially disruptive of the educational process or substantially interferes with the teacher’s authority over the classroom.”<sup>149</sup>

#### **What are my child’s legal rights before a suspension in New York?**

When a suspension is for less than five days, the school must provide the student and his or her parents with notice of the alleged misconduct, which must be in writing and must be provided before the period of suspension begins. However, if the principal

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<sup>147</sup> N.Y. Educ. Law §3214.

<sup>148</sup> Id.

<sup>149</sup> Id. §(2-a)(b)

determines that the student is a danger or a disruption to the academic process, a short-term suspension may begin before notice is provided, as long as notice is given within 24 hours. The notice must contain: a) a description of the event and the date it took place; b) an explanation of your right to request a conference with the principal; and c) an explanation of your right to question “complaining witnesses,” (i.e. the people who reported the student’s alleged conduct), at the conference.

If your child is being suspended and he or she denies the misconduct, the suspending authority must provide an explanation of the basis for the suspension.<sup>150</sup> Your child and you, upon request, must then be given an opportunity for an informal conference with the principal, at which you and your child may present your child’s version of the events and may ask questions of the witnesses.<sup>151</sup> The conference must take place prior to your child’s suspension unless your child’s presence is a danger or a disruption to the academic process, in which case the notice and opportunity for an informal conference must take place as soon after the suspension as is reasonably practicable.<sup>152</sup>

If your child is 16 years old or younger, he or she has the right to continue with school work while under suspension, as long as the work is equivalent to the work that was being done in school. Depending on your school district, this may mean that your child can go to school for a few hours a day, have work brought home by you or another student, or receive instruction at an alternative educational setting. If your child is older than 16, the school district is not required to provide alternative instruction, but has the discretion to do so.<sup>153</sup>

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<sup>150</sup> Id. §(3)(b)

<sup>151</sup> Id.

<sup>152</sup> Id.

<sup>153</sup> Id.

When a suspension is for a period in excess of 5 school days, school districts must conduct a student suspension hearing, also referred to as a student disciplinary hearing or a §3214 hearing, and both you and your child must be provided written notice of the latter.<sup>154</sup> The notice must be provided before the suspension begins, either by hand-delivery or express mail, and it must inform you and your child why the school wants to suspend your child. It must contain: a) a description of the event and the date it took place; and b) an explanation of your child's right to a formal suspension hearing and the proposed date of the hearing. Your child may be assigned a short-term suspension while he or she is waiting for a hearing, up to 5 days. If your child is suspended for 6 days or more without a hearing, he or she may be eligible to return to school pending a hearing. If your child does not wish to contest the charges, he or she can waive the right to a hearing by entering a no contest plea or signing a waiver.

At the hearing, your child has the right to representation by counsel, the right to question witnesses, the right to remain silent, and the right to present witnesses and evidence.<sup>155</sup> The suspending authority may personally hear and determine the proceeding or may, in its discretion, designate a hearing officer to conduct the hearing. The hearing officer is authorized to administer oaths and to issue subpoenas related to the proceeding. A recording of the hearing must be kept, either by audio recording or by written transcript. After the parties have presented their witnesses and evidence, the hearing officer will make findings of fact and recommendations as to the appropriate measure of discipline to the superintendent. The report of the hearing officer is advisory only, however, and the

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<sup>154</sup> Id. §(3)(e).

<sup>155</sup> Id. §(3)(c).



superintendent can accept or reject all or part of the hearing officer’s findings. The board may then adopt in whole or in part the decision of the superintendent. If your child is suspended by a board of education, the board may in its discretion hear and determine the proceeding or appoint a hearing officer, whose findings and recommendations shall be advisory and subject to final action by the board of education, which may reject, confirm, or modify the conclusions of the hearing officer.<sup>156</sup>

If your child has been suspended and is of compulsory attendance age, “immediate steps shall be taken for his or her attendance upon instruction elsewhere or for supervision or detention” of the student.<sup>157</sup> If your child has been suspended for cause, the suspension may be revoked by the board of education whenever it appears to be for the best interest of the school and your child to do so.<sup>158</sup> The board of education may also condition your child’s early return to school and suspension revocation on your child’s “voluntary participation in counseling or specialized classes, including anger management or dispute resolution . . .”.<sup>159</sup>

### *What are my child’s rights after the hearing in New York?*

Your child may appeal a suspension decision based on insufficient notice or a violation of certain rights. The only evidence that may be presented at an appeal is the record from the suspension hearing. Usually, the student must first appeal to the Board of Education in his or her school district, by submitting a letter explaining how his or her rights were violated and why they should reconsider the decision. If your child loses an appeal to the Board of Education, he or she may appeal to the State Commissioner of

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<sup>156</sup> Id. §(3)(c)(2).

<sup>157</sup> Id. §(3)(e).

<sup>158</sup> Id.

<sup>159</sup> Id. §(3)(d).

Education.

**What are my child's legal rights when he or she is removed from class in New York?**

In New York, a teacher has the power and authority to remove a disruptive pupil from the teacher's classroom consistent with discipline measures contained in the code of conduct adopted by the local board of education.<sup>160</sup> The school authorities of any school district must establish policies and procedures to ensure the provision of continued educational programming and activities for students removed from the classroom. Moreover, a pupil cannot be removed if doing so violates any state or federal law or regulation.

If your child is removed from his or her classroom, the teacher must apprise both your child and the school principal of the reasons for the removal.<sup>161</sup> If the teacher finds that your child's continued presence in the classroom does not pose a continuing danger to persons or property and does not present an ongoing threat of disruption to the academic process, the teacher must, prior to removing your child from the classroom, provide your child with an explanation of the basis for removal and allow the pupil to informally present the pupil's version of relevant events. In all other cases, the teacher must provide your child with an explanation of the basis for the removal and an informal opportunity be heard within twenty-four hours of the pupil's removal.<sup>162</sup>

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<sup>160</sup> Id. §(3)(e)

<sup>161</sup> Id. §(3-a)

<sup>162</sup> Id. §(3-a)(a)

## V. Search and Seizure: Your Child's Fourth Amendment Rights

### **Introduction**

As drugs and weapons infiltrate our nation's schools, it is imperative that school officials take the necessary steps to maintain safety and preserve order in your child's school. With that being said, your child has a right to privacy and school officials must not be overzealous in their investigation of alleged violations of school policy. The following will provide you, as a parent, with a basic understanding of the rights of your child, as well as the requirements your child's school must adhere to regarding the search of his or her person or property while in school.

The Fourth Amendment of the United States Constitution protects persons from unreasonable searches and seizures by agents of the government, which includes school officials.<sup>163</sup> The Fourth Amendment provides that, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause..."<sup>164</sup> First, we will discuss your child's Fourth Amendment rights while he or she is at school and the applicable standard that will allow school administrators to conduct a search. Second, we will look at the permissible scope of locker and desk searches, searches of personal items, such as knapsacks and pocketbooks, as well as the use of drug testing, sniffer dogs, and metal detectors.

While this is a practical overview of Fourth Amendment search and seizure issues pertaining to your child and their school, you should contact one of our

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<sup>163</sup> New Jersey v. T.L.O., 469 U.S. 325 (1985).

<sup>164</sup> U.S. Const. Amend. IV.

attorneys at Maya Murphy P.C. if you believe that your child's rights have been violated by a school official in the course of an investigation.

### **How does the Fourth Amendment apply to my child while at school?**

The application of the Fourth Amendment to an in-school search of your child or their property differs from the more generally applicable criminal standard. With respect to the criminal standard, the Fourth Amendment requires law enforcement officials to first demonstrate that they have "probable cause" to believe that a crime has been committed. This usually means that evidence must be presented to a judge and a warrant must be obtained before law enforcement officials may conduct a search of private property. Unlike the criminal standard, the requirements for conducting a permissible search of your child while he or she is in school are somewhat different.

The United States Supreme Court has articulated a clear-cut standard that school officials must adhere to when conducting a search of your child or his or her property. First, school officials do not need to obtain a warrant before conducting a search of your child or his or her property.<sup>165</sup> The Court reasoned that requiring school officials to obtain a warrant would interfere with their ability to obtain evidence and maintain the informal disciplinary procedures that schools use to preserve order.<sup>166</sup> Moreover, the need to maintain safety in the school environment at all times outweighs the warrant requirement.

Unlike the criminal standard that requires probable cause, the legal standard set forth by the court for in-school searches by school officials is "reasonable, under all of the circumstances." In determining what is "reasonable", the Court has developed a two-fold

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<sup>165</sup> New Jersey v. T.L.O., 469 U.S. 325 (1985).

<sup>166</sup> Id. at 340.

inquiry before a search may be conducted of your child or his or her property. First, the search must be “justified at its inception.” Second, the search must be “permissible in its scope.”<sup>167</sup>

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<sup>167</sup> Id. at 341-342.

What does “justified at inception” mean?

A school official that conducts a search of your child must have reasonable grounds for suspecting that the search will reveal evidence demonstrating that your child has violated or is violating school rules or the law.<sup>168</sup> Here, unlike the probable cause standard requiring probability that a search will produce evidence, school officials using the reasonableness standard may conduct a search irrespective of whether it is probable that a search will reveal evidence of wrongdoing. School administrators, however, must not abuse this leniency in conducting a search and must do so “with reason and common sense.”<sup>169</sup> This relatively relaxed approach, while justified in deference to the safety of the school population, pertains only if at the time of the search, school officials had reasonable suspicion in conducting a search of your child or his or her property.

Reasonable suspicion sufficient to satisfy the “justified at inception” prong can be found in many different ways. For example, if your child is acting in a manner indicating that he or she has consumed alcohol or has taken illicit drugs, smells like alcohol or drugs, or other students have informed school officials that your child may be engaging in activity inconsistent with school policy or the law, a search of your child will likely be found to be reasonable. To justify a search of your child or their property, school officials must have a logical reason for doing so in order to satisfy the “justified at inception” requirement. If a school official is able to demonstrate that school safety concerns were the primary factors for conducting a search, it is likely that the search will be found reasonable.

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<sup>168</sup> Id. at 342.

<sup>169</sup> Id. at 343.

What does “permissible in its scope” mean?

A search will be found “permissible in its scope” when the measures that school officials employ in searching your child or their property were reasonably related to the objective of the search and the search was not excessively intrusive in light of the age and sex of your child.<sup>170</sup> First, when conducting a search, school officials must show that the search was related to the object of the search. Therefore, if your child is accused of allegedly possessing or selling illegal drugs, a more thorough search may be tolerated. On the other hand, if your child is accused of possessing a bottle of alcohol, a search of her pocketbook or his knapsack may be reasonable, while the removal of clothing would likely be unreasonable.

Second, the search should not invade the legitimate privacy right of your child in relation to the search. Taking into consideration your child’s age and sex, different search procedures will be subjectively evaluated. For example, a school was found to have violated a thirteen-year-old girl’s Fourth Amendment rights after school officials were informed that she allegedly possessed prescription painkillers.<sup>171</sup> Following a search of the girl’s knapsack, which revealed no evidence of prescription drugs, she was sent to the nurse’s office for a strip search, which further revealed no evidence of prescription drugs. Due to its highly intrusive nature, a strip search should only be conducted when there is reasonable suspicion of danger or the resort to underwear for hiding evidence of wrongdoing.<sup>172</sup> Conversely, pat downs have been held by courts to be minimally intrusive. Thus, the means used in conducting a search, along with the age and sex of

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<sup>170</sup> Id. at 342.

<sup>171</sup> Safford Unified School District v. Redding, 557 U.S. 364 (2009).

<sup>172</sup> Id.

your child, are pertinent factors that school officials must consider before conducting a search of your child's person or their property.

**What if a search of my child or their property results in the discovery of another item of contraband not subject to the initial search?**

If a school administrator conducts a search of your child or their property when there is reasonable suspicion to do so, and that search results in discovery of an item that was not the intended object of the search, the school may still use that evidence of contraband to discipline your child for violating school policy or the law. An example of such a scenario would be checking your child's bag or purse for cigarettes and finding illicit drugs, such as marijuana or other contraband.

Moreover, the school still may take disciplinary action against your child even if they violate your child's Fourth Amendment rights. These violations, however, may provide grounds for you and your child to bring a Title 42 U.S.C. Section 1983 action against the school and school personnel for infringing upon your child's civil rights.

**Can my child's personal property be subject to a search?**

Provided school officials adhere to the "reasonable, under all of the circumstances" requirement, your child's personal property, such as a purse, backpack, and even a car is subject to being searched. Although conducting a search of your child's property is permissible, school officials still must adhere to the same standard applicable to the search of your child's person, i.e., the search must be "justified at inception," and it must be "permissible in its scope." Again, the search must not be excessively intrusive, and school officials must adhere to this requirement even when it comes to searching your child's personal property.



### **Can my child's locker or desk be subject to a search?**

The short answer is yes. The Connecticut General Assembly enacted legislation whereby all boards of education may authorize school officials or law enforcement officials to search lockers and other school property that is available for use by your child, which includes desks, for the presence of weapons, contraband, or the fruits of a crime.<sup>173</sup> This legislation expressly states that a search of your child's locker or other property owned by the school is permitted so long as the search is "reasonable, under all of the circumstances," (i.e., reasonable at inception and permissible in its scope).

Under New York law, students have no reasonable expectation of privacy with respect to their lockers, desks, and other school storage places, and school officials retain complete control over them. This means that student lockers, desks, and other school storage places may be subject to search at any time by school officials, without prior notice to students and without their consent. In New York City, however, regulations require that there be reasonable suspicion to believe the lockers contain evidence of wrongdoing.<sup>174</sup>

### **Can my child's social media account(s) be subject to a search?**

Maybe. In 2014, a Minnewaska, Minnesota student won a \$70,000 settlement from his school district after being forced to give school officials access to her Facebook account. The U.S District Court for the District of Minnesota denied the school district's motion to dismiss and held that "one cannot distinguish a password-protected Facebook message from other forms of private electronic correspondence, [and thus], based on

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<sup>173</sup> Conn. Gen. Stat. Ann. §54-33n (West 2011).

<sup>174</sup> NYC Chancellor's Regulations A-432.

established Fourth Amendment precedent, that R.S. had a reasonable expectation of privacy to her private Facebook information and messages.”<sup>175</sup> As part of the settlement, Minnewaska school policies were amended to provide that electronic records and passwords created off-campus can only be searched if there is reasonable suspicion that they will uncover violations of school rules.<sup>176</sup>

However, in a recent case where a student sued school officials after they inspected her Facebook account and then suspended her from cheerleading based on evidence that they found on her account, the U.S. Court of Appeals for the Fifth Circuit ruled that the school officials had qualified immunity because they “did not have fair warning that they could not, consistent with the Fourth Amendment, access a student’s social-networking account upon receiving information that the student had sent threatening online messages to another student, where those remarks concerned school activities and where the quarrel began at a school-related function.”<sup>177</sup> However, the Court also stated, “we express no opinion regarding whether the defendants’ conduct violated either constitutional right.”<sup>178</sup>

### **Can my child’s school conduct a search without having reasonable suspicion?**

Having discussed searches conducted by school officials where there was reasonable suspicion to support a search of your child or their property, we now turn our attention to random searches involving your child that are not founded on reasonable

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<sup>175</sup> R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, 2012 WL 3870868 (D.Minn. September 6, 2012).

<sup>176</sup> Id.

<sup>177</sup> Jackson v. Ladner, No. 13-60631 (5th Cir. Sept. 15, 2015).

<sup>178</sup> Id.

suspicion.

*Can my child be subject to random drug testing?*

Drug testing is considered to be a type of search. For that reason, school officials may require your child to take a drug test when it is justifiable, and the requisite “reasonable suspicion” standard is met. There are, however, in this context, certain exceptions to the reasonable suspicion standard, whereby your child may be subject to drug testing regardless of whether or not they are suspected of taking illicit drugs.

The United States Supreme Court has found that random drug testing of athletes through urinalysis is not a violation of a child’s Fourth Amendment rights.<sup>179</sup> The Court articulated a three-part balancing test that is to be used when evaluating suspicionless searches, consisting of: 1) the nature of the privacy interest upon which the search intrudes; 2) the character of the intrusion; and 3) the nature and immediacy of the governmental concern and the efficacy of the means to meet it. Your child’s right to privacy in school is distinct from that of the general population. This lessened right to privacy is even more pronounced for student-athletes, due in part to the voluntary nature of their child’s participation and the reduced expectation of privacy (i.e., communal showers and shared locker rooms). The Supreme Court extended this decision in a subsequent case, which now allows schools to drug test any student who participates in extracurricular activities, such as the Academic Team, cheerleading team, the band, and choir.<sup>180</sup> Even school-sponsored proms and dances can be considered extracurricular

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<sup>179</sup> Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).

<sup>180</sup> Board of Education Independent School District No. 92 v. Earls, 536 U.S. 822 (2002).

activities. Further, the urinalysis test is designed to detect only the use of illegal drugs, such as amphetamines, marijuana, cocaine and opiates, and not for medical conditions or the presence of authorized prescription medication.<sup>181</sup> The circumstances surrounding a urinalysis test are no different than going to the restroom in a public facility, and a monitor is present only to make sure that your child does not tamper with the urine specimen. The procedure used to conduct a urinalysis test has been found to not be intrusive of your child's expectation of privacy.<sup>182</sup> Drug tests are considered a "reasonable means" of preventing and deterring student drug use in a manner that does not violate the Fourth Amendment.

Your child's school has a compelling (and judicially countenanced) interest to deter, detect, and prevent the use of drugs in their school in order to preserve the safety of the school environment. The results of your child's drug test are confidential and only school personnel who are on a "need to know" basis will be granted access to the records.<sup>183</sup> Additionally, these tests may not be turned over to law enforcement officials or used to discipline your child. They are employed solely to identify if your child may have a drug problem and accordingly needs help. As a result, schools, at their discretion, may implement suspicionless drug testing programs that your child must adhere to if they plan on participating in school sports or extracurricular activities.

*Can my child's school use metal detectors and/or sniffer dogs to conduct searches?*

Due to increasing violence in schools over the past two decades, school districts have been permitted to employ metal detectors to screen students for weapons or other

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<sup>181</sup> *Id.* at 826.

<sup>182</sup> *Id.* at 833.

<sup>183</sup> *Id.* at 883.

contraband that may harm the student population. A metal detector, whether it be stationary or handheld, is considered to be a minimally intrusive search. The courts have allowed schools to use this method in order to ensure weapons are excluded from the school environment.

In regard to the use of “sniffer dogs,” it is generally seen as being non-intrusive since sniffer dogs are exploring for items that while perhaps not in “plain sight,” are within “plain smell.” In accordance with Connecticut General Statutes § 54-33n, if a sniffer dog alerts to a certain smell within your child’s locker or other school property that has been made available to them, it will likely satisfy the “reasonable, under all of the circumstances” requirement and school personnel may conduct a search of your child’s locker or other property. Note, however, sniffer dogs may not be used to search your child’s person unless the reasonable suspicion requirement is satisfied.

Although metal detectors and sniffer dogs are usually found to be minimally intrusive, your child’s school district must still have reasonable suspicion to conduct an additional search of your child or their property. If one of these devices alerts school personnel of possible contraband, a search should not continue unless school personnel can show that it was reasonable for them to conduct a more detailed search at that time in order to obtain evidence that your child violated school policy or the law.

### **Can my child be arrested and handcuffed at school?**

In the past decade, arrests of students in school have, unfortunately, become increasingly common. Students may be arrested for a wide range of offenses while on school grounds, and these offenses are not treated lightly. For instance, under

Connecticut law, it is a felony for any person, including a student, to verbally or electronically make threats in a public or a private school. Under the law, threatening someone with serious physical injury while on school grounds is a felony. Moreover, a student may get arrested in Connecticut schools even if the threats are not communicated verbally. The threats may be electronic, written, or conveyed through social media outlets.

School officials and law enforcement are granted broad discretion, oftentimes to the detriment of students. In a case where a student was accused of disrupting his class with “fake burps,” and was ultimately arrested and handcuffed, the U.S. Court of Appeals for the Tenth Circuit ruled that the arresting officer was immune from liability because it was not clearly established that the student’s classroom disruptions were not in violation of a New Mexico law that prohibits interference with the “educational process” at any public or private school.<sup>184</sup> The court reasoned that the effect of the student’s conduct “was not merely to disturb the good order of Ms. Mines-Hornbeck’s classroom; rather, it was to bring the activities of that classroom to a grinding halt.”<sup>185</sup> The Court concluded, “[i]n sum, we hold that it would not have been clear to a reasonable officer in Officer Acosta’s position that his arrest of F.M. would have been lacking in probable cause and thus violative of F.M.’s Fourth Amendment rights.”<sup>186</sup>

In another case, where a 9-year-old student and his family filed a lawsuit after a Youth Officer used a “twist-lock” control technique while arresting him for allegedly stealing an iPad from his school, the U.S. Court of Appeals for the Tenth Circuit held that, while the alleged crime at issue was a relatively minor offense, “[the officer] could

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<sup>184</sup> A.M. v. Holmes, 14-2066 (10<sup>th</sup> Cir. 2016).

<sup>185</sup> Id.

<sup>186</sup> Id.

objectively and reasonably view C.G.H.'s grabbing her arm as resisting arrest and escalating a tense situation. For safety, it was objectively reasonable for [the officer] to de-escalate the situation and command C.G.H.'s compliance by using a twist-lock."<sup>187</sup>

If your child has been arrested on or off school grounds, you should immediately consult one of our experienced criminal defense attorneys at Maya Murphy, P.C.

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<sup>187</sup> Hawker v. Sandy City Corporation, 13-4139 (10<sup>th</sup> Cir. 2014).

## VI. Student Educational Records

Since student educational records often contain confidential information such as grades, disciplinary history, and medical history, it is important for parents to understand what procedures school districts must follow when disclosing educational records either with or without parental consent. This section will provide parents with an overview of the Family Educational Rights and Privacy Act (FERPA), the primary federal legislation guiding schools in the disclosure of student educational records.

The first part of this section will touch upon the rights of parents to access their own child's educational records, including restrictions on this right, and the right of parents and students to amend their educational records. Beyond outlining the respective rights of parents and students to access their records, FERPA also touches upon the confidentiality to be afforded to these educational records. While schools cannot generally disclose information within the student educational records without parental or student consent, parents should be aware that there are several exceptions to this rule, which we will also discuss. We will then conclude with a discussion on the general obligations of the school or district to notify parents and students about their rights under FERPA.

### **What materials are considered “educational records?”**

The U.S. Congress has defined “educational records” as records, files, documents, or any other materials that: (1) contain information related to the student; and (2) are maintained by an educational institution or by a person acting on behalf of such an institution.<sup>188</sup> While the definition is broad, the legislation also spells out what material is

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<sup>188</sup> 20 U.S.C. § 1232g(a)(4)(A).



excluded from the definition. Under the Act, a record that teachers or other school employees maintain in their sole possession is not considered an educational record. In addition, records of law enforcement authorities in the school, records of a student who is 18 years or older that are maintained by a physician, psychiatrist, psychologist, or records in connection with the treatment of a student, do not fall under the definition.<sup>189</sup>

### **What are the rights of parents and students to access educational records?**

Under FERPA, parents and students have the right to access their educational records, subject to a few limitations. Parents may exercise these rights while the student is a child, and the right extends to the student once he or she turns 18.<sup>190</sup> Nevertheless, at this stage, parents still have the right to access the records without consent from the student provided the student is listed as a dependent on a parent's federal income tax return.<sup>191</sup>

Under the statute, each school must develop appropriate procedures for granting requests by parents for educational records within a reasonable timeframe, not to exceed 45 days from the date of the written request.<sup>192</sup> In addition, the U.S. Department of Education calls for schools to respond to reasonable requests for explanations or interpretations of the records also within a reasonable time.<sup>193</sup> If circumstances prevent parents or eligible students from exercising their right to access the records, the school must either provide the parent or student with copies of the requested documents or make alternative arrangements for them to review the education records.<sup>194</sup> Finally, the regulations prohibit the school from destroying records if there is an outstanding request

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<sup>189</sup> Id. § 1232g(4)(B).

<sup>190</sup> Id. § 1232g(d).

<sup>191</sup> Id. § 1232g(b)(1)(H).

<sup>192</sup> 34 C.F.R. § 99.10(b) (2010).

<sup>193</sup> Id. § 99.10(c).

<sup>194</sup> Id. § 99.10(d)(1) -(2).

for them.<sup>195</sup>

There are, however, two important limitations to this right of review. First, if information about another student is on the educational record, the parent can review only the portion of the record pertaining to his or her child.<sup>196</sup> Second, while non-custodial parents generally can review their child's records without consent from the student or other parent, a school must deny such a request if there is a court order, state statute, or legally binding document explicitly revoking the right.<sup>197</sup> A stepparent has rights under the Family Educational Rights and Privacy Act ("FERPA") when the stepparent is present on a day-to-day basis with the natural parent and child, and the other parent is absent from that home. In such cases, stepparents have the same rights under FERPA as do natural parents. Conversely, a stepparent who is not present on a day-to-day basis in the home of the child does not have rights under FERPA with respect to such child's education records.

### **How do parents and students request to amend educational records?**

If a parent believes that his or her child's educational records are inaccurate, misleading, or in violation of students' rights to privacy, the parent may request that the school amend the record.<sup>198</sup> The school must decide whether to move forward with this request within a reasonable time.<sup>199</sup> If it opts not to carry out the request, then the school must inform the parent or eligible student of its decision and his or her right to an informal hearing to contest the decision.<sup>200</sup>

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<sup>195</sup> Id. § 99.10(e).

<sup>196</sup> Id. § 99.12(a).

<sup>197</sup> Id. § 99.4.

<sup>198</sup> Id. § 99.20(a).

<sup>199</sup> Id. § 99.20(b).

<sup>200</sup> Id. § 99.20(c).

The Department of Education has set forth minimum requirements for the conduct of such a hearing. The school must hold the hearing within a reasonable time after the request and notify the parent or student of the date, time, and place, reasonably in advance of the proceeding.<sup>201</sup> While an individual from an educational agency or institution may preside over the hearing, he or she must not have a direct interest in the outcome of the case.<sup>202</sup> In terms of the hearing itself, the Department of Education simply requires that the contesting party must have a full and fair opportunity to present evidence relevant to the issue at hand.<sup>203</sup> The regulations provide that parents or eligible students have the right to be represented by an individual at his or her expense, including an attorney.<sup>204</sup> As with other administrative proceedings, the hearing officer can only consider evidence that was presented during the hearing.<sup>205</sup>

If the hearing officer decides in favor of the parent or eligible student, the school must amend the record accordingly, and inform the requesting party of this decision.<sup>206</sup> On the other hand, if the hearing officer decides that the educational record is not inaccurate or misleading, parents have the right to put forth a statement in the record commenting on the contested information and why he or she disagrees with the decision of the school.<sup>207</sup> The school has to keep the statement in the record as long as the record is maintained and must disclose the statement whenever it discloses the record to which the statement refers.<sup>208</sup>

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<sup>201</sup> Id. § 99.21(a).

<sup>202</sup> Id. § 99.22(c).

<sup>203</sup> Id. § 99.22(d).

<sup>204</sup> Id.

<sup>205</sup> Id. § 99.22(f).

<sup>206</sup> Id. § 99.21(b)(1)(i)-(ii).

<sup>207</sup> Id. § 99.21(2).

<sup>208</sup> Id. § 99.21(c)(1) -(2).

## **When can a school disclose information regarding your child 's educational records?**

Generally, schools cannot disclose to a third party information about the student from the educational records without signed and written consent from the parent or the eligible student.<sup>209</sup> The signed and dated written consent may include a signature in electronic form, provided it identifies the person giving the electronic consent and indicates his or her approval of the information contained within the consent.<sup>210</sup> The written consent must specify which records are to be disclosed, state the reason for the disclosure, and identify the individual or organization to which the disclosure is being made.<sup>211</sup> The school is obligated, upon request, to provide parents or eligible students with copies of the records that are to be disclosed.<sup>212</sup>

## **When can a school disclose information without parental or student consent?**

While FERPA provides extensive confidentiality protections for parents and students with respect to their educational records, there are several exceptions permitting the school to disclose the records without prior consent. For example, the school can disclose information to school officials having a legitimate educational interest in reviewing the record.<sup>213</sup> School officials having such an educational interest include teachers and school employees that work directly with the student as well as attorneys for the school district. The right to disclosure may also extend to outside consultants, contractors, volunteers, and other parties that have contracted with the school provided they: (1) perform a service for which the school would otherwise use employees; (2) are under the direct control of the

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<sup>209</sup> Id. § 99.30(a).

<sup>210</sup> Id. § 99.30(d)(1)-(2).

<sup>211</sup> Id. § 99.30(b)(1)-(3).

<sup>212</sup> Id. § 99.30(c).

<sup>213</sup> Id. § 99.31(1)(i)A).

school in the use and review of the records; and (3) will not disclose the information to an unauthorized party.<sup>214</sup> Regardless of the source of the request, the school must take appropriate measures to ensure that these parties review only the records in which they have a legitimate educational interest.<sup>215</sup>

The parent and student do not need to consent when the school is disclosing information to state and local officials who are using the records to conduct audits, evaluations, and compliance reviews of specific educational programs.<sup>216</sup> The school can also disclose to organizations that are contracting with the school to develop and administer predictive tests, administer aid programs, and improve classroom instruction.<sup>217</sup> Under the statute, the term “organizations” includes federal, state and local agencies, and independent organizations.<sup>218</sup>

Congress has nevertheless imposed some restrictions to ensure these organizations are properly using the record. First, the written agreement between the school and the organization must specify the purpose, scope and duration of the studies, the information that is to be disclosed, and contain assurances from the organization that it uses the records only for its intended purpose.<sup>219</sup> Second, when conducting the studies, only representatives of the organization that have a legitimate interest in the information can access the records.<sup>220</sup> Finally, once the organization completes the study, it has to destroy or return to the school all personally identifiable information.<sup>221</sup> To ensure that schools comply with

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<sup>214</sup> Id. § 99.31(B)(1)-(3).

<sup>215</sup> Id. § 99.31(ii).

<sup>216</sup> Id. § 99.31.

<sup>217</sup> Id. § 99.31(6)(i)(A)-(C).

<sup>218</sup> Id. § 99.31(6)(i)(v).

<sup>219</sup> Id. § 99.31(C)(1)-(3).

<sup>220</sup> Id. § 99.31(C)(4).

<sup>221</sup> Id. § 99.31(6)(i)(iv).

these requirements, the U.S. Department of Education has the authority to prohibit an institution from disclosing information to a third-party organization for five (5) years if it makes a determination that the school violated the provisions outlined above.<sup>222</sup>

If a student is intending to enroll or transfer to another school in a different district, the “receiving school” may access the educational records from the “sending school,” without parental or student consent, unless there is a board policy prohibiting the transfer of records. However, under both Connecticut and New York law, the receiving school must send written notification to the sending school at the time the student enrolls there. The sending school then has ten (10) days after the written notification to send all the student’s educational records to the receiving school.<sup>223, 224</sup> If the sending school does disclose confidential information under these circumstances, it must make a reasonable attempt to notify the parent or the student at his or her last known address.<sup>225</sup> However, schools do not have to carry out this notification task if: (1) the parent or student initiated the disclosure; or (2) the school specifies a policy in its annual notification of forwarding a student’s records to the receiving school when that student enrolls there.<sup>226</sup> In any event, the school has to provide copies of the disclosed records to the parent or student and an opportunity for a hearing if he or she wants to amend the records.<sup>227</sup>

School officials may also disclose information pursuant to a court order or subpoena.<sup>228</sup> In doing so, the school has to make reasonable attempts to notify the parent

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<sup>222</sup> Id. § 99.31(6)(i)(iv).

<sup>223</sup> 2000 Conn. Pub. Acts. 00-220 § 1.

<sup>224</sup> N.Y. Education Law §3304.

<sup>225</sup> 34 C.F.R. § 99.34(a)

<sup>226</sup> Id. § 99.34(a)(1)(i)-(ii).

<sup>227</sup> Id. § 99.34(a)(2)-(3).

<sup>228</sup> Id. § 99.31(9)(i).

or student about the order or subpoena in advance of the disclosure, so the parent or student has an appropriate opportunity to challenge the subpoena or court order.<sup>229</sup> On a related note, if the school is defending or pursuing a legal action by or against a parent, it can disclose relevant student records without a court order, subpoena, or prior parental or student consent.<sup>230</sup>

Similarly, the school can disclose student information to state and local authorities without written consent if the disclosure is related to the juvenile justice system's ability to serve that student and a particular state statute permits such an action.<sup>231</sup> If the pertinent state statute was adopted after November 19, 1974, the authorities who are requesting the student records must certify in writing to the school that they will not disclose the information to any party that is not authorized by state law.<sup>232</sup>

The school can also disclose confidential information in emergencies if the information is necessary to protect the health and safety of the student or other individuals.<sup>233</sup> Parents should be aware that the school has the statutory authority to disclose confidential student records to teachers and school officials within the school and at other schools if they have a legitimate interest in the behavior of the student. The statute also permits the school to disclose information to any other individual whose knowledge of the information is necessary to protect the student and any other individuals.<sup>234</sup>

Finally, the school can disclose "directory information" without consent if it has

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<sup>229</sup> Id. § 99.10(9)(ii).

<sup>230</sup> Id. § 99.31(9)(iii)(A)-(B).

<sup>231</sup> Id. § 99.38(a).

<sup>232</sup> Id. § 99.38(b).

<sup>233</sup> Id. § 99.31(10).

<sup>234</sup> Id. § 99.36(b)(1)-(3).

provided public notice to parents or eligible students attending the school.<sup>235</sup> “Directory information” means any information in an educational record of the student that would not generally be harmful or an invasion of privacy if disclosed. Examples of directory information include the student’s name, address, phone listing, e-mail address, photograph, date and place of birth, major field of study, grade level, enrollment status, dates of attendance, participation in activities and sports, degrees, honors and awards received, etc.<sup>236</sup> The Department of Education has outlined requirements for what type of information must be in the public notice. First, the notice has to contain the types of personally identifiable information that the school has designated as directory information. Second, the school has to spell out the parent’s or the eligible student’s right to refuse to let the school disclose such information and the period of time within which he or she has to notify the school.<sup>237</sup>

### **What can I do if my child’s school is violating a provision of FERPA?**

If a parent or eligible student believes that the school has violated the Act, he or she can file a written complaint with the Family Policy Compliance Office, which is within the U.S. Department of Education.<sup>214</sup> The Office is responsible for investigating, processing, and reviewing complaints and providing technical assistance to ensure compliance with the Act.<sup>215</sup>

A parent or student must file the complaint with the Office within 180 days of the date of the alleged violation or the date that he or she knew or should have known about the alleged violation.<sup>216</sup> In the complaint itself, the filing party has to spell out the underlying

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<sup>235</sup> Id. § 99.31(11).

<sup>236</sup> Id. § 99.3(a).

<sup>237</sup> Id. § 99.37(1)(2)-(3).



facts that led the party to believe that a violation occurred.<sup>238</sup>

Once the complaint has been filed, the Office will notify the complainant and the school if it decides to investigate the alleged violation.<sup>239</sup> Regarding notice to the school, the Office has to include the substance of the allegations and direct the school to submit a formal written response and other relevant information within a specified period of time.<sup>240</sup> If the Office decides that more information is necessary before moving forward in the investigation, it may request the parties to submit further written or oral information.<sup>241</sup>

After the investigation, the Office will send both the complainant and the school a written notice of its findings and the reasons for its decision.<sup>242</sup> If the Office decides the school violated a provision of the Act, it must spell out in the written notice the specific steps the school has to take to comply with the legislation and give the school a reasonable timeframe for voluntary compliance.<sup>243</sup> However, if the school still refuses to comply after a reasonable timeframe, the Department of Education is authorized to take any available legal action, including withholding payments to the school, compelling compliance through a cease and desist order, or terminating any funding granted to the school.<sup>244</sup>

### **What are some other obligations of the school?**

Aside from the school privacy responsibilities mentioned above, the school must also notify parents or eligible students annually about the various rights and procedures outlined in the Act. The notice must inform parents and eligible students about rights and procedures

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<sup>238</sup> Id. § 99.63.

<sup>239</sup> Id. § 99.60(b)(1)-(2).

<sup>240</sup> Id. § 99.64(c).

<sup>241</sup> Id. § 99.64(a).

<sup>242</sup> Id. § 99.65(a).

<sup>243</sup> Id. § 99.65(2).

<sup>244</sup> Id. § 99.66(a).

to access student records, amend information within the records, and notify the U.S. Department of Education if they believe that a school has violated the Act. In addition, the notice must inform parents that schools cannot disclose information without consent unless such disclosure falls within one of the exceptions mentioned above. Finally, the school must specify criteria for determining who constitutes a “school official,” and what constitutes a “legitimate educational interest,” if it has a policy of allowing such individuals to access student records without consent.<sup>245</sup>

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<sup>245</sup> Id. § 99.7(a)(3)(iii).

## **VII. Your Child's Attendance Requirements & Residency Status**

The following will provide you with the pertinent laws and procedures regarding your child's attendance at school and residency status. The first part of this section will describe the mandatory attendance requirements that Connecticut and New York require students to adhere to, and potential penalties if your child fails to meet these requirements. The second part of this section will provide you with basic information regarding how your child's residency plays a role in where they may attend school. This section will further describe available hearing procedures if your child is determined to be an ineligible resident.

If there are any issues that arise between you and the school district regarding your child's school attendance or a dispute pertaining to the residency status of your child, please contact one of our attorneys at Maya Murphy, P.C.

### **Attendance**

As a parent, you are responsible for ensuring that your child is regularly attending school. Attendance is basic to your child's ability to obtain a proper education. Much of what your child learns is presented to them in the classroom setting. Your child's daily attendance will expose them to other learning processes that will help them to continue to grow and learn. Connecticut law states, "parents and those who have the care of children shall bring them up in some lawful and honest employment and instruct them or cause them to be instructed in reading, writing, spelling, English grammar, geography, arithmetic and United States history and in citizenship, including the study of the town,

state and federal governments.”<sup>246</sup>

In Connecticut, if your child is over the age of 5 and under the age of 18, you must ensure that he or she attends public school regularly during the normal operating hours of the school district in which your child resides. Meanwhile, New York law mandates that all children between the ages of 6 and 16 attend school, subject to certain exceptions. In both Connecticut and New York, if your child is a high school graduate or you are able to demonstrate that your child is receiving instruction in the appropriate studies equivalent to that taught in public school (e.g. homeschooling, private school), then your child will be excused from this mandatory attendance requirement.<sup>247,248</sup> Please note that if your child attends private school, there are certain attendance requirements that will be discussed in further detail below.

*Is my 17-year-old child permitted to withdraw from attending school in Connecticut?*

While New York has no attendance requirement for children 17 or older, Connecticut generally requires children to attend school until they reach the age of 18. However, a parent or other person having control of a child who is at least seventeen (17) years of age, may consent to their child’s withdrawal from attending school in Connecticut.<sup>249</sup> As a parent, you must personally appear at your child’s school district’s office and sign a withdrawal form. The withdrawal form must also be signed by a guidance counselor or school administrator who is employed by your child’s

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<sup>246</sup> Conn. Gen. Stat. Ann. §10-184.

<sup>247</sup> Id.

<sup>248</sup> N.Y. Education Law §3205.

<sup>249</sup> Conn. Gen. Stat. Ann. §10-184.

school district indicating that you, the parent, were provided with information regarding educational options available in your child's school system and the community.<sup>250</sup>

If your child has voluntarily terminated his or her enrollment in school with your consent and subsequently seeks readmission, the board of education of your child's school district may deny school accommodations to your child for up to ninety (90) school days following your child's withdrawal, unless your child seeks to be readmitted within ten (10) school days after his or her withdrawal. In this case, the school board must readmit your child within three (3) school days.<sup>251</sup>

*What is the maximum age at which I must enroll my child in school?*

In Connecticut, a parent has the option to exempt a child from attending school until the age of seven (7) provided the parent appears at the child's school district's office and signs an "Option to Exempt" form. The school district must provide you with information regarding the educational opportunities that would be available to your child if you were to enroll him or her in public school as early as the age of five (5).<sup>252</sup> An option form must be signed for each year you decide not to enroll a child below the age of seven (7) in public school.

*Is there a penalty for failing to comply with the mandatory attendance requirements?*

Failure as a parent to comply with the requirement that your child attend public school (absent alternative means of instruction), is a violation of criminal law. In Connecticut, if your child fails to attend school as required, you are subject to a fine not

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<sup>250</sup> Conn. Gen. Stat. Ann. §10-189(d)(2).

<sup>251</sup> Id.

<sup>252</sup> Conn. Gen. Stat. Ann. §10-185.

to exceed \$25 per day. A penalty will not be imposed if it appears that your child is destitute of clothing suitable for attending school and as a parent you are unable to provide proper clothing for your child to attend school.<sup>253</sup> Meanwhile, in New York, for a first offense, parents who do not send their children to school may be fined \$10 or put in jail for ten (10) days. Subsequent offenders can be fined \$50 or put in jail for up to 30 days.<sup>254</sup>

Failure to send your child to school may also subject you to investigation by your local child protective agency for educational neglect. If the agency obtains proof that your child has excessive absences, and that you failed to ensure that he or she attends school regularly, it may file a petition against you in court and seek a neglect finding against you.

*Am I responsible for mandatory attendance requirements if my child attends private school?*

As a parent, you are still required to comply with the mandatory attendance laws set forth above if your child attends private school in Connecticut or New York. Private schools must submit school attendance reports to the Commissioner of Education. The Commissioner of Education provides teachers and other school personnel at your child's private school with the forms needed to establish compliance with the mandatory attendance provisions.<sup>255,256</sup> If your child's attendance reports are not satisfactory, a complaint may be filed in court by the superintendent of the school district in which you and your child reside.

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<sup>253</sup> Id.

<sup>254</sup> N.Y. Education Law §3233.

<sup>255</sup> Conn. Gen. Stat. Ann. §10-188.

<sup>256</sup> N.Y. Education Law §3211.

### What is a Truant?

Your child may, on occasion, be excused from school for good reason, such as illness, where a written notice from your child's doctor should be provided to the child's school. However, unexcused absences may violate the mandatory attendance laws. Connecticut law defines a "truant" as a child age 5 to 18 who is enrolled in public or private school and has 4 unexcused absences from school in any 1 month or 10 unexcused absences from school in any 1 year.<sup>257</sup> A "habitual truant" is a child between the ages of 5 and 18 who is enrolled in private or public school and has 20 unexcused absences within one school year. Cities and towns may adopt their own ordinances concerning children who are found on the streets or in other public places during school hours. The police may detain your child and return the child to school if he or she is found to be a habitual truant.<sup>258</sup>

New York state law allows a legal absence of lateness for the following reasons: sickness, sickness or death in the family, impassable roads or weather making travel unsafe, religious observance, approved school-supervised trips, and required presence in court. Under New York law, there are two types of illegal absence: educational neglect and truancy. Educational neglect is absence with the knowledge and consent of parents for other than legal reasons. On the other hand, truancy occurs when students, whose parents expect them to be in school, do not attend for reasons other than the legal reasons listed above.

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<sup>257</sup> Conn. Gen. Stat. Ann. §10-198a(a).

<sup>258</sup> Conn. Gen. Stat. Ann. §10-200.

*What are the policies and procedures my child's school may adopt concerning truancy?*

In Connecticut, your local board of education must adopt and implement policies and procedures concerning truants, which must include:

- The holding of a meeting with you and your truant child and appropriate school personnel to review and evaluate the reasons for your child's truancy, provided such meeting is held no later than ten (10) school days after your child's fourth unexcused absence in any month or tenth unexcused absence in a school year.
- Coordinating services with referrals of children to community agencies providing child and family services.
- Notifying you annually at the beginning of the school year and upon any enrollment during the school year, as a parent having control of a child enrolled in a public school from kindergarten to grade eight (8), in writing of the obligations you have as a parent.
- Obtaining from you, annually at the beginning of the school year and upon any enrollment during the school year, as a parent of a child from kindergarten to grade eight (8), a telephone number or other means of contact.
- A system of monitoring individual unexcused absences of children from kindergarten to grade eight (8), ensuring that whenever a child fails to report to school on a regularly scheduled school day and no indication has been received by school personnel that you, the parent, are aware



of his or her absence, that a reasonable effort is made by school personnel or volunteers under the direction of school personnel to notify you, by telephone.<sup>259</sup>

In New York City, a student with less than 90% attendance is considered chronically absent. Each school must have a practical mechanism to notify parents when students are absent or late. Additionally, the schools must examine attendance, lateness, and early departure data and develop effective intervention strategies to improve school attendance.

*What if, as a parent or guardian, I fail to comply with the school policies and procedures regarding truancy?*

In Connecticut, if a parent fails to attend a truancy meeting regarding your child's truant status or cooperate with the school to attempt to solve the truancy problem, then the superintendent of your school district must file a written complaint with the court.<sup>260</sup> The board of education overseeing your child's school may appoint an individual or group of individuals authorized to prosecute violations of school attendance laws. The appointee is authorized to investigate the absence or irregular attendance of your child, to cause your child to attend school regularly if they are absent or irregularly in attendance and prosecute cases for violation of the mandatory attendance laws.<sup>261</sup> These appointees will report their findings to your child's school principal or superintendent, who based on these findings, may be required to file a written complaint in court.

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<sup>259</sup> Conn. Gen. Stat. Ann. §10-198a(b).

<sup>260</sup> Conn. Gen. Stat. Ann. §10-198a(c).

<sup>261</sup> Conn. Gen. Stat. Ann. §10-199.

In New York, if you fail to ensure that your child attends school regularly and on time, the Administration for Children's Services may file a neglect petition against you in Family Court.

## **Residency**

In both Connecticut and New York, local and regional boards of education are statutorily required to provide free school accommodations to each child who is a permanent resident of the school district and is between the ages of 5 and 21 years old, provided they have not graduated high school.<sup>262, 263</sup> School administrators should, but do not always, determine your child's residency status prior to his or her enrollment in the school district. If residency issues arise, your child's school district has the right to exclude him or her from attending school if it is determined through a formal hearing (which will be discussed below), that your child resides in another district.

### **Where will my child be deemed a resident if I am a divorced parent?**

If your child is part of a family in which you are married to or live with your child's mother or father, your residence will be deemed your child's permanent residence. Questions may arise when you are a divorced parent and your child spends equal time residing at each parent's home. Under these circumstances, your child will be able to attend school in the school district in which either parent resides. If your child confirms living with both parents, it is likely that the school board would allow you to choose the

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<sup>262</sup> Conn. Gen. Stat. Ann. §10-186(a).

<sup>263</sup> N.Y. Education Law §3202.

school district your child will attend even if your child may only spend half the time in that residence.

*What if my child lives with other family members or friends?*

There are circumstances in which your child may maintain residency and attend school in a school district in which neither one of his or her parents resides. Under these circumstances, it must be determined when your child established this permanent residency. Connecticut law states that, “children residing with relatives or nonrelatives, when it is the intention of such relatives or nonrelatives and the children or their parents or guardians that such residence is to be permanent, provided without pay and not for the sole purpose of obtaining school accommodations...shall be entitled to all free school privileges accorded to the resident children of the school district in which they then reside.”<sup>264</sup> This statute confirms three key elements.

First, such residency must be intended to be the permanent residency of your child. Although there is no clear-cut definition as to what this entails, there are certain factors that the State has set forth that may be relevant in determining whether this residence is in fact intended to be your child’s permanent place of living:

- Where the majority of your child’s clothing and personal possessions are located;
- Issuance of a library card;
- Where your child may attend religious services;
- Place of club affiliations (e.g. cub scouts, boy scouts, etc.);
- Where your child spends substantial time when school is not in session; and

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<sup>264</sup> Conn. Gen. Stat. Ann. §10-253(d).

- The place where your child would go if he or she left or was not permitted to attend school.

Second, the “provided without pay” provision was enacted to avoid payment to relatives or nonrelatives simply to enable your child to attend a certain school. Lastly, the “not for the sole purpose of education” provision was enacted to preclude your child from residing in a particular school district for the sole benefit of obtaining a free education. In order to make sure that these statutory requirements are satisfied, school districts may require submission of certain documentation as proof or may even request a signed affidavit attesting to pertinent facts in support of compliance with the law.

In New York, a non-parent who is not a legal guardian or custodian but has assumed caregiving responsibilities, referred to as a kinship “de facto” custodian, may enroll a student if he or she is designated as a “person in a parental relation” by the parent of a student.<sup>265</sup> Any designation may not exceed 6 months and must not be in contradiction with any prior order from any court in any jurisdiction that would prohibit the designating parent from exercising the same or similar authority. If the kinship “de facto” custodian lives in a different school district than the child’s parent or legal guardian, he or she will also have to prove residency. If the parent or legal guardian cannot be found, it may be possible to enroll the child after proving residency by affidavit.

Under New York Education Law, certain circumstances where parents cannot assume school responsibilities will qualify a caregiver as a “person in parental relationship,” and such persons can enroll a child in school so long as they can prove

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<sup>265</sup> N.Y. General Obligation Law §5-1551.

that the child resides with them. If the parent or legal guardian of the child is not in the child's life, then another option may be for the child to become an emancipated minor. Emancipated minors are able to enroll themselves in school. A student becomes an emancipated minor if he or she is beyond the compulsory school age of 16, is not in need or receipt of foster care, is living apart from his or her parents, and does not accept any financial support from his or her parents.

*What type of documentation may I need to produce in order to establish my child's residency in a particular town or school district?*

Your child's board of education may require a parent, guardian, relative or nonrelative, emancipated minor, or pupil 18 years of age or older to provide documentation sufficient to establish that your child's residence is permanent, provided without pay, and is not for the sole purpose of obtaining school accommodations.<sup>266</sup> Documents that may be provided as proof of permanent residency include: copies of deeds, rental/lease agreements, tax bills, utility bills, driver's license, and voter registration cards.

Furthermore, a signed affidavit may be requested by the school district in which your child attends school to assist in determining your child's permanent residency. Prior to making the request for documentation or a signed affidavit attesting to your child's residency, the school district must first specify, in a written statement, the basis upon which it has reason to believe that your child is not entitled to particular school accommodations.<sup>267</sup>

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<sup>266</sup> Conn. Gen. Stat. Ann. §10-253(d).

<sup>267</sup> Conn. Gen. Stat. Ann. §10-186(a).

*What if my child's home is located on a town boundary line?*

If your child resides in a dwelling (single, two or three family house or condominium unit), physically situated within the municipal boundaries of more than one town, he or she will be considered a resident of each town and may attend school in either school district.<sup>268</sup> The town line must actually bisect your child's dwelling edifice and not just the real property. If the boundary line traverses only the land, your child will only be eligible to attend school in the town in which the actual dwelling is located.

*What is the process if my child's residency status is challenged by the school district?*

In Connecticut, if your child's board of education denies school accommodations to your child based on residency, they must inform you as a parent of your due process right to a formal hearing and the basis for their conclusion that your child is ineligible for those particular school accommodations.<sup>269</sup> Following proper notice, you have the right to request a formal hearing before your child's board of education to challenge denial of schooling.<sup>270</sup> The school board is obligated to convene such a hearing within ten (10) days after receipt by the school board of your written request for a hearing on the matter.<sup>251</sup> You may be represented by counsel during this hearing, but at your own expense. You will have the opportunity to present evidence, cross-examine witnesses and make an argument regarding any issues that are in dispute. If your child has been denied school accommodations based on residency, you as a parent bear the burden of providing proof by a preponderance of the evidence regarding your child's

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<sup>268</sup> Conn. Gen. Stat. Ann. §10-186(a).

<sup>269</sup> Conn. Gen. Stat. Ann. §10-186(b)(1).

<sup>270</sup> Id.

residency.<sup>271</sup> The school board must make a stenographic record or tape recording of the hearing and issue a finding within ten (10) days following the hearing. You may request a copy of the transcript or recording and the school board must provide you with such within thirty (30) days of your request.<sup>272</sup> During the hearing process, if you so choose, your child may continue attending school while the resolution of the matter is still pending.<sup>273</sup>

In New York, a school board or designee may only return a negative determination regarding residency after the person in parental relation to the student is afforded the opportunity to submit evidence concerning the student's right to attend the school district.

*Do I have the right to appeal a decision made by my child's local board of education?*

In Connecticut, you may appeal to the State Board of Education the decision of your child's local board of education regarding its initial finding concerning your child's residency status.<sup>274</sup> As in the case of the initial hearing, your child may continue attendance at school pending the resolution of the appeal. Please note, that if an appeal is not taken to the State Board of Education within twenty (20) days of the mailing of the finding of the initial hearing, the decision of the local school board shall be final.<sup>275</sup>

If an appeal is taken, the hearing board must render its decision within 45 days after the receipt of the notice of appeal. An extension may be granted at the discretion of the Commissioner of Education upon an application by either party describing the

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<sup>271</sup> Id.

<sup>272</sup> Conn. Gen. Stat. Ann. §10-186(2).

<sup>273</sup> Conn. Gen. Stat. Ann. §10-186(b)(1).

<sup>274</sup> Id.

<sup>275</sup> Conn. Gen. Stat. Ann. §10-186(b)(2).

circumstances requiring an extension.<sup>276</sup> If the hearing board on appeal decides that your child was not a resident of the school district and therefore was not entitled to free school accommodations, the board of education may assess and seek reimbursement of tuition against you, the parent. In the event of nonpayment, the board of education may seek to recover the reimbursement of tuition through available civil remedies.<sup>277</sup> Finally, any party (parent/guardian or the school district) aggrieved by the findings of the State Board of Education may appeal to the state court.

In New York, if a negative determination is reached at the initial hearing, a written notice must be provided within two (2) business days to the person in a parental relationship to the student. The written notice must include the basis for the negative determination and the date of the exclusion from the district. Furthermore, the notice must inform the person in the parental relationship to the student of his or her right to appeal the decision to the commissioner within thirty (30) days, and that the procedures for appeal may be obtained from the Department's Office of Counsel.<sup>278</sup> The appeal is timely if brought within thirty (30) days of the school district's decision that is being appealed. If it is more than thirty (30) days, you may still ask the school district to reconsider its prior decision by submitting additional information/evidence to support the residency. If the new decision is still a negative determination, you may then file an appeal within thirty (30) days from the second decision. Your petition for an appeal may also include a request for stay, which would allow your child to attend school while your case is decided.

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<sup>276</sup> Conn. Gen. Stat. Ann. §10-186(b)(3).

<sup>277</sup> Conn. Gen. Stat. Ann. §10-186(b)(4).

<sup>278</sup> 8 NYCRR 100.2(y).



## VIII. Extending the Arm of School Authority Beyond the Schoolhouse Gate: Student Discipline for Off-Campus Speech in the New Digital Era

***“Today, students are connected to each other through email, instant messaging, blogs, social networking sites, and text messages. An email can be sent to dozens or hundreds of other students by hitting ‘send.’ A blog entry posted on a site such as livejournal.com can be instantaneously viewed by students, teachers, and administrators alike. Off-campus speech can become on-campus speech with the click of a mouse.”<sup>279</sup>***

What’s a parent to do? Students today are equipped with electronic devices that keep them in immediate and continuous contact with fellow students. It is virtually impossible to control (or even monitor) the content of outgoing texts, tweets, instant messages, and emails, and absolutely impossible to censor the content of incoming messages. As a result, “the line between on-campus and off-campus speech is blurred”<sup>280</sup> as are the “outer bounds of administrators’ authority to punish student speech. . . .”<sup>281</sup> While there are fewer “bright lines,” there are things parents should know if their child’s off-campus use of social media (as is becoming increasingly frequent), forms the subject of student discipline. There is also recent judicial guidance available as to what to tell your

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<sup>279</sup> Thomas v. BOARD OF ED., Granville Central School Dist., 478 F. Supp. 114, 124 (N.D.N.Y. 1979).

<sup>280</sup> Doninger v. Niehoff, 594 F.Supp. 2d 211, 223 (D. Conn. 2009), aff’d in part and rev’d in part 2011 U.S. App. LEXIS 8441 (2d Cir. Apr. 25, 2011).

<sup>281</sup> Id. (citing Erin Reeves, *The Scope of a Student: How to Analyze Student Speech in the Age of the Internet*, 42 Ga. L. Rev. 1127, 1131 (2008)).

child about potential school discipline related to cyberspace pitfalls that must be avoided. The purpose of this chapter is to make parents at least as well-informed as school administrators in the area of permissible student discipline for off-campus, social-networking speech.

## Where We Came From

Prior law with respect to students' First Amendment rights used to be relatively well-settled and fairly predictable. Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>282</sup> The constitutional rights of public school students, however, "are not automatically coextensive with the rights of adults in other settings."<sup>283</sup> In *Tinker v. Des Moines Independent Community School District*, the United States Supreme Court said that student rights must be applied in a manner consistent with the "special characteristics of the school environment," and that school administrators may prohibit student expression that will "materially and substantially disrupt the work and discipline of the school."<sup>284</sup> As schools are responsible for "teaching students the boundaries of socially appropriate behavior,"<sup>285</sup> otherwise constitutionally protected but offensive speech by an adult may when uttered by a student, give rise to disciplinary action by a school. Educators are also permitted to exercise editorial control over "school-sponsored expressive activities such as school publications or theatrical productions."<sup>286</sup>

More recently, the Supreme Court has allowed public school administrators to "take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."<sup>287</sup> The *Tinker, Fraser, Hazelwood* trilogy of cases was once thought to provide parents and teachers with a viable and stable framework for reconciling student rights of free speech with educators' rights to maintain

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<sup>282</sup> *Tinker v. Des Moines Indep. Sch. Dist.* 393 U.S. 503, 506 (1969).

<sup>283</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>284</sup> *Tinker v. Des Moines Indep. Sch. Dist.* 393 U.S. 503, 506, 513 (1969).

<sup>285</sup> *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

<sup>286</sup> *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>287</sup> *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

good order and discipline. Maybe in 1988, but no more.

### **Where We Are Now**

A Federal Court case from Connecticut has shone a spotlight on the difficulty of trying to extrapolate existing law onto the realities of student access to and use of social media. The case began as *Doninger v. Niehoff*, 514 F. Supp. 2d 199 (D. Conn. 2007) (“*Doninger I*”) and has a torturous procedural and checkered appellate history. *Doninger I* was affirmed by *Doninger v. Niehoff*, 527 F. 3d 41 (2d Cir. 2008) (“*Doninger II*”). The case was continued, seeking monetary relief, *Doninger v. Niehoff*, 594 F. Supp 2d 211 (D. Conn. 2009) (“*Doninger III*”). On appeal, *Doninger III* was affirmed in part and reversed in part by *Doninger v. Niehoff*, 2011 U.S. App. LEXIS 8441 (2d Cir. Apr. 25, 2011)(“*Doninger IV*”). The most important aspect of this serpentine procedural and appellate route is that *Doninger* arose out of the United States District Court for the District of Connecticut and has made two trips to the United States Court of Appeals for the Second Circuit. Thus, to the extent the Second Circuit has ruled on issues of law in *Doninger II and IV*, such precedent is binding on the Connecticut Federal Court and likely to receive highly deferential treatment from the Connecticut State Courts. It also illustrates how the availability and use of social media can cause a simmering dispute between students and educators to rapidly metastasize into an all-out war. For those reasons alone, it deserves our close inspection.

### **Doninger I**

In 2007, Avery Doninger (“Avery”) was a junior at Lewis Mills High School in Burlington, Connecticut. She served on the Student Council and was also the Junior Class Secretary. A dispute arose between the school administration and certain Student

Council members (including Avery) over the scheduling of an annual battle-of-the-bands concert called “Jamfest.” The concert had been twice postponed because of delays in the opening of the school’s new auditorium. It had been rescheduled for April 28, 2007, in the newly constructed venue. Shortly before the event, however, Avery and her fellow students learned that the teacher responsible for operating the auditorium’s sound and lighting equipment would not be able to attend on that date. At an April 24<sup>th</sup> Student Council meeting, the students were told that it would not be possible to hold Jamfest in the auditorium without the absent teacher, so that either the date or location of the event would have to be changed. The school proposed as an alternative venue the school cafeteria, limited to acoustic (as opposed to electric) instruments. The Student Council found this unacceptable.

Four Student Council members, including Avery, decided to alert the larger community to the Jamfest situation and enlist their help in convincing school officials to allow Jamfest to take place in the auditorium as scheduled. The four students met in the school computer lab and drafted an email message to be sent to a large number of addressees. The email essentially recounted the pertinent facts and requested recipients to contact the School District Superintendent to urge that Jamfest be held as and where previously scheduled, and to forward the message “to as many people as you can.” All four students signed and sent the email. As expected, the school and District received an influx of calls and emails expressing concern about Jamfest. The school Principal and Avery spoke later the same day where Avery was told that the Principal was amenable to rescheduling Jamfest so that it could be held in the new auditorium. According to the Principal, Avery agreed to send out a corrective email.

Avery disputed the Principal's version of their conversation.

That night, Avery posted a message on her publicly accessible blog that was hosted by livejournal.com, a website unaffiliated with Lewis Mills High School. Avery's blog stated that "jamfest is cancelled due to douchebags in central office," and that the District Superintendent "got pissed off and decided to just cancel the whole thing." The blog concluded by suggesting that people write or call the Superintendent "to piss her off more."

The following day, school administrators (after having received still more phone calls and emails about Jamfest) met with the four Student Council members who sent the original email and agreed to reschedule Jamfest for June 8, 2007 (when it was actually and successfully held). Several days after the conciliatory meeting, school administrators first learned of Avery's blog posting. Because of its vulgarity and misinformation, the Principal decided, as her only discipline, that Avery should be prohibited from running for Senior Class Secretary. Avery nevertheless won election as a write-in candidate and when the school refused to permit her to take office, Avery, through her mother as nominal plaintiff, filed suit seeking an injunction to force the school to hold new class secretary elections where Avery would be allowed to run. The District Court in *Doninger I* denied Avery's request for an injunction and that decision was appealed to the Court of Appeals.

### **Doninger II**

The Second Circuit immediately noted that the United States Supreme Court had yet to speak on the issue of school authority to regulate expression that neither occurs on school grounds, nor at a school-sponsored event. The Court did, however, refer to one of

its own decisions holding that a student may be disciplined for expressive conduct, even occurring off school grounds, when such conduct “would foreseeably create a risk of substantial disruption within the school environment,” at least to the extent it was similarly foreseeable that such off-campus expression might also reach campus.<sup>288</sup> The Court of Appeals then assessed Avery’s First Amendment rights in the context of students’ expansive use of electronic communication.

Had Avery’s electronic blog instead been posted as a handbill on school grounds, the case would fall squarely within the holding of *Fraser*. Therein, the Supreme Court held that a school may regulate “plainly offensive” speech, i.e., speech that is “offensively lewd and indecent.” The Second Circuit had no problem concluding that Avery’s posting contained the sort of language that, under *Fraser*, properly may be prohibited in the classroom. What the Court of Appeals did have a problem with, however, is whether *Fraser* (primarily relied upon by the Court, below) applied to off-campus speech, at all.

Instead, the Court applied to the facts an amalgam of *Tinker* and *Wisniewski*. The Court concluded that Avery’s blog “foreseeably created a risk of substantial disruption within the school environment.” It based this conclusion on three factors: (a) the language used, (b) the false or misleading information, and (c) Avery’s role as a student government leader. The Court attached particular significance to Avery’s status as a student government leader in that her conduct not only disrupted efforts to resolve the Jamfest dispute, but it also frustrated the operation of the school’s student government, and undermined the values that student government, as an extracurricular activity, is

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<sup>288</sup>Wisniewski v. Bd. Of Educ., 494 F.3d 34, 40 (2d Cir. 2007) cert. denied, 128 S. Ct. 1741 (2008).

designed to promote. The Court in *Doninger II* did not opine as to whether a different, more serious consequence than disqualification from student office would raise issues of constitutional dimension. It ruled only that Avery's First Amendment rights were not violated when she was disqualified from running for Senior Class Secretary.

### **Doninger III**

Avery's request for an injunction in *Doninger I and II* was rendered moot by her graduation from high school. She continued in *Doninger III* to press her lawsuit for damages against school officials. The District Court found no reason to alter its previously stated position that Avery's First Amendment rights were not violated when she was prohibited from running for class secretary because of an offensive blog entry that was clearly designed to come on to campus and influence fellow students. In addition, partially as a result of the decision in *Doninger II*, the Court concluded that participation in extracurricular activities, such as student government, is a privilege and not a right.

After all was said and done, the District Court found in favor of the defendant school officials under the legal principle of "qualified immunity" (a principle unrelated to and beyond the scope of this chapter on school discipline for off-campus conduct). Then it was off once again to the Court of Appeals.

### **Doninger IV**

The Second Circuit in *Doninger IV* initially identified the issue as "the circumstances in which school administrators may discipline students for speech relating directly to the affairs of the school without running afoul of the First Amendment." Then the Court refined the issue to include whether "the-defendant-school-administrators . . .



are entitled to qualified immunity on the plaintiff-student's claims that they violated her First Amendment rights . . ." Prior to 2009, the Court would have been required to first determine whether Avery's constitutional rights were violated, and then determine (for qualified immunity analysis) whether that right was "clearly established." In *Doninger IV*, the Court inverted the usual order of inquiry, found the defendants entitled to qualified immunity, and chose not to decide the question of whether Avery's First Amendment rights had been violated. What guidance the Court did provide on the core issue was: "it was objectively reasonable for school officials to conclude that Avery's behavior was potentially disruptive of student government functions . . . and that [Avery] was not free to engage in such behavior while serving as a class representative. . . ."289

### **What the Future Holds**

***"[W]hen it comes to student cyber-speech, the lower courts are in complete disarray, handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent, controlling legal principles."***<sup>290</sup>

The disjointed state of education law as it pertains to student discipline for off-campus speech was highlighted by two cases that arose in Pennsylvania. In each case, high school students were suspended after posting MySpace profiles of their respective principals, mocking them in lewd and salacious terms. Each of the student's cases were heard by a different Federal District Judge sitting in different courthouses. In one case,

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<sup>289</sup> *Doninger v. Niehoff*, 594 F.Supp. 2d 211, 223 (D. Conn. 2009), aff'd in part and rev'd in part 2011 U.S. App. LEXIS 8441 (2d Cir. Apr. 25, 2011).

<sup>290</sup> Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 B.Y.U. L. Rev. 971, 990 (2008).

the student's suspension was upheld; in the other case, the Judge ruled in favor of the student. Each of the cases was independently appealed to the United States Court of Appeals for the Third Circuit, which hears appeals from Federal trial courts in Pennsylvania. The two separate three-judge panels (from within the same Circuit and applying the same law) issued conflicting decisions, which prompted the entire Third Circuit (consisting of 14 Federal appellate judges) to hear the cases anew, and in both cases, find for the students.<sup>291</sup> The focus of the Court's decision appeared to be on the fact that one student's speech, in particular, "did not cause a substantial disruption in the school." This test differs from the Second Circuit test that requires only a "reasonable foreseeability of disruption in the school."

In May 2015, a Federal District Judge ruled that an Oregon eighth grader's rant to a friend on Facebook about a teacher, saying that "she needs to be shot," was not a true threat of violence but was instead protected speech. The court noted that the student "did not intend to threaten or otherwise communicate with [the teacher] and did not seriously believe that [the teacher] should be shot."<sup>292</sup>

In February 2016, the U.S. Supreme Court declined to hear a Mississippi high school student's appeal of a lower-court ruling that his off-campus Facebook and YouTube posts, that alluded to shooting two teachers, were not protected by the First Amendment. The U.S. Court of Appeals for the Fifth Circuit had ruled that the school officials had reasonably concluded that the rap video was directed at the school community and threatened the two teachers.<sup>293</sup>

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<sup>291</sup> J.S. v. Blue Mtn. Sch. Dist., 2011 U.S. App. LEXIS 11947 (3d Cir. June 13, 2011); Layshock v. Hermitage Sch. Dist., 2011 U.S. App. LEXIS 11994 (3d Cir. June 13, 2011).

<sup>292</sup> Burge v. Colton School District 53, 100 F. Supp. 3d 1057 (D. Or. 2015).

<sup>293</sup> Bell v. Itawamba School Board, 859 F. Supp. 2d 834 (N.D. Miss. 2012).

Additionally, in a case involving off-campus non-digital speech, decided on September 1, 2016, the U.S. Court of Appeals for the Ninth Circuit upheld a 2-day suspension of an Oregon middle school student where the student teased and harassed a sixth grade boy and girl using vulgar language, while the students were traveling a path from the school into a city park.<sup>294</sup> The suspended student's parents sued on the basis that the discipline was an infringement of his free speech and due process rights, but a federal district court rejected his claims and granted summary judgment to the school district, resulting in an appeal to the Ninth Circuit. The Court noted, "[i]n our digital age, a school's power to discipline students for off-campus speech has become an increasingly salient question for the courts, [but in this case], we conclude that C.R.'s speech was tied closely enough to the school to subject him to the school's disciplinary authority."<sup>295</sup> Until the Supreme Court speaks to the issue of off-campus digital speech, parents and students will have to glean guidance from lower courts' rulings about school discipline for off-campus speech.

### **Technology: A Double-Edged Sword**

Parents and students should be aware that companies exist that are capable of scouring the Internet for everything a person may have said or done online in the course of the last seven (7) years. Despite initial concerns, the Federal Trade Commission has determined that these companies' activities are in compliance with the Federal Fair Credit Reporting Act. Much of the information comes from deep web searches that find comments on blogs and posts on smaller social sites, like Tumblr

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<sup>294</sup> C.R. v. Eugene School District 4J, 835 F. 3d 1142 (9<sup>th</sup> Cir. Or. 2016).

<sup>295</sup> Id. at 1155.

and even Craigslist. Photos posted to sharing sites such as Flickr, Picasa, Yfrog, and Photobucket are also easily discoverable. The “terms of service” agreements on most sites make all comments and content publicly available. While many such companies presently research candidates for employment or personal injury litigants, rather than students, their import for the future is clear: *nothing* said or done on the Internet is private.

### **The Takeaway for Parents or Students**

- Students retain their constitutional rights of freedom of speech or expression while in or out of school.

#### **BUT:**

- School administrators may prohibit student expression that will materially and substantially disrupt the work and discipline of the school.
- Educators are permitted to exercise editorial control over school-sponsored expressive activities such as school publications or theatrical productions.
- Public school administrators may take steps to safeguard students from speech that can reasonably be regarded as encouraging illegal drug use.
- A student may be disciplined for expressive conduct occurring off school grounds when such conduct would foreseeably create a risk of substantial disruption within the school environment, at least to the extent that it was similarly foreseeable that such off-

campus expression might also reach campus.

- A school may regulate in the classroom “plainly offensive” speech, i.e., speech that is offensively lewd and indecent.
- Off-campus, the risk from student speech of substantial disruption within the school environment depends upon a number of factors including the language used, the truth or falsity of the communication, and whether the student serves as a student government leader.
- Participation in extracurricular activities is a privilege and not a right.

**SO, STUDENTS SHOULD PRESUME:**

- That any electronic communication (e.g., text, tweet, email) or creation (e.g., MySpace profile) that can be forwarded beyond its initial addressee may be forwarded to parties unknown, or may be seen by teachers or school administrators.
- That any school-related electronic communication (i.e., one relating or referring to students, teachers, administrators, or school activities) can be expected to find its way “on-campus.”
- Going forward, with respect to electronic communications, students should presume no practical or legal difference between on and off-campus.
- What constitutes “substantial disruption within the school environment” depends entirely on the circumstances. Virtually any deviation from the daily routine resulting from a student communication can be described as “disruption” sufficient to support student discipline.

## **The Bottom Line**

Any off-campus electronic communication relating or referring to students, teachers, administrators, or school activities has the potential to result in student discipline. As of now, the unsettled status of the law affords school administrators wide latitude in deciding when a student communication can be reasonably seen to create a foreseeable risk of academic disruption. Exclusion from extracurricular activities is now a judicially accepted punishment. Other types of student discipline may in the future also be countenanced by the courts. In the meantime, to be forewarned is to be forearmed.

## IX. School Bullying

Phoebe Prince was a fifteen-year old girl who had moved from Ireland to attend South Hadley High School in Massachusetts.<sup>296</sup> Instead of enjoying her teen years, however, she was for several months relentlessly tormented by classmates.<sup>297</sup> Despite months of verbal and social media attacks by other students—she was called an “Irish slut” and “whore,” had her books routinely knocked out of her hands, and received threatening text messages—the school failed to take action, even as Phoebe informed administrators about the bullying.<sup>298</sup> On January 14, 2010, after a classmate threw a Red Bull can at her from a car while she was walking back from school, Phoebe hung herself in a stairwell.<sup>299</sup>

Phoebe’s suicide stands as a tragic testament to the negative impact bullying may have on students. Connecticut and New York, like other states, are not immune to such tragedies. In 2002, a Meriden high school student killed himself after enduring months of verbal and physical abuse.<sup>300</sup> In 2016, a 13-year-old student in Brooklyn hung himself after months of relentless bullying at the hands of students and several teachers.<sup>301</sup> Even when bullying does not drive students to suicide, it may have other harmful effects. According to a recent survey, Connecticut high school students who admitted to being bullied are more

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<sup>296</sup> Helen Kennedy, *Phoebe Prince, South Hadley High School’s “New Girl,” Driven to Suicide by Teenage Cyber Bullies*, N.Y. Daily News (Mar. 29, 2010), nydailynews.com.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> Elaine Zimmerman and Thomas Brooks, *Connecticut Cannot Lose More Children to Bullying*, Connecticut Mirror (May 19, 2011), <http://www.ctmirror.org/node/12641>.

<sup>301</sup> Christina Carrega, *Family of Boy Bullied to Suicide Sues Brooklyn School for Abuse*, N.Y. Daily News (January 26, 2017), nydailynews.com

likely to experience depression, sleep less, skip school, and attempt suicide.<sup>302</sup>

Fortunately, Connecticut, New York, and the Federal Government have recognized the impact of bullying and have made genuine efforts to address the problem. While there are currently no federal anti-bullying laws, the U.S. Department of Education has, among other things, created a federal task force to elicit ideas from the public, held a bullying summit, and sent a “Dear Colleagues” letter reminding schools that they may be liable under federal civil rights laws for bullying among students.

For their part, Connecticut and New York have both passed sweeping anti-bullying laws, which took effect in 2011 and 2012, respectively. Both laws, as amended, have expanded school staff training, addressed cyber-bullying, devised statewide assessments, and delineated further responsibilities for schools. This section will examine the new laws in detail. The first part of this section will provide parents with an overview of what actions constitute bullying under both Connecticut and New York law. The Connecticut General Assembly and New York State Assembly have outlined specific criteria and listed a number of actions that would qualify as bullying, including cyber-bullying. However, parents should not limit themselves to the language of the statutes. They should consult the school handbook and the record of verified acts of bullying (described below) for more specific information.

The second part of this section will describe the state procedures by which parents and students can inform the school about bullying incidents. Next, we will outline the school’s responsibilities under the law in their respective state, including investigation of bullying complaints, training for school staff, and steps to monitor and improve the

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<sup>302</sup> Connecticut Commission on Children, *Anti-Bullying Law Becomes Law 1* (2011).



effectiveness of school anti-bullying plans. We will conclude by discussing what state and federal legal claims parents can pursue on behalf of their child if the school fails to discharge its responsibilities with respect to preventing or stopping bullying and providing a safe school environment.

### **What kind of actions qualify as bullying?**

In 2019, the Connecticut General Assembly redefined bullying as “an act that is direct or indirect and severe, persistent or pervasive, which

- 1) causes physical or emotional harm to an individual,
- 2) places an individual in reasonable fear of physical or emotional harm, or
- 3) infringes on the rights or opportunities of an individual at school.”<sup>303</sup>

The 2019 legislation also requires a 33-member “social and emotional learning and school climate advisory collaborative”, which will be responsible for, among other things, developing a biennial state-wide school climate survey, a model positive school climate policy, a “plain language” notice of rights and remedies available for parents and guardians, and a student suicide risk assessment. The legislation requires the State Department of Education to post on its website by August 1, 2021, the model policy and school climate survey that the collaborative develops. In addition, boards of education will be required to post on their websites the “plain language” notice of rights and remedies available for parents and guardians by June 30, 2021. The legislation also requires boards of education, in consultation with the collaborative and the State

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<sup>303</sup> 2019 Conn. Pub. Acts 19-166, § 3(a)(1).

Department of Education, to provide on the “department” website certain training materials to school administrators regarding bullying prevention and intervention.<sup>304</sup>

Schools are also required when contacting parent and guardians whose children have been involved in bullying, to let the parents know “the results of the investigation” into the alleged bullying incident. Schools will also be required to inform these same parents or guardians that they may refer to the “plain language” notice of rights and remedies on the schools’ websites.<sup>305</sup>

Building on federal civil rights laws, the Connecticut General Assembly has also clarified that bullying based on any of the following traits would also fall under the definition:

- Race or color;
- Religion;
- Ancestry;
- National origin;
- Gender;
- Sexual orientation;
- Gender identity or expression;
- Socioeconomic status;
- Academic status;
- Physical appearance;
- Mental, physical, development or sensory disability; or
- By association with an individual or group who has or is perceived to have one or more of such above characteristics<sup>306</sup>

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<sup>304</sup> Id. 19-166 § 3(a)(2).d.

<sup>305</sup> Id.

<sup>306</sup> 2019 Conn. Pub. Acts 19-166, § 3(a)(1).

Additionally, pursuant to Connecticut law, cyber-bullying is defined as “any act of bullying through the use of the Internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications.”<sup>307</sup> Under the definition, the use of email, text messages, live web streams by a student or group of students to ridicule or humiliate another student would be considered cyber-bullying.

Nevertheless, parents should still consult the school’s bullying policy for more detail as to what behavior qualifies as bullying since districts and local boards may have modified the definition. Parents can usually find the policy in the school handbook or on the school website. If the policy is not available in the school publication or website, parents should ask for a copy of the policy, which the school is required to provide immediately upon request.

The local board also must establish a procedure for each school to maintain reports of bullying in the school and maintain a list of verified acts of bullying, which they also must make available to parents. The list, at a minimum, should provide some details on each individual act. Regardless of the format, the school cannot include the names of any students involved in the action under FERPA. The federal act also forbids schools from informing parents about the consequences imposed upon the bullying child.<sup>308</sup>

Meanwhile, in New York, the Dignity for All Students Act (DASA) defines “harassment” in terms of “creating a hostile environment that unreasonably sustainably interferes with a student’s educational performance, opportunities or benefits, or mental, emotional or physical wellbeing or conduct, verbal threats, intimidation or abuse that

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<sup>307</sup> 2019 Conn. Pub. Acts 19-166, § 3(a)(2).

<sup>308</sup> 20 U.S.C. §1232g.

reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety.”<sup>309</sup> DASA defines bullying as “the intent to cause another individual pain and/or misery.”<sup>310</sup>

In 2012, the DASA was amended to include proposed guidelines for schools providing “guidance and educational materials...regarding the best practices in addressing cyber bullying and helping families and communities work cooperatively with schools in addressing cyber- bullying, whether on or off property or at or away from a school function.”<sup>311</sup> The amendment defines cyberbullying as harassment or bullying by any form of electronic communication, and includes incidents occurring off school property that create or would foreseeably create a risk of substantial disruption of the school environment.<sup>312</sup>

### **How can parents inform schools that their child is being bullied?**

In Connecticut, as part of a required safe school climate plan, the local or regional board of education must have a process in place for students to anonymously report to school employees acts of bullying.<sup>313</sup> Under the statute, “school employees” include a teacher, substitute teacher, school administrator, school superintendent, guidance counselor, psychologist, social worker, nurse, physician, paraprofessional, or anyone who has regular contact with students through the performance of his or her duties.<sup>314</sup> The board must notify parents annually about the process by which students

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<sup>309</sup> NY Education Law §11[7].

<sup>310</sup> Id.

<sup>311</sup> Id.

<sup>312</sup> Id.

<sup>313</sup> Conn. Pub. Acts. 11-232, § 1(b)(1).

<sup>314</sup> Id. 11-232 § 1(a)(7).

can make such reports.<sup>315</sup>

As students are often and understandably scared to report these acts for fear of retaliation, the board must also provide a way for parents or guardians of the afflicted students to file written reports of suspected bullying.<sup>316</sup> Moreover, any school employee who witnesses an act of bullying or receives word from a student of such an occurrence must notify the safe school climate specialist (who we will discuss later on in the section) or another school administrator if the climate specialist is not available, no later than the next school day after the bullying takes place.<sup>317</sup> The school employee must file a written report within two days after the bullying incident.<sup>318</sup>

To encourage people to report acts of bullying, the statute insulates school employees, students, and parents from any resulting lawsuits provided they follow the relevant provisions outlined in the statute and act in good faith. This immunity extends to local boards that are making good-faith efforts to implement a safe school climate plan or investigate bullying incidents. This immunity does not attach if their actions were reckless, willful, or wanton.<sup>319</sup>

Before filing a bullying complaint, parents should consider meeting with administrators or teachers to discuss the bullying incident. Given the immediate and harmful impact that bullying has on a child, parents should involve the relevant school authorities as fully and early as possible. If parents and school officials cannot informally resolve the situation, parents should next consider filing a formal complaint. Prior to filing,

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<sup>315</sup> Id. 11-232 § 1(b)(1).

<sup>316</sup> Id. 11-232 § 1(b)(2).

<sup>317</sup> Id. 11-232 § 1(b)(3).

<sup>318</sup> Id.

<sup>319</sup> Id. 11-232 § 10.

parents should gather as much documentation as possible. Documents reflecting communications between the child and the bully, conversations that parents have had with their child and/or the bully, relevant written communications with school staff, messages passed around the internet, witness statements, accounts of previous attempts to address the situation, and expert evaluations from social workers, physicians, or counselors would assist parents in making a strong case on behalf of their child.<sup>320</sup>

Parents should specifically cite to and make clear that they are invoking their state's anti-bullying law and the specific policy of the school district. It is important to spell out the bullying incident in as much factual detail as possible, including the names, dates, locations, witnesses, nature and the length of time of the bullying. Finally, parents should address the complaint to the school principal, with copies to teachers, the local board, social workers, and counselors.<sup>321</sup>

Once parents file the complaint, it is the obligation of the school to ensure the safety of the student who is being bullied. To ensure that the school is working towards this goal, parents should consult frequently with the relevant school staff as to what steps it is taking to address the issue and assess the success of such efforts.

Meanwhile, in New York, the NYC Department of Education has established the citywide Respect for All policy aimed at maintaining a safe and supportive learning environment that is free from harassment, intimidation and/or bullying, and from discrimination on account of actual or perceived race, color, citizen-ship/immigration status, religion, creed, national origin, disability, ethnicity, gender, gender identity,

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<sup>320</sup> CT. State Dep't of Educ., *Bullying and Harassment in Connecticut: A Guide for Parents and Guardians*, at 7-8.

<sup>321</sup> Id.

gender expression, sexual orientation, or weight. Students who believe they have been the victim of bullying, intimidation, or harassment by another student may make a report in writing or orally to school staff members listed on their school's Respect for All posters which are displayed throughout the school, or to any school staff member.<sup>322</sup>

After a report is made to the Respect for All liaison or any other school employee, New York City schools must advise the parents of the alleged victim and the parents of the accused student whether or not the allegations are substantiated. Where appropriate, the complaining student and accused student may be referred to the guidance counselor, school social worker, psychologist or other appropriate school staff for separate counseling. The principal may also use intervention methods, including sensitivity training, counseling, and/or referral to a community-based agency for counseling, support, and education.<sup>323</sup>

### **What are the school's obligations in addressing bullying in Connecticut?**

In Connecticut, each local or regional board of education must approve of a safe school climate plan and submit it to the State Department of Education.<sup>324</sup> Within 30 days after approval, the board must post the plan on its and each school's website, and publish the plan in any school district publications or school handbooks.<sup>325</sup> The plan's requirements can be broken down into three general components: (1) the investigation and resolution process for handling bullying complaints; (2) the specific bullying training school staff must undergo; and (3) steps to track and improve anti-bullying plans. We will address the three components in order below.

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<sup>322</sup> NYC Chancellor's Regulation A-832.

<sup>323</sup> Id.

<sup>324</sup> Conn. Pub. Acts. 11-232, § 1(c).

<sup>325</sup> Id.

### Investigation and Resolution Process for Bullying Complaints

The plan calls for a “safe school climate specialist” in every school, who must be the principal or the principal’s designee.<sup>326</sup> The climate specialist is responsible for supervising the investigation of all reports of bullying immediately after receiving the written report.<sup>327</sup> While the climate specialist can review anonymous reports by students, he or she cannot discipline the bullying student on the basis of such reports.<sup>328</sup> No later than 48 hours after the conclusion of the investigation, the school must notify both the bullying student and the bullied student and invite them to at least one meeting to discuss what steps the school is taking to protect the victim and prevent future incidents from taking place.<sup>329</sup>

The board must also develop a “prevention and intervention strategy” for school employees to deal with issues related to bullying.<sup>330</sup> The General Assembly does not bind the school to any specific requirements but issues some recommendations for schools to consider when formulating a strategy. For example, schools may implement behavioral support programs or other evidence-based model approaches to ensure a safe school climate or to prevent bullying. Schools should also devise clear anti-bullying rules, outline appropriate consequences for such actions, and have adults present to supervise students in specific areas where such incidents are likely to occur. Other recommendations include school-wide training, student peer training, education and support, and policies to increase

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<sup>326</sup> Id. 11-232 § 9(b).

<sup>327</sup> Id.

<sup>328</sup> Id. 11-232, § 1(b)(5).

<sup>329</sup> Id. 11-232, § 1(b)(8)(9).

<sup>330</sup> Id. 11-232, § 2.



parent involvement in bullying prevention.<sup>331</sup>

Because every bullying incident is different, the statute authorizes the board to initiate case-by-case interventions to address repeated acts of bullying committed by a student or directed against a student.<sup>332</sup> In cases where the principal believes that the bullying student is engaging in criminal conduct, he or she must report the misconduct to local law enforcement authorities.<sup>333</sup>

On a more general level, the superintendent of each local or regional board of education must appoint from existing staff a safe school climate coordinator to oversee the climate specialist in each school within the district.<sup>334</sup> The coordinator is primarily responsible for implementing the safe school climate plan. To that end, the coordinator must collaborate with climate specialists, the board, and the superintendent to identify and respond to bullying in the schools of the district. At a minimum, the coordinator must meet with climate specialists at least twice during the school year to discuss bullying issues, and any recommendations to amend the district's current plan. The coordinator also must collaborate with the superintendent to provide data and information with respect to bullying within their school district.<sup>335</sup>

### Training and Plans for School Staff

To better identify and address the problem of bullying within schools, the statute requires that all school employees complete a training program run by the State Department of Education on youth suicide prevention and bullying. All state school

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<sup>331</sup> Id.

<sup>332</sup> Id. 11-232, § 1(b)(11).

<sup>333</sup> Id. 11-232, § 1(b)(14).

<sup>334</sup> Id. 11-232, § 9(a).

<sup>335</sup> Id.

employees must go through this program annually unless they have a valid bullying certification.<sup>336</sup> The General Assembly does not outline requirements for the program, but does offer the following guidelines as to what should be included:

- Appropriate strategies to prevent bullying among students in school and outside of the school setting;
- Appropriate strategies for immediate interventions to stop bullying;
- Information concerning the interaction and relationship of students committing acts of bullying and students who are the victims of bullying;
- Findings on bullying, such as information about the types of students who are at-risk for bullying in the school setting;
- Information pertaining to cyber-bullying, including related Internet safety issues; and
- Information on youth suicide, ways to identify youth at risk of suicide and strategies for preventing it.<sup>337</sup>

As a closing note, the training may be presented in person by mentors, offered in state-wide workshops or through online courses.<sup>338</sup>

### *State Requirements to Monitor and Improve Bullying Plans*

The Connecticut General Assembly has prescribed requirements to monitor the

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<sup>336</sup> Id. 11-232 § 6.

<sup>337</sup> Id.

<sup>338</sup> Id. 11-232, § 6(7).

progress of and improve upon existing bullying plans. A school principal must establish a committee or designate an existing committee from the school to foster a safe school climate and address issues related to bullying in the school.<sup>339</sup> The committee, drawing upon investigative bullying reports from the schools, is responsible for identifying and addressing patterns of bullying among students, as well as reviewing and amending school bullying policies. The committee also must make recommendations on school climate issues and collaborate with the safe school climate coordinator to collect data on these incidents.<sup>340</sup>

To ensure a more balanced viewpoint on these issues, at least one parent or guardian of a student in the school must be on the committee.<sup>341</sup> The parent participates in all the committee activities outlined above except for receiving copies of bullying reports, identifying and addressing bullying among students in the school, or any other activities that may compromise the confidentiality of a student.<sup>342</sup>

On a broader level, the statute gives the State Department of Education oversight into tracking and evaluating each school's anti-bullying plans. The Department of Education is responsible for collecting information about school prevention efforts and intervention strategies to reduce bullying and documenting school districts' needs for training assistance to deal with the problem.<sup>343</sup> Based upon the data it collects and other information, the department must develop or recommend a model safe school climate plan applicable for grades kindergarten to twelve.<sup>344</sup>

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<sup>339</sup> Id. 11-232, § 9(c)(1).

<sup>340</sup> Id. 11-232, § 9(c)(2).

<sup>341</sup> Id. 11-232, § 9(c)(1).

<sup>342</sup> Id. 11-232, § 9(c)(3).

<sup>343</sup> Id. 11-232, § 3(a)(1)-(2).

<sup>344</sup> Id. 11-232, § 3(a)(3).

Every two (2) years the State Department of Education must submit to the General Assembly a status report that includes the number of verified acts of bullying in the state, analysis of action taken by school districts, and other recommendations for preventing bullying.<sup>345</sup>

### **What are the school's obligations in addressing bullying in New York?**

The DASA requires school districts to: (i) modify their Codes of Conduct to include prohibitions on harassment, bullying, and discrimination, and disseminate the updated code to students and their parents, (ii) train school employees on the topics of bullying, harassment, and discrimination, (iii) designate Dignity Act Coordinators for each district school, and (iv) provide students with instruction intended to discourage harassment, bullying, and discrimination.<sup>346</sup>

In accordance with the DASA, the Commissioner of the New York State Education Department provides direction to school districts related to preventing harassment, bullying, and discrimination, and to fostering an environment where all children can learn free of manifestations of bias. The Commissioner promulgates regulations to assist school districts in developing measured, balanced, and age-appropriate responses to the anti-bullying policy, with remedies and procedures following a progressive model that make appropriate use of intervention, discipline, and education, and provide guidance related to the application of the regulations. The Commissioner also provides grants to assist in implementation of the regulations, as well as guidance and educational materials. Finally, all school professionals applying for a certificate or a license must have completed training

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<sup>345</sup> Id. 11-232, § 1(a)(4).

<sup>346</sup> N.Y. Dignity for All Students Act (2012).

on social patterns of harassment, bullying and discrimination.<sup>347</sup>

The Commissioner must also create a procedure under which material incidents of discrimination and harassment on school grounds or at a school function are reported to the department at least on an annual basis. This procedure must require that reports delineate the specific nature of incidents of discrimination or harassment, and the department may also conduct research or undertake studies to determine compliance with the DASA throughout the state.<sup>348</sup> Reporters of bullying are immune from any civil liability that may arise from making a report.<sup>349</sup>

The Dignity Act does not apply to private, religious, or denominational educational institutions. Moreover, the Act does not preclude or limit any right or cause of action under local, state, or federal law, including the IDEA, Title VII of the Civil Rights Law of 1964, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990.<sup>350</sup>

### **Can parents file a federal claim against the school if their child is a bullying victim?**

Though there are no federal anti-bullying laws, the United States Department of Education sent a “Dear Colleague” letter to all boards of education throughout the country advocating for a more forceful approach to addressing bullying in schools.<sup>351</sup> In the letter, the Department of Education acknowledged that bullying “fosters a climate of fear and disrespect that can...impair the physical and psychological health of its victims” and

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<sup>347</sup> Id. §14.

<sup>348</sup> Id. §15.

<sup>349</sup> Id. §17.

<sup>350</sup> Id.

<sup>351</sup> U.S. Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter 2* (2010).

“negatively affect learning.”<sup>352</sup> More tellingly, the Department of Education noted that certain student misbehavior that violates a school’s anti-bullying policy could also trigger liability under federal antidiscrimination laws enforced by the Department’s Office for Civil Rights (OCR).<sup>353</sup>

Within the Department of Education, OCR is responsible for enforcing within a school setting, federal statutes prohibiting discrimination based on race, color, national origin, sex, and disabilities. While the OCR does not explicitly pursue discrimination claims based on religion, it noted that many religious groups face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics, thereby invoking a civil rights statute that is covered by OCR. OCR has decreed that if a school encourages, tolerates, fails to adequately address, or ignores peer harassment based on the traits mentioned above at a level sufficient to create a hostile school environment, the school staff may be liable under the statutes enforced by the OCR.<sup>354</sup>

As a general proposition, a school may be liable if it fails to address harassment incidents about which it knows or should have known. The school may be deemed to be on notice if the harassment was in plain sight, widespread, or well known to the staff, such as harassment occurring in hallways, recess, or on the school bus. The school may also be put on notice if a responsible employee knew, or in the exercise of reasonable care, should have known about the harassment. An example of this is when a student or another person informed the employee about the bullying and that employee did not inform the administration about the incident.<sup>355</sup>

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<sup>352</sup> Id.

<sup>353</sup> Id.

<sup>354</sup> Id.

<sup>355</sup> Id.

The Department of Education letter sets forth four major responsibilities that schools must undertake to address discrimination against students in the school. First, when responding to harassment, the school must take immediate and appropriate steps to investigate the situation. Though the specific steps will depend upon factors such as the nature of the allegations, the age of the student(s) involved, and the size of the school, the school's investigation must be prompt, comprehensive, and impartial.<sup>356</sup>

Second, once the school determines that harassment did occur, it must take effective steps to end the harassment. Appropriate steps include separating the bully and the target, providing counseling for one or both of the students implicated in the matter, and taking disciplinary measures against the harasser. The letter emphasizes that the school must not penalize the student who was harassed.<sup>357</sup>

Third, the school must take action to eliminate the hostile environment and its effects. To that end, schools may need to provide training or offer other intervention programs to the harassers, and on a broader level, to students, families, and school staff in the larger school community. It may also be necessary for the school to issue new policies against harassment and reporting procedures to respond to the problem. The school must provide additional services to the harassed student, especially if the school was late to respond to the incident.<sup>358</sup>

Finally, the school must take steps to prevent future harassment and retaliation against the person filing the complaint. At a minimum, the school must reach out to harassed students and their families concerning how to report future incidents, follow up

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<sup>356</sup> Id. at 1-2.

<sup>357</sup> Id. at 2.

<sup>358</sup> Id.

with them regarding any new harassment actions, and promptly respond to related problems as they arise.<sup>359</sup> A school is required to discharge these duties if the misconduct falls under the anti-bullying policy, regardless of whether the student complained, requested the school to take action, or claimed that the misconduct was anti-discriminatory.<sup>360</sup>

Although schools are responsible for preventing and addressing bullying, students who have sued school districts after being bullied in school have often been unsuccessful. In a case decided in May 2016, where a Massachusetts middle school student was repeatedly kicked and punched by students who belonged to a gang called “the Kool-Aid Club,” the student’s mother sued the school district, alleging that it “turned a blind eye” to the bullying and took affirmative steps to disregard his complaints.<sup>361</sup> The suit also alleged that school officials asked Lexington police officers to enforce the compulsory-attendance law when the student was refusing to go to school because of panic attacks due to the bullying. The student’s mother argued, among other claims, that the actions of the school system fell within the “state-created danger” theory of liability, which has been recognized by the U.S. Supreme Court and lower courts for situations in which acts of the government create or worsen danger to an individual. A Federal District Court dismissed the family’s lawsuit, and the U.S. Court of Appeals for the First Circuit upheld that decision. The First Circuit noted that the plaintiff must show that the governmental conduct caused the deprivation of a right, and that the student’s mother “has not alleged the pungent facts that would be required to show that any behavior by

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<sup>359</sup> Id. at 2-3.

<sup>360</sup> Id. at 3.

<sup>361</sup> Morgan v. Town of Lexington, No. 15-2174 (1<sup>st</sup> Cir. 2016).



school officials was so extreme as to shock the conscience.”<sup>362</sup> The court also rejected the family’s state-created danger claim, finding, “[a]n alleged failure of the school to be effective in stopping bullying by other students is not action by the state to create or increase the danger...these routine acts of school discipline, truancy enforcement, and administrator-parent conferences are not the vehicle for a substantive-due-process constitutional claim.”<sup>363</sup>

In Connecticut, in a case where parents of a student sued their school district under the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, alleging that the district failed to prevent the bullying, both a Federal District Court and the Fourth Circuit Court agreed that the Hartford County district did not respond to the bullying with “deliberate indifference,” which is the standard required under U.S. Supreme Court precedents to hold it responsible. The Fourth Circuit stated, “[w]hile we sympathize with students and parents who face bullying issues, we agree [that] S.B. has provided no evidence that the [school district] acted with the deliberate indifference necessary to hold it liable for student-on-student harassment.”<sup>364</sup>

Meanwhile, in New York, the New York City Department of Education settled a class action lawsuit that was filed in the U.S. District Court in Manhattan, alleging that the school system did not adequately respond to in-school violence, harassment, and bullying. The suit alleged a pattern of “acts and omissions” by the New York City system, which “reveal a custom and practice of deliberate indifference to in-school violence, creating a culture of indifference to continued, violent assaults against named class

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<sup>362</sup> Id.

<sup>363</sup> Id.

<sup>364</sup> S.B. v. Board of Education of Hartford County, No. 15-1474 (4<sup>th</sup> Cir. 2015).

plaintiffs and others similarly situated.”<sup>365</sup> The suit’s claims included both federal Fourteenth Amendment due process and equal protection claims, as well as New York state constitutional and statutory claims.

### **Can parents file a state claim against the school if their child is a bullying victim?**

Under Connecticut and New York law, there is no definitive answer as to when a school may be liable for an act of student bullying. We will outline the legal requirements and challenges parents may face in pursuing a negligence claim against the school. Whether a parent can prevail on such a claim is dependent on the unique facts and circumstances surrounding their child’s case. Therefore, it is best to consult with an attorney before contemplating a negligence claim.

#### **Ministerial Actions**

Municipal employees, including public school personnel, may be held liable for failing to adequately perform ministerial duties. Courts have generally characterized ministerial actions as prescribed actions that do not involve the exercise of judgment or discretion.<sup>366</sup> These types of actions are usually secondary in nature and executed according to established policy, rule, or practice.<sup>367</sup> Examples of ministerial acts include a school’s failure to inspect and keep hallways clean pursuant to a board of education bulletin or the absence of adult supervision during recess.<sup>368</sup>

The Connecticut courts are divided as to whether a school’s failure to take action against bullying when it knew or should have known about the misconduct constitutes a

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<sup>365</sup> Doe v. New York City Dep’t of Educ., 2016 U.S. Dist. LEXIS 169321 (E.D. NY 2016).

<sup>366</sup> Id. at 6.

<sup>367</sup> Id. at 5.

<sup>368</sup> Dornfried v. Berlin Bd. Of Educ., No. CV064011497S, 2008 WL 5220639 (Conn. Sup. Ct. Sept. 26, 2008).

misperformance of a ministerial function. In one case, a parent filed a lawsuit against the local board of education, the school principal, and school athletics personnel after the student claimed that he had been bullied and harassed by other teammates during an afterschool high school program.<sup>369</sup> The court held that the failure of school employees to guarantee the student would not be bullied or harassed during a voluntary after-school program was not a misperformance of a ministerial action.<sup>370</sup>

The court ruled differently in another case when a student who had been teased on a daily basis had an object thrown at her head, causing severe brain injuries.<sup>344</sup> After the incident, the parents filed a negligence claim against the town, the local board of education, and the school, alleging that they failed to follow their anti-bullying plan.<sup>345</sup> As the school had prescribed detailed procedures for teachers and administrators to handle bullying incidents, the court reasoned that their related actions could be ministerial in nature and allowed the parent to proceed to trial under that theory.<sup>371</sup>

While no two bullying incidents are alike, whether a particular action is ministerial is dependent upon the level of detail in the school's anti-bullying plan. A parent will likely have a better chance to prevail on a negligence claim under a "ministerial action" theory if the school fails to discharge a responsibility that was spelled out in the plan in such exquisite detail that it eliminated or marginalized a school employee's judgment or discretion. Since the revised state law mandates much more specific procedures for school employees to follow, some of these actions may be found to constitute ministerial functions. Given the current state of the law, it remains to be seen whether a court would

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<sup>369</sup> Id. at 5.

<sup>370</sup> Esposito v. Town of Bethany, No. CV065002923, 2010 WL 2196910 (Conn. Super. Ct. May 3, 2010).

<sup>371</sup> Id. at \*8.

adopt this view with respect to the actions outlined in the statute.

Meanwhile, the New York State Court of Appeals has found that a school was negligent when two sisters were beaten and terrorized on school property and one sister reported the incident to a teacher but no action was taken. The New York State Court of Appeals found that the school had “recognized the need for and put into effect a security plan and thus breached its duty to provide plaintiffs with adequate supervision at a time when such supervision was most critical.”<sup>372</sup>

### Governmental Actions

Municipal employees are granted qualified immunity with respect to performance of governmental acts, which are actions that benefit the public and are discretionary or supervisory in nature.<sup>373</sup> Generally, there are three exceptions to the granting of this immunity: (1) actions that involve malice or intent to injure; (2) statutory causes of action against the municipal employee; or (3) a public employee’s failure to act directed at an identifiable person subject to imminent harm.<sup>374</sup> The first two exceptions are self-explanatory, and most actions against schools for failing to prevent bullying do not involve them. Therefore, we will focus on the third exception.

To satisfy the third exception, so as to deprive a municipal employee of qualified immunity, plaintiffs have to show that there is: (1) an identifiable victim; (2) imminent harm; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to harm.<sup>375</sup> For school purposes, an identifiable person has traditionally

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<sup>372</sup> Mirand v. City of New York, 84 NY2d 44 (1194).

<sup>373</sup> Esposito v. Town of Bethany, No. CV065002923, 2010 WL 2196910, 8 (Conn. Super. Ct. May 3, 2010).

<sup>374</sup> Id. at 4.

<sup>375</sup> Id.

included schoolchildren attending school during school hours.<sup>376</sup> One Connecticut court, however, seemed to expand this definition when it noted that a person could be considered an identifiable person if he or she was exposed to imminent harm (which we will discuss in more detail below). The court also noted that Connecticut appellate courts have relaxed the definition of “identifiable person” for schoolchildren and identified them as a “foreseeable class to be protected.”<sup>377</sup>

To satisfy the “imminent harm” element, the particular misconduct must be limited in time and geographical area.<sup>378</sup> With respect to the time component, the action must be temporal or of short duration. Risks that might occur at some unspecified time in the future do not constitute imminent harm. In applying this definition, one court has held that an incident where a student tripped another student during recess did meet the requirement because recess was a defined period of time that took place after lunch every school day. Another court held differently when a male student made a series of sexual threats and advances to a female student because the actions complained of occurred during different school years.<sup>379</sup> In terms of the geographical area, the conduct has to be confined to a specific location. Therefore, if the action has the potential to occur at multiple places, then it would not constitute imminent harm.<sup>380</sup>

As indicated above, the presence or absence of qualified immunity is a highly fact-specific inquiry. Therefore, if parents want to proceed with a claim against school officials, it would be best to consult with an attorney in order to evaluate the respective strengths

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<sup>376</sup> Id. at \*8 and \*9.

<sup>377</sup> Doe v. Bristol Bd. Of Educ., No. CV065002257, 2007 WL 1053836, at \* 4 (Conn. Super. Ct. Mar. 23, 2007).

<sup>378</sup> Id. at 4.

<sup>379</sup> Negron v. Ramirez, No. CV095013686, 2011 WL 2739499, at \* 8 (Conn. Super. Ct. June 10, 2011).

<sup>380</sup> Id. at \*8.

and weaknesses of such a claim.

## X. Conclusion

For the attorneys of Maya Murphy, P.C., writing and publishing the foregoing “owner’s manual” for parents of students has been a labor of love. At each stage, we asked ourselves “what do parents and students need to know?” At the risk of demystifying to some degree the practice of law, we have shared with you our education, training, and experience as attorneys immersed in the practice of education law, and our own insights as parents of children attending Connecticut and New York public schools that along the way have also “been there, and done that.”

It is our sincere hope that this publication provides frequent comfort and valuable guidance to parents and children alike. Educational issues, particularly those involving student discipline, can be among the most stressful and potentially divisive to descend upon a family. Our goal has been to provide families with relevant and useful information to help reduce the stress and avoid altogether any familial division. If we have been the least bit successful, we will have met our personal expectations and professional responsibilities.

Please know that we at Maya Murphy stand ready to be of further service to you and your loved ones.