

GUIDE TO SUSPENSIONS AND EXPULSIONS (updated 8/1/11)

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Overview of Legal Responsibility

- US Constitution says people, including students, cannot be deprived of “property” without due process of law
- Courts have said that the right to attend school is a “property right” and students may not be suspended for more than 10 school days without being given due process

What constitutes “due process” in student discipline matters:

- Written notice to parents of specific charges
- Right to hearing by an impartial tribunal
- The right to examine exhibits offered against the student
- Right to have attorney present (not at public expense)
- Right to confront and examine adverse witnesses
- Right to present evidence on behalf of student
- Right to have a record made of the hearing
- Requirement that the decision be based on “substantial evidence”

Additional rights created by state statute:

In the summer of 2011, the North Carolina Legislature repealed the student suspension/expulsion statute, NCGS §115C-391, and replaced it with a series of statutes, NCGS 115C-390.1 to 390.12. These statutes provide additional rights to students who are recommended for suspensions in excess of 10 school days or expulsion and also provide certain rights for students who are suspended for less than 10 school days:

- Specific information must be included in the notice to the parent. See sample

letters.

- This notice must be sent by personal delivery, certified mail, facsimile, email or any other written method reasonably designed to achieve actual notice. For short term suspensions (less than 10 school days) the notice may also be given by telephone but it is better to give it in writing.
- For short term suspensions, the notice must be sent by the end of the workday on the day the suspension begins when reasonably possible, but not later than two days after the suspension begins.
- For long term or 365 day suspensions, the notice must be sent by the end of the workday in which the suspension is recommended when reasonably possible or as soon thereafter as practicable.
- If it is an ESL student the notice must be sent in English and, if foreign language resources are readily available, in the parent's first language. For long term or 365 day suspensions, an additional abbreviated translation must be included in the notice written in the dominant non-English language used by residents in the county.

Steps in assuring due process:

Conduct a proper investigation and follow the procedures in Policy 8410, section II.

Steps in Selecting Correct Conduct Rule and Suspension Level that matches the misconduct:

- Why is the discipline policy so complicated?
- The law requires students to be notified in advance of the types of conduct that may result in suspensions or expulsions.
- The law requires certain punishment for certain conduct.
- Look at headings.

Start at beginning of Section III, Policy 8410

Policy 8410 III A- 365-day suspensions. Firearms and Destructive Devices.
Look at definitions in Section I of policy. This has been
substantially revised due to the new law.

Policy 8410 III B - Ordinarily long-term suspension. Has a new definition: If
offense occurs before last quarter, suspension may be up to

end of school year. If offense occurs during last quarter, suspension may extend through first semester of next school year. Mandatory long term suspensions no longer allowed.

Policy 8410 III C - Possible long-term suspension

Policy 8410 III D - 10 days or less or other disciplinary action

Policy 8410 III E - Persistent disobedience - long-term suspension

Policy 8410 III F - Expulsion

- 14 years of age or older
- continued presence in school constitutes clear threat to safety of others at school
- clear and convincing evidence
- difference between 365 day suspension, long-term suspension, and expulsion

Long-term suspension: up to end of school year, may now carry over to first semester of next school year if offense occurs in last quarter, possible disciplinary reassignment (New Hanover County Schools Alternative Pathways Program)

Expulsion: out forever, subject to student's right to petition Board for re-admission 180 days after imposition of suspension. No alternative placement at Pathways Program.

8410 III G - Range Punishments - most severe may be used

8410 III H - Willfulness defined for contraband offenses

8410 III I - Self Defense

Steps in Preparing, Outlining and Presenting Evidence:

- need to prove who, what, when, where and how (sometimes why)
- usually chronological presentation
- be familiar with prior disciplinary record
- make list of questions to ask witnesses with essential facts
- get facts from the witnesses - See Examples of both adequate and inadequate questioning of witnesses - Attachment A

- make list of exhibits you want to emphasize to Panel or Board and refer to them during questioning or testimony
- bring copies of any exhibits not included in packet and present them to Panel or Board
- at the end of the presentation of evidence, always emphasize why you made your recommendation and why you believe you have proven the student's guilt and why you believe the recommended punishment is appropriate. If you have changed your recommendation based on the evidence at the hearing, let the Panel or Board know.

Importance of having appropriate witnesses present:

- Need to meet burden of proof (substantial evidence)
- Hearsay rule:

What is it? Complicated rule of evidence that in general says you cannot have witnesses testify to what other people told them and cannot introduce written statements without having the person who wrote the statement present to testify.

Big Exception: statements by the accused student.

Hearsay rule not strictly applicable in student discipline hearings but case law indicates there may be a problem with suspensions based only on hearsay without corroborating evidence.

See Wayne Bullard's separate Memo on hearsay (Attachment B).

What if witness won't cooperate? Board has subpoena power (even law enforcement officers).

Suggestions for Appropriate Questioning:

- not appropriate to question the student's attorney; only to question witnesses
- ask the student questions
- try to get them to admit the act or admit they confessed to the act
- if they give a different story in the hearing than they gave during the investigation, ask them why they changed their story

- student has right to take “the 5th” if there are pending criminal or juvenile charges (5th Amendment to US Constitution - privilege against self incrimination)

Steps in Responding to Students’ Attorney:

- be polite and responsive
- don’t get defensive or argumentative
- remember you have opportunity to rebut or clarify after student’s attorney asks questions

How to use SRO, or other law enforcement officer, most effectively:

- During investigation

In situations where searches are necessary, it is best to try to complete the investigation without the SRO.

Why? School officials only need “reasonable suspicion” to search a student, a locker, or a vehicle.

SRO needs “probable cause”.

If SRO conducts the search and there was reasonable suspicion but not probable cause, the criminal or juvenile charges could be compromised. It should not affect the student discipline matter, however.

Also, SRO may be required to call parents and give Miranda warnings before questioning students whereas school officials do not.

If the search or questioning involves a serious threat of harm to those present, let SRO do it (Ex: Don’t ask highly agitated student to hand you a gun you think is in his coat pocket).

Turn over to SRO all evidence you collect but keep copies.

- At Hearing

Have the arresting officer or investigating detective present.

Ask them to bring all investigative notes and reports.

If they have records of prior criminal records, ask them to bring them.

If they have lab reports of drug test, ask them to bring result.

Ask them why they arrested the student and why they think he is guilty.

Other Concerns:

Role of School Board Attorney

- neutral legal advisor to Hearing Panel or Board
- cannot act as prosecuting attorney (means cannot assist Principal or Asst. Principal in presenting evidence in hearing)
- does not vote
- can assist in answering questions prior to hearing about procedure, evidence, or other legal questions

ATTACHMENT A

Scenario: Student is charged with selling drugs on campus.

Example of adequate questioning of witnesses:

Principal calls Assistant Principal as first witness:

- Q. What did you see in the parking lot on 9/23/08?
A. I saw a student going to his car during a class break.
Q. Did you recognize the student?
A. Yes, it was Surly Malfeasance.
Q. What time of day was it?
A. Approximately 10:15 a.m.
Q. Was anyone with him?
A. No.
Q. What did he do?
A. He went to his car, opened the door, sat in the driver's seat and then got out and walked back to the building.
Q. How long was he in the car?
A. About 2 minutes.
Q. How do you know it was his car?
A. Because I checked his parking application and that is the car listed on it.
Q. What kind of car was it?
A. A two-door Jeep.
Q. Did you confront the student?
A. Yes, I walked up to him as he was entering the side door near the gym and asked him what he was doing. He said he had gone to his car to get his cell phone.
Q. Did he have a cell phone on him?
A. Yes, he showed it to me.
Q. What did you do?
A. I gave him a warning and sent him back to class.

Principal calls second witness (Teacher Johnny On-the-Spot):

- Q. Tell the panel what happened with Surly Malfeasance on 9/23/08.
A. I had lunch duty and I saw Surly hand something in a plastic bag to another student.
Q. Where were they?
A. Standing beside the big tree near the bus parking lot.
Q. Who was the other student?
A. Greg Gullible.
Q. What else did you see?

- A. Greg handed some money to Surly.
Q. Was it bills or coins?
A. Bills.
Q. What did you do?
A. I walked up to them and asked what they were doing. Surly said he had loaned Greg some money and Greg had just paid him back.
Q. What did Greg say?
A. Nothing.
Q. What did you do then?
A. I asked them what was in the plastic bag Surly had given Greg. Surly said he had not given Greg a plastic bag. Greg did not say anything. I then asked Greg to show me the plastic bag and he said he did not have one. I then took them to the Principal's office.

Principal calls herself as next witness:

I was in my office at approximately 12:30 p.m. on 9/23/10 when one of our teachers, Johnny On-the-Spot knocked on my door and told me he had seen what he thought might be a drug deal. I asked him what happened and he told me (repeat details relayed by teacher).

I checked Surly's discipline file and saw that he had been suspended the year before for possession of a small amount of marijuana on campus.

I first brought Surly in and questioned him. He denied he had sold any drugs to Greg and told me that Greg has repaid him some money he had loaned.

[Note: it is not necessary to call his parents first or to have his parents present for questioning.]

I asked him why he had gone to his car and he said to get his homework assignment.

[Note: discrepancy - told AP he went to get cell phone]

I asked him if he thought we needed to talk to any other witnesses and he said "No".

I asked him if we could search his car and he said "No".

At that point I sent Surly to wait in the AP's office and I questioned Greg. Greg was very nervous and admitted that he bought a marijuana joint from Surly for \$10.00. I asked him to give it to me and he took it out of his pocket and put it on my desk. I then asked him to empty his pockets and there was nothing else in them. At that point I called the SRO.

Principal calls SRO as next witness:

Q. What happened on 9/23/10 with respect to students Surly Malfeasance and Greg Gullible?

A. I was called to your office around 12:45 p.m. on 9/23/08. When I got there Greg was in your office and there was what appeared to be a marijuana joint on your desk. I asked you what you had discovered and you told me what each student said (get him to described what you told him).

You also told me that Greg had removed the marijuana joint from his pocket and put it on your desk. I collected the marijuana joint as evidence and called the parents of Surly and Greg. When their parents got there I read Surly and Greg their Miranda rights. Surly refused to answer my questions. Greg admitted he had purchased the marijuana joint from Surly during lunch that day. I placed Greg under arrest for possession of marijuana. I then asked Surly and his parents if I could search Surly's car. They said "No". I then called the drug dog and the dog gave a positive hit on both Surly and his car. I found a plastic ziplock bag in Surly's pants pocket with what appeared to be 4 marijuana joints in it. I then searched Surly's car and found 10 ziplock bags with what appeared to be 5 marijuana joints in each one under the driver's seat and \$210.00 in cash. I then placed Surly under arrest and collected the marijuana bags and cash as evidence. I charged Surly with selling and delivering a controlled substance.

I then sent the marijuana to our crime lab and the chemical tests showed that it was marijuana.

Q. What about the joint Greg bought from Surly?

A. It was confirmed as marijuana too.

Q. How much marijuana was found on Surly that day?

A. The 4 joints we found in his pocket were less than one-half an ounce.

Q. How much marijuana was found in Surly's car that day?

A. 4 ounces.

Q. Do you have a copy of the lab report?

A. Yes, here it is (mark as Exhibit and make part of record).

Principal calls Greg Gullible as witness:

Q. What happened on 9/23/10?

A. I was at lunch and Surly asked me if I wanted to buy a joint for \$10.00. I did not really want to but he said I would be cool and would like it. I bought it so he would think I was cool. I was going to throw it away but Mr. Johnny On-the-Spot caught us.

- Q. Did you admit to me what you did in the office that day?
A. Yes.
Q. Did you take the joint you bought from Surly out of your pocket and put it on my desk when I asked?
A. Yes.
Q. Did the SRO come and take the joint and put it in his evidence bag?
A. Yes.

Example of inadequate questioning of witnesses:

Assistant Principal testifies:

I saw Surly Malfeasance go to his car. When he came back I asked him where he had gone and he said to get his cell phone. Since he had his phone I gave him a warning and told him to go to class.

The Principal later told me that Surly had sold drugs to another student and had gotten them from his car. Surly was arrested by the SRO and charged with dealing drugs. That's why the Principal long-term suspended him.

Assistant Principal calls Deputy Rookie as witness:

- Q. What do you know about the case?
A. I was not the arresting officer. The SRO is on vacation. I have an arrest report in the file that says Surly Malfeasance was arrested and charged with possession of marijuana with intent to sell and deliver.
Q. Do you know anything else about the case?
A. Yes, the SRO told me that the boy who bought the drugs from Surly had given a statement as to what happened.
Q. Do you have any other information?
A. No.

NOTE: Proof that a student has been arrested is not sufficient by itself to prove he/she is guilty of a disciplinary infraction.

If the student has been found guilty in criminal court or found "delinquent" in juvenile court, that can be used to prove guilt in a student hearing.

If a student is found not guilty in criminal court or not delinquent in juvenile court, that does not mean that the student is innocent of a student discipline offense and may still be suspended if sufficient proof is available.

Why? Because in criminal or juvenile court, there is a higher burden of proof (beyond reasonable doubt), whereas in student hearings only substantial evidence is required. Usually, the student hearing will occur before the criminal or juvenile case is concluded, however.