I. STUDENT DISCIPLINARY HEARINGS

Since long-term suspensions are considered a deprivation of a student's property and/or liberty interests protected under the Fourteenth Amendment of the U.S. Constitution, the student is entitled to "due process of law." In other words, students placed on long-term suspensions must be given a hearing, notice of the charges against them, an opportunity to hear the evidence (e.g., witness testimony, documentary evidence, etc.) against them and an opportunity to present contradicting evidence. With these constitutional requirements in mind, the New York State Legislature enacted Education Law §3214. Not only does this law meet the minimal requirements of "due process" under the U.S. Constitution, it adds a number of its own procedural safeguards to protect the rights of students.

A. Student Disciplinary Proceedings – Pre-Hearing Considerations

Education Law §3214 dictates the procedures that a school district must follow in order to suspend a pupil.

Section 3214 requires a school district to offer a trial-type hearing to the student, of which fair notice (i.e., a statement of charges) is given, witness may be called and cross-examined, evidence introduced, and a tape or transcript is kept. The student has a right to representation by counsel at the student's expense. (§3214[3][c]).

B. Short-Term Suspension and Suspension Pending the Superintendent's Hearing

A student may be suspended by the Superintendent for up to 5 days pending the hearing. Principals may also suspend students for up to 5 days (§3214[3][b]), but have no authority to suspend for a longer period of time (Matter of House, 11 Ed. Dept. Rep. 215). An assistant principal has no authority to suspend (Matter of Henderson, 11 Ed. Dept. Rep. 3). An acting principal, however, may suspend (Matter of Wright, 18 Ed. Dept. Rep. 432).

No full-blown hearing is required if a pupil's suspension does not exceed 5 days. (Matter of Simmons, 11 Ed. Dept. Rep. 130). However, an opportunity for an informal conference must be offered to the student/parent, at which the complaining witness may be questioned. (§3214[3][b]). Where the pupil does not pose a "continuing danger to persons or property" or an "ongoing threat of disruption to the academic process", the pupil or pupil's parent(s) must be given an informal conference **prior** to the suspension to explain the pupil's version of the events leading to the removal. The pupil/parent(s) must also be given the opportunity to question the complaining witness(es) at that time. Where the pupil is dangerous or disruptive of the academic process, the informal conference can take place after the suspension begins, but should be held as soon as is "reasonably practicable."

If the student has been offered a hearing within the 5 days, the fact that a hearing is held more than five days after the last date of suspension does not, in and of itself, render the hearing or the resulting determination a nullity (Matter of Cousins, 10 E. Dept. Rep. 245; Matter of Kulik, 21 Ed. Dept. Rep. 567).

If the parent requests an adjournment of the hearing date it may be adjourned beyond the 5 days, and the student may continue to be suspended in the interim.

C. Written Charges

The Commissioner of Education has stated a general standard that charges must meet. Basically, the charge must be in writing and it must be sufficiently specific to inform the student and his parents or attorney of the activities or incidents which will be the basis of the hearing. (Matter of Spink, 25 Ed. Dept. rep. 129 [1985]).

The basic purpose of the statement of charges is to give the student and parent/attorney an opportunity to know what will be alleged so they can prepare a defense. (Matter of Rose, 10 Ed. Dept. Rep. 4 [1970]; Matter of Schmarge, 23 Ed. Dept. Rep. 359 [1984].

There should be a statement that the conduct was insubordinate, or was in violation of school conduct rules, or the student handbook, or show that the student is disorderly, or that conduct endangered the safety (or the morals or the health or the welfare) of the student or of others. However, it is not adequate to only repeat the language of the Education Law (such as "insubordinate"). It is also not enough to give a simple conclusion or conclusory statement such as "John Doe is guilty of serious violations of school rules". Equally inadequate would be "John Doe is guilty of disruption of school activities".

The charge should include at least the following information:

- The date(s) on which the event(s) occurred.
- The place in general where it took place (at the High School; in Barbados; etc.).
- The approximate time the incident occurred (during ninth period; at about 11:00 a.m.).
- A general description of the action or conduct ("cut fourth period class", "was involved in a fight with other students"; "was insubordinate to the Vice Principal when he refused to take off his hat".)

Notice of charges and hearing must be received by parents within a "reasonable" time prior to the hearing. While the law does not define "reasonable" the Commissioner has held that one day's notice was unreasonable (Appeal of Eisenhauer, 33 Ed. Dept. Rep. 604 [1994] and three days' notice was sufficient (Appeal of DeRosa, 36 Ed. Dept. Rep. 336 [1997]). **(See a sample Notice of Charges and Hearing in Appendix A.)**

D. Public Hearing

A former disciplinary hearing is not required to be open to the public. In fact, given the confidential nature of the proceeding, the hearing should be closed to all except those who have a need to be present. Although a board may provide for a public hearing if the student requests it,

its failure to do so upon the request of the petitioner does not constitute improper conduct (Matter of Edwards, 19 Ed. Dept. Rep. 347).

E. Transcript

A record of the hearing must be kept, but a stenographic transcript is not required. An audiotape recording is sufficient. (§3214[3][c]).

A district is not required to furnish a typewritten transcript of the hearing. A tape recording is deemed a satisfactory record (Matter of Vassar, 22 Ed. Dept. Rep. 284).

Any transcript which is kept must be intelligible enough so as to permit meaningful review of the hearing (Matter of Rose, 10 Ed. Dept. Rep. 4; Matter of Labriola, 20 Ed. Dept. Rep. 74, 77).

If a tape recorder is used, care should be taken to ensure that it clearly records all voices.

F. Designation of a Hearing Officer by the Superintendent of Schools

The Superintendent of Schools may designate, in writing, a hearing officer to conduct the hearing in his or her stead. (§3214[3][c]). The hearing officer's findings are advisory to the Superintendent, who may modify, accept or reject them.

G. Impartiality of Hearing Officer

There is a presumption of honesty and integrity of those serving as adjudicators. Mere familiarity with the facts of a case gained in the performance of duties does not disqualify a hearing officer from serving. (Matter of Dwaileebe, 17 Ed. Dept. Rep. 304).

The person judging the student disciplinary hearing should be fair and impartial and should not prejudge the case. Where a Superintendent participated as a hearing officer after he had already announced that a student would be expelled, the Commissioner held that he had prejudged the case. (Matter of Dishaw, 10 Ed. Dept. Rep. 34).

The mere fact that a hearing officer has participated in earlier hearings concerning other pupils involved in the same incident does not, without more, constitute a violation of a student's due process rights (Matter of Bullock, 13 Ed. Dept. Rep. 340).

Discipline under Education Law section 3214 must be based on the record made at the hearing and must be imposed by the superintendent or the board of education. The authority to revise the determination or to extend a suspension based on future events which are outside the record cannot be delegated to any other official. (Matter of Richards, 19 Ed. Dept. Rep. 43).

It is also improper for the superintendent to submit a memorandum to the board summarizing his reasons for rejecting a student's defense. These findings should be incorporated in the superintendent's decision so as to provide the student with notice of the basis of that decision (Matter of Snowberger, 24 Ed. Dept. Rep. 256).

H. Subpoenas

Education Law §3214 (C)(3) specifically grants the hearing officer the authority to issue subpoenas both for testimonial purposes and for the production of records and other written information. There are circumstances where the failure to issue a subpoena upon request is an abuse of discretion, e.g., a failure to subpoena the victim of assault where the assault was the basis of the charges. (Matter of Snowberger, 24 Ed. Dept. Rep. 256). A school district is not required to supply in advance a list of witnesses to be called (Matter of Seward, 12 Ed. Dept. Rep. 100).

I. Conducting the Student Disciplinary Proceeding

The hearing can be conducted by the superintendent or a hearing officer designated by the superintendent. Student disciplinary hearings are a two-part process. The first part determines whether the student is guilty of the misconduct charged. The second part determines the appropriate discipline for the student.

Testimony at the Hearing

The hearing officer should first require the District to present its evidence supporting the charges. Any witnesses should be sworn in before beginning direct examination. Witnesses should be required to stick to the facts (e.g., what they saw, heard, smelled, touched, etc.) and not allowed to give opinions (e.g., "Johnny was drunk") without first establishing the facts upon which the opinion of witness is based.

Upon completion of direct examination, the other party must be given the right to cross-examine the witness. Generally, cross-examination should be limited to questions which explore the witness's capacity to tell the story accurately (e.g., distance from the incident, accurate line of sight, etc.) or determine whether the witness has an improper bias or whether the witness is credible (i.e., believable or untruthful).

After the District has completed its case by calling its witnesses and introducing its other documentary evidence, the student's representative is allowed to present its witnesses and other evidence in opposition to the charges. The same direct and cross-examination process occurs throughout this phase.

When all testimony has been completed, the hearing officer should declare the evidentiary portion of the proceedings closed and moved onto the determination phases.

Once all of the factual evidence has been presented at the hearing, the hearing officer should make a point on the record that he/she is finding the student innocent or guilty of the charges. Only after the student has been found guilty should the hearing officer proceed to the penalty phase. After that evidence (usually the student's past records, etc.) has been presented, the hearing officer may then recommend appropriate discipline.

The superintendent may then make a decision based on the evidence and the exercise of judgment. If the hearing officer or the superintendent reserves judgment as to guilt or innocence, the anecdotal record material may not be introduced into the record until this decision is made.

A student's anecdotal record may be received into evidence at a disciplinary hearing only after a finding of guilt as to specific charges, and only if notice of its contents has been given in advance to the student or his counsel (Matter of Heredia, 19 Ed. Dept. Rep. 343; Matter of Saggae, 19 Ed. Dept. Rep. 133; Matter of Labriola, 20 Ed. Dept. Rep. 74; Matter of Kulik, 21 Ed. Dept.567).

While it is proper to consider the student's prior record in determining the penalty to be recommended, the hearing officer should afford the student the opportunity to rebut the content and effect of the prior record (Matter of Kulik, 21 Ed. Dept. Rep. 567; Matter of Saggese, 19 Ed. Dept. Rep. 133; Matter of Heredia, 19 Ed. Dept. Rep. 343; Matter of Cousins, 10 Ed. Dept. Rep. 245).

J. Determination of Guilt and Burden of Proof

A pupil must be afforded the presumption of innocence until his guilt has been established by direct evidence (Matter of Cuffee, 7 Ed. Dept. Rep. 60; Matter of DeVore, 11 Ed. Dept. Rep. 296.

Before discipline may be imposed upon a student, there must be competent and substantial evidence that the student participated in the objectionable conduct (Matter of Chitty, 12 Ed. Dept. Rep. 282; Matter of Bullock, 13 Ed. Dept. Rep. 240; Matter of Jackson, 20 Ed. Dept. Rep. 21; Matter of Durkee, 20 Ed. Dept. Rep 94). However, determination of guilt may be based upon hearsay evidence alone. In other words, even if there is no testimony by someone who had firsthand knowledge of the incident or admission of guilt by the student, the student may still be found guilty. (Gray v. Adduci, 73 N.Y.2d 741; Matter of Hamet, 36 Ed. Dept. Rep. 174). The responsibility for establishing that a student has been guilty of misconduct rests with school officials (Matter of Chitty, 12 Ed. Dept. Rep. 282; Matter of Devore, 11 Ed. Dept. Rep. 296; Matter of Rodreguez, 8 Ed. Dept. Rep. 214, 217).

A written decision is required to be issued by the superintendent stating the findings of fact and imposition of a penalty. **(See a sample Decision Letter in Appendix B.)**

K. Assessment of Penalty

The penalty imposed in a student discipline case should be proportionate to the offense established (Matter of Durkee, 20 Ed. Dept. Rep. 94; Matter of Funk and Messina, 18 Ed. Dept. Rep. 619). The student may be suspended from school, or may have privileges revoked, but cannot be required to undergo counseling, to perform community service, or transferred to another school or program as a penalty. See, e.g., Appeal of Alexander (West Irondiquoit), 36 Ed. Dept. Rep. 160 (1996). In an appropriate case, the penalty may be permanent suspension. Appeal of McNamara, 37 Ed. Dept. Rep. 326 (17 year old Senior broke into school on New Year's Eve carrying propane torches, a hammer and a hacksaw, with intent to shut off the boilers and "do something" to the electrical system).

While a penalty imposed may include readmission to school on a probationary basis, a district may not impose further suspensions for new acts of misconduct without following the procedures set forth in section 3214 (Matter of Labriola, 20 Ed. Dept. Rep. 74).

The fact that a school district has received reimbursement for damages to school property in an action brought does not preclude the district from imposing a disciplinary penalty on a student (Matter of Labriola, 20 Ed. Dept. Rep. 74).

Under New York law, as applied by the Commissioner of Education, the District is prohibited from requiring counseling as a part of a disciplinary action, and it cannot condition a student's return to school from suspension on completions of counseling. See, e.g., Appeal of Alexander (West Irondequoit), 36 Ed. Dept. Rep. 160 (1996). (The Commissioner also ruled that community service is not an authorized form of discipline.)

L. Appeal to the Board of Education

A board of education may not properly decide an appeal from a decision suspending a student unless it reviews the entire record of the hearing, including the tape recording or transcript. A review of the hearing officer's findings and recommendations is insufficient (Matter of Berkman, 21 Ed. Dept. Rep. 590; Matter of Luppino, et al., 19 Ed. Dept. Rep. 12).

M. Role of School Attorneys

School attorneys from the same law firm may represent the district during the superintendent's hearing and the appeal to the Board Education. (Appeal of Payne, 18 Ed. Dept. Rep. 280 [1978]).

N. Dealing with Attorneys Representing Student/Parents

A hearing officer who is not a lawyer should not feel intimidated when a student/parent(s) are represented by lawyers in a superintendent's hearing. Remember that the right of a party to be represented by counsel is a fundamental constitutional right. Although the emphasis of a Superintendent's Hearing in on informality, the representation of parties by attorneys should be welcomed and encouraged. Attorneys can provide valuable assistance to the hearing officer through a well-thought-out direct and cross-examination. It may also be helpful for an attorney to state the position of his/her client thereby simplifying and/or reducing the number if issues to be decided by the hearing officer.

Because of their training and experience, some lawyers appearing in Superintendent's Hearings may insist on following court room practice. Before the hearing begins, lawyers should be advised that hearing officers are not bound by formal rules of evidence or procedure but this informality will apply equally to both parties. Also explain that the hearing officer's ultimate decision will have to be based on substantial evidence. Such an explanation can save time and frustration by eliminating unnecessary objections and exceptions by the attorney.

[NOTICE OF SUPERINTENDENT'S HEARING FORM]

[insert date]

**[insert name and address
of parent/guardian]**

Re: **[insert student's name]**, Superintendent's Hearing Pursuant to Education Law § 3214, Regarding Incident on **[insert date]**.

Dear **[insert name of parent/guardian]**:

Please take notice that, in accordance with Section 3214 (3) of the New York State Education Law, a Superintendent's Hearing will be held concerning your child, **[Insert Student's Name]**. The hearing will take place on **[insert date]** at **[insert place]**. I have designated **[insert designee's name]** to serve as the Hearing Officer.

Following the hearing, and after receiving the Hearing Officer's recommendations, I will decide whether **[insert student's name]** will be suspended out-of-school beyond the five (5) day s/he has already been suspended.

[insert student's name] has been charged with **[insert type of charge(s) (*e.g.: insubordination; endangering the health, morals, safety and welfare of himself/herself and others, etc.*)]**. More specifically, s/he is charged with **[insert specifics facts on which charges are base (*e.g.: punching another student by the name of _____, on May 1, 2001; threatening a staff member by the name of _____, on May 1, 2001*]**.

You and **[insert student's name]** have the following rights during the hearing: (1) To be represented by counsel; (2) To receive prior notice of your child's anecdotal record (which may include his/her attendance, disciplinary and performance history) and the opportunity to rebut its effect; (3) To question witnesses against your child; (4) To present witnesses or other evidence; (5) To have the Superintendent of Schools, or his designee, issue subpoenas for witnesses; (6) To testify, or refrain from testifying, at the hearing; (7) To have a record of the hearing maintained; (8) To receive a decision from the Superintendent; (9) To appeal the Superintendent's decision to the Board of Education; and (10) To appeal the Board's decision to the Commissioner of Education.

Sincerely,

Superintendent

Cc: **[insert hearing officer's name]**, Hearing Officer

[add anyone else who should be cc'd, e.g., Principal(s), Guidance Counselor, etc.]

[DISCIPLINARY DECISION FORM]

[DATE]

[PARENT NAME AND ADDRESS]

Re: (Name of Student), Disciplinary Decision

Dear _____:

This is to inform you of my decision regarding the discipline of your child, (name), who is a student at (name of school). The disciplinary hearing was conducted by Hearing Officer (name) on (date of hearing).

Based upon the record presented at the hearing, and the Hearing Officer's findings of fact, I find (student name) [not] guilty of [*her insert the specific charges found guilty or not guilty, taking them from the notice of hearing sent to the parents earlier*].

Based upon the record presented at the hearing, and the Hearing Officer's recommendations, I have decided to impose the following discipline:

[*Here insert the measure of discipline, including any period of suspension, return to school, provision for home tutoring, any other matters*].

[*To use for gun violations.*] I am also referring this matter to the (name of County) County District Attorney in accordance with law.

[*To use if there is a continued suspension of the student from school.*] Suspension from school includes suspension from all school activities and events. (Student Name) is not to come on to school property at any time without the consent of (Superintendent? Building Principal?), nor may (she)(he) attend any school activities or functions without such permission. A violation of this provision may subject your child to further discipline, and may also result in a referral to the police for trespass.

You have the right to appeal this decision to the Board of Education, which you may do by submitting your notice of appeal in writing to the Clerk of the Board within fifteen days of the date of this decision.

[*You may insert any personal comments or observations if you wish also. In addition, any instructions regarding counseling, tutoring, person to contact, re-entry procedures or whatever is appropriate.*]

Very truly yours,

(Superintendent's name)

APPENDIX B