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LEGAL ADVISORY:

STUDENT DISCIPLINE AND CHAPTER 222

A. INTRODUCTION

In 2012 the Massachusetts legislature adopted Chapter 222, which substantially revised the process school districts must apply in many, but not all, student discipline cases. The law is effective July 1, 2014.

The due process procedures of the law, codified at M.G.L. c. 71, §37H³/₄, do not apply to cases involving possession of weapons or drugs in school, instances of student assaults on staff members, or cases in which a student has been indicted for a felony or felony delinquency. The process for imposing discipline in those matters remains the process set forth in M.G.L. c. 71, §§37H and 37H¹/₂. The new law limits the duration of suspensions to not more than 90 school days; this limitation does not apply to suspensions or exclusions under §§37H or 37H¹/₂.

Even in the cases subject to Sections 37H and 37H¹/₂, however, the legislature determined that school districts now must continue to provide educational services to students if they are suspended or excluded for more than 10 days. These provisions are codified at M.G.L. c. 76, §21.

The law and the regulations are a substantial departure from decades of jurisprudence concerning student discipline. Historically, “notice and an opportunity to be heard” were the “essential prerequisites” of a student’s due process rights. Goldberg v. Kelly, 397 U.S. 254, 258-68 (1970). A few years later, the United States Supreme Court determined in the famous case of Goss v. Lopez that a short term suspension for no more than 10 days must be accompanied by “oral or written notice of the charges against [the student] and if he/she denies them, an explanation of the evidence authorities have and an opportunity to present his side, of the story.” Goss v. Lopez, 419 U.S. 565, 581

(1975). Under Supreme Court precedent a student was not entitled to retain counsel, confront and cross-examine witnesses or call his own witnesses. Id. at 583.

As recently as May 14, 2014, the Federal District Court in Massachusetts summarized student due process rights, noting that federal courts have “warned against the undue judicialization of an administrative hearing, particularly in an academic environment” and explained that a court reviewing an administrative hearing in a public school setting should not “extoll form over substance.” McGrath v. Town of Sandwich, United States District Court of Massachusetts, Civil Action 13-12381-NMG, decided May 16, 2014. Despite 45 years of federal precedent emphasizing substance over form, the Massachusetts legislature adopted Chapter 222, which reverses the equation and sets form over substance.

The statute also required DESE to adopt regulations to implement the law. Given the statutory mandate, DESE has had little choice but to promulgate extensive regulations, the complexity of which would make proud the pettifoggers in Bleakhouse. The regulations are set out at 603 CMR 53.00.

B. SUMMARY OF STATUTORY AMENDMENTS

Changes to existing statutes, as well as enactment of entirely new provisions (Section 37H $\frac{3}{4}$ and Section 21) may be summarized as follows:

A. New MGL Chapter 71, Section 37H $\frac{3}{4}$

1. Applies to all exclusions except those based on Section 37H or 37H $\frac{1}{2}$.
2. All decision-makers (Principal, Headmaster, Superintendent “or other person acting as decision-maker”) “shall exercise discretion” in deciding consequences and considering ways to re-engage student. NO MORE “ZERO TOLERANCE.”
3. Prior written notice of charges in English and home language.
4. Student and parents have opportunity to meet to “discuss charges and reasons” prior to exclusion taking effect.
5. Administrator ensures parent/guardian included, but can meet without parent if document reasonable efforts to include parent/guardian.
6. DESE to promulgate rules and regulations that address administration duties. See 603 CMR 53.00.
7. Written update on final decision after meeting.
8. If student has received 10 or more cumulative suspension days or more than 10 for one event, student, parent/guardian receive written notification of request to appeal to Superintendent in English and home language.
9. Suspension or expulsion remains in effect pending appeal.
10. Administration notifies Superintendent in writing (email OK) of all out of school suspensions (more than 1 day) of students K-3, prior to suspension taking effect. Administration describes misconduct, reason for suspension.

11. If student has more than 10 cumulative suspension days or more than 10 for one event and wishes to appeal to Superintendent, must do so in writing no later than 5 calendar days after effective date of suspension or expulsion; may be extended to 7 days.
12. Superintendent or designee shall hold hearing with student, parent/guardian within 3 days of request, may extend for 7 days on parent/guardian request.
13. Superintendent or designee may proceed without parent/guardian if good faith effort was made to include parent/guardian.
14. Student may present oral/written testimony, cross-examine witnesses and shall have right to counsel.
15. Superintendent or designee renders decision in 5 calendar days.
16. Superintendent's decision is the final decision of the district.
17. NO SUSPENSION OR EXPULSION SHALL EXCEED 90 SCHOOL DAYS.

B. New Chapter 76, Section 21 (Education Service Plans)

1. Applies to all disciplinary removals.
2. Pupils suspended 10 or fewer days provided opportunity to continue academic progress by make-up assignments, earn credits, etc., by completing homework, quizzes, exams, papers, projects, etc.
3. Principals to determine school-wide Education Service Plan for those suspended/expelled for more than 10 consecutive days by creating opportunities for make-up assignments, etc.
4. ESPs may include but are not limited to tutoring, alternative placement, Saturday schools, on-line or distance learning, consider relevant HHS, housing and not for profits, ed. collaborative.
5. If student is suspended for 10 more days provide student/parent/guardian with list of alternative educational services: school follow up to verify enrollment, etc. if student selects AES. Students on work permits (age 14-16) exempt.
6. Instructional costs of ESP/AES eligible for reimbursement under c. 71B, sec. 5A, subject to appropriation by state.

C. Amendments to Chapter 71, Section 37H (Drugs, weapons, assault on staff)

1. Rewrites subsection (e): provide expelled or suspended student continued educational services during period of exclusion, per c. 76, s. 21 (summarized above).
2. If student moves, receiving district admits student or provides services per c. 76, s. 21.
3. Add new subsection (f): report to DESE specific reasons for exclusions; DESE to make information available on-line with personally identifiable information removed.
4. Add new subsection (g): for schools that exclude "significant" number of students for more than 10 cumulative days in a school year, shall

investigate/recommend modes; results of investigation reported publically at school district level.

D. Amendments to Chapter 71, Section 37H ½ (issuance of felony complaint/conviction of felony)

1. Last paragraph stricken and replaced with new paragraph: provide expelled or suspended student continued educational services during period of exclusion, per c. 76, s. 21 (summarized above).
2. If student moves, receiving district to admit student or provide services per c. 76, s. 21.

E. Other amendments to Chapter 76

1. Section 1: language clarified re: students subject to compulsory attendance requirement.
2. New Section 1B:
 - a. Student absence notification plan for all absences within 3 days of absence.
 - b. School Committee to adopt policy on home notification for all cases in which student has five or more days with two or more unexcused missed periods.
 - c. In such cases, policy shall require administration to make reasonable efforts to meet parent/guardian to develop plan to urge attendance. Action plan to be jointly agreed upon with student, parent/guardian, and other relevant school personnel.
3. Section 18:
 - a. Notice to home within 5 days of student's tenth consecutive absence.
 - b. Notice in English and home language.
 - c. Notice offers at least 2 dates for exit interview with Superintendent or designee to meet prior to student permanently leaving school.
 - d. Applies to student "who has not graduated" as opposed to "sixteen years of age or older."
 - e. May proceed without parent/guardian if good faith effort made to include.
 - f. Superintendent convenes team of school personnel including parent/guardian, guidance counselor, teachers, attendance officer and others to participate in exit interview, provide information to student, parent/guardian about detrimental impact of no high school diploma, the benefits of earning a diploma, and alternative educational programs and services available.
 - g. DESE to publish model protocol on exit interviews, consequences of drop-out, etc.

C. DESE REGULATIONS

The regulations implementing Chapter 222, specifically 603 DMR 53.03, require that school committees ensure that policies and procedures are in place that meet, at a minimum, the requirements of Chapter 71, Section 37H ¾, Chapter 76, Section 21 and the regulations themselves.

DESE regulations also contain the following notable provisions:

1. Purpose of the regulations are to:
 - a. Limit the use of long-term suspensions;
 - b. Promote involvement of parents in discipline;
 - c. Assure students who are expelled or excluded have access to education and opportunities to make academic progress during exclusion; and
 - d. Keep schools safe while ensuring fair disciplinary process.
2. Principals to avoid suspensions unless alternatives have been tried. DESE-suggested alternatives include evidence-based strategies, mediation, conflict resolution, restorative justice, positive behavioral interventions and supports.
3. Define “expulsion” as removal from school premises, regular classroom activities, and school activities for more than 90 days, indefinitely, or permanently.
4. Expulsions not permitted under G.L. c. 71, § 37H ¾. Expulsions allowed only under §§ 37H and 37H½.
5. Long-term suspensions may not extend beyond the end of the school year during which suspension imposed.
6. Removing students from privileges, such as extracurricular activities and school-sponsored events does not count as a suspension under § 37H¾.
7. Nothing in regs shall prevent an administrator from conducting an investigation of school-related disciplinary incident, including student interviews.
8. Oral and written notice prior to suspension, except in-school and emergency suspensions. Notice must be in English and home language, in plain language and set forth:
 - a. disciplinary offense;
 - b. basis for charge;
 - c. potential consequences, including potential length of suspension;
 - d. opportunity for hearing with principal, including opportunity to dispute charges, present evidence, and have parents attend;
 - e. date, time, and place of hearing;
 - f. right to interpreter services.
9. For students potentially facing long-term suspensions (more than 10 days cumulatively or more than 10 days for one incident), notice must include all of the information above, plus the following:

- a. Opportunity to review the student's record and documents upon which the principal may rely in making a determination prior to the hearing;
 - b. Right to be represented by counsel or lay person of student's choice at the student's/parent's expense;
 - c. Right to produce witnesses;
 - d. Right to cross-examine District's witnesses;
 - e. Right to request that the hearing be recorded and right to receive a copy of the audio recording; and
 - f. Right to appeal to the Superintendent.
10. Principal must make reasonable efforts to notify the parents orally of the opportunity to attend the hearing. Principal may hold hearing without the parents if he/she sent written notice to parents and tried to contact them twice in the manner specified by the parent for emergency contact.
11. Principal hearing before suspension. Principal to hear and consider information, discuss the offense, basis for charge, and other pertinent information. Parents and student permitted to respond and provide information, which principal should consider.
12. For long-term suspension, student permitted to bring lawyer or lay-person representative, present witnesses, and cross-examine District witnesses.
13. For short-term suspension (fewer than 10 days), principal to determine discipline and provide written notice of the determination, reasons for it, and opportunity to make up assignments during time of removal. May update notice sent prior to hearing.
14. For suspension over 10 days cumulative or for one offense, notice of decision must set forth in English and home language, in plain language:
- a. Identify disciplinary offense, date on which hearing took place, and participants at hearing;
 - b. Key facts and conclusions reached by principal;
 - c. Length and effective date of the suspension and date of expected return to school;
 - d. Notice of opportunity to make academic progress and information on ESP;
 - e. Information on right to appeal to superintendent:
 - i. Written notice of appeal within calendar days of effective date of suspension;
 - ii. May request extension up to 7 days;
 - iii. Suspension remains in effect pending appeal.
15. Superintendent hearing on appeal must occur within 3 school days of request (may extend up to 7 days by agreement), must make good faith effort to include parents, must arrange for audio recording, same rights as at principal's hearing for long-term suspension, and written decision within 5 calendar days. Final decision of District.
16. Regs create emergency removal when "continued presence of the student poses a danger to persons or property, or materially and substantially disrupts

the order of the school, and, in the principal's judgment, there is no alternative available to alleviate the danger or disruption."

17. Emergency removal not to exceed 2 days.
18. Principal must notify the Superintendent of emergency removal in writing, reason for it, and danger posed by student.
19. During the emergency removal, the principal must notify parents in writing and orally of the removal, provide student an opportunity for a hearing, with parents present if possible before the expiration of the 2 days (unless extension agreed to), and render a decision orally on the same day as hearing and in writing the following day.
20. Must make adequate provisions for student's safety and transportation before emergency removal.
21. In-school suspension may be used as alternative for short-term suspension.
22. For in-school suspension, principal to inform student of offense charged, basis, and give student opportunity to dispute or explain. Principal to inform student of in-school suspension, which shall not exceed 10 days consecutively or cumulatively in a school year.
23. On same day principal decides on in-school suspension, principal to notify parents orally of the offense, reasons, and length of in-school suspension. Invite parents to meeting regarding student's academic performance and behavior, strategies for student engagement, and possible responses to behavior. Scheduled for day of suspension, if possible.
24. Provide written notice to student and parent about the in-school suspension, including the reason and length and inviting them to the meeting if it did not already occur.
25. Regs make clear that expulsions still permissible under §§ 37H and 37H½.
26. ESPs shall include process for notifying students expelled or suspended for more than 10 days and their parents of the services and how to arrange the services. Services to be based on and provided in a manner consistent with the academic standards and curriculum frameworks established for all students.
27. District to record student's enrollment in education services, and track and report attendance, academic progress, and other data directed by DESE.
28. Districts must report data to DESE. Principal to periodically review to ensure discipline not improperly impacting selected student populations, *e.g.*, students of certain race, ethnicity, and religion.
29. DESE to report statistics and identify Districts with the most suspensions. For those Districts, DESE will identify models that may assist the school. DESE to intervene if suspensions adversely impacting certain groups.

Please note that the Superintendent may appoint a designee to hear disciplinary appeals. We recommend that, for each case, administrators keep a log or spreadsheet of pertinent events relative to a particular suspension. As the new statute and regulation require multiple notifications to parents, maintaining a clear dateline is imperative.

This advisory is for informational purposes only and may be considered advertising. It is not intended to and does not constitute legal advice with respect to any specific matter and should not be acted upon without consultation with legal counsel.