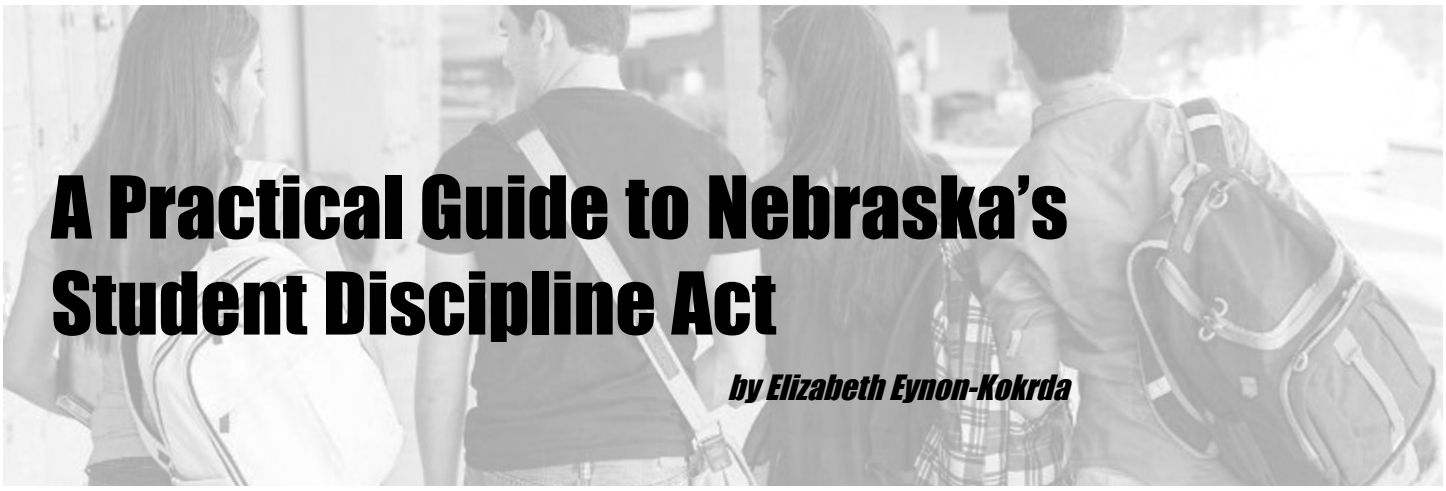

# A Practical Guide to Nebraska's Student Discipline Act

*by Elizabeth Eynon-Kokrda*

Discipline Reform! Orderly Classrooms! How school districts respond to actual or perceived student misbehavior is a national and Nebraska hot button. Balancing the duties of serving our children and communities, ensuring the rights of all, not using unnecessary force, safety of students, and avoiding the normalization of criminalizing minor offenses … this is not an easy task. While students do not shed all their constitutional rights at the school house door, the law applicable to a student's rights when being disciplined by a school district differs significantly from a student's rights in a criminal context, despite a significant overlap between discipline and referrals to law enforcement under state law. With nearly 324,000 students in Nebraska, a working knowledge of current Nebraska Student Discipline Act assures informed policy discussions and appropriate client representation.


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## Background

Nebraska's Student Discipline Act (the "Act"),[1] applicable to all public school districts in the state, was created in 1976 because Nebraska faced a constitutional challenge. Several cases had been filed in previous years concerning due process, where students were being suspended or expelled on the basis of Nebraska law, yet without notice or a timely opportunity to appeal or for extensive unregulated periods of time. Judge Warren Urbom, in at least two separate cases, found school district policy and practices were depriving students of due process and ordered the districts to amend their policies.[2] These cases drove the 84th Legislature to action.[3] Thus, the purpose of the Act then and now is "to assure the protection of all … students' constitutional right to due process and fundamental fairness…" noting that the sanctions defined in the Act are to be interpreted "at all times … in recognition of the right of every student to public education."[4]

## Discipline, in General

The Act is all about when a school can suspend, expel, or mandatorily reassign a student. Every public school district in Nebraska must adopt and publish their own rules of conduct. These rules can amplify, supplement, or extend state law, provided that they are not inconsistent with the Act.

### Short-Term Suspension

Essentially, the Act permits suspension of a student for five days or less, without any right of appeal, for any violation of the rules adopted by the Board. This is known as "short-term suspension." The district still must investigate the alleged misconduct for which a short-term suspension is given, provide the

student with oral or written notice of the charges against her along with an explanation of the evidence, and give the student the opportunity to tell her side of the story. Note that (a) schools are not required to contact parents before interviewing students and taking the action to suspend,[5] and (b) "in-school suspensions" are not "suspensions" under the Act.[6] Students in short-term suspension do not have an automatic right to complete homework, but each district is required to adopt guidelines about whether, when, and how a student may do so.

### Long-Term Suspension, Expulsion and Mandatory Reassignment

Suspensions longer than five days but less than 20 days are "long-term suspensions" and, along with any type of expulsion and any mandatory reassignment, they come with more specific due process.

First, a student can only be long-term suspended, expelled, or mandatorily reassigned for actions that occur on school grounds, in school property, or at a school-sponsored event. This limitation matters. In a 2013 case where Millard Public Schools search a student's truck that was parked on a public street in front of the school, the Nebraska Supreme Court held that the district had no right to conduct such a search and that adopting a "nexus to school" standard, as argued by Millard, would be confusing and nebulous.[7]

Second, a student can only be long-term suspended, expelled, or mandatorily reassigned for a specific set of 11 actions, enumerated at Neb. Rev. Stat. § 79-267. Many of these actions have been subject to court review for clarification. For example, the statute permits suspension and expulsion for "causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student. Personal injury caused by accident, self-defense, or other action undertaken on the reasonable belief that is was necessary to protect some other person shall not constitute a violation of this subdivision." In *Spencer v. Omaha Public School District*,[8] a student on a bus bent a metal fork back and forth, and then placed the fork against the neck of the student in front of him which caused a mild burn. The school district expelled the student for intentionally and knowingly causing injury. The student advised that he didn't know the burn would happen. The district's policy at the time was that "it is not a defense to a charge of assault where someone is hurt that the student did not intend to hurt anyone as long as the student intended to engage in the conduct which cause the harm." The Court found the term "injury caused by accident" in this statute means "one which is caused accidentally, unintentionally, or unexpectedly" and therefore, the district exceeded its statutory authority in creating its policy.

Third, the process for long-term suspension, expulsion, or mandatory reassignment is specific and failure to follow it can nullify an attempted disciplinary action.[9] On the date of the decision to discipline, a written charge along with supporting evidence has to be filed with the superintendent (or her/his delegee). *Within* 2 days after the decision, written notice by *registered or certified mail* has to be sent to the student and her/his parent/guardian informing them of their rights under the Act, which notice must include:

- the rule allegedly violated;
- the acts of the student that are alleged to be cause for suspension, expulsion or reassignment, *including a summary of the evidence to be presented against the student*;
- the penalty recommended *and any other penalty to which the student may be subject*;[10]
- a statement that, before the discipline can be invoked, the student has a right to a hearing;
- a description of the hearing procedures, along with procedures for appealing any decision rendered at the hearing;
- a statement that the student and family have a right to examine the student's academic and disciplinary records and any affidavits to be used at the hearing, and to know the identity of the witnesses to appear at the hearing and the substance of their testimony; and
- a form to be used to request a hearing (which MUST be delivered either in person or via registered or certified mail.)

## Referrals to Law Enforcement

The Act requires every school district to "notify as soon as possible the appropriate law enforcement authorities, of the county or city in which the school is located, of any act of the student … which the principal or designee knows or suspects is a violation of the Nebraska Criminal Code" and protect all school employees reporting an alleged violation of the Nebraska Criminal Code from civil and criminal liability "as a result of" such report unless the report was knowingly false or was made with negligent disregard for the truth or falsity of the report.[11]

In addition, each school district must annually "review in collaboration with the county attorney … the rules and standards concerning student conduct … to define conduct which the principal or designee is required to report to law enforcement."[12] In many cases, these referrals happen nearly instantly, due to the increase in police officers assigned to work in schools. This can blur the lines between student misconduct and crime. LB 390, introduced this past legislative session by Senator Pansing-Brooks and passed into law in April, addresses School Resource Officers ("SRO") in schools.

It mandates that each district have a comprehensive and clear memorandum of understanding between law enforcement and school officials that delineates the roles and responsibilities of each. It also requires policy concerning when a student will be advised of her rights prior to being questioned or interrogated by a school official or SRO and a complaint process concerning SRO practices.

## Challenges to School District Action

There are actually five possible levels of review under the Act, the first of which is critical. If a family wants to challenge recommended discipline, it must request a hearing within five school days after receipt of the written notice of the suspension or expulsion in order to get a hearing within two to five days of the request.[13] After the hearing is requested but before it occurs, the matter can be settled by the parties,[14] and, of course, the request for a hearing can be withdrawn at any time.

### 1. The First Hearing

The first hearing is held before a "hearing examiner" who is not required to have any special training, is usually not a lawyer, may be anyone the school district designates, is usually a current or former school administrator, and often is a person who reports to the Superintendent seeking to enforce the discipline.[15] The rules of evidence do not apply, but this hearing is critical as it may form the entire record, if there is to be an appeal.[16] Although the rules of evidence don't apply, if counsel anticipates the matter could get to judicial review, making a record concerning the evidence to assist in that review is important. This, however, can be difficult. For example, at this first hearing, while a family may request the attendance of witnesses and the hearing examiner is to "make reasonable effort" to assist in obtaining attendance of witnesses,[17] the hearing examiner is not given the power to compel witnesses. In Nebraska, school districts are divided into "Classes" and statutory authority can differ by class. Thus, the school boards of Lincoln Public Schools and Omaha Public Schools, or any committee of the members of those Boards, have the power to compel the attendance of witnesses (the "same authority to compel the giving of testimony as is conferred on courts of justice") "for the investigation of matters that *may* come before them"[18] (emphasis added). Since an appeal from a hearing "may" come before the Boards of these districts, it is arguable that they can compel witnesses to a hearing, but exercise of this power still remains discretionary.

At the hearing, the school is to present to the hearing officer statements "in affidavit form" of any person having information about the student's conduct and/or records, provided

that the statements have been "made available" to the student/student's representatives "prior to the hearing."[19] The family also has the right to examine "the statement of any witness in the possession of the school board or board of education at a reasonable time prior to the hearing."[20] In other words, (a) there is no specific determination for when counsel for a family can anticipate seeing the evidence prior to the hearing and may wish to negotiate this with counsel for the district; and (b) the district is not obligated to provide or present all existing evidence (e.g. exculpatory or conflicting witness statements) in its possession at the hearing but should do so prior to the hearing, if requested.

Since the rules of evidence do not apply, it is important for counsel to discuss, and hopefully agree upon, a procedure for exhibits (e.g., advising the hearing examiner about what exhibits are not objected to, especially as it may be difficult to lay foundation for documents when necessary witnesses are not present). To assist the hearing officer, it is common for each party's exhibits, affidavits, and other evidence to be labeled and organized in a manner that makes for easy reference by each party and the hearing officer. Counsel for the student should anticipate that there may or may not be opening statements, that the school district will argue first, and that they will introduce:

- the school rules; evidence that the student was in receipt of school rules[21] (the district must prove the student was provided notice that the behavior for which discipline is sought was prohibited behavior, and failure to do so is evidence that the student was not given procedural due process);
- evidence that the statutory notice requirements were met;
- if the discipline being sought is expulsion, evidence that the school board has actually passed a motion that the type of conduct for which expulsion is specified has the potential to seriously affect the health, safety, or welfare of the student, other students, staff members or any other person or to otherwise seriously interfere with the education process;[22]
- evidence that student did what s/he is accused of doing;
- evidence that what the student did is prohibited by school rules and that the penalty being imposed is statutorily permissible;[23] and
- if the student was excluded from school pending the investigation by the district which resulted in recommending a long-term penalty, evidence that the exclusion lasted no more than five days, and that prior to the exclusion, an actual determination was made by the district that the student's conduct presented a clear threat to the physical safety of himself or others, or was so extremely disruptive as to make temporary removal necessary to preserve the rights of other students to pursue an education.[24]

Each of these procedural aspects of the hearing are material to a showing that the school district's burden of providing constitutionally required due process to the student has been met.

The hearing must be attended by the student and the student's parent/guardian, but no one from the school district is mandated to attend except counsel for the district "if the hearing officer or the superintendent deems advisable."[25] Witnesses may only be present at the hearing when they are giving information.[26] Note that the student, while required to attend, is not necessarily a witness because the student is not required to testify, and refusal to testify cannot be held against the student.[27] Since school districts may put all evidence in via affidavit, counsel for the student may also wish to pursue this route, especially if the student has been or may be charged by law enforcement for her/his actions.[28]

The right to question witnesses applies only to "any witness giving information at the hearing."[29] Counsel for the student should be aware that school districts generally de-identify the affidavits or written statements of students taken during their investigation of the incident giving rise to the recommended discipline because the Family Educational Rights to Privacy Act ("FERPA")[30] prohibits school districts from disclosing student education records or personally identifiable information in such records without prior written consent from a parent/student. Additionally, the U.S. Department of Education has opined that, in the discipline context, while a parent/student has the right to inspect and review witness statement that are directly related to their case, even if the statements contain information directly related to another student, the information related to other students must be segregated and redacted, including the identity of a student-witnesses who authored a witness.[31]

After the presentation by the school district, counsel for the student will have an opportunity to cross-examine any witnesses of the district and put on direct evidence. While evidence of good character may be relevant, the decision of the hearing officer will rest on whether the district complied with procedural due process requirements of the Act and whether the district has shown that the student did what s/he has been accused of doing. Generally, the hearing examiner gives each party the opportunity for closing arguments.

## 2. The Superintendent's Review

After the hearing, the hearing examiner makes a report on findings and recommendations. The recommendations

can be more severe than the discipline requested by the district.[32] There is no statutory time frame for making the report, so counsel may wish to get a commitment from the hearing officer concerning timely reporting. The report is provided to the superintendent of schools (or designee) who reviews the decision and can change, revoke, or impose the sanction recommended by the hearing examiner but cannot be more severe than that recommended by the hearing examiner. As with the hearing examiner, there is no statutory time frame in which the superintendent is required to make this review and decide on the recommendations, so counsel may wish to seek a commitment for timely review. This is especially important because the discipline (which must be sent by certified or registered mail, or by personal delivery) "takes effect" when this notice is received. In other words, if a student violates the rules, and a one-semester expulsion is recommended, and the student appeals, and the discipline decision isn't received until the following semester, that is when the discipline "takes effect."[33]

All expulsions must be limited to one semester except:

- Expulsions for the knowing and intentional use of force in causing or attempting to cause personal injury to a school employee, school volunteer, or student (unless that injury was caused by accident, self-defense or other action undertaken on the reasonable belief that it was necessary to protect some other person);
- Expulsions for the knowing and intentional possession, use, or transmission of a dangerous weapon other than a firearm. In these two instances, an expulsion can be for the remainder of the school year in which it "took effect." The exception to these "one-semester" and "remainder of school year" time limits arises when the misconduct leading to the discipline occurred "within ten school days prior to the end" of the semester or year. In such cases, the expulsion carries over to the subsequent semester;[34] and
- As discussed previously, the final exception to the one-semester expulsion rule is that expulsions for the knowing and intentional possession, use, or transmission of a firearm must be for at least a calendar year unless modified by the superintendent or school board on an individual basis per school district policy.

## 3. The Second Hearing (Appeal to the Board of Education)

A student has seven school days from receipt of the superintendent's written notice to appeal the decision to the Board of Education. The appeal must be in writing and "filed" with the secretary of the Board or the superintendent. There is no definition of "filed," so counsel may wish to assure that the appeal is hand-delivered and a receipt of delivery obtained in order to make the record concerning "filing." A hearing before the Board of Education must be held "within a period of ten school days after it is requested."[35] This hearing also may be before a three-member committee of the Board of Education, based on Board policy. Note that this can delay a request for hearing made less than ten days before the end of a semester. Counsel may wish to agree to expedite a hearing.

As discussed, the appeal must be made on the record, although new evidence may be admitted if the Board of Education permits it. If the new evidence were to be the testimony of a witness, the Boards of Lincoln and Omaha have the power to compel the giving of testimony. If the appeal hearing is before the entire Board, it will be subject to the Open Meetings Act,[36] but the Board should move to go into executive/closed session as soon as the meeting is properly convened to protect the student information covered by FERPA. At the close of the appeal hearing, the Board (or committee) "may withdraw to deliberate privately." There is no statutory timeframe in which they must reach their decision. The Board decision may lessen the severity of the superintendent's recommendation but may not impose a more severe sanction. The final action of the Board must be communicated in writing and personally delivered or delivered by certified mail.

## 4. The Fourth Review (Judicial)

The Act provides for a specific judicial review process for "any person aggrieved" by the discipline decision of a Board of Education. This specific judicial process is not exclusive – any other means of review, redress, or relief provided by law may be pursued in lieu of, or in addition to, the judicial review. To obtain the judicial review under the Act, one files a petition in the district court of the county where the action was taken "within 30 days after the service of the final decision by the school board," all parties of record must be made parties to the proceedings, and the court at its discretion may permit intervention by "other interested parties."[37] The filing of a petition does not stay enforcement of the Board of Education's decision, but the court may order a stay upon application. The Board of Education then has 15 days from the date of service to provide the court with a certified transcript of the record; the rules the Board relied upon in making its decision; and the final decision sought to be reversed, vacated, or modified. The court may affirm; remand for further proceedings; or reverse or modify the decision if the substantial rights of the Petitioner may have been prejudiced because the Board's decision is (a) unconstitutional; (b) in excess of its statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) unsupported by competent, material, and substantial evidence in view of the entire record; or (f) arbitrary and capricious.[38]

### 5. The Fifth Review (Judicial)

The Act provides that the district court decision may be appealed as provided in the Administrative Procedure Act.[39] On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.[40] A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[41]

## Conclusion

The debate about the best approaches to student discipline will continue. Understanding our current processes informs that debate and appropriate implementation of Nebraska's Student Discipline Act.

## Endnotes

1 Neb. Rev. Stat. § 79-254 through § 79-294. Nebraska's Student Discipline Act is cited at §79-254 as extending through §79-294; note, however, that §79-295 prohibits corporal punishment in public schools, and §79-296 permits any student under 19 who possesses anabolic steroids whether on or off school grounds to be prohibited from participation in extracurricular activities and mandates that school boards have a written policy on same.

2 *See Fielder v. Board of Ed. of School Dist. of Winnebago*, 346 F.Supp. 722 (D. Neb. 1972); *See also Graham v. Knutzen*, 351 F.Supp. 642 (D. Neb. 1972).

3 Senator F. Lewis, 84th Legislature Floor Debate - Page 6550.

4 Neb. Rev. Stat. § 79-255.

5 More than 56% of Nebraska school districts do not require that a parent be notified with their student is questioned about incidents in school. From the Classroom to the Courtroom: A Review of Nebraska's School Police Programs, ACLU Nebraska December 2018.

6 Neb. Rev. Stat. § 79-256.

7 *J.P. ex rel A.P. v. Millard Public Schools*, 285 Neb. 890, N.W. 2d 453 (2013).

8 252 Neb. 750, 566 N.W. 2d 757 (1997).

9 "Any action taken by the school board or board of education or by its employees or agents in a material violation of the act shall be considered null, void, and of no effect." Neb. Rev. Stat. § 79-261(2).

10 Note that the concept prohibiting "double jeopardy" (protection against multiple penalties for the same offense) does not apply in the school context, notwithstanding the fact that many violations which result in discipline under the Act can also be charged as crimes. In general, double jeopardy only extends to adjudication or crimes, and suspension or expulsion themselves are not so deemed.

11 Neb. Rev. Stat. § 79-293.

12 Neb. Rev. Stat. § 79-294.

13 Neb. Rev. Stat. § 79-269. If a hearing is requested more than 5 school days after receipt of notice but less than 30, a hearing will be held, but the punishment will go into effect and the timing of the hearing is unclear. *See* Neb. Rev. Stats. § 79-271 and § 79-272.

14 *See* the final paragraph of Neb. Rev. Stat. § 79-286.

15 *Id*.

16 *See* § 79-277 re rules of evidence. What is in the record is defined at § 79-284. The appeal to the school board is made "on the record" and it "may" admit new evidence to avoid a substantial threat of unfairness but is not required to (§ 79-285). The Court reviews the transcript of the record before the school board (§ 79-290) and the standard of review is statutorily defined at § 79-291.

17 Neb. Rev. Stat. 79-278.

18 *See* Neb. Rev. Stats. § 79-521 and 522.

19 Neb. Rev. Stat. § 79-276.

20 Neb. Rev. Stat. § 79-296(4).

21 All districts must distribute all rules which form the basis for discipline to each student and her/his guardian at the beginning of each school year, or at the time the student enrolls. Neb. Rev. Stat. § 79-262.

22 This is required by Neb. Rev. Stat. § 79-262, or expulsion is not permissible.

23 Nebraska does not require any specific discipline for any misbehavior except for the knowing and intentional possession, use, or transmission of a firearm as defined in 18 U.S.C. 921. In such case, the expulsion must be for "not less than one year" although the board or superintendent may modify this on an individual basis. Neb. Rev. Stat. § 79-263.

24 Neb. Rev. Stat. § 79-264.

25 Neb. Rev. Stat. § 79-273.

26 *Id*.

27 Neb. Rev. Stat. § 79-275.

28 While hearings at this level are not open, the record must be recorded at school district expense. Neb. Rev. Stat. § 79-280.

29 Neb. Rev. Stat. § 79-278.

30 20 U.S.C. 1232g(a)(4)(A); 34 CRF § 99.3.

31 USDOE Letter to Wachter, December 7, 2017.

32 Neb. Rev. Stat. § 79-282.

33 Neb. Rev. Stat. § 79-283.

34 *Id*.

35 Neb. Rev. Stat. § 79-285.

36 Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2018).

37 Neb. Rev. Stat. § 79-289.

38 Neb. Rev. Stat. § 79-291.

39 Neb. Rev. Stat. § 89-901 et. seq.

40 *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996).

41 *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996).