

# **Student Discipline in the Age of the Coronavirus**

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# Statutory Basis for Student Discipline – Suspension

- Connecticut law empowers public school districts to suspend students for conduct on school grounds or at a school-sponsored activity that violates a publicized Board policy *or* is seriously disruptive of the educational process or endangers persons or property. **Conn. Gen. Stat. §10-233c**
- Districts can also suspend students for conduct off school grounds that violates a publicized Board policy *and* is seriously disruptive of the educational process. **Conn. Gen. Stat. §10-233c**

# Statutory Basis for Student Discipline – Suspension

- Students may be suspended for **up to fifty school days or up to ten times** – whichever results in fewer days of exclusion – in any one school year without the right to a formal hearing before the Board, a panel of the Board, or an impartial hearing officer appointed by the Board.
- Consequently, whereas one student could be given five, ten-day suspensions in any school year before gaining the right to a formal hearing, another student would be entitled to a hearing after he or she had been given ten, one-day suspensions in a school year.
- Thus, districts should be judicious when suspending.

- **Special education and Section 504 students** are subject to the same suspension provisions that are applicable to their typical peers under Section 10-233c of the Connecticut General Statutes.
- Consequently, districts **are not required** to convene manifestation determination meetings prior to a suspension – even subsequent suspensions – in any school year unless the length, basis, and proximity of multiple suspensions constitute a “pattern of removals” which can be considered a change in placement under the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§1400, *et seq.* [“IDEA”].

# Suspension – Instructional Obligations

- Although districts are required to provide suspended students with an opportunity to complete any classwork, including examinations which the student missed during the suspension, districts **are not required** to provide actual instruction – such as in the form of tutoring – during the ***first ten school days of suspension***.
- **This also applies to special education students.**

- Suspensions are required to be included on the student's cumulative record, with the understanding that it shall be expunged upon the student's graduation from high school.
- If a student has been suspended for the first time, the district can shorten or waive the suspension period if he or she completes an administration-specified program or satisfies conditions imposed by the administration.
- A student whose suspension has been shortened or waived can also have his or her suspension expunged *prior* to graduation if the administration chooses to do so. Remember, though, this potential early expungement is *only* available to students who have been suspended once and had that suspension shortened or waived.

- A student **cannot** be suspended without first having the opportunity for an informal “hearing” by the administration. Conn. Gen. Stat. §10-233c(a). The United States Supreme Court has held that students are constitutionally entitled to due process in the form of such informal proceeding prior to a suspension. **Goss v. Lopez, 419 U.S. 565 (1975)**
- This “hearing” generally consists of a building administrator giving a student accused of a suspendable offense the opportunity to give his or her side of the story. There is no entitlement to legal representation or any of the formalities that are part of an expulsion hearing.

- Connecticut law **requires** that “all suspensions” be in-school suspensions, except . . . .
- 1. For students in **grades three through twelve**, if during the informal hearing the administrator determines that the student poses a danger to persons or property or a serious disruption of the educational process, then the student “shall be excluded from school during the period of suspension,” **or**
- 2. The administration determines that an out-of-school suspension is appropriate based upon the student’s prior disciplinary problems that resulted in suspension or expulsion and prior efforts by school staff to address conduct through non-exclusionary disciplinary consequences. **Conn. Gen. Stat. §10-233c(g)**.



- For students in **preschool through second grade**, the out-of-school suspension alternative is only available if during the informal hearing, the administration determines that the student's conduct was "of a violent or sexual nature that endangers persons."
- This ISS mandate is not necessarily the most assiduously followed provision, and the exceptions for students from third through twelfth grades are generally interpreted with a certain amount of flexibility.

# Suspension – ISS v. OSS in the Hybrid or Remote Model

- In the wake of the COVID-19 pandemic, the concept of a school day and what constitutes in-school has changed. Obviously, if a district is fully remote, there is no obligation to have a student serve a suspension inside a school building. Similarly, under the hybrid model, it would make little sense to rotate a student in and out of school simply to serve a suspension. Thus, practically speaking, schools should be able to apply the exceptions to the ISS requirement even more liberally.

# Statutory Basis for Student Discipline – Expulsion

- Connecticut law empowers public school districts to expel students for **up to one calendar year** (having been changed from the prior maximum of 180 school days). This state law invests school boards with the discretionary power to expel and ***requires*** school boards to expel under certain circumstances.
- **Conn. Gen. Stat. §10-233d(a)(1) & (a)(2)**

# Statutory Basis for Student Discipline – Expulsion

- Unlike suspensions, **only** school boards, a panel of the Board, or a hearing officer appointed by the Board has the power to expel.
- When Board members – as opposed to a hearing officer – are presiding over an expulsion hearing **there must be at least three votes to expel**. Consequently, if a three-person panel of the Board decides the case and only two members of that panel believe expulsion is appropriate, **the student cannot be expelled as there are fewer than three votes**. Thus, having hearing committees of more than three Board members is highly recommended.

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- A school board has the discretion to expel a student in **grades three through twelve** if the student's conduct on school grounds or at a school-sponsored activity violates a publicized policy of the Board **and** is seriously disruptive of the educational process or endangers persons or property.
- **PLEASE NOTE:** In its wisdom (or lack thereof), the General Assembly recently amended Section 10-233d(a)(1) so that a serious disruption of the educational process is no longer a separate and sufficient basis for expulsion. Thus, in order to warrant expulsion, a student's conduct must **both** violate a Board policy **and** be seriously disruptive. Either ground, in and of itself, is no longer sufficient.

- School boards also have the discretion to expel students in third through twelfth grades for behavior off school grounds if it violates a publicized policy of the Board **and** is seriously disruptive of the educational process. In determining whether conduct is “seriously disruptive of the educational process,” Boards may consider – **but are not limited to** – the following:
  - 1. Proximity to school;
  - 2. Involvement of other students from the school or gang involvement;
  - 3. Whether violence, threats of violence, or the unlawful use of a weapon was involved;
  - 4. Whether alcohol was involved.\*
  
- \*Oddly, the legislature included alcohol but not controlled substances, but, again, Section 10-233d(a)(1) expressly states that these considerations shall not be an exclusive list.

# Expulsion – Mandatory

- As previously noted, Connecticut law **mandates** expulsions for students in **kindergarten through twelfth grades** for certain conduct, including:
  - 1. Possession of a firearm, deadly weapon, dangerous instrument, or martial arts weapon on school grounds or at a school-sponsored activity;
  - 2. Illegal possession of a firearm off school grounds or the possession and use of a firearm, weapon, or dangerous instrument in the commission of certain crimes;
  - 3. On or off school grounds sold or distributed a controlled substance.
- **PLEASE NOTE:** Although students in preschool through second grade cannot be subject to discretionary expulsions, students in kindergarten through twelfth grade *are* subject to mandatory expulsions.

- Section 10-233d(a)(2) provides that a student who is found to have engaged in the conduct that is the subject of a mandatory expulsion “shall be expelled for one calendar year,” but then abruptly modifies that mandate by empowering school boards to lessen the period of exclusion on a case-by-case basis.



# Mandatory Expulsions – Common Misconceptions

- Police sometimes charge a student who is in possession of a large amount of a particular controlled substance with “possession with intent to distribute.” The *intent* to distribute is not the same as actual distribution and thus, it is *not* a basis for a mandatory expulsion.
- School districts are *not* required to wait for a student’s criminal conduct to be adjudicated by a court before moving forward with an expulsion hearing. The evidentiary standard in criminal proceedings is far higher than it is for expulsion hearings, and what might not be provable under that higher criminal standard does not mean it cannot be established using the much-lower administrative hearing standard.
- Distribution of a controlled substance does *not* require the transmission of money or a large amount of the drug. Merely passing a blunt from one student to another student constitutes distribution.

- An expulsion hearing can perhaps best be analogized to a criminal court proceeding: the Administration is the “prosecution,” the student is the “defendant,” the Board is the “jury,” and the Board typically has a procedural advisor, who is the equivalent of the “judge,” explaining the process, ruling on evidentiary issues, and otherwise ensuring that the proceeding runs as smoothly and fairly as possible.

# Expulsion Hearing – Important Points to Remember

- Notice of the hearing should include the date, location, bases for the hearing -- including both the conduct and relevant Board policies -- whether the Administration will be represented by an attorney, the right to an attorney at the parents'/guardians'/student's own expense, and the contact information for free or reduced legal representation, such as Connecticut Legal Services – even if the family would not appear to be indigent – and the availability of a translator if requested.
- The hearing notice **must** be provided to the parents, guardians, or student – if the student is eighteen or older or is an emancipated minor – **no later than five business days prior to the hearing.**
- The parents are entitled to have the hearing postponed for up to one week in order to obtain legal representation.

# Expulsion Hearing - Important Points to Remember

- In determining the length of an expulsion and the nature of the an alternative educational opportunity, the Board can consider a student's prior disciplinary misconduct that resulted in a removal from class, a suspension, or an expulsion.
- Although Section 10-233d does not expressly authorize it, school boards also commonly consider a student's academic performance and attendance history. The rationale is that Board members wish to get a full picture of the student, and it can be argued that grades and attendance would help inform the Board's decision on a recommended alternative educational opportunity. At the same time, there is a risk that a Board could be accused of using a student's poor academic performance to impose more severe consequences than it would for a student with better grades.

# Expulsion – Alternative Educational Opportunities

- Any expelled student who is younger than sixteen **must** be offered an alternative educational opportunity.
- Any student who is sixteen-to-eighteen years old and is being **expelled for the first time** must also be offered an alternative educational opportunity if the student “wishes to continue his or her education . . . [and] if he or she complies with conditions established by his or her local or regional board of education.”
- A student who has been previously expelled and who is sixteen-to-eighteen years of age at the time of his subsequent expulsion, is **not entitled** to an alternative educational opportunity. Similarly, a student who is over the age of eighteen is also **not entitled** to an alternative educational opportunity.
- **PLEASE NOTE: Special Education students are *always* entitled to an alternative educational opportunity.**

- Expulsions are required to be expunged from a student's records upon graduation **except** when a student in grades nine through twelve is expelled for illegally possessing a firearm or deadly weapon.
- A school board can also decide to expunge the expulsion of the student prior to graduation on a case-by-case basis.
- **PLEASE NOTE:** Once an expulsion has been expunged, it cannot be used following a subsequent expulsion to deny a student between the ages of sixteen and eighteen with an alternative educational opportunity as once expunged, the expulsion is deemed as a matter of law to never have occurred.

# Expulsion – Withdrawal From School

- If a student withdraws from school subsequent to the issuance of the hearing notice, the school board is still required to move forward with the hearing and issue a decision, which decision must be entered on the student's cumulative educational record.

- A school district may adopt the expulsion decision from another school district following a hearing, the sole issue of which is whether the conduct for which the prior district expelled the student would also be an expellable offense in the current district.
- The student may be excluded from school pending the outcome of that hearing, although he or she is entitled to an alternative educational opportunity pending the outcome of the hearing.



# Expulsion – Disabled Students

- A special education or Section 504 student **cannot** be expelled unless either the PPT or the Section 504 Team (depending upon the student's classification as special education or Section 504) first conducts a manifestation determination meeting.
- The criteria for finding that it is not a manifestation of the student's disability is whether the student's IEP or 504 Plan were being implemented and whether the student's disability caused or was a substantial catalyst for the student's conduct. It is a high standard.

- A student's admission of misconduct is a sufficient – and in most cases the best -- basis for a suspension or expulsion. A written statement admitting misconduct is the gold standard. If the student refuses to make a written statement, it is advisable that more than one staff member is present for the student's oral admission.
- If a student denies the misconduct, a credible allegation of such behavior by another student can be a sufficient basis for suspension or expulsion. The fact that it is a he-said/she-said is irrelevant so long as the Administration finds the accuser credible.

- Although the police, including a School Resource Officer, requires a warrant to conduct searches, school officials do not.
- A school district does not require parent permission – or a parent’s presence – to search a student, although if the student is very young or has limited cognitive ability, a district may wish to permit a parent to be present.

- Although school officials do not require a warrant, their right to search students and student property is not unfettered.
- The Fourth Amendment of the U.S. Constitution provides:
  - The right of 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, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- Article 1, Section 7 of the Connecticut Constitution contains an almost identical provision protecting individuals against unreasonable search and seizure.

# SEARCH AND SEIZURE OUTSIDE OF SCHOOL

- Law-enforcement searches typically require "**Probable Cause**," which in the context of a search is defined as:
- "Information sufficient to warrant a prudent person's belief that evidence of a crime or contraband would be found in a search."



- Students in school enjoy less protection of their privacy than adults because a student's right to privacy has been deemed secondary to concerns for students' overall safety and well-being.

- Before a school official can perform a warrantless search of a student, the justification for **the search must be “reasonable at its inception”** and **“reasonable in scope.”**
- In this post-Columbine, post-Sandy Hook, and post-Parkland world, most courts will give school officials wide – but not limitless -- latitude in what is “reasonable.”



- High school teacher found two female students smoking in school lavatory and brought them to the assistant vice principal's office.
- One student denied that she had been smoking.
- Assistant vice principal demanded to see student's purse and found a pack of cigarettes and rolling papers.

- Further search found marijuana, a pipe, empty plastic bags, a substantial amount of money, an index card listing individuals who owed the student money and letters implicating the student in marijuana dealing.
- **Student argued teacher's search of purse violated Fourth Amendment**

- The United States Supreme Court disagreed, holding that the search had been reasonable and there was no Fourth Amendment violation.

- The Court held that reasonableness is based upon **a two-prong test**:
  - Is the search **justified at its inception**?
    - In other words, school must suspect that a search will turn up evidence that the student has violated law or school rules; **and**

Is the search **reasonably related in scope to the circumstances** that justified the interference in the first place?

In other words, **the manner in which the search is performed must be reasonably related to the objectives of the search.**

- A search **cannot be excessively intrusive in light of age and gender or student and nature of the infraction.** The greater an individual's expectation of privacy, the more intrusive a search is that violates that privacy.

- Searches of electronic devices are governed by the same rules.

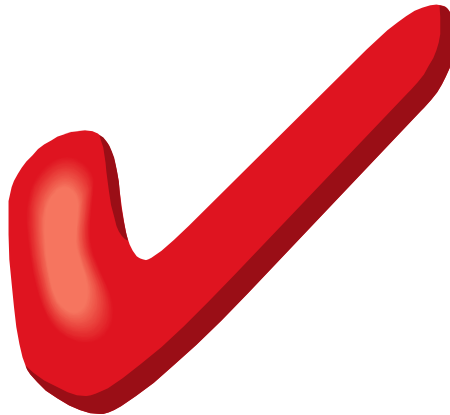


# SEARCHING ELECTRONIC DEVICES – A HYPOTHETICAL

- A teacher observes several students gathered around a cell phone and laughing. One student approaches the teacher and tells him that they are looking at an inappropriate photograph of another minor student.
- The teacher confiscates the phone and brings it to the vice principal. The vice principal searches the phone and finds a text message containing an inappropriate photograph of a female student.
- **Was the search legal?**



- **Yes!**
- The teacher's suspicion that the student's cell phone contained illegal material was reasonable under the circumstances.



# SEARCHING ELECTRONIC DEVICES – A HYPOTHETICAL

- Joe is a pain. He has a long history of insubordination, physical altercations, and skipping classes.
- This morning, he was caught sending text messages in class and school officials took his cellphone.
- Can the school officials read his text messages?



# SEARCHING ELECTRONIC DEVICES – A HYPOTHETICAL

- **No!**

- “A search is justified at its inception if there is reasonable suspicion that a search will uncover evidence of further wrongdoing or of injury to the student or another. Not all infractions involving cell phones will present such indications.”



What if the wallpaper of Joe's home screen was a sexually explicit photo of what appeared to be a minor. Would that change the answer?

- **Yes!**
- The home screen photo would likely be deemed a reasonable basis to search Joe's text messages to determine whether the individual pictured was a minor and to see whether this image had been transmitted by or to Joe.

- In the context of student searches, T.L.O. remains the legal standard, and searches are governed by two principles (are you tired of hearing them yet?):
  - 1. Was the search **justified at its inception?**
  - 2. Was the search **reasonably related in scope** to the circumstances?

- **Electronic devices issued by a school for academic purposes would probably be found to offer no reasonable right to privacy** as they are owned by the school, and not by the student.
- Consequently, courts would likely give far greater latitude to schools to search school-issued devices.

- Consequently, school district policies should explicitly state that such devices **are not for personal use** and that such use could subject the student to discipline.



- In the cyber age, the boundary between on-campus and off-campus is increasingly disappearing, and what is posted on social media off school grounds will almost certainly affect on-campus relationships and conduct.

- As such, **harassing or bullying statements** that are created and posted totally **off campus** and either before or after the school day, **can still be susceptible to discipline.**

# DISCIPLINING STUDENTS FOR OFF CAMPUS CONDUCT

- Section 10-233d of the Connecticut General Statutes permits a school board to expel a student for out-of-school conduct if the conduct both (1) is “seriously disruptive of the educational process” **and** (2) violates a publicized school board policy. In deciding whether conduct seriously disrupts the educational process, the law allows a board to consider whether, among other things, (1) the incident happened close to a school; (2) other students from the school or a gang were involved; (3) the conduct involved violence, threats of violence, or illegal use of weapons; (4) injuries occurred; or (5) alcohol was used.

# DISCIPLINING STUDENTS FOR OFF CAMPUS CONDUCT

- The case of Doninger v. Niehoff, 527 F.3d 41 (2<sup>nd</sup> Cir. 2008), involved a high school student who used a blog she maintained to urge the community to contact the Superintendent of Schools and the Principal – whom she referred to collectively as “douchebags” – regarding what Doninger inaccurately claimed was their cancellation of the annual “Jamfest” at the school. She wrote that contacting the Superintendent would “piss her off.”
- As a consequence, a number of people called the Superintendent and Principal to complain about their purported actions.

- When the Administration discovered Doninger's blog post, they denied her the opportunity to run for Senior Class Secretary. Consequently, she filed suit, claiming that the school district had violated her First Amendment right to free speech.
- The courts did not agree with her perspective.

- In Doninger v. Niehoff, 527 F.3d 41 (2<sup>nd</sup> Cir. 2008), the United States Court of Appeals for the Second Circuit held:
- “[A] student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ at least when it was similarly foreseeable that the off-campus expression might also reach campus.”

- The Doninger court further held:
- “[O]ff-campus conduct of this sort ‘can create a foreseeable risk of substantial disruption within a school’ and that, in such circumstances, its off-campus character does not necessarily insulate the student from school discipline.”

# *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)

- Student gave a speech before 600 students that nominated another student for class office. However, the speech was filled with easily identifiable sexual innuendos.
- As a result, the school suspended the student. The Supreme Court found that the suspension was lawful.
- “[I]t was perfectly appropriate for the school to ... make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.”



# *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)

- School administration prohibited the students in a school journalism class from writing stories about teen pregnancy in the school and the story of a divorced family. The story on teenage pregnancy contained information about teenagers pregnant at the school.”
- The Supreme Court ruled school districts’ suppression of student speech in this regard was appropriate “so long as their actions are reasonably related to legitimate pedagogical concerns.”

# *Morse v. Frederick*, 551 U.S. 393 (2007)

- Student unfurled a banner across the street from the school, where students were assembled during a school-sponsored event (Olympic torch relay), stating “BONG HITS 4 JESUS.” This resulted in the student being suspended.
- The Supreme Court ruled that the school was justified because it had a compelling interest in prohibiting speech that could reasonably be construed as promoting drug use.

# Identifiable Threats of Violence

## *Wisniewski v. Weedsport C.S.D.*

- Student sent an IM to a friend with a picture of a person firing a gun at his head and added pictures of splattered blood.
- Below the picture was a message that said “Kill [the name of his teacher.]”
- The message was sent to approximately 15 of his “IM” “buddies” and the word of the drawing ultimately reached the teacher and the school administration.
- Although it was meant as a joke, the student was suspended.

**WHO WON?**

# Identifiable Threats of Violence

## *Wisniewski v. Weedsport C.S.D.*

- The school district prevailed, the court holding:
- “[W]e conclude that it crosses the boundary of protected speech and constitutes student conduct that poses a **reasonably foreseeable risk** that the icon would come to the attention of school authorities and **that it would materially and substantially disrupt the work and discipline of the school.**”

# *But . . . -- Burge v. Colton BOE*

- Student who was angry at his teacher for giving him a “C” posted on his private Facebook account that the teacher should be “shot.”
- The posting was made on a day school was not in session.
- Only his Facebook “friends” could view the post.
- An anonymous student brought the post to the school administration and the student was suspended.
- The student meant the post as a joke, but the teacher who was the subject of the post was legitimately frightened.

# *Burge v. Colton BOE*

- Sadly, the student won, the court holding:
- “The comments did not cause a widespread whispering campaign at school or anywhere else. No students missed class and no CMS employees, including [the Teacher], missed work. Although [she] initially protested having [the Student] back in her class, she accepted the school's decision for him to return and did not discuss the comments with either [the student] or with any other students or teachers at CMS.”

## *Kowalski v. Berkley County Schools*

- Student created a “myspace” page called “S.A.S.H.” that was directed towards a fellow female student.
- “S.A.S.H.” stood for “Students Against Slut Herpes.”
- One student uploaded a picture of the female victim student, where she was referred to as a “whore” and other hurtful comments.
- Approximately 2 dozen students from school posted comments on the site.
- Parents of the victim complained to the school.
- School concluded that the student who created the page had created a “hate” website, which resulted in her suspension.

**WHO WON?**

# Cyberbullying Cases

The school district prevailed, the court holding:

“This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about habits and manners of civility or the fundamental values necessary to the maintenance of a democratic political system.”



# What Can We Take Away From Social Media Caselaw?

- Each case is fact intensive.
  
- Administrators should consider:
  - Where the “speech” took place.
  - Just because the “speech” does not take place on school grounds is not dispositive.
  - What is the nexus of the speech to the school?
  - Did the speech cause a substantial disruption to the school activities and operation?
  - Was it reasonably foreseeable that the “speech” would cause a substantial disruption to the school?
  - Were school officials pulled away from their ordinary duties to address the issue?
  - What was the nature of the speech and was the victim upset and/or did the victim complain?

- As a general proposition, students and employees **must always** wear face masks or other cloth material that covers their mouths and noses while on school property or buses.
- There are, however, **some exemptions**, including students with disabilities who cannot safely or successfully wear a mask.

- With certain exceptions that will be subsequently addressed, a student who refuses to wear a mask or who regularly removes it in an oppositional manner, can be subjected to discipline such as suspension or, if the conduct is sufficiently egregious, expulsion.
- Similarly, a student who refuses to comply with or who knowingly violates quarantine mandates following interactions with individuals who have COVID-19 or travel to states on Connecticut's list of states which require quarantine or a negative COVID test can also be disciplined.

# Disabled Students And Masks

- Although there is a presumption that most disabled students are fully capable of complying with mask mandates, some students cannot do so due to the nature or the severity of their disabilities.
- As is true when making decisions regarding other aspects of a disabled student's educational program and placement, if an exemption from wearing masks is sought for a student, the student's PPT or Section 504 Team should meet to determine whether such an exception is warranted. In making this determination, the PPT or Section 504 Team should consider accommodations or consider alternative programmatic and placement options.

# Disabled Students And Masks

- A disabled student may **NOT** be excluded from school due to his or her inability to wear face covering.
- If, however, a student with a disability who is capable of wearing a mask refuses to do so or regularly removes it in an oppositional manner, the student can be subjected to discipline such as suspension or, if the conduct is sufficiently egregious as to warrant expulsion, would first be entitled to a manifestation determination meeting of his or her PPT or Section 504 Team to ensure that the student's conduct was not a manifestation of his or her disability.

- Students who engage in Zoom bombing or other misconduct while participating remotely are subject to suspension or expulsion. Despite the fact that this conduct occurs off campus, given that it happened within the context of the learning model the student selected, it could be equated to in-school misconduct.
- The suspension informal hearing and expulsion formal hearing can be held virtually, although the same notice provisions are applicable.
- Remote learning could serve as the alternative educational opportunity, although if the discipline arises from abuse of the remote learning program, the district could provide a different form of alternative education.

- While it would appear that school districts could decline admission to the school building to a student who refuses to be vaccinated against COVID-19 (when such vaccines become widely available), it is doubtful that districts could suspend or expel them.
- Nonetheless, a declination to admit essentially serves the same purpose.

# QUESTIONS?





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