REPRESENTING STUDENTS IN SCHOOL TRIBUNALS IN GEORGIA

GEORGIA™ APPLESEED
Center for Law & Justice

THIRD EDITION, 2020

DISCLAIMER

The Young Professionals Council of the Georgia Appleseed Center for Law and Justice, Georgia Appleseed Center for Law and Justice, and the author(s) (the "Committee") present the information in this Representing Students in School Tribunals in Georgia Attorney manual (the "Manual") as a public service to pro bono attorneys who represent clients in school tribunal hearings. The Committee makes no warranties, express or implied, concerning the information contained in this Manual or other resources to which it cites.

The intent of this Manual is not to provide legal advice. Non-lawyers should consult a licensed attorney in all legal matters. This Manual does not establish a lawyer-client relationship between the Committee, any member thereof, and the attorney or client. The Committee, its employees, agents, or others that provide information on or through this Manual will not be liable or responsible to the attorney or client for any claim, loss, injury, liability, or damages related to the use of this Manual.

TABLE OF CONTENTS

INTRODUCTION

School disciplinary actions that remove a student from school can have long-lasting negative consequences. Suspensions and expulsions deprive the student of education instruction and important social experiences. Students who are removed from school may not develop the skills and experiences required to prepare for an increasingly competitive workforce or to adjust to the complex social structures we all confront in adulthood. Expulsions and suspensions also increase the student's risk of later involvement with the juvenile justice system.

When a child is subject to a school disciplinary action, the school should involve the student's parents and/or guardians immediately. In many cases, the student should also have to an attorney familiar with school discipline matters. A competent attorney can ensure that the student's rights are respected, that the school carries out the disciplinary process consistent with the requirements of the law, and that the disciplinary action is fair.

Georgia Appleseed, founded in 2005, is a nonpartisan nonprofit justice center dedicated to law that serves the public interest. Its Young Professionals Council (YPC) encourages younger lawyers and other professionals to engage in pro bono activity that will help level the playing field for Georgians who often do not have a voice to effect systemic change.

In 2012, the YPC decided to focus on the due process concerns in school tribunals as its signature project. The mission of the School Tribunal Project is to provide resources and training to expand the pool of lawyers available to represent K-12 public school students, who are foster children, in disciplinary hearings. The involvement of advocates for students who understand the purposes of the disciplinary process and its practice and procedures will benefit both the affected students and the school system.

Making a Difference for School Tribunal Clients

This *Representing Students in School Tribunals in Georgia* attorney training manual has been created to provide attorneys who are not experienced education lawyers with an understanding of the laws and procedures involved in a Georgia school tribunal hearing. It provides tools to help pro bono attorneys represent a student throughout the tribunal process.

This manual is presented as a public service to pro bono attorneys and is intended for educational purposes only.

Supplemental tools available for school tribunal clients and attorneys include ***When My Child is Disciplined at School: A Guide for Families*** and ***Help Guides for Children with Behavior and Learning Challenges***. These tools cover such topics as a parent's first response to school discipline, meeting with the school and challenging a school discipline decision, the causes of behavior challenges, and where parents and caregivers can find additional resources and help. **These resources and others, available in English and in Spanish, can be found at: http://www.gaappleseed.org/publications/**.

We extend our sincerest appreciation to our School Tribunals Project volunteer practitioners and to the many legal volunteers who have helped to bring this Manual to fruition.

ACKNOWLEDGMENTS

The 3rd Edition of the *Representing Students in School Tribunals in Georgia* attorney training manual was produced under the auspices of the Young Professionals Council (YPC) of the Georgia Appleseed Center for Law and Justice.

We would like to thank the following individuals and organizations for their participation and support of this edition.

Eric Fisher, Esq., Barnes & Thornburg LLP

Matt Miehl, Esq., DLA Piper LLP (US)

Georgia Appleseed Young Professionals Council (YPC)

Micah Moon, Esq., *Executive Committee President*

Ebony Mosley, *President-Elect*

Rachel Platt, Esq., *Immediate Past President*

Appleseed School Tribunal Manual Project Staff

R. Michael Waller, Esq., *Georgia Appleseed, Executive Director*

Caroline Durham, Esq., *Georgia Appleseed, Law and Policy Director*

Eloise Holland, *Communications Manager*

KyMara Guidry, J.D., *Equal Justice Works Fellow*

Victoria Miller, J.D., *Georgia Appleseed Law & Policy Summer Associate*

Ariana Peden, J.D., *Georgia Appleseed Law & Policy Extern*

In addition, we offer thanks to the **Child Protection and Advocacy Section of the State Bar of Georgia** for its financial support for the publication of this manual.

I. OVERVIEW OF THE HEARING PROCESS

This chapter provides an overview of the Manual, including the basic legal requirements of a school disciplinary tribunal. It discusses:

- How to effectively prepare for a tribunal.
- What to do when meeting a client before the tribunal.
- What to do during the tribunal.
- What to do after the tribunal.
- How student disabilities and race may be raised during a tribunal.

Each section below directs the reader to a later chapter that covers the requirements in more depth.

Students accused of violating school policies are entitled to statutory and due process protections before a school can impose certain disciplinary actions. Georgia law prohibits students from being subject to long-term suspension (defined as **more than ten (10) days**) or expulsion without a disciplinary process (a tribunal) where the student can challenge the charged violation and the fairness of the discipline recommended by school administrators.

A. Sources of Student Procedural Rights and Preparing for a Tribunal

Local Boards of Education (**"LBOE" or "Local Board"**) are required to adopt codes of conduct for schools, the purpose of which is to enhance the student learning environment by improving student behavior.[1] Each code of conduct must include provisions that address specific types of student conduct: (i) during school hours, (ii) at school-related functions, (iii) on the school bus, and (iv) in certain circumstances, during off-school hours.[2] The student code of conduct is distributed by the LBOE at the beginning of the school year to every student's parent or guardian.[3] The LBOE is also required to solicit or require the signatures or confirmation of receipt from the student and parent or guardian, including but not limited to electronic mail or facsimile.[4]

The LBOE must "provide for enforcement for disciplinary action against students who violate" their respective school's code of conduct.[5] The disciplinary processes and the degree of severity of disciplinary action must be proportionate to a student's transgression and take into account the student's history of violations and other relevant factors.[6]

If a school administrator recommends suspension from school **for less than or equal to ten (10) school days**, the student must at least "be given oral or written notice of the charges against [the student] and, if [the student] denies them, an explanation of the evidence the authorities have and an opportunity to present [the student's] side of the story."[7] The student can then be removed from school and does not have the right to a formal hearing or to appeal the suspension.

If, however, the school administrator recommends expulsion or suspension from school **for longer than ten (10) school days**, the student is entitled to written notice and a formal disciplinary hearing prior to the imposition of the expulsion or long-term suspension.[8] This hearing is called a **tribunal**.

NOTE: If the student's alleged conduct involves assault or battery upon any teacher or other school official or employee, a disciplinary hearing officer, panel, or tribunal shall hold a disciplinary hearing and the student will be suspended pending the hearing.[9]

The LBOE may appoint individual disciplinary hearing officers, panels, or a group of school officials to conduct the tribunal.[10] Anyone who serves as a hearing officer and/or tribunal member must be "qualified"[11] to serve in this role and must be able to be an independent, neutral arbiter.[12]

Before a disciplinary hearing is held, all parties must receive reasonable notice of "the time, place, and nature of the hearing; a short and plain statement of the matters asserted; and a statement as to the right of all parties to present evidence and to be represented by legal counsel…."[13]

Chapter 2 discusses a student's rights in more detail.

B. Meeting with a Client Before the Tribunal Hearing and the Role of Parents and Setting Expectations

Your client is the student. Build your relationship with the student as you would with any client: listen, engage, and let them ask questions. Be open and honest about the problems and strengths of their case.

The attorney-client privilege applies to your relationship and communication with the student. The parent, guardian, or—in the case of foster children—foster care case worker, may want to be engaged with you. Know that the rules of attorney-client privilege do not apply to communications with them. And if they are present in the meetings with you and the student, the attorney-client relationship is compromised.

Navigating engagement of the parent/guardian/case worker is important. A student's parent may attend meetings with the student. Attorneys should give due consideration to whether to exclude parents from these meetings in order to preserve confidentiality and attorney-client privilege, particularly where there are criminal or delinquency charges pending.

Take care to set expectations about the results of the tribunal and explain the possible outcomes. Clients should be advised that a favorable decision is far from guaranteed at a hearing. The attorney should exercise caution in making predictions regarding the outcome of the hearing process.

PRACTICE POINTER:

If the parent/guardian/caseworker comes with a child to meet with you, explain to all that you will meet first with the child alone. Explain the concern about conflicts and that you want to avoid making the adult a potential witness in some future proceeding, such as a tribunal or criminal proceeding.

Then, talk with the child alone. Explain your role as their attorney. Let them ask questions. Explain that they can have their parent/guardian in the room but do not have to have them present. Ask if they wish to have the adult in the room. Attorneys want to ensure it is a safe environment for the child share whether they wish to have the adult present.

Chapter 3 "Preparing for the Hearing" addresses effective communication with a client before a tribunal in detail.

C. At the Tribunal Hearing

At the tribunal hearing, all parties may present and respond to evidence and may examine and cross-examine witnesses.[14] (Chapter 3 provides more detail about preparing witnesses and preparing evidence.) At the conclusion of the hearing, the hearing officer will issue a decision determining whether the child violated the school's code of conduct and, if so, what disciplinary action should be taken. Disciplinary action may include, but is not limited to, short-term suspension, long-term suspension, or expulsion.[15]

Under Georgia law, all parties at a public school disciplinary hearing are given an opportunity to present and respond to evidence and to question all witnesses on all issues unresolved.[16] Witnesses may be questioned about any issues that are relevant to the charges against the student or the appropriate discipline. It is a violation of the student's due process rights if you are not permitted to present witness testimony or to cross-examine witnesses on behalf of the student.

Make sure that you protect the record for appeal.[17] Evidentiary issues or other matters not raised at the initial disciplinary hearing cannot be raised for the first time on appeal. The LBOE and State Board of Education (SBOE) will only consider information that was put on the official record during the initial hearing.[18] For this reason, a verbatim electronic or written record of the hearing is a requirement and must be made available to all parties.[19] Deficiencies in a record, however, are not dispositive of a violation of due process.[20] Instead, a violation of due process occurs when deficiencies in the record result in denying a student's effective right of appeal.

Chapter 4 discusses the conduct at the hearing.

D. Appeals from the Tribunal's Decision

A student has the right to appeal any decision of the hearing officer, panel, or tribunal, imposing a long-term suspension of **more than ten (10) days** or expulsion.[21] The appeal is made to the LBOE. The LBOE reviews the hearing record and takes the action it deems appropriate, including imposing more lenient or a harsher discipline than that imposed by the disciplinary tribunal.[22]

If the LBOE decision is adverse to the client, the attorney may file an appeal to the SBOE **within thirty (30) days** of that decision to the SBOE.[23] Either party may appeal the decision to the SBOE.[24] If the decision is appealed to the SBOE, both parties are required to file briefs with the SBOE.[25] Oral arguments occur if either party or the hearing officer requests oral argument **within ten (10) days** of the docketing.[26]

After the SBOE issues its decision, either party may then appeal to the Superior Court of the county where the LBOE is situated.[27] Attorneys should note that they must file an appeal within a specific time frame from the final decision of the tribunal, the LBOE, or the SBOE.

Chapter 5 discusses the appeals process in greater detail, including timing requirements for each appeal.

E. Students with Disabilities and Discrimination Based on Race, Color, National Origin, Gender, Sexual Orientation, Gender Identity, Disability, or Age

If a student has a suspected disability or the student's LBOE determined that the student has a disability, there may be a separate complaint and dispute resolution procedure available to that student through the Georgia Department of Education.[28]

Chapter 6 discusses the procedures available to students with disabilities.

If a child has been discriminated against based on race, color, national origin, gender, sexual orientation, gender identity, disability or age, the child/parent may file a complaint with the Office of Civil Rights of the U.S. Department of Education ("OCR"). While it is recommended that parents/guardians attempt to resolve the situation first with school administrators and next at the LBOE/SBOE level, a complaint may be filed directly with the OCR. A complaint must be filed with the OCR **within 180 calendar days** from the date that the alleged discrimination took place. More information and the OCR complaint form can be found online at http://www.ed.gov/about/offices/list/ocr/complaintprocess.html. Note that the OCR complaint is separate and apart from the tribunal process and does not impact any of the deadlines involved in the tribunal process.

II. THE STUDENT'S RIGHTS BEFORE AND DURING A TRIBUNAL

This chapter explains the rights of students before and during a disciplinary tribunal. The chapter also describes what qualifies as reasonable notice, a student's right to an attorney, what evidence may be presented by students or the board, and what the right to a timely hearing entails.

A. Source of Student's Rights in a Disciplinary Trial

Constitutional due process requirements[29] and Georgia's Fair Tribunal Act[30] govern a student's rights with respect to a disciplinary tribunal. Because a student's right to a public education is a property interest protected by the Fourteenth Amendment's Due Process Clause, it cannot be taken away for disciplinary reasons *unless* a school follows procedures complying with constitutional due process requirements.

As an initial matter, once school officials determine that a particular student's conduct requires disciplinary action by the school, the length of the prospective disciplinary action determines the due process requirements to which that student is entitled. As described above, in *Goss*, the United States Supreme Court made a distinction between suspensions lasting **ten (10) days or less** and longer-term suspensions or expulsion with respect to the due process requirements for each.[31]

1. The Fourteenth Amendment's Due Process Clause Provides Protected Property and Liberty Interests

Property and liberty interests cannot be taken away for disciplinary reasons without complying with constitutional due process requirements.[32] A student's right to public education is a property interest. A student's reputation implicates a liberty interest.

2. Georgia's Fair Tribunal Act

The Georgia Fair Tribunal Act identifies the due process requirements needed for students faced with long-term suspension or expulsion.[33] Under the Act, once school officials determine a particular student's conduct requires disciplinary action by the school, the prospective disciplinary action's length determines the student's due process protections.[34]

3. Suspensions of Ten Days or Less

Georgia courts have applied the *Goss* ruling to suspensions of **ten (10) days or less**.[35] In *Goss*, the Supreme Court held that a student facing a suspension of **ten (10) days or less** should be given:

- Oral or written notice of the charges against the student.
- If the student denies the charge, an opportunity to tell their side of the story by explaining the evidence presented against them.[36]
- As a general rule, a hearing *before* the student is removed from school.

Even these basic due process rights may be abridged in certain unusual circumstances. For instance, if the student's continued presence at school poses a danger to persons or property or an ongoing threat of disrupting the academic process, the student may be removed immediately or at least before the hearing. See Section 2.1.5 for more timely hearings.

Note that these minimum requirements may be met informally.[37]

With short-term suspensions, students may not be entitled to an attorney or to present witnesses. Because of the informal nature of the process described above for short-term suspensions, these steps may be conducted as the events transpire, making it difficult for the student to secure an attorney or present the testimony of witnesses.

4. Long-term Suspensions or Expulsion

A student facing removal from school for *more than ten (10) days* is entitled to greater due process protections.

Georgia law defines discipline requiring a due process hearing as:

- **Long-term suspension:** a suspension out of school for more than ten (10) school days but not beyond the current quarter or semester.[38]
- **Expulsion:** removal from school beyond the current quarter or semester.[39]

Under **Georgia's Fair Tribunal Act,** due process requirements for students who are facing a long-term suspension or an expulsion include:

- **Notice:** reasonable notice to all parties prior to the hearing.
- **Evidence:** the right to present and respond to evidence and witnesses.
- **Timing of the hearing**: the right to a hearing **within ten (10) school days** after the beginning of a suspension. The student can request a continuance of the hearing in writing.

B. Addressing the Notice Requirements

1. Right to Reasonable Notice

Students and their parent/guardian are entitled to "reasonable notice" prior to a hearing.[40] Under Georgia law, reasonable notice requirements include that the notice **must**:

- Be in writing.
- Be served on the student's parent or guardian, personally or by mail.[41]
- Include a statement of the time, place, and nature of the hearing.
- Include a short, plain statement of the behavior alleged as violating the school's code of conduct.
- Include a statement as to the right of all parties to present evidence and to be represented by counsel.[42]
- Be sent to all parties and to the parent or guardian of the student or student(s) involved.[43]

  NOTE: Providing notice to the student's guardian does not mean "legal guardianship." Where "guardianship" can be established by way of authority to provide care for a student, *i.e.*, a foster home, then reasonable notice to such guardian is sufficient under the regulation.[44]

- Be given before a school disciplinary hearing.[45]
- Include the names of any witnesses the school intends to call – along with the expected testimony.

Notice need not be given *directly* to the parents. For example, in one case, a notice delivered to the student's home and addressed to the parents, but delivered to the student, was sufficient notice, according to the SBOE.[46]

2. Statement of Time, Place, and Nature of Hearing

SBOE rules require that the LBOE notify parties of the time and place of the hearing.[47] If a student receives notice of the hearing, is given an opportunity to attend, and voluntarily chooses not to, conducting the hearing in the students' absence does not violate due process.[48] The LBOE has no further requirement to ensure a student attends the hearing.

If actual notice was received by the student in a letter personally served, or served by mail, on the student's parent or guardian, then the parents have received notice even if they did not actually receive the letter.

3. Short and Plain Statement of Matters Asserted

Students are entitled to receive a short and plain statement of the allegations of misconduct to be asserted during the hearing.[49] The notice must specify which provision of the code of conduct the student allegedly violated.[50] Students cannot be disciplined for offenses for which they were not specifically charged in the notice of their hearing.[51]

The SBOE does not require the notice to describe the details of the charge.[52] The LBOE may enact its own rules requiring the notice to include a description of the acts that allegedly violated the code of conduct and if it does, then the LBOE must comply with their rule.[53]

NOTE: The LBOE does not need to notify the student that the student could be expelled for their conduct. O.C.G.A. § 20-2-755 provides that a disciplinary officer, panel, or tribunal can decide to expel a student brought before it.[54]

One of the main reasons for requiring notice is to enable the student to prepare a defense. To prepare a defense, the accused student needs to know the rule or rules allegedly violated; the date, time, and place the offense occurred; and the act or actions that resulted in a violation of the rule or rules. Without notice of the conduct charged against the student, the student would be at a disadvantage when preparing their defense. The amount of information needed to prepare the defense depends on the specificity of the rule involved.

C. Right to an Attorney

Under Georgia law, a student is entitled to retain counsel to represent them in a tribunal.[55] There is no right to have an attorney appointed if the student cannot afford to retain one.[56] Most schools require advanced notice if a student will be represented by an attorney.

The school is permitted to bring counsel even if the student is not represented by counsel. They need only notify the student and their parent/guardian of their right to be represented by counsel at the hearing.

PRACTICE POINTER:

Students, or the attorney if there is one representing them, should consult local school board rules to determine the manner and timing required for notification of representation prior to the hearing.

D. Evidence to Be Presented at Hearing

The student is entitled to present evidence at the tribunal hearing. SBOE has overturned LBOE decisions made after the student was denied the right to present evidence.[57]

The notice must inform the student of their right to present evidence along with:

- Notice of the right to cross-examine the witnesses

on all issues unresolved.

- A list of witnesses' names along with their expected testimony.[58]

Denying a student the right to present a particular witness's testimony is a violation of the student's due process rights.[59]

Discovery rights: A student, the parent or guardian, or legal counsel for the student may obtain a copy of any documents relating to the hearing prior to the tribunal.[60] Georgia law is silent as to the form of a request for such documentary evidence, but the SBOE states that such a request **should be made in the form of a subpoena**.[61]

Importantly, while school boards have the power to issue subpoenas, they do not possess the power to enforce them as there are no penalties under the law for a witness failing to appear.[62]

PRACTICE POINTER:

Documentary evidence can often be obtained by submitting a letter of representation and notifying the school district that you intend to appear at the tribunal. In this letter, you should include a request for the documentary evidence that is going to be presented at the tribunal.

Obtaining the student's school records – including academic, disciplinary, and other – requires a signed release from the child's guardian.

E. Right to a Timely Hearing

Students are entitled to a timely hearing. **Georgia law defines timeliness of the hearing as "no later than ten [10] school days after the beginning of the suspension** unless the school system and parents or guardians mutually agree to an extension…."[63] There should be a clear notice to the student that there will be a hearing, including the date, time, and location of the hearing.[64]

The U.S. Supreme Court holds that "notice and hearing should precede removal of the student from school."[65] However, where the student's presence creates a continued danger to persons or property or an ongoing threat of disrupting the academic process, then the student may be immediately removed from school with the notice and hearing following as soon as practicable.[66]

Students have the right to delay the hearing, in order to prepare, including time to secure a lawyer. SBOE held that a one-day notice does not provide the student enough time to engage the services of an attorney or to secure witnesses.[67] A teacher called as a witness must have **at least three (3) days** notice prior to the hearing,[68] a requirement that suggests that the student should have at least an equivalent amount of time to prepare a response, retain counsel, and secure witnesses.[69]

Sample language Georgia Appleseed provides for requesting a continuance:

> "Greetings, Please accept this as a request for a continuance of the disciplinary hearing of STUDENT NAME that is scheduled for DATE at TIME. In order to protect STUDENT NAME'S Constitutional right to Due Process and to provide STUDENT NAME with effective assistance of counsel, we need additional time to prepare and ensure that STUDENT NAME receives adequate legal representation in this very serious matter. I understand that STUDENT NAME will not be allowed to return to the school's campus until the hearing has taken place. Please provide me with potential future hearing dates. Thank you in advance."

The request for continuance needs to be timely, meaning that it should be sent as soon after receiving hearing notice as possible.[70]

While the Fair Tribunal Act has not codified the grounds on which a student is entitled to a continuance, SBOE held that a denial for such a request should be weighed carefully before issuance.[71] A student may waive their opportunity for a continuance if they make their request after witnesses against them testify.[72]

III. PREPARATION FOR THE HEARING

This chapter provides information that will help you prepare for the hearing, including:

- How tribunals differ from other hearings with which you have experience.
- What to expect during the hearing.
- How to prepare parents and witnesses to testify on behalf of the client.
- Information on settlement agreements.

A. A Tribunal Is Different from Other Legal Proceedings

Tribunals differ from other legal proceedings in many ways:

(1) Tribunals do not follow the stringent requirements of criminal or civil proceedings.[73]

(2) **Hearsay evidence may be permissible**. Hearsay evidence was previously held to be permissible,[74] though a more recent line of cases seems to indicate, at least implicitly, that hearsay may be impermissible.[75]

PRACTICE POINTER:

If the school introduces hearsay evidence, that opens the door for you to introduce hearsay evidence. You may want to ask the hearing officer in advance of the hearing if hearsay evidence will be allowed. Have your documents, such as school records or letters from counselors/doctors/teachers, prepared to offer.

(3) The **Exclusionary Rule does not apply** to the tribunal's disciplinary hearing. Evidence obtained in violation of the 5th Amendment's protections against self-incrimination are admissible. In other words, interviews of the student prior to advising them of their Miranda rights are admissible.[76]

PRACTICE POINTER:

When you meet with your client (the student), ask who they have talked to about the accusations. Has the school principal questioned them? Or the school resource officer (SRO – police assigned to work at the school)? Or some other person? What did the student tell them? Did they put anything in writing?

(4) The **burden is on the tribunal** (the school) to establish that the student violated its policy.[77] **The burden of proof is preponderance of the evidence.**

Like other legal proceedings, **all parties are afforded an opportunity to present and respond to evidence. This includes examination and cross-examination of witnesses on all issues unresolved.**[78] Typically, the school is represented by an attorney that will present the evidence and witnesses for the school. They will cross-examine your witnesses.

NOTE: Sometimes the child is facing criminal charges in juvenile court stemming from the behavior alleged by the school. Issues relating to criminal proceedings are outside the scope of this Manual. If you are handling a matter that involves criminal proceedings, laws, or issues, you should be sure to consult with criminal law counsel regarding those aspects. If the child has not been criminally charged, but the alleged behavior involved violence, guns/weapons, or drugs, consult a criminal law expert.

B. The Student Is Your Client: Balancing Parental/Guardian Involvement

Remember, your client is the child, not the child's parents or guardians. When representing a child, addressing the concerns of the parent/guardian can be challenging and may raise ethical considerations. If the child has certain disabilities that result in a Manifestation Hearing, the attorney-client relationships may be modified.

The student's parents or guardians may attend meetings with the student. However, the attorney-client privileges do not apply to those meetings that the parent/guardians – or any other third party – participates in.

It is critical that you thoughtfully explain this situation to the student and to the parent/guardian. You want to assure the student that whatever they share with you is protected. The parent/guardian needs to understand that their support is critical to your work but that they are not the client. They should be engaged. Their presence at the tribunal is important.

As you build your relationship with your client, consider the following:

- Whether to exclude parents or guardians from the meetings with the child in order to preserve confidentiality and attorney-client privilege, particularly where there are criminal or delinquency charges pending.
- Conflicts of interest that may exist between the student and his/her parents.

NOTE: If you are engaged in the representation of a student with a disability (discussed in Chapter 6), the attorney must clarify to the student and the parent/

guardian that the student is the client. The attorney should use a detailed Engagement Letter to clarify issues of representation and potential conflicts of interest.

PRACTICE POINTER WHEN REPRESENTING CHILDREN IN CARE:

The same ethical considerations must be weighed when representing a foster child. The child is your client. The foster care worker or foster parent may want to be involved in assisting you with information, background, and providing other important resources that will aid in the defense or mitigation at the tribunal hearing. Their support is important. The child gets to decide whether they are involved in the meetings you have with the child. As mentioned above, if the foster parent or foster care worker is in any meeting you have with the child, the attorney-client privilege dissolves for that meeting.

Once you have explained the attorney-client role to the child and parent/guardian, the next important step is to ensure that the client fully understands what you have agreed to do. You should provide, in writing, an agreement between your client and you that sets forth your duties and obligations to the client.

C. Prepare the Student, Parent, and Witnesses for the Tribunal

1. Prepare the Student to Testify

Carefully consider whether the student will provide testimony at the hearing. As noted in chapter 3, section 1, the alleged behavior may result in criminal charges against the student. Any testimony given at the tribunal by the child can be used against them in a criminal proceeding.

If you decide to have the child testify, preparation of the student's testimony will be critical. To prepare, you should:

(1) Review in detail all of the events that led to the disciplinary action with the student.

(2) Obtain any documents that a student may have signed or statements the child made. If a student submitted a signed confession, you should obtain this confession and talk to the client in detail about the circumstances surrounding the attainment of the confession.

REMEMBER: School officials are given greater leeway to question students and ask them to sign "confessions." Statements may be admitted into evidence (or otherwise used) even if Miranda rights have not been read to the student.

(3) Educate the student about the cross-examination process, including that it will be conducted by the school's attorney or other representative for the school. Practice cross-examining them so they are prepared for the different sentence structure and tone the school's attorney may have.

(4) Remind them that they should not immediately answer confusing questions or questions that they do not fully understand. Instead, they should ask that that the question be asked again or stated in a different way if they do not understand it.

(5) Consider preparing the student to read a prepared statement outlining that they are sorry for their behavior and what steps they are taking to ensure good behavior in the future.

PRACTICE POINTER:

If the focus is on the punishment, consider having the child write their prepared statement in their own words – even their own handwriting. Or you may want to have them dictate it to you. Work with them. You are a team. This is a good area to show the child that you are working with – and for - them.

NOTE: Anything said at a tribunal can be used against the student in a later criminal or juvenile court proceeding. If criminal or juvenile charges are pending or might be filed, you may want to consider not having the student testify. Make sure the student understands this concern.

2. Explain Possible Consequences to Your Client

Rule 1.4 of the Georgia Rules of Professional Conduct provides that a lawyer is required to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, to keep the client reasonably informed about the status of matters, and to comply promptly with reasonable requests for information.

Thus, it is your duty to:

- Fully educate the client about the tribunal.
- Explain all the possible outcomes associated with the tribunal hearing and any related appeals.
- Make information known to the client promptly.

3. Provide Honest Advice While Considering the Client's Situation

Rule 2.1 of the Georgia Rules of Professional Conduct states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

However, the rule also provides: "In rendering advice, a lawyer may refer not only to law, but also to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."

Although Rule 1.2 provides that *both* the lawyer *and* the lawyer's client have authority and responsibility in the objectives and means of representation, the client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. This agreement of legal services should be in writing and in accordance with the rules of professional conduct.

A client is thus entitled to:

- Straightforward advice expressing the lawyer's honest assessment, even if negative to the client.
- Advice presented in a way that sustains the client's morale and provided in as acceptable a form as honesty permits.
- The power to determine the ultimate objectives of the attorney, scope of services, and other issues that involve expense and which concerns to prioritize, although the lawyer should assume responsibility for technical and legal tactical issues.
- Unrealistic client expectations are a common challenge to providing straightforward advice and sustaining morale. For example, the client may believe that the client should not be punished for the alleged behavior. In this case, you must explain to the client that if the tribunal finds that the client violated the applicable school code of conduct, the client is likely to face discipline for that behavior. Explain that your role is to:
- Provide a defense to the allegations.
- Help ensure that the procedure is fair and accords the student due process.
- If a finding of violations is made, present mitigation evidence to ensure that:
    - o Any discipline is consistent with the behavior and code violation.
    - o Any discipline is mitigated to the extent possible under the law.

If the student admits doing the behavior, you still have a duty to defend the client's due process rights and ensure that if the client is disciplined, the punishment is consistent with the behavior and mitigated to the extent possible under the law.

4. Prepare the Parent to Testify

In preparing for the tribunal hearing, assess whether you will have the parent/guardian (or foster care case worker) provide testimony. If so, you should take time to prepare the parent's testimony. As with any witness, this preparation can include creating an outline of proposed topics and walking the parent/guardian through each of the topics to be covered during their testimony.

The parent will likely need to testify about:

- The student's family history.
- Their supervision of the student.
- The parent's and student's ties to the local community, highlighting the student's contributions.
- Positive qualities, successes, and what the parent/guardian believes the student needs to be even more successful in school.

All of this serves to mitigate the discipline. The parent/guardian should also be prepared for potential cross-examination on such topics. Prepare them for items within the student's school record that may be of concern. Often there is underlying information behind concerning items. Work with the parent/guardian to minimize any potential problems with their testimony. Also, be sure to learn from them successes and positive characteristics of the student that serve as mitigation.

5. Identify and Prepare Other Witnesses to Testify

The attorney must analyze the facts of the case to determine whether it will be helpful to have other witnesses testify before the tribunal. When determining whether to have other witnesses testify, the attorney should keep in mind that such witnesses may be subpoenaed in tribunal proceedings.

Witnesses may include:

- Individuals who witnessed the events leading to the discipline, such as teachers and other students.
- Individuals with knowledge of the student, such as teachers, clergy, therapists, other community members, and, in the case of a foster child, the foster care worker.

A student's mentor, clergy, or sports leader may be a helpful witness to show that the student is a good person with good role models in their life.

In presenting this style of evidence, the overall focus of the testimony should be that the student is not a threat to the safety or order of the educational environment. Witnesses should be called who can speak to any intervening events that have occurred since the incident, e.g., the student started counseling, changed medications, or enrolled in an afterschool program. Additionally, if there were services that needed to be provided that had not yet been provided, the witnesses can share these as alternatives to out-of-school suspension.

Look for, identify, and highlight the positives in the child's

background, experience, and record.

6. Documents to Obtain

As quickly as possible, you must obtain a copy of the notice that the parent and student received, as well as any other supporting documents the school may have related to the alleged charge, including any witness statements. You should also find (often online) a copy of the school code of conduct.

Additionally, you should obtain all school records, including academic, behavioral, and special education services. The records will provide you with history and background of the student, allow you to highlight successes, and help you identify gaps in services.

7. Key Issues in Preparing the Case

Subpoenas are notices that require witnesses to appear at a hearing and provide testimony about what they know about someone's acts, behavior, or conduct. Subpoenas also are used to request the production of documents.

Each local school board determines how a subpoena will be issued and served on a witness. Local school boards must issue subpoenas to witnesses upon request by the student to ensure that witnesses for the student will be present for the hearing.[79]

Teacher witnesses must be given at **least three (3) days** advance notice of the hearing.[80]

When subpoenaing a student witness (a student other than your client), it is best practice to notify the parents/guardians of the student witness. The parents/guardians should be notified that the student is requested as a witness to testify at a hearing and that the student might miss class time as a result.

Be aware that attendance at a disciplinary hearing is not mandatory and there is currently no specific mechanism for compelling a witness who has been served with a subpoena to appear.[81]

PRACTICE POINTER:

Always interview a witness before deciding to subpoena as a witness. You want to know what they would testify about and if they are willing to testify – allowing you to assess whether to call them. For example, a school district employee may not wish to testify against their employer. Regardless of what they may have witnessed, they may ultimately not be a favorable witness for you. For any witness that you intend to call at the hearing, you want to confirm that their testimony will support your case.

8. Hearsay

While many hearings allow hearsay evidence, sole reliance on hearsay, such as written statements introduced without the declarant available to testify, is impermissible in disciplinary hearings.[82]

PRACTICE POINTER:

Be on the lookout for the school district's counsel attempting to admit written evidence into the record without bringing the actual witness to testify, i.e., student witness statements. Hearsay evidence alone cannot justify an alleged violation of the student code. Parties have a right to cross examine witnesses. In order to introduce documents, like school records, a foundation witness (like custodian of the records) is required. You should talk with the school's lawyer about the documents they intend to introduce and how they intend to offer them. You may agree to their admission by stipulation as a way to allow your own records to be admitted by stipulation.

9. Notice Issues

In your examination of the record, look to whether the school board gave "reasonable notice" of the hearing, as required by the Georgia Code. As discussed earlier, the notice *must be given to all parties and to the student's parent/guardian*. The notice must include a statement of the time, place, and nature of the hearing; a short and plain statement of the matters asserted; and a statement as to the right of all parties to present evidence and to be represented by counsel.[83]

PRACTICE POINTER:

Does the LBOE require advance notice of the student being represented by an attorney? Many do. Be sure to notify the school within the appropriate time frame of your representation.

The SBOE has reversed LBOE decisions when the punishment doesn't match with the alleged misconduct, particularly when a student was expelled from school.[84] The attorney should determine what arguments about the impropriety of the discipline can be made: Was the student acting in self-defense? Does the student lack any other disciplinary history? What was the intent behind the student's actions? What were the actions of others involved?

D. Settlement Considerations

As with any case, settlement is an option when navigating a tribunal matter. In lieu of a full-blown hearing, the student may enter into a settlement agreement with the LBOE. Once you are retained by the student, you may want to contact the attorney for the school district to see if settlement is an option.

Options for settlement include:

- A behavior contract between the student and the school administrator. This document will set forth an expectation of appropriate classroom behavior and establish regular communication between the school and the student's parent or guardian.
- Negotiating a lesser discipline, such as an in-school suspension where the student is moved to a separate classroom in the school to complete class assignments.
- School or community service instead of a suspension or expulsion. Contact Georgia Appleseed for guidance on how to identify what services may be available.

PRACTICE POINTER:

Include a settlement proposal provision that requires the school to give the student their regular class assignments during the suspension period. The school does not always do so. Failure to provide the assignments can cause the student to fall behind. Also, attempt to negotiate scheduling suspension days or detentions so that they do not conflict with tests or other difficult-to-schedule school deliverables.

IV. AT THE HEARING

This chapter discusses:

- The procedure at a tribunal hearing.
- How to effectively create a record during the tribunal.
- How to mitigate any punishment your client may receive.

A. Procedure Governing Tribunal Hearing

LBOEs have wide discretion on many of the specific procedures followed by the tribunal.[85] Procedures can differ from LBOE to LBOE. For example, many disciplinary tribunals follow a bifurcated format. In the first part of the hearing, the school and student present evidence about whether the student committed the alleged misconduct. The school district typically puts on its case first. During the second half, the tribunal hears evidence to determine the punishment. Not all LBOEs employ this bifurcated approach. You should ask other lawyers in the district that defend students in Tribunals or ask opposing counsel or the tribunal itself to explain any local procedures.

There are important legally mandated procedural requirements for hearings and tribunal decisions, including:

- The factfinder or presiding officer for the hearing will be selected from a hearing officer, a tribunal, or a panel.[86]
- All parties at a public school tribunal disciplinary hearing are given an opportunity to present and respond to evidence and to question all witnesses on all issues unresolved.[87] Witnesses may be questioned about any issues that are relevant to the allegations against the student or the appropriate discipline. It is a violation of the student's due process rights if you are not permitted to present witness testimony or to cross-examine witnesses on behalf of the student.
- Teachers may be called as witnesses at the tribunal hearing. Any teacher who is called as a witness by the school system must be given notice **at least three (3) days** before the tribunal hearing.[88]
- Parents and students (or their counsel) are given the opportunity to question all witnesses.[89]
- While the tribunal has the authority to determine if and what disciplinary action shall be taken, the decision **must be based solely on the evidence presented at the hearing**.[90]
- All parties shall receive a written decision **within ten (10) days** of the close of the hearing record.[91]

PRACTICE POINTER:

It is important that you make your arguments effectively and that you challenge the case put on by the school. Overbearing cross-examination, repeated unnecessary objections, and theatrical arguments are not at all well received in disciplinary hearings and most often do not serve the best interests of the client.

B. Creating the Record at the Tribunal: Preparing for the Appeal

If an evidentiary issue or other matter is not raised at the initial disciplinary hearing, then it cannot be raised for the first time on appeal.[92] The LBOE and SBOE will only consider information that was put on the official record during the initial hearing.[93]

Georgia law requires that there be a verbatim electronic or written record of each hearing made available to all parties.[94] This right is rooted in the student's right of appeal.

Deficiencies in a record, however, are not dispositive of a violation of due process.[95] Due process is violated when deficiencies in the record result in the denial of a student's effective right of appeal.[96]

PRACTICE POINTER:

If there are documents the hearing officer/panel refused to admit, present them provisionally for the record for appeal. Offer to the tribunal all records that may be useful on appeal that you intend to admit. The SBOE will not allow you to amend your appeal to add any new documents that were not presented at the tribunal hearing.

PRACTICE POINTER:

Once the tribunal hearing has concluded, request an electronic or written recording of the disciplinary hearing and copies of all documents submitted during the hearing.

C. Mitigating the Discipline

If a student has committed the alleged offense, then regardless of the reason for committing the offense, it is likely that the student will be subject to discipline. You should argue to reduce the level of discipline imposed.

The attorney can and should be prepared to present relevant evidence and testimony, including:

- Any witnesses that may be able to testify to the student's community activities and other local involvement.
- Testimony of the parents/guardian about what steps they are taking to help rehabilitate the student to ensure the behavior does not happen again.
- A statement or testimony of the student taking responsibility for their actions and apologize, if appropriate. (Remember, even these statements can be used against the student in a criminal proceeding.)
- Statistical data relevant to the district, school, grade level, gender, and nationality of your student.

Georgia Appleseed has many resources that may assist you, including **"Find My School's Suspension Rate,"** available at: https://gaappleseed.org/initiatives/toolkit/suspension-rate.

If data shows that this particular district/school has a history of disproportionally suspending and/or expelling students of color, you should argue that point during your closing statement. It serves as a counter to the recommendation presented by the district. Then offer an alternative to the district's recommendation.

V. AFTER THE TRIBUNAL HEARING: APPEAL PROCEDURES

This chapter discusses possible appeals to tribunal decisions that are not favorable to your client. The first appeal is to the LBOE. The decision of the LBOE can then be appealed to the SBOE. The student may seek judicial review in Superior Court to appeal an SBOE decision. This chapter will discuss each appeal in detail, including timing issues on appeals.

A. Appeal of Tribunal Decisions to the LBOE

After a disciplinary hearing, the student may appeal an adverse tribunal ruling to the LBOE, including whether the discipline imposed outweighs the severity of the violation.[97]

All parties shall receive a written decision within **ten (10) days** of the close of the hearing record. If appealing the tribunal decision is appropriate, then the appellant must file a written notice within **twenty (20) days** from the date of the tribunal's decision.[98]

The time calculations for appeals include holidays and weekends. If the twentieth (20th) day falls on a holiday or weekend, the appeal must still be submitted *prior* to that holiday or weekend.

The local school superintendent may suspend the disciplinary action imposed by the tribunal during the pendency of the appeal to the LBOE.[99] Generally, counsel for a student will send a request to suspend the disciplinary action along with the filed notice of appeal.

After receipt of the appeal, the LBOE shall review the record and render its decision in writing within **ten (10) days** (excluding weekends and public and legal holidays) from the date the LBOE receives notice of the appeal.[100]

Oral arguments: Local practice varies from school district to school district regarding oral arguments as part of the appeal to the LBOE. Some school districts do not allow oral argument and resolve appeals in executive session after reviewing the record. Other school districts entertain brief oral presentations. The practitioner should determine the local practice by contacting the school board attorney or conferring with other experienced practitioners in the jurisdiction.

While the LBOE may take any action on the appeal that it deems appropriate,[101] **the LBOE may not impose a harsher discipline than the one imposed by the tribunal *unless* the LBOE provides a written explanation of the harsher discipline.**[102]

B. Appeal of LBOE Decision to the SBOE

The student may appeal the decision of the LBOE to the SBOE by filing a written appeal to the local school superintendent within **thirty (30) days** after the LBOE's decision.[103] Unlike an appeal of the tribunal's decision, **the decision of the LBOE will not be suspended during the period of appeal to the SBOE unless the LBOE or the vice chairperson for the appeals of the SBOE so orders.**[104]

The appeal must:

- Be in writing.
- "Distinctly set forth the question in dispute, the decision of the [L]ocal [B]oard, and a concise statement of the reasons why the decision is complained of . . . ."[105]
- Include a transcript of the LBOE hearing that is certified as correct by the local superintendent, at the expense of the appellant.[106]

Each district will have provisions for obtaining a transcript free of charge in the case of an indigent client.[107] If this is an issue, you should check with the district for the appropriate procedures.

Within **ten (10) days** after receipt of the appeal, the superintendent must submit to the SBOE:

- A copy of the appeal.
- The transcript of evidence and proceedings.
- The decision of the LBOE.
- Any other matters relating to the appeal.[108]

After a determination that the appeal is in proper form, the appeal shall be docketed before the hearing officer of the SBOE at the "earliest practical time."[109]

Appellants must request oral arguments within **ten (10) days** of the date that the SBOE dockets the appellant's case on its calendar.[110] It is critical that the attorney pay close attention to any communications from the SBOE.

The Appellant Brief is due to the SBOE within **twenty (20) days** of docketing.[111] **The Appellee Reply Brief** is due **forty (40) days** from the date of docketing to file its brief.[112]

The SBOE shall not receive new evidence in hearing the appeal and may not consider any question not raised specifically in the written appeal or the statement of contentions.[113]

The SBOE shall issue a written decision within twenty-five (25) days after the hearing and shall notify the parties in writing of its decision and of their right to appeal the decision to the Superior Court of the county in which the LBOE is located.[114] **The SBOE and Superior Court apply the "any evidence" rule to the LBOE's decision.** The LBOE decision will be upheld "so long as evidence exists that supports the [LBOE's] decision…[and] the record [does not show] the [L]ocal [B]oard grossly abused its discretion

or acted arbitrarily or contrary to law."[115] Accordingly, the scope of appellate review by the SBOE is quite narrow and only rarely does the SBOE reverse LBOE actions.

C. Appeal of SBOE Decision to Superior Court

An aggrieved party may appeal an adverse ruling by the SBOE to Superior Court. The appeal must be filed within **thirty (30) days** from the decision of the SBOE.[116]

Within **ten (10) days** of the filing of such appeal, the State School Superintendent shall transmit a certified copy of the record, transcript from the LBOE, the LBOE decision, and all orders of the SBOE to the Superior Court.[117]

As with the SBOE, the Superior Court applies the 'any evidence" rule to the LBOE's decision.[118] The LBOE decision will be upheld "so long as evidence exists that supports the [LBOE's] decision…[and] the record [does not show] the [L]ocal [B]oard grossly abused its discretion or acted arbitrarily or contrary to law."[119]

If the student receives an unfavorable ruling from the Superior Court, the attorney may file an application for discretionary review with the Georgia Court of Appeals.[120]

VI. STUDENTS WITH DISABILITIES

Special considerations and procedures apply for students with a disability or who may have a disability. This chapter provides only a summary review of issues that arise in connection with representation of students with disabilities.

Should you have a client with a disability or a suspected disability, it is *imperative* that you seek out additional resources when representing your client. When you receive information from Georgia Appleseed regarding a referral, it should include whether there is an IEP for the child. Err on the side of inclusion by always including in your discovery request from the school any IEP or related documents.

In-depth information about the issues addressed in this chapter can be found at: http://www.doe.k12.ga.us/Curriculum-Instruction-and-Assessment/Special-Education-Services/Pages/default.aspx.

Please reach out to Georgia Appleseed if you have any questions or need additional resources.

A. Overview of Protections

The Individuals with Disabilities Education Act ("IDEA"), a federal law, imposes certain limitations on the imposition of school disciplinary actions on a student who has a disability, as well as on those students whom the school knew or should have known were suspected of having a disability.[121]

IDEA requirements are implemented in Georgia pursuant to **Georgia Department of Education ("GaDOE")** Rule 160-4-7-.10.

Under IDEA, the school is required to provide to each student who has a disability (a "special education student") an individualized education program (IEP) (as defined below).

An individualized education program ("IEP") is a written statement that:

- Describes the student's disability.
- Establishes goals for the student's education.
- Lists the special education and related services to be provided to the student.[122]

Unless the IEP specifically provides otherwise, a special education student is subject to the student code of conduct and may be disciplined in accordance with the terms of the code subject to the limitations discussed below.[123]

Georgia must comply with IDEA requirements for students who are deemed "suspected to have a disability" **and** about whom the school knew or should have known might have a disability. **If a student is not a special education student but is suspected to have a disability, then a written request for an evaluation for services should be made as soon as possible.**

PRACTICE POINTER:

In all cases, you want to obtain copies of all school records. With students with disabilities, you will request all IEP/504/Behavioral Intervention Plans. Review all school records closely as they are a source for identifying a child who has not received special education services but should. Therapy, counseling, and medical records are critical as well.

B. Manifestation Determination

If a special education student has violated the code of conduct and the misconduct is a manifestation of the disability, the student may only be removed from their current placement and be assigned to an alternative education setting or be suspended for **up to ten (10) days**, with few exceptions.[124]

1. "Change of Placement"

If the special education student violates the school's code of conduct

> **and** the school seeks to remove the student from their current placement for **more than ten (10) consecutive days**
>
> **or** if the student has been removed for multiple similar actions for periods that cumulatively **exceed ten (10) days**,
>
> **then** the removal is considered a "change of placement."

If a change of placement occurs, then the local educational agency, the student's parent/guardian, and the relevant members of the student's IEP team must meet **within ten (10) days** of the change of placement. The school can provide you information about who is on the IEP team.

At the meeting, the team members review all relevant information to determine whether student's conduct was a **"manifestation of the child's disability."**[125]

2. "Manifestation of the Child's Disability"

A student's conduct is considered a manifestation of the child's disability if the conduct was:

- Caused by or had a direct and substantial relationship to the student's disability, **or**
- Is the direct result of the local educational agency's failure to implement the IEP.[126]

PRACTICE POINTER:

If your client has a disability, it is very important that you ask for a manifestation determination. If your client has a suspected disability, then it is equally important that you notify the school district of the suspected disability *in writing* and ask for the appropriate testing *before any further discipline is imposed*. In other words, if it is suspected the child has a disability and the school has set a tribunal hearing absent a manifestation determination, request that the tribunal hearing be postponed and a manifestation determination review hearing scheduled.

If the IEP team determines that **the student's behavior was a manifestation** of their disability, then the IEP team is required to (1) conduct a functional behavioral assessment (if one has not already been conducted) and (2) develop and implement a behavioral intervention plan for the student.[127]

If a behavioral intervention plan is already in place, the IEP team is required to review and modify it as needed to address the behavior.[128]

The student may then return to their initial placement unless:

- The parents and local educational agency agree otherwise,[129] **or**
- The student possessed a weapon or illegal drugs or inflicted serious bodily injury while at school.[130]

If the IEP team determines that the student's behavior was not a manifestation of their disability, then the relevant disciplinary procedures applicable to students without disabilities may be applied to the student with the disability in the same manner and for the same duration.[131] In other words, if the finding is the student's behavior is not a manifestation of their disability, the tribunal hearing process may be triggered.

PRACTICE POINTER:

Make sure the student has a behavior intervention plan that addresses how specific behavior problems should be addressed. Additionally, behavior intervention plans that have been drafted for different behaviors need to be amended to address the current behavior that has triggered this manifestation.

C. Due Process Requirements

The GaDOE rules provide that a parent/guardian must be notified of a change of placement decision *on the day* that such a decision is made.[132] The notice must include (a) detailed information concerning the procedural safeguards related to such actions; (b) provide several pieces of information about the basis for the decision; and (c) notice of parent's rights with respect to the decision.[133]

D. Appeal of Manifestation Determination

The manifestation determination finding may be appealed by either the parent/guardian of a student with a disability who disagrees with a decision regarding placement or a manifestation determination or an educational authority (e.g., school) that believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others.[134] The student appeals by filing a due process hearing request pursuant to Rule 160-4-7-.12[135] and seeking a due process hearing before an independent administrative law judge ("ALJ") or hearing officer.

The ALJ, after hearing all the evidence, may return the student to the original placement if the ALJ finds a violation of GaDOE rules or finds that the conduct was a manifestation of the student's disability.[136] Alternatively, the ALJ may order a change in placement to an interim alternative educational setting for no more than **forty-five (45) days** upon finding that maintaining the current placement is substantially likely to result in harm to the student or others.[137]

While the appeal is under review, the student must remain in the interim alternative educational setting until either a decision has been made or the 45-day time restriction expires, whichever comes first.[138]

A final decision of an ALJ may be challenged by any aggrieved party by the filing of a civil action in any state court of competent jurisdiction or in a federal district court.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 also requires special treatment in connection with disciplinary actions proposed for disabled children as separately defined under that statute. A detailed discussion of the differences between the IDEA provisions above and Section 504 is beyond the scope of this Manual but practitioners representing students with disabilities should determine whether the client is covered by IDEA, Section 504, or both.

FOOTNOTES

[1] O.C.G.A. § 20-2-735(a).

[2] O.C.G.A. § 20-2-751.5.

[3] O.C.G.A. § 20-2-736(a).

[4] *Id.* ("A signature or confirmation of receipt is available in writing, via electronic mail or facsimile, or by any other electronic or other means as designated by the [LBOE].").

[5] O.C.G.A. § 20-2-736(b).

[6] O.C.G.A. § 20-2-735(d).

[7] *Goss v. Lopez*, 419 U.S. 565, 581 (1975). While *Goss* is cited throughout this Manual, the Committee recognizes that Courts have refused to apply *Goss* in certain circumstances due to changes in the applicable laws since 1975. Nonetheless, for purposes of this Manual, *Goss* serves as a reliable source for explaining some of the relevant fundamental concepts.

[8] O.C.G.A. § 20-2-754(b)(1).

[9] O.C.G.A. § 20-2-751.6(b).

[10] O.C.G.A. § 20-2-752.

[11] Ga. Rules & Regs., Georgia State Board of Education, (hereinafter "GaDOE") §160-4-8-.15(1)(j)

[12] GaDOE § 160-4-8-.15(1)(h)(1)(v) (noting that the Tribunal Training Course that Tribunal members must complete includes a session on members being an "independent, neutral arbiter").

[13] O.C.G.A. § 20-2-754(b)(1).

[14] O.C.G.A. § 20-2-754(b)(3).

[15] O.C.G.A. § 20-2-755.

[16] O.C.G.A. § 20-2-754(b)(3).

[17] O.C.G.A § 20-2-1160(e) (confining appellate review to matters in the record).

[18] *See Sharpley v. Hall Cty. Bd. of Educ.*, 303 S.E.2d 9, 10 (Ga. 1983) (noting that the state board's review "shall be confined to the record").

[19] O.C.G.A. § 20-2-754(b)(5).

[20] *See, e.g., B.M. v. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2009-16 (Jan. 2009) (holding that although there were several instances in which the transcript appeared inaudible, the deficiencies in the record did not change the record testimony and therefore did not affect the student's due process rights). (Note that this case was eventually considered on appeal by the Georgia Supreme Court, which held that the LBOE did not "adequately consider[] the evidence of justification presented in this case…." *Henry County Bd. of Educ. v. S. G., 301 Ga. 794, 802 (2017).)*

[21] O.C.G.A § 20-2-752(3); See each school district's rules regarding procedures for initiating an appeal and the corresponding deadlines and timing.[15] O.C.G.A. § 20-2-755.

[22] O.C.G.A. § 20-2-754(d).

[23] O.C.G.A. § 20-2-1160(b).

[24] *Id.*

[25] *GaDOE § 160-1-3-.04(4)(g) (noting that the appealing party has 20 days to file a brief and the appellee has 40 days).*

[26] GaDOE § 160-1-3-.04(4)(h).

[27] GaDOE § 160-1-3-.04(4)(j).

[28] GaDOE § 160-4-7-.12.

[29] *See Goss*, 419 U.S. at 574-76.

[30] O.C.G.A. § 20-2-754.

[31] *Goss*, 419 U.S. at 574-76.

[32] *Id.*

[33] O.C.G.A. § 20-2-754.

[34] O.C.G.A. § 20-2-753.

[35] *See, e.g., Gamble v. Ware Cty. Bd. of Educ.*, 561 S.E.2d 837, 842 (Ga. Ct. App. 2002).

[36] *Goss*, 419 U.S. at 581.

[37] In *Wayne Cty. Bd. of Educ. v. Tyre*, 404 S.E.2d 809, 811 (Ga. Ct. App. 1991), the Georgia Court of Appeals held that in cases where the maximum disciplinary outcome is a suspension of less than 10 days, due process requirements are satisfied when school officials questioned a student at the location where the incident occurred and offered the student an opportunity to explain the next day.

[38] O.C.G.A. § 20-2-751(5).

[39] O.C.G.A. § 20-2-751(2).

[40] O.C.G.A. § 20-2-754(b)(1).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *M.R. v. Fulton Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2012-61 (Aug. 2012) (holding that the group home that the student was placed was the student's guardian even though the Fulton County Department of Family and Children Services was the student's legal guardian because the school's records indicated that a representative from the group home was the contact for the student and the student appeared with a representative from the group home at the hearing).

[45] *Goss*, 419 U.S. at 579 (internal quotation omitted) (noting that at a minimum, due process requires that the adjudication "be preceded by notice").

[46] *Harvey R. v. DeKalb Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1986-38 (Nov. 1986).

[47] GaDOE § 160-1-3-.04(3)(a)(1).

[48] *E.W. v. Douglas Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2006-02 (Sept. 2005).

[49] O.C.G.A. § 20-2-754(b)(1).

[50] In *J.G. v. Walton Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1999-56 (Nov. 1999), the LBOE failed to identify any provision in the code of conduct that the student violated. Because the school board did not provide the particular provision the student violated, the SBOE reversed the LBOE's decision in part and concluded the LBOE did not have any policies governing the student's behavior in question.

[51] *E.W. & N.W. v. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2001-36 (Jun. 2001).

[52] In *V.N. v. Pierce Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2003-22 (Mar. 2003), the notice of hearing stated the student was charged with battery but did not describe the details of the alleged battery. The SBOE ruled the notice was sufficient and permitted the student to present a defense to the battery charge.

[53] *Roshon E. v. Burke Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No.1994-54 (Nov. 1994) (finding a notice that only listed the rules that the student allegedly violated improper when the LBOE policy required a description of the acts of that violated a rule and a summary of the evidence expected to be used in support of the charges).

[54] *Damon P. v. Cobb Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1993-09 (Apr. 13, 1993) ("One of the main reasons for notice is to permit the accused to prepare a defense.").

[55] O.C.G.A. § 20-2-754(b)(1).

[56] *Brisendine v. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1978-36 (Feb. 1979) (holding that due process only requires notice of right to counsel).

[57] *See C.W. v. DeKalb Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2000-15 (Jun. 2000) (holding that a student's due process rights were violated when a school board prevented the student from conducting a full cross examination of witnesses); *see also B.G. v. Pike Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2001-13 (Jan. 2001) (finding that a Local Board denied a student due process when it conducted a hearing of other students before making a decision regarding the student because the student was prevented from having an opportunity to cross examine witnesses that the Local Board considered when ruling on the student's case).

[58] O.C.G.A. § 20-2-754(b)(3). *See K.S. v. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2006-42 (Mar. 2006) ("Due process requires a notice of…the names of witnesses and their expected testimony.").

[59] *See A.M. v. Forsyth Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2009-64 (Sept. 2009) (reversing a decision because the student did not have an opportunity to examine and cross-examine anonymous witnesses regarding unresolved issues).

[60] O.C.G.A. § 20-2-754(e).

[61] *L.W. v. Gwinnett Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2000-3 (May 2000). See GaDOE § 160-1-3-.04(3) (codifying the requirement that school boards issue subpoenas to witnesses at the request of a student).

[62] *McIntosh v. Gordy,* 707 S.E.2d 609 (Ga. Ct. App. 2011).

[63] O.C.G.A. § 20-2-754(b)(2). *But see I.F. v. Glynn Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2015-02 (Nov. 2014) (The Act is not violated when a student is in custody by the juvenile justice system and the suspension and hearing take place after the student is released from custody.)

[64] *J.P. v. Polk Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2018-06 (Feb. 2018).

[65] *Goss*, 419 U.S. at 582.

[66] *Id.* at 582-83.

[67] *See M.C. v. Peach Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2013-69 (Aug. 2013).

[68] O.C.G.A. § 20-2-754(b)(4).

[69] *M.C.*, Ga. State Bd. of Educ. Case No. 2013-69.

[70] In *N.L. v. Brooks Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1999-73 (Apr. 2000), the denial of a student's request for a continuance to give the student's attorney time to prepare a defense violated the student's due process rights because "[t]he right to a hearing is meaningless if an adequate defense cannot be prepared because of the shortage of time."

[71] *Id.*

[72] *J.W. v. Henry Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1997-47 (Mar. 1998).

[73] *Harvey D. v. Rabun Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1989-8 (Jun. 1989).

[74] *Id.*

[75] *Z.B. v. Bartow Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2008-44 (May 2008) (ruling that a school system did not meet its burden of proof when it only presented hearsay evidence).

[76] *V.F. v. Fulton Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2003-24 (Mar. 2003) ("[T]he courts have not held that there is any requirement for a *Miranda* warning in any administrative proceeding.").

[77] *Owens v. Burke Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1978-6 (Jun. 1978).

[78] O.C.G.A. § 20-2-754 (b)(3).

[79] GaDOE § 160-1-3-.04(3).

[80] O.C.G.A. § 20-2-754(b)(4).

[81] *McIntosh v. Gordy,* 707 S.E.2d 609 (Ga. Ct. App. 2011).

[82] *Z.B. v. Bartow Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2008-44 (May 2008). See also, *C.M. v. Muscogee Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2002-22 (Mar. 2002), the school board reversed the decision of the Tribunal on the grounds that only hearsay evidence was presented – written statements by the alleged victims. Also, in *A.M. v. Forsyth Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2009-64 (Sept. 2009), the school board found that a student's due process rights were violated because the student did not have the opportunity to cross-examine the witnesses who proffered written statements.

[83] O.C.G.A. § 20-2-754(b)(1).

[84] *See, e.g., Michael C. v. Houston Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1992-19 (Sept. 1992) (noting that expulsion is an extreme punishment that should only be used in extreme circumstances); *D.H. v. Brooks Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1994-15 (May 1994) (holding that a Local Board's decision to expel a student that was "arbitrary and capricious" when the student's conduct did not involve weapons or attempting to endanger the teacher).

[85] O.C.G.A. § 20-2-752.

[86] O.C.G.A. § 20-2-754(c).

[87] O.C.G.A. § 20-2-754(b)(3).

[88] *Id.* at (b)(4).

[89] *Id.* at (b)(3).

[90] *Id.* at (c).

[91] *Id.*

[92] O.C.G.A. § 20-2-1160(e).

[93] *See Sharpley v. Hall Cty. Bd. of Educ.*, 303 S.E.2d 9, 10 (Ga. 1983) (noting that the state board's review "shall be confined to the record").

[94] O.C.G.A. § 20-2-754(b)(5).

[95] *See, e.g., B.M. v. Henry Cty. Bd. of Educ.,* Ga. State Bd. of Educ. Case No. 2009-16 (Jan. 2009) (holding that although there were a number of instances in which the transcript appeared inaudible, the deficiencies in the record did not change the record testimony and therefore did not affect the student's due process rights).

[96] *In Dax C. v. Floyd Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1991-12 (Aug. 1991), the student asserted that the LBOE violated its rules for the hearing because it did not provide him with a complete copy of the transcript of the hearing. The SBOE found, however, that the appeal does not concern any factual disputes and all the parties agree on the factual background about the incident, thus the omissions did not result in denying the student an effective right of appeal.

[97] O.C.G.A. § 20-2-754(c).

[98] *Id.*

[99] *Id.*

[100] O.C.G.A. § 20-2-754(d).

[101] *Id.*

[102] *B.J.D. v. Walker Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 2000-23 (Aug. 2000) (quoting *Chauncey Z. v. Cobb Cty. Bd. of Educ.*, Ga. State Bd. of Educ. Case No. 1992-42 Mar. 11, 1993).

[103] GaDOE § 160-1-3-.04(4)(d).

[104] *Id.* at (4)(l).

[105] O.C.G.A. § 20-2-1160(b).

[106] *Id.*

[107] GaDOE § 160-1-3-.04(4)(c).

[108] O.C.G.A. § 20-2-1160(b).

[109] GaDOE § 160-1-3-.04(4)(f).

[110] GaDOE § 160-1-3-.03(4)(h).

[111] GaDOE § 160-1-3-.04(4)(g).

[112] *Id.*

[113] GaDOE § 160-1-3-.04(4)(i); O.C.G.A. § 20-2-754(d). *See Ransum v. Chattooga Cty. Bd. of Educ.*, 242 S.E.2d 374, 376 (Ga. Ct. App. 1978) (internal citation omitted) ("Neither the state board nor the superior court is authorized to consider a matter de novo from the local board.").

[114] GaDOE § 160-1-3-.04(4)(j).

[115] *Henry Cty. Bd. of Educ. v. S.G.*, 804 S.E.2d 427, 432 (Ga. 2017).

[116] O.C.G.A. § 20-2-1160(c).

[117] *Id.*

[118] *Ransum*, 242 S.E.2d at 376 (stating that both the SBOE and the superior court sit as appellate bodies).

[119] *Henry Cty. Bd. of Educ.*, 804 S.E.2d at 432.

[120] O.C.G.A. § 5-6-35(a)(1).

[121] 20 U.S.C. §§ 1400-1487. *See id.* § 1401(3)(A) (defining "disability" as it applies under IDEA).

[122] GaDOE § 160-4-7-.06(1).

[123] GaDOE § 160-4-7-.10(1)(b).

[124] 20 U.S.C. § 1415(k)(1)(B); GaDOE § 160-4-7-.10(2)(b).

[125] 20 U.S.C. § 1415(k)(1)(E); GaDOE § 160-4-7-.10(3)(a).

[126] 20 U.S.C. § 1415(k)(1)(E)(i)-(ii); GaDOE § 160-4-7-.10(3)(a).

[127] 20 U.S.C. § 1415(k)(1)(F); GaDOE § 160-4-7-.10(4).

[128] 20 U.S.C. § 1415(k)(1)(F)(ii); GaDOE § 160-4-7-.10(4)(a)(2).

[129] 20 U.S.C. § 1415(k)(1)(F)(iii).

[130] 20 U.S.C. § 1415(k)(1)(G); GaDOE § 160-4-7-.10(4)(a)(2). Importantly, if the student's conduct involved any one of these three actions, then the school may remove the student for no more than 45 days without regard to whether the student's behavior was a manifestation of the student's disability. *Id.*; GaDOE § 160-4-7-.10(5).

[131] 20 U.S.C. § 1415(k)(1)(C); GaDOE § 160-4-7-.10(2)(b).

[132] GaDOE § 160-4-7-.10(6)(a).

[133] GaDOE § 160-4-7-.09 (establishes procedural safeguards).

[134] GaDOE § 160-4-7-.10(8)(a).

[135] *Id.*

[136] *Id.* at (b)(1)(i).

[137] *Id.* at (1)(ii).

[138] GaDOE § 160-4-7-.10(9)(a).