

Student Discipline

Suspension, Expulsion, and the Delicate Balance
between FOIA and FERPA in a Student Hearing

Angela C. Artherton
Friday, Eldredge & Clark, LLP
3350 South Pinnacle Hills Parkway, Suite 301
Rogers, Arkansas 72758
(479) 695-6044 Direct
(417) 592-9433 Cell
(501) 537-2934 Facsimile
aartherton@fridayfirm.com

Angela C. Artherton



FRIDAY | **ELDREDGE
& CLARK** LLP

3350 South Pinnacle Hills Parkway, Suite 301

Rogers, Arkansas 72758

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Student Discipline



Types of Discipline

Types of Discipline

- Academic Sanctions
- Withholding Diplomas
- Exclusion from extracurricular/athletic activities
- Corporal punishment
- Suspension
- Expulsion

Academic Sanctions

- Lowered grade
- Reduced credit for completed work
- Automatic class failure

Academic Sanctions

It is a violation of substantive due process to discipline a non-academic violation (smoking, dress code, etc.) with an academic consequence.



What about tardies?

Withholding Diplomas

Same – academic recognition should reflect academic achievement.

If a student earns a diploma, it should not be withheld even if the student's conduct warrants discipline.

Withholding Diplomas

However....

Most courts agree that participation in graduation ceremonies is a privilege and not a right.

Exclusion from Extracurricular or Athletic Activities

Schools, generally, have wide latitude to exclude students from extracurricular activities for failure to meet eligibility requirements or as a penalty for inappropriate behavior.

Exclusion from Extracurricular or Athletic Activities

- Exceptions to the general rule:

- No sufficient advance notice

- Special circumstances

Boyd v. Board of Directors of McGehee School District,
612 F.Supp. 86 (E.D. Ark. 1985).

- Arkansas Activities Association rules



Can schools impose
penalties for athletes
who kneel during the
national anthem?

Corporal Punishment

- Banned in almost 2/3 of states
- Remains legal in Arkansas
Ark. Code Ann. § 6-17-112
- But only for schools...

Corporal Punishment

“The use of corporal punishment is contrary to humane standards of care and professional correctional practices and as such is **absolutely prohibited** by an employee of the Department of Correction.”

DOC Reg. § 004.00.2-830 (emphasis added).

Corporal Punishment in Arkansas

47⁰% of Arkansas public school students attend a school that reports using corporal punishment.

Corporal Punishment in Arkansas

Although more white students (54%) than black students (38%) attend such schools,

black students were three times as likely to receive corporal punishment in school as white students.

Corporal Punishment in Arkansas

Even when statistics are leveled for reported misbehavior, boys are two to three times as likely as girls to receive corporal punishment.



Corporal Punishment in Arkansas

Arkansas children with disabilities are 50% more likely to experience corporal punishment at school as compared to their non-disabled peers.

Gershoff, E.T., & Font, S.A. (2016), Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy. Soc. Policy Rep., 30, 1. Available at www.ncbi.nlm.nih.gov/pmc/articles/PMC5766273/ (data from the 2011-2012 academic year).

Corporal Punishment

- To be valid, corporal punishment must:
 - Be authorized by the school district's written student discipline policy;
 - Be implemented in accordance with the policy;
 - Be used as a method of correction;
 - Not be motivated by anger or malice;
 - Be suitable for the age, sex, and physical condition of the child;

Corporal Punishment, Cont'd

- To be valid, corporal punishment must:
 - Be appropriate for the offense;
 - Not be cruel or excessive;
 - Be consistent with the terms of any applicable IEP – DANGER ZONE! – and
 - Not be used on a child who is intellectually disabled, non-ambulatory, non-verbal, or autistic. Acts of 2019, Act 557, § 1 (eff. July 24, 2019).

Suspension

Suspension is dismissal from the learning environment for a period of time that does not exceed ten (10) days.

Suspension

School board policy can authorize suspension of a student for a maximum of ten (10) school days for violation of the school's written discipline policies, subject to appeal to the superintendent or designee.

Ark. Code Ann. § 6-18-507(c)(1)(A).

Suspension

But, schools “shall not use out-of-school suspension or expulsion for a student in kindergarten through grade 5 (K-5) except in cases when the student’s behavior:

- A. Poses a physical risk to himself or herself or to others; or
- B. Causes a serious disruption that cannot be addressed through other means.”

Ark. Code Ann. § 6-18-507(b)(2) (Acts of 2019, Act 640, § 10, eff. July 24, 2019).

Suspension

Some form of due process is required for ANY disciplinary exclusion from educational services.

What process, specifically, is due depends on the length and nature of the exclusion.

Suspension

- Even for a multi-day, out-of-school suspension, due process can be spontaneous and informal, so long as the student receives:
 - Verbal or written notice of the charges;
 - An opportunity to explain, deny, or admit the charges or evidence; and
 - A decision based on the evidence presented.



Expulsion

A superintendent may recommend the expulsion of a student for more than ten (10) days for violation of the district's written discipline policies, **subject to appeal to the board of directors and to the requirements of the IDEA.**

Expulsion

A public school... that expels a student under § 6-18-507 **shall offer** to the expelled public school student digital learning courses or other alternative educational courses for which the student may receive academic credit that is **at least equal to** the credit the expelled public school student may have received if he or she was still enrolled...

Ark. Code Ann. § 6-16-1406(g) (Acts of 2019, Act 709, § 1, eff. July 24, 2019).



Hearing Procedures

Hearing Procedures

- Adequate Warning
- Evidence
- Right to Counsel

Adequate Warning

School disciplinary rules must provide students with adequate warning of prohibited conduct, but need not be as detailed as criminal statutes must be.

Bethel School District v. Fraser, 478 U.S. 675 (1986).

Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

- “Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.”
- Two teacher warnings that speech containing sexual innuendo was “inappropriate” and that delivering it could have “severe consequences.”



Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

- Speech was delivered.
- Student was suspended for 3 days and barred from delivering graduation speech.

Was the student adequately warned?

Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

The speech:

I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for ASB vice-president—he'll never come between you and the best our high school can be.

Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

- The U.S. District Court for the District of Washington ruled in favor of the student!
- It found that the school violated the student's 1st and 14th Amendment rights.
- It reversed the suspension, prohibited the school from barring the student's graduation speech, and awarded the student money damages plus attorneys' fees.

Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

The 9th Circuit Court of Appeals affirmed the district court decision.

It held that the discipline violated the student's First Amendment right to freedom of speech because the school could not show that the speech was disruptive of the educational process.

Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

“Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.”

Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

In a 5-2-1 decision, SCOTUS reversed, finding that the school had authority to discipline the student, and that the rule against “obscene, profane language or gestures,” combined with the teachers’ statements to the student before he gave the speech, constituted adequate warning.

Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

Moral of the Story??

Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

Make sure the policy invoked clearly warned the student not to engage in the conduct for which she will be disciplined!



Adequate Warning

Bethel School District v. Fraser, 478 U.S. 675 (1986)

Bonus Lesson:

- Speech was given April 26, 1983
- Student spoke at graduation that year without incident
- Yet litigation continued for 3½ years at least!

**Involve your lawyer before the
expulsion hearing!**

Hearing Evidence

- The student has the right to testify and to present own evidence;
- The student should NOT be made to testify;
- All parties may question witnesses;
- Best practice not to allow formal cross-examination;

Hearing Evidence

- The rules of evidence do not apply;
- Evidence presented at the hearing must relate directly to the specific charges for which the student has been given notice;
- But, a student's prior conduct can be considered for the purpose of determining an appropriate penalty; and
- Hearsay alone typically will be inadequate – get corroboration!

Right to Counsel

- Allowing students to be represented by counsel is not required by statute in Arkansas.
- BUT... courts in other states have held that, as a matter of fundamental fairness, students should be permitted to have representation at a hearing where expulsion is a possibility.
- Best Practice: allow students to have counsel, at least to the extent the district will use an attorney.

Discipline of Special Education Students



Does the Student Have an IEP?

Short Term Discipline

- An IEP student who has not been exempted from the District's discipline rules is subject to the rules.
- An IEP should identify any needed exceptions to the discipline rules.
- Generally speaking, an IEP student can be **cumulatively suspended for up to 10 school days.**

Long Term Discipline

- 10 days, total, whether consecutive or not
- Constitutes a change in placement
- Must follow a manifestation determination



Manifestation Determination

Manifestation Determination

- Must be conducted by the IEP team within 10 days of the change of placement
- Purpose is to determine whether the student is being disciplined for disability-related behavior

Manifestation Determination

- Is the misconduct:
 - Caused by or directly related to the student's disability? or
 - The result of the district's failure to implement the IEP?
- If yes to either question, the student cannot be disciplined for the misconduct and must be returned to his or her current educational placement.

Manifestation Determination

BUT...

Even if the misbehavior *is* a manifestation of the student's disability, the IEP group still can determine that a change in placement is needed for the student and can modify the IEP.

Manifestation Determination


- Is the misconduct:
 - Caused by or directly related to the student's disability? or
 - The result of the district's failure to implement the IEP?
- If no to both questions, the student can be disciplined as any other student would be.

Unilateral Change of Placement

A SPED student can be placed in an alternative educational setting, for up to 45 days, regardless of the outcome of the manifestation determination, if the student:

- Carries a dangerous weapon to school or to a school function;
- Possesses, uses, sells or attempts to sell illegal drugs while at school or at a school function; or
- Inflicts serious bodily injury upon another while at school or at a school function.

Threats or other dangerous behavior are not enough.



If the student does not have
an IEP, does the incident
trigger a need for a referral
for evaluation for special
education eligibility?

Discipline of Special Education Students

All of the IDEA's protections are available to a child without an IEP if, at the time of the misconduct, the school has “prior knowledge” that the child has a disability.

What constitutes prior knowledge?

Discipline of Special Education Students

Prior Knowledge:

- The student's parent has requested an evaluation of the child;
- The parent has expressed in writing a concern that the child may need special education; or
- A teacher has expressed a specific concern about the student's behavior pattern(s) directly to the special education director or other supervisory personnel.

Discipline of Special Education Students

No Prior Knowledge:

- The student already has been evaluated and was found not to be a child with a disability;
- The parent has not permitted the school to evaluate the student for eligibility; or
- The parent has refused special education services for the child.

The Basics of FOIA & FERPA



The Family Education Rights and Privacy Act (FERPA)

What is FERPA?

- Federal law protecting the privacy of student education records;
- Applies to all educational institutions & agencies that receive funds under any U.S. Dept. of Ed. program; and
- Gives parents certain rights to their children's education records. The rights transfer to the student when he or she turns 18 or attends a postsecondary institution.



FERPA Rights

- FERPA protects the rights of parents and eligible students to:
 - Inspect and review education records;
 - Seek to amend education records; and
 - Consent to the disclosure of information from education records, except as specified by law.
- Education records are records that are (1) directly related to a student, and (2) maintained by a school (or someone acting for the school), including:
 - Student transcripts;
 - Disciplinary records;
 - Immunization records; and etc.

FERPA Rights

Schools may disclose personally identifiable information (PII) from students' education records to outside parties, including law enforcement, **only if** the parent or the eligible student has provided prior written consent.

FERPA Rights

- Personally Identifiable Information (PII):
 - Direct Identifiers
Name, SSN, Student ID #, etc.
 - Indirect Identifiers
DOB, demographic information, etc.
 - “Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.”

Exceptions to FERPA

- School Law Enforcement Unit (LEU) records
- Directory Information
- School Official
- Safety Exception
- Audit/ Evaluation Exception
- Judicial Order or Subpoena



To What Extent Can Video of an Incident be Viewed or Copied?

Viewing a Recording

- The right to inspect is triggered only for parents whose students are the cause for the retention of the recording; and
- Parents of students “inadvertently” caught in the recording do not have the right to inspect it; but
- The parents of students who become involved in the incident have the right to inspect.

Viewing a Recording – Example

A video of a fight between students A and B, in which student C, who was not involved in the fight, was shoved by student A accidentally, and in which other students who happened to walk past or observe the fight are incidentally included.

Who can view the video?

Viewing a Recording – Example

- The parents of students A, B, and C may view the video without having to receive permission from the other students' parents.
- None of the parents of the “incidental” students have the right to view the video nor do they have to give their permission for the viewing of the video by the “involved” students' parents.

Copying a Recording

- The school district is NOT obligated to give a copy of the recording to the parent or their lawyer!
- But if you choose to provide a copy, for all involved students (A, B, and C) other than the student whose parent requested the copy, you MUST either:
 - Redact their faces; or
 - Receive written permission from their parents.
- Otherwise the recording should not be copied.



The Freedom of Information Act (FOIA)

FOIA – Freedom of Information Act

- Purpose is to ensure that electors are fully advised of the activities and decisions of their officials;
- Popularly referred to as the “Sunshine Law”



FOIA – Freedom of Information Act

- Three major sections of FOIA:
 - Public Records
 - Public Meetings
 - Executive Sessions

Public Records

Writings, recorded sounds, films, tapes, electronic or computer-based information or data compilations in any medium required by law to be kept or otherwise kept and which constitute a record of the performance or lack of performance of official functions

Public Records

- All records maintained in public offices or by public employees within the scope of their employment are presumed to be public records.
 - The presumption can be rebutted if the records do not reflect the performance or lack of performance of official functions, though.
- Whether a record is a public record depends on its content.
 - *Pulaski Cty. v. Ark. Democrat-Gazette, Inc.*, 371 Ark., 217 (2007).

Public Records

- FOIA covers “records” not information;
- No need to create new records to comply;
- If records are part public and part exempt, redact exempt material and provide the rest;
- E-mails or letter sent to private email addresses or private residences of public officials are subject to FOIA if they involve the public’s business; and
- A public entity can be the custodian of public records even if it does not have physical possession of them, as long as it has “administrative control” of the records.

Public Records True or False

A board member must save and maintain his or her school board related e-mail.

☐

True

☐

False

Public Records True or False

A board member must save and maintain his or her school board related e-mail.

☐

True

☒

False

Public Records True or False

A board member must save and maintain his or her school board related e-mail?

Absolutely not! If there is an active FOIA request that covers an email you have, then you must produce and not delete. Otherwise, active inbox management is a good practice that will save you from serial FOIA requests.

Public Records - Exception

Ark. Code Ann. § 25-19-105(b)(2)

(b) It is the specific intent of this section that the following **shall not be deemed to be made open to the public** under the provisions of this chapter:

(2) Medical records, adoption records, and **education records as defined in** the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g [FERPA], unless their disclosure is consistent with the provisions of that act.

Open Public Meetings

Except as otherwise specifically provided by law, **all meetings, formal or informal, special or regular, of the governing bodies of all municipalities, counties, townships, and school districts and all boards, bureaus, commissions, or organizations of the State of Arkansas, except grand juries, supported wholly or in part by public funds or expending public funds, shall be public meetings.**

Open Public Meetings

25-19-106(d)(1) – NEW in 2019

(d)(1) All officially scheduled, special, and called open public meetings **shall be recorded** in a manner that allows for the capture of sound including without limitation:

(A) A sound-only recording;

(B) A video recording with sound and picture; or

(C) A digital or analog broadcast capable of being recorded.

(2) A recording of an open public meeting shall be maintained by the public entity for a minimum of one (1) year from the date of the open public meeting.

(3) The recording shall be maintained in a format that may be reproduced upon a request under this chapter.

(4) Subdivisions (d)(1) and (2) of **this section do not apply to:**

(A) **Executive sessions**; or

(B) Volunteer fire departments.

FOIA Multiple Choice

What kind of FOIA issue is a text conversation between board members?

- a. Public records issue
- b. Open meetings issue
- c. Executive session issue
- d. None of the above
- e. All of the above

FOIA Multiple Choice

What kind of FOIA issue is a text conversation between board members?

- a. Public records Issue
- b. Open Meetings Issue
(sometimes)

FOIA Multiple Choice

What kind of FOIA issue is a text conversation between board members?

a. Records Issue

Written communications between public officials are always subject to a proper document request.

FOIA Multiple Choice

What kind of FOIA issue is a text conversation between board members?

b. Open Meetings Issue (sometimes)

A text conversation between members of the board is an open meetings issue if the text messages are sequential or circular messages that appear to be moving toward a decision.

Executive Sessions

Ark. Code Ann. § 25-19-105(c)

(c)(1)(A) Except as provided under subdivision (c)(6) of this section, an executive session will be permitted only for the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.

(B) The specific purpose of the executive session shall be announced in public before going into executive session.

Executive Sessions

Ark. Code Ann. § 25-19-105(c), Continued

(c)(3) Executive sessions must never be called for the purpose of defeating the reason or the spirit of this chapter.

(c)(4) No resolution, ordinance, rule, contract, regulation, or motion considered or arrived at in executive session will be legal unless, following the executive session, the public body reconvenes in public session and presents and votes on the resolution, ordinance, rule, contract, regulation, or motion.

The Delicate Balance Between FOIA & FERPA in a Student Disciplinary Hearing

Is FERPA an Exemption to FOIA?

As to public records? Yes. Ark. Code Ann. § 25-19-105(b)(2) provides:

“It is the specific intent of this section that... education records as defined in [FERPA]... shall not be deemed to be made open to the public under the provisions of this chapter... unless their disclosure is consistent with the provisions of that act.”

Is FERPA an Exemption to FOIA?

As to open meetings? Unclear.

- FERPA applies to education records.
- A meeting is not a record.

What about executive sessions?

Is FERPA an Exemption to FOIA?

As to open meetings? Unclear.

Ark. Code Ann. § 25-19-106 provides:

(c)(1)(A) ... an **executive session will be permitted only for** the purpose of considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee. [But,]

(c)(6) ... a public agency may meet in executive session for the purpose of considering, evaluating, or discussing matters pertaining to... municipality owned utility system security...

HOWEVER...

Executive Session for a Student Hearing

Ark. Code Ann. § 6-18-507(d)(3)

A school board meeting entertaining an appeal shall be conducted in executive session if requested by the parent or guardian of the student provided that after hearing all testimony and debate, the board of directors shall conclude the executive session and reconvene in public session to vote...

Executive Session for a Student Hearing

Ark. Code Ann. § 6-18-507(d)(2)

(A) After hearing all testimony and debate on a suspension, expulsion, or appeal, the board of directors may consider its decision in executive session without the presence of anyone other than the board members.

- This means that neither the superintendent nor the school attorney may be in the room.

(B) At the conclusion of an executive session, the board... shall reconvene in public session to vote on the suspension, expulsion, or appeal.

Is FERPA an Exemption to FOIA?

Open Meetings Bonus Round

Does the provision of the open meetings statute that requires open meetings be recorded and made publicly available apply to student hearings?

Is FERPA an Exemption to FOIA?

Open Meetings Bonus Round

Arguably, no, the recording requirement would not apply to require a student hearing be recorded.

A recording of a student hearing is an education record, and education records are an exemption to the public records provisions of FOIA.

But, this is not entirely clear because the statutes appear to contradict each other.



Is FERPA an Exemption to FOIA? Open Meetings Bonus Round

**So, what are best practices for
student hearings?**



Best Practices for Student Hearings

If the parent requests the hearing be conducted in an executive session per Ark. Code Ann. § 6-18-507(d)(3), do so, and do not record the hearing.*



Best Practices for Student Hearings

- If the parent does not request the hearing be conducted in executive session, then record the evidentiary portion of the hearing, but do not make it publicly available as it is an education record subject to FERPA.
- For deliberation, board members only should go into an unrecorded* executive session, but then reconvene in an open, recorded and publicly available session to vote.



QUESTIONS?



THANK YOU!!

ANGELA C. ARTHERTON

Business & Education Litigation

Office: (479) 695-6044

Cell: (417) 592-9433

aartherton@fridayfirm.com



FRIDAY | **ELDREDGE
& CLARK** LLP

www.FridayFirm.com



400 West Capitol Ave. Suite 2000 | Little Rock, AR 72201
3425 North Futrall Dr. Suite 103 | Fayetteville, AR 72703
3350 South Pinnacle Hills Pkwy. Suite 301 | Rogers, AR 72758