

Considerations regarding for students found guilty

By the New York State
Association of School Attorneys



In the fall of 2016, a shooting occurred in an elementary school in Townville, S.C., injuring three and killing a young boy. The perpetrator, a 14-year-old middle school student, had been suspended from school after bringing a machete and a hatchet to school.

The case conjures the kinds of questions that administrators in any school may confront:

- What is the appropriate consequence for a student who brings a weapon to school?
- What level of risk to school security is posed in any given case?
- What kinds of responses would be most effective in ensuring school safety?
- What kinds of responses would be in the best interest of the student who brought the weapon to school?

While many weapons are seized in schools (4,468 in New York City alone between July 2022 and March 2023), others go undetected. Nationally, about 7% of high school students report on surveys that they were threatened or injured with a weapon on school property during the previous 12 months, according to the National Center for Education Statistics (see bit.ly/47Rn6iL).

This article will discuss legal decisions involving discipline and considerations when determining an appropriate penalty for bringing a weapon to school.

Laws and policies affecting disciplinary penalties

Pursuant to the Commissioner's Regulations, schools in New York State set forth in their Code of Conduct the penalty to be imposed for various infractions. The wording of the Code of Conduct can be critical if a student or their family challenges a disciplinary penalty.

Sometimes, laws point to specific penalties for certain offenses, depending on the circumstances and local policies. For instance, Section 3214 of the Education Law allows schools to have a policy authorizing a suspension of "not less than one calendar year" on any public school pupil who is found to have brought a firearm to a public school or possessed a firearm in school. However, the superintendent of schools may impose a suspension of less than one year on a case-by-case basis. This state law is based on a mandate in the federal Gun-Free Schools Act of 1994 (GFSA). Under the GFSA, schools that receive any federal aid under the Elementary and Secondary Education Act of 1965 are directed to have this one-year suspension requirement in place and also to develop policies requiring referral to the criminal justice or juvenile delinquency system for any student who brings a firearm or weapon to school.

Notably, students with disabilities are exempted from the automatic one-year suspension. A student with a disability found to be possessing a weapon on school grounds may be removed from school and placed in an interim alternative educational setting (IAES) for a period of up to 45 school days without regard to whether the behavior is a manifestation of the child's disability, consistent with Part B of the Individuals with Disabilities Education Act.

In addition to facing discipline in schools, older students who bring weapons to school may be subjecting themselves to the juvenile justice system. Under section 265.01-a of the New York Penal Law, a person is guilty

of criminal possession of a weapon on school grounds when they knowingly possess a rifle, shotgun or firearm in a school building, on school grounds or on a school bus without the written authorization of such school. When a local police department makes an arrest after a student is found possessing a firearm on school grounds, school administrators may be asked by criminal defense counsel or the family to postpone the student disciplinary hearing pending resolution of the criminal investigation and proceeding.

Loss of instruction is a potential downside of suspension. While school districts are obligated to provide certain minimum hours of "alternative instruction" to students who are serving a suspension, an average of 23 days of instruction are lost per 100 students, per year, due to disciplinary suspensions in New York State, according to a 2021 report to the State Education Department by Renee Ryberg, senior research scientist at Child Trends. Disproportionality is another issue: Ryberg found that 9% of students who were suspended were white, and 91% were students of color.

Penalties can be subject to review by the commissioner of education

Students or their families can appeal disciplinary penalties to the school board and further to the state commissioner of education (and even further to the courts if they allege a violation of law or a constitutional right). As a result, the commissioner reviews dozens of disciplinary penalties every year.

While the commissioner sometimes finds procedural errors or other flaws that invalidate a suspension, long-term suspensions stemming from the possession of a weapon or threats involving weapons have been upheld by the commissioner in numerous instances:

- 30 hours of community service in lieu of five days of suspension for bringing a knife to school.
- A one-year suspension for a student who brought a knife to school and chased another student with it.
- A suspension from approximately Sept. 19 through the remainder of the school year for possession of a "karambit" knife.
- Approximately three months for threatening statements about possessing a weapon, although the penalty was dismissed on other grounds.
- A suspension for up to 25 school days for a student who stated that he was "going to just blow this place up" and warned other students not to "come to school on Friday." (This decision was upheld by the Appellate Division of state Supreme Court, Third Department).
- One calendar year for a student who threatened to "shoot up" a high school on a specific date.
- A one-year suspension for a high school student who brought a stun gun to school and activated it in the school cafeteria (dismissed on other grounds).
- A one-year suspension for a student who brought an air gun to school (dismissed on other grounds).
- A suspension from approximately Nov. 5 through the end of the school year for making bomb threats.

A recent decision, *Appeal of E.R.*, involved a high school student who was aware that non-students with weapons were on campus but did not inform administrators. He was found guilty of escorting nine non-students, some of whom carried weapons later found by school authorities, into the boys locker room of the school gym without permission. One non-student carried a TASER and pepper spray, while another had a butterfly knife and a TASER. The student reported that the non-students approached him in the lunchroom after gaining access to the building and threatened to hurt him if he did not help them navigate the building. The student informed classmates about individuals carrying weapons on campus but did not tell any administrator or teacher. The district imposed a suspension of about six months on the student.

On appeal, the commissioner ordered the school district to expunge references to the student's short- and long-term suspensions. The commissioner found that the record showed that the district produced competent and substantial evidence that the student engaged in one of the infractions he was charged with – endangering the safety, morals, health, or welfare of himself/others. However, the commissioner reasoned that, based on the district's Code of Conduct, the student had no obligation to inform school administrators of the strangers in the school building. Noting that the district was primarily responsible for ensuring the security of the school building, the commissioner stated that the district should not shift such responsibility to the student.

The commissioner concluded that absent a duty to inform adults, the student's culpability was minimal. She said mitigating evidence (mainly the student's testimony that he was scared) rendered the district's penalty "excessive" and "shocking to the conscience." The Commissioner emphasized that "[t]he length of a student suspension must be proportionate to the severity of the offense."

The ruling in *Appeal of E.R.* may have implications for school districts. Because the commissioner relied on the wording of the school's Code of Conduct to evaluate the appropriateness of the penalty, it follows that school districts should be deliberate in spelling out what will justify a long-term suspension in the Code of Conduct. Specifically, school boards should examine their disciplinary policies as they relate to:

- Possession of weapons or firearms on school grounds, including imitation or look-alike weapons and firearms.
- Knowledge of possession of weapons or firearms on school grounds.
- Duty to report instances of violence or weapons possession to school officials.

At the same time, the penalty in any disciplinary case must be tailored to the unique facts of that case. Although "zero tolerance" policies with automatic penalties for certain offenses were in vogue in decades past, the commissioner has interpreted such policies as inconsistent with a school's mission to support educational opportunities for children, including those found guilty of disciplinary offenses.

A bill in the state Legislature called the Solutions Not Suspension Act would limit suspensions to a maximum of 20 days. Reservations about the bill in its current form have been expressed by NYSSBA and the New York State Council of School Superintendents. (see bit.ly/3uBDFRs). Superintendents describe their ability to impose a long-term suspension as a tool for working with families and ensuring that students in trouble get the help they need.

g disciplinary penalties y of weapons offenses

They say that disciplinary cases sometimes reveal that the student is in need of professional counseling to handle anger, develop social skills and/or deal with family stress or other psychological issues. It is common to meet with parents to offer the student and the family two options: (1) sign a “contract of conduct” in which the student and a parent commit to certain actions such as a number of visits to a professional counselor, or (2) a long-term suspension. (See “Superintendents brief Regents on school discipline challenges,” On Board, Feb. 20, 2023.)

Restorative practices as an alternative to traditional discipline

Education Commissioner Betty Rosa and Regents Chancellor Lester Young have encouraged school districts in New York State to seek to minimize their use of suspensions in light of patterns of racial disproportionality and evidence that students who are suspended for more than five days tend to show little or no improvement, academically or behaviorally. The State Education Department has offered training in a structured dialogue approach called restorative justice (see <https://bit.ly/46sDdly>).

However, the effectiveness of restorative practices is debated in the academic community. “Educators often become frustrated because the restorative practices they use don’t seem to fix behavior,” according to an article entitled, “Don’t Give Up on Restorative Practice!” in the November 2023 issue of ASCD’s *Educational Leadership* magazine. (ASCD is a national organization formerly known as the Association for Supervision and Curriculum Development.)

According to a presentation at NYSSBA’s 2023 Pre-Convention School Law Seminar, a list of criticisms of restorative practices has been compiled by Mikhail Lyubansky, who teaches courses in restorative justice at the University of Illinois, Urbana-Champaign (see bit.ly/3sVhViU). The criticisms include:

- Restorative justice places unfair expectations on the victims/targets to engage with the individual who caused the harm.
- Actions required of teachers are beyond the scope of classroom teaching.
- Agreements made are not followed.
- Students are not held accountable for their actions.
- The process is time-consuming and emotionally draining.

A recent edition of the ASCD Connect podcast entitled, “Can Restorative Justice Be Saved?” includes suggestions for educators who feel frustrated with restorative practices. Listen to it at bit.ly/46H1JQ9.

Considerations for school administrators

America’s history of school violence (Columbine, Sandy Hook, Parkland and Uvalde, among many others) colors any discussion of how schools should respond when a student brings a weapon or firearm to school. Members of every community expect school officials to keep students safe and hold students accountable for actions that put others in harm’s way. But determining the appropriate penalty is not an easy task, particularly in light of the possibility that a penalty will be overturned by the commissioner, as in *Appeal of E.R.*

Some important considerations for school administrators include:

- 1. Protecting school safety.** Every disciplinary case involving a weapon involves a judgment regarding the degree of threat the student poses. Nikolas Cruz had a lengthy disciplinary record in Broward

Definition of a ‘weapon’ and a ‘firearm’ under New York State Education Law

Pursuant to the Education Law, a weapon is a “device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length.” A firearm on the other hand is defined as “(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.”

Section 3214 of the Education Law allows schools to impose a suspension of “not less than one calendar year” on any public school pupil who is found to have brought a firearm to or possessed a firearm at a public school.

A superintendent of schools, district superintendent of schools or community superintendent is given the authority to modify such penalty for each student on a case-by-case basis, subject to review by the board of education and the commissioner of education.

– Sarah Gyimah, Volz & Vigliotta, PLLC

County, Florida, and school officials banned Cruz from wearing a backpack after he made threats to students in Parkland, Fla. He later shot and killed 17 people and injured 17 others at Marjory Stoneman Douglas High School. Andrew Pollack asserts that lenient school discipline and poor decisions by school officials contributed to the death of his daughter, Meadow, in his book, *Why Meadow Died: The People and Policies that Created the Parkland Shooter and Endanger America’s Students*.

2. Risk of legal liability and litigation expenses.

Situations involving weapons in schools can lead to significant liability exposure for public school districts. In civil lawsuits stemming from mass school shootings, plaintiffs often expound liability theories centered on negligence, such as a duty to warn, the foreseeability of the criminal acts of third parties, negligent supervision of students, failure to intervene, noncompliance with safety measures and established protocols, etc. Even if a school is ultimately not found legally liable for the actions of a school shooter, the costs of defending such claims present a significant financial exposure for districts – as well as a major distraction from the business of educating young people.

3. Impact, if any, on certain student populations.

The disparate treatment of persons of color, particularly African Americans, throughout all aspects of the criminal justice and juvenile justice systems has been widely documented and publicly debated. In the public school context, the implementation of disciplinary policies that are neutral on their face may inadvertently contribute to the disparate treatment of such racial and ethnic groups. The New York State Attorney General and the Office of Civil Rights in the U.S. Department of Education have threatened legal action and demanded changes in individual school districts in New York State when statistics show that the race of suspended students is disproportionate to the overall school population. On the other hand, allowing a given student to remain in school despite threatening behavior or inappropriate comments may encourage even more disruptive (if not dangerous) behavior, with implications for the safety of students and faculty. School administrators must approach each disciplinary issue on a case-by-case basis.

4. Security protocols.

When imposing discipline for a student’s possession of a weapon in schools, school

administrators often review the security protocols to determine whether any additional measures need to be taken to minimize the recurrence of the same kind of event. Some school districts rely on hardware such as walk-through metal detectors, hand-held scanners, wands, fences and/or video cameras. It is common to limit access to a sole point of entry (often with a locked vestibule for added security), and many schools have screening systems for all visitors. However, a single unlocked or propped open door may render such measures inadequate.

5. Whether to have law enforcement personnel on school grounds.

Increased safety concerns have caused many schools to consider stationing law enforcement officers or private security personnel on their campuses. Some schools participate in the School Resource Officer (SRO) program, a national program that places police officers in schools to perform various duties, including traditional law enforcement functions. However, “a poorly implemented SRO program can exacerbate the school-to-prison pipeline,” according to a study funded by the U.S. Department of Education (bit.ly/47XDdv9). A study funded by the U.S. Department of Justice states: “(A) frequent mistake made by SRO programs is that they lack a detailed written definition of the roles and responsibilities to guide officers in their duties and govern school administrators in the use of SROs.” (See bit.ly/46L0fUS)

School officials must respond appropriately on a case-by-case basis when a student is found to have brought a weapon onto school grounds. While long-term suspensions have many drawbacks, school administrators should not rule them out in their pursuit of providing a safe, welcoming educational setting for all students and staff of the school district. School boards should ensure that school policies help administrators address all student disciplinary matters in a fair and non-discriminatory way.



Sarah Gyimah

Members of the New York State Association of School Attorneys represent school boards and school districts. This article was written by Sarah Gyimah of Volz & Vigliotta, PLLC.