

# 37H PRACTICE GUIDE



## A Guide for Juvenile Court Practitioners

*for clients who are facing exclusion  
from school due to drugs, weapons or  
assault on education staff*



# *Before we get started....*

This practitioner guide is written in chronological order of the lifecycle of a school exclusion case under G.L. c.71, § 37H (“§ 37H”).

It includes references to statutory requirements as well as practical guidance.

This guide covers only offenses related to drugs, weapons or assault on education staff under § 37H.

## **Slow Things Down...**

In all school discipline cases, timelines are accelerated. For example, a hearing before a principal may happen the day following an incident.

**Consider requesting a postponement** of the disciplinary hearing so that you have time to receive and review evidence and student record.

You must balance the need to be prepared for and be present at the disciplinary hearing with the desire to quickly resolve this disciplinary action and return the student to school.



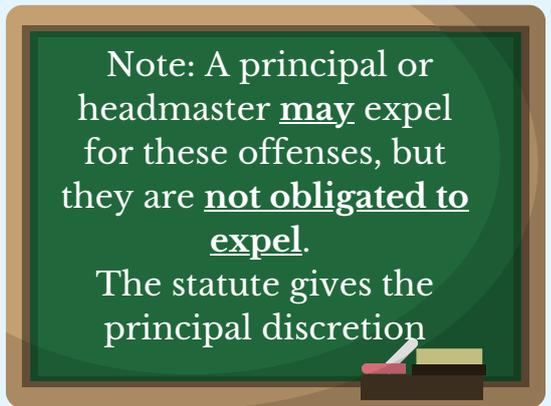
# Let's get going!

We'll now walk you through a case.

## 1. THE STATUTE

**MGL Ch 71 § 37H** allows a principal or headmaster to expel a student for possession of a dangerous weapon or drugs or who has assaulted educational staff on school premises or at a school-sponsored or school-related event.

- a. "**Drug**" is defined in MGL c.h 94C & MGL c. 71 § 37H(a).  
This still includes marijuana. \*contact EdLaw to discuss possible marijuana arguments.
- b. "**Weapon**" is defined by the principal.  
See *Doe v. Superintendent of Schools of Worcester*, 421 Mass. 117, 128 (1995), and see the school's code of conduct.
- c. "**Education staff**" is defined in the statute as a "principal, assistant principal, teacher's aide or other educational staff."  
This does not include a school police officer.



## 2. PARENT RECEIVES NOTICE OF THE INCIDENT

- Confirm parent received written notice of the incident.**  
**Review** the notice for content. Ensure proper notice of disciplinary hearing was given. Raise any issues with the school either before or at the hearing and note for potential appeal!

If the parent did not receive any notice, find out exactly what happened. Students cannot be excluded without a hearing, and there must be proper notice. The student may be entitled to return to school (but there are risks) or you could reach out to the school to find out what is going on. Contact EdLaw if you would like to discuss strategies.

The notice must include:

- Date and time of hearing before the principal**
- Notice of right to bring an attorney (at family expense)**
- Inform parent of right to present evidence and witnesses**
- Language: Notice was provided in language of the home.**

### 3. PREPARING FOR THE HEARING

- **Meet with your client** and, if possible, parent or guardian.
  - a. Explain the process to the student and parent.
  - b. Get contact information and give them yours.
  - c. Discuss next steps (mainly, document request.)
  
- 1. Determine if the incident falls within an offense defined by §37H, including the requirement that the event happened on school property or at a school-sponsored event.
- 2. Determine if charges have been filed as a result of the incident or are likely to be filed. If you are not the student's defense attorney, **contact the student's defense attorney** and coordinate efforts. If the child doesn't have a defense attorney yet, please contact EdLaw.
- 3. Determine if the student has a disability. This includes students on an IEP, 504 plan, being evaluated for an IEP or 504 plan or if the school had knowledge that the student had a disability before the incident.
  - a. If the student has a disability, it will change the procedures and due process protections. See below section on School Discipline & Students with Disabilities.

- **Get signed records release.**  
**Get client (and parent/educational decision maker, if student is under 14) to sign a release at the first meeting.**

**Ask EdLaw for a sample release.**

#### NOTE:

If student is in DCF custody, DCF has general ed. signing rights. For students with disabilities, figure out who has the special education signing rights! Ask EdLaw for a copy of the education rights chart if you don't already have one.

603 CMR 23.01(2) allows students ages 14-17 to have concurrent rights with their parents to access their school records.

- **Send executed release to school with a letter requesting documents.**  
You can send this by email to the school principal, but also send another way. If you have already been in contact with the school's attorney, you can also send it directly to the attorney. Make sure to keep copies and get confirmation of delivery. For mail, use certified mail with a return receipt. **Include:**

- a. **Copy of release**
- b. **Request for specific documents:**
  - All notices and reports of the incident and disciplinary action
  - Investigation of the incident (if one occurred)
  - Past behavior records or discipline records
  - Grades
  - Attendance records
  - Any special education records
  - Correspondence (including emails) between parent and the school system.
- c. **Your expectations that the documents be returned before the hearing as required to protect students' due process rights and/or student handbook.**

**\*Contact EdLaw for a sample request letter.**

- **Notify the school that you are an attorney.** Before you attend the school hearing or speak to school personnel, make sure you inform them that you are an attorney and you will be attending the disciplinary hearing. Ask if they have an attorney and if they want you to communicate directly with them.
  - a. **This can be done in conjunction with the records request or separately.**
  - b. The school may send an attorney to the hearing, especially in situations involving special education and/or MetCo students.
  - c. Use the school attorney to your advantage, find out what their client is most concerned about, what they want or what they want from your client.
  
- **Postpone hearing, if necessary.**
  - a. If you need additional time or if you cannot make the scheduled date, request a hearing postponement.
  - b. Remember that the longer you postpone a disciplinary hearing, the more time the student may spend out of school. Always advocate for the student to remain in school pending the hearing, **or to get tutoring set up if a student has to wait more than 10 days for the hearing.**
  
- **Locate and review school code of conduct.**
  - a. Review both M.G.L. c. 71 § 37H and school code of conduct prior to hearing. Many code of conducts/student handbooks are available on the school's website.
  
- **Consider the ways race may have played a factor in the decision to seek an expulsion**

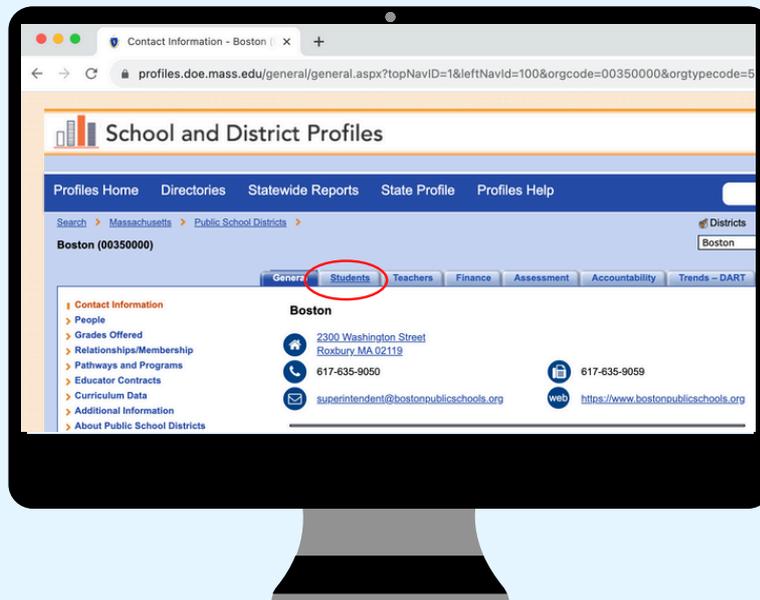
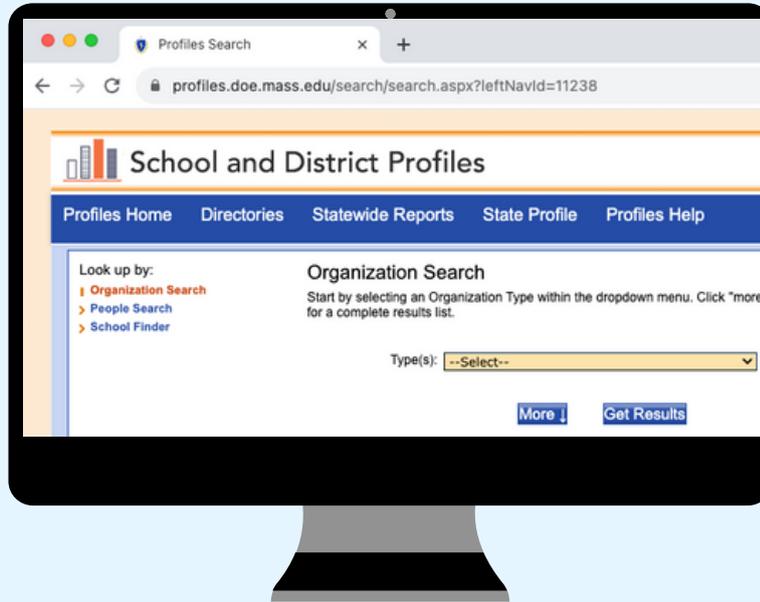
### Note on Racial Bias:

Consider ways race may have played a factor in the decision to seek a suspension or expulsion.

- Talk to your client about their experience in school and whether they see bias as a contributing factor in the possible discipline.
- Review the school records for racially charged language such as “aggressive,” “threatening,” or “violent.”
- Review relevant articles on racial bias in perception among adults.
- Review discipline data for the school and district. (See below for details).
- Consider sending this sample letter to the school prior to the hearing to raise your concerns about racial bias in their disciplinary actions.

# How to review discipline data for your school & district

1. Search for the school district [here](#).
2. Once you select the school district profile, click on the student tab
3. Select “school discipline” on the left hand side of the webpage
4. It will show discipline rates by race and disability status
5. For gateway city data, also see [this site](#).
6. You can also review federal data at [U.S. Dept. of Ed. Civil Rights Data](#)



**Boston (00350000)** Boston

2022

General **Students** Teachers Finance Assessment Accountability Trends – DART

2021-22 Student Discipline Data Report  
All Offenses

Offense: All Offenses

The Student Discipline Data Report reports the disciplines that public school students in Massachusetts received for the offenses committed, as reported by school districts in the School Safety Discipline Report (SSDR). For more detailed information on the SSDR collection, see the documents at the [School Safety Discipline Report \(SSDR\)](#) page on the ESE website.

[More about the data.](#)

Student Group	Students	Students Disciplined	% In-School Suspension	% Out-of-School Suspension	% Expulsion	% Alternate Setting	% Emergency Removal	% Students with a School-Based Arrest	% Students with a Non-Arrest Law Enforcement Referral
All Students	50,036	1,853	0.4	3.4	0.0	0.0	0.2	0.0	0.0
English Learner	16,229	355	0.2	2.1	0.0	0.0	0.0	0.0	0.0



## 4. HEARING

### Opportunity to be heard should include:

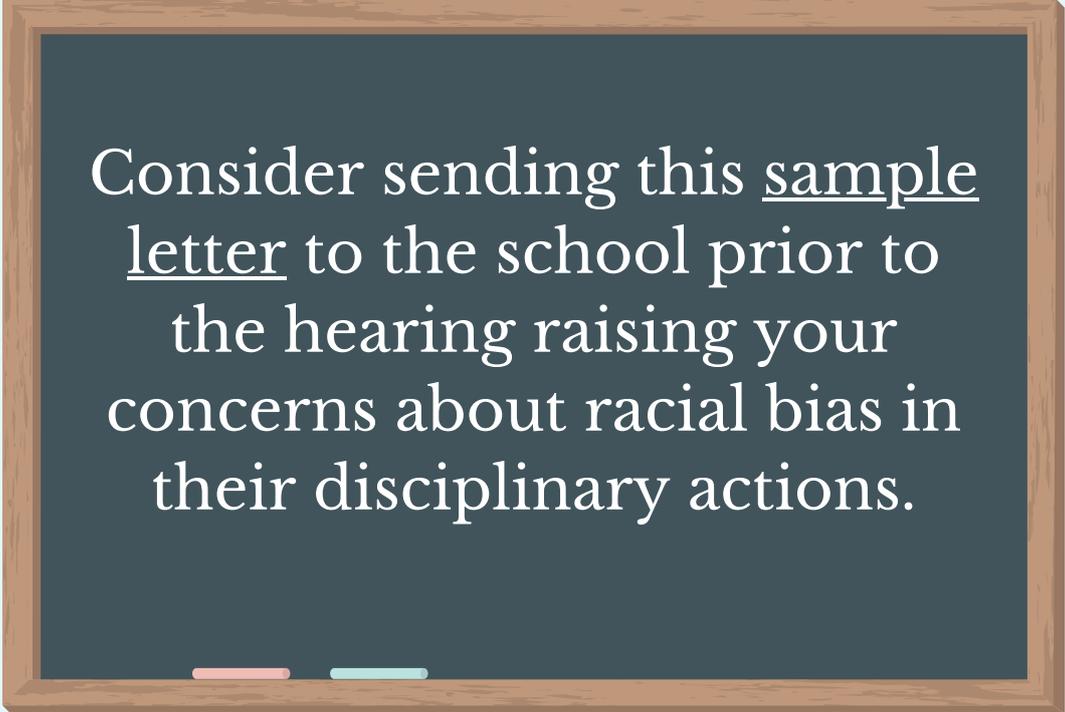
- In-person hearing (See § 37H(c) and/or student handbook)
- Audio-recorded, to preserve a record for appeal (See due process argument under *Goss v. Lopez* and/or student handbook; *see also Nicolas B. v. Sch. Comm. Of Worcester* 412 Mass. 20 (1992)).
- **Hearing** run by the principal (may not be delegated) (See § 37H and/or student handbook)

### Suspension or expulsion is DISCRETIONARY:

The principal is authorized to permanently expel a student who commits one of these infractions. The principal is NOT REQUIRED to do so.

Consider the ways race may have played a factor in the decision to seek an expulsion

- Review the records for racial charged language “aggressive” “threatening” or “violent.”
- Review relevant articles on racial bias in perception among adults.
- Review discipline data for school and district. (see above on pages 5-6)



Consider sending this sample letter to the school prior to the hearing raising your concerns about racial bias in their disciplinary actions.

# Arguments for Hearing:

## A. Procedure:

1. Get the student handbook. Sometimes there are broader protections outlined in the handbook than required by the statute.
  - What sort of protections, if any, does the code offer? (Ex. Hearings? Alternative dispute resolutions? Mediation? Probation?)
2. Refer to MA Law, Regulations and Guidance:  
[www.doe.mass.edu/lawsregs/advisories](http://www.doe.mass.edu/lawsregs/advisories).
3. Note any issues with notice, searches, witness statements, recording the hearing. (Is the person conducting the hearing a witness to the incident?)

## B. Substance:

1. Did the incident happen as described by the school?
2. Did the school talk to your client as part of their investigation into the incident? Are there any written statements from your client?
3. **If there are charges pending (or possible) from the alleged incident, your client SHOULD NOT SPEAK about the incident unless upon the advice of the criminal defense attorney.** Statements made by the student at the disciplinary hearing may be used against the student in court. **Disciplinary hearing recordings can be subpoenaed.** However, in most circumstances the school will want to hear your client speak.
  - Prepare your client for this and have them talk about things other than the incident itself.
    - What does your client enjoy about school?
    - What are your client's plans for the future?
4. Discuss ways to mitigate any safety concerns. Are there things that can be done other than excluding the client to mitigate those concerns, i.e. bag checks, checking in with counselor at the beginning of the day, etc. Make sure you talk to your client before raising any of these options and don't bring up a mitigation strategy unless your client is ok with it.
5. If your client is a student of color speak to them about **raising race based arguments** and consider strategies for doing so at the hearing.
  - Raise concerns regarding district's discipline data at the hearing.
  - Check the district/schools website to see if there are any statements on racial equity and raise them at the hearing.
  - Counter racial charged narratives about your client as "aggressive." Adolescents are all predisposed to act in more risk seeking types of behaviors and explore the bounds of societal rules.

## C. Reason:

1. In disciplinary hearings, the student is often judged solely by the offense. Your role is to humanize the student and compel the principal to consider the whole student, not just the infraction.
2. Is the student involved in the school community?
  - Clubs, Grades, Mitigating Circumstances?
  - Personal Statements: Parents, Students, Collaterals.
3. Prepare your client for this and have them speak about their strengths and how this school exclusion would impact them.
4. Be prepared to **negotiate** an alternative sanction if school's case is strong.

## Practical Advice:

- a. Remember this is not a courtroom! These hearings are conducted by non-attorneys.
  - i. **APPEARANCE:** Think about what tone you want to set, often everyone in attendance is school personnel.
    - For school personnel this will feel very formal compared to their typical day. Consider whether to dress in business casual rather than a suit.
  - ii. **DEMEANOR:** Read the room. You may be the only one with legal expertise, so know your audience.
    - Sometimes it is helpful to assert this expertise, and sometimes this will backfire.
    - Remember the school has discretionary power.
  - iii. **POINT OF VIEW:** This is just one piece of the principal's job and they may not do these hearings very often. They are likely to be considering many factors beyond your client, including general school safety and parent/public opinion. When making your arguments, put yourself in the shoes of the principal and work to address those concerns.
- b. **Bring focus back to the client and their strengths** instead of letting the school project larger issues onto your client, i.e. school-wide concerns about vaping.
- c. **Consider highlighting the harm that comes from school exclusion**, especially how Black, Latinx, and Indigenous students are disproportionately excluded in MA (see more arguments re: racial bias above).

## 5. APPEAL

Students have the right to appeal an expulsion to the superintendent of the school district. This cannot be delegated

- See *Doe v. Worcester Public Schools*, 484 Mass. 598 (2020)
- **Request appeal in writing within 10 calendar days of notice to expel.**
- If the 10 days have passed, ask anyway. Many school districts will allow an appeal past the timeline.
  - The request can be very short. You only need to ask for an appeal hearing. You do not need to plead your reasons why in the request.
- **Request a copy of recording of the original hearing from the school.**
- Students may bring an attorney to an appeal hearing (at own expense).
  - Appeals are *de novo*.
    - You can bring up arguments, facts, and witnesses at this hearing that were not discussed at the original hearing.

# SCHOOL DISCIPLINE & STUDENTS WITH DISABILITIES

Applicable to students with IEPs, 504 plans, students who are being evaluated for an IEP or 504 plan or, possibly, students who the school had notice of a potential disability prior to the action. Students with special needs are entitled to additional procedural safeguards.

**10 Day Rule:** Before a district can exclude a student with a disability for more than 10 days (consecutive days or cumulative days, if the exclusions are for a pattern of behavior) the Team must conduct a Manifestation Determination Review (MDR). Removal of a student for more than 10 days is considered a change in placement under special education law and this is not allowable without additional protections.

**Manifestation Determination Review (MDR):** This is an IEP Team meeting to review the incident and determine if the behavior is either:

- 1) directly or substantially related to student’s disability, or
- 2) a direct result of district’s failure to implement student’s IEP.
  - o Burden of proof is on the parents/students.
  - o If the behavior is determined to be a manifestation of the disability (yes to either question 1 or 2 above) → district cannot proceed with disciplinary action.
  - o If not a manifestation (no to both questions) → district can proceed with disciplinary action as they would with any student.
  - o If the behavior is found to be a manifestation, this will result in discussion of changes to the student’s IEP and a FBA will be conducted.
  - o **The MDR usually occurs back to back with disciplinary hearing before the principal.**
  - o **Appeal:** MDR decisions may be appealed to the Bureau of Special Education Appeals at any time within the two year statute of limitations on BSEA claims.

Who should attend the MDR?

Who Should Attend?	Who Should Not Be Allowed!
1. IEP Team Members 2. someone who can testify positively regarding the student’s behavior (e.g. school psychologist, social worker, guidance counselor)	SROs

Note: Students with disabilities, especially BIPOC students, are disproportionately disciplined.

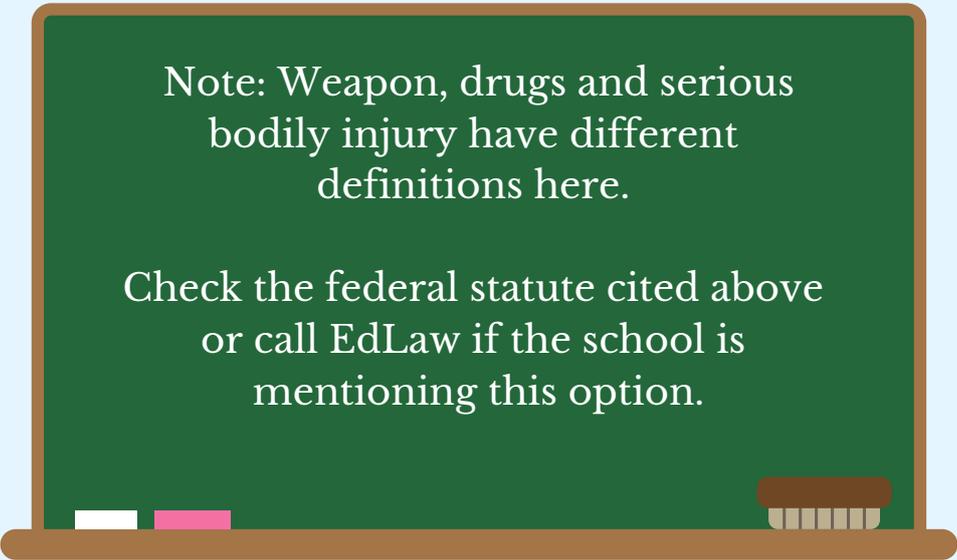
### Prepare for MDR and Hearing

- Discuss with the student what changes they would like to see in the IEP.
- Discuss with the family, outside agency supports (mentors, youth workers, etc) and experts (therapists, psychiatrists, etc.) whether the behavior was a manifestation of the student's disability.
- Consider having outside supports attend meeting or write letters in support of student, if they are unable to attend meeting.
- Ensure all relevant members of the IEP Team are present at the meeting, including someone who can speak about the student's disability (e.g. psychologist)

### Interim Alternative Educational Setting for 45 days:

- may be used for specific-serious offenses (weapons, drugs or assault causing serious bodily injury) or if agreed to by parent. (see 20 USC § 1415(k)(1)(G))

For additional information on school discipline and special education law, and pandemic specific policy changes, refer to the EdLaw Project's Tools and Resources available at: <https://www.youthadvocacyfoundation.org/general-tools-resources>



Note: Weapon, drugs and serious bodily injury have different definitions here.

Check the federal statute cited above or call EdLaw if the school is mentioning this option.

# **ACADEMIC PROGRESS & ALTERNATIVE EDUCATION UNDER CHAPTER 222 AND M.G.L. 37H ¾ & 603 CMR 53.13**

## **Academic Progress:**

Applies to ALL excluded students. For exclusions for ANY period of time – 1 day to forever. Student must be given the opportunity to make academic progress during the exclusion.

- Must be allowed to make up: assignments, homework, quizzes, exams, papers, projects.
- Cannot be given a 0 based on the exclusion.

## **Alternative Education:**

For exclusions longer than 10 consecutive days. Schools must create a school-wide Education Service Plan to address these needs.

- Tutoring, alternative placement, Saturday school, and/or online or distance learning.
- Schools provide written list of options and must provide the options which the student selects.
- Students should be provided with at least 2 options and can choose which one they want.

## **Students with IEPs:**

District must provide FAPE (free appropriate public education) and special education services even while the student is excluded.

# Questions?



Contact EdLaw!

There are three ways to reach us:

- Call: 617-910-5829
- Email: [edlawproject@publiccounsel.net](mailto:edlawproject@publiccounsel.net)
- Online Request Form: <https://edlaw.publiccounsel.net>

