



37H 1/2 PRACTICE GUIDE

A Guide for Juvenile Court Practitioners

*for clients who are excluded from school
due to a felony complaint or conviction*

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, § 37H1/2 (“37H1/2”).

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

This guide covers only covers exclusion under 37H1/2.

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!

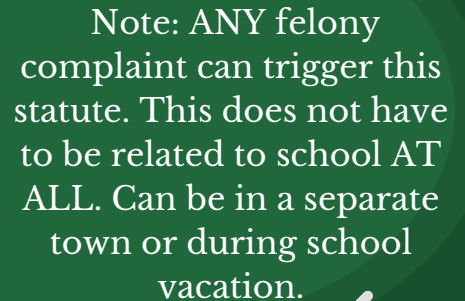
We'll now walk you through a case.

1. INCIDENT OCCURS & CHARGES ARE ISSUED

Summary of 37H½:

i. A principal or headmaster may **suspend** a student “for a period of time determined appropriate by the principal” upon

- 1.) the issuance of a criminal complaint charging the student with a felony or felony delinquency complaint AND
- 2.) if said principal or headmaster determines that the student's continued presence in school would have a **substantial detrimental effect** on the general welfare of the school.



Note: ANY felony complaint can trigger this statute. This does not have to be related to school AT ALL. Can be in a separate town or during school vacation.

ii. The principal or headmaster may **expel** a student upon

- 1.) felony conviction **or** upon an admission in court of guilt with respect to such a felony or felony delinquency AND
- 2.) if said principal or headmaster determines that the student's continued presence in school would have a **substantial detrimental effect** on the general welfare of the school.

In **all cases**, they **must** determine that the student would have a substantial detrimental effect on the general welfare of the school.



□ **Determine if the charges fall within 37H½.** Determine if there is a pending felony complaint or conviction. Did a complaint issue for a felony? See note on diversion, CWOs, and PTP on page 6.

□ **Contact Defense Attorney.** If you are not the defense attorney, find out if there is a defense attorney already appointed and coordinate efforts. If the child does not have a defense attorney yet, please contact EdLaw.

□ **Don't spill the beans.** Make sure you are not the one to alert the school to the fact that charges have issued. It is possible the school doesn't know about the charges and is seeking to exclude the student under their student handbook and not 37H ½. If you are the defense attorney, be careful about contacting the school and what you tell them. If they did not already know that a felony is pending, they might get curious when a defense attorney contacts them.

□ **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 has a disability before the incident. If the student has a disability, it will change the procedures and due process protections. See section below on School Discipline & Students with Disabilities.

2. PARENT RECEIVES NOTICE OF DISCIPLINARY ACTION

□ **Confirm parent received written notice.**

Review the notice for content. Raise any issues with the school either before or at the hearing and note for potential appeal! Pursuant to the statute, notice must include:

1. **The charges**
2. **Reason for the suspension including the determination of substantial detrimental effect**
3. **Notice of hearing date**
4. **Notice of right to appeal decision and appeal process**
5. **Language: notice was provided in language of the home**

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.

3. IS THE SCHOOL HOLDING A HEARING?

The plain language of 37H ½ only provides for written notice of suspension prior to suspension taking place. However, *Goss v. Lopez* (below) still applies and therefore a hearing should be held.

□ **If school is not holding a hearing, ask for one!**

Cite *Goss v. Lopez*, 419 U.S. 565, 574-575 (1975); Found students have legitimate property interest in their education, protected by Due Process Clause. Argue that for any removal a student requires an opportunity to be heard! Under *Goss*, Due Process requires:

- a. For removal 10 days or less: notice and opportunity to be heard.
- b. For removal more than 10 days: “may require more formal proceedings,” argue for in-person hearing, right to representation, right to have hearing recorded, etc. since 37H ½ involves indefinite suspension or expulsion.

4. PREPARING FOR HEARING

- **Meet with your client** and, if possible, the parent or guardian.
 - a. Explain the process to the student and parent.
 - b. Get contact information and give them yours.
 - c. Discuss next steps

- **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.

NOTES re Ed Decisionmaker:

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, fax or mail to the school principal. 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 expectation is 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. Reach out to the school's attorney if they have one; they can be a great source to find out what their client is most concerned about 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.**

Review both MGL c. 71 §37H ½ and school code of conduct prior to hearing. Many code of conducts/student handbooks are available on the school's website.

□ **Confirm issuance of criminal complaint or conviction.** The charge must either be a felony or felony delinquency complaint (possible indefinite suspension) or a conviction of the same or admission of guilt (possible expulsion).

i. **Complaint Issued:** A police officer cannot, by themselves, issue a complaint. A complaint does not issue until a clerk magistrate certifies that probable cause exists. This happens one of two ways:

1. A police officer files an application for complaint and the clerk magistrate signs off and sets a date for arraignment (or, in the case of arrest, signs off and the case is immediately brought before a judge for arraignment). In this case, a complaint has issued. OR
2. A police officer files an application for complaint and the clerk magistrate sets a date for a hearing to determine whether there is probable cause, and whether the interests of justice are served by issuing said complaint. See Mass. R. Crim. P. 3(g). If the police have filed the application, but the clerk magistrate's hearing has not yet happened, then the complaint has not issued.

ii. **Judicial Diversions** (governed by MGL c. 119, § 54A & Section 75 of the Act) avoids CARI and thus avoids a finding that could be used to sanction a student under 37H ½.

1. Unlike DA diversion, a student cannot be suspended under subsection 1 of 37H ½ if they receive judicial diversion (G.L. c. 119 s. 54A (c)(4)).
2. Eligibility for judicial diversion is set out under MGL c. 119 §54A(G).

iii. **CWOFs:** No case law on this. EdLaw has a decision from MA DESE that says a continuing without a finding (CWOFF) does not trigger an expulsion and is the resolution of the case. Contact EdLaw for a redacted copy.

1. Inform the school district that the client did not admit guilt, only sufficient facts, and the court did not adjudicate them delinquent.
2. Inform them that it is the end of the case, and the case is resolved.

iv. **Pre-Trial Probation & DA Diversion:** Both are complicated in regards to 37H ½. Call EdLaw if either of these options result.

□ **Decide if your client is able to talk at the hearing and what they will say.** See V(c)(ii)(2) below.


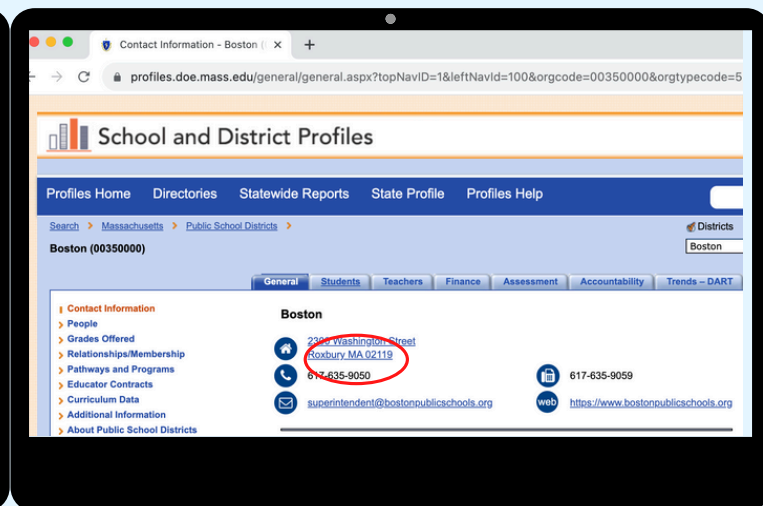
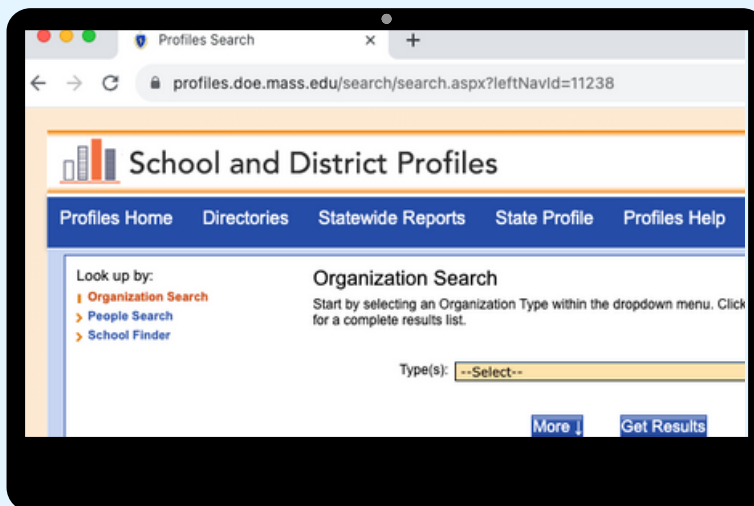
Note on Racial Bias:

Consider ways race may have played a factor in the decision to seek an expulsion. 37H ½ is particularly insidious when it comes to racial bias in school discipline because it compounds the racial bias within our juvenile courts with the racial bias within our schools.

- Talk to your client about their experience in school and whether they see bias as a contributing factor in the possible discipline.
- Review the records from the school and from the police report 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 [website](#).
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

5. HEARING

Opportunity to be heard should include:

- In-person hearing (*Goss v. Lopez* and/or student handbook)
- **Audio-recorded**, to preserve a record for appeal
 - If the school isn't planning to record, push this issue and document your request.
 - Right to a recorded hearing under *Nicolas B. v. Sch. Comm. Of Worcester* 412 Mass. 20 (1992).
- Hearing run by the **principal** (may not be delegated to anyone else) (37H1/2 and/or student handbook)

Decision maker:

The decision maker in long-term exclusions is the principal/headmaster. The principal is authorized to permanently expel a student upon conviction of a felony **or upon an admission in court of guilt** with respect to such a felony or felony delinquency.

The principal is NOT REQUIRED to do so. Suspension or expulsion is DISCRETIONARY. Felony adjudications or convictions, as well as three offenses under 37H, are the only situations where the principal can permanently expel.

Remember the principal must determine that the student is charged with or has been convicted of a felony **AND that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school.**

- Principals have broad discretion. *See Doe ex rel. Doe v. Winchendon Sch. Comm.*, 18 Mass. L. Rptr. 53 (Mass. Super. June 28, 2004).

C. Arguments for Hearing:

i. PROCEDURE:

1. Know the student handbook.
 - a. Sometimes there are broader protections outlined in the school handbook than required by the statute.
2. Refer to MA Law, Regulations and Guidance. See our [linktree](#) for DESE guidance.
3. Note any issues with notice, searches, witness statements, recording the hearing.
 - a. Is the person conducting the hearing impartial? (i.e.: not a witness to the incident)

ii. SUBSTANCE:

1. Did the incident happen as described by the school? What does the school know? Do they have the police report? Where is the school getting its information and was it lawfully obtained?
 - a. See [Guide to the Disclosure of Confidential Information](#).
 - b. Note: Be careful not to give the school more information than they already have unless it is helpful to your client.
 - c. Make sure to argue in the alternative and **DO NOT admit to any of the alleged facts at the hearing.**
2. Do the facts and circumstances of the incident suggest that the student would be a “substantial detriment to the general welfare of the school”?
 - a. Do any witnesses or victims attend the same school?
3. **When there are charges pending from the alleged incident (or the possibility of charges), your client SHOULD NOT SPEAK about the incident unless cleared with the 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.**
 - a. 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 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.
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.
 - a. Raise concerns regarding district’s discipline data at the hearing.
 - b. Check the district/school’s website to see if there are any statements on racial equity and raise them at the hearing.
 - c. Counter racially charged narratives about your client as “aggressive” in either the school’s notices or the police report (if the school has it). Adolescents are all predisposed to engage in more risk-seeking types of behaviors and explore the bounds of societal rules.

iii. REASON:

1. In the hearing, 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?
 - a. Clubs, Grades, Mitigating Circumstances?
 - b. Personal Statements: Parents, Students, Collaterals.
 - c. Show that they are not a substantial detriment to the school
3. Prepare your client for this and have them speak about their strengths and how this school exclusion would impact them.
4. Especially if your client is a student of color, think about ways to dispel stereotypes and present the student's positive traits and supports.
5. If the client is on conditions of release from court, the fact that probation and the court are supervising your client may reassure the school. Argue that a judge felt the student was safe enough for release and to attend school.
 - a. BUT be aware of conditions of the court like a stay away order. Be prepared with a solution.
 - b. Many judges will impose a "no avoidable contact" order if the youth and the alleged victim(s) are in school together. This type of order allows your client to attend school and means they will not get in trouble for sharing classes or seeing the other student(s) in the hallway.
6. Be prepared to negotiate an alternative sanction if school's case is strong

D. Practical Advice:

- i. Remember this is not a courtroom! These hearings are conducted by non-attorneys.
- ii. 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.
- iii. 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.
- iv. 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.
- v. **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.
- vi. **Consider highlighting the harm that comes from school exclusion**, especially how Black, Latine, and Indigenous students are disproportionately excluded. (see more arguments re: racial bias above).

6. APPEAL

- a. Students have the right to appeal a suspension or expulsion to the superintendent of the school district under 37H¹/₂.
 - i. This cannot be delegated
 - ii. See *Doe v. Worcester Public Schools*, 484 Mass. 598 (2020)
- b. **Request appeal within 5 calendar days from receipt of notice to suspend or expel.** The student has 5 calendar days from the date of suspension or expulsion to request an appeal. The request can be short, you only need to ask for an appeal hearing. You do not need to include your reasons for the appeal in the request.
- c. **Request a copy of recording of the original hearing from the school.**
- d. Students may bring an attorney to an appeal hearing.
- e. Appeals are de novo. You can bring up arguments or facts at this hearing that were not discussed at the original hearing.
- f. The Superintendent must hold a **hearing within 3 calendar days of the request** and must render a decision within 5 calendar days of the hearing.
- g. If you are not successful with the Superintendent's appeal, you could file a complaint with the Problem Resolution System at DESE or file in Superior Court. Contact EdLaw to discuss these options.

SCHOOL DISCIPLINE & STUDENTS WITH DISABILITIES

Applicable to students with IEPs, 504 plans, being evaluated for an IEP or 504 plan or, possibly, students where the school had notice they may have disability prior to the action. Students with disabilities 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 MDR. Removal of a student for more than 10 days is considered a change in placement.

Manifestation Determination Review (MDR): This is an IEP Team meeting to review the incident and answer the questions whether the behavior is:

- 1) directly and substantially related to student's disability **or**
- 2) a direct result of district's failure to implement the student's IEP.
 - Burden of proof is on the parents/students.
 - 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 AND this results in a discussion of changes to IEP and conducting a functional behavioral assessment ("FBA").
 - If not a manifestation (no to *both* questions) --> district can proceed with disciplinary action as they would with any student.
 - **The MDR usually occurs back to back with disciplinary hearing before the principal.**
 - **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.

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 the student if they are unable to attend meeting.
- Review special education records and prepare your argument.
 - Is there anything in the IEP that can support an argument that the behavior was a manifestation of the disability? E.g. student caught with drugs--were they self-medicating due to depression or anxiety which is documented in their IEP?
 - Review the most recent evaluations for language that might support an MDR argument. E.g. is there documentation regarding physical outbursts when PTSD is triggered that could be the basis for an "assault on school staff."
 - Review special education records for:
 1. IEP goals & PLEP A and B accommodations for how the child's disabilities impact them in school to see how it aligns to the alleged behavior
 2. ways that the school failed to follow the IEP, safety plan, or behavior intervention plan
 - Are there independent evaluations such as a neuropsychological evaluation that might provide helpful information?

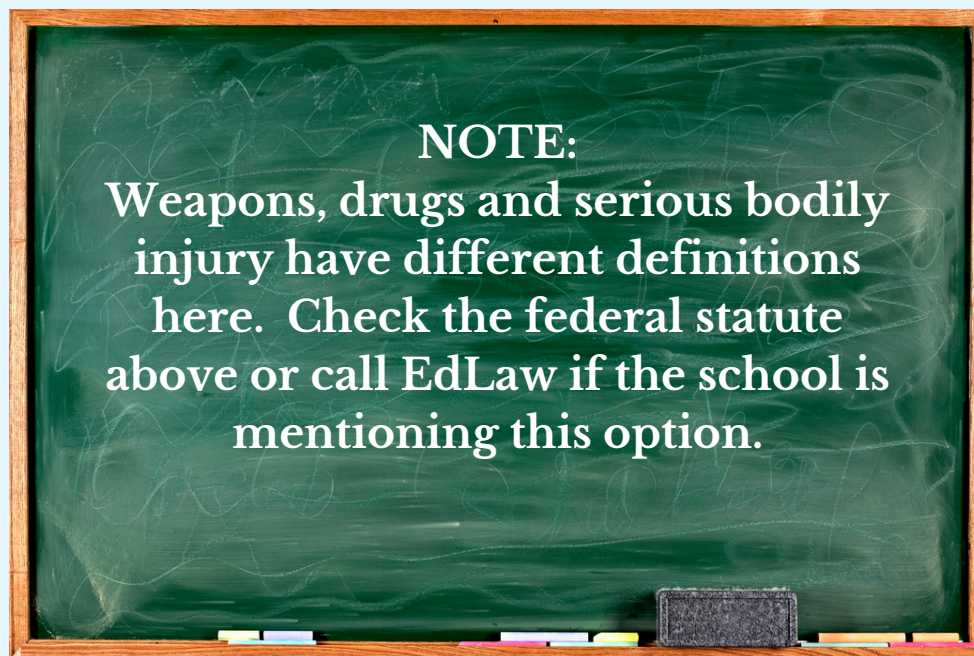


- Ensure all relevant members of the IEP Team are present at the meeting, including someone who can speak about the student's disability (e.g. psychologist). Ask the student who they have the best relationship with at the school and might be able to speak with empathy about their behavior and seek to have that person at the meeting.

Interim Alternative Educational Setting for 45 days

Even if a behavior is found to be a manifestation of a student's disability, the student may be sent to an Interim Alternative Educational Setting (IAE) for 45 days 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)k).

For additional information on school discipline and special education law, refer to the EdLaw Project's Tools and Resources available [here](#).



ACADEMIC PROGRESS & ALTERNATIVE EDUCATION UNDER 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. Students 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 or marked late.
- **Alternative Education**: For exclusions longer than 10 consecutive days. Schools must create a school-wide Education Service Plan to address these needs.
 - Options often include tutoring, alternative placement, Saturday school, and/or online or distance learning.
 - Schools provide written list of options and verify 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 students are excluded.
 - Review the student's IEP Service Delivery Grid and ask for a plan that provides all of those services. Satisfying the requirements of the grid may mean that the district must send the student to a special education school rather than providing tutoring or alternative education.
 - **Students in DYS**: Should be provided with their IEP services. Please contact EdLaw for more info.

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Questions?



Contact EdLaw!

There are three ways to reach us:

- Call: 617-910-5829
- Email: edlawproject@publiccounsel.net
- [Online Request Form](#)

