

Tips for Representing a Student in an Expulsion Hearing

I. First Steps

A. Obtaining Documents

By law, you are entitled to all documents that will be used in an expulsion hearing. As soon as you receive a case, you should request these documents from the District. (sometimes referred to as the “expulsion packet”) You will need a release from your client to get the documents. In addition to your right to see everything being used in the expulsion, parents have a general right to see everything in their child’s file within five days of making a request (Education Code §4069). You may want to get the student’s whole file to help you prepare for the case.

You should review the documents carefully and then review them with your client. Look out for inconsistent witness statements and statements from students that appear to have been written by adults.

B. Interviewing the client

There are several areas that are important to cover in your first interview with your client.

1. The incident

Review your client’s version of the incident. Review the statements in the expulsion packet with your client. Find out what your client has already told school officials and if your client has already written a statement.

2. Disability

Find out if your client is receiving special education services or receiving accommodations under Section 504, or should be receiving such services. Students with disabilities have special protections. You should consult an attorney with expertise in this area if your client has a disability.

3. The investigation

One important issue at the hearing will be what kind of investigation the school did. Review with your client who was present during the incident. You may find there were many students whose statements are not included in the expulsion packet. This will be something you can raise at the hearing.

4. The process

It will also be important to interview your client about the process that was followed by the school. You will often find that the school did not follow procedures. For example, you may find that the school failed to meet with the client prior to initially suspending him, or that the school automatically extended the student's suspension until the expulsion hearing, instead of having the required meeting with the parent to discuss whether the suspension would be extended beyond the initial five days. You also need to look at the notice the student received to make sure it was timely and included everything required by law. (Including a clear statement regarding the incident the student is being recommended for expulsion for and under what part of the code.) Make sure the hearing is being held within the required timeframe. You will want to bring up any procedural violations at the expulsion hearing.

5. Possible witnesses

You will want to review with your client any possible witnesses that might be helpful to the case and whether your client knows how to contact those witnesses.

6. Past history

You will need information about your client's past history and whether he has ever been in trouble before. This will be relevant to whether the school can prove that "other means of correction have failed" (see below). You will also need information on what kinds of interventions, if any, the school has tried to assist your client.

7. Mitigating factors/character witnesses

You will need to discuss with your client what kind of evidence you can bring to the hearing that shows positive things about your client. It is helpful to bring letters of support and even better if you can bring character witnesses. It is also often helpful to have your client prepare a statement about why he wants to go back to school, including what his goals are.

C. Gathering witnesses

1. Voluntary witnesses

You will need to work closely with your client to ensure that witnesses come to the hearing. If your client does not have a phone number for a particular witness the school should provide that to you because they cannot interfere with your right to bring witnesses to the hearing.

2. Subpoenas

The law provides that the school board can issue subpoenas for witnesses as requested by the student. A few districts, such as Oakland, actually have a form to fill out to request a subpoena. In other districts you may have to show them the law to get them to issue the subpoena. Keep in mind that you should carefully evaluate using a subpoena. A witness who has to be subpoenaed may not be helpful to your client.

II. The hearing

1. Format

Most expulsion hearings are heard by an administrative panel appointed by the school board. A few districts hire a hearing officer to hear expulsion hearings. In some smaller districts the board itself conducts the hearing. Regardless of who conducts the hearing, the final decision to expel must come from the board.

All expulsion hearings must be taped. If you end up appealing your case you will need to request a transcript of the hearing from the school District.

Generally a hearing will begin with the District representative going over the procedures for the hearing, including the rules of evidence for the hearing and what could be the results of the hearing. The school representative and the student representative will then each make an opening statement. The school then presents its case, including all witnesses and the student's representative can cross-examine any witnesses. The student then presents his or her case, including all witnesses, and the school representative can cross-examine any witnesses. There may also be questions from the panel for witnesses on both sides. Both sides are permitted to make closing statements. (See sample hearing script from OUSD) Note that Districts vary immensely in the level of formality in their hearings. Some Districts follow a very formal structure, whereas others treat the hearing more like a meeting. If the District is not following a formal structure, you may need to remind the hearing officer of your desire to make an opening and closing statement and of your right to cross-examine all witnesses.

2. Procedural violations

Any procedural violations that have occurred should be raised at the hearing. You may need to raise these issues on your direct examination of your client or their parent and/or in your cross-examination of the school representative. In Oakland Unified School District, the panel hears procedural concerns first and then only goes on to a hearing regarding the incident if they find there

have not been significant procedural violations. In any District, you should make the argument that if procedural violations have occurred the expulsion is not valid and the minor should return to school immediately.

3. Problems with investigation

You will often need to spend part of the hearing proving that the incident was not appropriately investigated. This can be done very effectively in your cross-examination of the school official. You will often find that the investigation was inadequate (for example, only a couple of students interviewed about an incident that took place in a classroom full of students.)

4. Inconsistent witness statements

It is very common to find that witness statements are not consistent with each other or that a witness statement is not consistent with what the witness says at the hearing. Unfortunately, many times witnesses do not attend hearings, making it difficult to use cross-examination to bring out inconsistencies. However, in these cases the failure the school to bring witnesses is a good argument for not expelling the student and may be grounds for appeal if the student is expelled. (see below)

5. Evidentiary issues

Technical rules of evidence do not apply to expulsion hearings, however, a student cannot be expelled solely on hearsay evidence. So, if the only evidence the school brings are witness statements, without the witnesses, that is not enough for an expulsion. However, there is one exception which is that if the testimony of a witness would expose them to “an unreasonable risk of psychological or physical harm” the testimony of that witness can be presented in the form of a sworn declaration. Keep in mind, this exception is extremely overused by Districts. There must be evidence of the risk of harm. A school cannot decide not to bring witnesses because the witness prefers not to be there.

Also keep in mind that expulsion decisions are to be based on substantial evidence.

If your client is expelled without substantial evidence or solely on hearsay you have grounds for an appeal.

6. Secondary findings

In all cases except zero tolerance offenses (gun possession, brandishing a knife, drug sales and sexual assault) finding that your client committed the offense is not enough to expel. The Board must also find that either the student poses an ongoing threat

to the physical safety of others, or that other means of correction are not feasible or have repeatedly failed. This is a very important area for advocacy. It allows you to advocate against expulsion, even if your client has committed an expellable offense. The board must have substantial evidence of this secondary finding, so this is often a ground for appeal if there has been no evidence of either ongoing threat or other means of correction.

7. Student statement

It is usually a good idea to have your client make a statement at the end of the hearing about why he or she wants to go back to school, future goals, etc.. If your client has not had a good academic record he or she should talk about why they think things will be different if they return. Of course, a student cannot be expelled for being a bad student, but the reality is that a student is less likely to be expelled if they can demonstrate that they take school seriously and plan to really take advantage of their opportunity to return to school.

8. Possible Recommendations

After a hearing, the panel of hearing officer will make one of the following recommendations:

a. Not to expel

If the recommendation is not to expel the process stops at this point and nothing goes before the governing board. However, the Education Code does allow for the student who is not expelled to be placed by the Superintendent or Designee in a specific program, so even if your client is not expelled he or she may be transferred to another school in the District.

b. Expulsion

The panel can recommend expulsion. If the board accepts this recommendation your client will not be able to attend any of the District schools. He or she will be able to attend some type of educational program such as a county school.

c. Suspended Expulsion

A suspended expulsion means that the student is technically and legally expelled, but is being allowed to attend a District school. Since the student is technically expelled they can be taken out of school if there is another infraction without a new hearing. Suspended expulsion is a good

alternative to argue for if your client has committed a zero tolerance offense but there are mitigating circumstances. Although districts must expel for zero tolerance offenses, they can give suspended expulsions. (See Attorney General's opinion in this manual.) However, suspended expulsion is not a good (or legal) outcome if there were not adequate grounds for expulsion. Those cases should be appealed, even though your client is allowed to go back to school. Keep in mind that, for purposes of appeal, a suspended expulsion is the same as an expulsion. If you wish to appeal a suspended expulsion you must do so within the timelines, you cannot wait and see if your client "makes it" under a suspended expulsion and then appeal if he or she is taken out of school for a second infraction.

III. Appeals

1. Board review

If a student is recommended for expulsion by the administrative panel or hearing officer the recommendation has to go before the school board for action. That gives your client another opportunity to advocate to not be expelled. In some cases you may want to argue that your client be given a suspended expulsion (see above). The board will not hear the evidence over again and will rely on the findings of the panel, but this can be another opportunity to bring up mitigating circumstances, character references, etc.

Different Districts have different procedures for this level of review so you should check with the District. (For example, in Oakland you can go before a specific Board committee before the Board makes a final decision.)

2. Requesting an appeal before the County Board

Once an expulsion is voted on and confirmed by the School Board you can appeal to the County Board of Education. You must do so within 30 days of the expulsion order and you should do so right away so your client can return to school.

If you are appealing a case to the county you must request the transcript of the hearing. If the parent cannot afford to pay for the cost of the transcript the fee is to be waived.

There are limited grounds for appeal to the county board. In your appeal, you have to make the argument that your case falls within one of these grounds. (See County Board procedures from Alameda County, in this manual and sample brief.)

3. Writ

If you are unsatisfied with the County Board's decision you have the right to take an administrative writ in court.

IV. Post-Expulsion

1. Keep in mind that your client is entitled to an educational program even if he or she is expelled. If your client is expelled you will need to advocate for a good program during the term of the expulsion.
2. Families can request that the expulsion be expunged from the student's record after they have finished the term of the expulsion.
3. It is very important that the student follow the "rehabilitation plan" during the term of the expulsion. They must attend the educational program so that they will be able to return to a comprehensive school.

V. Issues to look out for

1. Disability

If your client is in special education or has any disability that affects his or her ability to succeed in school he or she is entitled to special protections before the school can proceed with an expulsion hearing. (See information on students with disabilities in this manual.) Always ask about special education or disabilities in your initial interview. If your client does have a disability you may want to consult with an attorney with expertise in this area.

2. Language

If your client, or his or her parents, are not fluent in English all documents should be provided in their native language and the hearing should be translated.

3. Racial Bias

You may find evidence of racial bias in the particular incident your client was involved in (for example, your client, a student of color, was in a fight with a white student and the white student is not being recommended for expulsion) or in school discipline in general at the school (for example, your client reports that certain groups of students are targeted by administrators for school security.) Through a public records request you can obtain information from the school and the District about the racial breakdown of expulsions. This information may be helpful in the expulsion process, or in a subsequent complaint with the U.S.

Department of Education Office of Civil Rights. (See information from OCR in this manual)