

Suspensions in Western Australian public schools

A guide for parents and caregivers of neurodivergent children*

Why can my child be suspended?

The **School Education Act 1999** is the relevant law that governs suspension in government schools.

A student can be suspended for “**a breach of school discipline**”. A student can also be suspended for “**a serious breach of school discipline**”. Different rules apply if your child is suspended for a serious breach.

A **breach of school discipline** means any act or omission that impairs the “good order and proper management of the school”.

A **serious breach of school discipline** means a breach of school discipline that is described in the school's code of conduct as a serious breach of school discipline, something that adversely affects, or threatens, the safety of a person at the school, or something that the CEO of the Department of Education has issued a direction on.

Who can make the decision to suspend?

The Principal, or if the Principal is absent, a person authorised by the Principal.

How a suspension must be communicated and your right of reply

If the suspension is for a breach of school discipline (ie: not a serious breach)

- **BEFORE** imposing the suspension, the Principal is to provide oral or written advice about the duration of, and reasons for, the proposed suspension to the student and a parent/person responsible for the student.
- In addition, **BEFORE** the suspension is imposed, the Principal is to give the parent/person responsible for the student a reasonable opportunity to give reasons for not suspending the student.

If the suspension is for a serious breach

- If the suspension is for a serious breach, the rules are slightly different.
- In this case, the Principal is to provide written advice about the duration of, and reasons for, the suspension to the student and a parent/person responsible for the student.
- In addition, the Principal is to give the parent/person responsible for the student a reasonable opportunity to show that the student should not have been suspended or that the suspension should not continue. This opportunity does not need to be given before the decision to suspend is imposed.

How long can the suspension last?

- For a breach of school discipline, the maximum period of suspension is 5 consecutive days.
- For a serious breach, the maximum period of suspension is 10 consecutive days.
- The period of suspension ceases at the end of the school term in which it was imposed.
- If the suspension is in place pending a decision by the CEO of the Department of Education to expel the student, or vary the educational instruction of the student, the maximum period is 10 consecutive days (or longer as ordered by the CEO until the CEO makes the decision).

*This information serves as a guide only and has been based on the references cited at the end of the guide. It is important to note that this guide is not intended as legal advice. Neurodiverse conditions include autism, dyspraxia, dyslexia, dyscalculia, ADHD and Tourette's syndrome among others. The accuracy of this information was verified as of April 2024.

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The school has an obligation to provide educational instruction

The Principal is to ensure that educational instruction is made available to a student only if the student is suspended for **3 or more consecutive school days** or for a **total of 5 or more school days** in a school year.

How do I find out all the information about the suspension?



The Principal is obliged to provide the reasons for the suspension, either orally (for a breach of school discipline) or in writing (for a serious breach). If the reasons given are insufficient and do not fully explain the suspension event, you have the option to ask the school for more information about the suspension.

If you find the school's information unsatisfactory, you can formally request all documents held by the school and the Department of Education concerning, or relating to, the suspension (including the incident report required by the Department of Education when a student is suspended) under the **Freedom of Information Act 1992**, section 11.

Freedom of Information



Currently, the Department of Education's website advises that parents of current students should contact the school directly for such requests. Alternatively, you can contact the Department of Education's Corporate Information Services via the email address FOI.enquiries@education.wa.edu.au. These requests can take up to 45 days to process.

Useful information about how to make an application under the **Freedom of Information Act 1992** can be found on the Office of the Information Commissioner's website www.oic.wa.gov.au.

Important considerations

My child has an Individual Education Plan or Behaviour Support Plan in place

If your child has an Individual Education Plan or Individual Behaviour Support Plan at school, it's important to know whether the school implemented and followed the plan when the breach of school discipline occurred. If the plan was not properly implemented or followed, this could provide a reason to request the school reconsider the suspension.

Department of Education policies

The Department of Education's website lists various policies, procedures, and guidelines on student behavior, discipline, and duty of care. On the next page, you can find some of these resources along with a summary of key details. This information can help you consider whether the school met its duty of care, or other obligations, owed to your child as well as understand its duty to staff and other students.



Standing together against violence, ministerial statement

In 2023, the Minister for Education Hon Dr Tony Buti MLA released a statement titled 'Standing together against violence'.

Amongst other things, it makes suspension for students who "attack other students or instigate fights" mandatory.

Unfortunately, this limits the school leadership in their exercise of discretion if the behaviour that gave rise to the suspension was considered an attack on another student

The statement makes no differentiation for neurodiverse students nor does it take into consideration behaviour that may form part of a neurodevelopmental disorder.

What is most concerning is that the statement implies it is the behaviour of parents at home that shapes the behaviour of children at school.

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Department of Education policies relevant to student behaviour

Duty of care for public school students policy

This policy mandates that all Department of Education employees have a duty of care to protect students from risk of harm that can reasonably be foreseen when students are involved in all school activities, whether on or off the Department site.

Student Behaviour in Public Schools Policy

This policy places an obligation on the Principal to ensure the school builds positive behavior in its students. Positive behavior is defined as a student's competence and capacity to build positive connections, develop empathy and understanding, recognize and regulate their own emotions, make responsible decisions, work effectively with others and cope with challenging situations constructively.

Importantly, this policy requires the Principal to use available behaviour supports for students with complex needs.

Student behavior in public schools procedures

This document applies to all Principals of public schools. It places an obligation on Principals to engage with the school community to build positive student behavior, and respond to behaviours of concern. It also places an obligation on the Principal to keep the safety of all members of the school community a priority, including taking reasonable steps to keep the school environment free from violence, aggression, discrimination, and bullying. This document refers to the Minister for Education's "Standing Together Against Violence" statement.

For students with complex needs, Principals must provide intensive behaviour support, ensuring responses are fair, proportionate, and prioritise the safety and well-being of all members of the school community. The document emphasises a collaborative problem-solving/solution focused approach for challenging behaviors. Individualized support and effective case management are required for students with complex behavior support needs.

The procedures require the Principal to:

- use a multi-tiered system of support to identify and plan for students with behaviour support needs
- use available resources to establish case management processes for identified students, including:
 - understanding the factors impacting on behaviour and identifying the student needs and the desired behaviour/s
 - understanding the function of student behaviour
 - developing a documented plan through engaging with and seeking input from parents, and other relevant people
 - document processes for implementing, monitoring, and reviewing the plan
 - collect and use data to develop, review and refine the plan
 - minimising the use of restrictive practices and prohibiting the use of protective isolation in confined spaces.



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My child was suspended for behaviour that is an aspect of my child's neurodevelopmental disorder/learning disability: is that discrimination?

Discrimination on the grounds of disability is covered by the *Disability Discrimination Act 1992* (a federal law), and the *Equal Opportunity Act 1984* (a State law). There is significant overlap between federal and State laws in respect of discrimination. Since the *Disability Discrimination Act* defines "disability" broadly, and the fact that federal laws override any inconsistent State laws, this guide will focus on the *Disability Discrimination Act*.



Direct discrimination

Direct disability discrimination occurs when a person with a disability is treated less favourably than a person without that disability in the same or similar circumstances.

Schools cannot discriminate against students with disabilities by subjecting them to a 'detriment'. This includes suspension.

Proving discrimination, whether direct or indirect, is very difficult for neurodiverse students who exhibit problematic behavior. This is especially true when such behaviour jeopardises health and safety or hinders the learning environment.

School students and staff have a right to safety which school administrators have a duty to protect.

Courts, when presented with this issue, have limited the scope of anti-discrimination laws towards students with disability-related behaviour issues.

Anti-discrimination law in the context of student behaviour at school is nuanced and complex. If you believe that your child has been treated in a manner that would constitute discrimination, seek legal advice.

Indirect discrimination

Indirect discrimination occurs when a person puts in place conditions or requirements that appear to treat everyone the same but which actually disadvantage some people because of their disability. It will be discriminatory if a requirement or condition:

- applies to everyone, but because of their disability a person is not able to comply or, although able to comply, would suffer serious disadvantage by doing so, and
- the requirement or condition disadvantages a person because of their disability, and
- it is unreasonable in all of the circumstances.

In order to prove direct discrimination, the law requires a comparison to be made between the treatment of the student with the disability (the complainant) and the treatment of a 'hypothetical person' who does not have the disability in order to determine whether the complainant has been treated less favourably.

Unfortunately, the High Court of Australia has ruled that in this situation, the 'hypothetical non-disabled person' is a student who has behaved in the same way as the complainant.

So, for example, if a student with ADHD is suspended for hitting another student, the Court would compare the ADHD student with a student who does not have ADHD, but who still hit another student.

If the school would have suspended this "hypothetical student" for acting in the same way as the complainant, then it is unlikely that the suspension in the case of a disabled student for the same behavior would be considered discrimination.

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I don't think the decision to suspend my child from school was fair. What can I do?

After gathering all the details about the suspension, you might feel the disciplinary action was harmful or unfair, especially if you think the behaviour stemmed from your child's neurodevelopmental disorder or if the school didn't offer appropriate or agreed support, thereby influencing or causing the behaviour in question.



What are my options?

1

Request a reasonable opportunity to be heard by the Principal on the decision to suspend your child from school

School Education Regulations r. 44

2

Present a proposal to your school's board or council for improved support for neurodiverse students

School Education Act s. 128

3

Email your local member of Parliament and the Minister for Education in regards to your situation to lobby for better supports for neurodiverse students

4

If your child suffered significant emotional or psychological harm due to the events surrounding the suspension, you can request the Principal notify the Ombudsman of this, failing which you can report the harm incurred

For more information see www.ombudsman.wa.gov.au and search for "Reportable Conduct"

5

If you suspect discrimination against your child, consider seeking legal advice

6

Write to the Minister for Education to request a review of the school's processes for student suspensions

School Education Act s. 223

If you are dissatisfied with the decision-making process by which your child was suspended, you have the option to ask the Minister for Education to review it.

While the Minister has the option to conduct the review, it is not mandatory. The Minister can only review the process by which the decision was made, not the actual decision itself.

7

If your child sees a psychologist, GP or developmental paediatrician, you can request that they write to the school to advocate for your child



References

Legislation

Disability Discrimination Act 1992 (Cth) sections 4 to 6 and section 22

Equal Opportunity Act 1984 (WA) section 4(1) (definition of impairment) and section 66I

School Education Act 1999 (WA) sections 88 - 90 and section 223

School Education Regulations 2000 (WA) regulations 43 to 46

Case law

Minns v New South Wales (Dept of Education and Training) [2002] FMCA 60

Purvis v State of New South Wales (Dept of Education and Training) (2003) 217 CLR 92

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Journal articles

Colin Campbell, 'A Hard Case Making Bad Law: Purvis v New South Wales and the role of the Comparator Under the Disability Discrimination Act 1992 (Cth)' (2007) 35(1) **Federal Law Review** 111 - 128.

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Other publications

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Government of Western Australia, 'Make a discrimination, harassment or victimisation complaint' **Equal Opportunity Commission** (webpage, 2017 - 2024) <<https://www.wa.gov.au/service/community-services/social-justice-and-equity/make-discrimination-harassment-or-victimisation-complaint>>

LexisNexis, **Halsbury's Laws of Australia** (online at 24 April 2024) 80 Civil and Political Rights, '(C) Discrimination' [80-215].

Tony Buti, 'Standing Together Against Violence' (Ministerial Statement, 17 July 2023) <<https://www.education.wa.edu.au/dl/ergjmo3>>

This guide was compiled by Peta Drury, mum to a child living with ADHD and giftedness, and passionate parent supporter.

This guide is not intended as legal advice. If you are in any doubt as to you or your child's rights, please seek independent legal advice.

This guide does not apply to non-government schools.

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