

HK School Law Monthly Newsletter



Dear Jennie

Thank you for your interest in the HK School Law Monthly Newsletter. Our firm is growing, and we are now Hansberger & Klein, LLP. We look forward to hearing from you soon!

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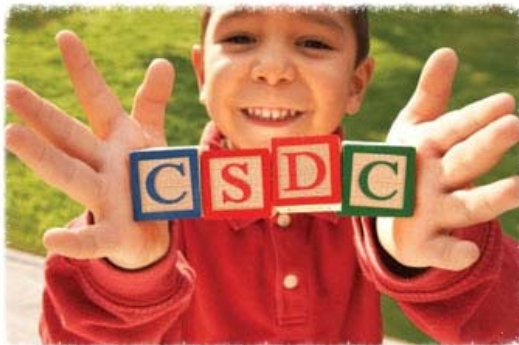
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VISIT US AT CSDC!



Come visit Hansberger & Klein, LLP at the upcoming Charter Schools Development Center's 2014 Charter Schools Leadership Update Conference!

WHERE: Hotel Irvine Jamboree Center

WHEN: November 3-4, 2014

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IN THE NEWS



[California Governor Vetoes SB 1263](#)

SB 1263 would have prevented a charter school from locating outside the jurisdiction of its chartering school district without the approval of the school district in which it is located.

[California Governor Vetoes AB 2408](#)

The new LCFF funding model established the California Collaborative for Educational Excellence for purposes of advising and assisting public schools. AB 2408 would have added a representative of charter schools and a parent of a California public school pupil to the governing board of the Collaborative.

[California Governor Appeals Teacher-Tenure Ruling](#)

Attorney General Kamala Harris has filed an appeal of the ruling in *Vergara v. California* on behalf of Governor Jerry Brown. This appeal sets Gov. Brown apart from leaders in some other states who have fought to end such protections or raise the standards for obtaining them.

[Judge Rejects Administrator's Search of Student's Cell Phone](#)

This ruling is apparently the first time a cellphone search in schools has come under scrutiny since a June decision by the U.S. Supreme Court giving strong Fourth Amendment protection to the contents of cellphones. In the same ruling, the judge upheld a pat-down search of the student and an examination of his pockets, shoes, and backpack. The case started with reports from two parents that they had witnessed "a long-haired student" smoking marijuana on the Henrico High School bus on a morning in February 2013.

BULLYING, CYBERBULLYING AND THE LAW

Bullying unfortunately is not new. Since the existence of humans, there has likely been bullying. What is new however is that bullying and its effects are now a more prominent topic of discussion than ever before. Further, bullying is now more easily and readily accomplished using the Internet, cell phones, social-networking sites, and even game consoles. Impersonating, judging and embarrassing others has entirely new applications in the digital age, and because the data is digital, it can be forwarded, archived, and searched by virtually anyone, indefinitely. These days technology makes it possible for youth to reach through both space and time to harass or bully classmates, regardless of physical location. As such, the difficulty our clients face is what is or is not considered outside the reach or jurisdiction of the school.

Gone are the days when misbehaving in school meant you actually had to physically be in school. Now with computers, tablets and cell phones kids can sit in the privacy of their own homes on a Saturday night, using any number of technological means or social-networking sites to demean, harass, defame, or impersonate a fellow student. The activity is taking place off campus, outside of school hours, and no school equipment is being used. Yet come Monday, that same online activity can have a very real impact on campus. Not only might fellow students have seen the bullying or participated in it prior to arriving at school, they might also access that page at school on school computers or their own mobile phones. It could have a negative impact on the victim(s) or even cause a disruption school-wide.

AT SCHOOL, AT HOME – DOES IT MATTER?

In examining children's posting malicious content online on their own time, we find more often than not it's happening outside the reach of school officials. Many of our clients have asked whether this conduct is within the jurisdiction of the school to control. Even though the

behavior may be taking place away from school, it could be having an impact on campus. Can a school administrator discipline the students involved? The answer isn't necessarily obvious.

Technology has complicated a clear policy direction set down by the United States Supreme Court in two landmark cases. In the 1968 case *Tinker et al. v. Des Moines*, the Supreme Court struggled with students' freedom of speech at school. There, a group of students were suspended from school for wearing black armbands to protest the Vietnam War. The Supreme Court found in favor of the students holding "[t]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." The Court determined that because the students did not interrupt school activities, did not intrude in school affairs or the lives of others, and caused no interference with work and no disorder, the Constitution did not permit the school to deny their particular form of expression.

In the 1983 case *Bethel School District v. Fraser*, however, the Supreme Court placed some limits on student speech, ruling that it was appropriate for a school to suspend a student for using sexual innuendos in a student government nomination speech made on behalf of a fellow student. The court identified a significant difference between the political protest of *Tinker's* self-expression and the lewdness of the student's speech in *Fraser*. The Court held there must be a balance between a tolerance of opposing political and religious views and a consideration for the sensibilities of others, as well as the school's interest in teaching students the boundaries of socially appropriate behavior.

To simplify, schools cannot not punish political expression when it doesn't lead to disruption, but they can impose sanctions against certain types of lewd speech that go beyond the "boundaries of socially appropriate behavior." As such, based on case law, many argue that schools have the right—some say responsibility—to intervene in cases of harassment or cyberbullying. However, most case law refers to activities that took place on campus. The difficulty in present day application and interpretation is that these landmark cases were decided long before smartphones and Internet access on multiple devices became commonplace.

Still, students don't have to be in school to impact what happens at school. For example, imagine a group of students post remarks on a social networking site over the weekend stating that another student is a "slut." The next school day, the post has been widely circulated among the student body and other students start laughing at the student in question or making lewd or mean comments to the student at school. Suddenly, the students' off-campus behavior is having an impact at school and could easily jeopardize the targeted student's ability to obtain an education.

While the school can clearly take action to prevent the on-campus behavior, the school has no jurisdiction over the actions that took place off campus, and school administrators should carefully consider the limits of the school's authority.

Reporting incidents to the local police and meeting with parents regarding off-campus behavior would be appropriate responses. In addition, schools must document that the off campus conduct is causing a *substantial disruption* of the educational activities of the school during school hours. Schools should document how many students are talking about the off campus behavior, if students are accessing disruptive material online while on campus, and the extent to which such conduct is disrupting the educational experience at school for the victim and others.

In keeping with the seminal cases outlined above, then, schools must balance the free speech rights of their students with the school's commitment to provide a safe learning environment. In 2005, the U.S. District Court of the Western District of Pennsylvania heard the case *Latour v. Riverside Beaver School District*, in which 14-year-old Anthony Lautour

and his parents sued the school for expelling him for writing rap music in his home and publishing it online. The child, who never wrote music at school or brought his songs in, posted a song that contained violent language as part of a rap battle with another musician. The school worried that the songs contained terrorist threats and harassment. In a preliminary injunction, the court ruled in favor of the student, who was reinstated at school. The settlement included a \$90,000 payment and the District had to agree to amend its policy regarding the circumstances under which it could discipline students from school based on the student's speech.

In contrast, in *Weedsport Central School District v. Wisniewski*, the Court ruled in favor of the Weedsport Central School District after an eighth-grader sent messages to friends from home that contained an icon depicting a pistol firing at a man's head with the words, "Kill Mr. VanderMolen," the student's English teacher. The Second Circuit District court judge concluded that the icon was not protected speech because it constituted a true threat.

Compounding the difficulties many school administrators face, technology changes much faster than the law and public policy. As a result, some of these issues play out in schools before they do in the rest of society, leaving school officials need to make decisions before they have clear guidance from the law. To provide some legal framework for schools, some states, including California, have passed cyberbullying laws that impact school administrators.

CALIFORNIA ASSEMBLY BILLS 86 AND 746

California Assembly Bill 86 went into effect in January of 2009, giving schools the authority to suspend or expel students for bullying via the Internet, in text messages, or via other electronic means. The bill covers activities on school grounds, while going to or coming from school, during lunch period whether on or off campus, and during or while going to or coming from a school-sponsored activity. In January 2012, Assembly Bill 746 went into effect extending the protections afforded by AB 86 to social networking sites. Both AB 86 and AB 746 added California *Education Code* Section 48900(r), which allows for the suspension or recommended expulsion of a student engaged in an act of bullying.

The text of Section 48900(r)(1) defines "bullying" as the "severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act, and including one or more acts committed by a pupil or group of pupils as defined in Section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

- (A) Placing a reasonable pupil or pupils in fear of harm to that pupil's or those pupils' person or property.
- (B) Causing a reasonable pupil to experience a substantially detrimental effect on his or her physical or mental health.
- (C) Causing a reasonable pupil to experience substantial interference with his or her academic performance.
- (D) Causing a reasonable pupil to experience substantial interference with his or her ability to participate in or benefit from the services, activities, or privileges provided by a school."

Significantly, Section 48900(r)(2) defines an "electronic act" as "the creation and transmission originated on or off the schoolsite, by means of an electronic device, including, but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication, including, but not limited

to” a message, text, sound, or image or a post on a social network Internet Web site (including the impersonation of another person or creating a false profile to bully another student).

Note that because a student posts something online, it is not necessarily “pervasive conduct” simply because it has been transmitted on the Internet or is currently posted on the Internet.

School administrators should read the prohibited conduct in subsection (r) in the context of Section 48900(s), which states that a student “shall not be suspended or expelled for any of the acts enumerated in this section unless the act is related to a school activity or school attendance occurring within a school under the jurisdiction of the superintendent of the school district or principal or occurring within any other school district.” Subsection (s) continues by clarifying that a student may be suspended or expelled for acts that occur at any time, including, but not limited to, any of the following:

- (1) While on school grounds.
- (2) While going to or coming from school.
- (3) During the lunch period whether on or off the campus.
- (4) During, or while going to or coming from, a school-sponsored activity.

WHAT YOU SHOULD DO

Preventing and responding to school bullying is the responsibility of every school administrator, teacher, school staff member, student, and parent. Bullying among children often leads to greater and prolonged violence. Not only does bullying harm the targets, it also negatively affects students’ ability to learn and achieve in school. As such, the entire school community must recognize the responsibility to create a climate in which bullying is not tolerated. Reducing bullying and other antisocial behavior among students in primary and junior high schools calls for interventions at different levels including school-wide interventions, classroom interventions and individual interventions.

Short of the school’s own disciplinary action, there are a wide range of other actions available to staff, including confronting the student and the parents of the student committing the act. Students must understand that actions have consequences, and sometimes it is effective to remind parents and students that college admission counselors and employers know how to search for student activity online, and victims have a multitude of rights, including pursuing criminal charges or a civil lawsuit.

As well, we recommend that schools:

- Implement a school-wide anti-bullying policy that not only defines bullying but also provides appropriate responses to the problem.
- Conduct assemblies educating and raising awareness amongst students on what to do if they are a victim of bullying or observe bullying behavior.
- Provide teacher in-service training to raise the awareness of school staff regarding bullying.
- Encourage teachers to create classroom rules against bullying.
- Take immediate action when bullying is observed.

- Respond in a timely manner to all reports of bullying.
- Provide protection for students who are bullied.
- Establish an effective system for reporting bullying, including adults who can be relied on to respond responsibly and sensitively.
- Educate parents to understand bullying and the consequences.

QUESTIONS?

As always, if you have questions about this newsletter or any other matter, please call us at any time for guidance.

Hansberger & Klein, LLP is a law firm representing public charter schools. This newsletter is not intended to be legal advice. If you are seeking legal advice, please contact us or your attorney for guidance. We look forward to working with you!

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