

STUDENT RIGHTS, SAFETY AND RESPONSIBILITIES

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A Post-Columbine World – By the Numbers

- 10 School shootings with 5 or more persons killed (128 fatalities)
 - 2007 – Virginia Tech University – 33 deaths
 - 2012 – Sandy Hook Elementary – 27 deaths
 - 2018 – Marjory Stoneman Douglas High School – 17 deaths
 - 2015 – Umpqua Community College -10 deaths
 - 2018 – Santa Fe High School – 10 deaths

A Post-Columbine World – By the Numbers (Cont'd)

- 2005 – Red Lake Senior High School – 7 deaths
- 2012 – Oikos University – 7 deaths
- 2006 – West Nickel Mines School – 6 deaths
- 2008 – Northern Illinois University – 5 deaths
- 2014 – Marysville Pilchuck High School – 5 deaths

• Source: Axios.com



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ABC News Profile

- 270 – Shootings at schools post-Columbine
- 50 – Mass killings or attempted mass killings post-Columbine
- 17 – The number of kids 15 years old or younger committing or attempting to commit a mass school shooting post-Columbine

ABC News Profile (Cont'd)

- Gender – 96% male
- No criminal record (not even an arrest) – 73%
- Information that attacker was planning or thinking about a school shooting – 81%
 - Liability Exposure?
 - Threat Assessment?

Mass Shootings:

Comparing Schools to American Society

- Schools are just a fraction of society's violence problem:
 - MGM Las Vegas – Route 91 Music Festival – 58 killed, 851 injured (Oct 2017)
 - Thousand Oaks – Borderline Bar & Grill – 12 killed (Nov 2018)
 - Pittsburgh Synagogue – 11 killed, 6 injured (Oct 2018)

What Does Safety Mean?

1. Physical Safety

- (Mass shootings, bombs, weapons)
- (Adult on child, child on child sexual misconduct occurring on school campus)
- (Personal injury lawsuits, e.g. playground, parking lot accidents)

2. Emotional Safety

- (Harassment, Bullying, Hazing)

Physical Safety: Common Theories of Liability

- Negligence:
 - Negligent hiring
 - Negligent training
 - Negligent supervision
- Dangerous Condition of Public Property
 - Substantial (not trivial) risk of injury
 - Property utilized in foreseeable manner
- Direct liability of employees – Govt. Code §820
- Vicarious liability of school district – Govt. Code §815.2
 - Limitation on vicarious liability for public entity – Conduct must be within course and scope
 - Majority of dangerous condition cases turn on physical condition of property. Visual images of property critical post-accident. Comparative fault, and immunities are critical defenses to explore.
 - Majority of sexual misconduct cases turn on what school personnel knew, did or failed to do. Some sexual assault though can involve the condition of the school property (e.g. “hidden” areas in classrooms or playground)

School Safety

Key Laws

Statutes:

- School Safety Act of 1985 [School districts must write and develop comprehensive school safety plans relevant to needs and resources of K-12 schools.]
- *Education Code* §44807 [Every teacher in public schools shall hold pupils to strict account for their conduct on the way to and from school, on the playgrounds, of during recess]
- School Facilities Act of 1998 [Requires locks on classroom doors for all new construction projects.]

New School Safety Laws 2019

1. Threat Assessment Plans

- *Education Code §32880* [Safety plans to develop strategies aimed at prevention of potential incidents involving crime and violence on campus.]

2. Locks

- School modernization projects using state bonds must include doors that lock from the inside from classroom or any room with an occupancy of five or more persons.

3. Active Shooter Training

- Schools must conduct Annual Active Shooter Training.
 - Does it educate?
 - Schools have a conflict. Schools have to convey a sense of security and normalcy while at the same time educating students about the dangers of society, including guns, weapons and violence.

New Laws for 2019 (cont'd)

- Does active shooter training traumatize?
The Atlantic, When Schools Simulate Mass Shootings (February 19, 2015)
www.theatlantic.com/education/archive/2015/02/when-schools-simulate-massshootings
- What about announcing plans for active shooter training?
McLean v. Pine Eagle Charter School Oregon (2015)

Facts: Elementary school had in service training day (teachers present, students not present). School administration arranged for simulated active shooter drill on campus. Administrators in camouflage set off fireworks mimicking gunfire in school while teachers in classrooms. One administrator pointed a real-looking gun at teacher and pulled trigger and said “You’re dead” and ran away. The gun was a starter pistol and was smoking. That teacher thought the attack was authentic and fled from the school. Female teacher alleged PTSD from simulated school shooting. She claimed she was not, but should have been, informed in advance it was a simulation.

Outcome: Case was dismissed at trial court and appeal taken, then dismissed.

Physical Safety – Important California Public School Cases

- Dailey v. Los Angeles Unified School Dist. (1970) 2 Cal.3d 741, 747
 - Facts: Two students engaged in slapboxing contest without supervision. One student died.
 - Holding: School personnel are not insurers but must exercise reasonable care (i.e., a degree of care “which a person or ordinary prudence, charged with comparable duties, would exercise under the same circumstances.”)
 - Key Takeaway: When children are involved, the younger the students, the greater degree of vigilance required.
 - Example: Level of supervision necessary for first graders on playground equipment significantly different than eighth graders.

Physical Safety – Important California Public School Cases

- M.W. v. Panama Buena Vista Union School Dist. (2003) 110 Cal. App. 4th 508
- Facts: Student on student sexual assault occurring on playground in “hidden” area without much visibility.
- Holding: Court takes a rigid view of school supervisory responsibilities. Schools must regulate student conduct “so as to prevent disorderly conduct and dangerous practices which are likely to result in physical injury to immature scholars.”
- Key Takeaway: Very difficult to win school supervision cases prior to trial on ground that school exercised reasonable care. Many motions are denied on this ground, instead, causation is often a strong defense.
- Example: Students engaged in spontaneous fight. No amount of supervision can prevent such a fight that occurs without notice.

Hypothetical: Dirty Deeds in the Bathroom

- Antoine, 14, a high school freshman, has been making suggestive comments to Tanya, 15, a sophomore, for the past few weeks. [“We need to hook up... we should be getting it on...”] Tanya is interested in Antoine, but not ready yet.
- The school campus consists of multiple buildings in a city block. In the middle of the campus is a stand alone bathroom, next to an athletic field.
- The bathroom is open during school hours and after school activities. There is a boys bathroom and a girls bathroom.
- After a few weeks of suggestive comments, Antoine sees Tanya near the bathroom and tells her “This is the time for us...” Tanya continues to walk with Antoine until they are by the boys bathroom door.
- Antoine forces her into the boys bathroom, and then locks the door from the inside. Tanya then performs oral sex on Antoine, but refuses to allow him to penetrate her vagina. Tanya hurriedly unlocks the door and leaves the bathroom.
- Tanya is too embarrassed to report the incident. Several weeks later, as Antoine continues to make comments to Tanya’s friends about her, they ask what happened, and Tanya spills the beans.

Hypothetical: Dirty Deeds in the Bathroom (Cont'd)

- How do you assess the school's liability exposure?
- What additional facts must be determined?
- Should the school investigate; if so, how?
- Should one or both students be suspended pending investigation? Why/not?
- Once reported to the school administrators, are mandated reporting duties triggered?
 - Relative age(s)?
 - Forced or consenting conduct between minors?

Policies and Prevention

- **Policies – The Good**

- Policies provide behavioral expectations for students
- Policies allow for consistent discipline, and avoid criticisms of arbitrary discipline.
- Single egregious events vs. multiple, repetitive events

- **Policies – The Bad**

- Policies can become promises not be kept.
 - Zero tolerance: 1) Does “zero” really mean “zero”? 2) Must it be applied in every situation?
 - No bullying: 1) Different perceptions of what “bullying” means; 2) So if a student is bullied, didn’t the school fail to enforce its policy?
- Procedures requiring a school administrator to follow multiple steps in sequence can become traps.

Laws Applicable to Sexual Misconduct, Sexual Harassment involving Students

Federal:

- Title IX of Education Amendments of 1972

California:

- Penal Code §11165 [Mandated reporting obligations for sexual and child abuse]
- Education Code §212.5 [Sexual harassment means unwelcome sexual advances, requests for sexual favors, or other verbal, visual or physical conduct of a sexual nature]
- Education Code §220 [Prohibits discrimination based on disability, gender, gender identity, gender expression, nationality, race, ethnicity, religion, sexual orientation, or hate crimes]

What is Bullying?

- California Education Code §32261:
 - (a) The Legislature hereby recognizes that all pupils enrolled in the state public schools have the inalienable right to attend classes on school campuses that are safe, secure, and peaceful. The Legislature also recognizes that pupils can not fully benefit from an educational program unless they also attend school on a regular basis. In addition, the Legislature further recognizes that school crime, vandalism, truancy, and excessive absenteeism are significant problems on far too many school campuses in the state.
 - (f) As used in this chapter, “bullying” has the same meaning as that set forth in subdivision (r) of Section 48900.

Education Code §48900(r)(1) (Grounds for Suspension/Expulsion):

- “Bullying” means any 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 reasonably be 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 person 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.

Education Code §48900(r)(2)

- Electronic Bullying:
 - Sending a message, text, sound, video or image.
 - Posting on a social network internet website
 - This includes:
 - Catfishing (creating a fake profile)
 - Credibly impersonating another student

Education Code §48900.3 (Grounds for Suspension/ Expulsion)

- Hate crimes: A pupil in grades 4-12 may be suspended or recommended for expulsion if the superintendent or the principal of the school determine the pupil has caused, attempted to cause, threatened to cause, or participated in an act of, hate violence as defined in subdivision (e) of Section 233.
- Section 233 cites to Penal Code Sections §422.6, §422.7 and §422.75:
 - Section §422.6. Injury or threat to person or damage to property based on perception of person's race, color, religion, ancestry, national origin, disability, gender or sexual orientation.
 - Section §422.7. Additional punishment for hate crimes committed for purpose of intimidating or interfering with constitutional rights of another.

Education Code §48900.4 (Grounds for Suspension/Expulsion)

- Harassment: A pupil may be suspended or recommended for expulsion if the superintendent or the principal determines that the pupil has intentionally engaged in harassment, threats, or intimidation, directed against school personnel or pupils that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment.

Investigating Harassment/Bullying Complaints

- Go Beyond the Words:
 - A complaint need not use the words “harassment” or “bullying” to identify it; conversely, just because a parent or student calls it “harassment” or “bullying” does not mean it is, either.
- Get the Facts:
 - The specific words...
 - The physical acts ...
 - The role/location of each person present ...
 - Electronic images (Screen shots)
 - Single or multiple targets
- Explore the Consequences of the Conduct:
 - Did this impact ability to teach, learn or not? How?
- Assessment:
 - Did it happen?
 - Single Act vs. Pervasive Acts?
 - Trivial vs. Severe?
 - Power imbalance between students?
 - Words + Physical aggression

Hypothetical – Social Media Harassment/Bullying

Ofure is an African American female; Vladimir is a Hispanic male – both eighth grade students. Vladimir has been persistently, verbally disruptive during eighth grade. He doesn't do his own school work and at times interferes with other students. By comparison Ofure is an angel.

The class is reading John Steinbeck's *Grapes of Wrath*. After a class discussion of the book, but after school, Vladimir calls Ofure a "n-----." Ofure responds by calling him a "w-----." No school teacher or administrator overhears them. Ofure reports only Vladimir's comment to her mother. Ofure's mother informs the principal, who investigates and learned of Ofure's comment.

The principal meets with both students and they acknowledge making these comments. Both are warned they have slurred the other, in violation of school rules. Neither is suspended. Both are told the school had "zero tolerance" for this kind of slurring.

Three days later, Vladimir is on Instagram and posts a message to a friend stating he could not attend a school function "because of the fat [picture of a gorilla] ... named Ofure. A friend of Ofure's is part of the messaging chain and sees the message, screen shots it, and then shares it with Ofure. The next day, Ofure's mother, incensed, visits the school to demand Vladimir's expulsion.

Questions:

1. The school has a “zero tolerance” policy for any type of harassment. Did the principal handle the initial slurring appropriately?
2. Can the school discipline Vladimir for his Instagram posting, even though it occurred outside of school?
3. If so, what should the consequences be for Vladimir’s Instagram posting?

Student Rights – First Amendment/Freedom of Speech

- In the Stone Age
 - Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)
 - Facts: Students at a school want to show their support for a Christmas truce during the Vietnam war. They meet and agree to wear black armbands to school. The school officials learn of the plan and adopt a policy stating any students who wear armbands will be asked to remove them and, if they do not, the students will be suspended. John Tinker (and others) come to school with black armbands, refuse to remove them and get suspended.
 - Outcome: Tinker’s First Amendment free speech rights were violated by the school’s policy. The Supreme Court famously ruled: “Students don’t shed their constitutional right to freedom of speech or expression at the schoolhouse gate.”

Student Rights – First Amendment/Freedom of Speech

- Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)
- Facts: High school student newspaper planned to publish two articles about student experiences with teen pregnancy and divorce. The principal was sent the proof sheets (in advance of publication) and ordered the two articles to be removed. The students challenged the censorship.
- Outcome: Principal's right to remove articles from school newspaper affirmed by U.S. Supreme Court. Because it was a school-sponsored and funded newspaper, it was not intended as a public forum, and the school had a legitimate right to prevent publication of articles it deemed inappropriate.

Student Rights – First Amendment/ Freedom of Speech

- Bethel School District v. Fraser, 478 U.S. 675 (1986)
- Facts: During student elections at a high school assembly, Matthew Fraser spoke promoting one of the candidates. Over 600 students attended the assembly, held on campus. His language was lewd and filled with sexual language and obscenities. Some students in the audience responded by hooting and mimicking the sexual innuendo in the speech. Fraser was allowed to finish the speech, but the next day was suspended for violation of the school's disruptive conduct rule, which prohibited conduct that substantially interfered with the educational mission by use of obscene words, profanity or gestures.
- Outcome: No First Amendment violation; Fraser had fair notice of conduct prohibited in school's disruptive conduct policy.

Student Speech – First Amendment/Freedom of Speech

- Out of the Stone Age ... into First Amendment cases involving use of social media occurring outside school premises that can disrupt school activities through social media...
 - R.L. York v. Central York School District, 183 F. Supp.3d 625 (M.D. Pa. 2016)
 - Facts: A student finds a note randomly left at school stating “there is a bomb at the school.” The school is evacuated promptly. An exhaustive search follows. No bomb was found. Later that day, away from school, a student uses his personal computer and posts to his Facebook account: “Plot twist, bomb isn’t found and goes off tomorrow.” Later that day, the student returns to school and deletes this Facebook post from his cell phone, located at school. The school suspends the student for 10 days, then another 13 days during disciplinary hearings.
 - Outcome: School’s discipline affirmed, even though the student’s speech occurred away from school, it significantly impacted the school in terms of safety.

Student Safety – First Amendment/Freedom of Speech

- Shen v. Albany Unified School District, 2017 WL 5890089 (USDC-NDCA, 2017)
- Facts: Instagram account created by a student and invited other students to follow it. The student sent racist and derogatory messages that targeted other students and school employees.
- Outcome: Social media messages were done off campus but written “by students for students” and were not protected speech. The student who posted was expelled, and the students who followed (without posting) were suspended. All of the school’s student discipline was affirmed.

Student Speech – First Amendment/Freedom of Speech

- Burge v. Colton School District 53, 100 F.Supp.3d 1057 (USDC Oregon, 2015)
- Facts: Burge, a middle school student makes Facebook posting at home from his own computer criticizing his health teacher and announces his plan to start a petition to get her fired. A Facebook friend asks “Why are you upset?” Burge replies “She’s a bitch. Haha”. The Facebook friend replies again and Burge then states “She needs to be shot.” Burge’s mother finds his Facebook post the next day and makes him delete it. Burge never circulates a petition. Six weeks later another parent informs the principal of Burge’s Facebook post, long since deleted. Burge is given a three day suspension.
- Outcome: Discipline overturned. No material and substantial interference with school discipline created by student’s Facebook post.

“Walking the Tightrope”

- “With the advent of the Internet and the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping students safe without impinging on their constitutional rights. It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result.”
- Wynar v. Douglas Co. School Dist., 728 F.3d 1062 (9th Cir. 2013)

“Walking the Tightrope”

- The Balancing Act at One Pole –
 - How imminent is the safety risk from the speech, and the disruption of the school?
 - How real is the safety risk, or is the student speech mere joking or venting?
 - Did the school’s actions evidence a genuine concern for safety of its students or employees?
 - Was a campus lockdown or shelter in place ordered?
 - Were the police notified and on campus to assess situation?
 - Were parents/guardians notified of the safety threat – promptly?
 - Did the student have the ability to deliver on a threat?

“Walking the Tightrope”

- The Balancing Act at The Opposite Pole
 - Does the student speech address issues of public importance (e.g., school shootings, gun violence, etc.)
 - Does the student speech express opinions on issues of public controversy?
 - Does the student speech advocate for any disruptive conduct interfering with learning?
 - Did the school’s actions indicate a disinclination to take the matter seriously?
 - Delays in discipline
 - Changes in deciding what grounds to impose discipline
 - Parental pressure on administrators to impose discipline

Walking the Tightrope

- The Grey Areas ...
 - No immediate or clear threat of physical harm, or risk of diminished safety to anyone at school
 - Disparaging opinions, but not profane or harassing language
 - Use of language and images that may be perceived as form of illegal harassment or bullying but also contain a discussion of issues of public concern

LITIGATION – ARE TACTICAL RESPONSE PLANS OR ASSESSMENTS DISCOVERABLE?

- Exempt from disclosure under Education Code?
 - Education Code §32281(f)(3) for “those portions of the comprehensive school safety plan that include tactical responses to criminal incidents”
- Exempt from disclosure under Public Records Act?
 - Government Code §6254(aa) for documents assessing vulnerability to terrorist or criminal attack for “distribution or consideration as closed session.”
- Applicable privileges?
 - If attorney participates in creation of tactical review plan, attorney-client privilege?
 - If mental health professional participates in threat assessment of any particular student, psychotherapist privilege?

CAN YOU GET ON THE OFFENSIVE?

- Any ability to recover amounts spent for protecting teachers and students?
 - Criminal actions brought against persons threatening school teachers, students or property?
 - Restitution

QUESTIONS?

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