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ARE YOU PREPARED?

When your District receives a student complaint against a teacher or other employee, immediate action is required to protect all parties: the student, the employee, and the District. Are you prepared to adequately respond?

- How quickly must the investigation begin?
- Is the District required to investigate anonymous complaints?
- What immediate steps can be taken to protect the student?
- What are the employee's rights?
- Who should conduct the investigation?

For answers to these and other critical questions, log onto www.mbm-law.net or contact one of our school law attorneys for advice on how to proceed.



Built on Integrity, Proven by Performance

Education News Fall 2006

Inside This Issue:

Student Code of Conduct – Firm Foundation or Issue for Appeal? pg. 1

Federal Judge Rejects Challenge to Pennsylvania Home Schooling Statutepg. 2

Cyber Speech and Student Discipline pg. 2-3

Competitive Bidding in the Electronic Age pg. 3

Record Retention – How Long is Long Enough?insert

STUDENT CODE OF CONDUCT - FIRM FOUNDATION OR ISSUE FOR APPEAL?

In order to successfully defend a challenge to a disciplinary or expulsion decision, it is fundamental that every student and parent be placed on notice of the conduct which will result in discipline. It is not required that the District's discipline policy be given to each student and parent, as long as the student and parent are informed of where they can view or obtain copies of the full policy if they desire. However, critical information contained in the policy must be summarized in sufficient detail in the Code of Conduct that is distributed to students and parents. The Code of Conduct must include a detailed description of the conduct which is considered a violation, and identify the type of discipline, including expulsion, which could be imposed. The Code of Conduct must accurately reflect and coincide with the District's comprehensive policy in order to avoid successful challenge.

Conduct are critical. For example, if a drug and alcohol policy prohibits "look alike" drugs and the weapons policy prohibits "look alike" weapons, the Code of Conduct must also define

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In many situations, a disciplinary action, especially in the context of expulsion proceedings, may rely on several sections of the Student Code of Conduct depending upon the nature of the offense. Policies regarding drugs and alcohol, assault, harassment, discrimination, terroristic threats, tobacco use, vandalism and weapons may all be implicated. Adequate summaries of the drug and alcohol, harassment, tobacco and weapons policies within the Code of

what is considered a "look alike" drug or a "look alike" weapon. With regard to harassment issues, the types of harassment should be described in greater detail. If sufficient detail is not provided, the District could find itself faced with a reversal of a student expulsion in a situation where a serious violation has occurred. It is strongly recommended that a review of each of these issues be conducted on a regular basis to determine whether sufficient information is included and that it adequately addresses the offending behavior.

In the event that you have any questions about the required detail in the Student Code of Conduct or are in need of guidance in amending the policy summaries, please do not hesitate to contact one of our school attorneys. For more education news, log onto www.mbm-law.net.



FEDERAL JUDGE REJECTS CHALLENGE TO PENNSYLVANIA HOME SCHOOLING STATUTE

Recently, separate lawsuits were filed in federal court by home schooling parents who argued that the Pennsylvania home schooling statute, 24 P.S. 13-1327.1 et seq. was an unconstitutional violation of the religious and parental freedom rights of parents and students. The separate cases are *Combs, et ux. v. Homer Center School District, et al.*, *Prevish, et ux. v. Norwin School District, et al.*, *Newborn, et al. v. Franklin Regional School District, et al.*, *Hankin, et al. v. Bristol Township School District, et al.*, *Nelson, et ux. v. Titusville Area School District, et al.*, and *Weber, et ux. v. DuBois Area School District, et al.* The suits were consolidated into a single case before Western District of Pennsylvania Judge Arthur Schwab. In an opinion dated May 25, 2006, Judge Schwab granted summary judgment against the plaintiffs and in favor of the school districts, and held that the statute's provisions requiring parents to submit information concerning the home school programs to school districts do not violate the free exercise, free speech or establishment clauses of the First Amendment, nor do they violate the Constitution's due process clause or Pennsylvania's Religious Freedom Protection Act.

The plaintiff home schoolers have appealed Judge Schwab's decision to the Third Circuit Court of Appeals, and that appeal is pending. Maiello Brungo & Maiello represented two of the school districts in the case and we will be involved in the appeal as well. Stay tuned for further updates to this matter in future editions of this newsletter.

CYBER SPEECH AND STUDENT DISCIPLINE

Imagine that you discover that a student in your district maintains a blog, and on that site says things about staff members or other students which are hurtful or offensive. If those things were said during school hours, they could be punished under your Code of Conduct. Does the fact that the statement is made online change anything?

In reality, chances are that somebody has said something on the internet about your school district. The target of the communication may

be a school administrator, teacher or a student. Given the popularity of personal computers and the possibility that a student has a computer in his or her own room, the use of which is unsupervised by parents, it is entirely likely that a student's own writings on the internet were conducted wholly off-school grounds and without the assistance of any other individuals.

In recent years, school districts have begun to grapple with addressing new forms of student speech in relation to their written Codes of Student Conduct. In turn, courts have also struggled to apply traditional First Amendment analysis to internet-based speech.

As a starting point, the U.S. Supreme Court has long recognized that students retain First Amendment protection while in school. In the landmark 1969 *Tinker* decision, the Court held students were permitted to wear black armbands to protest the Vietnam war without disciplinary reprisal from school officials, and stated that unless the student speech activities could be shown to "materially and substantially disrupt the work and discipline of the school," it would be protected by the First Amendment. Pennsylvania has codified this principle at 22 Pa.Code 12.9.

Following the Supreme Court's reasoning in *Tinker*, courts have clarified the "material and substantial disruption" standard and prohibited certain types of student expression while protecting other kinds. One distinction often made in cases involving student speech and conduct is whether the speech or conduct occurs on school grounds. Of course, speech in the form of websites or postings frustrates this distinction because the speech can be created off campus on a student's home computer, and yet can be brought onto school grounds by students or staff members accessing the internet via school computers, either with or without the invitation or knowledge of the student who created the speech. Courts have decided the reported student internet speech cases under the *Tinker* standard of whether school operations are materially and substantially disrupted by the speech. Unless a district can establish that the speech disrupted school order and operations, a student cannot otherwise be punished.

In *Killion v. Franklin Regional School District* (2001), a student compiled a derogatory "top ten" list about the district's athletic director on his home computer but never distributed it in school, either electronically or by hard copy. Another student who obtained a copy by e-mail

Cyber Speech and Student Discipline, continued...

at home distributed it on school grounds. The District suspended the student who wrote the list for ten days. The Court held the district's action in suspending the student violated the student's First Amendment free speech rights because the District produced no evidence that the list disrupted or could potentially disrupt the school's educational mission or hampered discipline. The Court concluded that absent exceptional circumstances, the District could not discipline a student for lewd, vulgar or offensive speech occurring off District grounds.

A Pennsylvania case from August, 2005 also applied this line of reasoning to speech which is aimed at fellow students. In *Latour v. Riverside-Beaver School District*, the Court held that a school district could not expel a student for posting violent rap lyrics on a personal website which specifically named and threatened classmates. Because the student had not otherwise been involved in violent incidents, and because the lyrics were found to be "metaphor" and not true threats, the district could not otherwise establish that the lyrics materially disrupted school operations. The Court denied the parents' request for a Preliminary Injunction to the discipline imposed by the District.

A recent case illustrates when student internet speech can be punished. In *Layshock v. Hermitage*, (2006) a high school student used his grandmother's computer to create a demeaning profile of his principal on MySpace.com. The profile contained crude language and copied the principal's photo taken from a school website. When the student body discovered the existence of the website, they began accessing it on school computers. The district suspended the student and assigned him to an alternative program. A suit was filed seeking a Preliminary Injunction to enjoin the discipline.

The Court rejected the student's request for an injunction to return him to school and found the district demonstrated the student's off-campus speech substantially disrupted school operations. Specifically, the internet profile became infamous in school and so many students either accessed it from school or imitated it that the school's computer network was shut down for a five-day period to block access to the fake profiles and the technology coordinator and co-principal were required to spend 25% of their time dealing with the technological or disruptive effects of the profile. Under these circumstances, the student could not show his speech was protected.

To that end, if your district is presented with a scenario like the ones described in the opening paragraph, before taking disciplinary action for this sort of off-campus internet speech, you should first ask whether you can prove that the speech substantially disrupted school order and operations. To prove this, you must be able to present testimony and documentation concerning disruptive effects on your school computer network, administrator time and the impairment of overall operations. Document and keep track of the disruption caused by the out-of-school speech. Have administrators and staff members write memos concerning the efforts and time spent in responding to disruptive speech. Have students write statements concerning the effects of off-campus speech on school grounds. Unless you can show substantial disruption, the speech, in all probability, will be held to be protected speech. For more education news, log onto www.mbm-law.net.

COMPETITIVE BIDDING IN THE ELECTRONIC AGE

In a step to move the bidding system into the electronic age, Act 88 of 2006, known as the Local Government Unit Electronic Bidding Act, was passed and took effect on September 11, 2006. The Act applies to School Districts and permits electronic submission of bids as part of the traditional bidding process and also establishes a procedure for competitive electronic option bidding. As part of the traditional bidding process where sealed bids are accepted, the District may permit the electronic submission of bids if the District has the electronic capability to maintain the confidentiality of the bid until the bid opening time. The electronic bids would then be accessed at the bid opening time when the other written bids are opened and read. The Act also authorizes the School District to adopt a resolution permitting the use of competitive electronic bidding limited to contracts for supplies or services, but not for construction or design professional services. The electronic auction bidding process must include an invitation for bids and public notice in the same manner as currently required. A unique feature of the Act provides that each bidder must have the capability to view their bid rank or the low bid price and may reduce their bid prices during the auction. The Act contains other provisions governing the electronic bidding process. To review the entire contents of Act 88, log onto www.mbm-law.net.