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## LEGAL UPDATE

February 28, 2012

  
Susanne K. Reed  
(1947 - 2010)

**To:** Superintendents, Member School Districts (K-12)

**From:** Marko Fong, Assistant General Counsel *MF*  
Frank Zotter, Associate General Counsel *FZ*

**Subject:** Discipline for Online Bullying and Harassment  
Memo No. 07-2012

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The U.S. Supreme Court recently declined to hear two cases from the Third Circuit where the appeals court had refused to uphold school disciplinary action against students who, while away from school, had made fake and offensive MySpace profiles for their site principals.<sup>1,2</sup> The Court also declined to hear a case from the Fourth Circuit<sup>3</sup> where the appeals court upheld school discipline for a student whose MySpace page encouraged offensive comments to be directed at a fellow student. By letting these cases stand, the Supreme Court is not forbidding schools from disciplining students for creating electronic messages from home or away from school that are obscene or insulting to staff or peers. It is, however, making it clear that “substantial disruption at school”<sup>4</sup> remains the standard for any attempts to discipline for student speech whether the speech originates at school or away from school and whether it takes “in person” or electronic form. Thus, unless there is “substantial disruption at school”, the district cannot discipline students when they engage in this kind of behavior.

The court’s ruling leaves intact the decision in *J.C. v. Beverly Hills Unified School District*, 711 F.Supp.2d 1094 (C.D.Cal., 2010), in which a Federal District Court in Southern California reversed a middle school’s attempt to discipline two female students for posting a video on YouTube that disparaged a classmate. In the *Beverly Hills* case, the judge had modified

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<sup>1</sup> *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3rd Cir., 656, C.A.3 (Pa.), (2011).)

<sup>2</sup> *Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3rd Cir., 2011).31, C.A.3 (Pa.), (2010)

<sup>3</sup> *Kowalski v. Berkeley County Schools*, 652 F. 3d 565 (4th Cir., 2011).)

<sup>4</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, (1969).)

his opinion to address the issues raised by the two cases from the Third Circuit (although the opinions in those cases were themselves later modified).

California law clearly states that “bullying by means of electronic act” Education Code section 48900, subd. (r) is an offense that can support suspension or expulsion. (see also Education Code section 32261, subds. (d)<sup>5</sup> and (g)<sup>6</sup>). At the same time, California has specific protections for the student exercise of free expression<sup>7</sup> that make it critical that administrators document both the electronic act and the “substantial disruption at school” or a “reasonable threat of substantial disruption” when disciplining a student for cyber-bullying. In *J.C. v. Beverly Hills*<sup>8</sup>, the court found that mere gossip or negative peer interactions did not amount to “substantial disruption.” Conversely, in *Lavine v. Blaine School District*, 279 F.3d 719 (9th Cir.2002)<sup>9</sup>, the Ninth Circuit found that a student’s poem, submitted to his English teacher, in which the student described a dream about slaying 29 classmates, *could* serve as the basis for an “emergency expulsion” due the seriousness of the threat and the student’s past psychological issues and a history of physical altercations. Because most situations will fall somewhere between these two statements, we recommend the following,

Substantial disruption due to cyber bullying should include at least one of the following as specified in the version of Education Code Section 48900, subd. (r), subsections (1)(A-D) that goes into effect on July 1, 2012:

- 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.

Be aware that the conduct must be either severe or pervasive to support discipline. Inadvertent insults or annoying insults that are used only once would be neither severe nor pervasive.

Evidence of substantial disruption for staff might include:

- 1) Disruption of the individual’s ability to carry out his/her duties due to a loss of authority,

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<sup>5</sup> Education Code section 32261 subd. (d.)

<sup>6</sup> Education Code section 32261, subd. (g.)

<sup>7</sup> Education Code section 48907.

<sup>8</sup> *J.C. ex rel. R.C. v. Beverly Hills Unified School Dist.*, 711 F.Supp.2d 1094,(2010)

<sup>9</sup> *LaVine v. Blaine School Dist.*, 257 F.3d 981 (2001)

- 2) Similar or related depictions either through graffiti, passed notes, text messages, or images circulated at school either anonymously or by identified students.

Because the courts require “substantial disruption”, administrators should always include charges for Education Code 48900, subd. (k), “disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, etc.” along with any suspension or expulsion based on Education Code section 48900, subd. (r).

In many cases, cyber bullying is not isolated. Often, there are accompanying acts which do occur at school that are clearly suspendable or expellable. For example, if the perpetrator calls attention to the website or message while at school for the purpose of further embarrassing the victim, that could be an additional separate basis for discipline or could also be evidence of “substantial disruption at school.”

Administrators should also be aware that simply because a student’s act has not risen to a “substantial” disruption at school, schools still have a legal responsibility to address the existence of a hostile atmosphere or a culture of harassment for individual students or groups of students. Staff should still speak with the students involved, discuss the matter with parents, make referrals to counselors, and take steps to make certain that students understand the possible harm caused by persistent teasing or bullying of either peers or staff.

Please contact any attorney in this office if you have questions about this update or specific situations that may involve any of the issues mentioned in this update.

## EDUCATION CODE SECTION 48900

[Operative July 1, 2012]

### § 48900. Grounds for suspension or expulsion; legislative intent

A pupil shall not be suspended from school or recommended for expulsion, unless the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed an act as defined pursuant to any of subdivisions (a) to (r), inclusive:

- (a)(1) Caused, attempted to cause, or threatened to cause physical injury to another person.
- (2) Willfully used force or violence upon the person of another, except in self-defense.
- (b) Possessed, sold, or otherwise furnished a firearm, knife, explosive, or other dangerous object, unless, in the case of possession of an object of this type, the pupil had obtained written permission to possess the item from a certificated school employee, which is concurred in by the principal or the designee of the principal.
- (c) Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of, a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, an alcoholic beverage, or an intoxicant of any kind.
- (d) Unlawfully offered, arranged, or negotiated to sell a controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, an alcoholic beverage, or an intoxicant of any kind, and either sold, delivered, or otherwise furnished to a person another liquid, substance, or material and represented the liquid, substance, or material as a controlled substance, alcoholic beverage, or intoxicant.
- (e) Committed or attempted to commit robbery or extortion.
- (f) Caused or attempted to cause damage to school property or private property.
- (g) Stolen or attempted to steal school property or private property.
- (h) Possessed or used tobacco, or products containing tobacco or nicotine products, including, but not limited to, cigarettes, cigars, miniature cigars, clove cigarettes, smokeless tobacco, snuff, chew packets, and betel. However, this section does not prohibit use or possession by a pupil of his or her own prescription products.
- (i) Committed an obscene act or engaged in habitual profanity or vulgarity.
- (j) Unlawfully possessed or unlawfully offered, arranged, or negotiated to sell drug paraphernalia, as defined in Section 11014.5 of the Health and Safety Code.

(k) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties.

(l) Knowingly received stolen school property or private property.

(m) Possessed an imitation firearm. As used in this section, "imitation firearm" means a replica of a firearm that is so substantially similar in physical properties to an existing firearm as to lead a reasonable person to conclude that the replica is a firearm.

(n) Committed or attempted to commit a sexual assault as defined in Section 261, 266c, 286, 288, 288a, or 289 of the Penal Code or committed a sexual battery as defined in Section 243.4 of the Penal Code.

(o) Harassed, threatened, or intimidated a pupil who is a complaining witness or a witness in a school disciplinary proceeding for the purpose of either preventing that pupil from being a witness or retaliating against that pupil for being a witness, or both.

(p) Unlawfully offered, arranged to sell, negotiated to sell, or sold the prescription drug Soma.

(q) Engaged in, or attempted to engage in, hazing. For purposes of this subdivision, "hazing" means a method of initiation or preinitiation into a pupil organization or body, whether or not the organization or body is officially recognized by an educational institution, which is likely to cause serious bodily injury or personal degradation or disgrace resulting in physical or mental harm to a former, current, or prospective pupil. For purposes of this subdivision, "hazing" does not include athletic events or school-sanctioned events.

(r) Engaged in an act of bullying. For purposes of this subdivision, the following terms have the following meanings:

(1) "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 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.

(2) “Electronic act” means the transmission of a communication, including, but not limited to, a message, text, sound, or image, or a post on a social network Internet Web site, by means of an electronic device, including, but not limited to, a telephone, wireless telephone or other wireless communication device, computer, or pager.

(3) “Reasonable pupil” means a pupil, including, but not limited to, an exceptional needs pupil, who exercises average care, skill, and judgment in conduct for a person of his or her age, or for a person of his or her age with his or her exceptional needs.

(s) A pupil shall not be suspended or expelled for any of the acts enumerated in this section, unless that act is related to 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. A pupil may be suspended or expelled for acts that are enumerated in this section and related to school activity or attendance 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.

(t) A pupil who aids or abets, as defined in Section 31 of the Penal Code, the infliction or attempted infliction of physical injury to another person may be subject to suspension, but not expulsion, pursuant to this section, except that a pupil who has been adjudged by a juvenile court to have committed, as an aider and abettor, a crime of physical violence in which the victim suffered great bodily injury or serious bodily injury shall be subject to discipline pursuant to subdivision (a).

(u) As used in this section, “school property” includes, but is not limited to, electronic files and databases.

(v) A superintendent of the school district or principal may use his or her discretion to provide alternatives to suspension or expulsion, including, but not limited to, counseling and an anger management program, for a pupil subject to discipline under this section.

(w) It is the intent of the Legislature that alternatives to suspension or expulsion be imposed against a pupil who is truant, tardy, or otherwise absent from school activities.