

LEADERSHIP Insider

PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

A Membership Benefit of NSBA National Affiliates

Memorandum on Struggling Schools

To: School boards
and superintendents

From: Sandy Kress

Times are hard. Budgets are stretched. You have to make do with less just to stay even. As if that weren't enough, here comes the No Child Left Behind Act. Under the law, as many as 40 percent of your schools will be identified as not making adequate yearly progress. You will be required to take serious steps to improve student achievement in these schools or be forced to use precious resources to give the parents of students in these schools options for other services or schooling.

The business of running schools in the days ahead will clearly not be business as usual. While federal dollars for education have increased, the total dollars for education in this economy will not be up. Simply, that means the practice of effecting reform by layering on additional spending is not possible. Rather, all the work of running schools must be reexamined and reconfigured.

This memorandum consists of some basic questions designed to provoke new thinking and changes in the management of schools that are not making adequate

yearly progress. Underlying the questions is the strong view that implementing certain practices in these schools can lead to dramatic improvement in the achievement of students enrolled in them.

This view is not borne entirely in the minds of mere idealists. It is held, for example, by the parents and teachers of children in Kelso Elementary School in Los Angeles. Ninety percent of the students in this school receive a free or reduced-price lunch, yet 70 percent are

proficient or advanced in math, and 49 percent are proficient or advanced in reading. In 2002, second-grade students scored at the 68th percentile in reading, far above national and state averages.

This optimistic view that high achievement is possible in high-poverty schools is also held at the Roosevelt Elementary School in Houston. According to Just For The Kids, an organization committed to improving stu-

Living By Standards, Tests, and Data

1. Do you and your staff know why your schools are not making adequate yearly progress?

The business of running schools in the days ahead will clearly not be business as usual.

2. Do you know which subgroups are below the bar in each subject?

3. Do you administer tests aligned with state standards and have items analyzed from the tests showing precisely where against the state standards there is subpar performance?

4. Most important, does the staff in your district have a clear understanding of

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The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Hawaii, and the U.S. Virgin Islands.

About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join provided they are members in good standing of their state school boards association.

About the National Education Policy Network

The National Education Policy Network (NEPN) helps foster better communication, understanding and management of local school districts through better policy-making. It offers access to a sample policy clearinghouse and current policy-related resources, as well as publications and tools to help districts keep their policy manuals well-organized and up-to-date.

About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

'Nobody Ever Told Me'

Getting policy across through student handbooks

By **Karen McNamara**

"Nobody ever told me" is a common answer when teachers or administrators ask students why they've done something against school policy.

To provide students with information they are likely to need throughout the school year—including important school policies—one tool school boards can use is the student handbook. Typically, student handbooks are produced by individual schools, but they should also incorporate district policies so students will be aware of expectations, rules, and procedures.

Handbooks should be comprehensive and easy to understand. Artwork and relevant quotes can make handbooks more interesting and attractive. But producing a handbook that students actually read begins with a good understanding of what's essential for students to know and what's superfluous.

Code of Conduct

One essential is the code of conduct, which governs the conduct of students and others on school property. How much of it do you include in this section of your handbook? Begin with specifying acceptable student behavior, and spell out the consequences for not meeting those expectations. Indicate the student's due process rights and the procedures for appeal. If repeating the entire code would be too cumbersome, indicate where students and parents may obtain a complete copy.

Student Attendance

Provide parents and students with a clearly written attendance policy. Include a list of incentives to promote good attendance, along with a discussion of excused absences and disciplinary penalties for unexcused absences. If your district requires minimum attendance for course credit, outline the specific requirements in the handbook.

You might also summarize district policy on make-up work. Staff and students alike will benefit when their roles in regard to make-up work are clearly explained, and students won't miss credit they could earn.

Promotion and Retention

A key part of any student handbook should be the district's policy on promotion and retention. To allay possible concerns, the policy should identify:

- The academic standards against which student progress is judged;
- The procedures for early identification of failing students and requirements for notifying parents;
- The services available to students who are in danger of failing, such as tutoring, additional instructional time, and diagnostic testing; and
- The evidence that will be used in making retention decisions and who will participate in the decision to retain students.

Class Ranking

Districts use different criteria to rank students. Some use a weighted grading system to arrive at class ranks, and some select only a valedictorian and a salutatorian.

See Policy on page 4

NSBA is pleased to present this inaugural issue of your newest National Affiliate benefit, *Leadership Insider: Practical Perspectives on School Law and Policy*. Published six times a year, *Insider* takes the best from three of your previous resources—*Inside School Law*, *Updating School Board Policies*, and *Administrative Angle*—and combines them into one convenient (and more frequent) source of practical information for National Affiliate districts on school law issues, policy approaches, and implementation strategies. We hope and expect that you will find *Insider* even more helpful to your service in public education. Please let us know what you think of *Insider*—and what topics you'd like to see covered in future issues. Send your comments to NSBA Staff Attorney Thomas Hutton (thutton@nsba.org) or Manager, Policy and Governance Services Karla Schultz (kschultz@nsba.org).

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how each student stacks up against state standards?

These questions are intended simply to say that without sophisticated data on individual student achievement against specific state standards, principals and teachers are flying blind in any kind of school improvement effort. Flying blind is not safe for pilots, nor is it appropriate for fixing schools and teaching kids. The states must upgrade data systems to provide this information. If they do not, or until they do, school boards and superintendents must find ways to generate it and make it available.

Teaching and Learning Content Aligned to Standards

1. Do you know whether the curriculum in your schools is aligned with state standards?

2. Is there a written curriculum for each grade? If not, why not? If so, does it conform to state standards, and is it actually taught?

3. Are the strategies used in the classroom to teach the curriculum research-based?

4. Does the district staff know exactly where the taught curriculum is aligned with state standards and where it is not?

5. Are the materials actually used in the classroom aligned closely with state standards and effective for teaching to them?

6. Are the district's professional development activities principally, if not exclusively, devoted to making teachers more knowledgeable of the content they teach and more effective in teaching that content?

7. Do you hire and place teachers largely on the basis of their proven competence in teaching the content of the subject they are assigned to teach?

These questions are intended simply to say that when adults have the requisite intention, commitment, and capacity to teach children a certain set body of knowledge, they almost universally can and will do so successfully.

Good Management Makes All the Difference

1. If your principals receive entering students who are below grade level, what consequences do you impose on the sending school, if there is one?

2. If students are below grade level, what array of funding and programming

do your administrators and other principals organize to bring these students up to grade level in the shortest time possible?

3. Specifically, how do you use school improvement funds, Title I funds, 21st Century Learning Center funds, and the many other sources of public and private funds for before-school, after-school and summer-school programs to catch students up whenever they fall off track?

4. Do you know the effectiveness of such programs? Are they scientifically proven? What is the quality of the proof of their effectiveness? Who told you of their effectiveness, and how credibly?

These questions are intended simply to say that in an accountably run system, the vast majority of students can stay on track. If students fall off, they must receive a student-specific, research-proven, effective response until they get back on track. Spending for programming of dubious value must be reoriented specifically to this task. Running a rigorous and ongoing

school management plan with your district staff is a must.

A First Step

While there is more to learn, we now know a great deal about the common characteristics of high performing schools with high poverty. As a first step in the next school year, let us endeavor to make these the characteristics of all schools that are not making adequate yearly progress.

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DISTRICT POLICIES AND NCLB

If you haven't done so already, be sure to review your district policies to ensure compliance with the No Child Left Behind Act. Existing policies should have been amended, or new policies created, in the following areas. Bear in mind that these topics are only a summary of the policy areas and that the list is not all-inclusive. The policy service of your state schools boards association can assist you with the specifics and with unique state requirements.

Annual Yearly Progress

- School Report Cards
- Choice Options for Students at Schools Identified as in Need of Improvement
- Policies for Handling Schools Identified as in Need of Improvement
- Transportation Policies for Students Who Exercise Choice Option

Students and Student Services

- Supplemental Services for Qualified Students
- Transfer Options for Students in Schools Identified as Persistently Dangerous
- Limited English Proficient Students/English Language Learners and Related Services

- Migrant Students
- Homeless Students
- Student Code of Conduct

Families

- Parental Involvement Policies
- Student Surveys
- Parental Notifications

Student Privacy

- Privacy of Student Information
- Military Recruiters and Directory Information
- Health Screenings and Physical Examinations of Students

District Staff

- Qualifications for Teachers
- Qualifications for Paraprofessional Staff
- Using Title I Funds for Professional Development of Staff
- Hiring Policies

Miscellaneous Provisions

- Community Use of Facilities
- Use of Internet by Students
- Prayer
- Sex Education
- Tobacco-Free Schools
- Safe and Drug Free Schools
- Use of Title I Funds

rian. Whatever criteria your district uses, some students may be unaware of those criteria or make inaccurate assumptions about them. The high school handbook is a good place to publish and explain the district's methodology for computing grade-point averages and class standing. This advance notice might alleviate year-end confusion and stress at what should be a joyful time.

Computers

The rules governing the use of school computers and the district's Internet safety policy are important pieces of information to convey to students and parents. Many schools require a signed agreement by the parent and/or student before allowing the student to use a school computer.

No Child Left Behind

Because the handbook is often a guide for parents as much as for students, it is a good place to publish many of the annual notices required under the federal No Child Left Behind Act (NCLB). These notices could be published as a separate packet at the back of the handbook or be flagged throughout the book.

The following notices are required to be given at the beginning of the school year:

- **Student privacy policy.** Under NCLB, districts must notify parents of policies concerning students' right to privacy regarding activities such as marketing, surveys, and certain types of physical examinations. The district must also publish the specific or approximate dates during the school year when these activities are scheduled and give parents an opportunity to remove their child from any of these activities.

- **Parental right to teacher qualifications.** Parents must be notified of their right to request and receive information about the professional qualifications of their children's classroom teachers. It is a good idea to specify exactly what type of information they are entitled to and include a sample letter requesting such information.

- **Parental right to withhold information from military recruiters.** Parents and high school students should be advised that the student's name, address, and telephone number will be provided to military recruiters unless otherwise requested.

For each of these notices, it is a good idea to include a separate response sheet so that parents will be able to get back to you as soon as possible if, for example,

they want to inquire about teacher qualifications or do not want their child's information provided to the military.

A number of additional notices are required under special circumstances. For example, if a school fails to make Adequate Yearly Progress, there are a number of notices and steps that may be taken depending upon how long the school has fallen short.

While it is not necessary to include such notices in the handbook, you might want to explain the terms "accountability" and "adequate yearly progress" and assure parents that they will be notified and that additional steps will be taken if necessary.

Think of the handbook as a companion document to the district's policy manual. Including policies or at least cross-referencing the topics covered in the district's handbooks with those in the district policy manual gives staff, students, and community ready access to further information on any topic included in the handbook. Properly used, school handbooks can help your district achieve and maintain compliance with state and federal requirements.

Karen McNamara is deputy director for policy services for the New York State School Boards Association, Latham, N.Y.

YOU ASKED!

Answers to Your School Law Questions

By *Thomas E. Wheeler II*
and *Thomas Hutton*

In the months leading up to NSBA's 63rd Annual Conference in San Francisco this past spring, we asked National Affiliate members to send us their questions on school law for a special round-table discussion at the Conference's National Affiliate Center. Members submitted their questions on the National Affiliate page of NSBA's Web site (www.nsb.org/na). Attorney Thomas E. Wheeler II, a member of NSBA's Council of School Attorneys and a partner at the Indianapolis firm of Locke Reynolds LLP, discussed the issues that were at the top of National Affiliate members' lists. As we promised at the session, here is a recap of our wide-ranging discussion.

Board e-mail and open-meeting and records laws

Most states have open-meeting, or "sunshine," laws requiring that school boards transact their business in public. In addition, the federal Freedom of Information Act, state sunshine laws, and open-records laws require that many school district records be made available to the public.

As you take advantage of the convenience of electronic communication, you need to be aware of how these laws apply to e-mail. The fact that e-mail is often less formal than other forms of written communication does not necessarily mean that the law treats it any differently.

For example, even before the advent of e-mail, some courts had held that "public

meetings" are not limited to face-to-face meetings. Thus, certain telephone calls or e-mail messages must comply with the sunshine law. When board members use these forms of communication to transact or deliberate over school business, they may be violating the open-meeting law. Under many laws, the remedy for transacting business in violation of the open-meeting law is to nullify any resulting action taken by the board.

Even when all board members do not communicate simultaneously, the lack of a quorum may not exempt the communication from the sunshine law. Some courts have held that a series of exchanges that individually might not violate the sunshine law may do so when taken together—otherwise it would be too easy to circumvent open-meeting requirements. A series of one-on-one e-mail exchanges about school business could therefore be considered a "meeting" under the law.

Note, though, that merely forwarding

information, without any discussion or deliberation, may not trigger the open-meeting law. For example, a Nevada court recently held that requiring a board to consider only information obtained in public comment or in formal sessions would cripple the board's ability to conduct business.

Many sunshine laws also have narrow exceptions, such as for communication dealing with sensitive personnel matters or subjects of pending litigation. These exceptions may apply to e-mail communication about the same subjects.

Public-records laws govern what kinds of written records must be preserved by the district and how such records must be made available to the public. Under these laws, e-mail messages dealing with official business may be public records subject to public disclosure. Some state laws define specific kinds of e-mail communication that are subject to public-records law and may exclude e-mail about other topics. But other states have expressly determined that e-mail messages are subject to public-record requirements.

Because this area of law is still in its formative stages and varies from state to state, here are some general, practical approaches to dealing with these issues:

- Know what your state open-meeting law requires as to electronic communications. Review existing district policies about open meetings and public records to make sure they're up to date with technology, or consider adopting such policies if your district has none. Consider adding specific provisions governing school board e-mail communication, and be prepared to adhere to them consistently.

- Know what federal and state public-record laws require as to electronic communications. Review your existing policies and procedures about public records to make sure they're up to date with technology and the law, or consider adopting such policies and procedures if necessary. Include provisions about when and how your district will preserve and provide public access to electronic communications. Apply these guidelines consistently.

- When in doubt, or if the sunshine law in your state is unclear, it is always better to assume that the open-meeting law applies. Bear in mind that courts tend to interpret open-meeting requirements broadly and interpret exceptions narrowly. The spirit of the law is to promote open and accountable decision making.

- Similarly, when in doubt, it's best to assume that any written communication

will be a public record. The useful rule of thumb is not to put anything in an e-mail message that you wouldn't want to see printed in the newspaper. For this reason, it's a good practice to keep personal messages separate from official ones.

Student threats

In the wake of several shooting incidents at schools in recent years, schools have worked hard to learn to recognize early warning signs that a student might be prone to violent outbreaks. How to respond to a student's threatening statements without overreacting raises not only policy concerns, but legal issues as well.

The First Amendment protects student expression, and courts will not allow schools to punish students for every imprudent comment. However, courts have also recognized that school boards and administrators need the discretion to respond to situations that they reasonably feel might pose a danger or disrupt the educational process.

First, the school can take action in response to what the courts view as a "true threat." Whether a threat is a true threat does not depend on the actual intent of the student who makes it, the ability of the student to carry it out, or even whether the threat was logical or based in reality. Rather, the key is how others perceive the threat.

Recognizing that kids sometimes say and do provocative or stupid things, courts apply a kind of common-sense test. Instead of simply asking whether the person who was threatened actually believed the threat was true, the court asks whether an "objective, reasonable person" would have believed the threat were true.

For example, one court decided that a student's story about a boy who is asked to leave class and returns to behead his teacher, while "repugnant and insulting," was not a true threat, in part because it included humor and was written in the third person.

Courts look to various factors to determine whether it was reasonable to believe the threat was true. These include whether the student had made similar statements before, whether school officials had reason to believe the student might have a propensity for violence and might follow through on the threat, how the threat was made, and whether it was communicated directly to the "victim."

Even when a threatening statement is

not a true threat, school officials can still respond out of concern about substantial disruption of school activities. For example, even if a student's statement about harming classmates is obviously not serious, administrators might have reason to believe that other students would be sufficiently upset by the statement to warrant action against the student.

Here again, the court typically applies a common-sense test: It does not limit its analysis to whether the school officials actually involved in the incident feared disruption. Rather, it determines whether this fear was well-founded from the perspective of a "reasonable" school official. Past incidents of violence are relevant to this inquiry. For example, a court found that, in light of school shooting incidents, a school's concern over a student's poem about a school killing spree was warranted.

In either a true threat case or a threat of disruption case, it is important to remember that school officials need not wait for an actual incident or actual disruption to occur before acting. A student can be removed immediately if officials reasonably believe the student poses a threat to the health or safety of students or staff.

Normally, the law would require the school to give notice to the student of the reason for disciplinary action before taking the action. But when safety is in question, the school is only required to provide the notice and a hearing as soon as possible. Similarly, school officials need only have reasonable grounds to believe a substantial disruption is likely to occur.

Student discipline for off-campus conduct

In the highly publicized powder-puff football hazing involving high school girls in a Chicago suburb, a key legal issue was whether the school district could impose disciplinary consequences on students for conduct that took place off campus. In this hazing situation, as in others, the courts have determined that there is no blanket rule prohibiting school districts from doing so.

The primary issue a court examines is whether the off-campus conduct either (1) was related to a school program or (2) had any direct and immediate impact on school discipline or on the safety and welfare of students or staff. The disciplinary

action also must be reasonable in scope and should relate to school purposes.

Examples of off-campus conduct that some courts have found warranted disciplinary action include:

- Improper behavior at school functions or on school buses;
- Threatening, harassment, or intimidation of students or school staff members;
- Dangerous or criminal behavior, including incidents like the girls' hazing activity; and
- Underage drinking or drug abuse.

The disciplinary action is most likely to be upheld when the off-campus conduct had an impact on the school and also had some other connection to the school. In one case, a court upheld an expulsion for a student's off-campus illegal drug sale not only because the conduct could have an impact on the well-being of the school's students, but also because the transaction was between students, the negotiations had occurred on campus, and the purchaser resold drugs to other classmates, who were caught on campus.

Where the conduct at issue is a form of expression, the First Amendment's free speech protections might raise the bar for imposing disciplinary action. Even here, though, a direct impact on school operations is likely to persuade a court that the school has met its burden.

For example, one court held that the First Amendment did not preclude disciplinary action against a student for an article he wrote in an underground publi-

cation about how to hack into the district's computers. The court held that the school board need only show a "reasonable forecast" of disruption and noted that the district had been forced to change all of its passwords and obtain diagnostic tests to protect its computer system.

As a practical matter, it is a good idea to make sure the student code of conduct or other school policies notify students that they are subject to action for off-campus conduct. Should a court challenge arise, the school will have a stronger case if it can show that students were on notice about the school's policy concerning off-campus conduct. A written policy also provides helpful guidance for school personnel so that they apply rules consistently and do not improvise.

Student discipline for off-campus Web sites

The issues involved in disciplining a student for an off-campus Web site are similar to those in handling other off-campus conduct.

One difference is that the First Amendment will be a factor in most cases involving student Web sites, since online communication is a form of expression.

As in other situations, using an off-campus Web site to express a true threat or views that have a demonstrable effect on the school or the strong potential to disrupt school operations generally will

not be protected speech. For example, a court upheld discipline against a student for a site that embarrassed a principal and his family and caused a teacher such anxiety that she took medical leave.

In contrast, merely expressing an opinion—even an insulting or offensive one—might well be the very kind of unpopular speech the First Amendment is intended to protect. In one recent example, a court struck down the suspension of a student for launching a Web site that linked visitors to the school's site and invited them to submit their opinions about the school to the principal. The school district could show no impact at all on school operations, and the court held that the principal's "immediate" decision to discipline the student suggested his decision was simply based on his dislike of the site. This was not a constitutionally sufficient reason to restrict the student's speech.

A Web site that falls somewhere in between a mere statement of opinion and a true threat might or might not be grounds for discipline, depending on its actual or potential impact on the school. Even heightened public concerns over school violence might not justify disciplinary action under either the true threat or the disruption analysis.

Another recent case concerned a student's Web site featuring mock obituaries of students and encouraging visitors to vote on who should be the "next to die." Although the news media characterized the site as a Columbine-style "hit list," the court overturned the student's suspension,

finding no evidence that the site really harmed or threatened anyone.

Procedural due process at suspension and expulsion hearings

In the 1975 case of *Goss v. Lopez*, the U.S. Supreme Court set forth three basic procedural due process requirements for student suspensions under the U.S.

Constitution: (1) notice, (2) an opportunity for a hearing appropriate to the nature of the case, and (3) a decision that is based on the evidence presented. These requirements are generally applied to expulsions as well, and most states have statutes that establish additional requirements for suspensions and expulsions.

Students must receive oral or written notice of the “charges” for which they are to be disciplined. If a student denies committing the infraction, he or she is entitled to an explanation of the evidence the district is relying on in seeking the disciplinary action. In many states, especially for expulsions, the district must allow the student sufficient time between the notice and the hearing to prepare a defense.

The student must also have a chance to present his or her side of the story at a hearing. The student need not actually be present at the hearing but must at least have had this opportunity. The nature of the hearing depends on the seriousness of the case: The more severe the disciplinary consequences, the more procedural safeguards must be observed.

For example, unless state law specifies whether a student has a right to have an attorney present at the hearing, many courts have held that the student should be allowed to have the same access to an attorney that the district does—especially when the issues are complex and the disciplinary consequences severe.

The most complex issues have to do with evidence. An overriding legal principle is that different constitutional requirements apply in student disciplinary cases than in criminal cases. Even lawyers and courts occasionally need to be reminded of this, and NSBA occasionally weighs in as an *amicus curiae* to defend this principle in court. The principle is especially relevant when it comes to evidentiary requirements in disciplinary hearings:

- Even in states that have relatively stringent rules for evidence in disciplinary

hearings, not all of the formal court rules apply to what kinds of evidence can be admitted. The evidence presented must relate to the charges about which the student has received notice, but, in general, any relevant information can be presented. For example, evidence of the student’s past misconduct might be relevant and could be admitted. Hearsay evidence might have to be corroborated, but it generally need not be entirely excluded.

- Students must be allowed to speak and to present evidence on their own behalf. Courts have split over whether the student may be required to testify. The Fifth Amendment right against self-incrimination applies only to criminal proceedings, and some courts have held that requiring the student to testify in a disciplinary hearing does not violate due process. Other courts, however, have held that students may not be compelled to implicate themselves and that no adverse inference may be drawn from their silence.

- Whatever evidence will be presented to decision makers must be presented so as to give the student the opportunity to hear it and answer. Courts have found, for example, that due process was violated when a superintendent was present and made additional comments to the school board after the board had gone into closed deliberation.

- Students might have the right to confront witnesses against them, depending on such factors as the effect on the truth-finding process if confrontation is denied, the identity of the witness, and the burden to the witness if the confrontation is allowed. For example, courts have held that a student witness can remain anonymous if necessary for protection against ostracism or reprisals.

- School officials who conduct a hearing or present evidence against a student in a hearing generally are presumed to be unbiased. Courts usually will not assume a conflict merely from the fact that the same official might have been involved in the matter before the hearing or served in an advisory role to the student. However, additional special circumstances might show that the official’s involvement compromised his or her partiality.

Peer sexual harassment

Few situations are as distressing as a teacher’s sexual harassment of students. One such situation, however, might be sexual harassment cases in which the

alleged perpetrator is another student—especially if, as in a recent case, the accused student is only 5 years old.

A school district can be held liable for peer sexual harassment under various theories of negligence, which vary from state to state. The most important of these is negligent supervision. Common to all negligence claims is that the school must have breached a duty of care it owed the victim, and this breach must have caused the harm to the victim.

To assess whether the district breached its duty of care, a court typically will look to whether the district had policies on sexual harassment, whether it had notice of the harassment, and whether it responded appropriately.

A district can also be liable under Title IX of the Educational Amendments Act of 1972, which prohibits sexual harassment by recipients of federal funds.

A four-part test for holding a school district liable under Title IX for an incident of sexual harassment was established in the 1999 Supreme Court case of *Davis v. Monroe County Board of Education*. The school must have shown:

1. “deliberate indifference”;
2. to sexual harassment that occurred under the operations of the school;
3. of which the school had actual knowledge; and
4. that was so severe, pervasive, and objectively offensive that it barred the student’s access to educational opportunities and benefits.

The court noted that schools are different from the workplaces and warned that student conduct must be viewed in light of the age of the students. Thus, for example, simple acts of name-calling and teasing should create no school liability.

To show that it did not respond to a known case of sexual harassment with deliberate indifference, the school must be able to show a prompt and thorough response to the allegation—especially to serious allegations such as rape or molestation. The school district should take care to document its responses and should retain these records for longer than it might retain other disciplinary records.

Appropriate responses can include:

- Investigation of the alleged incident;
- Disciplinary action against the perpetrator;
- Notification of parents of the students involved;
- Notification of child protective services or law enforcement authorities;
- Increased supervision of both the

alleged victim and the perpetrator; and

- Actions to separate the alleged victim and the perpetrator.

As with sexual harassment involving adults, school personnel might be extremely reluctant to wade into or call attention to a messy situation where the truth might be hard to discern and the impact on the accused student could be devastating. This behavior, while understandable, is one of the most common factors contributing to school district liability in cases of sexual harassment.

Sound policies and training for school personnel—with an emphasis on the need to investigate all allegations and on the important presumption of innocence—can go a long way toward increasing staff comfort with taking appropriate action in such cases.

Backpack and locker searches

The Fourth Amendment protects citizens against unreasonable searches and seizures. Again, however, issues of student safety and discipline are not governed by the constitutional protections that apply to cases of criminal law: Schools need not obtain a search warrant and need not show probable cause to conduct a search.

Instead, the search must be “reasonable under the circumstances.” Courts recognize that school officials have special needs in looking out for the safety and well-being of students. The less a student’s expectation of privacy, the less the constitutional protections apply to a search.

Courts usually have held that students have only a minimal expectation of privacy in their lockers. State law or school codes might make matters even easier by specifying that school lockers are school property in which students shall have little or no expectation of privacy.

Either way, schools may search lockers with only minimal suspicion and can use anything found as evidence in disciplinary proceedings. However, school officials should attempt to notify a student of a locker search and allow the student to be present, unless they suspect the locker contains something that might pose a threat to student health, welfare, or safety.

When it comes to backpacks and book bags, students enjoy a somewhat higher expectation of privacy. The school needs to have a reasonable, individualized suspicion to justify the search of a student’s backpack: that is, it must have a good rea-

son to suspect that particular student.

In addition to requiring reasonable suspicion, a search must also be reasonable in scope. That is, the search should be limited to those places where school officials have a reasonable basis for suspecting the item sought could actually exist.

Most courts have held that a search conducted by a school security officer—including a police officer acting in the capacity of a school security officer—is governed by the more permissive constitutional standards applicable to school searches. However, when the search is initiated by outside law enforcement officers—or when school officials conduct the search at the behest, or with the significant involvement, of outside law enforcement officials—courts usually require that the officials show probable cause.

Body piercing and tattoos

One seemingly timeless issue that confronts schools is what—if anything—the district should do when new trends in personal appearance among students clash with the sensibilities of older generations. Several questions NSBA received mentioned two such trends: body piercing and tattoos. As a legal matter, the same analysis should apply to these practices as applies to student dress codes or to specific rules about controversial symbols or messages on clothing, such as gang insignia or Confederate flags.

Some courts have held that student attire and grooming are matters of constitutionally protected expression. Where this is so, a school district restricting this form of expression must be able to show that the restricted activity is:

- Materially and substantially disruptive;
- Pervasively vulgar; or
- Harmful to the student or to others.

Courts traditionally give districts a good deal of deference on these questions, and districts usually don’t have to wait until actual disruption occurs before acting. Still, a district that can cite prior experience with actual disruption or harm, or otherwise demonstrate that its concern is well-founded, will be more persuasive to a court than one that is merely speculating.

Other courts have been more deferential to school policies that simply reflect prevailing community standards in the area, holding that the constitution does not protect a student’s personal appearance from all state regulation. Even in these

jurisdictions, however, schools should make sure that any restriction they adopt is:

1. Reasonably related to its stated purpose—for example, a policy against tattoos should specifically explain the connection between tattoos and disruption or safety;

2. Not too general or vague—for example, a policy intended to reduce gang activity was struck down when it did not describe exactly what gang attire it sought to restrict; and

3. Accommodating of religious practices—a policy against wearing hats, for example, may infringe on the free exercise of religion by students of some faiths.

Apart from the legal considerations, this subject warrants a practical note in the “Nero fiddling” category. Readers who heard Eli Broad’s speech in San Francisco will recall his criticism that too many school board agendas are filled with items having little or nothing to do with academic achievement. (The text of the speech is accessible at NSBA’s Web Site, www.nsba.org.)

Board members should probably at least give some thought to how it may look for the district to expend time and energy on earrings and tattoos at a time when it is confronted by the challenges of the No Child Left Behind Act and inadequate resources.

A final word

While this article presents some useful suggestions, remember that many of the requirements affecting these issues are a matter of state law. Your state school boards association and your legal counsel can provide helpful guidance on requirements in your state and policies for meeting those requirements.

In addition, since so many of the issues discussed here deal with student conduct and discipline, be sure to read Karen McNamara’s article on page 2 discussing the use of the student handbook to communicate board policy.

Finally, those of you who participated in the San Francisco session said you’d like NSBA to hold similar “You Asked!” sessions at future Annual Conferences. Watch for notices in the months leading up to April’s conference in Orlando asking you for your new school law questions.

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