

EMERGING ISSUES IN STUDENT DISCIPLINE

Presentation to the Michigan Council of School Attorneys
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Subjects to be Addressed

1. Model Code of Student Conduct 2014
2. State Mandated Discipline
3. Due Process Requirements
4. State School Safety Requirements
5. Bullying (and Cyberbullying)
6. The Internet Privacy Protection Act

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Model Code of Student Conduct 2014

Issued by MDE in August 2014

http://www.michigan.gov/documents/mde/Revised_Code_of_Student_Conduct_SBE_Approved_465406_7.pdf

Not mandatory:

“This Model Code of Student Conduct is provided as a tool to assist Michigan school districts in developing, updating or revising their local codes. This document may be modified to reflect local school district policy and procedure.”

Model Code of Student Conduct 2014

MDE makes very clear its principal goals:

The Michigan State Board of Education's mission is: "All students graduate ready for careers, college, and community." This can only be achieved if students are pursuing their education. To fulfill this mission, the Michigan State Board of Education (SBE) strongly urges school districts to review existing zero tolerance policies and to adopt practices that allow educators to address disciplinary matters as opportunities for learning instead of punishment. (Emphasis in original)

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Model Code of Student Conduct 2014

Model Code cites studies, etc., for the proposition that any exclusion from school, particularly one for more than a minimal amount of time, can be “devastating” for the student involved.

Little question that exclusion can be harmful to the student involved.

But there are other issues – disruption, safety, integrity of school rules.

Model Code of Student Conduct 2014

Discouraging exclusion from school is in accord to some extent with the “Dear Colleague” letter from Civil Rights Division of Department of Justice and Office of Civil Rights of Department of Education -- issued January 2014

Target – racial disparities in issuance of discipline that excludes students from school.

Letter refers to discipline that involves “different treatment” – intentionally disciplining similarly situated students differently because of their race.

- hard to dispute aggressively challenging “different treatment.”

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“Dear Colleague” Letter of January 8, 2014

Letter also talks about facially neutral policies that have a “disparate impact” on particular racial groups.

Three-part inquiry for disparate impact:

- 1) Has the policy resulted in adverse impact on students of one race vs. another race? (Examples – students disciplined at higher rates, or subjected to more severe sanctions).
- 2) Is the policy at issue necessary to meet an important educational need? [Similar to “legitimate, non-discriminatory reason” inquiry in employment discrimination litigation].
- 3) Are there effective alternatives that would meet the educational goal while reducing the adverse impact on the disproportionately affected racial group; or is the school’s justification a pretext for discrimination?

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“Dear Colleague” Letter of January 8, 2014

The sentence that got the most attention from the media was the following:

“Examples of policies that can raise disparate impact concerns include policies that impose mandatory suspensions, expulsion or citation. . . upon any student who commits a specified offense . . .”

Mandatory expulsion seems to be directly in the sights of the federal government – Model Code supports that notion. But until state law changes, schools are between the proverbial rock and hard place.

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“Dear Colleague” Letter of January 8, 2014

Federal scrutiny of mandatory expulsions presents a potential conundrum for Michigan districts.

State law mandates expulsions or suspensions for particular infractions; but complying with state law may get us in trouble with the feds.

Districts are ill-advised to ignore state law; but they had best be certain – as they should have been all along – that all races are treated the same in imposing mandatory consequences.

Stay tuned.

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Model Code of Student Conduct 2014

In the course of discussing the undesirability of exclusions of students from school, the Model Code recognizes the existence of mandatory disciplinary provisions in Michigan law – the so-called “zero tolerance” statutes enacted after Columbine.

But the Model Code adds a curious statement:

“Zero Tolerance laws, however, allow greater flexibility and discretion than many educators realize.”

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Model Code of Student Conduct 2014

Nowhere does Model Code explain this statement.

Unfortunate that zero tolerance laws do not provide the “flexibility and discretion” the Model Code credits them with.

Since the zero tolerance laws conflict with the key principle of the Model Code, let’s discuss.

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“Zero Tolerance” Discipline

Post-Columbine statutes enacted a number of new mandatory discipline requirements.

- Drafting left much to be desired; e.g., use of “suspension” and “expulsion” as synonymous; also referred to “permanent expulsion;” others discussed below.

- one encouraging aspect of Model Code is that it defines “expulsion” as being for an indefinite time, unless state law says otherwise.

Almost no case law on these statutes.

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Permanent Expulsion Required

MCL 380.1311:

- Permanent expulsion required when a pupil possesses in a weapon free school zone a weapon that constitutes a dangerous weapon, commits arson in a school building or on school grounds, or commits criminal sexual conduct in a school building or on school grounds.

MCL 380.1311a:

- Permanent expulsion required when a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by or engaged as a volunteer or contractor by the school board.

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“Dangerous Weapon”

Permanent expulsion required when a pupil possesses in a weapon free school zone a weapon that constitutes a dangerous weapon.

- “Dangerous weapon”: a firearm, dagger, dirk, stiletto, knife with a blade over 3 inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles. (MCL 380.1313).

- Exceptions:
 - object or instrument not possessed by pupil for use as a weapon or for delivery to another student for use as a weapon.
 - weapon was not knowingly possessed by the pupil.
 - pupil did not know or have reason to know the object constituted a dangerous weapon.
 - weapon was in possession of pupil at suggestion, request, or direction of, or express permission of school or police.

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Permanent Expulsion Required: “Criminal Sexual Conduct”

Permanent expulsion required when a student commits criminal sexual conduct in a school building or on school grounds.

- The statute refers to several provisions in the Penal Code in defining criminal sexual conduct. (MCL 750.520b, 520c, 520d, 520e, or 520g)

Does any sort of CSC result in mandatory expulsion – including CSC 4th, which is a misdemeanor?

What of the word “criminal;” does that require criminal prosecution, conviction; or are schools to determine if crimes occur?

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Permanent Expulsion Required: "Arson"

- Permanent expulsion required when a student commits arson in a school building or on school grounds.
 - Definition of "arson" for this statute is limited to felony arson convictions under (MCL 750.71 to 750.80); fire in trash can does not require expulsion.

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Permanent Expulsion Required : "Physical Assault" on School Employee, Volunteer, etc.

MCL 380.1311a:

- Permanent expulsion required when a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by or engaged as a volunteer or contractor by the school board.
- "Physical assault" means intentionally causing or attempting to cause physical harm to another through force or violence.
- This is a little clearer – but still some ambiguity; contrast a push to get past a staff member with hauling off and belting one.

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Suspension or Expulsion Required: “Verbal Assault” against school employee, volunteer, etc.

- MCL 380.1311a:

Suspension or expulsion required when:

- a pupil enrolled in grade 6 or above commits a “verbal assault,” as defined by school board policy, at school against a person employed by or engaged as a volunteer or contractor by the school board

OR

- if a pupil enrolled in grade 6 or above makes a bomb threat or similar threat directed at a school building, other school property, or a school-related event.
- No minimum or maximum exclusion; up to school; but district shall act.
- No definition of “verbal assault;” school district to define.

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Physical assault on another pupil

MCL §380.1310:

If a pupil enrolled in grade 6 or above commits a physical assault at school against another pupil, then the school shall suspend or expel the pupil from the school district for up to 180 school days.

- is it “suspension” or “expulsion?”
- how can an exclusion for a finite period be an “expulsion?”
- what does “for up to 180 school days” mean? No minimum time; 1 day to 180?

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Physical assault on another pupil.

Definition: “physical assault” means intentionally causing or attempting to cause physical harm to another through force or violence.

Generally regarded as different, more serious than “fighting;” 1 assailant vs. 2 willing participants.

One district is not required to enroll someone “expelled” from another district for physical assault against another student during the “expulsion.”

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State-Mandated Expulsion vs. Expulsion Pursuant to Board Policy

- If a student's conduct constitutes an expulsion offense under the zero tolerance statutes, expulsion is mandatory.
 - mandatory expulsion under state law requires expulsion from every public school in the state.
- If the student's conduct is serious but does not constitute one of the expulsion offenses under state law, the school may still punish the student based upon a violation of Board policy – even up to expulsion (but only from the district itself).
- Ex: *Knife shorter than 3 inches is not a "dangerous weapon," as defined in the statute; thus, permanent expulsion is not mandated, but the school may still expel or suspend for a violation of its own code of conduct.*

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Mandatory Expulsion Is Subject to Possible Reinstatement

Permanent Expulsion under MCL 380.1311 and 1311a:

- Parent or student may petition the school board for reinstatement after 150 days, with no reinstatement until 180 school days (1 year) after the expulsion (60 days/90 days for under grade 6).
- Statute gives parent/student the right to apply for reinstatement; but no right to be reinstated. It is a matter of grace.
- Statute provides criteria to be considered, procedure to be followed in deciding whether to reinstate.

Model Code of Student Conduct 2014

The Model Code is divided into 5 sections

Section I – Introduction

- restates, re-emphasizes principle that exclusion of students from school is to be avoided.
- assigns various “responsibilities” among students, parents and educators; nothing terribly profound, but not a bad idea to emphasize that everyone has a role in student discipline.

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Model Code of Student Conduct 2014

When and Where the Code of Student Conduct Applies:

“The Code of Student Conduct applies before, during, and after school and whenever student is engaged in a school-related activity. Each student is expected to follow this code of conduct:

- “At school,” meaning in a classroom, elsewhere on school premises, on a school bus or other school-related vehicle, or at a school-sponsored activity or event, whether or not it is held on school premises.
- When a student’s conduct at any other time or place has a direct and immediate effect on maintaining order and discipline, or on protecting the safety and welfare of students or school district staff.
- When a student is using school telecommunications networks, accounts, or other district services.”

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Model Code of Student Conduct 2014

When/where does Code apply?

Item 1 – traditional places, circumstances to which Code applies.

Item 3 – consistent with bullying statute.

Item 2 – this is where the challenges come in – to what extent may school regulate, sanction conduct that takes place off “school premises” (term includes school transportation and school activities)?

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Model Code of Student Conduct 2014

Suggested alternative:

“The District may impose disciplinary or remedial measures in the event that off-campus activities of students, including travel to and from school, directly interfere with the operations, discipline or general educational environment of the District.”

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Model Code of Student Conduct 2014

Section II – Due Process Procedures

Despite title, Model Code talks not only about procedural due process, but also substantive due process.

General principle of substantive due process – disciplinary rules should be clear, fair, and not constitute overreaching by the school.

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Model Code of Student Conduct 2014

Substantive due process

In developing a policy governing school rules and regulations, the following principles to assure substantive due process should be considered:

- The policy must provide notice of what conduct is prohibited or permitted.
- The rules must be reasonably understandable to the average child/student, taking into account the age of the individual child/student.
- The rules must be rationally related to a valid educational purpose.
- The rules must be precise so as not to prohibit constitutionally protected activities.
- The policy must provide students with notice of potential consequences for violating specific rules.

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Model Code of Student Conduct 2014

Substantive due process (continued)

- The type of consequence specified in the policy must be within the expressed or implied authority of the school district to utilize.
- The consequence must be of reasonable severity in relation to the seriousness of the misconduct or the number of times the misconduct was committed.
- A copy of the rules and procedures must be disseminated to all students.

I don't see any of these principles as unreasonable or unusual; not sure they should be part of the published policy, but they ought to be a guiding principle for school codes.

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Model Code of Student Conduct 2014

Procedural Due Process

One interesting feature of the Model Code is a proposal that the duration of a “short-term” suspension be reduced from 10 days to 5 days.

The apparent practical effect of this: when it discusses violations, Model Code makes many violations punishable only by a “short-term” suspension; thus reduces exclusion from school for many offenses.

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Procedural Due Process

When addressing procedural due process, there are two cases to keep in mind, and a recent third case that reaffirmed the key rules.

Goss v Lopez – 419 U. S. 565 (1975).

Involved a suspension of ten days, which the Court characterized as a “short-term” suspension

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Procedural Due Process

Question – what process is due?

For suspensions of up to 10 days, minimum due process:

- 1) Oral or written notice of the charges against student;
- 2) If student denies the charges, an explanation of the evidence against him/her; and
- 3) An opportunity for the student to present his/her side of the story.

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Procedural Due Process

Goss v Lopez set minimum due process for suspensions up to 10 days; what about long-term suspensions, expulsions?

- *Goss* expressly does not address.

Newsome v Batavia Local School District, 842 F. 2d 920 (6th Circuit, 1988).

Involved expulsion; thus considered due process for consequences greater than 10 days.

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Procedural Due Process

Newsome did not disturb the *Goss v Lopez* general formulation for disciplinary proceedings seeking more than 10 days: oral or written notice of charges; explanation of evidence; right to present his/her side of story.

But also settled several key details:

- 1) Students do not have the right to cross-examine student accusers or even to know their identity.
 - need to protect students who “blow the whistle” on other students.

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Procedural Due Process

Newsome (continued)

- 2) Students do not have the right to cross-examine school administrators or employees.
 - school boards ill-equipped to conduct a quasi-judicial proceeding; can't be expected to referee.

- 3) Due process is not violated by presence of principal and superintendent in Board's closed-door deliberations and their participation in deliberations.

"A student has the right to a pre-expulsion hearing before an impartial trier-of-fact, [but] not to a full-blown administrative process."

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Procedural Due Process

Newsome (continued)

- 4) School did violate due process when Board allowed principal to present new evidence in closed-door deliberation, evidence student had not been allowed to hear or rebut.
- violates *Goss* requirement that student be given an explanation of the evidence against him.

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Procedural Due Process

Goss, Newsome reaffirmed by Detroit federal court in *C. Y. v Lakeview Public Schools*, 2013 U. S. Dist. LEXIS 66658 (E. D. Mich. 2013).

Summarized key rulings, principles:

1. Student has the right to a pre-expulsion hearing before an impartial trier of fact, but does not have the right to a full-blown administrative appellate process.
2. Schools must afford students notice of the hearing and a meaningful opportunity to prepare for it.

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Procedural Due Process

3. Notice should be in writing and include the charges leveled against the student, the policies and procedures at issue, and the possible penalties.
4. If the hearing is live, student has the right to attend all the significant portions of the hearing.
5. If the hearing is procedurally complex or uses rules of evidence, student may be entitled to counsel – but there is no absolute right to counsel.
6. Students do not have the right to cross-examine any witnesses, nor to know identity of student witnesses.
7. Participation of investigating administrators in the deliberations of punishment does not violate due process.

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Model Code of Student Conduct 2014

The Model Code proposes that schools consider several additional procedural guarantees:

- a “right to question” school staff or student witnesses; not consistent with *Newsome*, although “questioning” may be less a problem than cross-examination.
- a right to counsel – not required by *Newsome, C. Y.*
- a right to a record of the hearing – many districts audio or video record hearings; particularly for appeal.
- a right to appeal – not required; but may be advisable to permit appeal of expulsion, suspension to Board.

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Model Code of Student Conduct 2014

Section III – Types of Suspension and Expulsion

Not quite clear why this is a separate section, since a large part is discussion of state-required expulsion or suspensions, as Model Code also does elsewhere.

Brief discussion of the teacher “snap suspension” which was added by the post-Columbine statutes, but doesn’t seem any more or less prevalent than it used to be.

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Model Code of Student Conduct 2014

Section III also reviews in some detail the process for reinstatement of students expelled under state law.

Many districts adopt the same reinstatement policy for non-mandatory expulsions as specified by law for mandatory expulsions.

- probably wise; would be difficult to explain a more or less lenient procedure for expulsions imposed by the school of its own accord.

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Model Code of Student Conduct 2014

Section IV – “Violations of the Code of Student Conduct and the School Community Responses.”

Lays out offenses, consequences.

Two categories of offenses: “Violations” and “Very serious violations.”

“Violations” run the gamut; from inappropriate dress and grooming, up through gang activity and hazing – 35 types of conduct are described.

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Model Code of Student Conduct 2014

Interesting preamble to list of “violations:”

“Various types of student misconduct are defined below. These definitions of misconduct are not all-inclusive, but only representative and illustrative. A student who commits an act of misconduct not listed herein is nonetheless subject to disciplinary action . . .”

How does this square with substantive due process notion that “the policy must provide notice of what conduct is prohibited or permitted?”

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Model Code of Student Conduct 2014

After describing these 35 “violations,” Model Code provides a list of possible “responses” to the violations – 24 possibilities, the most severe of which is a short-term suspension of up to 5 days.

Consistent with principle of minimizing student exclusions.

But is 5 days strong enough consequence for “gang activity,” hazing, threats or coercion, sexual harassment, cheating or academic fraud, etc.?

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Model Code of Student Conduct 2014

“Very serious violations” – again includes the state mandatory and state-regulated offenses.

Also includes violations involving alcohol and drugs, extortion, “felony,” theft or possession of stolen property worth over \$100, weapons not covered by state statute.

Recognizes that these violations may require exclusion of more than 5 days, while again stating principle discouraging exclusions.

- but adds that if student found not guilty in criminal trial, school may re-consider its consequences.
- what about different standards of proof?

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Model Code of Student Conduct 2014

Section V – Other Student Responsibilities

Suggests adding school attendance policy, technology policy and locker search policies to Code of Conduct.

- no recommendation of what the attendance or technology policies should say – left to the districts.
- provides a model locker search policy – recognizes that lockers are school property that can be searched for any reason or no reason (randomly).

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Model Code of Student Conduct 2014

Conclusion – I'm not impressed with Model Code.

- not well-organized;
 - much repetition;
 - insufficient penalties for some “violations;”
 - over-emphasis on avoiding exclusion;
 - I'm not a fan of “zero tolerance” and mandatory expulsion statutes; would prefer to leave these decisions to the professional educators vs. legislature.
- but Model Code seems to go too far in the other direction.

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School Safety Statutes

In April 1999, two students at Columbine High School in Colorado went on a shooting rampage at their school, during which they killed 12 people and wounded 24 more. Both students had been discipline problems at their school, and had shown signs of mental illness that, if recognized and acted upon, might have prevented the massacre.

In Michigan, the Legislature within the next 90 days passed a group of bills in reaction to the Columbine events; including “zero tolerance” statutes discussed previously.

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School Safety Statutes

MCL §380.1308 required, by October 1999, the creation of a “statewide school safety information policy,” to identify types of incidents occurring at school that must be reported to police, protocols for sharing of information among agencies.

“School Safety Response Guide” was created.

I know that Statewide School Safety Information Policy and School Safety Response Guide were created in 1999; I saw copy of one, still have copy of other.

But they seem to have disappeared. I have tried several times to find on MDE website – no luck.

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School Safety Statutes

School Safety Response Guide had some common-sense guidelines for offenses requiring police to be called.

- some anomalies – like requiring police to be called for a minor in possession of tobacco.

Local meetings called for, took place, produced local agreements that seem to have disappeared from view.

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School Safety Statutes

On October 7, I wrote to Superintendent Flanagan, asking if the Department still considers the Statewide School Safety Information Guide and School Safety Response Guide to be still in effect.

- and if so, where they can be found.
- no answer yet, but I'm hopeful.

The statutory requirements are still there, and ignoring them may be asking for trouble.

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BULLYING

“Matt’s Safe School Law” – PA 241 of 2011 – designed to deal with bullying at school [MCL §380.1310b].

Required all districts no later than June 2012 to enact policy prohibiting bullying “at school,” policy to State; presumably all have done so.

I won’t review bullying requirements; familiar to all.

But will update in two areas.

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Cyberbullying

2011 statute largely punted on “cyberbullying.”

SB 74 is pending in Legislature; passed Senate committee unanimously on October 9, 2013, but then seems to have ground to a halt – no activity since October 9, 2013.

Could come up during lame duck session.

While absence of attention to “cyberbullying” is a concern, this bill is not the solution.

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Cyberbullying – SB 74

Here is the sole provision about cyberbullying:

A district's policy prohibiting bullying "shall include cyberbullying as a form of bullying and shall define cyberbullying."

That's it – that's the language that will protect against cyberbullying.

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Cyberbullying – SB 74

Two major flaws in SB 74.

First – no definition of cyberbullying; it is expressly left up to each district. Will produce numerous different definitions – narrow, broad, clear and unclear.

If Legislature has determined there is an evil to be remedied, it should define what that evil is.

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Cyberbullying – SB 74

Second major flaw in SB 74 is potentially more important.

No indication of the extent to which schools may regulate off-campus cyberbullying (however defined) using private equipment and internet service.

- current law classifies as “bullying” actions conducted with school equipment or using school network.

Many cases challenging cyberbullying discipline have turned on the extent to which schools may regulate, punish off-campus cyberbullying.

- and courts have been reluctant to give schools much leeway.

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Cyberbullying – S.B. 74

One of the earliest – and fairly typical of subsequent cases:

Mahaffey v Aldrich, 236 F Supp 2d 779 (ED Mich 2002), decided by Judge Patrick Duggan.

Student created “Satan’s web page,” and reported Satan’s assignment to “stab someone for no reason then set them on fire, throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face.”

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Cyberbullying – SB 74

Website listed “people I wish would die;” added, “please don’t go killing people and stuff and blaming it on me.”

Court: Under *Tinker v Des Moines Independent School District*, school can only punish for conduct that “substantially interfered with the work of the school or impinged upon the rights of other students.”

No record of disruption to school or campus activity; thus, discipline violates First Amendment.

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Cyberbullying – S.B. 74

S. B. 74 does not address this issue at all; directs schools to prohibit cyberbullying, but then gives no assistance in allowing schools to reach most cyberbullying.

Puts schools in position of being compelled to deal with cyberbullying, while most case law will prevent school action from happening.

At very least, any cyberbullying legislation should contain 1) a statewide definition of cyberbullying – like the definition of bullying in original Act – and 2) some standards to help schools combat it.

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Bullying

Second development:

October 21, 2014 – another “Dear Colleague” letter came from Office of Civil Rights of U. S. Department of Education.

Contends that bullying of a student with a disability by another student on any basis – not just due to the disability – is not only a violation of disabled student’s civil rights, but may also deprive student of FAPE, which school must remedy.

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Bullying

This letter gives schools something else to think about, and an added reason to be aware of and to assign consequences for bullying.

Letter cites cyberbullying, defined as “bullying through electronic technology,” without addressing jurisdiction issue – what off-campus cyberbullying can a school address?

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Internet Privacy Protection Act

Public Act 478 of 2012 – passed during lame duck, December 2012.

Similar provisions applicable to employers and schools to protect internet privacy of employees and students.

Violation of IPPA is a misdemeanor – fine up to \$1,000, no jail time. Aggrieved individual can bring civil action, can recover damages up to \$1,000, plus attorney fees and costs.

Compliance with state, federal laws is a defense to an “action;” presumably means civil action, not criminal charge.

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Internet Privacy Protection Act

Key provision: Educational institutions shall not:

Request a student or prospective student to grant access to, allow observation of, or disclose information that allows access to or observation of the student's or prospective student's personal internet account.

Expel, discipline, fail to admit or otherwise penalize a student or for failure to grant access to, allow observation of, or disclose information that allows access to or observation of the student's personal internet account.

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Internet Privacy Protection Act

The law applies to students' "personal internet account:"

"An account created via a bounded system established by an internet-based service that requires a user to input or store access information via an electronic device to view, create, utilize, or edit the user's account information, profile, display, communications, or stored data."

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Internet Privacy Protection Act

Exception: Schools may request or require student to disclose access information to gain access to or operate:

- (a) An electronic communications device paid for in whole or in part by the educational institution [similar to bullying statute].
- (b) An account or service provided by the educational institution that is either obtained by virtue of the student's admission to the educational institution or used by the student for educational purposes.

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Internet Privacy Protection Act

We are wrestling with this issue in a school district I represent:

District network allows students access after first establishing their credentials as a student, and requires them to click agreeing to Acceptable Use Policy; after first log-in, student is on network automatically when on campus.

- students can decline option, utilize public towers – but there are costs, other issues – few if any do so.

Appears that that may fall into this exception, since students are using a school network made available to them as students; but not clear.

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Internet Privacy Protection Act

Exception for employers:

May request, require access to employee's personal internet account when "conducting an investigation or requiring an employee to cooperate in an investigation."

No such exception for schools – reason is not explained, hard to imagine.

Certainly limits schools' ability to investigate cyberbullying; presumably can get cooperation from victim, but can't follow up with the cyberbully.

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Students with Disabilities: Extra Protections

Students with disabilities have extra protections when the school proposes to change their educational placement due to a violation of school rules.

- These extra protections also apply when the student's misconduct falls under the mandatory expulsion and suspension statutes in the Revised School Code (MCL 380.1311 and 380.1311a).

These protections apply to students with IEPs and 504 plans (Section 504 of the Rehabilitation Act).

Be aware of these protections and rules; but they are not subject of this presentation.

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QUESTIONS



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