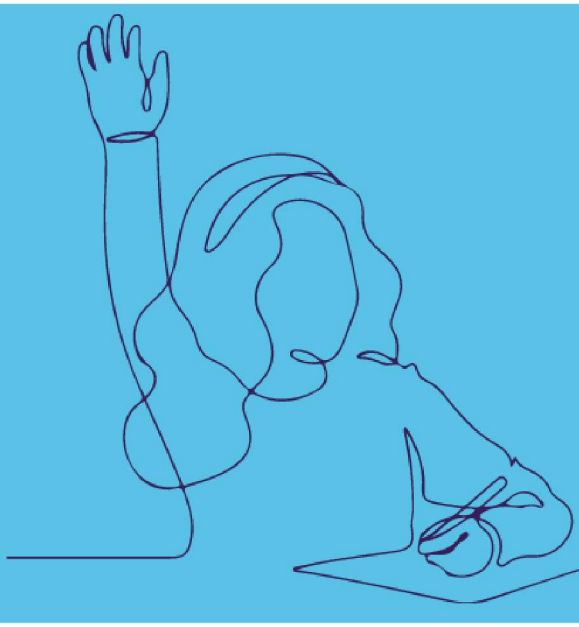
F3 Law

Student Legal Symposium 2023-2024

I. Responsive and Responsible Student Suspensions

II. Say What? Legal Parameters of Student Free Speech

III. Legal Update



Online Presentation
September 7, 2023

Fresno | Inland Empire | Los Angeles | Oakland | Sacramento | San Diego

Student Legal Symposium - 2023-2024 School Year

Dear Colleague:

Student learning is at the heart of your work. From classroom teachers to principals, counselors, support staff and district administrators, everyone shares the goal of optimizing learning for all students. We know that students learn best when they feel safe, welcome, respected and comfortable in their learning environments. To this point, to ensure safe learning environments for all students and to uphold the expectations for student conduct, there are situations that require education professionals to responsibly consider and administer discipline.

As such, we begin today's session with "Responsive and Responsible Student Suspensions." Suspension of a student from school—which typically means removal of the student from ongoing instruction for adjustment purposes—involves teachers and administrators in an often-complex decision-making process. This session focuses on the legal requirements governing the various circumstances under which a student may be suspended; other means of correction and suspension alternatives; how long a suspension may last; suspension procedural requirements; obligations to notify law enforcement; and suspension of general education students potentially eligible for special education. In addition, we will offer practical investigative pointers that include a "to do" checklist, tips on conducting investigations, and more.

Next is "Say What? Legal Parameters of Student Free Speech." While public school students generally have the same First Amendment rights to freedom of speech as everyone else when they are at school and during school activities, there are certain limitations. Historically, there are two aspects by which student speech is evaluated by courts when deciding whether to imposing these limitations: content and location. Social media has exacerbated this complexity for the courts by introducing new and unique forms of communication and expression. This session focuses on the constitutional and statutory framework of student speech, as well as delving in-depth into important case law decisions concerning a school's ability to regulate (and thereby discipline) students for speech that takes place on-campus and off-campus. Plus, the session provides numerous practical pointers for educators when confronted with issues related to student speech and expression

We continue with our popular "Legal Update" session, which provides an overview of some important cases decided during the past year—and why they matter to educators. We also highlight recent guidance from the U.S. Department of Education, relevant administrative rulings, regulatory updates, new and pending legislation, and any late-developing news affecting students in California.

The day closes with "Targeted Questions and Answers," where F3 education attorneys field your inquiries on a variety of topics in an expanded Q&A session.

We designed this this Symposium to provide you with the most current legal information and case law analysis—combined with "practice pointers"—in selected important topic areas relevant to the provision of student services in California.

As always, we thank you for taking time from your demanding schedules to be with us. Thank you for your time, for your trust, and for your friendship. It is our sincere honor to work with so many dedicated and fierce advocates for children's education.

Respectfully,

Fagen Friedman & Fulfrost LLP

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Co-Coordinator, Student Legal Symposium

Anne M. Sherlock, Partner
Co-Coordinator, Student Legal Symposium
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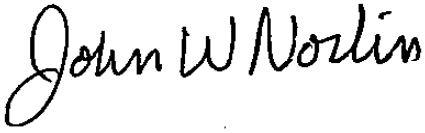

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STUDENT LEGAL SYMPOSIUM
2023
AGENDA

Introductions and Opening Remarks 8:30 a.m. – 8:45 a.m.

Responsive and Responsible Student Suspensions. **8:45 a.m. – 10:00 a.m.**
Suspension of a student from school—which typically means removal of the student from ongoing instruction for adjustment purposes—involves teachers and administrators in an often-complex decision-making process. This session focuses on the legal requirements governing the various circumstances under which a student may be suspended; other means of correction and suspension alternatives; how long a suspension may last; suspension procedural requirements; obligations to notify law enforcement; and suspension of general education students potentially eligible for special education. In addition, we will offer practical investigative pointers that include a "to do" checklist, tips on conducting investigations, and more.

Break 10:00 a.m. – 10:10 a.m.

Say What? Legal Parameters of Student Free Speech. **10:10 a.m. – 11:25 a.m.**
While public school students generally have the same First Amendment rights to freedom of speech as everyone else when they are at school and during school activities, there are certain limitations. Historically, there are two aspects by which student speech is evaluated by courts when deciding whether to imposing these limitations: content and location. Social media has exacerbated this complexity for the courts by introducing new and unique forms of communication and expression. This session focuses on the constitutional and statutory framework of student speech, as well as delving in-depth into important case law decisions concerning a school's ability to regulate (and thereby discipline) students for speech that takes place on-campus and off-campus. Plus, the session provides numerous practical pointers for educators when confronted with issues related to student speech and expression.

Break 11:25 a.m. – 11:35 a.m.

Legal Update. **11:35 a.m. – 12:35 p.m.**

During the past 12 months, federal and state courts have issued several ruling addressing student issues in public schools. Our 2023 Legal Update provides an overview of the some of the important cases decided during the past year—and why they matter to educators. We also highlight recent guidance from the U.S. Department of Education, relevant administrative rulings, regulatory updates, new and pending legislation, and any late-developing news affecting students in California.

Targeted Questions and Answers. **12:35 p.m. – 1:00 p.m.**

To wrap up the workshop, F3 attorneys field your inquiries on a variety of topics in a Q&A session.

Adjourn **1:00 p.m.**

STUDENT LEGAL SYMPOSIUM
2023

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Responsive and Responsible Student Suspensions

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Introduction

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- School districts have duty to supervise students in their conduct and to enforce rules necessary for protection of students and staff at school
- "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." (Cal. Constitution, Art. I.)
- Teachers and administrators are authorized to exercise reasonable control over students necessary to maintain order, protect property, and the health and safety of students or to maintain proper and appropriate conditions conducive to learning (Ed. Code § 44807)

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Introduction

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- Suspension of a student from school—which typically means removal of the student from ongoing instruction for adjustment purposes—involves teachers and administrators in often complex decision-making process
- CDE has stated that sending a student home from school and removing student from learning environment does not address root cause of the student's behavior
- Legislation in recent years, reflecting extensive research, has sought to minimize use and impact of suspensions

(CDE, "State Guidance for New Laws on Discipline" (Aug. 19, 2021))

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Introduction

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- Suspensions have disproportionate impact on African-American students, students with disabilities, and other marginalized groups
- Misapplication of disciplinary protections, or failure to apply them, may result in disparate exclusion of students of color and students with disabilities
- USDOE: "[D]iscrimination in student discipline forecloses opportunities for students, pushing them out of the classroom and diverting them from a path to success in school and beyond"

(USDOE, "Resource on Confronting Racial Discrimination in Student Discipline" (May 2023); Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions (OSERS 2022) 81 IDELR 138)

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Introduction

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- Our session today covers these topics:
  - Grounds for Suspension
  - Suspension Alternatives
  - Duration of Suspensions
  - Other Suspension Procedures
  - Obligation to Notify Law Enforcement
  - Suspension of General Education Students Potentially Eligible for Special Education
  - Practical Pointers on Suspension Processes and Procedures

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Grounds for Suspension

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Circumstances Under Which Student May Be Suspended

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California Education Code section 48900 states that student may only be suspended (or recommended for expulsion) if superintendent or principal determines that student committed one (or more) of the following acts . . .

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Commission of Enumerated Acts

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- 48900(a): Caused, attempted to cause or threatened to cause physical injury to another person or willfully used force or violence upon another person, except in self-defense
- 48900(b): Possessed, sold or otherwise furnished any firearm, knife, explosive, or other dangerous object, unless, in case of possession, student had obtained written permission to possess item
- 48900(c): Unlawfully possessed, used, sold, or otherwise furnished, or been under influence of, any controlled substance
- 48900(d): Unlawfully offered, arranged or negotiated to sell controlled substance, alcoholic beverage or intoxicant; and either sold, delivered, or otherwise furnished another substance

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Enumerated Acts (cont'd)

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- 48900(e): Committed or attempted to commit robbery or extortion
- 48900(f): Caused or attempted to cause damage to school or private property
- 48900(g): Stolen or attempted to steal school or private property
- 48900(h): Possessed or used tobacco or any tobacco product
  - Does not prohibit use or possession of student's own prescription products
    - **Note:** AB 599, currently pending in California legislature, would remove this section effective 7/1/25
- 48900(i): Committed obscene act or habitual profanity
- 48900(j): Unlawfully possessed or unlawfully offered, arranged or negotiated to sell any drug paraphernalia

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Enumerated Acts (cont'd)

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- 48900(k): Disrupted school activities or willfully defied valid authority
  - As of July 1, 2020, student enrolled in kindergarten or any of grades 1 to 5, inclusive, may not be suspended for these acts
  - Beginning July 1, 2020 through June 30, 2025, student enrolled in any of grades 6 to 8, inclusive, may not be suspended for these acts
  - Limitation does not apply to teacher's ability to suspend student from student's own classroom
  - **Note:** Senate Bill 274, currently pending in California Legislature, would remove this subsection from section 48900, such that no student, including charter school students, may be suspended for willful disruption, although law would retain teacher's existing authorization to suspend student from class for any of the listed acts, including willful defiance, for day of suspension and day following

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Enumerated Acts (cont'd)

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- 48900(l): Knowingly received stolen school or private property
- 48900(m): Possessed imitation firearm
- 48900(n): Committed or attempted to commit sexual assault or committed sexual battery
- 48900(o): Harassed, threatened or intimidated student witness in order to prevent testimony or to retaliate for giving testimony
- 48900(p): Unlawfully offered, arranged/negotiated to sell, drug Soma
- 48900(q): Engaged in, or attempted to engage in, hazing
- 48900(r): Engaged in act of bullying, including, but not limited to, bullying committed by means of electronic act, directed specifically toward student or school personnel

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Additional Acts Subject to Suspension Acts

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- Various other sections of Education Code permit district to suspend (or expel) student for committing one of the following offenses:
  - **Sexual harassment**, if student is in grades 4 through 12
  - Caused, attempted to cause, threatened to cause, or participated in act of **hate violence**, if student is in grades 4 through 12
  - Intentionally engaging in severe or pervasive **harassment, threats or intimidation**, if student is in grades 4 to 12
  - Making **terroristic threats** against school officials, school property or both

(Ed. Code, §§ 48900.2, 48900.3, 48900.4, 48900.7)

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Commission of Acts During School Attendance/Activity

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- Student may be suspended if student commits one of offenses discussed in preceding slides during time related to school activity or attendance that occur at any time, including, but not limited to, any of following:
  - While on school grounds
  - While going or coming to school
  - During lunch period, whether on or off campus
  - During, or while going to or coming from, school-sponsored activity
  - **Note:** Court has held that act does not have to be committed at the school where student is enrolled

(Ed. Code, § 48900, subd. (s); Fremont Union High School Dist. v. Santa Clara County Bd. of Educ. (Cal. Ct. App. 1991) 235 Cal. App. 3d 1187)

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Practice Tips: Learn the Rules

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- Familiarize yourself with rules of California Education Code concerning circumstances under which district may suspend student
- If possible, create table or chart, to document compliance in order to justify any decision to suspend
- Multiple grounds for suspension may apply to a single incident and may each be identified on the suspension notice

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Suspension Alternatives

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Alternatives to Suspension

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- For students subject to discipline under section 48900, superintendent or principal is encouraged to provide alternatives to suspension or expulsion, using research-based framework with strategies that improve behavioral and academic outcomes, that are age appropriate and designed to address and correct student's specific conduct
- Legislature intends that alternatives to suspension or expulsion be used for student who is truant, tardy or otherwise absent from school activities
- Legislature also encourages use of Multi-Tiered System of Supports ("MTSS") to help students gain social/emotional skills, understand impact of actions, and receive support to help transform trauma-related responses

(Ed. Code, § 48900, subds. (v) and (w))

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Positive Behavioral Interventions and Supports ("PBIS")

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Implementation of positive behavioral interventions and supports ("PBIS") results in:

- Improved outcomes, such as increased academic achievement and social and emotional competence for children with disabilities, and reduced bullying behaviors;
- Significant reductions in inappropriate behavior;
- Reduced use of exclusionary discipline, including reduced discipline referrals and suspensions;
- Improved teacher outcomes, including perception of teacher efficacy, school organizational health and school climate, and perception of school safety; and
- Reduced use of restraint and seclusion.

(OSEP, Discipline Discussions: The Impact and Harm of Exclusionary Discipline (last reviewed, August 2023)

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Other Means of Correction

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- Suspension, including supervised suspension, can be imposed only when "other means of correction" fail to bring about proper conduct
- District may document other means of correction used and place that documentation in student's record
- Any student, including student with disabilities, may be suspended (subject to IDEA disciplinary procedural protections) upon first offense, if principal or superintendent determines that student violated subdivision (a), (b), (c), (d), or (e) of Section 48900, or that student's presence causes danger to persons

(Ed. Code, § 48900.5)

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Other Means of Correction (cont'd)

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- "Other means of correction" can include, but are not necessarily limited to, the following:
  1. Conference between school personnel, parent or guardian, and student
  2. Referrals to school counselor, psychologist, social worker, child welfare attendance personnel, or other school support service personnel
  3. Study teams, guidance teams, resource panel teams, or other intervention-related teams that assess behavior, and develop and implement individualized plans to address behavior, in partnership with student and parents
  4. Referral for comprehensive psychosocial or psychoeducational assessment, including for purposes of creating IEP or Section 504 plan

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Other Means of Correction (cont'd)

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- "Other means of correction" can include, but are not necessarily limited to, the following (cont'd):
  5. Enrollment in a program for teaching prosocial behavior or anger management
  6. Participation in restorative justice program
  7. Positive behavior support approach with tiered interventions that occur during schoolday on campus
  8. After-school programs that address specific behavioral issues or expose students to positive activities and behavior
  9. Community service options

Note: AB 1165, pending in legislature, would, for student who has been suspended, or for whom other means of correction have been implemented, for incident of racist bullying, harassment, or intimidation, encourage LEAs to have victim and perpetrator engage in restorative justice practice

(Ed. Code, § 48900.5)

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Alternatives to Suspension from School

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- **Community Service**
  - District may require student to complete community service work instead of, or in addition to, suspension
  - Community service work may take place on campus or off-campus with parental permission
  - Community service work may include outdoor beautification, campus betterment, or peer/youth assistance programs

(Ed. Code, § 48900.6)

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Alternatives to Suspension from School

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- **Supervised Suspension Classroom**
  - If student poses no imminent danger or threat, or if expulsion proceeding has not been initiated, district may assign student to supervised suspension classroom for entire period of suspension
  - Students so assigned must be separated from other students at school site for period of suspension in separate classroom, building or site
  - School employee must notify parent or guardian, foster child's educational rights holder, attorney, and county social worker, or, if student is Indian child, tribal social worker and, if applicable, county social worker

(Ed. Code, § 48911.1)

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Alternatives to Suspension from School

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- **Suspension from Class by Teachers**
  - Teacher may suspend student from class for committing any of acts enumerated in section 48900 for day of offense and following day
  - Teacher must immediately report suspension to principal and send student to principal for appropriate action
  - If action requires continued presence of student at school site, student must be under appropriate supervision, as defined by district policy
  - Teacher must ask parent or guardian to attend parent-teacher conference
    - If practicable, school counselor or school psychologist may attend
    - School administrator must attend if teacher or parent/guardian requests
  - Student cannot be returned to class during period of suspension without concurrence of teacher and principal (Ed. Code, § 48910)

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Practice Tips: Consider Alternatives to Suspension

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- Familiarize yourself with positive behavior interventions and disciplinary options in response to a student's behavior
- Consider that a student may benefit more from remaining in school
- Create a list of options to implement in response to student behavior and document implementation of alternatives for each student

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Duration of Suspensions

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Five-Day Limit

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Districts may suspend student for any of reasons enumerated in Section 48900, 48900.2, 48900.3, 48900.4, and 48900.7 for no more than **5 consecutive school days** per offense

(Ed. Code, § 48911, subd. (a))

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20 Cumulative Day Limit

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- Generally, student may not be suspended for more than 20 school days per school year
- If student is transferred to another regular school, continuation school or class, or opportunity school or class, total number of schooldays for which student may be suspended cannot exceed 30 days in any school year
- 20-day limit does not apply if student's suspension is extended during pendency of expulsion or if student is suspended for balance of semester from continuation school

(Ed. Code, §§ 48903, 48911)

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Other Suspension Procedures

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Pre-Suspension Conference

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- Suspension by principal, designee or superintendent of schools must preceded by informal conference with student and, whenever practicable, teacher, supervisor or employee who referred student
- Student must be informed of reason for disciplinary action, including other means of correction that were attempted before suspension, and of any evidence against student
- Student must be given opportunity to present student's version of events and offer evidence in his or her defense
- Conference may be omitted if it is determined that emergency situation exists involving clear and present danger to lives, safety or health of other students or school personnel

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Pre-Suspension Conference (cont'd)

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- If student is suspended without this conference, parent/guardian and student must be notified of student's right to return to school for purpose of holding conference
- Such conference must be held within two school days, unless student waives right or is physically unable to attend for any reason
  - In such case, conference must be held as soon as student is physically able to return to school

(Ed. Code, § 48911, subds. (b) and (c))

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Contacting Parents

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- At time of suspension, school employees must make "reasonable effort" to contact student's parent or guardian in person, by email or by telephone
- Whenever student is suspended from school, parent or guardian must be notified in writing of suspension

(Ed. Code, § 48911, subd. (d))

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Meeting with Parents

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- District may establish policy that permits school officials to conduct meeting with parent or guardian of suspended student to discuss causes, duration, school policy involved, and other matters pertinent to suspension
- Parent or guardian must respond "without delay" to request from school officials to attend conference regarding student's behavior
- Penalties cannot be imposed on student for failure of parent or guardian to attend conference with school officials
- Reinstatement of suspended student must not be contingent upon attendance by parent or guardian

(Ed. Code, §§ 48911, subd. (f), 48914)

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Extension of Suspension

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- If expulsion has been recommended, then principal, principal's designee or superintendent may extend suspension until governing board has rendered decision
- Extension may be granted only when it is determined, following meeting in which student and student's parent or guardian are invited to participate, that presence of student at school or in alternative school placement would cause danger to persons or property or threat of disrupting instructional process
- Meeting may be combined with the initial meeting on the merits of the suspension

(Ed. Code, § 48911, subd. (g))

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Provision of Homework Materials

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- Upon request by student, parent, legal guardian or other person holding right to make educational decisions for student, teacher must provide to student in any of grades 1 to 12, inclusive, who has been suspended from school for two or more schooldays, homework that student would otherwise have been assigned
- If homework assignment that is requested and turned in to teacher—either upon student's return to school from suspension or within timeframe originally prescribed by teacher, whichever is later—is not graded before end of academic term, such assignment cannot be included in calculation of student's overall grade

(Ed. Code, § 48913.5)

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Obligation to Notify Law Enforcement

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Assault or Battery with Deadly Weapon

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- Principal or principal's designee must, before suspension (or expulsion) of any student, notify appropriate law enforcement authorities, of any acts of student that may violate Section 245 of Penal Code (assault or battery with a deadly weapon or means of force likely to produce great bodily injury)
  - Includes firearms, knives, or any blunt instrument

(Ed. Code, § 48902, subd. (a))

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Controlled Substances

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- Principal or principal's designee must, within one schoolday after suspension or expulsion, notify law enforcement authorities of any acts of student that may violate subsections (c) or (d) of Education Code section 48900
  - Unlawfully possessed, used, sold, or otherwise furnished, or been under influence of, any controlled substance
  - Unlawfully offered, arranged, or negotiated to sell any controlled substance, alcoholic beverage, or intoxicant of any kind; and either sold, delivered, or otherwise furnished to a person another liquid, substance, or material and represented liquid, substance, or material as controlled substance, alcoholic beverage, or intoxicant

(Ed. Code, § 48902, subd. (b))

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Other Notification Requirements

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- Principal or principal's designee must notify appropriate law enforcement authorities of any acts of student that may involve:
  - Possession or sale of narcotics or of controlled substance
  - Violation of Penal Code section 626.9 (possession of firearm within 1,000 feet of school)
  - Violation of Penal Code section 626.10 (possession of knife more than 2 and one-half inches long or other specified weapons on grounds of school)

(Ed. Code, § 48902, subd. (c))

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False Reports

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- Principal, principal's designee, or any other person reporting student's known or suspected act to law enforcement cannot be held civilly or criminally liable, unless it can be proven that false report was made and that person making report knew it was was false or that report was made with reckless disregard for truth or falsity

(Ed. Code, § 48902, subd. (d))

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Criminal Act by Student with Disabilities

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- Principal or principal's designee reporting criminal act committed by eligible student with disability must ensure that copies of student's special education and disciplinary records are transmitted to appropriate authorities to whom criminal act is reported
- Any copies of student's special education and disciplinary records can be transmitted only to extent permissible under FERPA

(Ed. Code, § 48902, subd. (e))

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Suspension of General Education Students Potentially Eligible for Special Education

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Availability of IDEA Protections

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- Parent of student who has not been determined to be eligible for special education and related services may assert any IDEA protections, including use of due process, in circumstances when district had a "basis of knowledge" that student was student with disability before occurrence of behavior that precipitated disciplinary action, including suspension

(34 C.F.R. § 300.534(a))

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What Is a "Basis of Knowledge"?

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- District is deemed to have a "basis of knowledge" of student's disability for purposes of IDEA disciplinary protections if any of the following occur:
  - Parent has expressed concern in writing to district supervisory or administrative personnel, or to one of student's teachers, that student needs special education and related services
  - Parent has requested evaluation of student; or
  - Student's teacher, or other district personnel, has expressed specific concerns about pattern of behavior demonstrated by student, directly to director of special education or to other district supervisory personnel
  - **Note**: Districts are not deemed to have a "basis of knowledge" if parent has not allowed evaluation or has refused services, or if student has been evaluated but determined not to be eligible

(34 C.F.R. § 300.534(b), (c))

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Proceeding with Discipline

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- If district is not deemed to have a "basis of knowledge" of student's disability, student may be subjected to disciplinary measures applied to students without disabilities who engage in comparable behaviors
- However, if parents request an eligibility assessment during time period in which student is subjected to disciplinary measures, assessment must be conducted in expedited manner
- If, as result of assessment, student is determined to be student with disability, district must provide special education and related services and student is entitled to all IDEA disciplinary protections

(34 C.F.R. § 300.534(d))

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Proceeding with Discipline (cont'd)

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- IDEA does not establish specific timeframe for completion of expedited assessment
- Since law requires that evaluation be "expedited," it "should be conducted in a shorter period of time than a typical evaluation"
- Until expedited assessment is completed, student remains in placement determined by district, which can include suspension or expulsion without educational services.

(34 C.F.R. § 300.534(d); 71 Fed. Reg. 46728 (Aug. 14, 2006))

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Practice Tips: "Basis of Knowledge"

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- When determining whether "basis of knowledge" exists, it is important to consider information provided in all contexts, including IEP team meetings, Section 504 meetings and student study team meetings
- Also, districts must not limit "patterns of behavior" analysis only to behaviors that are associated with disciplinary incidents

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Practical Pointers on Suspension Processes and Procedures

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"To Do" Checklist

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1. Conduct investigation by interviewing student and witnesses, and obtaining sworn statements and pictures if appropriate
2. Contact school resource officer, when appropriate
3. Hold informal, pre-suspension conference with student (explain results of investigation and ask student for his/her side of story)
4. Notify law enforcement, if required by Education Code
5. Determine if student has IEP or Section 504 plan; review records
6. Identify all applicable Education Code offenses.
7. Consider alternatives to suspension
8. Determine whether to suspend student (for not more than 5 school days)

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"To Do" Checklist (cont'd)

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9. Prepare written Notice of Suspension
10. Contact parents to pick up student and hand deliver Notice of Suspension or mail/email suspension letter to parents with Notice of Suspension
11. Notify teachers
12. Report suspension and deliver Notice of Suspension to director of student services
13. If student has IEP or Section 504 plan, notify program specialist assigned to school site, as well as district's department of special education

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Conducting Investigations

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- **Interviews:** Interview all persons involved, asking specific questions to determine if violation has occurred
  - Interview each student and staff member separately
  - Take notes during each interview
  - As witnesses to prepare written statements or prepare written statements for witnesses to sign
  - Seek identities of all additional witnesses, and attempt to interview each identified witness
  - Principal may request written statements or elicit oral confessions from students without advising students that "confession" will be used against them, i.e., Miranda warnings (In Re Christopher W. (1973) 29 Cal.App.3d 777)

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Conducting Investigations (cont'd)

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- **Searches:** Conduct searches, as appropriate
- **Evidence:** Preserve all evidence (e.g., weapons, drugs, notes, etc.). Photographs may be taken, if appropriate
- **Determination of Violation:** Based on investigation of facts, principal should determine whether violation has occurred, which Education Code provision(s) was violated, and who committed violation

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Searches and Seizures

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- **Reasonable Suspicion Standard:** School officials may conduct search of student's person and personal effects based on reasonable suspicion that search will disclose evidence that student is violating or has violated law or school rule
  - Correlation between wrongful behavior of student and intended findings of search is essential for valid search under Fourth Amendment
  - Where possible, it is generally recommended that school officials ask for student's consent before searching student and student's personal effects, even if reasonable suspicion exists

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Searches and Seizures

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- **Reasonable Suspicion Standard (cont'd):** Following circumstances might give rise to a "reasonable suspicion
  - Independent reports by more than one student or single report by highly reliable student or staff member
  - Student demeanor and/or mental or physical condition
  - Outside informant who provides significant level of detail concerning identity of alleged wrongdoer and specific nature and location of contraband
  - Presence at time or location of illegal conduct
  - Suspicious conduct (e.g., attempts to flee scene or agitated mental condition)
  - Other considerations when deciding whether to search student include: age and behavior patterns; seriousness of possible offense compared with intrusiveness of search; urgency of situation requiring search

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Searches and Seizures

F3 Law

- **Reasonable Scope of School Searches**
  - In addition to reasonable justification for search, search must be carried out in reasonable manner
  - Scope of school search is valid if measures adopted are reasonably related to objectives of search and are not excessively intrusive in light of student's age, sex and nature of infraction
  - Search must be limited to specific area which is subject of suspicion
  - Strip searches are not allowed, as Education Code section 49050 prohibits searches of sensitive body areas and any search that rearranges clothing to permit view of breasts, buttocks or genitalia

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Searches and Seizures

F3 Law

- **Searches of Electronic Devices:**
  - If student brings cellular phone or other electronic communication device onto school grounds, district may search device if it has reasonable suspicion search will lead to evidence that student has violated specific law or a school rule
  - Note, however, California Electronic Communications Privacy Act (Penal Code, §§ 1546-1546.4.) imposes significant limitations on ability of state government entity to compel production of, or access to, information on electronic device, including cell phones, laptop computers, tablets or any other devices that stores, generates or transmits information in electronic form

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Searches and Seizures

F3 Law

- **Suspicionless Searches:** Some searches may not require reasonable suspicion if invasion of privacy is minimal and important school interest is served; suspicionless searches should be based upon clear policy and parents/students should be given notice of possibility of these searches
  - Lockers: Locker searches are not searches for purpose of Fourth Amendment. However, locker searches for purpose of criminal liability must be motivated by individualized suspicion. Practice of searching lockers should be supported by clear policy that includes notifying students and parents. Policy should clearly state district ownership of lockers and student lack of expectation of privacy therein

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Searches and Seizures

F3 Law

- **Suspicionless Searches (cont'd):**
  - Notebooks: Notebooks can only be examined from the outside, unless student has waived right to privacy. If notebooks are property of district, written policy that makes such notebooks subject to inspection at discretion of school authorities will suffice to authorize search
  - Vehicles: Vehicles parked or driven onto school property are subject to search without suspicion pursuant to Vehicle Code section 21113. However, notice of search policy must be clearly posted. For vehicles parked off-campus, probable cause must be established, involving law enforcement officials (who may be required to obtain warrant before searching).

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Take Aways . . .

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- As materials above demonstrate, laws relating to student suspension are complex and wide-ranging
- District staff who have knowledge about suspension processes and procedures and who know where to look for information can be more effectively involved in ensuring disciplinary process that is fair and consistent for all parties, keeping in mind CDE and legislature's desire to minimize use and impact of suspensions and keep students in school

Information in this presentation, included but not limited to PowerPoint handouts and the presenters' comments, is summary only and not legal advice. We advise you to consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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Responsive and Responsible Student Suspensions

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RESPONSIVE AND RESPONSIBLE STUDENT SUSPENSIONS

Introduction. Suspension of a student from school—which typically means removal of the student from ongoing instruction for adjustment purposes—involves teachers and administrators in an often complex decision-making process.

School districts have a duty to supervise students in their conduct and to enforce rules necessary for the protection of students and staff at school. Article I of the California Constitution states: "Right to safe schools. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." Teachers and administrators are authorized to exercise reasonable control over students as is necessary to maintain order, protect property, and the health and safety of students or to maintain proper and appropriate conditions conducive to learning. (Ed. Code § 44807.)

The California Department of Education ("CDE") has stated that sending a student home from school does not address the root cause of a student's behavior, it removes students from their learning environment. It also has a disproportionate impact on African American students and students with disabilities among other marginalized groups. (CDE, "State Guidance for New Laws on Discipline" (Aug. 19, 2021).) Additionally, in recent guidance, the U.S. Department of Education ("USDOE") noted that "[d]iscrimination in student discipline forecloses opportunities for students, pushing them out of the classroom and diverting them from a path to success in school and beyond . . . While racial disparities in student discipline alone do not violate the law, ensuring compliance with Federal nondiscrimination obligations can involve examining the underlying causes of such disparities." (USDOE, "Resource on Confronting Racial Discrimination in Student Discipline" (May 2023).)

Legislation in recent years, reflecting extensive research, has sought to minimize the use and impact of suspensions. This session focuses on the legal requirements governing the various circumstances under which a student may be suspended; other means of correction and suspension alternatives; how long a suspension may last; suspension procedural requirements; obligations to notify law enforcement; and suspension of general education students potentially eligible for special education. In addition, we will offer practical investigative pointers that include a "to do" checklist, tips on conducting investigations, and more.

I. Grounds for Suspension.

A. Circumstances Under Which a Student May Be Suspended.

1. Commission of Enumerated Acts. California Education Code section 48900 states that a student may only be suspended (or

recommended for expulsion) if the superintendent or principal determines that the student committed one (or more) of the following acts:

(a) Caused, attempted to cause, or threatened to cause physical injury to another person or willfully used force or violence upon the person of another, except in self-defense;

(b) Possessed, sold, or otherwise furnished any firearm, knife, explosive, or other dangerous object, unless, in the case of possession of an object of this type, the student 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;

(i) "Firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion

(ii) "Knife" means any dirk, dagger, or other weapon with a fixed, sharpened blade fitted primarily for stabbing, a weapon with a blade fitted primarily for stabbing, a weapon with a blade longer than 3½ inches, a folding knife with a blade that locks into place, or a razor with an unguarded blade

(iii) "Explosive" means (A) Any explosive, incendiary, or poison gas bomb, (i) grenade, (ii) rocket having a propellant charge of more than four ounces, (iii) missile having an explosive or incendiary charge of more than one-quarter ounce, (iv) mine, or (v) device similar to any of the devices described in the preceding clauses, (B) Any type of weapon (other than a shotgun or a shotgun shell which the Secretary of the Treasury finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in

diameter; and (C) Any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

(iv) "Dangerous object" means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length as defined in 18 U.S.C. Section 930. "Weapon" additionally includes a knife with a blade of any length.

(c) Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of, any controlled substance;

(d) Unlawfully offered, arranged, or negotiated to sell any controlled substance, 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 or private property;

(i) "School property" includes, but is not limited to, electronic files and databases. (Ed. Code, § 48900, subd. (u).)

(g) Stolen or attempted to steal school 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, vaping products and betel; however, this does not prohibit the use or

possession by a student of the student's own prescription products;

(i) **Note:** At press time for these materials, Assembly Bill 599 ("AB 599") is pending in the California Legislature. If enacted, this bill would, effective July 1, 2025, remove having 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, vaping products, and betel from the list of acts for which a pupil may be suspended or recommended for expulsion, regardless of their grade of enrollment and charter school students in grades 1 to 12.

(i) Committed an obscene act or habitual profanity;

(j) Unlawfully possessed or unlawfully offered, arranged, or negotiated to sell any drug paraphernalia;

(k) Disrupted school activities or otherwise willfully defied valid authority;

(i) Except as provided in Education Code section 48910, commencing July 1, 2020, a student enrolled in kindergarten or any of grades 1 to 5, inclusive, shall not be suspended for any of these acts, and those acts shall not constitute grounds for a student enrolled in kindergarten or any of grades 1 to 12, inclusive, to be recommended for expulsion.

(ii) Except as provided in Education Code section 48910, commencing July 1, 2020 through June 30, 2025, a student enrolled in any of grades 6 to 8, inclusive, shall not be suspended for any of these acts.

(iii) This limitation does not apply to a teacher's ability to suspend a student from the student's own classroom.

(iv) **Note:** At press time for these materials, Senate Bill 274 ("SB 274") is pending in the California

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Legislature. If this bill passes and is signed by the governor, the law would remove this subsection from section 48900. No student, including charter school students, may be suspended for any of these acts, but SB 274 would retain a teacher's existing authorization to suspend any pupil from class for any of the listed acts, including willful defiance, for the day of the suspension and the day following.

(l) Knowingly received stolen school or private property;

(m) Possessed an imitation firearm, which 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 or committed a sexual battery;

(i) "Sexual battery" as defined in Penal Code section 243.4 is the touching of an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse.

(o) Harassed, threatened, or intimidated a student witness in order to prevent testimony or to retaliate for giving testimony;

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

(q) Engaged in, or attempted to engage in, hazing;

(i) "Hazing" means a method of initiation or pre-initiation into a student 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 student. For purposes of this subdivision, "hazing" does not include athletic events or school-sanctioned events.

(r) Engaged in an act of bullying, including, but not limited to, bullying committed by means of an electronic act, directed specifically toward a student or school personnel.

(i) "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 student or group of students that has or can be reasonably to predicted have one or more of the effects stated in section 48900, subdivision (r)(1)(A)-(D) (i.e., (A) placing a reasonable student or students in fear of harm to person or property; (B) causing a reasonable student to experience a substantially detrimental effect on the student's physical or mental health; (C) causing a reasonable student to experience substantial interference with the student's academic performance; or (D) causing a reasonable student to experience substantial interference with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.)

(ii) "Electronic act" means the creation or transmission originated on or off the school site, by means of an electronic device, including but not limited to, a telephone, wireless telephone, or other wireless communication device, computer, or pager, of a communication, including, but not limited to, any item or act in section 48900, subdivision (r)(2)(A) (i.e., a message, text, sound, video or image; a post on a social network internet website, or an act of cyber sexual bullying.)

(iii) "Cyber sexual bullying" means the dissemination of, or the solicitation or incitement to disseminate, a photograph or other visual recording by a student to another student or to school personnel by means of an electronic act that has or can be reasonably

predicted to have one or more of the effects described in section 48900, subdivision (r)(1)(A)-(D), described above, inclusive. A photograph or other visual recording, as described above, includes the depiction of a nude, semi-nude, or sexually explicit photograph or other visual recording of a minor where the minor is identifiable from the photograph, visual recording, or other electronic act. "Cyber sexual bullying" does not include a depiction, portrayal, or image that has any serious literary, artistic, educational, political, or scientific value or that involves athletic events or school-sanctioned activities.

(iv) "Reasonable [student]" means a student, including, but not limited to, a student with disabilities, who exercises average care, skill, and judgment in conduct for a person of that age, or for a person of that age with the student's disabilities.

Note: For a student subject to discipline under this section of the Education Code, the district superintendent or the principal is encouraged to provide alternatives to suspension or expulsion, using a research-based framework with strategies that improve behavioral and academic outcomes, that are age appropriate and designed to address and correct the student's specific misbehavior as specified in Education Code section 48900.5 (discussed in section II. A., below). (Ed. Code, § 48900, subd. (v).) It is the intent of the legislature that alternatives to suspension or expulsion be imposed against any student who is truant, tardy, or otherwise absent from school activities. It is further the intent of the legislature that the Multi-Tiered System of Supports, which includes restorative justice practices, trauma-informed practices, social and emotional learning, and schoolwide positive behavior interventions and support, may be used to help students gain critical social and emotional skills, receive support to help transform trauma-related responses, understand the impact of their actions, and develop meaningful methods for repairing harm to the school community. (Ed. Code, § 48900, subd. (w).)

2. **Additional Acts.** In addition to the above enumerated acts contained in Education Code section 48900, the Education Code

permits a district to suspend or expel a student for committing one (or more) of the following offenses:

(a) **Sexual harassment**, if the student is in grades 4 through 12. "Sexual harassment" means, under Education Code section 212.5, unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions: (a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress; (b) submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual; (c) the conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment; (d) submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution. The conduct described in Education Code section 212.5 must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact upon the individual's academic performance or to create an intimidating, hostile, or offensive educational environment;

(b) Caused, attempted to cause, threatened to cause, or participated in an act of **hate violence**, if the student is in grades 4 through 12. "Hate violence" means, under Education Code section 233, any act punishable under Section 422.6, 422.7, or 422.75 of the Penal Code;

(c) Intentionally engaging in **harassment, threats, or intimidation** that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading rights by creating an intimidating or

hostile educational environment, if the student is in grades 4 to 12;

(d) Making **terroristic threats** against school officials or school property.

(i) Terroristic threats include written and/or oral statements threatening a crime that will result in death, great bodily injury to another person, or property damage over $1,000.00 with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, or for the protection of district property, or the personal property of the person threatened or his or her immediate family.

(Ed. Code, §§ 48900.2, 48900.3, 48900.4, 48900.7.)

B. **Commission of Acts During School Attendance/Activity.** A student may be suspended or recommended for expulsion, if the student commits any of the acts described above during a time related to a 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 or coming to school; (3) during lunch period, whether on or off campus; or (4) during, or while going to or coming from, a school-sponsored activity. (Ed. Code, § 48900, subd. (s).)

In Fremont Union High School District v. Santa Clara County Board of Education (Cal. Ct. App. 1991) 235 Cal. App. 3d 1187, student argued that the phrase "related to a school activity or school attendance" meant that the prohibited act must be related to the school the student was attending or to the student's own school activity. Because student was at Monte Vista High School at the time of the commission of the act (pulling out a "stun gun" and using it on another student), rather than at Homestead High School (where he was enrolled), student contended that section

48900 did not apply. The Court of Appeal disagreed. It stated that if the prohibited act had to be related to the suspended student's own school activity or to the school the student was attending, then the statute should read "related to his or her school activity or his or her school attendance" or "related to the pupil's school activity or the pupil's school attendance." However, the court noted that the statute does not include these words. Instead, section 48900 simply refers to "school activity or school attendance." Thus, it is school which is emphasized, the court stated. As long as the prohibited act is related to school activity or school attendance, then the district has jurisdiction under section 48900. Whether the student is attending his or her own school or involved in his or her own school activity is not determinative, the court concluded.

PRACTICE TIPS: Learn the Rules.

Familiarize yourself with the specific requirements in the California Education Code for when the district may suspend a student. If possible, create a table or chart to document compliance in order to justify a decision to suspend. Multiple grounds for suspension may apply to a single incident and may each be identified on the suspension notice.

II. Suspension Alternatives.

A. Positive Behavioral Interventions and Supports ("PBIS"). According to the Center on Positive Behavioral Interventions and Supports and the National Center for Pyramid Model Innovations, implementation of positive behavioral interventions and supports (PBIS) results in:

- Improved outcomes, such as increased academic achievement and social and emotional competence for children with disabilities, and reduced bullying behaviors;
- Significant reductions in inappropriate behavior;
- Reduced use of exclusionary discipline, including reduced discipline referrals and suspensions;
- Improved teacher outcomes, including perception of teacher efficacy, school organizational health and school climate, and perception of school safety; and

- Reduced use of restraint and seclusion.

(OSEP, Discipline Discussions: The Impact and Harm of Exclusionary Discipline, https://sites.ed.gov/osers/2022/12/discipline-discussions-the-impact-and-harm-of-exclusionary-discipline/ [last reviewed, August 5, 2023].)

B. **Other Means of Correction.** As noted in the Introduction to these materials, CDE has stated that "[s]ending a student home from school does not address the root cause of a student's behavior; it removes students from the learning environment; and it has a disproportionate impact on African American students and students with disabilities, among other marginalized groups that are underperforming academically and overrepresented in our criminal justice system. Legislation in recent years, reflecting extensive research, has sought to minimize the use and impact of suspension." (CDE, "State Guidance for New Laws on Discipline" (https://www.cde.ca.gov/nr/el/le/yr21ltr0819.asp [last reviewed, February 2023].) As such, suspension, including supervised suspension as described in Education Code section 48911.1, may be imposed only when "other means of correction" fail to bring about proper conduct. A district may document the other means of correction used and place that documentation in the student's record.

However, a student (including a student with disabilities), may be suspended (subject to applicable IDEA disciplinary procedural protections) for any of the reasons enumerated in Section 48900 upon a first offense, if the principal or superintendent of schools determines that the student violated subdivision (a), (b), (c), (d), or (e) of Section 48900 (listed above in section A. 1. (a)-(e), or that the student's presence causes a danger to persons.

"Other means of correction" can include, but are not necessarily limited to, the following:

1. A conference between school personnel, the student's parent or guardian, and the student;

2. Referrals to the school counselor, psychologist, social worker, child welfare attendance personnel, or other school support service personnel for case management and counseling;

3. Study teams, guidance teams, resource panel teams, or other intervention-related teams that assess the behavior, and develop and implement individualized plans to address the behavior in partnership with the student and the parents;

4. Referral for a comprehensive psychosocial or psychoeducational assessment, including for purposes of creating an individualized education program, or a plan adopted pursuant to Section 504 of the Rehabilitation Act of 1973;

5. Enrollment in a program for teaching prosocial behavior or anger management;

6. Participation in a restorative justice program;

7. A positive behavior support approach with tiered interventions that occur during the schoolday on campus;

8. After school programs that address specific behavioral issues or expose students to positive activities and behaviors, including, but not limited to, those operated in collaboration with local parent and community groups;

9. Any of the alternatives described in Education Code section 48900.6 (i.e., community service work).

(Ed. Code, § 48900.5.)

Note: At press time for these materials, Assembly Bill 1165 ("AB 1165") is pending in the California Legislature. If this bill passes and is signed by the governor, the law would encourage local educational agencies to have both the victim and perpetrator engage in a restorative justice practice that is found to suit the needs of both the victim and the perpetrator when a student has been suspended, or for whom other means of correction have been implemented, for an incident of racist bullying, harassment, or intimidation.

C. Alternatives to Suspension from School.

1. Community Service. A district may require a student to complete community service work instead of or in addition to a suspension. Community service work may take place on campus or may take

place off-campus with parent permission. Community service work may include outdoor beautification, campus betterment, or peer/youth assistance programs. (Ed. Code, § 48900.6.)

2. **Supervised Suspension Classroom.** If a student poses no imminent danger or threat to the campus, other students, or staff, or if an expulsion proceeding has not been initiated, the district may assign the student to a supervised suspension classroom for the entire period of suspension. Students assigned to a supervised suspension classroom must be separated from other students at the school site for the period of suspension in a separate classroom, building, or site for students under suspension. At the time a student is assigned to a supervised suspension classroom, a school employee is required to notify (in person, by email, or by telephone), the student's parent or guardian, or, if the student is a foster child, the foster child's educational rights holder, attorney, and county social worker, or, if the student is an Indian child, the Indian child's tribal social worker and, if applicable, county social worker. If a student is assigned to a supervised suspension classroom for longer than one class period, a school employee shall notify, in writing, the student's parent or guardian or, if applicable, the foster child's educational rights holder, attorney, and county social worker, or, if applicable, the Indian child's tribal social worker and, if applicable, county social worker. (Ed. Code, § 48911.1.)

3. **Suspension from Class by Teachers.** A teacher may suspend a student for committing any of the acts enumerated in Education Code section 48900, described above. The teacher may remove the student from his or her class for the day of the offense and the following day. The teacher must immediately report the suspension to the principal of the school and send the student to the principal (or the designee of the principal) for appropriate action. If that action requires the continued presence of the student at the school site, the student must be under appropriate supervision, as defined in policies and related regulations adopted by the district's governing board. As soon as possible, the teacher must ask the student's parent or guardian to attend a parent-teacher conference regarding the suspension. If practicable, a school counselor or a school psychologist should attend the conference. A school administrator must attend the conference if the teacher or the parent or guardian so requests. The student cannot be returned to

the class from which he or she was suspended, during the period of the suspension, without the concurrence of the teacher of the class and the principal. (Ed. Code, § 48910.)

PRACTICE TIPS: Consider Alternatives to Suspension.

Familiarize yourself with positive behavior interventions and disciplinary options in response to a student's behavior. Consider that a student may benefit more from remaining in school. Create a list of options to implement in response to student behavior and document implementation of alternatives for each student.

III. Duration of Suspensions.

A. Five-Day Limit. Districts may suspend a student for any of the reasons enumerated in Section 48900, 48900.2, 48900.3, 48900.4, 48900.7, and pursuant to Section 48900.5, described above, for no more than 5 consecutive school days per offense. (Ed. Code, § 48911, subd. (a).)

B. Twenty Cumulative Day Limit. Generally, a student may not be suspended for more than 20 school days per school year. If a student is transferred to another regular school, continuation school or class, or opportunity school or class, the total number of schooldays for which the student may be suspended shall not exceed 30 days in any school year. (Ed. Code, § 48903.) **Note:** The 20-day limit does not apply if a student's suspension is extended during the pendency of an expulsion or if the student is suspended for the balance of the school year from a continuation school. (Ed. Code, § 48911, subd. (g).)

IV. Other Suspension Procedures.

A. Informal Pre-Suspension Conference. A suspension by the principal, the principal's designee, or the district superintendent of schools must be preceded by an informal conference conducted by the principal, the principal's designee, or the district superintendent of schools between the student and, whenever practicable, the teacher, supervisor, or school employee who referred the student to the principal, the principal's designee, or the district superintendent of schools. At the conference, the student must be informed of the reason for the disciplinary action, including the other means of correction that were attempted before the suspension, and the evidence against the student. The student must be given the opportunity to present the student's version of events and offer

evidence in his or her defense. This conference may be omitted if the principal, principal's designee, or superintendent of schools determines that an emergency situation exists involving a clear and present danger to the lives, safety, or health of students or school personnel. If a student is suspended without this conference being held, the parent/guardian and the student must be notified of the student's right to return to school for the purpose of the conference and the conference shall be held within two school days, unless the student waives the right to it or is physically unable to attend for any reason. In such a case, the conference must be held as soon as the student is physically able to return to school. (Ed. Code, § 48911, subds. (b) and (c).)

B. Contacting and Meeting with Parents.

1. Contacting Parents. At the time of the suspension, a school employee shall make a reasonable effort to contact the student's parent or guardian (or, if applicable, the foster child's educational rights holder, attorney, and county social worker, or, if applicable, the Indian child's tribal social worker and, if applicable, county social worker) in person, by email, or by telephone. Whenever a student is suspended from school, the parent or guardian must be notified in writing of the suspension. (Ed. Code § 48911, subd. (d).)

2. Meeting with Parents. Each district is authorized to establish a policy that permits school officials to conduct a meeting with the parent or guardian of a suspended student to discuss the causes, the duration, the school policy involved, and other matters pertinent to the suspension. The parent or guardian of a student (or, if applicable, the foster child's educational rights holder, attorney, and county social worker, or, if applicable, the Indian child's tribal social worker and, if applicable, county social worker) must respond "without delay" to a request from school officials to attend a conference regarding the student's behavior. Penalties cannot be imposed on a student for failure of the student's parent or guardian (or, if applicable, the foster child's educational rights holder, attorney, and county social worker, or, if applicable, the Indian child's tribal social worker and, if applicable, county social worker) to attend a conference with school officials. Reinstatement of the suspended student must not be contingent upon attendance at the conference by the student's parent or guardian or, if applicable, the foster child's educational rights holder, attorney, and county social worker, or, if applicable, the Indian child's tribal social worker and, if

applicable, county social worker.) (Ed. Code § 48914; Ed. Code § 48911, subd. (f).)

C. **Extension of Suspension.** If an expulsion has been recommended, then the principal of the school, the principal's designee or the district superintendent of schools may extend the suspension until the governing board has rendered a decision on the expulsion. This extension may be granted only after the principal, principal's designee, or superintendent, has determined, following a meeting in which the student and the student's parent or guardian are invited to participate, that the presence of the student at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the instructional process. This meeting may be combined with the initial meeting on the merits of the suspension. (Ed. Code § 48911, subd. (g).)

D. **Provision of Homework Materials.** Upon the request of the student, a parent, a legal guardian or other person holding the right to make educational decisions for the student, a teacher must provide to a student in any of grades 1 to 12, inclusive, who has been suspended from school for two or more schooldays the homework that the student would otherwise have been assigned. If a homework assignment that is requested and turned in to the teacher by the student—either upon the student's return to school from suspension or within the timeframe originally prescribed by the teacher, whichever is later—is not graded before the end of the academic term, that assignment shall not be included in the calculation of the student's overall grade in the class. (Ed. Code, § 48913.5.)

V. Obligation to Notify Law Enforcement.

A. Circumstances For Referral to Law Enforcement Authorities.

1. **Assault or Battery with Deadly Weapon.** The principal or principal's designee must, before the suspension or expulsion of any student, notify the appropriate law enforcement authorities of the county or city in which the school is situated, of any acts of the student that may violate Section 245 of the Penal Code (assault or battery with a deadly weapon or means of force likely to produce great bodily injury including firearms, knives, or any blunt instrument). (Ed. Code, § 48902, subd. (a).)

2. **Controlled Substances.** The principal or principal's designee must, within one schoolday after suspension or expulsion of any

student, notify, by telephone or any other appropriate method chosen by the school, the appropriate law enforcement authorities of the county or the district in which the school is situated of any acts of the student that may violate subdivision (c) or (d) of Education Code section 48900 (student who unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of, any controlled substance; unlawfully offered, arranged, or negotiated to sell any controlled substance, 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). (Ed. Code, § 48902, subd. (b).)

3. **Other Notification Requirements.** Notwithstanding paragraph 2. above, the principal or principal's designee must notify the appropriate law enforcement authorities of the county or city in which the school is located of any acts of a student that may involve the possession or sale of narcotics or of a controlled substance or a violation of Penal Code section 626.9 (possession of a firearm within 1,000 feet of a school) or Penal Code section 626.10 (possession of a knife more than 2 and one-half inches long or other specified weapons on the grounds of a school). (Ed. Code, § 48902, subd. (c).)

B. False Reports. A principal, the principal's designee, or any other person reporting a known or suspected act described above is not civilly or criminally liable as a result of making any report authorized by above, unless it can be proven that a false report was made and that such person knew the report was false or the report was made with reckless disregard for the truth or falsity of the report. (Ed. Code, § 48902, subd. (d).)

C. Criminal Act(s) by Student with a Disability. The principal or the principal's designee reporting a criminal act committed by an eligible student with a disability must ensure that copies of the student's special education and disciplinary records are transmitted for consideration by the appropriate authorities to whom he or she reports the criminal act. Any copies of the student's special education and disciplinary records may be transmitted only to the extent permissible under the federal Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g et seq.). (Ed. Code, § 48902, subd. (e).)

F3 Law

VI. Suspension of General Education Students Potentially Eligible for Special Education.

A. Availability of IDEA Protections. A parent of a student who has not been determined to be eligible for special education and related services may assert any IDEA protections, including the use of due process, in circumstances when the district had a "basis of knowledge" that the student was a student with a disability before the occurrence of the behavior that precipitated the disciplinary action, including a suspension. (34 C.F.R. § 300.534(a).)

1. What Is Meant by "Basis of Knowledge"? Under the IDEA, a district is deemed to have "knowledge" of a student's disability for purposes of disciplinary protections if any of the following occur: (1) Parent has expressed concern in writing to district supervisory or administrative personnel, or to one of the student's teachers, that the student is in need of special education and related services; (2) Parent has requested an evaluation of the student; or (3) The student's teacher, or other district personnel, has expressed specific concerns about a pattern of behavior demonstrated by the student, directly to the director of special education or to other district supervisory personnel. (34 C.F.R. § 300.534(b).) But districts are not deemed to have "knowledge" if the parent has not allowed an evaluation or has refused services, or if the student has been evaluated and determined not to be eligible. (34 C.F.R. § 300.534(c).

(a) What Is Meant by "Express Concern"? Two of the three ways in which a district is deemed to have "knowledge" are when a parent has "expressed concern" that the student is in need of special education and related services or when district personnel "express specific concerns" about a pattern of behavior demonstrated by the student. When it issued the 2006 regulations, the U.S. Department of Education refused to modify the rules against imputing knowledge to a district when a parents "orally express their concerns." Therefore, parental concerns must always be in writing. In addition, parents must direct this writing to specific school staff, namely, "supervisory or administrative personnel" or to one of the student's teachers.

(b) **<u>What Is Meant by "Pattern of Behavior"</u>?** As noted above, a district is deemed to have "knowledge" of a student's disability for purposes of disciplinary protections if district personnel express specific concerns about a "pattern of behavior" demonstrated by the student. This term was construed by a federal district court in <u>Anaheim Union School District v. J.E.</u> (C.D. Cal., May 21, 2013, No. CV 12-6588) 61 IDELR 107. In that case, discussion by Student's Section 504 team concerning his low grades, inability to remain in class and his recent hospitalization demonstrated concerns about a "pattern of behavior" such that district had an obligation to conduct an MD review following Student's suspension. District urged the court to construe a "pattern of behavior" as necessarily implicating disciplinary issues. Failure to do so, it argued, transforms all Section 504 plan meetings into "deemed knowledge" for the purposes of the IDEA. The Court refused, noting first that the plain meaning of the words "pattern of behavior" does not support such a narrow reading. "A pattern is ordinarily construed as recurrent, similar or related events. Behavior implicates outwardly observable characteristics and actions." Second, the court pointed out that having a disability does not always result in disciplinary problems. For example, "a child may exhibit severe forms of autism such that the child does not speak or engage but certainly does not act out or violate rules. A teacher may recognize that such a child has a disability and communicate that fact to an administrator without identifying any disciplinary problems. Finally, the court observed that "teachers may communicate isolated events at Section 504 plan meetings that do not create a pattern for the purposes of the IDEA. Or, the occurrences communicated may not factually put the district on notice that the child has a disability."

B. **<u>Proceeding with Proposed Disciplinary Sanctions</u>.** If the district is not deemed to have "knowledge" of a student's disability, the student may be subjected to the disciplinary measures applied to students without disabilities who engage in comparable behaviors. (34 C.F.R. § 300.534(d)(1).) However, if the parents ask for an eligibility assessment during the time period in which the student is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner. If,

as a result of the assessment, the student is determined to be a student with a disability, the district must provide special education and related services and the student is entitled to all the disciplinary protections of the IDEA. (34 C.F.R. § 300.534(d)(2).) The IDEA does not establish a specific timeframe for the completion of the expedited assessment since what may be required to conduct an assessment will vary widely depending on the nature and extent of a student's suspected disability and the amount of additional information that would be necessary to make an eligibility determination. However, since the law requires the evaluation to be "expedited," it "should be conducted in a shorter period of time than a typical evaluation." (71 Fed. Reg. 46728 (Aug. 14, 2006).) Until the expedited assessment is completed, the student remains in the placement determined by the district, which can include suspension or expulsion without educational services. (34 C.F.R. § 300.534(d)(2)(ii).)

PRACTICE TIPS: "Basis of Knowledge".

When determining whether a "basis of knowledge" exists, it is important to consider information provided in all contexts, including IEP team meetings, Section 504 meetings and student study team meetings. Also, districts must not limit "patterns of behavior" to behaviors that are associated with disciplinary incidents.

VII. Practical Pointers on Suspension Processes and Procedures.

A. "To Do" Checklist.

1. Conduct investigation by interviewing student and witnesses, and obtaining sworn statements and pictures if appropriate (see below).

2. Contact the school resource officer, when appropriate.

3. Hold informal, pre-suspension conference with student. (Explain the results of the investigation and ask student for his/her side of the story.)

4. Notify law enforcement, if necessary under Education Code section 48902.

5. Determine if student has an IEP or Section 504 plan; review records.

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6. Identify all applicable Education Code offenses.

7. Consider alternatives to suspension.

8. Determine whether to suspend student (for not more than 5 school days).

9. Prepare written Notice of Suspension.

10. Contact parents to pick up student and hand deliver Notice of Suspension or mail suspension letter to parents with Notice of Suspension. (Be sure the suspension letter contains sufficient information regarding the Education Code offenses to stand on its own as the basis for an expulsion recommendation if an expulsion referral is made.)

11. Notify teachers.

12. Report suspension, and fax or deliver Notice of Suspension to director of student services.

13. If the student has an IEP or Section 504 plan, notify program specialist assigned to the school site and district's department of special education.

B. <u>Conducting Investigations</u>.

1. <u>Interviews</u>. Interview all persons involved, asking specific questions to determine if a violation has occurred.

(a) Interview each student and staff member separately.

(b) Take notes during each interview.

(c) Ask witnesses to prepare written statements or prepare written statements for the witnesses to sign.

(d) Seek the identities of all additional witnesses and attempt to interview each identified witness.

(e) The principal may request written statements or elicit oral confessions from students without advising students that the "confession" will be used against them, i.e., Miranda warnings. (In Re Christopher W. (1973) 29 Cal.App.3d 777.)

2. **Searches.** Conduct searches, as appropriate (discussed below).

3. **Evidence.** Preserve all evidence (e.g., weapons, drugs, notes, etc.). Photographs may be taken, if appropriate.

4. **Determination of Violation.** Based on the investigation of facts, the principal should make a determination as to whether a violation has occurred, which Education Code provision(s) was violated, and who committed the violation.

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C. **Searches and Seizures.**

1. **"Reasonable Suspicion" Standard.** School officials may conduct a search of the student's person and personal effects based on a reasonable suspicion that the search will disclose evidence that the student is violating or has violated the law or a school rule. A correlation between the wrongful behavior of the student and the intended findings of the search is essential for a valid search of the student under the Fourth Amendment. Where possible, it is generally recommended that school officials ask for the student's consent before searching the student and his/her personal effects, even if reasonable suspicion exists. The following circumstances might give rise to a "reasonable suspicion."

(a) Independent reports by more than one student or by single, highly reliable student or a staff member;

(b) Student demeanor and/or mental or physical condition;

(c) Outside informant who provides a significant level of detail concerning the identity of the alleged wrongdoer and the specific nature and location of the contraband;

(d) Presence at the time or location of the illegal conduct;

F3 Law

(e) Suspicious conduct such as attempts to flee the scene or agitated mental condition.

(f) Other considerations when deciding whether to search a student can include: the student's age and behavior patterns; the seriousness of the possible offense compared with the intrusiveness of the search; the urgency requiring search; and the location of the student at the time of the incident leading to reasonable suspicion.

2. **Reasonable Scope of School Searches.** In addition to reasonable justification for a search, the search must be carried out in a reasonable manner. The scope of a school search is valid if the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the student's age and sex and the nature of the infraction. The search must be limited to specific area which is the subject of the suspicion. **Note:** Strip searches are not allowed. Education Code section 49050 prohibits searches of sensitive body areas and any search which rearranges clothing to permit view of breasts, buttocks or genitalia.

3. **Searches of Electronic Devices.** If a student brings a cellular phone or other electronic communication device onto school grounds, the district may search the device if it has reasonable suspicion the search will lead to evidence that the student has violated a specific law or a school rule. (Note, however, on January 1, 2016, Senate Bill 178 (SB 178), the California Electronic Communications Privacy Act, took effect (Penal Code, §§ 1546-1546.4.) This law imposes significant limitations on the ability of a state government entity to compel the production of, or access to, information on an electronic device, including cell phones, laptop computers, tablets or any other devices that stores, generates or transmits information in electronic form.)

4. **Suspicionless Searches.** Some searches may not require reasonable suspicion if the invasion of privacy is minimal, and an important school interest is served by the suspicionless search. Suspicionless searches should be based upon a clear policy. Parents and students should be given notice of possibility of these searches. These suspicionless searches are often the basis for reasonable suspicion and more intrusive searches.

(a) **Locker Searches.** Locker searches are not searches for purpose of Fourth Amendment. However, locker searches for purpose of criminal liability must be motivated by individualized suspicion. Practice of searching lockers should be supported by clear policy that includes notifying students and parents. The policy should clearly state district ownership of lockers and student lack of expectation of privacy therein.

(b) **Notebook Searches.** Notebooks can only be examined from the outside, unless the student has waived his or her right to privacy. If the notebooks are property of the district, a written policy which makes such notebooks subject to inspection at the discretion of school authorities will suffice to authorize a search.

(c) **Vehicle Searches.** Vehicles parked or driven onto school property are subject to search without suspicion pursuant to Vehicle Code section 21113. However, notice of the search policy must be clearly posted. For vehicles parked off-campus, probable cause must be established, involving law enforcement officials (who may be required to obtain a warrant before searching).

Conclusion. As the materials above demonstrate, the laws relating to student suspension are complex and wide-ranging. We hope that our discussion has helped clarify any areas of confusion and that this document will be useful as refresher materials should the need arise. District staff who have knowledge about suspension processes and procedures and who know where to look for information can be more effectively involved in ensuring a disciplinary process that is fair and consistent for all parties, keeping in mind CDE's and the California legislature's desire to minimize use and impact of suspensions.

F3 Law

Say What? Legal Parameters of Student Free Speech

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What We'll Cover . . .

F3 Law

- Setting the Parameters: Constitutional and Statutory Foundations
- Unpacking the Parameters: Key Case Law Decisions Addressing On-Campus Speech
- Unpacking the Parameters: Key Case Law Decisions Addressing Off-Campus Speech
- Practical Parameters: What Have We Learned From All of These Cases?

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Introduction and Overview

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- While public school students generally have same First Amendment rights to freedom of speech as everyone else when they are at school and during school activities, there are certain limitations
- Historically, there are two aspects by which student speech is evaluated by courts when deciding whether to imposing such limitations: content and location
- These two factors have been defined and interpreted differently by various courts across the nation

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Introduction and Overview

F3 Law

- If speech takes place on campus or while student is subject to school supervision, schools are given more governing authority to regulate speech
- If speech takes place off campus, school's effort to regulate or punish speech is more limited and complex because school must first be shown to have jurisdiction over speech in question
  - Social media has exacerbated this complexity by introducing new and unique forms of communication and expression

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F3 Law

Setting the Parameters: Constitutional and Statutory Foundations

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First Amendment to U.S. Constitution

F3 Law

"Congress shall make no law . . . **abridging the freedom of speech**, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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California Const. Art. I, §2

F3 Law

"Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

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Education Code § 48907

F3 Law

- Public school students have right to exercise freedom of speech and of press, including, but not limited to:
  - Use of bulletin boards
  - Distribution of printed materials or petitions
  - Wearing of buttons, badges and other insignia
  - Expression in publications (whether or not school sponsored)
- Prohibits speech that:
  - Is obscene, libelous or slanderous; or
  - Creates clear and present danger that unlawful acts will be committed on school premises, school regulations will be violated, or school operations will be disrupted

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Education Code § 48950

F3 Law

- School district operating one or more high schools, or charter school, shall not make or enforce any rule subjecting high school student to disciplinary sanctions **solely** on the basis of speech or other communication that, when engaged in outside of campus, is protected by U.S. or California Constitution
- Authorizes high school students to file civil lawsuit to obtain appropriate injunctive and declaratory relief
- Does not prohibit imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected
- Does not supersede, or otherwise limit or modify, provisions of Section 48907

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Education Code § 48900

F3 Law

- Allows suspension or expulsion if student engages in **bullying** that is related to school activity or school attendance occurring within school
- "Bullying" means any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of electronic act, directed toward one or more students that has or can be reasonably predicted to have effect of one or more of following:
  - Placing reasonable student in fear of harm to person or property
  - Causing reasonable student to experience substantially detrimental effect on mental health
  - Causing reasonable student to experience substantial interference with academic performance
  - Causing reasonable student to experience substantial interference ability to participate in or benefit from services, activities or privileges provided by school

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Education Code § 48900.3

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- Student in grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if superintendent or principal of school in which the student is enrolled determines that student has caused, attempted to cause, threatened to cause, or participated in act of, **hate violence**, as defined by specified section of the California Penal Code

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Education Code § 48900.4

F3 Law

- Student enrolled grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if student has intentionally engaged in harassment, threats, or intimidation, directed against school district personnel or pupils, that is sufficiently severe or pervasive to have actual and reasonably expected effect of:
  - Materially disrupting classwork
  - Creating substantial disorder
  - Invading rights of either school personnel or students by creating intimidating or hostile educational environment.

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Unpacking the Parameters: Key Case Law Decisions Addressing On-Campus Speech

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Types of Student Speech

F3 Law

- U.S. Supreme Court, in three landmark cases decided decades ago, delineated three categories of student speech, providing separate legal standard for each category:
  - "Pure Speech"—Tinker v. Des Moines Indep. Community School Dist.
  - "Plainly Offensive Speech"—Bethel School Dist. No. 403 v. Fraser
  - School-Sponsored Speech—Hazelwood School Dist. v. Kuhlmeier

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"Pure" Speech

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- Speech that is silent, passive expression of opinion, unaccompanied by any disorder or disturbance
- Entitled to comprehensive protection under First Amendment regardless of whether it occurs in or out of school

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"Pure" Speech

Tinker v. Des Moines Indep. Cmty. School Dist.

F3 Law

Facts:

- Three students wore black armbands to protest Vietnam war
- School implemented policy to ban armbands, but permitted other symbols such as iron cross (traditional symbol of Nazism)
- Students were suspended from school until they agreed to remove armbands
- Students' parents sued district
- District argued that banning armbands was reasonable because they might cause disturbance

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"Pure" Speech

Tinker v. Des Moines Indep. Cmty. School Dist.

F3 Law

Decision:

- Supreme Court: School could not ban armbands because there was no substantial disruption of school activities
  - Students went to class; school officials continued their normal duties
  - Armband was only 2 inches wide and did not intrude on lives of others
  - Caused discussion and some hostile remarks, but no threats or acts of violence
- "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"
- Speech must cause, or be reasonably likely to cause, material and substantial interference with school operations

(Tinker v. Des Moines Independent Community School Dist. (1969) 393 U.S. 503, 107 LRP 7137)

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"Plainly Offensive" Speech

F3 Law

- Must balance individual's freedom to advocate unpopular and controversial views in schools vs. society's interest in teaching students boundaries of socially appropriate behavior

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"Plainly Offensive" Speech
Bethel School Dist. No. 403 v. Fraser

F3 Law

Facts:

- Student gave speech during high school assembly that contained sexual metaphors
- Some students hooted, yelled and mimed sexual activities alluded to in speech
- Other students appeared bewildered and/or embarrassed
- School suspended student for 3 days for "disruptive conduct"
- Father sued district for violating student's First Amendment right to free speech

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"Plainly Offensive" Speech
Bethel School Dist. No. 403 v. Fraser

F3 Law

Decision:

- District may prohibit student's speech because it was sexually explicit and "plainly offensive"; was potentially damaging to less mature audience; and was insulting to female students
- "Function of public school education [is] to prohibit the use of vulgar and offensive terms in public discourse"
- Although school officials should allow controversial views to be expressed, they must balance that interest with those of other students who may be offended by certain language

(Bethel School Dist. No. 403 v. Fraser (1986) 478 U.S. 675, 103 LRP 22719)

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School-Sponsored Speech

F3 Law

- Districts may regulate style and content of student speech in school-sponsored activities provided their actions are reasonably related to educational concerns

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School-Sponsored Speech
Hazelwood School Dist. v. Kuhlmeier

F3 Law

Facts:
- Students on school newspaper wrote two articles describing their experiences with pregnancy and with their parents' divorce
- Without telling students, principal removed articles from newspaper because students could be identified and because references to birth control and sexual activity were deemed "inappropriate"
- Students sued district for violating their First Amendment rights

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School-Sponsored Speech
Hazelwood School Dist. v. Kuhlmeier

F3 Law

Decision:
- Court: Deletion of articles was reasonable
- School newspaper was not public forum
- Educators do not violate First Amendment rights "by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"
- BUT Supreme Court noted that outcome may be different if school authorities had by policy or practice opened school facilities "for indiscriminate use by the general public or student organizations"

(Hazelwood School Dist. v. Kuhlmeier (1988) 484 U.S. 260, 103 LRP 26545)

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Other Decisions Addressing Regulation of On-Campus Speech

F3 Law

- Other key cases involving issue of regulating on-campus speech have included situations where students advocated illegal drug use, made written threats in personal journal, and wore articles of clothing likely to offend other students to point of likely inciting violence

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Advocating Illegal Drug Use

Morse v. Frederick

F3 Law

Facts:

- Students released to watch Olympic torch pass by school
- Event was school-sanctioned and supervised, but not required
- Student, along with other students, held up banner across street from school that read "Bong Hits 4 Jesus"
- Principal directed them to take down banner, which she confiscated, and then suspended student for violating school policy forbidding advocacy of use of illegal drugs
- Student and parents sued, claiming violation of First Amendment rights

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Advocating Illegal Drug Use

Morse v. Frederick

F3 Law

Decision:

- U.S. Supreme Court ruled that First Amendment does not prevent school administrators from restricting student expression that can be reasonably viewed as promoting use of illegal drugs
- "Bong Hits 4 Jesus" reasonably could be viewed as promoting illegal drug use
- Student's message was, by his own admission, not political, as was case in Tinker
- School had "important," if not "compelling," interest in prohibiting/punishing such student speech

(Morse v. Frederick (2007) 551 U.S. 393, 107 LRP 34918)

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Potential to Cause Disruption

La Vine v. Blaine School Dist.

F3 Law

Facts:

- High school student, troubled by recent rash of school shootings, wrote poem while off campus depicting feelings student might have after killing several classmates
- Student submitted poem to his English teacher, who had said she would be happy to review his written work
- Teacher became alarmed after reading poem, contacting school counselor, who was aware student had suicidal feelings
- School officials expelled student on emergency basis
- Parent sued alleging First Amendment violation

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Potential to Cause Disruption

La Vine v. Blaine School Dist.

F3 Law

Decision:

- School officials did not violate the First Amendment because they had reasonably forecasted "potential for substantial disruption"
- "Tinker does not require school officials to wait until disruption actually occurs before they may act"
- Given totality of circumstances school officials could have reasonably believed that there would be substantial disruption of school activities
- **Note:** Court did not explicitly address poem's off-campus origination; as such, it was not forced to make distinction between on-campus and off-campus speech

(La Vine v. Blaine School Dist. (9th Cir. 2001) 257 F.3d 981, 108 LRP 27748, cert. denied, (2002) 536 U.S. 959)

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Reaction of Other Students

Dariano v. Morgan Hill Unified School Dist.

F3 Law

Facts:

- Cinco de Mayo altercation between Caucasian and Mexican students occurred at school in 2009
- In 2010, on Cinco De Mayo, group of Caucasian students wore American flag clothing
- Students did not dispute that their attire put them at risk of violence
- They were offered choice either to turn their shirts inside-out or to go home for day with excused absences that would not count against their attendance records
- Parents alleged district's actions violated First Amendment

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Reaction of Other Students

Dariano v. Morgan Hill Unified School Dist.

F3 Law

Decision:

- 9th Circuit ruled that school could prohibit flag apparel
- Level of threat of physical altercation distinguished facts of case from Tinker
- Evidence of impending violence existed and school officials acted accordingly based upon reasonable safety concerns
- "[P]rior cases do not distinguish between 'substantial disruption' caused by the speaker and 'substantial disruption' caused by the reactions of others"

(Dariano v. Morgan Hill Unified School Dist. (9th Cir. 2014) 745 F.3d 354, 114 LRP 40553, cert. denied, (2015) 115 LRP 13666)

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Unpacking the Parameters: Key Case Law Decisions Addressing Off-Campus Speech

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Overview

F3 Law

- Ability of school district to regulate speech when student is not on campus requires more intricate legal analysis than circumstances when student is on campus
- Courts have held that strict tests of location of speech are not compatible with online methods of communication
- In response to our internet world, courts have developed updated approaches to analyzing school speech issues

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Overview

F3 Law

- Generally, courts, including 9th Circuit, have applied two-part analysis to determine school's ability to regulate off-campus speech
- 1st step: Jurisdiction
  - Nexus test: Whether student's off-campus speech was tied closely enough to school to permit its regulation; and/or
  - Reasonably foreseeable test: Whether it was "reasonably foreseeable" that off-campus speech would reach school
- 2nd step: If school has jurisdiction, apply same standard as "pure speech" under Tinker (regulate if material/substantial disruption)

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Off-Campus Speech in General

F3 Law

- Two decisions from 9th Circuit address issue of whether off-campus speech bears sufficient nexus to school to allow regulation by school district . . .

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Off-Campus Harassment

C.R. v. Eugene School Dist. 4J

F3 Law

Facts:

- Approximately five minutes after leaving school, seventh-grade student and some friends caught up to two younger students and teased them, including making sexual puns
- Harassment occurred along path that led from school
- Instructional aide witnessed episode and called school to report what she had seen
- District subsequently suspended student for two days for sexual harassment
- Parents sued district alleging First Amendment violations

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Off-Campus Harassment

C.R. v. Eugene School Dist. 4J

F3 Law

Decision:

- 9th Circuit held disciplining one of alleged harassers did not violate First Amendment
- Various factors linked speech to school such that school had jurisdiction over speech and could regulate it
  - Individuals involved were all students, incident took place close to school that in area that was mot clearly delineated from school property, and incident occurred as students left school to go home
- "[S]exually harassing speech, by definition, interferes with the victims' ability to feel safe and secure at school" under Tinker standard

(C.R. v. Eugene School Dist. 4J (9th Cir. 2016) 835 F.3d 1142, 116 LRP 37788, cert. denied, (2017) 117 LRP 19475)

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Threat of Violence in Journal

McNeil v. Sherwood School District 88J

F3 Law

Facts:

- Student created "hit list" of 22 students and one former employee in his personal journal, which also contained graphic descriptions of violence
- Mother discovered journal and told therapist, who informed police
- Police searched student's home, which was close to school, and found .22 caliber rifle and 525 rounds of ammunition belonging to student
- Police informed district of "hit list," which, subsequently, became known in local media
- District eventually suspended and then expelled student for one year for making "threat of violence"

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Threat of Violence in Journal

McNeil v. Sherwood School District 88J

F3 Law

Decision:

- 9th Circuit ruled that district's discipline did not violate First Amendment
- "There is always a sufficient nexus between the speech and the school when the school district reasonably concludes that it faces a credible, identifiable threat of school violence," although schools cannot take disciplinary action in response to "just any perceived threat of school violence" arising from off-campus speech
- Here, content of speech involved school and district could reasonably foresee that news of hit list would substantially disrupt school activities

(McNeil v. Sherwood School Dist. 88J (9th Cir. 2019) 918 F.3d 700, 119 LRP 9741)

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Cyber Speech and Social Media

F3 Law

- Courts recognize that internet is now "a meeting space" for students—and acts and discourse that occurs there will impact acts and discourse of days to follow at school
- Courts also are aware that, with growth of social media, districts will face many questions about when it is appropriate to suspend (or even expel) students for their actions in cyberspace

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Supreme Court's Cheerleader Case

Mahanoy Area School District v. B.L.

F3 Law

Facts:

- Student learned that she did not make varsity cheerleading squad and did not get position on softball team unaffiliated with her school
- On a Saturday afternoon from local convenience store, student posted to Snapchat her image with her middle fingers raised and caption, "F*** school f*** softball f*** cheer f*** everything"
- Student did not identify her school or any member of school community
- Post could only be seen by her private circle of Snapchat friends.

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Supreme Court's Cheerleader Case

Mahanoy Area School District v. B.L.

F3 Law

Facts (cont'd):

- Several students who saw captioned photo approached coach and expressed concern that snap was inappropriate
- Team coaches decided student's snap violated team and school rules, which student had acknowledged before joining the team
- Student was suspended from junior varsity team for one year
- Student and parents sued in federal court, contending that discipline violated her First Amendment right to free speech
- District court and 3d Circuit ruled in student's favor
- U.S. Supreme Court agreed to hear appeal

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Supreme Court's Cheerleader Case

Mahanoy Area School District v. B.L.

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Decision:

- In an 8-1 ruling, Court reasoned that, while public schools may have a special interest in regulating some off-campus student speech, special interests offered by school in this case were not sufficient to overcome student's interest in free expression
- Parents, not school officials, should be decider of discipline for student's off-campus Snapchat activities
- Courts must be more skeptical of school's efforts to regulate off-campus speech, since doing so may mean student cannot engage in that kind of speech at all

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Supreme Court's Cheerleader Case
Mahanoy Area School District v. B.L.

F3 Law

Decision (cont'd):

- Court further reasoned that there was no evidence that student's social media expression caused substantial disruption under Tinker standard
  - Court noted that there was only a 5-to-10-minute discussion of SnapChat post during class and that only some team members reported being upset by post
- Court also refuted district's argument that it should be able to discipline student because post caused concern for team morale
  - There was not sufficient evidence presented to demonstrate that any impact on morale created substantial disruption

(Mahanoy Area School District v. B.L. (2021) 141 S. Ct. 2038, 121 LRP 21955)

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9th Circuit: Instagram Bullying
Chen and Epple v. Albany Unif. School Dist.

F3 Law

Facts:

- Student created private Instagram account and invited several other students to follow him
- Account contained racist/derogatory comments and images about other students and teachers
- Other students contributed to Instagram page by commenting on posts and liking them
- As knowledge of account spread rapidly, about 10 students gathered at school; several were upset, yelling or crying
- Other students reported feeling "devasted", "scared" and "bullied"

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9th Circuit: Instagram Bullying
Chen and Epple v. Albany Unif. School Dist.

F3 Law

Facts (cont'd):

- School recommended expulsion for both student who posted and student who made positive comments about post
- After hearing, school board ordered students expelled
- Students sued for violation of their First Amendment rights
- District court concluded under C.R. v. Eugene School District that students' speech was susceptible to regulation by school because: (1) it had sufficient nexus to school; and (2) it was reasonably foreseeable that speech would reach school and create risk of substantial disruption

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9th Circuit: Instagram Bullying
Chen and Epple v. Albany Unif. School Dist.

F3 Law

Decision:

- 9th Circuit upheld lower court's decision in district's favor
- Based on sufficient nexus test and Mahanoy considerations, court concluded that district had jurisdiction to discipline students for their off-campus social media speech
- Speech also amounted to severe bullying and harassment targeting particular classmates, and caused disruption to school activities as demonstrated by negative student response

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9th Circuit: Instagram Bullying
Chen and Epple v. Albany Unif. School Dist.

F3 Law

Decision (cont'd):

- Student poster argued that Instagram account was intended to be private and that it was never his intention "to cause any school disruption"
- Court stated that subjective intention to keep the account private is not controlling, and we must consider "whether it was reasonably foreseeable that the speech would reach and impact the school"
  - "[G]iven the ease with which electronic communications may be copied or shown to other persons, it was plainly foreseeable that [student's] posts would ultimately hit their targets, with resulting significant impacts to those individual students and to the school as a whole"

(Chen and Epple v. Albany Unified School Dist. (9th Cir. 12/27/2022) Case No. 20-16540)

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9th Circuit: MySpace Threats
Wynar v. Douglas County School Dist.

F3 Law

Facts:

- Student sent number of MySpace messages from his home to his friends that mentioned using weapons to stage school shooting
- Message named specific students student intended to kill and indicated that he wanted to break school shooting record on April 20th, anniversary of Columbine massacre and Adolf Hitler's birthday
- Student's friends notified school authorities, who suspended student for 10 days; district later expelled student for 90 days
- Student and parent sued district for violation of student's First Amendment rights

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9th Circuit: MySpace Threats

Wynar v. Douglas County School Dist.

F3 Law

Decision:

- 9th Circuit upheld district's action
- Student's messages, which threatened safety of school and its students, both interfered with rights of other students and made it reasonable for school to forecast substantial disruption of school activities
- Note: When student speech is not violent and does not contain threats, courts are less likely to find that speech caused substantial disruption
  - E.g., J.S. v. Blue Mountain School District (3d Cir. 2011): Fake MySpace profile describing principal as pedophile "though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously"

(Wynar v. Douglas County School Dist. (9th Cir. 2013) 728 F.3d 1062, 113 LRP 35121)

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YouTube Post About Classmate

J.C. v. Beverly Hills Unif. School Dist.

F3 Law

Facts:

- After school, students went to restaurant
- One student filmed others making derogatory statements about 13-year-old girl, calling her "slut" and "ugly"
- Student posted video to YouTube from home computer
- Next day, victim and parent bring video to school's attention
- School suspended student who posted video
- Parents sued district for violation of First Amendment rights

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YouTube Post About Classmate

J.C. v. Beverly Hills Unif. School Dist.

F3 Law

Decision:

- School had jurisdiction over speech
  - Video made its way on campus through student and parent
  - Video could be viewed by other students on campus
  - Student who posted video contacted other students, including victim
- But speech was protected
  - No reasonably foreseeable risk that YouTube video would cause substantial disruption to school operations
  - Disruption was minimal: Only victim and parent were upset, victim and five other students missed one day of class, no discussion in class about video

(J.C. v. Beverly Hills Unified School Dist. (C.D. Cal. 2010) 711 F.Supp.2d 1094, 110 LRP 32757)

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Practical Parameters: What Have We Learned From All of These Cases?

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Where to Begin?

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- Begin with presumption that speech is protected
- Recognize that some highly offensive or insulting speech may be protected under the First Amendment and California law
- Understand limitations of schools' ability to monitor and discipline students in cyberspace

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Role of District When Incident Arises

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- It is not role of school officials to prevent students from, or punish them for, holding or expressing offensive views
- Focus on what you believe makes speech unprotected and avoid remarks about alleged offenders
- Recognize that offensive speech is societal problem—not just school problem—and convey values and principles that district wants to foster, rather than focusing on punishment of student

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Tinker Analysis Has Been Consistently Applied

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- Regardless of whether speech is on campus or off campus, keep in mind that districts may take disciplinary action in response to speech that might reasonably lead authorities to forecast substantial disruption with school activities or that would infringe on the rights of other students to be secure
- Identifiable threat of school violence represents legitimate basis for district to take disciplinary action against a student

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Mahanoy Decision and Off-Campus Speech

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- In the wake of the U.S. Supreme Court's Mahanoy decision, districts should consider asking and answering these three questions before attempting to regulate off-campus student speech:
  - Was the school standing in for parents (referred to as *in loco parentis*) at the time of the speech?
  - Would regulation of speech include entirety of student's speech made both on and off campus?
  - Does the school have interest in protecting unpopular expression?

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Mahanoy Decision and Off-Campus Speech (cont'd)

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- Also consider asking the following questions based on 9th Circuit's "sufficient nexus" analysis in Chen and Epple v. Albany Unified School District:
  - What is degree and likelihood of harm to school caused or augured by speech?
  - Was it reasonably foreseeable that speech would reach and impact school?
  - What is relation between content and context of speech and school?

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Mahanoy Decision and Off-Campus Speech (cont'd)

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- With its decision in Mahanoy, Supreme Court announced to districts that courts will be "skeptical" of any decision to discipline students for off-campus speech
- Accordingly, districts should ensure that strong reason exists for disciplining student for off-campus speech, such as bullying and targeted harassment or threats
- Remember: District generally cannot discipline students unless their off-campus conduct is closely tied to conduct at school or reasonably foreseeable to reach school AND will reasonably cause substantial disruption to school operations or infringe on rights of others

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Take Aways . . .

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- We hope this presentation has shed some light on both landmark and recent cases concerning how First Amendment's guarantee of freedom of speech applies to students in public schools
- It is important to note, and hopefully apparent from our discussion, that case law is not static—particularly in our digital age—and tests that courts use today to determine districts' ability to discipline students for their speech might not be same tests employed 10 years from now
- But regardless of legal parameters, we hope school administrators and staff keep in mind that their overarching goal is to protect all students and provide them with safe school environment in which to learn

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Say What? Legal Parameters of Student Free Speech

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SAY WHAT? LEGAL PARAMETERS OF STUDENT FREE SPEECH

Introduction. While public school students generally have the same First Amendment rights to freedom of speech as everyone else when they are at school and during school activities, there are certain limitations. Historically, there are two aspects by which student speech is evaluated by courts when deciding whether to imposing limitations: content and location. These two factors have been defined and interpreted differently by various courts across the nation. Typically, the content of student speech and expression is protected provided that it does not cause a substantial disruption at school or interfere with the rights of others. But courts have held that schools also can prohibit speech that is lewd, vulgar, offensive or even "inappropriate."

If speech takes place on campus or while a student is subject to school supervision, schools are given more governing authority to regulate the speech. If the speech, however, takes place off campus, a school's effort to regulate or discipline a student for such speech is more limited and complex because the school must be shown to have jurisdiction over the speech in question. Social media has exacerbated this complexity for the courts by introducing new and unique forms of communication and expression. The materials below summarize the constitutional and statutory framework of student speech, as well as delving in-depth into important case law decisions concerning a school's ability to regulate (and thereby discipline) students for speech that takes place on-campus and off-campus.

I. Setting the Parameters: Constitutional and Statutory Foundations. The U.S. Constitution, the California Constitution and state law provide protections for individual expression, which includes students.

A. United States Constitution. The First Amendment to the United States Constitution states in pertinent part that "Congress shall make no law…abridging the freedom of speech, or of the press; or of the people peaceably to assemble…." (U.S. Const., 1st Amendment.)

B. California Constitution. The California State Constitution grants free speech rights to its people: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2.) Notably, the First Amendment provides the floor of protection for student speech, but California generally provides more protection for student speech than does federal law.

C. California Education Code. First Amendment protections and discipline for certain speech-related activities are also specifically codified in various section of the Education Code.

1. **Education Code Section 48907.** This section of the Education Code provides that "[p]upils of the public schools . . . have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or by use of school facilities . . . ." Section 48907 contains two clear exceptions to its broad pronouncement. First, it provides that speech must be prohibited when it is obscene, libelous or slanderous. Second, it allows districts to prohibit materials that "so incite[] pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school." (Ed., Code § 48907.

   Note: At least one California court has interpreted subdivision (c) of Section 48907 to codify a third exception. That exception allows school districts, under certain circumstances, to restrict student content in a school sponsored publication where the content fails to "maintain professional standards of English and journalism." (Lopez v. Tulare Joint Union High School Dist. (1995) 34 Cal.App.4th 1302, 1323-25 [upholding a district's authority to have profanity deleted from a student-produced film on the basis that such expression violated "professional standards of English and journalism" under Section 48907, subd. (c)].)

2. **Education Code Section 48950.** This section of the Education Code, which applies only to high schools and secondary schools, provides that districts may not make or enforce a rule subjecting a high school student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the U.S. Constitution or Section 2 of Article I of the California Constitution. A student who is enrolled in a school at the time that the school has made or enforced a rule in violation of the above may commence a civil action to obtain appropriate injunctive and declaratory relief as determined by the court. This section of the Education Code, however, does not prohibit the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected. Nor does it

supersede, or otherwise limit or modify, the provisions of Section 48907, described above. In enacting section 48950, the legislature "finds and declares that free speech rights are subject to reasonable time, place, and manner regulations." (Educ. Code § 48950.)

3. **Education Code Section 48900.** This section of the Education Code allows suspension or expulsion of a student if the student engaged in an act of bullying. "Bullying" means any severe or pervasive physical or verbal act or conduct, including communications made in writing or by means of an electronic act directed toward one or more students that has or can be reasonably predicted to have the effect of one or more of the following:

   (a) Placing a reasonable student(s) in fear of harm to that student(s) person or property.

   (b) Causing a reasonable student to experience a substantially detrimental effect on the student's physical or mental health.

   (c) Causing a reasonable student to experience substantial interference with the student's academic performance.

   (d) Causing a reasonable student to experience substantial interference with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.

   A student cannot be suspended or expelled for any of the acts enumerated above unless the act is related to a school activity or school attendance occurring within a school or occurring within any other school district. (Educ. Code § 48900, subds. (r) and (s).)

4. **Education Code Section 48900.3.** This section of the Education Code states that a student in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the student is enrolled determines that the student has caused, attempted to cause, threatened to cause, or participated in an act of, hate

violence, as defined by specified section of the California Penal Code. (Educ. Code § 48900.3.)

5. **Education Code Section 48900.4.** This section of the Education Code provides that a student enrolled in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the student has intentionally engaged in harassment, threats, or intimidation, directed against school district personnel or students, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or students by creating an intimidating or hostile educational environment. (Educ. Code § 48900.4.)

II. Unpacking the Parameters: Key Case Law Decisions Addressing On-Campus Speech.

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A. Types of Student Speech: Three Landmark U.S. Supreme Court Decisions.

The U.S. Supreme Court, in three landmark cases decided several decades ago, delineated three categories of student speech, providing a separate legal standard for each category. First, speech that is characterized as "pure speech" is a silent, passive expression of opinion, unaccompanied by any disorder or disturbance. This type of speech is entitled to comprehensive protection under the First Amendment regardless of whether it occurs in or out of school. Second, for student speech deemed "plainly offensive," courts must balance an individual's freedom to advocate unpopular and controversial views in schools against society's interest in teaching students the boundaries of socially appropriate behavior. Third, for school-sponsored speech, districts may regulate the style and content of student speech in such activities as long as their actions are reasonably related to educational concerns.

1. **"Pure" Speech—Tinker v. Des Moines Independent Community School District (1969) 393 U.S. 503, 107 LRP 7137.** In December 1965, at a public school in Des Moines, Iowa, students planned to wear black armbands at school as a silent protest against the Vietnam War. When the principal became aware of the plan, he warned the students that they would be suspended if they wore the armbands to school because the protest might cause a disruption in the learning environment. Despite the warning, some students wore the armbands and were suspended. During their suspension, the students' parents sued

the school for violating their children's right to free speech. The U.S. District Court for the Southern District of Iowa sided with the school's position, ruling that wearing the armbands could disrupt learning. The students unsuccessfully appealed the ruling to the Eighth Circuit. Subsequently, they took the case to the U.S. Supreme Court

The Supreme Court considered two questions: Were the armbands a form of symbolic speech protected by the First Amendment? And, if so, did the school district have the power to restrict that speech in the interest of maintaining order in the school? By a 7-2 majority, the Supreme Court stated that the armbands represented "pure" speech that was entirely separate from the actions or conduct of those participating in it. The speech in question was a silent, passive expression of opinion, unaccompanied by any disorder or disturbance. The Court further observed that students did not lose their First Amendment rights to freedom of speech when they stepped onto school property. Justice Abe Fortas wrote, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . " The Court articulated what has come to be known as the Tinker standard—specifically that school officials cannot censor student expression unless they can reasonably predict that the expression will create a substantial disruption or material interference in school activities or invade the rights of others. According to the Court, the district had not demonstrated that the armbands caused or would cause "a material and substantial interference with schoolwork or discipline" and, rather, had acted merely to avoid the "discomfort and unpleasantness that always accompany an unpopular viewpoint." The Court noted that the district had not banned all political symbols, but had instead "singled out" the armbands for prohibition. In other words, the limiting of speech here was not content-neutral—a test the Supreme Court uses when deciding some First Amendment cases. The Tinker decision remains a landmark in upholding the rights of students in schools to express their views in a peaceful and orderly way.

2. **"Plainly Offensive" Speech—Bethel School District No. 403 v. Fraser (1986) 478 U.S. 675, 103 LRP 22719.** At a school assembly of approximately 600 high school students, Matthew Fraser made a speech nominating a fellow student for elective

office. In his speech, Fraser used what some in the audience believed was a graphic sexual metaphor to promote the candidacy of his friend. Fraser's speech referred to the student as "firm in his pants," who would take it to "the climax." As part of its disciplinary code, Bethel High School enforced a rule prohibiting conduct which "substantially interferes with the educational process . . . including the use of obscene, profane language or gestures." Fraser was suspended from school for two days. After school officials suspended Fraser, he sued in federal court. The district court and, subsequently, a federal appeals court ruled in Fraser's favor, finding that school officials violated his First Amendment rights. The district appealed to the U.S. Supreme Court.

The Court sided with school officials, noting a "marked distinction" between the political "pure" speech in Tinker and Fraser's sexual speech. "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior," the Court stated. "Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," it added. The Court continued by noting that although school officials should allow controversial views to be expressed, they must balance that interest with those of other students who may be offended by certain language. The Supreme Court thereby found that the school's disciplinary actions were not in violation of the First Amendment. The decision in Fraser remains vitally important in the public school context because it enables school officials to discipline students for profane and lewd expression.
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3. **School-Sponsored Speech—Hazelwood School District v. Kuhlmeier (1988) 484 U.S. 260, 103 LRP 26545.** Students in the Journalism II class at Hazelwood East High School in St. Louis wrote stories about their peers' experiences with teen pregnancy and the impact of divorce. When they printed the articles in the school-sponsored and school-funded newspaper, the principal deleted the pages that contained the stories prior to distribution without telling the students. Claiming that the school violated their First Amendment rights, the students took their case to court. A federal district court ruled that the school had the authority to remove the articles. The students then appealed to the Eighth Circuit, which reversed the lower court, finding that the paper was a

"public forum" that extended beyond the walls of the school. It decided that school officials could censor the content only under extreme circumstances. The district appealed to the U.S. Supreme Court.

In a 5-3 ruling, the Supreme Court held that the principal's actions did not violate the students' free speech rights. The Court noted that the newspaper was sponsored by the school and, as such, the school had a legitimate interest in preventing the publication of articles that it deemed inappropriate and that might appear to have the imprimatur of the school. Specifically, the Court noted that the newspaper was not intended as a public forum in which everyone could share views; rather, it was a limited forum for journalism students to write articles, subject to school editing, that met the requirements of their Journalism II class. The Court noted that First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings." Those rights, must be "applied in light of the special characteristics of the school environment," and schools do not need to tolerate student speech that is inconsistent with their "basic educational mission." In examining whether the newspaper was a forum for public expression, the Court determined that school facilities were public forums only if administrators had "by policy or practice" opened those facilities for "indiscriminate use by the general public." The newspaper had not "by policy or practice" been operating as a public forum. Hazelwood created a new standard for school-sponsored student speech as opposed to student-initiated speech. According to the Court, educators do not violate student First Amendment rights "by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." However, the Court also said students should go to court to protect their constitutional rights "when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose." .

B. Other Judicial Decisions Addressing Regulation of Student On-Campus Speech. Other cases involving the issue of regulating on-campus speech have included situations where students advocated illegal drug use, made written threats in a personal journal, and wore articles of

clothing likely to offend other students to the point of likely inciting violence. Each of these situations is discussed below.

1. **Advocating Illegal Drug Use—Morse v. Frederick (2007) 551 U.S. 393, 107 LRP 34918.** Joseph Frederick, a senior at Juneau-Douglas High School in Alaska, held up a banner with the words "Bong Hits 4 Jesus" during the Olympic Torch Relay through Juneau. Frederick's attendance at the event was part of a school-supervised activity. The school principal, Deborah Morse, told Frederick to put away the banner because it could be interpreted as advocating illegal drug activity. When Frederick refused, she took the banner away from him. Frederick was suspended for 10 days for violating a school policy forbidding advocacy of use of illegal drugs. After he sued, a federal district court ruled for the principal, finding that Frederick's action was not protected by the First Amendment. The Ninth Circuit reversed the lower court and held that Frederick's banner was constitutionally protected. The principal appealed to the U.S. Supreme Court

   In a 5-4 decision, the U.S. Supreme Court ruled that the First Amendment does not prevent school administrators from restricting student expression that reasonably is viewed as promoting the use of illegal drugs. The Court acknowledged that the U.S. Constitution affords lesser protections to certain types of student speech at school or at school-supervised events. It found that Frederick's message was, by his own admission, not political, as was the case in Tinker. The Court said the phrase "Bong Hits 4 Jesus" reasonably could be viewed as promoting illegal drug use. As such, the Court found that the school and its principal had an "important" if not "compelling" interest in prohibiting/punishing such student speech. The Court held that schools may "take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" without violating a student's First Amendment rights.

2. **Potential to Cause Disruption—La Vine v. Blaine School District (9th Cir. 2001) 257 F.3d 981, 108 LRP 27748, cert. denied, (2002) 536 U.S. 959.** High school student James La Vine from Blaine School District in Washington wrote a poem about a school shooter following a shooting at Thurston High School in Springfield, Oregon. La Vine's poem, entitled "Last Words," examined the mindset of a student who killed his classmates and

then expressed remorse. La Vine brought the poem to school to show his English teacher, who had encouraged her students to write creatively on their own time. After La Vine's teacher expressed concern that the student might harm himself or be "crying out for help," school officials decided to "emergency expel" La Vine for fear that he might cause harm to himself or other students at school. La Vine and his father sued, contending that school officials violated his First Amendment rights by punishing him for the content of his poem. La Vine also claimed that school officials violated his right to free expression by refusing to remove negative documentation about the incident in his student file. A federal district court ruled in favor of the La Vines on both counts, finding that the school officials overreacted.

The Ninth Circuit reversed the lower court, reasoning that the case must be understood against the backdrop of Columbine and other school shootings. The court applied the Tinker test, which asks whether school officials could reasonably forecast that the student expression might cause a substantial disruption of school activities, against the "totality" of the surrounding facts. Here, La Vine previously discussed his suicidal tendencies with the school counselor and had been involved in a domestic dispute with his father. In addition, the school knew that La Vine had recently broken-up with his girlfriend and that he had been accused of stalking her. He also had a prior discipline record at the school, including an act of violence, and the school was aware of school shootings that had recently occurred at other campuses. Based upon all of these factors, the Ninth Circuit found that it was reasonably likely that the poem would cause a substantial disruption at school and, therefore, could be regulated under the Tinker standard.

Note: La Vine is unique because it involved speech that was created off campus but brought into the school by the speaker. In its analysis, the court did not explicitly address the poem's off-campus origination. As such, it was not forced to make a distinction between on-campus and off-campus speech.

3. **Reaction of Other Students—Dariano v. Morgan Hill Unified School District (9th Cir. 2014) 745 F.3d 354, 114 LRP 40553, cert. denied, (2015) 115 LRP 13666.** The case arose out of the events of May 5, 2010, Cinco de Mayo, at Live Oak High School,

part of the Morgan Hill Unified School District. Live Oak's planned celebration was presented in the "spirit of cultural appreciation." However, at the prior year's celebration, an altercation arose between a group of predominantly Caucasian students and a group of Mexican students. The groups exchanged profanities and threats. One year later, several students wore American flag shirts to school. Alerted to potential trouble, the school's principal directed an assistant principal to address the issue. The assistant principal met with the students and explained that he was concerned for their safety. The students did not dispute that their attire put them at risk of violence. They were offered the choice either to turn their shirts inside out or to go home for the day with excused absences that would not count against their attendance records. Two students chose to go home. In the aftermath of their departure from school, they received numerous threats from other students. The two students and their parents sued the district and its officials, alleging violations of their federal and California constitutional rights to freedom of expression and their federal constitutional rights to equal protection and due process. The District Court dismissed all claims and, on appeal, the Ninth Circuit affirmed the dismissal

The Ninth Circuit concluded that, under Tinker, the assistant principal could reasonably forecast that the continued wearing of the T-shirts could cause a substantial disruption at school. According to the panel of three Ninth Circuit judges, there was evidence of impending violence and school officials acted reasonably in the name of student safety. Moreover, the court noted that school administrators had neither punished the students nor enforced a blanket ban on American flag apparel, and had thereby distinguished among students based on perceived threat level, rather than by viewpoint. As a result, the court determined, their conduct was appropriately tailored to preventing violence. It defined the determinative inquiry as "not whether the threat of violence was real, but only whether it was 'reasonable for [the school] to proceed as though [it were].'" Finding that "both the specific events of May 5, 2010, and the pattern of which those events were a part made it reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real," the court held that the school officials had not acted unconstitutionally under either the First Amendment or the California Constitution.

Subsequently, the Ninth Circuit denied petitions for rehearing, but amended its opinion. The court's amended opinion addressed concerns raised in a dissent to its denial of rehearing en banc. The dissenting justices argued that the Ninth Circuit was permitting a "heckler's veto." Disagreeing, the panel noted that, under Tinker, school officials may limit speech that "for any reason" substantially disrupts school activities. The panel pointed out that "prior cases do not distinguish between 'substantial disruption' caused by the speaker and 'substantial disruption' caused by the reactions of others."

III. Unpacking the Parameters: Key Case Law Decisions Addressing Off-Campus Speech.

A. Legal Overview. The ability of a school district to regulate speech when a student is not on campus requires a more intricate legal analysis than circumstances when the student is on campus. Courts have held that strict tests of the location of the speech are not compatible with the online methods of communication in our digital age. In response to our internet world, where today's students are particularly comfortable residents, the courts have developed updated approaches to analyzing school speech issues.

Generally, most courts, including the Ninth Circuit, have applied a two-part analysis to determine a school's ability to regulate off-campus speech. The first component requires a finding of whether the school has jurisdiction over the speech. To determine this, courts have applied the "nexus" test or the "reasonably foreseeable" test, or a combination of both. (Wynar v. Douglas County School Dist. (9th Cir. 2013) 728 F.3d 1062, 113 LRP 35121.) Under the "nexus" test, the school has jurisdiction over the speech if the student's off-campus speech is tied closely enough to the school to permit its regulation. (See, e.g., Kowalski v. Berkeley County Schools (4th Cir. 2011) 652 F.3d 565, 111 LRP 50106, cert. denied, (2012) 112 LRP 3081 [sufficient nexus to school existed regarding student's MySpace discussion group where she and over two dozen other students ridiculed a fellow student; group thread was understood by the victim as an attack "made in the school context"].) .Under the "reasonably foreseeable" test, courts will find the school has jurisdiction over the speech if it is "reasonably foreseeable" that the off-campus speech will reach the school. (See, e.g., S.J.W. v. Lee's Summit R-7 School Dist. (8th Cir. 2012) 696 F.3d 771 [two students used a Dutch domain site and told

only six school friends about their blog, but whether by accident or intention, word spread quickly; it was reasonably foreseeable that the blog might reach the school because it "targeted" the school].) Under the second component of the analysis, if it is determined that the school has jurisdiction over the speech, courts then generally apply the "pure speech" rationale under Tinker, discussed above. That is, the school may regulate the off-campus speech if the speech causes, or is reasonably likely to cause, a material and substantial disruption of school activities.

B. **Off-Campus Speech in General.** The two decisions from the Ninth Circuit summarized below address the issue of whether the off-campus speech bears a sufficient nexus to the school to allow regulation by the school district.

1. **C.R. v. Eugene School District 4J (9th Cir. 2016) 835 F.3d 1142, 116 LRP 37788, cert. denied, (2017) 117 LRP 19475.** Approximately five minutes after leaving Monroe Middle School, seventh-grade student, referred to as C.R., and some friends caught up to the two younger students and teased them, including making sexual puns and asking if they had watched pornography. The harassment occurred along a path that led from the school across a public park. An instructional aide with the district was biking home from school with her daughters when she rode past the group of students. The aide was a friend of C.R.'s mother and had known C.R. since he was in kindergarten. Concerned by the group's posture, the aide told the older boys to leave and walked the two younger students home. The following Monday, the aide called the school to report what she had seen. The district subsequently suspended C.R. for two days for sexual harassment. His parents sued the district alleging First Amendment violations. After a federal district court found in favor of the district, C.R. and his parent appealed to the Ninth Circuit.

Even though the alleged harassment of the younger students occurred several hundred feet from school, the Ninth Circuit held that it was within the district's administrative reach and that disciplining one of the alleged harassers did not violate the First Amendment. The court noted that regardless of whether the "nexus" test or the "reasonably foreseeable" test is ultimately applied, courts consistently engage in a circumstance-specific inquiry to determine whether a school can discipline a student for off-campus speech. Once the court has determined that a student's off-campus speech is susceptible to regulation by the

school, it then applies the Tinker standard to evaluate the constitutionality of the school's imposition of discipline. Here, there were various factors that linked the speech to the school such that the school could regulate it, the court concluded. For example, the individuals involved in the incident were all students, the incident took place in an area close to the school that was not clearly delineated from school property, and it occurred as the students left school to go home. "A school may act to ensure students are able to leave the school safely without implicating the rights of students to speak freely in the broader community," the court stated. In addition, it observed that school administrators could reasonably expect the effects of the harassment would spill over into the school environment. According to the court, under either the "nexus test" or the "reasonable foreseeable test, the district could take reasonable disciplinary action against C.R.'s off-campus speech. Next, the court concluded that under the Tinker standard by which schools may restrict speech that might reasonably lead school authorities to forecast substantial disruption or that collides with a student's right to be secure and to be let alone, the school did not violate the First Amendment by suspending C.R. It stated that "[s]exually harassing speech, by definition, interferes with the victims' ability to feel safe and secure at school." The facts here were a case in point, the court remarked, observing that one of the students reported feeling scared and uncomfortable after the encounter. "The school could therefore reasonably expect that those feelings would cause [the student] to feel less secure in school, affecting her ability to perform as a student and engage appropriately with her peers."

2. **McNeil v. Sherwood School District 88J (9th Cir. 2019) 918 F.3d 700, 119 LRP 9741.** In May 2014, a Sherwood High School sophomore student ("CLM") created a hit list of 22 students and one former employee in his personal journal. His journal also contained the statements "I am God" and "All These People Must Die." The journal detailed other graphic descriptions of violence. Several months later, CLM's mother discovered the journal and told a therapist that it contained a hit list. The therapist, alarmed by the entries, informed the Sherwood Police Department. The police searched the McNeil home, which was close to the school, and found a .22 caliber rifle and 525 rounds of ammunition belonging to CLM. However, the police did find any evidence that CLM intended to carry out any act of school violence. CLM told the police that he

used the journal to "vent" and that he would never carry out any violent thoughts. The police decided not pursue any criminal charges, but they informed the district of CLM's hit list. Subsequently, news of the hit list became known through the media. The district eventually suspended and then expelled CLM for one year for making a "threat of violence." CLM and his parents sued the district, alleging a violation of the student's First Amendment and other constitutional rights. A federal district court ruled in favor of the school district

On appeal, the Ninth Circuit affirmed the lower court's decision. The court devised a three-factor test for "determin[ing], based on the totality of the circumstances, whether [off-campus] speech bears a sufficient nexus to the school" to allow regulation by a school district. "This test is flexible and fact-specific, but the relevant considerations will include: (1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school." Under this standard, "there is always a sufficient nexus between the speech and the school when the school district reasonably concludes that it faces a credible, identifiable threat of school violence," the court emphasized. Here, the court opined that because the "hit list" constituted a credible, identifiable threat to the school, the expulsion was reasonable under the circumstances. The district could reasonably foresee that the news of the hit list would substantially disrupt school activities and the content of the speech involved the school. The court, however, cautioned that "[o]ur test does not allow a school to take disciplinary action in response to just any perceived threat of school violence arising from off-campus speech." It acknowledged that "there are situations where school officials overstep their bounds and violate the Constitution."

C. **<u>Cyber Speech, Including Social Media Postings</u>.** Courts are sympathetic to the fact that the internet is now the new "meeting space" for students—and the acts and discourse that occur there will impact the acts and discourse of the days to follow in school. Courts also are aware that, with the advent and growth of social media, districts will face many questions about when it is appropriate to suspend (or even expel) students for their actions in cyberspace.

F3 Law

1. **Mahanoy Area School District v. B.L. (2021) 141 S. Ct. 2038, 121 LRP 21955.** Freshman Brandi Levy—identified in court papers by her initials "B.L"—learned that she did not make the varsity cheerleading squad and also did not get her desired position on a softball team unaffiliated with Mahanoy Area High School. On a Saturday afternoon, from a local convenience store, B.L. posted to Snapchat her image with her middle fingers raised and the caption, "F*** school f*** softball f*** cheer f*** everything."
B.L. did not identify her school or any member of school community. The post could only be seen by her private circle of Snapchat friends. Several students who saw the captioned photo approached the coach and expressed concern that the snap was inappropriate. The team's coaches decided B.L.'s snap violated team and school rules, which she had acknowledged before joining the team, and decided to suspend her from the junior varsity team for one year. B.L., through her parents, sued in federal court, contending that the discipline violated her First Amendment right to free speech. A federal district court ruled in favor of B.L., as did the Third Circuit, which ruled that the Tinker substantial disruption standard does not apply to off-campus, online student speech. Alternatively, the Third Circuit also ruled that—even if Tinker did apply—the post did not rise to the level of substantial disruption. The district appealed to the U.S. Supreme Court

   In an 8-1 ruling, the Court reasoned that while public schools may have a special interest in regulating some off-campus student speech, the special interests offered by the school in this case were not sufficient to overcome B.L.'s interest in free expression. The Court acknowledged that schools have a special interest in regulating on-campus student speech that "materially disrupts class-work or involves substantial disorder or invasion of the rights of others." It added further that the special characteristics that give schools additional license to regulate student speech do not always disappear when that speech takes place off campus.
   "Circumstances that may implicate a school's regulatory interests include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices."

However, the Court continued, three features of off-campus speech often, even if not always, distinguish schools' efforts to regulate off-campus speech. "First, a school will rarely stand *in loco parentis* when a student speaks off campus. Second, from the student speaker's perspective, regulations of off-campus speech, when combined with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, because America's public schools are the nurseries of democracy. Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished." Applying these features, the Court determined that the school's interest in disciplining B.L. was low compared with her First Amendment free-speech rights. It observed that B.L.'s parents should be the decider of discipline for her off-campus Snapchat, not school officials, stating that "the school's interest in teaching good manners is not sufficient, in this case, to overcome B.L.'s interest in free expression." Finally, the Court reasoned that there was no evidence that B.L.'s social media expression caused a substantial disruption under Tinker. Specifically, the Court noted that there was only a 5-10 minute discussion about the snap during class and that only some team members reported being upset by the post. It also refuted the school district's argument that it should be able to discipline the student because the post caused concern for team morale. The Court stated that there was not sufficient evidence presented to demonstrate that any impact on morale created a substantial disruption.

2. **Chen and Epple v. Albany Unified School District (9th Cir. 12/27/2022) Case No. 20-16540.** CE, a student at Albany High School, created a private Instagram page with the intent to share comments and posts among his friends. This account was separate from his main Instagram account. CE only accepted around 13 followers, who were other students at the school, despite multiple follow requests. He posted content making fun of students for having braces, glasses, and for their weight. Other posts had violent and racist undertones. For example, one of the posts

included a photograph of a Black member of the high school girls basketball team standing next to the coach who was also Black. CE drew nooses around both of their necks and added the caption "twinning is winning." In another post, CE compared Black people to gorillas. There were other similarly disturbing posts. Another student, KC, contributed to the Instagram page by commenting on posts and liking them. The posts eventually became public throughout the school and had a negative effect on the students. As knowledge of the account spread rapidly, several students gathered at the school, and many were upset, yelling and crying. Even though the next class period had started, the students were too upset to go to class. In a teachers meeting, the teachers reported that their students were disturbed by what they heard and wanted to talk about it in class, which disrupted the teacher's lesson plans. One student learned of a post that made fun of her "Afro" hairstyle. She became very upset, resulting in her missing multiple days of school. Eventually her parents withdrew her from the high school. Other students reported feeling "devasted", "scared", and "bullied," and noted that their grades had suffered. The high school recommended expulsion for both CE and KC, and the school board, after hearing, ordered both student expelled. They then took their case to a federal district court claiming the school had violated their First Amendment right to free speech. The district court concluded that, under C.R. v. Eugene School District 4J (discussed above), the students' speech was susceptible to regulation by the school because: (1) the speech had a sufficient nexus to the school; and (2) it was reasonably foreseeable that the speech would reach the school and create a risk of a substantial disruption. The district court then found that under the Supreme Court's decision in Tinker, the students were properly disciplined because their speech caused or contributed to a substantial disruption at school and "clearly interfered with the rights of other students to be secure and to be let alone."

On appeal, the Ninth Circuit, answering the question of whether the student's First Amendment rights were violated, used the sufficient-nexus test while keeping in mind the additional considerations outlined by the Supreme Court in Mahanoy. It explained that the sufficient nexus test is a three-factor balancing test based on the totality of the circumstances. It looks at: (1) the degree and likelihood of harm to the school caused or augured by the speech; (2) whether it was reasonably foreseeable that the speech would

reach and impact the school; and (3) the relation between the content and context of the speech and school. The court added that while Mahanoy did not use this test, nothing in that case was inconsistent with such test nor clearly irreconcilable to it. In fact, the court stated, Mahanoy considered similar factors and added three additional considerations: (1) whether the school can be said to be acting in loco parentis in regulating the speech, (2) whether off-campus regulation threatens a student's ability to engage in certain speech at all; and (3) whether the speech implicates interests in protecting unpopular ideas. Based on the three factor test and the Mahanoy considerations, the Ninth Circuit affirmed the district court's decision on behalf of the district by holding that the high school had jurisdiction to discipline the students for their off-campus social media speech. It reasoned that the speech had a sufficient nexus to the school and amounted to severe bullying and harassment targeting particular classmates. It caused a disruption to school activities as seen by the negative student response.

CE argued that his Instagram account was intended to be private and that it was never his intention "to cause any school disruption." But, the court noted, CE's subjective intention to keep the account private was not controlling, and we must consider "whether it was reasonably foreseeable that the speech would reach and impact the school." CE failed in his effort to keep the posts private because a follower of the account told one of the targeted students about it. The Ninth Circuit stated that "[g]iven the ease with which electronic communications may be copied or shown to other persons, it was plainly foreseeable that CE's posts would ultimately hit their targets, with resulting significant impacts to those individual students and to the school as a whole."

3. **Wynar v. Douglas County School District (9th Cir. 2013) 728 F.3d 1062, 113 LRP 35121.** A student at Douglas High School in Nevada, Landon Wynar, sent several MySpace messages from his home to his friends. Wynar's messages mentioned using weapons he had in his possession to stage a school shooting, and the messages included specific dates as well as specific students he intended to kill. In the postings, he bragged about his weapons, threatened to shoot specific classmates, indicated that he wanted to break the school shooting record, and he named a specific date—April 20th, the anniversary of the Columbine massacre and Hitler's birthday—for his attack. His friends notified school

authorities, who suspended Wynar for 10 days. After a hearing before the school board, the district expelled the student for 90 days. Wynar and his father brought a claim against the school district for violation of Wynar's First Amendment rights. A federal district court granted summary judgment in favor of the district.

Upholding the lower court's decision, the Ninth Circuit stated that school districts have limited authority to discipline students for off-campus speech, noting that, "with the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping students safe without impinging on constitutional rights. It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result." Here, Wynar's messages, which threatened the safety of the school and its students, both interfered with the rights of other students and made it reasonable for school officials to forecast a substantial disruption of school activities. Wynar's messages could be interpreted as a plan to attack the school, written by a student with confirmed access to weapons and brought to the school's attention by fellow students. With that in mind, the court characterized it as "an understatement" to say that the specter of a school shooting fell within either component of Tinker. The nature of the threats was alarming and explosive in its challenge to the safety of students. In addition, his messages threatened the entire student body and targeted specific students, representing the quintessential harm to the rights of other students to be secure.

Note: However, when student speech is not violent and does not contain threats, courts are less likely to find that the speech caused a substantial disruption. Two such cases were cited by the Ninth Circuit in its Wynar decision. In J.S. v. Blue Mountain School District (3d Cir. 2011) 650 F.3d 915, 111 LRP 40374, cert. denied, (2012) 112 LRP 3125, a student created a fake Myspace profile of her principal, which included his picture and described him as a pedophile and a sex addict and included a message purporting to solicit young children for sexual acts. The Third Circuit applied Tinker's substantial disruption test and concluded that fake profile, "though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did." Other facts that lead the court to conclude that the profile was unlikely to cause

substantial disruption at school were that the student made the profile private so that it could only be accessed by her and her friends, and that the district computer system blocked access to the website so that no student could view the profile from school. Likewise, in Layshock v. Hermitage School District (3d Cir. 2011) 650 F.3d 205, 111 LRP 40385, decided on the same day as Blue Mountain, the court found that student discussion regarding a fake Myspace profile of a principal did not cause a "substantial disruption" because classes were not cancelled and there was not "widespread disorder." Accordingly, the court overturned the student's disciplinary sanctions. The Third Circuit opined that "we do not think that the First Amendment can tolerate the [district] stretching its authority into student's grandmother's] home and reaching [student] while he is sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there." Furthermore, the court held that the U.S. Supreme Court's decision in Fraser does not permit districts to punish students for expressive conduct which occurred outside of the school context. It ruled that the student's use of the district's website did not constitute "entering the school," and that the district was not empowered to punish his out-of-school expressive conduct under the circumstances..

4. **J.C. v. Beverly Hills Unified School District (C.D. Cal. 2010) 711 F.Supp.2d 1094, 110 LRP 32757.** A student, referred to as J.C., recorded a four-minute video making fun of a classmate. She posted the video on YouTube. The video included other students calling the classmate derogatory names, making sexual comments and using profanity. J.C. sent emails to approximately 10 students, including the classmate, telling them to watch the video. By the next day, the video had already received over 100 hits (i.e., over 100 people had viewed the video) and students were discussing the video on campus. The classmate, whose mother informed the school of the existence of the video, was extremely upset, did not want to go to class, and met with a school counselor for 25 minutes because she felt humiliated. School administrators, upon viewing the video, called J.C. out of class and made her write a statement about the video. The administrators also demanded that J.C. delete the video from YouTube. Upon consultation with the school district's lawyer, the principal suspended J.C. for two days.. J.C. and her parents sued the district, arguing that the school had

violated her First Amendment rights and did not have the authority to discipline her over a video made and viewed off campus.

The district court overturned the suspension, summarizing a "foreseeability" standard and a Tinker-based analysis for the ability of a district to regulate a student's off-campus electronic speech: (1) the speech is subsequently brought onto school campus, brought to the attention of the school officials, or could foreseeably make its way onto campus; and (2) the speech caused substantial disruption to the educational environment or it was reasonably foreseeable that such a disruption would occur. According to the court, however, the disruption or foreseeable disruption had to be based on specific facts and not the unsubstantiated fears of the school administration. In this case, the court concluded that the video had "not caused or threatened to cause a substantial disruption on the school campus." The court explained that the video was unlikely to lead to actual verbal or physical conflicts between students, none of the students involved had a history of violence and there was no evidence of similar incidents causing disruptions in the past. Moreover, the court stated that a substantial disruption "must equate to something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure." It explained that courts are more likely to find that it is reasonable to expect a substantial disruption where a student's speech is violent or contains threats against individuals affiliated with the school. The court stated that it "does not take issue with Defendants' argument that young students often say hurtful things to each other, and that students with limited maturity may have emotional conflicts over even minor comments. However, to allow the School to cast this wide a net and suspend a student simply because another student takes offense to their speech, without any evidence that such speech caused a substantial disruption of the school's activities, runs afoul of Tinker."

IV. **Applying the Parameters: What Have We Learned from the Cases?** Of course, any disciplinary decision based on speech—regardless of whether it is on campus or off campus—will hinge on the facts of the case. Nonetheless, much can be gleaned from analyses by the courts as discussed above. Such analyses can applied as practical parameters when a district is faced with the issue of whether or not it can regulate a student's speech.

A. **Where to Begin?** Begin with presumption that all speech is protected and that some highly offensive or insulting speech may be shielded by the First Amendment and California law. Also understand that there are limitations of schools' ability to monitor and discipline students in cyberspace.

B. **Role of the School District When Incident Arises.** It is not the role of school officials to prevent students from, or discipline them for, holding or expressing offensive views. Generally it is best to avoid making public statements objecting to the content of specific student speech.. Officials should focus on what they believe makes the speech unprotected and avoid remarks about the alleged offenders. Districts should recognize that offensive speech is a societal problem—not just a school problem—and convey values and principles that the district wants to foster, rather than focusing on the punishment of the student at issue.

C. **Tinker Analysis Has Been Consistently Applied.** Regardless of whether the speech is on-campus or off-campus, keep in mind that districts may take disciplinary action in response to speech that might reasonably lead authorities to forecast a substantial disruption with school activities or which would infringe on the rights of other students to be secure. An identifiable threat of school violence represents a legitimate basis for a district to take disciplinary action against a student.

D. **Mahanoy Decision and Off-Campus Speech.** In the wake of the U.S. Supreme Court's Mahanoy decision, districts should consider the following three questions before attempting to regulate off-campus student speech:

1. Was the school standing in for the parents (referred to as in loco parentis) at the time of the speech?

2. Would regulation of the speech include the entirety of the student's speech made both on and off campus?

3. Does the school have an interest in protecting unpopular expression?

Also, consider, based on Chen and Epple v. Albany Unified School District: (1) the degree and likelihood of harm to the school caused or augured by the speech; (2) whether it was reasonably foreseeable that the speech would reach and impact the school; (3) and the relation between the content and context of the speech and school.

With its decision in Mahanoy, the Supreme Court has announced to districts that courts will be "skeptical" of a school's decision to discipline students for off-campus speech. Accordingly, districts should ensure that there is a strong reason for disciplining the student for their off-campus speech, such as bullying and targeted harassment or threats. Districts generally cannot discipline students unless their off-campus conduct is closely tied to conduct at school or reasonably foreseeable to reach school AND will reasonably cause substantial disruption to school operations or infringe on rights of others.

Conclusion. The issue of student speech and expression as it relates to the First Amendment has been the center of controversy and litigation since the mid-20th century. We hope that the above discussion has shed some light on both landmark and recent cases that have set the parameters of how the First Amendment's guarantee of freedom of speech applies to students in the public schools. It is important to note, and hopefully apparent from this presentation, that case law is not static—particularly in the digital age. So the tests courts are using today to determine school districts' ability to discipline students for their speech might not be the tests employed 10 years from now. But regardless of the legal parameters, we hope school administrators and staff keep in mind that their overarching goal is to protect all of their students and provide them with a safe school environment in which to learn.

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Legal Update

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Judicial Decisions

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Expulsions

Natomas USD v. Sacramento County Bd. of Educ.

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Facts:

- District expelled Student after hearing evidence that Student brought BB guns and ammunition to school
- District reasoned that Student committed expellable offense in possessing BB guns, posing continuing danger to himself or others
  - District did not allow Student to present character witnesses and excluded his evidence tending to show his classmates did not believe he posed a danger
- County Board reversed District's decision, finding District deprived Student of fair hearing
- Sacramento Superior Court set aside County Board's decision
- Student and County Board appealed to Court of Appeal

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Expulsions

Natomas USD v. Sacramento County Bd. of Educ.

F3 Law

Decision:

- Court of Appeal reversed lower court's decision
- District's "continuing danger" finding was flawed
- "[C]continuing danger" finding must be due in part to, not due solely to, "the nature of the act [or violation]"
- Those at school who knew Student best—his teacher and his classmates—did not believe he posed danger to physical safety of himself or others
- District misread law by finding such evidence irrelevant and failing to conduct appropriate inquiry required by Education Code section 48915

(Natomas Unif. School Dist. v. Sacramento County Bd. of Educ. (Cal. Ct. App. 12/22/2022) Case No. C093475)

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Expulsions: Why Does This Case Matter to Us?

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- Except for offenses described in Education Code 48915(c), if district finds that student committed offense that could warrant expulsion, then it must find one or both of the following:
  - Other means of correction are not feasible or have repeatedly failed to bring about proper conduct; or
  - Due to the nature of act or violation, presence of student causes continuing danger to physical safety of student or others.
- In interpreting latter requirement, this court concluded that, when enacting section 48915, California legislature intended consideration of matters apart from nature of act or violation when evaluating whether student poses continuing danger

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Student Injury

Nigel B. v. Burbank Unif. School Dist.

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Facts:

- Eighth-grade Student was harassed in choir class by larger classmate (Gianni)
  - Student did not complain or report harassment
- During PE class, another student (Richard) routinely pushed Student and, on one occasion, twisted Student's arm and asked Student if he "wanted to die"
  - Student reported incident to assistant principal, who did not advise PE teacher that Student had complained
- Another student (Nick), who was a friend of Gianni's, threw Student around during soccer game and hit him in shins with his stick during field hockey
  - PE teacher yelled at Nick but did not discipline him

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Student Injury
Nigel B. v. Burbank Unif. School Dist.

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Facts (cont'd):

- During subsequent class, in game of touch football, Gianni ran into Student at full speed, causing Student to fly several feet in the air and land on his left side, resulting in significant knee injury
  - Another student ran to find PE teacher, who was "shocked" to learn Student was hurt
- Parents sued, asserting claims against teacher and District for negligence and breach of mandatory reporting duty under Ed Code section 49079
- Jury found that District failed to carry out its mandatory duty and that PE teacher was negligent

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Student Injury
Nigel B. v. Burbank Unif. School Dist.

F3 Law

Decision:

- Court of Appeal reversed judgment against District, finding insufficient evidence that District breached mandatory duty under Education Code section 49079 to report Gianni's conduct toward Student to his teachers
  - No evidence that Student ever complained about Gianni to school staff
  - Although Parents produced evidence that PE teacher failed to report Nick's conduct to others, there was no substantial evidence that such failure was substantial factor in causing Student's injury
  - Although there was evidence that District was aware of but failed to report Richard's conduct toward Student to teachers in violation of section 49079, there was no substantial evidence that such failure proximately caused Student's injury

(Nigel B. v. Burbank Unif. School Dist. (Cal. Ct. App. 7/3/2023) Case No. B317548)

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Student Injury: Why Does This Case Matter to Us?

F3 Law

- Education Code section 49079 requires districts to inform teachers about students who have engaged in, or are reasonably suspected of having engaged in:
  - Causing or threatening physical injury or willfully using violence upon another person, except in self-defense
  - Intentionally engaging in harassment, threats, or intimidation, directed against students, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of students by creating intimidating or hostile educational environment
- Districts may be subject to tort liability for breaches of any mandatory duty
- In this case, Court of Appeal found that no knowledge or reasonable suspicion existed regarding such conduct by Gianni

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Title IX

Grabowski v. Arizona Board of Regents

F3 Law

Facts:

- Student at University of Arizona was recruited to cross-country and track teams
- Student's teammates subjected him to "sexual and homophobic bullying"
- When Student raised his concerns to coach about "constant" homophobic bullying, coach did not respond
- After Student identified his bullies to another coach, coaches allegedly embarked on "concerted effort . . . to demoralize him"
- Student was ultimately dismissed from team
- Student sued school and coaches under Title IX, alleging harassment and retaliation

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Title IX

Grabowski v. Arizona Board of Regents

F3 Law

Decision:

- Ninth Circuit concluded that Title IX bars sexual harassment on basis of "perceived sexual orientation"
  - Student did not allege that he was gay; rather, he alleged that his harassers perceived him to be gay
- Although Student met three of four threshold tests for Title IX harassment claim, he could not show that suffered harassment so severe that it deprived him of access to educational opportunities or benefits
- Court, however, determined that Student alleged valid retaliation claim
  - He participated in protected activity; suffered adverse action; and demonstrated causal link between protected activity and adverse action

(Grabowski v. Arizona Board of Regents (9th Cir. 6/13/2023) Case No. 22-15714)

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Title IX: Why Does This Case Matter to Us?

F3 Law

- While this action involved postsecondary institution, its analysis applies to K-12 school districts as well
- In evaluating Title IX claims, districts should note Ninth Circuit's comments that harassment in this case allegedly stemmed from belief that male Student was attracted to men instead of women
- "That harassment is motivated by the stereotype that men should be attracted only to women. Both instances of harassment are motivated by a core belief that men should conform to a particular masculine stereotype. Both are impermissible forms of discrimination in violation of Title VII and Title IX."

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Guidance from U.S. Department of Education

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Migratory Children

Protecting Access to Education for Migratory Children

F3 Law

- Joint fact sheet released in June 2023 by OCR and DOJ to help public school understand their responsibilities to serve these children
- Migratory children may face barriers both before and after enrollment, which can include:
  - Barring enrollment after school year has begun
  - Requiring SSNs or U.S. birth certificates as condition of enrollment
  - Establishing proof-of-residency policies that prevent enrollment
  - Failing to conduct English language proficiency assessments
  - Uniformly placing migratory children in remedial classes
  - Incorrectly assuming that migratory families who speak Indigenous languages also speak Spanish

(Protecting Access to Education for Migratory Children (OCR and DOJ 06/2023)

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Unaccompanied Children

Protecting Access to Education for Unaccompanied Children

F3 Law

- Joint fact sheet released in June 2023 by OCR and DOJ to help public school understand their responsibilities to serve these children
- Unaccompanied children who live with family members or other adult sponsors, also may face barriers both before and after enrollment by:
  - Requiring SSNs or U.S. birth certificates as condition of enrollment
  - Barring unaccompanied students from accessing special academic programs or offerings due to interrupted schooling or incomplete academic records
  - Failing to conduct English language proficiency assessments
  - Relying on multilingual students to interpret for English Learners in the classroom
  - Denying of language assistance services and/or special education services

(Protecting Access to Education for Unaccompanied Children (OCR and DOJ 06/2023)

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Religious Expression

Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools

F3 Law

- On May 15, 2023, USDOE provided updated guidance on the current state of the law concerning constitutionally protected prayer and religious expression in public schools
- Various issued addressed by the guidance included the following . . .

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Religious Expression (cont'd)

Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools

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- Prayer and Religious Exercise During Non-Instructional Time
  - Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities
- Organized Prayer Groups and Activities
  - Students may organize prayer groups and religious clubs to same extent that students are permitted to organize other noncurricular student activity groups; such groups must be given same access to facilities as is given to other noncurricular groups, without discrimination because of groups' religious nature
- Moments of Silence
  - If school has "moment of silence" or other quiet periods during school day, students are free to pray silently, or not to pray, during these periods of time

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Religious Expression (cont'd)

Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools

F3 Law

- Student Assemblies and Noncurricular Events
  - Student speakers at school assemblies and noncurricular activities such as sporting events may not be selected on basis that either favors or disfavors religious perspectives
- Prayer at Graduation
  - School officials may not mandate or organize prayer at graduation or select speakers for such events in manner that favors religious speech such as prayer
- Religious Literature
  - Public school students have right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curricula or activities

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Religious Expression (cont'd)

Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools

F3 Law

- Student Dress Codes
  - Schools generally may adopt policies relating to student dress and school uniforms to the extent consistent with constitutional and statutory civil rights protections
  - Schools may not, however, target religious attire in general, or attire of particular religion, for prohibition or regulation
- Religious Expression in Class Assignments and Homework
  - Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on religious perspective of their submissions
  - Such home and classroom work should be judged by ordinary academic standards of substance, relevance, and other legitimate pedagogical objectives

(Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools (USDOE 5/15/2023) 123 LRP 15485)

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Student Records

Guidance for School Officials on Student Health Records

F3 Law

- Student Privacy Policy Office ("SPPO") issued FERPA guidance as it pertains focus on student health records maintained by educational agencies and institutions and by third parties acting on their behalf
- Student health records may qualify as education records under FERPA
  - Example: Health records maintained in school health clinic or nurse's office
- But not always . . .
  - Example: "Treatment records" (records made or maintained by medical personnel that are used only in connection with providing treatment do not qualify
  - Example: FERPA also does not apply to health information that school official obtains through personal knowledge or observation

(FERPA: Guidance for School Officials on Student Health Records (SPPO 4/12/2023) 123 LRP 13132)

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Guidance from California Department of Education

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Instructional Materials

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Guidance on Removal of Instruction or Instructional Materials

- On May 30, 2023, CDE released memorandum addressing questions about efforts of local governing boards to remove certain instruction or instructional materials
- CDE noted that governing boards are responsible for adopting instructional materials and policies for local instruction and learning and making specific curriculum decisions
- Board must keep in mind several federal and state laws when taking any action resulting in removal of instruction or instructional materials
- CDE provided four examples . . .

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Instructional Materials (cont'd)

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Guidance on Removal of Instruction or Instructional Materials

1. Students have right to receive information
   - This right may be violated by actions that remove or prohibit materials, ideas or activities

2. Law prohibits discrimination, harassment, intimidation and bullying directed against students based on actual or perceived traits or characteristics such as race, sex, gender identity, disability, religion, etc.
   - "Governing boards must be mindful of the effect that proposed actions may have on any and all of their students. Actions that remove or prohibit particular materials, ideas or activities may have the effect of discriminating against certain students based on protected characteristics."

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Instructional Materials (cont'd)

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Guidance on Removal of Instruction or Instructional Materials

3. California law contains several requirements regarding instruction and instructional materials
   - Comprehensive sexual health instruction at least once in junior high or middle school and at least once in high school that must, among other things: teach pupils about gender, gender expression, gender identity, and explore harm of negative gender stereotypes, and affirmatively recognize that people have different sexual orientations and must be inclusive of same-sex relationships
   - Instruction in social sciences must include role and contributions of both men and women, members of various races/ethnic groups, lesbian, gay, bisexual, and transgender Americans, persons with disabilities, and members of other ethnic and cultural groups, to economic, political, and social development of California and nation
   - Governing boards must adopt only instructional materials that accurately portray cultural and racial diversity of our society

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Instructional Materials (cont'd)

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Guidance on Removal of Instruction or Instructional Materials

4. Law also contains certain prohibitions with respect to instruction and instructional materials
   - Instruction must not promote discriminatory bias on the basis of race or ethnicity, gender, religion, disability, nationality, or sexual orientation, or any other protected characteristic
   - Governing board must not adopt instructional materials that contain any matter reflecting adversely upon persons on basis of race or ethnicity, gender, religion, disability, nationality, or sexual orientation, or because of any other protected characteristic
- CDE recommended that its guidance be "reviewed by superintendents, principals, administrators, and LEA officer appointed to ensure compliance with the educational equity and nondiscrimination requirements"

(Guidance on Removal of Instruction or Instructional Materials (CDE 5/30/2023))

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Administrative Ruling (OCR)

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Title IX (Gender Identity)

Letter to School District of Rhinelander (OCR 2023)

F3 Law

Facts:

- OCR's investigation determined that during the 2021-22 school year, nonbinary Student and Parent reported to District that other students repeatedly mocked and targeted Student during multiple classes
  - OCR found evidence that students bumped Student in hallways and called Student derogatory slur for LGBTQI+ individuals
- Additionally, multiple teachers repeatedly used incorrect pronouns for Student and one teacher removed Student from class on ground that teacher could not protect Student from harassment by other students
- District responded to allegations of harassment by changing Student's schedule to attend school in-person for only three classes and to take additional classes through self-directed study

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Title IX (Gender Identity)

Letter to School District of Rhinelander (OCR 2023)

F3 Law

Decision:

- OCR expressed concern that District's response to persistent harassment limited Student's participation in school activities
- Information produced in investigation did not reflect District was taking steps to ensure Student's equal access to education with peers
  - District records miscoded sex-based harassment, including use of slur for LGBTQI+ people, as "peer mistreatment"; did not document multiple complaints of sex-based harassment; and did not adequately document responses
- District resolved complaint by agreeing to:
  - Determine any compensatory services; to provide staff training on Title IX; provide information to students; and conduct survey on sex-based harassment

(Letter to School Dist. of Rhinelander (OCR 7/6/23) OCR Case No. 05-22-1029)

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Recent Developments Affecting Students and Education

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New Laws

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AB 58—Suicide Prevention Policies and Training

- Requires every LEA, on or before January 1, 2025, to review and update its policy on pupil suicide prevention, and revise its training materials, to incorporate best practices identified by CDE in its model policy

AB 452—Firearm Safety

- Requires districts, county offices of education, and charter schools to annually inform parents and guardians at beginning of first semester or quarter of regular school term of California's child access prevention laws and regulations relating to safe storage of firearms

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New Laws

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AB 748—Mental Health

- Requires each school site serving students in any of grades 6 to 12, inclusive, to create poster that identifies approaches and shares resources regarding pupil mental health.
  - Poster must be prominently and conspicuously displayed in appropriate public areas that are accessible to, and commonly frequented by, students at each school site

AB 1810—Seizure Disorders

- Authorizes LEA—if student diagnosed with seizures, seizure disorder, or epilepsy has been prescribed an emergency anti-seizure medication by student's health care provider—to designate, upon parental request, one or more volunteers at student's school to receive initial and annual refresher training regarding emergency use of anti-seizure medication

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New Laws

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SB 532—High School Coursework and Graduation Requirements

- Requires LEA to consult with student (and educational decision-maker(s)) who is homeless child or youth; former juvenile court school student; child of military family; or who is migratory child who transfers between schools any time after completion of student's second year of high school of option to remain in school for fifth year if LEA determines student is reasonably able to complete LEA's graduation requirements within student's fifth year of high school
  - Also applies to student participating in English language proficiency program for newly arrived immigrant pupils and who is in third or fourth year of high school
  - Until January 1, 2028, SB 532 requires that such consultation and option be provided if LEA determines student is not reasonably able to complete local graduation requirements within fifth year but is reasonably able to complete statewide graduation requirements within such time

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Proposed Legislation

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AB 373—Foster Children and Homeless Youth

- Requires priority access to foster children and homeless youth in districts that offer intersession program
- AB 373 states that notwithstanding any other law, if foster child or homeless youth will be moving during intersession period, the parent, guardian, or educational rights holder (or, if there is no parent, guardian, or educational rights holder, the unaccompanied homeless youth) shall determine which school such student will attend for intersession period

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Proposed Legislation

F3 Law

AB 659—Immunizations

- Cancer Prevention Act would declare public policy that students are recommended to be fully immunized against human papillomavirus ("HPV") before admission or advancement to eighth-grade level of any private or public elementary or secondary school
- AB 659 would, upon student's admission or advancement to sixth-grade level, require district's governing authority to submit, to student and parent or guardian, notification containing statement about such public policy and advising that student be fully immunized against HPV before admission or advancement to eighth-grade level
- AB 659 would incorporate such notification into existing provisions relating to notifications by school districts

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Proposed Legislation

F3 Law

AB 873—Media Literacy

- Passed unanimously in Assembly; currently pending in Senate
- AB 873 would direct Instructional Quality Commission to incorporate media literacy into K-12 curriculum in English language arts, math, science, history and social studies frameworks
- Eventually, all public school students would receive media literacy lessons every year, in every class
- In 2018, California passed optional media literacy guidelines, which focused on teaching about online privacy and safety; AB 873 goes further in that it addresses misinformation and social media use specifically, and would be required in all classrooms

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Proposed Legislation

F3 Law

AB 1078—Instructional Materials

- AB 1078 provides that LEA governing board cannot prohibit use of existing textbook, other instructional material, or curriculum that contains inclusive and diverse perspectives
- If governing board is considering removal of existing textbook, other instructional material, or curriculum for reason other than that it contains inclusive and diverse perspectives, such removal shall be approved only by two-thirds vote of governing board.
- Such requirement would apply only to removal of existing textbooks, other instructional material, or curriculum; it would not apply to scheduled or routine updates to textbooks, instructional materials, or curriculum

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Proposed Legislation

F3 Law

SB 323—Safety Plans

- Requires each school, on or before October 1, 2025, and on or before October 1 every year thereafter, to establish "school safety access and equity committee"
- Beginning July 1, 2025, schoolsite council or school safety planning committee would be required to forward its comprehensive school safety plan, as required under current law, to school safety access and equity committee for review and feedback before holding public meeting
- SB 323 would require school safety access and equity committee to review safety plan to consider whether it is inclusive of specific student population at school and to recommend any necessary changes to schoolsite council

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Proposed Legislation

F3 Law

SB 509—Mental Health and Behavioral Education

- Current law obligated State Department of Education, by January 1, 2023, to identify training programs for use by LEAs to address youth behavioral health
  - Programs must provide instruction on recognizing signs and symptoms of youth behavioral health disorders and on how school staff can best provide referrals to youth behavioral health services or other support to individuals in early stages of developing such disorder
- SB 509 requires, on or before July 1, 2027, that LEAs certify to State Department of Education that 75 percent of each of its classified and certificated employees, who have direct contact with students at school, have received specified youth behavioral health training
- SB 509, however, would prohibit training in youth behavioral health to be condition of employment or hiring

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Proposed Constitutional Amendments: "High Quality" Education

F3 Law

- Three education initiatives have been approved for circulation to collect signatures to be placed on 2024 ballot
- Must collect enough valid signatures by November 27, 2023 to qualify
- These Constitutional Amendment proposals are all variation of each other:
  - Amends California Constitution to require state and its school districts (including charter schools) to "provide a high-quality education to all public school students"
  - Amends California Constitution to provide that "all school-age children have the right to attend a high-quality public school"
  - Amends California Constitution to require state and its school districts (including charter schools) to "provide all public school students with high-quality public schools"

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Final Title IX Regulations Delayed

F3 Law

- On May 26, 2003, USDOE announced that amended regulations that implement Title IX, the federal civil rights law prohibiting discrimination on the basis of sex in education programs or activities that receive federal funding, will not be released until at least October 2023
- Original date for release was May 2023
- USDOE stated that it had received more than 240,000 public comments on proposed regulations (about twice the number of comments it received during its last rulemaking on Title IX), which might have been one of reasons for postponement

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FERPA and PPRA Changes On the Way

F3 Law

- USDOE anticipates releasing proposed amendments to FERPA regulations in November 2023
  - USDOE will propose to revise FERPA to update and improve current regulations by addressing outstanding policy issues, such as refining definition of "education records" and clarifying provisions regarding disclosures to comply with judicial order or subpoena
  - Revised regs will also address changes in administration and enforcement
- By early 2024, USDOE will also propose amendments to Protection of Pupil Rights Amendment ("PPRA") to update, clarify, and improve current regulations by addressing outstanding policy and administrative issues

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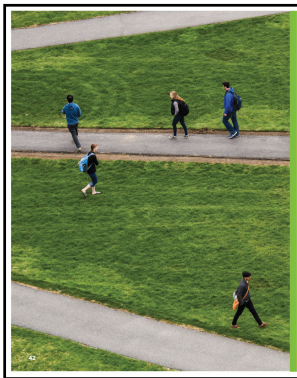

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Thank you for attending!

And thank you for all you do for students!

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Next Level Client Services
Special Projects
• Study emerging and converging issues
• Strategize and support district leadership:
○ Supplement/fill key staff positions
○ Charter petition review
○ Transportation studies
○ Facilities Master Plan RFPs
Governance Support
• Build strong governance teams:
○ Conduct governance workshops
○ Develop board self evaluations
○ Prepare for challenging topics/meetings
○ Draft accountability calendar
○ Create governance handbook from bylaws
Policy, Advocacy, Legislative Needs
• Monitor state and federal legislation
• Forecast emerging issues to anticipate policy
• Advise governance teams with advocacy efforts
Mentoring/Coaching
• Coach leadership teams
• Mentor incoming Superintendents:
○ Executive transition plans
○ Goal setting
○ Cabinet development

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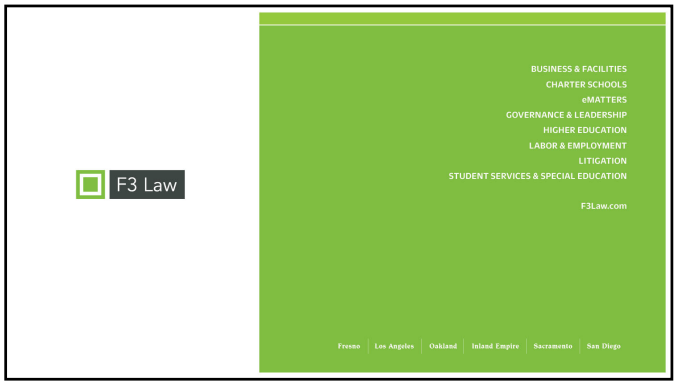
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Legal Update

LEGAL UPDATE

Introduction. During the past 12 months, federal and state courts have issued several ruling addressing student issues in public schools. Our 2023 Legal Update provides an overview of the some of the important cases decided during the past year—and why they matter to educators. We also highlight recent guidance from the U.S. Department of Education, relevant administrative rulings and any late-developing news affecting students in California. Our coverage includes:

- **Judicial Decisions (Expulsions, Student Injury, Title IX).**
- **Latest Guidance and Administrative Ruling (Guidance from the U.S. Department of Education ("USDOE"); Guidance from the California Department of Education ("CDE"); Administrative Ruling (OCR Letter of Finding).**
- **Recent Developments Affecting Students and Education (New Laws and Proposed Legislation; Proposed Constitutional Amendment; New Regulations).**

I. Judicial Decisions.

A. Expulsions.

1. Court of Appeal Reverses Student's Expulsion, Finding District Misapplied Education Code's "Continuing Danger" Provision—Natomas Unified School District v. Sacramento County Board of Education (Cal. Ct. App. 12/22/2022) Case No. C093475.

District expelled Student, I.O., under its discretionary authority granted under Education Code 48915. At an expulsion hearing, District heard evidence that Student brought two unloaded BB guns and a sealed bag of plastic BBs to his middle school, showed the guns to two friends, and fired one of the unloaded guns at the ground. District also heard evidence that one of the friends who saw the guns feared testifying at the expulsion hearing because Student and his Mother had asked the other student's family to speak about Student's character. Based on this evidence, District found Student unlawfully intimidated a witness. It further found he should be expelled. It reasoned that he committed an expellable offense in possessing the BB guns and posed a continuing danger to himself or others, although it did not allow

Student to present character witnesses and excluded his evidence tending to show his classmates did not believe he posed a danger.

Student appealed the District's decision to the Sacramento County Board of Education ("County Board"), which, pursuant to Education Code section 48922, has authority to review a school district's expulsion decisions. After holding a hearing, the County Board reversed District's decision. It found the District deprived Student of a fair hearing and prejudicially abused its discretion for several reasons. First, it found insufficient evidence supported District's findings that Student possessed a "firearm," a "dangerous object," and an "imitation firearm." Second, it found insufficient evidence supported District's finding that Student posed a continuing danger and further found District improperly excluded evidence— including his teacher's testimony and his classmates' comments—that could have been relevant to this topic. Third, the County Board found District wrongly relied on Education Code section 48900, subdivision (k) as a ground for expulsion. Fourth, it found that District's conclusion that Student intimidated a witness failed for two reasons—District provided inadequate notice of the charge, and it also supplied insufficient evidence to support a finding of witness intimidation. Lastly, the County Board found District failed to provide Student with a fair hearing, reasoning that the District prejudicially undermined Student's right to present evidence and question witnesses. District sought relief in the Sacramento Superior Court, which ultimately found that the County Board's decision should be set aside, finding none of the County Board's stated reasons for its decision persuasive. The court afterward found that District's suit enforced an important public policy, awarded District over $150,000 in attorney fees. Student and the County Board appealed to the California Court of Appeal (Third Appellate District).

The appellate court reversed the lower court's decision, citing two reasons. First, it found that District's "continuing danger" finding was flawed. According to District's interpretation of the law, it could consider only the nature of Student's misconduct when evaluating whether he posed a continuing danger. That is so, it argued, because the relevant inquiry under Education Code section 48915 is whether the student poses a continuing danger "due to" the nature of the student's misconduct—which District presumed to mean due only to the nature of the student's misconduct. The appellate court read the statute differently. "Considering the phrase "due to" in the context of section 48915, we find the phrase means "due in part to"—which means the "continuing danger" finding must be due in part to, not due solely to, "the nature of the act [or violation]." The court, citing to legislative intent, stated that "in

evaluating whether expulsion promotes the goal of safer school environments, common sense favors a scheme that evaluates the student's actual dangerousness based on all the relevant facts, not a scheme that artificially evaluates dangerousness based solely on a single moment in time." The court added the evidence tended to show that those at school who knew Student best—his teacher and his classmates—did not believe he posed a danger to the physical safety of himself or others. "Yet [District], misreading section 48915, found this evidence irrelevant, precluded [Student's] teacher from testifying, and failed to conduct the appropriate inquiry under section 48915. Under these circumstances, we conclude the County Board properly found the District prejudicially abused its discretion." Because District misunderstood the appropriate inquiry, it improperly limited Student's ability to present a defense and excluded relevant evidence.

Second, the appellate court found that District's witness intimidation finding was flawed. To support a claim of witness intimidation in a school disciplinary proceeding, the court noted that the evidence must show that a student either intended to prevent another student from testifying or to retaliate against another student for testifying. But, the court determined no evidence in this case shows Student had any improper intent. The other student (the witness) and his parent may have feared retaliation, as evidenced by their checking a box saying, "I request my statement remain anonymous as I fear retaliation." But they never alleged facts tending to show that Student "[h]arassed, threatened, or intimidated a pupil . . . for purposes of . . . retaliating against that pupil for being a witness." (Ed. Code, § 48900, subd. (o).) The court pointed out that "[e]ven the one panel member who commented on the topic acknowledged that [Student] and his mother might not have had any improper intent.

Why Does This Case Matter to Educators? With the exception of the offenses listed in Education Code section 48915(c), a district needs to make two findings before expelling a student. First, it must find that the student committed an offense that could warrant expulsion; and second, it must find one or both of the following: (1) other means of correction are not feasible or have repeatedly failed to bring about proper conduct, or (2) due to the nature of the act or violation, the presence of the student causes a continuing danger to the physical safety of the student or others. (Ed. Code, § 48915, subd. (b).) In interpreting the latter requirement, this court concluded the statute intends that districts consider matters apart from the nature of the act or violation when evaluating whether a student poses a continuing danger. "[A]s between one interpretation requiring a school district to make a finding of

dangerousness based on a single moment in a child's life, and another interpretation requiring a school district to make a finding of dangerousness based on all the relevant facts, we find the latter interpretation more sensible and consistent with the Legislature's likely intent."

B. Student Injury.

1. District Is Not Liable for Student's Injury Caused by Classmate —Nigel B. v. Burbank Unified School District (Cal. Ct. App. 7/3/2023) Case No. B317548. In April 2018, Student was in eighth grade. He was 14 years old, 4 feet 8 inches tall, and weighed approximately 70 pounds. Student participated in the school's show choir. Gianni, a fellow eighth-grade student, was 5 feet 5 inches tall and weighed 110 pounds. He and Student were in the same show choir class. Gianni was "very disruptive" during the class and he and Student had a "bully/quiet kid dynamic." Gianni made fun of Student's high-pitched voice. He also falsely implied that Student and another male student were in a gay relationship and used a gay slur to refer to Student and the other student. Gianni and his friends snickered and made fun of Student's performances during show choir, which caused plaintiff to cry and walk off stage in the middle of his final performance. Gianni and Student were also in the same mandatory eighth-grade advanced physical education class. During that class, Gianni made fun of Student's lack of athleticism and sports knowledge. During kickball, Gianni repeatedly threw a ball at Student "unnecessarily hard." Although Gianni's conduct bothered Student, he did not complain.. Eloise, a fellow student, observed Gianni's conduct toward Student during show choir and physical education class. She did not report Gianni's bullying of plaintiff to school officials.

In April 2018, Student's physical education teacher had Student's class rotate through multiple sports in five-week units. Students in the class routinely engaged in roughhousing and often directed "pushing, hitting, slapping, and the like" at Student. One student, Richard, routinely pushed Student during class and, during an ultimate frisbee game, he grabbed and twisted Student's arm, and asked Student if he wanted to die. Student reported this incident to an assistant principal who oversaw student discipline. Neither the assistant principal nor the school principal advised the physical education teacher that Student had complained about the bullying. Another student (Nick), who was a friend of Gianni's, threw Student around during a soccer game and hit him in the shins with a stick during field hockey. The physical education teacher, who had observed the other student's conduct, yelled at him but did not discipline him. The teacher's supervision of the class was

described as “passive.” On April 17, 2018, the students in the physical education class participated in seven-on-seven touch football. A player who stepped out of bounds or was touched with two hands by a member of the opposing team was deemed “down.” The students played four games simultaneously on the school field and none of the games included a referee. The teacher sat on a folding chair approximately 220 feet away from the field on which plaintiff played. That day, Student and Gianni were on opposing teams. The game was competitive and the players argued over many plays. On the play at issue, Student caught a pass and Gianni ran into him at full speed, causing Student to fly several feet in the air and land on his left side. Student—who had suffered a tear in his anterior cruciate ligament—screamed in pain as he held his left knee. Gianni laughed in response, called Student a “baby,” and claimed that he was “faking it.” Another student ran to get physical education teacher, who was seated on a bench doing paperwork. The teacher was “shocked” to learn that Student had been hurt. Parents of Student sued, asserting claims against the teacher and District for negligence and breach of a mandatory reporting duty in violation of Education Code section 49079. On September 16, 2021, the jury returned its verdict. It found that the District failed to carry out its mandatory duty and that the physical education teacher was negligent

On appeal, the Court of Appeal reversed the judgment against District, finding insufficient evidence that District breached a mandatory duty under Education Code section 49079 to report Gianni’s conduct toward Student to Student’s teachers. Although there was ample testimony that Gianni had engaged in intimidating and disruptive conduct against Student during show choir and physical education class, there was no substantial evidence that District either knew or reasonably suspected Gianni was engaged in such conduct prior to the April 17, 2018 injury. Specifically, there was no evidence that Student complained about Gianni to a teacher or school administrator. There also was no evidence that an employee or officer of District witnessed, or reasonably suspected, Gianni engage in any conduct described in section 49079 against Student prior to the injury. Further, although Student’s parents produced evidence that the physical education teacher failed to report Nick’s conduct to others, there was no substantial evidence that such failure was a substantial factor in causing Student’s injury. The court noted that “[w]here a claim of liability is premised on the administration’s failure to inform a teacher of a student’s disciplinary record, the finder of fact must engage in a difficult inquiry into whether the teacher’s lack of this specific information was a substantial factor in bringing about the harmful conflict.” Here, there was insufficient evidence to support a

finding that the teacher's failure to report Nick's conduct proximately caused Student's injury. Finally, although there was evidence that the District was aware of but failed to report Richard's conduct toward Student to teachers in violation of section 49079, there was no substantial evidence that such failure proximately caused Student's injury. "As a matter of practical necessity, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in making the defendant pay," the court observed. It noted that it was Gianni, not Richard, who caused Student's injury. Thus, it concluded, District's failure to inform the physical education teacher about Richard's conduct toward Student does not justify imposing liability against District for Gianni's conduct toward plaintiff. "Accordingly, there is insufficient evidence to support the judgment against the District. We therefore reverse that judgment and remand for the trial court to enter judgment in favor of the District."

Why Does This Case Matter to Educators? Education Code section 49079 requires districts to inform teachers about students who have engaged in, or are reasonably suspected of having engaged in, among other things: (1) causing or threatening physical injury or willfully using violence upon another person, except in self-defense; or (2) intentionally engaging in harassment, threats, or intimidation, directed against students, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of students by creating intimidating or hostile educational environment. Districts may be subject to tort liability for breaches of any mandatory duty under this section. In this case, Court of Appeal found that no knowledge or reasonable suspicion existed regarding such conduct toward Student.

C. Title IX.

1. Ninth Circuit: Title IX Bars Sexual Harassment on Basis of Perceived Sexual Orientation—Grabowski v. Arizona Board of Regents (9th Cir. 6/13/2023) Case No. 22-15714.

Student attended the University of Arizona ("University") on an academic and athletic scholarship, starting in 2017. He was recruited to join the cross-country and track-and-field teams. Student's teammates subjected him to "sexual and homophobic bullying" over the course of his first year on the track team. Beginning in August 2017, at the team's preseason training camp, his teammates used homophobic slurs "almost daily." Student's father reported the bullying to a coach, who promised to investigate the issue. The coach spoke with Student about the bullying the next week. One month later, in early October 2017, Student's mother emailed the team's sports

psychologist to request that she discuss the bullying with Student. Student's teammates called him "gay" and a "fag," and on an "almost daily" basis they "made multiple additional references alleging that they perceived him as gay." His teammates posted an "untrue," "harassing, homophobic, [and] obscene video" about Student in the team's public chat group. When Student raised his concerns to a team coach about the "constant" homophobic bullying and the published video, the coach did not respond. In August 2018, Student met with his coaches. At that meeting, a coach asked him if any bullying was going on, "as if he had no advance reporting of it." Student responded by naming the teammates who had subjected him to bullying; the coach replied that Student "can't single out the two top runners on the team."

After Student identified his bullies to a coach, the coaches allegedly embarked on a "concerted effort . . . to demoralize him." One such effort occurred in early September 2018, when an assistant coach scolded Student for "faking" an illness after Student vomited twice during a team meeting and then performed poorly in a race. A blood test later revealed that Student had a viral illness at the time. Around that same time, Student met with his coaches again. When he raised the issue of homophobic bullying at that meeting, the coaches denied knowledge of bullying and told Student that "there's a certain atmosphere we are trying to establish on this team, and you do not fit in it." At one point, in response to Student's raising the harassment issue, a coach "leapt out of his chair, ran up to within a few inches of [Student's] face, slammed his hands down hard on [Student's] arms . . . and called [Student] a . . . 'white racist.'" Student reportedly was so scared by the coach's actions that he had a spontaneous bloody nose and fainted. At the end of the meeting, the coaches dismissed Student from the team.

Student then filed this action in federal court against the Arizona Board of Regents, the University, and many individuals associated with the track team. Student asserted he was harassed because of his perceived sexual orientation and that the University deliberate indifference to that "severe, pervasive, and objectively offensive" harassment violated Title IX. He also asserted a retaliation claim against the University under Title IX. After the district court ruled in favor of the University, Student appealed to the Ninth Circuit

Holding that Title IX bars sexual harassment on the basis of perceived sexual orientation, the Ninth Circuit determined that Student's complaint sufficiently alleged that he suffered such harassment, that he asked his coaches to intervene, and that the coaches and the University retaliated against him when they failed to investigate his accusations adequately. The Ninth Circuit

therefore reversed the dismissal of his retaliation claim. However, it concluded that the operative complaint failed to allege a deprivation of educational opportunity, a required element of the harassment claim. As such, it affirmed the lower court's dismissal and returned the matter to the district court to consider Student's request to amend the complaint.

The court noted that Student did not allege that he was gay; rather, he alleged that his harassers perceived him to be gay. Therefore the court considered whether discrimination on the basis of perceived sexual orientation, as opposed to actual sexual orientation, was actionable under Title IX. Reviewing cases brought under Title VII, which prohibits discriminating against someone because of sexual orientation, the Ninth Circuit concluded that discrimination on the basis of perceived sexual orientation is actionable under Title IX. But its holding on that point did not resolve the issue in this matter because Student alleged that his teammates harassed him, but he then sued the University and coaches for violating Title IX. The court observed that a school that receives federal funding can be liable for an individual claim of student-on-student harassment, but only if: (1) the school had substantial control over the harasser and the context of the harassment; (2) the student suffered harassment so severe that it deprived the plaintiff of access to educational opportunities or benefits; (3) a school official who had authority to address the issue and institute corrective measures for the school had actual knowledge of the harassment; and (4) the school acted with "deliberate indifference" to the harassment such that the indifference "subject[ed the plaintiff] to harassment." Here, the court held that Student sufficiently alleged the first, third, and fourth elements of his Title IX harassment claim, but not the second element. Although Student experienced "increasing sadness," his complaint contained no facts describing how, if at all, his educational opportunities were diminished. To the contrary, his complaint stated that his "grades at school and his relationships with other students that were not in the running program [were] always exemplary." Nor did Student allege that he stopped attending team practices or team-sponsored events because of the bullying.

Concluding Student alleged a valid retaliation claim under Title IX, the Ninth Circuit noted that to establish such claim a plaintiff must allege that: (1) the plaintiff participated in a protected activity, (2) the plaintiff suffered an adverse action, and (3) there was a causal link between the protected activity and the adverse action. In this case, the court determined that Student sufficiently alleged that he participated in a protected activity when he reported the sex-based

bullying to his coaches. Student also sufficiently alleged an adverse action when he claimed that his scholarship was cancelled and that he was kicked off the track team. Finally, Student sufficiently alleged a causal link between his reports of bullying and his removal from the team, as the court noted that the short time between Student's final report of bullying to his coaches and his dismissal from the track team supported a plausible inference that he was removed from the team in retaliation for complaining about bullying by "the two top runners on the team." Accordingly, the Ninth Circuit reversed the judgment on the pleadings with respect to the retaliation claim and remanded the claim for further proceedings.

Why Does This Case Matter to Educators? While this action involved a postsecondary institution, its analysis applies to K-12 school districts as well. In evaluating Title IX claims, districts should note the Ninth Circuit's comments that the harassment in this case allegedly stemmed from the belief that the male Student was attracted to men instead of women. "That harassment is motivated by the stereotype that men should be attracted only to women. Both instances of harassment are motivated by a core belief that men should conform to a particular masculine stereotype. Both are impermissible forms of discrimination in violation of Title VII and Title IX."

II. Latest Guidance and Administrative Ruling.

A. Guidance from the U.S. Department of Education ("USDOE").

1. Migratory and Unaccompanied Children—Protecting Access to Education for Migratory Children and Protecting Access to Education for Unaccompanied Children (OCR and DOJ 06/2023).

In concurrent guidance released in June 2023, the USDOE's Office for Civil Rights and the U.S. Department of Justice released fact sheets highlighting specific access to education challenges faced by migratory children and unaccompanied children to help public schools understand their responsibilities to serve these children under federal civil rights laws.

The agencies explained that many children in the United States are highly mobile or have parents or guardians who are highly mobile, including some children who are, or who are part of families with, migratory agricultural workers, migratory fishers, and workers in seasonal industries or positions. These migratory children move regularly from one residence and school district to another, and their mobility often affects their access to education. Some migratory children who lack legal immigration status in the United

States or are English Learners may face additional barriers to participation in school. OCR and DOJ stated that migratory children may face enrollment barriers when: (1) schools bar students, including migratory children who travel seasonally or move multiple times in the course of a year, from enrolling after the school year has begun; (2) schools ask new students to provide Social Security Numbers or U.S. birth certificates as a condition of enrolling; (3) children who reside in locations, such as temporary labor housing, that are within a school district's geographical boundaries, face school proof-of-residency policies that prevent their enrollment; and/or (4) students try to access special academic programs or offerings (e.g., gifted and talented education) but are deterred or discouraged from applying to those or other grade-appropriate programs because they are English Learners or because they have interrupted formal schooling due to work-related mobility. Once enrolled, OCR and DOJ stated that these students may continue to face barriers to meaningful participation when: (1) schools that routinely conduct English language proficiency assessments at the start of the school year fail to do so for migratory children who arrive mid- or end- year; (2) parents, guardians, or sponsors who have limited English proficiency do not receive language assistance services necessary to participate in decisions about their children's education; (3) schools uniformly place migratory children who are entitled to language assistance services in remedial classes (e.g., remedial math) without appropriate consideration of student records of past enrollment and course completions; and/or (4) school staff incorrectly assume that migratory families who speak indigenous languages also speak Spanish because of their country of origin.

OCR and DOJ stated that unaccompanied children are children who are under 18 years old, who do not have a parent or guardian in the United States available to provide care and physical custody, and who lack legal immigration status in the United States. "Unaccompanied children may live with family members or other adult sponsors in local communities. Under U.S. Supreme Court precedent, unaccompanied children, like all other students, have an equal right to access local public schools. But they may face barriers to educational opportunities due to discrimination because of their national origin or immigration status." OCR and DOJ stated that unaccompanied children may face enrollment barriers when: (1) Schools ask new students to provide Social Security Numbers or U.S. birth certificates as a condition of enrolling, or schools reject valid documents, such as a Verification of Release Form or immunization records from the Office of Refugee Resettlement (ORR); and/or (2) students try to access special academic programs or offerings (e.g., gifted and talented education) but are

deterred or discouraged from applying to those, or other grade-appropriate programs, because they are English Learners, or because they have interrupted formal schooling or incomplete academic records. Upon enrollment, OCR and DOJ stated that these students may continue to face barriers to meaningful participation when: (1) schools that routinely conduct English language proficiency assessments at the start of the school year fail to do so for unaccompanied children who arrive mid- or end-year; (2) parents, guardians, or sponsors who have limited English proficiency do not receive language assistance services necessary to participate in decisions about an unaccompanied child's education; (3) schools rely on multilingual students to interpret for English Learners in the classroom, rather than providing required instruction and language assistance from qualified staff; and/or (4) unaccompanied children who are entitled to both language assistance services and special education services are denied the services or supports that they need or are told that they need to prioritize one set of instructional services over the other.

2. **Religious Expression—Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools (USDOE 5/15/2023) 123 LRP 15485.** On May 15, 2023, the USDOE provided updated guidance on the current state of the law concerning constitutionally protected prayer and religious expression in public schools. The various issued addressed by the guidance included the following.

Prayer and Religious Exercise During Non-Instructional Time. Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Students also may read from religious materials; say a prayer or blessing before meals; and engage in worship or study religious materials with fellow students during non-instructional time (such as recess or the lunch hour) to the same extent that they may engage in nonreligious activities.

Organized Prayer Groups and Activities. Students may organize prayer groups and religious clubs to the same extent that students are permitted to organize other noncurricular student activity groups. Such groups must be given the same access to school facilities for assembling as is given to other noncurricular groups, without discrimination because of the groups' religious character or perspective. School officials should neither encourage nor discourage participation in student-run activities based upon the activities' religious character or perspective. Schools may take

reasonable steps to ensure that students are not pressured to participate (or not to participate) in such religious activities

Moments of Silence. If a school has a “moment of silence” or other quiet periods during the school day, students are free to pray silently, or not to pray, during these periods of time. Teachers and other school employees may not require or encourage students to pray, or discourage them from praying, during such time periods

Student Assemblies and Noncurricular Events. Student speakers at school assemblies and noncurricular activities such as sporting events may not be selected on a basis that either favors or disfavors religious perspectives. Where a student speaker is selected on the basis of genuinely content-neutral, evenhanded criteria, and the school does not determine or have control over the content of the student's speech, the expression is not reasonably attributed to the school and therefore may not be restricted because of its religious content (or content opposing religion) and may include prayer. In these circumstances, school officials may choose to make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech.

Prayer at Graduation. School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely content-neutral, evenhanded criteria, and schools do not determine or have control over their speech, however, that expression is not attributable to the school and therefore may not be restricted because of its religious content (or content opposing religion) and may include prayer. In these circumstances, school officials may choose to make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's speech.

Religious Literature. Public school students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curricula or activities. Schools may impose the same reasonable time, place, or manner restrictions on distribution of religious literature as they do on non-school literature generally, but they may not target religious literature for more permissive or more restrictive regulation.

Student Dress Codes. Public schools generally may adopt policies relating to student dress and school uniforms to the extent

consistent with constitutional and statutory civil rights protections. Schools may not, however, target religious attire in general, or the attire of a particular religion, for prohibition or regulation. If a school makes exceptions to a dress code to accommodate nonreligious student needs, it ordinarily must also make comparable exceptions for religious needs.

Religious Expression in Class Assignments and Homework. Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious perspective of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance, relevance, and other legitimate pedagogical objectives.

The complete guidance document can be accessed at: https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

3. **Student Records—Family Educational Rights and Privacy Act: Guidance for School Officials on Student Health Records (SPPO 4/12/2023) 123 LRP 13132.** The federal Student Privacy Policy Office, a component of the USDOE, issued a guidance document regarding FERPA as it pertains focus on student health records maintained by educational agencies and institutions and by third parties acting on their behalf. Student health records may qualify as education records, but not always. For example, FERPA would protect the health records of a public elementary or secondary school student under 18 years of age that are maintained by the school in the school's health clinic or nurse's office. SPPO observed that a medical form or a questionnaire used to determine a student's eligibility for school-sponsored athletics would be part of the student's education record and thus protected under FERPA. That is because such records are maintained by the district and are made, maintained, or used for purposes other than treating a health or medical condition. Because that information is part of the student's education record, the school must obtain prior written consent for disclosure or show that one of FERPA's exemptions applies. For example, in some instances, FERPA permits, but does not require, schools to disclose personally identifiable information ("PII") from education records, without consent, to school officials with a "legitimate educational interest" in the information. FERPA also permits, but does not require, schools to disclose PII from education records, without consent and subject to certain conditions, to comply with court orders or lawfully issued subpoenas; and to appropriate parties in connection with an emergency if that information is necessary to protect the health or

safety of the student or other individuals. Whenever a school chooses to disclose PII from a student's education records without consent, the USDOE has advised school officials to consider the impact of such disclosure and to disclose the minimum amount of PII necessary for the intended purpose.

SPPO pointed out that "treatment records," which FERPA defines as records made or maintained by medical personnel that are made, maintained, or used only in connection with providing treatment to an eligible student, do not qualify as “education records” under the statute. Such records can be converted to protected “education records,” however, if the school discloses them for reasons other than medical treatment or review by an appropriate professional of the student's choice. FERPA also does not apply to health information that a school official obtains through personal knowledge or observation (not from an education record) - unless the school official uses the information in a manner that produces an education record. Finally, SPPO observed that student health records that constitute education records or treatment records under FERPA are not protected under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) Privacy Rule, including education records and treatment records maintained by campus health care facilities and clinics.

B. Guidance from the California Department of Education (“CDE”).

1. Instructional Materials—Guidance on Removal of Instruction or Instructional Materials (CDE 5/30/2023). On May 30, 2023, CDE released a memorandum addressing questions about the efforts of local governing boards to remove certain instruction or instructional materials. CDE noted that local governing boards are responsible for adopting instructional materials and policies for local instruction and learning and making specific curriculum decisions. These boards must bear in mind a number of federal and state laws when taking such actions, CDE stated

First, CDE stated that students have the right to receive information. This right may be violated by actions that remove or prohibit materials, ideas, or activities. It observed that the U.S. Supreme Court stated that a student’s First Amendment right to access of information is violated when school officials remove books from a library “simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’” (Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico (1982) 457 U.S. 853, 871–72.)

Second, CDE pointed out that "[t]he law prohibits discrimination, harassment, intimidation, and bullying directed against students based on actual or perceived traits or characteristics such as race, sex, gender identity, disability, religion, etc. Local governing boards must be mindful of the effect that proposed actions may have on any and all of their students. Actions that remove or prohibit particular materials, ideas or activities may have the effect of discriminating against certain students based on protected characteristics."

Third, CDE stated that California law contains a number of requirements regarding instruction and instructional materials. The law requires comprehensive sexual health instruction at least once in junior high or middle school and at least once in high school that must, among other things: teach pupils about gender, gender expression, gender identity, and explore the harm of negative gender stereotypes, and affirmatively recognize that people have different sexual orientations and, when discussing or providing examples of relationships and couples, must be inclusive of same-sex relationships. (Ed. Code, §§ 51933-51934.) Additionally, instruction in social sciences must include the role and contributions of both men and women, members of various races/ethnic groups, lesbian, gay, bisexual, and transgender Americans, persons with disabilities, and members of other ethnic and cultural groups, to the economic, political, and social development of California and the nation. (Ed. Code, § 51204.5.) Under Education Code sections 240 and 60040, local governing boards must adopt only instructional materials that the board determines accurately portray the cultural and racial diversity of our society, including the contributions of all the groups identified above.

Finally, CDE noted that California law also contains certain prohibitions with respect to instruction and instructional materials. Specifically, instruction must not promote a discriminatory bias on the basis of race or ethnicity, gender, religion, disability, nationality, or sexual orientation, or any other protected characteristic. (Ed. Code, § 51500.) Additionally, a local governing board must not adopt instructional materials that contain any matter reflecting adversely upon persons on the basis of race or ethnicity, gender, religion, disability, nationality, or sexual orientation, or because of any other protected characteristic. (Ed. Code, § 51500.1.)

CDE recommended that its guidance on this issue be "reviewed by superintendents, principals, administrators, and the LEA officer appointed to ensure compliance with the educational equity and nondiscrimination requirements."

C. Administrative Ruling (OCR Letter of Findings).

1. Title IX (Gender Identity)—Letter to School District of Rhinelander (OCR 7/6/23) OCR Case No. 05-22-1029. The U.S. Department of Education's Office for Civil Rights ("OCR") announced on July 6, 2023 that the Rhinelander School District in Rhinelander, Wisconsin, entered into an agreement to ensure compliance with Title IX of the Education Amendments of 1972 when responding to harassment based on gender identity. OCR's investigation determined that during the 2021-22 school year, a nonbinary Student and Parent reported to District that students repeatedly mocked and targeted Student during multiple classes, while multiple teachers repeatedly used incorrect pronouns for Student and one teacher removed Student from class on the ground that the teacher could not protect Student from harassment by the other students. In addition, OCR reviewed evidence that students bumped the harassed Student in the hallways and called Student a derogatory slur for LGBTQI+ people. Ultimately, District responded to these allegations of harassment by changing Student's schedule to attend school in-person for only three classes and to take additional classes through self-directed study.

Based on the evidence in the investigation, OCR expressed concern that District's response to the persistent harassment limited Student's participation in school activities. Additionally, the information produced in the investigation did not reflect District taking steps to ensure Student's equal access to education with their peers. OCR was also concerned that District records miscoded sex-based harassment, including the use of a slur for LGBTQI+ people, as "peer mistreatment"; did not document the multiple complaints of sex-based harassment brought by Student and Parent; and did not adequately document District's responses. Moreover, District Title IX coordinator reported that she was unaware of reports of sex-based harassment of Student until after the complainant filed with OCR and therefore had not coordinated a response consistent with Title IX. District's commitments in the voluntary resolution agreement included: (1) evaluating whether compensatory services or other services are necessary for the harassed Student due to the instructional time Student missed when attending in-person classes on an only part-time basis; (2) providing training to all District administrators and staff regarding District's obligation, in compliance with Title IX, to respond to complaints of sex-based harassment; (3) providing age-appropriate information programs for students to address sex-based harassment, including what students should do if they believe they or other students have experienced such harassment; and (4) conducting a climate survey to assess the prevalence of sex-based

harassment and obtain suggestions for effective ways to address harassment.

III. Recent Developments Affecting Students and Education.

A. New Laws and Proposed Legislation.

1. New Laws.

(a) AB 58—Suicide Prevention Policies and Training. Signed into law in September 2022, AB 58 requires every LEA, on or before January 1, 2025, to review and update its policy on pupil suicide prevention, and revise its training materials, to incorporate best practices identified by CDE in its model policy.

(b) AB 452—Firearm Safety. Signed into law in August 2022, AB 452 requires districts, county offices of education, and charter schools to annually inform parents and guardians at the beginning of the first semester or quarter of the regular school term of California's child access prevention laws relating to the safe storage of firearms. AB 452 also requires CDE, on or before July 1, 2023, to develop, and subsequently update as provided, in consultation with the Department of Justice, and provide to school districts, county offices of education, and charter schools, and, upon request, to provide to private schools, model language for the notice regarding those child access prevention and safe storage of firearms laws.

(c) AB 748—Mental Health. Signed into law in September 2022, AB 748 requires, on or before the start of the 2023–24 school year, each school site in a school district, county office of education, or charter school, serving students in any of grades 6 to 12, inclusive, to create a poster that identifies approaches and shares resources regarding pupil mental health. AB 748 requires the poster to be prominently and conspicuously displayed in appropriate public areas that are accessible to, and commonly frequented by, students at each school site.

(d) AB 1810—Seizure Disorders. Signed into law in September 2022, AB 1810 authorizes the LEA, if a student diagnosed with seizures, a seizure disorder, or epilepsy has been prescribed an emergency anti-seizure medication by the student's health care provider, to designate, upon parental request, one or more volunteers at the student's

school to receive initial and annual refresher training regarding the emergency use of anti-seizure medication. AB 1810 requires the Superintendent of Public Instruction to establish minimum standards of training for the administration of emergency antiseizure medication. It also authorizes a school nurse or, if the school does not have a school nurse or the school nurse is not onsite or available, a volunteer who has been designated and received training regarding the emergency use of anti-seizure medication, to administer emergency anti-seizure medication. Additionally, AB 1810 requires any local educational agency or school, upon receipt of a parent or guardian's request, to distribute a related notice at least once per school year to all staff. Before administering emergency anti-seizure medication or therapy prescribed to treat seizures in a student diagnosed with seizures, a seizure disorder, or epilepsy, AB 1810 requires the LEA to obtain from the student's parent or guardian a seizure action plan that includes specified information.

(e) **SB 532—High School Coursework and Graduation Requirements.** Current law requires LEAs to exempt a student in foster care, a student who is a homeless child or youth, a former juvenile court school student, a student who is a child of a military family, or a student who is a migratory child who transfers between schools any time after the completion of the student's second year of high school (or a student participating in an English language proficiency program for newly arrived immigrant pupils and who is in their third or fourth year of high school) from all coursework and other requirements adopted by the LEA's governing body that are in addition to the statewide coursework requirements necessary to receive a diploma of graduation from high school, unless the LEA makes a finding that the student is reasonably able to complete the LEA's graduation requirements in time to graduate from high school by the end of the student's fourth year of high school. SB 532, which was signed into law in September 2022, requires the LEA to instead consult with a student described above (and the person holding the right to make educational decisions for the student) of the option to remain in school for a fifth year if the LEA determines the student is reasonably able to complete the LEA's graduation requirements within the student's fifth year of high school. Until January 1, 2028, SB 532 requires that consultation and option be provided if the LEA determines the student is not reasonably able to complete the local graduation requirements within a fifth year

but is reasonably able to complete the statewide graduation requirements within the student's fifth year of high school.

2. **Proposed Legislation.** In addition to Assembly Bill ("AB") 599 and Senate Bill ("SB") 274, which were covered in the earlier session on student suspensions, the following bills are pending in California legislature at the time these materials were completed.

(a) **AB 373—Foster Children and Homeless Youth.** AB 373 would require a district, county office of education, or charter school, if the LEA operates an intersession program to grant priority access to foster children and homeless youth. The bill would, notwithstanding any other law, provide that if a foster child or homeless youth will be moving during an intersession period, the student's parent, guardian, or educational rights holder, or, if there is no parent, guardian, or educational rights holder, the unaccompanied homeless youth, as applicable, shall determine which school the student will attend for the intersession period.

(b) **AB 659—Immunizations.** AB 659, the Cancer Prevention Act, would declare the public policy of the state that students are recommended to be fully immunized against human papillomavirus ("HPV") before admission or advancement to the eighth-grade level of any private or public elementary or secondary school. The bill would, upon a student's admission or advancement to the sixth-grade level, require the district's governing authority to submit to the student and the student's parent or guardian a notification containing a statement about such public policy and advising that the student be fully immunized against HPV before admission or advancement to the eighth-grade level. AB 659 would incorporate that notification into existing provisions relating to notifications by school districts.

(c) **AB 873—Media Literacy.** AB 873 would direct the state's Instructional Quality Commission to incorporate media literacy into K-12 curriculum in English language arts, math, science, history and social studies frameworks. Eventually, all public school students would receive media literacy lessons every year, in every class .In 2018, California passed optional media literacy guidelines, which focused on teaching about online privacy and safety, conducting research online and other topics related to internet use. AB 873 goes further in that it addresses misinformation and social media use specifically, and would be required in classrooms. AB 873 passed unanimously in the Assembly

and, as of the deadline for these materials, was in the Senate Education Committee

(d) **AB 1078—Instructional Materials.** Under current law, the State Board of Education and any LEA governing board may not adopt any textbooks or other instructional materials for use in the public schools that contain any matter reflecting adversely upon persons on the basis of race or ethnicity, gender, religion, disability, nationality, or sexual orientation, or any other characteristic that is contained in the Penal Code's definition of hate crimes. AB 1078 adds that governing board also cannot prohibit the use of an existing textbook, other instructional material, or curriculum that contains inclusive and diverse perspectives. If a governing board is considering the removal of an existing textbook, other instructional material, or curriculum for a reason other than that it contains inclusive and diverse perspectives, the removal shall be approved only by a two-thirds vote of the governing board. Such requirement applies only to the removal of an existing textbook, other instructional material, or curriculum; it does not apply to scheduled or routine updates to textbooks, instructional materials, or the curriculum.

(e) **SB 323—Safety Plans.** Existing law provides that school districts and county offices of education are responsible for the overall development of a comprehensive school safety plan for each of its schools operating a kindergarten or any of grades 1 to 12, inclusive. Current law requires the schoolsite council or school safety planning committee, before adopting the plan, to hold a public meeting at the schoolsite in order to allow members of the public the opportunity to express an opinion about the plan. SB 323 would require each school, on or before October 1, 2025, and on or before October 1 every year thereafter, to establish a school safety access and equity committee. Beginning July 1, 2025, the schoolsite council or school safety planning committee would be required to forward its comprehensive school safety plan to the school safety access and equity committee for review and feedback before holding the above-described public meeting. SB 323 would require the school safety access and equity committee to review the plan to consider whether the plan is inclusive of the specific student population at the school and recommend necessary changes to the schoolsite council.

(f) **SB 509—Mental Health and Behavioral Education.** Existing law requires the State Department of Education to recommend best practices and identify training programs for use by LEAs to address youth behavioral health, on or before January 1, 2023. The current law requires the Department to ensure that each identified training program, among other requirements, provides instruction on recognizing the signs and symptoms of youth behavioral health disorders, including common psychiatric conditions and substance use disorders, and on how school staff can best provide referrals to youth behavioral health services or other support to individuals in the early stages of developing a youth behavioral health disorder. AB 509 would delete the term "common" from the specific examples included in the above-described training requirement of youth behavioral health disorders. It would also require, on or before July 1, 2027, that LEAs certify to the Department that 75 percent of each of its classified and certificated employees, who have direct contact with students at school, have received the specified youth behavioral health training. The bill, however, would prohibit the training in youth behavioral health to be a condition of employment or hiring.

B. **Proposed Constitutional Amendment: "High Quality" Education.** Three education initiatives have been approved for circulation to collect signatures to be placed on the 2024 general election ballot. The three Constitutional Amendment proposals are all a variation of each other and must collect enough valid signatures by November 27, 2023 to qualify. The three initiatives are as follows:

1. Amends the California Constitution to require the state and its school districts (including charter schools) to "provide a high-quality education to all public school students". The requirements are not defined and will depend on how the measure is implemented by the legislature, state agencies and public schools and interpreted by court decisions.

2. Amends the California Constitution to provide that "all school-age children have the right to attend a high-quality public school". The requirements are not defined and will depend on how the measure is implemented by the legislature, state agencies and public schools and interpreted by court decisions.

3. Amends the California Constitution to require the state and its school districts (including charter schools) to "provide all public school students with high-quality public schools". The requirements are not defined and will depend on how the measure is

implemented by the legislature, state agencies and public schools and interpreted by court decisions.

Should any or all of these initiatives pass, there likely will be substantial litigation necessary to clarify what is meant by any of the definitions.

C. New Regulations.

1. Final Title IX Regulations Delayed. On May 26, 2003, the U.S. Department of Education ("USDOE") announced that the amended regulations that implement Title IX, the federal civil rights law prohibiting discrimination on the basis of sex in education programs or activities that receive federal funding, will not be released until at least October 2023. The original date for the release was May 2023. The USDOE stated that it had received more than 240,000 public comments on the proposed regulations (about twice the number of comments it received during its last rulemaking on Title IX), which might have been one of the reasons for the postponement.

2. Revisions to FERPA and Protection of Pupil Rights Amendment Are Forthcoming. The USDOE anticipates releasing amendment for FERPA in November 2023. The USDOE will propose to amend FERPA to update and improve the current regulations by addressing outstanding policy issues, such as refining the definition of "education records" and clarifying provisions regarding disclosures to comply with a judicial order or subpoena. The USDOE stated that the proposed regulations will also address statutory amendments to FERPA to reflect a change in the name of the office designated to administer FERPA, as well as to make changes related to the enforcement responsibilities. In early 2024, the USDOE will also propose to amend the Protection of Pupil Rights Amendment ("PPRA") to update, clarify, and improve the current regulations by addressing outstanding policy issues. The proposed regulations are also needed to implement statutory amendments to PPRA contained in the Goals 2000: Educate America Act of 1994 and the No Child Left Behind Act of 2001, to reflect a change in the name of the office designated to administer PPRA and to make changes related to the enforcement responsibilities of the office concerning PPRA.

[Any additional late-breaking legal news and other new developments affecting special education after the publication date of these materials will be discussed during the Legal Update session.]

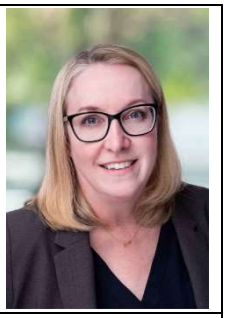
F3 Law

F3 Law's Student Services work covers the full range of needs to ensure compliance with state and federal law. From First Amendment issues to student discipline to student records to residency issues, F3 Law is a premiere student services law firm and has assisted districts in a variety of student-related legal issues.

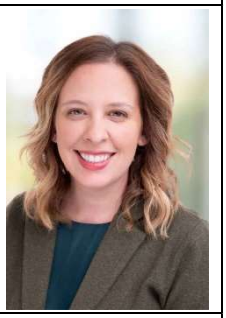
F3 Law Student Legal Symposium Leadership and
Student Services & Special Education Practice Group Leaders

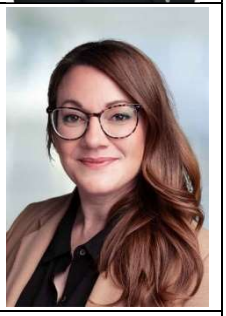
Shawn Olson Brown is a partner in the Oakland office and serves as the co-coordinator of the esteemed professional development series, F3's Special Education Symposium. She specializes in student matters, special education, and charter school matters. Ms. Olson Brown was also employed by the University of Washington, where she co-taught the law module for the Danforth Educational Leadership Program which provides training for school administrators. In addition, she was a research assistant with Project PRAISE and the Center for Educational Renewal. Ms. Olson Brown was also a bargaining team member with the Graduate Student Employee Action Coalition, a legal intern with the Northwest Justice Project, and a research analyst with the Washington State Commission on Student Learning.	
Anne M. Sherlock is a partner in the Sacramento office and co-chair of the Student Services & Special Education Practice Group. She also serves as the co-coordinator of the esteemed professional development series, F3's Special Education Symposium. In practice since 2000, Ms. Sherlock has developed an extensive background in special education law and litigation. She assists school districts, county offices of education, and SELPAs in a wide range of special education matters including compliance matters relating to the IDEA, Section 504, and the Americans with Disabilities Act. Her services to clients include representation in IEP meetings, due process hearings, and federal court appeals. She effectively represents clients with complaints filed with the Office for Civil Rights and the California Department of Education. She is a frequent speaker on a variety of special education topics including autism, assessment, discipline of students with disabilities, transition, IEP development, and more.	

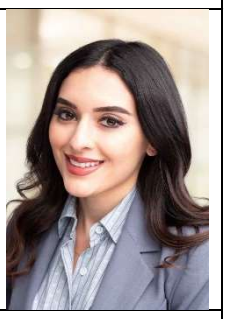
John W. Norlin is special counsel in the San Diego office and brings over two decades of comprehensive legal research and writing experience to Fagen Friedman & Fulfrost. Mr. Norlin is a nationally recognized author and creator of leading educational professional development curricula. Mr. Norlin lends his expertise to the construction and development of the firm's bi-annual, statewide Special Education Symposium, a compendious legal workshop designed to inform the practices of special educators with respect to emerging pedagogical trends and legal and/or legislative mandates. Additionally, Mr. Norlin is available to provide comprehensive professional development seminars and workshops for clients statewide on practical, preventative legal strategies to circumvent potentially litigious situations.	
Dee Anna Hassanpour is a partner in the Los Angeles office, where she specializes in special education law. In addition, she is co-chair of the Student Services & Special Education Practice Group. She has extensive experience with administrative law and due process hearings in the areas of special education, state government regulatory matters, unemployment insurance, and needs-based medical and welfare programs. She is also a frequent presenter at state and national conferences on the subjects of administrative hearings and unemployment insurance programs.	
Student Services & Special Education Practice Group Members	
Jennifer Aardema is an associate in the firm's San Diego office. She is a member of the Special Education and Student Services Practice Group. Jennifer began her career with F3 as a law clerk in the Special Education and Student Services Practice Group in the San Diego office. She previously worked in special education law as a summer associate at a California education law firm and interned throughout law school at the education and disability clinic and the child advocacy institute.	
Kathleen Anderson is an associate in the Fresno office. Her areas of practice cover student services and special education, and business, facilities & real estate. Ms. McDonald spent four years teaching severely handicapped students at a Central Valley public high school from which she gained considerable experience in the legal and everyday challenges facing special needs students and their teachers and service providers. She represents local education agencies in all aspects of special education law and practice, including compliance with the IDEA and related State laws, and with Section 504 of the Rehabilitation Act.	
Anisha Asher is an associate in the firm's Los Angeles office. Her practice focuses primarily on student services and special education matters. Prior to joining F3, Ms. Asher worked at the California Department of Rehabilitation and Neighborhood Legal Services of Los Angeles County, where she had experience with a myriad of matters, including those pertaining to employment, consumer healthcare programs and special education. During law school, she clerked for the Learning Rights Law Center and the National Center for Youth Law. Prior to pursuing her law career, she was a Corps Member with Justice Corps.	

Julie C. Coate is a partner in the San Diego office. Ms. Coate's practice focuses primarily on student and special education matters, and she advises school districts, county offices of education, and special education local plan areas with regard to student issues across all facets of special education law, including duties under the Individuals with Disabilities Education Improvement Act, Section 504 of the Rehabilitation Act and related California laws and regulations. Ms. Coate has counseled districts in a variety of forums including due process hearings and mediations before the Office of Administrative Hearings, IEP team meetings, as well as compliance complaints before the California Department of Education and the United States Department of Education Office for Civil Rights.	
Amanda D'Amico is an associate in the firm's San Diego office. She is a member of the Student Services and Special Education, Labor and Employment, and Litigation practice groups. Amanda has extensive experience supporting clients with all aspects of special education law and disciplinary proceedings under the IDEA and Section 504, including resolution sessions, mediation, due process hearings, and defense of school districts in Federal and state civil litigation.	
Summer D. Dalessandro is a partner in the firm's San Diego office. A highly respected education law attorney, Ms. Dalessandro is a member of the firm's Student Services and Special Education Practice Group. She has extensive experience advising school districts across the state on all aspects of special education law and practices, including administrative hearings, federal court appeals, mediations, and the Individualized Education Program (IEP) process. As a seasoned advisor and trainer, Ms. Dalessandro provides counsel at both at the school site and administrative levels. She is also a popular speaker, sharing her knowledge on a broad spectrum of special education topics.	
Rebecca Diddams is an associate in the firm's Sacramento office. Ms. Diddams focuses her practice on the areas of special education, student services, and charter schools, including issues pertaining to Section 504, student rights and discipline, and student policy compliance. She advocates for school districts in complaint hearings before the Office of Administrative Hearing, the Office for Civil Rights, and the California Department of Education.	
Peter Fagen is a partner in the San Diego office. Mr. Fagen provides outstanding counsel to school districts, superintendents, and boards throughout California, and guides clients in district leadership and governance, labor relations and mediations, data privacy concerns and procedures, and elections and voting rights issues. Mr. Fagen also performs fact-finding inquiries in advance of strikes and advises on personnel and student problems, business matters, and redevelopment projects. Mr. Fagen combines his ample leadership, business, and administrative skills to provide efficient and effective education legal counsel. As chair of the firm's Next Level Client Services Group, he conducts workshops on internal board relations, board-superintendent relations, goal setting, and leadership for school district administrators and board members. Districts regard him as a trusted advisor and rely upon his decades of experience and highly informed guidance.	

Christopher J. Fernandes is a partner in the San Diego office. Mr. Fernandes has practical school law experience in the areas of special education, student issues, labor and employment, charter schools, and real property. In his practice, he focuses primarily on special education and student issues. Mr. Fernandes has successfully argued before the Ninth Circuit Court of Appeals and has experience defending school districts in federal and state civil rights actions, mediations, and administrative proceedings such as expulsions, dismissals, and due process hearings. Prior to joining the firm, Mr. Fernandes worked for the San Diego County Office of Education, serving in the positions of Credentials Technician, STRS Accounting Clerk, and Teacher's Assistant for the Juvenile Court and Community Schools.	
Howard J. Fulfrost is a partner in the Los Angeles office. Mr. Fulfrost is a recognized legal leader in special education and student-related matters; and, in particular, the legal obligations of local educational agencies to students with disabilities. He has been an education attorney since graduating from law school. In that capacity, he represents and advises school districts, county offices of education, and special education local plan areas with regard to all aspects of special education law and practice. A popular presenter, Mr. Fulfrost is asked to speak throughout the country on a variety of special education legal topics. Furthermore, Mr. Fulfrost was the only California attorney selected to serve on the American Bar Association's Commission on Mental and Physical Disability Law.	
Arturo Garcia is an associate, working primarily in the firm's San Diego office. He provides advice to school districts and county offices of education in multiple areas of education law. He primarily focuses on Student Services & Special Education.	
Amanda S. Georgino is an associate in the **(office).** In her broad, multifaceted practice, Ms. Georgino represents and advises school boards and school administrators in the areas of labor and employment, governance and litigation. She handles a variety of legal issues concerning employees, students, parents, labor associations and the public—with a particular focus on employee discipline matters. Throughout her legal career, Amanda has provided counseling and addressed disputes and concerns involving legal topics such as constitutional rights, torts, the Americans with Disabilities Act/Fair Employment and Housing Act analysis and compliance, benefits and payroll and collective bargaining.	
Maria Gless serves in a senior counsel position in the firm's Inland Empire office and is a member of the Student Services and Special Education practice group. She guides clients on a variety of matters, including special education, student discipline and other student legal matters. Maria brings significant experience in education law to F3, having practiced at a California education law firm for over twenty years before she joined the firm, where she advised school districts on a myriad of student issues and special education law.	

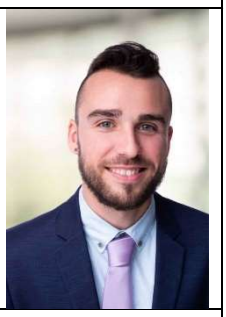
Angela Gordon is a partner in the Los Angeles office. Her practice focuses primarily on special education and student matters, including issues related to technology, equity, access, and cyber citizenship. Ms. Gordon represents and advises school districts, county offices of education and special education local plan areas with regard to student issues across all facets of special education law and practice. Ms. Gordon has counseled districts in a variety of forums including due process hearings and mediations before the California Special Education Hearing Office and the Office of Administrative Hearings; IEP team meetings; as well as compliance complaints before the California Department of Education and the United State Department of Education Office for Civil Rights.	
David A. Graham is of counsel in the firm's San Diego office, where he advises and assists clients in Special Education and Student Services matters. He brings a unique perspective to his legal practice. After working as an attorney for several years, David changed career paths and became an educator, working with a number of charter schools in the San Diego area. He worked with all K-12 grade levels, both as a case manager/teacher as well as an administrator. His duties included coordinating special education services, ensuring legal compliance, drafting contracts and board policies, creating and facilitating student and staff advisory programs, and working directly with students with IEPs and 504 plans.	
Matejka M. Handley is an associate in the firm's Sacramento office and is a member of the Student Services & Special Education and Charter Schools practice groups. Matejka has a primary focus on handling compliance with special education, Section 504, student rights and discipline, student services support, and student policy compliance. She effectively assists schools in complaints before the Office of Administrative Hearings, the Office for Civil Rights, and the California Department of Education.	
Austin Jones is an associate, working primarily in the firm's Inland Empire office. He provides advice to school districts and county offices of education in multiple areas of education law. He primarily focuses on Student Services & Special Education.	
Rikesha Lane serves F3 in an of counsel position in the firm's Inland Empire office, representing clients in a variety of matters. She primarily represents and advises school districts, county offices of education and special education local plan areas regarding issues relating to special education law and litigation. Rikesha has broad experience in special education, including providing advice regarding services to students with disabilities, Individualized Educational Program (IEP) meetings, and representing clients in resolution sessions, mediations, and administrative due process hearings.	

Melanie D. Larzul is a partner in the Oakland office. Her practice touches upon myriad legal issues relating to students and special education. She advises school districts, county offices of education and special education local plan areas statewide regarding all aspects of special education law. In addition to regularly participating in IEP meetings, Ms. Larzul has represented clients before the Office of Administrative Hearings, the California Department of Education, and the Office for Civil Rights. Ms. Larzul frequently provides counsel in student expulsion hearings. A member of the firm's Litigation Practice Group, Ms. Larzul successfully litigated an important stay put issue in federal district court, resulting in a settlement favorable to the firm's clients.	
M. Alejandra León is a partner in the Oakland office. Ms. León's practice focuses primarily on student and special education matters, and she advises school districts, county offices of education and special education local plan areas with regard to student issues across all facets of special education law, including duties under the IDEA, Section 504 of the Rehabilitation Act and related California laws and regulations. Additionally, Ms. León counsels districts statewide on charter school related matters, including petition reviews, denials, appeals, revocations, closures, and dependent charter school development. An active member of the firm's eMatters Practice Group, Ms. León is especially interested in issues related to technology, equity, access, and cyber citizenship.	
Jasey Mahon is an associate in the San Diego office. Drawing on her legal acumen and outstanding research and writing skills, Ms. Mahon handles document reviews, creates pleadings, and prepares cases for due process hearings in a range of special education matters. Her commitment to drafting documents in a way that paints a picture of the specific legal situation, and showcases a path toward a solution, keeps the child's best interests front and center.	
Lisa M. Martin is the office managing associate in the firm's Inland Empire office. She is a member of the Governance & Leadership, Labor & Employment, Student Services & Special Education practice groups and an F3 Law Diversity, Equity & Inclusion Ambassador. Prior to joining F3, Lisa focused on workers' compensation litigation on behalf of insurance carriers, third-party administrators and employers. Lisa has experience in conducting discovery, depositions and cross-examinations and appearing for conferences, hearings, and trials.	
Juliana Mascari is an associate in the firm's San Diego office and is a member of the Student Services & Special Education practice group. Ms. Mascari started her F3 career as a summer associate before returning as a post-bar clerk and, later, as an associate. Prior to joining F3, Ms. Mascari clerked for the Appeals, Writs, and Trials Division of the California Attorney General's Office and the Civil Division of the U.S. Attorney's Office.	

Treesineu McDaniel is an associate in the firm's Oakland office and is a member of the Student Services & Special Education practice group. She started her F3 career as a post-bar law clerk. While attending law school, Treesineu was a judicial extern for the Honorable Kandis A. Westmore at the U.S. District Court. She also participated in Google's Legal Scholars Internship where she researched employment defenses for employers, tracked recent judicial decisions for employment defenses and prepared advisory memos for employment issues.	
David R. Mishook is a partner in the firm's Oakland office. An experienced trial and appellate litigator, Mr. Mishook has appeared in state and federal trial and appellate courts throughout the state. Mr. Mishook advises school districts, county offices of education and community college administrators statewide across all aspects of general and municipal litigation, including civil rights, complex litigation, employment, personal injury, construction defect, civil harassment, and criminal matters. Mr. Mishook regularly conducts and defends depositions, facilitates status conferences, and makes court appearances in civil hearings and trials in state and federal courts.	
Elizabeth B. "Lisa" Mori is a partner in the Oakland office. With a rich legal career spanning three decades Ms. Mori advises both large and small school districts on a range of employment matters, including evaluations, discipline, layoffs, status issues and leaves. As a highly experienced labor relations lawyer and chief negotiator, she advocates for clients in collective bargaining discussions. Ms. Mori also represents public school agencies in state and federal court proceedings and before myriad administrative organizations. Currently co-chair of the firm's charter school practice group, she adeptly advises school districts and county boards of education on matters such as petition review, charter renewal and revocation actions, facilities issues and oversight.	
Lucy Nadzharyan is an associate in the firm's Los Angeles office. Ms. Nadzharyan focuses her practice on special education matters, due process hearings, and employee investigations. Known for her attention to detail and holistic approach to addressing issues, clients rely on Lucy to navigate them through the complexities of due process hearings.	
Taylor Needham is an associate in the firm's San Diego office and is a member of the Student Services & Special Education practice group. Taylor started her F3 career as a post-bar law clerk. During law school, she represented low-income families of students with disabilities at the University of San Diego School of Law's Education and Disability Clinic. She also clerked at the San Diego Unified School District Office of the General Counsel and San Diego Superior Court, Juvenile Courthouse, and externed for the Honorable Thomas Whelan at the U.S. District Court for the Southern District of California.	

Jennifer Nix is a partner in the firm's Oakland office. Her practice focuses on all aspects of special education matters, matters that fall within Section 504 of the Rehabilitation Act, and student discipline matters. Ms. Nix has more than 10 years of experience practicing law, including two years as a staff attorney at the U.S. Court of Appeals for the Eleventh Circuit. Prior to her law career, she was a middle and high school level public school teacher.	
Jennifer Oliva is an associate in the firm's Inland Empire office and is a member of the Litigation and Student Services & Special Education practice groups where she advises clients on a variety of matters including IEPs, employment matters and negligence causes of action.	
Wesley B. Parsons is a partner in the Los Angeles office. Highly respected for his special education legal expertise, Mr. Parsons represents and advises school districts, county offices of education and special education local plan areas statewide regarding all aspects of special education law and practice. A seasoned trainer and trusted advisor, Mr. Parsons is relied upon to offer counsel and services both at the school site and administrative levels. He successfully advocates on behalf of public agencies in all capacities relating to inter-district transfer appeals, due process Section 504 hearings, Individualized Educational Program (IEP) team meetings, Manifestation Determinations, mediations, compliance complaints with the California Department of Education and investigations with the Office for Civil Rights.	
Jonathan P. Read is a partner in the San Diego office. Mr. Read's practice primarily focuses on special education law, representing school districts and other educational agencies in all facets of due process and disciplinary proceedings. Mr. Read has developed a specific emphasis on representing school districts at highly contentious IEP team meetings and in cases involving private school reimbursement. He also specializes in issues related to juvenile courts, foster care, and interagency responsibility for IDEA compliance. Mr. Read is a popular speaker at school districts as well as state and national conferences.	
Laurie E. Reynolds is a partner in the Oakland office. She has extensive experience representing school districts and public agencies. Ms. Reynolds has specific expertise in special education, student matters, business and property, and appellate law. She has successfully represented school districts in a number of due process hearings and mediation conferences. Her skills extend to drafting and reviewing transactional documents including construction contracts, joint use agreements, and lease finance agreements. In addition, she is an expert on the laws affecting public entities in California, including the Brown Act and the Public Records Act. Ms. Reynolds has advised governing boards regarding conflicts of interest and political activities.	

Lee G. Rideout is a senior associate in the Los Angeles office. The primary focus of her practice is special education and student matters. Ms. Rideout advises school districts, county offices of education and special education local plan areas. Her legal practice includes mediation and due process hearings, juvenile court proceedings, IEP team meetings, compliance matters and discrimination claims. Formerly, Ms. Rideout served as Assistant General Counsel with the Atlanta Public Schools for four years, where she focused on special education and student matters. She previously served as an Attorney Advisor to the District of Columbia Public Schools for over four years.	
Lyndsy B. Rodgers is a partner in the Los Angeles office. Ms. Rodgers focuses her practice on student and special education law, including Section 504 and IDEA compliance, IEP team meetings, special education discipline, student records and privacy, OCR and CDE complaints, creative early dispute resolution, mediation and due process, and special education litigation matters. Before beginning her career in law, Ms. Rodgers was an executive fellow in Governor Gray Davis' administration. She served on the Managed Risk Medical Insurance Board. While in Sacramento, Ms. Rodgers developed a working knowledge of the State legislative and regulatory process, as well as numerous public benefit programs including SCHIP, Medicaid, school lunch programs and publicly funded school-based health clinics. These experiences greatly enrich her education law practice today.	
Lilianna E. Romero is an associate in the firm's Oakland office. She assists clients in the areas of Special Education and Student Services. Before joining F3 Law, Lilianna worked for a Bay Area law office that focused on labor and employment, where she gained experience with plaintiff-side wage and hour class action cases. She also has experience researching legal issues related to contract formation, land use, and environmental law. Before law school, she was a legal assistant at an immigration law firm, and she was a fellow with JusticeCorps.	
Lauren Rubio is an associate, working primarily in the firm's San Diego office. She provides advice to school districts and county offices of education in multiple areas of education law. She primarily focuses on Student Services & Special Education.	
David Salazar is a partner in the Los Angeles office. He specializes in special education matters, focusing on providing guidance on complying with provisions of the IDEA and Section 504 of the Rehabilitation Act, as well as assisting clients in preparing for IEP meetings and manifestation determinations. He also represents clients in due process hearings before the Office of Administrative Hearings and on appeal. In addition to being admitted to the State Bar of California, Mr. Salazar is also admitted to the Pennsylvania State Bar and the New Jersey State Bar.	

Karen E. Samman is a partner, working primarily in the firm's Oakland office. She also serves clients from the Sacramento and Fresno offices. Ms. Samman has also served in the capacity of in-house general counsel for a school district, providing legal advice and counsel on matters ranging from special education, student, personnel, governance, the Brown Act, Public Records Act, charter schools, and litigation matters. In the area of special education law, Ms. Samman has broad experience and has counseled districts in a variety of forums, including due process hearings and mediations before the California Special Education Hearing Office and the Office of Administrative Hearings, and compliance complaints before the California Department of Education.	
Tiffany M. Santos is a partner in our San Diego office. She also serves clients from the firm's Inland Empire office. Ms. Santos represents and advises school districts and other local educational agencies regarding all aspects of litigation, labor and employment issues, special education and student matters, and charter schools. In addition to mediations and settlement conferences, Ms. Santos has effectively represented school districts in a variety of forums including administrative hearings, and federal, appellate, and state superior courts. She also has extensive experience conducting and defending depositions. Ms. Santos is admitted to practice before the United States District Courts for the Central and Southern Districts of California and the United States Court of Appeals for the Ninth Circuit.	
Elizabeth Schwartz is an associate in the firm's Oakland office, where she assists clients in student services and special education matters. During law school, Ms. Schwartz externed for the Honorable Michael J. McShane in the United States District Court, District of Oregon, assisted the Lane County District Attorney's Office through the Criminal Prosecution Clinic, and clerked for the Oregon Department of Justice's Child Advocacy Section. Prior to beginning her law career, she taught second grade in Oklahoma City through Teach for America.	
Dan Soar is an associate, working primarily in the firm's San Diego office. He provides advice to school districts and county offices of education in multiple areas of education law. He primarily focuses on Student Services & Special Education.	
Lenore A. Silverman is a partner in the Oakland office. She has extensive practice involving student matters, with an emphasis on special education, regularly assisting clients statewide with disciplinary proceedings, charter school issues, and general education law. Ms. Silverman has particular experience in managing large special education litigation caseloads in urban districts and has successfully represented school districts in hundreds of due process hearings and mediations. Ms. Silverman is recognized for conducting comprehensive and instructive audits of non-public school placements to ensure that students' needs are being met and that these public agencies deliver both a free, appropriate public education (FAPE) and the objectives and services as outlined in the student's Individual Education Plan (IEP).	

Ankita Thakkar is an associate in the firm's Oakland office, where she primarily assists clients in student services and special education matters. Ms. Thakkar advises school districts, county offices of education and special education local plan areas with regard to student issues across all facets of special education law, including duties under the Individuals with Disabilities Education Improvement Act, Section 504 of the Rehabilitation Act and related California laws and regulations.	
Jasmine Tauer is an associate, working primarily in the firm's San Diego office. Focusing on business and facilities issues, Ms. Tauer helps school district clients through the property procurement process and guides them in limiting their liability by ensuring that their buildings and properties are legally shielded and that they're adhering to safety-enhancing procedures and protocols.	
Rachael B. Tillman is an associate in the firm's Sacramento office where she primarily practices in the area of Student Services & Special Education. She has extensive trial, appellate, and administrative hearing experience, has appeared in state and federal trial and appellate courts throughout the state, and has taken and defended numerous depositions. Prior to joining the firm, Ms. Tillman served as an associate in Sacramento and San Francisco area firms, where she represented schools in all aspects of litigation and administrative law, including civil rights issues, labor and employment matters, personal injury disputes, and violations of the Individuals with Disabilities Education Act.	
Jan E. Tomsky is a partner in the Oakland office. She has an extensive practice involving student matters, with a particular emphasis on special education and student discipline. Ms. Tomsky's expertise in special education matters has helped scores of districts to address issues and resolve disputes in this specialized field. She has had significant success representing school district clients in mediations and due process hearings, as well as in special education-related litigation in state and federal courts including the Ninth Circuit Court of Appeals. Ms. Tomsky has assisted districts in countless student expulsion hearings, particularly those that involve complex or sensitive issues, and has successfully defended the districts' decisions on appeals to county boards and in court. Ms. Tomsky is a frequent presenter on special education topics in a variety of settings.	
Madisyn Ukrainetz is an associate in the firm's San Diego office and is a member of the firm's Labor & Employment, Litigation, and Student Services & Special Education practice groups. She is admitted to practice law in California State Court and the United States District Court, Central District of California. Prior to joining F3, Ms. Ukrainetz was an associate attorney at a San Diego law firm where she primarily focused on special education and labor & employment related issues. She previously interned and later clerked for the San Diego Public Defender, in the Central Misdemeanor Unit.	

Matthew C. Vance is an associate in the Los Angeles office and is serving school districts and their boards, Mr. Vance focuses his practice on employment and personnel concerns, student matters, and governance and public agency areas. Matt advises clients on an array of issues, among them allegations of bullying, uniform complaints about unlawful discrimination, and charges of sexual harassment under Title IX. In addition to handling investigations and issues relating to employee discipline and leaves, he advocates for clients before California's Department of Fair Employment and the federal Equal Employment Opportunity Commission (EEOC).	
Cynthia D. Vargas is a partner in the Inland Empire office, where she represents and advises school districts, county offices of education and special education local plan areas statewide regarding all aspects of special education law and practice. A seasoned trainer and trusted advisor, Ms. Vargas is relied upon to offer counsel and services both at the school site and administrative levels. Ms. Vargas worked as a special education teacher prior to attending law school, providing her with a practical understanding of the interconnectedness of education legal matters and the many ways that a single issue can affect various areas of education operation.