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Addressing Students Facing
Criminal Charges for Off-Campus
Misconduct 1



ADDRESSING STUDENTS FACING CRIMINAL CHARGES FOR OFF-CAMPUS MISCONDUCT

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Let's face it – not every student's after-school activities consist of scouts, volunteering at the animal shelter or flipping burgers at the local fast food establishment. The call you receive from a school administrator at 4:48 p.m. on a Friday is not about the honor student trying to balance books and merit badges. Instead, it usually begins with a frantic recap of student misconduct, involving words such as "investigation," "police," "unacceptable," "threat," and "safety," and ends with the question, "May I keep this student out of school on Monday?"

While your legal analysis may be relatively simple if the student misconduct at issue occurred during the school day or at a school-related activity, this is not why that call came in. You must advise on a more difficult question: What about student misconduct that occurs off-campus, does not involve a school-related activity, and results in criminal charges for the student?

Unfortunately, this situation is becoming all too common for school districts across the nation. A quick internet search of recent

news yields headlines such as "High school athletes charged with rape,"¹ "York student accused of giving date rape drug to girl,"² and "Weirton teen charged with felony sex abuse against 7-year-old."³ Based on the nature of such criminal charges, school districts are concerned that the defendant-student may pose a threat to the health or safety of the school community. Legally, however, what action can school districts take in regard to the student while criminal charges are pending for off-campus misconduct? Because the law does not provide definitive guidance on this matter, practitioners should work with school districts to devise creative solutions that safeguard the school community without violating the accused student's rights.

May School Districts Take Disciplinary Action?

While traditional school district discipline policies address misconduct that takes place on campus, during the school day, or at school-related activities, many public school

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districts extend their disciplinary reach to off-campus misconduct through twenty-four/seven conduct policies. These policies typically apply to students who participate in extra-curricular activities, including athletics or other travel-related activities. Such policies, for example, provide that students must exemplify good citizenship; therefore, those who use drugs or alcohol outside of school may be prohibited from participating in extra-curricular activities or athletics, ordered to perform community service, and/or mandated to attend counseling at parents' expense. Removing students from extra-curricular activities has been upheld by courts under the reasoning that participation is a privilege and not a right; therefore it does not trigger the due process protections of the United States Constitution.⁴ Even so, such policies have been challenged as violating students' constitutional rights, including the Fourteenth Amendment right to due process.⁵ In some cases, the student discipline and/or school district policies and procedures have been upheld;⁶ in others, they have been struck down.⁷

Consider, for example, the following New Jersey administrative decisions. In *L.A. v. Bd. of Educ. of Twp. of Wayne*,⁸ high school football players were suspended from the football team and from playing in the state championship game based on their participation in a physical altercation at an off-campus party that resulted in criminal aggravated assault charges. The players' athletic suspensions, as well as the school district's policy and procedures, were upheld because the New Jersey administrative code⁹ permits schools to discipline students for off-campus misconduct when necessary to safeguard the security and well-being of the school community or when the misconduct "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school."¹⁰ In contrast, another New Jersey school district's 24/7 extracurricular activities discipline policy was struck down as being too broad because it did not require a relationship between the off-campus misconduct and the school as mandated by the New Jersey administrative code.¹¹

Surprisingly, some states -- through statute, caselaw or both -- allow school districts to suspend and/or expel a student from school attendance based on off-campus misconduct. Massachusetts law provides that "upon the issuance of a criminal complaint charging a student with a felony or upon the issuance of a felony delinquency complaint against a student, the principal or

headmaster of a school in which the student is enrolled may suspend such student for a period of time determined appropriate by said principal or headmaster if said principal or headmaster determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school."¹² This statute was reviewed and upheld in *Doe v. Superintendent of Schools of Stoughton*,¹³ when a superintendent suspended a high school student who was charged with sexually assaulting a six-year-old child in a garage during the prior summer. The high school student's parents alleged that the superintendent's decision was arbitrary and capricious; however, the court found that the superintendent made the necessary finding that the student's continued presence would have a substantial detrimental effect on the general welfare of the school, and that in doing so he was not prohibited from drawing an inference of detrimental effect based on the nature of the crime alone.

Similar reasoning was applied in *Johnson v. Bedford County School Board*,¹⁴ where a Virginia high school senior charged with murder resulting from a shooting at a shopping center was expelled. Upholding the student's expulsion, the judge stated, "expulsion of a student solely because he has been charged with a felony would be an abuse of School Board discretion...on the other hand, if a student is expelled after an investigation of the facts because his continued presence at school would tend to cause disruption, concern and fear on the part of the student body and teachers, then I think there is an inherent power in the school board to suspend or expel prior to trial whether the charge is a felony or misdemeanor."¹⁵ Even so, the *Johnson* court opined that "a better solution would have been to continue [the student's] suspension status with home instruction until he was tried."¹⁶

Courts in Texas,¹⁷ New Jersey,¹⁸ and Delaware¹⁹ have also allowed school districts to suspend and/or expel a student from school attendance based on off-campus misconduct. However, even in states that permit schools to discipline students for off-campus misconduct, school districts should be wary of imposing discipline if there is no nexus to the school. *Bd. of Educ. of Millbrook Central Sch. Dist. v. Ambach*²⁰ involved a high school student who was suspended for allegedly assaulting a woman at her home during school vacation. The Commissioner of Education directed the school to reinstate the student, and this decision was upheld on appeal. The court reasoned that while school

officials had statutory authority to discipline students for conduct that endangers the safety or welfare of other students, this authority was not meant to empower school officials to punish students for actions which have no connection to their school.²¹

Practical Solutions Short of Formal Discipline

In light of the problematic nature of imposing formal discipline on students for off-campus misconduct, school districts need practical solutions to deal with students facing criminal charges for such misconduct, especially when they fear the student's presence on campus may threaten the safety, health or welfare of the school community. As one would expect, school officials' level of response will vary depending upon the nature of the criminal charge(s) the student is facing. Before deciding how to address off-campus student misconduct that has led to criminal charges, school officials should carefully consider the facts and nature of the circumstance so as not to invite litigation to the school district based on their decision. After examining the unique circumstances, school officials may be able to employ an alternative solution to discipline, such as those described below.

Voluntary Agreement for Removal from School

While many school districts are not authorized to impose formal discipline on students facing criminal charges for off-campus misconduct, there is nothing preventing the school district from approaching the student's parents/guardians to see if a voluntary agreement for the student's removal from school can be reached. Such an agreement may involve the student's temporary placement in an alternative educational setting or on homebound instruction until the criminal case is resolved.

This type of agreement may serve both the school community, by ensuring that a potentially threatening student is not on campus, as well as the student, by allowing the student to continue with his or her education while avoiding possible stigmatization by peers. This approach could be problematic, however, if the student receives special education and related services and the student's individualized education plan cannot be met through an alternative placement or homebound instruction. This is why it is important to have the student's parents/guardians involved and fully aware of the terms of this joint agreement, if this is the chosen course of action.

Safety Plan for Continued Attendance

School districts can also work with the student and his or her parents/guardians to devise a safety plan outlining terms and conditions for the student's continued attendance at school. For example, if the student is charged with sexual abuse of a younger minor, terms of a safety plan may: (1) prohibit the student from unsupervised contact with other students; (2) prohibit the student from participating in extra-curricular activities; (3) prohibit the student from being on campus outside of the regular school day; (4) require the student to sign in and out of the school office upon his or her arrival/ departure from school; and (5) require the student to use private bathroom facilities (such as in the school nurse's office).

Before preparing a safety plan, school officials should be sure to inquire whether the student has been issued terms and conditions of bail by the criminal court. Not only will these terms help shape the school district's safety plan and be used to compel the student's compliance, but the school district also may be legally required to abide by them. If the student is not subject to terms and conditions of bail, the school district may consider intervening in the criminal matter in order to request terms and conditions for the protection of the school community.

On the other hand, keep an eye out for terms and conditions of bail which may be too restrictive upon the school, such as those requiring the student to attend school but also prohibiting the student from having *any* contact with younger minors. In such cases, the school district may need to intervene in the criminal matter to request that the "no contact" term be amended to "no unsupervised contact" so that, for example, a supervised eighth grade student is permitted to pass by sixth and seventh grade students in the school hallway without violating the terms and conditions of bail.

In addition, when creating and imposing a safety plan, school districts should carefully consider which staff members to inform of the student-defendant's criminal charges. Generally, pursuant to the Family Educational Rights and Privacy Act,²² local school student records laws and/or local juvenile court laws,²³ a school district's ability to disseminate information concerning a student's pending criminal charges will be restricted. However, even in the absence of such restrictions, the school should balance the school community's right to know about a potentially threatening or disruptive student

against the student's privacy rights and the potential that dissemination of information may turn the student into a target for bullying and retaliation.

Mental Health Screening and Assessment

Oftentimes, juvenile courts will order minors charged with a crime to undergo mental health screening and assessment. While the disclosure of the results of such screenings and assessments to school officials may not be statutorily permitted, schools may request voluntary disclosure of the results from the student's parents/guardians. Screening and assessment results will help a school determine whether the student poses a risk to others, the level of any risk posed, and what interventions are recommended to mitigate any risk. **I&A**

Conclusion

School districts must walk a fine line when balancing the health and safety interests of the school community as a whole versus the educational interests of an individual student facing criminal charges for off-campus misconduct. As education law practitioners, we must help school district clients in balancing these competing interests so that their ultimate course of action, be it simply to keep an extra eye on the student, to implement a safety plan, to enter a voluntary alternative placement agreement or to pursue formal discipline, is well informed and does not run afoul of the Constitution. The last thing we want to do is bog down schools in more litigation. Being more proactive when the problem first arises can save schools from a mountain of legal issues later down the road.

End Notes

1. Dave Summers, *Ohio: High school athletes charged with rape*, WKYC.COM (Sept. 3, 2012), <http://www.wkyc.com/news/article/259202/3/Ohio-High-school-athletes-charged-with-rape>.
2. Anna Douglas, *York student accused of giving date rape drug to girl*, HERALDONLINE.COM (Sept. 22, 2012), <http://www.heraldonline.com/2012/09/22/4283081/york-student-accused-of-giving.html>.
3. Kelly Camarote, *Weirton teen charged with felony sex abuse against 7-year-old*, WTOV9.COM (Oct. 4, 2012), www.wtov9.com/news/news/weirton-teen-charged-felony-sex-abuse-against-7-ye/nSTP8/.
4. See, e.g., *D.N. ex rel. Huff v. Penn Harris Madison Sch. Corp.*, 2006 WL 2710596 (N.D. Ind. 2006) (participation in interscholastic sports does not rise to the level of a fundamental right protected by substantive due process); *Clements v. Bd. of Educ. of Decatur Pub. Sch. Dist. No. 61*, 478 N.E.2d 1209 (Ill. App. 1985) (participation in extracurricular activities is a privilege not a right); *Jordan v. O'Fallon THSD 203*, 706 N.E.2d 137 (Ill.

- App. 1999).
5. *R.R. v. Bd. of Educ. of Shore Regional High Sch. Dist.*, 263 A.2d 180 (N.J. Sup. Ct. 1970); *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F.Supp.2d 1102 (E.D. Wis. 2001); *D.N. ex rel. Huff*, *supra* note 4 at *4.
 6. *D.N. ex rel. Huff* (policy upheld as constitutionally valid); *Clements*, *supra* note 4; *Jordan*, *supra* note 4; *LA. v. Bd. of Educ. of Twp. of Wayne*, No. 14241-11 (N.J. O.A.L. Dec. 1, 2011) (football players' athletic suspensions for off-campus brawl upheld, as well as district policy and procedures effectuating same).
 7. *Butler*, *supra* note 5; *R.R.*, *supra* note 5 (insufficient due process provided to student); *G.D.M. v. Bd. of Educ. Ramapo Indian Hills Reg. High Sch. Dist.*, 48 A.3d 378 (N.J. Super 2012) (district 24/7 extracurricular policy held unlawful for failure to limit discipline for off-campus misconduct to situations where the discipline is reasonably necessary to safeguard the physical or emotional safety or security of others and the conduct materially and substantially interferes with school operations).
 8. No. 14241-11 (N.J. O.A.L. Dec. 1, 2011).
 9. N.J. Admin. Code 6 § A:16-7.6(a) (2012).
 10. No. 14241-11 (N.J. O.A.L. Dec. 1, 2011).
 11. *G.D.M.*, *supra* note 7.
 12. MASS. GEN. LAWS Ch.71, §37H ½ (2012).
 13. 767 N.E.2d 1054 (Mass. 2002).
 14. 2 Va. Cir. 110 (Bedford County 1983).
 15. *Id.* at *2 (emphasis in the original).
 16. *Id.*
 17. *Caldwell v. Cannady*, 340 F.Supp. 835 (N.D. Tex. 1972) (policy permitting the district to expel students for possession of drugs upheld as constitutional).
 18. *R.R. v. Bd. of Educ. of Shore Regional High Sch. Dist.*, 263 A.2d 180 (N.J. Super. Ct. 1970) ("Where public school officials have reasonable cause to believe that a student, by virtue of activities after school hours and off school property, presents a danger to himself, to others or to school property, they may temporarily suspend the student for a short period of time pending a full hearing which will afford such student procedural due process.").
 19. *Howard v. Colonial Sch. Dist.*, 605 A.2d 590 (Del. Super. Ct. 1992) (district authorized to expel student for off-campus, nonschool activity drug sales).
 20. 96 A.D.2d 637 (N.Y. S. Ct., App Div. 1983).
 21. *Id.* at 638.
 22. The Family Educational Rights and Privacy Act permits the nonconsensual disclosure of personally identifiable information from a student's education record (including records relating to disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community) to teachers and school officials with a legitimate educational interest in the student and to "appropriate parties, including parents of an eligible student," in the case of a health or safety emergency. 34 C.F.R. §§99.31, 99.36.
 23. For example, the Illinois Juvenile Court Act of 1987 provides that if a minor student is arrested for certain offenses, the student's law enforcement records may be disclosed to the appropriate school official so long as a reciprocal reporting agreement exists between the student's school district and the local law enforcement agency. 705 ILL. COMP. STAT. 405/1-7(A)(8) (2012), 705 ILL. COMP. STAT. 404/5-905(1)(h) (2012).