

## TRENDS AND TROUBLE IN STUDENT DISCIPLINE

**Bobby Truhe**

KS School Law  
(402) 804-8000

[bobby@ksbschoollaw.com](mailto:bobby@ksbschoollaw.com)

 KSB School Law  
 @btruhe




---



---



---



---



---



---



---



---

### Agenda

- Hot Topics
- Student Discipline Act Tricky Spots
- Emergency Exclusion
- How different circumstances require different responses
  - On campus vs. off campus/social media
  - Gen ed vs. special ed
  - Dangerous crimes off campus

---



---



---



---



---



---



---



---

### Scott v. San Bernadino County and Etiwanda School

- Brace Yourself: junior high girls are fighting
  - Some physical fights, mostly talking
- On the day of the incident, no fight took place
- The girls were seated in a school office discussing how to end the "ongoing feud"
- The assistant principal then asked the school resource officer to speak to the students
- When the SRO began talking to the students, he decided they were being disrespectful

---



---



---



---



---



---



---



---

### Scott v. San Bernadino County and Etiwanda School

- The students whispered and snickered while he was talking (again, middle schoolers...)
- He told the students he was not playing around and that this was a good opportunity to prove a point and make the girls "mature faster"
- He called another deputy for backup and proceeded to arrest all seven students. Several of the students were taken in police vehicles to the county sheriff's department

---



---



---



---



---



---

### Scott v. San Bernadino County and Etiwanda School

- Families sue
  - School
  - School officials
  - SRO
  - County Sherriffs Department
- Court
  - Violated 4<sup>th</sup> Amendment and TLO
  - Clearly did not have probable cause
  - School, officer, and individuals may be liable (no immunity)
  - Freedom from unlawful search is "clearly established right"

---



---



---



---



---



---

### Juuling

---



---



---



---



---



---

## Not in SDA; Can Be A Crime

(6) Engaging in the unlawful possession, selling, dispensing, or use of a controlled substance or an imitation controlled substance, as defined in section 28-401, a substance represented to be a controlled substance, or alcoholic liquor as defined in section 53-103.02 or being under the influence of a controlled substance or alcoholic liquor;

### 28-1418.

Tobacco; vapor products; alternative nicotine products; use by minors; penalty.

Whoever, being a minor under the age of eighteen years, shall smoke cigarettes or cigars, use vapor products or alternative nicotine products, or use tobacco in any form whatever, in this state, shall be guilty of a Class V misdemeanor. Any minor charged with a violation of this section may be free from prosecution if he or she furnishes evidence for the conviction of the person or persons selling or giving him or her the cigarettes, cigars, vapor products, alternative nicotine products, or tobacco.

---



---



---



---



---



---

## Update your policy/handbook!

- d. Possessing, using, selling, or dispensing tobacco, drug paraphernalia, or a tobacco imitation substance or packaging, regardless of form, including cigarettes, chewing tobacco, and any other form of tobacco or imitation, such as electronic cigarettes, vapor pens, etc.;
- e. Possessing, using, selling, or dispensing any drug paraphernalia or imitation of a controlled substance regardless of whether the actual substance possessed is a controlled substance by Nebraska law;

---



---



---



---



---



---

## Marijuana at School?

---



---



---



---



---



---

## Ashley Surin




---



---



---



---



---



---

## A.S. v. Schaumburg Township Elementary District 54 (Ill.)

- 11-year old girl with leukemia and seizures
- Asked for use of marijuana at school
- Student had IEP, and this was pursued as an accommodation under IDEA/Section 504/ADA
- Used patch, oil extract, and lotion
- Illinois law does not allow even prescribed use at school
- School feared prosecution for administering
- Family filed suit
- School's attorney "applauded" courage of family
- Illinois AG agreed not to prosecute

---



---



---



---



---



---

## A.S. v. Schaumburg Township Elementary District 54 (Ill.)

▪ Judge:

- School must allow use and can assist student without fear of prosecution
- No different than Ritalin, Adderall, or Concerta
- "No one's saying she wants to fire up a bong in math class"
- "Ashley cannot wait to return to school"

---



---



---



---



---



---

**Other Cases**

---

---

---

---

---

---

**Nebraska**

- LB 390 in 2015 (Sections 28-463 to 28-468)
- Medical Cannabidiol Pilot Study
- UNMC
- Seizures only
- Cannabidiol – cannabis plant extract, oil, or resin
- Participants may be less than 19

---

---

---

---

---

---

**Nebraska**

- Defenses
  - Criminal - "Affirmative and complete defense"
    - Participant
    - Parent/Guardian of minor participant
    - State employee and Nebraska Medicine
- Abuse and neglect
  - removal prohibited
- Silent about school employees or schools at all
- Automatically terminates October 1, 2019

---

---

---

---

---

---

## Hypo #1 Bomb Threat

- "I'm going to blow up the school tomorrow"
  - Written on a bathroom wall at school
  - Security footage shows two students going into bathroom around time when threat was written
  - One student admits to making the threat
  - Principal calls parents to pick kid up
- Student is gen ed, and you believe he's just being an idiot

---



---



---



---



---



---

## Initial Steps

- Call in crimes
  - 79-293: *The principal of a school or the principal's designee shall notify as soon as possible the appropriate law enforcement authorities, of the county or city in which the school is located, of any act of the student described in section 79-267 which the principal or designee knows or suspects is a violation of the Nebraska Criminal Code*

---



---



---



---



---



---

## Initial Steps

- Call in abuse
  - 28-711: *When any physician, any medical institution, any nurse, any school employee, any social worker, the Inspector General appointed under section 43-4317, or any other person has reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected to conditions or circumstances which reasonably would result in child abuse or neglect, he or she shall report such incident or cause a report of child abuse or neglect to be made to the proper law enforcement agency or to the department on the toll-free number established by subsection (2) of this section.*

---



---



---



---



---



---

## Initial Steps

- Assemble the threat assessment and crisis team?
  - Follow school policy on team requirements and composition
  - This can occur simultaneously with other steps in the process
- Important for liability reasons, because your policy and practices (*i.e.*, I Love U Guys) set response standard

---

---

---

---

---

---

## Student Discipline

---

---

---

---

---

---

---

## Purpose of the SDA

"The purpose of the Student Discipline Act is to assure the protection of all elementary and secondary school students' constitutional right to due process and fundamental fairness within the context of an orderly and effective educational process. The sanctions defined in the act shall be interpreted at all times in the light of the principles of free speech and assembly protected under the Constitution of Nebraska and the United States Constitution and in recognition of the right of every student to public education."

---

---

---

---

---

---

---

## Discipline Definitions

- Short-term suspension
  - Exclusion of student from attendance in all schools within system for a period not to exceed five school days.
- Long-term suspension
  - 6 to 20 school days.
- Expulsion
  - Remainder of semester; remainder of semester plus following semester; one calendar year (depends on timing and offense).

---

---

---

---

---

---

## Discipline Definitions

- Mandatory reassignment means the involuntary transfer of a student to another school in connection with any disciplinary action.
- Emergency exclusion means not allowing a student to attend school due to a communicable disease or the student poses an imminent threat to others

---

---

---

---

---

---

## Other Authorized Actions

- Administrators and teachers may take actions not in the SDA that are “reasonably necessary to aid the student, further school purposes, or prevent interference with the educational process.”

---

---

---

---

---

---

## Other Authorized Actions

- Includes, but not limited to:
  - Counseling of students
  - Parent conferences
  - Rearrangement of schedules
  - Keep student after regular hours to do add'l work
  - Restriction of extracurricular activity
  - Requirements that a student receive counseling
  - Psychological or psychiatric evaluation upon written consent of parent or guardian

---



---



---



---



---



---

## Back to Hypo

- 79-267: 11 reasons for LTS, expulsion, MR
  - (1) Use of violence, force, coercion, threat, intimidation, or similar conduct in a manner that constitutes a substantial interference with school purposes
  - (10) Engaging in any other activity forbidden by the laws of the State of Nebraska which activity constitutes a danger to other students or interferes with school purposes

---



---



---



---



---



---

## Communication, Notification, and Timelines

79-268: (1) On the date of the decision, a written charge and a summary of the evidence supporting such charge shall be filed with the superintendent. The school shall, within two school days after the decision, send written notice by registered or certified mail to the student and his or her parent or guardian informing them of the rights established under the Student Discipline Act;

- Letter to Superintendent: **date of decision**
- Letter to parents: **send within 2 school days**

---



---



---



---



---



---

## Hypo Timeline

- SDA Compliant Timeline (79-268):
  - Student sent home the day of the threat (day 1)
  - Letter to Supt. (day 1)
  - Letter to parents/student (sent day 3)
  - Notice received (day 4-5)
- How was the student excluded day 1-5?

---



---



---



---



---



---

## Communication and Notification to school and student

(3) When a notice of intent to discipline a student by long-term suspension, expulsion, or mandatory reassignment is filed with the superintendent, the student may be suspended by the principal until the date the long-term suspension, expulsion, or mandatory reassignment takes effect if no hearing is requested or, if a hearing is requested, the date the hearing examiner makes the report of his or her findings and a recommendation of the action to be taken to the superintendent, if the principal determines that the student must be suspended immediately to prevent or substantially reduce the risk of (a) interference with an educational function or school purpose or (b) a personal injury to the student himself or herself, other students, school employees, or school volunteers.

---



---



---



---



---



---



---

## Communication and Notification to school and student

(3) When a notice of intent to discipline a student by long-term suspension, expulsion, or mandatory reassignment is filed with the superintendent, the student may be suspended by the principal until the date the long-term suspension, expulsion, or mandatory reassignment takes effect if no hearing is requested or, if a hearing is requested, the date the hearing examiner makes the report of his or her findings and a recommendation of the action to be taken to the superintendent, if the principal determines that the student must be suspended immediately to prevent or substantially reduce the risk of (a) interference with an educational function or school purpose or (b) a personal injury to the student himself or herself, other students, school employees, or school volunteers.

---



---



---



---



---



---



---

## Communication and Notification to school and student

(3) When a notice of intent to discipline a student by long-term suspension, expulsion, or mandatory reassignment is filed with the superintendent, **the student may be suspended by the principal until the date the long-term suspension, expulsion, or mandatory reassignment takes effect if no hearing is requested or, if a hearing is requested, the date the hearing examiner makes the report of his or her findings and a recommendation of the action to be taken to the superintendent**, if the principal determines that the student must be suspended immediately to prevent or substantially reduce the risk of (a) interference with an educational function or school purpose or (b) a personal injury to the student himself or herself, other students, school employees, or school volunteers.

---



---



---



---



---



---

## Communication and Notification to school and student

(3) When a notice of intent to discipline a student by long-term suspension, expulsion, or mandatory reassignment is filed with the superintendent, the student may be suspended by the principal until the date the long-term suspension, expulsion, or mandatory reassignment takes effect if no hearing is requested or, if a hearing is requested, the date the hearing examiner makes the report of his or her findings and a recommendation of the action to be taken to the superintendent, **if the principal determines that the student must be suspended immediately to prevent or substantially reduce the risk of (a) interference with an educational function or school purpose or (b) a personal injury to the student himself or herself, other students, school employees, or school volunteers.**

---



---



---



---



---



---

## Recommendations

- Recommendations when using SDA
  - “Suspension pending expulsion” solves the “go home” without notice problem
  - When the discipline is clear, get the notice documents out quickly\*\*
  - If no danger/interference, move even quicker
  - No extension/exception for investigation in the SDA, so be sure you understand how LEO’s want to handle crimes you call in

---



---



---



---



---



---

## Emergency Exclusion

- If student has dangerous **communicable disease** transmissible through normal school contacts and poses an **imminent threat** to the health or safety of the school community; or
- If S's conduct presents **clear threat to physical safety of himself, herself, or others**,  
**or** is **so extremely disruptive** as to make temporary removal necessary to preserve the rights of other students to pursue an education

---



---



---



---



---



---

## Emergency Exclusion

- Limited to 5 days initially
  - Follow same procedure as short-term suspension
- Beyond 5 days
  - School board must adopt hearing procedure
  - Final determination must be made within 10 school days after initial date of exclusion
    - Follow SDA pre-hearing and hearing procedures; may modify to meet shortened time period

---



---



---



---



---



---

## Emergency Exclusion Summary

- Overused, underused, and misused
- When facts are clear, don't use it as a substitute for discipline or to delay discipline procedures
- Be sure you have a clear policy in place
- Use Student Discipline Act notice procedures
- Consider Child Find obligation

---



---



---



---



---



---

## Hypo #2: Bomb threat from special education student

- Same facts:
  - "I'm going to blow up the school tomorrow"
    - Written on a bathroom wall
    - Security footage shows two students going into bathroom around time when threat was written
    - One student admits to making the threat
- Student has an IEP or 504

---



---



---



---



---



---

## Same Initial Steps?

- Call law enforcement?
- Assemble the crisis team?
  - Follow school policy
- Apply Student Discipline Act?
- Consider emergency exclusion?

---



---



---



---



---



---

## IDEA's Application to State Reporting Statutes

"Nothing in [Part B] shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a child with a disability."

20 USC 1415(k)(6), 34 CFR 300.535 (a)

---



---



---



---



---



---

## Criminal Code Violations are Generally Not an IDEA Issue

- Criminal code usually a function of state law
- School staff need to know reporting obligations and issues for their state and position
- NEB. REV. STAT. § 79-293:  
The principal of a school or the principal's designee shall notify as soon as possible the appropriate law enforcement authorities, of the county or city in which the school is located, of any act of the student described in section 79-267 which the principal or designee knows or suspects is a violation of the Nebraska Criminal Code.

---



---



---



---



---



---

## 34 CFR 300.535 (b)(1)

- An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.
- However, an agency reporting a crime may transmit copies of the child's special education and disciplinary records only to the extent that FERPA permits the transmission. 34 CFR 300.535 (b).

---



---



---



---



---



---

## Disclosing Verification to Crisis or Threat Assessment Team

- Can disclose special education information to team members as school officials
  - Serving school/statutory purpose

---



---



---



---



---



---

### Common Mistakes Related To Special Education/504

- Receiving **OR** entitled to verification
  - Secret 4<sup>th</sup> manifestation question
- Must be *disciplinary* "change in placement"
- 10 "FAPE free" days
- 45 day IAES for
  - Weapons
  - Controlled substances
  - Serious bodily injury (not really.....)

---



---



---



---



---



---

### Manifestation Determination

- Team convenes to ask "was this misbehavior caused by the student's disability?"
- Was conduct in question caused by or did it have a direct and substantial relationship to the child's disability?
- Was the misconduct a direct result of the district's failure to implement the IEP?
- (*Implied 4<sup>th</sup> Question: was the behavior caused by a disability we haven't identified or evaluated?*)\*\*

---



---



---



---



---



---

### Results of Manifestation

- If "no": apply SDA and determine IAES
- If "yes":
  - Conduct FBA
  - Develop BIP
  - If already in place, reevaluate BIP
  - Return to return current placement
- "Regardless": consider benefits of changing placement versus discipline and future discipline

---



---



---



---



---



---

**"No, he's not SPED. He's really smart and gets good grades."**

---

---

---

---

---

---

### **Child Find Trigger and Protections if Not Verified**

#### **▪ Rule 51 § 016.06A**

- A child who has not been determined to be eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct of the school district or approved cooperative, may assert any of the protections provided for in this Chapter if the school district or approved cooperative had knowledge... that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

---

---

---

---

---

---

### **Child Find Trigger and Protections if Not Verified**

#### **▪ Rule 51 § 016.06A**

- A child who has not been determined to be eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct of the school district or approved cooperative, may assert any of the protections provided for in this Chapter if the school district or approved cooperative had knowledge... that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

---

---

---

---

---

---

## Child Find Trigger and Protections if Not Verified

### ▪ Rule 51 § 016.06A

- A child who has not been determined to be eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct of the school district or approved cooperative, may assert any of the protections provided for in this Chapter if the school district or approved cooperative had knowledge... that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

---

---

---

---

---

---

## Child Find Trigger and Protections if Not Verified

### ▪ Rule 51 § 016.06A

- A child who has not been determined to be eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct of the school district or approved cooperative, may assert any of the protections provided for in this Chapter if the school district or approved cooperative had knowledge... that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

---

---

---

---

---

---

## Child Find Trigger and Protections if Not Verified

### ▪ Rule 51 § 016.06A

- A child who has not been determined to be eligible for special education and related services, and who has engaged in behavior that violates a code of student conduct of the school district or approved cooperative, may assert any of the protections provided for in this Chapter if the school district or approved cooperative had knowledge... that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

---

---

---

---

---

---

### Child Find Trigger and Protections if Not Verified

- Rule 51 § 016.06B: school “**has knowledge**” if:
  - Parent expressed concern in writing to teacher or admin
  - Parent requested an evaluation
  - Teacher or other personnel “expressed specific concerns” about behavior demonstrated by the child to up-line admins

---



---



---



---



---



---

### Child Find Trigger and Protections if Not Verified

- Rule 51 § 016.06C: sch. “**has no knowledge**” if:
  - Parent has refused evaluation
  - Parent has refused services
  - Child has been evaluated and did not qualify

---



---



---



---



---



---

### Child Find Trigger and Protections if Not Verified

- Rule 51 § 016.06D
  - If “no knowledge,” child may be disciplined
  - If a request for evaluation is made:
    - Expedited evaluation
    - Child remains in educational placement “determined by school authorities,” which can be suspension/expulsion
    - If child verifies, school must comply with Rule 51 requirements

---



---



---



---



---



---

### Hypo #3: Social Media Threat

- Snapchat post

- "I'm going to burn that bitch to the ground"



- Posted at 9:45 PM from home

- Screenshot sent to principal at 7:00 am next day

---



---



---



---



---



---

### Initial Steps

- Call law enforcement

- Assemble the crisis team

- Expel? (probably not...)

79-267.

Student conduct constituting grounds for long-term suspension, expulsion, or mandatory reassignment; enumerated; alternatives for truant or tardy students.

The following student conduct shall constitute grounds for long-term suspension, expulsion, or mandatory reassignment, subject to the procedural provisions of the Student Discipline Act, when such activity occurs on school grounds, in a vehicle owned, leased, or contracted by a school being used for a school purpose or in a vehicle being driven for a school purpose by a school employee or by his or her designee, or at a school-sponsored activity or athletic event:

---



---



---



---



---



---

### Jurisdiction and Authority Generally

- If you want LTS, expulsion, MR

- Did the ***misconduct*** occur on school grounds, in a school vehicle, or at a school activity?
- Did the misconduct occur on district "property" (such as a 1:1 iPad) even if off school grounds and outside of school/activity time?

- If you want a STS

- Did it violate a school rule or otherwise constitute grounds for STS/expulsion?

---



---



---



---



---



---

## Jurisdiction and Authority: Off-campus Speech

- If the incident occurred outside school grounds, vehicles, activities, and not on any other district property:
  - Did the incident cause you to “reasonably forecast” a material and substantial disruption of school functions?
  - Did the incident actually cause a material and substantial disruption of school functions?
  - Did the incident reasonably cause another student to miss school functions or school activities?

---



---



---



---



---



---

## Back to the Hypo

- Are we limited to a 5-day suspension?
  - Probably
- How does disruption of school play into this analysis?
  - You’ve cleared the 1A hurdle, but not the SDA
- What other disciplinary options do we have?
  - Extracurriculars, detentions, etc., but follow *Goss* due process requirements
- What if it was posted using a district device?
  - We don’t know, but we’re pretty aggressive

---



---



---



---



---



---

## Emergency Exclusion?

- No jurisdictional requirement
- Must still meet 1 of the reasons (illness, threat, extreme disruption)
- Can ask for letter from LMHP before readmitting
- Must afford due process of STS for 1st 5 days and LTS after 5 days
- Still may constitute a “change in placement”

---



---



---



---



---



---

## Questions

---

---

---

---

---

---

## TRENDS AND TROUBLE IN STUDENT DISCIPLINE

**Bobby Truhe**  
KSB School Law  
(402) 804-8000

[bobby@ksbschoollaw.com](mailto:bobby@ksbschoollaw.com)

 KSB School Law  
 @btruhe



---

---

---

---

---

---