



MEMBER ALERT
TECHNOLOGY, SOCIAL MEDIA
AND NON-AUTHORIZED COMMUNICATIONS,
AND CYBER-BULLYING

The Internet, e-mail, "smart phones" (that can take pictures and/or send text/email messages), and "tablets" (iPads, Nooks) can be useful and important tools for educators, while furthering the employee's personal interests and relationships. This technology is also used at school sites and at home by students for communication, homework, or social reasons. These resources, unfortunately, also present opportunities for misuse, misunderstandings, or unauthorized communications or activities that may lead to administrative, civil, and even criminal complaints.

It is therefore timely and appropriate for Members to update their Board Policies and Administrative Regulations to address increased liability risks, to implement clarified employee and student standards of conduct, and to better protect employee and student health, safety and welfare through reasonable and legally sustainable standards. Templates for updating such policies are provided with this Alert.

II. UNDERLYING IMPORTANT CONCEPTS

The context of this Alert and proposed policies is better understood in light of the following passage from *San Diego USD. v. Comm. on Prof Camp.*, 194 Cal.App.4th 1454 (2011):

"[T]he calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment.... His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. ... There are certain professions which impose upon persons attracted to them. responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as judges, policemen and schoolteachers fall into such a category.... And as our Supreme Court said in *Board of Education v. Swan* ... 'A teacher ... in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the [students] coming under [his] care and protection.'" [Underlining Added]

Given this elevated standard of conduct, Members' employees are subject to greater scrutiny (including enhanced media and social media attention), particularly as employees' "private use" of "public" social media and other websites, and e-mail and texting services, is resulting in an increased number of complaints and disciplinary and legal proceedings. Given changing and increasingly stringent laws and regulations, Members need to continually evaluate and update their policies and procedures to ensure a

! Each District's culture, union agreements, existing policies, and governance standards should be evaluated when updating Board Policies and Administrative Regulations. The provided BP/AR templates should be reviewed internally and potentially with the Member's legal counsel. There is no guarantee that adoption of these templates will insulate the Members or their employees from claims or administrative reviews in this complex and changing area of law. Due to the complexity of these issues, this Alert also cannot address all issues likely to confront Members and their employees, who should promptly seek guidance and counsel in addressing such situations.

safe and appropriate environment that also protects the rights and interests of employees, students, parents, and members of the public.

I. NEED FOR UPDATED POLICIES AND CARE

1. **By July 1, 2012**, the Child Internet Protection Act ("CIPA") required all school districts to amend their existing Internet safety policies and ensure the providing of education to minors regarding online behavior, interacting with other individuals on social networking sites and chat rooms, and cyberbullying awareness and response, in order to continue qualifying for e-rate discounts.
2. Employee whose suggestive "personal ads" have been seen by parents have been terminated, with those terminations upheld by the Court of Appeals, because the employees' personal conduct was seen as negatively impacting the educational environment.
3. A coach was fired after "sexting" pictures to his 20-year old girlfriend, whose mother found them and forwarded them to school administrators. The coach was reinstated only after it was proven that the photos were only available on the adult girlfriend's phone and no District equipment or computer networks were used.
4. A teacher was terminated after students surreptitiously took the teacher's phone from her desk, that did not have a password lock preventing access to its contents, with the students thereafter viewing illicit texts and photos on the phone.
5. Teachers have been reprimanded and terminated for "friending" students and/or sending arguably inappropriate messages, or allowing access by students to arguably inappropriate personal information or photographs, that were considered as negatively impacting the educational environment.
6. Teachers have been reprimanded and terminated for taking pictures of students with cameras and cell phones and then posting the pictures on social media sites, or generally transmitting the pictures to parents and others, in violation of student confidentiality laws.
7. Teachers have also been reprimanded and terminated for making disrespectful statements about students and parents on websites that were publicly viewable.
8. Students and employees are now subject to cyber-bullying and anti-impersonation laws that arguably create greater obligations to address off-site communications and activities of students and employees when such activities negatively impact student attendance or the educational environment.

II. MEMBER'S RIGHTS AND DUTIES

Employers can require that all employees transmit **business-related** communications only through District-controlled equipment or networks, ensuring the ability to monitor, review, and store work-related communications, as well as to ensure that confidential information is transferred only through adequately secure channels. In addition, when a Member has adopted and published a policy stating that use or access of its property or resources (computers, Wi-Fi or wired networks, cell phones, email systems, websites, etc.) is without an expectation of privacy by the employee, volunteer, or student, everything sent or received through such resources may be tracked, accessed and reviewed by the employer, including communications with private counsel, doctors, or others, except for information issued only through private email accounts that are password protected. E.g., *Holmes v. Perrovich Dev. Co.*, 191 Cai.App.4th 1047 (2011).

Members also have important duties to provide safe schools and workplaces free from discrimination, harassment, and physical/verbal bullying conduct and harm. While it is clear that Members may not infringe on employees' and students' rights of free speech and association, certain legal authorities also state or suggest that Members may also have affirmative duties to protect employees and students from known or reasonably expected actions that would violate governing laws, regulations, or District policies.

It is also important to remember that Members, **and their employees**, have important confidentiality obligations under FERPA, the California Information Practices Act, and the students' and parents' rights of privacy and association. Members and their employers must protect identifying student information from being publicly published, disclosed, or discussed absent express parental approval. Identifying student information can include photographs, academic issues/results, or issues relating to social or family situations.

III. EMPLOYEES' RIGHTS AND DUTIES

The state and federal constitutions protect public employees' rights to free speech (relating to matters of important public interest or concern) and association. E.g., *Perry Ed Assn. v. Perry Local Eds' Assn.*, 460 U.S. 37 (1983). It is illegal to retaliate against an employee for exercising protected rights (*Grassilli v. Barr*, 142 Cal.App.4th 1260 (2006)), nor may an employee be "dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in [free speech or association rights] or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution." *Education Code Section 48907(g)*.

In balance of these rights, however, are Education Code Sections 44932 [a certificated employee may be dismissed for immoral or unprofessional conduct, dishonesty, or "unfitness for service," whether such actions or statements occur at school or during off-duty personal activities]² and 45133 [classified employees may be subject to potentially broader standards than certificated employee due to the right to evaluate such conduct under stricter district policies and governing union agreements]. Other Codes Sections addressing reviews and action in response to certain felony and misdemeanor convictions (e.g., Education Code Sections 44421, 44424, 44425), as well as driving while intoxicated (CAC § 80302), also are implicated by off-duty conduct.

^f In *Morrison v. Board of Ed.*, 1 Cal.3d 214 (1969) and *Board of Ed v. Jack M*, 19 Cal.3d 691 (1977), the Supreme Court looked to seven factors to determine whether a teaching certification could be revoked for immoral or unprofessional behavior: (1) the likelihood the conduct might have adversely affected students or fellow teachers, and the expected degree of such adversity; (2) the proximity or remoteness in time of the conduct; (3) the type of teaching certificate held by the individual; (4) the extenuating or aggravating circumstances surrounding the conduct, if any; (5) the praiseworthiness or blameworthiness of the motives for the conduct; (6) the likely recurrence of the questioned conduct; and (7) the extent to which disciplinary action may inflict an adverse or chilling effect upon the constitutional rights of the involved teacher or other teachers. While there must be a nexus between the wrongful conduct and the employee's ability to perform his job, discharge may be appropriate based on a single event, particularly if it "has gained sufficient notoriety so as to impair his on-campus relationships." *Board of Trustees v. Stubblefield*, 16 Cal.App.3d 820 (1971).

IV. STUDENTS' RIGHTS AND DUTIES

While students have rights to privacy and association while on campus (*Widmar v. Vincent*, 454 U.S. 263 (1981)), these rights are more limited in the educational context than in the public context in order to maintain an orderly school environment and to protect the rights, health, and safety of all members of the school community. *Education Section 48907*.

As students of all ages now have greater access to the Internet, smart phones/cell phones (that can take and send pictures of students, tests, homework/answers), with certain websites even supporting and encouraging anonymous posts that often lead to derogatory and negative comments (e.g., FormSpring), students are being given greater access to information (including information regarding teachers and staff members) and forms of communication that can be used or misused. Such misuse, particularly among younger individuals who may not fully recognize the harm they can do, can lead to serious emotional distress, as well as violation of "cyberbullying" laws and Member policies. In addition, students are often seeking to impersonate others when making their negative postings, which would now also constitute a violation of Penal Code Section 528.5.

With the Legislature having also passed amendments to Education Code Section 32261, preventing the use of electronic equipment or websites to bully other classmates (at least as such matters may be "related to school activity or school attendance"). and with students also using phones to contact emergency services in questionable situations (requesting police assistance in response to a teacher "rattling" a table to get student's attention), the management of student communications is critical to implementing safe and appropriate educational environments.

V. CONCERNS AND RECOMMENDATIONS

Use and access to technology, email systems, cellular phones, and social media sites can create a variety of negative events that may lead to termination, discipline, or even regulatory and criminal investigations. For Members, updating and enforcing appropriate policies and procedures is critical in avoiding situations that can involve significant harm to students, costly lawsuits, and media attention that may all be disruptive to a positive educational environment.

Because technology-related issues also often blur the lines between personal and professional rights and duties, Members and their administrators often have difficulty providing clear guidance to employees, students, and parents. Consequently, the best way to protect the interests of all concerned, while also creating opportunities for education and lines of open communication, is to develop and implement comprehensive, updated policies that more clearly address these issues, including consequences of misuse.

While no policy or group of policies can fully anticipate all issues Members may face, the attached proposed Board Policies and Administrative Regulations may provide important guidance and support in these important areas.

Board Policy

District Technology and Electronic Communications

BP 1116

The Governing Board recognizes the value and importance of the District's owned and sponsored computers, wireless or wired networks, cellular and "smart" telephones, tablets, e-mail systems, and websites ("Technology") in meeting the District's, its employees', and its students' needs and objectives.

In the protection of the District, its employees, and its students, the District shall adopt, implement, and train employees, volunteers, and students with respect to reasonable standards for the access and use of Technology, including the use of personal devices, by employees, volunteers, and students during the school day and at District-sponsored events.

All District-related business will be conducted through District owned or sponsored Technology, not through personal email accounts or systems that are not recorded by the District's network system. The District will also adopt and implement reasonable standards relating to communications conducted through external sources or resources during non-work days and non-school hours that may negatively impact the safety, health, or welfare of employees or students during the school or work day.

No user of District Technology should have any expectation that items drafted, saved on, or sent or issued through Technology, or accessed or viewed through such Technology, is in any manner personal, private, or confidential. The District expressly reserves the right to monitor, review, and investigate any use, access, misuse, or abuse of Technology. While the District will not seek access to private email accounts that are password protected, upon a determination that the District's Technology has been misused or abuse, the District may take disciplinary action and, if appropriate, report the incident to law enforcement officials.

Administrative Regulation

Use of District Technology

AR 1116

The District's computers, wireless or wired networks, cellular and "smart" telephones, tablets, e-mail systems, and websites, whether owned, contracted for, or sponsored by the District ("Technology"), are the property of the District and may only be accessed or used in strict compliance with all laws, regulations, and District policies.

No employee, volunteer, student, or other individual may use or access Technology for any purpose other than the business of the District or for student studies or coursework, including communications related to such approved activities.

No individual may use Technology in violation of any governing law or regulation, nor to harass, defame, bully, intimidate, defame, discriminate against, or intentionally harm or injure any other party. All content and communications shall be free from profane or unprofessional language, pictures or graphic representations, which might subject the individual to investigation, discipline or termination pursuant to the provisions of Education Code Sections 44932 and/or 45133, or the District's Code of Conduct for Students.

The District's Technology department or administrator will undertake reasonable steps to help ensure only proper use and access to Technology, including the implementation of policies, procedures, and supporting technologies (content, access time, and/or access duration filters) intended to promote safe and appropriate use of Technology in conformity with all governing laws. The District's Technology department or administrator will also develop and distribute instructions, and provide training, regarding the proper use of Technology, although it remains the responsibility of each user or accessing party to personally familiarize themselves with such instructions and laws and regulations that may regulate their permissible use of Technology.

The District's Technology department or administrator will ensure that each employee requesting or needing access to Technology receives a unique log-in/password combination (which includes required password protection for computers, email accounts, and cellular telephones), as well as a unique District-assigned e-mail address. Volunteers or students will also need to log-in to Technology through appropriate log-in designations determined or assigned by the Technology department or administrator. The District reserves the right to limit or change access rights to Technology based on an individual's roles, responsibilities, and log-in access rights.

Passwords shall be applied to all individually assigned District devices (cellular telephones, tablets) to ensure that they are accessed only by the individual authorized to use such devices.

Unless expressly authorized in advance by their supervisor to incur overtime expenses, non-exempt employees shall not use Technology during non-work hours for work purposes. No District supervisor will cause, direct, or allow a non-exempt employee to engage in such activities without compensation.

Administrative Regulation

Employee's Personal Technology

AR 4120

Employees may use their personal Technology during personal time periods during the work day and during time away from work. Personal Technology use might include the use of personal computers, tablets, and "smart phones," to create or access social media websites, send email correspondence or text messages from personal accounts, take personal telephone calls, or access or create websites or webpages ("Personal Technology Use").

Personal Technology use remains subject to Education Code Sections 44932 and/or 45133, as well as other laws or regulations applicable to educational and public health or safety standards of proper and safe conduct.

Laws regarding student confidentiality and privacy must be respected. No employee may publish or disclose in any external context confidential information (governed by FERPA, the California Information Practices Act, and District policies) without the express, advance written approval of a parent/legal guardian and the District.

In the fulfillment of the District's obligation to protect the health and safety of students when they are under the District's care, custody or control, or in response to a complaint or notice filed with the District by an employee, student, parent or concerned member of the public, the District reserves the right to investigate an employee's Personal Technology use in keeping with applicable District policies and governing laws and regulations.

Employees and volunteers should be aware that email communications and shared access to social websites, particularly when students or others may have access to personal photographs, personal information, or the receipt of statements negatively affecting the employee's ability to successfully fulfill his/her job functions by negatively impacting the educational environment, may be a basis for discipline.

Administrative Regulation

Student's Personal Technology and Bullying

AR 5131

No student shall intimidate, harass, bully or threaten an employee or student through words or actions, including words or threats of action communicated over the Internet or through social media sites, if such actions occurring on school property or affect another student's ability or interest in attending school or participating in District-sponsored activities.

Prohibited physical behaviors include, but are not limited to, direct physical contact, such as spitting, hitting or shoving, or actions suggesting an imminent physical attack or harm, including menacing physical actions or verbal or written threats.

Prohibited verbal behavior includes statements intended to intimidate, harass, bully, teasing or name-call, including the making of knowingly false allegations or assertions intended to harm or isolate an individual.

While each student has a right to associate with his/her choice of students, prohibited conduct also includes verbal and physical actions conducted for the express purpose of socially isolating an individual from social relationships with other students. Any student who engages in prohibited conduct may be subject to disciplinary action, including suspension or expulsion.

District employees and volunteers shall intervene and prevent prohibited conduct when appropriate and safe to do so, or to immediately seek external assistance if there is a concern with physical safety of any involved individual. The District employee or volunteer shall also promptly give notice of the incident to the Site Administrator or his/her designee, who shall promptly investigate the incident and determine whether discipline, remedial assistance, or other actions should be taken in keeping with District policies.

No individual reporting potentially prohibited conduct, or participating in any subsequent investigatory or administrative process, shall be subject to retaliation by the District or its employees, who shall also endeavor to take reasonable actions to prevent further prohibited conduct targeting the student.

Administrative Regulation

Student's Personal Technology and Bullying

AR 5145.4

The District and its school sites shall seek to provide an orderly, caring, civil, and nondiscriminatory learning environment that prohibits acts of harassment or bullying behavior. Administrators, faculty, staff, parents, students and volunteers are expected at all times to actively demonstrate appropriate behavior, treating others with civility and respect, and promoting an inclusive atmosphere that models expected student behavior.

Bullying Prevention Plan

Bullying includes severe or pervasive physical or verbal act(s) or conduct, including communications made in writing, via telephone, or through text or Internet messaging services that reasonably places a student in fear of harm to themselves or their property; that substantially and detrimentally affects their physical or mental health, that substantially interferes with a student's academic performance, attendance, or that substantially affects participation in District-sponsored services, activities, or privileges.

Each school site will create and review annually, before November 30 of each year, a Bullying Prevention Plan that will be incorporated into each school site's Comprehensive Safety Plan and posted at the school site and distributed to the school community each year.

The Bullying Prevention Plan will include:

1. A definition of bullying behavior, as per this administrative regulation and all governing laws and regulations.
2. A statement that students should be free from bullying, intimidation and harassment from students, administrators, faculty, staff, parents or volunteers, whether on or off school property or through an electronic act (email, texting, etc.) that may affect the student's education, participation in District-sponsored activities, or attendance.
3. Designation of a site administrator to receive and respond to all reports of bullying.
4. A confirmation of the obligation of staff, students, parents/guardians and volunteers to report bullying behavior to the designated site administrator, with District employees and volunteers witnessing an act of discrimination, harassment, intimidation, or bullying to intervene and take appropriate steps to immediately stop such actions as long as it is safe to do so.
5. Procedures for how staff, students, parents and others will report bullying behavior and the methods for reporting and responding to such complaints.
6. Expectations regarding training for District employees regarding bullying prevention, identification, intervention, and reporting requirements.
7. Confirmation that students who seek to prevent bullying, or who may be victims of bullying, are timely and positively supported.
8. Potential additional strategies to prevent bullying and encourage students to be respectful of each other.

Reporting Procedures

Staff, students, parent/guardians, and volunteers are required to report Bullying behavior, whether directly observed or reported to them by students, parent/guardians, volunteers, or others.

A Student Incident Report form should be completed by the employee observing or receiving the report of Bullying and should be immediately submitted to the designated site administrator.

Response Procedures

The designated site administrator will investigate all Bullying reports in accordance with existing District practices and procedures. If the incident was determined to meet the definition of Bullying, the designated site administrator shall, as soon as possible, and no later than 48 hours after receiving the notice:

1. Complete a reasonable initial investigation of the incident, taking immediate interim steps to protect the reported victim and witnesses of bullying incidents;
2. Notify parents/guardians of the student(s) involved of the report and of the status of the investigation; and
3. Develop a preliminary response and action plan intended to best protect the interests of the targeted or potentially targeted student(s), copies of which shall be provided to the parents/guardians of the Bullied or potentially targeted student, with a copy included into each involved student's permanent record.

Upon request of a student's parent/guardian, the District shall assist the student to be transferred to another site or District in keeping with the preferences contained in Education Code Section 46600.

Complaint Process

If a student or parent/guardian is unsatisfied with the school's decision or response to a Bullying report, they may initiate a complaint to the school district in accordance with the district's Uniform Complaint Procedure.

Training

Every two years, the Superintendent or designee shall ensure that District employees who regularly interact with or supervise students or student activities, shall attend and participate in training regarding identification, preventing, and reporting of Bullying and harassment, including the District's policies and procedures for responding to such incidents.