

School lawyers say their practices run the gamut and include new issues

By Allison Petty
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Between recess and report cards, there is a world rife with legal challenges as varied as they are nuanced, where attorneys learn on their feet and every morning could bring a new conundrum: school law.

"There's only so many ways to have a car accident. But with school law, it's new and different every day," said Marcilene Dutton, deputy general counsel for the Illinois State Board of Education.

Education attorneys say they find their practices running the gamut of legal arenas, from transportation law to labor disputes to student discipline.

In addition, school attorneys these days are grappling with new technology, including cell phones and the Internet; more students expressing themselves as gay, lesbian, bisexual or transgendered; and more adversarial parents.

Cell phones

Ask Illinois Principals Association general counsel Brian D. Schwartz what keeps him busy, and he'll tell you: cell phones.

In 2002, the Illinois General Assembly repealed a ban on cell phones in schools. Lawmakers aimed to increase student safety by allowing the phones to be available in case of emergencies, but left it up to individual school districts to form their own cell phone policies.

Schwartz said 90 percent of districts allow the phones on school property, but say they must be off and out of sight.

Of course, they do not always stay off and out of sight, he said, which leads to problems.

Administrators may seize cell phones that are out in violation of the district's policy, but they may not look at the phone's contents without reasonable suspicion that something is amiss, he said.

In cases where school administrators suspect the phone contains inappropriate images, or "sexting," Schwartz



Photo by Allison Petty

Illinois Principals Association general counsel Brian D. Schwartz says education law has become increasingly complex with the emergence of technology plus an increasingly contentious relationship between parents and school districts.

discourages them from looking further without calling authorities first.

Teachers and principals who look at sexting — even by accident or to decide whether to discipline the student — could face child pornography charges.

That's why Schwartz advises principals to call the police before looking at a phone's contents if they suspect sexting could be present.

Lawmakers have sought to reduce penalties for sexting this year, with several bills to turn the crime from a felony to a misdemeanor working their way through the General Assembly.

The Internet

Hand an extraordinarily loud bullhorn to a bunch of children, and that is

essentially the Internet, said David J. Braun, a school-law attorney with Miller, Tracy, Braun, Funk & Miller Ltd. in Monticello.

Braun, who frequently handles student discipline issues, said students often use Web sites such as Facebook, MySpace and Twitter to document their misdeeds. Unconscious of the fact that the world is listening, they often do not understand that what they post online could hurt them, particularly when they do not have the life experience to know better.

"You know, for adults, most of us are thinking pretty quickly, 'Who's going to hear this?' Students, kids, aren't thinking that," Braun said.

He believes schools should educate

children about the Internet in the same way they used aggressive drug education to teach students to “just say no” in the 1980s and 1990s.

Schwartz, of the Principals Association, said incidents recorded on the Internet often make their way to school officials’ — and, thus, school attorneys’ — desks.

“Monday morning, I don’t think there’s a principal in the state that isn’t confronted with a phone call where two kids on the weekend have gotten into a fight via Facebook or MySpace and now they want the principal to do something about it,” Schwartz said.

The same types of incidents happened 30 years ago, but they took place in malls or on street corners, Schwartz said. The Internet has provided more documentation than ever before, but that evidence does not necessarily mean the school will intervene.

If the offense directly affects the school, school officials can take the next steps to offer discipline, Braun said. If not, he must advise them that they do not have much legal standing to get involved.

“If it’s not in connection with the school and it’s totally disconnected from the school and we can’t make a connection with the school, then we probably have a difficult case for student discipline. ... We can’t police the world,” Braun said.

Mary K. Klimesh, a Chicago school attorney with Seyfarth, Shaw LLP, agreed that most school attorneys begin by evaluating situations based on what policies and procedures the school has in place.

Then, she said, education attorneys must draw from both state law and constitutional principles to figure out how to handle a scenario.

“That’s the difference between private and public sector, in that you have that layer of needing to look to constitutional principles,” she said.

GLBT issues

As students are declaring sexual orientation or seeking sex-change operations at a younger age, a slew of corresponding legal issues have begun to pop up for school attorneys.

“Say 20 years ago, some of your issues would be ... what do you do with a pregnant teenager?” said Dutton, of the state board. “Now it’s like, you have transgender students who want to come to the prom. I mean, the issues have changed as society has changed.”

As more gay, lesbian, bisexual and transgender students seek to participate in athletics or school dances, school officials are seeking their own education about how to handle the related issues, Schwartz said.

“The issue comes up every prom season about gay or lesbian couples attending dances, and we need to make sure that as long as they follow the rules, that they are treated no differently than any other couple that attends dances,” he said.

Principals will call Schwartz for guidance, and he tells them to handle the situations delicately. Administrators should not deny a child who is undergoing gender reassignment the opportunity to participate in sports, but placement of that child is sometimes tricky.

If the student is undergoing gender reassignment, the student will typically be allowed to participate as the gender of his or her birth. If the student has already undergone the gender reassignment, then the student participates as the gender he or she now is, Schwartz said.

Administrators who grew up in a different era might not understand these issues, much less how to deal with them, which makes them quick to seek legal counsel on the subject, he said.

But once proper protocol is explained, Schwartz said, most districts are good about following it.

Adversarial parents

Where schools used to receive support from parents, they are now likely to receive a summons instead, attorneys say.

It is “exponentially true” that parents are more likely to seek legal action against a school district than they would have 20 or 30 years ago, said William Phillips, a former superintendent who teaches graduate courses in school finance at the University of Illinois Springfield.

Phillips said he never faced a lawsuit in his 29 years as a superintendent, but was threatened with them frequently. People believe school districts have “deep pockets,” he said.

“The assumption is that [school districts] have tax money and unlimited tax money and whatever you sue them for, they can cover,” Phillips said.

That perception is not untrue, he said, because school districts are required to buy insurance and most have enough to cover a lawsuit.

In addition to believing that schools have lots of money, parents increasingly regard themselves as adversaries of school districts, Schwartz said. He said administrators now see lawsuits that 20 years ago they would never have expected.

“I make the joke all the time that kids now, when they’re born, they get a birth certificate, they get a Social Security number, they get a cell phone and they get a lawyer,” Schwartz said.

Klimesh, from Seyfarth, Shaw, said school districts strive to find common ground with parents.

“Most parents, if not all parents, are very, very vested in their opinions with respect to either how their child should be treated or what is an appropriate education for their child, and the school district may have a difference of opinion with respect to that,” said Klimesh, who has practiced education law since 1990 and was a teacher before that.

She said most school districts do not want to cultivate adversarial relationships with parents.

Parents also have more legal avenues to get what they want, said Braun, the school-law attorney from Monticello. State and federal laws have provided myriad administrative means for parents to seek information from school districts.

He said the Illinois Freedom of Information Act, a new version of which passed last year, is a huge example.

Because some documents, such as teacher evaluations, are exempt from FOIA requests, Braun said school districts are facing greater legal fees as they must call their counsel to figure out which requests require them to comply.

In crafting their responses to the transforming landscape of education law, school attorneys are often learning on their feet. Other than case law and the Illinois School Code, which Braun says he has open to at least two different sections at any given time, there is not exactly a handbook.

Because school law is “tremendously complex,” Braun said attorneys often approach it in many different ways.

“Of course the philosophy of school law is education and because of that, just like in education, there are lots of opposing views about what works and what doesn’t,” he said. “If you need any evidence of that, look at one administration to the next.”