

Effective Strategies
for Creating Safer Schools
and Communities

School Policies and Legal Issues Supporting Safe Schools



THE GEORGE WASHINGTON UNIVERSITY
GRADUATE SCHOOL OF EDUCATION
AND HUMAN DEVELOPMENT



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School Policies

Effective Strategies for Creating

and Legal Issues

Safer Schools and Communities

Supporting Safe Schools

Thomas Hutton and Kirk Bailey

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Hamilton Fish Institute on School and Community Violence

The George Washington University
2121 K Street NW, Suite 200, Washington, DC 20037-1830
Phone: (202) 496-2200
E-mail: hamfish@gwu.edu
Web: <http://www.hamfish.org>

Hamilton Fish Institute Director:
Dr. Beverly Caffee Glenn

Center for Classroom Teaching and Learning

Northwest Regional Educational Laboratory
101 SW Main St., Suite 500, Portland, OR 97204
Toll-free number: 1-800-547-6339, ext. 135
E-mail: cctl@nwrel.org
Web: <http://www.nwrel.org/cctl>

Center for Classroom Teaching and Learning Director:
Kit Peixotto

Authors:

Thomas Hutton and Kirk Bailey

Editors:

Ira Pollack, Michael Garringer

Technical editor:

Eugenia Cooper Potter

Layout design:

Dennis Wakeland

Cover design:

Paula Surmann, Michael Heavener

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About the Effective Strategies for Creating Safer Schools and Communities Series

School safety requires a broad-based effort by the entire community, including educators, students, parents, law enforcement agencies, businesses, and faith-based organizations, among others. By adopting a comprehensive approach to addressing school safety focusing on prevention, intervention, and response, schools can increase the safety and security of students.

To assist schools in their safety efforts, the Hamilton Fish Institute on School and Community Violence and the Northwest Regional Educational Laboratory (NWREL) have revised this series of five guidebooks intended to build a foundation of information that will assist schools and school districts in developing safe learning environments. The series identifies several components that, when effectively addressed, provide schools with the foundation and building blocks needed to create and maintain safe schools. Written in collaboration with leading national experts, these resources will provide local school districts with information and resources that support comprehensive safe school planning efforts.

Each guide provides administrators and classroom practitioners with a glimpse of how fellow educators are addressing issues, overcoming obstacles, and attaining success in key areas of school safety. They will assist educators in obtaining current, reliable, and useful information on topics that should be considered as they develop safe school strategies and positive learning environments. As emphasized in *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates*, a joint publication of the U.S. Secret Service and the U.S. Department of Education, creating cultures and climates of safety is essential to the prevention of violence in school. Each guidebook retains this message as a fundamental concept.

Under No Child Left Behind, the education law signed in January 2002, violence prevention programs must meet specified principles of effectiveness and be grounded in scientifically based research that provides evidence that the program to be used will reduce violence and illegal drug use. Building on the concept in No Child Left Behind—that all children need a safe environment in which to learn and achieve—these guides explain the importance of selecting research-based programs and strategies. The guides also outline a sample of methods for addressing and solving safety issues schools may encounter.

About this series (continued)

Creating Schoolwide Prevention and Intervention Strategies, by Jeffrey Sprague, is intended to put the issue of schoolwide violence prevention in context for educators and outline an approach for choosing and creating effective prevention programs. The guide covers the following topics:

- Why schoolwide prevention strategies are critical
- Characteristics of a safe school
- Four sources of vulnerability to school violence
- How to plan for strategies that meet school safety needs
- Five effective response strategies
- Useful Web and print resources

School Policies and Legal Issues Supporting Safe Schools, by Thomas Hutton and Kirk Bailey, is a practical guide to the development and implementation of school district and school policies that support safe schools. Section 1 provides an overview of legal and practical considerations to keep in mind and to address with local legal counsel when developing policies at the district level to prevent violence. Section 2 addresses specific situations and issues that may arise and discusses how the framework set forth in Section 1 bears on these questions.

Ensuring Quality School Facilities and Security Technologies, by Tod Schneider, is intended to help educators and other members of the community understand the relationship between school safety and school facilities, including technology. The guide covers the following topics:

- Crime Prevention Through Environmental Design (CPTED)
- Planning To Address CPTED: Key Questions To Ask
- Security Technology: An Overview
- Safety Audits and Security Surveys

The Role of Mental Health Services in Promoting Safe and Secure Schools, by Krista Kutash and Albert Duchnowski, explores the role of mental health services in developing and maintaining safe schools. The guide provides an overview of research-based school mental health models and offers guidance for school personnel and others on implementing mental health-related services, including the role that federal, state, and district policies play and the need for community involvement.

About this series (continued)

Fostering School, Family, and Community Involvement, by Howard Adelman and Linda Taylor, provides an overview of the nature and scope of collaboration, explores barriers to effectively working together, and discusses the processes of establishing and sustaining the work. It also reviews the state of the art of collaboration around the country, the importance of data, and some issues related to sharing information.

The Hamilton Fish Institute on School and Community Violence and the Northwest Regional Educational Laboratory hope that the guides in this series assist your school and its partners in creating a safe, positive learning environment for the children you serve.

About the Authors

Thomas Hutton is a senior staff attorney with the National School Boards Association (NSBA), where his work includes amicus curiae advocacy in appellate court cases affecting public schools and support to state school board associations, local school boards, and the NSBA Council of School Attorneys, the national professional association for attorneys who represent school districts. A frequent writer and speaker on school law topics, he has represented school board positions in major media including C-SPAN's "Washington Journal" and National Public Radio's "Talk of the Nation." He serves as editor of NSBA's free weekly Legal Clips e-newsletter and co-editor of Leadership Insider, the school law and policy newsletter for NSBA-affiliated school districts. He is a co-founder and former chair of the board of trustees of Thurgood Marshall Academy, a charter high school in the District of Columbia that has a thematic focus on law and democracy. He currently serves on the board of directors of the 21st Century School Fund, a nonprofit organization that focuses on issues related to school facilities. Mr. Hutton was educated in public schools in New Hampshire, Wisconsin, and Colorado and is a graduate of Connecticut College and the Georgetown University Law Center.

Kirk Bailey serves as Legislative Counsel at Smith Dawson & Andrews, providing expertise in education, transportation, justice and natural resources issues, and constitutional and regulatory law. His background is in public affairs, lobbying and community outreach.

He has served as special counsel to the Hamilton Fish Institute on School and Community Violence, where he advised the Institute on legal issues involving school safety, youth violence, student constitutional rights, and federal administrative issues.

Mr. Bailey is a graduate of the University of Oregon, and holds a J.D. from the University Of Oregon School Of Law, and is an active member of the Oregon and American Bar Associations.

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Introduction

School district policies are an important tool in a comprehensive approach to school safety, both proactive violence prevention efforts and responses to situations as they arise. School district and school efforts to ensure a safe learning environment for all children must take into account a wide and growing variety of legal requirements and considerations.

Sound policies adopted by the local school board and administrative procedures and practices implemented by district and school administrations will reflect these legal requirements and considerations, providing school employees with an easily accessible point of reference. While no usable policy can anticipate every conceivable scenario, familiarity with district policies and practices should equip school personnel to handle most situations—and to frame the right question when they decide they need to seek additional guidance. Training programs can help ensure that staff members are familiar enough with the policies to know how to find the answers to the questions they confront. The collection and evaluation of data, in turn, can inform decisions about the effectiveness of policies and practices and suggest directions for revision.



This guide presents an overview of the legal and practical considerations concerning students of which school officials must be aware in developing and implementing efforts to prevent school violence. The primary focus is on federal law. State law varies significantly on many of the issues discussed, and some state education codes are quite prescriptive about what local schools are to do in certain situations. The details of many aspects of federal law itself vary from judicial circuit to judicial circuit. Some of the issues discussed in these pages may not yet even have been considered by the courts in some jurisdictions.

Perhaps most significant of all, there is vast diversity among the nation's nearly 17,000 local-level school districts and the communities

they serve. Together these realities mean that this guide is intended to help the reader to understand generally how the law bears on school safety questions and local policies, to recognize issues, and to frame questions when situations arise. This guide is no substitute for local legal counsel.

Section 1 provides an overview of the legal and practical requirements and considerations that govern school safety–related policies generally. Section 2 discusses in more detail how these requirements and considerations apply to a variety of specific school safety–related issues and situations, both preventive and responsive. The guide concludes with a glossary of terms and a list of additional resources and organizations that may be of assistance.

Several additional notes about this guide:

- The focus here is on preventing violence by students. Thus, policies addressing the full range of safety issues, such as accidents or alcohol or drug use—or policies governing potential safety threats posed by employees or outsiders—are beyond the scope of the discussion.
- Unless otherwise noted, “school policies” refers generally to district-level policies formally adopted by the board of education; school district administrative regulations and procedures adopted in order to implement the board’s directives; and district- and school-level practices.
- Similarly, unless otherwise noted, “school officials” refers generally to school board members, superintendents, district and school-level administrators, teachers, school security personnel, counselors, and so forth, in both regular and alternative education school settings.
- Unless otherwise noted, the legal considerations outlined in this document apply to any school environment and are not delineated by regular education, alternative education, or special education settings.

Like all things educational, school safety is ultimately a human enterprise. As in other realms of education policy, the law can serve as a useful tool for effectiveness, accountability, and support for local capacity building—but it also can prove to be a blunt instrument, resulting in unintended consequences, a “compliance” culture and stifling of creativity and flexibility, and significant administrative burdens.

The legal considerations reviewed in these pages are important, but they form only a baseline for the development of sound safety efforts. Among the strengths of the U.S. heritage of local governance of schools is the flexibility to adopt local policies that benefit from the community's engagement and that best reflect and effectively address widely varying local circumstances.

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Section I.

Legal and Practical Considerations Related to School Safety

The general legal and related practical considerations that apply when developing and adopting school safety policies and practices originate in the U.S. Constitution, federal statutes and their implementing regulations, and state constitutions, statutes, and regulations, including those state law provisions that are adopted in order to comply with the requirements accompanying federal funding.

Legal protections afforded by the U.S. Constitution that may bear on school safety policies include the Fourteenth Amendment's provisions related to due process and equal protection, the Fourth Amendment's protections against unreasonable search and seizure, the First Amendment's protections of freedom of expression and religion and, in certain instances, the Fifth Amendment's protections against self-incrimination. Generally speaking, these protections apply to students while under the care of schools, but they apply differently than they do to adults in other settings.

Due process

One of the most important tools schools have for ensuring safety is the student disciplinary code, which sets forth expectations for student behavior and imposes penalties when these expectations are not met. Student discipline may take many forms, from a simple rebuke to expulsion from school and even referral to law enforcement. Typical disciplinary methods include detention, time out or isolation, alternative education programs in or outside the student's school, denial of participation in school activities, and verbal reprimand or chastisement. While school officials enjoy considerable discretion when it comes to student discipline, disciplinary actions must respect the constitutional and statutory rights of pupils.



Of these student rights, the ones that bear most directly on disciplinary decisions are principles of due process, both substantive and procedural. The Fourteenth Amendment's protection against deprivation of liberty or property without due process of law is implicated in school disciplinary decisions because the courts have determined that students have liberty interests such as his or her reputation and property interests such as the right to attend school.

Substantive due process. To satisfy substantive due process, an action must be reasonably related to the school's interest in protecting students or maintaining order in the school. An action may fail to respect substantive due process where it is arbitrary, lacks reasonable grounds, or is unreasonably severe.

Generally, school districts will be required to adopt policies that are reasonably designed to address whatever problem they face. The reasonableness standard requires that school officials balance the need to make the school environment safe and maintain order and control with the student's interest in privacy, access to education, and autonomy. Schools should then design policies that match the problem in scope.

In other words, a school safety policy must bear some rational relationship to the problem it attempts to solve. For example, metal detectors clearly offer a rational and reasonable method of locating weapons in a school. However, cameras placed in boys and girls locker rooms to monitor potential drug sales may not be reasonable when students rightly expect some degree of privacy and the problem might be addressed just as easily by the presence of coaches, monitors, or other school officials.

Fortunately, the reasonableness standard offers a great deal of latitude for school policymakers. The burden of proving a rule unreasonable rests with the person contesting the rule, and the U.S. Supreme Court has instructed that, generally speaking, "It is not the role of federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."¹ Most conceivable school safety efforts will be rationally related to preventing violence, intercepting weapons, responding to antisocial behavior, and prohibiting drug use or theft. School safety and violence prevention policies and plans will be upheld by the legal system in most cases, provided they meet this standard.

Procedural due process. The requirements of procedural due process vary depending on the severity of the action: relatively more severe disciplinary consequences must be imposed only after observing relatively stricter procedural safeguards. Courts balance the significance of

the student's interests at stake and the value of procedural safeguards against the burden to the school of requiring more safeguards.²

Under the U.S. Supreme Court's ruling in *Goss v. Lopez*,³ in cases involving relatively minor penalty such as a suspension of 10 days or fewer, a student need be provided only with the following minimal due process:

- Oral or written notice of the infraction
- An explanation of the reasons for the charges (i.e., the evidence)
- An opportunity to present his or her side of the story

In such a case an informal review of the evidence will be procedurally sufficient. In addition, no delay between notice to the student and the hearing is necessary, because a school official "may informally discuss the alleged misconduct with the student minutes after it has occurred."⁴

Students also must have had advance warning about what conduct is prohibited, provided in a form and manner they can understand. Although the disciplinary code must not be so vague that a student could not reasonably have been expected to understand that his or her conduct was inappropriate, the U.S. Supreme Court has cautioned that the "prohibiting against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision"⁵ and that a student handbook "need not be as detailed as a criminal code."⁶

More serious penalties, such as a suspension for a period of more than 10 days or an expulsion, involve greater procedural protections. These may include:

- Notice of the disciplinary action to the student and parents, preferably in writing, specifying the reason for the action
- Right to appeal the decision in a fair, impartial hearing—for example, before the school board, the superintendent, or a hearing officer—in which the facts of the case are evaluated independently
- Right to be represented at the hearing by counsel, especially if the school district is represented by legal counsel
- Reasonable time to prepare for the hearing
- An opportunity to review evidence against the student

- An opportunity to examine witnesses against the student, subject to safety-related confidentiality concerns
- Opportunity to present evidence and witnesses on the student's behalf
- Right to record the proceedings
- Requirement that the hearing entity's decision be based on substantial evidence⁷

Finally, in some states, state statutes set forth more specific requirements for disciplinary actions and incorporate the requirements of the U.S. and the state's constitutions.

Nondiscrimination

Generally speaking, the Fourteenth Amendment's guarantee of equal protection requires that actions taken by a school be applied equally to similarly situated students. Individuals affected by school policies must be treated uniformly; in other words, the rights, privileges, or responsibilities imposed on an identified segment of the population must apply equally to all members of that group. Different treatment will be subject to varying levels of judicial review depending on whether the difference involves "suspect categories" of students that trigger discrimination concerns.

In most cases, a school need only have some rational basis for any difference in treatment among individual students, meaning that the school's actions are reasonably related to achieving some legitimate public purpose.⁸ In evaluating a "class of one" equal protection claim, in which it is alleged that the school improperly treated one student differently than it did a similarly situated student, courts tend to be deferential to the school's explanation for the difference in treatment, i.e., to the school's explanation of why the students in fact were not similarly situated. In such a case, it is not necessary for the school district to utilize the best possible methods to achieve its goals; rather, all that is required is that the methods used be reasonable.⁹

Increased judicial scrutiny comes into play only where it is argued the school's action affects students differently on the basis of characteristics such as race, ethnicity, gender, or religion. If the school's classification of students or some other school action affects an "inherently suspect" group, the action must be "narrowly tailored" to achieve a "compelling state interest."¹⁰ An "inherently suspect" group has traditionally been defined as a "discrete and insular minority" subject to "invidious discrimination" and is commonly understood to include racial minorities and ethnic groups.¹¹

Various federal and state anti-discrimination statutes protecting these groups also apply in the school setting. These include Title IX of the Education Amendments of 1972,¹² which prohibits federally funded educational institutions from discriminating on the basis of gender, and Title VI,¹³ which prohibits discrimination in federally funded programs on the basis of race, color, or national origin.

School policies may have discriminatory impacts in several situations, including disciplinary procedures, suspension and expulsion, special education services, and the provision of counseling or health services. In particular, research has highlighted disproportionately high rates of disciplinary actions against minority students in public schools. Schools can face legal challenges alleging either that they applied a policy in a discriminatory fashion or that the policy itself has a discriminatory effect.¹⁴ A plaintiff in such a case must show that the school district acted with some discriminatory intent, which courts so far generally have been reluctant to infer from statistical evidence alone.¹⁵

Disciplining students with disabilities

Disciplinary actions against students with disabilities are also subject to protections afforded by the federal Individuals with Disabilities Education Act (IDEA).¹⁶ The 2004 reauthorization of IDEA included revisions intended to address safety concerns.

IDEA generally requires that a student with a qualifying disability receive an Individualized Education Program (IEP), which is developed by a team comprising school personnel and the student's parent. Among other things, the IEP determines the student's placement in the appropriate learning environment. If the student violates school rules, the school may change this placement for fewer than 10 days, for example, by imposing a short suspension or placing the student in an alternative setting, as long as the same approach is taken with students without disabilities.

If the change of placement is to exceed 10 days, however, the IEP team must determine within 10 days of the decision whether the student's misbehavior resulted from his or her disability. The conduct will be considered a "manifestation" of the disability in any of the following situations:

- The conduct was caused by the disability
- The conduct had a direct or substantial relation to the disability
- The conduct was the direct result of the school's failure to implement the student's IEP

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If the conduct is determined not to have been a manifestation of the disability, disciplinary consequences may be imposed as they would on any other student, provided the student receives the following:

- Educational services enabling the student to continue to participate in the general education curriculum
- Services enabling the student to continue to make progress toward the goals established in the IEP
- A functional behavioral assessment and behavioral intervention services designed to prevent the behavior from recurring

If the manifestation determination concludes the behavior was a manifestation of the student's disability, the IEP team must:

- If the school district had not already done so before the behavior that resulted in the change in placement, conduct a functional behavioral assessment and implement a behavioral intervention plan to address the behavior
- If the school district already has developed a behavioral intervention plan for the student, review the plan and modify it as necessary to address the behavior
- Return the student to the former educational placement, unless the parent and school district agree to the change of placement as part of the behavioral intervention plan

There is now an important safety-related exception to the manifestation determination rules, however. Regardless of whether the behavior was a manifestation of the student's disability, school officials may remove the student to an interim alternative educational setting, determined by the IEP team, for up to 45 school days if the student commits any of the following infractions at school, on school premises, or at a school function:

- Carrying or possessing a weapon
- Knowingly possessing or using illegal drugs or selling or soliciting a controlled substance
- Inflicting serious bodily injury, defined as involving a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or faculty

IDEA also sets forth procedures and timelines for handling disagreements between the parent and the school district over the placement

decision and the manifestation determinations. While these procedures are pending, a hearing officer may order the student to be placed in the interim alternative educational setting for up to 45 days if the hearing officer determines that the current placement is substantially likely to result in injury to the student or others.

Search and seizure

The Fourth Amendment's protection against unreasonable search and seizure requires that a search of a student must be both reasonable at its inception based on the circumstances under which it was made and reasonable in its scope.¹⁷

School searches generally need not be based on the "probable cause" standard that applies to searches conducted by law enforcement, but merely on a "reasonable suspicion" that school rules are being violated or that contraband will be found.¹⁸ With some exceptions discussed in Section 2, general exploratory or sweep searches usually are impermissible.¹⁹

The scope of the search must be reasonably related to its objective, including the seriousness of the suspected infraction, and must not be excessively intrusive in light of considerations such as the student's expectation of privacy, age, and gender.²⁰

The U.S. Supreme Court in *New Jersey v. TLO* adopted the reasonableness standard for school searches in the hope that this approach would not "unduly burden the efforts of school authorities to maintain order in their schools" but "permit them to regulate their conduct according to the dictates of reason and common sense," while at the same time ensuring "that the interests of students rights will be invaded no more than is necessary to achieve the legitimate end of preserving order in schools."²¹ Any school official may make this determination depending on the circumstances.

Different standards may apply to the school's search as a result of a connection to, or role of, law enforcement authorities and school resource and security officers (see page 22 for further discussion).

Freedom of expression

Certain school policies or actions intended to ensure a safe and supportive environment for all students may implicate First Amendment interests where they impose restrictions on student expression or disciplinary consequences for the expression. Student free speech rights in school are not as great as those enjoyed by adults, but some school safety actions may be challenged for impinging on a student's speech or free exercise of religion.

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Provided it has a legitimate educational reason for doing so, a school may regulate a student’s expression that is or reasonably would be perceived as school-sponsored because, for example, it is delivered in a classroom setting, in school publication, or as part of a school function.²² However, speech or expression with a discernible message that is clearly the student’s own and unlikely to be attributed to the school enjoys greater constitutional protection and is subject to school regulation only under certain exceptions.

The most important of these free speech exceptions in the school safety context is that for “true threats.”²³ The U.S. Supreme Court has described “true threats” as encompassing “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²⁴

Lower courts vary in how they evaluate whether expression constituted a “true threat,” but they all have used some variation of a reasonableness inquiry: whether the speaker reasonably could have foreseen that the speech would be perceived as threat, for example, or whether a reasonable recipient would perceive it as such. The speaker’s intent and the recipient’s reaction may be relevant factors, as well as whether the threat was intentionally communicated to others. A true threat need not necessarily be uttered on campus to warrant school intervention.

The U.S. Supreme Court’s decision in *Tinker v. Des Moines Independent Community School District*,²⁵ establishes two other important exceptions. The first is for expression that causes, or is reasonably expected to cause, a “material and substantial” disruption to school operations. Courts have varied as to what disruption they have found “material and substantial,” but safety issues are likely to be among the more persuasive to a court. School officials need not wait for the disruption to occur, but *Tinker* does not give them license to intervene out of a vague or “undifferentiated” apprehension of disruption. Still, the forecast of disruption must merely be reasonable, and, here again, plausible safety considerations are likely to be relatively more persuasive to a court.

The second exception under *Tinker* that may have safety implications is for speech that “infringes upon the rights of others.” Courts typically have devoted less attention to this part of *Tinker*, but they occasionally have found that schools could regulate student expression because of its effect on other children.²⁶

In upholding a school’s restriction on a student’s drug message, the U.S. Supreme Court recently made clear in *Morse v. Frederick*²⁷ that “*Tinker*’s mode of analysis is not absolute.” Although the *Morse* opin-

ion was carefully limited to speech promoting drug use, the Court's reliance in this instance on the particularly compelling public interest in deterring drug use among children may have significance for other concerns relating to student safety.

Safety-related school rules that affect a student's religious practices also may be subject to challenge under the First Amendment's Free Exercise Clause. Generally speaking, a "neutral rule of general applicability" to all persons does not violate an individual's right to free exercise of religion, even if it has an incidental impact on religious expression.²⁸ However, if the state has adopted a "Religious Freedom Restoration Act" to set a higher bar for government action that affects religious exercise, this state provision may govern the school's actions.

Disciplining students for off-campus conduct

Particularly when it comes to issues of student safety, the old paradigm of the four walls of the school building representing the clear boundary of school disciplinary authority is proving inadequate to address 21st century realities. However, school authority to discipline students for off-campus conduct is limited and varies by state and by court.

A student generally may be disciplined for off-campus conduct if school authorities can show that the student's actions have a direct and immediate effect on either school discipline or the safety and welfare of students and staff.²⁹ Usually, if the off-campus activity involves two or more students from the same school then a sufficient connection will be established to warrant school discipline. However, this type of direct connection is not required.

Where state statutes do not otherwise establish the boundaries of school authority, courts addressing whether school officials exceeded their authority tend to consider the following factors:

- The nexus between the conduct and school safety, welfare, and operations
- The reasonableness of the scope of the relevant provision of the school disciplinary code
- The severity of the school's disciplinary action relative to the seriousness of the student's infraction³⁰

Thus, courts that in recent decades have upheld disciplinary action for off-campus conduct generally have focused on the impact the behavior had or could be expected to have on behavior on campus or the disruption it caused or could be expected to cause to the educational pro-

cess. Actions taken out of concern for student safety, such as intervention in response to violence, online threats, or severe “cyberbullying,” are relatively more likely to be upheld by a court than those arising in other circumstances.

Courts that have invalidated disciplinary actions for off-campus behavior sometimes consider whether the punitive consequences were out of proportion to the misbehavior or were too removed from the school. Most often they focus primarily, in a *Tinker* analysis, on whether the behavior caused or reasonably could have been forecast to cause “material and substantial disruption” to school operations. This approach is especially likely to be employed where the off-campus conduct in question was a form of expression.

Some state statutes clearly define the authority of school officials to intervene in situations occurring off campus. In addition, the authority of legislatures to expand the authority or obligation of school officials to address off-campus conduct is subject to the same constitutional limitations as apply to the school officials themselves. It is for this reason, for example, that state laws addressing cyberbullying tend to require school districts to address cyberbullying in their more general anti-harassment and anti-bullying policies and perhaps to enumerate some aspects the policy must address, as opposed to specifying what particular actions schools must take under what particular circumstances.³¹

Federal statutes on school safety

Additional safety-related requirements for school policies are established through federal legislation and regulations, as well as the state laws and administrative actions that implement these federal statutes.

No Child Left Behind. The federal No Child Left Behind Act (NCLB) imposes a mandate on states receiving funds under the act to provide for the designation of certain schools as “persistently dangerous” and to allow students attending such schools to transfer to “safe” schools in the district.³² Non-binding guidance from the U.S. Department of Education on this provision³³ suggests that a “safe” school is not only one that has not been identified as “persistently dangerous” but one that also is making “adequate yearly progress” academically under NCLB and not the subject of any resulting interventions.

Each state sets its own definition of “persistently dangerous,” in consultation with a representative sample of school districts in the state. States have based their definitions on safety-related offenses or incidents at the school, frequently with reference to the size of the

student population.³⁴ Incidents considered typically are those involving weapons or violence. These may be defined with reference to federal or state law or based on the number of disciplinary actions taken such as expulsions. Some states augment the formulaic approach with a review or other procedure to gather more information on the school environment before assigning the label. Although the U.S. Department of Education has encouraged states to define “persistently” based on just one school year, most states consider data over a two- or three-year period.

States are to notify the school district of any of its schools deemed “persistently dangerous” in sufficient time to allow the school district to offer students the opportunity to transfer at least 14 calendar days before the start of the school year.³⁵ The U.S. Department of Education also encourages school districts to consider developing and implementing a corrective action plan for any school designated “persistently dangerous.”

In addition, the NCLB provision also requires the state policy to allow for the transfer of a student who is a victim of a violent criminal offense, as determined by state law, while in or on the grounds of the public school the student attends, to a “safe” school within the district. The school district is to notify such a student of this option at least 14 calendar days before the start of the school year.³⁶

Safe and Drug-Free Schools and Communities Act. NCLB currently also incorporates the Safe and Drug-Free Schools and Communities Act (SDFSCA),³⁷ which sets forth criteria for federal funding to support school violence prevention programs. Among other things, states receiving funding under SDFSCA must conduct a needs assessment based on ongoing evaluation of violence factors in schools, establish state performance measures for its violence prevention, and assess and publicly report its progress toward meeting the performance measures.³⁸

SDFSCA, in turn, incorporates the Gun-Free Schools Act,³⁹ which requires any state receiving federal ESEA funds to codify in state law a “zero tolerance policy” establishing the disciplinary consequences local schools must impose for a student’s possession of a firearm on campus. The state must require that a school expel a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, for not less than one year, with two exceptions:

- The “chief administering officer” of the school district, which depending on state law may be the superintendent or the school board, may modify the expulsion requirement, in writing, for the student on a case-by-case basis

- The expulsion of a student with a disability would be inconsistent with the requirements of IDEA

The U.S. Department of Education has indicated that each incident must be reported by the school district and the state as an infraction, even if the chief administering officer elects to shorten the expulsion or impose no penalty.⁴⁰

Pending revisions. As of this writing, the reauthorization of NCLB, including SDFSCA, is pending before the Congress. When adopted, the new act may include revisions of existing legal requirements and new mandates for schools. For example, at the time of this writing, there is some indication that Congress is rethinking the “persistently dangerous” provisions of NCLB but considering very significant expansions of reporting requirements. If and when revisions are enacted, they will be addressed in an Afterword to this guide.

Liability for failure to prevent violence

Schools cannot guarantee safety for all students or teachers while at school. Yet, schools do have a duty to provide reasonable supervision of students and maintain the safety of the school grounds, especially since students are required to be at school under compulsory attendance rules. Acts of violence involving schools may make school officials, teachers, or the school board liable for civil damages for those harmed. This liability may arise from a variety of circumstances and may depend on actions taken (or not taken) by the school itself. Schools may face not only civil claims under state tort law, such as negligence, but claims asserting violation of a student’s constitutional rights or civil rights statutes.

Harassment and bullying in schools also increasingly have become the focus of additional legislative interest by states, several of which have enacted measures. State measures range from state requirements for school boards to develop and adopt their own local policies, to programs that provide model policies for consideration by local authorities and other support for the development and implementation of local efforts, to data gathering and reporting requirements, to more prescriptive mandates such as a requirement that every school establish a school safety committee.⁴¹

Civil tort liability. School districts may face potential liability for the violent acts of students where they fail to do any of the following:

- Provide appropriate supervision of students on campus or at school-sponsored functions, especially where prior instances of violence may have occurred

- Warn faculty, potential targets, or school personnel about a preexisting danger, including the known violent propensities of a student, with enough thoroughness and specificity
- Establish or adhere to appropriate school safety policies and plans⁴²

In order for liability to be found, the risk of harm must have been reasonably foreseeable under the facts and circumstances, and the school's failure must have caused the harm. No specific measures, such as constant supervision, security officers, or routine searches, are legally required of schools to enhance safety, so long as the school's efforts fulfill the school's reasonable duty of care.

This general duty of care and supervision extends to preventing a foreseeable suicide.⁴³ School officials with knowledge or notice of suicidal intent on the part of the student must exercise care to prevent the student from carrying out his or her intent.

Even where a school may have a duty to supervise, the school generally will not be liable for sudden, spontaneous violence.⁴⁴

Title IX. Under the Supreme Court's decision in *Davis v. Monroe County Bd. of Educ.*,⁴⁵ an educational institution that receives federal funds can be held liable under Title IX if it is "deliberately indifferent" to severe student-on-student harassment at school based on gender. School officials will be considered "deliberately indifferent" if they are aware of the harassment and respond, or fail to respond, in a way that is "clearly unreasonable in light of the circumstances."

The Court recognized that children often behave in ways that would be inappropriate for adults and that schools cannot be held liable for all such behavior. Therefore, in order for the school to be liable, the harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."

IDEA. One U.S. Circuit Court of Appeals has held that failure to protect a disabled student from severe harassment can deprive a student of the free, appropriate public education to which the student is entitled under IDEA.⁴⁶

Constitutional claims. American courts are reluctant to extend constitutional protection to situations already covered by state civil liability rules.⁴⁷ However, for strategic and financial reasons plaintiffs' attorneys may include constitutional claims in lawsuits over injuries to students.

School officials could face liability for violations of a victim's right to substantive due process where the school itself, through its decisions, "created the danger" of the harm. While the courts have varied in their approach to "state-created danger" cases, generally liability will depend on factors such as the following:

- The school or district, by its affirmative acts, created or increased the danger faced by an individual
- The failure to protect the individual from the danger caused the injury to the individual
- The school's failure to protect the individual was so egregious that it "shocked the conscience"⁴⁸

This is a high threshold for such constitutional claims, although liability still may be imposed in the same case under other laws.

In addition, a school may be liable under the equal protection clause if its failure to protect a student from harm was based on discriminatory motives.⁴⁹

State statutes. State civil rights statutes and anti-harassment and, increasingly, anti-bullying laws may impose additional safety-related duties, and possibly resulting liability, on schools.⁵⁰

In considering liability for failure to prevent violence, it is important to bear in mind that the standards established by these laws amount to the minimum expected of responsible school officials. While liability concerns reinforce the importance of safety efforts, the legal standard established merely to avoid liability may not define a truly effective strategy, program, or policy.

Privacy considerations

Creating a safe school environment requires extensive communications among schools, law enforcement, and social service agencies. Such cooperation involves significant record keeping about disciplinary and counseling matters among schools, law enforcement agencies, counseling and health organizations, research groups, and parents. The appropriate use of these records is essential for schools and the educational process.

At the same time, the confidentiality of student records (educational, medical, and disciplinary) has long been regarded as a compelling state interest, requiring courts, state agencies, and school districts to take reasonable steps to ensure that confidentiality is maintained. If anything, this concern has increased as technology has revolutionized the ease with which data can be compiled and transferred.

The discretion school officials have to disclose information about a student among themselves and to others is limited by the federal Family Educational Rights and Privacy Act (FERPA).⁵¹ Generally speaking, under FERPA personal information that is contained in a student's education records may not be disclosed without the parent's consent. When the student reaches the age of 18, his or her consent is required instead, except for disclosures to the parent as long as the student remains a dependent of the parent under the Internal Revenue Code.⁵² "Education records" is construed very broadly to cover most school records concerning a student, but several of the exceptions to the nondisclosure rule apply in safety-related situations and are described below.

A private individual has no right to sue over an alleged FERPA violation; rather, the remedy is an enforcement action by the federal government.⁵³ IDEA also includes privacy protections related to students with disabilities and special education that largely parallel those in FERPA.

Law enforcement unit records. As an initial matter, certain safety related records within the school or school district are not even considered "education records" subject to FERPA privacy regulations. These "law enforcement unit records" are those that are (1) created by, (2) created for, and (3) maintained by a school "law enforcement unit."⁵⁴ A "law enforcement unit" comprises personnel the district or school has officially designated to secure the safety and security of the institution, or to enforce laws, or to refer law enforcement matters to the appropriate authorities.

Records that are created by the law enforcement unit but that are maintained by another part of the school administration still fall under FERPA privacy rules, as do records that are created by the law enforcement unit exclusively for non-law enforcement purposes, such as a school disciplinary action. Similarly, a school's education records do not lose their protected FERPA status when they come into the possession of the school's law enforcement unit.

Disclosure within the school district. An important exception to FERPA's nondisclosure requirement allows school officials to disclose information that is considered the student's education record to other school officials whom the district or school has determined have a "legitimate educational interest" in the information.⁵⁵ This amounts to something of a "need to know" standard.

The FERPA regulations also specify that the act does not preclude a school from including in the student's education record information about disciplinary action taken against the student for conduct that

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posed a significant risk to the safety or well-being of the student or others and allows disclosure to others in the school deemed to have a legitimate educational interest in the information.⁵⁶

Disclosure to other schools or educational institutions. A school may disclose education or disciplinary records to another school or educational institution if the student is enrolled at or receives services from the other institution, and the following conditions are met:

- The parents or student requests the disclosure, or the school indicates in its annual FERPA notice to parents that it makes such disclosures, or the school makes a reasonable attempt to notify the parent or the student of the disclosure
- Upon the parent's or student's request, the school provides a copy of the record disclosed
- Upon the parent's or student's request, the school provides a hearing on the disclosure⁵⁷

The FERPA regulations also specify that the act does not preclude a school from including in the student's education record information about disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of the student or others and allows disclosure to school officials in other schools who are deemed to have a legitimate educational interest in the information.⁵⁸

Disclosure to non-educational entities. Although FERPA generally restricts access to student records by nonschool individuals or organizations, it allows disclosure without the consent of the parent or student under certain circumstances. Several of these exceptions are relevant to safety efforts. It is important to remember that these provisions of FERPA do not require the school to disclose the information but give them the discretion to do so. As discussed below, other laws may require the disclosure.

Juvenile justice officials. FERPA does not prohibit the disclosure of information to state and local authorities, providing the following criteria are met:

- State law specifically allows the information to be disclosed to the officials
- The disclosure concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication of a case, the student whose records are released

- The officials to whom the records are disclosed certify in writing to the school that the information will not be disclosed to any other party, except as provided under state law, without the prior written consent of the parent of the student.⁵⁹

Disclosure regarding registered sex offenders. FERPA permits the disclosure without consent of information provided to the school under federal law about a student’s status as a registered sex offender.⁶⁰ Although the legislation that made this amendment to FERPA addressed the higher education context, the Family Policy Compliance Office broadly interprets it as applying to elementary and secondary schools as well.⁶¹

Health or safety emergency. Schools are not precluded from disclosing information from education records to appropriate parties in connection with an emergency if the disclosure is necessary to protect the health or safety of the student or other individuals.⁶² The FERPA regulations stipulate that this exception is to be construed narrowly, and generally speaking federal officials have suggested that the exception applies when there is a serious and imminent risk of harm.⁶³

State privacy laws. FERPA establishes a “floor,” rather than a “ceiling,” for protecting the privacy of student records. That is, state privacy laws may be more detailed and may set stricter confidentiality requirements than does FERPA.

Mandatory reporting statutes. Federal or state law may require a school to report information regarding a student’s conduct or may allow the school to exercise discretion on such matters. Generally, federal statutes and state law require schools to report to law enforcement officials any criminal or violent acts (e.g., assault, homicide, child abuse) or possession of weapons or drugs.⁶⁴ Property damage, vandalism, and destruction of property may or may not come under a state-reporting requirement.

FERPA generally preempts state laws that directly conflict with its requirements, but school officials who believe that they cannot comply with FERPA due to conflict with state or local law are required to notify the U.S. Department of Education’s Family Policy Compliance Office within 45 days and provide the text and citation of the conflicting law.⁶⁵

Health Insurance Portability and Accountability Act (HIPAA).

The privacy requirements of this federal act relating to health information sometimes are a cause for concern among school officials who are uncertain what if any obligations they may have under this act. In

particular, school nurses, school counselors, school psychologists, and other school personnel whose professional certifications and affiliations may entail more association with the health care sector and interactions with non-school health officials and care providers are likely to encounter information related to HIPAA.

However, HIPAA is unlikely to be of relevance in a school safety situation—or, for that matter, in other school situations—because the HIPAA Privacy Rule regulations specifically exclude from their coverage information that is contained in an education record already protected by FERPA.⁶⁶ The obligations of these school-based professionals generally are those applicable to other school officials.

Protection of Pupil Rights Amendment (PPRA). This federal statute requires parental consent before minor student are required to take part in a survey funded through the U.S. Department of Education that addresses any of a number of sensitive topics.⁶⁷ Included on the list of topics are two that may be of relevance to surveys undertaken in connection with school safety efforts:

- Mental and psychological problems potentially embarrassing to the student and his or her family
- Illegal, antisocial, self-incriminating, and demeaning behavior

School security personnel and law enforcement

The terms of employment of the personnel whose duties focus primarily on school safety and circumstances under which they act in specific situations have implications for the legal standards governing their actions. The law makes clear distinctions between school disciplinary actions by school personnel and criminal enforcement actions by law enforcement personnel, recognizing the difference in potential consequences and the practical realities of the school environment. School safety arrangements and efforts sometimes can blur these distinctions.

School resource officers (SROs), full-time police officers assigned to provide security services at public schools, are one approach some school districts and law enforcement agencies have pursued in the wake of high-profile events like school shootings. SROs can develop more cooperative and trusting relationships among students and school officials, as well as help better inform law enforcement agencies about safety issues in schools.

However, the SRO's role straddling the twin realms of educational administration and law enforcement requires school officials to consider whether, under particular circumstances, an action by an SRO falls into one realm or the other and what the legal implications are

of this determination. The SRO's formal police powers mean that the stricter constitutional standards applicable to law enforcement may apply.

Interactions with local law enforcement authorities can raise similar questions about the boundaries between, and overlap of, school discipline and criminal law. Mandatory and discretionary reporting by school officials to law enforcement authorities is addressed above under "Privacy considerations." Sometimes, however, it is law enforcement officials who initiate contact with schools, seeking access to students on campus concerning matters that may, but do not necessarily, pose safety issues at the school.⁶⁸

Search and seizure. As discussed earlier, to conduct a search, school personnel without formal police powers need only have a "reasonable suspicion" that school rules have been violated. However, a search in school conducted by, or under the auspices, of law enforcement officials must be based on the "probable cause" standard applicable to police searches.

Probable cause requires that a search or arrest be objectively reasonable under the totality of the circumstances.⁶⁹ This is a fluid concept based on an independent assessment of the facts in each situation. Probable cause does not mean the law enforcement official must be correct or even more likely correct than mistaken, but it does mean more than a hunch, feeling, or vague suspicion. There must be facts that can be articulated to support the officer's conclusion.

Courts are divided over which standard governs searches by SROs.⁷⁰ Some have emphasized the SRO's police powers and applied probable cause,⁷¹ while others have stressed the SRO's special relationship with the school and applied reasonable suspicion.⁷²

Several other courts considering searches conducted by law enforcement personnel in schools, however, have adopted a case-by-case approach focusing on whether the search was undertaken on law enforcement's initiative or at the request of school officials.⁷³ Decisions finding that the reasonable suspicion standard applies to a search initiated by school officials, even if conducted by law enforcement personnel, have been based on the assumption that the officer has only limited involvement and discretion in the decision to search a student and, in essence, is acting as an agent of the school and only exercising the authority delegated from school officials.⁷⁴

Interrogations. Students generally enjoy no Fifth Amendment right to refuse to respond to questioning by school officials, nor must school officials inform students of their "Miranda rights" before questioning

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By drawing on best practices, schools demonstrate that their policies are well thought out, comprehensive, and reasonable . . .
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them.⁷⁵ As with searches, questioning of students initiated by law enforcement officials or with criminal implications would be subject to the standards that generally apply to law enforcement officers.

School board policies vary, depending on state law and the board’s policy preferences, as to whether they require school officials (1) to comply with any law enforcement requests to interview a student, or (2) first to notify the student’s parents unless the police assert a legal right to access the student without such notice, such as in cases of suspected child abuse or pursuant to a court order.⁷⁶ Law enforcement officers, rather than school officials, are responsible for compliance with the legal requirements applicable to their actions.

One possible implication of the distinction between the two standards is that information obtained in questioning under the auspices of mere school disciplinary efforts, and thus without the protections that generally apply to interrogations by law enforcement authorities, may subsequently be inadmissible in any related criminal proceeding.

General and practical considerations

These various legal requirements, along with simple considerations of effectiveness and public support, have important implications for school policies. Because most school boards have well-established policy processes already in place, this section will highlight a few guiding principles.

In general, school policy making should ensure that disciplinary and safety rules are:

- Directed toward an identified and legitimate safety, disciplinary, or educational goal or mission
- Consistent with federal and state constitutional and statutory standards
- Within the school district’s and school’s authority
- Articulated, clear, and consistent
- Nondiscriminatory
- Properly adopted
- Publicized and disseminated
- Consistently applied and properly enforced
- Supported by the community

Several key practical considerations warrant some additional discussion:

- The policy should incorporate best practices whenever possible
- The policy must be communicated to, and understood by school personnel, students, and parents.
- The policy should be informed by data where possible and periodically reviewed and revised as appropriate
- School officials should carefully consider the full range of potential options in school safety situations, including proactive and preventive measures and alternatives to disciplinary approaches

Best practices. Perhaps one of the most important elements of developing district policies is ensuring they are effective and draw on best practices in the field. Research and development, government programs, and the work of schools throughout the nation have led to an ever-increasing store of knowledge regarding school safety plans, violence policies, and promising prevention and intervention programs. In many areas, state school safety centers have been established to assist local school districts. Most state school boards associations provide policy support to school districts. This support benefits from strong familiarity with the particularities of state law, the federal and state court rulings, public schools, and school governance in that state. Numerous national associations and centers that publish model programs and policies for schools augment these efforts. A listing of some resources in this area is included in the Resources section of this publication.

By drawing on best practices, schools demonstrate that their policies are well thought out, comprehensive, and reasonable, which strengthens their position should legal challenges or issues arise.

Dissemination of policies. Of course, school board policies, school safety plans, and student conduct codes are effective only if students, teachers, and parents are aware of them. Schools are advised to make every effort to ensure students and parents are aware of the existence of school safety policies and plans and are familiar with the provisions of the school conduct code. Many schools ask both students and parents to sign forms stating they have read the school conduct code as a part of school procedures related to student enrollment, participation in extracurricular activities, or notification of grades. In addition, teachers may find appropriate opportunities to reference the school conduct code or safety plan as a part of parent-teacher conferences.

Moreover, schools would benefit from frequent references and overviews of the school safety plan in board meetings, school newsletters, or other outreach efforts to parents, students, and the community.

While no specific measures are required of schools in this regard, any effort to certify that students and parents are aware of the school's safety plans will heighten awareness and enhance the security of the school.

In services for school personnel can help ensure that school officials are aware of the policies and procedures and have a better idea where and when to refer to them and how and when to seek additional guidance. While there are, of course, countless competing priorities for the time and attention of school personnel and the training funds that support quality training, not only can such efforts improve the effectiveness of safety programs, but they also can be important should even a strong program fail to prevent an incident. Evidence of the school district's efforts to disseminate information to the school community can figure importantly in litigation over a school's alleged failure to fulfill its responsibilities.

Data-driven decision making, reevaluation, and revision. As in other areas of education policy, school safety programs can benefit tremendously from more sophisticated data collection and analysis. Here again, there are practical limitations in terms of staff time and funding for reporting and processing of data that sometimes are all too easy for policymakers to overlook or discount, especially given the small size of the preponderance of the nation's school districts. Nonetheless, the current attention to data-driven decision making in public education generally, assistance from other organizations, and technological innovation have made possible much more sophisticated and manageable systems for basing school policy on local generated data.

This also presents the opportunity for school officials periodically to review new data, to reevaluate current policies and practices, and to revise them where appropriate. Indeed, one of the principal advantages local policy making has over more ponderous federal and state legislative processes is the ability to craft policies and practices to suit local conditions, to gather prompt feedback on their effectiveness, and to correct problems with comparative speed. Data not only can be powerful for generating public support for policies, but frequently can prove decisive in litigation over the policies or their implementation.

Proactive and non-punitive approaches. Reactive approaches that rely heavily on purely disciplinary measures are decidedly disadvantageous where school safety matters are concerned. Few things have brought this point home more powerfully than school shooting tragedies, which have prompted careful examination of questions like school climate, identification and support for troubled youth, and crisis management plans and training. As a matter of sound policy, proactive

efforts that include a range of both disciplinary and non-punitive interventions are desirable.

On the legal side, proactive efforts can be an important demonstration that school officials fulfilled their duty of care to the school community. Alternatives to disciplinary measures, meanwhile, implicate fewer constitutional questions. Even when interventions do have at least a partly disciplinary character, less severe disciplinary consequences entail lower legal stakes and can be persuasive to a court that the school was not overreacting.

In this connection, school officials should consider carefully the balance to be struck in “zero tolerance” policies between the need for vigorous and consistent enforcement and the need not to deprive school personnel of all professional discretion in ways that lead to unintended consequences.⁷⁷ The formulaic application of some policies have generated embarrassing headlines for schools, as well as lawsuits.⁷⁸ Critics also argue that zero tolerance policies have exacerbated, rather than ameliorated, racial and socioeconomic disproportionality in student discipline.⁷⁹ (This is referred to as “disproportionate minority contact” in the juvenile justice system.)

The caution against purely punitive approaches is as applicable in the wider context of education policy as it is in student disciplinary decisions, albeit for different reasons. The “persistently dangerous” provisions of NCLB, for example, have generated considerable criticism on this point, notably complaints that:

- The very designation connotes a level of violence that has led many states to set high definitions of what constitutes such an extreme case, thereby understating safety problems.
- The “unsafe school choice” transfer option (USCO) does nothing for the vast numbers of U.S. students in communities without nearby “safe” schools or, for that matter, any other schools serving the same grade level—assuming the students and parents would even like to change schools, which for many reasons frequently proves less desirable an option than policymakers expect.
- It is unclear how allowing students to transfer elsewhere does anything to make the school any safer.
- The approach creates perverse disincentives, in effect penalizing schools for aggressive reporting and interventions, which end up being counted against the school’s safety profile.⁸⁰

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Section 2.

Specific Safety Issues and Situations

The general legal and practical considerations outlined in Section 1 apply in more specific ways to a variety of school safety policies and actions. These include both policies that establish preventive measures and those that attempt to outline appropriate responses to specific situations in advance in order to achieve more favorable outcomes than complete reliance on improvisation.

Preventive measures

As mentioned above, proactive and preventive efforts are preferable and ideally can reduce the need for some of the responses discussed below.

Safety planning generally

A school's preventive planning has implications for its potential liability for violence. Planning and policies can benefit from collaboration with law enforcement officials and from the gathering and evaluation of data on the school climate.

Liability considerations. Comprehensive school safety plans are an integral part of school management, yet paradoxically the decision to adopt and implement a plan may not protect a school from potential liability. A school may be held to a greater standard to ensure supervision and safety where it adopts a school safety plan. Courts have held schools liable in such circumstances under the belief that where a school increases efforts to curb violence, it assumes a greater duty to supervise students and persons on school grounds in part because people rely on the provisions of the plan to protect them.⁸¹

In light of current youth violence levels, however, liability will be asserted more often where a school fails to adopt a school safety plan. Ultimately, a school's responsibility rests on whether the act of vio-



lence was foreseeable and on an assessment of the school's duty to maintain a safe environment under the circumstances. Consequently, the existence or absence of a school safety plan will not be the only determining factor regarding a school's liability. At any rate, this is an example where the legal calculations probably are less important than the underlying policy question about effectiveness.

Cooperation with local law enforcement. There are significant advantages to working out some plans and procedures collaboratively with law enforcement in advance. Interactions between school and law enforcement officials can be high-pressure situations fraught with legal pitfalls and, sometimes, conflicting priorities. Among the issues officials may want to address are:

- Emergency response plans and procedures
- Sharing of information about risk factors, consistent with privacy requirements
- Rules and procedures governing the reporting of student violence to law enforcement authorities
- The school's expectations and policies in the event law enforcement officers seek access to students at school

Safety related data. Tracking of incidents and other related safety data such as student, teacher, and parent perceptions can provide early indicators of latent safety issues and allow for earlier interventions. Evaluations of school climate can be a powerful tool for informing local policymaking not only for these purposes but also for building public engagement and confidence in the community's schools.

As noted above, the U.S. Department of Education encourages states to provide for evaluations of, and safety interventions in, schools designated as "persistently dangerous" under NCLB. At least one state requires a survey of students about safety in the school before assigning the label. Even if the state does not require or support such measures, school officials should consider steps like these to address the safety issues. Note that student surveys used to gather data will need to be conducted in accordance with the requirements of PPR.

Supervision

The most basic security measure a school can take is simply to provide adult supervision. No specific measures are required of schools to enhance safety on school grounds. Courts generally are reluctant to impose such requirements and consequently have not required schools

to provide security officers, conduct routine searches, or adopt supervisory programs.⁸² Constant supervision of students is not required.⁸³

A school may, however, have a duty to supervise a particular area of school grounds depending on whether similar acts have occurred in that area previously. The currency, frequency, location, and nature of the prior crimes will be factors in determining whether the crimes establish a duty to supervise.⁸⁴ Common sense dictates that a school will be liable if a person is injured in an area where attacks of the same type occur often. Schools should develop monitoring plans for these “hot spots,” and are especially urged to adopt a school safety plan where there is a generally high level of violence at a school or the school is in a high crime area. The most effective school safety plans will include an assessment of the time and location of incidents and increase monitoring and resources during that time.

Increased supervision in certain locations may be a particularly sensible option for responding to some incidents of bullying, since victims may fear that other forms of intervention by school officials will make things worse than efforts simply to reduce or eliminate opportunities for the bullying to occur.

Generalized searches

General searches of students in the absence of reasonable suspicion generally are vulnerable to legal challenge. However, based on a lower expectation of privacy, the legal barrier is lower for searches of lockers and desks, the use of metal detectors and, depending on their placement, the employment of surveillance cameras in schools and on school buses.

Metal detectors. Metal detector searches are clearly permissible security measures. Although individualized suspicion is normally required for a search, general searches are permissible where the search is minimally intrusive and the individual has a low reasonable expectation of privacy, such as at the entrance to a school. Metal detector searches are valid where notice (a posted sign, for example) has been given stating that such searches will be conducted at that school, and where a school policy governing such searches is in place. It is not required that the actual date of the metal detector search be provided.⁸⁵

Locker or desk searches. Generally, locker or desk searches are permissible as a function of the orderly administration of a school. Schools should adopt and carry out a policy informing students that the school owns the lockers and may search them from time to time.⁸⁶ Less clear is the school’s authority to extend the locker or desk search to the insides

of a student's private articles within the locker or desk, such as jackets, purses, and backpacks. A court might find that, notwithstanding the school's notice, students still had a reasonable expectation of greater privacy in these items and conclude that a school official must possess individualized reasonable suspicion to search them.

Cameras. Technology increases the ability of school officials to monitor the activity of the student population through advanced camera and recording systems. The key question is whether a student has an expectation of privacy in the area being filmed. Accordingly, photographing public areas such as buses, hallways, classrooms, and cafeterias is permissible, while the use of a surveillance camera in a gym locker room or bathroom is normally unacceptable.⁸⁷

As more schools install surveillance cameras, considerable uncertainty has arisen as to the privacy requirements governing video footage showing students. Questions have arisen as to whether the footage constitutes an education record with respect to students shown engaged in conduct that led to disciplinary action or to other students who may appear in the footage and, if so, who has the right to access the footage. As of this writing, the U.S. Department of Education's Family Policy Compliance Office is considering issuing additional guidance on these questions. The office suggests that one option is for a school to assign responsibility for the camera to its existing "law enforcement unit," or to designate an employee to serve as the school's "law enforcement unit" to maintain the security camera so that the video footage is not an "education record" for FERPA purposes and the school can determine the appropriate circumstances in which footage shall be disclosed.

"Profiling"

In the aftermath of school shootings, the identification of warning signs that in hindsight seemed apparent has raised questions about the efficacy and legality of "profiling" practices in identifying risk factors in advance. Concerns include those related to unreasonable search and seizure, discrimination, and privacy.

In some circumstances, a list of risk factors for youth violence or a profile of a potentially dangerous student may be used as grounds to question a student or to search his or her possessions or person. The Supreme Court has expressly approved the use of "probabilistic" profiles in other settings to identify potential drug couriers or terrorists.⁸⁸ In these circumstances, the fact that lists of factors giving rise to reasonable suspicion are also part of a profile "does not somehow detract from their evidentiary significance...."⁸⁹

Search and seizure. Generally, individuals may be searched based on their identification through the use of a profile because the profile provides the officers with reasonable suspicion to stop a suspect.⁹⁰ Profiles are treated as an objective and useful tool and are valid so long as they leave no room for subjective interpretation by security authorities and are not applied in a discriminatory fashion.⁹¹

The profile, however, should not stand alone as the only factor justifying a search. School officials might use a profile to stop students to inquire about their activities, but probably need other suspicious individual behavior or other corroborating information in order to conduct a full search of the student's person or property.

Nondiscrimination. Student characteristics can complicate matters considerably. Those indicators in a risk factor list, for example, may appear benign as an initial matter but when utilized in school policies may have the effect of selecting individuals who are disproportionately members of a protected class. Characteristics that might work as proxies in this way include poverty, school achievement or skills, weapons possession, or history of suspension. Minorities are often disproportionately represented in these characteristics, raising at least the question of invidious discrimination.

A school official still needs reasonable grounds for suspecting a search will reveal contraband or evidence that a student is violating school rules under the circumstances. A profile match on a student tells a school official nothing regarding the presence of contraband or whether a student is violating school rules in a specific instance, so it should not be the only basis for the search or detention of a student.

The U.S. Secret Service and U.S. Department of Education produced a threat assessment guide providing recommendations for effective methods of assessing potential violence in a school setting.⁹² Among the cautions in the report is the warning that “[t]here is no accurate or useful ‘profile’ of students who engage in targeted school violence.”⁹³

Other privacy concerns. FERPA does not address these threat assessments directly and does not provide an exception for this type of information in a student's record. Therefore, the release of information on student achievement, behavioral or academic history, personal interests, extracurricular activity, or similar background information on a student is governed by the general provisions of FERPA, meaning the release must be accompanied by notification and consent of the student's parents or guardians. Both the U.S. Department of Education and the Federal Bureau of Investigation have expressed grave reservations about the use or misuse of profiles in schools, so extreme caution is recommended.

One place school officials increasingly monitor for potential safety threats that could relate to profiling is the Internet, where students post a great deal of information. Although it will not necessarily be required by a court, a school will be in at least a relatively safer legal position in any resulting litigation where it has put students and parents on notice that it may engage in such monitoring.

Zero tolerance policies

School boards may adopt zero tolerance policies in order to send a strong message about unacceptable conduct or simply to comply with a federal and state mandate. Although the federal mandate in the Gun-Free Schools Act applies only to firearms, some states have broadened the definition of “weapons” for purposes of their related statutes firearms to include knives, razors, slingshots, brass knuckles, and any other inherently dangerous object. In addition, some schools may view threats of violence from students, including assaults not involving the use of a weapon, as a reason for expulsion.⁹⁴

In light of the school district’s clear responsibility to ensure the safety of teachers and students, school officials may expect zero tolerance sanctions to survive legal challenges so long as the school guarantees the student the necessary due process protections. Such policies are not a violation of state compulsory education laws.

Wherever federal and state laws allow, local school officials should seriously consider ensuring that local policies allow for some degree of discretion by professionals as a safeguard against the potentially non-sensical results of mechanically applied rules.⁹⁵ As noted above, even the Gun-Free Schools Act allows school officials some flexibility in the “mandatory” one-year expulsion for a weapons violation.

One question arising from zero tolerance policies that school officials may want to discuss with legal counsel is whether disciplinary consequences can or should be imposed on a student who may not have knowingly violated the rule. Notwithstanding the distinction the law makes between student disciplinary actions and criminal proceedings, and notwithstanding the plain language of the Gun-Free Schools Act, one federal appeals court has held, based on criminal law principles, that a school could not punish a student for possessing a weapon on campus without showing that the student did so knowingly.⁹⁶

Student dress codes and uniforms

School dress codes and uniform policies, which may be adopted in part out of safety considerations such as ease of visually identifying students at the school, must bear a reasonable relationship to the

“**Restrictions on messages on clothing generally must not be based on the viewpoint expressed.**”

”

school's educational mission or the need to provide a safe and secure learning environment, and not simply represent a mere matter of preference or taste.⁹⁷ So long as the policies are consistently applied to achieve the school's inherent educational mission—such as improving school attendance, dropout rates, academic performance, or school safety—they generally will be upheld against legal challenge.⁹⁸

However, because attire can be a form of expression or be based on religious requirements, such policies may implicate First Amendment concerns. If possible, accommodations should be made for religious reasons.

Restrictions on messages on clothing generally must not be based on the viewpoint expressed. However, exceptions grounded in the *Tinker*, *Fraser*, and *Morse* decisions involving material and substantial disruption or safety concerns based on past incidents at the school, or vulgar or drug-related messages contrary to the school's mission may withstand constitutional scrutiny. The highest safeguards are afforded political speech, such as statements of support for candidates, social causes, symbols of ethnic heritage, religious symbols, and words to express ideas or opinions. Dress codes that restrict such expression are legally safest if they are strictly content neutral, such as a school uniform policy that prohibits all printed messages on clothing.

Among the additional steps a school can take to improve its position in anticipation of possible legal challenges to its dress code:

- Support the adoption of the dress code with an explanation of how the policy furthers the school's educational mission.
- Adopt findings, as necessary, that indicate school dress codes help reduce gang activity or other antisocial or violent behavior, ease tensions between students, aid schools in identifying campus visitors or intruders, and promote school safety in general.⁹⁹
- Especially important, ensure that there are alternative avenues of free speech to balance the individual student's interest in free expression with the school's interest in a quality education,¹⁰⁰ such as free speech forums, bulletin boards, online discussion forums, free speech classes, school suggestion boxes, expressly allowing students to wear buttons with messages, or any other avenue allowing students the opportunity to express their individual views on matters of public opinion.
- Adopt opt-out policies in uniform requirements, particularly where traditional ethnic or religious dress is an important part of family life.¹⁰¹

Responses

The following are some of the key considerations for policies that address situations to which school officials may have to react.

Suspension, expulsion, and investigative removal generally

Decisions to remove a student from his or her normal educational placement must be made in accordance with constitutional and state statutory requirements. Actions involving a change in placement of a student with a disability must be taken in accordance with IDEA.

Because due process concerns are inversely related to the severity of disciplinary consequences, school officials are well-advised to consider the full range of interventions at their disposal. A suspension entails less due process concern than does an expulsion, a short suspension less than a longer one, placement in an alternative learning setting less than temporary exclusion from learning, in-school suspension less than removal to an alternative school, etc.

Generally, notice and a hearing must precede a student's removal from school, except where the student presents an imminent threat to himself or the safety of others. Emergency situations justifying the immediate suspension or expulsion of a student may include conduct that:

- Seriously disrupts the academic atmosphere of the school
- Endangers other students, teachers, or school officials
- Damages property¹⁰²

In emergency situations, one option is a two-step approach in which the school (1) immediately imposes a temporary suspension or expulsion, and (2) enforces a permanent expulsion after the proper notice and hearing. In these scenarios, notice and a hearing must be provided as soon as practicable. Prompt notice to the parents and prompt scheduling of a hearing are desirable in such a situation.

Another option is removal from the regular educational placement simply to afford an opportunity for evaluation of whether a student may pose a risk—in other words, an investigative, rather than disciplinary, removal.¹⁰³ For example, in such a removal the student could be offered the opportunity to return to school after submitting to an evaluation that confirms that he or she poses no threat to safety.

Reporting and disclosures generally

When it comes to school safety, the privacy challenge is twofold: (1) protecting privacy of confidential information, while at the same time (2) not obstructing the legal uses of important information out of a misunderstanding about what privacy laws require.

FERPA requirements and other privacy concerns have been scrutinized as possible obstacles to the sharing of information important to preventing school violence. As detailed above, FERPA includes a number of specific provisions for the legal disclosure of information related to school safety or violence, and the records of school law enforcement unit records are excluded from FERPA's restrictions altogether.

If individual school districts do not already possess administrative rules governing the reporting of student violence to law enforcement authorities, they are urged to develop them immediately. Consulting law enforcement officials during this process can ensure that everyone understands the procedures.

Each of the incidents discussed below may also trigger state reporting statutes. In addition, they may be among those that the state factors into its definition of "persistently dangerous" under NCLB.

Violence

One issue school officials may want to consider addressing in their student disciplinary code is whether all students involved in a fight will face discipline. Students generally do not have a legal right to invoke self-defense when being disciplined for violence. Disciplining all students may avoid hopeless "he said-she said" scenarios. Clearly communicating the rule to students may also serve an important practical use of giving students an excuse to back away from a confrontation while saving face.

At the same time, school officials should consider possible scenarios in which a zero tolerance policy of this kind may lead to unintended outcomes.

Particularized searches

The level and variety of school violence may place significant pressure on school officials to use a range of methods to intercept guns and weapons in schools or to respond to threats of violence. The reasonableness and allowable scope of a search are greatest where there is imminent danger of harm.

While searches undertaken by law enforcement officials, or at their request, are subject to the higher probable cause requirement, school officials may inspect a student's bag (purse, backpack, duffel) and clothing for hidden weapons, cigarettes, and drugs where they have reason to do so (e.g., a tip that appears to be reliable, observation of materials associated with drug use, bulges in clothing characteristic of weapons). In addition, school officials may search a student for weapons where they notice a bulge in a student's clothing characteristic of knives and the officials received an anonymous tip that a student had a weapon. School security officers may frisk a student and proceed on reasonable suspicion resulting from the tip. A search may be conducted where a student does not possess the proper school pass and acts excited, aggressive, or exhibits other signs of potential drug use when confronted by school officials.¹⁰⁴

Searches by law enforcement officers at the behest of school officials, on the other hand, have been upheld, at least by some courts, under the following circumstances:

- Where an officer who found a student in a hall without the proper pass and escorted the student to the dean's office learned the student was suspended, giving rise to an arrest for criminal trespass¹⁰⁵
- Where an officer noticed a student arriving at school with bulges in his pockets characteristic of certain types of knives¹⁰⁶
- Where an officer conducted a pat-down search only after a school official had already questioned a student and discovered evidence of a theft¹⁰⁷
- Where the SRO observed a school official, based on student tips, enter a restroom to find students smoking marijuana, then searched students, finding additional marijuana¹⁰⁸
- Where the SRO handcuffed a student, at the request of an assistant principal who "needed someone with greater strength" to control the student while she conducted a search¹⁰⁹
- Where officers conducted "point of entry" searches (at school entrances), as directed by school administrators¹¹⁰

Teachers and school officials should be careful to document their preliminary observations, sources of information, tips, investigative steps, or other evidence that leads to reasonable grounds for a search.

Student tips. In the case of student tips about illegal behavior, school officials must take steps to verify the reliability of the information.¹¹¹ Verification may take several forms, including:

- Subjecting the student informant to extensive questioning regarding the student's motives, perception, or source of knowledge
- Conducting their own investigation of the accused student's activities through direct observations, questioning classmates, or using other methods to corroborate the tip

Either approach ensures school officials have reasonable grounds to believe a search will produce contraband or evidence of illegal behavior.

Strip Searches. In light of the serious invasion of privacy it represents, a strip search should be used rarely and as a last resort. A strip search may be reasonable where:

- The item cannot be found in other locations
- There is reason to believe the student possessed the item
- A policy outlining strip search procedure exists and is followed

Strip searches in cases of imminent physical harm to students or school personnel are probably justified, especially where weapons may be involved. Imminent circumstances would mean that a student presents an immediate and impending threat to himself or others, such as where a student threatens to use a weapon the student appears to possess (as indicated by a characteristic bulge in clothing, for example), but is detained before he or she can carry out the threat.

Some steps a school can take to protect itself legally are:

- First conduct an exhaustive search of possible alternative locations for the contraband items
- Establish with reasonable certainty that the student possessed the item (through a reliable witness, or the elimination of all other possibilities, for example)
- Thoroughly explain the search to the student in accordance with a preexisting policy
- Ensure that the search is as minimally invasive as it can be under the circumstance, including that it is conducted by an employee of the same gender

One option worth considering is a requirement that, circumstances permitting, the school district's legal counsel must pre-approve any search involving a student's disrobing.

Threats of violence

Disciplinary actions may be taken simply for the threat of harm to another person. Students sometimes will threaten to hurt fellow students out of frustration, fear, or a genuine intent to harm. Threats may take several forms including direct threats ("I'm going to kill you"), indirect threats ("If I wanted to I could blow the school up"), veiled threats ("If you want to settle this, let's go outside"), or conditional threats ("If I don't get out of detention, I'm going to cut you.").

The line between a real threat of violence, on the one hand, and parody, creative expression, or the simple voicing of frustration, on the other, frequently is difficult to draw, especially without benefit of hindsight.

Where there clearly is no serious threat of violence, even highly inappropriate expression by a student may be protected speech. In such a situation, even if the *Tinker* "material and substantial disruption" standard does not necessarily govern, that standard still can provide a useful point of reference for school personnel in knowing when to proceed cautiously.

Steps schools can take to improve the legal justification for their policy on threats and a resulting action include:

- Ensuring that the policy is grounded in the prevailing "true threat" analysis in that jurisdiction
- Ensuring that the school conduct code clearly identifies the behavior related to threats that could result in discipline, in order to provide teachers, students, and parents with an enforceable understanding of the appropriate conduct in school
- Establishing an understanding among school personnel that, circumstances permitting, they will seek legal guidance before proceeding in any situation in which they cannot clearly describe the significant disruption that has occurred or articulate their reasonable forecast of significant disruption
- Emphasizing to the school personnel the need to consider carefully the full range of disciplinary and non-disciplinary options for ensuring school safety, in order to minimize the risk of overreaction or the appearance of overreaction
- Stipulating in the school's acceptable use policy for school technology that using school computers to make threats will not be

tolerated; the school faces a lower free speech bar to regulating the use of its own equipment

In addition, see the discussion of “Off-campus conduct or expression,” below.

Harassment and bullying

Policies to combat harassment and bullying must comply with any applicable federal and state statutes.

As an initial matter, it is worth noting that harassment generally is a different category from bullying, is more serious, and may constitute criminal conduct.

Some unique aspects of harassment and bullying have practical implications that are worth consideration by school officials:

- Because victims can experience ostracism for coming forward with complaints, educational efforts directed at all students instead of disciplinary efforts directed only at perpetrators can be particularly important
- Courts considering harassment claims frequently consider what kinds of efforts the school has devoted to training of personnel and other educational efforts
- Notions that bullying represents an inevitable “rite of passage” may cause some personnel to discount the seriousness of the situation and its potential legal implications

As with threats, schools can:

- Ensure that the school conduct code clearly identifies the behavior related to harassment and bullying that could result in discipline, in order to provide teachers, students, and parents with an enforceable understanding of the appropriate conduct in school—this is particularly important with respect to cyberbullying
- Provide inservices to employees and educational programs to students on harassment and bullying prevention
- Establish an understanding among school personnel that, circumstances permitting, they will seek legal guidance before proceeding in any situation in which they cannot clearly describe the significant disruption that has occurred or articulate their reasonable forecast of significant disruption

“
... harassment generally is a different category from bullying, is more serious, and may constitute criminal conduct.
 ”

- Stipulate the school's acceptable use policy for school technology that using school computers to engage in harassment or bullying will not be tolerated; the school faces a lower free speech bar to regulating the use of its own equipment

In addition, see the discussion of "Off-campus conduct or expression," below.

Off-campus conduct or expression

Intervention in response to off-campus behavior, especially online expression, should be approached with great legal care, since school authority over both off-campus conduct and free expression are limited and, with respect to online expression, the law is still early in its development.

That said, actions taken out of concern for student safety, such as intervention in response to online threats and severe cyberbullying, are at least relatively more likely to be upheld by a court than those arising in other circumstances. Because of the legal uncertainties, this is an area in which the need to consider the full range of alternatives to disciplinary action is most acute.

Thus, as with threats and harassment and bullying generally, schools will be better able to defend their policy where:

- The policy clearly puts parents and students on notice about what kinds of off-campus conduct may result in school intervention
- They establish an understanding among school personnel that, circumstances permitting, the school will seek legal guidance before proceeding in any situation in which they cannot clearly describe the significant disruption that has occurred on campus as a result of the off-campus conduct or articulate their reasonable forecast of such disruption
- Schools emphasize to their personnel the need to consider carefully the full range of disciplinary and non-disciplinary options for ensuring school safety in order to minimize the risk of overreaction or the appearance of overreaction

Liability tradeoff. One complication for school officials to discuss with legal counsel is the potential tradeoff between the desire to assert authority over off-campus conduct and expression and the potential resulting assumption of liability.

In one recent case, for example, a plaintiff student filed various claims relating to the school district's alleged failure to protect her from harassment by classmates that featured the posting on the Internet of a photo of her and its dissemination among students.¹¹² The court ultimately dismissed the case, noting for purposes of the Title IX sexual harassment claim that the school did not have the requisite "substantial control" over those who disseminated the photo, including the non-student who initially posted it.¹¹³ Still, the attempt to impose liability on the school district based in part on off-campus, online activity is notable. A district that strongly asserted its authority over such activity by students in one instance might complicate its own defense against this kind of lawsuit in another.

Student sex offenders

Schools should consider adopting policies that detail in advance how they will reconcile their compliance with their legal obligations to a student who is sex offender with laws intended to protect against sexual predators. Schools must reconcile the generally applicable privacy safeguards with the kinds of notice of sex offenders that may be required or permitted under federal and state laws. Other practical options could include providing increased or even continual supervision of the student offender.

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Conclusion

Schools tend to be safe environments for children compared to other settings, which is not surprising considering that children are closely supervised at school and public schools are heavily regulated. For example, federally reported data indicate that rates for serious violent crime were less at school than they were away from school in each survey year from 1992 to 2004: in 2004, students ages 12–18 were victims of four serious violent crimes per 1,000 students at school, as compared with nine serious violent crimes per 1,000 students away from school.¹¹⁴

But the survey results and other indicators also show that students continue to be victimized at school too frequently, have concerns about their own safety, and report engaging in avoidance behaviors at school. Even if there were no injuries, perceptions like these adversely affect the core mission of schools: learning.

School policy making and attention to legal issues are critical to creating a school environment that is safe for students, teachers, and school officials. By setting the standard of cooperative behavior among the entire school population, school policies can strengthen community values, build esteem among students, prevent violence, and reduce the level of trauma if violence occurs.

School officials can and should act assertively in developing and implementing the kinds of policies discussed generally in these pages. While school officials have a moral and educational role in doing so to protect students and teachers, they also bear a responsibility as stewards of public resources to limit the school's level of liability in situations where violence occurs. At the same time, they must ensure that the indispensable civic institution of public schools respects and reinforces the legal framework that is crucial to the nation's social fabric.

In this regard, the philosophical approach the school district takes in its school safety efforts is important to the results. Ultimately, more secure schools will result from an institutional culture of integrity, fairness, justice, and cooperation exhibited and taught by school boards, district leaders, principals, teachers, and others. Helping young people to understand that justice is less about punishment and retribution and more about realizing a community's vision will build their sense of values, personal integrity, and responsibility.

While schools carry a great burden in balancing these issues, they may draw on significant resources offered by federal, state, and local governments; private organizations; and research universities and colleges. Dedicated, proactive, comprehensive, and creative efforts to support and empower local schools in developing clear and consistent safety policies can significantly reduce the risk of violence for all children.

Endnotes

¹ Wood v. Strickland, 420 U.S. 308, 326 (1975).

² Mathews v. Eldridge, 424 U.S. 319 (1976).

³ 419 U.S. 565 (1975).

⁴ *Id.* at 581–82.

⁵ Rose v. Locke, 423 U.S. 48, 49–50 (1975).

⁶ Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986).

⁷ Ann L. Majestic et al., *Legal and Policy Issues in Curbing Violence in Schools*, in NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, LEGAL GUIDELINES FOR CURBING SCHOOL VIOLENCE, 9 (1995) (hereinafter LEGAL GUIDELINES) citing Givens v. Poe, 346 F. Supp. 202, 209 (1972); Edgar H. Bittle et al., *Due Process for Students* in Hanks, AMERICAN BAR ASSOCIATION, SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS, (hereinafter SCHOOL VIOLENCE) 120–39 (James C. Hanks ed., 2004).

⁸ Martin v. Shawano-Gresham School Dist., 295 F.3d 701, 712–13 (7th Cir. 2002).

⁹ *Id.*

¹⁰ Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752 (2007) (citing Adarand Constructors Inc. v. Peña, 515 U.S. 200, 227 (1995)).

¹¹ San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

¹² 20 U.S.C. § 1681.

¹³ 42 U.S.C. § 2000d.

¹⁴ See generally Christine L. Chinni and Craig S. Meuser, *Civil Rights and Student Discipline: Practical Steps to Prepare for and Defend State and Federal Discrimination Claims*, in NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, SCHOOL LAW IN REVIEW 2006, 3–4 (2006).

¹⁵ *Id.*

¹⁶ 20 U.S.C. § 1400 et seq.

¹⁷ New Jersey v. T.L.O., 469 U.S. 325 (1985).

¹⁸ 3 JAMES A. RAPP, EDUCATION LAW § 9.04[1][c] (1999) (hereinafter RAPP).

¹⁹ 3 RAPP § 9.04.6[c][i].

²⁰ 3 RAPP § 9.04[1][c].

²¹ 469 U.S. at 342–43.

²² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding school regulation of school newspaper).

²³ *Watts v. U.S.*, 394 U.S. 705 (1969).

²⁴ *Virginia v. Black*, 538 U.S. 343 (2003).

²⁵ 393 U.S. 503 (1969).

²⁶ *E.g.*, *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) vacated by Harper ex rel. Harper v. Poway Unified Sch. Dist., 127 S.Ct. 1484 (2007). As of this writing a new incarnation of this case continues to work its way through the courts.

²⁷ 127 S.Ct. 722 (2007).

²⁸ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

²⁹ LEGAL GUIDELINES, at 10.

³⁰ *See generally*, Ronald D. Wenkart, *Discipline of K–12 Students for Conduct Off School Grounds*, 210 WEST'S EDUC. L.R. 531 (2006).

³¹ State laws related to bullying, including provisions specifically addressing cyber-bullying, are compiled by the National Conference of State Legislatures at <http://www.ncsl.org/programs/educ/bullyingoverview.htm>.

³² 20 U.S.C. § 7912.

³³ U.S. DEPARTMENT OF EDUCATION, UNSAFE SCHOOL CHOICE OPTION, NON-REGULATORY GUIDANCE (May 2004).

³⁴ EDUCATION COMMISSION OF THE STATES, PERSISTENTLY DANGEROUS SCHOOL CRITERIA (Gloria Zradicka ed. Aug. 2003).

³⁵ Elementary and Secondary Education Act; Unsafe School Choice Option; Final Deadlines for Implementation, 68 Fed. Reg. 35671-01 (June 16, 2003).

³⁶ *Id.*

³⁷ 20 U.S.C. § 7101 et seq.

³⁸ *Id.*, Subpart 1.

³⁹ 20 U.S.C. § 8921.

⁴⁰ U.S. DEPARTMENT OF EDUCATION, GUIDANCE CONCERNING STATE AND LOCAL RESPONSIBILITIES UNDER THE GUN-FREE SCHOOLS ACT (2003).

⁴¹ NATIONAL SCHOOL BOARDS ASSOCIATION, LEADERSHIP INSIDER (Aug. 2006), available at <http://www.nsba.org/site/docs/39100/39055.pdf> (providing a legal and policy overview of school anti-harassment and anti-bullying efforts and featuring descriptions of Massachusetts Safe Schools Initiative, Maryland Safe Schools Reporting Act, and Oklahoma School Bullying Prevention Act).

⁴² *See generally*, Jeff Horner and Wade Norman, *Student Violence and Harassment*, in SCHOOL VIOLENCE, at 1–14; LEGAL GUIDELINES, at 11.

⁴³ School Liability for Student Suicides, NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, INQUIRY & ANALYSIS, at 1–3 (Oct. 2002).

⁴⁴ Horner and Norman, *supra* n. 42, at 2.

⁴⁵ 526 U.S. 629 (1999).

⁴⁶ Shore Regional High Sch. Bd. of Educ. v. P.S. ex rel. P.S., 381 F.3d 194 (3d Cir. 2004).

⁴⁷ See generally, Bruce W. Smith, *Constitutional Liability of Schools and School Officials for Student Injuries*, LEGAL GUIDANCE, at 33–44.

⁴⁸ King ex rel. King v. East St. Louis Sch. Dist. 189, 496 F.3d 812, 817–18 (7th Cir. 2007).

⁴⁹ *E.g.*, Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (holding that severely harassed student could bring equal protection claim against school district for failure, based on his sexual orientation, to protect him).

⁵⁰ *E.g.*, L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ., 915 A.2d 535 (N.J. 2007) (holding school district liable under state anti-discrimination statute for student-on-student sexual harassment based on sexual orientation).

⁵¹ 20 U.S.C. § 1232g. The U.S. Department of Education’s Family Policy Compliance Office has compiled online resources on FERPA at <http://www.ed.gov/policy/gen/guid/fpco/index.html>.

⁵² 34 C.F.R. § 99.31(a)(8).

⁵³ Gonzaga Univ. v. Doe, 536 U.S. 273 (2002).

⁵⁴ 20 U.S.C. § 1232g (a)(4)(B)(ii); 34 C.F.R. § 99.8.

⁵⁵ 20 U.S.C. § 1232g(b)(1)(a) and (h)(2).

⁵⁶ 34 C.F.R. § 99.36(b).

⁵⁷ 34 C.F.R. § 99.34.

⁵⁸ 34 C.F.R. § 99.36(b).

⁵⁹ 34 C.F.R. §§ 99.31(a)(5), 99.38.

⁶⁰ 20 U.S.C. § 1232g(b)(7).

⁶¹ U.S. Department of Education, Family Policy Compliance Office, “Disclosure of Education Records Concerning Registered Sex Offenders” (Oct. 24, 2002), *available at* <http://www.ed.gov/policy/gen/guid/fpco/hottopics/ht10-24-02.html>.

⁶² 34 C.F.R. §§ 99.31(a)(10), 99.36.

⁶³ 34 C.F.R. § 99.36(c).

⁶⁴ *E.g.*, see the discussion of SDFSCA and the Gun-Free Schools Act, *supra*, text accompanying nn. 35–38.

⁶⁵ 34 C.F.R. § 99.61.

⁶⁶ 45 C.F.R. § 164.501.

⁶⁷ 20 U.S.C. § 1232h.

⁶⁸ See generally, Tom Pickrell, *Schools and Police: An Uneasy Alliance*, in NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, *SCHOOL LAW IN REVIEW* 2005, 227–39 (2005).

⁶⁹ *Illinois v. Gates*, 462 U.S. 213 (1983).

⁷⁰ Pickrell, *supra* n. 68, at 235–36.

⁷¹ *Id.*, citing, e.g., *A.J.M. v. Florida*, 617 So.2d 1137 (Fla. App. 1993).

⁷² *Id.*, citing, e.g., *In re Angelia D.B.*, 564 N.W.2d 682 (Wis. 1997).

⁷³ 3 RAPP § 9.08[9][c], citing, e.g., *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) (noting that school officials were not acting on direction of police); *Martens v. Dist. No. 220*, 620 F. Supp. 298 (N.D. Ill. 1985) (applying reasonable suspicion standard where officer’s role in search of student was limited); *Coronado v. State*, 835 S.W.2d 636 (Tex. Crim. App. 1992) (applying reasonable suspicion where school official, along with sheriff’s officer assigned to school, conducted various searches of student).

⁷⁴ 3 RAPP § 9.08[9][c], citing, e.g., *State v. Serna*, 860 P.2d 1320 (Ariz. Ct. App. 1993).

⁷⁵ Pickrell, *supra* n. 68, at 235, citing, e.g., *In re. V.P.*, 55 S.W.3d 25 (Tex. App. 2001); *People v. Butler*, 725 N.Y.S.2d 534 (N.Y. Supp. 2001); *G.J. v. Indiana*, 716 N.E.2d 475 (Ind. 1999).

⁷⁶ *Id.*, at 228.

⁷⁷ See generally, *NSBA Guidelines: Disciplining Students for Serious Offenses*, NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, *INQUIRY & ANALYSIS*, at 6–7 (Jan. 2002), available at <http://www.nsba.org/site/docs/8900/8821.pdf>.

⁷⁸ See generally, David M. Pedersen, *Zero Tolerance Policies*, in *SCHOOL VIOLENCE*, at 47–55.

⁷⁹ E.g., Russell Skiba et al., *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, American Psychological Association Zero Tolerance Task Force (Aug. 9, 2006), available at <http://www.apa.org/ed/cpse/zttfreport.pdf>.

⁸⁰ E.g., *Bajjani v. Gwinnett County Sch. Dist.*, 630 S.E.2d 103, 110 (Ga. Ct. App. 2006) (Ruffin, J., concurring specially) (opining that case involving school’s delay in reporting injury “amply illustrates bad consequences flowing from good intentions” in NCLB provision, which “produced the exact opposite of the result intended”). In fact, the U.S. Department of Education has encouraged states to adopt definitions that consider the number of incidents, not merely those that lead to particular school interventions such as expulsions. U.S. DEPARTMENT OF EDUCATION, *UNSAFE SCHOOL CHOICE OPTION, NON-REGULATORY GUIDANCE* (May 2004).

⁸¹ 5 RAPP § 12.06[7][b][v] (citations omitted).

⁸² LEGAL GUIDELINES, at 13.

⁸³ 5 RAPP at 12.06[7][b][i][A].

⁸⁴ *Id.*, at 12.

⁸⁵ LEGAL GUIDELINES, at 3, n. 2.

⁸⁶ *Id.*, at 4, n. 2, citing *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).

⁸⁷ Lisa L. Swem, *Preventing Threats of Violence in Schools from Turning into a Tragedy*, in NATIONAL SCHOOL BOARDS ASSOCIATION, SCHOOL LAW IN REVIEW 1999, at 7 (1999).

⁸⁸ *U.S. v. Sokolow*, 490 U.S. 1 (1989).

⁸⁹ *Id.*, at 19.

⁹⁰ *U.S. v. Moreno*, 475 F.2d 44 (5th Cir. 1973); *U.S. v. Bell*, 464 F.2d 667 (2d Cir. N.Y. 1972); *U.S. v. Riggs*, 347 F. Supp. 1098, (E.D.N.Y. 1972); *United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971).

⁹¹ *Bell*, 464 F.2d 667.

⁹² U.S. SECRET SERVICE AND U.S. DEPARTMENT OF EDUCATION, THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES (May 2002).

⁹³ *Id.*, at 17.

⁹⁴ 3 RAPP § 9.06[4][d][iii].

⁹⁵ See *supra*, text accompanying nn. 78-80.

⁹⁶ *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000).

⁹⁷ See 3 RAPP § 9.04[8][b] (citations omitted).

⁹⁸ 3 RAPP § 9.04[8][d].

⁹⁹ *Long v. Bd. of Educ.*, 121 F. Supp.2d 621 (W.D. Ky. 2000).

¹⁰⁰ Troy Y. Nelson, *If Clothes Make the Person, Do Uniforms Make the Student?: Constitutional Free Speech Rights and Student Uniforms in Public Schools*, 118 WEST'S EDUC. L.R. 1 (1997).

¹⁰¹ *Hicks v. Halifax County Bd. of Educ.* 93 F.Supp.2d 649 (E.D.N.C. 1999).

¹⁰² *Goss*, 419 U.S. at 572.

¹⁰³ See generally, W. Stuart Stuller, *School Violence: What to Do When Red Flags Appear*, NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS, INQUIRY & ANALYSIS, at 1-3 (July 2007)

¹⁰⁴ 3 RAPP § 9.04[11][d].

¹⁰⁵ *People v. Dorner*, 458 N.Y.S.2d 982 (Crim. Term 1982), cited in 3 RAPP § 9.08[9][c].

¹⁰⁶ *In re Guillermo M.*, 130 Cal. App. 3d Supp. 642 (Cal. App. Dep't Super. Ct. 1982), cited in 3 RAPP § 9.08[9][c].

¹⁰⁷ *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987), cert. denied, 482 U.S. 930 (1987), cited in 3 RAPP § 9.08[9][c].

¹⁰⁸ *K.K. v. State*, 717 So. 2d 629 (Fla. Dist. Ct. App. 1998), cited in 3 RAPP § 9.08[9][c].

¹⁰⁹ *In re Murray*, 525 S.E.2d 496 (N.C. Ct. App. 2000), cited in 3 RAPP § 9.08[9][c].

¹¹⁰ *In re F.B.*, 726 A.2d 361), cited in 3 RAPP § 9.08[9][c].

¹¹¹ LEGAL GUIDELINES, at 2, citing *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991).

¹¹² *Drews v. Joint Sch. Dist. No. 393*, No. CV04-388-N-EJL (D. Idaho March 29, 2006).

¹¹³ *Drews v. Joint Sch. Dist. No. 393*, No. CV04-388-N-EJL (D. Idaho May 11, 2006).

¹¹⁴ U.S. DEPARTMENTS OF EDUCATION AND JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2006, available at <http://nces.ed.gov/programs/crimeindicators/>.

Glossary

FERPA—the federal Family Educational Rights and Privacy Act, which protects the safety of a student’s education records by, among other things, generally requiring a parent’s consent before the schools can disclose personally identifiable information contained in the record.

Gun-Free Schools Act—the federal law generally requiring federally funded states to require local school districts to adopt a zero tolerance policy requiring a one-year expulsion of a student who brings a gun to campus, or who possesses a gun on campus.

IDEA—the federal Individuals with Disabilities Education Act, which establishes powerful legal rights, remedies, and procedural safeguards to ensure that children with qualifying learning disabilities are entitled to a free, appropriate public education.

IEP (Individualized Education Program)—under the federal Individuals with Disabilities Education Act (IDEA), an annually updated document developed by a team of educators and the parents of a child with a disability setting forth the plan for meeting the child’s individual needs, including, for purposes of this guide, the child’s educational placement.

Manifestation determination—under the federal Individuals with Disabilities Education Act (IDEA), the requirement that, if a child with a disability is to be removed from the current educational placement for more than 10 days for disciplinary reasons, the school first must determine the child’s behavior was neither caused by, nor had any direct and substantial relationship to, the disability and was not caused by the school’s own failure to implement the child’s Individualized Education Program (IEP).

NCLB—the federal No Child Left Behind Act, which sets educational goals every public school must meet and includes safety provisions including the Safe and Drug-Free Schools and Communities Act (SDF-SCA) and the Gun-Free Schools Act.

“Persistently dangerous” school—under the federal No Child Left Behind Act, a designation that triggers the right of the school’s students to transfer to a “safe” school in the school district; each state sets its own criteria for what schools are labeled “persistently dangerous.”

PPRA—the federal Protection of Pupil Rights Amendment, which sets forth certain parental consent and opt-out requirements for surveying public school children about sensitive topics.

School Resource Officer (SRO)—a professional police officer assigned to a public school to provide security.

SDFSCA—the federal Safe and Drug-Free Schools and Communities Act, which supports and funds school security efforts; SDFSCA includes the Gun-Free Schools Act.

“True threat”—in First Amendment law, threatening utterances not entitled to free speech protection; courts have employed somewhat different tests for determining what constitutes a true threat.

Resources

Hamilton Fish Institute

<http://www.hamfish.org>

Founded with the assistance of Congress in 1997, the institute serves as a national resource to test the effectiveness of school violence prevention methods. The institute's goal is to determine what works and what programs can be replicated to reduce school violence.

2121 K St., N.W., Ste. 200, Washington, DC 20037-1830

Phone: (202) 496-2200; Fax: (202) 496-6244

Northwest Regional Educational Laboratory (NWREL)

<http://www.nwrel.org>

NWREL is the parent organization of the Northwest Region Comprehensive Center. It provides information about coordination and consolidation of federal educational programs and general school improvement to meet the needs of special populations of children and youth, particularly those programs operated in the Northwest region, through the U.S. Department of Education. The Web site has an extensive online library containing articles, publications, and multimedia resources. It also has a list of other agencies and advocacy groups that addresses issues pertaining to, among other things, school safety issues as well as alcohol and drug abuse.

101 S.W. Main St., Ste. 500, Portland, OR 97204

Phone: (503) 275-9500; E-mail: info@nwrel.org

Blueprints for Violence Prevention

<http://www.colorado.edu/cspv/blueprints>

In 1996, the Center for the Study and Prevention of Violence (CSPV), with funding from the Colorado Division of Criminal Justice and the Centers for Disease Control (and later from the Pennsylvania Commission on Crime and Delinquency), initiated a project to identify 10 violence prevention programs that met a very high scientific standard of program effectiveness—programs that could provide an initial nucleus for a national violence prevention initiative. Our objective was to identify truly outstanding programs, and to describe these interventions in a series of “blueprints” that describe the theoretical rationale, the core components of the program as implemented, the evaluation designs and results, and the practical experiences programs encountered while implementing the program at multiple sites.

900 28th St., Ste. 107, Boulder, CO 80303

Phone: (303) 492-1032; Fax: (303) 443-3297

Centers for Disease Control and Prevention, Division of Violence Prevention

<http://www.cdc.gov/ncipc/dvp/dvp.htm>

The Division of Violence Prevention in CDC's National Center for Injury Prevention and Control has four priority areas for violence prevention: youth violence, family and intimate violence, suicide, and firearm injuries.

1600 Clifton Rd., Atlanta, GA 30333

Phone: (404) 639-3311

Education Commission of the States (ECS)

<http://www.ecs.org>

ECS is a nonprofit, nonpartisan, interstate compact created in 1965 to improve public education by facilitating the exchange of information, ideas, and experiences among state policymakers and education leaders.

700 Broadway, #1200, Denver, Colorado 80203-3460

Phone: (303) 299-3600; Fax: (303) 296-8332; E-mail: ecs@ecs.org

Johns Hopkins Center for the Prevention of Youth Violence

<http://www.jhsph.edu/PreventYouthViolence/index.html>

The Johns Hopkins Center for the Prevention of Youth Violence was created in October 2000 with a five-year grant from the National Centers for Disease Control and Prevention. Based on the theme of science informing practice, practice questioning science, the center brings together academic institutions, city and state agencies and organizations, community groups, schools, youth groups, and faith organizations to collaborate on both positive youth development and the prevention of violence.

Johns Hopkins Bloomberg School of Public Health, 624 N. Broadway, Baltimore, MD 21205

Phone: (410) 955-3962; Fax: (410) 614-4890; E-mail: pleaf@jhsph.edu

National Association of School Resource Officers (NASRO)

<http://www.nasro.org/home.asp>

NASRO is a not-for-profit organization for school-based law enforcement officers, school administrators, and school security and safety professionals working as partners to protect students, school faculty and staff, and the schools they attend.

1951 Woodlane Drive, St. Paul, MN 55125

Phone: (888) 316-2776; Fax: (651) 457-5665

National Conference of State Legislatures (NCSL)

<http://www.ncsl.org>

NCSL is recognized as the preeminent bipartisan organization dedicated to serving the lawmakers and staffs of the nation's 50 states, as well as its commonwealths and territories.

444 N. Capitol St., N.W., Ste. 515, Washington, DC 20001

Phone: (202) 624-5400; Fax: (202) 737-1069

National School Boards Association (NSBA)

<http://www.nsba.org>

The mission of the NSBA, working with and through the state school boards associations that comprise its federation, is to foster excellence and equity in public education through school board leadership. Links to, and contact information for, the state school boards associations are available at the NSBA Web site. The NSBA Council of School Attorneys is the national professional association for attorneys who represent public school districts.

1680 Duke St., Alexandria, VA 22314

Phone: (703) 838-6722; Fax: (703) 683-7590; E-mail: info@nsba.org

Safe Schools/Healthy Students Action Center

<http://www.sshsac.org>

The mission of the action center is to assist and support the Safe Schools/Healthy Students and School Action Grantees in the development and sustainability of peaceful and healthy communities.

2001 N. Beauregard St., 12th Fl., Alexandria, VA 22311

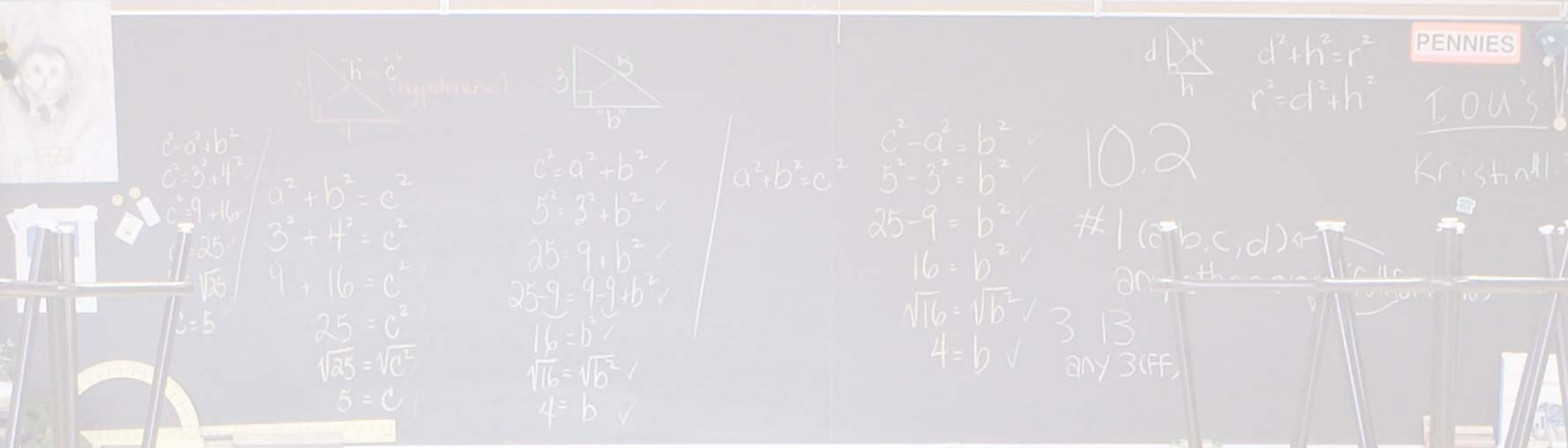
Phone: (877) 339-SSHS

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Reader Notes:



Hamilton Fish Institute

Hamilton Fish Institute
2121 K Street NW
Suite 200
Washington, DC 20037
Ph: (202) 496-2200
Fx: (202) 496-6244
<http://www.hamfish.org>
hamfish@gwu.edu