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# FOSTERING SAFER SCHOOLS

A Legal Guide for School Board Members on School Safety





# Fostering Safer Schools

## A Legal Guide for School Board Members on School Safety

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## ***FOREWORD***

The aftermath of emergencies and mass tragedies in our schools often leaves communities sorting through a myriad of questions, including what could have been done to avoid the unspeakable and what can be done to prevent it in the future. That conversation can be daunting in its complexity and overwhelming in its breadth. As one begins to delve into the subject of school safety, the comprehensive nature of the issues becomes rapidly apparent. From student discipline, to information sharing, to law enforcement, to mental health services, insurance, facilities issues and beyond, the areas to address in policy are many. This guide is intended as a first step towards helping school board members navigate the increasingly complex world of emergency preparedness and response to instances of school safety and mass violence. Our goal was to develop a legal guide that would contribute to school boards' efforts to find solutions that make sense for their communities and that make their schools safer and to design policies to prepare for emergencies or mass tragedies, should the need ever arise. Preparation is key, as is open communication with school communities, law enforcement and providers of mental and social resources for students. Our ultimate hope is that in helping schools identify and respond to the legal concerns associated with these unwelcome occurrences, they can create school environments that are safe and minimize the harm caused by instances of mass violence.

# INTRODUCTION

The overarching goal of schools is to create a safe, supportive environment where students can thrive, learn, and be themselves. This begins with a dedication to students' social and emotional well-being, and effective policies and programs that create a culture of trust. Such a culture provides not only an optimal learning environment but also a proactive step to avoid conflict, violence, and legal liability. But to do school safety right is a herculean task that touches virtually every aspect of school policy and operations and extends well beyond into the community at large, including every level of government, public safety agencies, community services programs, private agencies, places of faith, social research arms, families, and students themselves.

No one resource could address every issue or question that you might have as you attempt to do your part to keep children safe. In this guide, NSBA has chosen to provide a renewed look, through a legal lens, at key areas of concern that have emerged as looming issues that need our attention as we work to improve school safety. These include student mental health, crisis management, working with law enforcement, and legal liability. We recognize that there are many issues that are not addressed here that will affect the decisions that school board members have to make to keep students safe. For example, we do not discuss building security, a key component of a school safety plan.

With respect to the key issues discussed, the guide is designed to give school board members, as policy-makers for the district, an overview of:

- schools' legal obligations and liability concerns;
- best practices; and
- available resources.

In this way, we hope to provide some guidance for your careful consideration. We encourage you to join with others in your community, including your school attorney and your state school boards association, as you continue your work to give students the best chance to thrive in schools—safe from harm.

## I. STUDENT EMOTIONAL AND MENTAL WELL-BEING AND THREAT ASSESSMENT

### Student Emotional and Mental Well-Being

#### Q1. What policies and programs should school districts embrace to promote a safe and secure learning environment that supports students' emotional and mental well-being?

Creating a safe and supportive learning environment is an overarching goal of all schools. Policies that encourage non-discriminatory and nurturing practices and programs that are cognizant of students' social and emotional learning needs, such as character education and positive behavioral interventions and supports, are widely accepted as critical components of promoting and maintaining such environments. In supportive learning environments, bullying and harassment behaviors do not thrive, but rather are investigated, and students feel free to be themselves, to achieve, to make friends and to share concerns with staff. Such an

environment can be sustained only if concerns and challenges are spotted and addressed, so students get the supports and services they need.<sup>1</sup>

## **Q2. What steps should school districts take to ensure that students receive needed mental health services?**

Students' mental health is critical to their success and safety. Although school district personnel are familiar with addressing the needs of students with disabilities under the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and Section 504 of the Rehabilitation Act,<sup>3</sup> they usually do not have the expertise to assess and treat mental health conditions on their own. School boards should adopt mental health policies that require designated school personnel to collaborate as part of a team that includes parents, medical and mental health professionals, and community agencies.<sup>4</sup> School district policy should clarify the role of personnel in identifying and supporting students with mental health needs. (See page 4.) Districts should also outline protocols and procedures for working with outside mental health professionals,<sup>5</sup> including a crisis intervention and threat assessment protocol that specifies a screening assessment and referral process to ensure that each student is assisted based on immediate social and emotional needs.<sup>6</sup>

These policies and procedures will be effective only if the school personnel involved in supporting students with mental health needs—school counselors, social workers, psychologists, teachers, and administrators—get the ongoing training they need to understand their roles and responsibilities. Accountability measures can help ensure that staff follow policies, procedures and protocols with fidelity.<sup>7</sup> (See page 5.)

Some school districts have taken a further step—co-locating mental health services within the school. In this model, the district contracts with mental health providers to diagnose and treat students within, not by, the school.<sup>8</sup> For example, the Los Angeles Unified School District has established a similar model of direct mental services in clinics and centers located throughout the district.<sup>9</sup>

## **ROLES AND RESPONSIBILITIES OF SCHOOL PERSONNEL IN ADDRESSING STUDENT MENTAL HEALTH NEEDS**

District policy should clarify and clearly define the roles and responsibilities of school staff members in addressing student mental health needs. Staff need regular professional development training on the nature of mental health disorders, how they manifest in the school setting, and how educators can support students who are facing these challenges. School board procedures and training for staff should address:

- Conducting educational evaluations of students who have mental health disorders;
- Providing counseling as a related service;
- Attending Individualized Education Program (IEP) meetings;
- Providing ongoing documentation of special education interventions and their outcomes;
- Monitoring behavioral symptoms of disorders being treated by a medical clinician and documenting their nature, frequency, and severity, when required by a student's IEP or Section 504 Plan;
- Obtaining (with appropriate signed releases) mental health diagnostic and treatment records from the treating clinician;
- Communicating (with appropriate signed releases) the documentation of behavioral symptoms to the treating clinician; for example, if the student has sought professional assistance for suicidal or self-harm-related behaviors, designated school personnel should work with professionals to help prevent a recurrence;<sup>10</sup>
- Using information in diagnostic and treatment records to help develop appropriate educational accommodations and modifications, as required by a student's IEP;
- Assisting teachers in understanding the student's mental health concerns and helping them to work with the student;
- Communicating with parents about the student's challenges and successes, and seeking their input about interventions;
- Assisting in pre-referral mental health interventions;
- Screening for mental health and chemical health disorders when appropriate; and
- Conducting a functional behavioral analysis.

W. Dikel, MD, *School Shootings and Student Mental Health—What Lies Beneath the tip of the Iceberg*, published by the National School Boards Association (2012).



## **MENTAL HEALTH POLICIES AND PROCEDURES**

With the assistance of a qualified member of the NSBA Council of School Attorneys, school districts should establish student mental health policies, procedures and protocols. These should be reviewed and updated regularly to ensure compliance with federal and state law (see Q.5) and other legal and professional standards, as well as changing community needs and circumstances. Below are examples of topics to be considered in the development of policies, procedures and protocols:

- Methodology of crisis intervention (e.g., when a student makes suicidal statements);
- Protocol for including mental health related services on IEPs;
- Compliance with applicable privacy laws in handling mental health data generated internally or obtained from outside professionals;
- In-service presentations to educational staff on mental health disorders;
- Collaboration with professionals outside of the school district;
- Transition planning for student re-entry into the school environment from psychiatric hospitals and residential facilities;
- Maximization of funding streams for collaborative services, including Medicaid billing for services as appropriate;
- Supervision of school mental health staff to assure accountability in performance of defined roles and responsibilities; and
- Methods of identifying baseline and outcome measures to determine the success of interventions.

Source: W. Dikel, MD, School Shootings and Student Mental Health—*What Lies Beneath the tip of the Iceberg*, published by the National School Boards Association (2012).

**Q3. Can a school district suspend a student for purposes of a mental health evaluation?**

Yes, under some circumstances. Some courts have approved “evaluation suspensions,” or the short-term removal of a student from the general school environment, not for the purpose of disciplining the student, but to determine whether the student poses a threat of harm to himself or others. Courts tend to balance the incursion on the student’s rights against the school district’s concern for student safety.<sup>11</sup> Before imposing an evaluation suspension, the district should, to the extent appropriate, provide a “hearing,” or a brief meeting to give the student an opportunity to explain the conduct that gave rise to the concern. During the evaluation suspension, the school generally should avoid complete termination of educational services and should provide homework, homebound, or online instruction when possible. Throughout the process, school officials should make clear that the removal is not disciplinary and will not result in negative documentation unless the fuller investigation demonstrates that discipline is, in fact, warranted.<sup>12</sup>

**Q4. Can a school district condition a student’s attendance at school on completion of, or ongoing, mental health treatment?**

Yes. Schools have a responsibility to maintain safe school environments. Where a student continues to pose a danger to himself or others, the district should work with appropriate community agencies and mental health professionals to ensure that the student receives appropriate treatment. 46 states provide for some form of involuntary outpatient treatment. The four states that currently do not have assisted outpatient treatment are Connecticut, Maryland, Massachusetts, and New Mexico.<sup>13</sup>

**Q5. What laws and rules impact a school district’s efforts to address student mental health concerns?**

A web of laws and regulations at the federal and state levels affects how schools handle students’ mental health issues. School districts should include an experienced NSBA Council of School Attorneys (COSA) member in the development of its policies and procedures with respect to student mental health. Below are some of the relevant federal statutes:

- The Individuals with Disabilities Education Act<sup>14</sup> (IDEA) requires school districts to provide eligible children with a free appropriate public education through an individualized education program (IEP), in exchange for dedicated federal funds. The IDEA places certain restrictions on the discipline of children with disabilities, requires schools to develop a behavior intervention plan in some situations, and addresses confidentiality of records.
- Section 504 of the Rehabilitation Act<sup>15</sup> prohibits discrimination based on disability in the provision of programs and services that receive federal funding. If a student’s disability affects a major life activity, he/she may need a 504 plan that includes certain accommodations to allow the student to access district programs and services.
- The Americans with Disabilities Act<sup>16</sup> (ADA) prohibits discrimination based on disability in the provision of government programs and services, regardless of federal funding.

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*A diagnosis that a student has a mental illness is, by itself, insufficient to determine that a threat exists to the safety of the student or others at school.*

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- The Family Educational Rights and Privacy Act<sup>17</sup> (FERPA) requires educational institutions that receive federal funds through the Department of Education to allow parents and eligible students access to education records and prohibits the disclosure of student records without parental consent. There are enumerated exceptions that allow disclosure without consent under specific situations, including a health and safety emergency. School districts may need signed releases to share student mental health information.
- The Health Insurance Portability and Accountability Act<sup>18</sup> (HIPAA) prohibits the disclosure of certain patient information without consent. Mental health professionals may need signed releases to share mental health information about students being evaluated or undergoing treatment.
- Most states have privacy laws relating to the provision of mental health services. Some of these laws may impose more stringent disclosure restrictions than federal law and may allow student access to mental health records at a younger age than federal law.<sup>19</sup>
- Mental health care providers are bound by professional ethics rules that may limit the circumstances in which they may disclose patient information without consent.

## **Threat Assessment**

### **Q6. How are threat assessments and mental health evaluations related?**

“The goal of a threat assessment is to identify students of concern, assess their risk for engaging in violence or other harmful activities, and identify intervention strategies to manage that risk.”<sup>20</sup> Schools should consider establishing multidisciplinary threat assessment teams to “direct, manage, and document the threat assessment process.” Threat assessment requires gathering lots of information to determine the seriousness and urgency of a given situation and the appropriate response in light of many factors. Mental health evaluations may be one component of threat assessment. But keep in mind that a diagnosis that a student has a mental health condition is by itself insufficient to determine that a threat exists to the safety of the student or others at school. It is also crucial to keep in mind that there are limitations on the accuracy of predicting a person’s dangerousness, or tendency to commit mass violence.

### **Q7. When should a school district initiate a threat assessment?**

A district should swiftly and decisively address any potential threat of which it is informed.<sup>21</sup> Timely attention to a

possible threat focuses district resources on the issue at hand; validates the individual or community that raised the issue; allows timely engagement of resources and decision-making; and ultimately can save lives. The purpose of the threat assessment should be to identify and understand risk factors and should not involve matching an individual to a pre-determined profile. Rather, the action taken should be based upon a determination of whether the student presents an actual threat, given all the information known to the district. While gathering information to assess a possible threat often is time-consuming, where the violent or potentially destructive nature of the articulated threat is high, review of the threat itself may be all that is necessary to complete a meaningful, immediate assessment.<sup>22</sup> Threat assessment may also reveal exculpatory information that exonerates a student from a charge or suspicion of wrong-doing. Distinguishing between an actual threat of violence and other instances of misbehavior is an important part of the threat assessment process.

### **Q8. How can school districts promote appropriate and timely reporting by students, parents and staff who may have relevant information that should be further investigated?**

One way school officials learn about potential acts of violence as early as possible and before problems escalate is by fostering an environment in which students communicate with school personnel about warning signs. When students believe that the adults at school care about their safety and well-being, they are more likely to communicate their concerns. Encouraging school personnel to remain engaged in students' experience so that they can identify irregular or unexplained changes in behavior may also be a way to identify threats before they develop, and to refer students for appropriate services. In past school shootings, many perpetrators had told other students about their intentions. Students often choose not to convey this information to school officials or law enforcement for fear of being branded a "snitch" and/or because they did not take the statements seriously. Schools should consider a variety of approaches to gathering information, including those below:

- **Mandatory Reporting** — A school's goal should be to create a culture of mandatory reporting by all members of the school community, including students and parents. This culture of reporting all warning signs pointing to a threat of school violence must be supported by clear, definitive policies and adequate training for those involved. Individuals must know what and to whom concerns should be reported. Those reporting must know that the information they provide will be reviewed, investigated, and acted upon promptly and effectively.
- **Anonymous Tip Lines** — A number of anonymous reporting programs are available. Some private companies will establish anonymous tip lines for school districts. An anonymous tip line or similar program might increase the flow of information from students to law enforcement and school officials, but it must be structured and managed carefully.

If the school district has its own tip line, it must have procedures in place and personnel designated to determine whether a particular piece of information warrants further investigation and how that investigation will be conducted. Anonymous tips should be corroborated independently, especially if they will be used to support disciplinary measures or school searches. If no corroboration can be obtained, district procedures should guide school administrators on what to do next.

If the tip line is operated by the police, a good working relationship must exist between school authorities and law enforcement to ensure that the information is reviewed and exchanged in a timely fashion. A protocol should establish:

- which information will be shared and when,
  - whether joint investigations will be conducted,
  - when police investigations may take place on school grounds,
  - whether, when, and how police will have access to students during school hours, and
  - disposition of the evidence obtained.
- **Records Procedures** — Storage and documentation of reports of potential violence or suspicious behavior must be carried out according to established guidelines, developed in consultation with the district's school attorney. These procedures are particularly important when dealing with anonymous information and should answer questions such as: When, if ever, will a tip or accusation become part of a student's education record? Only after it is verified? If it cannot be verified, will the information be kept in some other location? Where will information be kept to document that the tip was in fact investigated and the results of that investigation? Clear documentation of investigation results may become important later if claims surface that the school should have known about a particular student's potential or intent to commit violence but failed to intervene in a reasonable manner.

### Q9. Who should undertake the threat assessment?

School districts employ different models of threat assessment, with some assigning a larger role to a designated team of school personnel, and others contracting out responsibilities to third parties or relying primarily on law enforcement. In every instance, the district's articulated process for threat assessment should be followed, unless some greater interest dictates departure from it. Most assessments of threats of violence follow the same general process, though reordering can occur based on the facts:

- Notification of possible threat;
- Notification of appropriate response personnel;
- Review/investigation of possible threat;
- Reporting to law enforcement/911;
- Lockdown/closure of school facilities;
- Emergency removal of students of concern;
- Further investigation as appropriate:
  - Interviews
  - Records
  - Expert assessment as appropriate;

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*School staff members know and care about their students. Their overarching goal every day in school buildings throughout the country is to provide a safe and supportive environment where students can learn and thrive.”*

—NSBA testimony before the Federal Commission on School Safety, July 11, 2018.

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- Response to alleged threat and student outcomes:
  - Student discipline;
  - Support and/or safety plan; and
  - Assess placement in light of continued concerns;
- Messaging to staff, student, parents, involved stakeholders.

The district’s process should involve some level of tiered reporting and assessment to the site and central administration, using a Critical Response Team (CRT), Emergency Response Team (ERT) or Threat Assessment Team (TAT). Reporting and communication should be carried out by the most effective means possible, whether by email, text, instant messaging, or conference call. The urgency and scope of notification are usually determined on a case-by-case basis. Threats of lower level harm may not require full initiation of the process, whereas a threat to kill usually mandates full deployment of available personnel and resources.<sup>23</sup>

#### **Q10. When is emergency removal of a student justified?**

Whenever a legitimate safety concern exists, the student causing that concern should be removed from school within the bounds of the law. (See Q3.) Law enforcement should be contacted. Where a student or staff member is a specific target, any threat or safety concerns should be reviewed and disclosed as appropriate in consultation with an experienced COSA attorney. Obtaining parental agreement to an alternative placement for the troubled student may help to avoid problems caused by statutory time limits on removals and allow sufficient time for a full assessment and completion of support and supervision plans.

#### **Q11. What is the role of law enforcement in threat assessment?**

Where school personnel determine an expression of threat is real, law enforcement should be contacted. School personnel should consult with their school attorney to be sure that the requirements of applicable privacy laws, including FERPA<sup>24</sup> are met. This legal consultation is particularly important when an SRO or other law enforcement officer participates on the threat assessment or other team and has access to education records.<sup>25</sup> While school officials understandably may be hesitant to share personal information for fear of

violating federal or state laws, it is vital to understand the breadth of health and safety exceptions in these laws to facilitate information sharing in critical instances.

Law enforcement can escalate resources, conduct significant investigation in a short time, perform welfare checks at student residences, and, if deemed necessary, station a uniformed officer at every school at issue to put students, staff, and stakeholders at ease. Because anonymous messaging and email can make it difficult to identify the origin of a threat, increased involvement of law enforcement can bring needed resources to bear that many school districts cannot on their own, whether because of skill set limitation or a lack of legal authority.

Collaboration with law enforcement can also serve to deflect criticism of the school district's reaction. Often law enforcement will complete an initial investigation and conclude there is no criminal threat and that a return to normal school operations is appropriate. While law enforcement may bring valuable resources and expertise to bear, school districts should keep in mind that law enforcement's investigative mandate is to determine whether a criminal law has been violated; it is not as sweeping as the school district's interest. A school district may still have a significant obligation to investigate and intervene further even though no crime has been committed.<sup>26</sup>

### **Q12. What is a school district's responsibility with respect to threats communicated online?**

Often by the time a school district becomes aware of an online comment or post, it will already be attracting significant attention and causing concern among school district stakeholders. School districts must respond in a timely manner. Where there is a controlling third-party host, districts may contact the host to take down or remove offensive or illegal content. Before the material is removed, districts should make sure to preserve evidence for use in any proceedings that follow.

During an investigation of a possible threat, school districts may view information that is publicly available, including students' personal web or social media pages, message boards, or chat. For secured information, districts may be able to work with law enforcement to execute warrants. Districts should keep in mind that law enforcement may not pursue a warrant where they don't perceive an alleged or potential crime. Subterfuge or covert surveillance to access information restricted by passwords or closed discussion groups is not recommended due to privacy concerns and possible violation of the Stored Communications Act (SCA).<sup>27</sup> Some states also regulate educational institutions' ability to request or access student passwords for applications that are not publicly available. Consult with your school attorney to weigh these options.

### **Q13. When can a school district discipline a student based on expression of a threat?**

Schools have broad authority to discipline students for making statements that are "true threats," which are not protected by the First Amendment. The Supreme Court has defined "true threats" as "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. . . . The speaker need not actually intend to carry out the threat."<sup>28</sup> Generally, a statement constitutes a true threat when "a reasonable person would foresee that the statement would be interpreted. . . as a serious expression of intent to harm or assault."<sup>29</sup> Even where no true threat exists, school districts may discipline students for statements where school officials can reasonably forecast material

and substantial disruption of school operations.<sup>30</sup> Because these legal principles are complex and courts have not always agreed about the extent of school authority,<sup>31</sup> school administrators should not make these determinations on their own, but should consult closely with a qualified school attorney.

#### **Q14. Must school districts communicate known threats to the target? Parents? Larger school community?**

The disclosure of known and valid threats should be made in accordance with the district's established communications protocol. Typically, a team of designated individuals, which should include the district's counsel, makes a decision that balances safety, privacy, logistical issues, and legal concerns. The district's protocol could include procedures for notifying both law enforcement and parents. Particularly when a threat is valid and credible, those procedures should be aimed at preventing instances of mass violence like school shootings. Notification plans must take into consideration the impact of communications to the larger school community with an eye towards minimizing potential interference with efforts to ensure the school community remains safe. For instance, advance communications might be helpful in keeping students away from campus if a threat is imminent and identifiable, but if it is not, misinformation could create confusion and be counterproductive.

#### **Q15. If a school district determines that a student poses a threat of violence, can the school district take any steps to prevent the student's access to firearms?**

Maybe. Known access to weapons of mass violence is an element that both law enforcement and school officials should consider in determining the potential to carry out threats. Communication with law enforcement and families in accordance with privacy restrictions is critical to any attempt to ensure weapons are either properly secured or removed from the student's access. A few states (CA, CT, FL, IL, IN, OR, RI, WA) have adopted red flag or extreme risk protection order (ERPO) laws that generally allow either law enforcement officers or relatives of an individual to petition a judge temporarily to prohibit the person from having or buying a firearm based on concerns that he may harm himself or others. The judge could also order the individual to surrender his weapons. The orders typically expire after a year. After recent school shootings, many other state legislatures are considering the adoption of similar laws. A proposal before the New York legislature would expand the authority to seek an ERPO to certain school officials.

## **II. SCHOOL SAFETY PLANS**

#### **Q16. Are school districts required to have school safety plans?**

Yes. Over 40 states require school districts to have a school safety or crisis management/emergency response plan in place. Other states have recommended safety procedures or safety requirements such as emergency drills and/or resources available to assist districts in maintaining safe schools.<sup>32</sup>

Under the federal Every Student Succeeds Act (ESSA), school districts must include school safety data in their annual report cards.<sup>33</sup> States may also choose to include school safety as one of their measures of school quality.<sup>34</sup> ESSA also provides certain funding streams that schools can use to promote student safety



and a positive school climate.<sup>35</sup> After the attack at Marjorie Stoneman Douglas High School in February 2018, Congress passed the STOP School Violence Act, which expands the Secure our Schools program and provides grants through the Department of Justice’s Bureau of Justice Assistance (BJA) and Office of Community Oriented Policing Services (COPS office).<sup>36</sup>

### **Q17. What are the key elements of a crisis management/emergency response plan?**

In developing a crisis management/emergency response (school safety) plan, school districts should ensure that the plan:<sup>37</sup>

- Uses an “all hazards” approach, which plans for risks that are:
  - *Natural* — Earthquakes, tornados, floods
  - *Technological* — Power outages, nearby nuclear plant
  - *Infrastructure* — Roads and bridges, utilities
  - *Nonstructural* — Portable room dividers, bookshelves, suspended ceilings and light fixtures
  - *Man-made* — Hazardous materials release, terrorism
  - *Biological* — Pandemic flu, contaminated food
  - *Related to physical wellbeing* — Broken bones, suicide
  - *Affecting student culture and climate* — Bullying, drugs, violent behavior;
- Is developed collaboratively with community partners and experts;
- Is based upon sound data and information—this could include National Fire Protection 1600 Standard, American National Standards Institute preparedness standards, etc.;
- Is communicated and practiced on a regular basis;
- Is continually reviewed and updated;
- Is tailored to conditions of school campuses, individual buildings and other outside facilities used for district-sponsored activities;
- Addresses all four phases of emergency management (See Q18.); and
- Includes a threat assessment process (See Q9-14.).

### **Q18. What are the four phases of crisis management,<sup>38</sup> and what steps should a school district take for each?**

#### **Phase 1—Prevention and Mitigation**

- Identify critical issues through a safety audit;
- Assess current status of planning;
- Review and revise the district’s current emergency management plan;

- Discuss with the district's architect or facilities manager safety improvements such as ingress/egress design, lighting, card key access, other technologies, etc.;
- Discuss loss control and accident prevention with the district's insurance carrier(s). Inquire about available risk mitigation programs and resources. (See Q24-25.);
- Communicate regularly with public safety agencies about prevention and safety practices and concerns specific to the district and community. (See Q19-23.);
- Implement school climate programs, anti-bullying policies, and student assistance and well-being resources. (See Q1.); and
- Innovate to share emergency management resources through specialized joint powers boards, cooperatives, and memoranda of understanding.

### **Phase 2—Preparedness**

- Work with community partners to develop and coordinate appropriate crisis management policies and procedures;
- Prepare for an immediate response to a crisis by designating an emergency response team with a pre-designated leader and clearly specified roles and responsibilities to coordinate efforts to achieve safety goals and efficient use of resources. This could include an Incident Command System as described in the National Incident Management System;<sup>39</sup>
- Provide training for all school community members;
- Conduct regular drills and exercises to meet the mandated schedule;
- Obtain necessary equipment and supplies;
- Prepare all materials for the emergency response team's use, including maps and facilities information (See Phase 3, Investigate.);
- Develop accountability and student release procedures; and
- Address liability issues. (See Q23-25.).

### **Phase 3—Response**

#### *Launch the Plan*

- Immediately convene an emergency meeting of high-level administrators and district counsel to activate the emergency response plan;
- Mobilize the emergency response team to implement the plan and shield the site, students, and staff from outside forces;
- Call for assistance before it's too late; and

- Focus on immediate action items, including coordination with investigating authorities, evidence preservation, grief counseling, media relations, and school resumption.

### *Investigate*

- Make pertinent documentation readily available to the emergency response team:
  - applicable school policies and handbooks (school, parent, district),
  - records and memoranda of understanding,
  - safety information including emergency management plans and facilities maps,
  - board minutes involving approval of safety plans,
  - delineation of staff for plan implementation,
  - documentation of practice drills and implementation, and
  - contracts and agreements with any vendors providing materials or plan proposals, etc.
- Carry out the investigation in cooperation with public safety authorities, coordinated through counsel;
- Promptly identify and secure student and employee victim records and personnel files and inventory personal effects; disclosures must be in accordance with the law;
- Keep a written record of all interactions with agencies involved in the investigation, including all district materials provided to or seized by agencies;
- Collect all media reports to aid investigative efforts;
- Develop files for each witness giving a statement or account;
- Collect visitor logs, phone logs and records, 911 calls, and all audio/video footage;
- Obtain and secure all evidence of past contact with the perpetrator or perpetrator's family (if known); and
- Preserve evidence through photos before reconstruction, clean-up, etc.

### *Communicate*

- Follow internal communication plan:
  - Use the internal warning system to advise students and staff of the potential threat and immediate action steps; provide status updates as appropriate; and
  - Communicate with district personnel about the need to preserve evidence and protocol for handling external requests for information.
- Follow external communication plan:
  - Notify the district's insurers through your school attorney, and coordinate insurer requests for information and interviews through that attorney to protect work product and attorney-client privilege;

- Communicate with parents and the community in a timely manner, keeping these priorities in focus:
  - providing factual content to control the rumor mill;
  - building trust and credibility to sustain support during and after the crisis;
  - modeling empathy and caring;
  - demonstrating the district's competence, expertise, honesty, openness, commitment and dedication; and
- In responding to media inquiries:
  - avoid political and personal agendas;
  - balance privacy rights with the public's right to know;
  - focus on healing and a return to normalcy;
  - stay on message;
  - speak with one clear voice; and
  - respond to all reasonable requests and develop guidelines for access to students and staff.

#### **Phase 4—Recovery**

- Tap state/national school associations for available resources;
- Develop a plan for inspections and access to the school, including sign-in, confidentiality, and approved persons. Consider private security to protect the site from unwanted inspections (i.e., media, tabloids, thrill-seekers, etc.);
- Develop a plan to re-open the school, or to use leased/loaned temporary space with a coordinated plan for full security of students and staff;
- Address any requirement to make up missed school days;
- Provide grief counseling; involve community partners;
- Seek federal and state grants and other assistance to help recovery efforts;
- Review all district insurance policies in place on the date of the incident; file claims as appropriate with the assistance of counsel;
- Allow time for healing and commemoration; and
- Update the emergency plan as needed.

### III. WORKING WITH LAW ENFORCEMENT

#### Q19. How can school districts work effectively with law enforcement agencies to promote school safety?

Law enforcement agencies can play a key role in the development, implementation and review of a school district's comprehensive school safety plan. Because of overlapping authority and complex legal rules, it is important that, for each phase of emergency management and threat assessment, the roles and responsibilities of law enforcement in school settings and during school emergencies are clearly set out. School districts must abide by any state requirements to report certain crimes that occur on school grounds but must keep the requirements of student privacy laws in mind as well. There may be a need for one or more memoranda of understanding (MOU). For example, the district may wish to clarify the plan for sharing records, including surveillance videos, between the district and law enforcement agency.

Some states have model memoranda of understanding, such as New Jersey's *A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials*,<sup>40</sup> which, among its terms, describes how and when information will be shared during or outside of an emergency.

#### Q20. What should school districts consider when engaging a school resource officer vs. a school security officer?

School districts should consider carefully the effects on school climate and community concerns when deciding whether to have a police presence on school grounds or at school events. According to some studies, a visible police presence may be helpful in reducing many forms of violence and increasing students' perceptions of safety within the school.<sup>41</sup> The presence of a uniformed officer may allow students to develop trust and to talk to law enforcement officers in a neutral, non-threatening atmosphere.

The most common method for a school district to provide a uniformed school officer is to partner with local law enforcement. This provides an opportunity for the school to work with other community officials. It can also build positive relationships, which may prove invaluable in crises situations. Local law enforcement officers with specialized training to work in schools are known as school resource officers (SROs); they have the full police powers of a public safety officer. In some jurisdictions, an SRO remains an employee of the law enforcement unit; in others, an SRO may be employed directly by the school district. A district may also contract with a private security firm to provide uniformed officers or directly employ school security officers (SSOs). Contracted security officers and those directly employed by the district do not have police powers.

A school district should consider several issues before determining whether to hire its own security personnel or to contract for a sworn officer from the local law enforcement agency, including:

- employment issues such as overtime requirements,
- liability concerns,
- size of the school/district,

- history of safety/violence in the district,
- purpose of the officer's presence,
- functions the officer will be expected to serve,
- information sharing,
- supervisory structure and reporting protocols, and
- availability of expertise and experience outside the local law enforcement agency.

**Q21. If a school district decides to have an SRO on campus, what issues should be addressed in a memorandum of understanding (MOU) or contract with the local law enforcement agency?**

When constructing the school district's relationship with the officer and/or the local law enforcement entity, it should address the following items, preferably in a written MOU or contract.<sup>42</sup>

- **Officer Selection** — If the district opts to use a law enforcement officer, it should ensure that it has input into the officer's selection, and the right to reject, at any time, an officer who behaves inappropriately for the school environment. Having the right officer is crucial to the success of the program. The district may wish to develop a set of qualifications for SROs. Officers should want to be at the school and not be compelled by the law enforcement agency. School districts may also wish to perform their own background check on the officer.
- **Officer and Staff Training** — Training of the school officer is equally important. The school district should ensure that it has input into the types of training beyond law enforcement techniques and principles the officer receives before being placed in schools. Officers placed in schools should have training specific to working with young people, as well as their role in the school environment -- unique aspects of the SRO's work that differ from an officer working a beat.
- **Officer Purpose and Role** — The functions and responsibilities of the officer should be clearly established, as the applicable legal rules and standards that apply to police officers conducting criminal investigations differ from those applicable to school personnel carrying out similar functions. The contract should detail the SRO's specific duties within the school district and, in return, the school district's duties with respect to the SRO. Consider outlining responsibilities and expectations regarding student interviews, searches, and arrests for student criminal activity on campus. Officers should not be required to handle routine disciplinary matters. Instead, school staff should be trained in appropriate discipline policies, procedures and techniques so that school discipline matters do not become criminal ones. Also consider if your state has any mandatory reporting requirements that could be streamlined if an SRO, as a certificated police officer, is easily accessible.
- **Presence during the School Day and at School Activities** — The MOU should discuss when and where the officer will be present on school grounds or at school activities. Will the SRO be assigned full time to the school district or will this be a part-time assignment? Will the school district have an SRO

at each of the schools within the school district? Or will the SROs only be at the high schools? It is also important for the agreement to include requirements for the SRO to be present outside the normal school day in certain circumstances. For example, the SRO might be needed to attend and give evidence at a student disciplinary hearing held during a school board meeting. Or, the SRO's presence may be necessary at a parent meeting to provide information regarding law enforcement issues at the school.

- **Reporting and Supervisory Structure** — A school district working with an SRO should establish a very clear chain of command, even if he or she remains ultimately an employee of the law enforcement agency. The governing policy, contract, or MOU should state clearly to whom the officer reports and from whom he or she takes direction. Clear lines of communication should be established, so that there is no question about to whom the officer reports information about student conduct, building security, and/or behavior by members of the public. If the officer is a local law enforcement officer and supervised from a central command, an agreement should be reached, in advance of placement, as to how the officer will interact with school administration. The agreement should also include a mechanism to address conflicts between the officer and the administration, before they arise.
- **Information Sharing** — Where the school district contracts with a public or private agency for security services, sharing of information may be restricted under FERPA unless the district designates in writing that the officers provided by the agency are considered the district's law enforcement unit, or are "school officials" for purposes of records disclosure under FERPA. Very few districts will have a department that would constitute a law enforcement unit for purposes of FERPA. If a school district is designating its SROs as "school officials" under FERPA, it will have to take great care to ensure that all the requirements of that FERPA exception are met, including that the district retains "direct control" over the officers, that the officers have a legitimate educational interest in the records to which they have access, and that redisclosure rules are followed.<sup>43</sup> School districts should also abide by state laws and regulations regarding sharing of student records.

For an example of a state-wide model MOU, see *A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials*, available at <https://www.state.nj.us/education/schools/security/regs/agree.pdf>).

## Q22. How should school districts handle the role of SROs in searches and interrogations?

The Fourth Amendment protects individuals from unreasonable government searches and seizures. Public school officials may search a student or a student's belongings if they have a reasonable suspicion that the student is violating the law or school rules; but the search must be reasonable both at its inception and in its scope.<sup>44</sup> Courts that examine school searches after-the-fact usually consider the school officials' degree of certainty that the student had violated a school rule or the law and the extent to which the student's expectation of privacy would be infringed by the search. The lower the expectation of privacy, the less certainty required to make a search reasonable.

Searches should be based on reasonable, individualized suspicion and should be conducted by a school administrator or under the supervision of a school administrator. An SRO should conduct searches of students and their belongings or interrogations of students only under the direction and supervision of a school

administrator. Courts will closely scrutinize an SRO's actions to determine whether the relaxed constitutional standards applicable to school officials or more stringent criminal justice standards apply.<sup>45</sup>

### **Q23. What factors should a school district consider before deciding whether to arm officers and/or school personnel?**

**Armed Officers** — Aside from the effect on the quality of the learning environment, whether an SRO should be armed will depend on a number of factors, including state law, potential liability in the event of a shooting by the officer, history of violence in the school, and the purpose of placing the officer in the school. Many schools have a combination of armed and unarmed officers, but the community culture may determine how schools approach this issue.

**Armed School Personnel** — Schools should keep in mind the Gun-Free School Zones Act<sup>46</sup> when making decisions about arming non-law enforcement personnel. GFSZA is a federal law that prohibits an individual from knowingly possessing a firearm in a “school zone.” The GFSZA provides exceptions to that rule for “a law enforcement officer acting in his or her official capacity,”<sup>47</sup> and for a person appropriately licensed by the state,<sup>48</sup> among others.

Some state legislatures have enacted or are considering laws that would allow school personnel to carry firearms on school grounds under certain conditions. In these states, school districts should consider carefully whether arming school personnel will increase school safety to such a degree that it offsets the inherent risks of bringing more firearms on to school grounds. Among the risks to consider are:

- failure to ensure that staff meet and maintain training certifications,
- failure to keep weapons safely stowed,
- firearm accidents,
- injuries to staff and students,
- ineffective deployment of armed staff during a crisis, and
- misidentification of staff with guns as shooters during a crisis.

Schools should also consider the cost and availability of insurance to cover the increased liability that may arise when school personnel carry or discharge weapons on school grounds. (See Q25.) Check with your state school boards association for additional considerations arising under your state law.<sup>49</sup>

For a list of state gun laws related to schools, see <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/> (Summary of State Law section).



## IV. LIABILITY AND INSURANCE

### Q24. What liability exposure does a school district have when students or staff are harmed by others at school or a school-sponsored event?

#### *Federal Claims*<sup>50</sup>

In general, a school district does not have a constitutional duty “to protect an individual against private violence.”<sup>51</sup> Courts have recognized two limited exceptions and imposed liability where there is: (1) a special relationship; or (2) a state-created danger.<sup>52</sup> Generally, courts have found that these exceptions do not apply to public schools<sup>53</sup> or have set out various multi-factor tests.<sup>54</sup>

Despite these court rulings, victims of violence or their families who want to assert a violation of their constitutional or other federal legal rights can do so under 42 U.S.C. Section 1983.<sup>55</sup> To win a Section 1983 claim, the victims or their families have to meet a standard much higher than the negligence standards used in state tort law claims.<sup>56</sup> Generally, to hold the school district liable, the alleged victim must prove that an official policy violated an established federal right or authorized or directed the deprivation of a federal right, and the policy was adopted or maintained with deliberate indifference to its known or obvious consequences.<sup>57</sup> Districts generally will not be held liable under Section 1983 where an employee happens to apply a policy in an unconstitutional manner.<sup>58</sup>

Where the district employs armed school personnel, a person who suffered an injury during a crisis might assert a federal claim that the school failed to properly train or supervise its armed personnel. The injured person would have to prove that the district had an official custom or policy of failing to adequately train or supervise its staff and that the policy was adopted by official policymakers with deliberate indifference towards the person’s constitutional rights.<sup>59</sup> Mere negligence on the part of the district in implementing a training program falls short of the deliberate indifference standard.<sup>60</sup> Because of the very high standard necessary to impose liability, Section 1983 claims brought against districts in school shooting cases generally have not been successful.<sup>61</sup> But such cases may still result in substantial legal expenditures for defense and settlement costs, and likely will impose a significant social, emotional, and human resource toll.

Federal claims may also be brought by individuals subjected to bullying and harassment under federal anti-discrimination statutes such as Title IX<sup>62</sup> and Section 504. In 1999, the Supreme Court established the standard for school district liability for peer harassment under Title IX in *Davis v. Monroe County Bd. of Educ.*<sup>63</sup>

#### *State Law Claims*<sup>64</sup>

Injured individuals may also seek to hold school districts liable under state law by asserting a “tort” claim. In such cases, the injured person might assert that the district was negligent for failure to detect and prevent the harm, failure to protect the student and/or failure to respond appropriately to a crisis. Although state law often provides some level of tort immunity to public entities and officials, these claims can be successful in certain circumstances, depending on state law.

Often times, a key factor is the foreseeability of the harm suffered by the alleged victim. In cases involving allegations of threats, courts ask whether a threatening statement, in combination with other information the district knew prior to a plaintiff's harm, placed the district on notice of a risk of the type of harm suffered by the plaintiff. In other words, was the harm foreseeable to the district?<sup>65</sup>

### **Q.25. What types of insurance coverages are available to school districts that provide some protection from risks associated with school violence?**

It is critical that school leaders consult with a school attorney knowledgeable about insurance coverage related to school violence as you determine what types of coverage are needed, especially if the district is considering allowing school personnel to carry firearms on school property and at school events. Working with qualified counsel will also be essential should school violence occur. Among the types of policies that may be relevant are:

- Comprehensive General Liability;
- Property;
- Special Law Enforcement Officer;
- Law Enforcement Professional Liability; and
- Violent Event Response/Workplace Violence/Active Shooter.

Schools that decide to arm staff (administrators, teachers, custodians, bus drivers, etc.) as part of school security efforts likely will be forced to undergo an additional evaluation for underwriting acceptability and charged additional premium for coverage. Underwriting requirements may require far more training than state law requires.

## **Closing Thoughts**

School safety is the first priority for schools every day. As you, school policy makers, determine how to best accomplish this core mission, collaboration is key. Keeping in mind the legal frameworks described in this guide, your work should include communication and cooperation with community agencies, school families, and the public. If the community at large is invested in the same vision for keeping students safe and supported at school, legal hurdles can be addressed and plans implemented more easily when they are needed. It is not easy work. Please reach out to your state school boards association, your COSA attorney, and the National School Boards Association for resources. Thank you for your dedication to the crucial effort to keep schools safe places to learn.

# RESOURCES

## Federal

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Office of Justice Programs (OJP) Safer Schools page, <https://ojp.gov/programs/saferschools.htm>.

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### **State/Local Governments**

Check your state department of emergency/crisis management.

Minnesota, U.S. Attorneys' Office, School Safety: Lessons Learned (2006), <http://www.justice.gov/usao/mn/downloads/schoolbrochure.pdf>.

Salem-Keizer (OR) School District, Salem-Keizer System, <http://studentthreatassessment.org> is a multi-agency model involving juvenile justice, law enforcement, and mental health agencies.

### **NSBA Resources available to members of the NSBA Council of School Attorneys**

Terilyn Finders, Crisis Communication Planning Guide, SCHOOL SAFETY AND EMERGENCY PREPAREDNESS (Council of School Attorneys, 2013 School Law Seminar).

Stephanie Harper, WORKING WITH LAW ENFORCEMENT (Council of School Attorneys, 2016 School Law Practice Seminar).

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## **NSBA Resources**

School Safety, Security, and Emergency Preparedness, <https://www.nsba.org/services/school-board-leadership-services/school-safety-and-security>.

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NSBA Statement to the Federal Commission on School Safety on FERPA and School Safety (July 11, 2018) [https://cdn-files.nsba.org/s3fs-public/reports/NSBA\\_Statement\\_FCSS\\_Meeting-7-11-18.pdf](https://cdn-files.nsba.org/s3fs-public/reports/NSBA_Statement_FCSS_Meeting-7-11-18.pdf).

**STATE SCHOOL BOARDS ASSOCIATIONS**—Below is a sample of resources provided by state school boards associations. Please contact your state association for specific guidance for your state.

**California School Boards Association** <https://www.csba.org/GovernanceAndPolicyResources/ConditionsOfChildren/SafeSupportiveSchlEnvironment/SchoolSafety.aspx>.

Safe Schools—Strategies for Governing Boards to Ensure Student Success [https://www.csba.org/GovernanceAndPolicyResources/ConditionsOfChildren/SafeSupportiveSchlEnvironment/~/\\_media/CSBA/Files/GovernanceResources/EducationIssues/ConditionsofChildren/2013\\_02\\_SafeSchoolsGuidebook.ashx](https://www.csba.org/GovernanceAndPolicyResources/ConditionsOfChildren/SafeSupportiveSchlEnvironment/~/_media/CSBA/Files/GovernanceResources/EducationIssues/ConditionsofChildren/2013_02_SafeSchoolsGuidebook.ashx).

### **Florida School Boards Association School Safety Resources**

<http://fsba.org/health-safety/>.

### **Missouri School Boards' Association**

<https://www.mosba.org/ces/>

**Oregon School Boards Association School Safety Center** [http://www.osba.org/Resources/Article/Community\\_Relations/StudentSafety/StudentSafetyCenterHome.aspx](http://www.osba.org/Resources/Article/Community_Relations/StudentSafety/StudentSafetyCenterHome.aspx).

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- <sup>2</sup> 20 U.S.C. § 1400 et seq.
- <sup>3</sup> 29 U.S.C. § 794.
- <sup>4</sup> William Dikel, *School Shootings and Student Mental Health—What Lies Beneath the Tip of the Iceberg*, published by the National School Boards Association (2012).
- <sup>5</sup> *Id.*
- <sup>6</sup> Andrew Manna, Christopher Borreca, & Lawrence Altman, WHERE IS THE LINE? MENTAL HEALTH SERVICES AND FAPE – UNDERSTANDING THE PUBLIC SCHOOL RESPONSIBILITY (NSBA Council of School Attorneys, Webinar March 2, 2016).
- <sup>7</sup> *Id.*
- <sup>8</sup> Dikel, *supra*, at n. 4.
- <sup>9</sup> Los Angeles United School District, SMH Referral Procedures, <https://achieve.lausd.net/domain/260> (last visited July 31, 2018).
- <sup>10</sup> Manna et al., *supra* at n. 6.
- <sup>11</sup> See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001); *Doe v. Mercer Island Sch. Dist.*, No. C06-395JLR, 2007 WL 215858 (W.D. Wash. 2007); *Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195 (D. Mass. 2003); *Robbins v. Regents of Univ. of California*, 25 Cal. Rptr. 3d 851, 859 (Cal. App. 2005).
- <sup>12</sup> W. Stuart Stuller, *School Violence: What to Do When Red Flags Appear*, NSBA INQUIRY & ANALYSIS (July 2007).
- <sup>13</sup> Involuntary Outpatient Commitment Laws, The Policy Surveillance Program Temple University Beasley School of Law, <http://lawatlas.org/datasets/involuntary-outpatient-commitment-1442865639> (last visited July 24, 2018).
- <sup>14</sup> 20 U.S.C. § 1400 et seq.
- <sup>15</sup> 29 U.S.C. § 794.
- <sup>16</sup> 42 U.S.C. § 12101 et seq.
- <sup>17</sup> 20 U.S.C. § 1232g; 34 CFR part 99.
- <sup>18</sup> Pub. L. 104-191 (Aug. 21, 1996).
- <sup>19</sup> See, e.g., Illinois Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/4 (2018).
- <sup>20</sup> U.S. Department of Homeland Security, United States Secret Service, ENHANCING SCHOOL SAFETY USING A THREAT ASSESSMENT MODEL: AN OPERATIONAL GUIDE FOR PREVENTING TARGETED SCHOOL VIOLENCE (July 2018).
- <sup>21</sup> See, e.g., *Jachetta v. Warden Joint Consol. Sch. Dist.*, 142 Wn. App. 819, at 824, 176 P.3d 545 (2008).
- <sup>22</sup> Charles Leitch, *Advising School Districts on Threats of Violence*, NSBA Council of School Attorneys, School Law Practice Seminar Presentation (Oct. 20-22, 2016).
- <sup>23</sup> *Id.*; see also U.S. Department of Homeland Security, United States Secret Service, ENHANCING SCHOOL SAFETY, *supra*, at n. 20 (July 2018).
- <sup>24</sup> 20 U.S.C. § 1232g; 34 C.F.R. Part 99.
- <sup>25</sup> See NSBA Statement to the Federal Commission on School Safety on FERPA and School Safety [https://cdn-files.nsba.org/s3fs-public/reports/NSBA\\_Statement\\_FCSS\\_Meeting-7-11-18.pdf](https://cdn-files.nsba.org/s3fs-public/reports/NSBA_Statement_FCSS_Meeting-7-11-18.pdf) (July 11, 2018).
- <sup>26</sup> Leitch, *supra*, at n. 22.



- <sup>27</sup> 18 U.S.C. §§ 2701-2712.4 (2018), *quoted in* Leitch, *supra* at n. 22, at \*13 (2016).
- <sup>28</sup> *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).
- <sup>29</sup> *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996).
- <sup>30</sup> *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969); *see generally*, Leitch, *supra*, at n. 22; Stuller, *supra*, at n. 12.
- <sup>31</sup> *See, e.g., Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 621-23 (8th Cir. 2002) (en banc). After the attack on Columbine, some courts have interpreted the concept of a true threat broadly, *e.g., Porter v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576 (M.D. La. 2004) (drawing of a school being destroyed constituted a true threat); *Commonwealth v. Milo M.*, 740 N.E. 2d 967, 969 (Mass. 2001) (twelve year old student's drawing of a student shooting a teacher constituted a true threat); while other courts have not. *E.g., State v. Kilburn*, 84 P.2d 1215, 1224 (Wash. 2004) (student's statement to a classmate that he was going to bring a gun to school and shoot everyone was not a true threat); *In re Douglas D.*, 626 N.W. 2d 725, 730 (Wis. 2001) (student's creative writing story regarding killing a teacher was not a true threat). *See also Madris v. Hannibal Pub. Sch. Dist.*, 684 F.Supp.2d 1114, 1120 (E.D. Mo. 2010). "In determining whether a statement amounts to an unprotected threat, there is no requirement that the speaker intended to carry out the threat, nor is there any requirement that the speaker was capable of carrying out the purported threat of violence"; *Tatro v. University of Minnesota*, 800 N.W.2d 811, 821 (Minn. Ct. App. 2011) (most courts hold that student expression need not reach the true-threat threshold before a public school may take appropriate disciplinary action in the interest of protecting the work and safety of its community).
- <sup>32</sup> National Association of State Boards of Education, Crisis Management/Emergency Response page, [www.nasbe.org/healthy\\_schools/hs/bytopics.php?topicid=31440](http://www.nasbe.org/healthy_schools/hs/bytopics.php?topicid=31440).
- <sup>33</sup> Pub. L. No. 114-95, 129 Stat. 1836 (2015).
- <sup>34</sup> 129 Stat. 1848.
- <sup>35</sup> *Id.* at 2032.
- <sup>36</sup> STOP School Violence Act, Pub. L. No. 115-141, 132 Stat. 348 (2018).
- <sup>37</sup> U.S. Department of Education, PRACTICAL INFORMATION ON CRISIS PLANNING: A GUIDE FOR SCHOOLS AND COMMUNITIES (2007), <https://www2.ed.gov/admins/lead/safety/emergencyplan/crisisplanning.pdf>. *See also* National Association of School Psychologists et al., FRAMEWORK FOR SAFE AND SUCCESSFUL SCHOOLS at \*3 (2013), <https://www.nasponline.org/resources-and-publications/resources/school-safety-and-crisis/a-framework-for-safe-and-successful-schools>.
- <sup>38</sup> Shamus O'Meara, Rick Kaufman & William Modzeleski, PLANNING FOR AND MANAGING THE SCHOOL CRISIS YOU HOPE NEVER COMES (Council of School Attorneys, Webinar, Dec. 21, 2012), *available at* [https://www.youtube.com/watch?v=o4qDyOL5F\\_I&feature=youtu.be](https://www.youtube.com/watch?v=o4qDyOL5F_I&feature=youtu.be).
- <sup>39</sup> U.S. Department of Homeland Security, National Incident Management System (2018), <https://www.fema.gov/national-incident-management-system>.
- <sup>40</sup> Office of the Attorney General State of New Jersey, A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials, (2015). <https://www.state.nj.us/education/schools/security/regs/agree.pdf>.
- <sup>41</sup> *See*, Barbara Raymond, *Assigning Police Officers to School*, PROBLEM ORIENTED GUIDES FOR POLICE RESPONSE GUIDES SERIES 10 (2010), [http://www.popcenter.org/Responses/pdfs/school\\_police.pdf](http://www.popcenter.org/Responses/pdfs/school_police.pdf).
- <sup>42</sup> C. Pardee, *So You Want an SRO: Ten Tips for Contracting for a Successful School Resource Officer*, NSBA INQUIRY & ANALYSIS (March/April, 2013).
- <sup>43</sup> 34 C.F.R. § 99.31 (2016).
- <sup>44</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
- <sup>45</sup> *E.g., State of Washington v. Meneese*, 282 P.3d 83 (Wash. 2012) (court declined to apply reasonableness standard to SRO who arrested and cuffed student for marijuana possession, then searched backpack); *State v. Alaniz*, 815 N.W.2d 234 (N.D. 2012) (court said reasonableness standard applies when school officials initiate the search or police involvement is minimal or when SROs search on their own initiative or at the direction of other school officials to further educationally-

related goals). See generally, Leitch, *supra* at n. 22.

<sup>46</sup> 18 U.S.C. § 922(q).

<sup>47</sup> 18 U.S.C. § 922(q)(2)(B)(vi).

<sup>48</sup> 18 U.S.C. § 922(q)(2)(B)(ii).

<sup>49</sup> See Texas Association of School Boards, School Marshalls and Other School District Personnel Carrying Firearms (2017) [https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Business/documents/sch\\_marshalls\\_and\\_other\\_personnel\\_carrying\\_firearms.aspx](https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Business/documents/sch_marshalls_and_other_personnel_carrying_firearms.aspx).

<sup>50</sup> Joe Tanguma & Thomas Wheeler, ARMED GUARDS IN SCHOOLS – PROS, CONS NND LIABILITY CONCERNS, NSBA Council of School Attorneys School Law Practice Seminar Presentation (2013).

<sup>51</sup> *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 (1989).

<sup>52</sup> *Id.* at 197.

<sup>53</sup> *E.g., Doe v. Covington County Sch. Dist.*, 675 F.3d 849, 857-58 (5th Cir. 2012) (en banc) (reaffirming decades of precedent across circuits to confirm that a public school does not have a *DeShaney* special relationship with its students because students are not held in custody against their will).

<sup>54</sup> *E.g., King v. E. St. Louis Sch. Dist.* 189, 496 F.3d 812, 818 (7th Cir. 2007) (for a duty to protect to apply: 1) the state, by its affirmative acts, must create or increase a danger faced by an individual; 2) the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual; and 3) the state's failure to protect the individual must shock the conscience).

<sup>55</sup> *West v. Atkins*, 487 U.S. 42, 48 (1988).

<sup>56</sup> See *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Collins v. City of Harker Heights*, 503 U.S. 115, 127 (1992).

<sup>57</sup> *Board of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 407 (1997).

<sup>58</sup> *City of Canton v. Harris*, 489 U.S. at 387; *Collins*, 503 U.S. at 122; *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691-94 (1978).

<sup>59</sup> *Harris*, 489 U.S. at 387-88; *Haverstick v. Fin. Fed. Credit, Inc.*, 32 F.3d 989, 996 n.8 (6th Cir. 1994); *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995).

<sup>60</sup> *Snyder v. Trepagnier*, 142 F.3d 791, 796 (5th Cir. 1998).

<sup>61</sup> *E.g., Walker v. Evans*, 10-12596, 2012 WL 917772 (E.D. Mich. 2012) (plaintiffs failed to establish an affirmative act by the state which either created or increased the risk that they would be exposed to an act of violence by a third party; there was no issue of material fact as to whether district officials knew or should have known that their actions specifically endangered the plaintiffs which reached the level of deliberate indifference); *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1133 (D. Colo. 2001) (plaintiffs failed to show underlying constitutional violation; shooters were the “moving force” behind plaintiffs' injuries. plaintiffs' allegations that different policies or adequate training would have prevented injuries failed to state a claim upon which relief could be granted).

<sup>62</sup> 20 U.S.C. § 1681 *et seq.*

<sup>63</sup> *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (plaintiff must show deliberate indifference to severe, pervasive in objectively offensive harassment based on a protected class that was known to a school official with authority to stop the misconduct).

<sup>64</sup> See generally, Leitch, *supra* at n.22 and Stuller, *supra* at n.12.

<sup>65</sup> *E.g., J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 57, 871 P.2d 1106, 1109 (1994); *Jachetta v. Warden Joint Consol. Sch. Dist.*, 142 Wn. App. 819, 176 P.3d 545 (2008); *Conklin v. Saugerties Cent. Sch. Dist.*, 106 A.D.3d 1424, 1426, 966 N.Y.S.2d 575 (N.Y. App. Div. 2013) (distinguishing threats of actual force from rumors of planned attack); *Pugh v. St. Tammany Parish Sch. Bd.*, 994 So. 2d 95, 98-100 (La. Ct. App. 2008) (summary judgment denied based on district's knowledge of threats generically, even without specific information about those threats); *Mirand v. City of New York*, 84 N.Y.2d 44, 46, 637 N.E.2d 263, 614 N.Y.S.2d 372 (1994) (summary judgment improper as district was sufficiently placed on notice of a risk of the student victim's assault because victim successfully reported death-threat to an art teacher whose name the victim could not remember).



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1680 Duke Street, 2<sup>nd</sup> Floor, Alexandria, Virginia 22314-3493  
[www.nsba.org](http://www.nsba.org)