

School Safety & Youth Violence

A Legal Primer

*by Kirk A. Bailey, J.D.
Catherine J. Ross, Ph.D., J.D.*

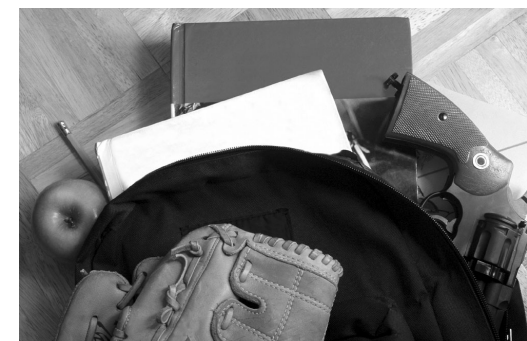


“Mostly we see .22 pistols, little .25 automatics or .38 revolvers,
but we did have one kid bring a fully loaded .357 Magnum to school.”
– *Les Burton, Assistant Superintendent of Security Houston Public School System,*
on establishing metal-detector searches at classroom doors.
New York Times, May 25, 1986

“The main goal of the future is to stop violence.
The world is addicted to it.”
– *Bill Cosby*
Comedian, actor, author

“What’s done to children, they will do to society.”
– *Orlando A. Battista*

School violence, teen shootings, and similar tragedies are a chronic problem affecting America’s youth, parents, teachers, and communities. As this publication was being prepared, two new school shootings occurred in Santee and El Cajone, California, suburbs of San Diego, killing two and injuring dozens more. Just a year ago, young Kayla Rollind was shot to death by a 7-year-old classmate at her elementary school in Mount Morris, Michigan. Few can forget the highly publicized shootings in Littleton, Colorado; Springfield, Oregon; West Paducah, Kentucky; Jonesboro, Arkansas; or Pearl, Mississippi, to name only a few. In the last several years, these high profile tragedies have resulted in more than 33 deaths and numerous wounded. Yet, for all the attention these horrors receive, they



are a rarity and only scratch the surface of the chronic violence in schools and communities that affects America’s youth. The Office of the Surgeon General has identified youth violence as an epidemic, which has diminished in recent years but remains a critical issue for public health.

While the overall youth crime rate, and the homicide rate in particular, has been dropping since 1994 (homicides down 34% since 1993), the level of violence remains unacceptably high. For example, the percentage of students in grades 9 through 12 who were threatened or injured with a weapon on school property has remained constant in recent years. A downward trend in juvenile crime cannot detract from that fact that violence casts a pervasive shadow over America’s schools and youth.

Indeed the reports of attacks, harassment, weapons, and so on have become so frequent and familiar as to seem commonplace and a part of the rhythm of daily life. The frequency and increasing severity of these events give pause to many parents, educators, community leaders, and politicians and motivate them to take action to curb the tide of violence that affects our schools and communities.

Clearly, states have a vested interest in providing a strong and secure education system, an interest that society has long recognized as one of its most compelling. In *Brown v. Board of Education* (1954), the Supreme Court observed:

Education is perhaps the most important function of state and local governments.... It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.... It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.ⁱ

For this reason, school officials have a strong obligation, both moral and legal, to respond to undisciplined youths whose behavior potentially threatens the welfare and safety of the other children in attendance. This is particularly true in light of the fact that students do not have a fundamental right to a public education under the Constitution.ⁱⁱ As a general notion, the exercise of the privilege to a free and public education carries the corollary responsibility of the student to comply with reasonable rules, regulations, and requirements duly authorized by school authorities. Violation of those rules and regulations may be addressed by a variety of disciplinary methods.

Educators nationwide have implemented zero tolerance policies, expanded search procedures to intercept weapons (guns, knives, bombs, etc.) or drugs, designed comprehensive school safety plans, and responded to numerous legal claims. This massive effort to reduce violence and improve safety in schools imposes an immense burden on educators and citizens alike to master the legal complexities of due process, constitutional

rights, and damage claims as they relate to the school setting. Teachers, students, and parents are provided little guidance regarding the legal issues created by violence in schools. In response, the Hamilton Fish Institute on School and Community Violence, in the George Washington University School of Education and Human Development and the George Washington University School of Law conceived this guidebook — a legal primer on violence in schools. The Hamilton Fish Institute researches and develops strategies for reducing violence and promoting civility in schools and their surrounding communities.

Violence in schools raises a variety of legal issues regarding prevention, intervention, and response to crisis. This guidebook seeks to outline the major legal issues faced by schools, including:

- School liability for violence
- Search and seizure, threats of violence
- Zero tolerance policies
- Use of student records

The following pages are broken down into sections that provide a brief overview of the key rules and guidelines for school officials and teachers in each topic area. Endnotes for each section are located at the end of the publication as a guide for any additional research that may be necessary.

We hope that this information will prove a valuable resource to teachers and administrators who face these issues on a daily basis. While the research into these areas was comprehensive and exhaustive, we have endeavored to present guidelines in the most concise manner possible. As the title suggests, this publication is a starting point and general overview, which we hope will be useful to all teachers, school administrators, parents, and students.

Please note that the guidelines and information presented in this document focus on the legal issues implicated by violence (shootings, assault, battery, and sexual assault, etc.) or the imminent threat of violence (verbal threats, possession of a weapon, etc.). Due to space considerations and the breadth of legal issues involved, this primer does not address other school

safety issues such as gang activity and corollary student free speech rights, drug use and possession (except as specifically noted), theft, robbery, or other activities that do not involve actual physical harm or the threat of harm to students, teachers, or administrators. Of course, we recognize these issues are interrelated, and any separation of these concerns is artificial. Accordingly, we have endeavored to identify where connections with these issues exist and refer the reader to other publications for guidance.

We emphasize that this primer is not intended to substitute for legal advice regarding any particular situation. The information presented is accurate but should serve as a general guideline only and not be taken as legal advice. Please consult with a competent, local attorney regarding specific questions, concerns, or situations.

The Hamilton Fish Institute is administered by The George Washington University, Institute for Education Policy Studies, Graduate School of Education and Human Development. This publication was prepared under a grant from the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice (97-MU-FX-K012), and points of view or opinions in this document are those of the Institute and do not necessarily represent the official position or policies of the U.S. Department of Justice. The Institute wishes to thank OJJDP for its continued support of the research conducted by the Institute and for their suggestions and feedback on the issues presented here. Questions regarding these materials may be directed to the Institute at 202.496.2200 or readers may access our Web site at www.hamfish.org.

The authors wish to thank the many members of the staff of the Hamilton Fish Institute, including Dr. Paul Kingery, Dr. James Derzon, Nancy Budd, Aaron Alford, Allison Seale, and Anthony McBurrough for their contributions to and suggestions for this article. In addition, the authors wish to thank the following individuals for their review of the work in this document: Kamala Shugar, Esq. (Assistant District Attorney, Lane County, Oregon), Mustafa T. Kasubhai, Esq., Jennifer Kulle (Glencoe High School, Hillsboro, Oregon), Ellen Boylan, Esq. (Education Law Center), Robert Schwartz, Esq. (Juvenile Law Center) and Julie Thomerson, Esq. (National Conference of State Legislatures). The strength of this article is the result of their clarifying arguments, concise editorial comments, and significant intellectual curiosity; while any deficiencies remain those of the authors.

About the Authors:

Kirk A. Bailey, J.D.; Special Counsel, Hamilton Fish Institute.

Catherine J. Ross, Ph.D., J.D.; Associate Professor of Law, George Washington University Law School.

Contents

Index of Terms	i.e.	Use of Student Records	19
School Liability.....	1	End Notes	23
Search and Seizure - Threats of Violence	7	Appendix	28
Zero Tolerance: Suspension and Expulsion	13		

Index of Terms

Alternative education	14	School disciplinary record/s	12, 19, 20
Anti-social behavior	20	(See also "Student Records")	
Cameras	10	School safety plans	1, 2, 3, 11, 25, 27
Chavez v. Tolleson Elementary School District (Arizona, 1973)	2, 23	Searches	
Civil liability	1, 3, 4	Lockers	3, 7, 9, 10, 11, 24
Civil rights.....	1, 21	Strip	7, 9, 11
Colvin v. Lowndes County (Mississippi)	15, 26	Drugs	7, 9, 11
Constitutional claims	1, 3, 11, 23	(See also "Metal detectors")	
Constitutional rights.....	1, 3, 4, 10, 14	Security officers.....	3, 7
Department of Justice	21	Sexual assault	4
Disruptive behavior.....	9,20	State law	14, 17, 21
Due process	1, 3, 13, 14, 15, 17, 18, 23	Student records.....	11, 19, 20, 21, 27
Exclusionary rule	10	Supervision	1, 2, 3, 5
Expectation of privacy	8,10	Surveillance	7
Expulsion	10, 13, 14, 15, 16, 17, 25	(See also "Cameras")	
Family Educational and Privacy Act (FERPA).....	19, 27, 28	Suspension	9, 13, 14, 15, 16, 17, 18, 25
Federal Bureau of Investigations	21	Threats of violence	7, 10, 14, 24, 25, 26, 28
Fourteenth Amendment.....	1, 23	Tinker v. Des Moines School District.....	14, 25, 26
George Washington University.....	ii,iii	Turner v. South-Western City School District	10, 25
Goss v. Lopez	14, 26	U.S. Department of Education.....	21
Gun-Free School Zones Act of 1990.....	1	U.S. Supreme Court	13
Gun-Free Schools Act of 1994	13, 25, 27	Violence:	
Hamilton Fish Institute	23	Spontaneous acts of violence	1
Legal liability	1	Planned Acts of violence	1
Metal detectors	7, 8, 9, 11	Violent acts	1, 3, 4, 20, 21
Off-campus activity	2, 14	Weapons	
Office of Juvenile Justice and Delinquency Prevention ..	17, 20	Guns	7,13
Profiles/Profiling	8, 20, 21	Knives	7,14
Racial bias.....	13	Workers' compensation	4,24
Risk factors	1, 4, 5, 7, 8, 19, 20, 21	Zero tolerance policies	13, 14, 15, 17, 25

School Liability



Generally, 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 place the school, its administrators, or governing body at risk of legal liability. This liability may arise from a variety of circumstances and may depend on actions taken (or not taken) by the school itself. Schools may be liable not only for civil claims such as negligence, but claims asserting violation of a student's constitutional rights under the Fourteenth Amendment (guaranteeing due process and equal protection) and a variety of civil rights claims.¹ This section outlines the school's potential for liability under civil or constitutional claims when violence occurs.

Civil Liability

School districts face potential liability for the violent acts of students or nonstudents where they fail to:

- 1) Supervise a specific area at school where prior instances of violence occurred,
- 2) Warn faculty, potential targets, or appropriate school personnel about a pre-existing danger, including the violent propensities of a student,
- 3) Establish and adhere to a school safety plan.²

Generally, schools are required to show the same degree of care and supervision that a reasonably prudent parent would

employ under the circumstances.³ The absence of supervision must have caused the violence or crime for the school to be liable.⁴ School boards may be liable for failure to establish adequate supervisory procedures, even if their employees are not liable.⁵ This general duty of care and supervision extends to preventing a foreseeable suicide. 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.⁶

However, even where a school may have a duty to supervise, the school will not be liable for sudden, spontaneous violence. "Spontaneous or planned acts of violence by students on school grounds do not create

liability on behalf of the school board if the school ground is otherwise well supervised."⁷ Courts support this rule for a variety of reasons usually observing that spontaneous violence is not foreseeable, that additional security measures are unlikely to prevent such violence in any case, or that the violent act is an intervening cause of the injury to the victims.

Previous incidents in same location

A school may have a duty to supervise a particular area of school grounds, depending on whether similar acts have occurred in that area previously. The recency, frequency, location, and nature of the prior crimes will be factors in determining whether the crimes establish a duty to supervise.⁸ 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. Please note, however, that courts in some states have concluded that only

similar crimes in a given location create a duty to supervise, while in other states they indicate a school may be liable where there is a generally high level of violence at a school or the school is in a high crime area.

Time and Location of Incident

Liability may depend on the time and location of the incident. For example, a school may be liable for violence suffered by students while in the school parking lot or while on their way to and from the school grounds. Normally, however, a school will not be liable where an incident occurs off-campus, during non-school hours, and is not related to school-sponsored activities.⁹ For example, a school incurred no liability for the assault of a young female student after an evening of drinking at a local bar and the activity had no relation to school-sponsored events or where an elementary school student wandered from school grounds and was subsequently kidnapped and murdered.¹⁰ (See **Case at a Glance: Chavez v. Tolleson Elementary School District [Arizona, 1973]**).

Attacker's Dangerous Propensities

A school will be liable where it fails to safeguard other students or teachers from someone with a known propensity to violence. School officials must warn intended and identifiable victims where serious danger from a known suspect exists, and the warning must be specific and complete.¹¹

School Safety Plans

Comprehensive school safety plans are an integral part of school management, yet 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 when it adopts a school safety plan. Courts have held schools liable in such circumstances under the belief that when 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.¹²

Please note that the opposite is true as well. In light of current youth violence levels, liability will be asserted where a

Case at a Glance: Chavez v. Tolleson Elementary School District (Arizona, 1973)

On the morning of September 17, 1973, a puppy walked through the open door of a fifth grade classroom at Tolleson Elementary School, Unit Two, causing a disturbance among the students. The teacher inquired if the dog belonged to anyone in the class, and Regina asked if she could take the puppy home. The teacher sent Regina to the to the Principal's office with the dog to get permission. The school office is located inside the school grounds some 30 feet away from the classroom. On arrival at the office with the dog, Regina was instructed by the school secretary to place the dog outside the office along the breezeway and to return to her classroom. Regina did not argue with the secretary and left the office with the puppy. A custodian, a fellow student, and a passerby observed Regina leaving the office. Regina's fate after leaving the office was detailed in the tape-recorded statement of her abductor, John Cuffle, who was later convicted and sentenced for her murder. Cuffle stated he abducted Regina outside the school grounds and took her to a field six miles from the school where he killed her. Her body was found some three months later in a field a few miles from the school. Regina's parents sued the school district for wrongful death.

The trial resulted in a jury verdict for Regina's parents, which was overturned by the trial judge, because the plaintiffs failed to establish that the school could have reasonably foreseen that Regina would be kidnapped and killed as she traveled between her class and the office.

The Arizona Court of Appeals upheld this decision on the grounds that there were insufficient facts to indicate that school personnel should have been aware of the potential of criminal conduct in the area of the school. The court stated "the heinous criminal conduct involved here, while shocking, is clearly in the category of the unforeseeable. If it were otherwise, prevision would become paranoia and the routines of daily life would be burdened by intolerable fear and inaction." Consequently, where the school could not reasonably foresee that Regina would leave the school grounds without permission and thereafter be abducted and slain, they were not liable for her death.

school fails to provide a school safety plan. Ultimately, liability rests on whether the act of violence 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. Accordingly, schools are urged to develop realistic plans as part of an effort to protect students and teachers alike from violent acts.¹³

Specific Measures

No specific measures are required of schools to enhance safety on school grounds. Courts are reluctant to impose such requirements and consequently have not required schools to provide security officers, conduct routine searches, or adopt supervisory programs.¹⁴ Constant supervision is also not required.¹⁵

Constitutional Claims

American courts are reluctant to extend constitutional protection to situations covered by state civil liability rules. Readers are urged to contact their local school counsel for specific advice regarding constitutional liability and substantive due process concerns raised by violence in schools.

Generally, constitutional claims rest on three theories of school liability, very similar to those outlined above:

- 1) Whether there is a "special relationship" creating a duty to protect students from harm;
- 2) Whether schools "created the danger" of harm; and
- 3) Whether school policies reflected a "deliberate indifference" to the constitutional rights of students.¹⁶

1. Special Relationship

When a private person, an uninvited guest at the school, or another student causes the harm to a student, the school is not liable for failing to protect students from each other or from the private actions of another person.¹⁷ The Constitution does not require the state (a school) to protect citizens from each other (students), except where the state has taken custody of the indi-

vidual, such as in the case of prisoners or mental patients.

In addition, school attendance, while compulsory, does not create a special relationship that requires a school to shoulder responsibility for the entire personal lives of students or for any harm that might befall them. Ultimately, parents retain custody, and the primary responsibility for children and their well-being. In short, compulsory attendance laws do not create a custodial relationship between a school and a student that imposes a duty upon the school to protect the student from harm.¹⁸

2. State Created Danger

A school may be liable under the Constitution for harm to a student by a private actor or employee, if the school's actions "created" the danger of possible harm. Generally, liability will depend on several factors:

- 1) The environment created by the school must be dangerous;
- 2) The school officials must know it is dangerous; and
- 3) School officials must have used their authority to create an opportunity that otherwise did not exist for the crime to occur.¹⁹

Mere inaction is not sufficient. A claim of constitutional liability will fail absent some proof that actions by the school caused the danger and the possibility of harm. Accordingly, schools have not been held liable constitutionally in a variety of circumstances:

- Where school officials received complaints that a teacher was sexually involved with students and did not discipline the teacher,
- Where students were killed by random shooting at a school dance,
- Where a student was killed by a nonstudent trespasser,
- Where the school knew of the violent propensities of a student who later killed a fellow classmate.²⁰

Please note that while these examples may be disturbing, they focus on constitutional liability; the schools involved may

have suffered state civil liability in these cases. Consequently, the reader is urged to contrast these examples with cases discussed above that assess civil liability for failure to protect against an individual (teacher or student) with known propensity to violence.

3. *Harm Inflicted by School Employees or Officials*

Where a school employee inflicts harm on a student, that act may be viewed as a constitutional violation. If so, supervisory officials and school boards may be liable under the Constitution if they allowed a practice or policy of deliberate indifference to the constitutional rights of students, and the policy or practice caused the harm.

These scenarios usually involve the sexual assault or physical injury of a student by a teacher, although some cases address student-on-student harm.²¹ Typically, school officials are held legally responsible where they have received several complaints about inappropriate or dangerous acts and have responded inadequately (i.e. they took no action) or they suppressed or concealed the complaints.

The primary issues in this area revolve around the following questions:

- 1) Whether protection from a particular kind of harm is a constitutional right;
- 2) Whether the accused teachers or employees are acting “under color of” state authority when they commit the alleged acts; and
- 3) Whether the officials’ indifference actually caused or contributed to the harm.

Unfortunately, this area of the law is highly unclear, so general guidelines are difficult to offer. School officials are urged to consult with their local school legal counsel for advice regarding any specific questions or circumstances.

Workers’ Compensation

Injury to students or school personnel presents the potential that school districts may face liability under workers’ compensation statutes.²²

Generally, injury on the job will be compensable if the likelihood of injury was increased by employment, either due to the nature of the job or because of the susceptibility to injury associated with the work environment. Schools have been held liable in a variety of circumstances, including, for example when a teacher was required to accept a student with known violent and aggressive tendencies into his or her teacher’s class despite objections,²³ when a teacher attempted to restrain a violent student,²⁴ when a teacher was asked to chaperone a school athletic event without proper training,²⁵ and when a teacher was assaulted by a member of a student’s family.²⁶

Defenses to Claims against Schools

Schools may argue that they are not liable for violent acts of students or nonstudents either on or off campus. They may assert governmental immunity, official immunity, intervening or supervening causes, contributory negligence, or assumption of risk by the victim. For the sake of space, these defenses are not reviewed in detail here. Please consult with your school attorney regarding any specific questions or situations.

Checklist - School Liability²⁷

- School personnel should exercise the same degree of care as a reasonably prudent parent in the supervision of students.
 - School personnel will be liable where they can reasonably be expected to foresee the potential danger of a situation resulting in injury to a student, regardless of whether they actually did or not.
 - A higher standard of care may be expected during activities with a higher foreseeable level of risk, such as field trips, excursions involving students, laboratories, physical education classes, and contact sports.
 - All school personnel have a responsibility to ensure that school buildings and grounds are safe for student use.
 - School officials should provide supervision for students on school grounds or at school-related activities, before and after the school day.
 - Unacceptable behavior by teachers and administrators should be clearly stated in a school or district policy
- with restrictions on any actions that may be considered assault and/or battery or intended to cause emotional harm, especially in cases involving physical punishment.
 - Schools should develop a culture and set of values that place a high premium on respect for the dignity of every individual involved in the school community and require workshops and seminars periodically to ensure that school personnel are aware of safety and liability issues.
 - Schools must keep personal information regarding students confidential except where sharing that information is required by law, but school officials must operate in good faith with no intent to harm a student’s reputation.
 - Board of education members may be held liable for their individual acts that result in the violation of a student’s rights.

Search and Seizure – Threats of Violence

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. These methods may include metal detectors, random searches of lockers or individuals, or individual searches of students suspected of wrongdoing. Administrators and teachers may rely on tips from other students, camera surveillance, and, in some instances, strip searches. This section outlines the basic legal rules in each of these areas.

Search and Seizure

Generally, school officials may search a student “if the search is justified at its inception and is conducted in a manner reasonably related in scope to the circumstances.”²⁸ The reasonableness standard is intended “to ensure student’s rights [will] be invaded no more than necessary to maintain order in schools,” not to authorize all searches conceivable to school officials.²⁹

A search will be justified where there are reasonable grounds for suspecting a search will reveal contraband or evidence that a student is violating school rules.³⁰ The permissible scope of a search depends on whether the measures used are reasonably related to the objective of the search and not excessively intrusive, given the age and sex of the student and nature of the infraction.³¹ General exploratory or sweep searches are usually impermissible under constitutional standards.³²

Accordingly, 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). As additional examples, school officials may search a student for weapons when 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. Security officers may frisk a student and proceed on reasonable suspicion resulting from the stop. Searches may be conducted when a student does not possess the proper school pass and acts excited or aggressive or exhibits other signs of potential drug use when confronted by school officials.³³

Reasonable suspicion by school officials may rest on numerous other factors, including:³⁴

- Possession of cigarette rolling papers commonly associated with marijuana use,
- Faltering and nervous behavior by a student without a pass in a school restroom frequently used for narcotics activity,
- Previous misconduct and unusually heavy use of public telephone,
- Furtive gestures,
- Drug paraphernalia observed through a car window,
- Weapons observed through a car window,
- Observation of a request to sell drugs or actual sale of pills,
- Observation of students smoking and the odor of marijuana,
- Record of concealed weapons combined with suspicious behavior,
- Bulging pockets and possession of a large sum of money,
- Reports of sale of firecrackers or other explosive materials.

- Unruly behavior by student with bloodshot eyes and dilated pupils.
- Process of elimination of other possible offenders.

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.³⁵ They may subject the student informant to extensive questioning regarding the student's motives, perception, or source of knowledge. In addition, they may conduct their own investigation of the accused student's activities through direct observations, questioning classmates, or using other methods, in an effort to corroborate the tip. Either approach ensures that school officials have reasonable grounds to believe a search will produce contraband or evidence of illegal behavior.

Risk Factors - "Profiles"

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 stop a student for questioning or to search his or her possessions or person. There is no specific legal rule, such as a Supreme Court decision, addressing the use of risk factor lists or profiles in the school setting. The general rules discussed above in combination with guidelines on the use of drug courier and passenger profiles used in airports provide some directions for the use of a profile in a school.

The Supreme Court has expressly approved the use of "probabilistic" profiles in the airport setting to identify potential drug couriers or terrorists.³⁶ 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."³⁷ 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 sus-

pect.³⁸ Profiles are treated as an objective and useful tool and are valid so long as they leave no room for subjective interpretation by airline personnel or security authorities and are not applied in a discriminatory fashion.³⁹

Based on this background, a profile may well be an acceptable method of identifying students who may present a risk to the safety of a school and may be stopped for additional questioning. 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 behavior or other corroborating information in order to conduct a full search of the student's person or property. A school official 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 the 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.

Locker Searches

Generally locker 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 locker and may search it from time to time.⁴⁰ A locker search should not extend to a student's private articles, such as jackets, purses, and backpacks, within the locker. The student rightly considers these items private and a school official must possess individualized reasonable suspicion to search them.

Metal Detectors

Metal detector searches also appear permissible under constitutional standards. 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 gov-

erning such searches is in place. It is not required that the actual date of the metal detector search be provided.⁴¹

Strip Searches

A strip search should be used rarely and as a last resort in light of the serious invasion of privacy it represents. Such a search is permissible if it is "justified at its inception and reasonably related in scope to the circumstances which justified the search in the first place."⁴² Generally, a reasonable search under the circumstances requires that school officials have reasonable suspicion that the student in question possessed drugs or other contraband.⁴³ A strip search may be reasonable where:

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

Allegations of previous illegal activity (as old as six months) may contribute to the reasonable suspicion, particularly when new incidents of suspected illegal behavior are present.⁴⁴ Strip searches in cases of imminent physical harm to students or school personnel are probably justified, especially when weapons are involved. Imminent circumstances would mean that a student presents an immediate and impending threat to himself or others, such as when 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.

The important issue to remember is that as the intrusiveness of the search increases, so does the concern regarding whether the search is reasonable. School officials must consider the age and sex of the student involved. Accordingly, if school officials plan to make a student disrobe to locate contraband items, they are encouraged to pursue an exhaustive search of possible alternative locations for the contraband item (weapon/drugs), establish with reasonable certainty that the student possessed the item (through a reliable witness, or the elimination of all other

Case at a Glance: *Turner v. South-Western City School District*

In September 1999, school and safety officials at Westland High School in Galloway, Ohio, noticed a partially concealed Smith and Wesson 9mm gun protruding from under the front driver's side seat of a car owned by Stephen Koser, a 17-year-old student at the school. Subsequent investigation by school officials and a sheriff's deputy, accompanied by Koser, revealed the gun to be a plastic toy gun that had a bright orange tip which had been concealed from view.

When Koser was asked to return to the Assistant Principal's office, he became belligerent and hostile and refused to return to school. Eventually, he was persuaded to return to the building, but on the walk back, he began to use profanity, was disruptive, and started to make veiled threats. During the time he spent in the office, Koser made threatening statements such as "This is how I solve my problems," "if I wanted to bring a real gun to school, I would have brought a gun and blown holes in this mother," "I get rid of my problems," and "every dog has his day, and you'll get yours." Koser said to the Deputy, "If you take your gun and badge off, you want to get froggy, leap," which was interpreted a direct threat and an attempt by Koser to instigate a fight.

Koser was suspended and subsequently expelled for the remainder of the academic term based on possession of a "look-alike gun" on school property, use of repeated profanity, disruptive behavior, and threats directed at school officials. The suspension was challenged by Koser's mother, Jerrie Turner, but subsequently upheld throughout appeals to school authorities, the local school board, and the courts.

possibilities, for example) and thoroughly explain the search to the student in accordance with a pre-existing policy.

Threats of Violence

Students sometimes will threaten to hurt or shoot fellow students out of frustration, fear, or a genuine intent to harm. Distinguishing between mere bravado or destructive impulses, constitutionally protected speech or threats, is a delicate matter. (See **Case at a Glance:** *Turner v. South-Western City School District*.)

Threats of violence and protected speech may be separated, however, and genuine threats met with discipline for the students uttering them. Whether a school may discipline a student for a threat rests on whether it can reasonably be inferred that the threat is a serious expression of intent to harm or assault another person.⁴⁵ A student may be punished where he or she has “directly and unambiguously threatened physical harm” to a fellow student or teacher.⁴⁶

Accordingly, students’ speech rights may be limited where they infringe on the rights of others to be secure and left alone, such as disrupting class work, causing substantial disorder, or invading the personal rights of others.⁴⁷ Students have been appropriately suspended or expelled for voicing threats of violence in a variety of circumstances, including:

- Threatening to shoot a high school guidance counselor if a class schedule was not changed,⁴⁸
- Threatening to rape a teacher and the teacher’s daughter and bragging to other students about the threats,⁴⁹
- Verbally assaulting school officials and using “veiled threats” after an erroneous identification of a gun in a student’s car.⁵⁰ [See **Case at a Glance:** *Turner v. South-Western City School District*, *inset above*.]

Finally, school conduct codes should clearly identify the behavior related to threats that could result in discipline. This will provide teachers, students, and parents with an enforceable understanding of the appropriate conduct in school.

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 camera in a gym locker room or bathroom is normally unacceptable.⁵¹

Use of Evidence Gathered in a Search and Ramifications of Searches Without Reasonable Grounds

Assume that a school official searches a student and retrieves a weapon without first establishing reasonable grounds to do so (thereby violating constitutional protections). Under ordinary circumstances, the exclusionary rule would prohibit the use of the weapon as evidence against the student in any subsequent criminal or delinquency proceedings against him. The exclusionary rule provides that “evidence may not be used in a criminal trial if it was the product of illegal police conduct.”⁵² So, the question arises, does the exclusionary rule apply in the school setting?

Three federal courts have held that the exclusionary rule applies to school disciplinary proceedings to assure protection of students’ constitutional rights.⁵³ Accordingly, under this interpretation a weapon discovered in an unreasonable search could not be considered in an expulsion hearing.

However, several federal district courts during the last ten years have held that the exclusionary rule does not apply, allowing the unlawfully obtained evidence to be considered in school disciplinary proceedings.⁵⁴ There is no Supreme Court decision on record, and consequently, no overall guiding legal rule on this point. Consequently, school officials are urged to consult with competent local legal counsel for an understanding of the rule in their area and advice regarding any specific questions or circumstances.

In addition, evidence or information gathered as a result of the search of a student may be kept in the student’s education record or school disciplinary record. Readers are referred to the “Use of Student Records” section of this guide where the legal requirements affecting student records are discussed.

Defenses to Claims Against Schools

Some students and their families will challenge the validity of the actions of school officials in conducting searches and other-

wise managing school safety and operations in compliance with constitutional standards. Schools may assert standard defenses allowed to them, including: governmental immunity, official immunity, failure to state a claim, and substantive defenses to constitutional claims. For the sake of space, these defenses are not reviewed in detail here. Please consult with your school attorney regarding any specific questions or situations.

Checklist - Search & Seizure⁵⁵

- A student’s freedom from unreasonable search should be carefully balanced against the need for school officials to maintain order and discipline and protect the health, safety, and welfare of all students.
- A decision to conduct a school search should be based on reasonable grounds for believing it will produce evidence of misconduct or contraband (drugs, weapons, stolen property) and consider factors such as the need for the search; the student’s age, history, and record of behavior; the gravity of the problem; and the need for an immediate search.
- Arbitrary searches, general sweep searches, or mass shakedowns are not reasonable and are illegal.
- Teachers and school officials should document their preliminary observations, sources of information, tips, investigative steps, or other evidence that led to reasonable grounds for a search.
- The information leading to school searches should be independent of police activity. Probable cause and a search warrant must accompany searches involving law enforcement.
- Items retrieved from students, if not illegal, should be returned to students or their parents promptly. Illegal items should be presented to law enforcement personnel and parents notified.
- Strip searches should be avoided except where imminent danger exists. When unavoidable, strip searches should be as brief as possible and be designed not to be humiliating. School officials and an adult witness with administrative, security, or health backgrounds (all the same gender as the student) should conduct strip searches in a private setting with nonstudents or unnecessary third parties excluded from the search.
- Handheld metal detectors should be used when there is evidence of student behavior that poses a threat to the health and safety of students in the school.
- Students and parents should be informed beforehand that metal detectors will be employed and informed of the reasons for their use.

Zero Tolerance: Suspension and Expulsion

Zero tolerance policies generally require mandatory suspension or expulsion for students caught possessing a weapon, engaging in violent behavior or using or possessing drugs. In many cases, the use of such policies is clearly necessary: a student brings a gun to school and threatens to use it against a fellow student or teacher. However, this is not always the case. Increasingly, reports show that students have been suspended or expelled for apparently trivial mistakes, including:

- Bringing a gun, owned by a student's police officer father, to school for show and tell,⁵⁶
- Pointing a finger at another student and saying "bang,"⁵⁷
- A seven-year-old boy bringing a nail clipper to school,⁵⁸
- Turning in a gun brought to school by another student.⁵⁹

In addition to these extremes of application, the question of racial bias arises in the implementation of zero tolerance programs. A study in Michigan, for example, established that African-American students were suspended and expelled from school at a rate 250% greater than white students.⁶⁰ This higher rate would only be appropriate if African-American students committed crimes at a rate 250% greater than white students.

Clearly then, adoption and application of zero tolerance policies has ventured into unexpected and uncertain territory. These developments raise important civil liberties issues regarding the right to an education and due process. The following review will outline the basic legal issues raised by zero tolerance policies.



The Policy of Zero Tolerance *Gun-Free Schools Act of 1994*

Zero tolerance policies in the various states draw much of their inspiration from the federal Gun-Free Schools Act of 1994 (GFSA). In essence, the GFSA requires each state receiving federal funds under the Elementary and Secondary Education Act to expel, for a period of not less than one year, any student found with a weapon on school grounds.⁶¹ Weapons may include firearms designed to propel a projectile by an explosive reaction, including starter guns, the components of any such device, silencers or other destructive devices such as bombs, poi-

son gas, grenades, rockets, missiles, or mines.⁶²

The GFSA should be distinguished from the Gun-Free School Zones Act (1990), which prohibited the possession of a weapon or firearm within 1,000 feet of a designated school or school property. The Gun-Free School Zones Act was overturned in 1995 by the U.S. Supreme Court as a violation of Congress' power under the Commerce Clause of the Constitution. Subsequently amended with greater findings, the revised Gun-Free School Zones Act (1996) maintains a prohibition against the possession of a firearm or weapon in a place a person knows or should reasonably know is a school zone but does not address zero tolerance policies.⁶³

Under the 1994 GFSA, federal funds may be denied to states that fail to adopt a zero tolerance policy for firearms. The GFSA allows local school officials to modify firearm-related expulsion requirements on a case-by-case basis but does not define modification or outline the circumstances under which such modifications would be appropriate.⁶⁴ The federal man-

date applies only to firearms, meaning that a zero tolerance policy is not required by federal law for other weapons, substance abuse, or other infractions. A number of states, however, have broadened the definition of “weapons” well beyond firearms to include knives, razors, slingshots, brass knuckles, and any other inherently dangerous object. In addition, some schools view threats of violence from students, including assaults not involving the use of a weapon, as a reason for expulsion.⁶⁵

The GFSA also allows schools to arrange alternative educational opportunities for expelled students at their discretion. Generally, there is no substantive right to public education that requires a state to provide alternative education, so schools may impose expulsion policies provided they are directed at a legitimate government purpose and their implementation is rationally related to achieving that purpose.⁶⁶ However, some states do guarantee a fundamental right to education through the state Constitution’s bill of rights or provisions requiring a free and public education, creating additional conflict between state law and zero tolerance policies. The scope of such issues exceeds the purpose of this guide, so readers are urged to contact their local school counsel for specific advice regarding state constitutional concerns raised by zero tolerance policies in schools.

State Interest in Safe Schools

In light of the state’s clear responsibility to ensure the safety of teachers and students, school officials may adopt suspension and expulsion policies that require mandatory sanctions for particular offenses and expect those sanctions will survive legal challenges so long as the student receives the necessary due process protections. Such policies are not a violation of state compulsory education laws.⁶⁷ Schools may ban weapons and impose suspension or expulsion for possessing a weapon but should exercise discretion based on the circumstances as allowed by the federal statute. This is particularly true in the rare case where a student’s religious practices may be violated, such as the possession of a knife for ceremonial or symbolic reasons.⁶⁸

Suspension for off-campus activity

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.⁶⁹ 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.

Due Process - Suspension and Expulsion

It is clear that certain procedural requirements must be followed if a student is to be suspended for a substantial period of time or expelled from a school. The Supreme Court noted in a famous line from the case of *Tinker v. Des Moines School District* that students do not “shed their constitutional rights... at the school house gate.”⁷⁰ The Supreme Court held in a later case, *Goss v. Lopez*, that a “student’s legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause and... may not be taken away for misconduct without adherence to the minimum procedure required by that clause.”⁷¹

Suspensions

In cases involving suspensions of ten days or less, a student must be provided with the following due process:

- 1) Oral or written notice of the charges against him or her; and
- 2) An explanation of the reasons for the charges, i.e. the evidence; and
- 3) An opportunity to present his or her side of the story.⁷²

The requirement of a hearing does not mean it must be as formal as a trial: an informal review of the evidence is sufficient. In addition, no delay between notice to the student and the hearing is necessary, since a school official “may informally discuss the alleged misconduct with the student minutes after it has occurred.”⁷³

Suspensions beyond ten days in length may require more formal procedures.⁷⁴ These procedures are outlined below under “*Due Process Checklist for Suspensions.*”

Expulsions

Suspensions for a substantial period of time or expulsions typically involve a greater level of procedural protection, which may include the following:⁷⁵

- 1) Notice to the student and parents,
- 2) A fair hearing and right to appeal,
- 3) An impartial hearing board,
- 4) Right to be represented by counsel,
- 5) Reasonable time to prepare for the hearing,
- 6) An opportunity to review evidence against the student,
- 7) An opportunity to examine witnesses against the student,
- 8) Opportunity to present evidence and witnesses on the student’s behalf,
- 9) Recorded proceedings, and
- 10) Requirement that board’s decision be based on substantial evidence.

A school board should make an independent assessment of the facts and circumstances of the case in light of any adopted zero tolerance policy and not simply endorse the decision of a school official or the effect of the policy.⁷⁶ [See **Case at a Glance: *Colvin v. Lowndes County (Mississippi)***.] Of course, an expulsion policy should be developed in compliance with the GFSA, but schools must be careful in implementing zero tolerance policies, as expulsion may be an excessive consequence when weapons are brought to school unknowingly and without a threat of harm to others.⁷⁷ Generally, expulsion is warranted only in cases of repeated or extreme misconduct, such as attacking a fellow student or teacher, repeatedly pulling fire alarms without cause, drug use, and weapons possession or use.⁷⁸ This point cannot be over-emphasized, as expulsion may be the final impetus to dropping out of school, leading to economic and social problems and potential criminal activity.⁷⁹

Case at a Glance: *Colvin v. Lowndes County (Mississippi)*

In February 1999, Jonathan Colvin, a sixth grade student at New Hope Middle School in New Hope, Mississippi, was found to be in possession, on school premises, of a weapon, specifically, a miniature Swiss Army type knife (The “weapon” in question is a miniature Swiss Army knife/key chain approximately two inches in length containing a fingernail file, small pair of scissors, and closed-end cuticle knife). When confronted, Jonathan admitted having the knife, stated that he was not aware that he had brought it to school, that it apparently fell into his book bag by accident, and handed the knife over to his teacher without incident. Jonathan made no threatening gestures with the knife and fully cooperated with his teacher and the school officials after its discovery.

School officials suspended Jonathan for one day and subsequently, the school board overruled a hearing officer’s recommendation and approved Jonathan’s expulsion for one year. The case was returned to the school board by the court with directions to reconsider the penalty with proper regard for due process. The court stated:

“Formalistic acceptance or ratification . . . of the scope of punishment, without independent Board consideration of what, under all the circumstances, the penalty should be, is less than full due process. . . . Employing a blanket policy of expulsion . . . precludes the use of independent consideration of relevant facts and circumstances. Certainly, an offense may warrant expulsion, but such punishment should only be handed down upon the Board’s independent determination that the facts and circumstances meet the requirements for instituting such judgment. . . . The school board may choose not to exercise its power of leniency. In doing so, however, it may not hide behind the notion that the law prohibits leniency for there is no such law.”

Emergency Situations

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:⁸⁰

- 1) Seriously disrupts the academic atmosphere of the school,
- 2) Endangers other students, teachers, or school officials, or
- 3) Damages property.

In emergency situations, a two-step approach may be employed:

- 1) Immediately impose a temporary suspension or expulsion, and
- 2) Enforce a permanent expulsion after the proper notice and hearing.

In these scenarios, notice and a hearing must be provided as soon as practicable. Notice should be sent to the student's parents within 24 hours of a decision to conduct disciplinary proceedings, and a hearing should be held within 72 hours (three days) of the student's removal.

Due Process Checklist for Suspensions⁸¹

- Determine whether applicable state law imposes any special requirements or procedures regarding the suspension of students or the imposition of other minor disciplinary measures.
- Follow school board policies or procedures regarding the suspension of students or the imposition of other minor disciplinary measures.
- If the student is disabled, comply with any applicable special procedures.
- Determine who has authority to suspend a student or impose discipline.
- Regularly inform students and parents of disciplinary policies, including zero tolerance.
- Determine whether the alleged misconduct is a proper basis for suspension.
- Promptly provide the student oral or written notice of the specific misconduct of which he or she is accused and the proposed disciplinary measure.
- If the student denies the misconduct of which he or she is accused, provide the student an explanation of the evidence that the educational institution has.
- Allow the student the opportunity to present his or her side of the story. Provide adequate time with no interruptions.
- If the student's presence endangers persons or property or threatens disruption of the academic process, immediately remove the student from school but provide notice and a hearing as soon as possible.
- Inform local juvenile justice and law enforcement authorities that the student has been removed for endangering persons or property.
- Impose the proposed disciplinary measure unless the student adequately refutes the misconduct of which he is accused.
- Notify the student's parents or guardian of the school's actions, including the charges against the student, a

description of the evidence, the length of the suspension, any conditions for the student's return to school (e.g., a parent conference) and information on appeal of the suspension.

- Parents or guardians should be notified immediately by phone, followed by written notification by registered mail.
- If requested by the student or parent, review the action taken, under applicable procedures.

Due Process Checklist for Expulsions⁸²

- Determine whether applicable state law imposes any special requirements or procedures regarding the expulsion of students or the imposition of other minor disciplinary measures.
- Follow board policies or procedures regarding the expulsion of students or the imposition of other minor disciplinary measures.
- If the student is disabled, comply with any applicable special procedures.
- Determine who has authority to expel a student or impose discipline.
- Regularly inform students and parents of discipline policies, including zero tolerance.

Preliminary Procedures

- Determine whether the alleged misconduct is a proper basis for an expulsion.
- Notify the student and/or his or her parents or guardians, in writing, of the misconduct of which he is accused, the factual basis of the charges, the specific provisions of any student disciplinary code allegedly violated, the right of the student to a hearing and procedures to be followed at the hearing, the right of the student to be represented by an attorney or other counsel, whether a hearing must be requested or whether it has been or will be scheduled automatically, and provide the student or parents a copy

Continued on page 18

Due Process Checklist for Expulsions⁹² (continued)

- of any applicable rules governing student conduct or disciplinary proceedings.
- If appropriate, schedule a telephone or personal conference with the student or parents.
- If the student poses a continuing danger to persons or property, suspend the student pending the hearing in keeping with guidelines for suspensions.
- Schedule a hearing if requested or required automatically under applicable disciplinary procedures.
- If requested, provide the student or counsel the names of witnesses against the student and an oral or written report on the facts to which each witness will testify.
- Compel the attendance of any witnesses desired by the student, if possible.
- Arrange for a transcript of record of the hearing to be kept.
- Review the interests of the members of the board to assure impartiality.
- Clearly define the role of each person involved in the hearing, including the board's legal counsel, faculty, and staff members to ensure fairness.

Conduct of the Hearing

- The presiding officer should declare the hearings convened and state the matter to be considered.
- If a board or panel is hearing the case, take the roll of its members and confirm a quorum.
- All people present at the hearing should be identified, as well as their interest in the matter.
- If desired, the meeting may be closed to the public and those without a proper interest in the matter excluded.
- The presiding officer should summarize the procedures to be followed.
- The charges against the student should be read and the student requested to confirm that he has received a copy.
- The student or counsel should be asked whether any

objections exist with regard to the time, place, or procedures of the hearing.

- The student or counsel should be allowed the opportunity to raise any questions regarding the impartiality of any member of the tribunal.
- Stipulated or agreed upon facts or exhibits in the case should be presented.
- Each party should be provided an opportunity to make opening statements.
- Allow both parties to present evidence, generally subject to cross-examination.
- Allow the parties to present rebuttal evidence.
- Allow the parties to make closing statements or arguments.
- Close the hearing with an explanation of the timetable and procedures to be used for rendering a decision.

Post hearing Procedures

- Commence deliberations of the case.
- Allow only the board and their attorney or advisor to participate in or attend the deliberations.
- When a decision is reached, reduce it to writing, setting forth factual findings, the basis of the decision, and the disciplinary measure imposed.
- Notify the student, parents, guardian and/or counsel of the decision and advise them of any available administrative review.
- Acknowledge that the student may always seek appropriate judicial relief.

Use of Student Records

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. The records that might be shared by various agencies include school records of student disciplinary problems released for law enforcement or counseling services or law enforcement records used by a school to identify problem students or as evidence in a school hearing. The appropriate use of these records is essential for schools and the educational process.

Family Educational and Privacy Rights Act (FERPA)

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. The leading legal framework on the appropriate use of student records is the Family Educational and Privacy Rights Act (FERPA).⁸³ Generally, FERPA allows schools to collect information concerning disciplinary action taken against a student for conduct that “poses a significant risk to the safety or well-being of that student, other students or other members of the school community.”⁸⁴ In addition, schools may disclose that information to teachers or school officials who have a “legitimate interest in the behavior of the student.”⁸⁵

Accordingly, a school may track the type and severity of violent incidents through regular reports included in a student's education record. These records would be considered discipli-

nary records because they involve reports of actual incidents of behavior requiring disciplinary action. Moreover, to the extent these records are maintained by a law enforcement office within the school, they will be considered law enforcement records, similar to crime reports that include investigation reports and incident data. Neither law enforcement records

nor crime reports are educational records under the statute.⁸⁶ In contrast, education records may include psychological evaluations and the results of psychological tests used for diagnostic purposes.⁸⁷

Sharing Disciplinary Records⁸⁸

Juvenile education and medical records are generally regarded as confidential, even after being provided to other agencies in accordance with law and may be sealed in court proceedings despite a presumption that such proceedings are open to the public and media.⁸⁹ The delicate matter of reporting student information to an outside agency or another school or institution is addressed directly by FERPA. It is important to remember that a school is not required to disclose information related to wrongdoing by a student, but schools have the discretion to do so.⁹⁰ FERPA governs both the request for information received by a school and the school's voluntary interest in providing information to an outside agency, such as law enforcement, social service agencies, or mental health counseling services. Consequently, the following guidelines apply where a school receives a request for student information or where the school may wish to volunteer student information.

Generally, a school that discloses a record must take three steps before releasing the record:⁹¹

- 1) Make a reasonable attempt to notify the parent or the student,
- 2) Provide a copy of the record that it proposes to release, and
- 3) Provide a hearing if requested.

Schools or Educational Institutions

A school may disclose information to another school or institution that the student is attending if the student is enrolled or receives services from the other institution and the preceding conditions are met. Student disciplinary records may be shared between schools attended by the student in question, with the appropriate notice to parents. This flexibility for schools is specifically addressed in the federal legislation, recognized by many state courts, and normally is a benefit to the student.

Non-School Agencies or Organizations: Law Enforcement and Social Service Agencies

FERPA generally restricts access to student records by non-school individuals or organizations. Generally, funds will be denied to any school that allows disclosure of student records without written consent from the parents with a few exceptions. The statute's exceptions allow disclosure of even personally identifiable information from educational records without the consent of the student or parents under the following circumstances:

- To state or local juvenile justice officials,
- To organizations conducting educational studies,
- In health and safety emergencies,
- Disciplinary records.⁹²

These exceptions are sufficiently broad, for example, to allow possession of a criminal defendant's school records by a prosecutor when the records had no apparent relation to the case being prosecuted.⁹³

Information on Specific Acts in Student Records

FERPA also controls the use of information regarding particular acts or issues, including violent acts, drug possession, weapons possession, destruction of property, disruptive behavior, and psychological or mental health assessments of students at risk for violence ("profiles"), as described below.

Violent Acts

FERPA allows the reporting of violent acts such as homicide, rape, assault, or the imminent threat of such acts.⁹⁴ Information regarding such actions by students may be reported voluntarily by the school or upon request by an outside agency.⁹⁵

Drug or Weapons Possession

FERPA allows the reporting of information related to the possession of drugs or weapons by students on school grounds, voluntarily or at the request of outside agencies.⁹⁶

Antisocial or Disruptive Behavior

To the extent disruptive or antisocial behavior includes the destruction of property or vandalism, it may be reported to law enforcement, voluntarily or on request.⁹⁷ Other forms of antisocial or disruptive behavior that do not fall into any of the previously mentioned categories will require notification to and consent of the student's parents before the information can be released to a third party. This type of behavior might include yelling in class, name-calling, disrespect for teachers or other school officials, bullying, intimidation, or similar behavior that does not reach the level of destruction of property or assault of fellow students or school personnel.

Risk Factor/Behavioral/Threat Assessments: "Profiles"

FERPA does not address this area 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 (U.S. Department of Justice) have expressed grave reservations about the use or misuse of profiles in schools, so extreme caution is recommended. Please contact the Department of Education at www.ed.gov/offices/OESE/SDFS or www.treas.gov/uss/; or the FBI at www.fbi.gov/library.htm for additional information.

State Law

State law also affects whether a school is required to report information regarding a student's conduct or may exercise dis-

cretion on such matters. Generally, federal statutes and state law require that schools report to law enforcement officials on any criminal or violent acts (assault, homicide, child abuse) or possession of weapons or drugs.⁹⁸ Property damage, vandalism, and destruction of property may or may not come under the a state reporting requirement. In addition, internal school board policies based on state or local requirements may govern these areas, and readers are urged to contact local legal authorities to determine the specific rules in their community.

Response to release of student records

Schools will not be liable in a civil suit by students or parents for FERPA violations, primarily due to the exclusive remedies by the Secretary of Education provided in the federal statute.⁹⁹ FERPA may create, however, a right actionable under civil rights statutes.¹⁰⁰ American courts are split on this issue so readers are advised to contact their local school counsel for guidance in this area. It is clear, however, that administrative remedies need not be exhausted for a person to bring suit against a school under civil rights laws.¹⁰¹

Checklist - Student Records¹⁰²

- Recognize that the student may always seek appropriate judicial relief.
- Schools should adopt policies and procedures consistent with the requirements of FERPA. Students, parents, and legal guardians should be informed of their rights under this act.
- Accurate student records should be maintained. Student records should include the name, title, date, description of educational interest, specific records examined, and the place of examination.
- Any corrections or adjustments to student records should be dated and initialed by the person responsible, with the knowledge and approval of school officials.
- School personnel should avoid labeling children.
- Disciplinary information in student records should be specific regarding the infraction committed (time, place, and witnesses) as appropriate. The student should be informed of the information recorded and provided a copy as appropriate.
- School personnel should not discuss student records with third parties. Gossip or careless talk among school personnel may not be protected by various privileges.
- Student records should be maintained in a safe and secure place and should not be removed from school premises by school personnel without proper authorization.
- Unless prohibited by court order, the noncustodial parent should be afforded the same right to access student records as the custodial parent.
- To avoid allegations of malicious intent, transmit only the information that is requested by a prospective employer.
- Avoid releasing information by telephone, unless the requestor's identity is confirmed.
- Consult with the school's legal counsel regarding any questions, conflict, or difficulty involving student records or FERPA.

Endnotes

- i Brown v. Board of Education, 347 U.S. 483, 493 (1954).
- ii San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

School Liability

- 1 Substantive Due Process, Procedural Due Process, and Equal Protection under the Fourteenth Amendment and 42 USC Section 1983.
- 2 Legal Guidelines for Curbing School Violence, National School Boards Association, March 1995, p.11. (Hereinafter: Legal Guidelines).
- 3 5 James A. Rapp, Education Law 12.06[7][a] (1999) (hereafter 5 Rapp), citations omitted.
- 4 5 Rapp at 12.06[7][b][i][B].
- 5 5 Rapp at 12.06[7][b][v].
- 6 5 Rapp at 12.06[7][c].
- 7 5 Rapp at 12.06[7][b], at n.462, citing Nicolosi v. Lingingston Parish School Bd. 441 So.2d 1261, 1265 (La. Ct. App. 1983).
- 8 Legal Guidelines, 12.
- 9 Legal Guidelines, 12.
- 10 Legal Guidelines, 12, citing Hartman v. Bethany College, 778 F. Supp. 286 (N.D. W.Va. 1991) and Chavez v. Tolleson Elementary School District, 595 P.2d 1017 (1979).
- 11 5 Rapp at 12.06[7][b][ii][B].
- 12 5 Rapp at 12.06[7][b][v], citations omitted.
- 13 Please see the Comprehensive Framework for School Violence Prevention, published by the Hamilton Fish Institute, available at www.hamfish.org.
- 14 Legal Guidelines, 13.
- 15 5 Rapp at 12.06[7][b][i][A].
- 16 Legal Guidelines, 33. Contrast with a standard that schools may be liable for constitutional claims when the decision by the school official is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such judgment. See Lemoine v. New Horizons Ranch & Ctr., Inc., 174 F.3d 629 (5th Cir. 1999), citing Youngberg v. Romeo, 457 U.S. 307 (1982).
- 17 Legal Guidelines, 33, citing DeShaney. Winnebago County Department of Social Services, 489 U.S. 189 (1989).
- 18 Legal Guidelines, 35, citing D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d. Cir. 1992), cert. denied, 113 S.Ct. 1045 (1993).
- 19 Legal Guidelines, 38, citing Johnson, 38 F.3d 198 (5th Cir. 1994).
- 20 Legal Guidelines, 36, citing Graham v. Independent School District, 22 F.3d 991 (10th Cir. 1994); Lefall v. Dallas Independent School District, 28 F.3d 521 (5th Cir. 1994); Johnson v. Dallas Independent School District, 38 F.3d 198 (5th Cir. 1994).
- 21 See Murrell v. School Dist. No. 1, 186 F.3d 1238 (10th Cir. Colo. 1999), citing Davis v. Monroe County Bd. of Educ. 526 U.S. 629 (1999).

- 22 Comment: *The Chicago public schools and its violent students: how can the law protect teachers?*, Noel M. Johnston, Summer, 1999, 48 DePaul L. Rev. 907
- 23 Joan Rascoe, Petitioner v. Workers' Compensation Appeals Board, Los Angeles Unified School District, Respondents, Civil No. B108707, Court of Appeal, Second Appellate District, Division Four, 62 Cal. Comp. Cas 1245; 1997 Cal. Wrk. Comp. LEXIS 699, August 29, 1997.
- 24 In the Matter of Velvia Cooley, Claimant, v. District of Columbia Public Schools, Employer., H&AS No. PBL 97-37 No. 365044, District of Columbia, Office of Employment Services, Hearings & Adjudication Section, 1998 DC Wrk. Comp. LEXIS 265, February 25, 1998.
- 25 Torrance Unified School District, Legally Insured, Petitioner v. Workers' Compensation Appeals Board, Stephen E., Ebey, Respondents., Civil No. B133940—, Court of Appeal, Second Appellate District, Division Seven, 64 Cal. Comp. Cas 1329; 1999 Cal. Wrk. Comp. LEXIS 1643, September 17, 1999.
- 26 Howard Wood, Petitioner, v. Chicago Public Schools, Respondent., No. 96 WC 725, Industrial Commission of Illinois State of Illinois, County of Cook, 1999 Ill. Wrk. Comp. LEXIS 29, March 1, 1999; Francis L. Wilson, Plaintiff, v. Detroit Board of Education, Self-Insured Defendant, Wilson, Docket No. 1999 ACO #398, Workers' Compensation Appellate Commission, 1999 MIWCLR (LRP) LEXIS 406; 13 MIWCLR (LRP) 1020, July 16, 1999.
- 27 Adapted from *School Law and the Public Schools: A Practical Guide for Educational Leaders*, Nathan L. Essex, Esq., Allyn and Bacon (1999).

Search and Seizure and Threats of Violence

- 28 New Jersey v. T.L.O., 469 U.S. 325 (1985)
- 29 T.L.O., supra n. 28.
- 30 3 James A. Rapp, Education Law, 9.04[1][c] (1999) (hereafter 3 Rapp); Please note, excellent guidelines, forms, and model conduct codes may be found at 6 James A. Rapp, Education Law Chapter F5: Student Control and Discipline.
- 31 3 Rapp at 9.04[1][c].
- 32 3 Rapp at 9.04.6[c][i].
- 33 3 Rapp at 9.04[11][d].
- 34 3 Rapp at 9.04[6][c][ii].
- 35 Legal Guidelines, 2, citing Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).
- 36 U.S. v. Sokolow, 490 U.S. 1 (1989).
- 37 Sokolow, 19.
- 38 United States v. Riggs, 347 F. Supp. 1098, (E.D.N.Y. 1972), United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971), U.S. v. Moreno, 475 F.2d 44 (5th Cir. 1973), U.S. v. Bell, 464 F.2d 667 (2nd Cir. N.Y. 1972).
- 39 See U.S. v. Bell, 464 F.2d 667.
- 40 Legal Guidelines, n. 2 at p. 4, citing Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).
- 41 Legal Guidelines, n. 2, p. 3, citing People v. Dukes, 151 Misc. 2d 295, 580 N.Y.S. 2d 850 (Crim.Ct. 1992).
- 42 Sostarecz by and through Sostarecz v. Misko, 1999 U.S. Dist. LEXIS 4065 (E.D. Pa. March 26, 1999), citing T.L.O., supra n.28.
- 43 Sostarecz, citing Cornfield v. Consolidated High School District No. 230, 991 F.2d 1316 (7th Cir. 1993), Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992), aff'd 12 F.3d 215 (6th Cir. 1993), Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991).
- 44 Legal Guidelines, n. 2, citing Cornfield v. School District No. 230, 991 F.2d 1316 (7th Cir. 1993).

- 45 Swem, Lisa, L., Preventing Threats of Violence in Schools from Turning into a Tragedy, School Law in Review 1999, National School Boards Association (1999); citing U.S. v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990).
- 46 3 Rapp at 9.02[9] (1999).
- 47 3 Rapp at 9.02 [9], citing Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969); See also, Hazelwood Sch. Dist v. Kuhlmeier 484 U.S. 260 (1988).
- 48 3 Rapp at 9.02 [9], citing Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996), rev'g 847 F. Supp. 780 (S.D. Cal. 1994).
- 49 Achman v. Chicago Lakes Indep. Sch. Dist. No. 2144, 45 F. Supp. 2d 664 (D.C. Minn. March 31, 1999).
- 50 Turner v. South-Western City School District, 82 F. Supp. 2d 757; 1999 U.S. Dist. LEXIS 20680 (S.D. Ohio, December 22, 1999). Note: This case is presented as a Case at a Glance for its discussion on threats of violence. Upon review the reader may observe that the case itself raises issues regarding school searches conducted by police. In the author's opinion, these issues do not affect the legal implications for school officials dealing with threats of violence and so are not addressed here. For the purposes of illustration, the case should be viewed as if only school officials had conducted the search.
- 51 Preventing Threats of Violence, supra n. 45 at p. 7.
- 52 *Barron's Law Dictionary*, 3rd ed. (1991) at p. 170.
- 53 Mitchell, J. Chad, An Alternative Approach to the Fourth Amendment: Balancing Students' Rights with School Safety, 1998 B.Y.U. L. Rev. 1207, 1218, citing Jones v. Latexo Indep. Sch. Dist., 499 F.Supp. 223 (E.D. Tex. 1980); Smyth v. Lubbers, 398 F.Supp. 777 (W.D. Mich. 1975); Caldwell v. Cannady, 340 F. Supp. 835 (N.D. Tex 1972).
- 54 Mitchell, at 1219, citing Thompson v. Carthage Sch. Dist., 87 F. 3d 979 (8th Cir. 1996), James v. Unified Sch. Dist. No. 512, 899 F. supp. 530 (D. Kan. 1995).

- 55 Adapted from Legal Guidelines, at n. 2., and School Law and the Public Schools: A Practical Guide for Educational Leaders, Nathan L. Essex, Esq., Allyn and Bacon (1999).

Zero Tolerance: Suspension and Expulsion

- 56 Bogos, Paul M., "Expelled. No Excuses. No Exceptions." 74 U. Det. Mercy L. Rev. 357 (Winter 1997) (hereinafter Bogos), citing Mark Andrejevic, Expelled Students in Limbo, Lansing St. J., March 27, 1995 at 1A.
- 57 The Columbine Effect, John Cloud, Time Magazine, DECEMBER 6, 1999, VOL. 154 NO. 23.
- 58 Id.
- 59 Bogos, 38; citing Zero Tolerance Proves to be a Little Ridiculous in Kanawha, Charleston Gazette & Daily Mailing, Dec. 8, 1995, at 4A.
- 60 Bogos, 381, n.166 (out of 37,189 students suspended in the '91-'92 school year, 71.5 percent of the students suspended were African American and 28.5 percent were white: African-American students are suspended at a rate 250 percent higher than white students); Elizabeth Bowman, Fair Punishment Policy Urged Schools in State Suspending Blacks, Hispanics, More Than Whites, Det. News, Apr. 6, 1995, at B3 (University of Michigan statewide study showing 56 of every 1,000 white students were suspended, compared with 167 for every 1,000 black students and 100 for every 1,000 Hispanic students).
- 61 Gun-Free Schools Act of 1994, 20 USCA Section 8921 (1994).
- 62 18 USCS § 921 (3), (4) (1999), stating as follows: The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.
(4) The term "destructive device" means any explosive,

- incendiary, or poison gas
- (i) bomb,
 - (ii) grenade,
 - (iii) rocket having a propellant charge of more than four ounces,
 - (iv) missile having an explosive or incendiary charge of more than one-quarter ounce,
 - (v) mine, or
 - (vi) device similar to any of the devices described in the preceding clauses.
- 63 Gun-Free School Zones Act of 1990, 18 USC Sect. 922 (q)(1)(A) [re-designated 18 USC Sect. 922 (q)(2)(A)]; overturned by *United States v. Lopez*, 115 S.Ct. 1624 (1995) (“[GFSZA] exceeds authority of Congress to regulate commerce among states under Commerce Clause, because it is not regulation of use of channels of interstate commerce nor attempt to prohibit interstate transportation of commodity through channels of commerce, and it can not be sustained as regulation of activity that substantially affects interstate commerce, since it is basically criminal statute that has nothing to do with commerce or economic enterprise.”)
- 64 20 USCS Section 8921 (b)(1) (1999).
- 65 Please refer to discussion regarding threats of violence in the Search and Seizure section.
- 66 3 Rapp at 9.06[4][d][iii].
- 67 3 Rapp at 9.06[4][d][ii].
- 68 See *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995)(district court preliminary injunction against total weapons ban valid where student Kalsa Sikh children were required to carry ceremonial knife at all times.)
- 69 Legal Guidelines, 10.
- 70 *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969).
- 71 *Goss v. Lopez*, 419 U.S. 565, 574 (1975).
- 72 Rapp at 9.05[2][b] (1998).
- 73 *Goss*, 582.
- 74 *Goss*, 584. See *Newsome v. Batavia Local School District*, 842 F.2d 920 (6th Cir. 1988), *Ashiegbu v. Williams*, 1997 U.S. App. LEXIS 32345, *3, No. 97-31373 (6th Cir. Nov. 12, 1997). See also, Legal Guidelines, 9.
- 75 *Givens v. Poe*, 346 F. Supp. 202, 209 (1972); Legal Guidelines, 9; See also, 3 Rapp at 9.05[3][b] (1999), citing *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).
- 76 *Colvin by and through Colvin v. Lowndes County*, 2000 U.S. Dist. LEXIS 2403 (N.D. Miss. Feb. 24, 2000)
- 77 3 Rapp at 9.03[4] (1999).
- 78 3 Rapp at 9.06[4][d][i].
- 79 3 Rapp at 9.06.4.d.iii, citing *Phillip Leon M. v. Greenbriar County Bd. of Educ.*, 484 S.E.2d 909, 915 at n.10 (W.Va. 1996).
- 80 *Goss* at 572.
- 81 Adapted from 3 Rapp, at 9.05[2][c] (1999).
- 82 Adapted from 3 Rapp at 9.05[3][h][I] (1999) and *Essex* 60, 61, 66 (1999).

Use of Student Records

- 83 Family Education and Privacy Act, 20 USCS § 1232g (1999).
- 84 20 USCS § 1232g (h).
- 85 20 USCS § 1232g (h).
- 86 20 USCS § 1232g (a)(4)(B)(ii); John Theumann, Annotation: *Validity, Construction and Application of the Family Educational and Privacy Rights Act of 1974*, 112 A.L.R. Fed. 1, 23 (1993) (hereafter Theumann).
- 87 Theumann at 22.
- 88 An excellent guide to student record sharing and forms can be found at 6 Rapp, Section F7.04: Student Record Sharing (1999). This section outlines a reciprocal reporting system for schools and law enforcement.
- 89 See FERPA, 20 USCS § 1232g (b)(4); See also, *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W. Va. 611, 520 S.E. 2d 186 1999.
- 90 See 61 Fed. Reg. 59,294 (1996), 6 Rapp 13.04[8][b][xii], p. 13-136.
- 91 34 CFR 99.30 - .34
- 92 6 Rapp at 13.04[8][b] (1999); See also, Rapp, Stephens & Clantz, *The Need to Know, Juvenile Record Sharing* (National School Safety Center 1989); FERPA, 20 USCS § 1232g (b)(4); *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W. Va. 611, 520 S.E. 2d 186 1999.
- 93 Theumann, supra note 2, at p.17.
- 94 20 USC § 1232g (a)(4)(B)(ii), (b)(6)(A), (b)(1)(E), (h).
- 95 20 USC § 1232g (b)(1)(E), (h).
- 96 20 USC § 1232g (b)(1)(E)
- 97 20 USC § 1232g (b)(1)(E), (h); See also 6 Rapp at 13.04 [8][b][xii][A], p. 13-132.

- 98 See generally, Gun-Free Schools Act of 1994, 20 USCA § 8921 (1999) (requiring reporting of firearms in schools); Safe and Drug-Free Schools and Communities Act of 1994, 20 USCS § 7101 et seq. (1999) (requiring reporting of drug possession in schools and communities).
- 99 *Meury v. Eagle-Union Community School Corp.*, 714, N.E.2d 233, 1999 Ind. App. LEXIS 1066 (Ind. Ct. App. 1999).
- 100 24 U.S. Code § 1983, See *Doe v. Knox County Board of Educ.*, 918 F. Supp. 181 (E.D. Ky. 1996) (holding Sect. 1983 will support a FERPA claim in an action where the educational records and medical condition of a student were revealed to the local newspaper and printed in an article), *Maynard v. Greater Hoyt School Dist.*, 876 F. Supp. 1104 (D.S.D. 1995), *Belanger v. Nashua, N.H. School Dist.*, 856 F. Supp. 40 (D.N.H. 1994); contra *Meury* at note 92, 714 N.E.2d 233 (Ind. Ct. App. 1999) and *Norris v. Board of Education*, 797 F. Supp. 1452 (S.D. Ind. 1992) (holding that FERPA is insufficient substantively to support a Sect. 1983 claim.).
- 101 Theumann, supra note 2, at 19.
- 102 Adapted from *Essex*, 136 (1999).

Appendix - Legal Resources

Annotation: *Validity, Construction and Application of the Family Educational and Privacy Rights Act of 1974*, Theumann, John, 112 A.L.R. Fed. 1, 23 (1993).

Expelled. No Excuses. No Exceptions.; Bogos, Paul M., 74 U. Det. Mercy L. Rev. 357 (Winter 1997).

James A. Rapp, *Education Law* (1999).

Legal Guidelines for Curbing School Violence, National School Boards Association, Council of School Attorneys, March 1995.

Preventing Threats of Violence in Schools from Turning into a Tragedy, Swem, Lisa, L., *School Law in Review* 1999, National School Boards Association (1999).

Safe Schools, Safe Communities, National School Boards Association, Council of School Attorneys. (September 2000). (See additional publications by COSA at www.nsba.org/cosa).

School Crime and Violence: Victim's Rights, National School Boards Association, Council of School Attorneys.

School Law and the Public Schools: A Practical Guide for Educational Leaders, Nathan L. Essex, Esq., Allyn and Bacon (1999).

Search and Seizure in the Public Schools, Second Edition, No. 54, NOLPE Monograph Series, Rossow, Lawrence F. & Stefkovich, Jacqueline A.; Education Law Association.

Student Searches and the Law, National School Boards Association, Council of School Attorneys.

The Legal Issues Surrounding Safe Schools, Day, Reed B.; Education Law Association.

Comment: *The Chicago Public Schools and its Violent Students: How Can the Law Protect Teachers?*, Johnston, Noel M.; 48 DePaul L. Rev. 907, Summer, 1999.

For more information and resources on school and community safety, please visit the Hamilton Fish Institute's Web site at www.hamfish.org.

The Hamilton Fish Institute is administered by the GWU Institute for Education Policy Studies, Graduate School of Education and Human Development.