


**School Law and School Safety:  
A National Update**

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Hamilton Fish Institute on School  
and Community Violence  
Persistently Safe Schools 2006  
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 National School Boards Association  
Office of General Counsel

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**Cause & Effect**

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**Post-Columbine themes**

- Zero tolerance policies
- Focus on weapons
- Searches, screening, detention
- Collaborative effort
- Warning signals: Bullying, expression, off-campus behavior
- **A timely discussion: two news items**

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**Getting to know you**

- Role relative to school safety
- Geographic
- Interest in this session

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**What is NSBA?**

- Federation of 49 state school boards associations, Hawai'i, D.C., & U.S. Virgin Islands boards
- 95,000 board members, 14,890 districts
- NSBA Council of School Attorneys

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**Overview**

- Zero tolerance
  - Weapons
- Threats & expression
- Bullying & harassment
  - School climate & expression
- Off-campus behavior
  - Cyberbullying

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## Overview

- Collaboration
  - Schools and law enforcement
- Searches & seizures

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## Overview

- “Persistently dangerous schools”
- Violence by students with disabilities
- Other topics, time permitting
- Conclude:
  - Return to proposed Student & Teacher Safety Act

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## A long session...

- Take a break
- Questions, discussion along the way
  - Expertise in this room
  - “Stump the Lawyer”
  - Law in federal system, case law tip of the iceberg, law & policy overlap
- Open discussion at end if time left

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**For more information**

- NSBA *Legal Clips*:  
[www.nsba.org/legalclips](http://www.nsba.org/legalclips)  
**(Or give me your card today)**
- NSBA School Law pages:  
[www.nsba.org/schoollaw](http://www.nsba.org/schoollaw)
- Council of School Attorneys  
[www.nsba.org/cosa](http://www.nsba.org/cosa)

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**Zero tolerance**

- Advice post-Columbine
- Federal Gun-free Schools Act
  - Provisions
- Reports of actual effectiveness
- Perceptions of safety

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**Horror stories**

- Kindergartner playing Cops and Robbers
  - *S.G. v. Sayreville Bd. of Ed.* (3d Cir. 2003)
- Replica musket – reenactor
- Traditional Korean pencil sharpener
- Others incidents in other contexts (drugs, tobacco, swearing, etc.)
- Policy questions: disproportionality, effectiveness: ABA, APA

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**Some cases**

- *Ratner v. Loudoun County Public Schools* (4<sup>th</sup> Cir 2001)
  - Student locked suicidal friend’s knife in own locker; meant to tell parents that night
  - Dean of school heard about it, suspended for 10 days under policy; board made it 4 months
  - Dean said boy acted reasonably
  - Ct: no violation of law, but expressed concern

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**Some cases**

Boards sued for complying with state law:

- *Cuesta v. Sch. Bd. of Miami-Dade County* (11<sup>th</sup> Cir, 2002)
  - Student distributed pamphlet with language about shooting principal
  - Law required reporting to police; girl arrested and strip searched

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**Some cases**

- *J.M. v. Webster County Bd. of Ed.* (W. Va. 2000)
  - Student afraid of volatile father, brings father’s gun to school, turns it over to coach
  - State law complying with Gun-free Schools Act requires 12 month expulsion
  - Ct.: Upholds state law as reasonably necessary and narrowly tailored for purposes of state *education* clause challenge

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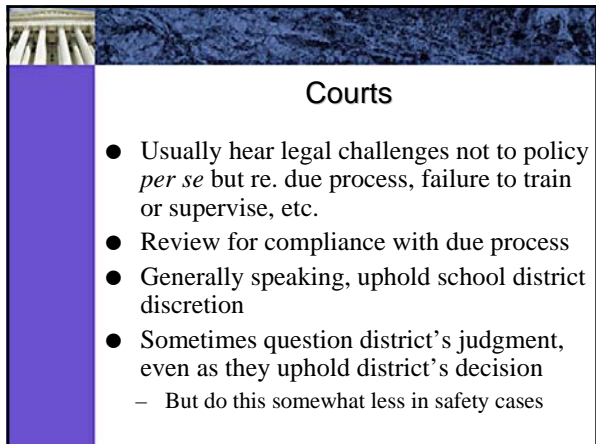
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**Courts**

- Usually hear legal challenges not to policy *per se* but re. due process, failure to train or supervise, etc.
- Review for compliance with due process
- Generally speaking, uphold school district discretion
- Sometimes question district's judgment, even as they uphold district's decision
  - But do this somewhat less in safety cases

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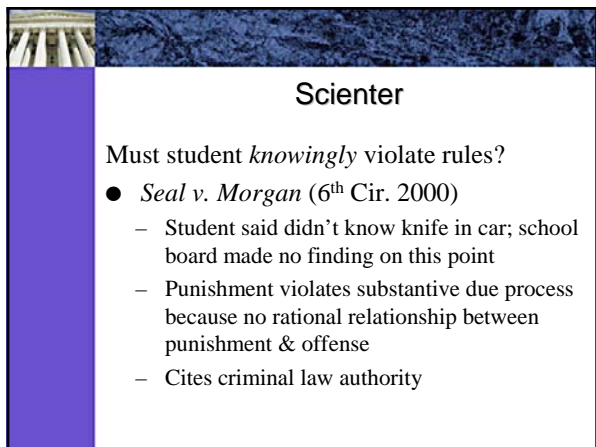
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**Scienter**

Must student *knowingly* violate rules?

- *Seal v. Morgan* (6<sup>th</sup> Cir. 2000)
  - Student said didn't know knife in car; school board made no finding on this point
  - Punishment violates substantive due process because no rational relationship between punishment & offense
  - Cites criminal law authority

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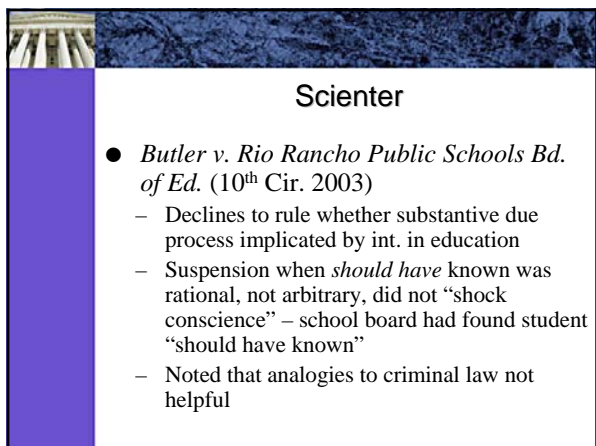
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**Scienter**

- *Butler v. Rio Rancho Public Schools Bd. of Ed.* (10<sup>th</sup> Cir. 2003)
  - Declines to rule whether substantive due process implicated by int. in education
  - Suspension when *should have* known was rational, not arbitrary, did not “shock conscience” – school board had found student “should have known”
  - Noted that analogies to criminal law not helpful

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### Scienter

- *Tarkington Indep. Sch. Dist. v. Ellis* (Tex. App. – Beaumont 2006)
  - District argued must expel under TX law
  - Ct: Texas Ed Code allows school district discretion NOT to expel for unknowing possession if district has intent as factor in expulsion decisions generally
  - District does otherwise, so can here, too
- Gun-free Schools Act?

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### Gun-free Schools Act

- Discretion or not?
- Federal non-regulatory guidance
  - Distinguishes btw incidents & expulsions
  - “shorten the expulsion or *impose no penalty*”
- Grapevine
  - ED tells states # incidents must = # expulsions
  - Different state school boards associations have different answers

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### Zero tolerance

- Zero tolerance shouldn't mean zero common sense
  - Administrator discretion
- Not one definition of zero tolerance
- Might work in some instances
  - A personal story

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### Threats & expression

- *Doe v. Pulaski County Sp. Bd. of Ed.* (8<sup>th</sup> Cir 2002)
  - Boy writes violent rants about ex-girlfriend, who eventually gets it
  - Expelled and makes Free Speech claim
  - Ct: “true threat”
  - Test is whether reasonable person would *believe* it’s a threat, not intent

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### “T-shirt jurisprudence”

- *Newsom v. Albemarle County Sch Bd.* (4<sup>th</sup> Cir. 2003)
  - NRA shirt – “The \$150,000 T-shirt”
  - School dress code: no depictions of weapons
  - Ct.: Not disruptive (citing *Tinker*)
  - Postscript: school official’s judgment?

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### Bullying & harassment

- “Where We Learn” urban school climate survey
  - 32,000 students in 15 districts
  - Note: reality about news coverage
  - Around 25% reported being bullied
  - Over 50% said they see students bullied once a month
  - 40% said teachers can’t prevent it

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### Bullying & harassment: courts

- Many, many cases
  - Protective orders from courts
- Title IX, tort, etc.
- *Theno v. Tongahoxie Sch. Dist* in Kansas
  - Title IX case settled for \$440,000
- *Shore Regional H.S. Bd. of Ed.* (3d Cir. 2004) (failure to provide FAPE under IDEA)
  - Alito: Dist. Ct should have deferred to hearing officer

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### Bullying & harassment

- School districts adopting policies, implementing programs
- States passing mandates, collecting data, providing support
- Some concern about expanding zero tolerance approach

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### Hostile climate?

Expression that may be deemed hostile or risk disruption or violence?

- *Scott v. Sch. Bd. of Alachua County* (11<sup>th</sup> Cir. 2003) (ban on Confederate flag)
  - Reasonable fear of disruption under *Tinker v. Des Moines* (U.S. 1969)
  - BUT ALSO “offensive symbol” could undermine school’s basic mission under *Bethel Sch. Dist. v. Fraser*

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### Hostile climate?

Expression that may be deemed hostile?

- *Harper v. Poway Unified Sch. Dist.* (9<sup>th</sup> Cir. 2006) (anti-gay T-shirts)
  - Ct: “Intrudes on rights of others,” *Tinker*
- Note: *Saxe v. State College Area Sch. Dist.* (3d Cir. 2001) (hate speech code)
  - No “harassment exception” to First Am., and code was not limited to disruptive speech

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### Hostile climate

- *Gov. Wentworth Regional Sch. Dist. v. Hendrickson* (D. N.H. 2006)
  - “Homophobes” vs. “gay students”
  - Student wears “No Nazis” patch to “get in the faces” of other group
  - Ct: school officials reasonably feared substantial disruption (*Tinker*)

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### Hostile climate

Watch these kinds of cases:

- “Bong Hits 4 Jesus” (*Frederick v. Morse*, 9<sup>th</sup> Cir. 2006)
- Cts tend to ignore some Supreme Court rulings, or ignore some of their prongs
  - *Tinker* = substantial disruption, not “intrudes on rights of others”
  - *Fraser* = sexual innuendo, not “school’s basic mission”
- Qualified immunity question

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**Hostile climate**

Tolerance programs must tread carefully around religious sensibilities and rights

- Boyd County, Kentucky
- Montgomery County, Maryland

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**Off-campus behavior**

- Related to school program?
- Direct impact on school discipline or safety?
- *Collins v. Prince William County Sch. Bd* (4<sup>th</sup> Cir. 2005) (off-campus bottle bombs)
  - School board: staff time investigating
  - Ct: code need not be as detailed as criminal code, provided sufficient notice, due process

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**Off-campus behavior**

- *Latour v. Riverside Sch. Dist.* (W.D. Pa. 2005)
  - Student's violent song lyrics composed at home, sold on Internet
  - Ct: Not a true threat – just imagery, never communicated to alleged targets, student had no history of violence, no district investigation as to true threat
  - No evidence of disruption at school

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### Cyberbullying

- Tricky: off campus AND 1<sup>st</sup> Amend.
- True threat? Disruptive?
- Many cases deal with staff, not students
- *Wisniewski v. Bd. of Ed. of Weedsport Cent. Sch. Dist.* (N.D.N.Y. 2006)
  - Student sends instant message of gun shooting head and words “Kill Mr. VanderMolen”
  - Ct: “True threat” – cites school violence and student knew district take jokes seriously

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### Cyberbullying

- *Layshock v. Hermitage Sch. Dist.* (W.D. 2006)
  - Spoof profile of principal
  - Ct: school district showed material and substantial disruption
    - Pandemonium at school resulted
  - Ct expresses reservations, but public interest served by letting school officials run schools

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### Cyberbullying

More often, school districts lose

- *Coy v. Bd. of Ed. of North Canton City Sch.* (N.D. Ohio 2002)
  - Students site identifies some students as “losers”
  - Ct: District can’t discipline student just because it dislikes content
  - (Think about political rhetoric deriding “constitutional right not to be offended”)

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### Off-campus behavior

- Controversial for school boards
- Liability calculation for school boards
  - Assertion of authority implies obligation?
  - Same as bus stops, recent rallies re. immigration
- Other means than student disciplinary actions implicating constitutional rights

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### Collaboration

- Privacy considerations
  - FERPA, justice codes
  - Lots of FERPA exceptions for safety issues
  - Federal guidance
- Policy questions
  - “School to prison pipeline”?
  - Schools criminalizing student misconduct?

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### Collaboration

Arizona: too cozy or not cozy enough?

- *In Re. Andre M.* (Ariz. 2004)
  - Student’s confession to police at school must be excluded because mother excluded from interview
  - AP had promised administrator would sit in
- County district attorney v. school boards association: **model policy** says school can deny access until parent called or arrives

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**Searches & seizures**

- *Doe v. Little Rock Sch. Dist.* (8<sup>th</sup> Cir. 2004)
  - Dist. subjected book bags, purses, etc., to random, suspicionless search at any time (think lockers, metal detectors)
  - Ct: Violates 4<sup>th</sup> Amend.
  - Not like *Vernonia* and *Earls* (upholding drug testing for athletics and extracurriculars):
    - No need shown, no voluntary surrender of privacy, consequence not just exclusion, but criminal law

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**Searches & seizures**

- *Shuman v. Penn Manor Sch. Dist.* (3d Cir. 2005)
  - Student detained for hours while school investigated alleged sexual misconduct
  - Ct: no 4<sup>th</sup> Amend. violation –reasonable under circumstances, and student allowed to do homework, get water, etc.
- *Stockton v. City of Freeport, Tex.* (S.D. Tex. 2001) (quite dramatic, but upheld)

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**Searches & seizures**

- *Wofford v. Evans* (4th Cir. 2005)
  - Student reported to have brought gun to school
  - Questioned once and consented to search
  - When witnesses re-interviewed, student questioned again by police and school, asks for mom
  - Ct: search reasonable at inception as in scope
  - Rejects call for bright-line rules requiring parental notification or prohibiting detention over certain duration
- Still, use with care, consider seriousness

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## Searches & seizures

Video surveillance

- Biloxi, MS – every room?
- School buses more common
- *WFTV v. Sch. Bd. of Seminole County* (Fla. App. 2004)
  - TV wants tape of beating
  - Ct: State FERPA protects tape
  - Note: Generally, FERPA covers as to students involved **BUT** law enforcement unit?

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## “Persistently dangerous schools”

- (Note: another session to focus on this)
- No case law on this *per se*
  - *ACORN v. NYC Dep’t of Ed.* (S.D.N.Y. 2003) (no private right of action under NCLB, per *Gonzaga v. Doe*)
- State definitions
  - Too lax? Too stringent?
- Incentives?

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## “Persistently dangerous schools”

- *Bajjani v. Gwinnett County Sch. Dist.* (Ga.App. 2006) (tort case - beating)
  - GA def: at least 1 incident for 3 years
  - Gross underreporting; don’t call 911
  - Inadequate safety plan, no warning to teachers of student’s violent tendencies
  - Conc. op: “exact opposite of result intended”

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**“Persistently dangerous schools”**

- Symptomatic of many aspects of NCLB?
  - Data
  - Consequences
- Your thoughts?

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**Violence by students with disabilities**

- *Teague v. Tex. Indep. Sch. Dist.* (5<sup>th</sup> Cir 2006)
  - Student sexual assault of another student
  - Ct: Neither of two exceptions to “private violence” rule applies: victim was over 18, so no “special relationship,” and no evidence district had actual knowledge of excessive risk, so no “state-created danger”
- More often, staff danger

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**Violence by students with disabilities**

IDEA 2004 changes:

- District allowed on case-by-case basis to place student in alternative setting pending “manifestation determination”
- Student can be removed from placement for up to 10 days without hearing
- IF student inflicts serious bodily injury or has weapon, school may remove to interim alternative placement without manifestation determination, up to 45 days

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**Violence by students with disabilities**

- Change to “stay put” rule:
  - Now, student shall remain in interim alternative setting pending hearing officer’s decision on an appeal, unless district and parent agree otherwise
  - BUT district must provide educational services
- Note: statute *very* specific

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**Violence by students with disabilities**

- IDEA: An obligatory note on funding
- But how does this relates school safety?

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**Time permitting: Other topics?**

- Drug testing?
- Teacher harassment of students?
- Background checks, sex offender laws?
  - Visitors, volunteers – students & parents
  - FL, GA examples
- Social networking websites, DOPA?
- School uniforms?
- Cell phone policies
- Other safety topics?
- Even other school law topics?

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## Proposed federal legislation

- Student and Teacher Safety Act
- What it does
- Any real significance?
- Substitute for meaningful action?
- Unintended consequences
  - NCLB experience: prayer guidance
- Yesterday's action in the House
  - Political reality: Welcome to public ed.

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## All too symptomatic

- “There oughta be a law!”
- Stampede to Congress, state legislatures
- Well-meaning proposals
- Cumulative impact
- Not unique to school safety: examples?
- Ease of advocacy, data-gathering, benchmarking vs. effectiveness?

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**NSBA**  
*Equity & Excellence in Public Education through School Board Leadership*




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