

SCHOOL POLICIES AND LEGAL ISSUES SUPPORTING SAFE SCHOOLS ¹

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Abstract

School district and school efforts to ensure a safe learning environment for all children and youth must take into account an increasing variety of legal requirements and considerations. This guide presents an overview of the legal and practical considerations, applicable to students, of which school officials must be aware in developing and implementing school safety efforts. The first section of the guide is an overview of the legal and practical requirements and considerations that govern school safety-related policies generally. The second section discusses how these requirements and considerations apply to a variety of specific school-safety related issues and situations. The guide concludes with a glossary of terms and a list of additional resources.

Overall Considerations

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

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

While school officials enjoy considerable discretion when it comes to student discipline, disciplinary actions must respect principles of due process, both substantive and procedural. To satisfy substantive due process, an action must be reasonably related to the school's interest in protecting students or maintaining order in the school. An action may fail to respect substantive due process where it is arbitrary, lacks reasonable grounds, or is unreasonably severe.

The requirements of procedural due process vary depending on the severity of the action: the more severe the disciplinary consequences, the more procedural safeguards must be observed. These safeguards may include notice, a hearing, an appeal, and evidentiary requirements. In some states, a state statute may set forth requirements for disciplinary actions that reflect requirements of the U.S. and the state's constitution.

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Generally speaking, equal protection requires that actions taken by a school are applied equally to similarly situated students. Different treatment will be subject to varying levels of judicial review depending on whether the difference involves categories of students. In most cases, a school need only have a rational basis for any difference in treatment among individual students. Increased scrutiny may come into play where it is argued the action affects students differently on the basis of characteristics such as race, ethnicity, or gender. Various federal and state anti-discrimination statutes also apply in the school setting.

A search of a student must be both reasonable at its inception based on the circumstances under which it was made and reasonable in its scope. School searches generally need not be based on the “probable cause” standard law enforcement searches must meet, but merely on a “reasonable suspicion” that school rules are being violated. The scope of the search must be reasonably related to its objective and not excessively intrusive in light of privacy considerations such as the student’s expectation of privacy, age, and gender. These considerations become more complex where there is collaboration between school and law enforcement officials, a scenario that may also implicate the Fifth Amendment’s protection against self-incrimination.

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

Safety-related requirements for school policies also are established through federal legislation and regulations, as well as the state laws and administrative actions that implement these federal statutes. The No Child Left Behind Act (NCLB), for example, establishes federal requirements for the reporting of incidents of school violence and provides for the designation of certain schools as “persistently dangerous,” a designation that triggers certain consequences for the school. State law defines the criteria for this designation in each state.

NCLB currently also includes the Safe and Drug-Free Schools and Communities Act (SDFSCA), which sets forth criteria for federal funding for school violence prevention programs. SDFSCA, in turn, incorporates the Gun-Free Schools Act, which imposes a federal mandate as to the disciplinary consequences for a student’s possession of a firearm on campus.

As of this writing, the reauthorization of NCLB, including SDFSCA, is pending before the Congress. When adopted, the new act may include revisions of existing legal requirements and new mandates for schools. If so, these revisions will be addressed in a post-script to this guide.

Disciplinary actions against students are subject to protections afforded by the federal Individuals with Disabilities Education Act (IDEA). The latest reauthorization of IDEA includes new provisions intended to address safety concerns.

Under state law, schools may face various forms of tort liability, such as negligence claims, for failing to intervene to prevent school violence, including severe bullying and harassment. In addition, Title IX of the Education Amendments of 1972 imposes liability under federal law for a federally funded school’s “deliberate indifference” to student-on-student harassment related to gender, where the harassment is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” Harassment and bullying also increasingly have become the focus of additional legislative interest by states, several of which have adopted state requirements for local policies.

The discretion school officials have to disclose information about a student among themselves and to others is limited by the federal Family Educational Rights and Privacy Act (FERPA) and by state privacy laws, which may set stricter privacy requirements than does FERPA. Generally speaking, personal information that is contained in a student's education record may not be disclosed without the parent's or student's consent. Exceptions are provided for other school officials with a "legitimate educational interest" in the information and for certain situations related to school safety consideration. IDEA also includes privacy protections related to special education.

These various legal requirements, along with simple considerations of effectiveness and public support, have important implications for school policies. Two of the most important are: (1) that the policy must be communicated to, and understood by, school employees, students and parents, and (2) that schools consider the full range of potential options in school safety situations, including proactive and preventive measures and alternatives to disciplinary approaches. In addition, school officials should consider carefully the balance to be struck in "zero tolerance" policies between the need for consistent enforcement and the need not to deprive school officials of all professional discretion in ways that lead to unintended consequences.

Specific Safety Issues and Situations

The general legal and practical considerations outlined in Section 1 apply in more specific ways to a variety of school safety policies and actions – both those that are preventive measures and those that represent responses to specific situations.

On the preventive side of school action, a school's failure to adopt and implement adequate safety measures could be the grounds for a tort claim in the event of school violence. Programs to support school safety efforts can serve as a useful point of reference in ensuring the adequacy of such efforts as a legal matter.

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

As to cameras, there is considerable uncertainty about how the requirements of FERPA apply to video footage, an issue on which, as of this writing, federal officials are focusing attention with the intent of providing additional guidance.

Retrospective identification of warning signs that had preceded school shootings has raised questions about the efficacy and legal acceptability of "profiling" practices in identifying such risk factors in advance. The legal considerations include the need to avoid discriminatory practices that raise equal protection and other legal concerns.

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

School dress codes and uniform policies, which may be adopted in part out of safety considerations, must bear a reasonable relationship to the school's educational mission or the need to provide a safe and secure learning environment. In addition, because attire can be a form of expression or be based on religious requirements, such policies implicate First Amendment concerns. If possible, accommodations should be made for religious reasons. Restrictions on messages on clothing generally must not be based on the

viewpoint expressed. However, under certain circumstances exceptions to this requirement may be made where safety concerns are at issue.

On the responsive side of school action, disciplinary actions taken in response to violence, bullying or harassment, threats, or other violations of safety-related policies are subject to the due process and anti-discrimination requirements described above. Actions involving a student with a disability must be taken in accordance with IDEA. Students generally do not have a legal right to invoke self-defense when being disciplined for violence, although this may be addressed in school policy.

Failure to intervene with disciplinary or other measures in response to school violence, including severe bullying and harassment, can give rise to liability under tort law or Title IX. One federal court even has ruled that failure to protect a disabled student from severe harassment deprived the student of the free, appropriate public education to which he was entitled under IDEA.

A search is undertaken with the necessary reasonable suspicion when the school has reasonable grounds for believing it likely to produce evidence of misconduct or contraband. The scope of the search should not extend beyond that part of the student's person or belongings reasonably related to the suspicion. The reasonableness and allowable scope of a search are greatest where there is imminent danger of harm. Strip searches should be avoided where possible and done in such a way to minimize intrusiveness and embarrassment. Searches undertaken by law enforcement officials, or at their request, are subject to the higher probable cause requirement.

The line between a threat of violence on the one hand and parody, creative expression or the simple voicing of frustration on the other frequently is difficult to draw, especially without benefit of hindsight. The First Amendment does not prevent school officials from intervening in response to the expression of a "true threat." While courts employ varying factors to evaluate whether expression constitutes a "true threat," these factors most often address not whether the speaker intended the message as a threat but whether the message reasonably was perceived as such by others, based for example on whether the threat was directly communicated to others, any previous incidents involving violence or the speaker. A true threat need not necessarily be uttered on campus to warrant school intervention. As noted above, however, school officials should proceed with caution, and preferably with legal counsel, before intervening in response to off-campus expression. Carefully developing a policy concerning such situations in advance can provide school staff with useful guidance. A proportionate response by the school can help persuade a judge that the school was not overreacting.

Intervention in response to off campus behavior, including online expression, should be approached with particular legal care, since school authority over off campus conduct and over free expression both are limited and, with respect to online expression, the law is in its infancy. That said, such actions taken out of concern for student safety, such as intervention in response to online threats and severe cyberbullying, are relatively more likely to be upheld by a court than those arising in other circumstances. Because of the legal uncertainties, this is an area in which the need to consider the full range of alternatives to disciplinary action is most acute.