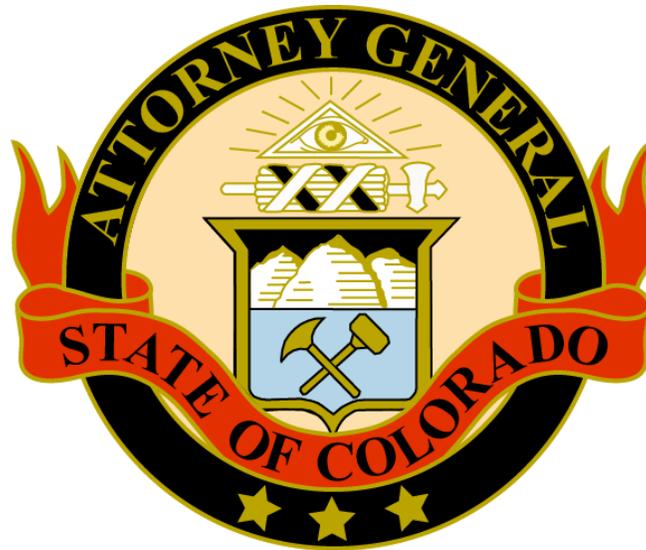


# **Colorado School Violence Prevention: A Legal Manual**



**Presented by:**

**Colorado Attorney General  
Cynthia H. Coffman**

**Revised Edition  
October 2018**

**ATTORNEY GENERAL  
OF COLORADO  
Cynthia H. Coffman**

**COLORADO SCHOOL VIOLENCE  
PREVENTION: A LEGAL MANUAL**

**Revised Edition  
October 2018**

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\*\* The Attorney General's Office will periodically update this Manual to reflect statutory changes and new case decisions. <https://coag.gov>

Dear Colleagues,

The safety of our children and their schools is a priority for anyone using this newly revised edition of “Colorado School Violence Prevention: A Legal Manual.” Since 1999, the Manual has been a source of information on the legal tools available to school administrators and personnel committed to creating a safe learning environment and preventing school-related violence.

This edition is organized in six substantive sections: I. Prevention and Preparation; II. Incident Response and Management; III. Information Sharing; IV. Student Discipline; V. Criminal Offenses Specific to Schools; and VI. Liability Considerations. The entire Manual has been refreshed and new material added. I would like to draw your attention specifically to changes in the subsections on search and seizure, the use and possession of medical marijuana on campuses, and cooperation with law enforcement.

Improving school safety has been a passion project of mine throughout my fourteen years in the Colorado Attorney General’s Office. As Attorney General in a state that has experienced seven school shootings since the infamous attack at Columbine High School, I understand the absolute necessity of information sharing between and among schools and districts, their law enforcement partners, social services agencies, mental health providers, and the judicial system.

To that end, in January 2018 my office issued a Formal Opinion of the Attorney General to provide guidance regarding the Federal Educational Rights and Privacy Act (FERPA). The opinion, found in Appendix III, addresses misconceptions about FERPA’s scope in order to assure teachers — administrators, and other staff that they may proactively respond to safety concerns, including threats of school violence — without violating students’ and families’ privacy rights. Accompanying the Opinion are Frequently Asked Questions about FERPA’s application to common information sharing scenarios.

Finally, the Manual includes a discussion of the Claire Davis School Safety Act of 2015. Under the Claire Davis Act, school districts and charter schools may be liable for damages if they or their employees fail to take reasonable steps to prevent an incidence of school violence in which a person commits, conspires to commit, or attempts to commit the crimes of murder, first degree assault, or felony sexual assault and the crime caused serious bodily injury or death to another person.

This duty only extends to harms that are reasonably foreseeable and that occur while students, faculty and staff are within school facilities or are participating in school-sponsored activities. This change in Colorado law was intended to heighten awareness and increase responsibility for school safety. Unfortunately, widespread

confusion about the Act instead has resulted in a fear factor that stifles communication and obscures transparency. I hope that our explanation of what the Claire Davis Act does and does not do alleviates many concerns so that attention may turn to improving schools' culture and climate.

Thank you very much for your commitment to providing Colorado children a safe, positive learning environment where they can thrive.

Best,

A handwritten signature in blue ink that reads "Cynthia H. Coffman". The signature is written in a cursive, flowing style.

Cynthia H. Coffman  
Colorado Attorney General

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[Appendix III](#) – Formal Opinion

## **EXECUTIVE SUMMARY**

Preventing violence starts with solid systems at both the school and district level. The Manual begins by identifying the systems and policies required by state and federal law to help keep schools safe. Preventative systems range from adopting solid student conduct policies to having a designated threat assessment team. The Colorado Safe Schools Act (“Safe Schools Act”), first adopted in the wake of the Columbine tragedy, contains comprehensive school policy requirements. Section I of this Manual will discuss the requirements and recommendations of the Safe Schools Act as well as some special federal requirements under Title IX, which governs sexual harassment and sexual violence.

Even with preventative systems in place, there will of course be times when school officials will need to respond to misconduct or investigate risks. Section II of this Manual explains when school personnel may search students and their property, and details the circumstances under which school personnel may use physical intervention or force with students.

Reports issued in the wake of both the Virginia Tech and Arapahoe High School shootings emphasized the need for greater information sharing between schools, law enforcement, and social services. Both reports identified misunderstandings about student privacy laws as an area for improvement moving forward. Section III of this Manual includes an expanded discussion of what information school personnel may share under the Family Educational Rights and Privacy Act (“FERPA”). Some information related to campus crime, violence, or threats is not an “education record” and thus is exempt from FERPA protection. In other instances, FERPA’s “emergency” exception allows schools to share information with outside agencies and law enforcement.

Section III also explains what kinds of information law enforcement and juvenile courts may share with schools. School resource officers must share criminal justice information with school administrators, and the officers must also share school crime data with outside law enforcement agencies. By taking advantage of information-sharing opportunities, schools

can better identify which students have specialized needs or present increased risks.

Section IV discusses the substantive and procedural requirements for student disciplinary proceedings. When school officials have reasonable cause to believe that a student has violated the school's conduct code, the post-incident response is governed by several basic legal rules. Section IV also discusses when a school can sanction a student for off-campus conduct. For less serious offenses, schools may employ non-exclusionary consequences, such as in-school suspension or participating in mediation or restorative justice programs. In cases involving more serious offenses, schools may consider imposing suspension or expulsion. However, school administrators should keep in mind that a decision to suspend or expel a student triggers certain due process rights and that students, by law, may only be denied public school admission under certain circumstances.

K-12 schools are special under Colorado law. Beyond the general criminal statutes we rely on to keep society safe, additional laws provide further protection for teachers and students. Section V of this Manual discusses the aspects of Colorado criminal law that are unique to the school setting. Educators should familiarize themselves with the statutes establishing distinct penalties for certain conduct at schools, school activities, and on school buses. These school-specific criminal laws include:

- Special weapons prohibitions;
- Increased penalties for drug sales;
- Criminalization of certain student organization activities, such as “hazing;”
- Specific criminal penalties for interfering with “staff, faculty, or students of educational institutions;”
- Particular legal protections for juvenile victims;
- Targeted offenses specific to public transportation, including school buses; and
- Teen sexting legislation (effective January 1, 2018).

Finally, state and federal law generally immunize school officials from legal liability when they make reasonable good faith efforts to serve their students. However, institutions or even school staff can be liable for failing to protect students from harm in certain instances. In 2015, the Colorado legislature adopted the Claire Davis Safe Schools Act, which reduced immunity from claims involving injuries caused by school violence. Likewise, evolving court decisions confirm that public employees can be liable when they are “deliberately indifferent” to student-on-student violence and that schools may be responsible for damages for failing to take action in response to known student harassment. Section VI of this Manual includes a description of the possible legal pitfalls that may expose schools, districts, and educators to legal liability for student misconduct that they fail to prevent.

## **I. PREVENTION AND PREPARATION**

Colorado law requires certain proactive systems and procedures to prevent school violence, enhance school safety, and facilitate communication with law enforcement agencies. In addition, federal law (Title IX) requires systems to be in place that are specific to claims of sexual violence and discrimination. This Section identifies and explains these systems and procedures, and addresses the “best practices” recommendations contained in the Colorado Safe Schools Act and elsewhere.

### **A. Colorado School Safety Requirements**

The 1999 tragedy at Columbine High School led to the passage of the Safe Schools Act in 2000. This statute has a number of specific requirements and recommendations to create systems designed to prevent violence and enhance emergency preparedness.<sup>1</sup> This subsection of the Manual details the requirements of the Safe Schools Act.

The Safe Schools Act provides the core framework for school safety in Colorado. It has been amended several times since its adoption to address our state’s changing needs. For example, it was amended in 2008 to create the Colorado School Safety Resource Center, which conducts research and assists schools in developing plans and strategies for school safety.<sup>2</sup> Consequently, school and district staff should regularly review the Safe Schools Act to ensure they are always in compliance with its mandatory provisions.

#### **1. Mission Statement**

As an initial matter, the Safe Schools Act requires the board of education of each school district to adopt a mission statement.<sup>3</sup> The mission statement must specifically make student and staff safety a priority for every school in the adopting board’s district.<sup>4</sup> The mission statement sets the tone

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<sup>1</sup> § 22-32-109.1, C.R.S.

<sup>2</sup> § 24-33.5-1803, C.R.S. (2008).

<sup>3</sup> § 22-32-109.1(1.5), C.R.S.

<sup>4</sup> *Id.*

for school safety in the district and is then implemented through each school district's safe school plan.

## **2. Safe School Plan**

Each school district is required to adopt and implement a safe school plan to provide a safe learning environment that is conducive to the learning process and free from unnecessary disruption.<sup>5</sup> Before adopting a safe school plan, school districts must consult with stakeholders.<sup>6</sup> The stakeholders, as enumerated in the Safe Schools Act, include the "school district accountability committee and school accountability committees, parents, teachers, administrators, students, student councils where available and, where appropriate, the community at large."<sup>7</sup> A school district may also consider the views of victim advocacy groups, school psychologists, law enforcement, and other partners in the community.<sup>8</sup>

Each school district must include certain elements in its safe school plan. The Safe School Act also contains recommendations for additional plan elements. Both categories (mandatory and suggested) are discussed below.

### **a. Written Code of Conduct**

As part of the state-mandated safe school plans, each board of education must adopt a concise conduct and discipline code that is to be uniformly, fairly, and consistently enforced for all students.<sup>9</sup> At least once per year, each district must distribute a written copy of its conduct code to every student who is enrolled in an elementary, middle, or high school within the district.<sup>10</sup> Additionally, the conduct code must be posted at or kept on file in each public school in the district.<sup>11</sup> Colorado courts have held that a school or district cannot discipline a student for violating a school rule unless the student has been "fairly apprised of that regulation."<sup>12</sup> Thus, as a first step,

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<sup>5</sup> *Id.* at (2).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at (2)(a)(I).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Martinez v. School Dist. No. 60*, 852 P.2d 1275, 1279 (Colo. App. 1992).

schools must clearly identify the conduct code and articulate behavior expectations to the student body. The code must not only include general student conduct policies and a structured discipline process, but it must also address the elements described below.

**i. Policies for Disruptive Students**

The Safe Schools Act requires each written code of conduct to state general policies and procedures for dealing with students who cause disruptions on school grounds, in school vehicles, or at school activities or events.<sup>13</sup> The code must specifically address the district’s policy for allowing a teacher to remove a disruptive student from the teacher’s classroom.<sup>14</sup> The policy must conform with the Act’s specific requirements regarding the removal of a disruptive student from the classroom and with certain due process protections reserved to such students.<sup>15</sup> The removal policy must also comply with applicable federal laws, particularly those that protect the rights of students with disabilities.<sup>16</sup> At a minimum, the teacher or school principal must contact a student’s parent or legal guardian as soon as possible after a removal to request that he or she attend a student-teacher conference regarding the removal.<sup>17</sup>

Each district’s removal policy must include a provision that permits the school’s principal or designee to develop and implement a behavior plan for any student who is removed from a classroom due to behavioral issues.<sup>18</sup> While the development and implementation of a behavior plan is not mandatory following a student’s first removal, if the disruptive student is removed from class a second time, the principal or designee is then statutorily required to complete and implement a behavior plan for that student.<sup>19</sup> Additionally, each district’s code of conduct must provide that after a teacher has removed the same student from the same classroom at least *three* times, the teacher may then permanently remove that student

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<sup>13</sup> § 22-32-109.1(2)(a)(I)(B), C.R.S.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

from the class for the remainder of the term, provided the school has satisfied its obligations to develop and implement a behavior plan for the student.<sup>20</sup> Subject to state statute, a student who has been removed from a classroom at least three times could be subject to being declared a “habitually disruptive student.”<sup>21</sup>

In addition to the requirements discussed in the preceding paragraphs, each district’s code of conduct must also outline the suspension or expulsion process for students who have been declared to be “habitually disruptive students.”<sup>22</sup> For purposes of suspension and expulsion, a “habitually disruptive student” is defined as “a child who has caused a material and substantial disruption on school grounds, in a school vehicle, or at a school activity or sanctioned event three or more times during the course of a school year.”<sup>23</sup>

Further information regarding student discipline can be found in Section IV of this Manual.

## **ii. Guidelines for Physical Intervention**

The Safe Schools Act requires that each district’s conduct code include policies addressing how and when school staff may use physical intervention or force when responding to disruptive students.<sup>24</sup> The physical intervention policies must not conflict with the definition of “child abuse” under Colorado law.<sup>25</sup> A person, including members of a school’s administration, faculty, or staff, commits child abuse if the person does the following:

causes an injury to a child’s life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child’s life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.<sup>26</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; § 22-33-106(1)(c.5), C.R.S.

<sup>22</sup> § 22-32-109.1(2)(a)(I)(C), C.R.S.

<sup>23</sup> § 22-33-106(1)(c.5)(II), C.R.S.

<sup>24</sup> § 22-32-109.1(2)(a)(I)(D), C.R.S.

<sup>25</sup> *Id.*

<sup>26</sup> § 18-6-401(1), C.R.S.; *see also* § 19-1-103(1), C.R.S. (providing a separate definition of “abuse” or “child abuse or neglect”).

Prior to drafting intervention and use of force policies, school districts should familiarize themselves with the state’s child abuse laws as well as any relevant county and municipal laws that relate to child abuse. For instance, one such relevant law in the City and County of Denver criminalizes certain “wrongs to minors,” including cruel punishment of a minor.<sup>27</sup> Finally, school districts should take guidance from the rules the Colorado Department of Education has adopted regarding the Protection of Persons from Restraint Act.<sup>28</sup>

For a discussion of the law regarding when a school employee may use physical force or seize a student, see Section II of the Manual.

### **iii. Prohibitions against Weapons, Drugs, and Tobacco**

Each school district’s code of conduct must contain a written policy that prohibits students from bringing or possessing deadly and dangerous weapons on school grounds, in school vehicles, or at any school activity or sanctioned event.<sup>29</sup> Likewise, the code must also contain a written policy that prohibits the possession, use, or distribution of drugs or other controlled substances at the same places, activities, or events.<sup>30</sup> As discussed in Section IV, the possession of dangerous weapons and the possession and sale of controlled substances are potential bases for suspension or expulsion.<sup>31</sup>

Additionally, each code must include a written prohibition against the use or possession of tobacco products on school grounds, in school vehicles, or at school sanctioned activities or events.<sup>32</sup> However, unlike in the case of a violation of the prohibition against deadly weapons or controlled substances, a student’s use, possession, or sale of tobacco products generally cannot be the basis for expulsion.<sup>33</sup>

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<sup>27</sup> Den. Rev. Mun. Code § 34-46(b)(2).

<sup>28</sup> 1 Code Colo. Regs. 301-45.

<sup>29</sup> § 22-32-109.1(2)(a)(I)(G), C.R.S.

<sup>30</sup> *Id.*

<sup>31</sup> *See* § 22-33-106(1)(d), C.R.S.

<sup>32</sup> § 22-32-109.1(2)(a)(I)(H), C.R.S.

<sup>33</sup> *See* § 22-33-106, C.R.S.

#### **iv. Search Policies**

The code of conduct must include a written policy regarding searches on school grounds.<sup>34</sup> This policy should address the circumstances under which searches of students and their belongings are permissible and should confirm expectations surrounding the search of lockers and other school-owned property.<sup>35</sup> Section II provides a more detailed discussion of what constitutes a search and the law surrounding when and how schools may conduct a search.

#### **v. Bullying Policies**

The code of conduct must include a specific bullying prevention and education policy.<sup>36</sup> School districts must ensure that the policy spells out the consequences for students who bully others as well as for students who retaliate against others who report bullying.<sup>37</sup> School districts are encouraged to conduct a survey of students every other year regarding the frequency of bullying at their schools.<sup>38</sup> As part of their bullying prevention and education policies, school districts are also encouraged to incorporate character-building programming and to create an advisory team of professionals and stakeholders.<sup>39</sup> As discussed more thoroughly in Section VI, schools must provide reports of their policies concerning bullying prevention and education in their safe school plans.<sup>40</sup>

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<sup>34</sup> § 22-32-109.1(2)(a)(I)(I), C.R.S.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at (2)(a)(I)(K).

<sup>37</sup> *Id.*

<sup>38</sup> § 22-93-104(1)(c), C.R.S.

<sup>39</sup> § 22-32-109.1(2)(a)(I)(K), C.R.S.

<sup>40</sup> § 22-32-109.1(2)(b)(VIII), C.R.S.

School districts are encouraged to take advantage of a range of available resources provided by the Colorado School Safety Resource Center to improve their bullying policies.<sup>41</sup>

#### **vi. Restraint Policies**

The code of conduct must now include information concerning the school district's policies for the use of restraint and seclusion on students.<sup>42</sup> In particular, the policies should specifically reference the state's general prohibition on the use of chemical, mechanical, or prone restraints on students under most circumstances.<sup>43</sup> In addition, the policies must include information explaining the process set-out by the Colorado State Board of Education for filing a complaint when restraint or seclusion has been used on a student.<sup>44</sup>

The inclusion of this information is a new requirement for school districts that went into effect on August 9, 2017.<sup>45</sup> More information on the use of restraint or seclusion can be found in Section II.

#### **vii. Gang-related Activity and Dress Code Expectations**

Each code must include a specific policy prohibiting gang-related activities on school grounds, in school vehicles, or at school-sanctioned activities and events.<sup>46</sup> The conduct code must also have a dress code policy prohibiting apparel that is likely to be disruptive to the school environment

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<sup>41</sup> The Colorado School Safety Resource Center has helpful materials on bullying prevention programs, including a resource guide that helps identify best practices, pitfalls, and important questions for school districts to ask before implementing prevention programs. See COLO. SCH. SAFETY RES. CTR., POSITIVE SCH. CLIMATE: BULLYING AND HARASSMENT PREVENTION AND EDUC. (2016), <https://cdpsdocs.state.co.us/safeschools/CSSRC%20Documents/CSSRC-Bullying-SchoolResourceGuide.pdf>. In addition, school districts should make use of the Safe Communities Safe Schools Initiative of the University of Colorado's Center for the Study and Prevention of Violence, which has produced its own set of bullying prevention recommendations for schools (among other helpful resources). See *Safe Cmty. Safe Schs. Initiative*, CTR. FOR THE STUDY AND PREVENTION OF VIOLENCE, INST. OF BEHAVIORAL SCI., <http://www.colorado.edu/cspv/safeschools/> (last visited October 9, 2018).

<sup>42</sup> § 22-32-109.1(2)(a)(I)(L), C.R.S.

<sup>43</sup> *Id.*

<sup>44</sup> §§ 22-32-109.1(2)(a)(I)(L), 22-32-147(4), C.R.S.

<sup>45</sup> 2017 Colo. Sess. Laws, ch. 270, § 8 at 1492.

<sup>46</sup> § 22-32-109.1(2)(a)(I)(F), C.R.S.

or to school order and safety.<sup>47</sup> Under these policies, several school districts have restricted displays of gang-related symbols or colors.

The dress code provision may be one of the more challenging requirements of the Safe Schools Act because schools must strike a balance between their interests in safe and orderly classrooms and students' interests in freedom of speech and expression. Although schools are afforded greater authority to regulate speech in the school environment, students do not "shed their constitutional rights of freedom of speech or expression at the schoolhouse gate."<sup>48</sup> Thus, when drafting and enforcing restrictions on the display of images or symbols, school officials must remain cognizant of the First Amendment's protections. In particular, certain symbols or items of apparel, if worn by students with the intent to convey a particular message that is likely to be understood as such by those who see it, may be protected under the First Amendment as "symbolic speech."<sup>49</sup> In such cases, school officials cannot require the students to remove the symbol or item of apparel merely because they disagree with the message the student intends to convey or because it fails to comply with the dress code.<sup>50</sup>

Students' right to free speech is not, however, absolute. First, a school district may categorically prohibit student speech (including words and images on clothing) that is vulgar, lewd, indecent, or plainly offensive.<sup>51</sup> A school district may also prohibit speech that promotes illegal drug use, which could include depictions of drugs, drug use, or paraphernalia on students' clothing.<sup>52</sup>

Second, even where students intend to engage in symbolic speech, if school officials reasonably forecast that the expressive activity would cause a substantial disruption to school activities or interfere with the rights of others, officials may properly prohibit the expression without having to wait

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<sup>47</sup> *Id.* at (2)(a)(I)(J).

<sup>48</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>49</sup> *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989).

<sup>50</sup> *Tinker*, 393 U.S. at 514.

<sup>51</sup> *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683-86 (1986) (concluding that school could prohibit "pervasive sexual innuendo").

<sup>52</sup> *Morse v. Frederick*, 551 U.S. 393, 408-10 (2007).

until actual disruption or violence occurs.<sup>53</sup> For such a determination to be reasonable, officials must perceive a “concrete threat” of substantial disruption.<sup>54</sup> Under most circumstances, “silent, passive expression that merely provokes discussion in the hallway” does not constitute a concrete threat; however, courts “have [nonetheless] upheld restrictions on passive, silent expression – even political expression – where it is clearly associated with past school violence or substantial disruption.”<sup>55</sup>

Ultimately, whether a school may lawfully prohibit a certain expressive symbol or item of apparel is a fact-specific inquiry. For example, a number of courts have upheld bans on the display of the Confederate battle flag when there is evidence of a school history of racial tension.<sup>56</sup> In contrast, courts have rejected broad bans where there was no evidence that the ban was tied to a specific problem previously experienced at the school.<sup>57</sup> As another example, a California school district enacted a ban on all college and professional sports team insignia, arguing that certain colors and logos were associated with gangs.<sup>58</sup> The court found that the evidence was not sufficient to support the ban at the elementary and middle school levels but that evidence of gang activity at the high school level was sufficient to justify the ban.<sup>59</sup>

Whether a restriction complies with the First Amendment depends a great deal on the individual facts specific to the school or district where the policy has been adopted. Accordingly, school districts should always consult with their attorneys when drafting these policies.

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<sup>53</sup> *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 36-37 (10th Cir. 2013).

<sup>54</sup> *Id.* at 37 (citations omitted).

<sup>55</sup> *Id.* at 37, n.10 (citations and quotations omitted).

<sup>56</sup> See, e.g., *Defoe v. Spiva*, 625 F.3d 324, 333-37 (6th Cir. 2010).

<sup>57</sup> *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1462 (C.D. Cal. 1993).

<sup>58</sup> *Id.* at 1460.

<sup>59</sup> *Id.*

**b. Mandatory Data Reporting Policies**

In addition to a conduct and discipline code, each safe school plan must include a policy describing the school district's annual reporting of certain required information.<sup>60</sup> The report must include:

- The school district's total enrollment;
- Average daily attendance rate;
- Dropout rate for grades seven through twelve (assuming such grades are taught at the school); and
- Average class size.<sup>61</sup>

Each school district is required to report the number of acts of sexual violence, reported in the aggregate without any personally identifying information.<sup>62</sup> Schools must also report discipline code violations, identifying the number of violations and the response taken organized by category of violation, as listed in the statute and below:

- Possessing a dangerous weapon on school grounds, in a school vehicle, or at a school activity or sanctioned event without the authorization of the school or the school district;
- Use or possession of alcohol on school grounds, in a school vehicle, or at a school activity or sanctioned event;
- Use, possession, or sale of a drug or controlled substance, other than marijuana, on school grounds, in a school vehicle, or at a school activity or sanctioned event;
- Unlawful use, possession, or sale of marijuana on school grounds, in a school vehicle, or at a school activity or sanctioned event;
- Use or possession of a tobacco product on school grounds, in a school vehicle, or at a school activity or sanctioned event;
- Being willfully disobedient, openly and persistently defiant, or repeatedly interfering with the school's ability to provide

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<sup>60</sup> § 22-32-109.1(2)(b), C.R.S.

<sup>61</sup> *Id.* at (2)(b)(I)-(III), (VII).

<sup>62</sup> *Id.* at (2)(b)(IX).

educational opportunities to, and a safe environment for, other students;

- Commission of an act on school grounds, in a school vehicle, or at a school activity or sanctioned event that, if committed by an adult, would be considered first degree assault, as described in section 18-3-202, C.R.S., second degree assault, as described in section 18-3-203, C.R.S., or vehicular assault as described in section 18-3-205;
- Behavior on school grounds, in a school vehicle, or at a school activity or sanctioned event that is detrimental to the welfare or safety of other students or of school personnel, including but not limited to incidents of bullying or other behavior that creates a threat of physical harm to the student or to other students;
- Willful destruction or defacement of school property;
- Commission of an act on school grounds, in a school vehicle, or at a school activity or sanctioned event that, if committed by an adult, would be considered third degree assault, as described in section 18-3-204, C.R.S., or disorderly conduct as described in section 18-9-106(1)(d), C.R.S. (fights with another in a public place except in an amateur contest of athletic skill), but not disorderly conduct involving firearms or other deadly weapons as described in sections 18-9-106(1)(e) and (1)(f), C.R.S.;
- Commission of an act on school grounds, in a school vehicle, or at a school activity or sanctioned event that, if committed by an adult would be considered robbery;
- Other violations of the code of conduct and discipline that resulted in documentation of the conduct in a school's record; and
- Violations of the school's policy concerning bullying prevention and education, including information related to the development and implementation of any bullying prevention programs.<sup>63</sup>

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<sup>63</sup> *Id.* at (2)(b)(IV), (VIII).

### 3. School Response Framework

In addition to the previously mandated mission statement and safe school plan, 2008 revisions to the Safe Schools Act require that each school district institute a “school response framework.”<sup>64</sup> The General Assembly’s goal is for schools to “achieve a level of readiness” by organizing safety teams and providing procedures, training, and equipment necessary to protect students.<sup>65</sup> Revisions to the Safe Schools Act in 2008 also require schools to adopt the national response framework issued by the U.S. Department of Homeland Security and the National Incident Management System.<sup>66</sup>

The school response framework must include the elements listed in the Safe Schools Act, which ensures the school district’s compliance with federal emergency management rules.<sup>67</sup> Those federal emergency management rules include, among other things, formal adoption of the National Response Framework issued by the National Incident Management System and institution of the incident command system taught by the Federal Emergency Management Agency.<sup>68</sup>

The school response framework must also include a school safety, readiness, and incident management plan.<sup>69</sup> At a minimum, the incident management plan must identify safety teams and backups responsible for community interaction and key incident command positions, as well as potential operational locations.<sup>70</sup> The statute asks that school districts, to the extent possible, undertake the following:

- Conduct incident response exercises and conduct follow-up written evaluations of those exercises;

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<sup>64</sup> § 22-32-109.1(4), C.R.S. (2008).

<sup>65</sup> 2008 Colo. Sess. Laws Ch. 215, § 1.

<sup>66</sup> *Id.*

<sup>67</sup> § 22-32-109.1(4), C.R.S.

<sup>68</sup> *Id.* at (4)(b)-(c), C.R.S. More information on the National Incident Management System is available at *Nat’l Incident Mgmt. Sys.*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/national-incident-management-system> (last visited, October 10, 2018).

<sup>69</sup> § 22-32-109.1(4)(d), C.R.S.

<sup>70</sup> *Id.* at (4)(d)(I)-(II).

- Inventory emergency equipment and test communication equipment, including ensuring it will work properly with other agencies' equipment;
- Adopt written procedures for communicating about incidents with law enforcement, community partners, and the community;
- Ensure appropriate training of staff and key personnel; and
- Work with community partners to ensure that procedures remain in compliance with the National Incident Management System.<sup>71</sup>

Based on the timelines set out in the Safe Schools Act, over the last several years each school district and charter school should have done the following:

- Formally adopted the National Response Framework by either school board order or resolution;
- Reviewed and revised its emergency plans to incorporate the Incident Command System;
- Developed a comprehensive plan that governs emergency response and communications and that identifies safety team members and key operations locations and/or facilities;
- To the extent possible, entered into memoranda of understanding with community partners (including first responders, mental health agency, emergency management personnel and the like) to coordinate services and minimize potential conflicts;
- Created an all-hazard exercise program that is based on the National Incident Management System; includes orientation meetings, drills, and exercises; and is followed by written evaluations;
- Conducted an inventory of emergency equipment; and
- Appropriately trained staff on safety and incident management.<sup>72</sup>

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<sup>71</sup> *Id.* at (4).

<sup>72</sup> *Id.*

Schools and school districts should evaluate their school response framework on an annual basis to ensure that it aligns with any changes to the law and is consistent with current best practices.<sup>73</sup>

#### **4. Site Inspection Protocols and Open School Policies**

The Safe Schools Act requires each school district to adopt a policy requiring inspections of all school buildings within the district each year.<sup>74</sup> The purpose of the policy is to ensure that school officials identify and remove any hazards, vandalism, and other barriers to safety or supervision from school buildings in a timely manner.<sup>75</sup> School districts must also ensure that parents and members of the school district's board of education have reasonable access to school classes, activities, and functions upon reasonable notice to the school administrator's office.<sup>76</sup>

#### **5. Employee Screening Processes**

The Safe Schools Act directs each school district to adopt a policy of screening employees' criminal histories.<sup>77</sup> The policy must address the school district's initial obligation to screen potential employees during the hiring process as well as its ongoing obligation to review employees' criminal histories for any new instances of criminal activity.<sup>78</sup> Pursuant to the Safe Schools Act, a school district must conduct a criminal background check on

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<sup>73</sup> The website for the Colorado School Safety Resource Center includes a number of useful resources for developing a school response framework, including sample documents and a checklist that schools and districts can use to ensure that their framework has all of the required elements. *See* COLO. SCH. SAFETY RES. CTR., ORGANIZING A SCH. CRISIS RESPONSE(2014), <http://edpsdocs.state.co.us/safeschools/CSSRC%20Documents/CSSRC%20Comprehensive%20School%20Safety%20Plan%20Checklist%202014.doc> (last visited October 10, 2018)

<sup>74</sup> § 22-32-109.1(5), C.R.S.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at (7).

<sup>77</sup> *Id.* at (8).

<sup>78</sup> *Id.*

any of its employees if there is good cause to believe that the employee has been convicted of a felony or nontraffic-related misdemeanor.<sup>79</sup>

Independent of the screening requirements enumerated in the Safe Schools Act, Colorado law establishes mandatory reporting requirements under the following circumstances. First, all schools and school districts have an obligation to notify the Colorado Department of Education whenever an employee is dismissed or elects to resign because a preponderance of the evidence supports an allegation that he or she engaged in unlawful behavior involving a child, including unlawful sexual behavior.<sup>80</sup> Second, if a district superintendent learns that any of the district's current or former employees were convicted of, received a deferred sentence for, or pled guilty or nolo contendere to a felony or misdemeanor offense involving unlawful sexual behavior or unlawful behavior involving children, the superintendent must immediately report that information to the Department.<sup>81</sup>

Finally, a school or school district must immediately notify the Department when a dismissal action against a licensed employee is based upon the employee's conviction, guilty plea, plea of nolo contendere, or deferred sentence for any of the following offenses:

- Any felony, including but not limited to felony child abuse, felony unlawful sexual behavior, a felony offense involving unlawful sexual behavior, and a felony offense involving an act of domestic violence;
- A crime of violence;
- Indecent exposure;
- Contributing to the delinquency of a minor;
- Misdemeanor domestic violence;
- Misdemeanor sexual assault;
- Misdemeanor unlawful sexual conduct;
- Misdemeanor sexual assault on a client by a psychotherapist;

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<sup>79</sup> *Id.*; see also §§ 22-32-109.9(1)(a), 22-32-109.8(2)(a), C.R.S.

<sup>80</sup> § 22-32-109.7(3), C.R.S.

<sup>81</sup> *Id.* at (3.5).

- Misdemeanor child abuse;
- Misdemeanor sexual exploitation of children;
- Misdemeanor involving the illegal sale of controlled substances;
- Physical assault;
- Battery; or
- A drug-related offense.

Timely reporting to the Colorado Department of Education plays a critical role in the school employee screening process for peer schools and school districts. Potential employers may access the Department’s e-Licensing system to determine whether an applicant’s license has been revoked, suspended, or is the subject of a pending investigation.<sup>82</sup>

## **6. Access to Colorado’s Sex Offender Registry**

At the beginning of each school year, all public schools must provide parents with a statement explaining how to access the sex offender registry.<sup>83</sup> Schools may also elect to post the statement explaining how to access the registry to their websites.

The Colorado Bureau of Investigation maintains the sex offender registry, which is publicly available at no cost online.<sup>84</sup> However, a person may also request a paper copy of the registry for a fee.<sup>85</sup> The request form is available to download from the Bureau’s website.<sup>86</sup>

The Colorado Bureau of Investigation does not post information concerning sex offenders who only were convicted of misdemeanor sex offenses or juveniles adjudicated for sex crimes; however, police departments

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<sup>82</sup> 1 Code Colo. Regs. 301-37: 2260.5-R-15.00 (providing mandatory reporting requirements).

<sup>83</sup> § 22-1-124, C.R.S.

<sup>84</sup> *Colo. Convicted Sex Offender Search*, COLO. BUREAU OF INVESTIGATION, <https://apps.colorado.gov/apps/dps/sor/information.jsf> (last visited October 9, 2018).

<sup>85</sup> *Registration*, COLO. BUREAU OF INVESTIGATION, <https://www.colorado.gov/apps/cdps/sor/information.jsf> (last visited October 9, 2018).

<sup>86</sup> *Id.*

and sheriff's offices do maintain that information.<sup>87</sup> Misdemeanor sex offenses include statutory rape (where the victim is between 15 and 17 and the offender is at least 10 years older);<sup>88</sup> unlawful sexual contact (where the offender touches the victim's intimate parts without consent);<sup>89</sup> invasion of privacy for sexual gratification (where a "peeping tom" observes or takes a picture of the victim's intimate parts without consent);<sup>90</sup> and some juvenile sexting violations that take effect on January 1, 2018 (possession or posting of sexually explicit images of juveniles without their permission).<sup>91</sup>

## **7. Information Sharing Policy**

Every school district must have an information sharing policy.<sup>92</sup> The policy must be consistent with confidentiality provisions outlined in the Colorado Open Records Act, which, among other things, protects personal medical, scholastic, and financial records from public disclosure.<sup>93</sup> The policy must also comply with federal student privacy laws, such as the Family Educational Rights and Privacy Act, which are discussed in greater detail in Section III.<sup>94</sup>

## **8. Teacher Protection Policies**

The U.S. Department of Education's National Center for Education Statistics reports that nearly 10 percent of teachers are threatened with injury by a student each year and that five percent of teachers are physically attacked by a student each school year.<sup>95</sup> Each school district is required

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<sup>87</sup> *Colo. Convicted Sex Offender Search*, COLO. BUREAU OF INVESTIGATION, <https://apps.colorado.gov/apps/dps/sor/> (last visited October 9, 2018).

<sup>88</sup> § 18-3-402, C.R.S.

<sup>89</sup> § 18-3-404, C.R.S.

<sup>90</sup> § 18-3-405.6, C.R.S.

<sup>91</sup> § 18-7-109, C.R.S.; 2017 Colo. Sess. Laws, ch. 390, § 8 at 2017.

<sup>92</sup> § 22-32-109.1(6), C.R.S.

<sup>93</sup> *Id.*; § 24-72-204(3), C.R.S.

<sup>94</sup> § 22-32-109.1(6), C.R.S.

<sup>95</sup> NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCI., U.S. DEPT' OF EDUC. & U.S. DEPT' OF JUSTICE OFFICE OF JUSTICE PROGRAMS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2016 50 (May 2017), <https://nces.ed.gov/pubs2017/2017064.pdf> (last visited October 10, 2018)

under Colorado law to adopt policies and mandatory procedures to protect teachers and school employees.<sup>96</sup>

Any of the following offenses against school staff will trigger a district's teacher or employee protection policies:

- Assault;
- Disorderly conduct;
- Harassment;
- Making a knowingly false allegation of child abuse, or any alleged criminal offense; and
- Damage to the personal property of a teacher or school employee on school premises.<sup>97</sup>

School district policies and procedures must require teachers or school employees to file a complaint with the school administration and local board of education in such instances.<sup>98</sup> Upon determination that the teacher's or school employee's report is supported by adequate proof, the district's procedures must require a minimum of three days suspension for the offending student as well as provide procedures for further suspension or expulsion of the student where personal injury or property damage has occurred.<sup>99</sup> The school administrator must also report the incident to either local prosecutors or the appropriate law enforcement agency.<sup>100</sup>

## 9. Threat Assessment Policies

In 2000, the Colorado legislature directed every school board to develop written policies on reporting, information sharing, and threat assessment.<sup>101</sup> "Threat assessment is a violence prevention strategy that involves: (a)

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<sup>96</sup> § 22-32-109.1(3), C.R.S.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at (3)(a).

<sup>99</sup> *Id.* at (3)(b).

<sup>100</sup> *Id.* at (3)(c).

<sup>101</sup> OFFICE OF THE ATTORNEY GEN., STATE OF COLO., COLO. JUVENILE INFORMATION EXCHANGE LAWS: A MODEL FOR IMPLEMENTATION (2001),

<https://cspv.colorado.edu/resources/AGModelAgreement.pdf>

(last visited October 10, 2018)

identifying student threats to commit a violent act, (b) determining the seriousness of the threat, and (c) developing intervention plans that protect potential victims and address the underlying problem or conflict that stimulated the threatening behavior.”<sup>102</sup>

Threat assessment works best when implemented pursuant to a formal policy that establishes an “integrated systems approach” to dealing with the risks posed by students who express thoughts of violence towards themselves or others.<sup>103</sup> One such approach is to create threat assessment teams, comprised of educators, local law enforcement officials, county health officials, and crisis management operatives who work together to reduce or eliminate the threat of violence in schools.<sup>104</sup> Specifically, these teams focus on actions, communications, and behaviors that indicate a student plans to act violently.<sup>105</sup> If the threat assessment team determines that there is a risk of violence, then the team collaborates to develop and implement a plan to reduce the threat posed by the student.<sup>106</sup>

The U.S. Department of Education and U.S. Secret Service have identified six principles and eleven questions that comprise the “best practices” approach to preventing or reducing violence in schools.<sup>107</sup> As an initial matter, the following six principles form the foundation of the threat assessment process:

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<sup>102</sup> *Threat Assessment for Sch. Adm’rs & Crisis Teams*, NAT’L ASS’N OF SCHOOL PSYCHOLOGISTS, <https://www.nasponline.org/resources-and-publications/resources/school-safety-and-crisis/threat-assessment-at-school/threat-assessment-for-school-administrators-and-crisis-teams> (last visited October 10, 2018).

<sup>103</sup> ROBERT A. FEIN ET AL., U.S. SECRET SERV. & U.S. DEPT’ OF EDUC., THREAT ASSESSMENT IN SCH: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCH. CLIMATES 32 (July 2004), <https://www2.ed.gov/admins/lead/safety/threatassessmentguide.pdf> (last visited October 11, 2018)

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 33.

<sup>106</sup> *Id.* at 63-64.

<sup>107</sup> *Id.* at 29-33, 55-58; *see also* SARAH GOODRUM & WILLIAM WOODWARD, CTR. FOR THE STUDY & PREVENTION OF VIOLENCE, REPORT ON THE ARAPAHOE HIGH SCH. SHOOTING: LESSONS LEARNED ON INFORMATION SHARING, THREAT ASSESSMENT, AND SYS. INTEGRITY

42 (2016), [https://cspv.colorado.edu/publications/AHS-Report/Report\\_on\\_the\\_Arapahoe\\_High\\_School\\_Shooting\\_FINAL.pdf](https://cspv.colorado.edu/publications/AHS-Report/Report_on_the_Arapahoe_High_School_Shooting_FINAL.pdf) (last visited October 10, 2018)

- 1) Targeted violence is the end result of an understandable, and oftentimes discernible, process of thinking and behavior.
- 2) Targeted violence stems from an interaction among the individual, the situation, the setting, and the target.
- 3) An investigative, skeptical, and inquisitive mindset is critical to successful threat assessment.
- 4) Effective threat assessment is based upon facts rather than on characteristics or traits.
- 5) An “integrated systems approach” should guide threat assessment inquiries and investigations.
- 6) The central question in a threat assessment inquiry or investigation is whether a student poses a threat, not whether the student has made a threat.<sup>108</sup>

While these principles establish the conceptual framework for violence prevention, addressing a particular threat will require structured team review.<sup>109</sup> The threat assessment team should analyze information collected and conduct interviews guided by the following 11 questions:

- 1) What are the student’s motives and goals?
- 2) Have there been any communications suggesting ideas or intent to attack?
- 3) Has the student shown inappropriate interest in school attacks or attackers, weapons, or incidents of mass violence?
- 4) Has the student engaged in attack-related behaviors?
- 5) Does the student have the capacity to carry out an act of targeted violence?
- 6) Is the student experiencing hopelessness, desperation, and/or despair?
- 7) Does the student have a trusting relationship with at least one responsible adult?

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<sup>108</sup> FEIN ET AL., THREAT ASSESSMENT IN SCH.: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCH. CLIMATES at 29-33.

<sup>109</sup> *Id.* at 35.

- 8) Does the student see violence as an acceptable, desirable, or the only way to solve problems?
- 9) Is the student’s conversation and “story” consistent with his or her actions?
- 10) Are other people concerned about the student’s potential for violence?
- 11) What circumstances might affect the likelihood of an attack?<sup>110</sup>

The threat assessment team’s evaluation of the answers to the eleven questions posed above can indicate whether the student poses a threat of targeted violence at school.<sup>111</sup> If the threat assessment team determines that the student does not pose a threat, then the threat assessment inquiry may be closed with no further action.<sup>112</sup> However, if the threat assessment team determines that the student does pose a threat of violence, then the team should contact law enforcement and refer the information for further investigation.<sup>113</sup>

Threat assessment teams generally work within a school to identify and evaluate particularized risks posed by individual students, but as the Safe Schools Act reflects, school safety also requires a systems-based approach.<sup>114</sup> The Colorado General Assembly encourages interagency social support teams to ensure a safe school environment.<sup>115</sup> Unlike the threat assessment team, the interagency social support team is responsible for identifying and responding to broader school climate issues.<sup>116</sup> This is a

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<sup>110</sup> *Id.* at 55-59.

<sup>111</sup> *Id.* at 57.

<sup>112</sup> *Id.* at 57-58. Nevertheless, it is still recommended that the student receive additional support. *Id.*

<sup>113</sup> *Id.* at 58.

<sup>114</sup> § 22-32-109.1(3), C.R.S.

<sup>115</sup> *Id.*

<sup>116</sup> SAFE CMTYS. SAFE SCH. INITIATIVE, CTR. FOR THE STUDY AND PREVENTION OF VIOLENCE, INST. OF BEHAVIORAL SCI., UNIV. OF COLO. AT BOULDER, PLANNING GUIDE 4 (2015), [https://cspv.colorado.edu/publications/safeschools/SCSS\\_PlanningGuide.pdf](https://cspv.colorado.edu/publications/safeschools/SCSS_PlanningGuide.pdf) (last visited October 10, 2018)

concept based on the Colorado Attorney General’s Model Interagency Agreement.<sup>117</sup>

The interagency social support and threat assessment teams may be comprised of the same group of people or some members may be part of each team. Regardless, an interagency social support team should include the following representatives:

- Educators, usually the school’s principal, a special education professional, and/or a counselor;
- Local law enforcement officials;
- Mental health professionals;
- Social services providers; and
- Juvenile justice system actors, such as probation or parole officers, diversion counselors, and/or a representative from the district attorney’s office.<sup>118</sup>

Assembling trained, multi-disciplinary threat assessment and interagency social support teams often requires sharing information with professionals who are not employees of the school district. As a result, the district must take special steps to designate those individuals as “school officials” so that they may lawfully receive confidential student information. In some circumstances, an interagency agreement can serve as a contract between agencies to specify what types of information should be shared and by whom.<sup>119</sup> Section III of this Manual discusses in further detail the requirements that must be satisfied prior to sharing information in the wake of threats or violence at a school.

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<sup>117</sup> See generally OFFICE OF THE ATTORNEY GEN., STATE OF COLO., COLO. JUVENILE INFORMATION EXCHANGE LAWS: A MODEL FOR IMPLEMENTATION (2001), <https://cspv.colorado.edu/resources/AGModelAgreement.pdf> (last visited October 11, 2018)

<sup>118</sup> SAFE CMTYS. SAFE SCH. INITIATIVE, PLANNING GUIDE at 4.

<sup>119</sup> See OFFICE OF THE ATTORNEY GEN., COLO. JUVENILE INFORMATION EXCHANGE LAWS: A MODEL FOR INTERPRETATION at 5-6.

## **B. Additional School Safety Recommendations**

In addition to the Safe Schools Act's required provisions, the Act also recommends that school districts adopt the following additional plans and policies as a "best practices" approach to student safety.

### **1. Internet Safety Plan**

The Safe Schools Act encourages school districts to provide age-appropriate internet safety curricula to students in grades kindergarten through twelve.<sup>120</sup> The curriculum may include topics such as:

- Interaction with strangers online;
- Recognition and avoidance of online bullying;
- Computer virus issues and ways to avoid computer infection;
- Identification of online predators;
- Intellectual property, including information about plagiarism and the downloading and use of copyrighted materials;
- Privacy and the internet;
- Online research literacy, including how to identify credible, factual, and trustworthy websites; and
- Homeland security issues related to internet use.<sup>121</sup>

The Safe Schools Act recommends that school districts incorporate these topics into the overall school curriculum.<sup>122</sup>

School districts are encouraged to work with law enforcement and collaborate with parents, teachers, and organizations representing parents and teachers when developing an internet safety plan. School districts that implement such plans are encouraged to appoint somebody to oversee compliance with the district's plan and to report to the board of education on

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<sup>120</sup> § 22-32-109.1(2)(c)(I), C.R.S.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at (2)(c)(I)(H)(II).

each school's compliance.<sup>123</sup> With that information, the school district may then submit a summary report to the Colorado Department of Education.<sup>124</sup>

## 2. Child Sexual Abuse Prevention Plan

The Safe Schools Act also recommends that every school district implement age-appropriate curricula on child sexual abuse and assault prevention as part of its safe school plan.<sup>125</sup> School districts may consider including the following topics:

- Skills for recognizing child sexual abuse and assault;
- Boundary violations and unwanted contact;
- Techniques used by offenders to groom and desensitize victims;
- Strategies for promoting disclosure and reducing self-blame by victims; and
- Mobilizing bystanders.<sup>126</sup>

School districts should also consider training employees and parents about child sexual abuse and assault prevention and response.<sup>127</sup> The Safe Schools Act directs districts to the Colorado School Safety Resource Center for valuable resources.<sup>128</sup>

### C. Federal Requirements Specific to Title IX

Federal law imposes certain additional requirements and recommendations regarding how schools address sexual harassment and sexual violence. Title IX of the Education Amendments of 1972 states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

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<sup>123</sup> *Id.* at (2)(c)(I)(H)(IV).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at (2.5)(a).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at (2.5)(b), C.R.S.

<sup>128</sup> *Id.* at (2.5)(c). For further information, visit *CSSRC Tool and Templates*, COLO. SCH. SAFETY RES. CTR., <https://www.colorado.gov/pacific/cssrc/cssrc-tools-and-templates> (last visited October 9, 2018).

under any education program or activity receiving federal financial assistance.”<sup>129</sup> Although Title IX was originally understood as relating to equal opportunity in athletics, the law addresses all forms of sex discrimination that impact students’ educational opportunities, including sexual violence, sexual harassment, stalking, and domestic violence.<sup>130</sup>

Title IX requires schools to implement safety measures to prevent and respond to sexual violence. Schools and school districts must (1) appoint a Title IX coordinator; (2) adopt and disseminate a notice of nondiscrimination; and (3) adopt and publish grievance procedures for Title IX complaints.<sup>131</sup> As will be discussed in Section VI, educational institutions may be liable for violating Title IX if educators knew, or should have known, about possible occurrences of sexual violence, and then failed to take immediate and appropriate steps to investigate and respond to the situation.

Due to the intricacies of many Title IX requirements and the detail-oriented nature of the Title IX’s “best practices” recommendations, school districts should involve legal counsel in the development and implementation of Title IX procedures. For additional assistance, school districts can also refer to an array of publicly available resources that address Title IX compliance. For instance, on the Colorado Department of Education’s website, officials can find answers to frequently asked questions about Title IX’s requirements and recommendations as well as guides on implementing Title IX’s procedures.<sup>132</sup>

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<sup>129</sup> 20 U.S.C. § 1681(a).

<sup>130</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCH. 1 (Apr.2011), <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html> (last visited October 11, 2018)

<sup>131</sup> See 34 C.F.R. §§ 106.8-106.9.

<sup>132</sup> See *Title IX of the Educ. Amendments of 1972*, COLO. DEPT OF EDUC., [http://www.cde.state.co.us/cde\\_english/titleix](http://www.cde.state.co.us/cde_english/titleix) (last visited October 9, 2018).

## II. INCIDENT RESPONSE AND MANAGEMENT

Colorado law recognizes that a safe learning environment is crucial to the mission of public education, and it empowers school districts, teachers, and employees to adopt and enforce policies and procedures to advance that mission.<sup>1</sup> Disruptive students can significantly interfere with the learning environment in schools, and certain student conduct can pose a threat to students and teachers via isolated incidents or through prolonged harassment and bullying. For a detailed summary of federal liability for certain types of harassment and bullying, see Section VI of this Guide.

Federal and state laws govern how school officials may respond to the potential for violence, threatened violence, and actual instances of violence on school campuses. Section II of the Manual addresses these laws and outlines the circumstances under which school officials may physically intervene with violent or disruptive students. Section II also discusses the laws that govern administrative searches and seizures, and it details the circumstances under which school officials may search students and/or seize their property.

### A. Physical Intervention and Force

Under Colorado law, teachers and other persons responsible for the care and supervision of minor students are statutorily entitled to “use reasonable and appropriate physical force upon [a] minor . . . when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor [student].”<sup>2</sup> Likewise, maintaining discipline also includes an educator’s ability to use reasonable and appropriate physical force to protect other students or school personnel.<sup>3</sup> If physical force or restraint is used, the teacher or school employee must be able to articulate what type of force was used, the extent to which it was used, and the reasons justifying its use.

When determining whether to use force against a student, a teacher or school employee must employ their best judgment; however, courts are likely

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<sup>1</sup> See, e.g., § 22-32-109.1, C.R.S.

<sup>2</sup> § 18-1-703(1)(a), C.R.S.

<sup>3</sup> *Id.*; see also §§ 18-1-704(1), 22-32-109.1(2)(a)(I)(D), C.R.S.

to be skeptical of the use of force unaccompanied by extenuating circumstances. For example, in *Board of Education v. Flaming*, a tenured music teacher “hit or tapped” a disruptive student on the head with a three-foot-long wooden pointer in an effort to get the student to pay attention.<sup>4</sup> The student, while disruptive, did not pose a risk to himself or others in the classroom, and there were effective alternatives short of physical force that the teacher could have employed to gain the student’s attention.<sup>5</sup> Colorado law does not permit teachers and administrators to use physical force against students to maintain routine classroom order.<sup>6</sup> Thus, the Colorado Supreme Court determined that the teacher’s use of force was “inappropriate and unreasonable” under the circumstances, and she was ultimately dismissed, in part, for neglecting her duty “to provide a safe and secure learning environment.”<sup>7</sup>

It is critical that educators are familiar with their school district’s policy on the use of physical force and that they operate within the policy’s parameters. If the school district empowered its schools’ principals to adopt additional procedures further limiting the use of physical intervention or force, teachers and school employees should be aware of, and comply with, those policies as well.

Under Colorado law, teachers and school officials will be immune from civil liability or criminal prosecution provided that they act within acceptable limits of the law as well as within the parameters of the school district’s conduct and discipline code.<sup>8</sup> In addition to this immunity, the appropriate use of physical force by an adult entrusted with the care of minors, such as a teacher or school employee, against a violent or disruptive student is a recognized affirmative defense to the crime of child abuse.<sup>9</sup> In contrast, teachers or employees who violate the laws and policies governing the use of

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<sup>4</sup> 938 P.2d 151, 153 (Colo. 1997).

<sup>5</sup> *Id.* at 154-55, 159-60.

<sup>6</sup> See § 18-1-703(1)(a), C.R.S.

<sup>7</sup> *Flaming*, 938 P.2d at 154, 156.

<sup>8</sup> § 22-32-109.1(9), C.R.S.

<sup>9</sup> See, e.g., *People v. Taggart*, 621 P.2d 1375, 1384 (Colo. 1981), *abrogated in part on other grounds by James v. People*, 727 P.2d 850 (Colo. 1986). Additionally, as noted in Section I of this Manual, school district policies may not conflict with state, municipal, or county laws that govern or define the crime of child abuse.

physical force against students may be subject to disciplinary or legal action. Colorado law prohibits the use of certain kinds of restraints, including restraining a student in a prone (“face-down”) position.<sup>10</sup>

### **“Best Practices” Checklist for use of Force or Restraint**

- *Ensure that teachers and employees understand the applicable use of force framework.* The circumstances under which teachers and administrators may need to use physical force or restrain a student will require swift and sound decision-making. The best outcomes will result from an understanding of the applicable framework for use of force in advance of such emergencies.
- *Follow the district’s conduct and disciplinary code.* Teachers and school officials should know the district’s policy on use of physical force against students prior to using any physical intervention with students, and they should follow its provisions. This includes both the district’s written policy and any additional directives or procedures required by individual school principals.
- *Use the minimum level of force necessary.* The use of force or physical intervention must be both reasonable and appropriate given the student’s physical characteristics and intellectual comprehension, the conduct of the student, and the threat of harm to the school official and to others. Generally, this will mean using only the minimum amount of force necessary, given the situation, to maintain order in the school and to protect the school official and others from an unreasonable risk of harm.
- *Restrain a student only when absolutely necessary.* School employees should resort to the physical restraint of a student in emergencies only after other, less drastic solutions have been exhausted or deemed inappropriate under the circumstances. To ensure that students who must be restrained are restrained in the safest manner possible, school

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<sup>10</sup> § 22-32-147(2). Although less likely to arise in a school setting, this statute also generally forbids “chemical restraints” (i.e., involuntary sedation) and “mechanical restraints” such as handcuffs. *Id.*

employees should receive training on safe and proper restraint techniques.

- *If possible, isolate the student from peers.* If possible, teachers and employees should confront a student about problematic or concerning behavior in a private setting, removed from the rest of the student body. Oftentimes, this approach can mitigate the aggravating factors that lead to the necessity of using force against a student.
- *If possible, teachers and staff members should not confront a student alone.* There is strength in numbers, and, when possible, at least two teachers or staff members should be present when confronting a student about problematic or concerning behavior. The mere fact that the student is outnumbered by school officials when first confronted about their behavior can reduce the likelihood that the confrontation will escalate to a point where the use of force becomes necessary.

## **B. Searching and Seizing Students or Their Property**

Evaluating how to respond to suspicions that a student has contraband, such as drugs or a weapon, can be a challenging legal issue for school officials. The discussion below outlines the circumstances under which a school official may properly search an individual student or his or her personal property as well as the circumstances under which schools may search students more broadly, such as through use of metal detectors or suspicionless drug testing.

The following examples would all constitute “searches” under law:

- Examining items or places that are not in the open and exposed to public view;
- Physically examining or patting down a student’s body or clothing, including the student’s pockets;
- Opening and inspecting personal possessions such as purses, backpacks, bags, books, and closed containers;

- Handling or feeling any closed, opaque item to determine its contents when the contents cannot be inferred by the item’s shape or other obvious physical properties;
- Using any extraordinary means (for example, x-rays) to enlarge the view into closed or locked areas, containers, or possessions, so as to view items not in plain view and exposed to the public;
- Drug testing.

As discussed in Section I, Colorado law requires school districts to establish written policies concerning searches on school grounds, including locker searches.<sup>11</sup> Student searches raise important issues under the United States and Colorado constitutions. Consequently, school districts should contact their school attorneys and local prosecutors for guidance and training in adopting and implementing appropriate search policies.

### **1. Contours of Permissible Student Searches**

The Fourth Amendment of the U.S. Constitution and article II, section 7 of the Colorado Constitution protect people from unreasonable government searches and seizures of their persons and belongings.<sup>12</sup> These constitutional protections are triggered whenever a government action intrudes upon an activity or area in which a person holds a legitimate expectation of privacy.<sup>13</sup> Individuals have a legitimate expectation of privacy if (1) they actually expect the area or activity to remain free from government intrusion and (2) society would recognize their expectation as reasonable.<sup>14</sup>

“Government action” is not limited solely to law enforcement activities. Teachers and school administrators engage in “government action” whenever they act as employees of Colorado’s public school system.<sup>15</sup> Although teachers may stand in a role similar to parents while supervising minor

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<sup>11</sup> See § 22-32-109.1(2)(a)(I)(I), C.R.S.

<sup>12</sup> Article II, section 7 of the Colorado Constitution states in part: “[t]he People shall be secure in their persons, papers, houses and effects, from unreasonable searches and seizures.”

<sup>13</sup> *People v. Oates*, 698 P.2d 811, 814 (Colo. 1985).

<sup>14</sup> *Id.* (citations and quotations omitted).

<sup>15</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (plurality decision).

students, this parent-like role does not shield them from constitutional requirements.<sup>16</sup> In fact, Fourth Amendment protections are triggered when school officials search students or their belongings.<sup>17</sup>

Federal and state laws governing searches and seizures are unique with regard to their application in schools. While students do not forfeit their right of privacy when in school, it is widely recognized that students have a lesser expectation of privacy within the school environment than they have elsewhere in society.<sup>18</sup> To ensure an environment in which learning can take place, courts balance students' expectations of privacy against schools' equally legitimate interests in maintaining order.<sup>19</sup> Thus, searches occurring in a school setting are not subject to the same kinds of restrictions that normally apply to searches by public officials, such as law enforcement officers.<sup>20</sup>

First, school officials do not need to obtain a warrant prior to conducting a search or seizure of a student or their property.<sup>21</sup> According to the U.S. Supreme Court, requiring school officials to obtain warrants would unduly interfere with the swift and informal disciplinary procedures needed to maintain an orderly learning environment.<sup>22</sup> Moreover, given the unique circumstances of searches in schools, the Court noted that enforcing the warrant requirement would likely frustrate the governmental purpose behind a search.<sup>23</sup>

Second, school officials do not have to satisfy the probable cause standard prior to conducting a search or seizure.<sup>24</sup> Ordinarily, a search – even one carried out without a warrant – must be based upon “probable cause.”<sup>25</sup> Probable cause is defined as a reasonable basis for believing that a

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829-30 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995).

<sup>19</sup> *T.L.O.*, 469 U.S. at 339-41.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 340.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 340-41.

<sup>25</sup> *Id.* at 340.

violation of the law has occurred or that evidence of a violation is present in the place to be searched.<sup>26</sup> However, this standard does not apply to searches conducted by school officials. Rather, for a search on school property, in a school vehicle, or at a school event to be proper, the search must merely be objectively reasonable under the circumstances.<sup>27</sup>

To determine whether a search conducted by school officials or employees is objectively reasonable, courts apply a two-prong test: (1) courts look to determine whether school officials had “reasonable suspicion” to justify the search; and (2) courts look to determine whether the search was reasonable in scope.<sup>28</sup>

Generally, a school official’s search is supported by “reasonable suspicion” where there are reasonable grounds for suspecting that the search, if conducted, will turn up evidence that the student has violated, or is about to violate, the law or school rules.<sup>29</sup> If an official has a reasonable suspicion, the search is “justified at its inception.”<sup>30</sup> Additionally, a search is “permissible in its scope when the measures adopted are reasonably related to the objectives of the search and [are] not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>31</sup>

Both these elements are discussed in greater detail below. In addition, this analysis may be avoided all together if students validly consent to a search of their person or property.

The following table provides a summary of student searches by school officials:

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 341.

<sup>28</sup> *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

<sup>29</sup> *Id.* at 341-42.

<sup>30</sup> *Id.* at 341 (citations omitted).

<sup>31</sup> *Id.* at 342.

<b>Search Area</b>	<b>Expectation of Privacy?</b>	<b>Required Justification for Search</b>
Student's Person or Property	Yes	Reasonable suspicion and/or consent
Car	Yes	Reasonable suspicion and/or consent
Lockers, Desks, Other Storage Areas in School	Yes or No Depending on School Policy	Reasonable suspicion and/or consent; no individualized justification required for a random search pursuant to adequate policy.
Abandoned Property, Denial of Ownership, and Property in Plain View	No	Not a search. No justification required.

**a. Student Consent**

As an initial matter, students always have the option of consenting to a search of their persons and/or their personal belongings. If a student validly consents to a search, then the search may be conducted and there is no reason to consider whether the search satisfies both prongs of the reasonability test stated above.

To be valid, a student's consent must be voluntary, meaning it cannot be obtained through duress or coercion.<sup>32</sup> Whether consent to a search is, in fact, voluntary is a question of fact that considers the totality of the circumstances surrounding the consent.<sup>33</sup> Such circumstances include the student's age, level of education, mental capacity, and whether the student knowingly and intelligently waived the right to refuse consent.<sup>34</sup> While consent does not necessarily have to be knowingly and intelligently given, it

<sup>32</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 226, 232-33.

is certainly a very important factor in evaluating the voluntariness of consent.<sup>35</sup>

As a practical matter, the most reliable way to establish that a student's consent was voluntarily given is to demonstrate that the searched student knew that he or she had a right to refuse the search in the first place. Thus, prior to conducting a consensual search, school officials should notify the student that he or she has a right to refuse to be voluntarily searched. After being advised of his or her right, a student's consent to be searched can be provided either orally or in writing. However, because a student's consent must be clear and unequivocal, a written waiver is preferred. A sample waiver, titled "Consent to Search Form," is included in the Appendix to this Manual. If using the attached Consent to Search Form or something similar, officials should have the student sign the form prior to the search.

When requesting consent to search, school officials should inform the student why permission to search is being sought and what the school officials believe the search will reveal. Providing such information helps ensure the student's consent is knowing and intelligent. Under no circumstances may school officials threaten a student with punishment for withholding consent.<sup>36</sup>

The student may withdraw his or her consent at any time, and the student's request to terminate the search must be honored.<sup>37</sup> However, school officials may seize any evidence they observed before the student

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<sup>35</sup> See *id.* at 241 (distinguishing the rights guaranteed by the Fourth Amendment from the right to a fair trial).

<sup>36</sup> *Id.* at 247; but see *DesRoches by DesRoches v. Caprio*, 156 F.3d 571, 577-78 (4th Cir. 1998) (concluding that a student was appropriately threatened with punishment when refusing consent to a search, because school officials had already developed a reasonable individualized suspicion to justify the search).

<sup>37</sup> See *United States v. Jimenez-Valenia*, 419 Fed. App'x 816, 820 (10th Cir. 2011) (noting that "[a] person who has consented to a search may withdraw his consent as long as he communicates his withdrawal to the officer"); see also *United States v. McWeeney*, 454 F.3d 1030, 1036 n.2 (9th Cir. 2006) (holding that "there is a constitutional right to withdraw consent once it is given"). These cases, while applying this rule in the criminal context, are sufficiently analogous to the rights applicable to students in schools because "school officials act as representatives of the State" and are therefore limited by the principles of the Fourth Amendment. See *New Jersey v. T.L.O.*, 469 U.S.325, 336 (1985).

withdrew his or her consent.<sup>38</sup> If a school official develops a reasonable suspicion, as explained below, then he or she may continue the search, even after consent has been withdrawn and over the student’s objections.

**b. Reasonable Suspicion**

Reasonable suspicion is the first prong of the above two-prong test for determining whether a non-consensual search of students or their belongings is reasonable. The concept of a reasonable suspicion is founded on common sense – it exists where there are reasonable grounds for suspecting “that [a] search [if conducted] will turn up evidence that the student has violated or is violating either the law or the rules of the school.”<sup>39</sup> A school official will have a reasonable suspicion if he or she is aware of objective facts and information that, taken as a whole, would lead a reasonable person to suspect that a rule violation has occurred and that evidence of the violation can be found in the place to be searched.<sup>40</sup> The suspicion must be more than a mere hunch, and it must be based upon articulable facts.<sup>41</sup> However, it need not rise to the level of absolute certainty or probable cause.<sup>42</sup>

Possible bases for a “reasonable suspicion” may include:

- Observed criminal law or school rule violation in progress;
- Observed weapon or portion of a weapon;
- Observed illegal item;
- Observed item believed to be stolen;
- Student found with incriminating items;
- Smell of burning tobacco or marijuana;

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<sup>38</sup> See *United States v. Mains*, 33 F.3d 1222, 1227 (10th Cir. 1994) (refusing to exclude from evidence contraband discovered in a closet when consent to search the closet had been revoked only after the contraband was discovered); see also *United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986) (holding that when consent is not withdrawn until *after* contraband is discovered, “the consent remains valid” and the contraband is “admissible as evidence”). Again, while these cases apply this concept in the criminal context, this protection is analogous under the Fourth Amendment and should extend to students in the school context as well. See *T.L.O.*, 469 U.S. at 336.

<sup>39</sup> *T.L.O.*, 469 U.S. at 341-42.

<sup>40</sup> *People in Interest of P.E.A.*, 754 P.2d 382, 388 (Colo. 1988).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 388-89.

- Student appears to be under the influence of alcohol or drugs;
- Student admits to criminal law or school rule violation;
- Student fits description of suspect of recently reported criminal law or school rule violation;
- Student flees from vicinity of recent criminal law or school rule violation;
- Reliable information provided by others, including evidence incriminating one student turned over by another student;
- Threatening words or behavior;
- Report of stolen item, including description and value of item and place where item was stolen;
- Student seen leaving area where criminal law or school rules violations are often committed; and
- Emergency situations, where school official can provide immediate assistance to avoid serious injury.

*In re William G.* helps demonstrate how courts have concluded that a mere hunch does not rise to the level of a reasonable suspicion.<sup>43</sup> In that case, a high school assistant principal noticed a student carrying a small black bag with an “odd-looking bulge,” which the student appeared to be trying to conceal by holding it the bag to his side and then behind his back.<sup>44</sup> The assistant principal approached the student and demanded to see the bag.<sup>45</sup> When the student refused to hand it over, the assistant principal forcefully took the bag from the student, opened it, and found marijuana inside.<sup>46</sup> On review, the Court held that the assistant principal’s search was not supported by a reasonable suspicion.<sup>47</sup> Specifically, the Court noted that the school official acted with a complete lack of any knowledge or information that would reasonably connect the student to the possession, use, or sale of illegal drugs or other contraband.<sup>48</sup> The student’s “furtive gestures,” alone,

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<sup>43</sup> 709 P.2d 1287, 1297-98 (Cal. 1985).

<sup>44</sup> *Id.* at 1289.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1297-98.

<sup>48</sup> *Id.* at 1297.

were not sufficient to justify the search.<sup>49</sup> Thus, while the threshold for reasonable suspicion is not a high one, school officials must be able to describe a specific basis for the suspicion.

### c. Scope of the Search

Once reasonable grounds to conduct a search exist, the next step is to establish the reasonable scope of the search, which defines how extensive a search can be. In general, the scope of a search must be “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>50</sup> In other words, the scope of the search should be reasonably related to the circumstances initially justifying the search.<sup>51</sup>

Generally, common sense dictates the appropriate scope of a search. Under the “reasonably related” standard, a search should not be excessive in relation to the concern justifying the search.<sup>52</sup> In other words, the scope of the search may vary depending on the nature and severity of a potential threat. For example, a search of a student for a gun could be more intrusive than a search of a student for evidence that the student is in violation of a campus chewing gum ban.

Similarly, there must be a logical connection between the thing or place to be searched and the item school officials are seeking to find.<sup>53</sup> For instance, when a school official has reasonable suspicion to conduct a search of a student’s locker for drugs, the school official may open and inspect any closed containers or objects that are stored in the locker so long as the drugs

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<sup>49</sup> *Id.*

<sup>50</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (plurality decision).

<sup>51</sup> *Id.* at 341 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

<sup>52</sup> See *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 498 (6th Cir. 2008) (noting that the methods employed during a search “must be congruent to the need for such a search in order to serve the policy goal of school safety and security”).

<sup>53</sup> See *id.* at 496-98 (holding that the scope of a search on school grounds is reasonable when the manner in which the search is conducted, including the location of the search, is “reasonably related to the objectives of the search and not excessively intrusive”) (citations and internal quotation marks omitted); see also *United States v. Kimoana*, 383 F.3d 1215, 1223 (10th Cir. 2004) (noting that “[t]he scope of a search is generally defined by its expressed object” and that “[c]onsent to search for specific items includes consent to search those areas or containers that might reasonably contain those items” (citations and quotation marks omitted)).

could reasonably be concealed within the containers. However, those same circumstances would not permit the official to read the contents of a diary found in the locker. Likewise, while a teacher's reasonable suspicion that a student stole a textbook would justify a search of that student's backpack or locker, it would not justify a search of that student's clothing or of any containers, such as a purse, that are too small to conceal the missing textbook.

Additionally, if in the course of a reasonable search a school official discovers new evidence indicating illegal or rule-breaking activity, that evidence may justify a continued or more thorough search of the student or their property.<sup>54</sup>

In *New Jersey v. T.L.O.*, a teacher found a student smoking in a school bathroom.<sup>55</sup> When the student denied that she was smoking, an assistant principal searched her purse and discovered cigarettes.<sup>56</sup> As he removed the cigarettes from the purse, the assistant principal noticed that the purse also contained cigarette rolling papers.<sup>57</sup> He knew that rolling papers were often associated with marijuana use, and, based on this discovery, he suspected that the purse probably also contained marijuana.<sup>58</sup> He then conducted a more thorough search of the purse and found marijuana and other evidence of marijuana use and sale.<sup>59</sup>

The student and her family challenged the legality of the search, and the U.S. Supreme Court ultimately determined that the search was reasonable in its entirety.<sup>60</sup> The Court concluded that opening the student's purse was initially reasonable and that "the discovery of the rolling papers gave rise to a reasonable suspicion that [she] was carrying [marijuana],"

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<sup>54</sup> See, e.g., *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 983 (8th Cir. 1996) (upholding the search of a student after the principal suspected that weapons had been brought to school by an unknown student).

<sup>55</sup> 469 U.S. at 328.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 332.

which justified the more thorough search.<sup>61</sup> This case, although now more than 30 years old, is still the most widely cited authority on student searches.

Similarly, in *People of Interest of P.E.A.*, the Colorado Supreme Court upheld thorough searches of a student’s person, locker, and car based upon information received from a local police officer that the student possessed, and intended to sell, drugs at school.<sup>62</sup> The Court recognized the school’s legitimate interest in preventing drug transactions from occurring on campus, and it held that the searches were reasonable in light of the information known to school personnel at the time the searches were conducted.<sup>63</sup>

This case also demonstrates that the “reasonable suspicion” standard applies equally to students’ cars. A car parked on school property receives no greater legal protection than a student’s purse or backpack, and therefore it may be searched by school officials under the appropriate circumstances.<sup>64</sup> Alternatively, a sample waiver, titled “Application for School Parking Lot Access,” is included in the Appendix to this Manual. By signing the sample waiver, students consent in advance to a search of their vehicles anytime they are parked on school property.

Furthermore, broader searches may occasionally be conducted during activities away from school grounds. In *Webb v. McCullough*, a principal entered a hotel room of students to search for alcohol during a field trip to Hawaii.<sup>65</sup> The court ultimately held that the search of the room was reasonable, noting both that a greater range of activities occur during extracurricular activities and that there are more ways for students to violate school rules or laws on a field trip than during school.<sup>66</sup>

Courts generally respect school policies designed to prevent disruptions, but those policies do not automatically allow a search of students’ property causing such disruptions. Policies banning the use or

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<sup>61</sup> *Id.* at 347.

<sup>62</sup> 754 P.2d at 384.

<sup>63</sup> *Id.* at 389.

<sup>64</sup> *Id.* at 384.

<sup>65</sup> 828 F.2d 1151, 1153 (6th Cir. 1987).

<sup>66</sup> *Id.* at 1157.

display of cell phones and other personal electronic devices in the classroom are generally deemed a legitimate exercise of the school's right to maintain a disruption-free educational environment.<sup>67</sup> If a student violates a "no cell phone" policy, school officials can temporarily confiscate the device.<sup>68</sup> However, the right to seize a phone does not convey a right to search it. Searching the phone's contents would be justified only if the school official has reasonable grounds for believing that the phone contains evidence of other violations of law or school policy. For example, credible reports of "sexting," exchange of improper photos, or evidence that students are using their phones to arrange drug sales could all provide a reasonable suspicion that would justify searching their phones.

#### **d. Strip Searches are Ill-advised**

School officials should be especially cautious before requiring a student to remove items of clothing for the purpose of conducting a search. Courts will more closely scrutinize the facts justifying a search where the search is particularly intrusive, such as one that involves a strip search or physical touching of a student's person.<sup>69</sup>

In *Safford Unified School District v. Redding*, the U.S. Supreme Court reviewed a matter in which school administrators strip-searched a middle-school girl to look for pills.<sup>70</sup> The Court held that although there was reasonable suspicion to search the girl's outer clothes and property, a search of her underwear violated the Fourth Amendment.<sup>71</sup> The Court cited the girl's 13 years of age and described the search as "embarrassing, frightening, and humiliating."<sup>72</sup>

The term "strip search" includes nude searches, searches that reveal a student's undergarments, and searches that include the removal or re-

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<sup>67</sup> See, e.g., *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1276, 1280-81 (W.D.Wash. 2007).

<sup>68</sup> *Id.* at 1283.

<sup>69</sup> *Safford Unified Sch. Dist. # 1 v. Redding*, 557 U.S. 364, 374 (2009) (stating that strip searches are "categorically distinct"); cf. *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 488 (5th Cir. 1982) (holding that the use of drug dogs to sniff school children in close proximity was overly intrusive).

<sup>70</sup> 557 U.S. at 368.

<sup>71</sup> *Id.* at 377.

<sup>72</sup> *Id.* at 368, 374-75.

arrangement of clothing for the purpose of visual inspection of the student's buttocks, genitals, or breasts.<sup>73</sup> Notably, the term does not include removal of outer layers of clothing not in direct contact with the student's skin, such as jackets or sweaters.<sup>74</sup> Although strip searches may be appropriate in certain circumstances, school districts should contact their school attorneys and local prosecutors for guidance and training on the legal requirements for initiating and conducting such a search.

#### **e. Limited Searches During Medical Emergencies**

Generally, the medical emergency exception to the Fourth Amendment permits school officials to search an unconscious or semi-unconscious student and/or their personal belongings for the purposes of discovering the student's identity or providing medical assistance.<sup>75</sup> For example, if school officials were to find an incoherent student on school grounds, those officials could search the student and her belongings to determine what type of substance(s) she may have ingested. This information could prove invaluable to first responders as they try to provide emergency medical assistance.

## **2. The Role of Law Enforcement in School Searches**

While school officials may conduct a search when they have a reasonable suspicion that a violation of a criminal law or a school rule has occurred, law enforcement officers generally cannot conduct a search without probable cause or a warrant.<sup>76</sup> The probable cause standard requires a reasonable belief that evidence of a crime or wrongdoing exists in the place to be searched, and it is a higher standard than the reasonable suspicion standard discussed above.<sup>77</sup>

Neither the U.S. Supreme Court nor the Colorado Supreme Court have established which standard will control when school officials conduct searches as agents of, or in cooperation with, law enforcement.<sup>78</sup> However,

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<sup>73</sup> See *id.* at 368-69 (referring to a search that exposed a student's "breasts and pelvic area to some degree" as a "strip search").

<sup>74</sup> *Id.* at 374.

<sup>75</sup> *People v. Wright*, 804 P.2d 866, 869 (Colo. 1991) (citing *Mincey v. Arizona*, 437 U.S. 385,392-93 (1978)).

<sup>76</sup> *People v. Zuniga*, 372 P.3d 1052, 1056 (Colo. 2016).

<sup>77</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985) (plurality decision).

<sup>78</sup> *Id.* at 341 n.7; *People in Interest of P.E.A.*, 754 P.2d 382, 385 n.3 (Colo. 1988).

other courts have held that “where a search is initiated and conducted by school officials alone, or where school officials initiate a search and police involvement is minimal, the [reasonable suspicion] standard is applicable.”<sup>79</sup> Conversely, “where ‘outside’ police officers initiate, or are predominantly involved in, a school search of a student or student property for police investigative purposes,” the ordinary probable cause and warrant requirements will apply.<sup>80</sup> While it is likely that Colorado courts would rule the same way, Colorado law is still uncertain. Thus, until Colorado courts definitively settle the issue, the timing and extent to which law enforcement becomes involved with searching students or their property is a decision best left to law enforcement officials – not school officials.

### 3. Suspicionless “Blanket” Searches

In addition to the authority to search individual students whom school officials suspect of breaking applicable laws or rules, school officials also have the authority to conduct suspicionless “blanket” searches of students. These searches empower school officials to screen all students who are present on school property or are participating in school-sanctioned activities without requiring officials to demonstrate an individualized, articulable suspicion for each student.<sup>81</sup> Examples include the use of metal detectors, video surveillance, random drug testing, dog sniffs, and campus-wide locker searches.<sup>82</sup> Generally, the purpose of these programs is to prevent students from bringing or keeping dangerous weapons, drugs, alcohol, and other prohibited items on school grounds.<sup>83</sup> Thus, schools will often adopt inspection programs to demonstrate that certain types of behavior are not tolerated.<sup>84</sup>

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<sup>79</sup> See, e.g., *Myers v. State*, 839 N.E.2d 1154, 1160 (Ind. 2005) (summarizing standards identified by various lower courts in other jurisdictions).

<sup>80</sup> *Id.*

<sup>81</sup> See Jason P. Nance, *Random, Suspicionless Searches of Public School Students’ Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 369-75 (2013), available at <https://scholarship.law.ufl.edu/facultypub/285/> (last visited October 11, 2018)

<sup>82</sup> *Id.* at 370.

<sup>83</sup> *Id.* at 373.

<sup>84</sup> *Id.* at 369-70.

These kinds of suspicionless, general search techniques are permissible so long as specific, articulable facts demonstrate an appropriate need for them.<sup>85</sup> School officials should always consult with counsel before adopting inspection programs to ensure that the applicable legal requirements are satisfied.

**a. Metal Detectors**

Random searches using metal detectors (both walk through and “wand” style) are reasonable administrative searches.<sup>86</sup> However, schools should not use metal detectors as a pretext to target particular individuals or groups. To ensure the propriety of their use, school districts should implement the following best practices before installing or providing school employees with metal detectors:

- ***Make appropriate findings.*** The local board of education, school district superintendent, and/or school principal should adopt and memorialize specific findings that detail the problem sought to be addressed by the use of metal detectors. The findings should explain why it is necessary and appropriate to use metal detectors in the school.
- ***Provide advance notice.*** All students, parents, and guardians should be provided with written notice of the metal detector program. Students should also be orally advised of the program in their homeroom classes and/or in a school-wide assembly.
- ***Have a neutral plan.*** Prior to implementing the inspection program, high-ranking school officials, such as the superintendent or school principal, should develop a neutral plan for using the metal detectors. It is preferred that school officials adopt a plan that requires all students to be screened; however, if that is not feasible, school officials should adopt a random selection method instead. Regardless of the plan

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<sup>85</sup> *Id.* at 394.

<sup>86</sup> *In re Latasha W.*, 60 Cal. App. 4th 1524, 1526-27 (1998) (holding that schools’ random wand detector searches of students does not violate the Fourth Amendment); *People v. Pruitt*, 278 Ill. App. 3d 194, 204-05, 662 N.E.2d 540, 547 (1996) (holding that schools’ random walk through metal detector searches of students does not violate the Fourth Amendment).

adopted by school officials, it is important that the individual school employees who are responsible for operating the metal detectors do not have unbounded discretion to select which students are screened and which students are not.

- ***Administer the plan carefully.*** Prior to screening a student, school employees should ask the student to empty his or her pockets and belongings of all metal objects. If the student activates the metal detector, school employees should remind the student to remove all metal objects from his or her pockets and ask the student to complete a second screening. If the metal detector is activated a second time, school officials should use a hand-held magnetometer, if available, to focus on and discover the exact location of the metal source. If the activation is still not eliminated or explained, then school officials may expand the scope and method of the search, which may include a limited pat-down of the student's body. In line with the above guidance regarding reasonable search procedures, a pat-down search is permissible only under the following conditions: (1) there must be no less intrusive alternative available, (2) the search must be limited to what is necessary to detect weapons, and (3) the search must be conducted in a private area away from other students and by school officials of the same gender as the student.<sup>87</sup>

## **b. Video Surveillance**

Video surveillance on school campuses is a critical and encouraged component of campus security.<sup>88</sup> When selecting the locations for security cameras on school campuses, school officials should be cognizant and respectful of student's privacy rights. Students do not have a reasonable expectation of privacy with regard to the actions they take in public spaces, but they do maintain an expectation of privacy in areas like bathrooms and locker rooms.<sup>89</sup>

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<sup>87</sup> See also *Herrera v. Santa Fe Pub. Sch.*, 956 F. Supp. 2d 1191, 1255-56 (D.N.M. 2013) (holding that pat-down searches without individualized, reasonable suspicion violated the Fourth Amendment).

<sup>88</sup> *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 498 (6th Cir. 2008) (suggesting that video surveillance of public areas in schools is appropriate).

<sup>89</sup> *Id.*

For example, in *Brannum v. Overton County School Board*, a federal court concluded that video surveillance in a middle school locker room was an unreasonable search that violated students' Fourth Amendment privacy rights.<sup>90</sup> The court reasoned that placement of the video cameras in the locker room setting was unnecessary and disproportionate to the school's goal to increase security.<sup>91</sup> The court emphasized the following: "a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room."<sup>92</sup>

Therefore, while security cameras may be used to monitor public spaces like hallways, parking lots, and common areas, school officials should not – except in the most extraordinary circumstances – place cameras in school bathrooms or locker rooms. Even when extraordinary circumstances might apply, officials should still consult with legal counsel prior to placing cameras in those locations.

### **c. Random Locker Searches**

As discussed in a previous subsection, school officials may search an individual student's locker based on a reasonable suspicion that the locker contains evidence of a legal or school rule violation. School officials are also empowered to conduct random, suspicionless searches of students' lockers so long as the authority for such searches is included in the school district's locker search policy.<sup>93</sup> The policy should make it clear that all lockers are the property of the school district and are subject to search by school officials at any time.

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 496, 498.

<sup>92</sup> *Id.* at 499.

<sup>93</sup> See § 22-32-109.1(2)(a)(I)(I), C.R.S. (requiring all school districts to adopt locker search policies).

In *Zamora v. Pomeroy*, the court upheld the school’s use of drug-sniffing dogs to search students’ lockers on the basis that the district’s policy made it clear to students that they did not have exclusive control over their lockers and could expect such searches to occur.<sup>94</sup> The policy specifically stated that all “lockers remain[ed] under the jurisdiction of the school, notwithstanding the fact that they were assigned to individual students,” and “the school reserved the right to inspect all lockers at any time.”<sup>95</sup> Therefore, neither the initial use of dogs to determine which lockers to search, nor the subsequent warrantless searches of the lockers violated the Fourth Amendment.<sup>96</sup>

#### **d. Suspicionless Drug Testing**

Random, suspicionless drug testing of students is a controversial and complicated issue that includes more nuances and caveats than can be addressed in the following few paragraphs. Consequently, before implementing any random drug testing programs, schools and school districts should closely consult with legal counsel to ensure that their programs and policies are compliant with state and federal constitutional law.

In *Vernonia School District 47J v. Acton*, the U.S. Supreme Court held that school districts may lawfully adopt policies that enable them to randomly test their student athletes for illegal substances.<sup>97</sup> Facing an unyielding drug abuse problem, the Vernonia School District implemented a Student Athlete Drug Policy after receiving unanimous support from parents at an “input night.”<sup>98</sup> The policy required all prospective student athletes and their parents to sign a form consenting to random, limited drug tests.<sup>99</sup> Ultimately, the Court concluded that the policy was reasonable due to student athletes’ lesser expectation of privacy and drug use’s increased risks of physical injury.<sup>100</sup> The Court noted that the school used a limited test, which would identify prohibited drugs and would not reveal other medical

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<sup>94</sup> 639 F.2d 662, 665, 671 (10th Cir. 1981).

<sup>95</sup> *Id.* at 665.

<sup>96</sup> *Id.* at 670.

<sup>97</sup> 515 U.S. 646, 666 (1995).

<sup>98</sup> *Id.* at 649-650.

<sup>99</sup> *Id.* at 650.

<sup>100</sup> *Id.* at 657, 662.

information.<sup>101</sup> The Court also recognized the school district's strong interest in curbing student drug abuse, particularly among student-athletes who were well-known in the community and appeared to be role models for others.<sup>102</sup>

Subsequently, the U.S. Supreme Court has held that under certain, narrow circumstances, school districts may require students who participate in non-athletic extracurricular activities to submit to suspicionless drug testing as well.<sup>103</sup> However, whether or not a school district's suspicionless drug testing policy falls within this authority depends on a careful, fact-specific analysis of the issues the school district is attempting to neutralize.

In *Trinidad School District v. Lopez*, the Colorado Supreme Court struck down a suspicionless drug testing policy that applied to all students involved in any extracurricular activity because the necessity of such a broad policy was not factually supported.<sup>104</sup> Specifically, the Court held that non-athletes have a higher expectation of privacy than athletes and that it is not enough for a school district to demonstrate merely that a growing drug abuse problem exists across a student body.<sup>105</sup> The Court distinguished *Acton* by noting that many of the students from *Lopez* did not face the same risks of physical injury as athletes and they were enrolled in for-credit classes as part of their extracurricular activities.<sup>106</sup>

Going forward, to justify suspicionless drug testing of all students involved in non-athletic extracurricular activities, a school district must identify compelling case-specific facts that support adopting such an invasive policy.<sup>107</sup> This is a difficult standard to satisfy, and Colorado courts generally disfavor broad suspicionless drug testing policies.<sup>108</sup>

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<sup>101</sup> *Id.* at 659-60.

<sup>102</sup> *Id.* at 662-63.

<sup>103</sup> See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 837-38 (2002).

<sup>104</sup> *Trinidad Sch. Dist. No. 1 v. Lopez by and through Lopez*, 963 P.2d 1095, 1096-97 (Colo. 1998).

<sup>105</sup> *Id.* at 1109-10.

<sup>106</sup> *Id.* at 1110.

<sup>107</sup> *Id.* (noting a lack of such evidence).

<sup>108</sup> See e.g., *Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 944-45 (Colo. 1993) (reviewing cases discussing various government interests in suspicionless drug tests).

#### 4. Seizure of Students or Their Property

The Fourth Amendment to the U.S. Constitution also protects all persons from unreasonable government seizures. Generally, a “seizure” describes two distinct types of government actions: (1) when a government representative intentionally interferes with an individual’s freedom of movement (“seizure of a person”); or (2) when a government representative interferes with an individual’s possession of property (“seizure of an object”).<sup>109</sup> However, in the context of actions taken by school officials, the concept of a “seizure,” either of a person or of an object, is more narrowly defined.

Similar to searches, courts must balance students’ constitutionally protected interests with “the interests in providing a safe environment conducive to education in the public schools.”<sup>110</sup> Thus, a school official seizes a student when “the limitation on the student’s freedom of movement . . . significantly exceed[s] that [which is] inherent in every-day, compulsory attendance.”<sup>111</sup> This definition necessarily accounts for a student’s diminished freedom of movement while at school in support of the school’s educational objectives.<sup>112</sup> Likewise, a seizure of property in the school context “occurs when there is some meaningful interference with [a student’s] possessory interests in that property.”<sup>113</sup> This definition accounts for the “lesser expectation of privacy” that students enjoy as compared to members of the general population.<sup>114</sup>

The propriety of a seizure is governed by the same standard that governs searches: reasonableness under the circumstances.<sup>115</sup> To determine whether a seizure was reasonable, one must consider (1) whether the action

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<sup>109</sup> See, e.g., *Brower v. Cty. of Inyo*, 489 U.S. 593, 595-98 (1989); see also *Soldal v. Cook Cty.*, 506 U.S. 56, 61 (1992).

<sup>110</sup> *Edwards ex rel. Edwards v. Rees*, 883 F.2d 882, 883-84 (10th Cir. 1989) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 332 n.2 (1985) (plurality decision)).

<sup>111</sup> *Couture v. Bd. of Educ. of Albuquerque Public Schools*, 535 F.3d 1243, 1251 (10th Cir. 2008).

<sup>112</sup> *Id.* at 1250-51.

<sup>113</sup> *Burlison v. Springfield Pub. Schs.*, 708 F.3d 1034, 1039 (8th Cir. 2013) (citations and internal quotations omitted).

<sup>114</sup> *Id.* (citing *Vernonia School District 47J v. Acton*, 515 U.S. 646, 656-57 (1995)).

<sup>115</sup> *Edwards*, 883 F.2d at 884 (10th Cir. 1989).

was justified at its inception and (2) whether the seizure was reasonable in scope.<sup>116</sup>

**a. Seizure of a Student**

Whether detaining a student for questioning is reasonable under the Fourth Amendment is a fact-dependent inquiry.<sup>117</sup> A seizure of a student’s person is justified at its inception when a school official reasonably suspects that questioning a student might yield evidence that he violated the law or an applicable school rule.<sup>118</sup> Similarly, a seizure is reasonable in scope so long as the detention is proportionate to the seriousness of the alleged offense.<sup>119</sup>

In *Edwards v. Rees*, a vice principal held and interrogated a high school student in a closed office for 20 minutes to question him about a bomb threat.<sup>120</sup> On review, the court held that the seizure was justified at its inception because the student had been implicated by two other students, which gave the vice principal a reasonable basis for suspecting that questioning the student would yield evidence related to the threat.<sup>121</sup> Moreover, the court also held that the seizure was reasonable in scope “[g]iven the seriousness of the suspected offense” and the relatively short duration of the questioning.<sup>122</sup>

Two cases from other jurisdictions help illustrate how courts determine whether a student seizure is reasonable under the circumstances. First, in *Shuman v. Penn Manor School District*, a high school student who had been accused of sexual misconduct was detained for three and a half hours.<sup>123</sup> During that time, school officials questioned the student about the

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<sup>116</sup> *Id.*; *Couture*, 535 F.3d at 1250; *Ebonie S. v. Pueblo Sch. Dist.*, 60, 695 F.3d 1051, 1056 (10th Cir. 2012); *see also*, *Gray v. Bostic*, 458 F.3d 1295, 1304-05 (11th Cir. 2006); *Wofford v. Evans*, 390 F.3d 318, 326 (4th Cir. 2004); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d

1075, 1079 (5th Cir. 1995).

<sup>117</sup> *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 830 (2002) (citations omitted).

<sup>118</sup> *Edwards*, 883 F.2d at 884.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 883.

<sup>121</sup> *Id.* at 884.

<sup>122</sup> *Id.*

<sup>123</sup> 422 F.3d 141, 144-45 (3d Cir. 2005).

allegation.<sup>124</sup> While the student was not free to leave or attend his normal classes, he was permitted to do his homework, get water, and eat lunch alone in the cafeteria.<sup>125</sup> The court held that the seizure was reasonable given the seriousness of the allegation and the reduced liberty typically afforded students in the public school setting.<sup>126</sup>

Second, in *Wofford v. Evans*, school officials, and later law enforcement, detained and questioned an elementary school student for short portions of two separate days.<sup>127</sup> The student was detained because several other students had alleged that she had brought a gun to school, with one student even claiming to have seen her discard the gun near school grounds.<sup>128</sup> The court held that the detentions were justified at their inception and reasonable in scope because the allegations were grave and the student was not held any “longer than [was] necessary to address [the] allegation[s].”<sup>129</sup> The court also held that law enforcement’s involvement in the incident was reasonable because the gun posed an ongoing threat to the school and the community if it was, in fact, discarded near school grounds.<sup>130</sup>

#### **b. Seizure of a Student’s Property**

Colorado courts have yet to address seizures in the context of a student’s personal property. However, three cases from other jurisdictions provide insight into how Colorado courts may rule if or when they consider a case involving the seizure of a student’s property.

In *Burlison v. Springfield Public Schools*, high school students were required to exit their classroom – leaving their backpacks, purses, and other personal items behind – while dogs searched the room and their belongings for drugs.<sup>131</sup> The search was conducted pursuant to a district-wide policy, and the students were separated from their property for only a short period of

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 144-45, 147.

<sup>126</sup> *Id.* at 148-49.

<sup>127</sup> *Wofford v. Evans*, 390 F.3d 318, 321 (4th Cir. 2004).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 326-27.

<sup>130</sup> *Id.* at 327.

<sup>131</sup> 708 F.3d 1034, 1036-37 (8th Cir. 2013).

time.<sup>132</sup> Afterward, one of the students sued the school district claiming the separation constituted an unreasonable seizure of his property.<sup>133</sup> The court rejected his claim on the basis that the seizure was intended to maintain students' safety and security, and therefore, was reasonable under the circumstances.<sup>134</sup> The court stated that "[r]equiring students to be separated from their property during such a reasonable procedure avoids potential embarrassment to students, ensures that students are not targeted by dogs, and decreases the possibility of dangerous interactions between dogs and children."<sup>135</sup>

Similarly, in the case of *In re D.H.*, students were required to leave their property in the classroom and wait in the hall while police entered the room with drug-sniffing dogs.<sup>136</sup> When a dog alerted to a student's backpack, the student's backpack was opened outside the presence of other students, and marijuana was discovered inside.<sup>137</sup> The student attempted to suppress the discovery of the marijuana, arguing (1) that her backpack had been unreasonably seized when she was separated from it and (2) that the school did not have a reason to believe she was in violation of school rules or the law prior to seizing her bag.<sup>138</sup> The court held that the seizure was reasonable, noting that a school's role as guardians and tutors was an important consideration in its analysis.<sup>139</sup> Given the school's educational objectives, the court held that the student's brief separation from her backpack implicated only a minor privacy interest.<sup>140</sup> In addition, the court held that the any invasion of her privacy was outweighed by the dog's alert to her backpack and the minimally intrusive way in which it was searched.<sup>141</sup>

Finally, policies banning the use of cell phones and other personal electronic devices in classrooms are generally considered to be legitimate

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<sup>132</sup> *Id.* at 1037.

<sup>133</sup> *Id.* at 1038.

<sup>134</sup> *Id.* at 1040.

<sup>135</sup> *Id.*

<sup>136</sup> 306 S.W.3d 955, 957 (Tex. App. 2010).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 957-60.

<sup>139</sup> *Id.* at 959.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 959-60.

exercises of a school’s right to maintain a disruption-free educational environment.<sup>142</sup> Accordingly, in *Requa v. Kent School District*, the court held that school officials may temporarily confiscate a student’s cell phone or other personal electronic device if they are caught violating a “no cell phone” policy.<sup>143</sup> However, as discussed earlier in this Section, the right to seize a phone does not convey a right to search it. School officials can search the contents of a student’s confiscated phone only if there are reasonable grounds for suspecting that the phone contains evidence of other violations of law or school policies.

## **5. Restraint in Colorado Schools**

Restraint cases implicate the Fourth Amendment of the U.S. Constitution and the right to be free from unreasonable seizures. Colorado broadly defines student restraint as “any method or device used to involuntarily limit freedom of movement, including but not limited to bodily physical force, mechanical devices, chemicals, and seclusion.”<sup>144</sup> While this definition is consistent with federal Fourth Amendment case law, Colorado has created its own rules for the use of restraints on minors.

This subsection will discuss the basic principles school officials should keep in mind when considering or implementing various forms of restraint on students in Colorado schools. It will also review Colorado law that generally bans the use of chemical, mechanical, and prone restraints in public schools. Finally, this subsection will address some of the specific issues that are unique to restraining students with disabilities.

### **a. Principles of Restraint**

Colorado’s “Protection of Persons from Restraint Act” generally prohibits the use of prone (face down), chemical (involuntary sedation), or mechanical (e.g., handcuffs) restraints on students. The law provides exceptions for circumstances in which the student has displayed a deadly weapon or where the restraint is undertaken by a trained law enforcement

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<sup>142</sup> *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1276, 1280-81 (W.D. Wash. 2007).

<sup>143</sup> *Id.*

<sup>144</sup> 1 Code Colo. Regs. 301-45: 2620-R-2.00.

official.<sup>145</sup> The Colorado State Board of Education has adopted rules which carefully limit the circumstances under which school officials may restrain students. Specifically, the Rules state that restraint may only be used “in an emergency,” “with extreme caution,” and only when “less restrictive alternatives” would be ineffective under the circumstances or have already failed.<sup>146</sup> In addition, “[r]estraints must never be used as a punitive form of discipline or as a threat to control or gain compliance over a student’s behavior.”<sup>147</sup>

The Board of Education’s Rules require schools to provide staff trainings before school employees may use restraint techniques on students.<sup>148</sup> School employees must participate in an orientation that introduces “nationally recognized physical management and restraint practices,” and they should be trained in prevention and de-escalation techniques at least every two years.<sup>149</sup> Finally, the trainings should teach employees how to properly document an incident that involved the use of a restraint technique.<sup>150</sup>

If a student is restrained by any school employee or volunteer, a written report must be prepared and submitted to the administration within one school day of the incident.<sup>151</sup> The school must also advise the student’s parents as soon as possible and no later than the end of the school day.<sup>152</sup> Moreover, within five days of the restraint incident, the school administration must mail, fax, or e-mail a written report of the incident to the student’s parents.<sup>153</sup> The written report should be placed in the student’s confidential file as well, and it should include the following information:

- The antecedent of the student’s behavior, if known;

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<sup>145</sup> § 26-20-111, C.R.S.

<sup>146</sup> 1 Code Colo. Regs. 301-45: 2620-R-2.01(1). Such “less restrictive alternatives” include “Positive Behavior Supports, constructive and non-physical de-escalation, and re- structuring the environment.” *Id.* at 2620-R-2.01(1)(b)(i).

<sup>147</sup> *Id.* at 2620-R-2.01(2), (7).

<sup>148</sup> *Id.* at 2620-R-2.03.

<sup>149</sup> *Id.* at 2620-R-2.03(4).

<sup>150</sup> *Id.* at 2620-R-2.03(7).

<sup>151</sup> *Id.* at 2620-R-2.04(2); § 22-32-147(3)(a).

<sup>152</sup> 1 Code Colo. Regs. 301-45: 2620-R-2.04(3).

<sup>153</sup> § 22-32-147(3)(c), C.R.S.

- A description of the incident;
- Any efforts made to de-escalate the situation;
- Any alternatives to the use of restraints that were attempted;
- The type and duration of the restraint used;
- Any injuries that occurred; and
- The staff members who were present and staff members who were involved in administering the restraint.<sup>154</sup>

Families may file a complaint with the Colorado Department of Education when they believe that a student has been restrained in violation of state law.<sup>155</sup>

Each school and school district must also have a review process that provides a structure for evaluating each restraint incident, following up with the family, reviewing all documentation, and making recommendations to adjust procedures when appropriate.<sup>156</sup> In addition, each school should have an annual review process for all restraint incidents to confirm that its staff members are properly using restraints, are sufficiently trained, and are increasingly using alternative strategies.<sup>157</sup> The annual review process must consider the following items

- Analysis of incident reports, including consideration of procedures used during the restraint, preventative or alternative techniques attempted, documentation, and follow-up;
- Training needs of staff;
- Staff-to-student ratios; and
- Environmental considerations, including physical space, student seating arrangements, and noise levels.<sup>158</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> 1 Code Colo. Regs. 301-45: 2620-R-2.07.

<sup>156</sup> *Id.* at 2620-R-2.05(1).

<sup>157</sup> *Id.* at 2620-R-2.05(2); § 22-32-147(3)(b), C.R.S.

<sup>158</sup> § 22-32-147(3)(b), C.R.S.

## b. Common Forms of Restraint

One common form of restraint is seclusion, which is defined as “the placement of a student alone in a room from which egress is involuntarily prevented.”<sup>159</sup> In fact, most of the cases discussed in the seizure subsection of this Manual involved some form of seclusion. For example, the student in *Edwards* was secluded in the vice principal’s office while he was interrogated about his potential role in a school bomb threat.<sup>160</sup> Recall that the court in that case applied the seizure test under the Fourth Amendment and deemed the vice principal’s conduct to be reasonable. Thus, brief seclusion of a student in the school environment does not necessarily violate Fourth Amendment prohibitions against seizure.

Physical restraint includes “the use of bodily, physical force to involuntarily limit an individual’s freedom of movement.”<sup>161</sup> An example of physical restraint is illustrated in *Wallace by Wallace v. Batavia School District 101*, where a teacher briefly grasped a disruptive student by the wrist and elbow as he escorted her from a classroom.<sup>162</sup> The incident arose from a classroom disturbance involving two 16-year-old female students.<sup>163</sup> In an effort to regain control of his classroom, the teacher told one student to leave; when she refused, he grabbed her by the wrist and then by the elbow to escort her out.<sup>164</sup> When the student demanded that he let go of her, he did.<sup>165</sup> The court determined that this brief physical restraint did not amount to an unreasonable seizure under the Fourth Amendment because the teacher was just “doing what he thought best to break up a fight so that some modicum of an educational atmosphere could prevail.”<sup>166</sup>

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<sup>159</sup> 1 Code Colo. Regs. 301-45: 2620-R-2.00(6)(d).

<sup>160</sup> *Edwards ex rel. Edwards v. Rees*, 883 F.2d 882, 883 (10th Cir. 1989).

<sup>161</sup> 1 Code Colo. Regs. 301-45: 2620-R-2.00(6)(c).

<sup>162</sup> 68 F.3d 1010, 1011 (7th Cir. 1995).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1014-15.

### **c. Chemical, Mechanical, and Prone Restraint**

Colorado law generally prohibits the use of chemical, mechanical, and prone restraints in Colorado public schools and charter schools.<sup>167</sup> A chemical restraint means involuntarily giving a student medication for the purpose of restraining the student.<sup>168</sup> This definition does not apply to the administration of medication for voluntary purposes or for life-saving medical procedures.<sup>169</sup> A mechanical restraint refers to any physical device used to involuntarily restrict the movement of a student or the movement or normal function of the student's body.<sup>170</sup> Finally, a prone restraint refers to the securing of a student in a prone, or "face-down," position.<sup>171</sup>

Schools are never permitted to use chemical restraints under any circumstances.<sup>172</sup> In contrast, the law creates two limited exceptions for the use of mechanical or prone restraints.<sup>173</sup> First, these techniques may be utilized on a student who is openly displaying a deadly weapon.<sup>174</sup> Second mechanical or prone restraint may be utilized by an armed security officer or certified peace officer working in a school if the officer has received documented training in defensive tactics involving handcuffing procedures; the officer has received documented training in prone restraint tactics; and the officer has made a referral to a law enforcement agency.<sup>175</sup>

### **d. Restraining Students with Disabilities**

Determining when a student with special needs may be restrained can be incredibly difficult. As a rule, when an Individualized Education Program ("IEP") is in place for a child, any restraint of that child should comply with,

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<sup>167</sup> § 26-20-111, C.R.S. Please note that the prohibition on these types of restraints does not apply to schools operated in state-owned facilities within the Division of Youth Corrections.

§ 26-20-111(4), C.R.S.

<sup>168</sup> § 26-20-102(2), C.R.S.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at (4).

<sup>171</sup> *Id.* at (5.3), (5.5).

<sup>172</sup> *See* § 26-20-111, C.R.S. (noting exceptions for the use of mechanical or prone restraints but not creating a similar exception for chemical restraints).

<sup>173</sup> *Id.* at (2)-(3).

<sup>174</sup> *Id.* at (2); § 18-1-901(3)(e), C.R.S. (defining a "deadly weapon" as "[a] firearm, whether loaded or unloaded," or "[a] knife, bludgeon; or any other weapon [or object] that, in the manner that it is used or intended to be used, is capable of producing death or serious bodily injury).

<sup>175</sup> § 26-20-111(3), C.R.S.

and should not exceed, the terms of that child's IEP.<sup>176</sup> Courts have given some deference to school officials that implement the provisions of a child's IEP in good faith.

For example, in *Couture v. Board of Education*, a team of educators developed an IEP for a young, emotionally disturbed student that included supervised time-outs in a separate room.<sup>177</sup> The student's mother signed a document that acknowledged her agreement with the IEP and gave school officials permission to implement it.<sup>178</sup> In accordance with the plan, school officials placed her child in supervised time-outs in the separate room when his behavior became otherwise unmanageable.<sup>179</sup> When the student's mother saw the time-out room, she sued the school alleging an unlawful seizure of her son due to the small size and poor lighting of the room.<sup>180</sup> The court held that the student's seizure, or seclusion, in the time-out room was reasonable, explaining that "[i]f [courts] do not allow teachers to rely on a plan specifically approved by the student's parents and which they are statutorily required to follow, we will put teachers in an impossible position – exposed to litigation no matter what they do."<sup>181</sup>

As previously noted, a student asserting a challenge under the Fourth Amendment must first demonstrate that school officials' conduct constituted an impermissible seizure. In *Ebonie S. v. Pueblo School District 60*, a student with multiple disabilities was placed in a special, U-shaped desk that surrounded the student on three sides with a wooden bar across the back of the desk.<sup>182</sup> The desk was used by the school to ensure that the student remained on-task so that she did not disrupt the rest of the classroom.<sup>183</sup> The student's mother had initially consented to an IEP authorizing the use of this kind of desk when her daughter was in a different preschool in the same

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<sup>176</sup> See 1 Code Colo. Regs. 301-45: 2620-R-2.00(6) (discussing various circumstances to consider when restraining a student).

<sup>177</sup> *Couture v. Bd. of Education of Albuquerque Public Schools*, 535 F.3d 1243, 1246 (10th Cir. 2008).

<sup>178</sup> *Id.* at 1247.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1248-49.

<sup>181</sup> *Id.* at 1252.

<sup>182</sup> 695 F.3d 1051, 1054 (10th Cir. 2012).

<sup>183</sup> *Id.* at 1055.

district; however, she later withdrew her consent to the IEP over her concerns that her daughter was not sufficiently progressing at the new school.<sup>184</sup>

The court never determined whether this type of restraint constituted a reasonable seizure. Before reaching that question, the court stated that the student first had to “show that the school’s restrictions rose to the level of a seizure under the Fourth Amendment.”<sup>185</sup> The court noted that seizures in the school context are inherently different from the law enforcement context, explaining that students are not at liberty to leave the school building whenever they wish.<sup>186</sup> Instead, children sent to public school are lawfully confined to the classroom.<sup>187</sup> Thus “to qualify as a seizure in the school context, the limitation on the student’s freedom of movement [had to] significantly exceed that inherent in every-day, compulsory attendance.”<sup>188</sup>

In determining there was no seizure, the court held that the desk’s limitation on the student’s movement did not significantly exceed that inherent in ordinary school attendance.<sup>189</sup> The court stated that the following three facts were critical to its conclusion: (1) the desk put the student in the “standard pose required of countless schoolchildren across the nation;” (2) the student could remove herself from the restraint; and (3) the restraining mechanism was not attached to the student’s body.<sup>190</sup> The court cautioned that had one or more of those facts been absent in the case, its conclusion might have been different.<sup>191</sup>

Courts will usually defer to teachers when they restrain special needs children based upon reasonable professional judgments. However, school officials’ application of student behavioral modification plans still remains bounded by the Fourth Amendment’s reasonableness standard.

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1056.

<sup>186</sup> *Id.* (citing *Couture*, 535 F.3d at 1250-51).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* (quoting *Couture*, 535 F.3d at 1251).

<sup>189</sup> *Id.* at 1057 (citing *Couture*, 535 F.3d at 1251).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

In *A.B. v. Adams-Arapahoe 28J School District*, a child with severe behavioral difficulties did not have an IEP, but her behavioral modification plan provided that when she became too unmanageable, teachers could strap her into a wooden, high-backed chair for no longer than five minutes at a time.<sup>192</sup> The chair was intended to be used as a “last resort” in a series of progressive restraints, but during the six-week period at issue in the case, a teacher strapped the child into the chair every school day, for nearly the entire duration of the day.<sup>193</sup> Distinguishing this case from *Couture*, the court concluded that the “length and frequency of the restraint” significantly affected its reasonableness.<sup>194</sup> Specifically, the restraint was not justified at its inception because the child was oftentimes strapped to the chair preemptively, before causing disruptions, and for punitive purposes, rather than corrective ones.<sup>195</sup> Additionally, the court indicated that a reasonable juror could find that “keeping a five-year-old restrained for such a long period of time exceeds the constitutionally permissible scope of the restraint.”<sup>196</sup>

Thus, even if school officials and a student’s parents or guardians have cooperated to develop an IEP, or a student’s behavior modification plan permits restraint, school officials’ latitude in restraining that child is not limitless. Teachers and school administrators must still act reasonably or risk violating the student’s Fourth Amendment rights.<sup>197</sup>

### C. Conclusion

When conducting searches and seizures, school officials should employ the legal standards explained above. Searches should be initiated only with a student’s voluntary consent or when there are articulable facts supporting a reasonable suspicion that a law or school rule has been violated. Seizures should be initiated only to achieve a specific goal, such as detaining a student for specific questioning or confiscating an object that violates a school rule.

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<sup>192</sup> 831 F. Supp. 2d 1226, 1237 (D. Colo. 2011).

<sup>193</sup> *Id.* at 1237-38.

<sup>194</sup> *Id.* at 1243.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *See id.* at 1244 (outlining the inquiry to determine whether a seizure was reasonable in the school context).

The scope of searches and seizures should be connected to and proportional to the reason for initiating the search or seizure.

Documentation is critical with regard to searches and seizures. School officials should carefully document all of the facts that led to a decision to search or seize a student or their belongings, including any reasonable, common sense inferences that could be drawn from the available information by school employees based upon their training and experience. School officials should also carefully document anything that was learned or discovered during the course of the search or the seizure.

### III. INFORMATION SHARING

Preventing and responding to school violence is a systems issue that involves many overlapping people and agencies, and as a result, doing so requires coordinated information sharing from all sides. However, many educators remain uncertain about privacy mandates under the Family Educational Rights and Privacy Act (“FERPA”) and the extent to which they may share a student’s information with partners from outside agencies. One of the key recommendations to come from the final reports on the Columbine High School, Virginia Tech, and Arapahoe High School shootings was that school officials, juvenile authorities, law enforcement personnel, and other members of the community should improve communication and information sharing to help prevent future school violence tragedies.<sup>1</sup> Thus, understanding FERPA is critical to enabling school officials to appropriately respond when issues and concerns about individual students arise.

This Section of the Manual will discuss how the law can prohibit, permit, or even mandate the exchange of information between agencies in connection with keeping schools safe. First, this Section will cover the types of information that school officials must share, and may elect to share, with law enforcement and other outside agencies. Second, it will then cover what types of information law enforcement and juvenile justice agencies must provide, and may elect to provide, back to school officials. Finally, it will address a number of other matters involving the sharing of student information with a focus on school safety.

In addition, for further information on this topic, please read the Formal Opinion of Cynthia H. Coffman, Attorney General that is attached to the Manual as an appendix. The Formal Opinion discusses FERPA and

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<sup>1</sup> COLUMBINE REVIEW COMM’N, THE REPORT OF GOV. BILL OWENS’ COLUMBINE REVIEW COMM’N 108 (2001), <https://schoolshooters.info/sites/default/files/Columbine%20-%20Governor%27s%20Commission%20Report.pdf> (last visited October 11, 2018)

VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH APR. 16, 2007: REPORT OF THE REVIEW PANEL (2007), <https://scholar.lib.vt.edu/prevail/docs/VTReviewPanelReport.pdf> (last visited October 11, 2018)

SARAH GOODRUM & WILLIAM WOODWARD, CTR. FOR THE STUDY & PREVENTION OF VIOLENCE, REPORT ON THE ARAPAHOE HIGH SCH. SHOOTING: LESSONS LEARNED ON INFORMATION SHARING, THREAT ASSESSMENT, AND SYS. INTEGRITY 42 (2016), [https://cspv.colorado.edu/publications/AHS-Report/Report\\_on\\_the\\_Arapahoe\\_High\\_School\\_Shooting\\_FINAL.pdf](https://cspv.colorado.edu/publications/AHS-Report/Report_on_the_Arapahoe_High_School_Shooting_FINAL.pdf) (last visited October 11, 2018)

provides further guidance to school officials as to when it is appropriate to share student information. Moreover, the Formal Opinion also includes a list of Frequently Asked Questions that will help school officials practically apply the law in everyday situations across Colorado.

### **A. Student Information Sharing under FERPA**

FERPA protects the privacy of student education records and applies to all schools that receive funds under any program administered by the U.S. Department of Education.<sup>2</sup> In general, the law does two things: (1) it provides parents and eligible students the right to review and seek to amend students' education records; and (2) it protects those education records from unwarranted disclosure without parental or student consent.<sup>3</sup>

FERPA governs the rights of parents and eligible students with regard to students' education records. The term "parent" includes a "natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian."<sup>4</sup> In addition, an "eligible student" refers to a student that has attained 18 years of age or that is enrolled in a postsecondary education institution.<sup>5</sup> For simplicity, Section III commonly refers to parents, guardians, and eligible students as "parents."

As mentioned above, FERPA provides parents with the right to inspect and review education records as well as the right to seek to amend education records if they believe the records are inaccurate.<sup>6</sup> More importantly, FERPA requires written parental consent before an institution may disclose "personally identifiable" information from students' "education records."<sup>7</sup> Each of these terms has an important legal definition that is addressed below in this subsection of the Manual.

First, information is "personally identifiable" if it can be used to distinguish or trace an individual's identity either directly or indirectly

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<sup>2</sup> 20 U.S.C. § 1232g.

<sup>3</sup> 20 U.S.C. § 1232g; 34 C.F.R. § 99, et seq.

<sup>4</sup> 34 C.F.R. § 99.3.

<sup>5</sup> 20 U.S.C. § 1232g(d).

<sup>6</sup> 20 U.S.C. § 1232g(a)-(b); 34 C.F.R. § 99.20.

<sup>7</sup> 20 U.S.C. § 1232g(a)-(b); 34 C.F.R. § 99.30(a).

through linkages with other information.<sup>8</sup> Direct identifiers include information that relates specifically to the student such as the student's address; social security number; student number; or biometric record, which includes fingerprints, voiceprints, facial characteristics, and handwriting.<sup>9</sup> In contrast, indirect identifiers include information that, when combined with other information, can be used to identify specific individuals.<sup>10</sup> Examples of indirect identifiers include date of birth, place of birth, race, religion, weight, or mother's maiden name.<sup>11</sup>

When a parent authorizes the release of student information, the release will generally set forth what portions of the education record are to be released and to whom.<sup>12</sup> Schools must maintain a record of each request for release of student information that identifies what information was disclosed in response to each request.<sup>13</sup> When disclosing information directly to a third party, schools should verify that the receiving party will not further disclose the information without consent.<sup>14</sup> If a receiving party wants to disclose the information to an additional party, it must either obtain consent from the student's parent or the re-disclosure must fall within a FERPA exception.<sup>15</sup>

Second, FERPA regulations, including the consent requirements, apply only to "education records."<sup>16</sup> Information obtained through personal knowledge, personal observation, or hearsay does not fall within the definition of an education record.<sup>17</sup> For example, if a teacher overhears a student making a threat of violence or hears a rumor that a threat has been made, that information is not protected as an education record under FERPA. Consequently, the teacher may disclose that information to appropriate law

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<sup>8</sup> 34 C.F.R. § 99.3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 34 C.F.R. § 99.30.

<sup>13</sup> 34 C.F.R. § 99.32(a)(1).

<sup>14</sup> 34 C.F.R. § 99.33(a).

<sup>15</sup> *Id.* at (a)-(b).

<sup>16</sup> 20 U.S.C. § 1232g(a)(4); *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432-35 (2002).

<sup>17</sup> 20 U.S.C. § 1232g(a)(4); *Owasso*, 534 U.S. at 433-35.

enforcement authorities. Whether student information qualifies as an education record has important ramifications for school officials.

## 1. “Education Records” under FERPA

When considering whether to disclose student information, school officials must first assess whether the information is protected under FERPA. As discussed above, FERPA requires school officials to obtain written parental consent before disclosing student information from “education records.” However, if student information does not fall qualify as an education record, school officials are able to disclose the information without first obtaining parental consent. As a result, it is very important that school officials understand how “education records” are defined under FERPA and some of the practical implications that has on information sharing.

### a. Defining an “Education Record”

In deciding whether to share student information without consent, school officials must first assess whether the information is a student “education record.” Education records are those records, files, documents and other materials that contain information directly related to a student and that are maintained by a school in any recorded way, including handwriting, print, computer media, video, or audio tape.<sup>18</sup> Education records contain information about current and former students, including the following: a student’s name, address, and telephone number; a parent’s or guardian’s name and contact information; grades and test scores; health and immunization records; discipline reports; documentation of attendance; schools attended; courses taken; awards conferred and degrees earned; and special education records, including individualized education programs.<sup>19</sup>

Only those documents that are maintained by a school or on behalf of a school are considered education records.<sup>20</sup> Ordinarily, a school designates one person to be the custodian of records, such as the school registrar, and he or she is responsible for maintaining the school’s official files and records.<sup>21</sup>

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<sup>18</sup> 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3.

<sup>19</sup> 34 C.F.R. § 99.3.

<sup>20</sup> *Id.*

<sup>21</sup> *Owasso*, 534 U.S. at 433 (noting that student files are usually maintained by a registrar).

However, it is important to note that education records include not only those documents contained in a student’s official file, but also documents found in a teacher’s desk, nurse’s records, or a principal’s file that directly relate to the student.<sup>22</sup> In contrast, assignments that are graded or reviewed by peers are not education records for FERPA purposes.<sup>23</sup>

**b. Information that is not an “Education Record”**

As set forth above, FERPA protections apply only to education records, and they do not apply to any other type of student information. Common forms of student information that are not education records include law enforcement records, information gained from personal knowledge or observation, and directory information.<sup>24</sup> Therefore, school officials may disclose these types of information, without obtaining consent from a parent, guardian, or eligible student. These common categories of student information are discussed below.

**i. Law Enforcement Unit Records**

Schools have increasingly relied on the services of law enforcement personnel to ensure the safety and security of their campuses. Some schools have their own law enforcement units, comprised of commissioned police officers or non-commissioned security guards, who are officially authorized to enforce state law or maintain physical security and safety of an educational agency.<sup>25</sup> Other schools designate a particular school official to be responsible for referring potential or alleged violations of law to local police authorities.

Law enforcement unit records are not part of a student’s education records.<sup>26</sup> Law enforcement unit records include any documents or files that were created and maintained by a law enforcement unit for a law enforcement purpose.<sup>27</sup> As a result, school officials may disclose information from law enforcement unit records to anyone without obtaining parental

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<sup>22</sup> 20 U.S.C. § 1232g(4)(A); 34 C.F.R. § 99.3.

<sup>23</sup> 34 C.F.R. § 99.3.

<sup>24</sup> *Id.*

<sup>25</sup> 34 C.F.R. § 99.8(a)(1)(i)-(ii).

<sup>26</sup> 20 U.S.C. § 1232g(4)(B)(ii).

<sup>27</sup> *Id.*

consent.<sup>28</sup> For example, if a school resource officer (“SRO”) investigates an on-campus weapons possession claim and creates a report of that investigation, school officials may disclose the report to local law enforcement or any other partner agency without parental consent.

Law enforcement unit records may also include surveillance videos, recordings, or photographs of students, provided the school’s law enforcement unit collects and maintains that information for a law enforcement purpose. However, if surveillance systems and the products – videos, recording, or images – of those systems are kept and maintained by school officials, then any information relating directly to a specific student will be considered an education record.<sup>29</sup> In such cases, prior to sharing the surveillance products with any outside agency, school officials would have to obtain consent from the parents of any students who are the subjects of the surveillance product. For this reason, the U.S. Department of Education recommends that “[s]chools that do not have a designated law enforcement unit might consider designating an employee to serve as the ‘law enforcement unit’ in order to maintain the security camera system and determine the appropriate circumstances in which the school would disclose recorded images.”<sup>30</sup>

Similarly, other documents created by a law enforcement unit might be considered education records subject to FERPA if they are either (a) maintained as a component of the school’s records or (b) created for a non-law enforcement purpose, such as a disciplinary action conducted by the school.<sup>31</sup> For example, if an SRO investigates an on-campus incident, writes a report, and provides a copy of the report to school officials who maintain it as part of a student’s disciplinary record, then the report is an education record subject to FERPA. Similarly, if a school official uses a surveillance tape for disciplinary purposes, the tape becomes a part of the disciplined student’s education record.

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<sup>28</sup> 34 C.F.R. § 99.8(d).

<sup>29</sup> *Id.* at (b)(2).

<sup>30</sup> U.S. DEPT OF EDUC., BALANCING STUDENT PRIVACY AND SCH. SAFETY: A GUIDE TO THE FAMILY EDUC. RIGHTS AND PRIVACY ACT FOR ELEMENTARY AND SECONDARY SCH. 2 (Oct. 2007), <https://www2.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf> (last visited October 11, 2018)

<sup>31</sup> 34 C.F.R. § 99.8(b)(2).

Whether the school employs a law enforcement unit directly or contracts with outside agencies, the school must include the law enforcement officials in its annual FERPA notification as “school officials” with “legitimate educational interests.”<sup>32</sup> Additional information on designating contracting people and agencies as “school officials” for FERPA purposes is discussed later in this Section.

Finally, Colorado law places additional, specific information-sharing burdens on school law enforcement units.<sup>33</sup> For instance, at least once per year, SROs or law enforcement units must submit a report to the Division of Criminal Justice outlining enforcement activities on campus and at school events, including all student tickets, summonses, or arrests.<sup>34</sup> The reports shall include the following information for each incident: the student’s name; date of birth; race, ethnicity, and gender; the name of the school; the date of the incident; the offense, and the incident report number.<sup>35</sup>

## **ii. Personal Knowledge and Observations**

A student at-risk of committing an act of violence may present warning signs or direct threats of violence in the presence of other students, teachers, school employees, or school officials. Research shows that in 81% of violent incidents in U.S. schools, someone other than the attacker knew it was going to happen but failed to report it.<sup>36</sup> For this reason, it is critical to note that FERPA protects only tangible education records; it does not protect other types of information that a school employee gains through hearsay, from overhearing a conversation, or from his or her own personal observations.<sup>37</sup> Therefore, if school employees learn of a threat, either because another student brought it to their attention or because they personally overheard or observed the student making the threat, they do not need to obtain parental consent before reporting what they were told, heard, or observed to the appropriate authorities. Because such information is not maintained in a

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<sup>32</sup> 34 C.F.R. §§ 99.31(a)(1), 99.7(a)(3)(iii).

<sup>33</sup> § 22-32-146, C.R.S.

<sup>34</sup> *Id.* at (5)(b).

<sup>35</sup> *Id.* at (5)(c).

<sup>36</sup> U.S. SECRET SERV. & U.S. DEPT OF EDUC., THE FINAL REPORT AND FINDINGS OF THE SAFE SCH. INITIATIVE 25 (July 2004), <https://www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf> (last visited October 11, 2018)

<sup>37</sup> See 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3.

student's education record, the information may, and should, be freely disclosed.

Additionally, student-generated information not maintained in a student's education record, such as a suspected hit list, will not qualify as an education record. For instance, if a student creates a list of "targets" on the inside cover of their textbook or if the student posts threatening statements or images on a social media account (Facebook, Snapchat, Twitter, Instagram, etc.), that information does not constitute an education record. Therefore, school authorities may provide the information to law enforcement authorities without parental consent.

### **iii. Directory Information**

Schools generally maintain information about a student's name; address; telephone number; date and place of birth; participation in extracurricular activities or sports; height and weight of members of athletic teams; dates of attendance; degrees received; and previous attendance at other educational institutions.<sup>38</sup> This information, known as "directory information," includes personal information about a student that can be made public according to a school records policy.<sup>39</sup>

Each year, schools must give parents public notice of the types of information designated as directory information.<sup>40</sup> By a specified period of time after the school provides public notice, parents must be afforded the opportunity to ask the school to remove all or part of the information about their child that they do not wish to be made available to the public without their consent.<sup>41</sup> With regard to former students, school officials do not have an ongoing obligation to provide notice and the opportunity to refuse to those students or their parents or guardians.<sup>42</sup> However, if a student formerly enrolled at the school had made previous requests to withhold disclosures of

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<sup>38</sup> 20 U.S.C. § 1232g(a)(5)(A).

<sup>39</sup> 34 C.F.R. § 99.37.

<sup>40</sup> 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37.

<sup>41</sup> 20 U.S.C. § 1232g(a)(5)(B).

<sup>42</sup> 34 C.F.R. § 99.37(b).

information, the school must honor those requests unless additional consent is provided.<sup>43</sup>

## 2. Exceptions to FERPA's Consent Requirement

This subsection discusses the exceptions to FERPA's generally applicable consent requirements, which apply to all elementary and secondary school education records. Under certain conditions, FERPA permits school officials to disclose information to certain parties without parental consent.<sup>44</sup> Specifically, information may be shared without consent when the disclosure is:

- To another school official within the educational institution who has a legitimate educational interest;<sup>45</sup>
- To authorized representatives of the Comptroller General of the United States, Attorney General of the United States, Secretary of Education, or state and local educational authorities;<sup>46</sup>
- In connection with a financial aid application;<sup>47</sup>
- To state and local authorities within a juvenile justice system or when pursuant to specific State law;<sup>48</sup>
- To organizations conducting studies for, or on behalf of, educational agencies;<sup>49</sup>
- To accrediting organizations to carry out their accrediting functions; to parents; to comply with court order or subpoena;<sup>50</sup> and
- In connection with a health or safety emergency.<sup>51</sup>

For the purposes of this Manual, the first exception (disclosure to another school official with a legitimate need to know) and the last

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<sup>43</sup> *Id.*

<sup>44</sup> 34 C.F.R. § 99.31(a).

<sup>45</sup> *Id.* at (a)(1)(i)(A).

<sup>46</sup> *Id.* at (a)(3).

<sup>47</sup> *Id.* at (a)(4).

<sup>48</sup> *Id.* at (a)(5).

<sup>49</sup> *Id.* at (a)(6).

<sup>50</sup> *Id.* at (a)(7)-(9).

<sup>51</sup> *Id.* at (a)(10); *see also* 34 C.F.R. § 99.36.

exception (disclosure in connection with a health or safety emergency) are the most important and will be discussed in greater detail below.

**a. Disclosure to Others within the School**

The study deconstructing the 2013 shooting at Arapahoe High School found that school staff were confused about whether they could share student information with one another.<sup>52</sup> Additionally, several staff, teachers, and the SRO indicated that they could not discuss students' concerning behaviors with other teachers or staff because school administrators believed that FERPA guidelines prohibited it.<sup>53</sup>

It is not uncommon for schools and school districts to isolate records of student discipline or behavior interventions from teachers, administrators, and SROs based on the erroneous view that FERPA prohibits such disclosure. While it is true that FERPA generally prohibits school employees from disclosing student information unless parental consent is obtained, there is an exception that permits school employees to share student information with other school officials who have a legitimate educational interest in the information.<sup>54</sup> School employees qualify as "officials" and have "legitimate educational interests" if they need access to the information in order to fulfill their professional responsibilities. Those professional responsibilities include maintaining a safe and secure learning environment for all students.

On occasion, school officials outsource school functions to individuals from private entities, volunteers, or members of a school's threat assessment team. These outside persons or entities may also receive information in a student's education records without prior consent so long as they qualify as "school officials" for FERPA purposes. In order to qualify as a "school official," an individual (1) must perform an institutional service or function for which the school would otherwise use its employees; (2) must be under the direct control of the school regarding the use and maintenance of education

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<sup>52</sup> SARAH GOODRUM & WILLIAM WOODWARD, CTR. FOR THE STUDY & PREVENTION OF VIOLENCE, REPORT ON THE ARAPAHOE HIGH SCH. SHOOTING: LESSONS LEARNED ON INFORMATION SHARING, THREAT ASSESSMENT, AND SYS. INTEGRITY 39 (2016), [https://cspv.colorado.edu/publications/AHS-Report/Report\\_on\\_the\\_Arapahoe\\_High\\_School\\_Shooting\\_FINAL.pdf](https://cspv.colorado.edu/publications/AHS-Report/Report_on_the_Arapahoe_High_School_Shooting_FINAL.pdf) (last visited October 11, 2018)

<sup>53</sup> *Id.*

<sup>54</sup> 34 C.F.R. § 99.31(a)(1)(i)(A).

records; and (3) must be prohibited from re-disclosing protected information pursuant to 34 C.F.R. § 99.33(a).<sup>55</sup> For example, if a part-time special education consultant receives student information during an Individualized Education Program team meeting, the consultant qualifies as a school official so long as the information received is necessary for the consultant to accomplish the contracted service.

Additionally, as discussed in Section I, schools are encouraged to have a designated threat assessment team. Members of a threat assessment team may share student information with one another because they would all qualify as “school officials” for FERPA purposes. For instance, team members that are school employees qualify as “school officials” with a legitimate educational interest in the information, while team members who are not school employees qualify as school officials because they perform outsourced school functions.<sup>56</sup>

Nevertheless, the school must still use reasonable methods to ensure that school officials obtain access to only those education records in which they have a legitimate educational interest.<sup>57</sup> In addition, school officials may use the information received only for the purposes for which it was disclosed, such as promoting school safety and protecting student security.<sup>58</sup> For example, if a student is expelled from campus, a school administrator may disclose the student’s personally identifiable information to the SRO so that the officer knows the student is no longer permitted on campus.

Each school year, a school must notify parents of their rights under FERPA.<sup>59</sup> The annual notification generally identifies the persons (or categories of persons) designated as “school officials” with access to FERPA-protected information.<sup>60</sup> Thus, if a school contracts and shares information with a threat assessment team or an SRO, the school must designate those individuals as school officials with legitimate educational interests in the

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<sup>55</sup> *Id.* at (a)(1)(i)(B).

<sup>56</sup> *Id.* at (a)(1)(i).

<sup>57</sup> 34 C.F.R. § 99.31(a)(1)(ii).

<sup>58</sup> 34 C.F.R. §§ 99.31(a)(1)(i)(B)(3), 99.33(a).

<sup>59</sup> 34 C.F.R. § 99.7(a)(1).

<sup>60</sup> *Id.*

annual FERPA notification. The notification must also identify the criteria for determining who constitutes a school official and what constitutes a legitimate educational interest.<sup>61</sup>

**b. Health and Safety Emergencies**

School officials may disclose student information from education records without written consent if the disclosures are “in connection with a health or safety emergency” and they are necessary to protect the health and safety of the school’s students and personnel.<sup>62</sup> School officials should familiarize themselves with this FERPA emergency exception so that they can act quickly and decisively to protect students and staff.

Prior to 2008, the U.S. Department of Education routinely opined that the health and safety exception was to be “strictly construed” and that releases pursuant to the exception were to be “narrowly tailored.”<sup>63</sup> However, the FERPA regulations were revised in 2008 in the wake of the Virginia Tech shooting. The amended rules were designed to provide school officials with broader discretion to determine whether a health and safety emergency exists, which increased school officials’ ability to share student information related to a threat.<sup>64</sup> The U.S. Department of Education’s Notice of Proposed Rulemaking reflects this shift:

[Amend] § 99.36 to remove the language requiring strict construction of this exception and add a provision stating that if an educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individual, it may disclose the information to any person, including parents, whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.<sup>65</sup>

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<sup>61</sup> *Model Notification of Rights under FERPA for Elementary and Secondary Schools*, U.S. DEPT OF EDUC., <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html> (last visited October 11, 2018).

<sup>62</sup> 34 C.F.R. §§ 99.31(a)(10), 99.36.

<sup>63</sup> *See, e.g.*, U.S. DEPT OF EDUC., RECENT AMENDMENTS TO FAMILY EDUC. RIGHTS AND PRIVACY ACT RELATING TO ANTI-TERRORISM ACTIVITIES 3 (Apr. 12, 2002), <https://www2.ed.gov/policy/gen/guid/fpco/pdf/htterrorism.pdf> (last visited October 11, 2018)

<sup>64</sup> *See* 73 Fed. Reg. 74806 (Dec. 9, 2008).

<sup>65</sup> *Id.*

The parameters of the health and safety emergency exception are set forth in the reauthorized version of the FERPA regulations.<sup>66</sup> School officials must make decisions to disclose personally identifiable information without parental consent on a case-by-case basis, taking into account the totality of the circumstances.<sup>67</sup>

A school official must be able to identify “an articulable and significant threat” as a basis for the disclosure.<sup>68</sup> The U.S. Department of Education’s Family Policy Compliance Office interprets the phrase “articulable and significant threat” as a flexible standard which allows school administrators the opportunity to address threats.<sup>69</sup> To justify disclosing personally identifiable information without parental consent, school officials must be able to explain why, based on all of the information available, the official reasonably believes that a student posed a significant threat. If the school can articulate a rational basis for the determination, then the Family Policy Compliance Office will not substitute its judgment for that of the school.<sup>70</sup> Thus, under the revised regulations, a school official need not wait to disclose information until the threat of school violence is imminent.

Once the school identifies an articulable and significant threat, it may disclose information from education records to “any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.”<sup>71</sup> Within a reasonable time thereafter, school officials must record the articulable and significant threat that formed the basis of the disclosure and identify the parties to whom the information was disclosed.<sup>72</sup> For example, if a school official received credible information that a student threatened to harm another student that would enable the official to identify particular facts indicating that the threatened student’s safety was in jeopardy, then the health and safety emergency exception would likely permit that official to disclose information about the threatening student and the

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<sup>66</sup> 34 C.F.R. § 99.36.

<sup>67</sup> *Id.* at (e).

<sup>68</sup> *Id.*

<sup>69</sup> ADDRESSING EMERGENCIES ON CAMPUS, U.S. DEPT OF EDUC. 3-4 (June 2011), <https://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf> (last visited October 11, 2018)

<sup>70</sup> 34 C.F.R. § 99.36(c).

<sup>71</sup> *Id.*

<sup>72</sup> 34 C.F.R. § 99.32(a)(5).

threat. After the disclosure, the school official must document the disclosure in the student's education record by listing the articulable and significant threat that formed the basis for the disclosure and the parties to whom the information was disclosed.<sup>73</sup>

The U.S. Department of Education's comments accompanying the 2008 FERPA revisions also make it clear that in order for school officials to provide meaningful protection to students, they must have the opportunity to make disclosures earlier, rather than later:

We note that the word "protect" generally means to keep from harm, attack, or injury. As such, the statutory text underscores that the educational agency or institution must be able to release information from education records in sufficient time for the institution to act to keep persons from harm or injury. Moreover, to be "in connection with an emergency" means to be related to the threat of an actual, impending, or imminent emergency, such as a terrorist attack, a natural disaster, a campus shooting, or the outbreak of an epidemic such as e-coli. *An emergency could also be a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment.* It does not mean the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as would be addressed in emergency preparedness activities.<sup>74</sup>

After 2008, the health and safety exception no longer required reaction to an imminent threat such as the proverbial "gun in the hall." Instead, it allowed disclosure of information to proactively address possible future threats. The U.S. Department of Education's 2008 comments to the FERPA regulations cited the following as examples of permissible preemptive disclosures:

- Disclosures to current or former peers of a student or mental health professionals who can provide additional information to assist in threat assessment;

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<sup>73</sup> *Id.*

<sup>74</sup> 73 Fed. Reg. 74806, 74838 (Dec. 9, 2008) (emphasis added).

- Disclosures to law enforcement officials who may assist in providing protection;
- Disclosures to a potential victim as an individual whose health or safety may need to be protected.<sup>75</sup>

Ultimately, the 2008 revisions of FERPA’s regulations and the accompanying examples show that school judgments are entitled to deference.<sup>76</sup> Thus, school officials should err on the side of safety when addressing threats of school violence.

**c. Transferring Records to Another School**

FERPA permits schools to transfer education records to another school, including postsecondary education institutions, if a student seeks or intends to enroll in that school or if a student is already enrolled in another school.<sup>77</sup> As part of a student’s education records, disciplinary records would therefore be included in the records transfer. In addition, federal law requires that each state provides an assurance to the Secretary of Education that the state “has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local education agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school.”<sup>78</sup>

**d. Judicial Orders and Subpoenas**

FERPA permits schools to release information without consent when disclosure is to comply with a judicial order or lawfully issued subpoena.<sup>79</sup> In such cases, prior to disclosing the information, the school must make a reasonable effort to notify parents so that they may seek protective action.<sup>80</sup> However, notification is not required in cases of federal grand jury subpoenas or in other circumstances where a court has ordered that the contents of a subpoena or protected education record not be disclosed.<sup>81</sup>

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<sup>75</sup> *Id.* at 74839.

<sup>76</sup> 34 C.F.R. § 99.36(e).

<sup>77</sup> 34 C.F.R. § 99.31(a)(2).

<sup>78</sup> *See* 20 U.S.C. § 7917; 34 C.F.R. § 99.31(a)(2)..

<sup>79</sup> 34 C.F.R. § 99.31(a)(9)(i).

<sup>80</sup> *Id.* at (a)(9)(ii).

<sup>81</sup> *Id.*

### e. Juvenile Justice Authorities

FERPA permits schools to release students' personally identifiable information from an education record to state and local juvenile justice authorities if it will help the juvenile justice system effectively serve the student.<sup>82</sup> However, prior to releasing the information, the school must receive a written certification that the student's information will not be disclosed to any other agency, organization, or third party without the prior written consent of the student's parent.<sup>83</sup>

## B. Student Medical Records under FERPA

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") prevents covered entities from disclosing protected health information without the written authorization of the patient or their parent/legal guardian.<sup>84</sup> HIPAA defines "covered entities" as health care providers who engage in certain electronic transactions, health plans that pay for health care, and the business associates of covered entities that perform HIPAA-covered functions.<sup>85</sup> Although schools often receive and maintain students' health or medical records, schools are not covered entities because they do not engage in the kinds of transactions covered by HIPAA.<sup>86</sup> Similarly, even when a school employs a medical professional, such as a nurse, physician, or psychologist, schools are still not covered entities because the law's focus remains on the characterization of the entity employing the professional – not the type of work the professional performs.<sup>87</sup> Therefore, HIPAA does not govern the disclosure of student health or medical

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<sup>82</sup> *Id.* at (a)(5)(i).

<sup>83</sup> *Id.*; 34 C.F.R. § 99.38.

<sup>84</sup> 42 U.S.C. § 1320d-2; 45 C.F.R. § 160, 164.

<sup>85</sup> 45 C.F.R. § 160.103.

<sup>86</sup> *Does the HIPAA Privacy Rule apply to an elementary or secondary school?*, U.S. DEPT OF HEALTH AND HUMAN SERVS., <https://www.hhs.gov/hipaa/for-professionals/faq/513/does-hipaa-apply-to-an-elementary-school/index.html> (last visited October 10, 2018).

<sup>87</sup> *Id.*

information maintained by a school or school district.<sup>88</sup> Instead, FERPA governs this kind of information.<sup>89</sup>

Accordingly, a school official may disclose information from a student's health or medical records only under the circumstances governed by FERPA as discussed in the preceding subsections. That means information can be shared with those within the school (i.e., school officials with a legitimate educational reason to know), with the school's threat assessment team as appropriate, or with outside personnel under the emergency exception.

Schools may also receive student medical records such as a student's immunization record or prescription drug records from health care providers or health plans which are required to comply with HIPAA. These types of disclosures from a health care provider typically require written parental consent to disclose the medical record to the school or school district.<sup>90</sup> Furthermore, it is the HIPAA covered entity's responsibility – not the school's – to ensure that the proper consent has been provided prior to the disclosure of student/patient medical information.<sup>91</sup> It is also important to note that, in certain situations, the HIPAA Privacy Rule allows a health care provider or mental health counselor to disclose protected health information to schools, law enforcement, or others without parental consent to avert a serious threat to health or safety.<sup>92</sup> Finally, remember that once medical records become part of a student's file, a school may share that health and medical information under any of the circumstances applicable to FERPA education records.<sup>93</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; see also 45 C.F.R. § 160.103 (excluding education records under FERPA from the definition of "protected health information").

<sup>90</sup> See 45 C.F.R. § 164.508.

<sup>91</sup> *Id.* at (a).

<sup>92</sup> 45 C.F.R. § 164.512(j).

<sup>93</sup> U.S. DEPT OF HEALTH & HUMAN SERVS., U.S. DEPT OF EDUC., JOINT GUIDANCE ON THE APPLICATION OF THE FAMILY EDUC. RIGHTS AND PRIVACY ACT (FERPA) AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) TO STUDENT HEALTH RECORDS 4 (Nov. 2008), <https://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf> (last visited October 11, 2018)

### **C. School and Staff Liability under FERPA**

School officials cannot be held personally liable for FERPA violations. FERPA is designed to address systematic, not individual, violations of students' privacy interests.<sup>94</sup> Therefore, it does not afford students and their parents a private right of action to directly sue a school district or school official for an unauthorized disclosure of protected information.<sup>95</sup> Rather, if a school violates FERPA, then the U.S. Department of Education may withhold future funding, issue a cease-and-desist order, or terminate the school's eligibility to receive funding.<sup>96</sup> Accordingly, when faced with the choice of remaining silent or sharing potentially valuable information about a concerning student, school officials should err on the side of safety and disclose the information to the proper authorities.

### **D. Disclosures to Criminal Justice Agencies**

As contemplated by FERPA, Colorado law requires schools to make certain disclosures to criminal justice agencies. For instance, when a child is under investigation for committing a crime, the criminal justice agency conducting the investigation may request the child's attendance and disciplinary records.<sup>97</sup> Upon receiving the request, if the student is in a public school, the school district superintendent or designee must provide the attendance and disciplinary records to the requesting criminal justice agency; if the student is not in a public school, the request is handled by a school principal or designee.<sup>98</sup> Notably, this reporting requirement is triggered only if the child is the subject of an active investigation; a criminal justice agency may not request records under these statutes if there is no investigation.<sup>99</sup>

When a school receives a request, the requesting criminal justice agency must provide the school a written certification that it will not further disclose the student's information to others, except as otherwise provided by

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<sup>94</sup> *Jensen v. Reeves*, 45 F. Supp. 2d 1265, 1276 (D. Utah 1999) (citing *Gundlach v. Reinstein*, 924 F. Supp. 684 (D. Penn. 1996)), *aff'd*, 246 F.3d 681 (10th Cir. 2001).

<sup>95</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002).

<sup>96</sup> 34 C.F.R. § 99.67(a)(1).

<sup>97</sup> § 19-1-303(2)(c), C.R.S.

<sup>98</sup> *Id.*; § 22-32-109.3(3), C.R.S.

<sup>99</sup> § 19-1-303(2)(c), C.R.S.

law or consented to by the child's parent.<sup>100</sup> For example, if a police department has requested the records of a child it is investigating, it must confirm in writing that it will not share those records. Once the school receives this certification, it is required to provide the student's records.<sup>101</sup> In addition, the criminal justice agency may use this information only to perform its legal duties and responsibilities, and it must otherwise maintain the records' confidentiality.<sup>102</sup> Therefore, any records provided to the agency may not be used for any other purpose outside of the investigation.<sup>103</sup>

## 1. Offenses against Teachers

Schools must report assault or harassment against teachers to the appropriate law enforcement agencies.<sup>104</sup> Specifically, any incident in which a teacher or other school employee is assaulted, harassed, falsely accused of child abuse, or made the victim of any other crime by a student must be reported.<sup>105</sup> This does not mean, however, that a police report must be filed every time a student bumps into a school employee in the hall or calls a teacher a name. Rather, assault and harassment have specific legal definitions, and such incidents have to be reported only when the circumstances of the incidents fall within those definitions, which are addressed below in turn.

Assault is broken down into three different categories – first degree, second degree, and third degree – based on the severity of the assailant's actions and the harm caused to the victim. First degree assault most commonly occurs when a person intends to cause a victim serious bodily injury and actually does so using a deadly weapon.<sup>106</sup> "Serious bodily injury" means bodily injury that, either at the time of the actual injury or a later time, involves substantial risk of death, a substantial risk of serious

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> § 22-32-109.1(3), C.R.S.

<sup>105</sup> *Id.*

<sup>106</sup> § 18-3-202(a), C.R.S. A person can also commit this crime without a deadly weapon if the person has the intent to permanently disable someone and actually causes that injury. *Id.* at (b).

permanent disfigurement, or substantial risk of protracted loss or impairment of the function of any part or organ of the body.<sup>107</sup> Second degree assault is similar but requires only that a person intends to – and does – use a deadly weapon to cause a victim ordinary bodily injury, meaning physical pain, illness, or impairment of a physical or medical condition.<sup>108</sup> Third degree assault most commonly occurs when a person intends to cause, or recklessly causes, ordinary bodily injury to a victim.<sup>109</sup> A person acts “recklessly” when he or she consciously behaves in a way that creates a substantial and unjustifiable risk of harm.<sup>110</sup>

Thus, a student who accidentally bumps into a teacher while walking down the hallway does not commit the crime of assault because that action does not fall within any of the three definitions of assault discussed above. Notably, the intent to cause any degree of bodily harm is missing from the student’s action. However, if the same student purposefully bumps into a teacher with the intent to cause harm, or the student slams into a teacher while recklessly sprinting through the halls, then the elements of assault may be satisfied and the incident must be reported to the proper authorities.

Harassment is a separate crime from assault and generally occurs when a person does any of the following:

- intends to harass a victim and strikes, shoves, kicks, or otherwise touches a victim;
- makes obscene remarks or gestures to a victim in a public place;
- follows a victim in a public place;
- threatens to hurt a victim or damage his or her property;
- repeatedly calls, emails, texts, or otherwise communicates with a victim for no legitimate conversational purpose or at inconvenient hours; or

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<sup>107</sup> § 24-10-106.3, C.R.S.

<sup>108</sup> §§ 18-1-901(3)(c), 18-3-203(1)(b), C.R.S. A person also commits this crime if recklessly causing serious bodily injury to another person using a deadly weapon. § 18-3-203(1)(d).

<sup>109</sup> § 18-3-204(a), C.R.S. A person also commits this crime if negligently causing bodily injury to another person using a deadly weapon. *Id.*

<sup>110</sup> § 18-1-501, C.R.S.

- repeatedly insults, taunts, or challenges a victim in a way that would provoke a violent response.<sup>111</sup>

Thus, a student who merely calls his or her teacher an inappropriate or offensive name does not commit the crime of harassment.

If one of these offenses does occur, the teacher or school employee must file a complaint with the school administration and the district's board of education.<sup>112</sup> After a complaint is filed, the school administration must report the incident to the district attorney or local law enforcement for a decision as to whether criminal charges or delinquency proceedings are appropriate.<sup>113</sup> Additionally, the administration must suspend the student for three days and initiate procedures for further suspension or expulsion in accordance with its policies for such matters.<sup>114</sup>

## **2. Minors under Court Supervision**

When a minor is on pre-trial release, probation, or parole, mandatory school attendance is often a condition of their supervised release. FERPA does not prohibit school officials from cooperating with supervising law enforcement officials.<sup>115</sup> Thus, if the student is required to attend school as a condition of release pending trial, or as a condition of a sentence (including probation or parole), then the school must notify the parole board if the student fails to attend all or any portion of a school day.<sup>116</sup>

## **3. Information Tracked by School Resource Officers**

School resource officers have specific reporting obligations. Any SRO who arrests a student on campus or at a school activity must notify the principal within twenty-four hours after the arrest.<sup>117</sup> Additionally, any SRO who issues a summons or a ticket to a student on school grounds or at a

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<sup>111</sup> § 18-9-111, C.R.S.

<sup>112</sup> § 22-32-109.1(3)(a), C.R.S.

<sup>113</sup> *Id.* at (3)(c).

<sup>114</sup> *Id.* at (3)(b).

<sup>115</sup> *See, e.g.*, 34 C.F.R. § 99.8.

<sup>116</sup> §§ 22-33-107, 22-33-107.5, C.R.S.

<sup>117</sup> § 22-32-146(1), C.R.S.

school event must notify the principal within ten days of issuing the summons or ticket.<sup>118</sup>

Furthermore, SROs and law enforcement agencies operating at schools must submit annual reports to the Division of Criminal Justice.<sup>119</sup> As discussed earlier in this Section, the reports should detail all incidents that occurred on the campus during that year and contain the following information for each incident:

- The student's name, date of birth, race, ethnicity, and gender;
- The school where the incident occurred or the name of the school that operated the vehicle or held the activity or event;
- The date of arrest and/or issuance of the summons or ticket;
- The incident report number;
- The most serious offense and its NCIC crime code;
- The type of weapon involved, if any; and
- The law enforcement agency's originating reporting identifier.<sup>120</sup>

#### **4. Mandatory Reporting of Child Abuse**

Under Colorado law, if any school official or employee has reasonable cause to know or suspect that a child has been abused or neglected, or if the official has observed a child being subjected to circumstances that would reasonably result in abuse or neglect, the official must immediately report the information to the county department, the local law enforcement agency, or the child abuse reporting hotline system.<sup>121</sup> It is not enough to report the suspected abuse or neglect to the school's principal or administrator – the report must be made directly to the county department, a local law enforcement agency, or the child abuse reporting hotline system (call 1-884-

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<sup>118</sup> *Id.* at (2).

<sup>119</sup> *Id.* at (5)(b).

<sup>120</sup> *Id.* at (5)(b)-(c).

<sup>121</sup> § 19-3-304, C.R.S.

CO-4-KIDS/1-884-264-5437).<sup>122</sup> In addition, aside from knowing Colorado’s mandatory reporting laws, educators are encouraged to learn whether their school system has a board policy or an administrative procedure for reporting suspected cases of child abuse and neglect.

Educators play a vital role in identifying, reporting, and preventing child abuse and neglect. While many teachers appropriately report child abuse, many more fail to report despite legal requirements to do so.<sup>123</sup> Obstacles to reporting include personal feelings on the particular circumstances, lack of support from administrators when faced with child abuse reporting, belief that nothing will happen as a result, and prior bad experiences with abuse reporting.<sup>124</sup> However, school training that covers the knowledge of the signs of abuse and reporting procedures may help reduce educators’ hesitancy to report.<sup>125</sup>

Again, to report suspected child abuse, educators or school employees may always call 1-844-CO-4-KIDS (1-844-264-5437). All calls are confidential and will be routed to the county where the child resides.

### **E. Information Law Enforcement Must Report to Schools**

Colorado law requires that arrest and criminal records for juveniles charged as adults be made available to the public.<sup>126</sup> As an initial matter, when a person is formally charged with a crime, not merely arrested, it means that a judge has made a determination of probable cause.<sup>127</sup> In other words, a judge has concluded that it is more probable than not that the accused individual engaged in the charged conduct.<sup>128</sup>

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<sup>122</sup> *Id.* at (1)(a).

<sup>123</sup> *See* § 19-3-304(2)(l), C.R.S.

<sup>124</sup> CYNTHIA CROSSON-TOWER, THE ROLE OF EDUCATORS IN PREVENTING AND RESPONDING TO CHILD ABUSE AND NEGLECT 34-36 (2003), <https://www.childwelfare.gov/pubPDFs/educator.pdf> (last visited October 11, 2018)

<sup>125</sup> *Id.* at 8-9.

<sup>126</sup> §§ 19-1-304(5), 22-33-105(5), C.R.S.

<sup>127</sup> *See, e.g.*, Crim. P. 5(4)(III); *see also* Crim. P. 7(h)(1).

<sup>128</sup> *People v. Brethauer*, 482 P.2d 369, 370 (Colo. 1971).

This subsection addresses the information law enforcement officials are required to report to schools when students are charged with crimes as well as when students are the victims of crimes.

### **1. Juvenile Students Charged as Adults**

Under Colorado law, when a juvenile is criminally charged as an adult, the juvenile's arrest and criminal records must be made available to the public.<sup>129</sup> Additionally, when such charges are filed, the law enforcement agency involved in the case must notify the school district where the juvenile is enrolled as a student.<sup>130</sup> The notification must provide basic identifying information about the student along with the details of the alleged offense.<sup>131</sup> Basic identifying information includes the person's name, place and date of birth, last-known address, social security number, occupation and address of employment (if applicable), physical description, handwritten signature, sex, fingerprints, and any known aliases.<sup>132</sup>

When the school learns that a student has been charged with a crime, it must determine whether the student's behavior is detrimental to the safety, welfare, and morals of the other students or school personnel.<sup>133</sup> It must also determine whether the student's presence would disrupt the learning environment, provide a bad example for other students, or create a dangerous environment.<sup>134</sup> This evaluation can, and should, be done by the school's threat assessment team. Ideally, the team would access police reports, communicate with law enforcement agencies, determine what the conditions of the student's pre-trial release may be, and carefully evaluate whether the student presents a risk to others. If school officials ultimately determine that a threat of violence or disruption exists, the school may proceed with suspension or expulsion proceedings.<sup>135</sup>

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<sup>129</sup> §§ 19-1-304(5), 22-33-105(5), C.R.S.

<sup>130</sup> § 19-1-304(5), C.R.S.

<sup>131</sup> *Id.*

<sup>132</sup> § 24-72-302(2), C.R.S.

<sup>133</sup> § 22-33-105(5)(a), C.R.S.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

For further information on this topic, please refer to Section IV regarding the suspension of students charged with certain crimes.

## 2. Crimes of Violence and Unlawful Sexual Behavior

Similarly, when charges are filed in juvenile court alleging that a juvenile has committed a crime of violence or an offense constituting unlawful sexual behavior, the school district must be immediately provided with the juvenile’s basic identification information and the details of the alleged offense committed by the student.<sup>136</sup> This information should be made available by law enforcement, prosecution, and the court.<sup>137</sup> Juvenile courts are also separately obligated to notify school districts if a juvenile enrolled in one of their schools has committed an offense constituting unlawful sexual behavior.<sup>138</sup>

Determining whether an offense constitutes a “crime of violence” involves two steps. First, the alleged assailant must have committed one of eleven specific, qualifying crimes. Second, the commission of the crime must have (1) included either the use or threatened use of a deadly weapon; or (2) caused the victim serious bodily injury or death.<sup>139</sup> The eleven qualifying crimes are as follows:<sup>140</sup>

- 1) Any crime committed against an at-risk adult or at-risk juvenile.<sup>141</sup>
- 2) Murder.<sup>142</sup>
- 3) First or second degree assault.<sup>143</sup>
- 4) Kidnapping.<sup>144</sup>
- 5) Sexual offenses.<sup>145</sup>

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<sup>136</sup> §§ 18-1.3-406, 19-1-304(5), C.R.S.

<sup>137</sup> § 19-1-304(5), C.R.S.

<sup>138</sup> §§ 16-22-102(9), 22-33-106.5(2), C.R.S.

<sup>139</sup> § 18-1.3-406(2)(a)(I), C.R.S.

<sup>140</sup> *Id.*

<sup>141</sup> An “at-risk adult” is any person who is age 70 or older. § 18-6.5-102(2), C.R.S. An “at-risk juvenile” is any person under 18 years old with a disability. *Id.* at (4).

<sup>142</sup> §§ 18-3-102 to -103, C.R.S.

<sup>143</sup> §§ 18-3-202 to -203, C.R.S.

<sup>144</sup> §§ 18-3-301 to -302, C.R.S.

<sup>145</sup> § 18-3-401, et seq., C.R.S.

- 6) Aggravated robbery.<sup>146</sup>
- 7) First degree arson.<sup>147</sup>
- 8) First degree burglary.<sup>148</sup>
- 9) Escape.<sup>149</sup>
- 10) Criminal extortion.<sup>150</sup>
- 11) First or second degree unlawful termination of pregnancy.<sup>151</sup>

The definition of “unlawful sexual behavior” encompasses the commission of, or attempt to commit, twenty-eight separate crimes, which all fall into the following basic categories: sexual assault; incest; indecent exposure; child prostitution; sexual exploitation of a child; and unlawful sexual contact (meaning that the offender subjects the victim to any sexual contact without consent).<sup>152</sup> Individuals ultimately convicted of an offense involving unlawful sexual behavior must typically register as a sex offender.<sup>153</sup>

Please note that on January 1, 2018, the teen sexting law goes into effect, which creates lower-level juvenile offenses for sexting conduct.<sup>154</sup> The lowest level of these offenses is a civil infraction for the exchange of sexting images between consenting juveniles.<sup>155</sup> Because a civil infraction does not result in juvenile court proceedings, the law does not require a school board of education to be provided with information related to the student and infraction. In contrast, the teen sexting law also creates two more serious juvenile criminal offenses for the nonconsensual possession or posting of sexually explicit images.<sup>156</sup> These offenses are charged as criminal petty

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<sup>146</sup> § 18-4-302, C.R.S.

<sup>147</sup> § 18-4-102, C.R.S.

<sup>148</sup> § 18-4-202, C.R.S.

<sup>149</sup> § 18-8-208, C.R.S.

<sup>150</sup> § 18-3-207, C.R.S.

<sup>151</sup> §§ 18-3.5-103 to -104, C.R.S.

<sup>152</sup> § 16-22-102(9), C.R.S.

<sup>153</sup> §§ 16-22-102, 16-22-111, C.R.S.

<sup>154</sup> 2017 Colo. Sess. Laws, ch. 390, § 1 at 2012-13.

<sup>155</sup> *Id.* at § 18-7-109(3) at 2014.

<sup>156</sup> *Id.* at § 18-7-109(1)-(2) at 2013-14.

offenses or misdemeanors and could result in juvenile court proceedings.<sup>157</sup> Consequently, information regarding these charges may be reported to school districts.

In addition, the teen sexting law will also reduce the number of juveniles required to register as sex offenders.<sup>158</sup> Ordinarily, juvenile sexting conduct constitutes the crime of sexual exploitation of a child, which would result in mandatory sex offender registration.<sup>159</sup> However, juveniles cited with the basic civil infraction of exchanging sexually explicit images will be exempt from the sex offender registry.<sup>160</sup> Moreover, courts will also have some discretion over whether juveniles should have to register if they have been adjudicated for the basic crimes of nonconsensual possession or posting of sexually explicit images.<sup>161</sup> For more information on the new teen sexting law, please see Section V.

### **3. Other Specifically Enumerated Crimes**

Beyond notifying school districts when any of their students have been charged as an adult, with a crime of violence, or with unlawful sexual behavior, the prosecution must also notify a student's principal after charges are filed in juvenile court alleging any of the following ten additional offenses:<sup>162</sup>

- 1) Menacing.<sup>163</sup>
- 2) Harassment.<sup>164</sup>
- 3) Fourth degree arson.<sup>165</sup>
- 4) Theft.<sup>166</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> *See id.* at § 2-3 at 2013.

<sup>159</sup> §§ 16-22-102, 18-6-403, C.R.S.

<sup>160</sup> *See* 2017 Colo. Sess. Laws, ch. 390, § 2-3 at 2013.

<sup>161</sup> *Id.*

<sup>162</sup> § 19-1-304(5.5), C.R.S.

<sup>163</sup> § 18-3-206, C.R.S.

<sup>164</sup> § 18-9-111, C.R.S.

<sup>165</sup> § 18-4-105, C.R.S.

<sup>166</sup> § 18-4-401, C.R.S.

- 5) Aggravated motor vehicle theft.<sup>167</sup>
- 6) Criminal mischief.<sup>168</sup>
- 7) Defacing property.<sup>169</sup>
- 8) Disorderly conduct.<sup>170</sup>
- 9) Hazing.<sup>171</sup>
- 10) Possession of a handgun by a juvenile.<sup>172</sup>

In addition, within three days after charges are filed, the prosecution must provide the student's principal with the student's arrest and criminal records, including the student's name, date of birth, address, and sex; the nature of the charges; and the name of the criminal justice agency that arrested the student.<sup>173</sup>

Courts also have an obligation to notify a juvenile's school district if a student is adjudicated or convicted of committing certain offenses on school grounds, in a school vehicle, or at a school event.<sup>174</sup> These offenses are as follows: possessing a dangerous weapon without authorization; the use, possession, or sale of drugs; robbery; or assault.<sup>175</sup> In its notification, the court must inform the school that the student may be subject to mandatory expulsion based on his or her adjudication or conviction.<sup>176</sup>

#### **4. Student Victims of Certain Enumerated Crimes**

Historically, the criminal justice system has carefully protected the identities of victims of certain sex crimes – including child victims. The general rule was that criminal justice officials needed to delete sex assault victims' names and identifying information from any documents before they

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<sup>167</sup> § 18-4-409, C.R.S.

<sup>168</sup> § 18-4-501, C.R.S.

<sup>169</sup> § 18-4-509, C.R.S.

<sup>170</sup> § 18-9-106, C.R.S.

<sup>171</sup> § 18-9-124, C.R.S.

<sup>172</sup> § 18-12-108.5, C.R.S.

<sup>173</sup> § 19-1-304(5.5), C.R.S.

<sup>174</sup> § 22-33-106.5(1), C.R.S.

<sup>175</sup> *Id.*; § 22-33-106(1)(d), C.R.S.

<sup>176</sup> § 22-33-106.5(1), C.R.S.

could be shared with any individual or agency outside of the criminal justice system.<sup>177</sup>

However, in 2016, the Colorado legislature enacted new legislation that is intended to better serve the needs of children who have been victims of sex crimes.<sup>178</sup> First, the new law expanded the list of sex crimes for which the identities of child victims should be protected; that list now includes child prostitution and internet-based crimes among others.<sup>179</sup> Second, and more importantly, the law carved out a narrow exception that allows for the sharing of child victims' identifying information between criminal justice agencies, school districts, school police departments, university administrators, assessment centers for children, or social services agencies.<sup>180</sup> This will help school districts better facilitate services for child victims. Additionally, once school districts receive the identifying information of child victims, they may share that information with schools for the limited purposes of suspension, expulsion, and reenrollment determinations.<sup>181</sup>

## **F. Schools' Inspection of Student Criminal Justice Records**

In an effort to balance the best interests of children, including their privacy rights, with the importance of information sharing and the need to protect the safety of schools and the public, the General Assembly has determined that certain criminal justice records may be shared with schools.

### **1. Records of Juvenile Proceedings**

After a juvenile is charged with an offense in a juvenile delinquency proceeding and is either found guilty or voluntarily pleads guilty, that is called an "adjudication of delinquency."<sup>182</sup> This term differs from a "conviction," which is the term used in a standard adult criminal proceeding.

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<sup>177</sup> § 24-72-304(4), C.R.S.

<sup>178</sup> 2016 Colo. Sess. Laws, ch. 90, § 24-72-304(4.5) at 252-54.

<sup>179</sup> § 24-72-304(4.5)(a)-(b), C.R.S.

<sup>180</sup> *Id.* at (4.5)(d)(I).

<sup>181</sup> *Id.* at (4.5)(d)(II).

<sup>182</sup> § 19-1-103(2), C.R.S.

Court records from juvenile delinquency proceedings are open for inspection to the principal of the school where the juvenile is enrolled, the superintendent of the school district, or their designees.<sup>183</sup> Likewise, records from proceedings where juveniles are charged with violating any municipal ordinances (other than traffic violations) are also open for inspection.<sup>184</sup> The available information may include arrest and criminal records such as the identity of the criminal justice agency that investigated the crime; the date and place of the arrest and filing of charges; the juvenile’s name, date of birth, last known address, and gender; the nature of the charges filed; and the disposition of those charges.<sup>185</sup>

As a practical matter, it may be necessary for school officials to inspect these records to determine whether school action such as suspension or expulsion is necessary. In addition, the information may be used to provide appropriate educational programming and related services to the student and to maintain a safe and secure school environment.

## **2. Public Safety Records**

School personnel may obtain records from judicial departments or criminal justice agencies relating to student incidents rising to the level of a “public safety concern.”<sup>186</sup> A matter of public safety includes records of threats made by a child, any arrest or charging information, any information regarding municipal ordinance violations, and any arrest or charging information relating to misdemeanor or felony charges.<sup>187</sup> School officials may also access records from judicial departments or criminal justice agencies if the information is necessary for them to perform their duties and responsibilities.<sup>188</sup> However, medical and mental health records do not fit

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<sup>183</sup> § 19-1-304(1)(a)(XVI), C.R.S.

<sup>184</sup> *Id.*

<sup>185</sup> § 24-72-302(1), C.R.S.

<sup>186</sup> § 19-1-303(2)(a), C.R.S.

<sup>187</sup> *Id.* at (2)(b)(I).

<sup>188</sup> *Id.* at (2)(a).

into this category.<sup>189</sup> School personnel must keep this type of information confidential.<sup>190</sup>

As a practical matter, school officials may request records where there are merely rumors that a student was involved in a matter reported to the police. It may be prudent in such circumstances for the school principal to obtain the records just to be sure that no school response is necessary.

## **G. School Cooperation with Other Government Agencies**

As will be further discussed in Section IV, the Colorado Safe Schools Act states that, as a matter of public policy, schools should try to limit referring students to law enforcement.<sup>191</sup> The goal of this policy is to ensure that police and courts do not unnecessarily become an additional penalty for student misconduct in routine disciplinary matters. However, those general principles do not restrict the school's obligation to involve law enforcement or other agencies to evaluate risk or prevent violence before it happens. Likewise, it does not limit the duty of school staff to report possible child abuse. Most importantly, if there is an emergency or a crime in progress, school officials should always call 911.

### **1. Interagency Cooperation**

As discussed above, information sharing among schools, law enforcement agencies, courts, mental health professionals, social services, and other stakeholders plays an important role in preventing future violent acts at schools. As such, the General Assembly has sought to encourage “open communication among appropriate agencies to assist disruptive children and to maintain safe schools.”<sup>192</sup> To better facilitate the exchange of information across agency boundaries, the General Assembly requires the following:

- Each board of education shall cooperate and, to the extent possible, develop written agreements with law enforcement,

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<sup>189</sup> *Id.* at (2)(b)(I).

<sup>190</sup> *Id.* at (2)(a).

<sup>191</sup> § 22-32-109.1(2)(a)(II)(A), C.R.S.

<sup>192</sup> § 19-1-302(1)(b), C.R.S.

the juvenile justice system, and social services, as allowed under state and federal law, to keep each school environment safe.<sup>193</sup>

Consistent with this mandate, school districts should develop interagency information sharing agreements to facilitate the exchange of information across agencies regarding cases of public safety concern.<sup>194</sup> Without such agreements, alarming or concerning student behaviors that foreshadow larger threats could be overlooked.

While a threat assessment team is responsible for conducting threat assessments and monitoring individual students, an interagency social support team is responsible for building an overarching support plan. Specifically, support teams build and monitor the plan for threat-assessed students, and they revise the assessment and plan whenever a new threat or risk factor appears.<sup>195</sup> The threat assessment team should use threat and risk assessment tools to help the support team build the safety and support plan for the student.<sup>196</sup> Often, the threat assessment team and the interagency support team have the same, or some of the same, members.<sup>197</sup>

The Colorado Attorney General's Office has created a Self-Assessment Checklist for the development of an Interagency Agreement and Social Support Team, which provides a list of questions for stakeholders to answer in order to evaluate the level of agreement about the sharing of information across agency lines.<sup>198</sup> A copy of the Checklist is provided as an appendix to the Manual.

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<sup>193</sup> § 22-32-109.1(3), C.R.S.

<sup>194</sup> *Id.* at (6).

<sup>195</sup> SARAH GOODRUM & WILLIAM WOODWARD, CTR. FOR THE STUDY & PREVENTION OF VIOLENCE, REPORT ON THE ARAPAHOE HIGH SCH. SHOOTING: LESSONS LEARNED ON INFORMATION SHARING, THREAT ASSESSMENT, AND SYS. INTEGRITY 18 (2016), [https://cspv.colorado.edu/publications/AHS-Report/Report\\_on\\_the\\_Arapahoe\\_High\\_School\\_Shooting\\_FINAL.pdf](https://cspv.colorado.edu/publications/AHS-Report/Report_on_the_Arapahoe_High_School_Shooting_FINAL.pdf) (last visited October 11, 2018)

<sup>196</sup> *Id.* at 30-31.

<sup>197</sup> *Id.* at 31.

<sup>198</sup> INTERAGENCY SOCIAL SUPPORT TEAM WORKING GROUP, COLO. OFFICE OF ATTORNEY GEN., SELF ASSESSMENT CHECKLIST (Nov. 30, 2005),

[https://rems.ed.gov/docs/2017Toolbox/CO\\_Interagency%20Agreement.pdf](https://rems.ed.gov/docs/2017Toolbox/CO_Interagency%20Agreement.pdf)

(last visited October 11, 2018)

## 2. Safe2Tell Colorado

The Safe2Tell Colorado program ensures that every student, parent, teacher, and community member has access to a safe and anonymous way to report any concerns about their safety or the safety of others.<sup>199</sup> Safe2Tell Colorado provides youth and adults in Colorado communities and schools with an increased ability to both prevent and report violence and other concerning behaviors by submitting a tip that is distributed to local responders and officials for investigation and follow-up.<sup>200</sup>

Safe2Tell encourages individuals to report conduct on a variety of issues that may pose a threat to the safety of the school or the community. Among the program’s “Reasons2Tell” are issues related to the following: guns; knives; threats; child abuse; vandalism; stealing; cheating; stalking; fire starting; explosives; fighting; harassment; sexual assault; animal cruelty; suicide threats; sexual misconduct; domestic violence; planned fights; planned parties; school threats; teasing; alcohol; hit lists; ditching; bullying; assaults; drugs; and gangs.<sup>201</sup> However, it should be emphasized that students and school staff may contact Safe2Tell regarding any concerns they may have about threats to anyone, including themselves, others at school, or the community at-large.<sup>202</sup>

Individuals may anonymously submit tips and information by phone, web, or mobile app.<sup>203</sup> Tips are answered twenty-four hours a day, seven days a week at two separate Colorado State Patrol communication centers.<sup>204</sup>

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<sup>199</sup> *About Us*, SAFE2TELL COLO., COLO. OFFICE OF ATTORNEY GEN., <https://safe2tell.org/?q=about-us> (last visited October 10, 2018); *see also* § 24-31-602, et seq., C.R.S. (implementing the Safe2Tell program).

<sup>200</sup> *About Us*, SAFE2TELL COLO., COLO. OFFICE OF ATTORNEY GEN., <https://safe2tell.org/?q=about-us> (last visited October 10, 2018).

<sup>201</sup> *Reasons2Tell*, SAFE2TELL COLO., COLO. OFFICE OF THE ATTORNEY GEN., <https://safe2tell.org/?q=reasons2tell> (last visited October 10, 2018).

<sup>202</sup> *Id.*

<sup>203</sup> *How it Works*, SAFE2TELL COLO., COLO. OFFICE OF THE ATTORNEY GEN., <https://safe2tell.org/?q=how-it-works> (last visited October 10, 2018).

<sup>204</sup> *Id.*

Answering points are live and provide an opportunity for a two-way dialog between the reporting party and the Safe2Tell answering party.<sup>205</sup>

If further action is warranted, Safe2Tell shares the reported information with the appropriate authorities, including local school officials, mental health professionals, and/or law enforcement agencies.<sup>206</sup> Safe2Tell will then follow-up with the school to ensure the tip was investigated and that appropriate action was taken.<sup>207</sup> In addition, the Safe2Tell program has a number of mechanisms to ensure the confidentiality of submitted tips, so individuals should feel comfortable and secure when reporting concerning behaviors.<sup>208</sup>

To make an anonymous report at any time:

- Text or call Safe2Tell at 1-877-542-7233;<sup>209</sup>
- Submit tips via the Safe2Tell Colorado mobile app, which can be download from the Apple Store or Google Play;<sup>210</sup> or
- Make an online report at: <http://safe2tell.org/submit-tip>.

Schools should help make students aware of the Safe2Tell program and these reporting options.

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *See* § 24-31-607, C.R.S.

<sup>209</sup> *Make a Report*, SAFE2TELL COLO., COLO. OFFICE OF THE ATTORNEY GEN.,

<https://safe2tell.org/?q=make-report> (last visited October 10, 2018).

<sup>210</sup> *Id.*

## IV. STUDENT DISCIPLINE

Even the most successful systems do not prevent all student disruption and misconduct. When students misbehave, Colorado law requires a guided framework for response, particularly for the use of exclusionary discipline (suspension and expulsion).

As discussed in Section I, school districts and charter schools must have a written code of conduct, and they must administer it “uniformly, fairly, and consistently for all students.”<sup>1</sup> School administrators must also consider whether a student’s conduct is serious enough to justify a police report. The procedures governing schools’ responses to student misconduct are set forth below.

### A. Proportionate and Non-discriminatory Discipline

The Colorado Safe Schools Act requires that schools “[i]mpose proportionate disciplinary interventions and consequences . . . in response to student misconduct.”<sup>2</sup> Disciplinary interventions include in-school suspensions – designed to be an alternative to exclusionary discipline – as well as out-of-school suspensions and referrals to law enforcement. Beyond these traditional tools, the Safe Schools Act also requires schools to implement “plans for the appropriate use of prevention, intervention, restorative justice, peer mediation, counseling, or other approaches to student misconduct . . . to minimize student exposure to the criminal and juvenile justice system.”<sup>3</sup> Thus, while out-of-school suspensions and expulsions may be appropriate in some cases, state law requires schools to consider lesser punishments before resorting to those measures.

Recent developments at the state and federal level reflect that approaches to student discipline are changing. A growing consensus favors alternatives to exclusionary discipline.<sup>4</sup> In 2012, Colorado amended state law to make expulsion and suspension permissive (no longer mandatory) for

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<sup>1</sup> § 22-32-109.1(2)(a)(I), C.R.S.

<sup>2</sup> *Id.* at (2)(a)(II)(A).

<sup>3</sup> *Id.* at (2)(a)(II)(B).

<sup>4</sup> *See, e.g., Rethinking Sch. Discipline*, U.S. SEC’Y OF EDUC. ARNE DUNCAN, U.S. DEPT’ OF EDUC. (Jan. 8, 2014), <https://www.ed.gov/news/speeches/rethinking-school-discipline> (last visited October 11, 2018)

students deemed “habitually disruptive” or who have committed certain offenses.<sup>5</sup> These offenses include the following:

- Weapons possession (except firearms);
- Use or possession of drugs or a controlled substance (see Section V for more information on controlled substances);
- False accusations of criminal activity against school employees;
- Serious assault;
- Robbery.<sup>6</sup>

In addition, the Colorado General Assembly discouraged unnecessary referrals to law enforcement, while it encouraged school districts to adopt policies for evaluating whether police intervention is necessary.<sup>7</sup> The General Assembly suggested that, at a minimum, schools should consider the following factors before referring a case to law enforcement:

- The student’s age;
- The student’s disciplinary history;
- Whether a student has a disability;
- The seriousness of the misconduct;
- Whether the conduct threatened the safety of any student or staff member; and
- Whether a lesser intervention would properly address the misconduct.<sup>8</sup>

While these factors provide some guidance to school administrators and local school boards, school officials are ultimately able to exercise discretion in determining the appropriate disciplinary response to student misbehavior.<sup>9</sup>

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<sup>5</sup> 2012 Colo. Sess. Laws, ch. 188, § 22-33-106(1) at 742.

<sup>6</sup> § 22-33-106(1)(d), C.R.S.

<sup>7</sup> 2012 Colo. Sess. Laws, ch. 188, § 21 at 730-32.

<sup>8</sup> *Id.* at § 21(1)(f)(III) at 731.

<sup>9</sup> *Id.* at § 21(1)(c) at 730.

Critically, the amendments and policy shifts around law enforcement referrals discourage school officials from involving law enforcement only in the school’s own internal disciplinary processes. They neither inhibit nor discourage timely contact with police to prevent violence or respond to a threat. If school administrators reasonably suspect that a student has violated the law, or is about to violate the law, they should contact their local law enforcement.<sup>10</sup>

It is also important to note that the 2012 amendments emphasize the need for equity in the enforcement of discipline policies. That is, the policies “must apply equally to all students regardless of their economic status, race, gender, ethnicity, religion, national origin, sexual orientation, or disability.”<sup>11</sup> In March 2016, the Colorado Department of Education issued its analysis of student discipline data from across the state for the 2014-2015 academic year.<sup>12</sup> That report indicates that Colorado schools may still be struggling with this mandate.<sup>13</sup>

The Department of Education found that while Black students represented 4.7% of the total statewide student population during the 2014-2015 academic year, they accounted for 10% of the students who were disciplined.<sup>14</sup> Similarly, Hispanic students represented 33.1% of the student population, but accounted for 41.6% of students disciplined in 2014-2015; American Indian or Alaska Native students represented 0.7% of the student population, but accounted for 1.4% of students disciplined.<sup>15</sup> Looking at the data from a different perspective, 14.1% of the Black student population, 12.7% of the American Indian or Alaska Native, and 8.3% of the Hispanic

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<sup>10</sup> 2012 Colo. Sess. Laws, ch. 188, § 22-32-109.1(1)(f)(I) at 733 (amendments to § 22-33- 109.1, C.R.S. defining a “referral to law enforcement” as a communication initiated by school officials to any law enforcement agency concerning student behavior that may have violated the law or a school’s conduct and discipline code).

<sup>11</sup> *Id.* at § 21(1)(e) at 731.

<sup>12</sup> JULIANA ROSA ET AL., COLO. DEPT OF EDUC., A BRIEF ANALYSIS OF 2014-15 STUDENT DISCIPLINE INCIDENTS (Mar. 2016), <http://www.cde.state.co.us/dropoutprevention/cdereportsdi20142015> (last visited October 11, 2018)

<sup>13</sup> *See id.* at 13 (noting that, “[s]imilar to previous years, a disproportionate number of minority students were disciplined in 2014-15.”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

student population were disciplined, as compared to just 5% of the White student population during the 2014-2015 academic year.<sup>16</sup>

In addition, the report also found that in the 2014-2015 academic year, out-of-school suspensions increased for the first time in five years despite the 2012 mandate from the General Assembly to limit exclusionary disciplinary measures.<sup>17</sup> In contrast, referrals to law enforcement encouragingly decreased by 1.6% from the 2013-2014 school year.<sup>18</sup>

Recently, discrimination in student discipline has become an enforcement priority for both the U.S. Department of Education's Office of Civil Rights as well as the U.S. Department of Justice, which are authorized to "initiate investigations based on public reports of racial disparities in student discipline combined with other information, or as part of their regular compliance monitoring activities."<sup>19</sup> Since 2013, both departments have aggressively scrutinized discipline data and increased the rate of enforcement proceedings brought against school districts with substantial racial disparities in their disciplinary data.<sup>20</sup> Once enforcement proceedings are initiated, school districts must provide a non-discriminatory explanation as to why students of a particular race are formally disciplined at a disproportionate rate.<sup>21</sup> School districts can help reduce the risk of costly and difficult federal enforcement proceedings by analyzing their own discipline data and proactively addressing any existing disparities.

## **B. Non-exclusionary Intervention and Response**

As discussed above, Colorado law encourages schools to consider non-exclusionary interventions in their student disciplinary processes. This subsection briefly reviews this policy, addresses some of the alternatives to

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<sup>16</sup> *Id.* at 14.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 7, 9.

<sup>19</sup> *See, e.g.*, U.S. DEPT OF JUSTICE & U.S. DEPT OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCH. DISCIPLINE 2 (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> (last visited October 11, 2018)

<sup>20</sup> *See id.* at 4 (indicating that statistics do not fully account for the extent of racial disparities in school discipline and noting that "racial discrimination in school discipline is a real problem").

<sup>21</sup> *Id.* at 10.

exclusionary discipline, and then discusses how these alternatives should account for the rights of victims of serious misconduct.

## 1. Alternatives to Exclusionary Discipline

Colorado law emphasizes that inflexible “zero-tolerance” policies in schools have resulted in unnecessary expulsions, out-of-school suspensions, and law enforcement referrals.<sup>22</sup> This type of discipline can increase the likelihood that a student will drop out of school, which can result in diminished job opportunities, lower lifetime earnings, an increased likelihood of criminal activity, and an increased likelihood of reliance on public assistance.<sup>23</sup> In light of this, the Colorado General Assembly has encouraged school districts to develop alternative plans that allow school administrators and local boards of education to use their discretion to determine the appropriate disciplinary response to each incident of student misconduct.<sup>24</sup> When a school develops its conduct and discipline code, it must include alternative plans that minimize student exposure to the criminal and juvenile justice system.<sup>25</sup> Alternative approaches include restorative justice, peer mediation, and counseling.<sup>26</sup>

Colorado’s emphasis on non-exclusionary alternatives echoes guidance from the federal government. In 2011, the U.S. Departments of Justice and Education launched the Supportive School Discipline Initiative.<sup>27</sup> The Initiative addresses the school-to-prison pipeline and advocates against disciplinary policies that correlate with an increase of students into the criminal justice system.<sup>28</sup> In early 2014, the departments published guidance designed to improve practices in school discipline across the country.<sup>29</sup> These

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<sup>22</sup> 2012 Colo. Sess. Laws, ch. 188, § 21(1)(a) at 730.

<sup>23</sup> § 22-32-144(1)(b), C.R.S.

<sup>24</sup> 2012 Colo. Sess. Laws, ch. 188, § 21 at 730-32.

<sup>25</sup> § 22-32-109.1(2)(a)(II)(B), C.R.S.

<sup>26</sup> *Id.*

<sup>27</sup> *Sec’y Duncan, Attorney Gen. Holder Announce Effort to Respond to Sch.-to-Prison Pipeline by Supporting Good Discipline Practices*, U.S. DEP’T OF EDUC. (July 21, 2011), <https://www.ed.gov/news/press-releases/secretary-duncan-attorney-general-holder-announce-effort-respond-school-prison-pipeline-supporting-good-discipline-practices> (last visited October 11, 2018)

<sup>28</sup> *Id.*

<sup>29</sup> *U.S. Dep’t of Educ. and Justice Release Sch. Discipline Guidance Package to Enhance Sch. Climate and Improve Sch. Discipline Policies/Practices*, U.S. DEP’T OF EDUC. (Jan. 8, 2014), <https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-school-discipline-guidance-package> (last visited October 11, 2018) *Sch. Climate and Discipline*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/index.html> (last visited October 11, 2018).

federal efforts emphasize non-discrimination in student discipline, reductions in exclusionary discipline and referrals to law enforcement, Positive Behavioral Interventions and Supports, and the use of restorative justice.<sup>30</sup>

Restorative justice practices seek to repair the harm to the victim and the school community caused by a student's misconduct.<sup>31</sup> A victim-initiated conference between the victim and the offender is one example of restorative justice in an academic setting. Participants in the conference could include the victim, a victim advocate, the offender, school members, and supporters of the victim and offender.<sup>32</sup> Such conferences are intended to provide the offender with an opportunity to accept responsibility for the harm he or she inflicted and cooperate with the victim and school officials to determine what consequences would repair the harm to the victim and the community.<sup>33</sup>

## 2. Victims' Rights

Schools must take care not to use restorative justice and mediation programs in a way that re-traumatizes victims. A victim of sexual misconduct, domestic violence, stalking, or violation of a protection order cannot be required to participate in a restorative justice or peer mediation program.<sup>34</sup> The U.S. Department of Education requires schools to be particularly sensitive to victims of offenses prohibited by Title IX, including sexual harassment and assault.<sup>35</sup> Those requirements include providing the

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<sup>30</sup> U.S. DEPT OF JUSTICE & U.S. DEPT OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCH. DISCIPLINE 1 (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> (last visited October 11, 2018)

<sup>31</sup> § 22-32-144(3), C.R.S.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> § 22-32-109.9(2)(a)(II)(B), C.R.S.

<sup>35</sup> KNOW YOUR RIGHTS: TITLE IX REQUIRES YOUR SCH. TO ADDRESS SEXUAL VIOLENCE, U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS 1-2 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf> (last visited October 11, 2018) (outlining the rights available to victims of such acts under Title IX).

victim the option of an alternative class schedule and identifying options for counseling, academic support, and victim advocacy.<sup>36</sup>

For more information regarding schools' obligations to student victims under Title IX, please refer to Section VI.

### C. Obligations to At-risk Students

Under Colorado law, a school district is required to adopt policies to identify students who are at-risk of suspension or expulsion from school.<sup>37</sup> Students who may be “at-risk” include students who are truant, students who have been or are likely to be declared habitually truant, and students who are likely to be declared a “habitually disruptive student.”<sup>38</sup>

Once a school district identifies an at-risk student, the school district must provide the student with a plan to provide the necessary support services to help them avoid expulsion.<sup>39</sup> The school district is required to work with the student's parent or guardian to identify and provide appropriate services.<sup>40</sup> These services, called “Expelled and At-Risk Student Services,” (“EARSS”) can include tutoring services, alternative education services, vocational education programs, counseling services, drug or alcohol addiction treatment programs, family preservation services, and any other necessary services.<sup>41</sup>

One example of a successful EARSS program is the Boulder At-Risk Student Services program, created in the Boulder Valley School District.<sup>42</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> § 22-33-202(1), C.R.S.

<sup>38</sup> *Id.* As discussed later in this Section, a student may be declared a “habitually disruptive student” if the student “has caused a material and substantial disruption on school grounds, in a school vehicle, or at a school activity or sanctioned event three or more times during the course of a school year.” § 22-33-106(1)(c.5)(II), C.R.S.

<sup>39</sup> § 22-33-202(1), C.R.S.

<sup>40</sup> *Id.*

<sup>41</sup> §§ 22-33-204(1), 22-33-205, C.R.S.; *see also Expelled and At-Risk Student Servs. (EARSS)*, COLO. DEPT OF EDUC., [https://www.cde.state.co.us/dropoutprevention/p\\_earss](https://www.cde.state.co.us/dropoutprevention/p_earss) (last visited October 10, 2018).

<sup>42</sup> JANELLE KRUEGER & JUDITH MARTINEZ, COLO. DEPT OF EDUC., *EXPULLED AND AT-RISK STUDENT SERVICES (EARSS) 2015-2016: FUNDED GRANTEEES AND PROGRAM DESCRIPTIONS 8* (2016), <https://www.cde.state.co.us/dropoutprevention/earss2015-16fundedprogramdescriptions> (last visited October 11, 2018)

This program provides “intensive intervention and wraparound services to the district’s highest risk students, target[ing] children/youth from preschool through 12th grade who demonstrate multiple risk factors in addition to current truancy and/or delinquency.”<sup>43</sup> Specifically, the Boulder program provides the following:

- comprehensive needs assessment, counseling, restorative justice for in-school and out-of-school delinquency/ infractions, meaningful and specific parent engagement, mental health services, academic/college/career/attendance/behavioral plans, rigorous and extended monitoring, and supports to access other school, district and community resources to help the child and family.<sup>44</sup>

In addition to an EARSS program, a school district may provide the required services through agreements with appropriate local government agencies, state agencies (including the Department of Human Services and the Department of Public Health and Environment), community-based non-profits, private schools, the Department of Military and Veterans Affairs, and institutions of higher education (both public and private).<sup>45</sup> The agreements should describe what services the student(s) will receive, identify the agency or individual who will oversee the provision of services, and explain the respective responsibilities of each party to the agreement.<sup>46</sup> The State Board of Education must approve any agreements to provide services by a nonpublic, non-parochial school.<sup>47</sup>

Additionally, Colorado law requires that each school district establish an alternative to suspension program where the student’s parent, guardian, or legal custodian may attend class with the student for a period specified by the suspending authority in lieu of suspending the student.<sup>48</sup> If the adult declines to attend class with the student, the administration may suspend

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> § 22-33-204(1), C.R.S.

<sup>46</sup> *Id.* at (2).

<sup>47</sup> *Id.*

<sup>48</sup> § 22-33-105(4), C.R.S.

the student in accordance with the district’s discipline and conduct code.<sup>49</sup> However, the failure of the school district to identify a student for participation in an expulsion-prevention program shall not be grounds to prevent school personnel from proceeding with appropriate disciplinary measures or used in any way as a defense in an expulsion proceeding.<sup>50</sup>

Finally, to ensure that these services and programs are available to students, school districts must use portions of their per pupil revenues.<sup>51</sup> But school districts may also use federal moneys, funds received from other appropriations by the state, and contributions from public or private grant programs to pay for the services.<sup>52</sup> Additionally, if education services are provided, the school district may apply for funds through CDE’s expelled and at-risk student services grant.<sup>53</sup>

The CDE and the Colorado School Safety Resource Center offer technical assistance regarding alternative discipline strategies.<sup>54</sup> Schools and school districts should take advantage of these resources when implementing expulsion-prevention and alternative discipline programs.

#### **D. Disciplining Students with Disabilities**

A detailed review of the laws governing discipline of students with disabilities (particularly those with an Individualized Education Program (“IEP”)) is beyond the scope of this Manual. However, it is generally accepted that a student with a disability may be placed in an appropriate interim alternative educational setting or suspended, as discussed below, for no more than ten days.<sup>55</sup> If the discipline exceeds this ten-day period, it triggers certain legal obligations, including reconvening the IEP team.<sup>56</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> § 22-33-202(1), C.R.S.

<sup>51</sup> § 22-33-204(3), C.R.S.

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

<sup>53</sup> § 22-33-202(2), C.R.S.

<sup>54</sup> *See, e.g.*, COLO. SCH. SAFETY RES. CTR. ALTERNATIVE DISCIPLINE WORK GROUP, CREATIVE DISCIPLINE & ALTERNATIVES TO SUSPENSION (May 2013),

<https://www.cde.state.co.us/mtss/creativedisdisciplinealternativestოსuspensionhand-out> (last visited October 11, 2018)

<sup>55</sup> 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b).

<sup>56</sup> 34 C.F.R. §§ 300.530(d), 300.536.

If a student's misconduct is a manifestation of the student's disability, the school cannot utilize its regular disciplinary procedures to discipline the student. Rather, the school must develop or modify the student's behavioral intervention plan or IEP as required by the Individuals with Disabilities Education Act.<sup>57</sup> These should be amended to address the student's needs in a more appropriate manner or setting that is less disruptive to other students.<sup>58</sup> Additionally, school officials cannot expel the student simply because their conduct creates a threat of physical harm to other students or school personnel.<sup>59</sup> Instead, school officials must place the student in an appropriate alternative setting within the same school district and arrange for a reexamination of the student's IEP within ten days of the placement.<sup>60</sup> However, if the available alternative programs are unable to benefit the student or if the student's behavior becomes inimical to the welfare of other students, then the student may be expelled.<sup>61</sup>

When a student's misconduct is not a manifestation of the student's disability, a school district may utilize regular disciplinary procedures.<sup>62</sup> However, regular disciplinary processes cannot conflict with any specific terms of the student's IEP or the Individuals with Disabilities Education Act's protections for children with disabilities.<sup>63</sup> If the student's IEP conflicts with the school's regular disciplinary processes, Colorado law proposes that a teacher request a review of the child's IEP, behavioral intervention plan, or both to consider changes in the student's services or educational placement.<sup>64</sup>

## **E. Suspension and Expulsion**

Sometimes a student's conduct and the risk to others necessitates excluding a student from school by suspension or expulsion. This subsection is an overview of when and why a school can suspend or expel students and the circumstances under which a school can deny admission to a student.

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<sup>57</sup> 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(f).

<sup>58</sup> *Id.*

<sup>59</sup> § 22-33-106(1)(c), C.R.S.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at (2).

<sup>62</sup> 34 C.F.R. § 300.530(c).

<sup>63</sup> § 22-20-108(9), C.R.S.

<sup>64</sup> *Id.*

## 1. Suspension

A district school board may – and typically does – delegate the authority to suspend a student from classes to the individual school principals or their designees for certain offenses.<sup>65</sup> Colorado law lists specific offenses for which principals or their designee may suspend a student and caps the length of suspension depending on the type of misbehavior.<sup>66</sup> The chart below lists all behaviors for which a student may be suspended (or expelled), along with the maximum number of days the student may be excluded from campus.<sup>67</sup> If a principal does not have the authority to suspend a student for a listed offense, that lack of authority is reflected in the chart by the phrase “N/A,” or not applicable.<sup>68</sup> For those offenses, only district school boards are able to impose suspensions because they are unable to delegate their authority to school principals in those circumstances.<sup>69</sup>

<b>Behavior Warranting Possible Suspension or Expulsion</b>	<b>Maximum Number of Suspension Days</b>
Continued willful disobedience	5
Open and persistent defiance of proper authority	5
Willful destruction or defacing of school property	5
Behavior on <u>or</u> off school property that is detrimental to the welfare or safety of other students or school personnel, including behavior that creates a threat of physical harm to the student or other students	5
Declaration as a “habitually disruptive student”	N/A

<sup>65</sup> § 22-33-105(2)(a), C.R.S.

<sup>66</sup> *Id.*; § 22-33-106(1), C.R.S.

<sup>67</sup> §§ 22-33-105(2)(a), 22-33-106(1), C.R.S.

<sup>68</sup> §§ 22-33-105(2)(a), 22-33-106(1), C.R.S.

<sup>69</sup> §§ 22-33-105(2)(a), 22-33-106(1), C.R.S.

Possessing a dangerous weapon on school grounds, in a school vehicle, or at a school activity or event (without authorization)	10
Drugs or controlled substances – use, possession, or sale on school grounds, in a school vehicle, or at a school activity/event	10
Robbery – committing an act on school grounds, in a school vehicle, or at a school activity or event that would be considered robbery if committed by an adult	10
Assault – committing an act on school grounds, in a school vehicle, or at a school activity or event that would be considered assault if committed by an adult (other than third degree assault)	10
Repeated interference with the school’s ability to provide educational opportunities to other students	5
Firearm facsimile that could reasonably be mistaken for a firearm – carrying, using, actively displaying, or threatening on school property	N/A
Making a false accusation of criminal activity against an employee of an educational entity to law enforcement or to the school district	N/A
Unlawful sexual behavior <sup>70</sup>	N/A
Crime of violence <sup>71</sup>	N/A

<sup>70</sup> § 16-22-102(9), C.R.S. As discussed in Section III, “unlawful sexual behavior” encompasses the commission of, or attempt to commit, twenty-eight separate crimes, all of which fall into the following basic categories: sexual assault; incest; indecent exposure; child prostitution; sexual exploitation of a child; and unlawful sexual contact (meaning that the offender subjects the victim to any sexual contact without consent). *Id.* More information on this topic is provided later in this subsection.

<sup>71</sup> § 18-1.3-406(2)(a)(I), C.R.S. As discussed in Section III, a “crime of violence” occurs when a student commits one of the eleven following crimes while using or threatening to use a deadly weapon or when serious bodily injury or death occurs: (1) any crime against an at-risk adult or at-risk juvenile; (2) murder; (3) first or second degree assault; (4) kidnapping; (5) a sexual offense; (6) aggravated robbery; (7) first degree arson; (8) first degree burglary; (9) escape; (10) criminal extortion; or (11) first or second degree unlawful termination of pregnancy. *Id.* A “crime of violence” also includes any unlawful sexual offense in which the student caused bodily injury to the victim, or in which the student used threat, intimidation or force against the victim. *Id.*

Additionally, if the circumstances of an individual student’s suspension so warrant, the school district’s “Executive Officer” may extend a suspension beyond the limits listed above for up to an additional ten school days.<sup>72</sup> The Executive Officer may extend the suspension another ten days (for a total of twenty additional days) to bring the matter before the next school board meeting.<sup>73</sup> However, the total period for which a student may be suspended cannot exceed twenty-five days.<sup>74</sup>

While most of the above-listed behaviors are self-explanatory, the “habitually disruptive student” category merits further attention. As discussed in Section I of this Guide, Colorado law specifies that a student may be declared to be a “habitually disruptive student” if the student “has caused a material and substantial disruption on school grounds, in a school vehicle, or at a school activity or sanctioned event three or more times during the school year.”<sup>75</sup> If a school determines that a student is “habitually disruptive,” it must provide written notification of the determination to both the student and the student’s parent or guardian.<sup>76</sup> The notification must advise the student and parents/guardians of the legal definition of a

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<sup>72</sup> § 22-33-105(2)(b), C.R.S. As defined by statute, “Executive Officer” is either the superintendent of schools or the head administrative officer designated by a board of education to execute its policy decisions. § 22-33-102(6), C.R.S.

<sup>73</sup> § 22-33-105(2)(b), C.R.S.

<sup>74</sup> *Id.* The twenty-five-day maximum has previously been held to be reasonable. *Hernandez v. Sch. Dist. No. One, Denver, Colo.*, 315 F. Supp. 289, 293-94 (D. Colo. 1970) (“There is no evidence that the suspension period of twenty-five days is an unreasonable time to allow the principal and superintendent to attempt to resolve problems of discipline and behavior which is inimical to the welfare, safety, or morals of other pupils, before resorting to expulsion.”).

<sup>75</sup> § 22-33-106(1)(c.5)(II), C.R.S.

<sup>76</sup> *Id.* at (1)(c.5)(III).

“habitually disruptive” student, and it must outline the specific incidents that warranted the determination in the student’s case.<sup>77</sup>

The statutory designation of a “habitually disruptive student” is unique to Colorado law and the contours of the definition have yet to be interpreted by Colorado courts. However, other courts that have addressed similar legal standards regarding student misconduct or misbehavior may help provide some guidance.

For example, in *Tinker v. Des Moines Independent Community School District* – a case discussed in Section II of this Manual – the U.S. Supreme Court held that a student’s behavior may be considered a “substantial disruption” or “material interference” when it “interrupt[s] school activities” or “intrude[s] in the school affairs or lives of others.”<sup>78</sup> The Court indicated that such behavior must affect “the work and discipline of the school.”<sup>79</sup> Similarly, in determining what level of student misbehavior qualified as a “substantial disruption,” a federal district court in California held that a school’s decision “must be anchored in something greater than one individual student’s difficult day (or hour) on campus.”<sup>80</sup> This case examined *Tinker* and noted that “a material and substantial disruption is one that affects the ‘work of the school’ or ‘school activities’ in general” – not just a handful of students.<sup>81</sup>

Because Colorado courts have yet to address this standard, each school district’s discipline and conduct code should include language that guides school officials through the process of assessing whether a student is “habitually disruptive.” Not only will this help clarify the standard for the district, but it will also ensure the fair administration of student discipline.

In addition, with the passage of the 2017 teen sexting law, there may be some questions as to what constitutes “unlawful sexual behavior” for purposes of student discipline. Once a school board of education has been notified of a petition in juvenile court alleging that a student has committed

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<sup>77</sup> *Id.*

<sup>78</sup> 393 U.S. 503, 514 (1969).

<sup>79</sup> *Id.* at 513.

<sup>80</sup> *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1119 (C.D. Cal. 2010).

<sup>81</sup> *Id.* (quoting *Tinker*, 393 U.S. at 509, 514).

an offense constituting unlawful sexual behavior (see Section III), Colorado law requires the board to determine whether suspension or expulsion of the student is appropriate.<sup>82</sup> The teen sexting law creates lower-level juvenile offenses for sexting conduct to provide a more appropriate juvenile alternative to the serious child pornography felony charges that were previously, and exclusively, available to prosecutors.<sup>83</sup>

The lowest level of these offenses is a civil infraction for the exchange of sexting images between consenting juveniles.<sup>84</sup> Because a civil infraction does not result in juvenile court proceedings, school boards are not required to consider suspension or expulsion for this sexting behavior. In contrast, the teen sexting law also creates two more serious juvenile criminal offenses for the nonconsensual possession or posting of sexually explicit images.<sup>85</sup> These offenses are charged as criminal petty offenses or misdemeanors and could result in juvenile court proceedings.<sup>86</sup> Consequently, boards may have to consider discipline for possession or posting offenses. For more information on the 2017 teen sexting law, see the complete discussion on this topic in Section V.

## 2. Expulsion

All of the grounds for suspension listed in the chart above are also grounds for expulsion.<sup>87</sup> In addition, a school can expel a student if the school determines the student does not qualify for admission or continued attendance at the school.<sup>88</sup> In the case of a student with a physical or mental disability, as noted above, the student may be expelled in the very limited circumstances where the disability is such that the student cannot reasonably benefit from the programs available or it causes the attendance of the student to be inimical to the welfare of the other students.<sup>89</sup>

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<sup>82</sup> §§ 19-1-304, 22-33-105, C.R.S.

<sup>83</sup> 2017 Colo. Sess. Laws, ch. 390, § 1 at 2012-13.

<sup>84</sup> *Id.* at § 18-7-109(3) at 2014.

<sup>85</sup> *Id.* at § 18-7-109(1)-(2) at 2013-14.

<sup>86</sup> *Id.*

<sup>87</sup> § 22-33-106(1), C.R.S.

<sup>88</sup> *Id.* at (2); § 22-33-105(2)(c), C.R.S.

<sup>89</sup> § 22-33-106(2), C.R.S.

It is important to note that after a student is expelled, the school district may have an ongoing obligation to the student.<sup>90</sup> Upon request of a student or the student’s parent, the district shall help provide educational services that are deemed appropriate for the student, which may include alternative educational programs or home instruction.<sup>91</sup> This topic is addressed in greater detail later in this Section.

The Colorado General Assembly has emphasized that expulsion is a disciplinary tool that should be used sparingly as a “last step taken after several attempts to deal with a student who has discipline problems.”<sup>92</sup> Students should be expelled only when their behavior “would cause imminent harm to others” or when the incident is of a type that requires mandatory expulsion.<sup>93</sup> For example, if a student brings a firearm to school, the school must expel the student for at least one year, except that the superintendent may modify this requirement on a case-by-case basis in writing.<sup>94</sup> Similarly, expulsion is mandatory if a student is adjudicated delinquent or convicted of any of the following offenses committed on school grounds, in a school vehicle, or at a school-sanctioned event:

- Possession of a dangerous weapon;
- The use, possession, or sale of drugs; or
- Commission of an act that would constitute robbery or assault if committed by an adult.<sup>95</sup>

### **3. Due Process Considerations**

When considering exclusionary discipline, officials must be mindful of students’ due process rights. This subsection will examine the kind of due process afforded students for both suspensions and expulsions – from initial hearings to appellate processes.

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<sup>90</sup> § 22-33-203(2)(a), C.R.S.

<sup>91</sup> *Id.* at (1)-(2)(a).

<sup>92</sup> § 22-33-201, C.R.S.

<sup>93</sup> *Id.*

<sup>94</sup> § 22-33-106(1.5), C.R.S.

<sup>95</sup> § 22-33-106.5, C.R.S. (citing § 22-33-106(1)(d)(I)-(III), C.R.S.).

**a. Suspension**

Students who are suspended are entitled to a hearing.<sup>96</sup> The length of the suspension determines the type of hearing that must be provided:

- ***Suspension of ten school days or less:*** A student must receive an informal hearing by the school principal (or principal’s designee) prior to being removed from school.<sup>97</sup> If the suspension is emergent, the student may be removed from school immediately, but the student must receive an informal hearing as soon as possible.<sup>98</sup>
- ***Suspension for more than ten school days:*** A longer suspension triggers more formal due process protections, should the student seek them.<sup>99</sup> A student suspended for more than ten days must be afforded the opportunity to request a review of the suspension before an appropriate official of the school district.<sup>100</sup>

Colorado law does not specify procedures for an informal hearing.<sup>101</sup> Nevertheless, the school should strive to provide the student with a fair hearing, consistent with basic due process principles.<sup>102</sup> The U.S. Supreme Court has held that basic due process should include, “[a]t the very minimum,[that] students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.”<sup>103</sup>

Consequently, an informal hearing should include oral or written notice of the accusation against the student, an explanation of the evidence on which the charges are based, and a meeting at which the student has the opportunity to tell the student’s side of the story.<sup>104</sup> However, an informal hearing does not include the right to have counsel present, to confront and cross-examine witnesses, or to call witnesses to testify as to the student’s

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<sup>96</sup> § 22-33-105(3)(c).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* (failing to outline such requirements).

<sup>102</sup> *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 581.

version of the incident.<sup>105</sup> The informal hearing can be rudimentary, and it can take place within minutes after the alleged offense has occurred.<sup>106</sup>

Once a student is suspended, the school must immediately notify the parent or legal guardian that the student has been suspended, the grounds for the suspension, the period of suspension, and the time and place for the parent or guardian to meet with the principal (or the individual who suspended the student, if it was not the principal).<sup>107</sup> As an alternative to suspension, the school district must also have a policy that allows the student's parent or guardian to attend classes with the student (with the consent of the teacher).<sup>108</sup>

The school shall provide an opportunity for the student to make up schoolwork for full or partial academic credit during the period of suspension.<sup>109</sup> The intent of this requirement is to help the student reintegrate into the educational program and to help prevent the student from dropping out of school.<sup>110</sup> School officials should take this intent into consideration when determining the amount of academic credit to award the student for makeup work.<sup>111</sup>

### **b. Expulsion**

Unlike the informal suspension hearings described above, an expulsion hearing is a more formal proceeding. If requested by the student or the student's parent or guardian, an expulsion hearing must be conducted by a hearing officer prior to the student's actual expulsion.<sup>112</sup> The hearing officer can either be the superintendent, an individual designated by the board, or members of the board, itself.<sup>113</sup> At the hearing, the student should be allowed

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<sup>105</sup> *Id.* at 583.

<sup>106</sup> *Id.* at 582.

<sup>107</sup> § 22-33-105(3)(a), C.R.S.

<sup>108</sup> *Id.* at (4).

<sup>109</sup> *Id.* at (3)(d)(III).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at (2)(c) ("No board of education shall deny admission to, or expel, any child without a hearing, if one is requested.").

<sup>113</sup> *Id.*

to present evidence about his or her version of the incident.<sup>114</sup> The student should also be allowed to present evidence about his or her character in support of an argument that a lesser sanction would be more appropriate.<sup>115</sup>

School districts must ensure that the hearing is fair to the student. If the hearing is not fair, the student could challenge the expulsion in court as discussed below.<sup>116</sup> A successful challenge may result in an order for a new expulsion hearing and thus delay the expulsion.<sup>117</sup> In *Nichols v. DeStefano*, a school district refused to allow a student to request testimony from two teachers at her expulsion hearing.<sup>118</sup> On review, rather than narrowly focusing on the technical issues, the Colorado Court of Appeals considered “the totality of the procedures afforded and their effect on the fundamental fairness of the hearing.”<sup>119</sup> The court held that “the School District [was] not allowed to isolate potential witnesses from the student.”<sup>120</sup> Instead, a proper expulsion hearing must allow the student to be heard on the potential sanction to be imposed, which includes allowing the student to “present effectively all relevant evidence and challenge the evidence offered against her.”<sup>121</sup>

A hearing officer must be careful when considering a student’s admission of any act that would result in mandatory expulsion. A student’s statement may not be used against him or her unless (1) it was signed by the student and (2) a parent or legal guardian was present when the student signed the document or a reasonable attempt was made to contact the parent or legal guardian.<sup>122</sup> For the purposes of this restriction, a “reasonable attempt” means that the school district must call each of the phone numbers

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<sup>114</sup> See, e.g., *Goss v. Lopez*, 419 U.S. 565, 568 n.2 (1975) (describing the procedure employed by the school district in question that permitted a student to provide his or her “version of the story”).

<sup>115</sup> *Nichols v. DeStefano*, 70 P.3d 505, 508 (Colo. App. 2002).

<sup>116</sup> See §§ 22-33-105(2)(c), 22-33-108, C.R.S. (outlining the procedures by which a student may appeal a decision denying admission or expelling the student).

<sup>117</sup> See *Nichols*, 70 P.3d at 506 (affirming the district court’s remand of the case back to the School District for rehearing of the expulsion proceeding).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 507.

<sup>120</sup> *Id.* at 508.

<sup>121</sup> *Id.*

<sup>122</sup> § 22-33-106.3(1), C.R.S.

provided by the parent or legal guardian as well as all additional phone numbers provided by the student.<sup>123</sup>

After the hearing, the hearing officer must issue a written decision within five days.<sup>124</sup> If the hearing officer is not the superintendent, then the hearing officer must prepare findings of fact and a recommendation regarding expulsion and send it to the Executive Officer (as defined above) at the conclusion of the hearing.<sup>125</sup> The Executive Officer will still have five days following the hearing to make a decision.<sup>126</sup> If the Executive Officer decides to expel the student, the student has ten days to appeal the decision to the school district's board of education.<sup>127</sup> Any appeal filed after the ten day deadline may be accepted at the discretion of the board.<sup>128</sup>

Once an expulsion decision is appealed, the school district's board of education will review the facts and arguments presented at the hearing.<sup>129</sup> Although the board may ask clarification questions regarding the record, the board's review is generally limited to the hearing officer's decision.<sup>130</sup> The board shall decide whether to uphold or overturn the expulsion.<sup>131</sup>

Following the board's decision, the student can request further review by the state district court.<sup>132</sup> The student or his or her parent or legal guardian must provide the board with written notification of their intent to appeal within five days of receiving official notification of the board's decision.<sup>133</sup> The board must then issue a statement of the reasons for the board's actions to the student or his or her parent or legal guardian.<sup>134</sup> Within ten days of receiving the statement of reasons, the student or parent or legal guardian may file an

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<sup>123</sup> *Id.*

<sup>124</sup> § 22-33-105(2)(e), C.R.S.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> § 22-33-108(1), C.R.S.

<sup>133</sup> *Id.* at (2).

<sup>134</sup> *Id.*

action in district court requesting that the board's decision be set aside.<sup>135</sup> The district court will review the matter under Colorado Rule of Civil Procedure 106(a)(4) and Colorado Rule of Juvenile Procedure 3.8 to determine whether the board abused its discretion.<sup>136</sup> The district court "must examine the entire procedure used in the student's expulsion, including the board's exercise of discretion to provide a certain level of due process to the student."<sup>137</sup>

Because the student may appeal the decision to the district's board of education and district court, it is important that the hearing officer conduct the hearing in a fair manner and write a detailed opinion that appropriately reflects the basis of the hearing officer's decision.

Each school district must annually report the number of expelled students from schools within the district to the State Board of Education.<sup>138</sup> Expelled students are not included when calculating the drop-out rate from the school or the district as a whole.<sup>139</sup>

#### **4. Services for Expelled Students**

If a student is expelled from a school, the school district must provide the student's parents or guardians with information about the educational alternatives available to the student during the expulsion period.<sup>140</sup> If the student's parents or guardians choose a home-based educational program and request assistance with obtaining the appropriate curricula, the school must assist them.<sup>141</sup>

Also upon request, the school district must provide any appropriate educational services.<sup>142</sup> Such services must provide instruction in reading, writing, math, science, and social studies, and they may be done through

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at (3); C.R.C.P. 106(a)(4) (explaining that abuse of discretion is the appropriate standard of review in these types of cases).

<sup>137</sup> *Nichols v. DeStefano*, 70 P.3d 505, 507 (Colo. App. 2002) (citing *Tepley v. Pub. Emps. Ret. Ass'n*, 955 P.2d 573, 578 (Colo. App. 1997)).

<sup>138</sup> § 22-33-105(2.5), C.R.S.

<sup>139</sup> *Id.*

<sup>140</sup> § 22-33-203(1), C.R.S.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at (2)(a).

tutoring, alternative educational programs, or vocational training programs.<sup>143</sup> The school district may select one or more services that best fit the student's needs.<sup>144</sup>

The services provided must be designed to enable the student to return to school, successfully complete the high school equivalency exam, or enroll in a private or alternative school.<sup>145</sup> If the student is not receiving alternative educational services through the school district, school officials must contact the student's parent or legal guardian at least once every sixty days until the beginning of the next school year to determine whether the student is receiving educational services from another source.<sup>146</sup>

## **5. Re-enrollment Following Expulsion for Certain Crimes**

A student expelled for a sex offense or crime of violence may not enroll or reenroll in the same school where the victim or a member of the victim's immediate family is enrolled or employed.<sup>147</sup> If the school district has only one school in which the expelled student can enroll, the school district may either prohibit the expelled student from enrolling, or, to the extent possible, design a schedule for the expelled student that prevents contact between the expelled student and the victim or victim's family member.<sup>148</sup>

These requirements apply only if the student was convicted, adjudicated as a juvenile delinquent, received a deferred judgment, or placed in a diversion program as a result of committing the offense for which the student was expelled.<sup>149</sup> Additionally, these requirements do not apply if a student was expelled for a crime against property.<sup>150</sup> To determine whether any of these

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<sup>143</sup> § 22-33-201.5(1), C.R.S.

<sup>144</sup> See § 22-33-203(2)(a), C.R.S. (noting that "the school district shall provide, for any student who is expelled from the school district, any educational services that are deemed appropriate for the student by the school district").

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 203(3).

<sup>147</sup> § 22-33-106(4)(a), C.R.S.

<sup>148</sup> *Id.* at 4(b).

<sup>149</sup> *Id.* at 4(d).

<sup>150</sup> *Id.* at 4(c).

provisions apply to the expelled student, the school district must contact the court that oversaw the student's case.<sup>151</sup>

## **6. Disciplining Off-campus Criminal Conduct**

The process for determining what degree of disciplinary action school officials may take against a student for illegal conduct that occurred off-campus depends on the type and severity of the student's offenses.

### **a. Unlawful Sexual Behavior or Crimes of Violence**

If a student is charged with an offense constituting unlawful sexual behavior or a crime of violence for conduct that occurred off-campus, Colorado law provides a statutory framework for evaluating whether the student may be suspended or expelled from school.<sup>152</sup> Once a juvenile has been charged with such an offense – either as a juvenile offender or as an adult – the court and/or prosecutor must notify officials in the student's school district of the charges.<sup>153</sup> Upon receipt of such information, school officials may choose to proceed in one of two ways: (1) take immediate action to suspend or expel the student, or (2) wait to make such a determination until after court proceedings against the student have concluded.<sup>154</sup>

If school officials choose to take immediate action to suspend or expel a student, they must determine whether the student's behavior poses a threat to the safety, welfare, or morals of other students or personnel.<sup>155</sup> In addition, they must determine whether continuing to provide educational services to the student at a school within the district would disrupt the learning environment, provide a negative example to other students, or create a dangerous and unsafe environment.<sup>156</sup> If school officials determine that the student should not be educated in the school, they have the

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<sup>151</sup> *Id.*

<sup>152</sup> § 22-33-105(5), C.R.S.

<sup>153</sup> *Id.* at (5)(a).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

authority to take immediate action to remove the student from the school's campus.<sup>157</sup>

School officials may also choose to wait until the court proceedings against the student have concluded before determining whether to expel the student.<sup>158</sup> If the school officials decide to wait, the school district must provide the student with access to an appropriate alternate education program, such as an online or home-based program.<sup>159</sup> Under these circumstances, the student shall not be allowed to return to the school until the court case has been resolved.<sup>160</sup> If the student pleads guilty, is found guilty, or is adjudicated a juvenile delinquent, then the school may proceed with expulsion proceedings.<sup>161</sup>

#### **b. Other Off-campus Offenses**

If a student is charged with any other offense for off-campus conduct, the student may be suspended or expelled only if the behavior “creates a threat of physical harm,” or is otherwise “detrimental to the welfare or safety” of other students or school staff members.<sup>162</sup> This standard necessarily dictates that, when a student has been charged with anything other than an offense constituting unlawful sexual behavior or a crime of violence, any disciplinary determinations must be made on a case-by-case basis. For instance, if a student is criminally charged for an off-campus assault, it would be important to consider whether the student has displayed similar conduct in school. If the student has always been a model pupil on-campus, he may not be suspended or expelled; however, if the student has been involved in similar fights or assaults at school, the student may be suspended or expelled.<sup>163</sup>

Additionally, when deciding whether to suspend or expel a student based on off-campus behavior, school districts should be aware that Colorado case law limits school districts' disciplinary authority to conduct bearing

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at (5)(b).

<sup>161</sup> *Id.*

<sup>162</sup> § 22-33-106(1)(c), C.R.S.

<sup>163</sup> *Id.*

“some reasonable relationship to the educational environment.”<sup>164</sup> In *Martinez v. School District Number 60*, a district-wide policy provided for the automatic suspension of any student “who has sold, used, consumed, *is affected by*, [or] has in his/her possession” any type of alcohol.<sup>165</sup> Two students were suspended pursuant to the policy because their breaths smelled of alcohol while at a school dance.<sup>166</sup> There was no additional evidence that either student was “affected by” alcohol.<sup>167</sup> At trial, the court upheld the suspensions on the basis that the students’ consumption of alcohol violated the district’s policy, regardless of whether the students were affected by the alcohol during the school event.<sup>168</sup> However, the Colorado Court of Appeals reversed the trial court because the policy and subsequent suspensions did not “bear some reasonable relationship to the educational environment.”<sup>169</sup> Ultimately, the court concluded that “a school district cannot regulate purely private activity having no effect upon [the school] environment.”<sup>170</sup>

School administrators should also be mindful that punishing a student for off-campus conduct could implicate the student’s First Amendment right to free speech. In *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court noted that students’ on-campus speech is ordinarily protected by the Constitution; however, the Court held that school officials may nevertheless discipline students for on-campus speech if they are able to demonstrate the speech would “materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school and collid[e] with the rights of others.”<sup>171</sup>

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<sup>164</sup> See, e.g., *Martinez v. Sch. Dist. No. 60*, 852 P.2d 1275, 1278 (Colo. App. 1992).

<sup>165</sup> *Id.* at 1276 (emphasis in original).

<sup>166</sup> *Id.* at 1277.

<sup>167</sup> *Id.* (internal quotation marks omitted).

<sup>168</sup> *Id.* at 1278.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> 393 U.S. 503, 513 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (quotation marks omitted)).

In recent years, courts have extended the *Tinker* standard to students' off-campus speech as well.<sup>172</sup> To discipline a student for off-campus speech, the speech must be directed towards the school community and must cause an actual, substantial disruption on-campus or be reasonably anticipated to cause such a disruption.<sup>173</sup> This "speech" distinction can even arise when evaluating a student's use of social media, including online platforms such as YouTube, Twitter, and Facebook.<sup>174</sup>

Ultimately, the existing case law does not clearly define the outer limits of schools' ability to limit students' off-campus speech and conduct. Therefore, schools should consult with legal counsel when evaluating these kinds of cases.

## **F. Grounds for Denial of Admission**

Colorado law permits a school to deny admission to a student in eight circumstances:

- 1) Where a student's physical or mental disability is such that the student could not reasonably benefit from the programs available;
- 2) Where a student's physical or mental disability or disease would threaten the welfare of the other students;
- 3) Where a student has previously graduated from any secondary school or received a document demonstrating that the student completed the equivalent of a secondary curriculum;
- 4) Failure to meet the requirements of age, as fixed by the Board of Education, by a child who has reached the age of six at a time after the beginning of the school year;

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<sup>172</sup> See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (collecting cases and concluding that the majority of circuit courts have applied *Tinker* to off-campus speech).

<sup>173</sup> *Id.* at 396.

<sup>174</sup> *Id.* at 393 (examining discipline imposed for a student's posting of a video to YouTube); see also *Sagehorn v. Indep. Sch. Dist. No. 728*, 122 F. Supp. 3d 842, 848 (D. Minn. 2015) (examining discipline imposed for a student's "tweet" on Twitter); *Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057, 1060 (D. Or. 2015) (examining discipline imposed for a student's comments posted to Facebook).

- 5) Where a student has been expelled from any school district in the previous twelve months;
- 6) Where a student resides outside of the school district (unless otherwise entitled to attend);
- 7) Where a student fails to satisfy immunization requirements; or
- 8) Where a student's behavior in another school district in the previous twelve months was deemed detrimental to the welfare or safety of other students or of school personnel in that other district.<sup>175</sup>

Most relevant to the purposes of this Manual are the circumstances laid out in 5) expulsion from a peer school or district, and 8) a history of problematic behavior in another school district. Under these circumstances, school officials should consult with their Threat Assessment Team prior to accepting and enrolling the student. In addition, school officials should keep in mind their authority to access criminal justice and law enforcement records to assist them in evaluating the situation.

The parents or guardians of a student who is seeking to enroll in a school district may request a hearing on the matter.<sup>176</sup> If a hearing is requested, a school district may not deny the student admission until after the hearing has been conducted.<sup>177</sup> The same notice and procedural requirements apply to a denial of admission hearing as apply to an expulsion hearing.<sup>178</sup> For an in-depth discussion of those requirements, please refer to that subsection above.

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<sup>175</sup> § 22-33-106(2)-(3), C.R.S.

<sup>176</sup> § 22-33-105(2)(c), C.R.S.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

## V. CRIMINAL OFFENSES SPECIFIC TO SCHOOLS

This Section sets out the General Assembly's recommendations on how school districts can, through the enactment of effective policies, strike a proper balance between maintaining school and student safety and preventing unnecessary law enforcement interventions. As discussed in Section IV, the legislature has made it clear that school officials should not involve law enforcement in routine student discipline matters. However, Colorado law also outlines offenses and enhanced punishments for conduct that either occurs on school property or specifically involves a school-age population (e.g. juveniles). For these kinds of offenses, particularly those involving weapons and drugs, law enforcement is an important resource in maintaining safe schools.

### A. Law Enforcement Referral Policies

While school and student safety benefit from schools' partnerships with local and state law enforcement, the General Assembly encourages schools to be cautious and consider the possible negative consequences of exposing students to unnecessary law enforcement intervention.<sup>1</sup> In 2012, the Colorado General Assembly declared that an inflexible "zero-tolerance" approach to student discipline has resulted in unnecessary expulsions, out-of-school suspensions, and referrals to law enforcement agencies.<sup>2</sup> Instead, school districts are encouraged to address minor conflicts and misbehavior common to a student's developmental stage without involving the criminal justice or juvenile justice systems.<sup>3</sup>

The Colorado Safe Schools Act requires schools to design and adopt disciplinary policies intended to reduce suspensions, expulsions, and law enforcement referrals.<sup>4</sup> Towards that end, the General Assembly encourages each school district to include in its school conduct and discipline code a specific policy that identifies which violations of the code will require a

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<sup>1</sup> 2012 Colo. Sess. Laws, ch. 188, § 21 at 730-32.

<sup>2</sup> *Id.* at § 21(1)(a) at 730.

<sup>3</sup> *Id.* at § 21(1)(b) at 730.

<sup>4</sup> § 22-32-109.1(2)(a)(II)(A), C.R.S.

referral to law enforcement, either due to the seriousness of the offense or because of state or federal reporting laws.<sup>5</sup>

School districts are also encouraged to identify other violations of the code where a school administrator or school district may exercise discretion over whether to refer a matter to law enforcement.<sup>6</sup> In doing so, the policy is encouraged to identify which factors school officials will consider when exercising such discretion. At a minimum, these factors should include the following: the student's age; the student's disciplinary history; whether the student has a disability; the seriousness of the offense; whether the misconduct threatened the safety of another student or staff member; and whether a lesser intervention would properly address the violation.<sup>7</sup>

## **B. Offenses on School Property**

Colorado criminal law statutes define criminal offenses separately from punishment enhancers resulting from certain conduct on school property. Some of the school-related crimes that receive separate sentence enhancers include the following: 1) weapons offenses; 2) drug offenses; 3) interference or disruption of the educational process; 4) offenses against at-risk juvenile victims; 5) hazing offenses; and 6) offenses endangering public transportation, including school buses.

### **1. Weapons**

In Colorado, special laws address the possession of weapons on school property. The categories of those weapons and where weapons are prohibited is discussed below. Of course, these criminal statutes set forth the minimum expectations regarding the possession of weapons on school property. Individual schools or school districts may adopt more stringent rules within their school safety policy.

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<sup>5</sup> 2012 Colo. Sess. Laws, ch. 188, § 21(1)(f)(I) at 731.

<sup>6</sup> *Id.* at § 21(1)(f)(II) at 731.

<sup>7</sup> *Id.* at § 21(1)(f)(III) at 731.

It is a felony under Colorado law to bring or possess a “deadly weapon” on the property of any kindergarten through 12<sup>th</sup> grade school.<sup>8</sup> This prohibition extends across the entirety of the school property, including all areas inside and outside of the buildings.<sup>9</sup> The statutory definition of a “deadly weapon” includes a firearm (loaded or unloaded), a knife, bludgeon, or any other object if it is used or could be used in a way that is capable of causing serious bodily injury or death.<sup>10</sup> Although it may sound fairly straightforward, each of the above-listed weapons has a specific definition.

A firearm is any device that is or could be capable of discharging bullets, cartridges, or other explosive projectiles.<sup>11</sup> This definition encompasses those items traditionally recognized as firearms such as pistols, rifles, and shotguns, but it can also include any hand-made item that fires a projectile using an explosion.<sup>12</sup> Thus, a homemade device such as a pipe that can launch a projectile (e.g., a “zip gun”) would count as a firearm.<sup>13</sup>

To be a “deadly weapon,” a knife must have a blade over 3.5 inches long.<sup>14</sup> For a knife with a blade length of 3.5 inches or shorter to fall within the “deadly weapon” category, there must be some additional evidence that the student used or intended to use the knife as a weapon.<sup>15</sup> While a knife with a blade less than 3.5 inches in length may not fall within the definition of a “deadly weapon” (barring its use or intent to use), this is not a per se allowance for a person to carry the knife onto school grounds. Colorado

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<sup>8</sup> § 18-12-105.5(1), C.R.S. A “deadly weapon” is distinguishable from a “dangerous weapon” as defined in the School Attendance Law of 1963. Compare § 18-1-901(3)(e), C.R.S. with § 22-33-102(4), C.R.S. Note that some dangerous weapons also qualify as deadly weapons.

<sup>9</sup> § 18-12-105.5(1), C.R.S.

<sup>10</sup> § 18-1-901(3)(e), C.R.S. The statutory definition of a “serious bodily injury” is an “injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death; a substantial risk of protracted loss or impairment of the function of any part or organ of the body; or breaks, fractures, or burns of the second or third degree.” § 18-1-901(3)(p), C.R.S.

<sup>11</sup> *Id.* at (3)(h).

<sup>12</sup> *Id.*

<sup>13</sup> *People v. O’Neal*, 228 P.3d 211, 215 (Colo. App. 2009) (explaining that a “zip gun,” which is a pipe device capable of discharging bullets and the like, is a firearm).

<sup>14</sup> § 18-12-101(f), C.R.S.

<sup>15</sup> *People ex rel J.W.T.*, 93 P.3d 580, 583 (Colo. App. 2004).

courts have confirmed that schools may adopt express rules or policies prohibiting possession of any knife or weapon on campus.<sup>16</sup>

To determine whether an object other than a firearm or a knife qualifies as a deadly weapon is a two-step process: first, the object must be used or intended to be used as a weapon, and second, the object must be capable of causing serious bodily injury.<sup>17</sup> For example, despite the fact that BB guns are not typically considered firearms under the above definition, the Colorado Court of Appeals has concluded that a BB gun constitutes a deadly weapon.<sup>18</sup> In that case, while the defendant admitted to using a weapon to shoot the victim, he argued that he had not used a “deadly weapon” because he did not intend to cause serious bodily injury or death to the victim.<sup>19</sup> In rejecting the defendant’s argument, the Colorado Court of Appeals reasoned that there was sufficient evidence that a BB could cause serious bodily injury if one were to hit a vulnerable area of the body, such as the eyes, and therefore it concluded that a BB gun is a deadly weapon.<sup>20</sup>

There are additional rules for juveniles regarding possession of what the law defines as “dangerous weapons.”<sup>21</sup> A juvenile can be suspended, expelled, and/or denied admission if they possess a dangerous weapon on school grounds, in a school vehicle, or at a school activity or school-sanctioned event without the authorization of the school or the school district.<sup>22</sup>

The definition of a dangerous weapon is broader than the definition of a deadly weapon, and therefore the definition includes a number of items also listed as a deadly weapon. For example, the definition of a dangerous weapon includes firearms, knives with blades over 3.5 inches in length, and

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<sup>16</sup> *Id.*

<sup>17</sup> § 18-1-901(3)(e), C.R.S.

<sup>18</sup> *People v. J.R.*, 867 P.2d 125, 127 (Colo. App. 1993).

<sup>19</sup> *Id.* at 126.

<sup>20</sup> *Id.* at 127.

<sup>21</sup> In addition to the specific prohibitions listed above that apply to possession of weapons on school property, there are additional general prohibitions that apply to all juveniles regardless of location. For example, it is against the law for anyone under the age of eighteen to possess a handgun. There are a few exceptions, such as when attending a gun safety course or when practicing at a shooting range, but these exceptions rarely occur while on school property. § 18-12-108.5, C.R.S.

<sup>22</sup> § 22-33-106(1)(d), C.R.S.

objects that are used or intended to be used to cause serious bodily injury or death.<sup>23</sup> However, the definition also includes any pellet, BB gun, or other device designed to propel projectiles by spring action or compressed air (regardless of whether or not it works) as well as a fixed-blade knife with a blade that is longer than three inches in length.<sup>24</sup>

**a. Exemptions to Weapons Prohibitions**

Colorado law has carved out four specific exceptions under which otherwise-prohibited weapons are allowed on school grounds. First, “deadly weapons” may be permitted for the purpose of authorized demonstrations or instructional exhibitions that are related to an organized school or class, for use in an approved educational school program, or for the purpose of participation in an authorized extracurricular activity or athletic team (e.g., archery).<sup>25</sup>

Second, certain employees need to possess deadly weapons on school property in connection with a specific function of their jobs. These people include school resource officers or a peace officer when carrying a weapon in conformance with the policy of the officer’s employing agency.<sup>26</sup> A concealed carry permit holder employed by the school as a security officer may also be armed on campus while they are on duty.<sup>27</sup> Nothing in Colorado law permits teachers, administrators, or other school staff to carry a firearm at school unless they fall specifically within these categories.

Lastly, there are two exceptions unique to vehicles. A person in a private vehicle may carry a weapon for lawful protection of that person’s self or property or the protection of another’s self or property while travelling.<sup>28</sup> This “travelling” exception is most likely to arise when parents are dropping off and picking up children. Concealed carry permit holders visiting a school

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<sup>23</sup> § 22-33-102(4), C.R.S.

<sup>24</sup> *Id.*

<sup>25</sup> §§ 18-12-105.5(1), 18-12-105.5(3)(h), C.R.S.

<sup>26</sup> § 18-12-105.5(3)(e). A “school resource officer” means a law enforcement officer who has specialized training to work with school staff and students, and who is assigned to a public or charter school for the purpose of creating a safe learning environment and responding to all-hazard threats that may impact the school. § 22-32-109.1(1)(g.5), C.R.S.

<sup>27</sup> § 18-12-214(3), C.R.S.

<sup>28</sup> § 18-12-105.5(3)(c), C.R.S.

campus may also have their handgun on school property if it is inside a compartment within the vehicle and the vehicle is locked.<sup>29</sup>

### **b. Public Reporting Requirement**

As part of its safe school plan (see Section I), each public school must annually report certain information to the school district's board of education.<sup>30</sup> This reporting requirement is known as safe school reporting, and the reports are compiled, submitted to the department of education, and are ultimately made available to the general public.<sup>31</sup> As part of the safe school reporting, all incidents involving weapons possession on school grounds, in a school vehicle, or at a school event must be reported.<sup>32</sup>

## **2. Drugs**

Under Colorado law, it is a crime to possess or sell drugs and certain other substances on school property.<sup>33</sup> In addition, substances legally permitted elsewhere may nevertheless be prohibited on school property. The 2015 Healthy Kids Colorado Survey Report indicated that the top four substances reportedly abused by high school students are alcohol, marijuana, tobacco, and prescription drugs.<sup>34</sup> Children are particularly susceptible to the negative effects and impacts of these substances.

Substantial drug-related penalties are imposed when a person is convicted of selling drugs at or near school grounds.<sup>35</sup> A person selling, distributing, or possessing drugs with the intent to distribute them on or within 1,000 feet of the grounds of any elementary, middle, junior, or high school may be charged with the highest level of drug offense in Colorado.<sup>36</sup> The same elevated level of penalty applies if the offense occurs in any school

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<sup>29</sup> § 18-12-214(3), C.R.S.

<sup>30</sup> § 22-32-109.1(2)(b), C.R.S.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at (2)(b)(IV)(A).

<sup>33</sup> § 18-18-407(1)(g)(I), C.R.S.

<sup>34</sup> DEPT OF PUB. HEALTH & ENV'T, HEALTHY KIDS COLO. SURVEY 2015: SUBSTANCE USE AMONG YOUTH IN COLO. (2015), [https://www.colorado.gov/pacific/sites/default/files/PF\\_Youth\\_HKCS\\_Substance-Infographic.pdf](https://www.colorado.gov/pacific/sites/default/files/PF_Youth_HKCS_Substance-Infographic.pdf) (last visited October 11, 2018) (reporting that 59% of Colorado youth have abused alcohol, 38% marijuana, 20% cigarettes, and 14% prescription drugs).

<sup>35</sup> § 18-18-407(1)(g), C.R.S.

<sup>36</sup> *Id.*

vehicle while transporting students.<sup>37</sup> A “school vehicle” is a vehicle (not limited to a bus) that is owned by or under contract to a school and used to transport students to or from school or a school-related activity.<sup>38</sup>

Furthermore, any distribution of illegal drugs in any amount by an adult to a minor (with at least a two-year age gap) constitutes a felony.<sup>39</sup>

**a. Classifications of Drugs**

Colorado law has classified drugs into several categories, or “schedules,” to indicate the level of danger associated with a particular drug as well as the severity of a potential drug-related offense.<sup>40</sup> Schedule I drugs are considered to be the most dangerous, and therefore offenses related to Schedule I drugs (including possession and distribution) are more serious than those typically associated with a lesser Schedule drug.<sup>41</sup> Similarly, each increase in the Schedule number (II, III, IV, and V) corresponds to a lesser penalty for the illegal possession and sale of drugs contained in that Schedule.<sup>42</sup>

A Schedule I drug is a substance that has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and that lacks accepted safety for use under medical supervision.<sup>43</sup> Schedule I drugs include most of the substances commonly known as illegal street drugs, including heroin, LSD, and ecstasy (MDMA).<sup>44</sup>

A Schedule II drug also has a high potential for abuse, but it has currently accepted standards for medical uses in the United States and is usually subject to substantial restrictions.<sup>45</sup> Abuse of a Schedule II drug may lead to severe psychological or physical dependence.<sup>46</sup> Schedule II drugs

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<sup>37</sup> *Id.*

<sup>38</sup> § 42-1-102(88.5), C.R.S.

<sup>39</sup> §§ 18-18-405(2)(a)(II), 18-18-405(2)(b)(II), C.R.S.

<sup>40</sup> § 18-18-201, et seq., C.R.S.

<sup>41</sup> Compare § 18-18-203, C.R.S. with §§ 18-18-204, 18-18-205, 18-18-206, 18-18-207, C.R.S.

<sup>42</sup> See, e.g., § 18-18-403.5, C.R.S. (prescribing harsher penalties for possession of Schedule I or II drugs than for Schedule, III, IV, or V drugs).

<sup>43</sup> § 18-18-203(1), C.R.S.

<sup>44</sup> *Id.* at (2).

<sup>45</sup> § 18-18-204(1), C.R.S.

<sup>46</sup> *Id.*

include prescription painkillers and stimulants.<sup>47</sup> As shown in the chart below, Schedule II drugs are the most susceptible to abuse by teenagers.

Schedule III drugs have less potential for abuse than Schedules I or II drugs and have current accepted medical use in treatment in the United States.<sup>48</sup> Abuse of a Schedule III drug may lead to moderate or low physical dependence or high psychological dependence.<sup>49</sup> Schedule III drugs include anabolic steroids, prescription sedatives (including sleeping pills), and depressants (such as barbiturates).<sup>50</sup>

Schedule IV drugs have a lower potential for abuse than Schedule II or III drugs and have currently accepted medical use in treatment in the United States.<sup>51</sup> Abuse of a Schedule IV drug may lead to limited physical or psychological dependence.<sup>52</sup> Schedule IV drugs include prescription anxiety medications like Xanax and Ativan; prescription anti-seizure medications like Klonopin; and stimulants like Sudafed (which contains pseudoephedrine).<sup>53</sup>

Finally, Schedule V drugs have the lowest potential for abuse, have currently accepted medical use in treatment in the United States, and carry the least risk of limited physical or psychological dependence.<sup>54</sup> Schedule V drugs include cough syrups that contain a small amount of codeine or buprenorphine used for treating opioid addiction.<sup>55</sup>

#### **b. Prescription Drugs on Campus**

Many otherwise-legal drugs may not be possessed on-campus without a valid prescription from a licensed healthcare professional.<sup>56</sup> A school district board may adopt a policy to allow a student to possess and self-administer a valid prescription drug on school grounds, on a school bus, or at any school-

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<sup>47</sup> *Id.* at (2).

<sup>48</sup> § 18-18-205(1), C.R.S.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at (2).

<sup>51</sup> § 18-18-206(1), C.R.S.

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

<sup>53</sup> *Id.* at (2).

<sup>54</sup> § 18-18-207, C.R.S.

<sup>55</sup> *Id.*

<sup>56</sup> §§ 18-18-403.5, 18-18-308, C.R.S.

sponsored event.<sup>57</sup> However, the school policy must require the parent or legal guardian to notify the school of the student's medical need and the fact that he or she is carrying a prescription drug at school.<sup>58</sup> The school, in turn, should advise teachers (as needed) and the school nurse of the student's medical situation.<sup>59</sup> As discussed later in this Section, different rules apply to medical marijuana.

Many prescription drugs are abused by teens across the country. Below is a table that highlights the common prescription opioids and stimulants that may be abused by teens, the names of those drugs, and their Schedule and statutory location under Colorado law.

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<sup>57</sup> § 22-1-119.3(1), C.R.S.

<sup>58</sup> *Id.* at (2)(a).

<sup>59</sup> *Id.* at (2)(b).

**Table 1.0: Common Prescription Drugs Subject to Abuse**

<b>Drug Name</b>	<b>Retail Name</b>	<b>Schedule</b>	<b>C.R.S.</b>
<b><u>Opioids</u></b> <sup>60</sup>			
Oxycodone	OxyContin, Percodan, Percocet	II	§18-18-204(2)(a)(I)(N)
Hydrocodone	Vicodin, Lortab, Lorcet	II	§18-18-204(2)(a)(I)(J)
Diphenoxylate	Lomotil	II	§18-18-204(2)(b)(VII)
Morphine	Kadian, Avinza, MS Contin	II	§18-18-204(2)(a)(I)(M)
Codeine	N/A	II	§18-18-204(2)(a)(I)(G)
Fentanyl	N/A	II	§18-18-204(2)(b)(VIII)
Hydromorphone	Dilaudid	II	§18-18-204(2)(a)(I)(K)
Methadone	N/A	II	§18-18-204(2)(b)(XIII)
<b><u>Amphetamines/Stimulants</u></b> <sup>61</sup>			
Amphetamines	Adderall, Dexedrine	II	§18-18-204(2)(c)(I)
Methylphenidate	Ritalin, Concerta	II	§18-18-204(2)(c)(IV)

<sup>60</sup> *Prescription Pain Medications (Opioids)*, NAT. INST. ON DRUG ABUSE FOR TEENS, <https://teens.drugabuse.gov/drug-facts/prescription-pain-medications-opioids> (last visited October 10, 2018).

<sup>61</sup> *Prescription Stimulant Medications (Amphetamines)*, NAT. INST. ON DRUG ABUSE FOR TEENS, <https://teens.drugabuse.gov/drug-facts/prescription-stimulant-medications-amphetamines> (last visited October 10, 2018).

### c. Marijuana

Marijuana and certain marijuana products have been legalized in Colorado for recreational use by people over the age of 21 and for medical use.<sup>62</sup> Nevertheless, marijuana and its active ingredient, tetrahydrocannabinol (THC), continues to be listed under the Federal Controlled Substances Act as a Schedule I drug.<sup>63</sup> The General Assembly has noted the dangers of the early use of marijuana, and therefore Colorado generally prohibits the use of marijuana or marijuana products on school property.<sup>64</sup> However, as will be discussed below, a narrow exception applies to medical marijuana.

Possession of marijuana is still a criminal offense in certain circumstances. “Possession of marijuana’ means that a person has or holds any amount of marijuana anywhere on his or her person or that a person owns or has custody of marijuana or has marijuana within his or her immediate presence and control.”<sup>65</sup> Examples of “possession” include having marijuana in a pocket, backpack, or even a locker or car at school. If the possessor is under twenty-one years old and possesses one ounce or less of marijuana, he or she commits the crime of illegal possession or consumption of marijuana by an underage person.<sup>66</sup>

Marijuana possession is a “strict liability offense.”<sup>67</sup> All that is required for commission of a strict liability offense is the conduct itself, meaning that the defendant’s mental state has no bearing on a determination of guilt or innocence – the offense is established solely by possession. That means, for example, it is no defense to a charge of marijuana possession that a student claims to have been holding it for another person or that the student did not know that marijuana was in his or her backpack. The unlawful use, possession, or sale of marijuana on school grounds, in a school

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<sup>62</sup> Colo. Const. art. XVIII, § 16(3) (legalizing marijuana for individuals over the age of 21); § 25-1.5-106, C.R.S. (legalizing marijuana for medical use).

<sup>63</sup> 21 U.S.C. § 812(c).

<sup>64</sup> §§ 18-13-122(1)(a), 25-14-103.5(3)(a)(I), C.R.S.

<sup>65</sup> § 18-13-122(2)(f), C.R.S.

<sup>66</sup> *Id.* at (3)(b).

<sup>67</sup> *Id.*

vehicle, or at a school activity or sanctioned event must be reported in accordance with safe school reporting requirements.<sup>68</sup>

**d. Medical Marijuana**

In 2016, the Colorado General Assembly adopted “Jack’s Law.”<sup>69</sup> Jack’s Law authorizes a “primary caregiver,” as defined by school district policy, to administer medical marijuana in a nonsmokeable form to a student who holds a valid recommendation for medical marijuana.<sup>70</sup> The nonsmokeable marijuana can be administered on the grounds of a preschool, primary or secondary school, on a school bus, or at a school-sponsored event.<sup>71</sup> However, it cannot be administered in a manner that creates a disruption to the educational environment or which causes exposure to other students.<sup>72</sup> After primary caregivers have administered the nonsmokeable marijuana, they are required to remove any remaining product from the grounds of the school, school bus, or school-sponsored event.<sup>73</sup>

In addition, Jack’s Law states that a school may not discipline a student who holds a valid recommendation for medical marijuana solely because the student requires medical marijuana as a reasonable accommodation necessary to attend school.<sup>74</sup> Moreover, a school may not deny admission or attendance to a student merely because the student requires medical marijuana in order to attend school.<sup>75</sup> However, nothing in Jack’s Law requires a member of the school district staff to administer medical marijuana.<sup>76</sup> Finally, school districts and charter schools may adopt policies defining who may act as a primary caregiver to administer medical marijuana to a student as well as policies defining the reasonable parameters of the administration and use of medical marijuana.<sup>77</sup>

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<sup>68</sup> § 22-32-109.1(2)(b)(IV)(C.5), C.R.S.

<sup>69</sup> § 22-1-119.3(3)(d), C.R.S.

<sup>70</sup> *Id.* at (3)(d)(1)(A).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at (3)(d)(I)(B).

<sup>74</sup> *Id.* at (3)(e).

<sup>75</sup> *Id.* at (3)(f).

<sup>76</sup> *Id.* at (3)(d)(II).

<sup>77</sup> *Id.* at (3)(d)(III).

Under Colorado’s general medical marijuana law, a “patient” is defined as a person who has a debilitating medical condition.<sup>78</sup> A “primary caregiver” is defined as a person, other than the patient and the patient’s physician, who is over 18 years old and has significant responsibility for maintaining the patient’s debilitating medical condition.”<sup>79</sup> A parent may be considered his or her child’s primary caregiver.

The exception for nonsmokeable medical marijuana in Jack’s Law is a limited one. The use or possession of medical marijuana by a student or anyone else on school grounds, buses, or activities is still prohibited by law, except for the limited exception outlined above.<sup>80</sup>

Moreover, Jack’s Law does not extend to the medical use of marijuana by school staff. A school employee who has a valid medical marijuana license may still be subject to dismissal (depending upon the school’s policy) if he or she uses medical marijuana at work.<sup>81</sup> In a 2015 employment law case, the Colorado Supreme Court held that a cable company could legally fire an employee who failed a random drug test, even though he had a medical marijuana prescription.<sup>82</sup> The Court said that Colorado’s statute protecting workers who engage in “lawful activities” only refers to those activities that are legal under both state and federal law.<sup>83</sup> Because the federal Controlled Substances Act prohibits the use of medical marijuana and federal law supersedes any state law, the use of marijuana, even for medical purposes, is not a lawful activity under that statute.<sup>84</sup> Therefore, the plaintiff had no basis for a wrongful discharge claim.<sup>85</sup>

Nevertheless, it is important to remember that non-probationary teachers are afforded due process for disciplinary actions. Please consult

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<sup>78</sup> Colo. Const. art. XVIII, § 14(1)(d).

<sup>79</sup> *Id.* at (1)(f).

<sup>80</sup> § 22-1-119.3(3)(c), C.R.S. (policy for student possession and administration of prescription medications); § 25-1.5-106(12)(b)(IV), C.R.S.

<sup>81</sup> *Coats v. Dish Network, LLC*, 350 P.3d 849, 853 (Colo. 2015).

<sup>82</sup> *Id.* at 850-51.

<sup>83</sup> *Id.* at 853.

<sup>84</sup> *Id.* at 852-53.

<sup>85</sup> *Id.* at 851.

with legal counsel before taking any action against a non-probationary teacher regarding the use of marijuana.

Finally, please note that substantial questions exist as to whether Jack’s Law can be legally enforced due to potential conflicts with federal drug laws. It is still a federal crime to maintain a drug-involved premise, to distribute marijuana to persons under the age of twenty-one, or to distribute marijuana in or near schools.<sup>86</sup> Jack’s Law, itself, provides that it does not apply to a school district or charter school if the school loses federal funding as a result of implementing the law.<sup>87</sup> In addition, a school district or charter school may choose to opt-out of Jack’s Law if it conspicuously posts a statement on its website explaining why it will not implement the law.<sup>88</sup> It is strongly advised that a school district or charter school consult with its legal counsel before taking steps to implement Jack’s Law.

#### **e. Alcohol**

The Colorado General Assembly has recognized the dangers of the early use of alcohol.<sup>89</sup> Consequently, a person under the age of twenty-one who possesses or consumes alcohol anywhere in the State of Colorado commits illegal underage possession or consumption of alcohol.<sup>90</sup> “Possession of alcohol” means that a person has or holds any amount of alcohol on his or her person, owns or has custody of alcohol, or has alcohol within his or her immediate presence and control.<sup>91</sup> The number of alcohol violations on school grounds, in a school vehicle, or at a school activity must be included in a school’s required safe school report.<sup>92</sup>

#### **f. Tobacco Products**

Tobacco products are prohibited from use on school property because of the health risks associated with them.<sup>93</sup> Colorado law also generally

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<sup>86</sup> 21 U.S.C. §§ 856, 859, 860.

<sup>87</sup> § 22-1-119.3(3)(d)(IV), C.R.S.

<sup>88</sup> *Id.* at (3)(d)(IV)(C).

<sup>89</sup> § 18-13-122(1)(a), C.R.S. For the purposes of this Section, “alcohol” means “ethyl alcohol” as defined in § 18-13-122(2)(b), C.R.S.

<sup>90</sup> *Id.* at (3)(a).

<sup>91</sup> *Id.* at (2)(e).

<sup>92</sup> § 22-32-109.1(2)(b)(IV)(B), C.R.S.

<sup>93</sup> § 25-14-103.5(1), C.R.S.

prohibits the possession of cigarette or tobacco products by a person who is under the age of eighteen.<sup>94</sup> In furtherance of these laws, school districts and charter schools are required to adopt rules and policies prohibiting their use by students, teachers, staff, and visitors.<sup>95</sup> However, a school cannot expel a student solely for tobacco use.<sup>96</sup>

The definition of “tobacco product” is expansive and includes smokeless tobacco as well as e-cigarettes.<sup>97</sup> All instances of use or possession of a tobacco product on school grounds, in a school vehicle, or at a school activity or event must be included in the school’s required safe school report.<sup>98</sup>

### **3. Disruption on Campus**

Colorado law provides special protections for teachers and school staff on the job. On school grounds, it is a misdemeanor crime to “willfully impede the staff or faculty of such institution in the lawful performance of their duties . . . through the use of restraint, abduction, coercion, or intimidation, or when force and violence are present or threatened.”<sup>99</sup> The use of physical force or the threat of such force is an important element of the crime.<sup>100</sup> For example, a student cannot physically block teachers from entering a classroom or threaten them with violence to try to prevent them from assigning homework.

It is also unlawful to willfully impede students in the pursuit of their educational activities “through the use of restraint, abduction, coercion, or intimidation, or when force and violence are present or threatened.”<sup>101</sup> This

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<sup>94</sup> § 25-14-301(2)(a), C.R.S.

<sup>95</sup> § 25-14-103.5(3)(a)(I), C.R.S.

<sup>96</sup> § 22-32-109(1)(bb)(I), C.R.S; *see also* § 22-33-106(1), C.R.S. (prescribing a list of offenses for which a student may be expelled, but failing to list tobacco use or possession as an offense warranting expulsion).

<sup>97</sup> §§ 25-14-103.5, 18-13-121(5)(a), C.R.S.

<sup>98</sup> § 22-32-109.1(2)(b)(IV)(D), C.R.S.

<sup>99</sup> § 18-9-109(2), C.R.S.

<sup>100</sup> *See People ex rel. C.A.J.*, 148 P.3d 436, 437 (Colo. App. 2006) (holding that a student willfully impeding a school employee from performing the employee’s duties required that the student also do so “through the use of restraint, abduction, coercion, or intimidation or when force and violence are present or threatened” to come within the meaning of the statute).

<sup>101</sup> § 18-9-109(2), C.R.S.

means that a school official cannot prevent a student from going to class by, for example, detaining them during school without good cause. For further information on student detention, please refer to Section II's discussion of physical intervention and restraint.

To fall within this statute, the act of willful interference must happen on the school's campus. In 2012, the Colorado Court of Appeals examined this "interference" statute in a case involving a student that left voice messages at the school claiming that a bomb was on campus.<sup>102</sup> The court held that the student could not be convicted under the interference statute because he was not on campus at the time of the conduct.<sup>103</sup> At minimum, this statute requires physical presence on school property and is not a legal basis for a criminal charge against a person who causes a campus disruption remotely, although other laws can and will apply.<sup>104</sup>

Furthermore, a person can be asked to leave school grounds if they are committing, threatening to commit, or inciting others to commit any act which would disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions of the institution.<sup>105</sup> It is against the law to refuse to leave school grounds when asked to do so by the chief administration officer, their designee, or a dean.<sup>106</sup> Thus, if a student was repeatedly leaving and entering a classroom during class without authorization, the student could be asked to leave school grounds and would violate the law if failing to do so.

It is a criminal act to knowingly make a credible threat to cause death or bodily injury with a deadly weapon against any student, school employee, or guest on school property.<sup>107</sup> A "credible threat" is "a threat or physical action that would cause a reasonable person to be in fear of bodily injury with

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<sup>102</sup> *People v. C.F.*, 279 P.3d 1231, 1232 (Colo. App. 2012).

<sup>103</sup> *Id.* at 1235-36.

<sup>104</sup> *See, e.g., id.* (noting that the student, despite not being held accountable under the interference statute, could still be held accountable under other provisions of the law for making "a credible threat to cause death or to cause bodily injury" to those at an educational institution).

<sup>105</sup> § 18-9-109(3), C.R.S.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at (6).

a deadly weapon or death.”<sup>108</sup> For example, a person who says, “I hate you, and I hope you fall off a cliff” does not make a credible threat because no reasonable person would be afraid of bodily injury or death as a result of that statement. However, a student that says, “I hate you, and I am going to stab you with the knife I keep hidden in my locker,” probably has made a credible threat. As a general rule, the more specific and realistic the statement is, the more likely it is to be considered a “credible threat.”<sup>109</sup>

Finally, a student who repeatedly interferes with a school’s ability to provide educational opportunities to other students may be suspended, expelled, or denied admission.<sup>110</sup>

#### **4. Offenses against At-risk Juvenile Victims**

Penalties for specified crimes against at-risk juveniles are more severe than the penalties for the commission of identical crimes against other members of society.<sup>111</sup> The Colorado General Assembly has recognized that fear of mistreatment is one of the major personal concerns of at-risk juveniles.<sup>112</sup> An “at-risk juvenile” is a person under the age of eighteen years who has a statutorily defined disability.<sup>113</sup> A “person with disability” means any person who has permanent loss of a hand or foot; is blind or virtually blind; is unable to walk, see, hear, or speak; cannot breathe without mechanical assistance; has an intellectual and developmental disability; has a mental illness; is mentally impaired, or is receiving care and treatment for a developmental disability.<sup>114</sup>

At-risk juveniles are more vulnerable to, and disproportionately damaged by, crime in general.<sup>115</sup> In particular, they are more impacted by abuse, exploitation, and neglect because they are less able to protect

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<sup>108</sup> *Id.* at (6)(b).

<sup>109</sup> *People v. Chase*, 2013 COA 27, ¶¶ 7, 26 (Colo. App. 2013) (defendant’s emails specifically referencing the victims and stating that “someone is going to get hurt or worse” and that he will “headbutt” and “kick” someone constituted a “credible threat”).

<sup>110</sup> § 22-33-106(1)(e), C.R.S.

<sup>111</sup> § 18-6.5-101, C.R.S.

<sup>112</sup> *Id.*

<sup>113</sup> §§ 18-6.5-102(4), 18-6.5-102(11), C.R.S.

<sup>114</sup> § 18-6.5-102(11), C.R.S.

<sup>115</sup> § 18-6.5-101, C.R.S.

themselves against offenders – many of whom are in positions of trust.<sup>116</sup> In addition, at-risk juvenile victims are more likely to receive serious injury from crimes committed against them, and they are less likely to fully recover from those injuries.<sup>117</sup> Not only do they tend to suffer greater physical injuries, they tend to suffer from greater relative financial and psychological deprivation as well.<sup>118</sup> In the school environment, at-risk juveniles may be subject to targeted bullying or harassment.

There are enhanced penalties for certain crimes committed against at-risk juvenile victims. These crimes include the following: conduct amounting to criminal negligence; assault; robbery; theft; caretaker neglect; sexual assault; unlawful sexual contact; and criminal exploitation.<sup>119</sup> Furthermore, severe bullying or harassment of disabled students may be punishable under this statute, depending on the specific facts of the mistreatment.

## **5. Hazing**

It is against the law to engage in hazing, and any person who is convicted of hazing has committed a misdemeanor offense.<sup>120</sup> While some forms of initiation are acceptable, hazing can become a dangerous form of intimidation and degradation.<sup>121</sup> “Hazing” is any activity by which a person recklessly endangers the health or safety of another individual or creates a risk of bodily injury to that individual for purposes of initiation or admission into or affiliation with any student organization.<sup>122</sup> “Hazing” may include, but is not limited to, forced and prolonged physical activity; forced consumption of any food, beverage, medication or controlled substance in excess of usual amounts; forced consumption of any substance not generally intended for human consumption; and prolonged deprivation of sleep, food or drink.<sup>123</sup>

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<sup>116</sup> *Id.* A “position of trust” means that a person has assumed a responsibility, duty, or fiduciary relationship toward an at-risk individual. § 18-6.5-102(12), C.R.S.

<sup>117</sup> § 18-6.5-101, C.R.S.

<sup>118</sup> *Id.*

<sup>119</sup> § 18-6.5-103, C.R.S.

<sup>120</sup> § 18-9-124(3)-(4), C.R.S.

<sup>121</sup> *Id.* at (1)(a).

<sup>122</sup> *Id.* at (2)(a).

<sup>123</sup> *Id.* at (2)(b).

Certain criminal statutes cover the more egregious hazing activities, such as assault or kidnapping, and the specific crime of hazing is not meant to override those statutes.<sup>124</sup> In other words, if the hazing activity amounts to an assault, then the criminal behavior would be charged as an assault. The purpose of the hazing statute, by contrast, is to account for conduct that is not covered by criminal statutes but that may threaten the health of students or, if not stopped early enough, may escalate into serious injury.<sup>125</sup>

Hazing does not include customary athletic events such as team games or practices, or other similar contests or competitions.<sup>126</sup> Nor does hazing include authorized training activities conducted by members of the armed forces of the State of Colorado or the United States.<sup>127</sup> Therefore, a team-building activity that does not endanger the health or safety of the student and does not create a risk of bodily injury would generally not be considered hazing.

## **6. Offenses in School Vehicles**

Endangering public transportation is a crime, and for purposes of this Manual, the public transportation at issue is a school vehicle.<sup>128</sup> Colorado statutes define a “school vehicle” as any vehicle (not just a bus) owned or under contract to the school that is being used to transport students.<sup>129</sup> There are three separate criminal offenses at issue from a school safety perspective that are related to conduct that endangers a school vehicle.

First, a person endangers a school vehicle if he or she tampers with the vehicle with the intent to cause damage, a malfunction, theft, or unauthorized removal of material, which would create a substantial risk of death or serious bodily injury.<sup>130</sup> For example, if a person tries to drain the oil from a school vehicle without permission, he or should could be liable for

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<sup>124</sup> *Id.* at (1).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at (2)(a).

<sup>127</sup> *Id.*

<sup>128</sup> §§ 18-9-115(1), 18-9-115(2), C.R.S.

<sup>129</sup> § 42-1-102(88.5), C.R.S.

<sup>130</sup> § 18-9-115(1)(a), C.R.S.

the “unauthorized removal of material” because doing so would make driving the vehicle unsafe.

Second, a person endangers a school vehicle if the person stops or boards a school vehicle with the intent of committing a crime on the vehicle.<sup>131</sup>

Third, endangering public transportation may occur on a school vehicle if a person either threatens to kill or seriously injure another person with a deadly weapon on the vehicle, or if the person actually causes death or serious bodily injury of another person on the vehicle.<sup>132</sup> Moreover, a person may not use verbal threats which are intended to make the victim(s) believe that the person is armed with a deadly weapon.<sup>133</sup>

Additionally, there could be other crimes associated with a school vehicle. For example, it is a crime to falsely report that a bomb or other explosive, any chemical or biological agent, any poison weapon, or any harmful radioactive substance has been placed on a school vehicle or at a bus stop.<sup>134</sup> Lastly, smoking is never permitted in a school vehicle.<sup>135</sup>

### **C. Colorado Teen “Sexting” Law**

The crimes detailed in the previous subsection primarily involved enhanced sentences for conduct occurring on school property. In contrast, the 2017 Colorado General Assembly passed House Bill 17-1302 (“teen sexting law”) providing for reduced sentences aimed at mitigating the harmful consequences of the growing “sexting” trend among juveniles.<sup>136</sup> Specifically, the teen sexting law will offer more lenient criminal or civil penalties as well as teen-specific diversion programs to help juveniles avoid the far more

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<sup>131</sup> *Id.* at (1)(b).

<sup>132</sup> *Id.* at (1)(c)-(d).

<sup>133</sup> *Id.* at (1)(d).

<sup>134</sup> § 18-8-110, C.R.S.

<sup>135</sup> § 25-14-204(1)(e), C.R.S.

<sup>136</sup> 2017 Colo. Sess. Laws, ch. 390, § 1 at 2012-13.

serious felony crimes currently available to prosecutors.<sup>137</sup> This law goes into effect on January 1, 2018.<sup>138</sup>

## 1. Definitions and Background

In the context of the teen sexting law, “sexting” refers to the posting, possession, or exchange of sexually explicit images of any juvenile, whether images of oneself or of another person.<sup>139</sup> A “juvenile” is defined as a person under 18 years of age, and a “sexually explicit image” refers to “any electronic or digital photograph, video, or video depiction of the external genitalia or perineum or anus or buttocks or pubes of any person or the breast of a female person.”<sup>140</sup>

While it is clear that the definition of a “sexually explicit image” includes nude images of juveniles, ambiguity remains as to what other types of images might meet this definition. For example, sexually explicit images also could potentially include images that expose portions of the above body parts through strategic posturing or the use of revealing or see-through clothing. Accordingly, the contours of the “sexually explicit image” definition will be tested as juveniles are charged with the new criminal and civil infractions. However, until further guidance is provided, school officials and school resource officers should consider applying a broader definition of the term “sexually explicit image” to err on the side of protecting juveniles impacted by the distribution of compromising photos or videos.

Prior to the passage of the teen sexting law, Colorado criminal statute only allowed prosecutors to charge juveniles who have engaged in sexting behavior with the crime of sexual exploitation of a child.<sup>141</sup> Sexual exploitation of a child – commonly referred to as a crime involving child pornography – is a serious crime typically charged as a class 3 felony.<sup>142</sup> This

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at § 8 at 2017.

<sup>139</sup> *See id.* at § 18-7-109 at 2013-16.

<sup>140</sup> *Id.* at § 18-7-109(8) at 2016.

<sup>141</sup> *Id.* at § 1(a) at 2012; § 18-6-403, C.R.S.

<sup>142</sup> 2017 Colo. Sess. Laws, ch. 390, § 1(a) at 2012; § 18-6-403, C.R.S. Felonies range from class 1 to class 6, with a class 1 felony representing the most serious crimes. § 18-1.3- 401(V)(A).

crime also qualifies as “unlawful sexual behavior,” which is a classification that mandatorily results in a person being placed on the sex offender registry.<sup>143</sup>

Given the harshness of the potential felony penalties and the stigma of the sex offender registry, district attorneys have been reluctant to charge juveniles with sexual exploitation of a child. Moreover, due to how widespread teen sexting has become, felony charges could be devastating for large groups of teens. For example, in response to two tips students made to Safe2Tell, law enforcement investigators discovered the sharing of 351 sexually explicit images among teens at Cañon City High School, which implicated 106 identified students and likely hundreds of other students at the school.<sup>144</sup> After a comprehensive investigation, the local District Attorney declined to prosecute the individuals, determining that the impact of felony convictions was inappropriate given the vast number and ages of students involved.<sup>145</sup> The District Attorney’s decision was also influenced by school officials’ promise to educate students, teachers, and parents of the school community on the consequences of sexting.<sup>146</sup> In addition, the school took independent action to discipline students internally with available penalties such as suspension.<sup>147</sup>

This incident illustrates the pervasiveness of sexting and the high number of depicted juveniles that may be negatively impacted by this conduct. Most importantly, it calls attention to the gap in legal tools necessary for officials to appropriately respond to juvenile sexting behavior. The teen sexting law fills this gap by developing more appropriate

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<sup>143</sup> § 16-22-103(2)(a)-(b), C.R.S.

<sup>144</sup> Jesse Paul, *Cañon City students say sexts were collected, shared over years*, THE DENVER POST (Nov. 9, 2015), <https://www.denverpost.com/2015/11/09/caon-city-students-say-sexts-were-collected-shared-over-years/>; Jesse Paul, *Despite evidence, no charges will be filed in Cañon City sexting case*, THE DENVER POST (Dec. 9, 2015) (last visited October 11, 2018), <https://www.denverpost.com/2015/12/09/despite-evidence-no-charges-will-be-filed-in-caon-city-sexting-case/>

<sup>145</sup> Jesse Paul, *Despite evidence, no charges will be filed in Cañon City sexting case*, THE DENVER POST (Dec. 9, 2015) (last visited October 11, 2018), <https://www.denverpost.com/2015/12/09/despite-evidence-no-charges-will-be-filed-in-caon-city-sexting-case/>

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

alternatives that will aid authorities in trying to educate juveniles and impress upon them the serious, long-lasting consequences of their conduct.

## **2. Creation of New Sexting Offenses**

In contrast to the felony penalties available to prosecutors, the teen sexting law creates lower-level crimes as a more appropriate alternative to engage youth and help address sexting behaviors.<sup>148</sup> In particular, new juvenile-specific offenses have been developed for the exchanging, possession, and posting of sexually explicit images of juveniles.<sup>149</sup>

### **a. Exchanging**

The lowest-level offense is a civil infraction for the exchange of a private image by a juvenile, which commonly applies to the consensual exchange of images between juveniles.<sup>150</sup>

This infraction may be committed in two ways through digital or electronic means.<sup>151</sup> First, the infraction is committed when a juvenile knowingly sends a sexually explicit image or images of solely himself or herself to another person who is at least 14 years old or who is less than four years younger than the juvenile and the sender reasonably believed that the recipient had requested or agreed to receive the image(s).<sup>152</sup> Second, the civil infraction is committed when a juvenile knowingly possesses a sexually explicit image of another person who is at least 14 years old or who is less than four years younger than the juvenile, only the sender is depicted in the image(s), and the juvenile reasonably believed that the sender had sent or agreed to send the image(s).<sup>153</sup>

For example, if 16 year old Steven texts a sexually explicit image of himself to his consenting 15 year old girlfriend, Mary, he has committed the civil infraction of the exchange of a private image by a juvenile. Likewise, once Mary has received the image on her phone – and therefore she possesses

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<sup>148</sup> 2017 Colo. Sess. Laws, ch. 390, § 1(1)(b)-(c) at 2012.

<sup>149</sup> *Id.* at § 18-7-109(1)-(3), (5) at 2013-16.

<sup>150</sup> *Id.* at § 18-7-109(3) at 2014.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at § 18-7-109(3)(a) at 2014.

<sup>153</sup> *Id.* at § 18-7-109(3)(b) at 2014.

a sexually explicit image from her consenting boyfriend, Steven – she has also committed the civil infraction of exchange of a private image by a juvenile.

This civil infraction will result in one of two punishment options: either (1) the juvenile must participate in an educational program designed by the Colorado School Safety Resource Center that addresses the risks and consequences of exchanging sexually explicit images of juveniles or (2) the juvenile must pay a fine of up to \$50, which may be waived by the court upon a showing of indigency.<sup>154</sup> If the offending juvenile fails to appear in civil court or refuses to complete the required punishment, the court may impose additional age-appropriate punishments but it may not issue an arrest warrant or impose jail time.<sup>155</sup>

#### **b. Possession**

Next, the teen sexting law creates the petty criminal offense of possessing a private image by a juvenile, which commonly applies to a juvenile’s nonconsensual possession of a sexually explicit image of another juvenile.<sup>156</sup>

Specifically, a juvenile commits the offense by knowingly possessing, either digitally or electronically, a sexually explicit image of another person who is at least 14 years old or who is less than four years younger than the juvenile without the depicted person’s permission.<sup>157</sup> However, a juvenile can avoid committing this crime all together if the juvenile does one of two things: either (1) the juvenile must take reasonable steps to destroy or delete the sexually explicit image within 72 hours of having initially seen it or (2) the juvenile must report the existence of the image to law enforcement or a school resource officer within 72 hours of having initially seen it.<sup>158</sup> In contrast, the petty offense is enhanced to a more serious class 2 misdemeanor if the

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<sup>154</sup> *Id.* at § 18-7-109(5)(c) at 2014.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at § 18-7-109(2) at 2014.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at § 18-7-109(2)(a)-(b) at 2014.

juvenile possesses ten or more separate sexually explicit images that depict three or more different people without their permission.<sup>159</sup>

Applying the above example to this violation, suppose that when Steven texted Mary a sexually explicit image of himself, he told her that she could not show the picture to anybody else. Unfortunately, without Steven's consent, Mary decided to text the photo to Jessica, her 17 year old best friend. At that point, Jessica would be in jeopardy of committing the petty offense of possessing a private image by a juvenile. However, if she deletes or reports the image within 72 hours of having seen it, she will not have committed a crime. But if Jessica does nothing within that 72 hour window, she would be in possession of a sexually explicit image of a juvenile without his permission, and therefore she would have committed the petty offense. If Jessica has accumulated at least 10 of these types of images depicting three or more unwitting boys in a similar fashion, then her violation would be enhanced from the petty offense to a class 2 misdemeanor.

### **c. Posting**

Additionally, the teen sexting law creates the class 2 misdemeanor of posting a private image by a juvenile, which commonly applies to a juvenile's posting of a sexually explicit image of a juvenile either without the depicted juvenile's consent or without a viewer's consent.<sup>160</sup>

A juvenile may commit this crime in two ways through digital or electronic means.<sup>161</sup> First, this crime is committed when a juvenile knowingly distributes, displays, or publishes to any person a sexually explicit image of another person who is at least 14 years old or who is less than 4 years younger than the juvenile and any of the following circumstances are present: (1) the depicted person did not give the juvenile permission to post the image; (2) the recipient of the image did not ask to see the image and suffered emotional distress; or (3) the juvenile knew or should have known that the depicted person had a reasonable expectation that the image would remain private.<sup>162</sup> Second, the crime of posting a private image by a juvenile

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<sup>159</sup> *Id.* at § 18-7-109(5)(b) at 2015.

<sup>160</sup> *Id.* at § 18-7-109(1) at 2013-14.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at § 18-7-109(1)(a) at 2013-14.

is committed when a juvenile digitally or electronically distributes, displays, or publishes a sexually explicit image of himself or herself to another person who is at least 14 years old or who is less than four years younger than the juvenile when the viewer did not ask to see the image and the viewer then suffers emotional distress.<sup>163</sup>

Similar to the crime of possession, the crime of posting a private image by a juvenile also may be enhanced to a more serious crime under certain circumstances. Posting a private image by a juvenile moves from a class 2 misdemeanor to a class 1 misdemeanor if any of the following three circumstances apply: (1) the juvenile committed the offense with intent to coerce, intimidate, threaten, or cause emotional distress to the depicted person; (2) the juvenile has already committed the crime of posting a private image by a juvenile; or (3) the juvenile distributed, displayed, or published three or more sexually explicit images that depicted three or more different people without their permission.<sup>164</sup>

Continuing with the previous examples, Mary committed the crime of posting a private image by a juvenile when she sent the sexually explicit image of Steven to her best friend, Jessica, without his permission. Even if Steven had not explicitly told Mary that she could not show anyone his sexually explicit image, Mary could still have been liable for having committed this crime if she knew or should have known that Steven would have reasonably expected her to keep the image private.

Next, suppose Steven was no longer interested in dating Mary and decided to send the sexually explicit image of himself directly to Jessica, unsolicited, in a misguided attempt to court her behind Mary's back. If Jessica, ever-loyal to Mary, saw the lewd image and consequently became emotionally distressed, then Steven has also committed the class 2 misdemeanor of posting a private image by a juvenile.

In addition, as outlined above, the penalties could be enhanced. Suppose that Jessica tells Mary about Steven's ill-advised conduct, which causes Mary to try to get back at Steven by posting his sexually explicit

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<sup>163</sup> *Id.* at § 18-7-109(1)(b) at 2014.

<sup>164</sup> *Id.* at § 18-7-109(5)(a) at 2015.

image to a private Facebook group page she shares with friends. Because Mary posted Steven’s image without his permission in order to cause him emotional distress, she could be charged with the enhanced class 1 posting misdemeanor.

Moreover, even if Mary had posted Steven’s image without the intent to cause him emotional distress, she still could be charged with the enhanced posting crime. For example, if Mary had already been adjudicated for her first posting violation (e.g., when she initially sent Steven’s sexually explicit image to Jessica without his permission), then her second posting infraction may be charged as the enhanced class 1 misdemeanor. Finally, if Mary’s posting of Steven’s image to the Facebook group was the third time she had posted a person’s sexually explicit image without their permission, she again would have committed the class 1 misdemeanor.

The Colorado School Safety Resource Center has produced the following chart to help summarize the three new offenses:<sup>165</sup>

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<sup>165</sup> *Guidance on New Legislation Regarding “Sexting”*, COLO. SCHOOL SAFETY RES. CTR., <https://www.colorado.gov/pacific/cssrc/news/guidance-new-legislation-regarding-sexting> (last visited Oct. 10, 2018).

Offense	Committed if Juvenile:	Penalty	Enhanced to:
POSTING	Knowingly distributes, displays or publishes image another who is at least 14 or is less than 4 years younger without permission; OR of him/herself if the recipient didn't request it and suffered emotional distress; OR the poster knew or should have known that the depicted person had a reasonable expectation of privacy.	<u>Class 2 Misdemeanor</u>	<u>Class 1 Misdemeanor</u> if Intent to coerce, intimidate, threaten, or cause emotional distress; OR prior posting of a private image and completion of a diversion or educational program; OR a prior adjudication; OR posted 3 or more images of separate persons.
POSSESSION	Knowingly possesses image of another who is at least 14 or is less than 4 years younger without permission.	<u>Petty Offense</u>	<u>Class 2 Misdemeanor</u> if: possessor has 10 or more images depicting 3 or more separate persons
EXCHANGING	Knowingly sends an image of self to another who is at least 14 or is less than 4 years younger and reasonably believed the recipient agreed; OR Knowingly possesses an image of another who is at least 14 or is less than 4 years younger and reasonably believed depicted person agreed.	<u>Civil Infraction</u> May be required to participate in an educational program designed by CSSRC or pay a fine up to \$50, which may be waived.	

#### d. Felony Charges Still Possible

It is important to keep in mind that prosecutors may still charge felony sexual exploitation of a child in more severe sexting cases. For basic cases, the teen sexting law states that juveniles cannot be prosecuted for the felony crime if their conduct is limited to the elements of the civil infraction of exchanging or the petty offense of possession (as opposed to the class 2 misdemeanor).<sup>166</sup> In contrast, felony charges are possible in some cases of possession, and they are always possible in cases of posting.<sup>167</sup>

Prosecutors are more likely to bring felony charges in more extreme cases of possession or posting, such that the enhanced penalties for possession or posting could apply. Such offenses could include cases involving the possession or posting of an unreasonably high number of

<sup>166</sup> 2017 Colo. Sess. Laws, ch. 390, § 18-6-403(3.5) at 2013.

<sup>167</sup> *Id.*

images; cases where images are maliciously used to coerce, intimidate, threaten, or cause emotional distress to others; or cases where images are used for blackmail or profit. However, if prosecutors choose to charge a juvenile with felony sexual exploitation of a child, they cannot also charge the juvenile with misdemeanor posting for the same images or conduct.<sup>168</sup>

Additionally, the teen sexting law only creates lower civil and criminal penalties for juveniles under 18 years of age. Once juveniles become 18 years of age or older, prosecutors are only able to charge them with felony sexual exploitation of a child. For example, if a 17 year old student is consensually exchanging sexually explicit images with a significant other, it would be charged as a civil infraction. However, the moment the student reaches 18 years of old, exchanging or still possessing the same images could then be charged as a felony requiring registration as a sex offender. Thus, while it is important that all students be made aware of the risks and consequences of sexting behavior, older high school students, in particular, should be educated about the serious criminal liability that they could potentially face.

### **3. Other Notable Features**

In addition to the reduced criminal and civil liability created by the teen sexting law, the law also contains a number of features that improve many of the flaws under the existing sexting regime. Such features include some affirmative defenses to the criminal or civil offenses, alternative disciplinary processes such as restorative justice practices and diversion programs for first-time offenders, and granting judges discretion in determining whether juveniles should have to register as sex offenders.

#### **a. Affirmative Defenses**

In criminal or civil law, if an affirmative defense applies, it operates as a complete bar to liability. As already discussed above, an affirmative defense applies for the crime of possessing a private image by a juvenile if the juvenile takes one of two actions within 72 hours of having viewed a sexually explicit image: either (1) the juvenile must take reasonable steps to destroy or delete the image or (2) the juvenile must report the existence of the image to

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<sup>168</sup> *Id.* at § 18-6-403(7) at 2013.

law enforcement or a school resource officer.<sup>169</sup> In addition, it is an affirmative defense to the offenses of exchanging, possession, or posting if a juvenile is coerced, threatened, or intimidated into distributing, displaying, publishing, possessing, or exchanging a sexually explicit image of any juvenile.<sup>170</sup>

**b. Alternative Disciplinary Processes**

The teen sexting law encourages each district attorney to develop diversion programs for juveniles who commit the offenses of possession or posting.<sup>171</sup> These programs should be offered to first-time offenders to allow the juveniles to avoid adjudication.<sup>172</sup> If no program yet exists in a jurisdiction, the law encourages district attorneys to offer any other type of alternative program to help juveniles avoid adjudication for first-time offenses.<sup>173</sup> In addition, once a juvenile completes his or her sentence, diversion program, or other alternative program, the court should have all records of the juvenile delinquency case expunged.<sup>174</sup>

Please note that no such program would be offered for the civil infraction of exchanging. This is because the civil infraction would not result in a potential adjudication that would be handled by a local district attorney. Instead, juveniles that have committed the civil infraction of exchanging could be ordered by a civil court to participate in an educational program designed by the Colorado School Safety Resource Center.<sup>175</sup>

Accordingly, the teen sexting law directs the Colorado School Safety Resource Center to create and provide a model educational program that school districts can use by June 1, 2018.<sup>176</sup> The model program will cover the risks and consequences of sexting behavior; it will provide information about the different offenses created by the teen sexting law; and it will explain to

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<sup>169</sup> *Id.* at § 18-7-109(2)(a)-(b) at 2014.

<sup>170</sup> *Id.* at § 18-7-109(4) at 2015.

<sup>171</sup> *Id.* at § 18-7-109(5)(e) at 2015-16.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at § 18-7-109(6) at 2016.

<sup>175</sup> *Id.* at § 18-7-109(5)(c) at 2015. Alternatively, a juvenile offender may have to pay a fine of up to \$50, which is waivable upon a showing of indigency.

<sup>176</sup> *Id.* at § 24-33.5-1803(3)(m) at 2017.

students that they may avoid adjudication for the possession offense by destroying or reporting sexually explicit images within 72 hours of viewing them.<sup>177</sup>

Finally, in addition to any other sentence a court may impose on a juvenile that has committed a posting violation, the court may also order the juvenile to be assessed for his or her suitability for restorative justice practices.<sup>178</sup> If it is determined that the juvenile would be suitable, the court may then inform the victim of the possibility of restorative justice practices, which the victim may attend on a voluntary basis.<sup>179</sup> Restorative justice practices emphasize repairing the harm offenders caused to victims and the community.<sup>180</sup> These may include victim-offender conferences, family group conferences, and other victim-centered practices.<sup>181</sup> The goal is that, “[b]y engaging the parties to the offense in voluntary dialogue, restorative justice practices [can] provide an opportunity for the offender to accept responsibility for the harm caused to the victim and community, promote victim healing, and enable the participants to agree on consequences to repair the harm.”<sup>182</sup>

### **c. Sex Offender Registry**

One of the more important features of the teen sexting law is that it provides courts with discretion as to whether or not to require a juvenile to register as a sex offender. As discussed above, the conduct covered by the new offenses of exchanging, possession, or posting would typically also constitute violations of felony sexual exploitation of a child, which is “unlawful sexual behavior” mandating sex offender registration.<sup>183</sup> However, the teen sexting law allows first-time juvenile offenders that have engaged in the possession or posting of sexually explicit images to be exempted from sex offender registration in certain circumstances.<sup>184</sup> First, the juvenile’s conduct must be limited to the elements of posting or possession without other

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at § 18-7-109(5)(d) at 2015.

<sup>179</sup> *Id.*; *see also* § 18-1-901(3)(o.5), C.R.S.

<sup>180</sup> § 18-1-901(3)(o.5), C.R.S.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *See* §§ 18-6-403, 16-22-103(2)(a)-(b), C.R.S.; *see also* 16-22-103(4), C.R.S., which applies to adjudications of offenses that constitute unlawful sexual behavior.

<sup>184</sup> 2017 Colo. Sess. Laws, ch. 390, § 16-22-103(5)(a)(III) at 2013.

aggravating factors.<sup>185</sup> Second, the court must then consider the totality of the circumstances and determine that registration would be unfairly punitive and that exemption would not pose a significant risk to the community.<sup>186</sup>

Finally, please note that juveniles cited for the basic civil infraction of exchanging will not have to register as sex offenders because a civil infraction does not result in an eligible criminal adjudication for purposes of the sex offender registry. The sex offender registry only applies in cases of adult criminal convictions or juvenile adjudications/deferred adjudications.<sup>187</sup>

#### **4. Further Resources for School Officials**

Teen sexting is a community issue, and combating it will take the efforts of everyone in the community, including school administrators, parents, teachers, and students. A critical first step in having that discussion with the school community starts with educating students about the risks and consequences of sexting. As mentioned above, the Colorado School Safety Resource Center is creating a model educational program on sexting that will be made available to Colorado school districts by June 1, 2018. The Center has already published some guidance for school officials as they seek to understand and prepare for the new teen sexting law as it comes into effect on January 1, 2018.<sup>188</sup> School officials should not hesitate to reach out to the Colorado School Safety Resource Center for additional information or specific questions they might have. Its website is available at: <https://www.colorado.gov/cssrc>.

Finally, school officials also should keep in mind the critical role that the Safe2Tell program can play in ensuring that students feel safe in their communities. As previously discussed, the Cañon City situation came to light because two students had submitted anonymous tips to Safe2Tell. Sexting is

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.* It is still unclear how this provision will be applied by courts in practice. For specific legal advice regarding sex offender registration, students should always seek independent legal counsel.

<sup>187</sup> See § 16-22-103(2), (4), C.R.S.

<sup>188</sup> *Guidance on New Legislation Regarding “Sexting”*, COLO. SCHOOL SAFETY RES. CTR.,

<https://www.colorado.gov/pacific/cssrc/news/guidance-new-legislation-regarding-sexting> (last visited October 10, 2018).

an embarrassing and difficult topic for students to discuss with even the most trusted teachers or adults. As a result, Safe2Tell provides students with an alternative outlet to report teen sexting. Schools should make sure students are aware that they can always anonymously report any concerning issues or behavior to the Safe2Tell program. For more information on the Safe2Tell program, see the more thorough discussion of the program in Section III or visit its website at: <https://safe2tell.org>.

## VI. LIABILITY CONSIDERATIONS

Student misconduct—such as bullying, violence, and sexual harassment—harms others, interferes with the educational environment, creates conditions that negatively affect learning, and can have legal consequences. As discussed earlier in the Manual, schools must have systems in place to responsibly address student misconduct.

Schools and their staff are not normally liable for damage and injury inflicted by students. However, when school officials unreasonably fail to respond to student misconduct or address known risks, certain student actions can expose school districts, schools, and personnel to liability. Recent changes to Colorado law impose liability on schools when they do not act reasonably to prevent school violence. Under federal law, some student misconduct falling under a school’s anti-bullying policy may also trigger responsibilities under one or more of the antidiscrimination laws enforced by the United States Department of Education. For example, student-on-student sexual harassment may amount to a form of sex discrimination prohibited by federal law. Taking reasonable care to monitor and respond to student misconduct or identify warning signs is not just the right thing for schools to do; it is also required by both state and federal law.

This Section discusses the scenarios under which schools, school officials, and school districts may be liable for student misconduct.

### A. The Claire Davis School Safety Act

The general rule under the Colorado Governmental Immunity Act is that sovereign immunity is a bar to any action against a public school district, charter school, or employee of a district or school for personal injury, regardless of the type or form of relief chosen by the claimant.<sup>1</sup> However, there are certain instances where a public school district or charter school may be liable for damages for failing to take reasonable steps to prevent school violence.

These instances were recently expanded when the General Assembly passed

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<sup>1</sup> § 24-10-108, C.R.S.

the Claire Davis School Safety Act (“Claire Davis Act”) in the aftermath of the shooting at Arapahoe High School.<sup>2</sup>

“Sovereign immunity” is a legal doctrine immunizing public entities and public employees from injury claims. By statute, the Colorado General Assembly has enacted a number of exceptions to sovereign immunity.<sup>3</sup> These exceptions are designed to allow claims against public entities or public employees for certain kinds of errors and omissions.<sup>4</sup>

Under the Claire Davis Act, all school districts, charter schools, and their employees have a duty to exercise reasonable care to protect all students, faculty, and staff from harm from acts committed by other persons, including students.<sup>5</sup> This duty only extends to harms that are reasonably foreseeable and that occur while such students, faculty and staff are within school facilities or are participating in school-sponsored activities.<sup>6</sup> The term “reasonably foreseeable” in this context means when a reasonable person in the position of the school employee could anticipate, based on all the facts, that some harm or injury is likely to result from the acts or omissions of which he or she is aware.<sup>7</sup>

Under the Claire Davis Act, sovereign immunity is waived with respect to school districts and charter schools for a claim of a breach of the aforementioned duty of reasonable care by a school district, charter school, or an employee of the school district or charter school arising from an incident of school violence.<sup>8</sup> The term “duty of care” generally refers to the obligation to exercise the type and degree of care that an ordinarily prudent person would exercise under the same or similar conditions existing at the time.<sup>9</sup> Additionally, an “incident of school violence” means that, at a school or school-sponsored activity, a person commits, conspires to commit, or attempts to commit the crimes of murder, first degree assault, or felony sexual assault

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<sup>2</sup> 2015 Colo. Sess. Laws, ch. 266, § 1(2) at 1035-36.

<sup>3</sup> *Id.* (referencing exceptions in §§ 24-10-104, 24-10-106, 24-10-106.3, C.R.S.).

<sup>4</sup> *See* §§ 24-10-104, 24-10-106, 24-10-106.3, C.R.S.

<sup>5</sup> § 24-10-106.3(3), C.R.S.

<sup>6</sup> *Id.*

<sup>7</sup> *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1326 (Colo. 1996).

<sup>8</sup> § 24-10-106.3(4), C.R.S.

<sup>9</sup> *United Blood Servs. v. Quintana*, 827 P.2d 509, 519 (Colo. 1992).

and the crime caused serious bodily injury or death to another person.<sup>10</sup> In short, the Claire Davis Act allows public school districts and charter schools to be sued only in these serious, limited circumstances.

Every public school and public school district in Colorado is subject to the Claire Davis Act. The term “public school” is broadly defined by the law to include any school that derives its support, in whole or in part, from money raised by a general state, county, or district tax.<sup>11</sup> That definition is broad enough to include any public school, regardless of whether it is operated by a school district, the Colorado Charter School Institute, or Boards of Cooperative Educational Services.

The Claire Davis Act makes clear that, while sovereign immunity is waived with respect to school districts and charter schools as public entities, individual employees of a public school, school district, or charter school are not subject to suit under the Act in their individual capacity unless their actions or omissions are willful and wanton.<sup>12</sup> “Willful and wanton” refers to acts or omissions “purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or the rights and safety of others”<sup>13</sup> Board members of school districts, charter schools, and Boards of Cooperative Educational Services are also subject to liability under the Act if their acts or omissions are “willful and wanton.”<sup>14</sup>

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<sup>10</sup> §§ 24-10-106.3(2)(b)-(c), 18-3-402, C.R.S.

<sup>11</sup> §§ 24-10-106.3(2)(d), 22-1-101(1), C.R.S.

<sup>12</sup> § 24-10-106.3(4), C.R.S. (emphasis added)

<sup>13</sup> § 13-21-102(1)(b), C.R.S.

<sup>14</sup> §§ 24-10-106.3(4), 24-10-103(4)(a), C.R.S.

Finally, damages that may be recovered under the Claire Davis Act are capped by statute. For all claims for relief that accrue before January 1, 2018, damages are capped at \$350,000 for one person in any single occurrence, or \$950,000 for two or more persons for any single occurrence, except that no one person may recover more than \$350,000.<sup>15</sup> For all claims for relief that accrue between January 1, 2018 and January 1, 2022, damages are capped at \$387,000 for one person in any single occurrence, or \$1,093,000 for two or more persons for any single occurrence, except that no one person may recover more than \$387,000.<sup>15</sup> These maximum numbers will increase over time, since they are tied by statute to the consumer price index.<sup>16</sup> Thus, these amounts will be adjusted for inflation every four years, beginning in 2018.<sup>17</sup>

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<sup>15</sup> §§ 24-10-106.3(9)(a), 24-10-114(1)(a), C.R.S.

<sup>16</sup> § 24-10-114(1)(b), C.R.S.

<sup>17</sup> *Id.*

## **B. Federal Protections for Students**

A number of federal laws protect students from bullying, harassment, and other misconduct. While the content of these laws should be reflected in schools' bullying and harassment policies, mere enforcement of general bullying prohibitions of such misconduct may not adequately meet schools' legal obligations. That is, schools must align their responses to the specific requirement contained in federal civil rights statutes and anti-discrimination laws. This subsection will discuss schools' obligations under some key federal laws, which includes section 1983 "danger creation" claims, federal civil rights laws, and a section specifically devoted to Title IX.

### **1. Section 1983 "Danger Creation" Claims**

Schools and school officials should be aware that failing to adequately respond to bullying could, in extreme cases, result in federal civil liability under 42 U.S.C. § 1983, which allows claimants to file civil actions for the deprivation of rights arising under the U.S. Constitution, such as the 14th Amendment's protections of "life, liberty, or property."<sup>18</sup>

In the event of foreseeable bullying, school officials may be liable for failing to protect students from assaults by peers under the "danger creation" theory. Claims under the "danger creation" theory require that the following five elements are met:

- 1) the claimant is a member of a limited and specifically definable group;
- 2) the claimant is subject to a substantial risk of serious immediate harm;

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<sup>18</sup> 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"); U.S. Const. amend. XIV, § 1.

- 3) the risk is obvious and known;
- 4) the school or school official acted in reckless, conscious disregard of the risk; and
- 5) the school's or school official's conduct viewed in total is "conscience shocking."<sup>19</sup>

Among "danger creation" cases that have been considered by the Tenth Circuit, the Court has concluded that conduct "shocks the conscience" if a school or school official acts with a high level of outrageousness or with deliberate indifference to previous assaults.<sup>20</sup>

## 2. Federal Anti-discrimination Laws

School districts and schools may violate civil rights statutes when students are bullied or harassed based on race, color, national origin, sex (including gender identity), or disability. Although this type of student behavior is likely addressed in a school's anti-bullying policy, merely limiting the school's response to invoking consequences listed in its general anti-bullying policy may be insufficient. If the student-on-student harassment, abuse, or bullying reflects a discriminatory intent in violation of federal law, it would trigger affirmative duties by the school. Disciplining isolated incidents of bullying may ignore evidence of an underlying discriminatory, hostile environment.

The civil rights laws at issue include:

- Title VI of the Civil Rights Act of 1964 ("Title VI"), which prohibits discrimination on the basis of race, color, or national origin;<sup>21</sup>

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<sup>19</sup> *Uhlig v. Harder*, 64 F.3d 567, 572-74 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 924 (1996).

<sup>20</sup> *Id.* at 574; *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 995 n.7 (10th Cir. 1994);

*Castaldo v. Stone*, 192 F. Supp. 2d 1124 (Colo. 2001).

<sup>21</sup> 42 U.S.C. § 2000d et seq. The key provision of Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

- Title IX of the Education Amendments of 1972 (“Title IX”), which prohibits discrimination on the basis of sex (including gender identity);<sup>22</sup>
- Section 504 of the Rehabilitation Act of 1973 (“Section 504”), which prohibits discrimination on the basis of disability;<sup>23</sup> and
- Title II of the Americans with Disabilities Act of 1990 (“Title II”), which also prohibits discrimination on the basis of disability.<sup>24</sup>

Beyond the specific protections listed above, some of the federal anti-discrimination laws have been extended to provide additional protections for certain classes. For example, although Title VI does not expressly prohibit discrimination against students on the basis of religion, “discrimination against Jews, Muslims, Sikhs, and members of other religious groups violates Title VI when that discrimination is based on the group’s actual or perceived shared ancestry or ethnic characteristics, rather than its members’ religious practice.”<sup>25</sup> Moreover, religious discrimination against students is prohibited when “it is based on actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.”<sup>26</sup> Thus, Title VI protects students from religious discrimination when, as is often the case, the basis of the discrimination overlaps with other closely-related, protected categories such as race or national origin.<sup>27</sup>

Similarly, while Title IX does not explicitly list “sexual orientation” as a protected class, Title IX prohibits discrimination against students on the

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<sup>22</sup> 20 U.S.C. § 1681 et seq.; U.S. DEPT OF JUSTICE & U.S. DEPT OF EDUC., DEAR COLLEAGUE LETTER: TRANSGENDER STUDENTS 2 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (last visited October 11, 2018)

<sup>23</sup> 29 U.S.C. § 794.

<sup>24</sup> 42 U.S.C. § 12131 et seq.

<sup>25</sup> THOMAS E. PEREZ, U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., RE: TITLE VI AND COVERAGE OF RELIGIOUSLY IDENTIFIABLE GROUPS 1-2 (Sept. 8, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810\\_AAG\\_Perez\\_Letter\\_to\\_Ed\\_OCR\\_Title%20VI\\_and\\_Religiously\\_Identifiable\\_Groups.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf) (last visited October 11, 2018)

<sup>26</sup> *Id.*

<sup>27</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, KNOW YOUR RIGHTS: TITLE VI AND RELIGION 1 (Jan. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201701-religious-disc.pdf> (last visited October 11, 2018)

basis of sexual orientation to the extent it overlaps with protections for sex.<sup>28</sup> In 2016, the U.S. Department of Education issued the following guidance: “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity, and a [school] must accept and appropriately respond to all complaints of sex discrimination.”<sup>29</sup> Thus, schools may not simply ignore discrimination based on sexual orientation just because sexual orientation is not a protected class under Title IX.<sup>30</sup> Instead, schools have an obligation to respond to any sex-based harassment, even if the harassment includes anti-gay comments or when harassment is partially based on sexual orientation.<sup>31</sup>

To summarize, a substantial body of federal civil rights laws prohibits discrimination, including harassment, in educational programs and activities based on race, color, national origin, sex (including gender identity), disability, and at times, religion and sexual orientation to the extent there is overlap with the other categories. These are just the basic federal requirements. Schools are always able to adopt anti-bullying policies that go beyond federally protected categories if they want to formally protect students on the basis of religion or sexual orientation.<sup>32</sup>

The U.S. Department of Education cautions that schools risk violating these civil rights laws when peer bullying or harassment based on any of these factors “is sufficiently serious that it creates a hostile environment and

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<sup>28</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE 15-16 (Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> (last visited October 11, 2018)

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 16.

<sup>31</sup> *Id.* In addition, a California federal district court recently determined that sexual orientation should be protected under Title IX without qualification, concluding that “the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.” *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015).

<sup>32</sup> RUSSLYNN ALI, U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: HARASSMENT & BULLYING 1-2 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (last visited October 11, 2018)

such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.”<sup>33</sup>

Bullying and harassing conduct that rises to the level of a potential civil rights issue may take many forms, including any of the following conduct:

- Verbal abuse, such as name-calling, epithets, or slurs;
- Graphic or written statements;
- Threats;
- Physical assault; and
- Other conduct that may be physically threatening, harmful, or humiliating.<sup>34</sup>

Furthermore, this bullying and harassing conduct does not necessarily have to include the intent to harm, be directed at a specific target, or involve repeated incidents. The key is whether the conduct creates a hostile environment. “Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”<sup>35</sup> When such conduct is targeted towards a student who is a member of one of the protected classes outlined above, it can violate civil rights laws enforced by the Office of Civil Rights of the U.S. Department of Education.<sup>36</sup>

School officials are charged with compliance with these laws, and schools are responsible for addressing any incidents involving these factors when the school or its employees know or reasonably should have known about the harassment.<sup>37</sup> While this Section focuses on student-on-student harassment, note that federal civil rights law also protects students from

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<sup>33</sup> *Id.* at 1.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

discrimination from school employees.<sup>38</sup> Obviously, school employees should know about discriminatory harassment if they are actively encouraging or engaging in it.

In the context of peer bullying and harassment, a school employee “reasonably should have known” about an incident when, given all the facts and circumstances actually known by the employee, the existence of the bullying or harassing behavior could have been reasonably inferred.<sup>39</sup> Thus, obvious signs of bullying and harassment occurring in common areas, in classes, during extracurricular activities, at recess, on the school bus, or through graffiti are sufficient to put the school on notice.<sup>40</sup> In other instances, a school may become aware of such bullying or harassment through simply being told about the misconduct, which should trigger a school investigation.<sup>41</sup> In any case, schools should have well-publicized policies prohibiting such conduct as well as procedures for reporting and affirmatively resolving such complaints.<sup>42</sup>

A school should take immediate action to investigate and document any incidents of bullying or harassment.<sup>43</sup> The scope of the investigation will depend on the nature and source of the allegations, the age of the students involved, and other relevant factors when considering the totality of the circumstances.<sup>44</sup> In all cases, the investigation must be prompt, thorough, and impartial.<sup>45</sup>

If a school’s investigation concludes that students were the subject or bullying or harassment based on race, color, national origin, sex (including gender identity), or disability, the school must take prompt and effective steps to end the harassment, correct any hostile environment and its effects,

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<sup>38</sup> *Id.* at 1 n.6 (explaining that federal civil rights laws protect students from third parties as well).

<sup>39</sup> *Id.* at 2 n.9.

<sup>40</sup> *Id.* at 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

and prevent the harassment from recurring.<sup>46</sup> These duties are a school's responsibility even if the student has not complained or asked the school to take action or identified the harassment as a form of discrimination.<sup>47</sup>

Appropriate steps to end the bullying or harassment include separating the harasser from the victim, providing counseling for the harasser and/or the victim, or taking disciplinary action against the harasser.<sup>48</sup> In doing so, the school should not inadvertently penalize the student who is the victim.<sup>49</sup> For example, in separating a student from his or her harasser, care should be taken to minimize the burden on the victim's education.<sup>50</sup> The school may need to provide additional services to the victim to address the effects of the harassment, particularly if the school delayed in responding to the harassment or if it initially responded in an inadequate manner.<sup>51</sup> Schools may need to provide training or other types of counseling not only to the perpetrators and victims, but also to the larger school community to help them identify and prevent such discrimination in the future.<sup>52</sup>

Finally, schools must take whatever steps are necessary to both prevent further harassment and bullying and to prevent any retaliation against the student victim or against anyone who provided information as witnesses.<sup>53</sup> This includes making sure the affected students and their families report any subsequent problems, conducting follow-ups with the affected students to see if there have been any new incidents or retaliation, and then responding promptly to address any new or continuing problems.<sup>54</sup>

In addition, school districts have a duty to designate a person or persons responsible for coordinating each school's compliance with the requirements of Title IX, Section 504, and Title II, including investigation of

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<sup>46</sup> *Id.* at 2-3.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>51</sup> *Id.*

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

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

complaints of discrimination based on sex, gender, or disability as detailed more fully in the next subsection.<sup>55</sup>

Schools that fail to properly address discriminatory acts of student-on-student bullying or harassment may be subject to an investigation and legal action by the Office of Civil Rights of the U.S. Department of Education or the U.S. Justice Department.<sup>56</sup> The United States Department of Education's Office of Civil Rights has issued formal guidance (in the form of "Dear Colleague" letters cited throughout this Manual) reminding school districts that harassment on the basis of race, ethnicity, national origin, disability, or sex violates federal civil rights statutes and that students are protected from such harassment from school employees, other students, and third parties.<sup>57</sup> When school officials know of bullying and fail to respond appropriately, it can trigger enforcement proceedings.<sup>58</sup>

### 3. Title IX

Federal law imposes certain additional requirements and recommendations regarding how schools address sexual harassment and sexual violence. Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."<sup>59</sup> Although Title IX was originally understood as relating to equal opportunity in athletics, the law addresses all forms of sex

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<sup>55</sup> 28 C.F.R. § 35.107(a) (Title II); 34 C.F.R. § 104.7(a) (Section 504); 34 C.F.R. § 106.8(a) (Title IX).

<sup>56</sup> 28 C.F.R. § 35.170 (enforcement of Title II); 34 C.F.R. § 100.8 (enforcement of Title VI); 34 C.F.R. § 104.6 (enforcement of section 504); 34 C.F.R. § 106.3 (enforcement of Title IX).

<sup>57</sup> See, e.g., RUSSLYNN ALI, U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: HARASSMENT & BULLYING 1-2 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (last visited October 11, 2018)

<sup>58</sup> *Id.* at 1 n.6 (referring to administrative enforcement and possible injunctive relief).

<sup>59</sup> 20 U.S.C. § 1681(a)

discrimination impacting educational opportunities, including sexual violence, sexual harassment, stalking, and domestic violence.<sup>60</sup>

Title IX requires mandatory safety measures to prevent and respond to sexual violence in schools. Institutions may be held liable for violating Title IX if they knew or should have known of possible sexual harassment or violence and they failed to immediately take appropriate steps to investigate and respond. Title IX requires that school districts take the following steps, upfront: (1) appoint a Title IX coordinator; (2) adopt and disseminate a notice of nondiscrimination; and (3) adopt and publish grievance procedures for Title IX complaints. School districts should involve legal counsel in the development and implementation of Title IX procedures because Title IX's many requirements and best practices are detailed and context-specific. School districts should also refer to the Colorado Department of Education's array of resources available on Title IX compliance, including frequently asked questions and resource guides outlining requirements and recommendations.<sup>61</sup>

#### **a. Title IX Coordinator**

Title IX requires each school district to appoint a Title IX coordinator who will ensure the district's compliance with Title IX.<sup>62</sup> Title IX coordinators may also address patterns that arise in responding to complaints brought under Title IX.<sup>63</sup>

School districts should ensure that the Title IX coordinator is adequately trained to respond to and investigate complaints of sexual violence.<sup>64</sup> School districts should also make sure the coordinator is independent, and districts should avoid appointing a Title IX coordinator whose other job responsibilities may cause a conflict of interest (or the

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<sup>60</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS OR THIRD PARTIES 3, 3 n.9 (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (last visited October 11, 2018)

<sup>61</sup> See *Title IX of the Education Amendments of 1972*, COLO. DEPT OF EDUC., [http://www.cde.state.co.us/cde\\_english/titleix%20](http://www.cde.state.co.us/cde_english/titleix%20) (last viewed October 10, 2018).

<sup>62</sup> 34 C.F.R. § 106.8(a).

<sup>63</sup> CATHERINE LHAMON, U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: TITLE IX COORDINATORS 3 (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf> (last visited October 11, 2018)

<sup>64</sup> *Id.* at 6-7.

appearance of a conflict of interest), such as the school district's general counsel.<sup>65</sup> Moreover, Title IX requires that schools and school districts notify students and employees of the name, office address, telephone number, and email address of the Title IX coordinator.<sup>66</sup> The school or district website must always reflect complete and current information about the Title IX coordinator.<sup>67</sup>

The United States Department of Education has issued formal guidance regarding Title IX coordinators.<sup>68</sup> School districts should examine this guidance for a more thorough discussion of the role and responsibilities of a Title IX coordinator.

### **b. Notice of Nondiscrimination**

Each school district must publish a notice of nondiscrimination confirming that it does not discriminate on the basis of sex and that it is required by Title IX and federal regulations not to discriminate on the basis of sex.<sup>69</sup> The U.S. Department of Education advises that the notice explain that prohibited sex discrimination also covers sexual harassment and sexual violence, and it should provide detailed examples of the types of covered conduct.<sup>70</sup> This notice may fall under a district's broader anti-discrimination policy.<sup>71</sup>

School districts should also use the notice to make the role of Title IX coordinator visible to the school community.<sup>72</sup> The notice of nondiscrimination must state that questions regarding Title IX may be

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<sup>65</sup> *Id.* at 2-3.

<sup>66</sup> *Id.* at 5 (citing 34 C.F.R. § 106.8(a)).

<sup>67</sup> *Id.*

<sup>68</sup> See CATHERINE LHAMON, U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: TITLE IX COORDINATORS (Apr. 24, 2015),

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf> (last visited October 11, 2018)

<sup>69</sup> 34 C.F.R. § 106.9(a).

<sup>70</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE 6-7, 15-17

(Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> (last visited October 11, 2018)

<sup>71</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS OR THIRD PARTIES 19 (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. (last visited October 11, 2018)

<sup>72</sup> CATHERINE LHAMON, DEAR COLLEAGUE LETTER: TITLE IX COORDINATORS AT 5.

referred to the recipient’s Title IX coordinator.<sup>73</sup> The notice must be included in any bulletins, announcements, publications, catalogs, application forms, or recruitment materials distributed to the school community.<sup>74</sup> Because the notice must be distributed to the school community, school districts should post it in various conspicuous school locations, in district publications, and on district websites.<sup>75</sup>

### **c. Title IX Grievance Procedures**

Students must be informed of their rights under Title IX, and schools must have a responsible individual available to address potential Title IX violations.<sup>76</sup> When a student or employee makes a Title IX complaint, there also must be procedures in place to ensure that the complaint is addressed promptly and appropriately.<sup>77</sup>

School personnel should inform and attempt to obtain consent from a student victim’s parents (assuming the student is under 18) before beginning a Title IX investigation.<sup>78</sup> However, regardless of whether the student’s parents decide to file a formal complaint or request action on behalf of the student, the school “should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.”<sup>79</sup> This applies even if a law enforcement investigation is already under way. Because a Title IX investigation is different from any law enforcement investigation, a law enforcement investigation does not relieve a school from its independent duty to investigate the conduct and take appropriate action.<sup>80</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 5-6.

<sup>76</sup> U.S. DEPT OF EDUC., 2001 REVISED SEXUAL HARASSMENT GUIDANCE at 19, 21.

<sup>77</sup> *Id.* at 19.

<sup>78</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT 6 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (last visited October 11, 2018)

<sup>79</sup> U.S. DEPT OF EDUC., 2001 REVISED SEXUAL HARASSMENT GUIDANCE at 15.

<sup>80</sup> *Id.* at 21.

The reasonableness of the school's response differs depending on the circumstances.<sup>81</sup> If a student has requested confidentiality in the process or that no action be taken, the school should inform the student that such requests may limit the school's ability to respond.<sup>82</sup> For example, an alleged student harasser would not be able to adequately answer to any charges made by an unnamed accuser, and therefore it is unlikely that the student harasser could be disciplined by the school.<sup>83</sup> Instead, the school might respond by conducting a sexual harassment training where the problems occurred, taking a student survey related to specific harassment issues, or it could implement systemic measures to reduce future harassment.<sup>84</sup> The school should also explain to the student victim that Title IX prohibits retaliation, and it should highlight the actions it would take to prevent retaliation.<sup>85</sup>

If the student insists on confidentiality, then the school should take all reasonable steps to investigate and respond to the complaint consistent with the student's requests.<sup>86</sup> However, the school must always evaluate a student's requests for confidentiality in the context of its responsibility to provide a safe and nondiscriminatory environment for all students.<sup>87</sup> In evaluating the student's request, the school may want to consider the following factors:

- The seriousness of the alleged harassment;
- The age of the student harassed;
- Whether there have been other complaints or reports of harassment against the alleged harasser; and
- The rights of the accused individual to receive information about the accuser and the allegations if a formal proceeding with sanctions may result.<sup>88</sup>

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<sup>81</sup> *Id.* at 15.

<sup>82</sup> *Id.* at 17.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 18.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 17.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 17-18.

If the school cannot ensure confidentiality under the circumstances of a particular investigation, the school should inform the complaining student and provide reasons for its decision.

School districts may use their general student disciplinary procedures to address complaints of sexual harassment or sexual violence.<sup>89</sup> If a school district chooses to use its general student disciplinary procedures, it is crucial that those procedures comply with Title IX's requirement of affording complainants a "prompt and equitable" resolution of their complaints.<sup>90</sup> Promptness can be addressed by informing students and employees of a timeframe in which complaints will be investigated and resolved and by then implementing and adhering to that timeframe.<sup>91</sup> School districts should also ensure that all parties receive prompt notice of the outcome of a case and notice of any rights to appeal.<sup>92</sup>

Recent guidance from the U.S. Department of Education's Office of Civil Rights states that there is no set timeframe under which a Title IX investigation must be completed.<sup>93</sup> Instead, the Office of Civil Rights only expects schools to make a good faith effort to conduct fair, impartial investigations in a timely manner.<sup>94</sup>

With regard to the equitableness of a Title IX investigation, the Office of Civil Rights' latest guidance requires that an investigation be impartially led by an investigator free of actual or reasonably perceived conflicts of interests and biases, including the institutional interests of the school.<sup>95</sup> The investigator also must be trained to objectively evaluate the credibility of parties and witnesses, synthesize all evidence (both inculpatory and

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<sup>89</sup> *Id.* at 19-20.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 20.

<sup>92</sup> *Id.*

<sup>93</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT 6 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (last visited October 11, 2018)

<sup>94</sup> *Id.* at 3.

<sup>95</sup> *Id.* at 3-4.

exculpatory), and consider the unique and complex circumstances of each case.<sup>96</sup>

In addition, all parties to a Title IX investigation must be given equal rights consistent with federal due process rights.<sup>97</sup> This includes all parties receiving adequate written notice of interviews and hearings; the right to have an attorney or advisor present during interviews and hearings; and the right to cross-examine or ask written questions of parties and witnesses to the case.<sup>98</sup> Parties also must be provided with timely and equal access to pertinent investigation information.<sup>99</sup> Furthermore, should a school choose to offer the right to appeal a decision on responsibility and/or a disciplinary decision, all parties must be given the opportunity to appeal the decision(s).<sup>100</sup>

Furthermore, when sexual violence is at issue, the grievance procedures should also reflect the unique dynamics of these kinds of cases. For example, while informal procedures for mediating certain sexual harassment complaints might be appropriate, it would be inappropriate to require that more serious sexual assault cases be mediated between the parties.<sup>101</sup>

Finally, schools should note that the Department of Education withdrew two of its key Title IX documents in a 2017 Dear Colleague Letter.<sup>102</sup> The withdrawn documents are as follows:

- Dear Colleague Letter on Sexual Violence, dated April 4, 2011.

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<sup>96</sup> *Id.* at 4.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 4-5.

<sup>99</sup> *Id.* at 4.

<sup>100</sup> *Id.* at 7.

<sup>101</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS OR THIRD PARTIES 21 (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (last visited October 11, 2018)

<sup>102</sup> CANDICE JACKSON, U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER ON CAMPUS SEXUAL MISCONDUCT (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> (last visited October 11, 2018)

- Questions and Answers on Title IX and Sexual Violence, dated April 29, 2014.<sup>103</sup>

The U.S. Department of Education has emphasized that schools should now rely on previous Title IX guidance from 2001 as well as a Q&A document issued alongside the 2017 Dear Colleague Letter.<sup>104</sup> The preferred guidance documents are as follows:

- Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, dated January 2001.
- Q&A on Campus Sexual Misconduct, dated September 2017.<sup>105</sup>

For additional questions on grievance procedures and the effects of the 2017 Dear Colleague Letter, school officials should always consult with their school attorneys or the school district's Title IX coordinator.

#### **d. Title IX Liability**

Regardless of whether a student or parent files a complaint, if a school knows or reasonably should know about possible sexual harassment, it has a duty to promptly investigate and then take the appropriate steps to resolve the situation. As previously discussed, a school or school district's failure to investigate and remedy Title IX violations may result in legal action by the U.S. Department of Education's Office for Civil Rights or the U.S. Department of Justice.<sup>106</sup>

A school also may be liable for monetary damages for student sexual harassment. In *Davis v. Monroe County Board of Education*, a parent brought a federal Title IX suit against the school board, school system superintendent, and school principal for their alleged failure to remedy a classmate's sexual harassment of her child.<sup>107</sup> The parent claimed that her child, a female fifth grade student, was subjected to sexual harassment by a

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2.

<sup>105</sup> *Id.*

<sup>106</sup> 34 C.F.R. § 106.3

<sup>107</sup> 526 U.S. 629, 632-36 (1999).

male student in her class for five months.<sup>108</sup> The sexual harassment occurred a number of times and included both spoken words and acts, many of which occurred in the classroom.<sup>109</sup> The complaint alleged the female student had brought the incidents to the attention of teachers and the principal on a number of occasions, but that the male student was never disciplined.<sup>110</sup> The suit sought \$500,000 in monetary damages on the girl's behalf under Title IX, and alleged that the defendants' "deliberate indifference" to the male student's conduct "created an intimidating, hostile, offensive and abusive school environment in violation of Title IX."<sup>111</sup>

The case was ultimately reviewed by the U.S. Supreme Court, which held that the parent could properly pursue a lawsuit for money damages under Title IX against the school board.<sup>112</sup> To pursue such a claim for student-on-student sexual harassment, the Supreme Court concluded there had to be evidence that a recipient school or school district: 1) had actual knowledge of the peer sexual harassment; 2) acted with deliberate indifference to the peer sexual harassment; and 3) the harassment was so severe that it effectively barred the victim's access to an educational opportunity or benefit.<sup>113</sup> The Supreme Court did not mandate any particular response or disciplinary action that a school must take when it has actual knowledge of such incidents, but it indicated that the school's response to known peer harassment could not be "clearly unreasonable in light of the known circumstances."<sup>114</sup>

#### **e. Sexual Harassment**

Because of the expansive definition of the term "sexual harassment," student-on-student sexual harassment requires additional discussion. Title

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<sup>108</sup> *Id.* at 633-36.

<sup>109</sup> *Id.* at 633.

<sup>110</sup> *Id.* at 634-35.

<sup>111</sup> *Id.* at 636.

<sup>112</sup> *Id.* at 654. The lawsuits against the superintendent and school principal were ultimately dismissed before reaching the U.S. Supreme Court, and the dismissal of those suits was not part of the appeal. *Id.* at 636.

<sup>113</sup> *Id.* at 646-47, 650.

<sup>114</sup> *Id.* at 648.

IX prohibits any unwelcome conduct of a sexual nature.<sup>115</sup> It includes unwelcome sexual advances, requests for sexual favors, as well as verbal or non-verbal communication of a sexual nature, remarks, and physical contact of a sexual nature.<sup>116</sup> Both sexual assault and other forms of sex-based discrimination can occur even when the harasser and the targeted student are the same sex.<sup>117</sup>

When a student sexually harasses another student, the harassing conduct creates a sexually hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program.<sup>118</sup> Types of sexual harassment include:

- Unwelcome sexual advances or requests for sexual favors;
- Comments and rumors about an individual's body, sexual activity, or sexual attractiveness;
- Unwanted e-mails or texts of a sexual nature; and
- Sexually suggestive touching, leering, gestures, sounds, or comments.

Harassing conduct that rises to the level of sexual harassment under Title IX includes conduct that is based on sex but not necessarily of a sexual nature. Thus, sexual harassment may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on either sex, gender identity, or on sex-stereotyping.<sup>119</sup>

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<sup>115</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS OR THIRD PARTIES 2 (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (last visited October 11, 2018)

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 3.

<sup>118</sup> *Id.* at 5.

<sup>119</sup> *Id.* at 2.

Sexual harassment based on sex, gender identity, or stereotypes can occur if the student, in appearance, speech, mannerisms, interests, friendships, or other factors does not conform to stereotypical notions of how some individuals believe boys or girls are “expected” to act or stereotypes of masculinity or femininity.<sup>120</sup> As previously discussed, while sexual orientation is not a protected class under Title IX, the law does protect all students, including those students who are gay, lesbian, bisexual or transgender, from any sex-based harassment as outlined above.<sup>121</sup> Moreover, harassment based on actual or perceived sexual orientation or gender identity often implicates other classifications protected under Title IX.<sup>122</sup>

Similar to the other civil rights statutes set-out above, Title IX protects students engaged in any academic, educational, extracurricular, athletic, and other programs at the school, whether those programs take place on or off school grounds.<sup>123</sup> While schools are not required to address purely off-campus, non-school related claims of sexual harassment, they do have an obligation to respond when the victim experiences ongoing, related harassment in the school environment.<sup>124</sup> For example, a victim of off-campus harassment could be taunted or harassed on-campus by the alleged perpetrator or other students who are friends of the alleged perpetrator. In such cases, the school must process the student victim’s complaint regardless of where the conduct occurred because the harassment or hostile environment would then be linked to the school environment.<sup>125</sup> Accordingly, schools should always be prepared to take steps to protect a student who is assaulted off-campus from further school-related sexual harassment or retaliation by the alleged perpetrator or his or her associates.<sup>126</sup>

Avoiding liability under Title IX involves a combination of having required policies in place and responding appropriately to known incidents of harassment. Depending on the circumstances, remedies for the affected student may include any of the following:

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<sup>120</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE 15-16 (Apr. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>. (last visited October 10, 2018)

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 4.

<sup>124</sup> U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT 1 n.3 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (last visited October 10, 2018)

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

- Providing an escort to ensure that the complaining student can move safely between classes and activities;
- Ensuring that the complaining student and the perpetrator do not attend the same classes;
- Moving the alleged perpetrator to another school in the district;
- Providing counselling services;
- Providing medical services;
- Providing academic support services, such as tutoring; and
- Arranging for the victim to re-take a course or withdraw from a class without penalty, including ensuring that any changes do not affect the student's academic record (for instance, when a complaining student cannot finish a course because of the presence of the harasser).

## **APPENDIX I – SEARCH and SEIZURE FORMS**

**Please see the following pages for forms that may be utilized as part of a school district’s search and seizure procedures.**

**CONSENT TO  
SEARCH FORM**

I, \_\_\_\_\_ voluntarily consent to a search by a school  
official and/or  
*(student's name)*

school security guard of\_

\_\_\_\_\_

*(list place or item to be searched)*

I authorize the school official and/or security guard to seize any item that violates a criminal law or school rule or provides evidence of a criminal law or school rule violation. My voluntary consent is not the result of fraud, duress, fear, or intimidation.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

## APPLICATION FOR SCHOOL PARKING LOT ACCESS

I, \_\_\_\_\_, understand that the parking lot is the property of \_\_\_\_\_ school district. I agree that the car driven by \_\_\_\_\_, will not be used to transport or store illegal items on school property.

I understand and give school officials and/or school security consent to search the vehicle and its contents at any time when it is parked on school property.

I authorize school officials and/or school security to seize any item that violates a criminal law or school rule or provides evidence of a criminal law or school rule violation.

_____	_____	_____
School Official Name/Title	School Official Signature	Date

_____	_____	_____
Student Name	Student Signature	Date

_____	_____	_____
Parent Name	Parent Signature	Date

Vehicle Description

Color: \_\_\_\_\_

Make: \_\_\_\_\_

Model: \_\_\_\_\_

License Plate Number: \_\_\_\_\_

## **APPENDIX II – INTERAGENCY CHECKLIST**

## **APPENDIX II – INTERAGENCY CHECKLIST**

# INTERAGENCY AGREEMENT AND SOCIAL SUPPORT TEAM SELF ASSESSMENT CHECKLIST

These questions are designed as an aid to create information sharing agreements among schools, law enforcement, prosecution, courts, mental health, social services and other stakeholder professionals. **The goal is to assure a safe environment for students and staff**, provide a basis from which communities can organize Interagency Social Support Teams (ISST) that are encouraged by the legislature and share information mandated by statute (CRS 22-32-109.1(3) & CRS 19.1.303 and 304). The questions should be answered from each agency’s perspective. Each stakeholder agency should complete the checklist independently, then share the results and resolve differences. It is helpful to create a set of answers for incidents occurring on school grounds and off-campus, and for differing behaviors such as 1) rule breaking, 2) threats, and 3) unusual behaviors that may signal a school/public safety concern.

**A “No” or conflicting answers between stakeholders indicates more discussion/action required.**

CHECKLIST	YES	NO
<b>1. Does each ISST agency share sufficient information to address public safety concerns?</b>		
<b>1-a</b> Do you understand your confidentiality requirements?		
<b>1-b</b> Do you understand that schools are criminal justice agencies and therefore have access to criminal justice records?		
<b>1-c</b> Do you understand there are exceptions to confidentiality requirements for public safety		
<b>1-c</b> Do you have a written policy and/or procedures that indicate how information is shared between agencies and other providers?		
<b>1-d</b> Do you have a form for release of information?		
<b>2. Does each ISST team include the following recommended members to manage threat and/or other public safety concerns involving students:</b>		
• School representatives (administrator, special ed, psychologist, social worker, counselor)		
• Law enforcement and prosecution representatives		
• Juvenile justice representatives (probation, parole, diversion, DA)		
• Human services or social services		
• Mental health agency		
<b>3. Are ISST agencies and staff trained to identify and respond to warning signs and/or threatening behavior?</b>		
<b>3-a</b> Does this training for new and returning staff occur at least on an annual basis?		
<b>3-b</b> Have you adopted a threat assessment protocol? (Used for actual threats/violence)		
<b>3-c</b> Have you adopted a risk assessment protocol? (Used to identify risk and protective factors)		
<b>4. When a student exhibits an early warning sign or threatening behavior, are other agencies notified?</b>		
<b>4-a</b> Do you have a written policy and/or procedures that indicate who is responsible for notification?		
<b>4-b</b> Do you have a written policy and/or procedure that indicate who is notified and how they will be notified?		
<b>5. Is there an automatic review of the situation by more than the agency first collecting the information?</b>		
<b>5-a</b> Do you have a written policy and/or procedure that indicate how a review will be conducted, who attends the review, and when parents are involved?		
<b>6. Are results of the review communicated to persons working directly with the student?</b>		
<b>6-a</b> Do you have a written policy and/or procedure that indicate how a review is communicated?		
<b>6-b</b> If the review reveals no public safety concern, is that communicated?		

**Supporting Web Sites:** [www.state.ago.co.us](http://www.state.ago.co.us); safe and drug free schools (Attorney General’s Office) / [www.state.cde.co.us](http://www.state.cde.co.us); “prevention”, “safe and drug free schools”, (Colorado Department of Education);/ [www.cdsip.net](http://www.cdsip.net) (Colorado School Districts Self Insurance Pool);/ [www.colorado.edu/cspv/safeschools](http://www.colorado.edu/cspv/safeschools) (CU Center for the Study and Prevention of Violence) / [www.casb.org](http://www.casb.org) (Colorado Association of School Boards);/ [www.ed.gov/offices/OESE/SDFS](http://www.ed.gov/offices/OESE/SDFS) (U.S. Dept. of Education, Office of Safe and Drug Free Schools)/ [smph.psych.ucla.edu](http://smph.psych.ucla.edu) (UCLA Mental Health and Schools).

**APPENDIX III: FORMAL OPINION**



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Office of the Attorney General

FORMAL	)	
OPINION	)	
	)	No. 18-01
of	)	
	)	January 11, 2018
CYNTHIA H. COFFMAN	)	
Attorney General	)	

This Opinion provides general guidance regarding the Family Educational Rights Privacy Act, 20 U.S.C. § 1232g (“FERPA”), a federal statute governing privacy of student records. The Opinion addresses misconceptions about FERPA’s scope to assure teachers, administrators, and other school staff that they may proactively respond to safety concerns, including threats of school violence, without violating students’ and families’ privacy rights. The Opinion also explains what information Colorado schools may obtain from juvenile courts and law enforcement agencies to assist in evaluating school safety risks.

For answers to specific questions regarding FERPA compliance, including questions beyond the scope of this Opinion, schools and districts should consult counsel. This Opinion focuses on the K-12 school environment. FERPA questions specific to higher education are beyond the scope of this Opinion.

**OVERVIEW**

Reports analyzing recent campus shootings observe that educators in Colorado and elsewhere often misunderstand the scope and meaning of FERPA. Teachers and administrators fear that by responding proactively to threats of school violence, they may run afoul of federal privacy laws. This Opinion seeks to dispel these misunderstandings and to prevent unfounded

privacy concerns from hampering school violence prevention. When deciding whether to share student information with other school staff or outside agencies, educators should remember the following guidelines, which are discussed and analyzed more fully in the body of this Opinion:

- Not all student information is an “education record” subject to FERPA’s privacy restrictions. For example, without implicating FERPA, educators may share the following information with other educators and with law enforcement personnel:
  - observations and other personal knowledge about a student’s behavior (for example, behavior a teacher sees or overhears);
  - reports, whether written or spoken, about a student from a student’s friends or peers;
  - threats of violence or other information shared on social media platforms like Facebook or Twitter; and
  - records created and kept by school security personnel.
- Even “education records” may be disclosed without parental consent in certain circumstances. For example:
  - FERPA does not prevent school staff from sharing education records with other school personnel who have “legitimate educational interests” in the information.
  - In response to health or safety emergencies, schools may share FERPA-protected education records with those outside the school who can help protect the school and its students.
- Educators can and should err on the side of safety.
  - Neither a school nor a school employee can be sued for claimed violations of FERPA. Only federal officials have the right to enforce FERPA and, in doing so, they must focus on systemic violations, not good-faith mistakes.
- Amendments to FERPA regulations have broadened the emergency exception, making clear that federal regulators will defer to the reasonable judgment of educators confronted with potential safety risks.

- Colorado law encourages law enforcement agencies and school districts to share information. Schools may obtain a variety of information from state law enforcement and juvenile justice agencies to help keep their campuses safe.

Included at the end of this Opinion is a list of “Frequently Asked Questions” about FERPA, designed to help school officials understand how FERPA operates in practice.

## BACKGROUND

Congress enacted FERPA to “protect [students’] right to privacy by limiting the transferability of their records.” *United States v. Miami Univ.*, 294 F.3d 797, 817 (6th Cir. 2002) (internal quotation marks omitted; alteration in original). To serve this purpose, FERPA generally prohibits schools from releasing information in a student’s “education records” without obtaining written consent from the student’s parents. 20 U.S.C. § 1232g(b)(1).<sup>1</sup>

This general rule against disclosure is not absolute, however. Not all information that comes into the hands of an educator, administrator, or other school staff member is an “education record” subject to FERPA’s restrictions. And even education records may be disclosed without parental consent under certain circumstances, including when schools are presented with health or safety emergencies. These exceptions to FERPA are critically important: they ensure that FERPA’s goal of protecting student privacy does not prevent educators from appropriately responding to significant risks.<sup>2</sup>

Yet FERPA’s exceptions are not always well understood. Some educators believe, incorrectly, that FERPA applies to any information about a student, including a teacher’s personal knowledge and observations. Some believe that they will be subject to lawsuits if they disclose student information, even in the

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<sup>1</sup> This Opinion uses the term “education records” to refer both to education records themselves and to “personally identifiable information contained [in education records].” 20 U.S.C. § 1232g(b)(1). Both categories of information are equally subject to FERPA’s restrictions, and the distinction between the two is not relevant to the guidance in this Opinion.

<sup>2</sup> Experts have emphasized that information sharing is important in preventing school violence. See Report of Governor Bill Owens’ Columbine Review Commission 88 n.202, 108–10 (May 2001) Available at <https://schoolshooters.info/sites/default/files/Columbine%20-%20Governor's%20Commission%20Report.pdf> (last visited Aug. 13, 2016) (“It is clear to the Commission ... that police and school authorities must work cooperatively in assessing actual or potential threats to the safety of students and school personnel.”).

face of safety concerns. These misunderstandings have caused educators to question whether they can proactively respond to potential threats of school violence, as two recent tragedies demonstrate.

In 2007, the Governor of Virginia commissioned a panel of experts to study a mass shooting at Virginia Polytechnic Institute and State University (“Virginia Tech”), in which 32 students lost their lives. Report of the Virginia Tech Review Panel Presented to Timothy M. Kaine, Governor, Commonwealth of Virginia, *Mass Shootings at Virginia Tech April 16, 2007* at 2 (August 2007).<sup>3</sup> While the study identified many factors as potentially contributing to the tragedy, confusion about FERPA was among them. The study highlighted “widespread confusion about what federal ... privacy laws allow,” including a failure to realize that “federal laws and their state counterparts afford ample leeway to share information in potentially dangerous situations.” *Id.* The report observed that, in the case of the Virginia Tech shooting, this confusion hampered effective information sharing, limiting opportunities to identify the gunman as a safety risk before he committed his acts of violence.

In 2016, a report analyzing the circumstances leading to a shooting at Arapahoe High School in Centennial, Colorado, likewise cited misunderstandings about FERPA. Sarah Goodrum and William Woodward, *Report on the Arapahoe High School Shooting: Lessons Learned on Information Sharing, Threat Assessment, and Systems Integrity* (Jan. 18, 2016).<sup>4</sup> For example, school staff believed that under FERPA “they would be more liable if they had shared information about [the gunman’s] concerning behaviors, than if they had not.” *Id.* at 8–9. These mistaken assumptions included the belief that staff could not share information with others within the school itself. Staff believed that “they could not discuss a student’s concerning behaviors with other teachers or staff prior to the shooting because ... FERPA guidelines prohibited it.” *Id.* at 39. As one staff member put it, “[t]he school [was] somewhat confused on what FERPA is.” *Id.*

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<sup>3</sup> Available at <http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf> (last visited August 13, 2016).

<sup>4</sup> Available at [http://www.colorado.edu/cspv/publications/AHS-Report/Report\\_on\\_the\\_Arapahoe\\_High\\_School\\_Shooting\\_FINAL.pdf](http://www.colorado.edu/cspv/publications/AHS-Report/Report_on_the_Arapahoe_High_School_Shooting_FINAL.pdf) (last visited August 13, 2016).

## DISCUSSION AND GUIDANCE

### I. FERPA restricts disclosure of information only if it qualifies as an “education record.”

FERPA does not apply to any and all information about a student. It covers only “education records,” which are defined as “records, files, documents, and other materials” that “contain information directly related to a student” and are “maintained by an education agency or institution.” 20 U.S.C. § 1232g(a)(4). While this definition is broadly worded, it is not boundless in scope. The United States Supreme Court has held that FERPA is concerned mainly with “institutional records kept by a single central custodian, such as a registrar,” which would typically be “kept in a filing cabinet in a records room at the school or on a permanent secure database.” *Owasso Indep. Sch. Dist. v. Flavo*, 534 U.S. 426, 432–3, 434–35 (2002). In practice, this means that a significant amount of information relevant to school safety is outside the scope of FERPA and may be freely shared among educators and outside agencies, including law enforcement.

Two particularly important categories of information are outside the scope of FERPA’s definition of “education records”: first, information an educator learns through personal observation, peer reports, or social media; and, second, records of a school’s security personnel, which are governed by a specific exception to FERPA.

#### A. Information about student behavior that an educator learns through observation, discussions with students, or social media is not subject to FERPA.

Educators receive a significant amount of information in day-to-day interactions with students. This may include information relevant to evaluating present or future safety threats. Without implicating FERPA, educators may disclose this information to school staff, law enforcement agencies, or parents.

***Personal Observations.*** Information “obtained through [a] school official’s personal knowledge or observation” is not an “education record.” U.S. Dep’t of Educ., *Addressing Emergencies on Campus* 4 (June 2011).<sup>5</sup> Nor are opinions about the significance or dangerousness of a student’s behavior. See Letter from Kathleen Wolan, Program Analyst, U.S. Dep’t of Educ., Office of

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<sup>5</sup> Available at [http://rems.ed.gov/docs/ED\\_AddressEmergenciesOnCampus.pdf](http://rems.ed.gov/docs/ED_AddressEmergenciesOnCampus.pdf) (last visited Aug. 13, 2016).

Innovation and Improvement, Family Policy Compliance Office, to Anonymous 2 (Apr. 5, 2007) (hereinafter “FPCO Letter (Apr. 5, 2007)”). This includes a broad range of information, illustrated by the following examples.

- “[A] teacher overhears a student making threatening remarks to other students.” U.S. Dep’t of Educ., *Addressing Emergencies on Campus* 4.
- A school staff member finds a letter, drawing, or other document created by a student that indicates a possible safety threat—for example, a “hit list” written on the cover of a text book. *Risica ex rel. Risica v. Dumas*, 466 F. Supp. 2d 434, 437, 441–42 (D. Conn. 2006).
- A student pulls an education aide’s hair, and the aide believes the student’s “behaviors [are] escalating,” that the student is “very strong,” and that the student will “continue[ ] to hurt people.” FPCO Letter 2 (Apr. 5, 2007).
- A teacher notices a disturbing change in a student’s behavior or observes the student become withdrawn and uncommunicative. *Cf. id.*; *Risica*, 466 F. Supp. 2d at 441–42; U.S. Dep’t of Educ., *Addressing Emergencies on Campus* 4.

In each of these circumstances, information about the student may be shared with others, including law enforcement officials, without implicating FERPA.

***Information Learned from a Student’s Peers.*** Students themselves may report information about other students, and that information may sometimes be relevant to assessing school safety. Because students are not “agents of [a] school” and do not “act[ ] for” an educational institution, peer reports, whether written or spoken, are not “education records.” *Cf. Owasso Indep. Sch. Dist.*, 534 U.S. at 434–35 (holding that when students grade each other’s work, those grades are not subject to FERPA). Thus, if a student shares information with an educator that concerns another student and is potentially relevant to school safety, the educator may disclose that information without implicating FERPA.

***Social Media.*** “Almost every middle school [and] high school ... student in the United States engages in some form of social media” such as Facebook and Twitter. Nat’l Center for Campus Pub. Safety, *Guide to Social Media in*

*Educational Environments* 2–3 (2016).<sup>6</sup> Students engage with online social media platforms constantly—sometimes “more than 100 times a day, ... even during school hours.” *Id.* at 2. Social media posts are often publicly viewable and include observations about students’ school experiences. Students “post things they’d never say in person,” and may even post information that foreshadows “threats of mass violence on campuses or proposed violence toward specific individuals or groups.” *Id.* at 2, 5.

Social media posts are not restricted from disclosure under FERPA. They fall outside the definition of “education records” because they are not “maintained” by schools and are created by students, not school staff. *Cf. Owasso Indep. Sch. Dist.*, 534 U.S. at 434–35. Thus, a school official may disclose the existence and content of social media posts.

**B. FERPA contains a specific exclusion for records maintained by school security personnel, which may be disclosed without parental consent.**

Many schools employ staff tasked with maintaining campus security. Under FERPA, investigative reports and other records created and maintained by a school’s security staff are specifically excluded from the definition of “education records.” 20 U.S.C. § 1232g(a)(4)(ii)(B)(II). These records are therefore exempt “from the privacy requirements of FERPA” and may be disclosed without parental consent. U.S. Dep’t of Educ., *Addressing Emergencies on Campus* 5.

To qualify as a FERPA-exempt “law enforcement record,” the record must be (1) created by a “law enforcement unit”; (2) created for a “law enforcement purpose,” and (3) maintained by the law enforcement unit. 34 C.F.R. § 99.8(b)(1). The term “law enforcement unit” is not limited to a formal department staffed by commissioned police officers or school resource officers (“SROs”). It may simply be a “component” of the school staffed by “security guards” or others designated to “maintain the physical security and safety of the [school].” 34 C.F.R. §99.8(a)(1).

Taken together, these provisions mean that if school security personnel conduct an investigation into an event—for example, an allegation that a student possessed a weapon—and create a report, that report may be disclosed without implicating FERPA. Only if a copy of the report becomes part of an education record (a disciplinary file, for instance) does it become subject to FERPA’s privacy restrictions. *Compare Bryner v. Canyons Sch. Dist.*, 351 P.3d

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<sup>6</sup> Available at [http://www.nccpsafety.org/assets/files/library/NCCPS\\_Guide\\_to\\_Social\\_Media.pdf](http://www.nccpsafety.org/assets/files/library/NCCPS_Guide_to_Social_Media.pdf) (last visited Aug. 13, 2016).

852, 858–59 (Utah App. 2015) (holding that a video recording of a student fight was an education record because it was maintained by the school district for disciplinary reasons as part of student education records), *with In re Rome City Sch. Dist. v. Grifasi*, 806 N.Y.S.2d 381, 383 (N.Y. Supp. Ct. 2005) (holding that a surveillance video was exempt from FERPA because it “was recorded to maintain the physical security and safety of the school building and [did] not pertain to the educational performance of the students captured on th[e] tape”). Even then, only the copy maintained as an education record (for example, as a student disciplinary record) is subject to FERPA. 34 C.F.R. § 99.8(b)(2)(i). The original report, if maintained by the school’s law enforcement unit, may still be disclosed without parental consent.

## **II. Even “education records” may be disclosed in certain circumstances.**

While not all information is an education record under FERPA, even education records themselves may be disclosed without parental consent under certain circumstances. Two of FERPA’s exceptions assist schools in sharing information regarding threats to school safety and are relevant here: the “emergency” exception and the “school official” exception. Additionally, schools should be aware that they are required to share certain student information with law enforcement agencies under Colorado law. They should also understand that health records in a school’s possession are subject to FERPA, not federal medical privacy laws.

### **A. Schools may disclose protected information to respond to a health or safety emergency.**

School officials may disclose education records without parental consent “to appropriate persons” if the disclosure “is necessary to protect the health or safety of the student or other persons” and is “in connection with an emergency.” 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.36. This emergency exception is “flexible” and allows “school administrators to ... bring appropriate resources to bear on the situation.” U.S. Dep’t of Educ., *Addressing Emergencies on Campus* 4.

In applying this exception, schools should not adopt an overly restrictive approach to determining what qualifies as an “emergency.” Federal regulations make clear that a school’s actions will not be second-guessed based on information and understandings that may become clear only later. The school need only “articula[te]” a “significant threat to the health or safety of a student or other individuals,” and it may make its judgment “based on the information available at the time.” 34 C.F.R. § 99.36(c). The school may “take

into account the totality of the circumstances” to reach its decision. *Id.* Further, a school needs only a “rational basis” for the decision to disclose records; the federal government “will not substitute its judgment” for the school’s. *Id.* In plain terms, this means “simply ... that a school official [must] be able to express in words what leads the official to conclude that a student poses a threat.” Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,838 (Dec. 9, 2008).<sup>7</sup>

Schools also should not delay disclosure until an emergency has materialized. School officials “must be able to release information from education records in sufficient time ... to keep persons from harm or injury.” *Id.* An “emergency” may thus arise not just from an immediate, ongoing incident, but from less immediately urgent circumstances, such as a change in a student’s behavior:

[a]n emergency could ... be a situation in which a student gives sufficient, cumulative warning signs that lead an educational agency or institution to believe the student may harm himself or others at any moment.

*Id.* Neither a “red alert” nor a “gun in the hall” is required; schools may take steps early enough to prevent a dangerous situation from arising.

Finally, disclosure need not be limited to those “responsible for providing the protection” necessary to respond to an immediate danger. *Id.* Under the emergency exception, schools may “disclose ... education records in order to gather information from any person who has information that would be necessary to provide the requisite protection.” *Id.* at 74,838–39. This includes:

- disclosures to current or former peers of the student or mental health professionals “who can provide ... appropriate information to assist in protecting against the threat”;
- disclosures to law enforcement officials who “may be helpful” in providing protection; or

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<sup>7</sup> For example, if a student has had a medical procedure such as hand surgery, it is permissible for a school’s physical therapist to share information with a student’s doctor to assist in ensuring adequate follow-up medical care. Letter from Ellen Campbell, Acting Director, U.S. Dep’t of Educ., Family Policy Compliance Office, to Anonymous 2 (Dec. 20, 2010).

- disclosures to “a potential victim or the parents of a potential victim ... whose health or safety may need to be protected.”

*Id.* at 74,839.

**B. Education records may be shared among school staff with a legitimate educational interest in the information.**

FERPA does not require parental consent when schools share education records among “school officials” who have a “legitimate educational interest” in the information. 34 C.F.R. § 99.31(a)(1)(i)(A). The meaning of these terms is broad, making this exception an important tool for addressing concerns relevant to school safety.

The term “school officials” is not limited to administrators and teachers. It includes all staff members who “need access to students’ education records to perform their duties” or need the information “in order to perform ... required institutional services and functions for the school.” Family Educational Rights and Privacy, 73 Fed. Reg. at 74,814. Thus, school security staff fall within the exception and may receive information helpful in maintaining campus safety and security. *Id.* at 74,815 (“As school officials, [security personnel] may be given access to personally identifiable information from those students’ education records in which the school has determined they have legitimate educational interests.”). “School officials” may also include those who are not formally employed by a school, such as “parents and other volunteers who assist schools in various capacities, such as serving on official committees, serving as teachers’ aides, and working in administrative offices.” *Id.* at 74,814. If a school uses a threat assessment team, members of the team may likewise receive education records in carrying out their school safety functions. *Id.* at 74,839.

This exemption is subject to two notable qualifications. First, “school officials” may “access ... only those education records in which they have legitimate educational interests.” 34 C.F.R. § 99.31(a)(1)(ii). But, again, “educational interests” include maintaining the safety of students and the security of campus. *See* Family Educational Rights and Privacy, 73 Fed. Reg. at 74,815. Second, each year, schools must notify parents of their rights under FERPA, and this annual notification must include criteria for determining who qualifies as a “school official” with access to education records. 34 C.F.R. § 99.7(a)(1).

**C. Colorado schools must share education records with law enforcement agencies conducting criminal investigations.**

FERPA allows schools to share education records with criminal justice agencies if authorized by state law and if the “disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released.” 20 USC § 1232g(b)(1)(E). Colorado’s Children’s Code includes provisions allowing for the reciprocal sharing of information between schools and juvenile justice system in juvenile delinquency or dependency and neglect cases as needed to facilitate services and support. § 19-1-303(1)(a), C.R.S. (2015). The Colorado statute requires schools to share “disciplinary and truancy information” upon the request of a criminal justice agency, if the agency is investigating a criminal case or a truancy matter. § 19-1-303(2)(c), C.R.S. (2015). The criminal justice agency may use the information only for the performance of its legal duties and must maintain its confidentiality. *Id.*

**D. Health information maintained by a school is part of the student’s education record and subject to FERPA, not to HIPAA.**

Some educators mistakenly believe that the federal Health Insurance Portability and Accountability Act (“HIPAA”) applies to all medical records in a school’s possession and therefore imposes special privacy restrictions on those records. In fact, medical records in a school’s possession are treated as education records and are subject to FERPA’s disclosure framework. *See* 45 C.F.R. § 160.103 (defining “protected health information” as excluding health information contained in education records covered by FERPA). Thus, according to the Department of Education, “[medical] treatment records may be disclosed to any party, without consent, as long as the disclosure meets one of the exceptions to FERPA’s general consent rule.” U.S. Dep’t of Educ., *Addressing Emergencies on Campus* 10.

**III. When faced with potential safety risks, schools may, consistent with FERPA, err on the side of proactive disclosure.**

In attempting to balance FERPA’s policy of promoting student privacy against the need to address school safety concerns, educators should err on the side of disclosure. The United States Department of Education has made clear through revised regulations that it will not second-guess judgments made on the ground in the face of a potential emergency. 34 C.F.R. § 99.36(c). Additionally, FERPA does not give students or parents the right to file a lawsuit and it applies only to systemic violations of student privacy, not good-faith mistakes in judgment.

**A. Under current FERPA regulations, schools are entitled to deference when they decide to disclose education records in the face of safety concerns.**

The United States Department of Education previously took the position that FERPA's emergency exception was to be "strictly construed" and that emergency disclosures were to be "narrowly tailored." *See, e.g., U.S. Dep't of Educ., Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities* 3 (Apr. 12, 2002). This position shifted in the wake of the Virginia Tech shooting.

In 2008, the Department of Education issued new rules "to eliminate[] the previous requirement that [the emergency exception] be 'strictly construed.'" Family Educational Rights and Privacy, 73 Fed. Reg. at 74,837. The amendment recognizes that school officials must "act quickly and decisively when emergencies arise" and accordingly "provides greater flexibility and deference to school administrators." *Id.* The current version of the regulation specifically requires the Department to defer to schools: "the Department will not substitute its judgment for that of the [school] in evaluating the circumstances and making its determination [that an emergency existed]." 34 C.F.R. § 99.36(c).

**B. Schools and school officials cannot be sued by parents or students for FERPA violations.**

One apparent misconception about FERPA is that a good-faith but technically unauthorized disclosure of information can lead to significant liability on the part of schools or individual teachers. But parents and students may not sue under FERPA for an unauthorized disclosure of protected information. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). Only the United States Department of Education may enforce FERPA, and it must do so within FERPA's administrative framework. Further, that framework focuses on "systemic" violations of student privacy, not isolated mistakes. *Jensen v. Reeves*, 45 F. Supp. 2d 1265, 1276 (D. Utah 1999). Enforcement proceedings are reserved for educational institutions which have a "policy or practice" of disclosing information without consent. 20 U.S.C. § 1232g(a)(1)(b). Educators should not fail to act out of an unreasonable concern that technical violations of FERPA will lead to severe legal consequences.

#### IV. Colorado law gives schools access to criminal justice information which can assist in risk assessment.

In 2000, the Colorado General Assembly passed the Exchange of Information Related to Children Act<sup>8</sup> (the “Information Act”) as an amendment to the Colorado Children’s Code. § 19-1-301, C.R.S. (2015). The Information Act authorizes schools and school districts to obtain information from law enforcement and criminal justice agencies, based on the assumption that schools “are often better able to ... preserve school safety when they are equipped with knowledge concerning a child’s history and experiences.” § 19-1-302(1)(b), C.R.S. (2015).

Under the Information Act, schools may receive information about a student, except mental health or medical records, relating to an incident that “rise[s] to the level of a public safety concern.” § 19-1-303(2)(b)(I), C.R.S. (2015). The disclosing criminal justice agency has discretion to determine what constitutes a public safety concern, but the Information Act specifies some examples:

- “information or records of threats made by the [student],”
- “any arrest or charging information,”
- records of “municipal ordinance violations,”
- and records relating to arrests or charges that, “if committed by an adult, would constitute misdemeanors or felonies.”

*Id.* The Information Act also makes available to school principals and superintendents information such as juvenile delinquency records, arrest records, and probation records. § 19-1-304, C.R.S. (2015).

#### CONCLUSION

As this Opinion demonstrates, FERPA and its accompanying regulations allow educators flexibility in responding to potential school safety threats. Schools should become familiar with FERPA’s framework and adopt policies that avoid well-intentioned but overly restrictive application of student privacy laws. Schools should also be aware that Colorado law makes available to them

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<sup>8</sup> The law was renamed the Children’s Code Records and Information Act.

criminal justice information that may assist them in maintaining a safe campus.

Issued this 11<sup>th</sup> of January, 2018.

  
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CYNTHIA H. COFFMAN  
Colorado Attorney General

## **FREQUENTLY ASKED QUESTIONS (FOR SCHOOL STAFF)**

**I am concerned about the behavior of one of my students. Can I share my observations with others?**

Yes. Observations and opinions do not fall under FERPA. A teacher may always discuss observations about a student with other school officials and, if necessary, law enforcement.

**A student told me her friend planned to do something violent on Friday. Can I do anything other than call the student's parents?**

Yes. A report from a fellow student is not protected information under FERPA. This information may be shared with those inside and outside the school to determine the best response to the threat.

**I learned that one of my students posted a threatening statement towards another student on Facebook. Is a student's Facebook post protected by FERPA?**

No. Information posted on a student's personal social media account is not maintained by the school. The information may be shared with those inside and outside the school to determine the best response to the threat.

**We found an anonymous bomb threat in the library. Can we give local police the library surveillance video so that they can investigate who did it?**

Yes. The threat itself would trigger the "emergency" exception, so providing information to an outside agency that can assist is permitted by FERPA. Also, if your security video system is maintained by your security staff or SRO for law enforcement purposes, footage would be a "law enforcement record" exempt from FERPA.

**Based on information we learned from students, we believe that two groups of students are going to fight after school. Does this situation qualify as a "health or safety emergency"?**

Yes. FERPA defers to the judgment of school officials when making the determination that a "health or safety emergency" exists. So long as the school can articulate facts indicating a "significant threat to the health or safety of a

student” at the time the decision was made, the U.S. Department of Education will not second guess your judgment.

**In a health or safety emergency, with whom can I share student information?**

This depends on the circumstances. FERPA-protected information may be shared with anyone who needs the information to help respond to the threat. Information may be shared with law enforcement officials, emergency responders, and social service agencies. In appropriate circumstances, otherwise-confidential information may be shared with a student’s doctor, therapist, or other person deemed “necessary” to assist with the emergency.

**In the event of an emergency, is there a limit to what student information I can share?**

Again, the answer to this question depends on the circumstances. A school may disclose any information that would help others assess and respond to the emergency. Appropriate information may include discipline records, attendance history, or medical information, if needed.

**A student was expelled last week. May the principal tell the school resource officer about the expulsion?**

Yes, because the SRO is a school official and needs the information to do his job. In this case, the SRO would have a reasonable need to know that the student should not be on campus.

**A student has been behaving strangely on campus. Can our Threat Assessment Team review our in-school nurse’s records regarding his prescription medications?**

Yes. Records at the school, even if they are medical in nature, are “education records” that may be disclosed in appropriate circumstances under FERPA. Because members of a threat assessment team are “school officials,” they may obtain access to student information relevant to performing their function.

**A principal called police and shared confidential student information, believing she was faced with an emergency. The “emergency” turned out to be a prank. Can the student or his family sue the school or the principal?**

No. FERPA does not provide a basis for private lawsuits. Also, the release is not a violation of FERPA if the administrator used reasonable judgment based on the information she had at the time, even if hindsight suggests the disclosure was an error.

**We believe one of our students was arrested for domestic violence last weekend. Do we have any right to know the details?**

Yes. If the student has been involved in an incident which suggests a public safety concern or has been arrested for a crime which, if committed by an adult, would be a misdemeanor or felony, the school may obtain the details of the offense so that school officials can evaluate what risk, if any, the student presents on campus.