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MIRANDA & STUDENT INTERROGATIONS: TO WARN OR NOT TO WARN

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We all know what *Miranda* warnings are. From TV and movies, most people could recite the warnings from memory and say with confidence that criminal suspects are entitled to *Miranda* warnings when they are interrogated by the police. But outside of the fictional, black and white world of TV cop dramas and crime novels, the precise application of *Miranda* to everyday life can be difficult even for trained lawyers to predict.

In the school setting, determining when and how *Miranda* might come into play is no less difficult. Acknowledging that student conduct can involve two layers of repercussions, potentially implicating both school disciplinary codes and state penal laws, courts have developed a binary analysis in applying *Miranda* in the school setting. In general, *Miranda* warnings have not been required when school officials question students for school disciplinary purposes, but they are required when law

enforcement officials interrogate students at school about suspected criminal conduct.

Unfortunately, situations inevitably arise that do not fit neatly within this binary rule. In *N.C. v. Commonwealth*,¹ the Kentucky Supreme Court held that the failure to provide *Miranda* warnings to a student prior to questioning by a school official about a suspected violation of school policy required the suppression of the student's confession at a later juvenile proceeding to adjudicate a felony charge.² Does this case mark the beginning of a new trend that could affect schools and their officials?

Miranda Warnings Generally

To understand the result in *N.C.* and its potential implications, it helps to first review the basics of *Miranda*. The Fifth Amendment provides that "No person ... shall be compelled in any criminal case to

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be a witness against himself[.]”³ To ensure that this right is honored, the Supreme Court in *Miranda v. Arizona*, held that law enforcement officers, prior to conducting a custodial interrogation, must “warn” criminal suspects of their rights (i.e., the right to remain silent, the fact that anything he or she says can be used against him or her in court, and the right to an attorney).⁴ Hence, when criminal suspects are in police custody, not free to leave, and questioned about a suspected crime, they are entitled to these “*Miranda* warnings.” According to the Supreme Court, because custodial interrogation by the police is inherently coercive,⁵ these warnings help ensure that a criminal suspect’s admissions to the police are knowingly and voluntarily made.⁶ If these warnings are not provided, any statements, including a full confession, made by the suspect in the interrogation may be excluded at trial.

Miranda warnings are only required when a suspect is “in custody.”⁷ When police arrest and take a suspect in for questioning, the custodial nature of the interrogation may be apparent. But all police investigations do not occur in circumstances that afford easy classification. For example, police may choose to interview an individual at home, in a parking lot, on a street corner, in a public library, or in a coffee shop. In these less obvious cases, courts consider whether the objective circumstances of the interrogation would cause a reasonable person in the suspect’s position to believe that he or she was in police custody. This highly fact intensive inquiry makes it difficult to distill many hard and fast rules.

Miranda Warnings in Schools

Courts use this same, fact-intensive test when reviewing the need for *Miranda* warnings prior to the questioning of students in school. As a general matter, school officials do not usually have the inherently coercive, authoritarian presence associated with most law enforcement officers. Though they certainly have authority over the students under their charge, school administrators do not wear uniforms or carry weapons, and they do not have the authority to arrest or incarcerate citizens. For this reason, courts have tended to hold that the questioning of students by school officials investigating a school disciplinary infraction does not implicate *Miranda*.⁸

In contrast, when law enforcement

officers, including school resource officers, question students about suspected criminal conduct, *Miranda* warnings have been required.⁹ Hence, under certain circumstances, if students are questioned by law enforcement officers in school without being read their *Miranda* rights, their statements could be excluded from subsequent juvenile proceedings. While some police officer involvement is necessary for an interrogation in the school setting to rise to the level of a custodial interrogation, courts are divided as to precisely how much involvement triggers the need for *Miranda* warnings. For example, courts in Georgia and North Carolina have suppressed statements made by students in response to questions from school administrators simply because of the presence of law enforcement officers.¹⁰ But courts in New York and Virginia have held the opposite, ruling *Miranda* warnings were not required in cases where law enforcement officers were present but asked no questions.¹¹ At this juncture, the United States Supreme Court has not offered much guidance about the amount of police involvement necessary for an in-school interrogation to be considered a custodial one. Seeking to fill this jurisprudential void, the Kentucky Attorney General has requested that the High Court review the decision in *N.C.*¹²

The U.S. Supreme Court has decided one case involving *Miranda* in the school setting, *J.D.B. v. North Carolina*.¹³ There, the Court addressed how the age of the child affects the “in custody” analysis under *Miranda*.¹⁴ Officer involvement was not an issue in *J.D.B.* because it was undisputed that a law enforcement officer questioned the student at school, behind closed doors, about a suspected crime that occurred outside of school. In *J.D.B.*, a uniformed police officer removed a 13-year-old student from his classroom and took him to a closed room for questioning about a series of neighborhood burglaries. The student was never given *Miranda* warnings or permitted to call his legal guardian. He eventually admitted his guilt. After this admission, the officer advised the student that he could end the interrogation and leave, but the student remained and drafted a full confession.¹⁵

The state trial court initially found that the interrogation was not custodial, and that *Miranda* warnings were not required. The student contended his age should have been factored in when assessing whether he would have felt free to end the inter-

rogation.¹⁶ It was this issue alone that the Supreme Court considered. The Court believed a child's young age can affect both his understanding of his rights and his response to authority figures, because a child does not process information the same way that adults do. As a result, the Supreme Court remanded the matter to the state court to reconsider whether the student was "in custody" for purposes of *Miranda*, after factoring in the student's age at the time of the questioning.¹⁷

In short, *J.D.B.* offers some guidance for lower courts to consider in assessing whether in-school interrogations are "custodial." But the Court did not address how law enforcement participation affects this determination.

***N.C. v. Commonwealth:* An Example of a Close Call**

The facts in *N.C.* brought this issue to the fore.¹⁸ After discovering an empty bottle for a hydrocodone prescription in the boy's restroom, school officials investigated. They discovered that *N.C.* had given some of the pills to other students. An armed and uniformed school resource officer took *N.C.* to the assistant principal's office for questioning. Although the officer knew that hydrocodone is a scheduled narcotic and the distribution of it is a felony offense, he never told the student that he was suspected of committing a crime. In accordance with the officer's and assistant principal's standard practice, only the assistant principal questioned the student. Eventually, the student admitted that he had given two tablets to another student.¹⁹ Upon the student's admission, the school resource officer advised the student and his mother that he would face felony charges. At trial, the student moved to exclude his statements, but the court refused to suppress them.

On appeal, the Kentucky Supreme Court reversed in a split decision.²⁰ Though the court acknowledged that a school official, and not a law enforcement officer, had questioned the student, it nonetheless concluded that *Miranda* warnings were required. The court reasoned that the assistant principal essentially acted as an agent for the school resource officer,²¹ using the same "loose routine" they had developed in previous interrogations of students.²² In the court's view, the assistant principal had acted "in tandem" with the school resource

officer and had done so knowing that criminal charges would follow.²³

The court was troubled by the fact that the student appeared not to understand that criminal charges were even a possibility until after his confession.²⁴ The Court seemed to be significantly influenced by the Supreme Court's holding in *J.D.B.*, focusing extensively on the psychological inability of the 16-year-old *N.C.* to understand the ramifications of a confession and to assert his constitutional rights.²⁵ The court found that this lack of understanding, coupled with the overlapping nature of the criminal and school disciplinary investigations, made the interrogation custodial.²⁶ The Court opined that the absence of active questioning by the officer made the interrogation no less custodial, but rather mislead the student into believing he was subject only to school discipline and caused him to "confess without full knowledge of the consequences for so doing."²⁷

Lessons from *N.C.*

Pending the High Court's decision on whether to grant review of *N.C.*, the Kentucky Supreme Court's ruling offers several lessons for school officials and school attorneys. First, *N.C.* illustrates the potential influence of the Supreme Court's *J.D.B.* opinion. Consistent with *J.D.B.*, the Kentucky Supreme Court in *N.C.* paid very close attention to the psychological effect that the questioning may have had on the minor student. In close cases, lower courts may be inclined to find investigative interviews of students at school to be custodial interrogations, particularly if the student being questioned is very young.

On an operational level, *N.C.* also serves as a reminder that the circumstances surrounding many school investigations make it difficult to determine the need for *Miranda* warnings. This is more likely to occur where the line between conduct that offends only school disciplinary codes and that which also violates criminal laws is quite fine, or where the conduct in question straddles both sides of the line. The exercise of police officer discretion in deciding whether to charge a student, where the student has technically violated a law but withholding charges is prudent, also complicates the matter, since *Miranda* warnings are not needed if charges are not filed regardless of the extent of the

officer's involvement. Given the inevitable occurrence of these "close calls," school officials must have a firm grasp of students' procedural rights when being questioned. Relevant school district policies and operating procedures should be reviewed for clarity and compliance with applicable law.

In conducting such a review, one thing to consider is whether it makes sense to avoid the situation that occurred in *N.C.* by providing guidance on when to conduct separate school and criminal investigations. In the court's view, the school official and the school resource officer had consciously merged the investigations for both criminal and school disciplinary matters and deluded the student into underestimating the potential consequences of an admission. One practical option to avoid invoking the need for *Miranda* warnings may be to conduct school disciplinary investigations separately from the criminal investigations by law enforcement agents. Where the involvement of school resource officers or law enforcement officers in school investigations is not necessary to protect the safety of students and staff, this approach may help reduce claims of constitutional violations.

Conclusion

As *N.C.* demonstrates, it is not always easy to predict exactly how *Miranda* will apply in the school setting. Courts have developed a general distinction between mere questioning by school officials for disciplinary purposes, on the one hand, and interrogation by law enforcement officers investigating crimes on the other, but close calls inevitably arise. Thought and attention to the procedural details of student questioning is therefore necessary to ensure that student rights are honored and school safety is preserved. I&A

End Notes

1. 396 S.W.3d 852 (Ky. 2013).
2. *Id.* at 865.
3. U.S. Const. amend V.
4. 384 U.S. 436 (1966).
5. *Id.* at 447-458.
6. *Id.* at 467.
7. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (holding that *Miranda* warnings

were not required during initial traffic stop, but were required upon defendant's arrest).

8. See, e.g., *S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633 (6th Cir. 2008) ("we conclude that Lacey's actions did not violate the Fifth Amendment, as under the circumstances--where Lacey was not acting at the behest of law enforcement, law enforcement officers were not present, and we have found [the Defendant's] actions under the circumstances to be reasonable--we agree that he was not required to advise A.E. of her Miranda rights"); *C.S. v. Couch*, 843 F. Supp. 2d 894, 918 (N.D. Ind. 2011) (*Miranda* warnings not required for student questioned by school officials who were not "acting at the behest of law enforcement officials").

9. See, e.g., *In the Interest of R.H.*, 791 A.2d 331 (Pa. 2002) (suppressing statement by student made to school police); *In re: Kilitz*, 651 P.2d 1382 (Or. Ct. App. 1982) (affirming exclusion of student's statement to armed police officer in school official's office).

10. See, e.g., *In re: Interest of T.A.G.*, 663

S.E.2d 392 (Ga. Ct. App. 2008) (excluding unwarned statement to school official in presence of school resource officer); *In re: Matter of K.D.L.*, 700 S.E.2d 766 (N.C. Ct. App. 2010) (*Miranda* warnings required for student interrogated by school principal for 6 hours in presence of officer who had earlier transported student in his police cruiser and frisked him for weapons).

11. See, e.g., *Matter of Tateana R.*, 64 A.D.3d 459 (N.Y. App. Div. 2009) (warnings not required for interview of student by school dean, though officer was present and asked some questions in an effort to locate a missing iPod); *J.D. v. Commonwealth*, 591 S.E.2d 721 (Va. Ct. App. 2004) (no warnings needed for principal's interview of student in presence of school resource officer who asked no questions and had not instructed principal as to the possible criminal charges that may be pursued).

12. Petition for writ of *certiorari* filed (No. 13-123)(U.S. Aug. 21, 2013). The Kentucky School Board Association and the National School Boards Association along with 15 other state and national education and school safety organizations filed an *amici*

curiae brief in support of the petition urging review. The KSBA/NSBA brief is available at <http://www.nsba.org/School-Law/AmicusBriefs/Commonwealth-of-Kentucky-v-NC-Petition-Brief.pdf>.

13. 131 S.Ct. 2394 (2011).

14. *Id.* at 2398.

15. *Id.* at 2399-2400.

16. *Id.* at 2400.

17. *Id.* at 2403-2406.

18. *N.C.*, 396 S.W.3d at 853-854.

19. *Id.* at 854-855.

20. *Id.* at 865.

21. *Id.* at 863.

22. *Id.* at 854.

23. *N.C.*, 396 S.W.3d at 862.

24. *Id.*

25. *Id.* at 860-861.

26. *Id.* at 862-863.

27. *Id.* at 862.

THREE WAYS TO IMPROVE MEMORANDA OF UNDERSTANDING FOR SCHOOL RESOURCE OFFICER SERVICES

By Kimberly Small, Assistant General Counsel, Illinois Association of School Boards, Lombard, IL

As school-based policing has continued to grow, schools have become increasingly concerned about how to balance school safety needs with students' constitutional rights. Achieving an appropriate balance is critical to avoiding litigation and to achieving an environment focused on student learning. It can also help stem the troubling flow of young people into the criminal justice system as a result of relatively minor school discipline issues better left to school officials.¹

One way to promote such an equilibrium is for school officials, local law enforcement agencies, and school attorneys to take a closer look at the memoranda of understanding (MOU) that formalize the relationship between the school district and

the local law enforcement agency for the use of school resource officers (SROs). Most MOUs include the mission, organizational structure, goals and procedures of the SRO. Some also address such issues as location of SROs in school buildings, specific day-to-day duties like recordkeeping, funding sources, selecting the SRO, and training by the local law enforcement agency, along with chain of command issues.

But many MOUs often fail to address the roles of school officials and SROs with respect to student discipline and maintaining the educational environment, resulting in "at that moment" decisions that may ultimately upset the ideal balance between school safety and student rights. By discussing matters beforehand, all

involved can carefully consider the local conditions necessitating the presence of SROs and take into account the applicable laws and relevant school policies on such issues as search and seizure, questioning of students, and requests for student records. Following are three recommendations and some useful resources to help stakeholders update and better-define school official and SRO roles that promote a positive and safe educational environment.²

1. Align the SRO's roles and activities with specific, identified needs for maintaining the educational environment.

Because SROs are frequently trained by their agencies and associations to use the *Triad Model of SRO Responsibility*: educa-

tor, informal counselor, and law enforcer,³ one important question to ask is in which area(s) of the Triad Model does the school district need assistance from the SRO to maintain the educational environment?

The answer will depend upon local conditions within the school district. Perhaps the answer may even depend upon the specific building where the SRO will be assigned. Because many issues that SROs manage involve components of preventing and managing school violence, stakeholders may want to begin answering this question by collecting data with a school climate measurement instrument. (See text box for school climate resources.)

School climate measurement instruments may help to prevent, identify, investigate and respond to school violence and student discipline issues. They are designed to collect data identifying: (a) a school district's or individual school building's conditions affecting student development and learning;⁴ and (b) the specific needs within the school community. The data may help to align the SRO's role with the specific, identified needs. Many state boards of education provide great information and data collection options, which are usually listed in conjunction with their school violence prevention materials.

Results from a school climate measurement instrument can also provide a good starting place for stakeholders to discuss what to include in the MOU. Examples of possible MOU language include:

1. A section titled, *Alignment of SRO's activities to specific, identified needs for creating and maintaining [School District's] ideal conditions for development and learning in the educational environment.*

2. Establishment of a school leadership team that includes key personnel: principals, teachers, school-employed mental health professionals, instruction/curriculum professionals, school resource officer, and a staff member skilled in data collection and analysis.⁵

3. A statement recognizing that alignment of the SRO's role to the school district's identified needs moves stakeholders away from using SROs as a substitute for effective student discipline policies (a practice that has been shown to increase the risk of litigation and is the subject of debate for perpetuating the school-to-prison pipeline).⁶

4. A statement that [School District] and [Local Law Enforcement Agency] seek to implement a partnership with the SRO to create effective, positive school discipline that: (a) functions in concert with efforts to address school safety and climate; (b) is not simply punitive (e.g., zero tolerance); (c) is clear, consistent, and equitable; and (d) reinforces positive behaviors.

2. Clarify school officials' authority under the law.

Most states have statutory provisions that grant school officials the authority to control their buildings and discipline students to maintain the educational environment. This authority is generally granted on the premise that school administrators, teachers, and other certified educational employees stand in the place of parents and guardians to students while they are in school, i.e., *in loco parentis*.⁷ Generally, the *in loco parentis* status of school officials usually extends to non-disciplinary matters and to all activities connected with the school program, including athletic and extracurricular programs.

Although the term "school official" may statutorily include the SRO, if the school community has identified the need for a law enforcement presence in school build-

ings, the MOU should nonetheless set forth the roles and responsibilities of the SRO while on school grounds. It should clearly specify how SROs will assist and partner with school officials to manage disruptive student behavior and discipline issues. In matters where SROs are better trained, such as questioning and searching techniques, SROs may be given the authority to take the lead. Because students do maintain their constitutional protections while at school, the MOU should clearly state that school officials are empowered to draw the line so that their school buildings and activities do not become an unwarranted extension of the local law enforcement agency.

Although many lower courts have considered the issue, the Supreme Court of the United States has not yet ruled on what standard should be used when school officials act in concert with or at the request of law enforcement agencies.⁸ A well crafted MOU can give school officials the confidence to assert their authority over an SRO to control their own school buildings and programs and the discipline of students. This is essential given, school officials' potential liability for violations of students' established constitutional rights. *In loco parentis* status does not automatically confer authority for school officials to consent in

SCHOOL CLIMATE RESOURCES

Listed below are several data collection instruments for assessing conditions for development and learning.

- Measuring Bullying Victimization, Perpetration, and Bystander Experiences: A Compendium of Assessment Tools, available at www.cdc.gov/violenceprevention/pdf/bullyCompendiumbk-a.pdf;
- Safe Supportive Learning's School Climate Measurement Compendium, available at <http://safesupportiveschools.ed.gov/index.php?id=133>;
- Positive Behavior Intervention & Supports (PBIS), available at www.pbis.org/school/default.aspx;
- Youth Violence: Measuring Violence-Related Attitudes, Behaviors, and Influences Among Youths: A Compendium of Assessment Tools – (2d ed.), available at www.cdc.gov/ViolencePrevention/pub/measuring_violence.html;
- Intimate Partner Violence and Sexual Violence Victimization Assessment Instruments for Use in Healthcare Settings, available at www.cdc.gov/ncipc/pub-res/images/ipvandsvscreening.pdf;
- World Health Organization (WHO) Information Series on School Health's Document 10, Creating an Environment for Emotional and Social Well-Being, available at www.who.int/school_youth_health/media/en/sch_childfriendly_03_v2.pdf

place of parents for the purpose of furthering local law enforcement interests.

The appropriate roles and responsibilities based upon relevant law may be set forth in the MOU under the rubric of collaboration. Examples of possible MOU language include:

1. A statement that the school community, through its school officials, directs and commands the resources that it needs from the SRO and local law enforcement agencies to maintain the educational environment. See text box for a sample statement.⁹

2. A clear description based on legal authority of the tasks that require the SRO to engage in the execution of his or her legal duty as a law enforcement officer and those situations that require the SRO to act or perform the duties as a school official. It should delineate between the circumstances when the SRO will be acting at the direction of educators attempting to enforce school policy and those under which the SRO should immediately intervene in school incidents without first waiting for direction by either the police or school officials.¹⁰

3. An ongoing training calendar to ensure school officials and SROs receive updates from the school board attorney so they understand the current law on difficult issues such as search and seizure, questioning, and requests for student

records. Many MOUs also require training of their SROs through the local law enforcement agency and/or state or district attorney. Training is critical to reducing future litigation.

4. Discussion of landmark U.S. Supreme Court cases, such as *New Jersey v. T.L.O.* (search and seizure)¹¹ and *J.D.B. v. N.C.* (questioning)¹² and the case law specific to the jurisdiction.¹³ Cite and explain the federal and state statutes, along with any applicable interpreting opinions regarding student records.¹⁴ Embed measures for a school official to prevent SROs from recommending prosecution of students in a court of law for discipline issues better left for school officials to manage.

5. Criteria based on state and federal law for communication and record sharing between schools and law enforcement agencies. (See text box on record sharing.)

3. Include supervision plans that measure the alignment of the SRO's performance with the needs of the school environment

The U.S. Department of Justice's Office of Community Oriented Policing Service (COPS) publication, *A Guide to Developing, Maintaining, and Succeeding with Your SRO Program (COPS Guide)*,¹⁵ discusses supervision of SROs. Three themes emerge that may be included in MOUs to help improve the effectiveness of SROs in schools:

1. Decide how school officials will supervise SROs. The type and degree of supervision should take into account the individual SRO's needs, school policy, available resources, specific local or building needs, and geographical realities.

2. Set an expectation of excellence. When this expectation is not met, provide constructive feedback to the SRO and report unresolved concerns to the SRO's direct law enforcement supervisor sooner rather than later. Addressing issues promptly will help increase understanding and minimize any potential negative impact on the school environment.

3. Commit to regular and frequent communication between the SRO and school officials. Many concerns can be addressed quickly and informally by keeping the lines of communication open at all times.¹⁸

The COPS Guide suggests incorporating school officials' supervisory roles for their assigned SROs into the MOU. Highlights include:

1. Methods of supervision. Many law enforcement agency supervisors and SROs report that the most effective supervision occurs when programs implement multiple supervision approaches. Approaches range from logs to maintaining telephone and radio communication to involving school officials in the SRO's evaluation.

2. SRO performance evaluations. Assess whether stakeholders are ready to agree upon an instrument to measure SRO performance in the school setting¹⁹ which incorporates the data results from the school climate assessment. In *SRO Performance Evaluation: A Guide to Getting Results*,²⁰ DOJ provides a step-by-step strategy for implementing outcome-oriented performance evaluations. Using data and implementing outcome-based performance evaluation processes can help provide clear guidance to stakeholders about whether the SRO's performance is aligned to the specific needs that assist school officials in maintaining an educational environment conducive to learning.

Conclusion

The following excerpt from a court decision sets forth the importance of the MOU:

SROs perform a unique mission. They are certified law enforcement officers who are assigned to work

SAMPLE STATEMENT OF COLLABORATION

Collaboration between the [School District] and [Local Law Enforcement Agency] and respect for the important role each plays in connection with our youth are essential to the success of the mission of both institutions. Where it is necessary for local law enforcement to be present on school property, they will conduct themselves according to accepted legal practices, recognizing the responsibility and authority of school officials to manage the school environment and will work with school officials to minimize any impact their actions might have on that environment.

RECORD SHARING

Because FERPA and many state records laws mandate non-disclosure of student records as a default position, the MOU should make clear that school officials may appropriately refuse disclosure without a warrant or subpoena. See *Commonwealth of Virginia, Letter to The Honorable Kenneth Alger, II, May 2, 1013.*

While it cites some specific state laws, general guidance about addressing requests from law enforcement agencies is available in *Answers to FAQs Responding to a Subpoena* (Illinois Council of School Attorneys, March 2011), available at <http://www.iasb.com/law/FAQsubpoena.pdf>.

at schools under [MOUs] between their law enforcement agencies and school boards. They [may be] bound to abide by district school board policies and consult with and coordinate activities through the school principal. In this capacity, SROs are called upon to perform many duties not traditional to the law enforcement function, such as instructing students, serving as mentors and assisting administrators in maintaining decorum and enforcing school board policy and rules.²¹

A well-written MOU will focus on duties with specific locally-based outcomes as the controlling theme. The intervention that results when implementing its language will make the SRO and school officials more effective in educating their students and reducing litigation. The resources show evidence that opening these discussions often improves the learning environment, school safety, and when necessary, the administration of justice in a court of law. **I&A**

End Notes

1. See, e.g., *The School-to-Prison Pipeline*, N.Y. TIMES, May 29, 2013, available at http://www.nytimes.com/2013/05/30/opinion/new-york-citys-school-to-prison-pipeline.html?_r=0; Erik Eckholm, *With Police in Schools, More Children in Court*, N.Y. TIMES, April 12, 2013, available at: <http://www.nytimes.com/2013/04/12/education/with-police-in-schools-more-children-in-court.html?pagewanted=all>. Senator Dick Durbin (D-IL) Chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, recently held the first-ever Congressional hearing on the school-to-prison-pipeline (webcast of hearing available at <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=b61e5f08eadf22b2ec4ab964fc64ae9f>). Recommendations included increasing collection of data on discipline incidents and school-based arrests; support for improved discipline practices like Positive Behavior Interventions and Supports (PBIS) and Restorative Justice (non-punitive discipline); ending corporal punishment; abolishing zero tolerance policies; increasing funding for poverty reduction programs; and improving investigations where there are alleged violations of special education laws.

2. For a comprehensive discussion about drafting an MOU, see *So you want an SRO?*

Ten Tips for Contracting for a Successful School Resource Officer, INQUIRY & ANALYSIS (NSBA Council of School Attorneys, March/April 2013).

3. NATIONAL ASSOCIATION OF SCHOOL RESOURCE OFFICERS, TO PROTECT & EDUCATE, THE SCHOOL RESOURCE OFFICER AND THE PREVENTION OF VIOLENCE IN SCHOOLS: 2012, available at http://www.nasro.org/sites/default/files/pdf_files/NASRO_Protect_and_Educate.pdf.

4. The National Association of School Psychologists partnered with several other organizations to create A Framework for Safe and Successful Schools. Published in April 2013, it provides a framework supported by educators for improving school safety and increasing access to mental health supports for children and youth, stating that efforts to improve school climate, safety, and learning are not separate endeavors. K.C. COWAN, K. VAILLANCOURT, E. ROSEN, & K. POLLITT, A FRAMEWORK FOR SAFE AND SUCCESSFUL SCHOOLS (2013), available at http://www.nasponline.org/resources/handouts/Framework_for_Safe_and_Successful_School_Environments.pdf.

5. *Id.*

6. *Id.*

7. For example, Illinois law states that school employees shall maintain discipline and "stand in the relationship of parents and guardians to the pupils." 105 ILL. COMP. STAT. 5/24-24. Citing this common law doctrine that originated in *William Blackstone's Commentaries on the Laws of England 441* (1769), courts have reasoned that even in schools with few or no disciplinary problems, a state still has a substantial interest in maintaining a proper educational environment for the school children entrusted to its custody and tutelage, through close supervision of students.

8. For a comprehensive listing that identifies specific case law that applies to your jurisdiction, see webinar materials for *Working with Law Enforcement: Tips for School Attorneys and School Boards* (NSBA Council of School Attorneys, Aug. 21, 2013)

9. Adapted from MOU between Newtown Public Schools and the Newtown Police Department, available at <http://www3.newton.k12.ma.us/sites/default/files/Mem%20of%20Understanding.pdf>.

10. NATIONAL ASSOCIATION OF SCHOOL RESOURCE OFFICERS, TO PROTECT & EDUCATE, THE SCHOOL RESOURCE OFFICER

AND THE PREVENTION OF VIOLENCE IN SCHOOLS: 2012, available at http://www.nasro.org/sites/default/files/pdf_files/NASRO_Protect_and_Educate.pdf

11. 469 U.S. 325 (1985) (holding that school officials do not need a warrant and are held to a reasonableness standard when searching students, but local law enforcement agencies are held to a probable cause standard). Thus, the relevant question is whether the SRO is acting at the direction of a school official (reasonableness) or the local law enforcement agency (probable cause).

12. 131 S.Ct. 2394 (2011) (holding that the child-suspect's age is relevant (although not dispositive) in a Miranda custody analysis when the child's age is known to the law enforcement agent at the time of questioning, or would have been objectively apparent to a reasonable law enforcement agent, and a reasonable child of that age would perceive that he or she was not free to leave).

13. See, e.g., *Guidelines for Interviews of Students at School by Law Enforcement Authorities* (Committee of the Illinois Council of School Attorneys (ICSA), September 2011), available at <http://www.iasb.com/law/ICSAGuidelinesInterviews.pdf>.

14. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2013); 34 CFR Part 99 (2013).

15. Peter Finn, Meg Townsend, Michael Shively, and Tom Rich. (U.S. Department of Justice, Office of Community Oriented Policing Services, 2005), available at: http://www.cops.usdoj.gov/files/ric/CDROMs/SchoolSafety/Law_Enforcement/AGuidetoDevelopingMaintainingSucceeding.pdf.

16. *Id.* at 149.

17. *Id.*

18. *Id.* at 150, 159.

19. See *id.* at 160 for a sample SRO performance measure document. For more information on designing SRO performance measure instruments that reflect local conditions, see note xx, *infra*.

20. TAMMY RINEHART KOCHER, ANNA T. LASZLO, & LAURA B. NICKLES, SRO PERFORMANCE EVALUATION: A GUIDE TO GETTING RESULTS (U.S. Dep't of Justice, Office of Community Oriented Policing Services, 2005), available at <http://www.cops.usdoj.gov/files/ric/Publications/sroperformanceevalguide.pdf>.

21. *C.M.M. v. State*, 983 So. 2d 704, 705 (Fla. Dist. Ct. App. 5th Dist. 2008).

STATES BEGIN INITIATIVE TO ARM SCHOOL STAFF

LESSONS FROM LEGISLATIVE EFFORTS

By Lawrence J. Altman, Esquire, Kansas City Public Schools

I. Introduction

In the aftermath of Sandy Hook the federal government and many state governments debated the issue of what steps should be taken to avoid another similar tragedy. Congress passed the "Uninterrupted Schools Act," a bill that had been held up in Congress for over five years. The purpose of the Act was to amend the Family Educational Rights and Privacy Act to allow certain state agencies easier access to student educational records. The thinking was greater information sharing might have prevented Sandy Hook. This act, signed into law by President Obama on January 15, 2013, did not address the issue of arming school staff.

Further, in April of 2013, a report was issued by the "National School Shield Task Force" addressing the question posed by the National Rifle Association: What can be done to improve student safety when children are in school? One Task Force recommendation was for governments to enact legislation that would allow school staff to be armed.

A number of states started to review existing gun laws to determine whether they allowed teachers to have concealed weapons at school (but some states, such as Connecticut, tightened gun laws to make it more difficult to obtain weapons). At least four states introduced bills that would have allowed teachers and other school staff to carry concealed weapons at school. Missouri and South Dakota passed legislation permitting school boards to arm staff. Two states, Maine and New Hampshire debated but ultimately defeated similar legislation. Missouri's Governor vetoed his state's bill, which was sustained when the legislature's override effort failed. South Dakota's Governor signed his state's bill into law.

The debate over arming school staff will continue. Apart from core questions such as whether armed staff will prevent another Sandy Hook, the initiative presents many complex legal issues. Much can be learned from these state's legislative efforts to enact concealed carry laws for

school staff.

II. National School Shield Task Force Model Legislation

The "Report of the National Shield Task Force" is over two hundred pages and provides detailed recommendations on the steps that schools should take to prevent another Sandy Hook. The Task Force suggests, among other steps, arming school personnel. In fact, the Report includes a model "law" for legislatures to consider when debating the issue of arming school personnel. The highlights:

- Staff authorized to carry concealed weapons in school must submit evidence of training in a program developed by the National Rifle Association or proof of completion of a program approved by a state agency authorized to establish standards for carrying and using weapons.
- Schools should be protected from liability when armed staff are acting to ensure the safety of the school, staff, and students, unless the staff person's acts or omissions are reckless, or deemed to be willful or wanton misconduct.

III. Maine

On April 23, 2013, LD 1492 was introduced into the Maine Legislature. The bill was ultimately defeated, but it included provisions not within the Task Force Model that warrant consideration:

- Schools may establish protocols for psychological testing of those who desire to carry concealed weapons in schools.
- The records of those applying to carry concealed weapons at school, including recommendations, would not be public records subject to disclosure.
- School board discussion of an applicant would be held in an executive session.
- The names of those who receive authorization to carry concealed weapons would be a public record.
- If a school board elected to adopt the Maine concealed gun law in its district,

voters could hold a referendum on the school board's decision.

IV. Missouri

On May 17, 2013 the Missouri Legislature passed HB 436. Governor Nixon, however, vetoed the bill on July 15, 2013. As passed, HB 436 would have permitted school districts to adopt policies permitting school staff to carry concealed weapons at school. The bill required training of staff but did not address the issue of school liability. Other highlights:

- Allowed school districts to appoint "school protection officers" who may carry concealed weapons at school.
- Required a school protection officer to possess the weapon at all times while on school property. Failure to do so was a misdemeanor, and could result in termination (raising interesting due process issues under the state's teacher tenure law, which does not include this as a disciplinary offense).
- Authorized a school protection officer to detain, for up to four hours, any person whom the officer had reasonable grounds to believe had violated state law or school policy.

- Provided that personal information about an appointed school protection officer is not subject to public disclosure. Anyone publishing the name or personally identifiable information about a school protection officer could be charged with a misdemeanor. If disclosure was by a school employee, the individual would also be subject to termination (raising issues of consistency with the state's tenure law).

V. New Hampshire

After Sandy Hook, but before the Task Force report was issued, New Hampshire's Legislature defeated a bill that would have permitted school personnel to carry concealed weapons. Proponents of the bill argued that the bill would prevent future Sandy Hooks. Opponents believed that allowing teachers and school administrators to carry concealed weapons would not direct itself to the cause of the problem.

VI. South Dakota

On March 8, 2013, the Governor of South Dakota signed into law SDCC §§ 23-3-26 to 23-3-47, allowing school districts the right to adopt a policy permitting staff to carry concealed weapons at school.

Much like the Task Force Model, training is required before anyone is permitted to carry a concealed weapon at school and liability protections are in place for school districts adopting a concealed carry policy. The law also, however, protects school districts that decide not to adopt a concealed carry policy from liability. The law permits a public referendum if a school district adopts a concealed carry policy.

VII. Comparison of the Maine, Missouri, and South Dakota Bills

The bills debated in Maine, Missouri, and South Dakota all required school staff to be trained prior to carrying a concealed weapon. The Maine bill and the South Dakota law addressed school district liability, but not as proposed in the Task Force Model. On the other hand, Missouri's law said nothing about school liability.

The Maine and South Dakota bills allowed public referendums in school districts that adopted concealed weapons policies. Missouri's proposed law did not. The Missouri and Maine legislation specified what was subject to public disclosure about staff authorized to carry a concealed weapon. South Dakota's law does not.

Maine's bill was the only one of the three that allowed schools to mandate psychological testing of staff members requesting to carry a concealed weapon in school. Missouri's bill would have been the only one of the three that made it a misdemeanor for a staff person to disclose information about school staff authorized to carry concealed weapons, and a misdemeanor for those authorized to carry concealed weapons not to carry their weapon at school.

VIII. Implementation Issues.

South Dakota school districts may now adopt policies that permit teachers and

staff to carry concealed weapons. As a result, attorneys representing South Dakota school districts will have to wrestle with many questions concerning implementation and liability protection. For example, what is the review process after a shooting, and who conducts it, to determine if proper protocols were followed? Will the results be protected from disclosure? What types of crisis support and staff protections are in place in the unfortunate circumstance where an armed staff member kills an innocent student or fellow employee? Can liability insurance be purchased? If it can be purchased, at what cost? Mr. Steven Yaccino, in an article appearing in *The New York Times* on July 7, 2013, reported that some insurance carriers have notified school systems that they will not provide coverage to schools that arm staff, and those that will provide coverage will significantly increase the district's premiums. Or consider this scenario:

A state passes a bill that allows school districts to enact policies permitting staff to carry concealed weapons. District A implements the policy. District B, a school system located alongside District A, does not. A person enters a school building in the B District, shooting and killing 30 students and ten teachers. The shooter is killed. The post shooting investigation discloses that the shooter left a note. In the note, the shooter writes that he wanted to be known as the person who shot and killed more students and staff than the Sandy Hook shooter. The shooter also wrote that he chose District B over District A because he knew staff in District B were not armed and he could get the "record" in District B.

Some issues are foreseeable and can be addressed in policy, but given the far reaching consequences of a school shooting, school districts and their attorneys will undoubtedly face pressure to respond to many unforeseen problems as well. Attorneys working on state legislation or school board policy to authorize school staff to carry and use concealed weapons can learn from the proposals that have already been put forth in these states.

AUGUST "GUS" W. STEINHILBER 1932-2013

NSBAs Council of School Attorneys and Office of General Counsel Staff mourn the loss of Gus Steinhilber, former NSBA General Counsel and life long advocate for public education. Gus passed away in Maryland in August 2013 surrounded by his beloved wife of over 50 years, Dolores, and their children and grandchildren, who called him "Poppa." For those of us who had the privilege of knowing and working with him, he was an unsurpassed lawyer, wise and trusted friend, professional mentor and consummate human being, and now someone who will be greatly missed.

During his thirty year tenure as NSBA's General Counsel, Gus Steinhilber was responsible for handling all of NSBA's legal matters and overseeing the NSBA Council of School Attorneys. In this capacity he led the improvement of the practice of school law by attorneys representing school districts nationwide as well as enhancing the legal literacy and compliance of school boards and school administrators. He represented the interests of public education before the U.S. Supreme Court, federal courts of appeals and state supreme courts, filing over 50 amicus curiae briefs in the U.S. Supreme Court alone. Responsive to the needs of public education, he established through Lloyds of London a liability insurance program available to any public school district in the U.S., and founded the Committee for Education Funding. Prior to becoming NSBA's General Counsel, he headed NSBA's Office of Federal Relations and created the Federal Relations Network, a grassroots advocacy organization of school board members.



Before joining NSBA, Gus served as an officer in the U.S. Marine Corps and later as the Deputy Assistant U.S. Commissioner of Education for Legislation in the federal government and participated in the creation of what is now the U.S. Department of Education. After leaving NSBA, he continued to advocate for public schools by joining the Maryland law firm of Reese and Carney, LLP on a part-time basis. In addition to his leadership in the field of school law, he was a nationally recognized expert on copyright law and tort reform. In 2005, COSA honored Gus's accomplishments and contributions with the Lifetime Achievement Award at the School Law Seminar in San Diego, California.

Outside his work life, Gus dedicated himself to his family and friends. He was passionate about hunting and fishing and made yearly trips to Montana, understanding firsthand why that state is known as the "Last Best Place." Gus could tell you the names of the mountain passes where you were likely to find elk and the best streams to catch rainbow trout. In true Gus Steinhilber fashion, he passed on his love of the sport through teaching Hunter Safety for the State of Maryland and serving as president of a local sportsman's club. He also had a musical side and exercised his chops as a member of church and university choirs. With a reputation as a nimble dancer, he was frequently sought out as a dance floor partner at NSBA events.

No matter how busy Gus was, he always had time to listen to friends and colleagues and to offer humbly his sage advice. While his words always reflected experience and wisdom, it was his unflinching example of personal excellence and true humanity that will be remembered most.

ANNOUNCEMENTS & EVENTS

2014 School Law Seminar!

April 3–5, 2014, New Orleans Marriott, New Orleans, Louisiana

Attorneys can earn up to 11.5 hrs. CLE, including 1 hr. of ethics.

Registration opens October 23, 2013.

Kicking off the 2014 School Law Seminar will be a **keynote address given by U.S. Department of Education Assistant Secretary for Civil Rights Catherine Lhamon**. Ms. Lhamon heads the Department's Office for Civil Rights, which enforces federal civil rights laws applicable to public schools.

Seminar topics include:

- *The National School Law Docket and NSBA Advocacy Work on Behalf of Public Schools*
- *Handling a Contentious Special Education Due Process Hearing*
- *Special Education: Working Collaboratively with Parent Advocates*
- *Defending a Union-Filed Grievance*
- *Your Top FERPA Questions*
- *What School Voucher Litigation Means for You and Your Clients*
- *Best Practices for School District Contracts*
- *Saying No to School Visitors*
- *The School Attorney's Role in Collective Bargaining*
- *Recent Litigation on Religion in Public Schools*
- *Ethics*
- *and much more!*

Watch your e-mail for more information or check the COSA website at www.nsba.org/cosa

NSBA Council of School Attorneys (COSA) 2014 Awards

Nominations are now being accepted for awards honoring COSA members for Distinguished Service and Lifetime Achievement in support of the COSA mission. Award recipients will be recognized at the 2014 Annual School Law Seminar in New Orleans.

Visit the Council's website for more information and a nomination form.

Deadline for nominations is November 1, 2013.

Upcoming COSA Webinars

COSA has a full year of webinars planned, so make sure to check the website and your e-mail for topic, schedule and registration information so that you don't miss these timely events.

Special Ed. #1 of 3: Resolving Special Education Disputes

Wednesday, November 5, 2013, 1:00 – 2:15 p.m.

Join **Kathy Mehfood**, partner in the Richmond, Virginia, firm of Reed Smith, and host **Sonja Trainor**, COSA Director, for a discussion on amicable measures that school districts can take to resolve disputes and avoid contentious due process hearings. Register now.

The Affordable Care Act: an Implementation Update for School Districts on Key ACA Elements

Wednesday, November 13, 2013, 1:00 – 2:15 p.m.

Join **Leza Conliffe**, NSBA Senior Staff Attorney, and host **Naomi Gittins**, NSBA Deputy General Counsel, to get up to date on the federal government's continued roll-out of elements of the ACA. We will discuss such topics as the controversial "delay of the employer mandate" and what it means for your clients, developments in the reporting requirements for employers and insurers, the individual mandate and exemptions, non-discrimination in wellness programs, employee enrollment in the Exchanges, and other areas that may come to the fore. Register now.

Don't forget that if you missed a webinar, you can easily purchase a recording by going to <http://allendsmeet.com/cosa/>

Thank You COSA Members!

Thanks go to **Anne H. Littlefield** and **Jessica Ritter**, Shipman & Goodwin, for presenting at the August 21 webinar *Working with Law Enforcement: Tips for School Attorneys and School Boards*; **Margaret-Ann F. Howie**, Baltimore County Public Schools, for presenting at the September 11 webinar *FERPA Series #1 of 2: The Family Educational Rights and Privacy Act Inside and Out*; **Jessica Sherrill**, Oklahoma School Boards Association, for her article *In Loco Parentis*, and **Leander A. Dolphin** and **Anne H. Littlefield**, Shipman & Goodwin, for their article *Handling Student Handbooks*, both of which appeared in the September issue of NSBA's *American School Board Journal*; and **Sherry H. Culves**, Jones, Cork & Miller, for her article *Surviving a Special Ed Battle*, which appeared in the October issue of NSBA's *American School Board Journal*.

April 3-5, 2014

NSBA Council of School Attorneys' School Law Seminar

NEW ORLEANS MARRIOTT, 555 CANAL STREET, NEW ORLEANS, LA

Join Your School Law Colleagues for a Dynamic Program
Featuring U.S. Dept. of Education Assistant Secretary for
Civil Rights **Catherine Lhamon.**

- Opening Keynote: Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education
- Frequent FERPA questions asked and answered, with an official from the Department's Family Policy Compliance Office
- The national school law docket
- Voucher litigation
- Working with parent advocates in special education matters
- Handling unavoidable due process hearings
- The school attorney's role in collective bargaining
- An update on religion and public schools
- Legal ethics: the Confidentiality Conundrum

**REGISTRATION
OPENS OCTOBER 23**

Register online at www.nsba.org/cosa2/law/ or by phone 1.800.950.6722.

Using your registration confirmation number, call our NSBA housing experts at 1.800.616.8210. to reserve your room in the COSA block at the New Orleans Marriott, French Quarter. Great rates available: \$225 single/double, plus tax.

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www.nsba.org/conference

National School Boards Association

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Council of School Attorneys

NSBA Council of School Attorneys
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