Colorado School Violence Prevention

And

Student Discipline Manual

Presented by:

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Revised Edition, January 2009

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COLORADO SCHOOL VIOLENCE PREVENTION AND STUDENT DISCIPLINE MANUAL

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** The Attorney General's Office will periodically update this manual to reflect statutory changes and new case decisions.
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TABLE OF CONTENTS

INTRODUCTION

Public schools continue to be among the safest places in America. Even so, each day, serious offenses, including violent crimes and weapon and drug-related offenses, are committed by and against schoolchildren. These offenses endanger the welfare of children and teachers, and disrupt the educational process. The situation requires a decisive response.

One of the best ways to maintain a safe and secure atmosphere in our schools, and to keep weapons, drugs, tobacco, alcohol, and other forms of contraband out of our schools and away from children, is to make clear that school officials will keep a watchful eye and will intervene decisively at the first sign of trouble. It is essential for school officials to be vigilant and to pursue all lawful means to maintain school safety and to keep guns and other weapons, drugs, and alcohol off of school grounds. This Manual is intended to inform teachers and school officials of legal tools available to address the security problems posed by students who engage in violent or disruptive behavior or who use, possess, or distribute drugs, alcohol, or weapons.

This manual was first published in 1999. Since that time, there have been significant changes in Colorado law related to school safety. These changes have been incorporated into every subsequent Edition of this Manual. The 2007 Edition reflected statutory additions to Colorado law that grant good faith immunity to school personnel acting pursuant to a conduct and disciplinary code. (SB 07-227). The 2008 Edition reflects statutory additions to Colorado law affecting mandatory reporting of non-attendance. The Manual also updates Colorado case law related to student searches.

EXECUTIVE SUMMARY

For your convenience, the following is a short summary of the topics discussed in more detail in this Manual:

School district discipline codes are required, and reasonable physical intervention by teachers and school officials is permitted in limited circumstances.

- **School district discipline codes are required.** School Districts are required by law to adopt a written conduct and discipline code, including policies for dealing with disruptive students, policies governing the removal of disruptive students from the classroom, policies governing physical intervention or force in dealing with disruptive students and an anti-bullying policy.

- **School personnel have immunity from civil liability.** Any school official or employee acting in good faith in carrying out the provisions of a District's conduct and disciplinary code will be immune from civil liability and criminal prosecution.

- **Reasonable physical force may be used.** Teachers and school officials may use reasonable and appropriate physical force upon a student to the extent it is reasonably necessary and appropriate to maintain school discipline and to promote the safety and welfare of students or school personnel.

- **Anti-gang policies must be adopted.** School districts are now required to adopt policies regarding gang-related activities in school, as well as dress code policies. Thus, school districts may consider adopting policies that restrict the display of gang symbols or "colors" in schools.

- **Safe school plans are required.** Each district is now required to adopt a safe school plan that includes a written conduct and discipline code, annual reporting regarding the school environment, a crisis management policy, and a safety and security policy.

Schools may suspend, expel, or deny admission to students in certain circumstances.

- **Schools may suspend students.** The school principal may suspend a student for up to five days for school rule violations, and up to ten days for serious violations. The superintendent may extend the suspension for an additional ten days. The total term of suspension may not exceed twenty-five school days.

- **Schools may expel students.** A District board of education may expel a student for violation of any of the grounds for suspension. The board may also decide to deny admission to any student who was expelled from any school district during the preceding twelve months, and any student whose behavior in another school district during the preceding 12 months was detrimental to the welfare or safety of other students or school personnel.

- **Schools must expel students in certain circumstances.** Expulsion shall be mandatory for declaration of a student as "habitually disruptive"; and for possessing a dangerous weapon, sale of a drug or controlled substance, robbery, or assault on school grounds.

Specific School Related Crimes.

- **Possession of deadly weapons is prohibited.** It is a class 6 felony if any person knowingly and without legal authority possesses a deadly weapon on the grounds of any public or private elementary, middle, junior high, or high school. A "deadly weapon" means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: a firearm, a knife, a bludgeon, or any other weapon, device, instrument, material, or substance whether animate or inanimate. § 18-12-105.5, C.R.S. There are, however, three very precise exceptions to this general rule regarding concealed weapons. Assuming the person has lawfully obtained a permit, carrying a concealed weapon onto school grounds is permitted when: 1) the handgun remains in a locked vehicle on school property and, if the permittee is not in the vehicle, the handgun is in a compartment within the vehicle and the vehicle is locked; 2) school security officer carries while on duty; and 3) a permittee may carry a concealed handgun on undeveloped property owned by the school district used for hunting or other shooting sports. § 18-12-214 (3)(a)(b)(c), C.R.S.

- **Making false bomb reports is a crime.** It is unlawful to make a false report that an explosive device has been placed in a school. It is also unlawful to carry a firearm or explosive onto a school bus.

- **Selling drugs on school grounds is a crime.** Selling drugs inside a school or a school bus will subject the offender to enhanced sentencing.

- **Bullying other students is serious and may constitute a crime.**

- **Several laws may make bullying a crime.** Generic bullying could be considered the crimes of harassment, menacing, or assault; given the factual situation, bullying could also be considered ethnic intimidation or, could expose the perpetrator to enhanced liability under the at-risk victim statutes.

- **Impeding students and faculty is unlawful.** It is a class 3 misdemeanor for a person, through the use of force or violence, coercion or intimidation, to disrupt students, faculty or administrators in their educational activities. It is also unlawful for a person engaging in these activities to refuse to leave the school grounds when requested to do so by the school administration.

- **Parents may be required by a court to attend proceedings, undergo training, and pay restitution.** The parent, guardian, or legal custodian of a juvenile is required to attend juvenile justice proceedings regarding that juvenile. The parent, guardian, or legal custodian may also be legally required by the court to attend parental responsibility training, cooperate in treatment plans or the performance of public service, or make restitution to the victims of the juvenile.

<u>Law Enforcement and schools may share information related to students, crimes and delinquency.</u>

- **Law enforcement must report certain criminal charges.** Whenever a student is charged with committing a crime of violence, information concerning the student and details of the alleged offense must be forwarded to the school district in which the student is enrolled. Upon receipt of the information, the District's board of education may proceed with suspension or expulsion procedures against the student, or wait until the conclusion of juvenile proceedings to consider the expulsion matter, or provide the student with an appropriate alternative education program during the pendency of the juvenile proceedings. If the student is found guilty or adjudicated delinquent, the board may then proceed to expel the student.

- **Law enforcement must report the filing of delinquency petitions.** Whenever a delinquency petition is filed against a student in juvenile court, the prosecuting attorney must notify the principal of the student's school. Furthermore, the principal must be notified whenever a student under the age of 18 is convicted of a crime of violence, a crime involving controlled substances, or a crime that subjects the student to mandatory expulsion.

- **Schools must disclose certain student records.** Criminal justice agencies are authorized to request and receive the disciplinary and attendance records of students under criminal investigation. Schools are required to report criminal offenses committed against teachers and school employees to the appropriate law enforcement agencies.

Under § 22-1-124, C.R.S, public schools shall now provide to parents of children attending school a statement identifying where and how the parent can obtain information concerning registered sex offenders. This information also can be posted on a school website.

Under § 22-32-109.1 (2)(b)(IV)(I), C.R.S., schools and school districts are now required to provide the Department of Education with an additional category of information under the subsection "Safe School Reporting Requirements." This new category, "Fights," would encompass acts committed on school grounds that if committed by an adult would be considered Third Degree Assault and Disorderly Conduct, but excludes Disorderly Conduct involving firearms or other deadly weapons, as they are already covered in other subsections.

- **School officials may obtain designated criminal records on students.**

Principals, superintendents, or their designees are authorized to obtain records on students maintained by criminal justice agencies, including court records, probation records, and law enforcement records.

School officials may conduct reasonable searches of students.

- **The Fourth Amendment applies to schools.** The Fourth Amendment's prohibition against unreasonable search and seizure applies to searches conducted by public school officials.

- **Reasonable suspicion is required for a search.** A search of a student will be justified at its inception where there is reasonable suspicion that the search will uncover evidence that the student is violating either the law or the rules of the school.

- **The search must be reasonable in scope.** A search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in the light of the age and sex of the student and the nature of the violation.

- **Nondiscriminatory random searches are permitted.** In certain limited circumstances, such as nondiscriminatory and random checks of lockers, it is also appropriate for school officials to conduct administrative searches without reasonable suspicion.

<u>Ten concrete steps to developing safer schools – (Ron Stephens, The National School Safety Center)</u>

- **Mission Statement.** Include safety in school mission statement.
- **Safe School Plan.** Craft individual safe school plans.
- **Discipline Code.** Prepare and publicize discipline code.
- **Written Agreements.** Develop written agreements with other youth focused agencies such as memorandum of understanding with law enforcement.
- **Crisis Management Policy.** Establish crisis management policies.
- **Annual Evaluation.** Conduct annual school safety assessments.
- **Crime Reporting System.** Establish systematic crime reporting process.
- **Custodial Control Over School Property.** Exercise full custodial responsibility over school and school property.
- **Information Sharing.** Share information among schools and staff members about dangerous conditions or people.
- **Screen Employees.** Screen new and existing employees.

I. SCHOOL DISTRICT DISCIPLINE CODES, REASONABLE PHYSICAL INTERVENTION BY TEACHERS, AND GOOD FAITH IMMUNITY

Schools have the power to regulate student conduct.

The right to freedom of movement enjoyed by students in public schools is far more limited than the right of liberty enjoyed by adult citizens. Thus, school employees can compel students to attend particular classes and to be present at certain events or assemblies without in any way implicating the rights embodied in the Fourteenth Amendment.

Schools may also impose significant restrictions not only on students' freedom of movement, but also on their ability to use and possess personal property. School authorities may, for example, prohibit students from bringing onto school property objects or items that are not *per se* illegal when carried by adults, such as personal stereos, cellular telephones, pagers, pocket knives, tobacco products, or any other object that might conceivably disrupt the educational environment. Schools may also regulate and impose significant restrictions on the *use* of student property that is allowed on school grounds. For example, school employees may prohibit students from carrying backpacks into the classroom and may require students to keep backpacks stored safely in assigned lockers while school is in session.

Schools must adopt discipline codes.

School Districts are required by law to adopt a written conduct and discipline code relating to the discipline, conduct, safety and welfare of all students enrolled in the public schools of the District. § 22-32-109.1(2)(a)(I), C.R.S. This code must be concisely written and must be enforced *uniformly, consistently, and fairly for all students*. § 22-32-109.1(2)(a), C.R.S. These codes are required to include the following:

1. General policies on student conduct, safety, and welfare;

2. Policies for dealing with students who cause a disruption in the classroom, on school grounds, vehicles, or at school activities or events;

3. Provisions for the initiation of expulsion proceedings for students who qualify as habitually disruptive by causing such disruptions at least three times during a single school year or calendar year;

4. Policies and procedures for the use of acts of reasonable and appropriate physical intervention or force in dealing with disruptive students, consistent with the statutory definitions of child abuse;

5. Policies on disciplinary actions, including suspension and expulsion;

6. Policies governing gang-related activity in the school;

7. A written prohibition on students bringing dangerous weapons, drugs, or other controlled substances to school;

8. A written policy concerning searches on school grounds, including student lockers;

9. A dress code policy that defines and prohibits students from wearing apparel that is deemed disruptive to the classroom environment or the maintenance of a safe and orderly school; and

10. A specific policy concerning bullying prevention and education, including information related to the development and implementation of any bullying prevention programs. § 22-32-109.1(2)(a)(I) through (X), C.R.S.

Note that a school's "disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Fuller ex. rel. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 667 (Ill. App. Ct. 2001).

In order to comply with the law, a district's bullying prevention and education policy should incorporate the definition of bullying provided by § 22-32-109.1(2)(A)(X), C.R.S., so that students have a consistent understanding of prohibited conduct. In addition, the law explicitly requires that the policy include a "reasonable balance between the pattern and severity of the bullying behavior." Presumptively, the policy is to balance the pattern and severity of the bullying behavior with the severity of negative consequences or discipline imposed by the policy for such behavior. Implicit in this is a requirement that the policy also identify the negative consequences or discipline applicable to students who engage in the bullying behavior. Other aspects of the policy are left to the discretion of the district.

The Center for the Study and Prevention of Violence has conducted extensive research into the bullying problem. The Center's website (www.colorado.edu/cspv) is a useful resource for assisting districts in developing their bullying prevention and education policy. The Center suggests that there are four basic principles to guide a school district in adopting an effective policy to address the bullying problem. The district needs to:

- Promote awareness and involvement of adults;
- Set firm rules limiting unacceptable behavior;
- Apply consistent negative consequences for rule violations; and
- Encourage adults to act as authorities and role models.

While a District's individual needs will dictate the details of its policy, based on the requirements of statute and the general principles developed by the Center, a sufficient and effective policy would likely include the following elements:

1. An affirmation of the district's commitment to providing a safe and positive learning environment, free from bullying.

2. A statement of the purpose of the policy to specifically set forth the district's bullying prevention and education program in compliance with § 22-32-109.1(2)(a)(X).

3. A statement identifying the behavior addressed by the policy by restating the definition of bullying that appears in § 22-32-109.1(2)(a)(X).

4. A statement that any student who engages in bullying behavior is subject to appropriate discipline, up to and including, but not limited to, suspension, expulsion or referral to law enforcement authorities.

5. A statement that the discipline imposed will be reasonably balanced with the pattern and severity of the bullying behavior.

6. A statement of the district's goals for its bullying prevention and education program which may include, but need not be limited to,

reducing existing bullying, preventing new bullying and achieving better peer relations among students.

7. A statement of how the goals will be accomplished. The policy may require the superintendent to implement the schools program on bullying prevention and education or it may be self-executing. To achieve its goals, the policy might direct the District to:

- Incorporate into communications with students, staff, parents, and the community the message that bullying will not be tolerated;
- Train staff and students to be aware of bullying, to take steps to prevent it and to report it to appropriate authorities;
- Institute corrective measures for students engaged in bullying, including training in acceptable behavior, discussion, counseling and appropriate discipline;
- Create opportunities for dialogue to take place among staff, parents and community members on how they can help prevent bullying;
- Provide support and counseling for bullying victims to assist them in coping with the effects of bullying and to help them learn techniques that will discourage further bullying;
- Develop programs that involve all students in learning positive social skills, confidence and developing peer support networks;
- Instruct staff in the use of concrete methods for recognizing and praising positive, supportive behaviors of students toward one another; and
- Implement procedures for immediate intervention, investigation, and, if necessary, separation of students in the event of reported or observed bullying.

The law also requires that the conduct and discipline code include "[p]olicies and procedures for the use of acts of reasonable and appropriate physical intervention or force in dealing with disruptive students; except that no board shall adopt a discipline code that includes provisions that are in conflict with the definition of child abuse in § 18-6-401(1) C.R.S., and § 19-1-103(1), C.R.S. § 22-32-109.1(2)(a), C.R.S. (*It should be noted parenthetically that school districts are now required to also adopt a dress code policy for teachers and other school employees*). § 22-32-109(1)(cc), C.R.S.

The written conduct and discipline codes are required to be distributed to each student in elementary, middle, junior high, and high school at least once, and must be posted or kept on file in each public school. § 22-32-109.1(2)(a), C.R.S.

The Center for the Study and Prevention of Violence reports that in the fall of 1999 The Safe Communities ~ Safe Schools initiative launched a statewide effort to help create safe schools and safe communities. The initiative sought to develop an understanding of youth violence in Colorado and promote effective solutions to address the challenge of youth violence in our communities. As part of this effort, over 60 youth violence prevention forums were held throughout Colorado. The report set forth the recommendations of the Colorado Attorney General, The Colorado Trust, and the Center for the Study and Prevention of Violence at the University of Colorado at Boulder. These recommendations included the following:

- Colorado schools should implement character education training for our youth.
- Colorado schools and communities need additional assistance to undertake effective safe school planning efforts (Safe School planning is more than developing a crisis response plan).
- Each Colorado school should go through a safety assessment to determine the issues that must be addressed in each school.
- Schools and communities should implement proven, effective programs to address the violence issues in their schools. These are programs that have been evaluated and have shown concrete, positive results which are sustainable over time.
- Colorado schools and communities should look at the 30 Blueprints and Promising Programs of the Center for the Study and Prevention of Violence at the University of Colorado at Boulder, and other innovative promising programs, for implementation in their schools if the school safety assessment identifies issues that can be addressed by those programs. When new, innovative programs are implemented, they must be evaluated for effectiveness. (Exhibit A, information on the Blueprints programs, is attached to this report.)
- Colorado should undertake a review of existing drug prevention programs for youth, and develop recommendations to make changes and implement only programs that have proven demonstrated results in reducing the onset of drug usage.

Schools must adopt procedures to protect teachers and employees.

Each District is required to adopt mandatory procedures to protect teachers and school employees. These procedures must be used following instances of assault upon, disorderly conduct toward, harassment of, making a knowingly false allegation of child abuse against, or any alleged criminal offense against, teachers or school employees, or damage to the personal property of a teacher or school employee on school premises, by a student.

These procedures *must* include a provision allowing teachers or employees to file a complaint with the school administration or board of education. Upon determination that the teacher's or school employee's report is supported by adequate proof, the policy must require a minimum of three days suspension for the offending student, as well as procedures for further suspension or expulsion of the student where personal injury or property damage has occurred. Furthermore, the school administrator must now report the incident to either the district attorney or to the appropriate law enforcement agency. § 22-32-109.1(3)(c), C.R.S.

Disruptive students may be removed from the classroom.

Amendments to the law passed by the General Assembly in 2000 require that school districts promulgate a policy allowing a teacher to remove a disruptive student from his or her classroom. Upon the third such removal by the teacher, the student may be removed from the teacher's class for the remainder of the term. This policy must include a due process procedure, requiring at a minimum that the teacher or principal contact the parent or legal guardian of the student and request his or her attendance at a parent teacher conference on the removal. The policy may allow for the development of a behavior plan for the student after the first removal from the class, and requires the development of such a plan after the second removal from the class. Finally, the policy adopted by the school district must comply with applicable federal laws regarding students with disabilities. § 22-32-109.1(2)(a)(II), C.R.S.

School personnel have immunity from liability.

Any board of education, teacher, or any other person acting in good faith in carrying out the provisions of a District conduct and disciplinary code will be immune from civil liability or criminal prosecution unless that person acted "willfully or wantonly." § 22-32-109.1(9)(b), C.R.S. A law passed in 2007 allows a teacher or any other person claiming immunity from criminal prosecution to file a motion heard prior to trial to establish the right to immunity by a preponderance of the evidence. § 22-32-109.1(9)(a), C.R.S. Furthermore, a teacher or other person shall be entitled to his or her costs and attorneys fees upon dismissal of a civil action under this section. § 22-32-109.1(a)(b). Good faith compliance with a District conduct and disciplinary code is also an affirmative defense to any action against a teacher or other person in any criminal action, and for contract nonrenewal or other disciplinary proceedings. § 22-32-109.1(9)(c) and (e), C.R.S. Furthermore, a 2007 law allows a person to sue a school district if the district disciplines a person who acts in good faith pursuant to a school safety plan. § 22-32-109.1(9)(e), C.R.S. Finally, the act of a teacher or any other person shall not be considered child abuse pursuant to § 18-6-401(1), C.R.S., and § 19-3-103(1) C.R.S., if the act was performed in compliance with the conduct and discipline code, or if the act was an appropriate expression of affection or emotional support, as determined by the district board of education. § 22-32-109.1(9), C.R.S.

In *Fredrickson v. Denver Public School Dist. No. 1*, 819 P.2d 1068, 1072 (Colo. App. 1991), the District initiated a disciplinary action against a teacher for using force against two students to maintain order after one student pushed and slapped the teacher's hand as the teacher attempted to intercept a note being passed, while another student struck the teacher in the back. In overturning the disciplinary action, the Colorado Court of Appeals concluded that student behavior reflecting a breakdown in, breach of, or serious threat to, a state of order in the classroom or school requires conduct by a teacher in furtherance of the maintenance of order. To this end, the Court concluded that, as a matter of law, a serious threat of order exists whenever a student, without reasonable provocation, touches a teacher in a hostile, angry, refractory, or otherwise unconsented to manner on or within school property during school hours, or during school sponsored activities. Given the Court's decision in this case, it appears that, subject to the specific provisions of the District's conduct and discipline code, Colorado Court's have sanctioned the use of reasonable and appropriate force by a teacher to maintain order in the classroom when that teacher is the subject of a student assault or hostile physical action.

In *Kerin v. Board of Educ., Lamar School District*, 860 P. 2d 574, 578 (Colo. App. 1993), the Board of Education dismissed a teacher for fostering a parent-child type relationship with a fourth-grade student outside of school hours, and then commencing a custody battle with the parent. The dismissed teacher argued that the hearing officer erred in concluding that the school district established "other good and just cause" for his dismissal. He specifically argued that the district failed to show that his conduct had a substantial adverse effect on his performance. Good and just cause includes "any cause bearing a reasonable relationship to a teacher's fitness to discharge his duties" or "conduct which materially and substantially affects performance." *Fredrickson v. Denver Public School Dist. No. 1*, 819 P.2d 1068, 1072 (Colo. App. 1991). The hearing officer concluded that the teacher fostering a relationship with his student bears a reasonable relationship to his fitness to discharge his duties, materially and substantially affects his performance, and was detrimental to students and the efficiency of the service, thus constituting good and just cause for his dismissal. *Kerin*, 860 P. 2d 574 at 582.

Physical intervention is permissible, consistent with the school district discipline code.

Many teachers and school officials express concern regarding whether the reasonable and appropriate use of force against a student would subject the teacher or school official to lawsuits or to potential prosecution for criminal child abuse. In this regard, it is important to remember that a teacher or school official will be immune from civil liability and criminal prosecution so long as they are acting within the parameters of the District's conduct and discipline code. In addition to the immunity provided by following the District's conduct and discipline code, teachers and school officials should be aware that the reasonable and appropriate use of physical force is a recognized affirmative defense to the crime of child abuse when it is employed by one entrusted with the care of a child for the purpose of maintaining discipline. *People v. Taggart*, 621 P.2d 1375 (Colo. 1981) [reversed on other grounds, 727 P.2d 850 (Colo. 1986)]. Under common law, a person standing *in loco parentis* of a minor child, including a teacher, was privileged in using a reasonable amount of force upon a child for purposes of safeguarding or promoting the child's welfare. So long as the use of force was moderate and reasonable in light of the child's age and condition, the misconduct to be restrained, the extent of force used, the degree of harm done to the child and other relevant circumstances, the custodian of the child would incur neither civil nor criminal liability, even though identical behavior against a stranger would be grounds for an action in tort or prosecution for assault and battery. This common law privilege has been codified in Colorado as follows:

> The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:
>
> (a) ... a teacher or other person entrusted with the care and supervision of a minor, may use reasonable and appropriate physical force upon the minor or incompetent person when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor...

§ 18-1-703(1), C.R.S. *See, People v. Jennings*, 641 P.2d 276 (Colo.1982).

Consequently, when facing the necessity of physical intervention of the use of force against a student, it is crucial that the teacher or school official know the District policy on the matter and operate within its parameters. School officials should also be aware that some districts empower school principals to adopt procedures further limiting the use of physical intervention and force by a teacher. School personnel should make themselves aware of such policies and procedures and comply with them at all times in order to avoid the possibility of a disciplinary or other legal action. *See, Board of Education of West Yuma School Dist. RJ-1 v. Flaming*, 938 P.2d 151 (Colo. 1997).

One way to reduce the likelihood that actual or threatened force will be necessary is to always have more than one teacher or school official on hand when the student is confronted. Police departments, when making arrests, and especially when conducting house searches or "raids," will often use what is called a "show of force" as a means to convince outnumbered suspects that resistance is futile. This tactic has, in the law enforcement context, proven successful in reducing the need to resort to actual force, resulting in fewer injuries to suspects as well as to police officers. Likewise, in the school context, confronting the student with several school officials will likely convince the student that physical resistance is futile and reduce the likelihood that actual force or physical intervention will be necessary.

Checklist for Reasonable and Appropriate Use of Force

- *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 should follow its provisions. This includes both the District's written policy and any additional directives or procedures required by the school principal.

- *Use the Minimum Level of Force Necessary.* The use of force or physical intervention must be both *reasonable and appropriate* given the student's age and sex, 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.

- *Isolate the Student from Peers*. The necessity to use force can often be avoided by first confronting the student away from other students, such as in the principal's office or at some location away from the student body.

- *If Possible, Don't Confront the Student Alone.* The necessity to use force can also be avoided through having two or more school officials present at the first confrontation with the student, thereby convincing the student that resistance would be futile.

II. RESTRICTING GANG SYMBOLS IN SCHOOLS AND DRESS CODES

School districts are required by statute to adopt "a specific policy concerning gang-related activities in the schools, on school grounds, in school vehicles, or at school activities or sanctioned events." § 22-32-109.1(2)(a)(VI), C.R.S. School districts are also required to adopt a "dress code policy that defines and prohibits students from wearing apparel that is deemed disruptive to the classroom environment or to the maintenance of a safe and orderly school." § 22-32-109.1(2)(a)(IX), C.R.S.

School districts may, as part of this dress code, require students to wear a school uniform or establish minimum standards of dress. In light of these requirements, schools and districts may consider adopting a written policy restricting the display of gang symbols or 'colors.' While the precise constitutional limitations on such a restriction have not been directly addressed by the Colorado courts, there is sufficient legal authority nationwide to guide a district in drafting such a policy. As always, school districts should contact their attorney for guidance in drafting these policies.

The display of gang 'colors' or symbols in the form of clothing, tattoos, jewelry and the like amounts to conduct rather than verbal speech. It nonetheless may be considered 'symbolic speech' for purposes of a First Amendment analysis. Generally, conduct is classified as 'symbolic speech' if the actor intends to display a particular message, and if there exists a great likelihood that the message would be understood by those who view it. *Texas v. Johnson*, 491 U.S. 397 (1989). Thus, whether conduct such as wearing certain clothing or displaying certain symbols is entitled to some level of protection under the First Amendment will depend on the circumstances. The bare display of gang symbols, unaccompanied by some other overt gang-related conduct, will usually amount to nothing more than wearing a certain symbol on a piece of clothing, or showing a tattoo of initials or numbers, etc. In *Texas v. Johnson*, 491 U.S. 397 (1989) "… In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [one asks] whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." (quoted in *Greenberg v. Woodward*,---F.2d---,2001 WL 1688902 (D. Mass 2001). For purposes of drafting a district or school wide policy restricting gang symbols, school officials should assume that such generic display of gang symbols is symbolic speech protected to some degree by the First Amendment. Thus, the policy should be drafted in a way (i.e., with reasonable time, place, and manner restrictions) that will meet with a court's approval even though it may be found to restrict symbolic speech. *See Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *Stephenson v. Davenport Community School District*, 110 F.3d 1303 (8th Cir. 1997); *City of Harvard v. Gaut*, 660 N.E. 2d 259 (Ill. App. 1996). (For the opposite conclusion, *see Bivens by and through Green v. Albuquerque Public Schools*, 899 F. Supp. 556 (D. N.M. 1995)). *See also, Fuller ex. rel. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662 (Ill. App. Ct. 2001) (concluding that the phrase "gang like activity" in a school rule is not considered unconstitutionally vague).

The unique purpose and special needs of the educational system dictate that within the context of the school environment, students do not enjoy the same level of freedom under the First Amendment as do adults. *Bethel School District No.403 v. Fraser*, 478 U.S. 675 (1986); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); s*ee also, People in the Interest of P.E.A.*, 754 P.2d 382, 387 (Colo. 1988). In short, school officials may restrict students' symbolic speech when that speech materially and substantially interferes with the requirements of appropriate discipline in the operation of the school, or when it invades the rights of others. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 513 (1969); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). The key to drafting a gang symbol restriction that will survive constitutional scrutiny is to avoid the pitfalls that appellate courts have mapped out in similarly situated cases.

Schools can use the following seven-step guide for drafting gang symbol restrictions in schools.

1. Schools or districts should objectively analyze the need for the restriction. If there is no demonstrable need for the restriction (for instance, if your community has never had any problems with gangs or gang symbols in schools), then a restriction is vulnerable to a constitutional challenge. However, school officials do not necessarily need to wait until gang symbols contribute to actual violence or significant disruptions to adopt a restrictive policy. *See, Guzick v. Drebus*, 431 F.2d 594, 600 (6th Cir. 1970). The crucial factor is the ability to demonstrate a legitimate need for the restriction that is reasonably related to the educational mission of schools.

2. Document the basis for the need. Any violent or disruptive incidents caused in whole or part by the display of gang symbols should be

recorded. The documentation should also include the detailed testimony of teachers, parents and students who may feel in any way intimidated, threatened or distracted from their educational goals by the display of gang symbols in school. Finally, the school board might solicit testimony from local ‘gang unit’ police officers familiar with the reasons for, and significance of, displaying gang symbols.

3. Clearly articulate the purpose of the restriction. The restriction as drafted should include a preamble articulating the historical context developed through the comprehensive documentation process discussed above. It should also state clearly that the purpose of the restriction is to maintain the educational mission of the school by eliminating substantial distractions and ensuring the security of the students and staff. The fact that students and teachers, inasmuch as they are required to be in the school, constitute a ‘captive audience’ should also be noted in the preamble. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); *See also*, *Cohen v. California*, 403 U.S. 15, 22 (1971). In *Cohen*, the court held that the state could not prohibit Cohen from wearing a message on his jacket conveying his profane but distinct sentiments concerning the draft merely because unwilling viewers might find it shocking or distasteful. The Court said nothing about what the state could have done if Cohen had plastered a number of flyers containing the same or a difference message on the courthouse walls. Later cases make clear that the government is on firm constitutional ground when it regulates visual displays so as to protect the aesthetic character of a given area. *Gaylor v. Thompson*, 939 F. Supp. 1363 (W.D. Wis. 1996).

4. Provide a meaningful due process procedure. Distribute copies of the gang restriction policy to all students, parents and staff before it is ever enforced. See, Martinez v. School District No. 60, 852 P.2d 1275, 1279 (Colo. App. 1992). Students should receive an informal warning before any suspension or other disciplinary action is taken. This way, there will be less ambiguity as to the nature or purpose of the display at issue, and the student can correct the situation without suffering an interruption in the educational process. Also, the restriction should be specifically subject to an ‘appeals’ process. Depending on the circumstances as well as the history of the student, a particular symbol may represent affiliation with a common religion, or it may represent membership in a gang. A student must be given the opportunity to demonstrate the display did not qualify as a gang symbol. See, City of

Harvard v. Gaut, 660 N.E.2d 259 (Ill. App. 1996); Stephenson v. Davenport Community School District, 110 F.3d 1303 (8th Cir. 1997).

5. Define all pertinent terms. Words and phrases such as “gang,” “gang symbol,” “gang color,” “gang sign,” or “gang activity” must be defined or the restriction is vulnerable to a claim that it is unconstitutionally vague because students must guess at its meaning, and because school officials can enforce it in an arbitrary fashion. Stephenson v. Davenport Community School District, 110 F.3d 1303 (8th Cir. 1997). “Gang” officers or units in local police and prosecution agencies can provide valuable assistance in this regard, as they generally define those terms as part of their policies and procedures, and have experience in this area. The U.S. Department of Justice articulated the following factors in defining a “gang”: A self-formed group of people, united by mutual interests, that has a geographic territory, a regular meeting pattern, uses symbols in communication, and is collectively involved in illegal activity. Juvenile Justice Bulletin, U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, August, 1998; Fact Sheet, U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, December 1997. Finally, the Colorado legislature defines a “gang,” as that word is used in the juvenile delinquency code, as follows: “Gang… means a group of three or more individuals with a common interest, bond, or activity, characterized by criminal or delinquent conduct, engaged in either collectively of individually.” § 19-1-103(52), C.R.S.

6. Maintain sufficient flexibility. Gang symbols can change over time for a variety of reasons. Any policy restricting gang symbols must therefore be capable of adapting to these changes in order to contribute to the educational mission in a meaningful way, and to minimize sweeping within its purview non-gang related conduct or displays. Any policy should have a provision for annual updates based on documented incidents and the input of local ‘gang’ officers.

7. Maintain neutrality and universal application. Any restriction should avoid targeting only gangs of a particular type, or from a particular neighborhood, or comprised of members of a particular race. Singling out a particular gang or gangs gives rise to significant constitutional infirmities. *See, Tinker v. Des Moines Independent School District*, 383 U.S. 503 (1969), while restricting display of any gang symbol regardless of the identity of its members or its name is less susceptible

to constitutional challenge. *See Guzick v. Drebus*, 431 F.2d 594 (6th Cir. 1970). Maintaining a policy that is at the same time neutral and universally applicable, sufficiently flexible to be effective, and that provides sufficient definition to avoid vagueness challenges is a difficult task. Adoption of a school uniform or minimum standard of dress policy, pursuant to § 22-32-109.1(2)(a)(IX), C.R.S., is the most effective way to avoid this problem. However, if that is not a viable option, the problem is alleviated to some degree by adequately defining “gang” and “gang symbol,” and in conjunction with those definitions, providing an explicitly non-exhaustive list of symbols or displays that are prohibited. Such a list of examples should be supported by the comprehensive documentation process discussed above, and it should be compiled with the cooperation of ‘gang’ officers or law enforcement agencies familiar with local gang dynamics. *See*, *Melton v. Young*, 328 F. Supp. 88 (E.D. Tenn. 1971).

III. SAFE SCHOOL PLANS AND SAFE SCHOOL REPORTING REQUIREMENTS

Colorado law requires each school and each school district to put into effect certain plans and agreements intended to improve school safety and crisis management.

Schools must adopt a safe school plan.

Each district is required to adopt a mission statement for the school district, making safety a priority in each public school. § 22-32-109.1(1), C.R.S. Additionally, in order to provide a safe and conducive learning environment free from unnecessary disruption, each school district is required to adopt and implement a safe school plan. § 22-32-109.1(2), C.R.S. Such a plan must be adopted following consultation with the school district accountability committee and school advisory councils, and with parents, teachers, administrators, students, student councils, and the community at large. Each safe school plan must include the following:

A written conduct and discipline code is required. A concisely written conduct and discipline code in conformance with the elements described in Chapter I above;

Schools must report violations of the code. A policy requiring each principal to submit an annual written report to the school district board of education concerning the learning environment in the school during that year. These reports are required to be compiled annually by the board of education and submitted as a report to the Department of Education in a format specified by rule of the State Board; they will be made available to the public. Each report must include the following specific information:

- The total enrollment for the school;
- The average daily attendance rate at the school;
- The dropout rates for grades seven through twelve, if applicable;
- The number of conduct and discipline code violations, including specific information on the number of violations, and actions taken by the school, by category of violation. This report must also specifically

identify each conduct and discipline code violation by a student with a disability; and

- The average class size for each school.

Incidents described as “Fights.” Under § 22-32-109.1 (2)(b)(IV), C.R.S., “fights” encompass acts committed on school grounds that if committed by an adult would be considered Third Degree Assault and Disorderly Conduct, but excludes Disorderly Conduct involving firearms or other deadly weapons, as they are already covered.

Written agreements with law enforcement are required.

Each local board of education is required, unless it is not possible, to develop written agreements with local law enforcement officials, the juvenile justice system, and social services departments for the purpose of keeping each school environment safe. § 22-32-109.1(3), C.R.S. Furthermore, each board of education is now required to establish a crisis management policy that sets forth procedures for taking action and communicating with local law enforcement agencies, community emergency services, parents, students, and the media in the event of a crisis. § 22-32-109.1(4), C.R.S. Each such policy must provide for school district employee crisis management training. § 22-32-109.1(4), C.R.S.

Schools must adopt a safety and security policy.

Finally, each district school board must adopt a safety and security policy requiring annual school building inspections to address the removal of hazards, vandalism, and any other barriers to the safety and supervision of students. § 22-32-109.1(5), C.R.S.

IV. STUDENT SUSPENSION, EXPULSION, DENIAL OF ADMISSION

Student suspensions are authorized in certain circumstances.

Section 22-33-105(2)(a), C.R.S. authorizes a District board of education to delegate to the principal of any school or the principal's designee the right to suspend a student from classes for not more than five days for the following grounds: continued willful disobedience or open and persistent defiance of proper authority; willful destruction or defacing of school property; behavior on or off school property which is detrimental to the welfare or safety of other pupils or of school personnel, including behavior creating a threat of physical harm to the child or to other children; and repeated interference with a school's ability to provide educational opportunities to other students. §§ 22-33-106(1)(a)-(c) and (e), C.R.S. Furthermore, a District board of education may delegate to the principal of any school or to the principal's designee the right to suspend a student from classes for not more than ten days for serious violations in a school building or in or on school property, including but not limited to carrying, bringing, using or possessing a dangerous weapon; the sale of a drug or other controlled substance; or the commission of an act which if committed by an adult would be robbery or first or second degree assault. § 22-33-106(1)(d), C.R.S.

In addition to the powers delegated to the principal outlined above, the District's board of education may also suspend a student on these grounds for an additional ten days, or delegate this responsibility to its chief executive officer (usually the superintendent). The District's superintendent may also extend the term of any suspension for an additional ten days if necessary to present the matter to the next board of education meeting, except that the total period of suspension imposed under these provisions may not exceed a total of twenty-five school days. § 22-33-105(2)(b), C.R.S.

A pupil suspended for a period of ten days or less is entitled to receive an informal hearing by the school principal or his designee prior to the student's removal from the school, unless an emergency, such as an imminent threat to the health and safety of students or faculty, requires immediate removal, in which case the informal hearing must take place as soon as practicable following removal. A student suspended for more than ten days may request a review of the suspension before an appropriate school district official. § 22-33-105(3)(c), C.R.S. A student suspended from school is required to leave the school building and grounds immediately. § 22-35-105(3)(b)(I), C.R.S. The principal or superintendent is required to immediately notify the parents of the student of the suspension and grounds for suspension, and the student may not be readmitted to the school until a meeting between the parent or guardian and the suspending authority has taken place, or in the suspending authority's discretion, until the parent or guardian has substantially agreed to review the suspension with the suspending authority. § 22-33-105(3)(a)-(b), C.R.S. Finally, as an alternative to suspension, each District must establish a policy allowing the student to remain in school if the student's parent or guardian, with the consent of the student's teachers, attends class with the student for a period of time specified by the suspending authority. § 22-33-105(4), C.R.S.

These statutory procedures for temporary suspensions of up to 25 days have been found by the courts to be reasonable:

> 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.
>
> The Court concludes that the statutory procedures for temporary suspension are not a denial of procedural due process and their application in this case did not deprive the plaintiffs of the procedural due process required by the Federal Constitution.

Hernandez v. School Dist. No. One, Denver, Colo., 315 F.Supp. 289, 293-294 (D. Colo. 1970).An institute charter school authorized by the State Charter School Institute may carry out the functions of the suspending authority pursuant to § 22-33-105, C.R.S. Furthermore, the State Charter School Institute is authorized to carry out the functions of a school district and its board of education with respect to the suspension, expulsion, or denial of admission of a student to an institute charter school. § 22-33-105(7), C.R.S.

Expelling or denying admission to students is explicitly allowed.

A District board of education may expel a student for a period not exceeding one calendar year for violation of any of the grounds for suspension outlined above. The District board of education may also decide to deny admission to any student who was expelled from any school district during the preceding 12 months; and any student whose behavior in another school district during the preceding 12 months is detrimental to the welfare or safety of other students or of school personnel. § 22-33-106(3), C.R.S.

In addition to these grounds, the statute states that expulsion shall be mandatory for the following grounds: declaration of a student as “habitually disruptive,” defined as a student who was suspended for willful, material and substantial disruptive behavior at least three times during the school year; carrying, bringing, using or possessing a dangerous weapon on school grounds without the authorization of the District; sale of a drug or controlled substance; and commission of an act which if committed by an adult would constitute robbery or first or second degree assault. §§ 22-33-106(1)(c.5) and (d), C.R.S.

As used in this statute, “dangerous weapon” includes a firearm, whether loaded or unloaded, or a firearm facsimile that could reasonably be mistaken for an actual firearm; any pellet, “B-B” gun, or other device, whether operational or not, designed to propel projectiles by spring action or compressed air; any fixed blade knife with a blade measuring longer than three inches, or a spring loaded or pocket knife with a blade longer than three and one-half inches in length; or any object, device, instrument, material, or substance used or intended to be used to inflict death or serious bodily injury. § 22-33-106(1)(d)(II), C.R.S. (please note that the term “dangerous weapon” used in § 22-33-106 is defined differently in § 18-12-102 and is distinguishable from the term “deadly weapon” as it is used in § 18-1-901 (3)(e), C.R.S.). Any student enrolled in a public school may be subject to being declared a habitually disruptive student and the parent and legal guardian of such student must be notified in writing or by other means of the definition of “habitually disruptive” student and of the mandatory expulsion of such students. § 22-33-106(1)(c.5), C.R.S.

A public school employee may not use a student’s statement concerning an offense that may result in mandatory expulsion against the student at an expulsion hearing, unless the statement is signed by both the student and the student’s parent, guardian, or legal or physical custodian, or unless the school made a reasonable attempt to contact the parent, guardian, or custodian prior to the student signing the statement. A “reasonable attempt” means that the school has called each of the telephone numbers provided to the school by the parent, guardian or custodian and any telephone number provided by the student. Additionally, the student and his or her parent or guardian may waive this requirement in writing, after full advisement of the student and his or her parent or guardian of the student’s rights. § 22-33-106.3, C.R.S.

Any student denied admission to or expelled from a public school may request a hearing before the District board of education. The District board may delegate authority to act as hearing officer in such cases to the District’s superintendent or another designee, who shall render a written opinion within five days after the hearing is conducted. An appeal of this decision may be taken by the student to the District board of education. An appeal of a board of education’s expulsion or denial decision may be taken by the student to juvenile court under § 22-33-108, C.R.S.

In *People in Interest of K.P.*, 514 P.2d 1131 (Colo. 1973), a student expelled for assault challenged the school board’s action, contending that the statutory ground of suspension for “[b]ehavior which is inimical to the welfare, safety, or morals of other pupils” was unconstitutionally vague and overbroad and did not afford notice of the type of conduct it proscribed. In rejecting this argument, the Colorado Supreme Court noted that courts have “expressly recognized the importance of an education in modern society and the necessity of providing school authorities with the means to maintain an atmosphere conducive to learning.” *Id*. at 1133. The Court found that the legislature had provided factors in sufficiently clear and definite language to apprise students of the type of conduct that is prohibited:

> First, the statute focuses its prohibition only on conduct which is directed toward other pupils -- a narrowed class of individuals. Second, the conduct proscribed is strictly limited to conduct which is hostile to welfare, safety, or morals and could not be utilized to prohibit all forms of socially unacceptable conduct. *Id.*

In implementing these statutes, school districts should be aware that Colorado case law appears to limit disciplinary actions involving students to conduct bearing some reasonable relationship to the educational environment. In *Martinez v. School Dist. No. 60*, 852 P.2d 1275 (Colo. App. 1992), two students were suspended from school under a policy that called for automatic suspension for any student “who has used, consumed, is affected by, [or] has in his/her possession...” alcohol. The two students had the smell of an alcoholic beverage on their breath, but were not otherwise affected by their prior consumption of alcoholic beverages, at a school-sponsored dance. In remanding the case for further proceedings, the Colorado Court of Appeals stated that:

> A school district's regulation of students' conduct must bear some reasonable relationship to the educational environment; a school district cannot regulate purely private activity having no effect upon that environment... For example, while the private, off-premises, use of alcohol by a student athlete may have an effect upon his athletic performance and may, therefore, be a fit subject for regulation, even these circumstances do not provide to a school an opportunity for unlimited regulation.

Id. at 1278. The Court also found that "a school district may not discipline a student for violating a school regulation unless the student has previously been fairly apprised of that regulation." *Id*. at 1279.

Thus, disciplinary action requires some reasonable relationship between the student conduct and the educational environment. School districts would be wise to limit their use of suspension and expulsion procedures to conduct demonstrating a relationship to the school or to the health and safety of students and teachers.

The school administrator should be cognizant of the differences between actions which can result in the expulsion of a student versus those actions which can result in the prosecution of a student. By way of example, Title 22 of the Colorado Revised Statutes can permit the expulsion of students for conduct that is not necessarily criminally punishable under Title 18 of the Colorado Revised Statutes. More specifically, a student who carried a firearm facsimile, which could reasonably be mistaken for a firearm, on school grounds could be subject to expulsion. § 22-33-106 (1)(d)(II)(a), C.R.S. However, under Title 18 the same "mere carrying of a firearm replica" off school grounds would not subject an individual to criminal prosecution. Thus, the administrator should know that behaviors that could result in an expulsion are not necessarily offenses subject to prosecution.

V. SPECIFIC CRIMINAL VIOLATIONS RELATED TO SCHOOLS

Deadly weapons are prohibited in schools.

Under § 18-12-105.5(1), C.R.S., it is a class six felony if any person "knowingly and unlawfully and without legal authority carries, brings, or has in such person's possession a deadly weapon ... in or on the real estate and all improvements erected thereon of any public or private elementary, middle, junior high, or high school..." A "deadly weapon" is defined as any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: a firearm, either loaded or unloaded, a knife, a bludgeon, or any other weapon, device, instrument, material, or substance, whether animate or inanimate. § 18-1-901(3)(e), C.R.S.

There are, however, several exceptions in the statute to this offense, such as carrying a weapon on school grounds for the purpose of presenting an authorized demonstration, for the purpose of carrying out the necessary duties and functions of an employee of an educational institution, when the person is a peace officer, and when the person has possession of the weapon for use in an educational program approved by the school. § 18-12-105.5(3), C.R.S. Section 18-12-214 (3)(a) through (c) creates three precise exceptions for carrying a concealed weapon on school property. A permit to carry a concealed weapon does not authorize a person to carry a concealed weapon on real property or improvements of any public elementary, middle, junior high or high school, except:

> a) The permit holder may keep the handgun in his vehicle. If the permit holder is not in the vehicle at the time, the handgun must be in a compartment in the vehicle, and the vehicle must be locked;
>
> b) A permit holder who is employed as a school security guard for a public elementary, middle, junior high or high school may carry a concealed weapon while on duty at school;
>
> c) A permit holder may carry a concealed handgun on un-developed school property that is used for hunting or other shooting sports.

It is illegal to make a false report of a bomb, or to bring explosive materials onto a school bus.

It is a class 6 felony to knowingly make a false report to any person that an explosive, chemical or biological agent, poison or weapon, or any harmful radioactive substance has been placed in any public or private place, or vehicle. § 18-8-110, C.R.S. It is also a class 6 felony to possess, carry or bring, or caused to be carried, any loaded firearm, explosive or incendiary device in any facility of public transportation. § 18-9-118, C.R.S. "Incendiary Device" means a flammable material or container containing a flammable liquid or material whose ignition by fire, friction, concussion, detonation, or other method produces destructive effects primarily through combustion rather than explosion. § 9-7-103(4), C.R.S. "Facility of Public Transportation" includes a school bus. It also includes any area or structure which is used to facilitate the movement or servicing of the bus or used for the loading or unloading of passengers or goods. § 18-9-115(2-4), C.R.S.

Enhanced penalties apply to drug sales in schools.

Any person convicted of a drug felony, under § 18-18-405, C.R.S., that involves distribution, sale, or possession with intent to sell, is considered a "special offender" for enhanced sentencing purposes if the crime was committed within or upon the grounds of any elementary, middle, junior high, or high school. § 18-18-407(2)(a), C.R.S. The "special offender" status also applies to those who commit these crimes in a public access area that is within one thousand feet of the perimeter of any such school. The "special offender" status also applies to those who commit these crimes while on a public school bus, while such school bus is engaged in the transportation of persons who are students at any public or private elementary, middle, junior high, or high school. Vehicles used in informal car pools arranged by parents or others do not qualify as a school bus under the special offender law. A person who is 18 years of age or older and who is convicted as a special offender faces anywhere from eight to forty-eight years in prison.

VI. BULLYING IS SERIOUS AND MAY CONSTITUTE A CRIME

“Bullying” means any written or verbal expression, or physical act or gesture, or pattern thereof, intended to cause distress upon one or more students in the school, on school grounds, in school vehicles, at a designated school bus stop, or at school activities or sanctioned events. § 22-32-109.1(2)(a)(X), C.R.S. As mentioned on page 8 above, a written policy concerning bullying prevention and education is required in each school’s conduct and discipline code. *Id*. The school district's policy shall include a reasonable balance between the pattern and the severity of such bullying behavior. *Id*.

Although there is no Colorado statute prohibiting “bullying” per se, there are several laws that apply to behavior commonly associated with bullying situations. Of course, the appropriate law enforcement authority must assess the applicability of any given criminal statute to any situation before criminal proceedings are initiated, such as formal arrest.

The applicability of a given statute to a bullying incident will depend in part on the following circumstances:

1. Location of the event;
2. Use of a deadly weapon;
3. Number of times it has happened;
4. Presence of physical touching or physical pain;
5. Nature of threats;
6. Taking a thing of value;
7. Motivation and intent of perpetrator;
8. Number of perpetrators;
9. Presence of unwilling confinement or movement;
10. Presence of property damage; and
11. Statutory status and age of victim.

School officials have a duty to protect students from assaults by other students if the “danger creation” theory applies. As stated in *Uhlrig v. Harder*, a school or school official is liable under the “danger creation” theory if five circumstances exist. The five circumstances include:

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;
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."

The Tenth Circuit's "shock the conscience" test may be met if a school or school official acts with deliberate indifference to previous assaults. *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir.), *cert. denied,* 116 S.Ct. 924 (1996); *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991 (Okla. Civ. App. 1994); *Castaldo v. Stone*, 192 F.Supp.2d 1124 (D. Colo. 2001).

A school may also be liable for damages for student-on-student sexual harassment. In *Davis v. Monroe County Board of Education,* 526 U.S. 629, 119 S.Ct. 1661 (1999), the parent of a fifth-grade student sued the school board and officials under Title IX for failure to remedy the classmate's sexual harassment of the student. The Supreme Court held that: a damages action could be pursued by the parent against the school board under Title IX in cases of student-on-student harassment, but only where the 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 is so severe that it effectively barred the victim's access to an educational opportunity or benefit. 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 indicated that the school's response to known peer harassment must be in a manner that is not "clearly unreasonable." See also, *Murrel v. Sch. Dist. No. 1 Denver*, 186 F. 3d 1238 (10th Cir. 1999) (allowing a suit on both Title IX and 42 U.S.C. §1983 theories for student on student sexual harassment).

Inaction by the state in the face of a known danger is not enough to trigger a constitutional duty under the due process clause to protect unless the state has a constitutional or other special relationship with the victim; the affirmative duty to protect arises not from the state's knowledge of the individual's predicament but from the limitation which it has imposed on his freedom to act on his own behalf. *Sanders v. Board of County Com'rs of County of Jefferson, Colorado*, 192 F. Supp. 2d 1094, 1108 (D. Colo. 2001).

Interfering with the students or faculty of a school is a crime.

The closest thing Colorado has to a statute explicitly applicable to bullying among students is § 18-9-109(5), C.R.S. Because of the broad language articulating the prohibited results, and because it is specifically applicable to incidents on or near school grounds, any bullying conduct which amounts to a separate and distinct criminal violation will likely also result in liability under § 18-9-109, C.R.S.

It is a class 3 misdemeanor for any person on or near the premises or facilities of any educational institution to willfully deny students or school employees lawful freedom of movement or use of the facilities, to impede the staff or faculty in the lawful performance of their duties, or to willfully impede students in the lawful pursuit of their educational activities through the use of restraint, abduction, coercion, or intimidation or when force or violence are present or threatened. § 18-9-109(1) and (2), C.R.S. It is also a violation for any person to refuse or fail to leave the property of an educational institution when requested to do so by the school's chief administrative officer or his designee if such person is committing threatens to commit, or incites others to commit any act which would disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions of the institution. § 18-9-109(3), C.R.S.

Generic bullying may constitute harassment, assault or other crimes.

It is class 3 misdemeanor harassment for anyone, with intent to harass, annoy or alarm, to strike, shove, kick or otherwise subject another to physical contact; or repeatedly insult, taunt, challenge or use offensively coarse language to communicate with another, in a manner likely to provoke a violent or disorderly response. § 18-9-111(1)(a) and (h), C.R.S. "Repeatedly" means more than one time. § 18-9-111(1)(c)(IV). The likelihood of a violent or disorderly response must be immediate, and is judged by an objective "average person" standard.

It is class 3 misdemeanor menacing to knowingly use threats or physical action to place, or attempt to place, another person in fear of imminent serious bodily injury. § 18-3-206, C.R.S. It is a class 5 felony if such actions are accomplished by use of a deadly weapon, or any article used in a manner to cause a person to reasonably believe that the article is a deadly weapon. "Serious bodily injury" means bodily injury, which at the time of occurrence or later, involves a substantial risk of death, serious permanent disfigurement, protracted loss or impairment of any part or function of the body, or broken bones, or second or third degree burns. § 18-1-901(3)(p), C.R.S. Additionally, it is class 3 misdemeanor Reckless Endangerment to recklessly create a substantial risk of serious bodily injury to another person. § 18-3-208 C.R.S. Third Degree Assault is considered an extraordinary risk crime that subjects the perpetrator to an increased penalty under § 18-1.3-501(3), C.R.S. It is class 3 felony First Degree Assault to intentionally cause serious bodily injury by means of a deadly weapon, or under circumstances manifesting extreme indifference to the value of human life, to knowingly create a grave risk of death to another person, and thereby cause serious bodily injury to any person. § 18-3-202(1) and (2)(b), C.R.S. If the perpetrator engages in this conduct under extreme provocation from the victim, it is a class 5 felony. § 18-3-202(2)(a), C.R.S. Both Felony and Misdemeanor Child Abuse are considered extraordinary risk crimes that subject the perpetrator to an increased penalty under § 18-1.3-401(10), C.R.S. and § 18-1.3-501(3), C.R.S.

It is a class 4 felony Second Degree Assault to intentionally cause bodily injury by means of a deadly weapon, to recklessly cause serious bodily injury by means of a deadly weapon, or to intentionally cause serious bodily injury. § 18-3-203, C.R.S. If the perpetrator engages in this conduct under extreme provocation from the victim, it is a class 6 felony. § 18-3-203(2)(a), C.R.S. "Bodily injury" means any physical pain, illness, or any impairment of physical or mental condition. § 18-1-901(3)(c), C.R.S. Furthermore, it is class 1 misdemeanor Third Degree Assault to knowingly or recklessly cause bodily injury to another person. § 18-3-204, C.R.S.

It is child abuse to do any of the following: cause injury to a child's life or health, permit a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engage in a continued pattern of conduct that results in cruel punishment or mistreatment. § 18-6-401(1)(a), C.R.S. "Child" means a person under sixteen years of age. § 18-6-401(2), C.R.S. Child Abuse is a class 3 felony if done knowingly or recklessly and serious bodily injury results, and it is a class 4 felony if done with criminal negligence and serious bodily injury results. § 18-6-401(7)(a)(III) & (IV), C.R.S. Child Abuse is a class 1 misdemeanor if done knowingly or recklessly and any injury other than serious bodily injury results and it is a class 2 misdemeanor if done with criminal negligence and any injury other than serious bodily injury results. § 18-6-401(7)(a)(V) & (VI), C.R.S. Child Abuse is a class 2 misdemeanor if done knowingly or recklessly and no injury results, and it is a class 3 misdemeanor if done with criminal negligence and no injury results. § 18-6-401(7)(b)(I) & (II), C.R.S.

It is Criminal Mischief to damage the real or personal property of another, if done knowingly, and if it is perpetrated in the course of a single criminal episode. § 18-4-501(1), C.R.S. The classification of the offense of Criminal Mischief depends on the aggregate damage. It is a class 3 misdemeanor for damage totaling less than $100.00. Stalking is considered an extraordinary risk crime that subjects the perpetrator to an increased penalty under § 18-1.3-401(10); § 18-1.3-401(10)(b)(XIII), C.R.S.

Repeat bullying may constitute stalking.

Bullying often involves more than one incident between the perpetrator and the victim. The crimes listed below provide criminal sanctions for such "pattern" situations.

The following conduct, if done knowingly, constitutes class 5 felony Stalking, but it is a class 4 felony if the perpetrator and victim are parties to an existing restraining order at the time of occurrence: making a credible threat to the victim, and in connection with the threat, repeatedly following, approaching or contacting the victim; making a credible threat to the victim, and in connection with the threat, repeatedly making any form of communication with the victim; or repeatedly following, approaching, contacting or making any form of communication to the victim, if done in a manner that would cause a reasonable person to suffer serious emotional distress, and the conduct does in fact cause the victim serious emotional distress. § 18-9-111(4)(b)(I), (II) & (III), C.R.S. "Credible threat" means a threat, physical action or repeated conduct that would cause a reasonable person to be in fear for his or her safety. § 18-9-111(4)(c)(II), C.R.S.

Bullying on a school bus may constitute endangering public transportation.

In addition to other applicable crimes, bullying incidents occurring on a school bus expose the perpetrator to liability under the Endangering Public Transportation statute. § 18-9-115, C.R.S.

The following conduct constitutes class 3 felony Endangering Public Transportation: on a public conveyance, knowingly threatening any passenger with death or serious bodily injury; or threatening another passenger with a deadly weapon; or threatening another passenger with words or actions intended to induce belief that the perpetrator is armed with a deadly weapon. § 18-9-115(c)(I)(II), C.R.S. "Public" means offered or made available by a school or school district to pupils (preschool through twelfth grade) regularly enrolled in public or nonpublic schools. § 18-9-115(2), C.R.S.

‘Lunch money’ and ‘forced conduct’ bullying may be considered theft or extortion.

The common ‘shake-down-for-lunch-money’ or ‘do-this-or-else’ scenario exposes the perpetrator to liability under multiple criminal statutes. It is criminal Theft to knowingly, by threat or deception, obtain or exercise control over anything of value belonging to another person without that person’s authorization. The perpetrator must also either intend to permanently deprive the victim of the use or benefit of the item in question, or demand consideration to which he or she is not legally entitled for the return of the item. § 18-4-401(1)(a) & (d), C.R.S. The classification of the crime of Theft depends on the value of the item. It is a class 3 misdemeanor for any item valued at less than $100.00. § 18-4-401(2), C.R.S. Furthermore, it is class 4 felony Robbery to knowingly take anything of value from the person or presence of another by the use of threats, intimidation or force. § 18-4-301(1), C.R.S.

It is class 4 felony Criminal Extortion to make a substantial threat to the victim to confine, restrain, cause the victim economic hardship, cause the victim bodily injury, or damage the victim’s property or reputation. § 18-3-207, C.R.S. The perpetrator must threaten to cause one of these enumerated results by performing or causing the performance of an unlawful act, or by invoking action by a third-party whose interests are not substantially related to the interests pursued by the perpetrator. Finally, this conduct must be accompanied by the specific intent to induce the victim to perform an act or refrain from performing a lawful act, against the victim’s will. § 18-3-207(1)(b)(I) & (II), C.R.S. “Substantial threat” means a threat that is reasonably likely to induce a belief that it will be carried out, and that involves “significant” confinement, restraint, injury or damage. § 18-3-207(3), C.R.S.

Hazing as an initiation ritual is prohibited.

The applicability of the “Hazing” statute is narrow. The legislature specifically indicated that it did not intend to alter the penalty for more egregious activity that is covered by other criminal statutes. Rather, it sought only to define “hazing” activity not addressed elsewhere. § 18-9-124(1)(b), C.R.S.

It constitutes class 3 misdemeanor Hazing to recklessly endanger the health or safety of another, or cause risk of bodily injury to another. § 18-9-124, C.R.S. This conduct must be for the purposes of initiation or admission into, or affiliation with, a student organization. § 18-9-124(2)(a), C.R.S. Authorized training and customary contests or athletic events are excluded. § 18-9-124(2)(a), C.R.S. Hazing activities include, but are not limited to, forced and prolonged physical activity, forced consumption of food, beverage, controlled substance, or any substance not generally intended for human consumption, or prolonged deprivation of sleep, food or drink. § 18-9-124(2)(b)(I)-(III), C.R.S. The statute does not define "student organization."

If the victim of a hazing incident is forced to engage in illegal conduct, the Hazing perpetrator is exposed to liability under the Contributing to the Delinquency of a Minor statute. It constitutes class 4 felony Contributing to the Delinquency of a Minor to induce, aide or encourage a person under eighteen years of age to violate any federal, state, municipal or county law, or court order. § 18-6-701, C.R.S.

Confinement and forced movement may constitute false imprisonment.

In addition to other statutes addressing unlawful restraint, bullying incidents involving forced confinement or movement expose the perpetrator to criminal liability under the False Imprisonment and Second Degree Kidnapping statutes. It constitutes class 2 misdemeanor False Imprisonment to knowingly, without the victim's consent, and without legal authority, confine or detain the victim. § 18-3-303, C.R.S. Additionally, it constitutes class 4 felony Second Degree Kidnapping to knowingly, without the victim's consent, and without lawful justification, seize and carry the victim from one place to another. § 18-3-302(1), C.R.S. If the kidnapping victim is also robbed pursuant to § 18-4-301, C.R.S., it is a class 2 felony. The movement to which the victim is subjected need not be significant if it substantially increases the risk of harm to the victim. This analysis involves comparing the location from which the victim was forced, to the location where the victim was taken. Moving a victim from relatively high-traffic area to a more secluded place will usually satisfy the "seize and carry" requirement.

Group or gang bullying may constitute inciting a riot.

It constitutes class 1 misdemeanor Inciting a Riot to incite or urge a group of five or more persons to engage in a current or impending riot, or to command, instruct or signal to a group of five or more persons in furtherance of a riot. § 18-9-102(1)(a) & (b), C.R.S. If property damage or injury results, Inciting a Riot is a class 5 felony. It is a class 2 misdemeanor to engage in a riot. § 18-9-104(1), C.R.S. "Riot" means a public disturbance involving an assemblage of at least three persons which, by tumultuous and violent conduct creates grave danger of property damage or personal injury, or which substantially obstructs the performance of any governmental function. § 18-9-101(2), C.R.S. "Governmental function" includes the education of students in public schools. *See,* § 18-1-901(3)(i), (j) & (o), C.R.S.

Hate crimes subject the perpetrator to enhanced penalties.

In addition to enhanced penalties under the Harassment statute, § 18-9-111, C.R.S., bullying conduct motivated by certain prejudices exposes the perpetrator to liability under the Ethnic Intimidation statute. § 18-9-121, C.R.S.

It constitutes Ethnic Intimidation, if accompanied by a specific intent to intimidate or harass the victim because of his or her actual or perceived race, color, religion, ancestry or national origin, physical or mental disability, or sexual orientation, to knowingly cause bodily injury to another, or by word or conduct likely to produce bodily injury or damage to the victim or victim's property, or to knowingly place the victim in fear of imminent lawless action directed at the victim or his or her property. § 18-9-121(2)(a)(b)(c), C.R.S. Ethnic intimidation is a class 5 felony if bodily injury results. It is a class 1 misdemeanor otherwise, except that it is a class 4 felony if bodily injury results and the perpetrator is aided or abetted by another person during the commission of the offense. § 18-9-121(3), C.R.S.

Harassment is bumped from a class 3 to class 1 misdemeanor if accompanied by the intent required to establish Ethnic Intimidation. § 18-9-111(2), C.R.S.

Bullying at-risk victims subjects the perpetrator to enhanced penalties.

The target of bullying is often a child with some physical or mental impairment. These scenarios expose the perpetrator to enhanced penalties under the Crimes Against At-Risk Juveniles statute, § 18-6.5-103, C.R.S. If the victim of a Third Degree Assault, pursuant to § 18-3-204, C.R.S., is an at-risk juvenile, the offense is bumped from a class 1 misdemeanor to a class 6 felony. § 18-6.5-103(3)(c), C.R.S. If the victim of a Robbery, pursuant to §

18-4-301, C.R.S., is an at-risk juvenile, the offense is bumped from a class 4 felony to a class 3 felony, and the offender is subject to mandatory sentencing. § 18-6.5-103(4), C.R.S. If the victim of a Theft, pursuant to § 18-4-401, C.R.S., is an at-risk juvenile, the offense becomes a felony regardless of the value of the item taken. § 18-6.5-103(5), C.R.S.

"At-Risk Juvenile" means a person under eighteen years of age who suffers from one of the following maladies: impairment due to loss of a hand or foot or permanent loss of their use; impairment due to blindness or "virtual" blindness; inability to walk, see, hear or speak; inability to breathe without mechanical assistance; any developmental disability which substantially affects the victim and is attributable to mental retardation or related conditions, including cerebral palsy, autism or any neurological condition that results in an impairment of intellectual functioning or adaptive behavior in a way similar to mental retardation; any mental or psychological disorder, including organic brain syndrome, mental illness, or "specific learning disabilities"; and any substantial disorder of the cognitive, volitional or emotional processes that grossly impairs judgment or capacity to recognize reality or control behavior. § 18-6.5-102(1.5), 27-10.5-102(11), 27-10-102(7), and 24-34-301(2.5), C.R.S.

VII. PARENTS CAN BE HELD ACCOUNTABLE FOR THE ACTIONS OF THEIR CHILDREN.

Parents are required to attend juvenile proceedings.

The parent, guardian, or legal custodian of any juvenile subject to proceedings in the Colorado Juvenile Justice system is required to attend all proceedings concerning the juvenile. Furthermore, the court may impose sanctions against a parent, guardian, or legal custodian who fails to attend the proceedings without good cause. § 19-2-109(6), C.R.S.

Juvenile courts may impose requirements on parents.

For any juvenile adjudicated in the Colorado Juvenile Justice system, the court may specify its expectations for the parent, guardian, or legal custodian, so long as they are a party to the proceedings. Thus, any treatment plan developed by the system may include requirements to be imposed on the juvenile's parents, including parental involvement in sentencing orders, parental responsibility training, cooperation in treatment plans for the juvenile, performance of public service by the parent, cost of care reimbursement, supervision of the juvenile, and any other provisions the court deems to be in the best interests of the juvenile, the parent's other children, or the community. § 19-2-113(2), C.R.S. Any sentence imposed in a juvenile justice proceeding may require the parent to perform volunteer community service, to attend parental training, or to perform services for the victim designed to contribute to the rehabilitation of the juvenile.
§ 19-2-919(1), C.R.S. The court may also order the parent or guardian to make restitution to the victims of the juvenile, not to exceed $3,500.00, for each delinquent act (note: Under 19-2-919 the limit is now $25,000). § 13-21-107, 19-2-919(2)(a), C.R.S. If the juvenile's parent is a party to the delinquency proceeding, the court may order the parent or guardian to make restitution in an amount not to exceed $25,000.00 for each delinquent act. § 19-2-919(2)(b), C.R.S. However, if in either case the court finds that the juvenile's parents made a diligent, good faith effort to prevent or discourage the juvenile from engaging in delinquent activity, the court must absolve the parents or guardian from liability for restitution. § 19-2-919(2)(a) and (b), C.R.S.

School districts may recover damages from parents.

School districts are entitled to recover damages in court, not to exceed $3,500.00, from the parents of each minor under the age of eighteen years, living with such parents, who “maliciously or willfully damages or destroys property, real, personal, or mixed…belonging to” the school district. § 13-21-107(1), C.R.S. Furthermore, any person is entitled to recover damages, not to exceed $3,500 from the parents of each minor, living with such parents, who knowingly causes bodily injury to that person on school district property. § 13-21-107(2), C.R.S. If however, the school is treated as a victim and awarded restitution, under § 19-2-919(2)(b), the court may order the parent or guardian to make restitution in an amount not to exceed $25,000.00 for each delinquent act. § 19-2-919(2)(b), C.R.S.

The court may not enter an order of restitution against a juvenile's parent unless the court, prior to entering the order of restitution, holds a restitution hearing at which the juvenile's parent is present. If the court finds, after the hearing, that the juvenile's parent has made diligent, good faith efforts to prevent or discourage the juvenile from engaging in delinquent activity, the court shall absolve the parent of liability for restitution under this paragraph (b). § 19-2-919(2)(b), C.R.S. For purposes of paragraph (b), “parent” includes a natural parent having sole or joint custody, regardless of whether the parent is designated as the primary residential custodian, or a parent allocated parental responsibilities with respect to a child, or an adoptive parent. § 19-1-103(82)(a), C.R.S.

In some circumstances, parents can be prosecuted for providing a handgun to a juvenile.

Finally, it is a class four felony for any parent or guardian to intentionally, knowingly, or recklessly provide a handgun to a juvenile, or to permit a juvenile to possess a handgun, if the parent or guardian is aware that there is a substantial risk that the juvenile will use the handgun to commit a felony offense, and fails to make reasonable efforts to prevent the commission of that offense. § 18-12-108.7(2)(a), C.R.S.

VIII. MANDATORY REPORTING REQUIREMENTS RELATING TO CRIMES AND DELINQUENCY

Cooperation with other agencies is required.

All boards of education are required to cooperate, and to the extent possible, develop written agreements with law enforcement officials, the juvenile justice system, and social services, as allowed under state and federal law, to keep each school environment safe. § 22-32-109.1(3), C.R.S. Each board of education shall adopt a policy whereby procedures will be used following instances of assault upon, disorderly conduct toward, harassment of, the making knowingly of a false allegation of child abuse against, or any alleged offense under the "Colorado Criminal Code" directed toward a school teacher or school employee or instances of damage occurring on the premises to the personal property of a school teacher or school employee by a student. Such procedures shall include, at a minimum, the following provisions:

a) Such school teacher or school employee shall file a complaint with the school administration and the board of education.

b) The school administration shall, after receipt of such report and proof deemed adequate to the school administration, suspend the student for three days, such suspension to be in accordance with the procedures established therefore, and shall initiate procedures for the further suspension or expulsion of the student where injury or property damage has occurred.

c) The school administration shall report the incident to the district attorney or the appropriate local law enforcement agency or officer, who shall, upon receiving such report, investigate the incident to determine the appropriateness of filing criminal charges or initiating delinquency proceedings. § 22-32-109.1(3), C.R.S.

Law enforcement agencies and courts must report certain charges and convictions to school districts and schools.

Crimes of Violence and Sex Offenses

Whenever a student between the ages of 12 and 18 is charged with committing an offense constituting a crime of violence or unlawful sexual behavior, basic identification information concerning the student and details of the alleged offense must be forwarded by the juvenile justice agency (defined as any investigating policy agency, prosecuting attorney's office, or court) to the school district in which the student is enrolled. § 22-33-105(5)(a) and § 19-1-304(5), C.R.S. For purposes of this reporting requirement, a "crime of violence" means any of the following crimes if the student, during the commission of the crime, used, or possessed and threatened the use of, a deadly weapon, or caused serious bodily injury or death to any person; any crime against an at-risk adult or at-risk juvenile; murder; first or second degree assault; kidnapping; sexual assault; aggravated robbery; first degree arson; first degree burglary; escape; or criminal extortion. 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. § 18-1.3-406, C.R.S. For purposes of this reporting requirement, "unlawful sexual behavior" means any of the following crimes; sexual assault in the first, second or third degree; sexual assault on a child; sexual assault on a child by one in a position of trust; enticement of a child; incest; aggravated incest; trafficking in children; sexual exploitation of children; procurement of a child for sexual exploitation; indecent exposure; soliciting for child prostitution; pandering of a child; procurement of a child; keeping a place of child prostitution; pimping of a child; inducement of child prostitution; or patronizing a prostituted child. § 16-22-102 (9), C.R.S.

Upon receipt of the information pursuant to § 22-33-105(5)(a), C.R.S., the district's board of education or its designee is required to make a determination whether the student has exhibited behavior that is detrimental to the safety, welfare, and morals of the other students or of school personnel in the school and whether educating the student in the school may disrupt the learning environment in the school, provide a negative example for other students, or create a dangerous and unsafe environment for students, teachers, and other school personnel. If the board of education determines that the student should not be educated in the school, it may then proceed with suspension or expulsion procedures as outlined in Chapter IV.

Alternatively, the board of education may decide to wait until the conclusion of delinquency or criminal proceedings to consider the expulsion matter, and to provide the student with an appropriate alternative education program of the board's choosing, such as an on-line program or home-based education program, during the pendency of juvenile proceedings. However, no student being educated in an alternate education program shall be allowed to return to the education program in the public school until there has been a disposition of the charge. Should the student plead or be found guilty, or be otherwise adjudicated a delinquent juvenile or convicted, the school district may proceed to expel the student. § 22-33-105(5)(a) and (b), C.R.S. Other than using the information obtained through § 22-33-105(5), C.R.S., in accord with its stated purpose, this information must remain confidential unless otherwise made available to the public by operation of law. § 22-33-105(5)(a) and § 19-1-304(5), C.R.S.

Under § 22-1-124, C.R.S., public schools shall provide to parents of children attending school a statement identifying where and the procedures by which the parent can obtain information concerning registered sex offenders. The information can also be posted on a school website. § 22-1-124, C.R.S.

Filing of Charges and Convictions

Whenever a petition is filed in juvenile court involving a felony or a class 1 misdemeanor or the following offenses of any degree: menacing, harassment, fourth degree arson, theft, aggravated motor vehicle theft, criminal mischief, defacing property, disorderly conduct, hazing, or possession of a handgun by a juvenile, the prosecuting attorney, within three working days after the petition is filed, shall make good faith reasonable efforts to notify the principal of the school in which the juvenile is enrolled and shall provide such principal with the arrest and criminal records information, as defined in section § 24-72-302(1), C.R.S. In the event the prosecuting attorney, in good faith, is not able to either identify the school which the juvenile attends or contact the principal of the juvenile's school, then the prosecuting attorney shall contact the superintendent of the juvenile's school district. § 19-1-304(5.5), C.R.S.

Whenever a student under the age of 18 is convicted or adjudicated for an offense constituting a crime of violence or involving controlled substances, the adjudicating or convicting court must now notify the school district in which the student is enrolled of the conviction or adjudication. § 22-33-106.5(2), C.R.S. The same reporting requirement applies to a student who is under 18, but at least 12 years of age, when that student is convicted or adjudicated of an offense constituting unlawful sexual behavior. § 22-33-106.5(2), C.R.S.

Whenever a student under the age of 18 is convicted or adjudicated of one of the following crimes occurring in a school building or in or on school property, the convicting district court or adjudicating juvenile court must now notify the school district in which the student is enrolled that the student is subject to mandatory expulsion based on the adjudication or conviction: Carrying, bringing, using or possessing a dangerous weapon without authorization of the school or school district; sale of drugs or controlled substances; robbery; or first or second degree assault. § 22-33-106.5(1) and § 22-33-106(1)(d), C.R.S.

Thus, the prosecuting attorney must notify the principal or school district each time a delinquency petition is filed against a student in juvenile court, and each time a student is charged in any court with a crime of violence or unlawful sexual behavior. Furthermore, each time a student is convicted or adjudicated in any court for an offense involving a crime of violence, controlled substances, unlawful sexual behavior, or an offense subjecting the student to mandatory expulsion, the court must notify the school district of that conviction or adjudication. It should be noted, however, that not all direct filings or convictions of criminal charges in "adult" district court are subject to these mandatory reporting requirements. *See*, § 19-2-517, C.R.S. (setting forth the requirements for direct filing against a juvenile in district court). If charges against a student under 18 years of age are filed directly into adult district court, the mandatory reporting of those charges to school personnel is limited to crimes of violence and unlawful sexual behavior. If the conviction of a student less than 18 years of age occurs in adult district court, the mandatory reporting of the conviction to school personnel is limited to crimes of violence, unlawful sexual behavior, and those crimes occurring on school property which subject the student to mandatory expulsion. However, records and information related to charges or convictions in adult district court which are not subject to mandatory reporting may be obtained by school district personnel upon request, as outlined below.

School officials may inspect certain juvenile agency records.

Inspection of Criminal Justice Agency Records

Records or information on students which are maintained by the judicial department or any agency that performs duties with respect to delinquency or dependency and neglect matters, may now be obtained by school personnel when
the information is required to perform the school officials' legal duties and responsibilities. § 19-1-303(2)(a), C.R.S.

Certain records or information concerning a particular child, and which are maintained by any criminal justice agency or child assessment center, may be obtained by the principal of the school where the child attends or will attend, or by that principal's designee. If the school is public, the information may also be obtained by the superintendent or superintendent's designee. § 19-1-303(2)(b), C.R.S. School officials receiving information pursuant to this section may use it only in the performance of their legal duties, and must otherwise maintain the confidentiality of the information. § 19-1-303(2)(d), C.R.S. The following records or information are open to inspection under this statute:

1. Any information or records, except mental health or medical records, relating to incidents that, in the discretion of the agency or center, rise to the level of a public safety concern, including but not limited to, any information or records of threats made by the child, any arrest or charging information, any information regarding municipal ordinance violations, and any arrest or charging information relating to acts that, if committed by an adult, would constitute misdemeanors or felonies. § 19-1-303(2)(b)(I), C.R.S.

2. Any records of incidents, except mental health or medical records, concerning the child that, in the discretion of the agency or center, do not rise to the level of a public safety concern, but that relate to the adjudication or conviction of a child for a municipal ordinance violation or that relate to the charging, adjudication, deferred prosecution, deferred judgment, or diversion of a child for an act that, if committed by an adult, would have constituted a misdemeanor or felony. § 19-1-303(2)(b)(II), C.R.S.

Inspection of Juvenile Delinquency Records

Regarding juvenile delinquency records maintained by the various agencies responsible for delinquency proceedings, such records are now open to inspection by school officials as outlined below:

1. Court records in juvenile delinquency proceedings or proceedings concerning a juvenile charged with the violation of any municipal ordinance except a traffic ordinance are open to inspection by the principal or superintendent of the school in which the juvenile is or will be enrolled, or to their designees. § 19-1- 304(1)(a)(XVI), C.R.S.

2. Juvenile probation records, whether or not part of the court file, are open to inspection by the principal or superintendent of the school in which the juvenile is or will be enrolled, or to their designees. § 19-1-304(1)(c)(X), C.R.S.

3. Law enforcement records concerning juveniles are open to inspection by the principal of the school in which the juvenile is or will be enrolled, or to the principal's designee. If the school is public, inspection is also open to the superintendent or superintendent's designee. § 19-1-304(2)(a)(XV), C.R.S.

4. Parole records are open to inspection by the principal of the school in which the juvenile is or will be enrolled, or to the principal's designee. If the school is public, inspection is also open to the superintendent or superintendent's designee. § 19-1-304(2.5), C.R.S.

Schools must provide certain information to criminal justice agencies.

Mandatory Reporting Pursuant to Criminal Investigations

Whenever a criminal justice agency is investigating a criminal matter concerning a child, and if it is necessary to effectively serve the child prior to trial, that agency may now request disciplinary and attendance records from the principal of the school in which the child is or will be enrolled, or from the superintendent if the school is public. § 19-1-303(2)(c), C.R.S. Upon such a request, accompanied by written certification that the criminal justice agency will not unlawfully disclose the information without proper consent, the principal or superintendent must provide the criminal justice agency with such records. § 19-1-303(2)(c) and § 22-32-109.3(3), C.R.S.

Mandatory Reporting of Assault or Harassment of Teachers

The school administration must now report the following to the District Attorney or the appropriate local law enforcement agency or officer: Any incident involving assault upon, disorderly conduct toward, harassment of, the making of a knowingly false allegation of child abuse against, or any alleged offense under Colorado's criminal code directed toward a teacher or school employee, or any incident involving damage occurring on the premises to the personal property of a teacher or school employee by a student. As a practical matter, while the new laws refer to mandatory reporting to the District Attorney or to the local law enforcement agency (usually the police or sheriff's department), it is the local law enforcement agencies that do the preliminary investigation of crimes as opposed to the District Attorney; therefore, to satisfy the reporting requirement, schools should report to both the District Attorney and to the local law enforcement agency. § 22-32-109.1(3)(c), C.R.S.

Mandatory Reporting of Non-Attendance

If a student is required to attend school as a condition of release pending an adjudicatory trial, or as a condition of or in connection with any sentence imposed by a court, including probation or parole, and the student fails to attend all or any part of a school day, the school district must now notify the appropriate court or parole board of the failure to attend. § 22-33-107.5, C.R.S.

New legislation, effective August 5, 2008, has redefined the phrase "habitually truant" to include a child who has attained the age of six years on or before August 1 of the year in question and is under the age of seventeen years having four unexcused absences from public school in any one month or ten unexcused absences from public school during any school year. Absences due to suspension or expulsion of a child shall be considered excused absences for purposes of this subsection (3). § 22-33-107(3)(a), C.R.S.

Federal Confidentiality Restrictions

In complying with the above-referenced statutes, school officials must still comply with the provisions of the Federal Family Educational Rights and Privacy Act ("FERPA"). Under FERPA, educational institutions may not disclose information about students nor permit inspection of their records without written permission of the student, unless such action is covered by certain exceptions permitted by the Act. 20 U.S.C. § 1232g(a)(6)(b). The restrictions on disclosure in FERPA apply to all educational institutions which either receive funds directly from the federal Department of Education or which have students in attendance who receive funds through programs administered by the federal Department of Education. 34 C.F.R. § 99.1. Thus, every public school in Colorado is required by federal law to comply with the disclosure requirements of FERPA. Violations of FERPA by a public school may result in termination of federal funding. 20 U.S.C. § 1232g(f).

The restrictions in FERPA apply to personally identifiable information contained in educational records maintained by the school. As discussed above, Colorado law allows for the disclosure of disciplinary and truancy information, attendance records, incidences of student criminal misbehavior directed against the person or property of teachers, and student failure to attend school when court ordered to do so. Each of these categories of information would either constitute educational records or contain personally identifiable information on the student as defined under FERPA. Fortunately, Colorado's disclosure provisions have been drafted with the exceptions to FERPA's confidentiality provisions in mind.

Thus, a request from a law enforcement agency complying with State law will comply with the restrictions of FERPA as well. Additionally, a disclosure by a school of a student's failure to attend school, when such attendance was a condition ordered by a court or parole board, would also fit within this exception to the FERPA restrictions.

The officers, employees, and agents of the law enforcement agency receiving the information from the school may only use the information for the purposes for which the disclosure was made. 34 C.F.R. § 99.33(a)(2).

The law enforcement agency may not disclose the information to a third party unless 1) it obtains prior consent from the parent of the student; or 2) the further disclosure also meets the requirements of the law, and the school has made a record of the further disclosure pursuant to the provisions of 34 C.F.R. § 99.32(b).

Schools May Provide Certain Information to Criminal Justice Agencies

Regarding permissible reporting of other information by schools to law enforcement, state law requires local boards of education to comply with the applicable provisions of FERPA and the federal regulations promulgated thereunder. § 24-72-204(3)(d)(III), C.R.S.

Reporting with the Student's Consent

Under FERPA, personally identifiable student information may, of course, be disclosed by the school with the written consent of the parent of the student, or with the consent of the student if the student is over 18 years of age. 34 C.F.R. §99.30 and 34 C.F.R. § 99.3. The written consent must specify the records to be disclosed, the purpose of the disclosure, and the party to whom the disclosure will be made. *Id*.

Reporting Directory Information

The school may also, under certain circumstances, disclose directory information. "Directory information" includes information contained in the education records of the student which would not generally be considered harmful or an invasion of privacy if disclosed. This includes the student's name, address, telephone number, date and place of birth, participation in extra-curricular activities or sports, weight and height for members of athletic teams, dates of attendance, and degrees received, and the most recent previous school attended. 34 C.F.R. § 99.3. In order to disclose directory information, the school must have given public notice to parents of students and (if over 18) the students in attendance of the types of personally identifiable information the school has designated as directory information, and the parent's or (if over 18) the student's right to refuse to let the agency designate any or all of those types of information as directory information. A school may disclose directory information about former students without meeting these conditions concerning notice and right to refuse. 34 C.F.R. § 99.37.

Reporting of School Law Enforcement Unit Records

Another applicable exemption from FERPA relates to school district disclosure of the records of its own law enforcement unit. FERPA does not prohibit the disclosure of the records of a school's law enforcement unit. The term "law enforcement unit" in this context relates to an individual, office, or department of the school, such as a unit of commissioned police officers or noncommissioned security guards, who are assigned to the school to enforce the law or provide security services. 34 C.F.R. § 99.8. Law enforcement unit records include those records created and maintained by the law enforcement unit for a law enforcement purpose. However, law enforcement unit records do not include records created by the law enforcement unit that are maintained by a component of the school other than the law enforcement unit, or records created and maintained by the law enforcement unit that are exclusively for a non-law enforcement purpose. 34 C.F.R. § 99.8(b). Finally, educational records do not lose their protection under FERPA solely by being in the possession of a school law enforcement unit. 34 C.F.R. § 99.8(b)(2).

Reporting in Emergencies

Finally, under FERPA a school may disclose personally identifiable information to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or of other individuals. 34 C.F.R. § 99.36.

Checklist for Information Exchange

- Juvenile justice agencies are now required to provide schools with basic identification information whenever a student is charged in any court with committing a crime of violence or unlawful sexual offense; arrest and criminal records information whenever a delinquency petition is filed in juvenile court; notice whenever a student is convicted or adjudicated for an offense constituting a crime of violence, involving controlled substances, or unlawful sexual behavior; notice whenever a student is convicted or adjudicated for a crime that would result in mandatory expulsion proceedings under Colorado law; and notice whenever a court makes school attendance a condition of release, probation, or sentencing.

- Law enforcement agencies may now, upon request, provide certain school officials access to records or information on students which are maintained by the judicial department or any agency that performs duties with respect to delinquency or dependency and neglect matters, when the information is required to perform the school officials' legal duties and responsibilities. This includes information or records of threats made by the student, arrest or charging information, records relating to the adjudication or conviction of a child for a misdemeanor or felony, court records in juvenile delinquency proceedings, and probation officer, law enforcement, and parole records.

- School districts are now required to provide the following information to law enforcement authorities: truancy, disciplinary, and attendance records upon proper request; reports of incidents on school grounds involving assault or harassment of a teacher or school employee; and notification of failure of a student to attend school, if school attendance is a condition of that student's sentence or release. However, the disclosure of student information must comply with the provisions of FERPA.

- School officials may also disclose personally identifiable student information with the consent of the student's parents, if the information falls under the category of "directory information," if the records are of the school's own "law enforcement unit," or in an emergency if knowledge of the information is necessary to protect the health or safety of the student or of other individuals.

IX. LEGAL GUIDELINES FOR STUDENT SEARCHES

Colorado law requires all school districts to establish written policies concerning searches on school grounds, including student locker searches. The following guidelines should be used in drafting and consideration of these policies. Although student searches are appropriate in many circumstances, school districts should be aware that an improper search may constitute an invasion of the student's privacy. Therefore, school districts should contact their school attorneys and local prosecutors for guidance and training in formulating their district policies concerning searches on school grounds.

The Fourth Amendment applies to searches of students and their belongings by school officials.

The Fourth Amendment's prohibition against unreasonable search and seizures applies to searches conducted not only by law enforcement officers, but also by public school officials. Even so, in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386 (1995), the U.S. Supreme Court stated that, while "children assuredly do not 'shed their constitutional rights ... at the schoolhouse gate,'" students within the school environment have a lesser expectation of privacy than members of the population generally. *Id*. at 655-656, s*ee also, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559 (2002).

Thus, the student's expectation of privacy is balanced against the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds, and the school's legitimate need to maintain an environment in which learning can take place. *New Jersey v. T.L.O.*, 469 U.S. 325, 339-340, 105 S.Ct. 733, 741-742, (1985). In *New Jersey v. T.L.O.,* the Supreme Court articulated the following two-prong test to determine the legality of school searches:

> [t]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope

> to the circumstances which justified the interference in the first place."

Id., 469 U.S. at 341, 105 S.Ct. at 742-43. According to the United States Supreme Court, a search of a student will be justified at its inception where there are reasonable grounds for suspecting that the search will uncover evidence that the student has or is violating either the law, or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in the light of the age and sex of the student and the nature of the infraction. *Id.*

This test has been interpreted by the Colorado Supreme Court as requiring "reasonable suspicion" of a violation, defined as "whether there were specific and articulable facts known to the officer, which taken together with rational inferences from these facts, created a reasonable suspicion of criminal activity [or of school rule violations] to justify the intrusion into the defendant's personal security." *People in Interest of P.E.A.,* 754 P.2d 382, 388 (Colo. 1988) (quoting *People v. Thomas*, 660 P.2d 1272 (Colo. 1983)).

The U.S. Supreme Court, in the case of *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559 (2002), eased a school district's ability to conduct suspicionless searches in some circumstances. *Earls* concluded that if a school is attempting to prevent drug abuse, then individualized suspicion is not needed. Therefore, the reasonableness requirement does not always imply the least intrusive means available. *Id.* at 2568.

What is a "Search"

A "search" means conduct by a school employee that involves intrusion into a person's protected privacy interests by examining items or places that are not out in the open or exposed to public view.

The following are examples of searches:

- 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 they cannot be inferred by the item's shape or other publicly exposed physical properties.
- Using any extraordinary means 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 through urinalysis.

What is *not* a "Search"

The following are ***not*** searches:

- Observing an object after a student denies ownership of an object.
- Observing an object abandoned by a student.
- Observing any object in plain view, exposed to the public.
- Peering into car windows, so long as this is done without opening the door or reaching into the vehicle to move or manipulate its contents.
- Detecting anything exposed to the senses of sight, smell or hearing, as long as school officials are located in a place where they have a right to be and extraordinary means were not used to gain a vantage point.

What is a "Seizure"

A "Seizure" describes two distinct types of governmental action. A seizure occurs (1) when a school official interferes with a student's freedom of movement (seizure of a person), or (2) when a school official interferes with a student's possessory interest in property (the seizure of an object).

In considering whether a juvenile is in custody for *Miranda* purposes, a court may consider, within the totality of circumstances, the age of the juvenile and whether the parents were present or had knowledge of the interrogation. *People v. Howard*, 92 P.3d 445, 450 (Colo. 2004).

Student searches by school officials must be justified at their inception and reasonable in scope.

- The Fourth Amendment to the United States Constitution protects students from unreasonable searches by public school officials on school property, school buses and at school events.

- Unless they are acting as agents of the police, school officials and school security officers do not need to establish probable cause to justify the search of a student on school grounds, school buses, and at school events; reasonable suspicion of a violation is sufficient.

Student searches by school officials and school security guards on school property, school buses, and at school events are justified if the following two-prong test is met:

> 1. *Justified at its Inception.* The search must be justified at its inception. A student search is justified when there are specific and articulable facts known to the school official, which taken together with rational inferences from these facts, create reasonable suspicion of criminal activity or of school rule violations.
>
> 2. *Reasonable Scope.* The search must be reasonably related in scope to the circumstances that justified the initial interference. In other words, a search will be permissible when the measures adopted are reasonably related to the objective of the search and not excessively intrusive given the type of infraction and the age and sex of the student. *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985); *People v. Interests of P.E.A.*, 754 P.2d 332 (Colo. 1988); *See, State v. Crystal*, 24 P.3d 771 (N.M. Ct. App. 2000). (Concluding that a principal violated a student's Fourth Amendment rights because he seized the student off campus to conduct a search when no evidence of a school rule was being violated).

A. To initiate a student search, school officials must meet the reasonable suspicion standard.

To initiate a lawful search, a school official or school security officer must have *reasonable suspicion* to believe all of the following:

> 1. A criminal law or school rule has been or is being violated;
> 2. A particular student or group of students has committed a criminal law or school rule violation;

3. The suspected criminal law or school rule violation is of a kind for which there may be physical evidence; and
4. The sought-after evidence would be found in a particular place associated with the student(s) suspected of committing a criminal law or school rule violation.

The concept of *"reasonable suspicion"* is founded on common sense. A school employee will have *"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 that infraction can be found in a certain place. *"Reasonable suspicion"* means a suspicion that is based on reasons that can be articulated. It is more than a mere hunch or supposition.

Specific Factors that Justify a Search

In deciding whether there are reasonable grounds to initiate a search, the teacher or school administrator may consider all of the attending circumstances. Moreover, the attending facts and circumstances should not be considered in artificial isolation, but rather should be viewed together and taken as a whole. For example, a piece of information viewed in artificial isolation might appear to be perfectly innocent, but when viewed in relation to other bits of information might thereafter lead to a reasonable suspicion of wrongdoing. In other words, the whole may be greater than the sum of its parts.

The following factors may be considered in determining whether reasonable grounds exist to initiate a search:

- Observed criminal law or school rule violation in progress.
- Observed weapon or portion of weapon.
- Observed illegal item.
- Observed item believed to be stolen.
- Student found with incriminating items.
- Smell of burning tobacco or marijuana.
- 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.
- Student flees upon approach of school official.
- Reliable information provided by others.
- Threatening words or behavior.
- Evidence incriminating one student turned over by another student.
- Student to be searched has history or previous similar violations;
- Student was previously disciplined for a similar infraction or criminal offense; or Student was already subject of investigation for a similar infraction or criminal offense.
- 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 rule violations are often committed.
- Student became nervous or excited when approached.
- Emergency situations, where school official can provide immediate assistance to avoid serious injury.

B. Schools may conduct searches with the consent of the student.

If a school official has information meeting the reasonable suspicion standard, the student's consent is not required to initiate a search. However, a student may also consent to a search of his or her belongings, thereby waiving Fourth Amendment rights. To be valid, the consent must be *knowing* and v*oluntary*. As a practical matter, the most reliable way to establish that the student giving consent knew that he or she had the right to refuse is to inform the student of that right. This notice can be given orally, or can be printed on a consent-to-search form like the one included in the Appendix to this manual. Be sure to obtain the student's signature on the consent form prior to the search. Because a student's consent to search must be clear and unequivocal, a written waiver is the preferred method of obtaining permission, although a search will not be invalid merely because the permission is given orally. It should also be noted that, if the school official is acting as an agent of the police, different rules apply and any statement the student makes may be suppressed at a criminal trial unless a parent or guardian is present and the student is advised of his or her *Miranda* rights.

It is a good practice for the school employee to inform the student why permission to search is being sought, and what the school employee believes will be revealed. While not necessarily required by law, providing such information will help demonstrate that the consent was informed, or *knowing*. To be *voluntary*, the request for consent must not be made in an inherently coercive or intimidating environment. The consent must be given without threat of punishment. Under no circumstances may the school employee seeking consent threaten a student with punishment if the student refuses to give permission to search.

The fact that a student refuses to give consent cannot be used as evidence that the student has "something to hide." Also, a student may terminate consent at any time, and the student's request to terminate the search must be honored. However, any evidence observed before consent was terminated may be seized. Also, if during the consent search a school employee develops *reasonable suspicion* that evidence of an offense or school rule infraction will be found in the place being searched or any other place, considering the totality of the circumstances, then the school official may continue to search even after the consent has been withdrawn and over the student's objections.

C. The factors justifying a student search should be documented.

The Fourth Amendment only prohibits searches that are *unreasonable*. The key to meeting the reasonableness test, simply stated, is to document all the *reasons* justifying the school employee's decision to undertake the search. Most Fourth Amendment violations are thoughtless ones. When school employees think carefully about what they are doing and try consciously to minimize the intrusion upon the students' privacy rights, they are far less likely to violate the Fourth Amendment.

Thus, school employees should carefully *document* all of the facts that were known before conducting a search, as well as any information learned during the course of conducting a search. The timing and sequence of events is crucial. An investigation must be thought of as a step-by-step process where each step in the unfolding sequence of events is justified by the information learned in the preceding steps. For example, a school employee must have a reasonable suspicion to believe an offense or infraction was committed before opening a locker or bookbag to search for evidence of the infraction. School officials should carefully document not only all relevant facts and observations, but also the reasonable, common sense inferences that can be drawn from the information at hand based upon that official's training and experience. Schools may wish to adopt a Student Search Report Form like the one included in the Appendix to this manual.

D. Recommended procedures for searching students.

Once reasonable grounds to conduct a search have been established, the next step is to discuss the *scope* of the actual search, that is, the degree to which the teacher or school administrator may peer into or poke around a student's belongings. The general rule is that a search will be allowable in *scope* when it is 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 suspected violation. Once again, the permissible scope of any search is bounded by the dictates of common sense. At all times during the search, the school employee conducting the search has to keep firmly in mind what he or she expects to find. School officials are never permitted to undertake a "fishing expedition" during a reasonable suspicion search.

The school employee conducting the search must follow a logical strategy designed to minimize the intrusiveness of the search and to complete the search as quickly and easily as circumstances allow. He or she should begin at the location where the sought-after item is most likely to be kept, based upon available information, reasonable inferences, and customary practices. School officials should not begin by searching a student's person where there are also reasonable grounds to believe that the sought-after item(s) are being kept in a locker or a backpack that can be easily separated from the student (unless the information available to the school official indicates that the item will most likely be found in the clothing the student is wearing).

A search should be no broader in scope or longer in duration than is reasonably necessary to fulfill its legitimate objective. There must be a logical connection between the thing or place to be searched and the item that is expected to be found there. For instance, a school teacher's reasonable suspicion that a student stole a textbook would not justify a search of that student's clothing, or of containers such as a purse too small to conceal the missing textbook. Nor would a suspicion that a student's book bag conceals drugs permit a school official to read a diary kept in the book bag. Furthermore, school officials should be careful never to damage the property belonging to a student.

When a school official has reasonable suspicion to conduct a search of a student's locker, the school official would also be authorized to open and inspect any closed containers or objects that are stored in the locker, provided there are reasonable grounds to believe that the sought-after item could be concealed in the container that is to be opened.

Even though school officials are empowered to use reasonable and appropriate physical intervention or force to maintain order, school teachers and school officials are urged to avoid using force to effectuate a search whenever possible, and where force must be used, it should be no greater than that necessary to restrain the student and protect against destruction of evidence or the use of a weapon. Furthermore, before actually using physical force, school officials should, if appropriate under the circumstances, tell the student that his or her behavior will make the use of force necessary to effectuate the search and seizure, thus providing the student a last opportunity peacefully to submit to authority.

One way to reduce the likelihood that actual or threatened force will be necessary is first to confront the student and conduct the search in the principal's office or at some other location away from the student body. By isolating the student, school officials can eliminate the incentive for the student to try to impress peers by resisting. Once the student is isolated, be sure to confront the student with more than one school official or teacher on hand. This tactic also serves to reduce the possibility that other students might come to the suspect's rescue, create a disturbance, or otherwise try to interfere with the search or intimidate outnumbered school officials.

Recommended Student Search Guidelines

In conducting student searches, the school teacher or officials should always adhere to the following general guidelines:

A. Remove students to a private area. Personally escort the students to be searched to the office. Maintain visible contact with the students from the time they are retrieved from the classroom to the time they reach the search location to ensure they do not abandon contraband. At least two staff members should escort the students to provide extra support in monitoring that the students do not flee or resist the school officials. Stops along the way to the search location should not be permitted.

B. Always watch the student's hands. If a student is suspected of having a weapon or drugs, the student may try to discard it if the opportunity arises. This can occur from the time the student is told to accompany a school official to the office up to and including the time when the student is actually in the office and being searched. Never allow a student to follow behind a staff member where the student cannot be observed.

C. Always have another school official present as a witness from the inception of the search until the evidence is properly secured. This will strengthen any case brought against the student and protect the searcher from charges of improper conduct.

D. Student searches should be conducted and witnessed by school officials of the same gender as the student. This will help protect the student's rights as well as protect the searcher from claims of impropriety.

E. Searches should be conducted in a discreet manner to cause the least amount of embarrassment possible. Only the searcher, witnesses and student should be present. A student should never be searched in front of another student. Student searches should be conducted in a private area where there will be no interruptions.

F. Tell students what you are looking for and give them a chance to surrender the item. Before beginning the search, ask the students if they have anything in their possession that violates the criminal law or school rules. If they hesitate, tactfully advise them that you have reasonable suspicion that they do possess such an item. Further explain that you plan to conduct a search and that it would save everyone time and unnecessary embarrassment if the student cooperates. *See*, Section B, page 56, on "Consent Searches."

G. Students should first remove all outer clothing such as coats, sweaters, hats, and shoes. Students should not necessarily be required to remove inner layers of clothing in direct contact with the skin, unless school officials have authorization from the school district to conduct strip searches and justification to conduct a strip search. *See*, discussion of strip searches below. Students should remove all objects from their pockets. These items should be laid aside until the student search is complete. Conduct a pat down search on the side of the student's body working from top to bottom on each side. Do not stop if contraband is found. Continue until all places have been searched. Next, turn attention to items that had been set aside. Items that could conceal contraband should be searched. *Remember:* The scope of the search must be reasonably related to the circumstances that justified the search and the item sought.

H. Seize any item that violates a criminal law or school rule or provides evidence of a criminal law or school rule violation. Each seized item should be placed inside a separate sealed envelope. The envelope should be marked with inventory information including a description of the item seized, date and time of the seizure, source of item, name of the person who seized item, and name of the person who witnessed the search. Seized evidence should be secured in a locked storage area with restricted access. Where a potential criminal violation is involved, the seized evidence should be transferred to police in a timely manner.

Checklist for Searching Students

- Remove student to private area.
- Closely observe student during removal and search.
- Have another school official present during procedure.
- Have school officials of same gender as student conduct and witness search.
- Offer student opportunity to surrender item.
- Search student for item connected to criminal law or school rule violation.
- Seize any item that violates a criminal law or school rule or provides evidence of a criminal law or school rule violation.
- For each item seized, prepare the following chain of custody checklist:

Chain of Custody Checklist

A. Write down inventory information for the seized item.

B. Inventory information should include:
   1. Description of item seized.
   2. Date and time of the seizure.
   3. Source of seized item (from whom and location obtained).
   4. Name of person who seized item.
   5. Name of person who witnessed the search.

C. Place each item seized in separate sealed envelope marked with inventory information.

D. Secure evidence in locked storage area with restricted access.

E. Do not leave evidence unattended before it is placed in locked storage
area.

F. Transfer evidence to police in sealed envelopes in timely manner.

Car searches on school property are permissible in certain circumstances.

A student's car brought on school property is subject to no greater protection than a student's purse or book bag and, thus, may be subject to a search conducted by school officials provided, of course, that the facts meet the reasonable suspicion test.

It is a good idea to provide advance notice to students that vehicles brought on school property may be subject to search by school officials when there is a particularized reason to believe that evidence of a crime or violation of school rules would be found in the vehicle. It is especially important to provide such advance notice if any such vehicle searches are to be conducted pursuant to a suspicionless or random inspection program (*discussed in the next section)*. Providing such advance notice to students that vehicles parked on school grounds are subject to search provides students with an opportunity either to keep highly personal items out of these vehicles or to choose another means of transportation to and from school. In regards to such notice, school districts may wish to post signs in school owned parking lots notifying students that all cars are subject to school searches, thus lowering the students' expectation of privacy. School districts can also adopt the application for school parking lot access included in the Appendix of this Manual. If a school district adopts this application, the school district should provide each student and each student's parent with a copy of the application to be returned and signed at the beginning of the school year.

Schools should exercise caution if they conduct strip searches of students.

The term "strip search" includes "nude" searches, a search that reveals a student's undergarments, and a search that includes the removal or re-arrangement of clothing for the purpose of visual inspection of the student's buttocks, genitals, or breasts. The term "strip search" does not include removal of outer layers of clothing not in direct contact with the student's skin, such as jackets or sweaters worn over other clothing. Although strip searches may be appropriate in certain circumstances, strip searches constitute a gross invasion of privacy, especially when the subject of the search is a child. Therefore, school districts should contact their school attorneys and local prosecutors for guidance and training on when it is appropriate to initiate such a search.

The Courts have noted that "the Fourth Amendment applies with its fullest vigor against any indecent or indelicate intrusion on the human body." *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir.), *cert. denied*, 463 U.S. 1207, 103 S.Ct. 3536 (1982). For this reason, school officials should be especially cautious before undertaking a search of a student's person. School officials should be mindful that courts will more closely scrutinize the facts justifying a search where the search is particularly intrusive, such as one that involves the strip search or physical touching of a student's person.

In *Horton*, the court held that an up-close canine sniff of students while in school without reasonable suspicion was unreasonable. 690 F.2d at 481-482. *Horton* is easily distinguishable from the facts presented in *U.S. v. Kelly*, 303 F.3d 291(5th Cir. 2002). "… Because *Horton* is not a border case but rather analyzed canine sniffs in the context of a school environment." *Id*. "The balance between the government's intrusion on the individual's Fourth Amendment interests and the promotion of legitimate government interests is struck much more favorably to the government at the border." *Id* at 295.

As a general rule, students should not be subjected to strip searches or physical touching to find evidence of comparatively minor infractions of school rules, such as possession of chewing gum, candy, or cigarettes. School officials must use common sense and should carefully consider the seriousness of the suspected infraction before conducting a physical search of the student's person. In short, courts are likely to afford school officials with more latitude in conducting a search for a suspected gun or switchblade or drugs than a search for cigarettes. Also, many school districts have policies prohibiting strip searches of students; school officials should familiarize themselves with their school district's policies in this area.

Like other non-random searches, a strip search must be justified at its inception, meaning that there exists reasonable suspicion that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. The search itself must also be reasonable in scope;

meaning that the extent of the search must be reasonably related to its objectives and not expressly intrusive in light of the age and sex of the student and the nature of the infraction. *See*, *Kennedy v. Dexter Consol. Schools*, 10 P.3d 115 (N.M. 2000) (concluding that the strip search of a student to locate another student's missing ring violates the student's rights to be free from strip searches that are excessive in scope).

Courts have upheld strip searches when there exists reasonable suspicion that the search will reveal evidence of drug possession, weapons, or theft, but have found the generalized strip search of an entire 5th grade class over a missing $5 bill, and a strip search involving a student "acting suspiciously" in a parking lot, to be invalid. *Cornfield v. Consolidated High School Dist. No. 230U*, 991 F.2d 1316 (7th Cir. 1993); *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977).

Individualized reasonable suspicion is also required for a school official to conduct a strip search. *Kennedy*, 10 P.3d at 120. "A child cannot be stripped to his boxer shorts by school officials who have no reason to suspect him individually." *Id.* at 121. Therefore, it is important to have individualized suspicion of wrongdoing before conducting a strip search to avoid liability.

If school officials have reasonable suspicion to believe that a particular student is hiding drugs or weapons under his or her clothing, a strip search may be deemed reasonable in certain limited circumstances if the search is conducted in a careful manner. The strip search should always be conducted in private by school officials of the same sex as the student. Two school officials should be present during any strip search. School officials should always seek approval from school administrators before commencing a strip search. Nobody else should be present in the room. The school official may wish to attempt to seek the consent of the student for the search. *See* Section B, page 56. The student should be ordered to remove his or her street clothes. The school officials may then visually inspect the student and physically inspect the clothes. The scope of the search should be strictly limited to what is necessary to identify the type of contraband sought -- a search for a suspected handgun, for instance, may necessitate removal of the student's baggy pants or sweater, but not the student's undergarments.

Search of Students on School Property by or on behalf of Police Officers

Although school officials may conduct student searches based upon reasonable suspicion, police officers must have *probable cause and a valid search warrant or a valid search warrant exception* to participate actively in a student search on school property. Additionally, a school official who undertakes a search of a student, locker, or student vehicle at the request of or in cooperation with a law enforcement officer must also have probable cause or a valid search warrant to undertake such a search. For instance, if law enforcement officials are invited onto the campus to conduct a locker inspection with drug detection canines, courts would likely hold that probable cause and a warrant would be required to open a locker when the dog alerts to the presence of illicit substances. *See,* page 71.

However, the reasonable suspicion standard may apply to school resource officers when undertaken at the request or direction of a school official. *In re Josue T.*, 989 P.2d 431 (N.M. Ct. App. 1999). In *Josue*, a school resource officer searched a student, but only after the school official initiated and conducted the entire investigation. The court concluded that the officer searched the student "in conjunction with school officials." *Id.* at 437. The character of the search suggested that a reasonable suspicion standard should apply.

Summary of Student Searches by School Officials

Search Area	**Expectation of Privacy**	**Required Justification for Search**
Student's Person Or property	**Yes**	**Reasonable Suspicion (see page 54-55) and/or Consent (see page 56)**
Car	**Yes**	**Reasonable Suspicion (see page 54-55) and/or Consent (see page 56)**
Lockers, Desks, Other Storage Areas in School	**Yes or No Depending on School Policy**	**No justification for random search (see page 58)** **Reasonable Suspicion standard (see page 54-55) or Consent (see page 56)**

Abandoned property, denial of ownership and property in plain view	**No**	**No justification for search required (see page 53)**

E. Generalized or suspicionless searches are appropriate in certain circumstances if conducted in a nondiscriminatory manner.

Given the serious security and discipline problems existing in some school districts, it is sometimes appropriate and necessary to conduct routine searches that are not based upon a suspicion that a particular student has committed an offense or infraction. These suspicionless search or inspection programs are sometimes referred to as "sweep" or "blanket" searches.

A suspicionless search may be permissible when the search serves "special needs, beyond the normal needs of law enforcement." *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 109 S.Ct. 1402 (1989). "In limited circumstances," the United States Supreme Court has observed, "where the privacy interests implicated by the search are minimal, and where an important government interest is furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable in the absence of such suspicion." *Id.*

Suspicionless searches are not designed to catch offenders, but rather serve to *prevent* students from bringing or keeping dangerous weapons, drugs, alcohol, and other prohibited items on school grounds. These inspection programs are intended to send a clear message to students that certain types of behavior will not be tolerated.

In most cases, such suspicionless searches should be conducted by school officials acting entirely on their own authority, without the assistance of or active participation by a law enforcement agency. It is critical to note that where a law enforcement agency does participate in the search, for example, by providing the services of a drug detection dog, the rules governing the legality of the search could become quite different. As a general proposition, the greater the involvement and participation of a law enforcement agency, the greater likelihood that the law enforcement involvement will trigger stricter rules and subject the entire inspection program to enhanced scrutiny by the courts.

It is important to note that, while demonstrably effective, random searches pose a greater risk of a successful legal challenge, especially since the state of the law remains unsettled in this area. Additionally, because all legal challenges will turn on the individual facts of the case presented to the court, a search policy that is perfectly suitable for one school district facing certain problems may be less suitable or even unreasonable if undertaken by a different school district or building facing less severe problems. Thus, school officials are urged to consult with legal counsel when planning to implement any particular random search or inspection plan in their school.

1. Drug Testing

There are few subjects more controversial than whether and when schools may compel large numbers of students to submit to random urinalysis. To discuss all the legal issues involved in random drug testing would be another manual in itself. Consequently, any school or school district contemplating implementing any random drug testing program would be wise to closely consult with legal counsel.

The Colorado Supreme Court's most recent case on the subject held that random testing of students involved in non-athletic, extra-curricular activities violates the student's Fourth Amendment rights under the U.S. Constitution. The testing was not deemed justified by the existence of a serious drug problem within the school district. *Trinidad School Dist. No. 1 v. Lopez by and through Lopez*, 963 P.2d 1095 (Colo. 1998). Random drug testing appears to be disfavored by the Colorado courts. *See, University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993).

A more recent U.S. Supreme Court case suggests that under certain circumstances, requiring students who participate in non-athletic, extra-curricular activities to submit to suspicionless drug testing does not violate the U.S. Constitution. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559 (2002). This case broadened the Court's holding in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), which permitted such testing of school athletes. The Court's decision was premised on a fact-specific balancing of the intrusion on the student's Fourth Amendment rights against the promotion of legitimate governmental interests. Because of the fact-specific nature of the Court's decision, and because the Colorado Supreme Court may or may not follow this holding when interpreting the State Constitution, the case should not be viewed as an invitation to abandon the safeguards set forth below for development of a constitutional random school drug testing program.

- *Solicit Parental Input*. School officials are strongly encouraged to solicit input from parents, teachers, and other members of the school community before implementing a random drug testing policy. Soliciting parental input not only provides school officials with an opportunity to solicit the opinions of the "primary guardians" of the district's schoolchildren, but also affords an opportunity to engage in a fact-finding inquiry to learn firsthand from parents their views concerning the scope and nature of the school's substance abuse problem.

- *Investigate the scope and nature of the drug problem*. School officials should engage in a fact-finding inquiry about the substance abuse problem at the school and carefully document their findings to demonstrate why it is necessary and appropriate to implement a random drug testing policy. These findings must spell out the nature and scope of the problem as it exists in the school and why the proposed policy will help alleviate the problem. It is also critical that the findings relate specifically to the particular school and population of students who will be subject to random drug testing, for example, student athletes. Finally, school officials must carefully consider whether there are less intrusive alternatives to accomplish their legitimate objective, which is to discourage students from using alcohol or drugs.

- *Advance Notice.* All students and parents should be afforded notice in writing of the nature and purpose of the random drug testing policy. Students who are or wish to be members of the category of students to be tested (for example, student athletes) should additionally be required to sign an acknowledgment of the program as a precondition for participation. Advance warning is consistent with the true goal of the program, which is not to catch and punish students but to discourage substance abuse.

- *Limited purpose.* Random drug testing policies have been upheld as constitutional when undertaken in furtherance of the public school's responsibilities as guardian and tutor of children entrusted to its care. Thus, they must be undertaken for prophylactic and distinctly non-punitive purposes. A random school drug testing policy must be designed to deter substance abuse and *not* to catch and punish users. For example, a random drug testing policy for student athletes should state as its purpose protecting student athletes from injury and deterring drug use in the student population. The policy must make clear that positive test results will not be disclosed to law enforcement agencies.

- *Minimize the Invasiveness of the Intrusion.* A random drug testing policy must specify the procedures for collecting and handling urine samples, so as to minimize to the greatest extent possible the invasion of student privacy.

- *Neutral Plan for Selecting Students for Testing*. The policy must establish a neutral plan that clearly prescribes the random selection method that will ensure that students selected to submit to urinalysis are not singled out on the basis of an individualized suspicion, or on the basis of some impermissible criteria, such as race, ethnicity, socioeconomic status, or membership in a "gang."

- *Preserving the Chain of Custody and Ensuring Accuracy.* The policy must specify the procedures to preserve the so-called "chain of custody" of all samples to be taken, and must also include procedures to ensure reliable test results.

- *Preserve confidentiality.* It is critically important that the policy include provisions to make certain that the identity of students who test positive for drugs be kept confidential.

The Seventh Circuit has upheld random, suspicionless drug testing as a condition to participate in non-athletic extracurricular activities. *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (Ind. Ct. App. 2000). The ruling extended to student drivers, but did not allow testing of student drivers for nicotine. *Id.* at 1053.

2. Locker Searches

School districts are required to include a specific policy concerning the student locker searches in their school district policy. Locker searches by school officials are lawful when there exists a reasonable suspicion that evidence of a violation of law or a school rule will be found therein and the search of the locker is properly limited in scope. *People in Interest of P.E.A.*, 754 P.2d 382 (Colo. 1988).

However, school districts may reduce or even eliminate the students' reasonable expectation of privacy in school lockers by notifying students and parents in writing that lockers are the property of the school district and are subject to search by school officials at any time. In *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981), two high school students claimed that their school unlawfully used drug sniffing dogs to discover marijuana in their lockers. In rejecting their claim, the court found that the school had given written notice to the students that lockers were subject to being opened through their school handbook entitled "Rights, Responsibilities and Limitations of Students." The school policy stated that lockers remain under the jurisdiction of the school, notwithstanding the fact that they were assigned to individual students, and that the school reserved the right to inspect all lockers at any time, without the presence of the student. The court found that the school retained joint control of the students' lockers, and that the Fourth Amendment was not violated by either the use of drug sniffing dogs to indicate the presence of marijuana in the lockers, nor by the subsequent warrantless search of the lockers by school officials.

In addition to reducing the students' expectation of privacy in school lockers, school districts may also adopt a school-wide policy of randomly selecting lockers to be periodically and routinely inspected for items that do not belong on school grounds. School officials would then have the flexibility to establish a random locker inspection program that involves inspections occurring on a persistent and regular basis. Such a program would not only convince students to remove prohibited items, but would also serve to discourage students from bringing contraband back on to school grounds in the future.

To successfully pass legal muster, any random locker inspection program adopted by a school should meet all of the following criteria:

- *Findings.* The local board of education, school district superintendent, and/or school principal should adopt and memorialize specific findings that detail the nature, scope, and magnitude of the problem sought to be addressed by the locker inspection. The findings should explain why it is necessary and appropriate to adopt an inspection program.

- *Advance Notice of the Program.* All students and parents should be afforded notice in writing of the nature and purpose of the locker inspection program, and students should additionally be alerted to the program in their homeroom classes and/or in a school assembly. Students need not, however, be notified in advance of each separate locker inspection. Advance warning is consistent with the true goal of the program, which is not to catch and punish students but to discourage students from bringing or keeping prohibited items on school grounds. Students and parents should be notified that any closed containers kept in lockers selected for inspection may be opened and their contents examined.

- *Neutral Plan.* A “neutral plan” is one based on objective criteria established in advance, and not on the discretion of the school officials conducting the random search. The plan should be developed in advance by a high-ranking school official, like the principal or superintendent. It is preferable that school officials use a random selection method for lockers to be inspected, or where feasible to inspect *all* lockers. A lottery system would be ideal. Lockers should never be selected for inspection on the basis of associations, such as membership in “gangs” or troublesome groups or cliques. Where any particularized suspicion exists, the locker should only be searched in accordance with the reasonable suspicion standard.

- *Execution.* The inspections should be conducted in a manner that minimizes the degree of intrusiveness. Inspections should be limited to looking for items that do not belong on school property or in a locker. School officials would be authorized to open and inspect any closed containers or objects stored in a locker that has been selected and opened pursuant to a neutral plan. Law enforcement officers should not participate in the conduct of these inspections and should not be present or “standing by” in the corridor. Rather, it is crucially important that these random inspections be based solely on the authority of the school officials to take steps to preserve discipline, order, and security in the school.

3. Search of Students by Using Metal Detectors

Random searches using metal detectors (both walk through and “wand” style) are reasonable administrative searches. However, the search may not be used as a pretext to target particular individuals or groups. School districts should adopt the following procedures if metal detectors are used:

- 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.

- All students and parents should be afforded notice in writing of the metal detector program, and students should additionally be alerted to the program in their homeroom classes and/or in a school assembly.

- A "neutral plan" for selecting students for a metal detector search should be established in advance; such searches should not be left to the discretion of the school officials conducting the random search. The plan should be developed in advance by a high-ranking school official, like the principal or superintendent. It is preferable that school officials use a random selection method for such searches, or where feasible to search all students.

- Request all students to empty their pockets and belongings of all metal objects before the search.

- Request a second walk-through when the metal detector is activated.

- Use a hand-held magnetometer, if available, to focus on and discover the location of the metal source if a second activation results.

- Expand the scope of the search if the activation is not eliminated or explained. School officials responding to the metal detection alarm should be instructed to limit any search to that which is necessary to detect weapons. If no less restrictive alternatives remain available a limited pat-down search may then be necessary.

- Ask the student to proceed to a private area for any greater subsequent intrusion.

- Conduct any expanded search, such as a pat down or a request to open purses or book bags, by school officials of the same sex.

4. Use of Drug Sniffing Dogs

The United States Supreme Court has held that the use of a law enforcement drug detection dog to sniff the exterior surface of a container is, at most, a "minimally intrusive" act -- one that does not constitute a search for purposes of the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637 (1983). Though the U. S. Supreme Court has ruled that dog sniffs are not a "search" requiring a warrant, Colorado law affords broader protections and has ruled that a dog sniff can be a "search" when it intrudes upon a reasonable expectation of privacy, which requires a reasonable suspicion of criminal activity. *People v. Haley,* 41 P.3d 666 (Colo. 2001). This is generally not problematic as long as the school has in place the suggested policies for both lockers and parking areas wherein the student and parents give consent to search in exchange for the privilege of using that school property. With those polices, there is no requirement for even reasonable suspicion of illegal substances or activities. Without those policies, the school would need reasonable suspicion of criminal activity to conduct the "search" by the dog. *See generally, People v. Boylan*, 854 P.2d 807 (Colo.1993).

It must be emphasized that, while the act of exposing a locker or book bag to a trained canine might be a reasonable search, depending on the circumstances, opening the locker or container or entering a vehicle in response to the dog's alert would constitute a search requiring reasonable suspicion (or probable cause, if the drug detection canine is provided by a law enforcement agency). However, it is probable that a positive alert by a scent dog would constitute evidence sufficient enough to meet the reasonable suspicion test, giving school officials reasonable grounds to open and inspect the locker, container, or vehicle. However, according to the Eleventh Circuit, a positive alert by a scent dog to a person's property would "supply not only reasonable suspicion, but probable cause to search that property." *Hearn v. The Bd. of Pub. Educ.*, 191 F. 3d 1329, 1333 (11th Cir. 1999). *See also, Marner ex rel. Marner v. Eufaula City Sch. Bd.*, 204 F.Supp.2d 1318 (M.D. Ala. 2002). Therefore, when property is alerted to by a scent dog, it can be searched immediately without a warrant.

5. Search incident to a "Medical Emergency"

The medical emergency exception will support a warrantless search of a person's book bag, purse or wallet when the person is found in an unconscious or semi-conscious condition and the purpose of the search is to discover evidence of identity and other information that might enhance the prospect of administering appropriate medical assistance to the person. *See generally,* *People v. Wright*, 804 P.2d 866 (Colo. 1991), *citing*, *Mincey v. Arizona*, 437 U.S. 385 at 392-93 (1978).

The rationale for this exception is that the need to protect or preserve life or avoid serious injury to another is paramount to the right of privacy and thus is justification for what would otherwise be an invalid search in the absence of an emergency. *Compare, State v. Newman,* 292 Or. 216, 637 P.2d 143 (1981) (search of intoxicated adult's purse to obtain identification during transportation to detoxification center not justified under medical emergency exception, since no real emergency existed and public intoxication was not a crime, and illegal drugs found in purse properly suppressed); *State v. Loewen,* 97 Wash.2d 562, 647 P.2d 489 (1982) (officer's search of defendant's tote bag at hospital for identification and officer's recovery of illegal drugs from bag constituted unlawful search because defendant at that time was under treatment by trained medical personnel and no emergency existed under objective analysis of facts). Once again, a search during the course of a true medical emergency is generally not problematic as long as the school has in place the suggested policies for both lockers and parking areas wherein the student and parents give consent to search in exchange for the privilege of using that school property.

F. Colorado case law on student searches.

Information received by a police officer from a student that two other students had brought marijuana to school has been held to justify the search by the principal and school security officer of those students' persons, school lockers and car, considering the limited ways the students could have transported the marijuana to school and concealed it on school grounds and the magnitude of the threat of having marijuana sold and distributed at the school. *People in Interest of P.E.A.*, 754 P.2d 332 (Colo. 1988).

Information that a student had been in the company of another student on school premises under the influence of alcohol gave rise to reasonable suspicion that the student had also consumed alcohol, and warranted attempts to verify that fact. *Martinez v. School Dist. No. 60,* 852 P.2d 1275, 1278 (Colo. App. 1992).

The existence of a serious drug abuse problem within the student body of a school district did *not* justify a policy of mandatory drug testing for all students wishing to participate in an extracurricular activity, given that the policy swept within its reach students who were enrolled in for-credit classes as their extracurricular activity, who were not demonstrated to have contributed to the drug problem in the district, and that there was no demonstrated risk of immediate physical harm to the students participating in the extracurricular activity. *Trinidad School Dist. No. 1 v. Lopez by and Through Lopez,* 963 P.2d 1095, 1109 (Colo. 1998).

APPENDIX – FORMS

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.

________________________________ ________________________________
School Official Name and Title School Official Signature

____
Date

_________________________________ ______________________________
Student Name Student Signature

____
Date

STUDENT SEARCH REPORT FORM

Name of the student suspected, including age, grade, sex:

____
____
____
____

Name address, and phone number of school official and/or school security officer conducting and witnessing search:

____
____
____
____

Time and location of search:

____
____
____

What criminal law or school rule violation is suspected?

____
____
____
____
____

Why is this particular student suspected of the criminal law or school rule violation?

____
____
____
____
____

What item related to the criminal law or school rule violation is being sought?

____
____

What is being searched and how is it being searched:

How is the item sought connected to the criminal law or school rule violation?

Why is the item sought suspected of being presently located in the place searched?

Does the search involve more than one student?

If YES, answer a, b, and c

a. How many students?

b. Explain your reasonable grounds for believing that each student to be searched is in possession of the sought item.

c. What investigative steps were taken before searching a group of students to narrow the field of suspects?

___

___

Was information concerning the student provided by another person?
(*check appropriate line)*

__ School staff member
__ Student
__ Parent
__ Other __________________ (identify)

a. What did the person providing this information see or hear concerning the student and criminal law or school rule violation?

___

___

___

___

b. How did the person learn about the student's involvement with the criminal law or school rule violation?

___

___

___

___

___

c. Was the information provided by a person involved in the violation of the criminal law or school rule? *(If YES, answer "d" through "j")*

___

___

___

d. Was the information provided by a person with a reputation for telling the truth?

___

___

e. Was the information provided by a person with a motive to lie or exaggerate?

___

___

f. Has this person provided reliable information in the past?

g. Did the person make a statement against his or her own interest?

h. Does the person providing the information have a motive to lie or minimize his/her culpability by falsely accusing another?

i. Did the person provide information in exchange for leniency?

j. Explain why the information is credible and how the information was corroborated.

k. List any items found and where the items were found.

Application for School Parking Lot Access

I, *(student's name*), agree to the terms and responsibilities stated below in connection with obtaining authorization to use the school parking lot.

I understand that the parking lot is the property of *(name of school district)*. I agree that the car driven by *(student's name)* will not be used to transport or store
illegal items on school property. I agree that *(student's name)* will not use the school parking lot to violate a criminal law or school rule.

I understand and give school officials and/or school security guards consent to search the car driven by *(student's name)* and the car's contents at any time when
it is parked on school property.

I authorize school officials and/or school security guards 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: _________________

SOURCES

- COLORADO REVISED STATUTES
- Attorney General State of Indiana; INDIANA SCHOOL SEARCH MANUAL (1999)
- National Association of Attorneys General; SCHOOL SEARCH REFERENCE GUIDE (1999)
- Mississippi Safe School Initiative; GUIDELINES AND PROCEDURES FOR IMPLEMENTATION OF INSPECTIONS, SEARCHES AND SEIZURES (1999)
- National School Safety Center, STUDENT SEARCHES AND THE LAW: AN ADMINISTRATOR'S GUIDE TO CONDUCTING LEGAL SEARCHES ON SCHOOL CAMPUSES (1995)
- New Jersey School Search Policy Manual (1998)
- Kenneth S. Trump, PRACTICAL SCHOOL SECURITY: BASIC GUIDELINES FOR SAFE AND SECURE SCHOOLS, Corwin Press (1998)
- Jon M. Van Dyke and Melvin M. Sakurai, CHECKLISTS FOR SEARCHES AND SEIZURES IN PUBLIC SCHOOLS, West Group (1999)

RESOURCES

Resources available for schools and communities in helping address school violence and safety issues include the National Association of Attorneys General web site at *http://www.naag.org/features/brused_inside.PDF* and a document entitled "A Guide to Safe Schools," prepared by the U.S. Department of Education and the U.S. Justice Department.

Another excellent resource for school violence prevention is the Center for the Study and Prevention of Violence at the University of Colorado at Boulder, particularly a publication entitled "Bullying Prevention Program," included in the Center's "Blueprints for Violence Prevention" series. Information on resources provided through the Center can be obtained from their web site at *www.colorado.edu/cspv*.

In addition, nationally noted school violence and safety expert Dr. Ronald Stephens of the National School Safety Center offers "Ten Steps to Safer Schools." A copy of his article is attached.

ADDITIONAL RESOURCES

Colorado Coalition Against Sexual Assault (CCASA) is a statewide coalition of individuals and organizations working together for freedom from sexual violence.
Website: http://www.ccasa.org/
Phone: 303-861-7033 or toll free at 1-877-37-CCASA for those outside the Denver metro area.

Colorado Rape Crisis Hotlines

Moving to End Sexual Assault (MESA) **303-443-7300**
Located in Boulder and serves Boulder County.

Rape Assistance and Awareness Program (RAAP) **303-322-7273**
Located in Denver. Counties served include: Denver, Jefferson, Douglas, Adams, Arapahoe, Elbert, and Lincoln.

Sexual Assault Services Organization **970-247-5400**
Located in Durango. Counties served include: La Plata and San Juan.

Sexual Assault Survivors, Inc. (SASI) **970-352-7273**
SASI is located in Greeley, Colorado and serves Weld County.
1-800-656-4673

Sexual Assault Victim Advocate (SAVA) Team **970-472-4200**
The SAVA Team is located in Fort Collins, Colorado. Counties served include Larimer and Jackson.

Deaf Community

Denver Victims Service Center
TTY 303-860-9555
Located in Denver serving the Denver metro region.

DOVE
TTY 303-831-7874
Advocacy Services for Abused Deaf Women and Children. Serving the Denver metro region.

Rape Assistance and Awareness Program
TTY 303-329-0023
Located in Denver. Counties include: Denver, Jefferson, Douglas, Adams, Arapahoe, Elbert, and Lincoln.

WEBSITES

Larimer Center for Mental Health – The Sexual Assault Victim Advocate (SAVA) Team, is comprised of specially trained victim advocates who are on-call 24 hours a day for emergency services or to answer your questions about sexual assault.
http://www.savacenter.org

Moving to End Sexual Assault – Boulder County. MESA provides a variety of sexual assault assistance and prevention programs, including a 24-hour Hotline – a first critical point of contact for victims to obtain immediate crisis assistance. Victims can also receive counseling, medical, legal, and criminal advocacy, ongoing support, therapy, and referrals.
http://www.movingtoendsexualassault.org/contact.aspx

RAAP (Rape Assistance and Awareness Program) – Denver
http://www.raap.org/index.html

Sexual Assault Survivors, Inc. – Greeley
http://www.survivorinfo.org/

CHILD ADVOCACY CENTERS

Blue Sky Bridge
Serving Boulder County
P.O. Box 19122
Boulder, Colorado 80308-2122
Phone: 303-444-1388
Fax: 303-444-2045
E-mail: info@blueskybridge.org
Website: www.blueskybridge.org

MESA (Moving to End Sexual Assault)
Serving Boulder County
2885 E. Aurora Ave., Suites 10
Boulder, Colorado 80303
Phone: 303-443-0400
E-mail: info@joinmesa.com
Website: http://www.movingtoendsexualassault.org/contact.aspx

Colorado Organization for Victim Assistance
Serving the State of Colorado,
2460 W. 26th Ave., Suite 255-C
Denver, CO 80211
Phone: 303-861-1160 or 1-800-261-2682
Fax: 303-861-1265
E-mail: COVA789@aol.com
Website: www.coloradocrimevictims.org

Children's Advocacy Center for the Pikes Peak Region ("Safe Passage")
Serving El Paso and Teller Counties
423 South Cascade Avenue
Colorado Springs, Colorado 80903
Phone: 719-636-2460
Fax: 719-636-1912
E-mail: cacppr@earthlink.net
Website: http://www.safepassagecac.org/

Denver Children's Advocacy Center
Serving Denver City and County
2149 Federal Blvd.
Denver, Colorado 80211
Phone: 303-825-3850
Fax: 303-825-6087
E-mail: dcac@vs2000.org
Website: http://www.denvercac.org/

Jeffco Children's Alliance
3 sites serving Jefferson, Gilpin, and Clear Creek Counties
Cheryl Fugett, Executive Director
1875 Wadsworth Blvd.
Lakewood, CO 80214
Phone: 303-462-4001
Fax: 303-462-4000
E-mail: Jeffcocac@aol.com

Kempe Children's Center
Serving the Denver Area
1825 Marion Street
Denver, Colorado 80218
Phone: 303-864-5300
Fax: 303-864-5302
E-mail: questions@Kempe.org
Website: http://kempecenter.org

Platte Valley Children's Alliance Center
Serving Adams & Broomfield Counties
2360 West 112th Ave.
Northglenn, CO 80234
Phone: 303-864-5271
Fax: 303-254-6696

Children's Advocacy and Family Resources, Inc.
Serving Arapahoe, Douglas, Elbert, and Lincoln Counties
P.O. Box 24225
Denver, Colorado 80224-0225
Phone: 303-368-1065
Fax: 303-368-1089
E-mail: sungate@ecentral.com
Website: www.sungatekids.org

Larimer County Child Advocacy Center
Serving Larimer County
5529 S. Timberline Road
Ft. Collins, Colorado 80528
Phone: 970-407-9739

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Western Slope Center for Children
Serving Mesa County and the Western Slope
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National Children's Advocacy Center, a *national* Advocacy Center
210 Pratt Ave.
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FORMAL OPINION No. 00-7

FORMAL OPINION of KEN SALAZAR Attorney General	No. 00-7 Law Enforcement and School Authorities Sharing of Information Alpha No. LW CJ AGBAI Issued August 3, 2000

This opinion sets forth guidelines for schools and law enforcement agencies about information that can be exchanged between law enforcement and school authorities. It is meant to present and clarify these complex issues.

Recent statutory changes have greatly expanded the ability of school districts and law enforcement agencies to cooperate in the transmission and sharing of information. Juvenile justice agencies are now required to provide schools with basic identification information whenever a student is charged in any court with committing a crime of violence or unlawful sexual offense; arrest and criminal records information whenever a delinquency petition is filed in juvenile court; notice whenever a student is convicted or adjudicated for an offense constituting a crime of violence involving controlled substances or unlawful sexual behavior; notice whenever a student is convicted or adjudicated for a crime that would result in mandatory expulsion proceedings under Colorado law; and notice whenever a court makes school attendance a condition of release, probation, or sentencing. Moreover, law enforcement agencies may now, upon request, provide certain school officials access to records or information on students which are maintained by the judicial department or any agency that performs duties with respect to delinquency or dependency and neglect matters, when the information is required to perform the school officials' legal duties and responsibilities. This includes information or records of threats made by the student, arrest or charging information, records relating to the adjudication or conviction of a child for a misdemeanor or felony, court records in juvenile delinquency proceedings, and probation officer, law enforcement, and parole records.

School districts are now required to provide the following information upon request from law enforcement authorities: truancy, disciplinary, and attendance records; reports of incidents on school grounds involving assault or harassment of a teacher or school employee; and notification of failure of a student to attend school, if school attendance is a condition of that student's sentence or release. However, the disclosure of student information must comply with the provisions of the federal Family Educational Rights and Privacy Act ("FERPA"). School officials may also disclose personally identifiable student information with the consent of the student's parents if the information falls under the category of "directory information," if the records are of the school's own "law enforcement unit," or in an emergency if knowledge of the information is necessary to protect the health or safety of the student or of other individuals.

QUESTIONS PRESENTED AND CONCLUSIONS

ISSUE 1: Under Colorado law, what information must law enforcement officials provide to school authorities concerning students enrolled in schools?

ANSWER 1: Law enforcement must provide schools the following information: (1) basic identification information whenever a student is charged with committing a crime of violence or unlawful sexual offense; (2) arrest and criminal records information whenever a delinquency petition is filed in juvenile court; (3) notice whenever a student is convicted or adjudicated for an offense involving a crime of violence, illegal use of controlled substances, or unlawful sexual behavior; (4) notice whenever a student is convicted or adjudicated for a crime that would result in mandatory expulsion proceedings under Colorado law (i.e., while on school grounds, possessing a dangerous weapon, sale of drugs, robbery, or first or second degree assault); and (5) notice whenever a court makes school attendance a condition of release, probation, or sentencing.

ISSUE 2: Under Colorado law, what other information may law enforcement authorities share with school authorities concerning students enrolled in schools?

ANSWER 2: Upon request of school personnel, law enforcement authorities may share with school authorities’ records or information on students maintained by the judicial department or any agency that performs duties with respect to delinquency or dependency and neglect matters, when the information is required to perform the school officials' legal duties and responsibilities. The information shared may include information or records of threats made by the student, arrest or charging information, records relating to the adjudication or conviction of a child for a misdemeanor or felony, court records in juvenile delinquency proceedings, and probation officer, law enforcement, and parole records.

ISSUE 3: What information concerning students must school officials provide to law enforcement agencies under Colorado and federal law?

ANSWER 3: Upon request from law enforcement personnel, school officials must provide the following information to law enforcement agencies: truancy, disciplinary and attendance records; reports of incidents on school grounds involving assault or harassment of a teacher or school employee; and notification of failure of a student to attend school, if school attendance is a condition of that student's sentence or release. These disclosures of student information must comply with FERPA.

ISSUE 4: What student information are school authorities permitted, but not required, to provide law enforcement authorities under Colorado and federal law?

ANSWER 4: Permissible disclosure of information to law enforcement is governed by FERPA. Generally, personally identifiable student information may be disclosed with the consent of the student's parents, if he or she is over 18, with the consent of the student. Personally identifiable student information may also be disclosed if it falls under the category of "directory information" (i.e., the student's name, address, telephone number, etc., if such information has been designated as directory information by the school in accordance with law); if the records are of the school's own "law enforcement unit"; or in an emergency if knowledge of the information is necessary to protect the health or safety of the student or of other individuals.

BACKGROUND

The Colorado legislature enacted laws in the 2000 term of the General Assembly governing the sharing of information between law enforcement agencies and schools.

Senate Bill 133 requires school boards to establish written policies for reporting criminal activity occurring on school property to the District Attorney or a law enforcement agency, and provides for the greater exchange of information between school districts and law enforcement. Greater exchange of information between schools and law enforcement agencies is also authorized by House Bill 1119. These new enactments also require boards of education to cooperate with law enforcement, and to the extent possible, to develop and implement written agreements with law enforcement officials, the juvenile justice system, and social services, as allowed under state and federal law, to keep each school environment safe. Section 22-32-109.1(3), C.R.S. (2000).

ANALYSIS

Issue 1: Under Colorado law, what information must law enforcement officials provide to school authorities concerning students enrolled in schools?

A. Crimes of Violence and Sex Offenses

Whenever a student between the ages of 12 and 18 is charged with committing an offense constituting a crime of violence or unlawful sexual behavior, basic identification information concerning the student and details of the alleged offense must be forwarded by the juvenile justice agency (defined as the investigating police agency, prosecuting attorney's office, or court) to the school district in which the student is enrolled. Sections 22-33-105(5)(a), and 19-1-304(5), C.R.S. (2000). For purposes of this reporting requirement, a "crime of violence" means any of the following crimes if the student, during the commission of the crime, used, or possessed and threatened the use of, a deadly weapon, or caused serious bodily injury or death to any person: (1) any crime against an at-risk adult or at-risk juvenile; (2) murder; (3) first or second degree assault; (4) kidnapping; (5) sexual assault; (6) aggravated robbery; (7) first degree arson; (8) first degree burglary; (9) escape; or (10) criminal extortion. 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. Section 16-11-309(2), C.R.S. (2000) (2006 School Violence Prevention Guide Editor’s Note: this statute has been changed to 18-1.3-406(2)(a)(I), C.R.S. (2005)).

For purposes of this reporting requirement, "unlawful sexual behavior" means any of the following crimes: (1) sexual assault in the first, second or third degree; (2) sexual assault on a child; (3) sexual assault on a child by one in a position of trust; (4) enticement of a child; (5) incest; (6) aggravated incest; (7) trafficking in children; (8) sexual exploitation of children; (9) procurement of a child for sexual exploitation; (10) indecent exposure; (11) soliciting for child prostitution; (12) pandering of a child; (13) procurement of a child; (14) keeping a place of child prostitution; (15) pimping of a child; (16) inducement of child prostitution; or (17) patronizing a prostituted child. Section 18-3-412.5(1)(b), C.R.S. (2000).

Upon receipt of the information outlined above, the district's board of education or its designee is required to make a determination regarding whether the student's behavior is detrimental to the safety, welfare, and morals of the other students or of school personnel, and whether educating the student in the school may disrupt the learning environment, provide a negative example for other students, or create a dangerous and unsafe environment for students, teachers, and other school personnel. If the board of education determines that the student should not be educated in the school, it may then proceed with its suspension or expulsion procedures.

Alternatively, the board of education may decide to wait until the conclusion of the delinquency or criminal proceedings to consider the expulsion matter and to provide the student with an appropriate alternative education program of the board's choosing, such as an on-line program or home-based education program, while the juvenile proceedings are pending. However, no student being educated in an alternative education program shall be allowed to return to the education program in the public school until there has been a disposition of the charge. Should the student plead or be found guilty, or be otherwise adjudicated a delinquent juvenile or convicted, the school district may proceed to expel the student. Sections 22-33-105(5)(a) and (b), C.R.S. (2000). Other than using the information obtained through section 22-33-105(5), C.R.S. (2000) in accord with its stated purpose, this information must remain confidential unless otherwise made available to the public by operation of law. Sections 22-33-105(5)(a) and 19-1-304(5), C.R.S. (2000).

B. Filing of Charges and Convictions

The law now requires school personnel to be notified whenever certain types of criminal actions are initiated against the school's students. Specifically, when a delinquency petition (i.e., a petition alleging that the juvenile has committed a violation of a statute, ordinance, or order listed in section 19-2-104(1)(a), C.R.S. (2000)) is filed in juvenile court, the prosecuting attorney must now notify the principal of the school in which the juvenile is enrolled on or before the next school day. The prosecuting attorney must also provide the principal with arrest and criminal records information concerning the student. Section 19-1-304(5.5), C.R.S. (2000). Also, whenever a student under the age of 18 is convicted or adjudicated for an offense constituting a crime of violence or involving controlled substances, the court must now notify the school district in which the student is enrolled of the conviction or adjudication. Section 22-33-106.5(2), C.R.S. (2000). (The term "adjudication" in this context means a determination by a court that a juvenile has committed a delinquent act, or has pled guilty to a delinquent act. Section 19-1-103(2), C.R.S. (2000)). The same reporting requirement applies when a student between the ages of 12 and 18 is convicted or adjudicated of an offense constituting unlawful sexual behavior. Section 22-33-106.5(2), C.R.S. (2000). Finally, when a student under the age of 18 is convicted or adjudicated of one of the following crimes, the court must now notify the school district in which the student is enrolled that the student is subject to mandatory expulsion: carrying, bringing, using or possessing a dangerous weapon on school grounds without authorization of the school or school district; sale of drugs or controlled substances; robbery; or first or second degree assault. Sections 22-33-106.5(1) and 22-33-106(1)(d), C.R.S. (2000).

Thus, the prosecuting attorney must notify the principal or school district each time a delinquency petition is filed against a student in juvenile court, and each time a student is charged in any court with a crime of violence or unlawful sexual behavior. Furthermore, each time a student is convicted or adjudicated in any court for an offense involving a crime of violence, controlled substances, unlawful sexual behavior, or an offense subjecting the student to mandatory expulsion, the court must notify the school district of that conviction or adjudication. It should be noted, however, that not all charges or convictions in adult district or county court are subject to these mandatory reporting requirements. The law distinguishes between criminal charges, and allegations that a juvenile has committed a delinquent act. While certain conduct might give rise to criminal charges for a perpetrator 18 years of age or older, if the perpetrator is under 18, the conduct is generally classified as a delinquent act, and usually results in the filing of a delinquency petition in juvenile court, as opposed to criminal charges in an adult court.

Under certain circumstances, a juvenile may be charged as an adult in district court. If this happens, it is referred to as a "direct file." Section 19-2-517, C.R.S. (2000). In such a case, the charging document is not classified as a delinquency petition, and it is filed in adult district court rather than juvenile court. Finally, certain conduct perpetrated by a person under 18 may be processed either in juvenile court, or in county court. If charges against a student under 18 are directly filed in adult district court, or in county court, the mandatory reporting of those charges to school personnel is limited to crimes of violence and unlawful sexual behavior. If the conviction of a student under 18 occurs in adult district court or county court, the mandatory reporting of the conviction to school personnel is limited to crimes of violence, unlawful sexual behavior, and those crimes occurring on school property which subject the student to mandatory expulsion. However, records and information related to charges or convictions in adult district or county court, which are not subject to mandatory reporting, may be obtained by school personnel upon request, as outlined below.

C. Notification of Mandatory School Attendance

Courts frequently require school attendance as a condition of release, probation, or sentencing of a juvenile. Colorado law requires the court to notify the school district in which the juvenile is enrolled of such a condition in the following cases: (1) whenever a court allows a juvenile to be released pending resolution of a delinquency matter, and, as a condition of this release, requires the juvenile to attend school, Section 19-2-508(3)(a)(VI), C.R.S. (2000); (2) whenever a court, as a condition of or in connection with any sentence imposed in a delinquency matter, requires a juvenile to attend school, Section 19-2-907(4), C.R.S. (2000); (3) whenever a court, as a specific condition of probation in a delinquency matter, requires a juvenile to attend school; Section 19-2-925(5), C.R.S. (2000); (4) whenever a criminal defendant who is under eighteen years of age at the time of sentencing (i.e., where a juvenile is processed and sentenced as an adult) is required to attend school as a condition of probation, Section 16-11-204(2.3)(b), C.R.S. (2000) (2006 School Violence Prevention Guide Editor's Note: this statute Section16-11-204(2.3)(b), C.R.S. (2000), has been repealed); (5) whenever a juvenile is required, as condition of juvenile parole, to attend school, Section 19-2-1002(3)(b)(II) C.R.S., (2000); and (6) whenever a municipal court requires a person under eighteen years of age to attend school as a condition of or in connection with any sentence. Section 13-10-113(8), C.R.S. (2000).

Issue 2: Under Colorado law, what other information may law enforcement authorities share with school authorities concerning students enrolled in schools?

A. Inspection of Criminal Justice Agency Records

School personnel may now obtain records or information on students from the judicial department or any agency that performs duties with respect to delinquency or dependency and neglect matters, when the information is required by the school to perform its legal duties and responsibilities. Section 19-1-303(2)(a), C.R.S. (2000).

Certain records or information concerning a particular child, and which are maintained by any criminal justice agency or child assessment center, may be obtained by the principal or the principal's designee of the school which the child attends or will attend. If the school is public, the information may also be obtained by the superintendent or superintendent's designee. Section 19-1-303(2)(b), C.R.S. (2000). School officials receiving information pursuant to this section may use it only in the performance of their legal duties, and must otherwise maintain the confidentiality of the information. Section 19-1-303(2)(d), C.R.S. (2000). The following records or information are open to inspection under this statute:

1. Any information or records, except mental health or medical records, relating to incidents that, in the discretion of the agency or center, rise the level of a public safety concern, including but not limited to, any information or records of threats made by the child, any arrest or charging information, any information regarding municipal ordinance violations, and any arrest or charging information relating to acts that, if committed by an adult, would constitute misdemeanors or felonies. Section 19-1-303(2)(b)(I), C.R.S. (2000).

2. Any records of incidents, except mental health or medical records, concerning the child that, in the discretion of the agency or center, do not rise to the level of a public safety concern, but that relate to the adjudication or conviction of a child for a municipal ordinance violation or that relate to the charging, adjudication, deferred prosecution, deferred judgment, or diversion of a child for an act that, if committed by an adult, would have constituted a misdemeanor or felony. Section 19-1-303(2)(b)(II), C.R.S. (2000).

School and school district personnel who share information pursuant to section 19-1-303, C.R.S. (2000) are immune from civil and criminal liability for their conduct if they acted in good-faith compliance with the provisions of section 19-1-303, C.R.S. (2000). Section 19-1-303(4.3), C.R.S. (2000). A knowing violation of the confidentiality provisions of section 19-1-303, C.R.S. (2000) subjects the violating party to a civil penalty not to exceed one thousand dollars. Section 19-1-303(4.7), C.R.S. (2000).

B. Inspection of Juvenile Delinquency Records

Juvenile delinquency records maintained by the various agencies responsible for delinquency proceedings are also now open to inspection by the principal or superintendent of the school in which the juvenile is or will be enrolled, or to their designees, as outlined below:

1. Court records in juvenile delinquency proceedings or proceedings concerning a juvenile charged with the violation of any municipal ordinance except traffic ordinances. Section 19-1-304(1)(a)(XVI), C.R.S. (2000).

2. Juvenile probation records, whether or not part of the court file. Section 19-1-304(1)(c)(X) or (XI), C.R.S. (2000).

3. Law enforcement records concerning juveniles. Section 19-1-304(2)(a)(XV), C.R.S. (2000).

4. Parole records. Section 19-1-304(2.5), C.R.S. (2000).

Issue 3: Under Colorado and federal law, what information concerning students are school authorities now required to provide to law enforcement agencies?

A. Information to be Provided upon Request

The following student records are now available to criminal justice agencies upon request: (1) disciplinary and truancy information; (2) the student's attendance records; and (3) the student's disciplinary records. Section 19-1-303(2)(c), C.R.S. (2000). In order to obtain these records, the criminal justice agency must meet the following requirements: it must be investigating a criminal matter concerning the child; the information must be necessary to effectively serve the child prior to trial; and the request must be accompanied by written certification that the criminal justice agency will not unlawfully disclose the information without proper consent. The criminal justice agency should request these records from the principal of the school in which the child is or will be enrolled, or from the superintendent, if the school is public. Section 19-1-303(2)(c), C.R.S. (2000). Upon receiving the request, the principal or superintendent must provide the criminal justice agency with such records. Sections 19-1-303(2)(c) and 22-32-109.3(3), C.R.S. (2000).

B. Mandatory Reporting of Assault or Harassment of Teachers or School Employees

In addition to the above, the school administration is now required to report the following to the District Attorney or the appropriate local law enforcement agency or officer: any incident involving assault upon, disorderly conduct toward, harassment of, the making of a knowingly false allegation of child abuse against, or any alleged offense under Colorado's criminal code directed toward a teacher or school employee, or any incident involving damage occurring on the premises to the personal property of a teacher or school employee by a student. Section 22-32-109.1(3)(c), C.R.S. (2000). As a practical matter, while the new law refers to mandatory reporting to the District Attorney or to the local law enforcement agency, it is the local law enforcement agencies that do the preliminary investigation of crimes as opposed to the District Attorney. Therefore, to satisfy this reporting requirement, schools should report to the local law enforcement agency.

C. Mandatory Reporting of Student Non-Attendance

Finally, if a student is required to attend school as a condition of release pending an adjudicatory trial, or as a condition of or in connection with any sentence imposed by a court, including probation or parole, and the student fails to attend all or any part of a school day, the school district must now notify the appropriate court or parole board of the failure to attend. Section 22-33-107.5, C.R.S. (2000).

D. Federal Law Governing Disclosure of Student Information

In complying with the above-referenced statutes, school officials must still comply with the provisions of FERPA. Under FERPA, educational institutions may not disclose information about students nor permit inspection of their records without written permission of the student, unless such action is covered by certain exceptions permitted by the Act. 20 U.S.C. § 1232g(a)(6)(b). The restrictions on disclosure in FERPA apply to all educational institutions which either receive funds directly from the federal Department of Education or which have students in attendance who receive funds through programs administered by the federal Department of Education. 34 C.F.R. § 99.1. Thus, every public school in Colorado is required by federal law to comply with the disclosure requirements of FERPA. Violations of FERPA by a public school may result in termination of federal funding. 20 U.S.C. § 1232g(f).

The restrictions in FERPA apply to personally identifiable information contained in educational records maintained by the school. An "educational record" is any record maintained by the school that contains information related to a student. 34 C.F.R. § 99.3(a). However, the term does not include records of the law enforcement unit of the school, or records that only contain information about an individual after he or she is no longer a student at the school. 34 C.F.R. § 99.3. The term "personally identifiable information" includes, but is not limited to, the student's name, the name of the student's parents or other family members, the student's address, any personal identifiers, including the student's social security number, any list of personal characteristics that would make the student's identity easily traceable, or any other information that would make the student's identity easily traceable. 34 C.F.R. § 99.3.

As discussed above, Colorado law allows for the disclosure of disciplinary and truancy information, attendance records, incidences of student criminal misbehavior directed against the person or property of teachers, and student failure to attend school when court ordered to do so. Much of this information would either constitute educational records or contain personally identifiable student information under FERPA. Fortunately, Colorado's disclosure provisions have been drafted with the exceptions to FERPA's confidentiality provisions in mind; thus, disclosures of student information meeting the requirements of Colorado law should meet the requirements of FERPA, as well. It should be noted, however, that Colorado law does not allow for the disclosure of all personally identifiable student information; except as outlined in our discussion of Issue 4 below, only those categories of information identified above are accessible to law enforcement officials.

FERPA allows disclosure of personally identifiable information in student records to law enforcement in the following circumstances. First, and most relevant to Colorado's new mandatory disclosure laws, FERPA allows the disclosure of such information pursuant to any state statute adopted after 1974 if the reporting or disclosure: 1) concerns the juvenile justice system; and 2) is for the purpose of allowing the system to effectively serve, prior to adjudication, the student whose records are to be released. 34 C.F.R. § § 99.31(5)(i)(B), 99.38(a). These requirements are tracked in the language of section 19-1-303(2)(c), C.R.S. (2000). Thus, a request from a law enforcement agency complying with State law will comply with the restrictions of FERPA as well. Additionally, a disclosure by a school of a student's failure to attend school, when such attendance was a condition ordered by a court or parole board, would also fit within this exception to the FERPA restrictions.

Under FERPA, in order to obtain such records, the law enforcement officials to whom the records are to be disclosed must certify in writing to the school that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student. 34 C.F.R. § 99.38(b). This requirement is also contained in state law. Furthermore, the school must maintain a record of each disclosure of personally identifiable information under this provision, including the person receiving such information, and the legitimate interests the person had in requesting the information. 34 C.F.R. § 99.32(a)(3).

The officers, employees, and agents of the law enforcement agency receiving the information from the school may only use the information for the purposes for which the disclosure was made. 34 C.F.R. § 99.33(a)(2). The law enforcement agency may not disclose the information to a third party unless: 1) it obtains prior consent from the parent of the student; or 2) the further disclosure meets the requirements of 34 C.F.R. § 99.31 above, and the school has made a record of the further disclosure pursuant to the provisions of 34 C.F.R. § 99.32(b).

In addition to the above, the school may always disclose student records to a law enforcement agency pursuant to a judicial order or lawfully issued subpoena. 34 C.F.R. § (a)(9)(i). However, if served with such a subpoena, the school must make a reasonable effort to notify the parent or student (if over 18) in advance of compliance with the subpoena, so that the parent or student may seek protective action, unless the court or other issuing agency has ordered that the existence or contents of the subpoena or the information furnished in response to the subpoena not be disclosed. 34 C.F.R. § 99.31(a)(9)(ii).

Issue 4: Under Colorado and federal law, what other information are school authorities permitted, but not required, provide to law enforcement authorities concerning their students?

Regarding permissible reporting of other information by schools to law enforcement, state law requires local boards of education to comply with the applicable provisions of FERPA and the federal regulations promulgated thereunder. § 24-72-204(3)(d)(III), C.R.S. (2000).

A. Student Consent

Under FERPA, personally identifiable student information may, of course, be disclosed by the school with the written consent of the parent of the student, or with the consent of the student if the student is over 18 years of age. 34 C.F.R. § 99.30 and 34 C.F.R. § 99.3. The written consent must specify the records to be disclosed, the purpose of the disclosure, and the party to whom the disclosure will be made. Id.

B. Directory Information

The school may also, under certain circumstances, disclose directory information. "Directory information" includes information contained in the education records of the student which would not generally be considered harmful or an invasion of privacy if disclosed. This includes the student's name, address, telephone number, date and place of birth, participation in extra-curricular activities or sports, weight and height for members of athletic teams, dates of attendance, and degrees received, and the most recent previous school attended. 34 C.F.R. § 99.3. In order to disclose directory information, the school must have given public notice to parents of students and (if over 18) the students in attendance of the types of personally identifiable information the school has designated as directory information, and the parent's or (if over 18) the student's right to refuse to let the agency designate any or all of those types of information as directory information. A school may disclose directory information about former students without meeting these conditions concerning notice and right to refuse. 34 C.F.R. § 99.37.

C. School Law Enforcement Unit Records

Another applicable exemption from FERPA relates to school district disclosure of the records of its own law enforcement unit. FERPA does not prohibit the disclosure of the records of a school's law enforcement unit. The term "law enforcement unit" in this context relates to an individual, office, or department of the school, such as a unit of commissioned police officers or non-commissioned security guards, who are assigned to the school to enforce the law or provide security services. 34 C.F.R. § 99.8. Law enforcement unit records include those records created and maintained by the law enforcement unit for a law enforcement purpose. However, law enforcement unit records do not include records created by the law enforcement unit that are maintained by a component of the school other than the law enforcement unit, or records created and maintained by the law enforcement unit that are exclusively for a non-law enforcement purpose. 34 C.F.R. § 99.8(b). Finally, educational records do not lose their protection under FERPA solely by being in the possession of a school law enforcement unit. 34 C.F.R. § 99.8(b)(2).

D. Emergencies

Finally, under FERPA a school may disclose personally identifiable information to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or of other individuals. 34 C.F.R. § 99.36.

CONCLUSION

Recent statutory changes have greatly expanded the ability of school districts and law enforcement agencies to cooperate in the transmission and sharing of information. Juvenile justice agencies are now required to provide schools with basic identification information whenever a student is charged in any court with committing a crime of violence or unlawful sexual offense; arrest and criminal records information whenever a delinquency petition is filed in juvenile court; notice whenever a student is convicted or adjudicated for an offense constituting a crime of violence, involving controlled substances, or unlawful sexual behavior; notice whenever a student is convicted or adjudicated for a crime that would result in mandatory expulsion proceedings under Colorado law; and notice whenever a court makes school attendance a condition of release, probation, or sentencing. Moreover, law enforcement agencies may now, upon request, provide certain school officials access to records or information on students which are maintained by the judicial department or any agency that performs duties with respect to delinquency or dependency and neglect matters, when the information is required to perform the school officials' legal duties and responsibilities. This includes information or records of threats made by the student, arrest or charging information, records relating to the adjudication or conviction of a child for a misdemeanor or felony, court records in juvenile delinquency proceedings, and probation officer, law enforcement, and parole records.

School districts are now required to provide the following information upon request from law enforcement authorities: truancy, disciplinary, and attendance records upon proper request; reports of incidents on school grounds involving assault or harassment of a teacher or school employee; and notification of failure of a student to attend school, if school attendance is a condition of that student's sentence or release. However, the disclosure of student information must comply with the provisions of FERPA. School officials may also disclose personally identifiable student information with the consent of the student's parents, if the information falls under the category of "directory information," if the records are of the school's own "law enforcement unit," or in an emergency if knowledge of the information is necessary to protect the health or safety of the student or of other individuals.

Issued this 3rd day of August, 2000.

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FORMAL OPINION No. 03-06

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FORMAL	)	
OPINION	)	No. 03-06
	)	AG Alpha No. PS PA AGBAZ
Of	)	HIPAA Rules for Disclosures to
	)	Law Enforcement
KEN SALAZAR	)	September 30, 2003
Attorney General	)	

This opinion describes the types of health information that may be disclosed to law enforcement officials under the federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. Sections 1320d – 1320d-8 (2003) ("HIPAA"). It is issued at the request of Lieutenant Colonel Gary L. Coe, of the Colorado State Patrol.

Question Presented and Answer

Question: When may a health care provider disclose protected health information to law enforcement officials under HIPAA?

Answer: HIPAA permits health care providers to disclose protected health information to law enforcement officials under several complicated disclosure rules. Highlights of these rules include:

- Providers are required under Colorado law to report certain bullet and other wounds and injuries to law enforcement, and HIPAA expressly permits these types of mandatory disclosures to law enforcement.

- Disclosures of limited identifying information are permitted in response to an official inquiry from law enforcement to identify or locate a suspect or fugitive.

- Health care providers may voluntarily alert law enforcement of a suspicious death or a crime on their premises.

- Emergency medical personnel may advise law enforcement officials of information concerning the nature and commission of a crime and the location of the crime, victims or perpetrators.

- HIPAA permits disclosures to law enforcement to avert a serious threat to public health or safety and to report child abuse or neglect, domestic violence, and adult abuse or neglect.

- HIPAA's varied and complex disclosure rules may also permit other public health and public interest disclosure in particular circumstances, depending upon the purpose of the disclosure.

Discussion

HIPAA is a comprehensive federal statute that is designed, in part, to provide national standards for the protection of certain health information.[1] These statutory privacy provisions have been interpreted in a highly complex regulation issued by the federal Department of Health and Human Services and known as the HIPAA Privacy Rule.[2] The HIPAA Privacy Rule plays a central role in the discussion that follows.

Colorado's law enforcement personnel sometimes require medical information that is covered by HIPAA protections in order to carry out their public safety functions. These law enforcement needs raise difficult questions of federal law concerning the types of medical information that health care providers can disclose to law enforcement officials. This opinion addresses those questions.

This opinion is accompanied by a comprehensive attachment that sets forth a chart explaining the legal rules concerning HIPAA and law enforcement. This chart is included to provide easier access for law enforcement officials to the complex rules discussed below.

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[1] 65 Fed. Reg. 82,464 (Dec. 28, 2000).
[2] 45 C.F.R. Parts 160 and 164 ("HIPAA Privacy Rule"). Available at www.hhs.gov/ocr/hipaa.

Finally, this opinion is limited in important respects. It addresses HIPAA's rules in the abstract, but a conclusion as to whether a specific disclosure is permitted under the HIPAA Privacy Rule in a specific circumstance typically depends upon who is making the disclosure, the facts and circumstances of the disclosure, and the purpose of the disclosure. Also, this opinion does not address other federal laws that may impose restrictions upon the release of confidential medical information in particular circumstances. For these reasons, and assuming time is available, law enforcement officials are encouraged to seek legal guidance when specific circumstances arise.

Application of HIPAA. HIPAA's health information disclosure rules apply to "covered entities." This term is defined to include a health plan, a health care clearinghouse, and a health care provider who transmits protected health information in electronic form in connection with a covered transaction.[3] (Covered entities are referred to below collectively as "health care providers.") Most emergency medical and other health care personnel are covered and are required to comply with the HIPAA Privacy Rule.

As a general rule, the HIPAA Privacy Rule forbids a health care provider from using or disclosing a patient's protected health information without written authorization from the patient, except for treatment, payment, and health care operations. 45 C.F.R.§ 164.506(a). The rule restricts only the disclosure of "protected health information," which is defined as individually identifiable health information that is transmitted or received by a covered entity, excluding certain educational and employment records. 45 C.F.R. § 164.501. This opinion discusses the exceptions to the general rule that permit public interest disclosures to law enforcement officials.

The HIPAA Privacy Rule allows the disclosure of protected health information by health care providers – absent a patient's authorization – for a variety of public interest reasons. 45 C.F.R. § 164.512. When a disclosure is permitted by the rule, a health care provider must also determine whether a law makes that disclosure mandatory. Non-mandatory public interest disclosure provisions are permissive, and the disclosing health care provider then generally has discretion to choose not to disclose even though it legally could do so.[4]

[3] 45 C.F.R. § 160.102(a) (2003).
[4] The only disclosures *required* by the HIPAA Privacy Rule are disclosures at the request of the individual or by the federal Department of Health and Human Services. 45 C.F.R. § 164.502(a)(2) (2003), and neither is likely to be important to law enforcement officials.

The HIPAA Privacy Rule is not concerned solely with the need for law enforcement officials' access to protected health information.[5] Rather, it balances the competing interests of law enforcement and individual privacy. The preamble to the HIPAA Privacy Rule explains:

> The importance and legitimacy of law enforcement activities are beyond question, and they are not at issue in this regulation. We permit disclosure of protected health information to law enforcement officials without authorization in some situations precisely because of the importance of these activities to public safety. At the same time, individuals' privacy interests also are important and legitimate. As with all other disclosures of protected health information permitted under this regulation, the rules we impose attempt to balance competing and legitimate interests. 65 Fed. Reg. 82,678 (Dec. 28, 2000).

The requirement of an official request by law enforcement. An official request from law enforcement is needed by a health care provider in order to prompt certain disclosures. 45 C.F.R. § 164.512(f)(2) and (3). These include disclosures of protected health information needed to identify or locate a suspect, fugitive, material witness or missing person and disclosures concerning the victim of a crime. *Id.* Other disclosures to law enforcement can be made by a health care provider without an official request. 45 C.F.R. § 164.512(f)(1), (4), (5) and (6). These include disclosures required by law; to report a suspicious death; to report crime on the premises; during a medical emergency about a crime, victim or suspect. *Id.*

Accounting to the individual involved for disclosures to law enforcement officials. The HIPAA Privacy Rule requires that health care providers give an accounting of certain disclosures to the individual involved upon that individual's request. 45 C.F.R. § 164.528. Disclosures to law enforcement under section 512 of the HIPAA Privacy Rule are one of the types of disclosures that require such an accounting.

[5] The HIPAA Privacy Rule broadly defines a law enforcement official to include an officer or employee of the United States, a State, territory, political subdivision or Indian tribe who is empowered by law to investigate an official inquiry into a potential violation of law, or prosecute or conduct a criminal, civil or administrative proceeding of an alleged violation of law. 45 C.F.R. § 164.501 (2003).

It is the responsibility of the health care provider to account for disclosures to law enforcement officials. A summary accounting can be provided for multiple disclosures to the same entity under section 512 of the HIPAA Privacy Rule. 45 C.F.R. § 164.528(b)(3).

The significant accounting burden associated with disclosures by health care providers to law enforcement officials undoubtedly contributes to a reluctance to make disclosures under the HIPAA Privacy Rule.

Bullet wounds and injuries. Health care providers may disclose protected health information on their own when that disclosure is required by law. 45 C.F.R. § 164.512(a) and 45 C.F.R. § 164.512(f)(1)(i). This exception includes laws that require the reporting of certain types of wounds or other physical injuries. *Id.* The use of the information and the disclosure must comply with and be limited to the requirements of the particular law involved. *Id.*

In Colorado, licensed physicians are required by state law to notify law enforcement of certain bullet wounds and other injuries:

It shall be the duty of every licensee [physician] who attends or treats a bullet wound, a gunshot wound, a powder burn, or any other injury arising from the discharge of a firearm, or an injury caused by a knife, an ice pick, or any other sharp or pointed instrument that the licensee believes to have been intentionally inflicted upon a person, or any other injury that the licensee has reason to believe involves a criminal act, including injuries resulting from domestic violence, to report such injury at once to the police of the city, town, or city and county or the sheriff of the county in which the licensee is located . . . Section 12-36-135(1), C.R.S. (2002). This statutory duty to report injuries overcomes the physician-patient privilege which would ordinarily protect information the physician observes during an examination. *See* Section 12-36-135(3), C.R.S. (2002); *People v. Covington*, 19 P.3d 15 (Colo. 2001).

In Colorado, therefore, licensed health care providers must disclose information to law enforcement officials concerning gunshot and other wounds and injuries they believe involves a criminal act. Nothing in HIPAA prohibits this disclosure, and the HIPAA Privacy Rule permits disclosures required by state law. 45 C.F.R. § 164.512(f)(1)(i). Colorado law requires the reporting of these injuries to law enforcement "at once" and without further procedural requirements.

A health care provider need not limit its disclosures required by law to a minimum necessary amount of information, which is a limit that applies in other circumstances under HIPAA.[6] Nevertheless, the disclosure is limited to the amount of information mandated by State law. Under Colorado's mandatory reporting law, disclosures required by law are limited to a physician's observations of the injury.[7]

In general, disclosures required by law are subject to the verification procedures of the HIPAA Privacy Rule. This requires a health care provider to verify the identity and authority of a law enforcement official prior to making a disclosure.

Court orders and other legal process. Other disclosures required by state law and expressly allowed by HIPAA include responses to court orders and warrants; subpoenas or summons issued by a judicial officer; grand jury subpoenas; administrative and civil subpoenas; and civil or investigative demands authorized by law if the information is relevant, specific, limited and material to a legitimate law enforcement inquiry and de-identified information cannot be used under the provisions of 45 C.F.R. § 164.512(f)(1)(ii). These disclosures are subject to ordinary legal process and are limited to the requirements of the court order or subpoena.[8]

Disclosures to identify or locate a suspect, fugitive, material witness or missing person. The HIPAA Privacy Rule permits disclosure of limited information in response to a law enforcement request for information that is to be used to identify or locate a suspect, fugitive, material witness or missing person. 45 C.F.R. § 164.512(f)(2). Requests made on behalf of law enforcement are permitted and include providing the media with information in order to request the public's assistance in identifying a suspect, or information to include on a "wanted" poster.[9]

Only limited information may be released by a health care provider to law enforcement under this rule: name; address; date and place of birth; social security number; ABO blood type and rh factor; type of injury; date and time of treatment; date and time of death; and description of distinguishing

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[6] 45 C.F.R. § 164.502(b)(2)(v) (2003).
[7] Section 12-36-135(3), C.R.S.
[8] The HIPAA Privacy Rule has other requirements for responding to a subpoena or court order issued by parties in the course of a judicial proceeding. 45 C.F.R. § 164.512(e).
[9] 65 Fed. Reg. 82,532 (Dec. 28, 2000).

physical characteristics including height, weight, gender, race, hair and eye color, presence or absence of facial hair, scars and tattoos. 45 C.F.R. § 164.512(f)(2)(i). No DNA information may be disclosed. Disclosure of other information is a violation of HIPAA, unless it is allowed under some other provision of the HIPAA Privacy Rule.

This section of the HIPAA Privacy Rule does not allow a health care provider to reveal the hospital location of a victim or perpetrator of a crime, since this is not included in the list of information that may be disclosed. Nevertheless, other sections of the HIPAA Privacy Rule do allow a health care provider to disclose the location of a victim or perpetrator when law enforcement is investigating a crime. 45 C.F.R. § 164.512(f)(6).

Victims of a crime. Following an official inquiry from law enforcement, the HIPAA Privacy Rule permits disclosure of protected health information to law enforcement about the victim of a crime – if the victim consents to the disclosure. 45 C.F.R. § 164.512(f)(3).[10] If a victim's consent cannot be obtained due to incapacity or emergency, health care providers may disclose information only upon a specific representation by law enforcement that the information is needed to determine if a crime has occurred, is not intended to be used against the victim, and that immediate law enforcement activity depends upon the disclosure and would be materially and adversely affected by waiting for the victim's consent. 45 C.F.R. § 164.512(f)(3)(ii). Also, the disclosure must be in the best interest of the victim, as decided in the health provider's professional judgment. *Id.*

Colorado's mandatory reporting law broadly requires reporting of any "injury that the licensee has reason to believe involves a criminal act" and includes injuries resulting from sexual assault.[11] This law only permits disclosure of injuries the physician observes during an examination, and not statements made to a physician during the examination. To obtain information from victims other than an observed injury, the victim's consent is generally required. Consent for such disclosures may be made orally.[12]

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[10] The Office of Civil Rights in the federal Department of Health and Human Services says that the victim's authorization is required before protected health information can be released about a victim to law enforcement. *Standards for Privacy of Individually Identifiable Health Information*, Office of Civil Rights, U.S. Department of Health and Human Services, Page 116 (Dec. 3, 2002). Also available at http://www.hhs.gov/ocr, Frequently Asked Questions, Answer 349.
[11] Section 12-36-135(1), C.R.S. (2003).
[12] 45 C.F.R. § 164.512.

Deaths. The HIPAA Privacy Rule permits disclosure of information to law enforcement about decedents if the health care provider suspects that death may be the result of criminal conduct. 45 C.F.R. § 164.512(f)(4). Disclosures concerning suspicious deaths need not be made in response to an official law enforcement inquiry; health care providers may voluntarily disclose information about suspicious deaths to law enforcement if they have a good faith basis for believing the death may have resulted from criminal conduct. Colorado's mandatory reporting law also requires licensed health care providers to report injuries, including death, they believe resulted from a criminal act. Section 12-36-135(1), C.R.S. (2002).

Crime on the premises of a health care provider. The HIPAA Privacy Rule permits disclosure of information to law enforcement when a health care provider has a good faith belief the information is evidence of criminal conduct on the premises of the provider. 45 C.F.R. § 164.512(f)(5). This disclosure does not require an official request from law enforcement, and permits the covered health care provider voluntarily to disclose such information.

Reporting crime in emergencies. The HIPAA Privacy Rule permits disclosure of information to law enforcement concerning a crime in a medical emergency. 45 C.F.R. § 164.512(f)(6). The emergency must be off the premises of the health care provider and the disclosure must be to alert law enforcement to the commission and nature of a crime; location of a crime or victim; and identity, description and location of the perpetrator of the crime. Emergency personnel may reveal the location of a victim or suspect if this information is related to the investigation of a crime.

Comments to the final HIPAA Privacy Rule regulations indicate this disclosure provision was specifically added to permit such disclosures to law enforcement:

> This added provision [45 C.F.R. § 164.512(f)(6)] recognized the special role of emergency medical technicians and other providers who respond to medical emergencies. In emergencies, emergency medical personnel often arrive on the scene before or at the same time as police officers, firefighters, and other emergency personnel. In these cases, providers may be in the best position and sometimes the only ones in the position, to alert law enforcement about criminal activity. For instance, providers may be the first persons aware that an individual has been the victim of a battery or an attempted murder. They may also be in the position to report in real time, through use of radio or other mechanism,

> information that may immediately contribute to the apprehension of a perpetrator of a crime. 65 Fed. Reg. 82,533 (Dec. 28, 2000).

The HIPAA Privacy Rule does not prohibit disclosures to law enforcement related to the commission of a crime during an emergency and does not limit the type of information that can be disclosed if it is related to the commission of a crime. Health care providers can disclose the location of a victim or perpetrator of a crime when law enforcement is investigating a crime. An official request from law enforcement is not required if law enforcement is investigating a crime.

Child abuse. The HIPAA Privacy Rule permits disclosure of health information to appropriate governmental entities that are authorized by law to receive reports of child abuse. 45 C.F.R. § 164.512(b)(1)(ii). Colorado law requires that health care providers and other individuals report suspected child abuse to county social services or local law enforcement. Section 19-3-304, C.R.S. (2002). Thus, Colorado law requires, and the HIPAA Privacy Rule permits, covered entities to disclose reports of child abuse or neglect to appropriate governmental authorities.[13]

Abuse and neglect, including domestic violence. The HIPAA Privacy Rule contains special provisions to permit disclosures to report abuse, neglect or domestic violence other than child abuse. 45 C.F.R. § 164.512(c).

The disclosure must be to a government entity authorized by law to receive reports of abuse. If the disclosure is required by law, and limited to the relevant requirement of law the victim's consent is not required. Again, Colorado law mandates the reporting of certain wounds and injuries, including those resulting from acts of domestic violence, and disclosures mandated by state law are permitted by the HIPAA Privacy Rule under 45 C.F.R. § 164.512(c)(1)(i) and do not require the consent of the victim.[14]

Information other than the observed injury concerning abuse and domestic violence is not required to be reported to law enforcement under Colorado law. It is a permissible disclosure under the HIPAA Privacy Rule if the victim consents to the disclosure. The victim's consent may be oral. If the individual does not consent to the disclosure, the disclosure is allowed if it is expressly authorized by statute and the covered entity believes in the exercise of their professional judgment that the disclosure is necessary to

[13] 65 Fed. Reg. 82,527 (Dec. 28, 2000).
[14] Section 12-36-135(1), C.R.S. (2002).

prevent serious harm. If an individual is unable to consent because of incapacity, a government official must assure that the information is not intended to be used against the individual, and that immediate enforcement activity depends on the disclosure and would be materially and adversely affected by waiting for the individual's consent.

A covered entity must promptly inform the individual involved of such a disclosure unless (a) it would risk serious harm to the individual or (b) the covered entity reasonably believes a personal representative is responsible for the abuse and informing the representative would not be in the best interest of the individual.

Disclosures to avert a serious threat to health or safety. The HIPAA Privacy Rule permits health care providers to disclose information to law enforcement to avert a serious threat to health or safety. 45 C.F.R. § 164.512(j). The health care provider must have a good faith belief that the disclosure: (a) is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public and is to a person reasonably able to prevent or lessen the threat, or (b) is necessary for law enforcement to identify or apprehend an individual because of their admission to participation in a crime or because they appear to have escaped from a correctional institution or from lawful custody. The disclosure is limited to the admission and limited identifying information (section 164.512(f)(2)(i)), and may not include statements made to initiate treatment, counseling or therapy to affect the propensity to commit a crime.

This provision of the HIPAA Privacy Rule permits disclosures consistent with the duty to warn third persons at risk established in *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425 (1976).[15] Colorado courts impose a duty to warn upon physicians and therapists based upon a determination of several factors including the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against the harm, and the consequences of placing the burden of a duty on the defendant. *Ryder v. Mitchell*, 54 P.3d 885 (Colo. 2002).

Patient authorization. Disclosure of protected health information may be made under the HIPAA Privacy Rule if the health care provider has the express, HIPAA-compliant authorization of the individual whose protected

[15] 65 Fed. Reg. 82,538 (Dec. 28, 2000).

health information is being disclosed, except for the disclosure of certain psychotherapy notes. 45 C.F.R. § 164.502(a)(1)(iv). A HIPAA authorization must be specific, limited in time and meet several requirements set forth in 45 C.F.R. § 164.508.

An authorization form that complies with HIPAA, developed by and for law enforcement officials, is attached to this opinion as Attachment B.[16]

Enforcement of the HIPAA Privacy Rule. Violators of the HIPAA Privacy Rule are subject to government enforcement.[17] If disclosure is not permitted under the rule but information is released anyway, the disclosing health care provider is subject to civil penalties and potential criminal sanctions.

Civil penalties are $100 for each violation, up to a maximum of $25,000 per year for all violations of the HIPAA Privacy Rule. 42 U.S.C. § 1320d-5(a)(1). Criminal penalties include one to ten years of prison with penalties ranging from $50,000 to $250,000 for knowing violations committed under false pretenses or with the intent to use protected health information for malicious harm, personal gain, or commercial advantage. 42 U.S.C. 1320d-6.

As described in this opinion, HIPAA's disclosure rules are complex and sometimes difficult to apply. In circumstances in which a disclosure can invite civil or criminal penalties, unsure health care providers understandably may be reluctant to make the disclosure.

The agency that enforces the HIPAA Privacy Rule has described its approach to enforcement. It says:

> . . . [T]o the extent practicable, OCR will seek the cooperation of covered entities in obtaining compliance with the Privacy Rule, and may provide technical assistance to help covered entities voluntarily comply with the Rule. See 45 C.F.R. § 160.304. As further provided in 45 C.F.R. § 160.312(a)(2), OCR will seek to resolve matters by informal means before issuing findings of non-compliance, under its authority to investigate and resolve complaints, and to engage in

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[16] This authorization form was developed by the Office of the District Attorney for the First Judicial District.

[17] The Office of Civil Rights in the federal Department of Health and Human Services enforces the HIPAA Privacy Rule.

compliance review. 68 Fed. Reg. 18,897 (April 17, 2003) (preamble to interim enforcement regulations).

Finally, an individual whose privacy rights are violated by improper disclosure under the HIPAA Privacy Rule does not have an ability – under this statute – to recover damages for his or her injury. There is no private right of action under HIPAA. The legal recourse for an individual about whom a disclosure has been made is either to file a complaint with the Office of Civil Rights or to proceed under some other legal theory.

HIPAA preemption of state law. The HIPAA Privacy Rule preempts contrary state laws relating to the privacy of individually identifiable health information. 42 U.S.C. § 1320d-7. The HIPAA Privacy Rule does not preempt state laws that protect more strictly the disclosure of medical information. Also, HIPAA does not preempt state laws that provide for reports of disease, injury, child abuse, birth, or death. 45 C.F.R. § 160.203(c) (2003). The HIPAA Privacy Rule therefore does not preempt Colorado laws that require health care providers to notify law enforcement of bullet wounds and other injuries resulting from criminal conduct.

Historically, patient consent was obtained by law enforcement officials to avoid violating Colorado's theft-of-medical-record statute. The Colorado theft-of-medical-record statute, 18-4-412, C.R.S. (2002), was recently amended to exempt disclosures by health care providers and health plans that are covered entities under HIPAA.[18] Disclosures by a covered health care provider which are permitted under HIPAA are now permissible disclosures under Colorado law. Disclosures under Colorado's theft-of-medical-record statute are limited for entities that are not covered under HIPAA, unless the disclosure is with the written authorization of the patient or an appropriate court order. Section 18-4-412, C.R.S. (2002).

Conclusion

HIPAA is a complex set of federal statutory and regulatory rules that regulate the disclosure of medical information to law enforcement officials. This opinion describes several of the most important portions of these rules.

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[18] HB 03-1164, amending 18-4-412, C.R.S. (2002) effective July 1, 2003.

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