

# **Dangerous Students in the Schools: A Legal Perspective on Sharing Information or Not**

## **Texas Association of School Psychologists**

22<sup>nd</sup> Annual Professional  
Development Conference

*October 16-18, 2014*

---

**Denise Hays**

Attorney at Law

Walsh, Anderson, Gallegos, Green & Treviño, P.C.

# District Liability And Personal Liability In The Context Of Student Violence

- Can a school district be held liable for the death or injury of victims of school violence?
  - Maybe. 42 U.S.C., Section 1983 provides an avenue of recourse for citizens when a governmental entity deprives them of a federal statutory or constitutional right.
    - There are monetary damages available under this provision.

# District Liability And Personal Liability In The Context Of Student Violence

- Can an individual be held liable for the death or injury of victims of school violence?
  - Yes. Under Section 1983, individuals who are government officials, including employees, school board members, and administrators, may be sued. However, individuals may assert the defense of qualified immunity when confronted with claims under Section 1983.

# District Liability And Personal Liability In The Context Of Student Violence

- What is qualified immunity?
  - Legal doctrine that may shield a government official from personal liability when the official, exercising his discretionary authority, deprives another of a right secured by federal law.
  - It will protect school board members and district administrators from personal liability for actions performed in the course and scope of their official duties, pursuant to clearly established law, and in good faith.

# District Liability And Personal Liability In The Context Of Student Violence

- For victims of school violence, what constitutional right would be implicated?
  - The 14th Amendment of the United States Constitution:
    - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

# District Liability And Personal Liability In The Context Of Student Violence

In order for the school district to be held liable under Section 1983, a plaintiff must show:

- The existence of a **policy or custom** attributable to the district that was the “moving force” behind the deprivation of rights.
- That the policymaker of the district showed **deliberate indifference** to any violations of constitutional rights.
- The district’s **failure to train** its employees.
- The district’s **failure to protect** a student from the actions of third parties.

# District Liability And Personal Liability In The Context Of Student Violence

- So if the perpetrator was a student and it was the student who fatally wounded/injured the victims, how is it that the school or school personnel could be blamed for constitutional deprivation?
  - Courts have recognized when there is a special relationship or a state-created danger, there may be a violation of the due process clause, but generally, a school's failure to protect an individual against private violence does not constitute such a violation.

# District Liability And Personal Liability In The Context Of Student Violence

- The “special relationship” exception arises when, “The state by the affirmative exercise of its powers so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety.”



# District Liability And Personal Liability In The Context Of Student Violence

- In order for a plaintiff to establish a claim for state-created danger, he must show that there was:
  - An affirmative act by the state that either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party.
  - A special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large.
  - The state knew or should have known that its actions specifically endangered the plaintiff.

# District Liability And Personal Liability In The Context Of Student Violence

- Do school districts have a duty to warn of the known or reasonable foreseeable danger of a student with a propensity to commit school violence? It depends.
  - For a district to be liable under Section 1983, a plaintiff must establish that the district was deliberately indifferent to the rights of the victim.
  - In order for failure to warn to be constituted deliberately indifferent is likely contingent upon the extent of knowledge of the school and its failure to take any measures to protect students and staff from harm.

# District Liability And Personal Liability In The Context Of Student Violence

- Tell me more about the United States Secret Service and the United States Department of Education, May 2002 report, *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates (Threat Assessment Guide)*.
  - A guidance document that was developed to aid in the development of accurate and useful information about prior school attacks that could help prevent some future attacks from occurring.

# District Liability And Personal Liability In The Context Of Student Violence

- What are some key findings from the underlying study relevant to special education?
  - According to the study, most attackers:
    - Engaged in some behavior prior to the incident that caused concern or indicated a need for help.
    - Were known to have difficulty coping with significant losses or personal failures.
    - Many had considered or attempted suicide.
    - More than three-quarters of school shooters had a history of suicidal thoughts, threats, gestures, or attempts.
    - Were known to have been severely depressed or desperate before their attacks.

# District Liability And Personal Liability In The Context Of Student Violence

- Among the proactive measures set forth in the *Threat Assessment Guide*, what are some elements essential to the development of an effective school threat assessment program?
  - Schools should have policy on conducting a threat assessment inquiry or investigation.
  - Sharing information should be consistent with FERPA.
  - Creation of a threat assessment team prior to a crisis.

# District Liability And Personal Liability In The Context Of Student Violence

- As a district employee serving in the role of an LSSP, diagnostician, special education director or special education teacher, how does the *Threat Assessment Guide* implicate me?
  - Special education teachers have access to records, such as full and individual evaluations, psychological reports, and functional behavioral assessment that may contain information deemed helpful for deciding on precautionary measures.

# District Liability And Personal Liability In The Context Of Student Violence

- Are there other government resources that utilize this threat assessment perspective for preventing school violence?
  - Yes. In May 2011, the FBI issued a report titled *The School Shooter: A Threat Assessment Prospective*.
  - This report can be found at [www.fbi.gov/stats-services/publications/school-shooter](http://www.fbi.gov/stats-services/publications/school-shooter).

# District Liability And Personal Liability In The Context Of Student Violence

- In the FBI report, were there any specific personality traits identified by the FBI that were associated with school violence?
  - Yes. Narcissism, alienation, masks low self-esteem, among other traits.
  - This report noted that signs of serious mental illness can significantly elevate the risk for violence and should be evaluated by a mental health professional.



# District Liability And Personal Liability In The Context Of Student Violence

- Could an IDEA claim be implicated in the context of school violence?
  - Yes, but only if the petitioner can establish that the student was denied a free appropriate public education (FAPE).

# District Liability And Personal Liability In The Context Of Student Violence

- What analysis do hearing officers use to determine whether FAPE has been provided?
  - The 5th U.S. Circuit Court of Appeals provided a four-factor test to analyze whether a district provided a FAPE:
    - Is the program individualized on the basis of the student's assessment and performance?
    - Is the program administered in the least restrictive environment?
    - Are the services provided in a coordinated and collaborative manner by the key stakeholders?
    - Are positive academic and non-academic benefits demonstrated?

# District Liability And Personal Liability In The Context Of Student Violence

- Give us an example of how this plays out in the context of violent (or threatening) students and situations.
  - Student eligible for special education as a student with autism makes a terroristic threat.
  - Classmates report incident to parents, who contact police.
  - Student with disabilities is arrested.
  - Student's parents requested a special education due process hearing, challenging district had not provided appropriate programming in the area of social skills.

# Confidentiality And Student Violence In The School

- The *Threat Assessment Guide* seems to encourage sharing information when it comes to a threat assessment inquiry and students who may pose a risk to targeted school violence. Does FERPA remain applicable?
  - Absolutely. However, according to the FPCO, if a threat is deemed “articulable” and “significant,” disclosure can be made to members of the threat assessment team if they are designated as “school officials.”

# Confidentiality And Student Violence In The School

- What constitutes an “education record”?
  - FERPA defines education records as those that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.
  - Education records can be maintained in almost any format, including handwriting, print, computer media, video or audio tape, film, microfilm, or microfiche.

# Confidentiality And Student Violence In The School

- What is not an “education record”?
  - As a result of FERPA’s broad definition of “education records,” a lot of school district documents and other items are potentially protected from disclosure. Some examples are:
    - Records kept in the sole possession of the maker.
    - Records of a school district’s law enforcement unit.
    - Records about an individual after he is no longer a student.
    - Peer-graded papers before they are collected by the teacher and recorded by the teacher.

# Confidentiality And Student Violence In The School

- What is personally identifiable information?
  - The name of student's parent or other family member.
  - The address of the student or student's family.
  - Student's Social Security number or student number.
  - Fingerprints, handwriting, and facial characteristics.
  - Date and place of birth, mother's maiden name.
  - Any information that alone or combined would allow a reasonable person who does not have personal knowledge of the relevant circumstances to identify the student.

# Confidentiality And Student Violence In The School

- What constitutes permissible disclosure?
  - Access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.



# Confidentiality And Student Violence In The School

- What are some common permissible disclosures without parent consent?
  - Disclosure to other school officials within the district who have a legitimate educational interest.
  - Disclosure to comply with a judicial order or subpoena.
  - Disclosure in connection with a health or safety emergency.
  - Disclosure of information the district has designated as directory information.
  - Disclosure to officials in another school system where the student seeks to enroll.

# Confidentiality And Student Violence In The School

- In the context of school violence, does the health and safety exception automatically allow for disclosure of confidential student records to third parties?
  - No. The district may disclose personally identifiable information to appropriate parties only in connection with a safety emergency. A bomb threat or threat of targeted school violence would be an example of a safety emergency.

# Confidentiality And Student Violence In The School

- Is a psychological report, maintained by the school district, treated under the law as any other education record?
  - Yes. FERPA does not impose greater protections for disclosure of special education records, including psychological reports.

# Confidentiality And Student Violence In The School

- Does FERPA prohibit a school official from disclosing information obtained through personal knowledge or observation and not a student's educational records?
  - No. FERPA applies to the disclosure of education records and from information derived from education records.
  - A school official may disclose what he overheard to appropriate law enforcement authorities.

# Confidentiality And Student Violence In The School

After conducting a psychological evaluation of a student, which included a number of projective measures, the results indicated the student had homicidal thoughts and ideations and showed personality traits that fell clearly in line with the *Threat Assessment Guide*. Can I disclose to local law enforcement?

- This information may be disclosed to school officials as previously discussed. However, it would have to satisfy the health and safety exception under FERPA to be disclosed to local law enforcement.

# Confidentiality And Student Violence In The School

- During the course of this psychological evaluation, the student gave me the names of students he wished were dead. Should I notify the parents of those students?
  - If the health and safety exception was satisfied under FERPA, share information with law enforcement.
  - It would be both prudent and consistent with FERPA to disclose that specific information to school officials so that internal protections could be put in place.

# Confidentiality And Student Violence In The School

- As a school counselor, isn't it true that student communications in the context of counseling are confidential and cannot be disclosed to other parties, including other school officials?
  - Not necessarily. While school counselors should remain diligent to preserve the confidentiality inherent to the counseling relationship, they are also district employees responsible for determining when to disclose information and to comply with mandatory reporting requirements.

# Confidentiality And Student Violence In The School

- For students who commit acts of school violence, are their records protected by FERPA when sought through discovery by a plaintiff (parent of a student) who pursues litigation against the perpetrator or school?
  - No. FERPA allows for production of otherwise confidential documents to comply with a court order.
  - Simply because records are considered confidential according to a statute does not mean that they are privileged when it comes to discovery.



# Confidentiality And Student Violence In The School

- What remedies are available to parents or eligible students for violation of FERPA or a wrongful disclosure of educational records?
  - To date, the courts indicate that parents cannot bring private actions.
  - If the FPCO concludes that a district violated FERPA, the standard procedure is to advise the school of what actions it must take, and afford the school a reasonable amount of time to come into compliance with FERPA.
  - If school complies, typically no further action is taken.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- Since the rise of school violence in recent years, has the IDEA been amended to afford schools more flexibility in the area of disciplining students with mental health challenges?
  - Not really.
  - Schools must simultaneously maintain a safe and orderly school while appropriately serving students in the least restrictive environment.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- A student with an emotional disturbance has homicidal ideations. He is aggressive and has assaulted teachers and peers. He revealed his fantasy to cause significant harm, including fatalities. As the counselor, you are concerned about his presence in the school setting. Can he be disciplined for these comments? Can he be removed from the classroom in the interest of safety? What disciplinary options are available?

# Disciplinary Options Under IDEA In The Context Of Student Violence

- As a student eligible under IDEA, he is entitled to the protections set forth in 34 C.F.R. § 300.530.
- It is clear from the regulations that we still have a 10-day rule:
  - School officials have the authority to take disciplinary action in the same manner as would be taken against general education students for a total of 10 (cumulative) school days.
- A disciplinary change of placement (exceeding 10 days) can only occur if the outcome of the manifestation determination indicates that the behavior at issue was not directly and substantially related to the student's disability.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- So, if the district has information that clearly shows that a student with an emotional disturbance (and who exhibits all the characteristics of an emotional disturbance outlined in the federal regulations) poses a threat to himself or others, engages in aggressive acts, and makes threatening comments, then he is not subject to a disciplinary change of placement?

# Disciplinary Options Under IDEA In The Context Of Student Violence

- This depends on whether the conduct at issue is directly and substantially related to the student's disability.
- When the conduct at issue is a manifestation of a child's disability, then an FBA should be conducted unless one had previously been completed.
- A BIP should be implemented or reviewed and modified as necessary.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- But what about the special circumstances?
  - A student may be removed to an interim alternative educational setting for up to 45 school days without regard to whether the behavior is a manifestation of the disability or not for drug and weapon offenses or if the student has inflicted serious bodily injury upon another person while at school, on school premises, or while at a school function.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- How has “serious bodily injury” been interpreted?
  - Courts have determined that a student hitting a teacher in the arm, resulting in bruising, does not constitute “serious bodily injury.”



# Disciplinary Options Under IDEA In The Context Of Student Violence

- If the district has used the 10 days and a disciplinary change of placement cannot be imposed due to the outcome of the manifestation determination, what placement options are available in the interest of safety?
  - Least restrictive environment considerations are foremost when making placement determinations, even for students posing a threat of school violence.
  - Therapeutic measures should be reviewed.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- So, what are some positive behavior strategies suggested to address the needs of students who exhibit violent behaviors?
  - Updated FIE.
  - Release to exchange confidential information.
  - FBA, BIP.
  - Counseling evaluation and counseling services.
  - Teacher training.
  - Engaging a behavior specialist.
  - Collection of data on behaviors.
  - Significant monitoring.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- The IEP team has determined that a behavioral classroom is appropriate for a student who has committed aggressive acts toward peers and staff, and the assessment data clearly support the appropriateness of the behavioral classroom placement. What happens if the parent disagrees?
  - The district would proceed with implementing the IEP or placement with which the parent or adult student disagrees.
  - Special 10-day reconvene rule may apply in Texas.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- What are some recent interpretations regarding a parent challenging the IEP team's decision for a more restrictive setting in response to violent behavior?
  - *Rialto Unified School District*, 114 LRP 1023 (SEA CA 2013).
  - *San Leandro Unified School District*, 114 LRP 550 (SEA CA 2013).
  - *White Bear Lake Area Schools*, 113 LRP 28309 (SEA MN 2013).

# Disciplinary Options Under IDEA In The Context Of Student Violence

- What are some recent court decisions regarding challenges to MDR pertaining to violent students?
  - *Danny K. v. DOE State of Hawaii*, 57 IDELR 185 (D. Hawaii 2011).
  - *Lebanon Special School District*, 113 LRP 16893 (SEA TN 2013).

# Disciplinary Options Under IDEA In The Context Of Student Violence

- So does the parent have the right to request a due process hearing?
  - Yes. Parents have the right to request a due process hearing at any point when they disagree with decisions of the IEP team.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- What about stay-put? Could the parent request a due process hearing, and in effect, prevent the school from securing a more restrictive setting?
  - Unless the district and parents of the child agree otherwise, the student involved must remain in his current educational placement.
  - If the school district believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, the district may request an expedited hearing, wherein the hearing officer may order a change of placement.

# Disciplinary Options Under IDEA In The Context Of Student Violence

- Could a district seek an injunction in state court to remove a dangerous student from the current placement?
  - According to the U.S. Supreme Court, the district has the option to seek injunctive relief in a court of competent jurisdiction.



# Restraint And Time Out In The Context Of School Violence

- What do the federal statutes say?
  - Currently, neither IDEA nor Section 504 of the Rehabilitation Act address restraint.

# Restraint And Time Out In The Context Of School Violence

- What about the legal definition of restraint in different states? Timeout?
  - In Texas, restraint means the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of the student's body.
  - Timeout means a behavior management technique in which, to provide a student with an opportunity to regain self-control, the student is separated from other students for a limited period.
  - Each state is different, though.

# Restraint And Time Out In The Context Of School Violence

- When can restraint be used?
  - *Only* in an emergency and only with the following limitations:
    - Limited to the use of such reasonable force as is necessary to address the situation.
    - Discontinued at the point at which the emergency no longer exists.
    - Implemented in such a way as to protect the health and safety of the student and others.
    - Shall not deprive the student of basic human necessities.

# Restraint And Time Out In The Context Of School Violence

- What is an emergency?
  - A situation in which a student's behavior poses a threat of:
    - Imminent, serious physical harm to the student or others.
    - Imminent, serious property destruction.

# Restraint And Time Out In The Context Of School Violence

- How can restraint data help us in conducting a threat assessment?
  - A threat assessment will necessarily include a review of all existing information and data related to a student.

# Restraint And Time Out In The Context Of School Violence

- Does federal law prohibit the use of restraint for students presenting a threat of imminent serious physical harm to self or others?
  - No. Neither IDEA nor Section 504 preclude the use of restraint as a means to address emergency situations with students (i.e., threat of imminent serious physical harm to self or others).

# Restraint And Time Out In The Context Of School Violence

- What is the U.S. Department of Education's position on the use of restraint?
  - In May 2012, the DOE released a publication that discouraged the use of restraint and seclusion in public schools.
  - The document is intended to be a resource guide and includes access to current laws in each state, as well as 15 principles to help local stakeholders develop written policies.

# Restraint And Time Out In The Context Of School Violence

- What is the Alliance to Prevent Restraint, Aversive Interventions and Seclusion?
  - The alliance initiatives are as follows:
    - Raise awareness of the dangers of ARS among parents, educators, health care providers, policymakers, and the public.
    - Educate families of children with disabilities about Positive Behavior Support.
    - Eliminate loopholes in current legislation and regulations.
    - Encourage nationwide adoption of laws and regulations to strengthen school-based monitoring, reporting, and investigation into illegal and dangerous ARS practices.



# Law Enforcement And IDEA

- So when a student with a disability commits a crime, does the school have the authority to make a referral to law enforcement?
  - Yes. Nothing in the federal law prohibits a school from reporting a crime committed by a child with a disability to a law enforcement agency or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a student with a disability.

# Law Enforcement And IDEA

- When reporting a crime, can the school district release the child's educational records to the law enforcement officials?
  - Yes. A school district reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by law enforcement authorities as permitted under FERPA.

# Law Enforcement And IDEA

- The police come to the school requesting that the records of J.W. be turned over immediately. The police disclose to the school they have reason to believe J.W. will carry out a plan to commit school violence. Does the school hand over the requested educational records to the police officers?
  - Only after it is determined that the health and safety exception is satisfied under FERPA. Otherwise, police may need a subpoena.

# Law Enforcement And IDEA

- Are teachers or administrators permitted to carry firearms on campus or use them in the event of a campus emergency?
  - In 2013, the Texas legislature passed a bill that created the new law enforcement position of “school marshal.”
  - School marshals are already district employees who hold concealed carry licenses who, once designated by the district, undergo official certification and training through the Texas Commission on Law Enforcement Officer Standards and Education.

# Law Enforcement And IDEA

- Is there any provision prohibiting parents with students eligible as emotionally disturbed or autistic from possessing weapons in the home or a provision requiring such firearms to be locked in a secured location, thereby restricting access from students with documented mental health issues?
  - Not at this time.

# Law Enforcement And IDEA

- Are there any laws that minimize or otherwise eliminate an eligible student with a mental illness from purchasing a gun?
  - In 2013, 17 states enacted legislation relating to mental health reporting requirements for gun ownership.
  - The different state laws include a range of disqualifying factors:
    - History of violent behavior, suffering from a mental disorder, having been found incompetent to stand trial, having been found guilty by reason of insanity, and having made a threat of bodily harm to a reasonably identifiable victim.

# **Dangerous Students in the Schools: A Legal Perspective on Sharing Information or Not**

**THANK YOU!**

**Texas Association of  
School Psychologists**

22<sup>nd</sup> Annual Professional  
Development Conference

*October 16-18, 2014*

**Denise Hays**

Attorney at Law

Walsh, Anderson, Gallegos, Green & Treviño, P.C.