

LEADERSHIP  
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PRACTICAL PERSPECTIVES ON SCHOOL LAW &amp; POLICY

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## School Law and Policy—You Asked!

*Essential answers to your burning legal questions*

By Thomas Hutton

In the lead-up to its 2004 Annual Conference in Orlando, NSBA solicited school law and policy questions for a special roundtable discussion. Members submitted their questions electronically on a page set up for that purpose on the National Affiliate website, [www.nsba.org/na](http://www.nsba.org/na).

In Orlando, Thomas E. Wheeler, a member of the board of directors of the NSBA Council of School Attorneys and a partner at the Indianapolis firm of Locke Reynolds LLP, addressed many of the questions, illustrating some points with eye-opening anecdotes from his own practice.

As we promised at the session, this special issue of *Leadership Insider* is a brief recap of the legal points discussed. Some questions are more relevant to administrators than to school board members, while others are more clearly matters of governance. These are general answers, however, so bear in mind that laws vary from state to state and from circuit court to circuit court.

### Q. What rights do students have when school officials question them about matters with criminal implications?

How does Fourth Amendment protection against unreasonable search and seizure apply? Do students have a Fifth Amendment right against self-incrimination?

In matters of student discipline, bear in mind that this is school, not *Law and Order*. Many of the constitutional rights portrayed so often in TV and movies

apply differently in a school setting than in the adult world.

In *New Jersey v. T.L.O.* (1985), the Supreme Court ruled that the Fourth Amendment holds school officials to a lower standard than it does the police. Law enforcement authorities must have “probable cause” to take people into custody or search them, but school officials need only have a “reasonable suspicion.”

Assuming that questioning a student is a “seizure” for Fourth Amendment purposes (and this is debatable), “reasonable suspicion” means, first, the seizure must be reasonable at its inception, based on a variety of factors. These factors include the likelihood that the student has violated a rule, the degree of infringement on the student’s privacy, the purpose of the seizure, the seriousness of the problem, and the student’s age, school history, and the like.

The seizure also must be reasonable in its scope. That is, the duration and type of questioning must be reasonable in light of the circumstances that justified the seizure. A serious safety concern, like a bomb threat, would justify more intense questioning than would a minor infraction.

Sometimes the dividing line between school and *Law and Order* works to the student’s advantage as well. Although students don’t have the same legal protections in certain school matters as they do in criminal matters, there are limits on how the information gained under the school’s lower legal standard can be used subsequently in criminal proceedings.

In general, then, students cannot “plead the Fifth” if they are being questioned by school personnel. Similarly, the vice principal doesn’t give *Miranda* warnings to students. But whatever a student says in such circumstances will probably be inadmissible in any subsequent criminal proceeding arising from the same conduct.

The line between school and *Law and Order* can get a little trickier when the police show up at school wanting to question a student.

The school’s authority over the student can complicate the student’s legal protections in regard to the police. The police have to follow their normal rules, even in a school setting. If the police want to question the student, it’s probably advisable to insist on notifying the parent first and giving the parent a chance to attend the questioning.

Another uncertain area concerns state laws requiring schools to notify police of particular infractions, such as drug possession. For school discipline purposes, the school’s less stringent rules apply to the questioning, but there may be serious questions about whether any information obtained under those rules and reported to authorities can be admitted in a subsequent criminal action.

Bottom line: In interactions between schools and the police, it pays to have well-thought-out protocols for school personnel to know and follow. These situations can be sudden and high-pressure affairs. Working things out in advance with your district legal counsel, perhaps in cooperation with the police, can avoid headaches later.

Where does the school resource officer or liaison officer fit in? Most courts have held that when these officers are acting on their own authority in schools—and thus are wearing their “school employee” hat—the lower, “reasonable suspicion” standard

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#### About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands.

#### About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join provided they are members in good standing of their state school boards association.

#### About the National Education Policy Network

The National Education Policy Network (NEPN) helps foster better communication, understanding and management of local school districts through better policy-making. It offers access to a sample policy clearinghouse and current policy-related resources, as well as publications and tools to help districts keep their policy manuals well-organized and up-to-date.

#### About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

applies to their searches and seizures. However, when they or other school employees are acting on behalf of law enforcement agencies, or when outside law enforcement personnel are significantly involved in some way, the higher constitutional protections apply.

When only school personnel are doing the questioning, as a legal matter the parent generally does not need to be present. Still, depending on the gravity of the offense, it may make sense to wait for the parent before beginning the questioning. This might help avoid disputes later over what took place and whether school personnel acted appropriately. The parent may even turn out to be helpful.

### Q. Can schools reduce students' grades for misconduct?

In general, schools should not lower a student's grade as a consequence for nonacademic behavior, such as smoking or drinking. Some courts have found that doing so violates the student's constitutional right to substantive due process, essentially because there is no reasonable relationship between the misbehavior in question and academics. Instead, grades should be based upon a standard of acceptable *academic* performance.

However, a student's grade generally may be reduced because of absences or frequent tardiness. After all, absenteeism or truancy has a definite and direct impact on classroom academic performance.

Things might be stickier when it comes to co-curricular activities for which grades are assigned. Some courts have found that students who misbehave at a band concert, for example, though not in music class, can lose grade points, because these nonclassroom activities normally are part of the student's grade.

### Q. Can students claim self-defense when they have been disciplined for fighting?

This is another instance where "This is school, not *Law and Order*" applies. Self-defense is a defense under state criminal laws, but it need not be under school disciplinary policies—unless the school board or administrators so choose. Some do, but other policies and student conduct codes stipulate that any student involved in a fight may be punished, regardless of who started it.

There are practical considerations in favor of this option. The school may not be able to reach a conclusion about the fighters' inevitably conflicting claims, or it

may be impractical to spend the time and energy trying to do so in every case. A strict rule also can provide the students a good excuse to back away from a fight without losing face. Finally, across-the-board rules arguably help ensure that all students face "equal justice," instead of singling out some more than others.

That said, you've no doubt read embarrassing horror stories about "zero tolerance" policies. While school boards have a legitimate need to preserve parent and public confidence about school safety, they should consider carefully how to balance these considerations against the risks of depriving administrators of any discretion at all.

The silly results of inflexible policies—or of applying the rules too mechanically—are pounced on gleefully by the news media and others who are fond of ridiculing schools. They may also lead to lawsuits, which cost the district money even if it prevails in the end.

You can always call your policy "zero tolerance" if you like. School officials still can be allowed to discipline any student involved in fighting, and some will choose to do so. But leaving wiggle room for some common sense discretion may be a good way to avoid problems.

### Q. Can schools discipline students for drawing up 'hit lists'?

In the wake of Columbine and other student shooting incidents, schools are more attuned than ever to statements and other forms of expression that appear threatening. Yet kids sometimes do and say stupid things, sometimes just to vent, sometimes deliberately to shock. School officials confronting uncertain situations sometimes make judgment calls that later turn out to be questionable. And sometimes the questions come in the form of a lawsuit.

Drawing up "hit lists" may merely be childish hyperbole on a student's part. But many schools feel they don't have the luxury of assuming the best, and they have taken strong disciplinary action in response to the discovery of such lists.

Courts have said that schools can take action in response to a "true threat." For legal purposes, whether a threat is a true threat does *not* depend on the actual intent of the student who makes it, the ability of the student to carry it out, or even whether it was based in reality. Rather, the key is whether an "objective, reasonable person" would have *believed* the threat to be serious. The court may

look to factors such as the student's past history, whether the language used seemed to be just an attempt at humor, and whether the list was communicated to anyone else.

Even if the hit list is not a true threat, school officials still can respond out of concern about substantial disruption of school activities. A student's statement about harming classmates may not be serious, but administrators may have good reason to believe that other students will be sufficiently upset by the statement as to warrant school action.

Here again, the court typically applies a "common sense" test, asking whether the fear was well-founded from the perspective of a reasonable school official. School officials don't necessarily need to wait for the substantial disruption to occur before acting, but they do need to have reasonable grounds to believe it likely.

As with the discussion of self-defense, school officials should think through their "zero tolerance" policies.

### **Q** ■ What is the school's liability for unauthorized transportation of students by school staff?

What if there is an accident when a coach or teacher transports students in his or her own vehicle without authorization? What if there are allegations of impropriety?

This is one of those areas where legal considerations bump into practical realities. Coaches and teachers may find it a simple matter of convenience or of responsible adult supervision to help stu-

dents out by driving them somewhere. And many teachers know students who could benefit from a trusting relationship with an adult role model.

But the safety and liability concerns are real. If a school has no guidelines for when school personnel can transport students, or if it knowingly ignores violations of such a policy, an enterprising trial attorney might argue that the school district was negligent in providing for the safety of students while they were under staff supervision.

Perhaps more significantly, a much-publicized 2004 report commissioned by the U.S. Department of Education purported to find that as many as 10 percent of American students may be subject at some point in their school years to inappropriate sexual conduct by school employees. While these numbers are disputed, and while they include such conduct as inappropriate comments, there's no disputing that inappropriate incidents do occur. When a school district has notice of an untoward relationship but is "deliberately indifferent" to the allegations, it opens itself up to liability.

This potential liability—and, more important, the welfare of children—means school districts must take such allegations seriously, despite the discomfort of investigating them. It also has led many districts to adopt policies establishing guidelines on employee transportation of students and other situations where an employee is alone with a student.

Given the practical realities, common sense procedures and practices might be

found to avoid problems without needlessly tying the hands of school personnel. For example, a teacher might be required to notify the district or parents when transporting a student, parents might be asked to consent in advance, or school employees might be required to avoid one-on-one situations by ensuring that another student or employee is present.

### **Q** ■ What is the school attorney's responsibility to the school board and its members?

Attorneys occasionally find themselves in delicate situations because of demands by individual board members or conflicts between the superintendent and the board. In such situations, attorneys are subject to the Rules of Professional Conduct developed by the American Bar Association and adopted, sometimes with modifications, by the individual states.

Rule 1.13 provides that an attorney who is "employed or retained by an organization represents the organization acting through duly authorized constituents." For school attorneys, this means that the real client is the school board—not the superintendent, and not individual board members. This is the case even for in-house attorneys who are supervised by the superintendent. As a practical matter, the board often delegates to the superintendent the authority to obtain legal services.

In some situations, the lawyer is permitted to represent an individual employee or board member, too. Complications arise where there is a conflict of interest between the individual and the board as whole. If the board's interests are adverse to the individual's, the attorney has an ethical obligation to remind everyone who the client is. Even if there is a conflict of interest, the board still can agree to dual representation under some circumstances, but it must affirmatively consent to this.

If the attorney knows that an employee or board member is acting in a way that violates that individual's legal obligation to the school district or that is a legal violation for which the district could be liable, and if this violation could result in substantial harm to the district, the lawyer must proceed "as is reasonably necessary in the best interest of the organization."

This generally means the lawyer has three options: (1) to ask the individual to reconsider; (2) to advise the board member or superintendent to obtain a separate legal opinion or separate legal representation; or (3) to refer the matter to the

## FOR MORE INFORMATION ON SCHOOL LAW

Your district's own legal counsel is the best source of legal advice on issues confronting the district. Naturally, NSBA believes members of the Council of School Attorneys have some major advantages in serving their clients. Find out more at [www.nsba.org/cosa](http://www.nsba.org/cosa). Here are some other places to turn for information:

NSBA's *Leadership Insider* is mailed to you with *School Board News*. Past issues and additional resources also are accessible from the National Affiliate website, [www.nsba.org/na](http://www.nsba.org/na). If you need help accessing the members-only resources, follow the instructions on the log-in prompt.

NSBA also publishes a weekly e-newsletter called *Legal Clips*, available to anyone, free of charge. *Legal Clips* provides brief summaries of news stories and court decisions affecting public schools, with links to other resources. Written for non-attorneys, it has become popular with board members, administrators, and others. You can check out a sample issue and subscribe or unsubscribe at [www.nsba.org/legalclips](http://www.nsba.org/legalclips).

Your state school boards association probably provides additional legal and policy resources, programming, and services, which are especially important for laws specific to your state.

school board as a whole.

If the attorney takes these steps and the board as a whole responds in a way that still clearly violates the law and is likely to result in substantial injury to the district, the attorney may resign. No attorney likes to burn bridges or be perceived as betraying a relationship. But board members and administrators should be aware that their lawyers are subject to these ethical rules.

### **Q. Are schools liable for items sent via district e-mail?**

Improper electronic transmissions over school e-mail is probably not a big liability concern for schools. The federal Communications Decency Act of 1996 provides immunity from liability for an operator of an “interactive computer service.” This includes entities that enable computer access by multiple users to a computer server, including such systems or services offered by educational institutions. While courts have not yet made clear whether school districts would fit this definition, a case could be made that they do.

There are exceptions to this immunity, however. The district still can be subject to liability for violations of criminal law, intellectual property law, state laws that are not inconsistent with the Communications Decency Act, and communications privacy laws. And if the district itself is the source of the offensive content, the immunity does not apply. Individual district employees remain liable in their individual capacities, although not in their official capacities.

As a practical matter, it is impractical for districts to police carefully what is transmitted using school e-mail. This reality should be persuasive to a court.

### **Q. Can schools discipline students for ‘cyber-bullying’?**

The connection between bullying and school violence and suicide has received much attention in recent years. And many people are asking whether schools can do more to spare children from the uglier forms of what once was seen as an inevitable rite of passage.

Technology has brought a new variety of the old problem: so-called cyber-bullying, in which the bully uses the Internet, e-mail, or text messaging. This presents schools and courts alike with novel issues. Two legal complications affect school decisions about whether and how to do something about it: First, much or all of the bullying may be engaged in off-campus,

and second, there are First Amendment free-speech considerations.

When a court is asked to overturn a disciplinary action for off-campus conduct, it looks at two main factors: (1) whether the conduct was related to a school program, or (2) whether the conduct had any direct and immediate impact on school discipline or on the safety and welfare of students or staff. In addition, the disciplinary action taken also must be reasonable in scope and should relate to the school’s purposes.

In general, courts have upheld disciplining students for threatening, harassing, or intimidating students or school staff members. A serious case of cyber-bullying may be compelling to a court because *both* factors apply—that is, it has a clear connection to the school *and* an impact on the safety and welfare of students. The school should be prepared to document these things. Also compelling will be evidence that school equipment was used in the bullying.

If the bullying arguably is a form of expression, the First Amendment’s free-speech protections may raise the legal bar. The school is likely to prevail in a dispute, however, as long as it can show it had a well-founded concern about the impact on the school or potential disruption.

The operative words here are “well-founded.” Courts will not give school officials *carte blanche* where free speech is at stake—especially if it appears the school simply found the “bully’s” opinion offensive or upsetting to the “victim.” Kids sometimes say and do nasty things. A pattern of harassment, a demonstrable impact on the victim or school, concern arising from previous incidents, or truly threatening language could help convince the court that the school was not overreacting.

As a practical matter, it’s also a good idea to make sure the student code of conduct or other school policy puts students on clear notice that they are subject to disciplinary action for bullying, including—if the district wants to preserve this option—certain kinds of off-campus conduct. This may not be legally indispensable, but it will strengthen the school’s case if there’s a legal dispute over a school’s intervention.

Another interesting issue is whether courts might hold schools legally liable for *failing* to intervene to prevent severe cyber-bullying. In a legal Catch 22, some people might accuse schools of illegally interfering in protected, off-campus expression,

while others might accuse them of failing to protect students and employees. Whatever position the district takes on one question might come back to haunt the district on the other.

Welcome to the joys of school law. Consult your attorney on this one.

### **Q. Should schools regulate use of cell phones equipped with cameras?**

Another technological challenge is setting rules for student use of cellular phones. Years ago, many schools simply banned cell phones from school, in part for fear of disruption, and in part for fear the phones might be used to facilitate illegal activities like drug distribution. But as the technology has become ubiquitous, and in the wake of incidents like Columbine and September 11, many districts have relaxed their policies.

That doesn’t mean concerns about disruption have gone away. There are new concerns, too, such as text messaging, which some teachers worry may enable students to cheat. And now most new cell phones are equipped with digital cameras, raising worries about invasions of privacy as well, such as locker room pranks.

Basically, cell phone use is a matter of policy, not law. School officials have a great deal of discretion to set the rules. Some districts still forbid students to have cell phones in school; others allow students to carry cell phones but prohibit their use during school hours. Still others have discussed banning phones equipped with camera technology. Many school districts establish different rules for different grade levels. A recent gathering of Council of School Attorneys members in Mississippi discussed the pros and cons of technology that can jam cell phone signals in a particular area, such as a classroom.

Districts should consider the trade-offs between the seriousness of the problems they are trying to avoid and the amount of time and energy school personnel will have to put into enforcing the rules. The consequences for violations need to be thought out as well. Some schools confiscate phones for a certain period of time; others stipulate that phones will be returned only to students’ parents or guardians. Some parents may complain about the inconvenience, but they may become important allies in persuading students to take the rules seriously.

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