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Colorado School Safety: A Legal Manual

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A Legal Manual
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EXECUTIVE SUMMARY

The Attorney General created this legal manual as one tool of many in the State's ongoing commitment to mitigate and prevent school violence and ensure safe schools. The manual provides a *general overview* of the many legal issues, tools, and resources available for Colorado's schools and staff. This document is intended to be a legal companion to other important work by experts in the field, such as the 2019 Colorado School Safety Guide. Additionally, the Colorado School Safety Resource Center has many other resources to assist educators, emergency responders, community organizations, school mental health professionals, and parents to create safe, positive, and successful school environments for Colorado's students.

The manual does not constitute legal advice and it is not a substitute for sound legal advice from your local counsel. In addition, laws change regularly, and best practices evolve over time. Readers should consult their own counsel with all legal questions and issues that may arise.

Highlights of this manual include:

I. Creating a Safe Schools Plan and a Safe School Climate
- Discussion of Colorado's Safe Schools Act requirements
- Threat assessment protocols
- Climate and culture considerations
- The importance of ongoing data review

II. Student Discipline
- Ensuring proportionate, non-exclusionary and non-discriminatory discipline
- Trauma-informed, culturally responsive, and restorative protocols
- Disrupting the school-to-prison pipeline
- Discipline policy drafting and implementation, including due process considerations and special requirements for at-risk students and students with disabilities

III. Search, Seizure, and Restraint
- Legal limitations on searches and seizures of students and their property
- Policy essentials for searches, seizures, and restraints
- Practical and legal considerations for using physical interventions and restraints

IV. Information Sharing
- Identifying what is and what is not protected student information
- When student information is permitted, and in some cases, required, to be shared with other school staff or with other agencies
- The importance of cooperation among school employees and between schools and criminal justice agencies

V. Employment Issues in School Violence
    - Employee screening requirements
    - Training in violence prevention and response
    - Employee protection policies to deter violence against employees and to shield employees from liability for engaging in appropriate discipline procedures
VI. Criminal Offenses Specific to Schools
    - Discussion of weapons and drug offenses
    - Campus disruption offenses, including threats, hazing, and crimes against at-risk juveniles
    - Colorado's teen sexting law
VII. Liability Considerations
    - Discussion of the Claire Davis School Safety Act
    - Mitigating liability through the appropriate creation and use of policies for recognizing, reporting, investigating, and resolving violence and discrimination complaints

In this manual, we recognize and value how hard this work is for our schools, our educators, our school mental health professionals, and our students – for everyone that chooses to educate and support our students in any capacity. As we emerge from the most challenging years of the COVID-19 pandemic, our schools are deeply impacted by pre-existing and new traumas. When we build policies, protocols, systems, and cultures, we must acknowledge and respond to the impact of trauma and mental health on our schools. Whenever possible, this manual works to connect the legal principles with practical policies and approaches to accomplish that goal.

I. CREATING A SAFE SCHOOLS PLAN AND SAFE SCHOOL CLIMATE

CHAPTER INTRODUCTION

Key to safe schools is the creation of strong policies and practices. This includes implementing the Colorado Safe Schools Act's policy requirements for school safety.[1] This section overviews some of the Safe Schools Act's major requirements for districts and schools: safe school plans; internet safety plans; child sexual abuse and assault prevention plans; school response frameworks; bullying prevention and education policies; gang-related activities; dress code; and other requirements. Districts and schools should review the act in its entirety to ensure compliance.

In addition to the implementation of the Safe Schools Act, schools and districts are advised to implement research-based threat assessment protocols. An effective threat assessment process allows schools to identify and respond to potential threats before they escalate into a higher safety risk for the school community. This could be a threat to others, or it could be a threat to self. Addressing suicide risk and prevention is a critical component of creating safe schools.

Finally, violence prevention requires schools and districts to build an intentional safe school climate and monitor data regarding climate, culture, and the implementation of their systems.

This section does not attempt to identify all research-backed best practices. Districts should seek out resources that match their unique community needs. This manual also recognizes how mental health, trauma, and racial and other biases can undermine our implementation of well-intentioned polices. For those reasons, it is critical for schools and districts to implement ongoing cycles of review – plan, train, implement, collect data, review, adjust, and continuously improve.

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[1] § 22-32-109.1, C.R.S.

SAFE SCHOOLS PLAN

Colorado's Safe Schools Act requires that school districts adopt a "safe school plan."[2] The plan must include (1) a conduct and discipline code[3]; (2) a policy regarding the safe schools reporting requirement[4]; and (3) an internet safety plan[5].

The conduct and discipline code must address, at a minimum, the following:

1. Student conduct, safety, and welfare policies generally;
2. Policies for handling disruptive students, and policies for suspensions and expulsions of habitually disruptive students;
3. Policies for the use of reasonable and appropriate physical intervention with students;
4. Policies for determining when disciplinary actions, including suspension and expulsion, may be imposed;
5. Policies on gang-related activities;
6. Prohibitions against the possession or use of dangerous weapons, drugs, controlled substances, and tobacco products;
7. Policies on searches on school grounds;
8. A dress code policy that prohibits students from wearing disruptive apparel;
9. Policies on bullying prevention and education; and
10. Policies on the use of restraint and seclusion on students.

Discipline is discussed in Section II of this manual. Physical interventions, restraints, and searches are discussed in Section III. The other key components are discussed below.

In addition to the creation of a Safe Schools Plan, the Act requires schools to: (1) create a child sexual abuse and assault prevention plan[6]; (2) cooperate with law enforcement and, to the extent possible, to develop written agreements with state agencies[7]; (4) build a school response framework for school safety, readiness, and incident management plan;[8] (5) create a safety and security policy regarding annual building inspections[9]; and (6) establish policies for information

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[2] § 22-32-109.1(2), C.R.S.
[3] § 22-32-109.1(2)(a), C.R.S.
[4] § 22-32-109.1(2)(b), C.R.S.
[5] § 22-32-109.1(2)(c), C.R.S.
[6] § 22-32-109.1(2.5), C.R.S.
[7] § 22-32-109.1(3), C.R.S.
[8] § 22-32-109.1(4), C.R.S.
[9] § 22-32-109.1(5), C.R.S.

sharing.[10] Information sharing is discussed in Section IV of this manual, and other requirements are discussed below.

A. Bullying Prevention and Education Policy

Bullying behavior can lead to school violence, and in some cases, may itself be considered a form of school violence. The Safe Schools Act requires schools to adopt a bullying and prevention policy.[11] Schools must provide reports of their bullying prevention and education policies in their safe school plans.[12]

State law also requires the Colorado Department of Education (CDE) to research policies related to bullying prevention that have been enacted in other states and craft a model bullying prevention and education policy.[13] The model differentiates between a conflict and bullying and between harassment and bullying, and clarifies the role of cyberbullying during online instruction, as law requires.[14] The Colorado School Safety Resource Center publishes a resource guide on bullying prevention and education.[15] It also lists external resources.[16]

B. Dress Code Expectations

The Safe Schools Act also requires schools' conduct codes to have a dress code policy that prohibits apparel likely to disrupt the school environment, order, or safety.[17] For example, some school districts restrict displays of gang-related symbols or colors. This could be a component of the school district's required policy on gang-related activity.

The dress code provision must strike a balance between a school district's interests in safe and orderly classrooms and students' interests in freedom of speech and expression. Although schools are afforded greater authority to regulate speech in the school environment, students do not "shed their constitutional rights of freedom of speech or expression at the schoolhouse gate."[18] When drafting and enforcing restrictions on the display of images or symbols, school officials must remember the First Amendment's protections. In particular, certain symbols or items of apparel, if worn by students with the intent to convey a particular message that is likely

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[10] § 22-32-109.1(6), C.R.S.
[11] § 22-32-109.1(2)(b)(VIII), C.R.S.
[12] *Id.*
[13] § 22-2-144(2)(a), C.R.S.
[14] *Colorado Model Bullying Prevention and Education Policy*, COLO. DEP'T OF EDUC., https://www.cde.state.co.us/mtss/model_bullying_prevention_policy (last visited July 25, 2022).
[15] *Positive School Climate: Bullying and Harassment Prevention and Education*, COLO. SCH. SAFETY RES. CTR., COLO. DEP'T OF PUB. SAFETY (June 2021), https://cdpsdocs.state.co.us/safeschools/Resources/CSSRC_Resource_Guides/CSSRCBullyingSchoolResourceGuide2021.pdf.
[16] *Bullying and Harassment*, COLO. SCH. SAFETY RES. CTR., DEP'T OF PUB. SAFETY, https://cssrc.colorado.gov/bullying-harassment (last visited Sept. 30, 2022).
[17] § 22-32-109.1(2)(a)(I)(J), C.R.S.
[18] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969).

to be understood as such by those who see it, may be protected under the First Amendment as "symbolic speech."[19] School officials cannot require the students to remove the symbol or item of apparel *merely* because they disagree with the message the student intends to convey.[20] Students' right to free speech is not absolute, however, and schools may prohibit some speech as noted below, including words and images on clothing.[21] Because these inquiries are fact-specific, school districts should consult their attorneys when drafting policies or addressing situations to ensure compliance with current law.

C. Internet Safety Plans

The Safe Schools Act encourages districts to provide age-appropriate internet safety curricula to students in grades kindergarten through twelve.[22] The curriculum may include topics such as:

- Interacting with strangers online;
- Recognizing and avoiding online bullying;
- Computer virus issues and ways to avoid computer infection;
- Identifying online predators;
- Intellectual property, including information about plagiarism and the downloading and use of copyrighted materials;
- Privacy and the internet;
- Online research literacy, including how to identify credible, factual, and trustworthy websites; and
- Homeland security issues related to internet use.

School districts are also encouraged to work with law enforcement and collaborate with parents, teachers, and organizations representing parents and teachers when developing an internet safety plan.[23] Plans should be reviewed annually and updated when necessary.

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[19] *Spence v. Washington,* 418 U.S. 405, 410-11(1974); *Texas v. Johnson,* 491 U.S. 397, 405-06 (1989).
[20] *Tinker,* 393 U.S. at 514.
[21] *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675, 683-86 (1986)(pervasive sexual innuendo); *Morse v. Frederick,* 551 U.S. 393, 408-10 (2007)(drugs); *Taylor v. Roswell Indep. Sch. Dist.,* 713 F.3d 25, 36-37 (10th Cir. 2013)(clear association with past school violence or substantial disruption).
[22] § 22-32-109.1(2)(c), C.R.S.
[23] *See Internet Safety & Digital Responsibility,* COLO. SCH. SAFETY RES. CTR., COLO. DEP'T OF PUB. SAFETY, https://cssrc.colorado.gov/internet-safety-digital-responsibility (last visited July 24, 2022).

D. Child Sexual Abuse and Assault Prevention Plans

The Safe Schools Act also recommends that every district implement age-appropriate curricula on child sexual abuse and assault prevention as part of its safe school plan.[24] The following topics should be considered:

- Skills for recognizing:
    - Child sexual abuse and assault;
    - Boundary violations and unwanted contact; and
    - Techniques used by offenders to groom and desensitize victims; and
- Strategies that:
    - Promote disclosure;
    - Reduce self-blame by victims; and
    - Mobilize bystanders.

School districts should also consider training for employees and parents about child sexual abuse prevention and response. Valuable resources are available through the Colorado School Safety Resource Center.[25]

E. School Response Framework

Advance preparation is key to readiness and response. The Safe Schools Act requires that each district institute a "school response framework" that satisfies the Act's requirements.[26]

1. School District Response Framework Requirements:

- Adopt the national response framework released by the federal Department of Homeland Security and the National Incident Management System (NIMS)[27];
- Institutionalize the incident command system that is taught by the Emergency Management Institute of the Federal Emergency Management Agency[28];
- Develop a school safety, readiness, and incident management plan, including:

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[24] § 22-32-109.1(2.5)(a), C.R.S.
[25] *Adult Sexual Misconduct,* COLO. SCH. SAFETY RES. CTR., COLO. DEP'T OF PUB. SAFETY . https://cssrc.colorado.gov/adult-sexual-misconduct (last visited July 24, 2022); *Child Abuse Prevention,* COLO. SCH. SAFETY RES. CTR., COLO. DEP'T OF PUB. SAFETY, https://cssrc.colorado.gov/child-abuse-prevention (last visited July 24, 2022); *Human Trafficking,* COLO. SCH. SAFETY RES. CTR., COLO. DEP'T OF PUB. SAFETY, https://cssrc.colorado.gov/human-trafficking (last visited July 24, 2022).
[26] § 22-32-109.1(4), C.R.S.
[27] *See Nat'l IncidentMgmt. Sys.*, FED. EMERGENCY MGMT. AGENCY, https://www.fema.gov/national-incident-management-system (lastvisited July 24, 2022).

- Emergency communications;
- Coordination with state or local emergency operations plans;
- Safety teams and backups responsible for interacting with community partners and assuming key incident command positions; and
- Identifying potential sites for various operational locations and support functions or facilities;

- Enter into memoranda of understanding with community partners to specify incident response responsibilities;
- Conduct school district employee safety and incident management training;
- Adopt written procedures for taking action and communicating with local law enforcement, community emergency services, parents, students, and the media for events identified by the school district;
- Work with community partners to update and revise all standard operating procedures to ensure that all aspects of NIMS are incorporated, including policies, planning, procedures, training, response, exercises, equipment, evaluation, and corrective actions;
- Work with community partners to assess overall alignment and compliance with NIMS, identify requirements already met, establish a baseline for NIMs compliance, and determine action steps, including developing a plan and timeline to achieve and maintain all NIMS goals; and
- Develop a timeline and strategy for compliance with the school response framework requirements and strategically plan, schedule, and conduct all activities with community partners.

2. Individual School Framework Requirements*:*

- Create an all-hazard exercise program based on NIMS and conduct other exercises in collaboration with community partners from multiple disciplines;
- Practice and assess preparedness and communications with community partners;
- Complete a written evaluation after exercises and incidents to address lessons learned and appropriate corrective actions;
- Inventory emergency equipment and test communications equipment and its interoperability with relevant state and local agencies each academic term;
- Identify key emergency school personnel, including safety teams and backups, that should complete courses from the Federal Emergency Management Agency's Emergency Management Institute, or by institutions of higher education; and

- Ensure that school resource officers are familiar with the school response framework, the all-hazard exercise program, and the interoperable communications of the school assigned to the school resource officers.

Schools and school districts should evaluate their school response framework on an annual basis to ensure that it aligns with any changes to the law and is consistent with current best practices.[29]

F. Required Data Reporting

Given the importance of data analysis in preventing school violence, the Colorado Safe Schools Act requires schools to collect and report certain data.[30] For each school, the required annual report must include:

- Total enrollment;
- Average daily attendance rate;
- Dropout rates for grades seven through twelve, if such grades are taught at the school;
- Average class size; and
- Policy on bullying prevention.[31]

The report must also include the number of conduct and discipline code violations that occurred in the previous school year.[32] It must provide specific information identifying the number of, and the action taken with respect to, each of the following types of violations:

- Possession of a dangerous weapon without authorization;
- Alcohol use or possession;
- Use, possession, or sale of a drug or controlled substance, other than marijuana;
- Unlawful use, possession, or sale of marijuana;
- Tobacco use or possession;
- Willful disobedience, open and persistent defiance, or repeated interference with the school's ability to provide educational opportunities and a safe environment to other students;

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[29] The Division of Fire Prevention and Control provides information about courses and training on NIMS and interoperable communications to school safety personnel. § 24-33.5-1213.4(3)(a), C.R.S.
[30] § 22-32-109.1(2)(b), C.R.S. Districts can collect and report on this data on behalf of schools.
[31] *Id.*
[32] § 22-32-109.1 (2)(b)(IV), C.R.S.

- Commission of an act that, if committed by an adult, would constitute first degree assault, second degree assault, or vehicular assault;
- Behavior that is detrimental to the welfare or safety of other students or school personnel;
- Bullying;
- Willful destruction or defacement of school property;
- Commission of an act that, if committed by an adult, would constitute third degree assault or disorderly conduct;
- Commission of an act that, if committed by an adult, would constitute robbery;
- Other violations of the code of conduct and discipline that were documented in a student's record.[33]

Additionally, the report must include the number of acts of sexual violence on school grounds, in a school vehicle, or at a school activity or sanctioned event that occurred in the preceding school year.[34] This information must be reported as aggregate data and must not include any personal identifying information.

The local school board must compile this information and submit it to the Colorado Department of Education.[35]

G. Other Safe Schools Act Requirements

The Safe Schools Act requires each district to adopt a policy requiring annual inspections of all school buildings and the removal of hazards, vandalism, and other barriers to safety or supervision.[36] Research strongly suggests that a school environment that promotes academic achievement, looks cared for, and feels safe naturally shapes student behavior. In addition, environmental design that maximizes open, observable space helps reduce the likelihood of violence. Site-based analysis is discussed further in the Colorado Attorney General Office's Colorado School Safety Guide.[37]

The Act also requires districts to adopt an open school policy.[38] The policy must allow parents and members of district's board of education reasonable access to observe classes,

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[33] *Id.*
[34] § 22-32-109.1(2)(b)(IX), C.R.S.
[35] § 22-32-109.1(2)(b), C.R.S.
[36] § 22-32-109.1(5), C.R.S.
[37] Sarah Goodrum, et al., *Colorado School Safety Guide*, COLO. DEP'T OF LAW, https://coag.gov/app/uploads/2019/10/coloradoag_schoolsafetyguide_final_electronic_v2.pdf (April 2019).
[38] § 22-32-109.1(7), C.R.S.

activities, and functions. Access can be limited under that policy when there is a safety risk posed by the parent, guardian, or member of the public.

THREAT ASSESSMENT PROTOCOLS

Threat assessment is a violence prevention strategy that involves determining whether a student poses a threat of violence.[39] Districts may wish—but are not required to—outline threat assessments systems in their safe school plans.

Threat assessment also helps identify the reasons behind a person's threatening behavior. These enable educators to address those underlying reasons. Strategies to address those reasons may include the use of mental health resources, positive behavior intervention and support, restorative justice, trauma training, and social-emotional education strategies. These alternative disciplinary strategies are discussed in Section II of this manual.

A. Threat Assessment Strategy

Threat assessment strategy is comprised of three focus areas: (1) policy implementation; (2) an interdisciplinary team; and (3) formal threat assessment response and protocol.

Practical Tip: Defining a "Threat"

A threat is an expression of intent to harm someone that may be spoken, written, gestured, or otherwise communicated, including via photos, texts, emails, and other digital means.

1. Policy Implementation

Districts should adopt a threat assessment policy that defines a threat, establishes a school's authority to conduct a threat assessment, identifies the members of the threat assessment team, establishes interagency agreements to respond to public safety issues, and provides awareness training.[40] The policy should also discuss the following:

- The circumstances under which the school has the authority to conduct a threat assessment;
- If a school determines a threat assessment is warranted, parents of the suspected student will be notified that a threat assessment will be occurring;

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[39] *Threat Assessment at School*, NAT'L ASS'N OF SCH. PSYCHOLOGISTS, https://www.nasponline.org/resources-and-publications/resources-and-podcasts/school-safety-and-crisis/systems-level-prevention/threat-assessment-at-school (last visited July 24, 2022).

[40] *Essentials of School Threat Assessment: Preventing Targeted School Violence*, COLO. SCH. SAFETY RES. CTR., http://cdpsdocs.state.co.us/safeschools/Resources/CSSRCEssentialsofTA2018.pdf (June 2018).

- If the threat assessment involves a student with disabilities, the student's IEP team will be convened to determine whether the student's actions were the result of the student's disability. This information should be conveyed to and considered by the threat assessment team;
- Parents of the suspected student will be invited to participate in the threat assessment and will be advised that the assessment will take place, even if the parents decline to participate;
- A threat assessment could result in referrals to discipline, other interventions, mental health referrals, child find referrals, and/or law enforcement referrals; and
- Notice of the threat and the outcome of the threat assessment will be provided to any employee who is the subject of a threat. Employment issues, including employee protection, are discussed in Section V of the manual.

2. Interdisciplinary Team

An interdisciplinary team is critical to threat assessment because it increases the information that may be gathered and guides implementation of the process. There should be at least three members of the team. They may include:

- A senior, respected, and trained member of the administration;
- School disciplinary or safety personnel assigned to the school;
- A school or district mental health professional with threat assessment training;
- Local law enforcement, school violence detectives, and/or probation officers;
- Teachers or other school staff with personal knowledge of the person who made the threat;
- Nurses;
- Transportation personnel;
- Representative from IEP team, if applicable;
- Social service workers;
- Others trusted adults or individuals providing services to or have

Practical Tip: Threat Assessment Interview Techniques

1. *Begin with broad, open-ended questions that allow the person to tell their story, and gradually funnel down with narrower follow-up questions.*
2. *Ensure optimizing information obtained by using W questions: who, what, where, when, why, and the question how.*
3. *Stick to the facts and avoid personal opinions when recording information. For example, instead of saying: "I think she's lying," list behaviors that cause suspicion she is lying, such as evading eye contact.*

knowledge of the person who made the threat.

The team may consider involving other individuals who may have information relevant to the particular threat assessment. The team focuses on actions, communications, and behaviors that may indicate that a student presents a safety risk to themselves or others. The team should be trained in appropriate threat assessment protocol and should have specific roles and responsibilities defined. The team should also provide ongoing monitoring of the student, even if the threat has been mitigated.[41]

3. Threat Response Protocol

A threat response protocol is only as good as the information gathering utilized and the guiding principles underlying this process. The U.S. Department of Education and U.S. Secret Service have identified six guiding principles and eleven questions that comprise the "best practices" approach to preventing or reducing violence in schools:[42]

Principles

1. Targeted violence is the result of an oftentimes discernible, process of thinking and behavior that can be identified.
2. Targeted violence stems from an interaction among the individual, the situation, the setting, and the target.
3. An investigative, skeptical, and inquisitive mindset is critical to successful threat assessment.
4. Effective threat assessment is based upon facts rather than characteristics or traits.
5. An "integrated systems approach" should guide threat assessment inquiries and investigations.
6. The central question in threat assessment is whether a student *poses* a threat, not whether the student has made a threat.

Questions to Ask

The threat assessment team should consider, at a minimum, the following 11 questions:

1. What are the student's motives and goals?
2. Have there been any communications suggesting ideas or intent to attack?

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[41] *Id.*

[42] Robert Fein, et al., *Threat Assessment in Schools*, U.S. SECRET SERV. & U.S. DEP'T OF EDUC., https://cdpsdocs.state.co.us/safeschools/Resources/Secret%20Service/ssi_Threat%20Assessment%20schools%20guide,0.pdf (May 2022).

3. Has the student shown inappropriate interest in school attacks, attackers, weapons, or incidents of mass violence?
4. Has the student engaged in attack-related behaviors, such as developing a plan or making efforts to acquire or practice with weapons?
5. Does the student have the capacity to carry out an act of targeted violence?
6. Is the student experiencing hopelessness, desperation, and/or despair?
7. Does the student have a trusting relationship with at least one responsible adult?
8. Does the student see violence as an acceptable, desirable, or only way to solve problems?
9. Is the student's conversation and explanation consistent with the student's actions?
10. Are other people concerned about the student's potential for violence? Have Safe2Tell reports been made about the student?
11. What circumstances might affect the likelihood of an attack?[43]

If the threat assessment team determines that the student does not pose a threat, the threat assessment inquiry may be closed with no further action, though follow-up monitoring of the student may be advisable. If the threat assessment team determines that the student does pose a threat of violence, the team should implement a safety plan to address the risk and consider contacting law enforcement and referring the information for further investigation.[44] If the identified risk is to the student themself, make a safety plan and activate mental health resources and expert supports to ensure that the student cannot cause self-harm.

B. Threats of Self Harm: Suicide Prevention

The threat assessment process is one approach that can be used to assess for a student's risk of self-harm. In recent years, Colorado's suicide rate among adolescents ages 15-19 has been nearly double the national rate.[45] Based on the 2021 Healthy Kids Colorado Survey, 39.6% of youth experienced feelings of depression in the past year (reported feeling so sad or hopeless for two weeks or more in a row that they stopped doing some usual activities).[46] This was an eight

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[43] *Id.*
[44] *Id.*
[45] *Teen Suicide*, AMERICA'S HEALTH RANKINGS, UNITED HEALTH FOUND., https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/teen_suicide/state/CO (last visited July 25, 2022).
[46] *Healthy Kids Colorado Survey, 2021 Results: Key Takeaways By Topics*, COLO. DEP'T OF PUB. HEALTH & ENV'T (2021), https://drive.google.com/file/d/1GPp_4xOOHKNNQmbUj3wbRfMBnAOTXd3w/view.

percent increase over data from 2017.[47] In that same survey, 68.5% of youth experienced poor mental health during the COVID-19 pandemic.[48] Based on this mental health data (and many other resources that confirm these concerns), it is critical for schools and districts to invest in mental health resources, training, and strong policies and procedures to identify and support students struggling with mental health.

Colorado's Safe2Tell is an important resource that can be used to anonymously report potentially suicidal students. In addition, the Colorado School Safety Resource Center created a suicide assessment and intervention toolkit. The toolkit includes a comprehensive suicide risk screening form, monitoring tool, safety plan template, reentry plan template, a self-care plan, and resources for parents and guardians.[49] It also includes a list of suicide prevention and intervention resources.

Colorado's Office of Suicide Prevention also created a suicide prevention plan. The Office's 2019–2020 youth initiatives include funding for youth-serving organizations interested in prioritizing youth suicide prevention, funding for suicide prevention training, and working to implement Sources of Strength, a universal suicide prevention program designed to build socio-ecological protective influences among students, within Colorado schools.[50]

The Colorado Legislature passed the Youth Mental Health Education and Suicide Prevention bill, which allows minors 12 years of age or older to seek and obtain psychotherapy services with or without the consent of a parent or guardian. The Act further requires that the Colorado Department of Education create and maintain a mental health education literacy resource bank.[51]

The National Suicide Hotline Designation Act of 2020 imposes a fee to fund the efficient and effective routing of calls made to the 9-8-8 national suicide prevention and mental health crisis hotline to an appropriate crisis center and provide personnel.[52]

Finally, school districts should consider whether to implement a system for monitoring student email and internet use while on school devices and internet systems. Using keyword searches, these systems can help identify risks of violence to self or others. For example, if a student emails their friend on school internet or email about a plan to commit suicide, the district

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[47] *Id.*
[48] *Id.*
[49] *CSSRC Tools and Toolkits: Suicide Prevent*, COLO. SCH. SAFETY RES. CTR. COLO. DEP'T OF PUB. SAFETY, https://cssrc.colorado.gov/resources/cssrc-tools-and-templates (last visited Oct. 3, 2022).
[50] *Id.*; SOURCES OF STRENGTH, https://sourcesofstrength.org/ (last visited July 25, 2022).
[51] *Mental Health Education Literacy Resource Bank*, COLO. DEP'T OF EDUC., https://www.cde.state.co.us/healthandwellness/mhrb-about (last visited July 25, 2022).
[52] 47 U.S.C.A. § 251a.

can alert safety staff or law enforcement to conduct an immediate welfare check. These systems have been known to save lives.[53]

ADDITIONAL TOOLS FOR CREATING SAFE SCHOOL CLIMATES

Many of the requirements of the Safe Schools Act are rooted in the creation of a safe school climate or culture. However, school leaders will tell you that safe school climates require more than policy. Creating cultures and climates of physical and psychological safety and respect within schools is helped by trauma-informed strategies, addressing physical and emotional school climate issues, and data collection and review.

A. Trauma-Informed Strategies

Developing an understanding of trauma and how it impacts students and staff is critical to creating a climate of physical and psychological safety. Trauma results from an event or series of events or set of circumstances that a person experiences as physically or emotionally harmful or life-threatening. It has lasting effects on a person's functioning, and mental, physical, social, emotional, and spiritual well-being.[54]

Children who are exposed to abuse, discrimination, violence, neglect, and other adverse experiences face significantly increased risk of serious health, social, emotional, and learning problems throughout their lives.[55] Traumatic experiences, also known as Adverse Childhood Experiences, cause higher rates of suspension and unexcused absences and lower rates of high school graduation.[56] Children who experience significant trauma can develop anger, emotion dysregulation, poor coping skills, antisocial behavior, negative attitudes, and impulsivity, all of which can be precursors to violence. These experiences are almost contagious—impacting other children and adults who interact with a child who experienced trauma.[57]

The ever-present threat of school shootings and the lockdowns drills that help students prepare for and respond to safety threats can also be trauma-inducing. Lockdowns can be

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[53] When implementing these systems, consider this helpful guidance to ensure that they do not disproportionately impact marginalized students or contribute to the school-to-prison pipeline. *Hidden Harms: The Misleading Promise of Monitoring Students Online,* Ctr. for Democracy and Tech. (Aug. 2022), https://cdt.org/insights/report-hidden-harms-the-misleading-promise-of-monitoring-students-online/.

[54] *Trauma-Informed Approaches in Schools: Keys to Successful Implementation in Colorado*, COLO. DEP'T OF EDUC. (Feb. 2018), https://www.cde.state.co.us/pbis/traumainformedapproachesarticle.

[55] *Id.*

[56] *See Adverse Childhood Experiences (ACEs)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/aces/index.html (last visited July 25, 2022).

[57] *Creating, Supporting, and Sustaining Trauma-Informed Schools: A System Framework*, THE NAT'L CHILD TRAUMATIC STRESS NETWORK (2017), https://www.nctsn.org/sites/default/files/resources//creating_supporting_sustaining_trauma_informed_schools_a_systems_framework.pdf at 1.

triggered by police action in neighborhoods, online threats, or other perceived dangers. Recently, schools have seen an increase in "swatting" – fake calls to trigger police response to an alleged active shooter – which are both illegal and highly damaging to the sense of safety in school. Lockdowns can produce anxiety, stress, and traumatic symptoms in students and staff, and cause a loss of instructional time. This trauma can be mitigated with proper preparation before the lockdown, clear communication and support during the lockdown, and open communication and care provided after the lockdown.[58]

The Colorado Department of Education recommends a multi-tiered approach to mitigate trauma's impact and includes a specific emphasis on appropriate trauma-specific services, including comprehensive behavior plans and staff training to minimize traumatic triggers.[59]

B. Creating a Safe School Climate

The U.S. Secret Service and Department of Education have identified eleven major components and tasks for creating a safe school climate.[60]

Major components and tasks for creating a safe school climate:		Assess the school's emotional climate by surveying students, faculty, and other stakeholders.
		Emphasize the importance of listening in schools.
		Take a strong, but caring stance against the code of silence.
		Work actively to change the perception that talking to an adult about a student contemplating violence is considered snitching.
		Find ways to stop bullying.
		Empower students by involving them in planning, creating, and sustaining a school culture of safety and respect.

[58] *School Safety and Crisis: Mitigating Negative Psychological Effects of School Lockdowns: Brief Guidance for Schools,* NAT'L ASS'N OF SCH. PSYCHOLOGISTS, https://www.nasponline.org/resources-and-publications/resources-and-podcasts/school-safety-and-crisis/systems-level-prevention/mitigating-psychological-effects-of-lockdowns (2018) at 1-3.

[59] *Trauma-Informed Approaches in Schools: Keys to Successful Implementation in Colorado*, COLO. DEP'T OF EDUC. (Feb. 2018), http://www.cde.state.co.us/pbis/traumainformedapproachesarticle.

[60] *Threat Assessments in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates*, U.S. SECRET SERV., U.S. DEP'T OF EDUC. (July 2004), https://www2.ed.gov/admins/lead/safety/threatassessmentguide.pdf.

	Ensure that every student feels that he or she has a trusting relationship with at least one adult at school.
	Create mechanisms for developing and sustaining safe school climates.
	Be aware of physical environments and their effects on creating comfort zones.
	Bring all stakeholders to the table.
	Consider local factors: school leadership, student group buy-in, and connection to community and law enforcement.

C. Data Collection and Review

Data collection and analysis can help districts and schools determine whether they are meeting these goals and helps identify areas of improvement.[61] The University of Colorado Boulder's Center for the Study and Prevention of Violence's Safe Communities Safe Schools (SCSS) Model encourages school districts and/or school leaders to collect data at the student, staff, and community levels to identify gaps and needs related to safety and behavioral concerns.[62] It specifically recommends measuring "school climate, systems that influence school safety, and community readiness and motivation to take action towards change."[63] This data can be collected, analyzed, and used the schools develop, implement, and monitor school safety plans.

SCSS offers school climate surveys for varied audiences, including elementary school students, middle school students, high school students, and parents, at a moderate cost.[64] These surveys help schools determine how they are doing on the major components of a safe school climate. For example, the SCSS Middle School Climate Survey asks students whether they

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[61] *See Colorado School Safety Guide*, COLO. DEP'T OF LAW (2019), https://coag.gov/app/uploads/2019/10/coloradoag_schoolsafetyguide_final_electronic_v2.pdf.
[62] *Safe Communities Safe Schools*, CTR. FOR THE STUDY AND PREVENTION OF VIOLENCE, UNIV. OF COLO. BOULDER, https://cspv.colorado.edu/what-we-do/initiatives/safeschools/ (last visited Oct. 1, 2022).
[63] *Id.*
[64] *School Climate Surveys*, CTR. FOR THE STUDY AND PREVENTION OF VIOLENCE, UNIV. OF COLO. BOULDER, https://cspv.colorado.edu/what-we-do/surveys/ (last visited Oct. 1, 2022).

would report another student's unsafe or dangerous behavior.[65] Aggregating students' answers to this question allows schools to evaluate whether they have successfully pushed back against the code of silence and the perception that talking to an adult is 'snitching.'

Other organizations also offer school climate surveys. The National Center on Safe Supportive Learning Environments maintains a compendium of assessments that schools can use.[66] Other surveys and assessments, while not specifically addressing climate, can also provide valuable information to schools. Schools may incur costs to administer these surveys. Options include:

- The CDC's Crime Prevention Through Environmental Design School Assessment, which rates the physical parts of a school that may impact youth fear and aggressive behavior;[67] and
- The Healthy Kids Colorado Survey, a comprehensive survey of middle and high school students' health and well-being.[68]

Once schools have collected climate data, they should develop culture and climate action plans to address gaps and needs identified by the data. For example, in developing these plans, schools can use the Colorado School Safety Resource Center's Positive School Climate Action Plan Template.[69] After developing these plans, schools should continue to collect data to analyze the plans' effectiveness.

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[65] *Middle School Climate Student Survey Sample*, CTR. FOR THE STUDY AND PREVENTION OF VIOLENCE, UNIV. OF COLO. BOULDER, https://cspv.colorado.edu/wp-content/uploads/2019/03/SCSS-Student-Survey-MS-CORE-web-sample.pdf (last visited Oct. 1, 2022).

[66] *School Climate Survey Compendium*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENVIRONMENTS, U.S. DEP'T OF EDUC., https://safesupportivelearning.ed.gov/topic-research/school-climate-measurement/school-climate-survey-compendium (last visited Oct. 1, 2022).

[67] *Using Environmental Design to Prevent School Violence*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/youthviolence/cpted.html (last visited Oct. 1, 2022).

[68] *Healthy Kids Colorado Survey and Smart Source Information*, COLO. DEP'T OF PUB. HEALTH AND ENV'T, https://cdphe.colorado.gov/hkcs (last visited Oct. 1, 2022).

[69] *Positive School Climate Action Plan Template*, COLO. SCH. SAFETY RES. CTR., *available at Tool Box*, READINESS AND EMERGENCY MANAGEMENT FOR SCHS. TECHNICAL ASSISTANCE CTR., https://rems.ed.gov/ToolBox.aspx (last visited Oct. 1, 2022).

II. STUDENT DISCIPLINE

CHAPTER INTRODUCTION

Even the most successful systems do not prevent all student disruption and misconduct. When students engage in misconduct, Colorado law requires a guided framework for response, particularly for the use of exclusionary discipline (suspension and expulsion). As discussed in Section I, school districts and charter schools must have a written code of conduct, and they must administer it "uniformly, fairly, and consistently for all students."[70] The procedures governing schools' responses to student misconduct are set forth below.

When implementing the guidance of this chapter, it may be helpful to consider these questions:

- Are staff trained in trauma-informed, culturally responsive, and restorative protocols to respond to behavior with the understanding that behavior is communication?
- When is behavior a manifestation of trauma, mental health, or a disability that triggers the district's child find obligations?
- Does the district review whether its disciplinary practices are implemented without a discriminatory impact on any group?

A. Proportionate, Non-Exclusionary, and Non-discriminatory Discipline

Policies and training are essential to ensure that discipline is proportionate and non-discriminatory. Volumes of research demonstrate that school districts in Colorado and across the country struggle to meet these two foundational requirements. Additionally, there has been a shift to favor alternatives to exclusionary discipline.

1. Alternatives to Exclusionary Discipline

Colorado law requires schools to implement "plans for the appropriate use of prevention, intervention, restorative justice, peer mediation, counseling, or other approaches to student misconduct . . . to minimize student exposure to the criminal and juvenile justice system."[71] Thus, while out-of-school suspensions and expulsions may be appropriate in some cases, state law requires schools to consider alternative interventions first.

Restorative practices are one alternative in situations involving interpersonal conflict, bullying, verbal and physical conflicts, damage to property, or class disruption. Restorative

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[70] § 22-32-109.1(2)(a)(I), C.R.S.
[71] *Id.* at (2)(a)(II)(B).

practices seek to repair the harm to the complainant (or victim) and the school community caused by a respondent (or offender) student's misconduct. A complainant-initiated conference between the complainant and the respondent student is one example of restorative practice in an academic setting. Participants may include the complainant, their advocate, the respondent student, school members, and supporters of the complainant and respondent students. Such conferences are intended to provide the respondent student with an opportunity to accept responsibility and cooperate with the complainant student and school officials to determine what consequences would repair the harm to the complainant and the community.[72]

Restorative approaches are not appropriate in all situations. For example, a victim of sexual misconduct, domestic violence, stalking, or violation of a protection order cannot be required to participate in a restorative justice or peer mediation program.[73] The U.S. Department of Education requires schools to be sensitive to victims of offenses prohibited by Title IX, including sexual harassment and assault. Title IX complainants must be provided with supportive measures, such as the option of an alternative class schedule and identifying options for counseling, academic support, and victim advocacy.[74] In these situations, the protocols of the district's Title IX process must be implemented separately and before discipline is implemented. Title IX considerations are discussed later in this Section.

The Colorado School Safety Resource Center offers a wealth of suggestions on alternative discipline options.[75] The Alternative Discipline Workgroup identified the following as the "three pillars of effective discipline":

- **Reflective:** The student should be reflecting and gaining insight into their behavior.
- **Restorative:** The student should have the opportunity to repair the relationship or items that were damaged.
- **Instructional:** The student should gain knowledge and practice skills that will help them in the future.[76]

For example, the student could be required to take a substance abuse training if the misconduct involved the use of drugs or alcohol. For peer conflict, a student could write an apology letter to the student who was harmed. With creative thinking, the options can be tailored to the students and the community.

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[72] § 22-32-144(3), C.R.S.
[73] § 22-32-109.9(2)(a)(II)(B), C.R.S.
[74] *Know Your Rights: Title IX Requires Your School To Address Sexual Violence*, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC. (2014), https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf.
[75] *Discipline in Schools*, COLO. SCH. SAFETY RES. CTR., COLO. DEP'T OF PUB. SAFETY, https://cssrc.colorado.gov/discipline-in-schools (last visited Sept. 27, 2022).
[76] *Creative Discipline & Alternatives to Suspension*, COLO. DEP'T OF EDUC., https://www.cde.state.co.us/mtss/creativedisciplinealternativestosuspensionhand-out (last visited Oct. 1, 2022).

Exclusionary discipline, such as out-of-school suspension and expulsion, removes students from their current learning environment. As school districts begin to see the impact of the COVID pandemic on learning loss, it is especially critical that students have access to instruction. Exclusionary discipline can set students back academically when students need to be accelerating their learning. When in-school or out-of-school suspension is necessary, consider recording the class, requiring virtual participation, or other creative solutions to continue access to core instruction.

2. Non-discriminatory Implementation of Exclusionary Discipline

Discipline, and particularly exclusionary discipline, disproportionately affects students of color, LGBTQ students, and students with disabilities.[77] Colorado law requires that policies "apply equally to all students regardless of their economic status, race, gender, ethnicity, religion, national origin, sexual orientation, or disability."[78] To combat these identified disparities, districts must provide oversight on the disciplinary discretion provided to school leaders, invest in bias, trauma, and cultural competency training, and develop strong positive behavior intervention systems and alternative practices for exclusionary discipline.

Discrimination in student discipline is an enforcement priority for the U.S. Department of Education's Office of Civil Rights and the U.S. Department of Justice. The OCR enforces federal civil rights laws, including race, color, national origin, gender, disability, and age. The OCR has recently solicited information related to civil rights issues in student discipline.[79] Based on this request, OCR will likely issue new guidance related to discrimination in discipline.

B. Disrupting the School-to-Prison Pipeline

Current Colorado law and policy discourages school districts from involving law enforcement in the school district's internal disciplinary processes. The goal: disrupt the school-to-prison pipeline by decreasing referrals to law enforcement for school-based misconduct when that misconduct can be addressed through school disciplinary procedures. The "school-to-prison pipeline" refers to the conditions and dynamics that result in students being subjected to law enforcement penalties for in-school actions or subjected to consequences that increase the likelihood of future criminal justice involvement.[80]

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[77] *See Engaging Our Community: School Justice Roundtable Report*, COLO. DEP'T OF LAW (Feb. 2021): https://coag.gov/app/uploads/2021/03/School-Justice-Report_Engaging-Our-Community_22021-2.pdf; *Civil Rights Data Collection, Data Snapshot: School Discipline*, U.S. DEP'T OF EDUC. (March 2014), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf.

[78] § 22-32-109.1, C.R.S..

[79] *U.S. Department of Education's Office for Civil Rights Seeks Information on the Nondiscriminatory Administration of School Disciple*, U.S. DEP'T OF EDUC. (June 4, 2021), https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-seeks-information-nondiscriminatory-administration-school-discipline.

[80] *See Engaging Our Community: School Justice Roundtable Report*, COLO. DEP'T OF LAW (Feb. 2021): https://coag.gov/app/uploads/2021/03/School-Justice-Report_Engaging-Our-Community_22021-2.pdf

Absent exigent circumstances, interventions that are reflective, restorative, and instructional and offered by the school community may be more effective to change behavior and restore harm than a referral to law enforcement. In the 2020-21 school year, there were 1,023 criminal tickets or arrests of students that occurred at school.[81] Half of these criminal tickets or arrests were for elementary and middle school students – students who are still developing their executive functioning, impulse control, and emotional regulation.[82] For all of the incidents, from elementary through high school, the majority were for misconduct at school that could have been handled through the school discipline process – e.g. fighting/disorderly conduct, tobacco, alcohol, marijuana, property damage, trespassing, harassing communication, traffic offense, and theft.[83] Hispanic and Black students were more likely to receive a summons/ticket compared to White students.[84] For cases where the student was arrested, 67% were sentenced to probation/deferred judgment/intensive supervision and 26% were sentenced to the Division of Youth Services (DYS).[85] Black students were more likely to receive a sentence to DYS (29%) compared to White (6%) or Hispanic (5%) youth.[86]

These considerations do no inhibit or discourage timely contact with police to prevent violence or respond to a threat. Law enforcement should be called immediately when there is a current and ongoing threat to the school community that requires police support.

C. Discipline Policies[87]

1. Suspension and Expulsion[88]

Suspension and expulsion are considered "exclusionary" forms of discipline. While Colorado encourages alternative forms of discipline where possible, it also recognizes that exclusionary discipline may be necessary in some circumstances to optimize school safety and prevent school violence. Colorado law outlines the circumstances in which students *may* be

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[81] As a result of HB15-1273, Colorado tracks law enforcement contacts with students. Districts can review their individual data to determine what offenses are being referred to law enforcement and what schools are resulting in those referrals. *Summary of Law Enforcement and District Attorney Reports of Student Contacts*, COLO. DEP'T OF PUB. SAFETY (June 2022), https://cdpsdocs.state.co.us/ORS/Docs/Reports/2022-HB15-1273StudentContacts.pdf, at 13. The number of contacts for 2020-21 was one-fifth of the reported contacts with law enforcement for the 2019-20 school year. Thus, when schools were closed due to COVID, there was a significant decrease in students being referred to law enforcement – evidence that the "school-to-prison pipeline" is a reality.

[82] *Id.* at 13.

[83] *Id.*

[84] *Colorado Division of Criminal Justice Releases Report on Student Contacts with Law Enforcement, Criminal Justice System*, DIV. OF CRIM. JUST., COLO. DEP'T OF PUB. SAFETY (Sept. 19, 2022), https://dcj.colorado.gov/news-article/colorado-division-of-criminal-justice-releases-report-on-student-contacts-with-law.

[85] *Id*.

[86] *Id.*

[87] *See Colorado Compilation of School Discipline Laws and Regulations*, U.S. DEP'T OF EDUC. (March 31, 2021), https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/Colorado%20School%20Discipline%20Laws%20and%20Regulations.pdf.

[88] *See* §§ 22-33-105 and -106, C.R.S.

suspended or expelled, based upon the school's discretion, and the conduct that *requires* expulsion. Students are afforded due process rights in all forms of exclusionary discipline.

All districts are encouraged to "consider each of the following factors before suspending or expelling a student" for a discretionary ground for suspension or expulsion:

(a) The age of the student;

(b) The disciplinary history of the student;

(c) Whether the student has a disability;

(d) The seriousness of the violation committed by the student;

(e) Whether the violation committed by the student threatened the safety of any student or staff member; and

(f) Whether a lesser intervention would properly address the violation committed by the student.[89]

a. Suspension

Colorado statute sets a maximum number of days that a student can be suspended if the school district delegates suspension authority to the school principal.[90] The statute sets different limits depending on whether the school board retains the power to suspend or if it is delegated to the superintendent or if the superintendent or board agree to extensions of the original suspension.[91] However, in light of the considerations described above, school districts should evaluate whether to permit the maximum number of days. School districts can indicate by policy whether they permit in-school or out-of-school suspension for particular conduct. Some districts will also include limitations on suspension and/or expulsion for their earliest grades (e.g. ECE-3).[92]

The maximum length of a potential suspension (if delegated to a school principal) is follows[93]:

Behavior Warranting Possible Suspension or Expulsion	**Maximum Number of Suspension Days**
Continued willful disobedience	5[94]

[89] § 22-33-106(1.2).
[90] § 22-33-105(2)(a).
[91] § 22-33-105(2)(b).
[92] *See, e.g.*, *Denver Public Schools Discipline Matrix*, DENVER PUB. SCHS., https://go.boarddocs.com/co/dpsk12/Board.nsf/files/C8DUB47B32D6/$file/Final%20Attachment%20B%20Discipline%20Matrix%20October%202021%20-%20Matrix%20Oct%202021.pdf (last visited Oct. 3, 2022).
[93] § 22-33-105(2)(a), C.R.S.
[94] "Days" refers to school days, not calendar days.

Open and persistent defiance of proper authority	5
Willful destruction or defacing of school property	5
Behavior on or off school property that is detrimental to the welfare or safety of other students or school personnel, including behavior that creates a threat ofphysical harm to the student or other students	5
Possessing a dangerous weapon on school grounds, in a school vehicle, or at a school activity or event (without authorization)	10
Drugs or controlled substances – use, possession, orsale on school grounds, in a school vehicle, or at a school activity/event	10
Robbery – committing an act on school grounds, in a school vehicle, or at a school activity or event that would be considered robbery if committed by an adult	10
Assault – committing an act on school grounds, in a school vehicle, or at a school activity or event that would be considered 2nd degree or greater assault if committed by an adult	10
Repeated interference with the school's ability to provide educational opportunities to other students	5

When decisions are delegated to the school principal, the school district's "Executive Officer," usually the superintendent, may also extend a suspension beyond the limits listed for up to an additional ten school days. The Executive Officer may extend the suspension another ten school days (for a total of twenty additional school days) to bring the matter before the next school board meeting. However, the total period for which a student may be suspended cannot exceed twenty-five school days.[95] Additional suspension time is often used to determine whether to proceed with expulsion proceedings based on the conduct. **Suspension of students with disabilities for more than ten days (consecutive or all together in a year) requires the district to follow additional procedures described below.**

[95] § 22-33-105(2)(b), C.R.S.

b. Expulsion

Under statute, discretionary expulsions are available for the same grounds listed for suspensions. In addition, a school can expel a student if the school determines the student does not qualify for admission or continued attendance at the school. **Expulsion of students with disabilities requires different considerations and is discussed below.**

Colorado law provides that expulsion should be used sparingly as a "last step taken after several attempts to deal with a student who has discipline problems."[96] Students should be expelled only when their behavior would cause imminent harm to others or when the incident is of a type that requires mandatory expulsion.[97] Expulsion is mandatory if a student was determined to have brought a firearm to school or to have possessed a firearm at school.[98] In that situation, the student shall be expelled for a period of not less than one year; except that the superintendent may modify this requirement on a case-by-case basis if such modification is in writing.[99]

c. Due Process Requirements for Suspensions and Expulsions

Schools must afford students their constitutional due process rights before excluding them from school. The level of rights afforded depends on the proposed discipline:

Suspension of ten days or less

- Notice of the allegations and related evidence
- Meeting in which student has the opportunity to explain their side of the story
- Meeting must be prior to removal unless emergency circumstances require immediate removal
- Meeting can occur immediately after incident
- No right to counsel
- No right to confront and cross-examine witnesses
- No right to call witnesses
- Parent[100] notification is required and must include: that student is suspended; the grounds for suspension; the period of suspension; and the meeting time and place for parental meeting with principal
- School must provide alternative to suspension: allowing parent to attend classes with

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[96] § 22-33-201.
[97] *Id.*
[98] § 22-33-106(1.5).
[99] *Id.*
[100] "Parent" refers to parent or legal guardian throughout.

the student (with consent of teacher(s))

- Opportunity for makeup work for full or partial credit

Suspension greater than ten days (*see additional considerations for students with disabilities)

- Same as above, plus
- Student must be afforded a review of the suspension before an appropriate school district official

Expulsions (*see additional considerations for students with disabilities)

- More formal hearing before hearing officer must be conducted before expulsion, upon student or parent request
- Hearing officer may be superintendent, school board members, or individual appointed by board or superintendent
- Right to representation by counsel
- Right to present evidence, including character evidence supporting reduced sanctions
- Right to challenge evidence brought by school
- Student admissions or statements may not be used unless it was signed by the student, and a parent was present when signed or a reasonable attempt was made to contact the parent before signature[101]
- Written decision within five days; hearing officers other than the superintendent must prepare findings of fact and a recommendation regarding expulsion, and send it to the executive officer (usually the superintendent) or their designee
- The executive officer makes the expulsion decision within the five days post hearing
- Upon expulsion, student has ten days to appeal to the school board. Late appeals may be accepted at board's discretion

Appeals

- The appeal with the local board of education shall consist of a review of the facts that were presented and that were determined at the hearing conducted by the executive officer or by a designee acting as a hearing officer, arguments relating to the decision, and questions of clarification from the board of education[102]

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[101] § 22-33-106.3, C.R.S. Reasonable attempt means the school must call each phone number provided by the parent and any additional numbers provided by the student.
[102] §22-33-105(2)(c).

- If the child is denied admission or expelled, the child shall be entitled to a review of the decision of the board of education in accordance with section 22-33-108, C.R.S.
- Under the procedures of section 22-33-108, the student or parent must provide written notice of intent to appeal within five days of official notice of board's decision
- Following student notice, the board must issue written reasons for the board's actions to the student or parent
- Ten days following receipt of the board's written reasons, student or parent may file district court action requesting the board decision be set aside
- The district court uses the abuse of discretion standard, examining the entire procedure used in the expulsion[103]

d. Services for Expelled Students

Upon expelling a student, the school district must provide information to the student's parent concerning the educational alternatives available to the student during the period of expulsion.[104] If the parent chooses to provide a home-based educational program for the student, the school district must assist the parent in obtaining appropriate curricula for the student (if the parent requests it).[105] There are detailed requirements regarding the services for expelled students. Review Section 22-33-203, C.R.S. closely and confer with your legal counsel.

e. Re-enrollment Following Expulsion for Sex Offenses and Crimes of Violence

A student expelled for a sex offense or crime of violence may not enroll or re-enroll in the same school where the victim or a member of the victim's immediate family is enrolled or employed. If the school district has only one school in which the expelled student can enroll, the school district may either prohibit the expelled student from enrolling, or, to the extent possible, design a schedule for the expelled student that prevents contact between the expelled student and the victim or victim's family member.[106] These requirements apply only if the student was convicted, adjudicated as a juvenile delinquent, received a deferred judgment, or was placed in a diversion program because of the offense.

2. Disciplining Students with Disabilities – Manifestation Determinations

A detailed review of the laws governing discipline of students with disabilities is beyond the scope of this manual. Generally, a student with a disability cannot be suspended for more

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[103] Colo. R. Civ. P. 106(a)(4); Colo. R. Juv. P. 3.8; *Nichols v. DeStefano,* 70 P.3d 505, 507 (Colo. App. 2002) (citing *Tepley v. Pub. Emps. Ret. Ass'n*, 955 P.2d 573, 578 (Colo. App. 1997).
[104] § 22-33-203(1).
[105] *Id.*
[106] § 22-33-106(4), C.R.S.

than ten days (or have a series of removals for more than ten school days in a year) or expelled unless the school district reconvenes the IEP team and determines if the conduct was a manifestation of the student's disability.[107] If the suspension is ten days or less, it is considered an appropriate interim alternative educational setting and does not require reconvening the IEP team.[108]

If the suspension or expulsion will last more than ten days, the school must determine whether the student's misconduct is a manifestation of their disability. For the manifestation determination, the Local Education Agency (LEA), the parent, and relevant members of the student's IEP Team must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parent/guardian to determine: (1) if the conduct was caused, or a had a direct and substantial relationship to, the student's disability, or (2) if the conduct was a direct result of the LEA's failure to implement the IEP.[109] If either of those are determined to be true, the school cannot use regular disciplinary procedures. Instead, the parent and the IEP Team must either: (1) conduct a functional behavioral assessment (unless one has already been conducted) and implement a behavior intervention plan for the student, or (2) if a behavioral intervention plan has already been developed, review and modify the plan, if necessary, to address the behavior.[110]

Regular disciplinary procedures can be used when the misconduct is not a manifestation of the student's disability. However, regular disciplinary processes cannot conflict with any specific terms of the student's IEP or the Individuals with Disabilities Education Act's protections for children with disabilities.[111]

In addition, OCR recently issued new guidance related to discipline of students with disabilities. This guidance recognizes the disproportionate use of discipline for students with disabilities, particularly Black students. It also recommends the use of positive behavioral interventions and supports.[112]

3. Disruptive Students

Colorado law makes suspension and expulsion permissive rather than mandatory for students deemed habitually disruptive. Schools are required to implement policies for allowing a teacher to remove a disruptive student from the classroom. At a minimum, the teacher or principal must contact the student's parent as soon as possible after a removal to request that the

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[107] 34 C.F.R. §§ 300.530, 300.536.
[108] 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b).
[109] 34 C.F.R. § 300.530(e).
[110] *Id*. at § 300.530(f).
[111] *New Guidance Helps Schools Support Students with Disabilities and Avoid Disparities in the Use of Discipline*, OFF. OF SPECIAL EDUC. AND REHABILITATIVE SERVS., U.S. DEP'T OF EDUC. (July 19, 2022), https://sites.ed.gov/idea/new-guidance-helps-schools-support-students-with-disabilities-and-avoid-discriminatory-use-of-discipline/.
[112] *Id.*

parent attend a student-teacher conference. The policy must include a provision that permits the school's principal or designee to develop and implement a behavior plan for any student removed from a classroom based on behavioral issues. A behavior plan is not required after one incident but becomes mandatory once a student is removed a second time. The law also allows a teacher to remove a student permanently once the student has been removed from the same classroom at least three times.[113]

A student may be declared habitually disruptive if the student "causes a material and substantial disruption on school grounds, in a school vehicle, or at a school activity or sanctioned event three or more times during the school year." Once a school determines that a student is habitually disruptive, it must provide the student and parents with written notification. The notification must advise the student and parents of the definition of habitually disruptive and must specify the incidents that resulted in the habitually disruptive determination.[114]

School districts should tread carefully when implementing these provisions due to the potential impact on students of color and students with disabilities. While removals may be justified, they are fact- and context-specific; for example, in some cases, multiple attempts to remove a student may indicate that additional professional development is needed for the teacher on the topics of classroom management or bias. Alternatively, the removals may indicate that the student should be evaluated for a disability. For students with disabilities, the federal protections of the IDEA will supersede state law requirements.

4. Discipline for Off-Campus Conduct

Schools may discipline students for off-campus conduct in certain circumstances, depending on the nature of the conduct and its relationship to the school. When deciding whether to suspend or expel for off-campus conduct, consider whether there is a ***nexus*** to the school or district. As a reminder, the Colorado legislature indicated that students should only be expelled when their behavior would cause "imminent harm to others in the school" or when the incident is of a type that requires mandatory expulsion.[115]

a. Unlawful Sexual Behavior or Crimes of Violence

Courts and prosecutors must notify schools when a student is charged with a crime that would constitute unlawful sexual behavior or a crime of violence, if committed by an adult.[116] "Upon receipt of such information, the board of education of the school district or its designee shall determine 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

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[113] § 22-32-109.1, C.R.S.
[114] § 22-33-106, C.R.S.
[115] § 22-33-201.
[116] § 22-33-105(5)(a).

negative example for other students, or create a dangerous and unsafe environment for students, teachers, and other school personnel."[117] If the board or its designee makes such a finding, it can proceed with suspension or expulsion.

Alternatively, the school district can wait until the conclusion of the juvenile proceedings. In this situation, the school district has the discretion to remove the student from the school and educate the student in an alternative education program, such an online program or a home-based education program. If the school district elects to place the student in an alternative education program, the district may proceed with expulsion after the student pleads guilty, is found guilty, or is adjudicated a delinquent juvenile.[118]

School districts should also consider whether they have Title IX obligations in these situations. For example, if the off-campus criminal charge is sexual assault and the alleged offender and victim both attend the school, consider implementing supportive measures for the alleged victim (e.g. safety planning on contact with the alleged offender and access to safe adults in the building).

b. Other Off-Campus Conduct

For other criminal or non-criminal conduct off campus, Colorado statute and caselaw sets limits on the school district's disciplinary authority.[119] To discipline conduct that is not at school or at a school or district event, the conduct must be "detrimental to the welfare or safety of other pupils or of school personnel," such as "behavior that creates a threat of physical harm to the child or other children."[120] The conduct must also bear some reasonable relationship to the educational environment, as discussed in *Martinez v. School District No. 60,* and must not infringe upon rights to freedom of speech, as illustrated in *Mahanoy Area School District v. B.L.*

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[117] *Id.*
[118] *Id.* at -105(5)(b).
[119] § 22-33-106(1)(c), C.R.S.; *see, e.g.*, *Martinez v. Sch. Dist. No. 60*, 852 P.2d 1275, 1278 (Colo. App. 1992).
[120] § 22-33-106(1)(c).

Case Spotlight: Off-Campus Alcohol Use

Martinez v. School District No. 60[121]

A district-wide policy provided for the automatic suspension of any student who sold, used, consumed, *is affected by*, or possesses any type of alcohol during the regular school day or at any district-sponsored activity. Two students drank beer at an off-campus private party and then attended a high school dance. They argued that they did not violate the policy because they did not consume the beer at the district-sponsored event and there was no evidence that they were "affected by" the alcohol at the event. However, they were suspended under the policy because their breath smelled like alcohol, and they admitted to drinking one beer at the private party. The Colorado Court of Appeals observed that "a school district cannot regulate purely private activity having no effect upon [the school] environment."[122] The court remanded for a determination of whether plaintiffs' conduct did in fact violate the policy requiring evidence that the students were "affected by" the alcohol at the event. Note: to avoid the challenge of proving that someone is "affected by" alcohol, most school district policies prohibit being under the influence of drugs or alcohol at school, on buses, or at a school- or district-sponsored event.

In addition, punishing a student for speech, on or off-campus, could implicate the student's First Amendment right to free speech. In *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court noted that students' on-campus speech is ordinarily protected by the Constitution. However, the Court held that school officials may nevertheless discipline students for on-campus speech if they are able to demonstrate the speech would "materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school and collid[e] with the rights of others."[123] This substantial disruption standard has governed schools' discipline decisions for over a half-century. The explosion of social media has increased the potential for off-campus speech to substantially disrupt the school environment.

The U.S. Supreme Court weighed in recently with *Mahanoy Area School District v. B.L.* and held that, although the *Tinker* standard is not directly applicable to off-campus speech, there continues to be a balance of school interests and student interests that must be carefully considered. "[I]n considering student speech that occurs off campus and is unconnected to any school activity, a school: (1) can 'rarely stand *in loco parentis*'; (2) 'will have a heavy burden to

[121] 852 P.2d 1275.
[122] *Id.* at 1278.
[123] 393 U.S. 503, 513 (1969).

justify intervention' when political or religious speech is involved; and (3) must especially respect 'an interest in protecting a student's unpopular expression.'"[124]

Case Spotlight: Off-Campus Social Media Posts

***Mahanoy Area School District v. B.L.*[125]**

A public high school student was suspended from the junior varsity cheerleading squad because she used profanity in a social media post. The post, made off-campus on a Saturday and sent to her private friends, expressed frustration with the school and the cheerleading squad because the student was not chosen for the varsity squad. The U.S. Supreme Court held that the suspension violated the student's rights under the First Amendment. The school's argument that its interest in teaching good manners and thus, punishing vulgar speech aimed at the school community, was weakened by the fact the student spoke outside the school on her own time, did not threaten anyone, and was an expression of criticism, which is protected by the First Amendment. The Court also noted that the school's interest in preventing disruption was not supported when the only discussion of the incident took 5-10 minutes of class time on a couple of days. The Court noted that schools may have license to regulate off-campus speech when it involves behavior like serious or severe bullying or harassment targeting particular people, threats aimed at teachers or other students, failure to follow rules, and breaches of school security devices, none of which were at play in this case.

Although the stakes may seem low in the context of profanity on social media, these issues are particularly challenging when the off-campus speech is hate speech or uses racial slurs. In a recent Tenth Circuit case, the court considered the suspension (and then expulsion) of a Cherry Creek student who posted on social media: "Me and the boys bout to exterminate the Jews," along with a picture of his three classmates wearing hats, including one resembling a foreign military hat from WWII.[126] The district court had dismissed plaintiff student's claim asserting that the discipline violated his First Amendment rights. Relying on the *Mahanoy* considerations, the Tenth Circuit reversed and remanded to allow the case to proceed on the First Amendment claim.[127] Because caselaw is evolving, consultation with legal counsel is critical prior to pursuing a suspension or expulsion for off-campus speech.

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[124] *C1.G on behalf of C.G. v. Siegfried*, 38 F.4th 1270, 1276 (10th Cir. 2022) (summarizing and quoting *Mahanoy Area School District v. B.L.*, 141 U.S. 2038, 2046 (2021)).
[125] 141 U.S. 2038 (2021).
[126] *C1.G on behalf of C.G.*, 38 F.4th at 1274.
[127] *Id*. at 1282.

5. Disciplining At-Risk Students

Colorado law requires schools to adopt policies that identify students who are at-risk of suspension or expulsion. At-risk students may include students who are truant, students who have been or are likely to be declared habitually truant, and students who are likely to be declared a "habitually disruptive student." Once a school district identifies an at-risk student, the school district must provide the student a plan for necessary support services to help avoid expulsion and must work with the student's parent in doing so. These "Expelled and At-Risk Student Services" (EARSS) may include tutoring services, alternative education services, vocational education programs, counseling services, drug or alcohol addiction treatment programs, family preservation services, and any other necessary services.[128] A school district may also provide the required services through agreements with appropriate local government agencies, state agencies (including the Department of Human Services and the Department of Public Health and Environment), community-based non-profits, private schools, the Department of Military and Veterans Affairs, and institutions of higher education (both public and private).[129] The State Board of Education must approve any agreements to provide services by a nonpublic, non-parochial school. Example EARSS funded programs can be found on the Colorado Department of Education website.[130]

D. Additional Legal Considerations in Student Discipline

1. Title IX

PLEASE NOTE: THE U.S. DEPARTMENT OF EDUCATION ISSUED NEW PROPOSED TITLE IX REGULATIONS IN JUNE 2022.[131] IF FINALIZED, THESE REGULATIONS WILL IMPACT THE INFORMATION IN THIS SECTION. PLEASE REFER TO THE OFFICE FOR CIVIL RIGHTS FOR THE MOST UPDATED INFORMATION.[132]

There is significant overlap between school discipline infractions and conduct that could violate Title IX. When student conduct implicates Title IX, appropriate Title IX procedures should be followed. Issues to consider include reporting of sexual harassment, grievance procedures, emergency removal and administrative leave, supportive measures and remedies, informal resolution processes, and training requirements.

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[128] § 22-33-202, C.R.S.
[129] § 22-33-204(1), C.R.S.
[130] *Expelled and At Risk Student Services (EARSS) Funded Programs*, COLO. DEP'T OF EDUC., https://www.cde.state.co.us/dropoutprevention/earss_fundedprograms (last visited September 29, 2022).
[131] *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, U.S. DEP'T OF EDUC. (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.
[132] *Sex Discrimination*, OFF. OF CIV. RTS., U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/rights/guid/ocr/sex.html.

a. Reporting Sexual Harassment

Anyone should be able to report sex discrimination and sexual harassment to the school, including complainants (i.e., those allegedly victimized by sexual harassment), witnesses, and individuals who later become aware of the matter.[133] ***When any employee of a K-12 school becomes aware of sexual harassment, the school district is responsible for responding.*** As part of the response, the Title IX Coordinator must contact the complainant to discuss supportive measures and to explain the process for filing a formal complaint of sexual harassment.[134]

A formal complaint is a document filed by a complainant with the school, describing the allegations of sexual harassment and requesting the school investigate said allegations.[135] When a formal complaint is received, the school must follow its grievance procedures to investigate and resolve the matter.[136]

b. Grievance Procedures

Schools and districts must have grievance procedures to resolve formal complaints of sexual harassment.[137] The procedures must treat complainants and respondents (alleged perpetrators) equitably and provide for an objective review of the evidence before imposing any disciplinary sanctions against a respondent. Grievance procedures must presume that the respondent is not responsible for the alleged conduct and make no determination of responsibility until the end of the grievance process.

The procedures must also state the standard used to determine responsibility, which can be either the preponderance of the evidence or the clear and convincing standard.[138] The preponderance of the evidence standard is generally described as proving something is more likely true than not, while clear and convincing evidence is described as proving something is "highly probable" and leaves no serious or substantial doubt.[139] Regardless of which standard is used, the same standard must be used for formal complaints against student and employee respondents.

Schools should include information about supportive measures, potential sanctions or remedies, and how and why parties can appeal. Finally, schools must require that the Title IX Coordinator and all other people involved in the grievance procedures are adequately trained on the requirements and have no conflict of interest or bias.[140]

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[133] 34 C.F.R. § 106.8.
[134] 34 C.F.R. § 106.44.
[135] A formal complaint can also be signed by the Title IX Coordinator. *See* 34 C.F.R. § 106.30.
[136] 4 C.F.R. § 106.44.
[137] 34 C.F.R. § 106.8.
[138] 34 C.F.R. § 106.45(b)(1).
[139] Colo. Jury Instr., Civil 3:1-2.
[140] 34 C.F.R. § 106.45(b)(1).

Once a complaint is received, the school must send written notification to the parties. The notification must include a description of the allegations, information about the school's grievance process, and the rights of the parties to have an advisor throughout the process and to review any evidence obtained as part of an investigation into the allegations.[141]

Upon receiving the formal complaint and sending the notice of the allegations to the parties, the school's investigation begins. An investigation into sexual harassment allegations must give the parties an equal opportunity to gather and submit evidence and witnesses. Prior to interviewing a party, the party must be sent written notice of the interview details, including the purpose of the meeting. Parties must be able to have another person present during any meetings or other proceedings, who may be an attorney. The school can implement parameters for this person's participation, applied equally to each party.

Before the investigation process is completed, the parties must have equal opportunity to review any evidence that is "directly related" to the allegations, even if the school does not plan to rely on that evidence in its decision-making process. The parties must have at least 10 days to review this evidence and send a written response. The investigator(s) must consider these responses in drafting the investigative report.[142] Once the investigation process is complete and the parties have been given the opportunity to provide their written response to the directly related evidence, the investigator(s) must write an investigative report that fairly summarizes all relevant evidence.

Unlike colleges and universities, K-12 institutions are not required to have a hearing after an investigation into sexual harassment allegations. If the school provides a hearing, it must comply with Title IX.[143] Regardless of whether the school chooses to hold a hearing, the parties must have at least 10 days to review the investigative report prior to any hearing/other decision-making process.[144] The decision-maker(s) should facilitate a process by which parties can submit relevant written questions to be asked of other parties or witnesses, provide the answers to all parties, and allow for (limited) follow-up questions from each party.

Note that questions regarding the complainant's sexual predisposition or prior sexual behavior are generally deemed irrelevant, with two limited exceptions. First, this information can be used to prove someone other than the respondent committed the alleged conduct. Second, the information can be offered to prove the sexual conduct was consensual, but only if the information relates to specific incidents of prior sexual behavior between the complainant and respondent.[145]

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[141] 34 C.F.R. § 106.45(b)(2).
[142] 34 C.F.R. § 106.45(b)(5).
[143] 34 C.F.R. § 106.45(b)(6).
[144] 34 C.F.R. § 106.45(b)(5).
[145] 34 C.F.R. § 106.45(b)(6).

At the end of the decision-making process, the decision-maker(s) must provide their written findings to the parties, including a rationale for the determinations as to each allegation. The written decision must also describe any disciplinary action taken against the respondent, remedies provided to the complainant, and procedures for appealing the determination.[146] The school must give the parties an equal opportunity to appeal. If an appeal is filed, all parties must be notified and given the opportunity to submit a written statement to the appeal decision-maker, who must issue a written decision.[147]

c. Supportive Measures and Remedies

Supportive measures and remedies are services offered by a school to restore or preserve equal educational access. Supportive measures can be provided to any party and should be provided where appropriate and available, regardless of whether a formal complaint has or will be filed with the school. Such measures are non-disciplinary and must be provided at no cost. Common supportive measures include counseling services, work or class schedule changes, restrictions on contact between the parties, and extensions of class or work deadlines.148 Remedies apply after a respondent has been found responsible for sexual harassment. While remedies may include the same types of services referred to as "supportive measures," remedies can also be disciplinary or punitive.[149]

d. Emergency Removal and Administrative Leave

Schools can remove (i.e., suspend) a respondent on an emergency basis if the school determines that there is an immediate threat to the physical health or safety of any student or other person arising from the sexual harassment allegations. The determination must come after an individualized assessment of the circumstances.[150] Immediately after removing the respondent, the school must provide the respondent with notice and an opportunity to challenge the removal decision. In addition to the emergency removal option, federal regulations provide that respondents who are school employees may be placed on administrative leave during the investigation and resolution of the allegations.[151]

e. Informal Resolution Process

Schools may, but are not required to, use an informal resolution process (e.g., mediation or restorative justice practices) in certain circumstances. Schools cannot use an informal resolution process where the allegations involve sexual harassment by an employee against a

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[146] 34 C.F.R. § 106.45(b)(7).
[147] 34 C.F.R. § 106.45(b)(8).
[148] 34 C.F.R. § 106.30.
[149] 34 C.F.R. § 106.45(b)(1).
[150] Threat assessments are discussed in Section I of the manual.
[151] 34 C.F.R. § 106.44.

student. Schools also ***cannot require*** anyone to participate in an informal resolution process or condition enrollment or employment upon participation in such a process.

Once a formal complaint is filed, the school may determine that an informal resolution process is appropriate. If so, the school must obtain voluntary, informed, written consent from the parties to use an informal resolution process. The participants must be given the option, at any time prior to coming to a resolution, to withdraw from the process and resume the formal grievance process.[152]

If an informal resolution process is appropriate, the person(s) facilitating the process must be trained in conducting a compliant informal resolution process.[153]

f. Training Requirements

All individuals involved in the resolution of sexual harassment allegations should be trained to serve impartially and competently, including Title IX Coordinators, investigators, decision-makers, and those facilitating an informal resolution process. Training must include:

- The definition of sexual harassment in 34 C.F.R. § 106.30
- When Title IX applies to the school's education program and activities
- How to serve impartially, including avoiding prejudgment of the facts, conflicts of interest, and bias.

Individuals involved in the process also need to receive training regarding the specific role they will serve. Investigators must be trained on conducting investigations, including issues of relevance. Decision-makers also must be trained on issues of relevance, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant. If the school holds a live hearing, the hearing decision-maker must be trained on conducting hearings, including on any technology that will be used during the hearing.[154]

In addition to the required training for those involved in the Title IX process, all school employees should receive training about the prevention of sexual harassment and their reporting obligations.

2. Mandatory Reporting of Child Abuse Considerations

Student misconduct may sometimes implicate a mandatory reporting requirement under Colorado law. Without training, many school personnel may not realize that some allegations of behavior between students (e.g. student complainant/student respondent regarding unlawful

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[152] 34 C.F.R. § 106.45(b)(9).
[153] 34 C.F.R. § 106.45(b)(1).
[154] *Id.*

sexual contact or sexual assault) could be considered child abuse and a report to law enforcement *must* be made. Child abuse reporting requirements are discussed in Section IV of the manual.

III. SEARCH, SEIZURE, AND RESTRAINT

CHAPTER INTRODUCTION

Colorado law recognizes that a safe learning environment is crucial to the mission of public education. Some student conduct can pose a threat to the safety of students and staff. State law empowers school districts to adopt and enforce policies and procedures to advance safe learning environments. Both state and federal law place limitations on when, how, and why school staff may intervene. This chapter gives school employees the tools to understand what the law requires regarding the search and seizure of students and their property and the essential components of school policy. It also offers practical and legal guidance on physical intervention and restraints.

Key Chapter Topics


Search


Seizure


Restraint


Law Enforcement


Policy

SEARCH AND SEIZURE

A. Core Concepts

1. What is a search?

Evaluating how to respond to suspicions that a student has contraband—such as drugs or a weapon—can be a challenging legal issue for school officials. The discussion below outlines the circumstances under which a school official may properly search a student or the student's personal property. This section also addresses common circumstances under which schools may search students more broadly, such as through use of metal detectors or suspicionless drug testing.

Examples of "searches" under law:		Examining items or places that are not in the open and exposed to public view.
		Physically examining or patting down a student's body or clothing, including the student's pockets.
		Opening and inspecting personal possessions such as purses, backpacks, bags, books, and closed containers.
		Handling or feeling any closed, opaque item to determine its contents when the contents cannot be inferred by the item's shape or other obvious physical properties.
		Using any extraordinary means (for example, x-rays) to enlarge the view into closed or locked areas, containers, or possessions, so as to view items not in plain view and exposed to the public.
		Drug testing.

2. Contours of Permissible Student Searches

The Fourth Amendment of the U.S. Constitution and article II, section 7 of the Colorado Constitution protect people from unreasonable government searches and seizures of both their bodies and belongings.[155] These constitutional protections are triggered whenever a government action intrudes upon an activity or area in which a person holds a ***legitimate expectation of privacy***.

 **Practical Tip: When is there a legitimate expectation of privacy?**[156]	
An expectation of privacy exists when **BOTH** are true:	(1) the person expects the area or activity to remain free from government intrusion, **AND**
	(2) society would recognize their expectation as reasonable.

[155] Article II, section 7 of the Colorado Constitution states in part: "[t]he People shall be secure in their persons, papers, houses and effects, from unreasonable searches and seizures."
[156] *People v. Oates*, 698 P.2d 811, 814 (Colo. 1985).

"Government action" is not limited solely to law enforcement activities. **Teachers and school administrators engage in "government action" whenever they act as employees of a public school or district.** Although teachers may stand in a role like parents while supervising minor students, this parent-like role does not shield them from constitutional requirements and limitations. But because of this special responsibility that school employees have for the wellbeing of students, school employees generally have broader discretion to conduct a search or seizure than government actors in other contexts, such as searches by law enforcement. When the legality of a search is challenged, **courts balance students' expectations of privacy against schools' equally legitimate interests in maintaining order**.[157]

As a result, students have a lesser expectation of privacy within the school environment than they have elsewhere in society.[158]

Case Spotlight: Reasonable Suspicion

***New Jersey v. T.L.O.* (1985)**[159]

A teacher found a student smoking in a school bathroom. When the student denied that she was smoking, an assistant principal searched her purse and discovered cigarettes. As he removed the cigarettes from the purse, the assistant principal noticed that the purse also contained cigarette rolling papers. He knew that rolling papers were often associated with marijuana use. Based on this discovery, he suspected the purse also contained marijuana. He conducted a more thorough search of the purse and found marijuana and other evidence of marijuana use and sale. The student and her family challenged the legality of the search. The U.S. Supreme Court held that while students have some expectation of privacy under the Fourth Amendment, school officials needed only **reasonable suspicion** of a policy violation to conduct a search. In this case, the school's search of the student's purse for cigarettes was reasonable because she was caught smoking in the bathroom. The discovery of rolling papers typically associated with marijuana during that search of the purse provided the necessary reasonable suspicion to search further for other evidence of drug-related activity.

3. How are searches unique in the school setting*?*

First, school officials do not need to obtain a warrant prior to conducting a search or seizure of a student or their property.[160]

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[157] *See New Jersey v. T.L.O.*, 469 U.S. 325, 336-41 (1985) (plurality decision).
[158] *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829-30 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995).
[159] 469 U.S. 325 (1985).
[160] *Id.* at 340.

- The U.S. Supreme Court held that requiring school officials to obtain warrants would unduly interfere with the swift and informal disciplinary procedures needed to maintain an orderly learning environment.[161]

Second, school officials are not required to satisfy the probable cause standard prior to conducting a search or seizure.

- Ordinarily, a search—even one carried out without a warrant—must be based upon "probable cause." Probable cause is defined as a reasonable basis for believing that a violation of the law has occurred or that evidence of a violation is present in the place to be searched.
- However, this standard does not apply to searches conducted by school officials. Rather, for a search on school property, in a school vehicle, or at a school event to be proper, the search must merely be ***objectively reasonable*** under the circumstances.[162]

Practical Tip: Is the search "Objectively Reasonable"?	
Did the school official have a "**reasonable suspicion**"?	Reasonable grounds for suspecting that the search, if conducted, will turn up evidence that the student has violated, or is about to violate, the law or school rules.
Was the search **reasonable in scope**?	• Measures adopted are reasonably related to the objectives of the search, AND • The search is not excessively intrusive considering the age and sex of the student and the nature of the infraction.

To determine whether a search conducted by school officials or employees is objectively reasonable, courts apply a two-prong test: (1) courts look to determine whether school officials had "reasonable suspicion" to justify the search; and (2) courts look to determine whether the search was reasonable in scope.[163]

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

[161] *Id.*
[162] *Id.* at 340-41.
[163] *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

infraction."[164] For example, searching a teenage student's underwear for evidence of a drug violation is not reasonable.[165]

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

a. Student Consent

If a student validly consents to the search, it may be conducted without meeting any legal requirements. School officials always have the option to request a student's consent for a search of the student or the student's belongings.

To be valid, a student's consent **must be voluntary**, meaning it cannot be obtained through duress or coercion.[166] Whether consent to a search is voluntary is a question of fact that considers the totality of the circumstances surrounding the consent. Such circumstances include:

- the student's age,
- level of education,
- mental capacity, and
- whether the student knowingly and intelligently waived the right to refuse consent.[167]

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[164] *Id.* at 341-42.
[165] *Safford Unified Sch. Dist. # 1 v. Redding*, 557 U.S. 364, 374 (2009).
[166] *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).
[167] *Id.* at 226-27, 232-33.

While consent does not necessarily have to be knowingly and intelligently given, those are important factors in evaluating the voluntariness of consent.[168]

Practical Tip: Consent to Search

The most reliable way to establish that a student's consent was voluntary is to **demonstrate that the searched student knew that they had a right to refuse the search.**

Therefore, prior to conducting a consensual search, school officials should notify the student that they have a right to refuse to be voluntarily searched, tell the student why the search is being sought, and what the school officials believe will be found. School officials should document the student's consent in writing, preferably signed by the student.

After being advised of their right to refuse, a student's consent to be searched can be provided either orally or in writing. However, because a student's consent must be clear and unequivocal, a written waiver is preferred. If using a Consent to Search Form, officials should obtain the student's signature prior to the search.

When requesting consent to search, school officials should inform the student why permission to search is being sought and what the school officials believe the search will reveal. Providing such information helps ensure the student's consent is knowing and intelligent. Under no circumstances may school officials threaten a student with punishment for withholding consent, because this will suggest the student's consent was not voluntary.[169]

The student may withdraw consent at any time, and the student's request to terminate the search must be honored.[170] However, school officials may seize any evidence they observed before the student withdrew their consent.[171] If a school official develops a reasonable suspicion,

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[168] See *id.* at 241 (distinguishing the rights guaranteed by the Fourth Amendment from the right to a fair trial).

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

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

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

as explained below, the official may continue the search, even after consent has been withdrawn and over the student's objections.

b. Reasonable Suspicion

Reasonable suspicion is the first of two factors in determining whether a non-consensual search of students or their belongings is reasonable. Reasonable suspicion is founded on common sense—it exists where there are reasonable grounds for suspecting that the search, if conducted, will produce evidence that the student violated or is violating the law or school rules.[172] A school official will have a reasonable suspicion if the official is aware of objective facts and information that, taken as a whole, would lead a reasonable person to suspect that a rule violation has occurred and that evidence of the violation can be found in the place to be searched. The suspicion must be more than a mere hunch, and it must be based upon articulable facts. However, it does not need to rise to the level of absolute certainty or probable cause.[173]

Possible bases for a "reasonable suspicion" may include:

- Observed criminal law or school rule violation in progress;
- Observed weapon or portion of a weapon;
- Observed illegal item;
- Observed item believed to be stolen;
- Student found with incriminating items;
- Smell of burning tobacco or marijuana;
- Student appears to be under the influence of alcohol or drugs;
- Student admits to criminal law or school rule violation;
- Student fits description of suspect of recently reported criminal law or school rule violation;
- Student flees from vicinity of recent criminal law or school rule violation;
- Reliable information provided by others, including evidence incriminating one student turned over by another student;
- Threatening words or behavior;
- Report of stolen item, including description and value of item and place where item was stolen;

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[172] *T.L.O.*, 469 U.S. at 341-42.
[173] *People in Interest of P.E.A.*, 754 P.2d 382, 388-89 (Colo. 1988).

- Student seen leaving area where criminal law or school rules violations are often committed; and
- Emergency situations, where school official can provide immediate assistance to avoid serious injury.

Case Spotlight

***In re William G.* (1985)** [174]

A high school assistant principal noticed a student carrying a small black bag with an "odd-looking bulge," which the student appeared to be trying to conceal by holding the bag to his side and then behind his back. The assistant principal approached the student and demanded to see the bag. When the student refused to hand it over, the assistant principal forcefully took the bag from the student, opened it, and found marijuana inside. On review, the Court held that the assistant principal's search was not supported by a reasonable suspicion. The Court noted that the school official acted with a complete lack of any knowledge or information that would reasonably connect the student to the possession, use, or sale of illegal drugs or other contraband. The student's "furtive gestures" alone were not sufficient to justify the search. Thus, while the threshold for reasonable suspicion is not a high one, school officials must generally be able to articulate a *specific* basis for the suspicion.

Case Spotlight

People In Interest of C.C-S. [175]

This recent case is helpful for assessing when an anonymous tip creates reasonable suspicion for a search. The court found that an anonymous Safe2Tell tip that a defendant had been seen firing a gun in a social media video was insufficient to justify the school safety officer's search of the defendant's backpack even though the defendant had a history of bringing prohibited items to school. The court's nuanced analysis was based on the following: the defendant's prior misbehavior involved him bringing drugs to school, not firearms; the tip was anonymous and unsubstantiated because the school safety officer could not view the video, as it had been deleted; the video was a month old by the time the tip was reported; the tip provided no information about video's source; and the tip gave no indication that the

[174] 709 P.2d 1287, 1297-98 (Cal. 1985).
[175] *People In Interest of C.C-S.*, 503 P.3d 152 (Colo. App. 2021).

defendant would continue to carry a gun.[176] The court noted that a "tip is less supportive of reasonable suspicion after it has gone stale."[177]

c. Scope of the Search

Once reasonable grounds to conduct a search exist, the next step is to establish the reasonable scope of the search, which defines how extensive a search can be. Common sense dictates the appropriate scope of a search. The scope of a search must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[178] In other words, the scope of the search should be reasonably related to the circumstances initially justifying the search.[179] The scope of the search may vary depending on the nature and severity of a potential threat. For example, a search of a student for a gun could be more intrusive than a search of a student for evidence that the student is in violation of a campus chewing gum ban.

Similarly, there must be a logical connection between the thing or place to be searched and the item school officials are seeking to find.[180] When a school official has reasonable suspicion to conduct a search of a student's locker for drugs, the school official may open and inspect any closed containers or objects that are stored in the locker ***if*** the drugs could reasonably be concealed within the containers. However, those same circumstances would not permit the official to read the contents of a diary found in the locker. Likewise, while a teacher's reasonable suspicion that a student stole a textbook would justify a search of that student's backpack or locker, it would not justify a search of that student's clothing or of any containers, such as a small purse, that are too small to conceal the missing textbook.

If, during a reasonable search a school official discovers new evidence of illegal or rule-breaking activity, that evidence may justify a continued or more thorough search of the student or their property.[181] As noted in *New Jersey v. T.L.O.* (spotlighted above), a teacher was able to

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[176] 503 P.3d at 157-59.
[177] *Id.* at 159.
[178] *T.L.O.*, 469 U.S. at 342.
[179] *Id.* at 341 (*citing Terry v. Ohio*, 392 U.S. 1, 20 (1968)).
[180] *See id.* at 496-98 (holding that the scope of a search on school grounds is reasonable when the manner in which the search is conducted, including the location of the search, is "reasonably related to the objectives of the search and not excessively intrusive") (citations and internal quotation marks omitted); *see also United States v. Kimoana*, 383 F.3d 1215, 1223 (10th Cir. 2004) (noting that "[t]he scope of a search is generally defined by its expressed object" and that "[c]onsent to search for specific items includes consent to search those areas or containers that might reasonably contain those items") (citations and quotation marks omitted).
[181] *See, e.g., Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 983 (8th Cir. 1996) (upholding the search of a student after the principal suspected that weapons had been brought to school by an unknown student).

search further once he found rolling papers, because this was additional evidence of contraband.[182]

Similarly, in *People in Interest of P.E.A.*, the Colorado Supreme Court upheld thorough searches of a student's person, locker, and car based upon information received from a local police officer that the student possessed, and intended to sell, drugs at school.[183] The Court recognized the school's legitimate interest in preventing drug transactions from occurring on campus, and it held that the searches were reasonable in light of the information known to school personnel at the time that they conducted the search.[184]

Practical Tip: Searching Cars

The "reasonable suspicion" standard applies equally to students' cars. A car parked on school property receives no greater legal protection than a student's purse or backpack, and it may be searched by school officials under appropriate circumstances.[185] Alternatively, school officials may have students sign waivers to park cars on school property. By signing the waiver, students consent in advance to a search of their vehicles anytime they are parked on school property. Different standards may apply to students' cars parked off campus, based on the specific facts.

There may also be circumstances that justify broader searches during activities away from school grounds. In *Webb v. McCullough*, a principal entered a hotel room of students to search for alcohol during a field trip to Hawaii.[186] The court held that the search of the room was reasonable, noting both that a greater range of activities occur during extracurricular activities and that there are more ways for students to violate school rules or laws on a field trip than during school.[187]

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[182] *Id.*
[183] *People in Interest of P.E.A.*, 754 P.2d 382 (Colo. 1988).
[184] *Id.* at 389-90.
[185] 754 P.2d at 384, 389.
[186] 828 F.2d 1151, 1153 (6th Cir. 1987).
[187] *Id.* at 1157.

Practical Tip: What about disruptive items, like cell phones?

Courts generally respect school policies designed to prevent disruptions, but those policies do not automatically allow a search of students' property causing such disruptions. Policies banning the use or display of cell phones and other personal electronic devices in the classroom are often deemed a legitimate exercise of the school's right to maintain a disruption-free educational environment.[188] If a student violates a "no cell phone" policy, school officials can temporarily confiscate the device.[189] However, the right to seize a phone does not convey a right to search its contents.

Searching the phone's contents would be justified only if the school official has reasonable grounds for believing that the phone contains evidence of other violations of law or school policy. For example, credible reports of "sexting," exchange of improper photos, or evidence that students are using their phones to arrange drug sales could all provide a reasonable suspicion that would justify searching their phones.

d. Strip Searches Receive Heightened Judicial Scrutiny

School officials should be especially cautious before requiring a student to remove items of clothing for conducting a search. Courts will closely scrutinize the facts justifying a search where the search is particularly intrusive, such as one that involves a strip search or physical touching of a student's person.[190]

The term "strip search" includes nude searches, searches that reveal a student's undergarments, and searches that include the removal or re-arrangement of clothing for the purpose of visual inspection of the student's buttocks, genitals, or breasts.[191] The term does not include removal of outer layers of clothing not in direct contact with the student's skin, such as jackets or sweaters.[192] Although strip searches may be appropriate in certain circumstances,

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[188] *See, e.g.*, *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1276, 1280-81 (W.D.Wash. 2007).
[189] *Id.* at 1283.
[190] *Safford Unified Sch. Dist. # 1 v. Redding*, 557 U.S. 364, 374 (2009) (stating that strip searches are "categorically distinct"); *cf. Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 488 (5th Cir. 1982) (holding that the use of drug dogs to sniff school children in close proximity was overly intrusive).
[191] *See id.* at 368-69 (referring to a search that exposed a student's "breasts and pelvic area to some degree" as a "strip search").
[192] *Id.* at 374.

school districts should contact their school attorneys and local prosecutors for guidance and training on the legal requirements for initiating and conducting such a search.

Case Spotlight: Reasonable Scope of a Search

***Stafford Unified School District v. Redding* (2009)**

School administrators strip-searched a middle school girl to look for pills. The U.S. Supreme Court held that although there was reasonable suspicion to search the girl's outer clothes and property, a search of her underwear violated the Fourth Amendment. The Court cited the girl's age (13) and described the search as "embarrassing, frightening, and humiliating."[193]

e. Limited Searches During Medical Emergencies

Generally, the medical emergency exception to the Fourth Amendment permits school officials to search an unconscious or semi-unconscious student and/or their personal belongings for the purposes of discovering the student's identity or providing medical assistance.[194] For example, if school officials were to find an incoherent student on school grounds, those officials could search the student and their belongings to determine what type of substance(s) the student may have ingested. This information could prove invaluable in obtaining emergency medical assistance.

f. Searches Pursuant to a Safety Plan

There are times when a student may be subject to regular searches as part of a threat assessment safety plan. For example, a school should conduct a threat assessment if there are allegations of a student bringing weapons on campus. If the findings of the threat assessment necessitate a safety plan that includes daily searches of the student's backpack, the Colorado Court of Appeals recently held that a school does not need reasonable suspicion every time a search is conducted pursuant to that safety plan.[195] Consult your school attorney for information on this developing area of the law.

B. Law Enforcement's Role

While school officials may conduct a search when they have a reasonable suspicion that a violation of a criminal law or a school rule has occurred, law enforcement officers generally cannot conduct a search without probable cause or a warrant.[196] The probable cause standard requires a reasonable belief that evidence of a crime or wrongdoing exists in the place to be

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[193] *Id.* at 368, 374-75 (2009).
[194] *People v. Wright*, 804 P.2d 866, 869 (Colo. 1991) (citing *Mincey v. Arizona*, 437 U.S. 385,392-93 (1978)).
[195] *People In Interest of J.G.*, 2022 WL 2165523 (Colo. Ct. App. June 16, 2022) (not yet released for publication because a petition for rehearing or a petition for certiorari may be pending as of Sept. 2022).
[196] *People v. Zuniga*, 372 P.3d 1052, 1056 (Colo. 2016).

searched. It is a higher standard than the reasonable suspicion standard applicable to school officials.[197]

Neither the U.S. Supreme Court nor the Colorado Supreme Court have established which standard will control when school officials conduct searches as agents of, or at the behest of, law enforcement.[198] However, other courts have held that "where a search is initiated and conducted by school officials alone, or where school officials initiate a search and police involvement is minimal, the [reasonable suspicion] standard is applicable."[199] Conversely, "where 'outside' police officers initiate, or are predominantly involved in, a school search of a student or student property for police investigative purposes," the ordinary probable cause and warrant requirements will apply.[200] While it is likely that Colorado courts would rule the same way, Colorado law is still uncertain. Therefore, until Colorado courts definitively settle the issue, the timing and extent to which law enforcement becomes involved with searching students or their property is a decision best left to law enforcement officials—not school officials.

C. Suspicionless Searches

1. Suspicionless "Blanket" Searches

School officials also have the authority to conduct suspicionless ***"blanket" searches*** of all students.

Practical Tip: What is a blanket search?

Blanket searches empower school officials to screen all students who are present on school property or are participating in school-sanctioned activities without requiring officials to demonstrate an individualized, articulable suspicion for each student.

Examples include the use of metal detectors, video surveillance, random drug testing, dog sniffs, and campus-wide locker searches. Generally, the purpose of these programs is to prevent students from bringing or keeping dangerous weapons, drugs, alcohol, and other prohibited items on school grounds. Thus,

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[197] *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985) (plurality decision).
[198] *Id.* at 341 n.7; *People in Interest of P.E.A.*, 754 P.2d 382, 385 n.3 (Colo. 1988). In *People In Interest of P.E.A.*, the Colorado Supreme Court found that the school officials were not acting as agents of the police and, therefore, declined to decide which standard would apply if they had acted as agents.
[199] *See, e.g.*, *Myers v. State*, 839 N.E.2d 1154, 1160 (Ind. 2005) (summarizing standards identified by various lower courts in other jurisdictions).
[200] *Id.*

	schools will often adopt inspection programs to demonstrate that certain types of behavior are not tolerated.[201]

These kinds of suspicionless, general search techniques are permissible so long as specific, articulable facts demonstrate an appropriate need for them.[202] School officials should always consult with counsel before adopting inspection programs to ensure that the applicable legal requirements are satisfied.

a. Metal Detectors

Random searches using metal detectors (both walk through and "wand" style) are reasonable administrative searches.[203] However, schools should not use metal detectors as a pretext to target individuals or groups. To ensure the propriety of their use, school districts should implement the following best practices before installing or providing school employees with metal detectors:

- **Make appropriate findings**. The local board of education, school district superintendent, and/or school principal should adopt and memorialize specific findings that detail the problem sought to be addressed using metal detectors. The findings should explain why it is necessary and appropriate to use metal detectors in the school. Balance the documented need against the impact of metal detectors on school culture, the logistics of students getting to classes on time, and the investment of resources in the program.
- **Provide advance notice**. All students, parents, and guardians should be provided with written notice of the metal detector program. Students should also be orally advised of the program in their homeroom classes and/or in a school-wide assembly.
- **Ensure Neutrality**. Prior to implementing the inspection program, high-ranking school officials, such as the superintendent or school principal, should develop a neutral plan for using the metal detectors. School officials should adopt a plan that requires all students to be screened; however, if that is not feasible, school officials should adopt a random selection method. Regardless of the plan adopted by school officials, individual school employees who are responsible for operating the metal

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[201] *See* Jason P. Nance, *Random, Suspicionless Searches of Students' Belongings: A Legal, Empirical, and Normative Analysis*, 84 U. COLO. L. REV. 367, 369-75 (2013), *available at* https://scholarship.law.ufl.edu/facultypub/285/ (last visited August 2, 2022).

[202] *Id.* at 394.

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

detectors should be trained in genuinely random search protocols and they should not have discretion to select which students are screened.

- **Administer the plan carefully**. Prior to screening a student, school employees should ask the student to empty their pockets and belongings of all metal objects. If the student activates the metal detector, school employees should remind the student to remove all metal objects from their pockets and ask the student to complete a second screening. If the metal detector is activated a second time, school officials should use a hand-held magnetometer, if available, to focus on and discover the exact location of the metal source. If the activation is still not eliminated or explained, then school officials may expand the scope and method of the search, which may include a limited pat-down of the student's body because the ongoing activation of the detector itself gives rise to a reasonable suspicion.
- **A pat-down search is permissible only under the following conditions**:

  (1) there must be no less intrusive alternative available,

  (2) the search must be limited to what is necessary to detect weapons, and

  (3) the search must be conducted in a private area away from other students and (whenever possible) by school officials of the same gender as the student.[204] It may also be advisable to have two employees present when feasible to avoid any claims of impropriety against the employee. Always use this two-person approach if there is no option to have the search conducted by a school official of the same gender as the student.

b. Video Surveillance

Video surveillance on school campuses is a critical and encouraged component of campus security. When selecting the locations for security cameras on school campuses, school officials should be cognizant and respectful of student's privacy rights. Students do not have a reasonable expectation of privacy about the actions they take in public spaces, but they do maintain an expectation of privacy in areas like bathrooms and locker rooms.[205]

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

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

Case Spotlight: Surveillance Cameras in Locker Rooms

***Brannum v. Overton County School Board* (2008)**[206]

Middle school students challenged the legality of surveillance cameras in the school locker rooms. A federal court concluded that video surveillance in a middle school locker room was an unreasonable search that violated students' Fourth Amendment privacy rights. The court reasoned that placement of the video cameras in the locker room setting was unnecessary and disproportionate to the school's goal to increase security. The court emphasized that "a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room."[207]

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

c. Random Locker Searches

As discussed previously, school officials may search an individual student's locker when they reasonably suspect the locker contains evidence of a legal or school rule violation. School officials may also conduct random, suspicionless searches of students' lockers **where the authority for such searches is included in the school district's locker search policy**.[208] The policy should make clear that all lockers are the property of the school district and are subject to search by school officials at any time.

Case Spotlight: Searching Lockers

***Zamora v. Pomeroy* (1981)**[209]

A school policy specifically stated that all "lockers remain[ed] under the jurisdiction of the school, notwithstanding the fact that they were assigned to individual students," and "the school reserved the right to inspect all lockers at any time." The U.S. Tenth Circuit upheld the school's use of drug-sniffing dogs to search students' lockers on the basis that the district's policy made it clear to students that they did not have exclusive control over their lockers and

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[206] *Id.*
[207] *Id*. at 499.
[208] *See* § 22-32-109.1(2)(a)(I)(I), C.R.S. (requiring all school districts to adopt locker search policies).
[209] 639 F.2d 662, 665 (10th Cir. 1981).

could expect such searches to occur. Therefore, neither the initial use of dogs to determine which lockers to search, nor the subsequent warrantless searches of the lockers violated the Fourth Amendment because students had no reasonable expectation of privacy in their lockers.

d. Suspicionless Drug Testing

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

Case Spotlight: Drug Testing Student Athletes

***Vernonia School District 47J v. Acton* (1995)**[210]

Facing an unyielding drug abuse problem, the Vernonia School District implemented a Student Athlete Drug Policy after receiving unanimous support from parents at an "input night." The policy required all prospective student athletes and their parents to sign a form consenting to random, limited drug tests. The U.S. Supreme Court held that school districts may lawfully adopt policies that enable them to randomly test their student athletes for illegal substances, concluding that the policy at issue was reasonable due to student athletes' lesser expectation of privacy and drug use's increased risks of physical injury. The Court noted that the school used a limited test, which would identify prohibited drugs and would not reveal other medical information. The Court also recognized the school district's strong interest in curbing student drug abuse, particularly among student-athletes who were well-known in the community and appeared to be role models for others.

Subsequent to *Vernonia*, the U.S. Supreme Court has held that under certain, narrow circumstances, school districts may require students who participate in non-athletic extracurricular activities to submit to suspicionless drug testing as well.[211] Whether or not a school district's suspicionless drug testing policy falls within this authority depends on a careful, fact-specific analysis of the issues the school district is attempting to mitigate.

Drug testing policies that are overly broad are subject to challenge. In *Trinidad School District v. Lopez*, the Colorado Supreme Court struck down a suspicionless drug testing policy that applied to all students involved in any extracurricular activity because the necessity of such a broad policy was not factually supported. The Court held that non-athletes have a higher expectation of privacy than athletes and that it is not enough for a school district to merely

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[210] 515 U.S. 646, 666 (1995).
[211] *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 837-38 (2002).

demonstrate that a growing drug abuse problem exists across a student body. The Court distinguished *Vernonia* by noting that many of the students from *Lopez* did not face the same risks of physical injury as athletes and they were enrolled in for-credit classes as part of their extracurricular activities.[212]

A school district must identify compelling case-specific facts that support adopting a suspicionless drug testing policy intended to cover students other than athletes.[213] This is a difficult standard to satisfy, and Colorado courts generally disfavor broad suspicionless drug testing policies.[214]

D. Seizures Of Students or Student Property

The Fourth Amendment to the U.S. Constitution also protects all persons from unreasonable government seizures. Generally, a "seizure" describes two distinct types of government actions: (1) when a government representative intentionally interferes with an individual's freedom of movement ("seizure of a person"); or (2) when a government representative interferes with an individual's possession of property ("seizure of an object").[215] However, in the context of actions taken by school officials, the concept of a "seizure," either of a person or of an object, is more narrowly defined.

Similar to searches, courts balance students' constitutionally protected interests with "the interests in providing a safe environment conducive to education in the public schools when deciding whether a seizure is constitutionally permissible."[216] A school official seizes a student when "**the limitation on the student's freedom of movement . . . significantly exceed[s] that [which is] inherent in every-day, compulsory attendance**."[217] A seizure of property in the school context "occurs when there is some **meaningful interference with [a student's] possessory interests in that property**."[218] This definition accounts for the "lesser expectation of privacy" that students enjoy as compared to members of the general population.[219]

1. Seizure of a Student

In a case alleging seizure of a student by school officials, the plaintiff must satisfy a preliminary hurdle: to show that the school's restrictions rose to the level of seizure under the

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[212] *Trinidad Sch. Dist. No. 1 v. Lopez by and through Lopez*, 963 P.2d 1095, 1096-97, 1109-10 (Colo. 1998).
[213] *Id.* (noting lack of such evidence).
[214] *See e.g.*, *Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 944-45 (Colo. 1993) (reviewing cases discussing various government interests in suspicionless drug tests).
[215] *See, e.g.*, *Brower v. Cty. of Inyo*, 489 U.S. 593, 595-98 (1989); *see also Soldal v. Cook Cty.*, 506 U.S. 56, 61 (1992).
[216] *Edwards ex rel. Edwards v. Rees*, 883 F.2d 882, 883-84 (10th Cir. 1989) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 332 n.2 (1985) (plurality decision).
[217] *Couture v. Bd. of Educ. of Albuquerque Public Schools*, 535 F.3d 1243, 1251 (10th Cir. 2008).
[218] *Burlison v. Springfield Pub. Schs.*, 708 F.3d 1034, 1039 (8th Cir. 2013) (citations and internal quotations omitted).
[219] *Id.* (citing *Vernonia School District 47J v. Acton*, 515 U.S. 646, 656-57 (1995)).

Fourth Amendment.[220] In *Ebonie S.*, a school district used a desk with a student with severe disabilities that wrapped around the student on the front and sides and had a bar that ran behind the student to prevent her from leaving the desk. The school officials used the desk to keep the student on task and from disrupting the classroom.[221] The Tenth Circuit found that the actions did not constitute a seizure under the Fourth Amendment (even though they were prohibited by the Colorado Protection of Persons from Restraint Act) because: (1) the student was sitting in a chair facing forward, which is standard posture for students; (2) she could get out of the desk by crawling over or sliding under the front portion; and (3) the mechanism was not attached to the student's body.[222] In the court's opinion, the limitation on the student's freedom of movement did not significantly exceed that which is inherent in every-day, compulsory school attendance and was not a seizure.

If the action rose to the level of a seizure under the Fourth Amendment, the propriety of a seizure is governed by the same standard that governs searches: reasonableness under the circumstances.[223]

- A seizure of a student's person is justified at its inception when **a school official reasonably suspects that questioning a student might yield evidence that they violated the law or an applicable school rule**.[224]
- Similarly, a seizure is reasonable in scope if **the detention is proportionate to the seriousness of the alleged offense**.[225]

Case Spotlight: Student Questioning

***Edwards v. Rees* (1989)**[226]

A vice principal held and interrogated a high school student in a closed office for 20 minutes to question him about a bomb threat. On review, the court held that the seizure was justified at its inception because the student had been implicated by two other students, giving the vice principal a reasonable basis for suspecting that questioning the student would yield evidence related to the threat. The court also held that the seizure was reasonable in scope "[g]iven the seriousness of the suspected offense" and the relatively short duration of the questioning.[227]

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[220] *Ebonie S. v. Pueblo Sch. Dist.*, 695 F.3d 1051, 1056 (10th Cir. 2021).
[221] *Id.* at 1054-55
[222] *Id.* at 1057.
[223] *Edwards*, 883 F.2d at 884.
[224] *Id.*
[225] *Id.*
[226] 883 F.2d 882 (10th Cir. 1989).

[227] *Id.* at 884.

Note: The case did not answer the preliminary question of whether the interrogation was a seizure under the Fourth Amendment. Based on the subsequent analysis of *Ebonie S.*, it seems unlikely that the 20-minute interrogation would have met the preliminary hurdle to demonstrate a seizure under the Fourth Amendment because the student was free to leave the principal's office.[228] Future cases may focus on the preliminary question more closely before proceeding to the reasonableness standard.

Two cases from other jurisdictions illustrate how courts determine whether a student seizure is reasonable under the circumstances. In *Shuman v. Penn Manor School District*, a high school student who had been accused of sexual misconduct was detained for three and a half hours. During that time, school officials questioned the student about the allegation. While the student was not free to leave or attend his normal classes, he was permitted to do his homework, get water, and eat lunch alone in the cafeteria. The court held that the seizure was reasonable given the seriousness of the allegation and the reduced liberty typically afforded students in the public-school setting.[229]

In *Wofford v. Evans*, school officials, and later law enforcement, detained and questioned an elementary school student for short portions of two separate days. The student was detained because several other students had alleged that she had brought a gun to school, with one student claiming to have seen her discard the gun near school grounds. The court held the detentions were justified at their inception and reasonable in scope because the allegations were grave, and the student was not held any "longer than necessary to address [the] allegation[s]." The court also held that law enforcement's involvement in the incident was reasonable because the gun posed an ongoing threat to the school and the community if it was, in fact, discarded near school grounds.[230]

2. Seizure of a Student's Property

Colorado courts have yet to address seizures of a student's personal property. Three cases from other jurisdictions provide insight into how Colorado courts may rule.

In *Burlison v. Springfield Public Schools*, high school students were required to exit their classroom—leaving their backpacks, purses, and other personal items behind—while dogs searched the room and their belongings for drugs. The search was conducted pursuant to a district-wide policy, and the students were separated from their property for only a short period of time. One student sued the school district claiming the separation constituted an unreasonable seizure of his property. The court rejected his claim on the basis that the seizure was intended to

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[228] *Ebonie S.*, 695 F.3d at 1056-57 (noting that the Tenth Circuit had assumed without deciding that a seizure occurred in both *Edwards ex rel. Edwards v. Rees*, 883 F.2d 882, 883-84 (10th Cir. 1989) and *Couture v. Bd. of Educ. of Albuquerque Public Schools*, 535 F.3d 1243, 1251 (10th Cir. 2008)).
[229] 422 F.3d 141, 144-49 (3d Cir. 2005).
[230] *Wofford v. Evans*, 390 F.3d 318, 321, 326-27 (4th Cir. 2004).

maintain students' safety and security, and therefore, was reasonable under the circumstances. The court stated that "[r]equiring students to be separated from their property during such a reasonable procedure avoids potential embarrassment to students, ensures that students are not targeted by dogs, and decreases the possibility of dangerous interactions between dogs and children."[231]

Similarly, in the case of *In re D.H.,* students were required to leave their property in the classroom and wait in the hall while police entered the room with drug-sniffing dogs. When a dog alerted to a student's backpack, the student's backpack was opened outside the presence of other students, and marijuana was discovered. The student attempted to suppress the discovery of the marijuana, arguing (1) that her backpack had been unreasonably seized when she was separated from it and (2) that the school did not have a reason to believe she was in violation of school rules or the law prior to seizing her bag. The court held that the seizure was reasonable, noting that a school's role as guardians and tutors was an important consideration in its analysis. Given the school's educational objectives, the court held that the student's brief separation from her backpack implicated only a minor privacy interest.[232] In addition, the court held that any invasion of her privacy was outweighed by the dog's alert to her backpack and the minimally intrusive way in which it was searched.[233]

Finally, policies banning the use of cell phones and other personal electronic devices in classrooms are generally considered to be legitimate exercises of a school's right to maintain a disruption-free educational environment. In *Requa v. Kent School District*, the court held that school officials may temporarily confiscate a student's cell phone or other personal electronic device if they are caught violating a "no cell phone" policy.[234] However, as discussed earlier in this Section, the right to seize a phone does not convey a right to search it. School officials can search the contents of a student's confiscated phone only if there are reasonable grounds for suspecting that the phone contains evidence of other violations of law or school policies.

E. Policies

Colorado law requires school districts to establish written policies concerning searches on school grounds, including locker searches.[235] While the law does not mandate the content of a school's search policies, schools may want to consider provisions that address whether—and under what circumstances—school officials might conduct a search involving:

- Lockers (required)

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[231] *Burlison v. Springfield Pub. Sch.*, 708 F.3d 1034, 1036-37, 1038, 1040 (8th Cir. 2013).

[232] *In re D.H.*, 306 S.W.3d 955, 957-60 (Tex. App. 2010).
[233] *Id.* at 959-60.
[234] *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1276, 1280-81 (W.D. Wash. 2007).
[235] § 22-32-109.1(2)(a)(I)(I), C.R.S.

- Cars
- Personal effects
- Drug/alcohol screenings
- Metal detectors
- Dog sniffs
- Video surveillance
- Building-wide sweeps/searches

Student searches raise important issues under the United States and Colorado constitutions, making consultation with legal counsel important.

RESTRAINT

With respect to restraints of students, school districts must comply with federal constitutional standards and state statute and regulations. Colorado's "Protection of Persons from Restraint and Seclusion Act" and its implementing regulations govern restraints in schools by school employees. HB22-1376 impacted those standards. This manual provides guidance based on the new law, though consulting legal counsel is important, based on this evolving area and anticipated new regulations in 2023.

A. Distinguishing Between Physical Interventions and Restraints

Not all physical interventions and physical contact with students will qualify as a restraint under Colorado law. Physical contact or intervention that does not qualify as a restraint could include minimal physical contact or brief holding (under 1 minute) for the purposes of:

- Comforting or calming a student;
- Assisting the student in completing a task;
- Escorting a student from one area to another (often called an escort hold);
- Quelling a disturbance threating physical injury to the student or others;
- Protecting persons against physical injury or preventing the destruction of property (e.g. grabbing a student's arm before they throw a laptop at another student or out the window); or
- Self-defense.

A school district employee may use "reasonable and appropriate" physical force with a student to "maintain discipline" or "promote the welfare" of the student.[236] To ensure that physical interventions do not run afoul of any Fourth Amendment standard, they should always be justified at their inception and reasonable in their scope.

B. Restraints

Types of restraints that can be used by some school employees in defined circumstances include physical restraints, seclusion, prone (face down on the ground), and mechanical (e.g. handcuffs). The Colorado State Board of Education's adopted rules state that such restraints may only be used "in an emergency and with extreme caution," and only after the failure of "less restrictive alternatives" or a "determination that such alternatives would be inappropriate or ineffective under the circumstances."[237] Less restrictive means may include positive behavior supports, constructive and non-physical de-escalation, and restructuring the environment.[238] It could also mean that a school safety employee uses a physical restraint rather than handcuffs on a student. "Restraints must never be used as a punitive form of discipline or as a threat to control or gain compliance over a student's behavior."[239] School officials may only use restraints for the period of time necessary and using no more force than is necessary."[240] In addition to these requirements, the more serious and/or dangerous types of restraints (seclusion, prone, and mechanical) include additional restrictions, which are outlined in the specific sections below. **Chemical restraints, such as involuntary sedation for the purpose of restraining a student's freedom of movement, are *always* prohibited from use by school officials.[241]**

The regulations require several safety standards and regular training to minimize the dangers of improper restraint. Restraints cannot be administered in a way that places excess pressure on the student's chest, back, or in a manner that could potentially limit breathing. The school employee must provide opportunities to have the restraint removed if the student indicates a willingness to cease violent or dangerous behavior. A student must be reasonably monitored to ensure the student's physical safety. When the restraint is no longer necessary – because the emergency no longer exists – the restraint must be removed.[242]

The Colorado State Board of Education's Rules require school districts to train staff who utilize restraints.[243] A review of the full list of required training components and actual training should be completed at least every two years.[244] As a best practice, all school-based employees

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[236] § 18-1-703(2), C.R.S.
[237] 1 CCR 301-45: 2620-R-2.01(1),-R-2.01(1)(b)(i).
[238] *Id.* at 260-R-201(2).
[239] *Id.* at 2620-R-2.01(2), (7).
[240] *Id.* at 260-R-2.01(3).
[241] *Id.* at 2620-R-2.00(8)(a), -2.02(2)(a).
[242] *Id.* at 2620-R-2.02(1)(a).
[243] *Id.* at 2620-R-2.03.
[244] *Id.*

should receive this training. At minimum, it should be provided to school administrators and front office staff, employees in special education classrooms, and school safety personnel. The safety risk of prone restraints means that all employees should be trained on why these restraints are prohibited, except for certain trained safety personnel.

The following are additional considerations or requirements associated with each type of restraint.

1. Physical Restraint

With the passage of HB 22-1376, a physical restraint is "the use of bodily, physical force to involuntarily limit an individual's freedom of movement *for more than one minute*."[245] The reporting requirements vary depending on whether the physical restraint was between one minute and five minutes *or* over five minutes. For a physical restraint between one and five minutes, the school must notify the parent(s)/guardian in writing on the day of the restraint.[246] The notice must include the date, the student's name, and the number of restraints that day that lasted between one and five minutes.[247] These notifications are essential because a true restraint lasting more than one minute may be a significant event for a student and can, at times, induce trauma. As a matter of best practice, a parent or guardian should hear about a restraint from the school before they hear about it from their child. For a physical restraint over five minutes, the school must use the longer notification process described below that will be used for all other restraints.

2. Seclusion

Seclusion should be rarely used and is defined as "the placement of a student **alone** in a room from which **egress is involuntarily prevented**."[248] Due to the seriousness of using seclusion as a restraint, particularly when used with students with disabilities, some districts prohibit its use entirely through their district policy. If a school district, charter school, or institute charter school decides to permit seclusion, it must meet the following requirements:

- There must be at least one window for monitoring when the door is closed.
- If a window is not feasible, monitoring must be possible through a video camera.
- A student placed in a seclusion room must be continually monitored.
- The room must be a safe space free of injurious items.

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[245] § 26-20-102(5), C.R.S. Prior to HB 22-1376, a physical restraint was defined by a physical restraint lasting more than five minutes.
[246] § 26-20-111(7), C.R.S. This is a new addition from HB 22-1276 and will require most districts to revises their current policies and practices.
[247] § 26-20-111(7), C.R.S.
[248] 1 CCR 301-45: 2620-R-2.00(9).

- The seclusion room must not be a room that is used by school staff for storage, custodial, or office space.[249]

3. Mechanical Restraints (e.g. Handcuffs)

A mechanical restraint is "a physical device used to involuntarily restrict the movement of a student or the movement or normal function" of a student's body.[250] The state regulations include several categories that do not constitute a mechanical restraint.[251] For example, mechanical restraints do not include devices recommended by a physician, occupational therapist, or physical therapist and agreed to by a student's IEP Team or Section 504 Team and used in accordance with the student's IEP or 504 Plan. The most common example of what does constitute a mechanical restraint is the use of handcuffs by school safety personnel.

Mechanical restraints *cannot* be used by a school or district employee, except in two narrow circumstances. A mechanical restraint could be used by any employee when a student is openly displaying a deadly weapon.[252] Mechanical restraints can also be used by armed security officers who: (1) have received documented training in defensive tactics utilizing handcuffing procedures and (2) have made a referral to a law enforcement agency.[253] For example, if a district employs its own internal armed safety personnel, those individuals can use handcuffs with students *if* all of the other requirements of a restraint are met – e.g. "in an emergency and with extreme caution," and only after the failure of "less restrictive alternatives" or a "determination that such alternatives would be inappropriate or ineffective under the circumstances."

Taking all these requirements together, the use of handcuffs by internal armed safety personnel should be rare. For example, imagine a student brought a gun on campus and it was located inside the student's backpack during a search by the district's armed safety personnel. A referral to law enforcement will be made and the student will be detained until law enforcement arrives. If the student is sitting in the school administrator's office and is calm and compliant with directives from staff, there may be no emergency that would justify the use of handcuffs while the school officials wait for law enforcement to arrive. On the other hand, if there continues to be a threat to student or staff safety (even once a student is disarmed) and there are no less restrictive alternatives, the use of handcuffs may be permitted. If handcuffs are used, staff should follow all the safety requirements and discontinue the restraint as soon as the emergency subsides.

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[249] § 26-20-111(5), C.R.S.
[250] 1 CCR 301-45: 2620-R-2.00(8)(b).
[251] *Id*. at 2620-R-2.00(8)(b)(i)-(iv).
[252] *Id.* at 2620-R-2.02(2)(b).
[253] *Id.* at 2620-R-2.02(2)(b)(ii).

4. Prone Restraints

A prone restraint is a restraint where the student is secured in a face-down position. Prone restraints follow the same rules as mechanical restraints. They are prohibited except in two narrow circumstances: (1) when a student is openly displaying a deadly weapon or (2) when utilized by armed security officers who are trained in restraint tactics utilizing prone holds who have made a referral to law enforcement.[254] Like mechanical restraints, prone restraints should not be used unless all the other conditions are present – e.g "in an emergency and with extreme caution," and only after the failure of "less restrictive alternatives" or a "determination that such alternatives would be inappropriate or ineffective under the circumstances." Because prone restraints can be dangerous if not administered properly, there are almost always less restrictive and safer alternative holds or restraints that can be utilized by school staff.

5. Documenting the Restraint – For a Physical Restraint Over 5 Minutes, Mechanical Restraint, Prone Restraint (Any Length of Time), or Use of Seclusion

When a restraint is used, proper documentation and notification to the family is critical. The state regulations include the following requirements:

- The school principal or designee must verbally notify the student's parent(s)s/guardian as soon as possible and no later than the end of the school day.[255]
- The employee or volunteer who used the restraint must provide a written report of what occurred to the school administration within one school day of the restraint.[256]
- Within five days of the restraint, the school administration must mail, fax, or e-mail a written report of the incident to the student's parent(s)/guardian.[257]
- The written report should be placed in the student's confidential file.

Practical Tip: Checklist for a Written Report of Restraint[258]
☑ The precursor to the student's behavior, if known
☑ Factual description of the incident

[254] *Id.* at 2620-R-2.02(2)(d).
[255] 1 CCR 301-45: 2620-R-2.04(3).
[256] *Id.* at 2620-R-2.04(2); § 22-32-147(3)(a).
[257] § 22-32-147(3)(c), C.R.S.
[258] *Id.*

☑	Any efforts made to de-escalate the situation
☑	Any alternatives to the use of restraints that were attempted
☑	The type and duration of the restraint used
☑	Any injuries that occurred; and
☑	The staff members present, and staff members involved in administering the restraint.

Due to the intensity of some restraints, restorative approaches may be helpful to reintegrate the student into the school or classroom or to repair the relationship with a school employee.

Families may file a complaint with the Colorado Department of Education when they believe that a student has been restrained in violation of state law.[259]

6. Review Process

Each school and school district must also have a review process that provides an evaluation of all restraint incidents. The state regulations provide details on what this review should include.[260] Each school or district should also have a general annual review process.[261] The annual review process must consider the following items:

- Analysis of incident reports, including consideration of procedures used during the restraint, preventative or alternative techniques attempted, documentation, and follow-up;
- Training needs of staff;
- Staff-to-student ratios; and
- Environmental considerations, including physical space, student seating arrangements, and noise levels.[262]

The goal of this annual review is to ensure that the agency is properly administering restraints, identifying additional training needs, minimizing, and preventing the use of restraint

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[259] 1 CCR 301-45: 2620-R-2.07.
[260] *Id.* at 2620-R-2.05(1).
[261] *Id.* at 2620-R-2.05(2); § 22-32-147(3)(b), C.R.S.
[262] § 22-32-147(3)(b), C.R.S.

by increasing the use of positive behavior interventions, and reducing the incidence of injury to students and staff.[263]

Important Requirement: Students with Disabilities and Restraints

Physical restraints are most used on students with disabilities who may cause harm to themselves or others because of their disability. If there is a reasonable probability that restraint might be used with a particular student, the school must notify the student's parent(s)/guardian in writing and name the specific circumstances in which restraint might be used.[264] These communications could occur in a meeting where a student's Behavior Intervention Plan (BIP) or IEP is developed or reviewed. When a student has a BIP in place that includes recommendations on how to help a student de-escalate (so that restraints do not need to be implemented) make sure to communicate the expectations to all relevant school staff. This includes informing district safety staff who arrive at a school building to address an elevated safety risk from a student in crisis. As with all students, the seclusion or restraint of students with disabilities should be a last resort. School staff should consider all reasonable alternatives for intervention before resorting to seclusion or restraint.

C. Positive Behavior Interventions and Supports

The Center on Positive Behavioral Interventions & Supports encourages educators to use a three-tier approach to behavioral intervention. The three tiers escalate from (1) preventative practices, to (2) small group interventions, to (3) individual crisis intervention.

Practical Tip: PBIS Tiered Approaches to Behavior Management[265]

Restraint should be used as a last resort. Alternative approaches to behavior management should be considered prior to using restraint. The Center on Positive Behavioral Interventions & Supports (PBIS) recommends a Three-Tier Approach to behavior management:

Tier 1: Preventive Practices

- Positive expectations for all students
- Explicitly teaching social and emotional skills

[263] 1 CCR 301-45: 2620-R-2.05(2)
[264] *Id.* at 2620-R-2.04(1).
[265] *Restraint/Seclusion*, CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS, https://www.pbis.org/topics/restraintseclusion (last visited Oct. 3, 2022).

- Providing positive, specific feedback
- Reinforcing accomplishments
- Intentional de-escalation strategies

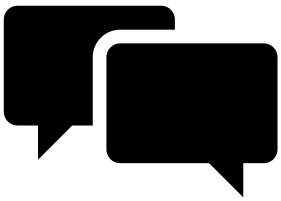
Tier 2: Small group interventions which teach:

- Appropriate, desired behaviors using social skills instruction when applicable
- A replacement skill which results in similar desired outcomes
- De-escalation and self-regulation strategies

Tier 3: Individual crisis intervention

- Follow function-based intervention plan.

Practical Tip: Behavior is Communication



Behavior is a form of communication, and all behavior serves a function. Students use their behavior to communicate that they want to get something (like attention or an activity) or avoid something (like escape an unpleasant or undesired situation). Therefore, when implementing more targeted (Tier 2) or intensive (Tier 3) prevention supports, educators should (a) teach students a replacement skill (i.e., more appropriate behavior) that effectively results in similar consequences and (b) make individualized adjustments to the classroom and school environment to set students up for success. For example, some evidence-based strategies include providing reminders, establishing predictable routines, adjusting academic instruction and tasks, and arranging the environment so the replacement skills "work" for the student. Increasing the likelihood of student success reduces the likelihood of a crisis.[266]

D. Policies

The school or district's code of conduct must describe the school's policies on restraint and seclusion of students, including:

[266] Simonsen, B., Sugai, G., George, H.P., Freeman, J., & Evanovich, L., *Preventing Restraint and Seclusion in Schools*, CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS (May 2019), https://www.pbis.org/resource/preventing-restraint-and-seclusion-in-schools.

- the prohibition on the use of chemical, mechanical, or prone restraints on students under most or all circumstances;[267]
- the instances or circumstances in which certain types of restraint will be used;
- training requirements for school officials;
- information about how each incident will be documented; and
- the process for filing complaints regarding the use of restraint or seclusion.[268]

Student restraint practices raise important issues under the United States and Colorado constitutions, as well as Colorado law and regulation. School districts should contact their legal counsel for guidance and training in adopting and implementing appropriate search policies.

E. Protections For School Employees

Under Colorado law, teachers and school officials are generally immune from civil liability or criminal prosecution provided that they act within acceptable limits of the law as well as within the parameters of the school district's conduct and discipline code.[269] In addition to this immunity, the appropriate use of physical force by an adult entrusted with the care of minors, such as a teacher or school employee, against a violent or disruptive student is a recognized affirmative defense to the crime of child abuse.[270] In contrast, teachers or employees who violate the laws and policies governing the use of physical force against students may be subject to disciplinary or legal action.

F. Conclusion

Searches should be initiated only with a student's voluntary consent or when there are articulable facts supporting a reasonable suspicion that a law or school rule has been violated. Seizures should be initiated only to achieve a specific goal, such as detaining a student for specific questioning or confiscating an object that violates a school rule. The scope of searches and seizures should be connected to and proportional to the reason for initiating the search or seizure.

Documentation should be made of all the facts that led to a decision to search or seize a student or their belongings, including any reasonable, common-sense inferences that could be drawn from the available information by school employees, based upon their training and

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[267] Pursuant to § 22-32-109.1(2)(a)(I)(L), C.R.S.
[268] Pursuant to §§ 22-32-109.1(2)(a)(I)(L), 22-32-147(4), C.R.S.
[269] § 22-32-109.1(9), C.R.S.
[270] See, e.g., *People v. Taggart*, 621 P.2d 1375, 1384 (Colo. 1981), abrogated in part on other grounds by *James v. People*, 727 P.2d 850 (Colo. 1986). Additionally, school district policies may not conflict with state, municipal, or county laws that govern or define the crime of child abuse.

experience. Facts, and not opinions, should be used when documenting anything that was learned or discovered during the search or the seizure using

School officials should be mindful of when and how they restrain a student, which includes seclusion. Students with disabilities should be managed in accordance with their individual IEP or behavior plan. Any form of physical intervention with a student should only be used when necessary to protect the safety and wellbeing of others and should only involve the minimum force necessary to keep others safe. Any use of physical intervention should be documented appropriately.

School leaders should work closely with other school employees to ensure that they understand the school's policies. School employees should also receive training on best practices and legal requirements.

IV. INFORMATION SHARING AND REPORTING

CHAPTER INTRODUCTION

Preventing and responding to school violence is a systems issue that involves many overlapping people and agencies. As a result, it requires coordinated information sharing from all sides. However, many educators remain uncertain about privacy mandates under the Family Educational Rights and Privacy Act ("FERPA") and the extent to which they may share a student's information with partners from outside agencies. One of the key recommendations from the final reports on the shootings at Columbine High School, Virginia Tech, and Arapahoe High School was that school officials, juvenile authorities, law enforcement personnel, and other members of the community should improve communication and information sharing to help prevent future school violence tragedies.[271] Sharing information can also be an important component of suicide prevention, such as identifying at-risk students. Thus, understanding FERPA is critical to enabling school officials to appropriately respond when issues and concerns about individual students arise.

This Section of the manual discusses how the law can prohibit, permit, or even mandate the exchange of information between agencies in connection with keeping schools safe. Section A. provides an overview of FERPA, including its protections, exemptions and exceptions, and school and staff liability for violations. Section B. discusses the sharing of information between schools and criminal justice agencies, including when student information must be shared, may be shared, or may be accessed upon request. Section C. explains the importance and responsibilities of schools working cooperatively with other governmental agencies and includes important resources for ensuring safe school environments.

A. Sharing Student Information Under FERPA

FERPA protects the privacy of student education records and applies to all schools that receive funds under any program administered by the U.S. Department of Education. In general, the law does two things: (1) it provides parents and eligible students the right to review and seek to amend students' education records; and (2) it protects those education records from

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[271] *The Report of Governor Bill Owens' Columbine Review Commission,* STATE OF COLO. (2001), https://schoolshooters.info/sites/default/files/Columbine%20-%20Governor%27s%20Commission%20Report.pdf.
Mass Shootings at Virginia Tech, VIRGINIA TECH REVIEW PANEL (2007) https://scholar.lib.vt.edu/prevail/docs/VTReviewPanelReport.pdf.
Sarah Goodrum & William Woodward, *Report on the Arapahoe High School Shooting: Lessons Learned on Information Sharing, Threat Assessment, and Systems Integrity*, CTR. FOR THE STUDY & PREVENTION OF VIOLENCE (2016), https://cspv.colorado.edu/wp-content/uploads/2019/03/Report_on_the_Arapahoe_High_School_Shooting_FINAL.pdf.

unwarranted disclosure without parental or student consent. Schools must annually notify parents and eligible students of their rights under FERPA.

In seeking to ensure compliance with FERPA, many school officials may err on the side of protecting information from disclosure even when the law does not require such an approach. While legal compliance is an important goal, violence prevention strategies that involve the sharing of student information are generally not in conflict with FERPA's privacy protections. To help guide school officials around this thorny (but not as thorny as you may think!) topic, let's first go over the main concepts under FERPA.

Examples of PII

- Direct identifiers of a student:
  - Name
  - Address
  - Social security number
  - Student identification number
  - Biometric data (e.g., fingerprints, handwriting)
- Indirect identifiers of a student:
  - Names of the student's parents or other family members
  - Student's date or place of birth
  - Student's race, religion, or weight

1. FERPA Protections[272]

a. Who is Protected?

FERPA affords protections to parents and eligible students. The definition of parent includes "a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian." An eligible student is a student that is 18 years of age or older or is attending an institution of postsecondary education.

The rights of most K-12 students under FERPA will be in the hands of parents. However, once a student reaches 18 years old or enters a postsecondary institution, those rights transfer from the parent(s) to the student.

b. What is Protected?

The general rules are that (1) the parent or eligible student must provide written consent before a school discloses a student's education records or personally identifiable information (PII) contained in those records and (2) the school must maintain a record of every disclosure of FERPA-protected information.

Education records are defined as records that are ***directly related to a student*** and ***maintained by a school***. This definition is expansive, but there are many limitations to its application that are important to the concept of school safety and violence prevention. See Section A.2. below.

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[272] 20 U.S.C. § 1232g, 34 C.F.R. §§ 99.1-99.67.

Common examples of FERPA-protected education records in the K-12 environment include grades and transcripts, course schedules, health records, and discipline records. Education records can be in any format, from written documents to audio files to emails. Education records may be handwritten, typed, recorded, printed, or digital. FERPA protects all education records *maintained* by the school, even if the records were not *created* by the school or school officials.

PII refers to data that "would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty."[273]

2. FERPA Exemptions and Exceptions

The concept of an "education record" is often interpreted as any form of information about a student, but this is not the case. Information that is not maintained in an education record can be shared without prior consent and recordation *if there is no other law protecting the information*. For example, a record that does not fall under FERPA might be subject to withholding under the Colorado Open Records Act. FERPA also includes many exceptions which permit the sharing of education records without prior consent and/or recordation.

a. FERPA Exemptions: Non-Education Records[274]

The following are examples of student information that are *not* education records that can be shared without violating FERPA: personal knowledge or observation, private notes, law enforcement unit records, employment records, alumni records, and treatment records of eligible students.

i. Personal knowledge or observation

Information based on a school official's personal knowledge or observation is not an education record maintained by the school. FERPA protects only tangible education records; it does not protect other types of information that a school employee gains through hearsay, from overhearing a conversation, or from their own personal observations. Because such information is not maintained in a student's education record, the information may, depending on the circumstances, be disclosed. Additionally, student-generated information not maintained in a student's education record (e.g., social media posts, notes to another student) do not qualify as an education record. Consider the following scenarios:

> *A school employee overhears a student threaten to "shoot up the school."*

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[273] 34 C.F.R. § 99.3.
[274] 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3.

A student tells a teacher that another student slammed them into a locker.

A student posts a list of "targets" on Instagram.

In each scenario, the school employee is not required to obtain parental consent before reporting this information to the appropriate authorities, school administrators, and parents because the information is not kept in a student education record.

ii. Private notes

Records kept in the sole possession of the person who created them are not education records if they are used only as a personal memory aid (i.e., private notes of instructors or staff members). This exception is particularly relevant when a family requests the educational records of a student, and the school is deciding what must be included in those records.

iii. Law enforcement unit records

This exemption applies to records (1) created by a law enforcement unit, (2) maintained by that unit, (3) and that are for the purpose of law enforcement. Law enforcement unit records can be kept in a variety of mediums including surveillance videos, photographs of students, written reports, and any other way information can be stored. If the records are maintained by a component of the school other than the law enforcement unit, or the records are maintained for non-law enforcement purposes (e.g., disciplinary actions by the school), they are protected by FERPA and the consent/recordation requirements apply. Consider the following scenario:

An SRO investigates an on-campus weapons possession claim and creates a report of that investigation. The SRO then provides a copy of the report to school officials who use it as grounds for disciplining a student. The report is maintained by the school officials as part of the student's disciplinary record.

In this example, the SRO's investigation report only becomes an education record once the school uses it to discipline the student (i.e., for a non-law enforcement purpose). Prior to that, the SRO report is a law enforcement record that can be shared with local law enforcement or any other partner agency without parental consent.

Distinguishing between records that fall under the law enforcement unit records exemption and education records may be challenging at times, particularly when schools have school resource officers ("SRO") who are employees of the local law enforcement agency or internal safety or security staff who are employees of the school or district. However, the requirement that the records are created and maintained by a law enforcement unit for law enforcement purposes is the key to differentiating between the two. For schools that do not have a designated law enforcement unit, the U.S. Department of Education recommends "designating an employee to serve as the 'law enforcement unit'" in order to maintain records (such as security camera footage) and determine under what conditions the school would disclose the

records.[275] Where the record does not fall under the law enforcement records exemption, there may still be other conditions present that allow disclosure without the consent/recordation requirement. Such conditions could include a health or safety emergency or a subpoena/judicial order, which are discussed in Section A.2.b. below.

The U.S. Department of Education has created helpful guidance on the intersection between FERPA, law enforcement records, and educational records.[276] The most common challenge occurs when a parent would like to view surveillance camera footage (e.g. from a school hallway or a bus) that includes other students. The standard practice is to allow the parent to come into the school or district offices to view the video, but to not provide them with a copy to retain.

iv. Employment records of school personnel

Note that this exemption only refers to records of non-student employees. Records which relate only to an employee in that person's capacity as an employee are not education records. However, they may be subject to withholding under the Colorado Open Records Act.

v. Alumni records

Records containing information about a former student ***after*** the individual is no longer a student at the school are not education records. However, records about former students are protected by FERPA if they relate to the former student's attendance at the school.

vi. Treatment records of an eligible student

For eligible students, (i.e., 18 years of age or older or attending a postsecondary institution), records that are made by a doctor or other professional for the purposes of the student's treatment are not education records; however, they may be protected by HIPAA.

b. FERPA Exceptions: When Education Records May be Disclosed Without Consent and/or Recordation[277]

In addition to information that does not constitute an education record, FERPA provides exceptions from its general consent/recordation requirements for disclosure of education records/PII in specific circumstances. The most relevant to school violence prevention are

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[275] *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools*, U.S. DEP'T OF EDUC. (Oct. 2007), https://www.cde.state.co.us/sites/default/files/documents/fedprograms/dl/ov_tiv_progadmin_balancingelementary.pdf.

[276] *FAQ on Photos and Videos Under FERPA*, U.S. DEP'T OF EDUC. https://studentprivacy.ed.gov/faq/faqs-photos-and-videos-under-ferpa (last visited Oct. 3, 2022).

[277] 20 U.S.C. § 1232g(b)(1).

disclosures (1) of ***directory information***; (2) to ***school officials with legitimate educational interests***; and (3) for ***health and safety emergencies***.[278]

i. Directory information

Directory information generally includes student names, addresses, telephone numbers, participation in extracurricular activities or sports, height and weight of members of athletic teams, dates of attendance, degrees received, and previous attendance at other educational institutions. Such information may be disclosed without prior consent in accordance with school policy and the disclosure does not need to be recorded by the school.

In its annual notice to parents and eligible students, the school must describe the types of PII designated as directory information and must provide an opportunity to opt out of the disclosure. Regarding former students, school officials do not have an ongoing obligation to provide notice and the opportunity to refuse to those students or their parents or guardians. However, if a student formerly enrolled at the school had made previous requests to withhold disclosures of information, the school must honor those requests unless additional consent is provided.

ii. Legitimate educational interests

PII from an education record may be disclosed to other school officials with legitimate educational interests in the information. Generally, a school official has a legitimate educational interest if the official needs to review an education record in order to fulfill their professional responsibilities.

School officials usually include teachers, school administrators, board members, school resource officers, specialized and related service providers, attorneys, information systems specialists, and support staff. School officials are those who:

- Perform an institutional service or function for the school;
- Are under the direct control of the school with respect to the use and maintenance of education records;
- May use the records only for the purposes for which the disclosure was made, e.g., to promote school safety and the physical security of students; and
- Meet the criteria specified in the school's annual notification of FERPA rights for being a school official with a legitimate educational interest in the education records.

Teachers and other school officials may have legitimate educational interests in the behavior of a student. To that end, schools are permitted to include information in a student's education record regarding disciplinary action for conduct that creates a significant risk to the

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[278] FERPA has additional exceptions that are not relevant to this discussion.

safety and well-being of the student and/or the school community and disclosing such information to those who qualify under this exception. Such information could also be disclosed to school officials at ***another*** school, if the other school has a legitimate educational interest in the behavior of the student (e.g., transferring to or attending a school-sponsored activity at the other school).

Among those who may qualify as a school official with a legitimate educational interest are members of a school's threat assessment team. Threat assessment teams are established by many schools in order to identify and respond to potential threats to the safety of a student and/or the school community. If a school's threat assessment team includes members who are not employees of the school (e.g., local law enforcement), these individuals may only access student education records if they are under the direct control of the school as it pertains to the maintenance and use of the education records. Consider the following scenario:

> *A school violence detective from the local police department serves on a school's threat assessment team for some high-risk situations. The team discusses concerns about Student A, who wrote a "hit list" that included other students at the school. The police officer sees that Student A's education records include prior discipline for bringing a knife to school.*

In this scenario, the police officer may not share information about Student A learned from Student A's education record with the local police department. However, there may be other applicable exemptions or exceptions that would allow disclosure. See the Health or Safety Emergency section below for such an example.

Practical Tip: Threat Assessment Teams

Schools can create a written agreement for threat assessment team members, outlining requirements related to FERPA, confidentiality, and other responsibilities.

Protecting Student Privacy, U.S. Department of Education

Whenever sharing information under this exception, the school must use reasonable methods to ensure that access is limited to education records in which the school officials have a legitimate educational interest. Under this exception, the school does not need to record the disclosure.

iii. Health or Safety Emergency

In case of emergency, disclosure of a student's education record is permitted without consent to the extent necessary to protect the health or safety of the student or others. This exception requires schools to make case-by-case determinations, based upon the totality of the circumstances, as to whether there is "an articulable and significant threat to the health or safety of a student or other individuals." Additionally, unlike most other FERPA exceptions, ***disclosures pursuant to this exception must be recorded.***

Before discussing the specifics of this exception, it is helpful to note that in 2008, the Family Policy Compliance Office (FPCO) made specific changes to the FERPA regulations relevant to school violence prevention. These changes removed language about narrowly construing the health or safety emergency exception and requiring its use only in the face of imminent threats. In place of those requirements, FPCO chose a more flexible approach. In light of the 2007 shootings at Virginia Tech and similar incidents, FPCO made these changes to give deference to school officials presented with concerns about potential harm to their school communities.[279] Former Attorney General Cynthia Coffman also issued a formal opinion encouraging the sharing of information in appropriate circumstances.[280] School officials should feel confident about their ability to share relevant information in the face of health and safety concerns in line with the following procedures.

FERPA requires that disclosures under this exception be made after a determination of an "articulable and significant threat." This standard simply requires that school officials be able to explain their reasoning for making a disclosure under this exception. As long as there is a "rational basis for the educational agency's or institution's decisions about the nature of the emergency and the appropriate parties to whom the information should be disclosed," the Department of Education has made clear that it will not second-guess the decision of school officials to disclose the information.[281]

An emergency that justifies disclosure could be related to student behavior (e.g., threats of violence or suicide) or external forces (e.g., natural disasters or epidemic disease outbreaks). As it pertains to student behavior, an emergency could be found where a student gives sufficient, cumulative warning signs that lead the school to believe the student may harm themselves or others at any moment.

There are reasonable limitations to this exception. The potential threat must be present; disclosure is not permitted under this exception for emergency preparedness activities. The exception is only available for the period in which the emergency exists. Finally, the exception does not permit a blanket release of PII or education records. Only the information that is needed to address the emergency may be disclosed.

Once the school determines there is an articulable and significant threat to the health or safety of a student or others, the school must then determine who should receive the PII/education record. FERPA allows the information to be shared with "appropriate parties" (i.e., those whose knowledge of the protected information is necessary to protect the student or others from harm). This often includes law enforcement officials, public health officials, medical

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[279] Katrina Chapman, *A Preventable Tragedy at Virginia Tech: Why Confusion Over FERPA's Provisions Prevents Schools from Addressing Student Violence*, 18 B.U. PUB. INT. L.J. 349, 360-362 (2009).
[280] Formal Opinion, No. 18-01, COLO. DEP'T OF LAW (January 11, 2018) https://www.cde.state.co.us/dataprivacyandsecurity/ag-ferpaandschoolsafety.
[281] 34 C.F.R. § 99.36.

professionals, and/or parents. Information can also be disclosed to potential victims in order to ensure their protection. However, there is not an exclusive list of appropriate parties and disclosure should be made to any and all individuals necessary to address the emergency.

Within a reasonable time after the emergency has been addressed, schools are required to make a specific record of the disclosure. The record must include (1) the articulable and significant threat justifying the disclosure and (2) the parties to whom the school disclosed the information.[282]

Questions to Ask Related to FERPA

Whether FERPA impacts the decision to share certain student information depends on if the information (1) is protected by FERPA and (2) falls under a FERPA exception.

1. **Is the information protected by FERPA (i.e., a student education record)?**

   Non-education records: personal knowledge, law enforcement unit records, employment records, etc.

   - If no, the information is not protected by FERPA and can be shared without prior consent or recordation as long as no other law limits dissemination of the record.
   - If yes, determine if an exception applies.

2. **Is there an applicable FERPA exception?**

   Exceptions: directory information, school official with legitimate educational interest, health or safety emergency

   - If yes, the information can be shared without prior consent. The disclosure may need to be recorded.
   - If no, obtain consent before sharing and record disclosure.

3. School/Staff Liability under FERPA

School officials cannot be held personally liable for FERPA violations. FERPA is designed to address institutional policies and practices related to students' privacy interests, not individual disclosures. If a school has a practice of violating FERPA protections, then the U.S. Department of Education may issue a cease-and-desist order, require the school to make changes to its procedures, or deny federal funding to the school.[283] However, students and parents do not

[282] 34 C.F.R. § 99.32(a).
[283] 34 CFR § 99.67(a)(1).

have a private right of action to directly sue a school district or school official for an unauthorized disclosure of protected information.[284]

When faced with the choice of remaining silent or sharing potentially valuable information about a concerning student, ***school officials should err on the side of safety and disclose the information to the proper authorities***.

B. Information Sharing Between Schools and Criminal Justice Agencies

In addition to the applicable FERPA exceptions listed above, there are scenarios in which schools and criminal justice agencies may (or must) share student information with one another. This subsection explains the rules around when information should be shared between these entities. These rules come from Colorado law and are not prohibited by FERPA.

1. Disclosures by Schools to Criminal Justice Agencies

Schools are required or permitted to disclose student information to criminal justice agencies as follows:

a. Active Investigations

When an underage student is under investigation for committing a crime, the criminal justice agency conducting the investigation may request the child's attendance and disciplinary records from the school. In making such request, the criminal justice agency must provide the school a written certification that it will not further disclose the student's information to others, except as otherwise provided by law or consented to by the child's parent.[285] Upon receiving the request and certification, the school must provide these records to the criminal justice agency regardless of parental consent.[286] Notably, this reporting requirement is triggered only if the child is the subject of an active investigation; a criminal justice agency may not request records under these statutes if there is no investigation. Additionally, the criminal justice agency cannot use the disclosed records for any purpose other than the investigation. If the criminal justice agency is seeking a broader set of records or is planning to use these records in a criminal case, the school district should request a subpoena from the criminal justice agency prior to releasing the records.

b. Offenses Against School Employees

There are special statutory procedures for alleged criminal offenses committed by students against teachers or other school employees. Under the Safe Schools Act, all schools or districts should have a policy regarding these procedures. While this requirement applies to any alleged offense under the Colorado Criminal Code, specific crimes are highlighted in the law,

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[284] *Gonzaga Univ. v. Doe,* 536 U.S. 273, 275 (2002). *See* §§ 1232g(b)(1)-(2).
[285] § 19-1-303(2)(c), C.R.S.
[286] § 22-32-109.3, C.R.S. If the student is in a public school, the school district superintendent or designee must provide the attendance and disciplinary records to the requesting criminal justice agency; if the student is not in a public school, the request is handled by a school principal or designee.

including assault, harassment, and knowingly making a false allegation of child abuse against a teacher.[287]

If one of these offenses occurs, the teacher or school employee may[288] file a complaint with the school administration and the district's board of education pursuant to the established policy. After a complaint under the policy is filed, the school administration should investigate the complaint and determine if suspension and/or expulsion is appropriate. The school administration should then report the incident to the district attorney or local law enforcement for a decision as to whether criminal charges or delinquency proceedings are appropriate.

c. Minors under Court Supervision

When a student is involved in a criminal justice process, mandatory school attendance is often a condition of supervised release. This may be part of pre-trial release, probation, parole, or a sentence imposed by a court. When a school is notified by a court or parole board that a student is required to attend school as such a condition, Colorado law requires school officials to share with supervising law enforcement officials the student's failure to attend all or any portion of a school day.[289]

d. Information Tracked by School Resource Officers

Under Colorado law, school resource officers have specific reporting obligations to the school and the state. As to their employing school, SROs must notify the principal:

- Within twenty-four hours, when the SRO arrests a student on campus or at a school activity; and
- Within ten days, when the SRO issues a summons or a ticket to a student on school grounds or at a school event.

As to the state, SROs (or other law enforcement agencies operating at schools) must submit annual reports to the Division of Criminal Justice within the Department of Public Safety. Such reports should detail all incidents that occurred on the campus during that year, including identifying information about the involved students.[290]

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287 § 22-32-109.1(3), C.R.S.

288 Although the statute says "must," a school employee has the discretion to decide whether they believe student misconduct should be referred to law enforcement or handled through the school's disciplinary process or through the student's behavior plan or Individualized Education Plan (IEP). For example, a student diagnosed with a Serious Emotional Disability (SED) who is placed in a more restrictive educational environment may engage in behaviors that could be considered assault (e.g. 10 year old student kicking the teacher in the shins). School districts are encouraged to consider modifications to behavior plans or an IEP when behaviors escalate rather than referral to the criminal justice system.

289 § 22-33-107.5, C.R.S.

290 § 22-32-146, C.R.S.

e. Mandatory Child Abuse Reporting

All school officials and employees are mandatory reporters of child abuse. This means that, if the official or employee has ***reasonable cause to know or suspect*** that a child has been abused or neglected, or if the official has observed a child being subjected to ***circumstances that would reasonably result in abuse or neglect***, they must ***immediately*** report the information to the appropriate county department, the local law enforcement agency, or the child abuse reporting hotline system.[291]

CO4Kids coordinates the reporting hotline system (1-884-CO-4-KIDS) and provides helpful resources and trainings for teachers on reporting child abuse and neglect. This information can be found on the CO4Kids website.

School officials should also learn whether their school system has a board policy or an administrative procedure for reporting suspected cases of child abuse and neglect.

Educators play a vital role in identifying, reporting, and preventing child abuse and neglect. They are often the first adults who see signs of abuse or neglect and they have unique and trusting relationships with children.

Reporting Suspected Child Abuse or Neglect

While there are multiple ways to report child abuse or neglect, calling the Colorado Child Abuse and Neglect Hotline at 1-884-CO-4-KIDS (1-884-264-5437) is an efficient method. The hotline is available 24 hours a day and routes callers to the appropriate county department for reporting.

It is important to remember that child abuse can apply to conduct by family or community members, employees, or other students. For example, an allegation of unlawful sexual contact must be reported regardless of whether the person alleged to be doing the touching is a family member, a school district employee, or another student aged ten or older. In all three of these situations, the report should be made to local law enforcement rather than DHS. This requirement applies even if the student victim pleads with you not to involve local law enforcement. For example, a high school student may tell a trusted counselor in school that they had an experience over the weekend where a fellow student "took it too far" in a sexual encounter. The student is really upset, but they do not want anyone to know about it. This must be reported because the educator has a reasonable suspicion that unlawful sexual contact or a sexual assault may have occurred.

More information about mandatory reporting in Colorado is on the Colorado School Safety Resource Center's website at https://cssrc.colorado.gov/mandatory-reporting.

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[291] § 19-3-304, C.R.S.

2. Disclosures from Law Enforcement to Schools

Law enforcement officials are required or permitted to report to schools when students are charged with crimes as well as when students are the victims of crimes.[292] This subsection outlines those circumstances and how schools can appropriately review the information.

a. Crimes of Violence and Unlawful Sexual Behavior

When a juvenile is charged with unlawful sexual behavior or a crime of violence, the criminal justice agency or the court must notify the school district in which the juvenile is enrolled. Unlawful sexual behavior includes conduct such as sexual assault; child sexual abuse, trafficking, or exploitation; and indecent exposure.[293] Crimes of violence are generally those which involve a deadly weapon or cause serious bodily injury or death. Such crimes include murder, assault, kidnapping, robbery, arson, burglary, and any crime against an at-risk adult or at-risk juvenile.[294]

The notification to the school will include information identifying the juvenile and detailing the alleged criminal act. Any information given to the school but not otherwise available to the public must be kept confidential by the school. Discipline for this conduct is discussed in Section II of the manual.

b. Other Specifically Enumerated Crimes

In addition to notifying schools about students charged with unlawful sexual behavior or crimes of violence, schools must be notified when a student is charged with certain other criminal offenses. Prosecutors must notify the principal of the school at which a student is enrolled if the student is charged with the following crimes: felony menacing, harassment, fourth degree arson, aggravated motor vehicle theft, hazing, possession of a handgun by a juvenile, and some drug-related felonies. The statute also requires prosecutors to notify the principal whenever a juvenile is charged if the alleged victim of a crime is a student or staff person in the same school as the juvenile offender. The notification will include the arrest and criminal records of the student charged.

c. Student Victims of Certain Enumerated Crimes

Generally, criminal justice officials must delete the names and identifying information of sexual assault victims from documents before sharing the documents with any individual or agency outside of the criminal justice system. In recent years, the Colorado legislature has made changes to the legal requirements around sharing identifying information of crime victims, which

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[292] §§ 19-1-304(5) & 22-33-105(5), C.R.S.
[293] In 2018, Colorado enacted a law regarding the possession and distribution of sexually explicit images of juveniles by other underage people. This law is discussed in Section VI of the manual.
[294] § 18-1.3-406(2), C.R.S.

has included expanding the list of offenses for which child victims of sex crimes will have their identities protected.[295]

Importantly, the law also carved out a narrow exception that allows for the sharing of child victims' identifying information between criminal justice agencies, school districts, school police departments, university administrators, assessment centers for children, or social services agencies. This will help school districts better facilitate services for child victims. Additionally, once school districts receive the identifying information of child victims, they may share that information with schools for the limited purposes of suspension, expulsion, and reenrollment determinations.

3. Inspection of Student Criminal Justice Records

Colorado law provides that, when a juvenile is criminally charged ***as an adult***, the juvenile's arrest and criminal records must be made available to the public.[296] However, school officials specifically can obtain arrest and charging information about any child who is or will be enrolled at the school from criminal justice agencies or assessment centers for children if the agency or center determines that the records relate to a public safety concern, a municipal ordinance violation, or misdemeanor or felony charges. School principals are also permitted to review the parole records of a juvenile that is or will be enrolled in the school.

Schools may also obtain any information from agencies providing services around juvenile delinquency or dependency and neglect cases when that information is required by school officials to perform their legal duties. The records that may be obtained by schools do not include mental health or medical records and any information obtained under these exceptions must be kept confidential.[297]

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[295] § 24-72-304(4.5), C.R.S.
[296] § 19-3-304(2)(a), C.R.S.
[297] § 19-1-303(2), C.R.S.

As a practical matter, school officials may request records where there are merely rumors that a student was involved in a matter reported to the police. It may be prudent in such circumstances for the school principal to obtain the records just to be sure that no school response is necessary.

Practical Tip: Education vs. Law Enforcement Records

FERPA protects any education records that contain information directly related to a student and that are maintained by a school, even if the records were not created by the school. Therefore, if law enforcement records are accessed and subsequently maintained by the school, it must treat those records as FERPA-protected.

C. School Cooperation with Other Governmental Agencies

Colorado law states that, as a matter of public policy, schools should try to limit referring students to law enforcement to avoid unnecessarily entangling students in the criminal justice system for routine student disciplinary matters. However, those general principles do not restrict the school's obligation to involve law enforcement or other agencies to evaluate risk or prevent violence before it happens. Likewise, it does not limit the duty of school staff to report possible child abuse. Most importantly, if there is an emergency or a crime in progress, school officials should always call 911.

1. Interagency Cooperation

Information sharing among schools, law enforcement agencies, courts, mental health professionals, social services, and other stakeholders plays an important role in preventing future violent acts at schools. To ensure that agencies are exchanging information relevant to school safety, the Colorado Legislature requires each board of education to work with law enforcement, the juvenile justice system, and social services on processes around information sharing. School districts should develop interagency information sharing agreements to facilitate the exchange of information across agencies regarding cases of public safety concern.[298]

Without such agreements, alarming or concerning student behaviors that foreshadow larger threats could be overlooked. In the wake of the 2013 shooting at Arapahoe High School, officials identified the school's failure to develop an interagency information sharing agreement as a factor leading up to the incident.[299] Without a process for centralized review of concerns raised about the student-assailant by SROs, teachers, students, and others, the cumulative nature of the threat was not identified. The General Assembly intentionally passed legislation allowing

[298] § 22-32-109.1, C.R.S.
[299] Goodrum & Woodward, *supra* note 1, at 38.

for such interagency cooperation in the wake of the Columbine shooting, to encourage "open communication . . . to assist disruptive children and to maintain safe schools."[300]

The creation of an interagency social support team is one method of ensuring collaboration across agencies. While a threat assessment team is responsible for conducting threat assessments and monitoring individual students, an interagency social support team is responsible for building an overarching support plan. Support teams can build and monitor the plan for threat-assessed students and revise the assessment and plan whenever a new threat or risk factor appears. In turn, the threat assessment team can assist the support team in building safety and support plans for identified students.

The Colorado Attorney General's Office has created a Self-Assessment Checklist for the development of an Interagency Agreement and Social Support Team, which provides a list of questions for stakeholders to answer to evaluate the level of agreement about the sharing of information across agency lines.[301]

2. Safe2Tell

Safe2Tell allows students, parents, and community members to anonymously report information about any issues that concern their safety or the safety of others. Individuals can report conduct on a variety of issues that may pose a threat to the safety of schools or communities, including threats of violence or suicide, drug or alcohol abuse, and possession of weapons. It should be emphasized that students and school staff may contact Safe2Tell regarding any concerns they may have about threats to anyone, including themselves, others at school, or the community at-large.

When Safe2Tell receives a report, the information is forwarded to a local multidisciplinary team made up of school officials, law enforcement, mental health professionals, and/or other partners. If Safe2Tell receives a report that is more appropriately directed to another resource, the program will refer the reporting party accordingly.

Reporting to Safe2Tell is simple and anonymous. Anyone can call 1-877-542-7233 (toll-free) or make a report on the Safe2Tell website, safe2tell.org. Mobile apps for iOS and Android can also be downloaded and used for providing information. Reports are answered 24 hours a day, every day. Notably, reporting to Safe2Tell does not satisfy the obligations of a mandatory reporter.

Schools should help make students, parents, and employees aware of the Safe2Tell program and these reporting options. The Safe2Tell website also includes a variety of resources

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[300] § 19-1-302(1)(b), C.R.S.

[301] *Interagency Agreement and Social Support Team Self Assessment Check List*, COLO. DEP'T OF LAW, https://coag.gov/interagency-cooperation/ (last visited September 30, 2022).

for schools, including marketing materials and information about responding to reported information.

3. Information Sharing Policy

In addition to any interagency information sharing agreements that a school may enter with other governmental agencies; every school district must have a policy which details how student information will be shared for the purposes of school safety. The policy must be consistent with provisions of the Colorado Open Records Act protecting, among other things, personal medical, scholastic, and financial records from public disclosure. The policy must also comply with FERPA's requirements.[302]

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[302] § 22-32-109.1(6), C.R.S.; § 24-72-204(3), C.R.S.

V. EMPLOYMENT ISSUES AND SCHOOL VIOLENCE

CHAPTER INTRODUCTION

All school employees serve a critical role in the prevention of school violence because they regularly interact with students, and are most familiar with school buildings, grounds, and vehicles. It is also important to screen potential employees to optimize the safety of students and school personnel. This section discusses employee screening and reporting requirements to ensure that school employees meet or exceed safety requirements, employee training to optimize violence prevention and preparation techniques, and employee protection policies designed to deter violence against school employees and immunize employees from legal actions for appropriate student discipline procedures.

A. Employee Screening Requirements

Pre-employment and ongoing post-employment screenings help schools identify issues in an employee's criminal history that may preclude them from working in schools. The Safe Schools Act requires schools to adopt pre-employment screening policies. It also requires screening current employees when good cause exists to check for instances of new criminal activity involving any felony or misdemeanor other than a misdemeanor traffic offense or traffic infraction.[303]

1. Inquiry Questions

Prior to the employment of any person, the school or district must ask the Colorado Department of Education for the following information about applicants:

- Whether the person has been convicted, pled nolo contendere to or referred a deferred sentence or prosecution for any felony; or a misdemeanor crime of unlawful behavior or unlawful sexual behavior involving a child
- Whether the person was dismissed by or resigned from a school district based on allegations of unlawful behavior or unlawful sexual behavior involving a child if the allegations were supported by a preponderance of the evidence
- Whether the person's license has ever been denied, annulled, suspended, or revoked following a conviction, plea of nolo contendere, or deferred sentence for unlawful behavior or unlawful sexual behavior involving a child.

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[303] §§ 22-32-109.1(8); 22-32-109.9(1)(a); and 22-32-109.8(2)(a), C.R.S.

Schools must also screen applicants by contacting applicants' previous employers to obtain relevant information of the applicant's fitness for working in schools.[304]

2. Fingerprints

Once selected for employment with a school district, a non-licensed applicant must submit fingerprints and attest that they have never been convicted of a felony or misdemeanor, or if convicted, the applicant must provide information regarding the specific crime, the date, and the court that entered the conviction. The fingerprints are used to conduct a state and national background check. If a fingerprint history reveals a record of arrest without a disposition, the applicant must submit to an additional name-based criminal history record check. The person may be employed pending results from the record check but *must* be terminated if the record check discloses a conviction for felony child abuse, a crime of violence, a felony involving unlawful sexual behavior, a domestic violence related felony, felony drug offense, felony indecent exposure, or an equivalent offense in any other state, the U.S. or a U.S. territory. However, disqualifications for felonies involving domestic violence or felony drug offenses are limited to five years past the date the offense was committed. In addition, a school may consider hiring an applicant involved in a felony drug offense or felony involving domestic violence within that five-year period if it conducts an assessment of the current risks of employing the applicant. An applicant may also request that a school district reconsider their disqualification involving a felony drug or domestic violence offense. The employee *may* but is not required to be dismissed if the information on the record check is inconsistent with what was reported by the applicant,[305] because it may indicate a substantive misrepresentation. The same dismissal requirements apply to current non-licensed employees who are convicted of these crimes.

Licensed applicants require the same fingerprint and criminal history attestation forms.[306] A school district must also require current licensed employees to submit to fingerprints when it finds good cause to believe the employee has been convicted of any felony or misdemeanor other than misdemeanor traffic-related infractions and must require the employee to submit to a criminal history record check when the fingerprint-based check reveals a record of arrest.[307]

3. Denials of Applications and License Revocations

Colorado law provides that an educator license *must* be revoked, or an application denied when the applicant or holder is convicted of:

- Felony child abuse
- A crime of violence

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[304] § 22-32-109.7(1), C.R.S.
[305] § 22-32-109.8, C.R.S.
[306] § 22-60.5-103, C.R.S.
[307] § 22-32-109.9, C.R.S.

- A felony offense involving unlawful sexual behavior
- A felony involving domestic violence
- A crime involving indecent exposure
- A crime in another state, the U.S., or a U.S. territory that is similar to these offenses; or
- A crime involving indecent exposure or similar crime in another state, municipality, U.S., or U.S. Territory.

An application must also be denied when an applicant fails to submit fingerprints on a timely basis.[308] In addition, a license or application must be revoked or denied where the person has been determined mentally incompetent and the court held that the incompetency renders the person incapable of performing their job.[309]

And, while not mandatory, an educator license *may* be revoked or an application denied if the person has obtained or attempted to obtain a license based on fraud or misrepresentation, the person is guilty of unethical behavior,[310] or been convicted of:

- Misdemeanor sexual assault
- Misdemeanor child abuse
- A second misdemeanor involving domestic violence
- The illegal sale of a controlled substance
- Contributing to the delinquency of a minor
- Misdemeanor sex exploitation of a child; or
- An adjudication or disposition for assault, battery, or drug-related offense in the last ten years, or any similar crime committed in any municipality, other state, U.S., or U.S. Territory.

B. Employee Reporting Requirements

Timely reporting plays a critical role in other schools' screening processes so that information in the Department of Education's e-Licensing system is up to date.[311]

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[308] § 22-60.5-107 (2.5), C.R.S.
[309] § 22-60.5-107 (2)(a), C.R.S.
[310] § 22-60.5-107 (1) and (2)C.R.S.
[311] Child abuse reporting requirements applicable to schools is discussed in Section IV, Information Sharing.

1. Reporting to the Colorado Department of Education

School districts must notify the Colorado Department of Education when an employee is dismissed or elects to resign based on an allegation that they engaged in unlawful behavior involving a child, including unlawful sexual behavior, *if the allegation is supported by a preponderance of the evidence.* A preponderance of the evidence means that the facts demonstrate that the allegation is more likely true than not. A school district must also notify the Department when it learns through sources other than the Department that any district current or former employee is convicted of, received a deferred sentence for, or pled guilty or nolo contendere to a felony or misdemeanor offense involving unlawful sexual behavior or unlawful behavior involving children. The school district must generally notify the employee when these reports are made to the Department.[312]

A school or school district must also notify the Department when the school brings a dismissal action against an employee based on a conviction, guilty plea, plea of nolo contendere, or deferred sentence for any of the following offenses:

1. Any felony, including felony child abuse, felony unlawful sexual behavior, a felony offense involving unlawful sexual behavior, and a felony offense involving domestic violence
2. A crime of violence
3. Indecent exposure
4. Contributing to the delinquency of a minor
5. Misdemeanor domestic violence
6. Misdemeanor sexual assault
7. Misdemeanor unlawful sexual conduct
8. Misdemeanor sexual assault on a client by a psychotherapist
9. Misdemeanor child abuse
10. Misdemeanor sexual exploitation of children
11. Misdemeanor involving illegal sale of a controlled substance
12. Physical assault
13. Battery; or
14. A drug-related offense.[313]

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[312] § 22-32-109.7, C.R.S.

[313] 1 Code Colo. Regs. 301-37: 2260.5-R-15.00.

C. Employee Protection from Liability

Colorado law protects school employees and educational entities from liability under certain circumstances. In addition to the Colorado Governmental Immunity Act protections, the Teacher and School Administrator Protection Act states that employees are immune from liability for any action related to the supervision, grading, suspension, expulsion, or discipline of a student unless the employee's action is willful and wanton and violates law or a clearly established school policy. The Act also provides immunity when an employee reports reasonable grounds for believing a student is under the influence of alcohol or drugs not prescribed to the student; possesses a firearm, alcohol, or controlled substance not prescribed to the student; or is involved in the illegal solicitation, sale, or distribution of firearms, alcohol, or controlled substances. The Act also provides penalties for students and other individuals who make false reports of criminal activity against school district employees.[314]

Colorado's Safe Schools Act also generally provides immunity from criminal prosecution and civil liability for school boards, teachers, and other school staff when acting in good faith compliance with the safe school plan, which includes all the components described in Section I of this manual. For example, a teacher is immune from civil and criminal liability for good faith implementation of the school's policy on physical interventions and restraints. This can alleviate a teacher's fear of intervening in a safety situation (e.g. breaking up a fight) when they know that the law protects them. Immunity is not available for any individual whose actions are considered willful or wanton, which is generally defined as conduct that is reckless and in conscious disregard of the rights of others or the risks inherent in the action.[315]

Federal law also provides *teachers* (not other school employees) from liability under certain circumstances. Teachers are protected from liability under federal law if they meet *all* the following:

- Were within the scope of their employment or responsibilities, conformed with federal, state, and local laws designed to control, discipline, expel, or suspend a student or to maintain classroom or school control
- The teacher was properly licensed, certified, or authorized by the appropriate authorities
- Their actions were not willful, criminal, grossly negligent, reckless, or a conscious, flagrant indifference to the rights or safety of the individual harmed; and
- The harm did not involve a teacher operating a vehicle requiring an operator's license or insurance.

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[314] § 22-12-101 *et. seq.* C.R.S.
[315] § 22-32-109.1(9) C.R.S.

The protections do not apply if, in connection with the misconduct, the teacher was convicted of acts constituting a crime of violence under federal law, a sexual offense under state law, a violation of federal or state civil rights law, or if the teacher was under the influence of alcohol or drugs at the time of the misconduct.[316]

Regardless of whether the claims are based in state or federal law, public employees are not responsible for defense costs or any judgment or settlement if:

- The claim against the public employee arises out of injuries sustained from an act or omission of the employee during the course of performance of their duties; and
- The employee's act or omission was not willful or wanton.[317]

Thus, school employees can rest assured that they will not bear the financial exposure of liability as long as their actions are not willful or wanton.

D. Employee Training

School employees are best equipped to identify potential school violence issues because they work with and are familiar with the students, their relationships, and their normal behaviors and demeanor. Ongoing training in preventing, identifying, and responding to school violence related issues and threat assessment protocols is an important school violence protection tool.

1. Child Sexual Abuse Training

Colorado law encourages school districts to include child sexual abuse and prevention training in their employees' professional development. It encourages training in preventing, identifying, and responding to sexual abuse and assault, and in using the child abuse reporting hotline system.[318] The law also encourages distributing related resources to increase employee awareness.[319] The law also encourages school districts to use the curricula and professional development materials, training, and other resources available from the School Safety Resource Center, including child sexual abuse and assault prevention training.[320]

2. Child Mental Health Training

The Behavioral Health Training Requirements Educator License bill requires that at least 10 hours of the 90 hours of professional development training required for teacher license renewal must include behavioral health training that is culturally responsive, and trauma- and evidence-informed.[321] Initial licensure teacher candidates must also complete similar behavioral health training lasting one-semester or one-quarter. Training goals must include awareness of

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[316] Federal Teacher Protection Act, 20 U.S.C. § 7946 (2022).
[317] § 22-10-110(1), C.R.S.
[318] The Child Abuse Reporting Hotline is: 844-CO-4-Kids.
[319] §22-32-109.1(2.5)(b), C.R.S.
[320] *Id.*
[321] § 22-60.5-110, C.R.S.

warning signs of dangerous behavior; identification of situations that present health and safety threats; knowledge of available community resources to enhance students' and schools' health and safety; youth mental health; safe de-escalation of crisis situations; and the recognition of signs suggesting poor mental health or substance use.

The training may include topics such as:

- Mental health first aid specific to youth and teens
- Teen suicide prevention
- Interconnected systems framework for positive behavioral interventions, supports, and mental health
- Addressing students with behavioral concerns or disabilities; and
- Child traumatic stress.[322]

Colorado also has the crisis and suicide grant program, which provides crisis and suicide prevention training for teachers and staff of public schools.[323] The Attorney General's Colorado School Safety Guide identifies numerous violence prevention training resources for schools and includes student trauma and suicide indicator surveys.[324] Mental health and trauma training for school resource officers and educators is also made available through the National Association of School Resource Officers.[325]

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[322] § 23-1-121(2)(d.5), C.R.S.
[323] § 25-1.5-113(2)(a), C.R.S.
[324] *Colorado School Safety Guide*, COLO. DEP'T OF LAW (April 2018), https://cdpsdocs.state.co.us/safeschools/CSSRC%20Documents/ColoradoAG_SchoolSafetyGuide_2v4_ELECTRONIC.pdf.
[325] *NASRO Training Courses*, NAT'L ASS'N OF SCH. RES. OFFICERS, https://www.nasro.org/training/training-courses/ (last visited Oct. 3, 2022).

VI. CRIMINAL OFFENSES SPECIFIC TO SCHOOLS

CHAPTER INTRODUCTION

As set forth in the chapter on discipline, school and district staff play an important role in disrupting the school-to-prison pipeline. The legislature has made it clear that schools do not need to involve law enforcement in school discipline matters. Recall the "three pillars of effective discipline":

- **Reflective:** The student should be reflecting and gaining insight into their behavior.
- **Restorative:** The student should have the opportunity to repair the relationship or items that were damaged.
- **Instructional:** The student should gain knowledge and practice skills that will help them in the future.

For all students, but especially for our younger students in elementary and middle school, consider whether these three pillars are better addressed through use of the school's disciplinary code and restorative practices rather than a law enforcement referral.

However, when necessary to ensure school and student safety, Colorado law includes criminal offenses for certain conduct that occurs on school property or involves school-age individuals. Common offenses include weapons possession, drug use or sales, mistreatment of at-risk students, hazing, and teen sexting.

This chapter discusses criminal offenses specific to school property and Colorado's teen sexting law.

A. Offenses on School Property

Crimes that most often occur in school settings involve: 1) weapons; 2) drugs; 3) interference or disruptive behavior in school; 4) threats against students and employees; 5) offenses against at-risk juveniles; 6) hazing; and 7) school vehicle offenses.

1. Weapons

Specific laws address the possession of weapons on school property. While these laws set minimum requirements, school districts may adopt more stringent rules within their school safety policies.

a. Deadly Weapons

Colorado distinguishes between a "deadly weapon" and a "dangerous weapon." Deadly weapons carry more serious consequences, and it is a felony to bring or possess a deadly weapon

onto the grounds of any K-12 school, including all areas inside and outside buildings.[326] "Deadly weapon" includes a firearm (loaded or unloaded), a knife, bludgeon, or any other object if it is used or could be used in a way capable of causing serious bodily injury or death.[327] Each of these weapons has a specific statutory definition.

A firearm is any device that is or could be capable of discharging bullets, cartridges, or other explosive projectiles. This includes firearms like pistols, rifles, and shotguns, and includes any hand-made item that fires a projectile using an explosion.[328] A homemade device like a pipe that can launch a projectile (e.g., a "zip gun") may also count as a firearm.[329]

A knife with a blade over 3.5 inches long is considered a deadly weapon.[330] Knives under 3.5 inches long may be considered a deadly weapon if it is intended to be used or used as a weapon.[331] Colorado courts have confirmed that schools may adopt rules or policies prohibiting possession of knives of any size on campus, whether or not the knife meets the definition of a deadly weapon.[332]

Generally, an object other than a firearm or a knife qualifies as a deadly weapon if the object is used or intended to be used as a weapon *and* the object is capable of causing serious bodily injury or death.[333] For example, Colorado courts have concluded that a BB gun may constitute a deadly weapon if it was used in a manner intended to cause serious bodily injury.

Case Spotlight: BB Guns

People in the Interest of J.R.[334]

A youth shot someone with a BB gun. The court held that whether the weapon ***actually caused*** seriously bodily injury is not the issue. Instead, the issue is whether the weapon "as used" ***could*** cause serious bodily injury.

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[326] § 18-12-105.5, C.R.S.
[327] § 18-1-901(3)(e), C.R.S. The statutory definition of a "serious bodily injury" is an "injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree." § 18-1-901(3)(p), C.R.S.
[328] § 18-1-901(3)(h), C.R.S.
[329] *People v. O'Neal*, 228 P.3d 211, 215 (Colo. App. 2009) (explaining that a "zip gun," which is a pipe device capable of discharging bullets and the like, is a firearm).
[330] § 18-12-101(f), C.R.S.
[331] *People ex rel. J.W.T.*, 93 P.3d 580, 583 (Colo. App. 2004).
[332] *Id.*
[333] § 18-1-901(3)(e), C.R.S.
[334] *People in Interest of J.R.*, 867 P.2d 125, 127 (Colo. App. 1993).

The definition of a "dangerous weapon" is broader than the definition of a "deadly weapon." It includes both deadly weapons as defined above, and any pellet gun, BB gun, or other device designed to propel projectiles by spring action or compressed air (whether or not it works), as well as a fixed-blade knife with a blade that is longer than three inches in length.[335]

b. Exceptions to Weapons Prohibitions

There are four exceptions where otherwise-prohibited weapons are allowed on school grounds.

First, "deadly weapons" may be permitted for the purpose of authorized demonstrations or instructional exhibitions related to an organized school or class, use in an approved educational school program, or for participating in an authorized extracurricular activity or athletic team (like archery).[336]

Second, certain employees need to possess deadly weapons as part of their job. These people include school resource officers or peace officers carrying a weapon in conformance with the officers' employer. A concealed carry permit holder employed by the school as a security officer may also be allowed to carry on campus while on duty.[337] Some districts arm an internal non-sworn safety and security team pursuant to school board policy. Nothing in Colorado law permits teachers, administrators, or other school staff to carry a firearm at school unless they fall within these categories.

Lastly, there are two exceptions unique to vehicles. Any "person" in a private vehicle may carry a weapon for lawful protection of property or people while travelling.[338] For example, this "travelling" exception may arise when parents drop off and pick up children. Concealed carry permit holders visiting a school campus may also have their handgun if it is kept within a compartment of their locked vehicle.[339]

Schools are required to report incidents involving weapons to its board as part of its safe school plan.[340] The Safe Schools Act and safe school plans are discussed in Section I of the manual.

2. Drugs

It is a crime to possess or sell drugs and certain other substances on school property in Colorado. Drugs in schools can adversely affect student safety and can lead to violence.

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[335] § 22-33-102(4), C.R.S.
[336] §§ 18-12-105.5(1), 18-12-105.5(3)(h), C.R.S.
[337] § 18-12-214(3)(b), C.R.S.
[338] § 18-12-105.5(3)(c), C.R.S.
[339] § 18-12-214(3)(a), C.R.S.
[340] § 22-32-109.1(2)(b), C.R.S.

Any person selling, distributing, or possessing drugs with the intent to distribute them on or within 1,000 feet of the grounds of any elementary, middle, junior, or high school may be charged with the highest level of drug offense in Colorado. The same is true for offenses in any school vehicle while transporting students.[341] Any distribution of illegal drugs in any amount by an adult to a minor (with at least a two-year age gap between participants) constitutes a felony.[342] For example, an 18-year-old student might violate this law by distributing drugs to another student aged 16 or younger. The law might also be violated if a staff member distributes drugs to students.

a. Drug Classifications

Colorado has five drug "schedules," indicating the drug's danger and the severity of a potential drug-related offense.[343] Schedule I drugs are the most dangerous, and include most illegal street drugs, like heroin, LSD, and ecstasy (MDMA). Schedule II drugs include many prescription painkillers and stimulants, and are most susceptible to abuse.[344] Schedule III drugs include anabolic steroids, prescription sedatives and sleeping pills, and depressants.[345] Schedule IV drugs include prescription anxiety medications like Xanax and Ativan; prescription anti-seizure medications like Klonopin; and stimulants like Sudafed (which contains pseudoephedrine).[346] Schedule V drugs include cough syrups that contain a small amount of codeine or buprenorphine, used for treating opioid addiction.[347]

b. Prescription Drugs

Many otherwise-legal drugs may not be possessed on-campus without a valid prescription from a licensed healthcare professional.[348] School districts may adopt a policy allowing students to possess and self-administer a valid prescription drug on school grounds, on a school bus, or at any school-sponsored event. The school policy must require the parent or legal guardian to notify the school of the student's medical need and that they are carrying a prescription drug at school. The school should advise teachers (as needed) and the school nurse of the student's medical situation.[349] Medical marijuana use is discussed below.

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[341] § 18-18-407(1)(g), C.R.S.
[342] §§ 18-18-405(2)(a)(II), 18-18-405(2)(b)(II), C.R.S.
[343] § 18-18-201, et seq., C.R.S.
[344] § 18-18-204(1), C.R.S.
[345] § 18-18-205(1), C.R.S.
[346] § 18-18-206(1), C.R.S.
[347] § 18-18-207(1), C.R.S.
[348] §§ 18-18-403.5, 18-18-308, C.R.S.
[349] § 22-1-119.3, C.R.S.

Practical Tip: Commonly Abused Prescription Drugs[350]	
Drug Name	***Retail Name***
Oxycodone	**OxyContin, Percodan, Percocet**
Hydrocodone	**Vicodin, Lortab, Lorcet**
Diphenoxylate	**Lomotil**
Morphine	**Kadian, Avinza, MS Contin**
Codeine	**N/A**
Fentanyl	**N/A**
Hydromorphone	**Dilaudid**
Methadone	**N/A**
Amphetamines	**Adderall, Dexedrine**
Methylphenidate	**Ritalin, Concerta**

[350] § 18-18-204, C.R.S.

c. Marijuana

Marijuana and certain marijuana products are legal in Colorado for recreational use by people over the age of 21 and for medical use.[351] Nevertheless, marijuana and its active ingredient, tetrahydrocannabinol (THC), remains listed under the Federal Controlled Substances Act as a Schedule I drug.[352] In addition, early use of marijuana carries dangers, and Colorado generally prohibits the use of marijuana or marijuana products on school property.[353]

Marijuana possession remains a criminal offense in certain circumstances. Marijuana "possession" means one of three things: a person has or holds any amount of marijuana anywhere on their person; a person owns or has custody of marijuana; or has marijuana within their immediate presence and control."[354] Examples of "possession" include marijuana in a pocket, backpack, a locker, or a car at school. A person under 21 years old possessing two ounces or less of marijuana commits the crime of illegal possession or consumption of marijuana by an underage person.[355] Importantly, marijuana possession is a "strict liability offense," which means there are no defenses available. For example, it is not a defense that a student claims they were holding it for another person or that they didn't know it was in their backpack.[356]

d. Medical Marijuana

Laws regulating medical marijuana are in flux. This information reflects the current state of the law at the time this section was written. We recommend that school districts and schools review the state of the law with their attorneys prior to issuing any policies.

Colorado adopted Jack's Law, which authorizes a primary caregiver or a volunteer from the school personnel to administer medical marijuana in a non-smokeable form to a student who holds a valid recommendation for medical marijuana. The non-smokeable marijuana may be administered on the grounds of a preschool, primary or secondary school, on a school bus, or at a school-sponsored event. However, it cannot be administered in a manner that creates a disruption to the educational environment or that causes exposure to other students.[357]

A "primary caregiver" is defined as "a person, other than the patient and the patient's physician, who is 18 years of age or older and has significant responsibility for managing the well-being of a patient who has a debilitating medical condition" for which the patient "holds a valid recommendation for medical marijuana." Schools may adopt additional policies defining

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[351] Colo. Const. art. XVIII, § 16(3) (legalizing marijuana for individuals over the age of 21); § 25-1.5-106, C.R.S. (legalizing marijuana for medical use).
[352] 21 U.S.C. § 812(c)(17).
[353] §§ 18-13-122(1)(a), 25-14-103.5(3)(a)(I), C.R.S.
[354] § 18-13-122(2)(f), C.R.S.
[355] § 18-13-122(3)(b), C.R.S.
[356] *Id.* Please note that crimes related to marijuana use must generally be reported, consistent with safe schools reporting requirements.
[357] § 22-1-119.3(3)(d), C.R.S.

who may administer medical marijuana to a student, and other policies defining reasonable parameters for the administration and use of medical marijuana.

Jack's Law applies to medical marijuana use by students, and does not address the use by school employees, which is beyond the scope of this manual. A school district or charter school can opt out of Jack's Law if the school loses or will lose federal funding based upon implementing the law.[358]

e. Alcohol

The Colorado Legislature recognizes the dangers of early alcohol use. Alcohol possession or consumption is illegal for people under 21.[359]

f. Tobacco Products

Tobacco products are prohibited from use on school property because of their associated health risks. School districts and charter schools are required to adopt rules and policies prohibiting their useby students, teachers, staff, and visitors.[360] However, a school cannot expel a student solely for tobacco use.[361] The definition of "tobacco product" includes smokeless tobacco and e-cigarettes.[362]

3. Campus Disruptions

Individuals, including students, are prohibited from willfully impeding school employees while they are performing their duties. Impeding includes restraint, abduction, coercion, or intimidation, or when force and violence are present or threatened.[363] The use of physical force or the threat of such force is an important element of the crime.[364] For example, a student cannot physically block teachers from entering a classroom or threaten them with violence to try to prevent the assigning of homework or other duties. Restraints on students is discussed in Section III of the manual.

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[358] § 22-1-119.3, C.R.S.
[359] § 18-13-122(3)(a), C.R.S. Note that alcohol violations must be included in a school's required safe school report.
[360] § 25-14-103.5, C.R.S.
[361] § 22-32-109(1)(bb)(I), C.R.S.
[362] §§ 25-14-103.5(2)(c), 18-13-121(5)(a), C.R.S. Tobacco violations must be included in a school's safe school report.
[363] § 18-9-109(2), C.R.S.
[364] *People ex rel. C.A.J.*, 148 P.3d 436, 437 (Colo. App. 2006).

Case Spotlight: Students Impeding School Employees

People ex rel. C.A.J.[365]

A student left voice messages at school claiming that a bomb was on campus. The court held that the student could not be convicted under the interference statute because he was not on campus at the time of the conduct. Nevertheless, other laws may apply for actions done remotely.

4. Threats

Threats of any kind are likely to cause disruptions. A person can be asked to leave school grounds if they commit, threaten to commit, or incite others to commit any act which would disrupt, impair, interfere with, or obstruct a school's lawful missions,processes, procedures, or functions. It is against the law to refuse to leave school grounds when asked by the chief administration officer, their designee, or a dean.

It is also a crime to *knowingly* make a credible threat to cause death or bodily injury with a deadly weapon against any student, school employee, or guest on school property. A "credible threat" is any threat or physical action that would cause a reasonable person to fear bodily injury or death.[366] For example, a person who says, "I hate you, and I hope you fall off a cliff" does not make a credible threat because no reasonable person would be afraid of bodily injury or death based on that statement. However, a student that says, "I hate you, and I am going to stab you with the knife I keep hidden in my locker" probably has made a credible threat. Generally, the more specific and realistic the statement is, the more likely it may be considered a "credible threat."[367] Threat assessments and response protocols are discussed in Section I of the manual.

5. Offenses Against At-Risk Juveniles

An "at-risk juvenile" is a person under the age of 18 years who has a statutorily defined disability.[368] A "person with a disability" means any person who has permanent loss of a hand or foot; is blind or virtually blind; is unable to walk, see, hear, or speak; cannot breathe without mechanical assistance; has an intellectual and developmental disability; has a mental illness; is mentally impaired; or is receiving care and treatment for a developmental disability.[369]

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[365] *Id.*
[366] § 18-9-109, C.R.S.
[367] *People v. Chase*, 411 P.3d 740, 745 & 748 (Colo. App. 2013) (defendant's emails specifically referencing the victims and stating that "someone's going to get hurt, or worse" and that he will "headbutt" and "kick" someone constituted a "credible threat").
[368] §§ 18-6.5-102(4) & (11), C.R.S.
[369] § 18-6.5-102(11), C.R.S.

Fear of mistreatment is a primary concern for at-risk juveniles. Penalties for specified crimes against at-risk juveniles are more stringent than penalties for the commission of identical crimes against other members of society.[370]

At-risk juveniles are more vulnerable to, and disproportionately damaged by, crime in general. They are more impacted by abuse, exploitation, and neglect because they are less able to protect themselves against offenders. At-risk juveniles are more likely to receive serious injury from crimes committed against them, and they are less likely to fully recover from those injuries. They also tend to suffer from greater financial and psychological deprivation.[371] In the school environment, at-risk juveniles may be subject to targeted bullying or harassment.

There are enhanced penalties for certain crimes committed against at-risk juveniles, including: criminally negligent conduct, assault, robbery, theft, caretaker neglect, sexual assault, unlawful sexual contact, and criminal exploitation.[372] Severe bullying or harassment of disabled students may be punishable under this statute, depending on the specific facts of the mistreatment.

6. Hazing[373]

"Hazing" is a misdemeanor related to initiation or admission into or affiliation with any student organization. It includes any activity that recklessly endangers the health or safety of another individual or creates a risk of bodily injury to that individual. While some forms of initiation are acceptable, hazing can become a dangerous form of intimidation and degradation. Hazing may include forced and prolonged physical activity; forced consumption of any food, beverage, medication, or controlled substance in excess of usual amounts; forced consumption of any substance not generally intended for human consumption; and prolonged deprivation of sleep, food, or drink.

Certain criminal statutes cover the more egregious hazing activities, such as assault or kidnapping, and the specific crime of hazing is not meant to override those statutes. In other words, if the hazing activity amounts to an assault, then the criminal behavior would be charged as an assault.

The purpose of the hazing statute, by contrast, is to account for conduct that is not covered by criminal statutes but may threaten the health of students or, if not stopped early enough, may escalate into serious injury.

Hazing does not include customary athletic events such as team games or practices, or other similar contests or competitions. Nor does hazing include authorized training activities conducted by members of the armed forces of the State of Colorado or the United States. A

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[370] § 18-6.5-101, C.R.S.
[371] § 18-6.5-101, C.R.S
[372] § 18-6.5-103, C.R.S.
[373] § 18-9-124, C.R.S.

team-building activity that does not endanger the health or safety of the student and does not create a risk of bodily injury would generally not be considered hazing.

The Colorado School Safety Resource Center offers additional materials on hazing.[374]

7. Offenses in School Vehicles

Colorado statutes define a "school vehicle" as any vehicle (not just a bus) owned or under contract to the school that is being used to transport students.[375] There are five separate criminal offenses related to conduct associated with a school vehicle: vehicle endangerment via tampering that creates a substantial risk of death or serious bodily injury; stopping or boarding a vehicle with intent to commit a crime; threats, attempts, or commission of serious bodily injury or death of a person with a deadly weapon; false reports of explosives, chemical or biological agents, poison weapons or any harmful radioactive substance on a school vehicle or school bus stop; and smoking.[376]

B. Colorado Teen "Sexting" Law[377]

Colorado law provides reduced sentences for "sexting" among juveniles and offers more lenient criminal or civil penalties and teen-specific diversion programs to help juveniles avoid the far more serious felony crimes available to prosecutors.[378]

Practical Tip: Defining Sexting

Sexting includes the posting, possession, or exchange of sexually explicit images of anyone under 18, whether they are images of oneself or of another person.

1. Definitions and Background

"Sexting" is the posting, possession, or exchange of sexually explicit images of anyone under 18 years old, whether images of oneself or of another person. A "sexually explicit image" is "any electronic or digital photograph, video, or video depiction of the external genitalia or perineum or anus or buttocks or pubes of any person or the breast of a female person."[379]

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[374] *Hazing,* COLO. SCH. SAFETY RES. CTR., https://cssrc.colorado.gov/hazing (last visited October 3, 2022).
[375] § 42-1-102(88.5), C.R.S.
[376] § 18-9-115, C.R.S.
[377] § 18-7-109, C.R.S.
[378] *Id.*
[379] *Id.*

Prior to the passage of the teen sexting law, prosecutors generally charged juveniles who engaged in sexting behavior with the crime of sexual exploitation, which required that the person be placed on the sex offender registry. The teen sexting law aids authorities in educating juveniles and impress upon them the serious, long-lasting consequences of their conduct and grants courts discretion whether to require juvenile offender registration on the sex offender registry.

2. Juvenile-Specific Sexting Offenses

Juvenile-specific offenses address the exchange, possession,and posting of sexually explicit images of juveniles.

a. Exchanging

The lowest-level offense is a civil infraction for the exchange of a private image by a juvenile, digitally or electronically. It commonly applies to the *consensual* exchange of images between juveniles. It requires the juvenile know that they have sent a sexually explicit image or images of solely themself to another person who is at least 14 years old or who is less than four years younger than the juvenile and the sender reasonably believed that the recipient had requested or agreed to receive the image(s). Similarly, an exchanging infraction occurs when a juvenile knowingly possesses a sexually explicit image or images of another person who is at least 14 years old or who is less than four years younger than the juvenile, only the sender is depicted in the image(s), and the juvenile reasonably believed that the sender had sent or agreed to send the image(s).

For example, if 16-year-old Steven texts a sexually explicit image of himself to his consenting 15-year-old girlfriend, Mary, he has committed this infraction. Likewise, once Mary has received the image on her phone—and she possesses a sexually explicit image from her consenting boyfriend, Steven—she has also committed an exchange infraction.

Consequences include either participation in an educational program designed by the Colorado School Safety Resource Center that addresses the risks and consequences of exchanging sexually explicit images of juveniles or a fine of up to $50, which may be waived by the court upon a showing of indigency. If the offending juvenile fails to appear in civil court or refuses to complete the required punishment, the court may impose additional age-appropriate punishments, but it may not issue an arrest warrant or impose jail time.

b. Possession

Possession generally applies to a juvenile's nonconsensual possession of a sexually explicit image of another juvenile. A juvenile commits the offense by knowingly possessing, either digitally or electronically, a sexually explicit image of another person who is at least 14 years old or who is less than four years younger than the juvenile without that person's permission. A juvenile can avoid committing this crime if the juvenile takes reasonable steps to destroy or delete the sexually explicit image within 72 hours of having initially seen it; or reports

the existence of the image to law enforcement or a school resource officer within 72 hours of having initially seen it. In contrast, the petty offense is enhanced to a more serious class 2 misdemeanor if a juvenile possesses 10 or more separate sexually explicit images that depict three or more different people without their permission.

Applying the above example to this violation, suppose that when Steven texted Mary a sexually explicit image of himself, he told her that she could not show the picture to anybody else. Unfortunately, without Steven's consent, Mary decided to text the photo to Jessica, her 17-year-old best friend.At that point, Jessica may have committed the petty offense of possessing a private image by a juvenile unless she deletes or reports the image within 72 hours of having seen it. If Jessica has accumulated at least 10 of these types of images depicting three or more people in a similar fashion, then her violation would be enhanced from the petty offense to a class 2 misdemeanor.

c. Posting

Posting commonly applies to a juvenile's posting of a sexually explicit image of a juvenile either without that person's consent or without a viewer's consent. This crime is committed when a juvenile knowingly distributes, displays, or publishes to any person a sexually explicit image of another person who is at least 14 years old or who is less than 4 years younger than the juvenile and: (1) the depicted person did not give the juvenile permission to post the image; or (2) the recipient of the image did not ask to see the image and suffered emotional distress; or (3) the juvenile knew or should have known that the depicted person had a reasonable expectation that the image would remain private.

The crime of posting a private image by a juvenile is also committed when a juvenile digitally or electronically distributes, displays, or publishes a sexually explicit image of himself or herself to another person who is at least 14 years old or who is less than four years younger than the juvenile, and the viewer did not ask to see the image and suffers emotional distress.

Posting a private image by a juvenile moves from a class 2 misdemeanor to a class 1 misdemeanor if: (1) the juvenile committed the offense with intent to coerce, intimidate, threaten, or cause emotional distress to the depicted person; (2) the juvenile has already committed the crime of posting a private image by a juvenile; or (3) the juvenile distributed, displayed, or published three or more sexually explicit images that depicted three or more different people without their permission.

Continuing with the previous examples, Mary committed the crime of posting a private image by a juvenile when she sent the sexually explicit image of Steven to her best friend, Jessica, without his permission. Even if Steven had not explicitly told Mary that she could not show anyone his sexually explicit image, Mary could still have been liable for having committed this crime if she knew or should have known that Steven would have reasonably expected her to keep the image private.

Next, suppose Steven was no longer interested in dating Mary and decided to send the sexually explicit image of himself directly to Jessica, unsolicited, in a misguided attempt to court her. If Jessica, ever loyal to Mary, saw the lewd image and consequently became emotionally distressed, Steven has committed the class 2 misdemeanor of posting a private image by a juvenile.

The penalties could also be enhanced. Suppose that Jessica tells Mary about Steven's ill-advised conduct, which causes Mary to try to get back at Steven by posting his sexually explicit image to a private Facebook group page she shares with friends. Because Mary posted Steven's image without his permission to cause him emotional distress, she could be charged with the enhanced class 1 posting misdemeanor.

Even if Mary had posted Steven's image without the intent to cause him emotional distress, she still could be charged with the enhanced posting crime. For example, if Mary had already been adjudicated for her first posting violation (e.g., when she initially sent Steven's sexually explicit image to Jessica without his permission), then her second posting infraction may be charged as the enhanced class 1 misdemeanor. Finally, if Mary's posting of Steven's image to the Facebook group was the third time she had posted a person's sexually explicit image without their permission, she again would have committed the class 1 misdemeanor.

The Colorado School Safety Resource Center has produced the following chart to help summarize the three offenses:[380]

Offense	Committed if Juvenile:	Penalty	Enhanced to:
POSTING	Knowingly distributes, displays, or publishes image of another who is at least 14 or is less than 4 years younger without permission; OR of themselves if the recipient did not request it and suffered emotional distress; OR the poster knew or should have known that the depicted person had a reasonable expectation of privacy.	Class 2 Misdemeanor	Class 1 Misdemeanor if: intent to coerce, intimidate, threaten, or cause emotional distress; OR prior posting of a private image and completion of a diversion or educational program; OR a prior adjudication; OR posted 3 or more images of separate persons.

[380] *Sexting: New Legislation/HB17-1302 (C.R.S. § 18-7-109) Juvenile Posting/Possessing/Exchanging Private Images,* COLO. SCH. SAFETY RES. CTR., https://cdpsdocs.state.co.us/safeschools/Resources/SextingFactSheet.pdf (last visited October 3, 2022).

POSSESSION	Knowingly possesses image of another who is at least 14 or is less than 4 years younger without permission.	Petty Offense	Class 2 Misdemeanor if: possessor has 10 or more images depicting 3 or more separate persons.
EXCHANGING	Knowingly sends an image of self to another who is at least 14 or is less than 4 years younger and reasonably believed the recipient agreed; OR knowingly possesses an image of another who is at least 14 or is less than 4 years younger and reasonably believed the depicted person agreed.	Civil Infraction May be required to participate in an educational program designed by CSSRC or pay afine up to $50, which may be waived.	N/A

3. Felony Charges Still Possible

Prosecutors may still charge felony sexual exploitation of a child in more severe sexting cases and enhanced penalties for possession or posting could apply. Offenses could include cases involving the possession or posting of an unreasonably high number of images; cases where images are maliciously used to coerce, intimidate, threaten, or cause emotional distress to others; or cases where images are used for blackmail or profit. If prosecutors choose to charge a juvenile with felony sexual exploitation of a child, they cannot also charge the juvenile with misdemeanor posting for the same images or conduct.[381]

Once someone turns 18, prosecutors are only able to charge them with felony sexual exploitation of a child. Thus, while it is important that all students be made aware of the risks and consequences of sexting behavior, older high school students should be educated about the serious criminal liability that they could potentially face once they reach 18.

4. Alternative Discipline

The law also includes alternative disciplinary processes, like restorative justice practices and diversion programs for first-time offenders.

The teen sexting law encourages each district attorney to develop diversion programs for juveniles who commit the offenses of possession or posting, allowing first time offenders to avoid adjudication[382] If no program exists in a jurisdiction, the law encourages district attorneys to offer any other type ofalternative program to help first time offenders avoid adjudication. In

[381] § 18-6-403(7), C.R.S.
[382] § 18-7-109(5)(e), C.R.S.

addition, once a juvenile completes their sentence, diversion program, or other alternative program, the court should have all records of the juvenile delinquency case expunged.[383]

The court may also order the juvenile to be assessed for restorative justice practices.[384] Restorative justice emphasizes repairing the harm offenders caused to victims and the community. These may include victim-offender conferences, family group conferences, and other victim-centered practices. The goal is that "[b]y engaging the parties to the offense in voluntary dialogue, restorative justice practices [can] provide an opportunity for the offender to accept responsibility for the harm caused to the victim and community, promote victim healing, and enable the participants to agree on consequences to repair the harm."[385]

The Colorado School Safety Resource Center has a model educational program for school districts to discuss sexting with its students.[386]

5. Sex Offender Registry

The teen sexting law grants courts discretion as to whether a juvenile offender must register as a sex offender. The conduct covered by the offenses of exchanging, possession, or posting would typically also constitute violations of felony sexual exploitation of a child, which is "unlawful sexual behavior" mandating sex offender registration. The teen sexting law allows first-time juvenile offenders that have engaged in the possession or posting of sexually explicit images to be exempted from sex offender registration, but only if particular criteria are satisfied. First, the juvenile's conduct must be limited to posting or possession, without other aggravating factors. Second, the court must consider the totality of the circumstances and determine that registration would be unfairly punitive, and that exemption would not pose a significant risk to the community.[387]

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[383] § 18-7-109(6), C.R.S.
[384] § 18-7-109(5)(d), C.R.S.
[385] § 18-1-901(3)(o.5), C.R.S.
[386] *Sexting: What You Need to Know,* COLO. SCH. SAFETY RES. CTR., https://cssrc.colorado.gov/sexting (last visited October 3, 2022).
[387] § 16-22-103(5)(a), C.R.S.

VII. LIABILITY CONSIDERATIONS

Student misconduct – such as bullying, violence, and sexual harassment – creates harm and interferes with the learning environment. It can also have legal consequences. Although schools and their staff are generally not liable for damage and injury inflicted by students, the protection for schools and staff is not absolute. When school officials *unreasonably* fail to respond to student misconduct or address known risks, certain student actions can expose districts, schools, and personnel to liability.

For state law claims, the Colorado Governmental Immunity Act bars most claims for harm caused by students.[388] For very serious acts of violence, the Claire Davis School Safety Act waives that governmental immunity. Under this 2015 law, all school districts, charter schools, and their employees have a duty to exercise reasonable care to protect all students and staff from reasonably foreseeable acts of violence – murder, first degree assault, and felony sexual assault – that occur at school or a school-sponsored activity.[389]

With respect to federal claims, this chapter provides a very high-level overview of the potential legal claims based on student misconduct such as bullying, harassment, or discrimination based on a protected class.

In a state that serves almost 900,000 public school students in almost 2,000 schools, it is impossible to eliminate all potential liability, though liability can be mitigated with (1) strong policies and procedures; and (2) regular training to help employees issue spot and implement those policies and procedures. More important than mitigating liability, it is the right thing to do.

A. Claire Davis School Safety Act

Every public school district, school, and charter school in Colorado is subject to the Claire Davis School Safety Act ("Claire Davis Act").390 The Claire Davis Act identifies certain instances in which districts, schools, or their employees may be liable for serious acts of violence at school or a school-sponsored event.

1. "Acts of School Violence"

An incident of school violence is defined as "an occurrence at a public school or public school-sponsored activity" where a person: (1) "engaged in a crime of violence" and (2) "caused serious bodily injury or death to any other person."[391]

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[388] §§ 24-10-106, 106.3(4), & 108, C.R.S.
[389] § 24-10-106.3, C.R.S.
[390] *Id*.
[391] *Id.* at -106.3(2)(c).

A "crime of violence" means the person "committed, conspired to commit, or attempted to commit": murder, first degree assault, or felony sexual assault, as defined in section 18-3-402, C.R.S.[392]

2. "Reasonable Care"

Public schools and their employees must exercise "reasonable care" to protect students, faculty, and staff from "incidents of school violence" caused by students and other persons.[393]

Key considerations to understand regarding this duty include:

1. Employees must use the same degree of care that a reasonable person with ordinary judgment would use.
2. Liability only lies for incidents that occur while students, faculty, and staff are within school facilities or participating in school-sponsored activities.
3. Liability only lies for a harm that is "reasonably foreseeable." An act is "reasonably foreseeable" when a reasonably thoughtful person could anticipate that harm or injury is likely to occur under the circumstances.
4. The statute expressly states that negligence cannot be based solely on a failure to expel or suspend any student. The statute was not intended to encourage districts to use suspension or expulsion out of fear of liability.

Although the liability provisions of the Claire Davis Act are often linked to horrific school shootings, it is also applicable to first degree assault and felony sexual assault. These acts of violence are not uncommon in schools. To ensure school officials meet that reasonable standard of care, it is critical to train regularly on the school's Title IX procedures, bullying policies, and safety measures to address school-based fighting and other assaults.

3. Liability

While immunity can be waived by public schools if they fail to exercise reasonable care, *individual employees* are not subject to liability unless their actions (or failures to act) are willful and wanton.[394] To be willful and wanton, an employee must have understood that their actions or failures to act were dangerous, done heedlessly and recklessly, without regard to consequences, or without regard to the rights and safety of others.

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[392] *Id.* at -106.3(2)(b).
[393] § 24-10-106.3(4), C.R.S.
[394] *Id.*

If liability is imposed for schools or districts, damages are capped pursuant to section 24-10-114. C.R.S. The current cap is $424,000 for any injury to one person in any single occurrence and $1,195,000 for any injury to two or more persons in any single occurrence.[395]

B. Federal Liability for Student Misconduct

Schools are not immune from liability for actions that violate federal laws because federal law supersedes state law in most circumstances. Schools may incur civil liability for school violence under multiple federal laws. To avoid liability, schools should proactively act to deter and prevent school violence.

1. State-Created-Danger Claims Under Section 1983

Generally, a state actor's failure to prevent harm to an individual by a private actor does not amount to a constitutional violation.[396] One recognized exemption that could apply to school officials in extremely rare situations is the "danger creation" theory that can be brought under a Section 1983 case.[397]

Liability is a high bar, but may be imposed under this theory if the following six standards are satisfied:

i. the victim of violent behavior or harassment is a member of a limited and specifically definable group;

ii. is subject to a substantial risk of serious and immediate harm;

iii. the risk is obvious or known;

iv. the school or school employee acts recklessly by consciously disregarding the risk;

v. the school's or school employee's conduct is conscience-shocking when viewed in its totality; and

vi. the school or school employee either created the danger or increased the student's vulnerability to danger.[398]

The *Sutton* case is an example of where a court found that plaintiff had pled sufficient facts to state a claim under the "danger creation" theory.[399] The plaintiff was a 14 year-old student at the Utah State School for Deaf and Blind who had severe cerebral palsy, was totally blind and could not speak, and whose mental capacity was the age of a three- to five-year-old

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[395] *Limitations on Judgments Certificate*, COLORADO SECRETARY OF STATE (Jan. 5, 2022), https://www.sos.state.co.us/pubs/info_center/files/LimitationsOnJudgments.pdf.
[396] *DeShaney v. Winnebago Cnty. Dept. of Social Servs.*, 489 U.S. 189, 196-97 (1989).
[397] *Sutton v. Utah State Sch. for the Deaf and Blind*, 173 F.3d 1226, 1237-38 (10th Cir. 1999).
[398] *Armijo v. Wagon Mound Public Sch.*, 159 F.3d 1253, 1262-63 (10th Cir. 1998); *Uhlrig v. Harder*, 64 F.3d 567, 572-74 (10th Cir. 1995).
[399] *Sutton*, 173 F.3d at 1240-41.

child.[400] The claim alleged that the principal acted with deliberate indifference when he failed to protect the plaintiff from being molested in the bathroom by a large student *after* the plaintiff and his mother had already complained about previous molestations in the bathroom by that same student.[401] This "deliberate indifference" of failing to act after notice of misconduct toward a vulnerable student in a manner that shocks the conscience creates potential for liability when the student is subsequently molested.

2. Federal Anti-discrimination Laws

School districts may violate federal civil rights statutes when students are bullied or harassed based on a protected class, including race, color, religion, national origin, sex, or disability. Addressing this behavior in school policies—including anti-bullying, sexual harassment, and anti-discrimination policies—or in response to single incidences may be insufficient to protect a school from liability. Districts should consult with their counsel to ensure compliance with these federal anti-discrimination laws and to avoid liability. Also, districts must designate a person(s) responsible for coordinating schools' compliance with Title IX, Section 504, and the ADA.[402]

Practical Tip: Applicable Federal Civil Rights Laws

Title VI of the Civil Rights Act of 1964 ("Title VI") prohibits race, color, and national origin discrimination, and is interpreted to include religious discrimination.[403]

Title IX of the Education Amendments of 1972 ("Title IX"), prohibits sex discrimination, [404] which includes discrimination on the basis of gender identity and sexual orientation.

Section 504 of the Rehabilitation Act of 1973 ("Section 504"), prohibits disability discrimination.[405]

Title II of the Americans with Disabilities Act of 1990 ("ADA") also prohibits disability discrimination.[406]

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[400] *Id.* at 1240.
[401] *Id.*
[402] 28 C.F.R. § 35.107(a) (Title II); 34 C.F.R. § 104.7(a) (Section 504); 34 C.F.R. § 106.8(a) (Title IX).
[403] 42 U.S.C. § 2000d, et seq.
[404] 20 U.S.C. § 1681.
[405] 29 U.S.C. § 794.
[406] 42 U.S.C. § 12101, et seq.

a. Title VI.

Title VI generally prohibits discrimination based on race, color, or national origin.[407] While not expressly prohibiting religious discrimination, it is also interpreted to prohibit discrimination against students of any religion involving racial, ethnic, or ancestral epithets, or slurs, or when based on how a student or group of students look, dress, or speak if these things are linked to ancestry or ethnicity. [408] Religious discrimination against students is also prohibited when it is based on actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.

b. Title IX.

Title IX prohibits discrimination on the basis of sex.[409] While Title IX does not explicitly list "gender identity" or "sexual orientation" as protected classes, the U.S. Department of Education and the U.S. Department of Justice issued guidance in 2021 explaining that Title IX prohibits discrimination based on gender identity and sexual orientation.[410] Schools should act on any discrimination, harassment, or bullying on the basis of gender identity or sexual orientation just as they would for sex-based discrimination. Section II of this manual does a deeper dive into Title IX.

c. Section 504 and the ADA

Both Section 504 and the ADA prohibit discrimination against students with disabilities. A school's policies should reflect these protections.

3. Civil Rights and Hostile Environment Claims

Schools risk violating federal civil rights laws—and being liable—when bullying or harassment of protected individuals is "sufficiently serious" that a hostile environment is created and the harassment is encouraged, tolerated, inadequately addressed, or ignored by school employees. Hostile environment claims against schools may be brought under the federal civil rights statutes discussed above. Sufficiently serious conduct is defined as conduct so severe, pervasive, or persistent that it interferes with or limits a student's ability to participate in or benefit from the school's activities, opportunities, or services. Examples include:

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[407] 42 U.S.C. § 2000d, et seq.
[408] *See Know Your Rights: Title VI and Religion*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Jan. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201701-religious-disc.pdf.
[409] 20 U.S.C. § 1681.
[410] Enforcement of Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637 (to be codified at 34 C.F.R. ch. I), *preliminarily enjoined by State of Tenn. v. U.S. Dep't of Educ.*, No. 3:21-cv-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022), *appeal filed*, No. 22-5807 (6th Cir. Sept. 13, 2022); Memorandum from Principal Deputy Assistant Attorney General Pam Karlan, Civil Rights Division to Federal Agency Civil Rights Directors and General Counsels, Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 (March 25, 2021), https://www.justice.gov/crt/page/file/1383026/download.

- Verbal abuse;
- Graphic or written statements;
- Threats;
- Physical assault; and
- Other conduct that may be physically threatening, harmful, or humiliating.

When such conduct creates a hostile environment and is targeted towards a student who is a member of one of the classes protected by the federal civil rights laws discussed above, it can violate those civil rights laws.

Schools are responsible for addressing any incidents when the school or its employees knows or reasonably should have known about the bullying or harassment. A school employee "reasonably should have known" about an incident when, given the facts and circumstances, the existence of the bullying or harassing behavior could have been discovered by exercising reasonable care. A school, through its employees, may become aware of bullying or harassment through direct observation of the conduct or being told about the misconduct.

Case Spotlight: Hostile Environment

***I.G. v. Jefferson County School District*[411]**

A student identifying as Jewish alleged multiple and ongoing instances of anti-Semitic behavior by other students in her school, including regular use of Nazi salutes, saying "Heil Hitler" regularly in school hallways, wearing swastikas, and referencing gas chambers. The student alleged that she reported the behavior to school and school district officials. While the school addressed some issues, others were never addressed or were addressed ineffectually. For example, the student alleged that one student received a one-day suspension but continued his behavior. She also alleged that she was forced to drop a class, suffered academic difficulties, and ultimately was forced to transfer out of the school. The court held that the student met all four elements of a hostile environment claim, sufficient to survive a motion to dismiss.

4. Investigation and Documentation

A school should take immediate action to investigate and document suspected bullying or harassment. The scope of the investigation depends on the nature and source of the allegations,

[411] *I.G. v. Jefferson Cnty. Sch. Dist.,* 452 F. Supp. 3d 989 (D. Colo. 2020).

the age of the students involved, and other relevant factors. The investigation must be prompt, thorough, and impartial.

If the investigation concludes that students were the subject of bullying or harassment, the school must take prompt and effective steps to end the harassment, correct any hostile environment and its effects, and prevent the harassment from recurring. The Department of Education also suggests separating the harasser and victim, providing counseling for both, taking disciplinary action against the harasser, or using alternative discipline strategies. Discipline and alternative discipline strategies are further discussed in Section II of the manual. A school should not inadvertently penalize the student who is the victim while taking these or other steps, however. For example, in separating a student from their harasser, care should be taken to minimize the burden on the victim's education. The school may need to provide additional services to the victim to address the effects of the harassment. Schools may also need to provide training or other types of counseling for perpetrators, victims, and the larger school community to help them identify and prevent future discrimination.

Finally, schools must take whatever steps are necessary to prevent further harassment and bullying and to prevent any retaliation against the student victim and against any witnesses. This includes encouraging affected students and their families to report subsequent problems, conducting follow-ups with affected students to see if there have been any new incidents or retaliation, and responding promptly to address new or continuing problems.

Practical Tip: Additional Liability Consideration

Schools that fail to address discriminatory conduct may also be subject to investigation and legal action by the Office for Civil Rights, U.S. Department of Education, or the U.S. Justice Department.[412]

Schools that fail to properly address discriminatory acts of student-on-student bullying or harassment may be subject to an investigation and legal action by the Office of Civil Rights of the U.S. Department of Education or the U.S. Justice Department. The United States Department of Education's Office of Civil Rights has issued formal guidance (in the form of "Dear Colleague" letters cited throughout this manual) reminding school districts that harassment based on race, ethnicity, national origin, disability, or sex violates federal civil rights statutes and that students are protected from such harassment from school employees, other students, and third parties. When school officials know of harassment and fail to respond appropriately, it can trigger enforcement proceedings.

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[412] 28 C.F.R. § 35.170 (ADA enforcement); 34 C.F.R. § 100.8 (Title VI enforcement); 34 C.F.R. § 104.6 (Section 504 enforcement); 34 C.F.R. § 106.3 (Title IX enforcement).