

Safe Schools

Legal Resource Manual



Wisconsin Department of Justice
Josh Kaul, Attorney General

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DISCLAIMER

This manual represents a synopsis of some of the basic laws governing the investigation of possible criminal activity in a school and the sharing of records between schools, courts, and law enforcement. The contents of this manual shall not be construed to create any rights beyond those established under the Constitution, statutes, and regulations of the United States and the State of Wisconsin.

Many of the issues discussed present challenges to school officials in balancing the need to have their schools safe with the need to keep buildings conducive to learning. The schools in concert with their school boards and their attorneys will make the ultimate policy decisions. This manual is not intended as legal advice, but rather as a resource in assisting school and law enforcement officials in identifying legal issues which may arise in schools and formulating appropriate responses.

This document reflects the law as of the date of its publication. It may be superseded or affected by other versions or changes in the law.



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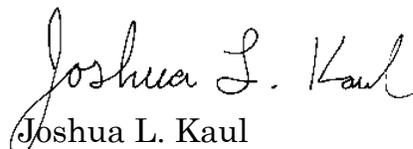
Dear Educators and School Safety Professionals:

The important work you do plays a critical role in creating a safe and secure learning environment for students. Unfortunately, schools are not free from safety concerns.

As you work to keep students safe as they learn each day, this *Safe Schools Resource Manual* is your resource for laws relating to school safety and other topics including search and seizure, speech, bullying, confidentiality, and child abuse. We encourage readers to use this manual in conjunction with the *Wisconsin School Safety Framework* created by the Wisconsin Department of Justice (DOJ) Office of School Safety (OSS).

Thank you to school staff and faculty, law enforcement, and mental health counselors for keeping kids in Wisconsin safe.

Sincerely,


Joshua L. Kaul
Attorney General

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PREFACE

This manual is offered as a resource for Wisconsin schools and law enforcement in understanding legal parameters for maintaining a safe and secure educational environment for our children to be used in conjunction with the Wisconsin School Safety Framework, provided and developed by the Department of Justice Office of School Safety.

While schools are a place of learning and personal development, they are not insulated from societal pressures and unrest. Consequently, school administrators, teachers, and law enforcement must cope with a variety of challenges to school safety. This manual provides an overview of the various laws which provide guidance to school officials and law enforcement in dealing with these challenges. This manual does not provide legal advice as it does not apply the stated legal principles to the specific circumstances or objectives of any specific entity or person. It is not a substitute for consulting local legal counsel on specific questions and issues.

The manual is divided into seven sections. The first section discusses the applicability of Fourth Amendment search and seizure principles in the school. The second section provides guidance regarding regulation of Free Speech in schools. The third section deals with child abuse investigations in the school. The fourth section deals with the rules for questioning a student. The fifth section describes the role and functions of the school resource officer in the school. The sixth section deals with bullying and the seventh and final section addresses the confidentiality issues that school and police officials must keep in mind when they exchange records concerning students.

Our schools are entrusted with the important mission of educating our children in a safe environment. This manual is designed to enhance the knowledge of school officials and law enforcement officers about laws relating to school safety. While the manual discusses various legal intrusions into a student's personal space, it is not suggested that these practices be employed on a regular basis. The law establishes the limits of action, but leaves it to schools and law enforcement to exercise judgment and discretion appropriately within these legal limits. The challenge is to preserve safety for both students and teachers while maintaining an environment conducive to learning. Good communication, cooperation, and mutual respect between students, teachers, and law enforcement are the best mechanisms for achieving this balance.

We hope this manual is helpful to schools and law enforcement in maintaining a safe, positive, and healthy school environment for all Wisconsin children.

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SEARCH AND SEIZURE

INTRODUCTION

A search is conduct by a government official (including a public school employee) that involves an intrusion into a person's protected privacy interests by, for example, examining items that are not out in the open and exposed to public view. A seizure occurs when a government official interferes with an individual's freedom of movement or with an individual's possessory interest in property.

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures. This amendment has been interpreted to protect people from police intrusion into areas where an individual has a reasonable expectation of privacy. The Fourth Amendment mandates that if the police wish to search these privacy zones they need a recognizable legal justification. The stakes for an illegal police intrusion into a privacy zone were raised in the 1960's with the formulation of the "exclusionary rule" by the United States Supreme Court. Under this rule, illegally seized evidence is excluded from trial, no matter how crucial to the outcome it might be.

The Fourth Amendment As It Applies To School Officials

The Fourth Amendment is targeted at the police and their agents. In contrast, citizens may conduct searches anywhere without regard to the rules which restrict police conduct (although they could subject themselves to criminal prosecution for illegal acts such as trespass or theft) and the evidence generated by these searches may be admissible in court.

In 1985, the United States Supreme Court was presented with the question whether school officials are analogous to the police and thus similarly bound to Fourth Amendment constraints or are citizens who may search without constitutional concern. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

In *T.L.O.* the court held that school officials represent a hybrid for Fourth Amendment purposes; they are accountable under the

amendment but with less stringent rules than those that govern police conduct. The court held that public school officials could search the protected areas if they reasonably suspect that the search will yield contraband, evidence of a school rule violation, ordinance, or crime. This "reasonable suspicion" standard, requiring only a suspicion of illegal activity, is a lesser standard than the "probable cause" threshold, under which police may search if they have probable cause to believe the search will yield evidence of a crime. **Note: Private and parochial schools are not government entities and thus are not bound by Fourth Amendment restraints.**

The Wisconsin Supreme Court extended the lower standard of "reasonable suspicion" for school searches to the police if they are working at the request of and in conjunction with school officials. *State v. Angelia D.B.*, 211 Wis. 2d 140, 564 N.W.2d 682 (1997). School officials may search students and their belongings with reasonable suspicion. In addition, as will be discussed later, school officials may search students even without reasonable suspicion if they have consent from the student or if they are acting pursuant to a policy on locker searches.

KEY POINTS

- The Fourth Amendment restricts public school officials, but to a lesser degree than the police. The Fourth Amendment does not apply to private or parochial school officials.
- School officials may search students and their belongings with "reasonable suspicion."
- The police may also search with "reasonable suspicion" (as opposed to their usual "probable cause" standard) if they are working at the request of and in conjunction with, school officials.

CONSENT SEARCHES

For a consent search to be valid, the student's permission or consent must be voluntary, clear, and unequivocal. Consent cannot be the product of coercion or threat. The general rules that govern consent searches apply with equal force in a school setting.

Consent Must be Voluntary

For a consent search to be valid, the consent must be voluntary, and cannot be the result of coercion, undue influence, or threat. A valid consent to search must be given without the threat of punishment. For example, a student who is told that he must comply with a request to empty his pockets or face discipline cannot be said to have voluntarily consented to the search, even if he dutifully complies with the request.

The question of whether consent was voluntary is determined from the totality of the circumstances. Courts consider several factors, though no one factor is dispositive, in deciding whether consent was given voluntarily. These factors include:

- whether the student was informed of the right to refuse to consent;
- the student's age, intelligence, physical, and mental condition;
- whether the student appeared to be under the influence of alcohol or other drugs when asked to give consent;
- the student's prior experience with the police or school officials;
- the presence of a trusted adult; and
- the student's cultural background

The courts will also examine the nature and circumstances of the request for consent to search including who made the request; whether the request was made in an inherently intimidating or coercive environment; and whether physical or psychological coercive tactics were used.

As noted earlier, under no circumstances may the person seeking consent threaten a student with punishment if the student refuses to give consent to search.

Consent Must be Clear

A student's consent to search must be clear and unequivocal. A written consent-to-search form signed by the student is one method of obtaining permission to search, although a search will not be invalid merely because the permission was given orally. Law enforcement agencies have developed consent-to-search forms that are used to memorialize the circumstances under which a suspect has given police permission to search. Written consent-to-search forms are essentially a kind of "permission slip" authorizing a particular search. Consent-to-search forms are a means by which law enforcement officers can show that the person giving consent was accurately advised of the rights that were being waived. It is encouraged that these same forms be used in a school setting to clearly spell out the student's rights under the Fourth Amendment.

Scope of a Student's Authority to Give Consent

A student can only give valid consent to a search of places or things that are owned or controlled by the student. Generally, these include the student's locker; any containers or objects belonging to the student that are kept in the locker; the student's clothing; any objects or containers that are owned, used, or carried by the student (such as a backpack, bookbag, purse, gym bags); and a student's car parked on school premises.

If a student denies ownership of a particular place or object, the student has no authority to give permission to search that place or object. Therefore, the search of that place or object may no longer be justified under the consent doctrine. In order for a search to be conducted of a place or object to which a student denies ownership, the search must be independently justified by a "reasonable suspicion" that the object or place contains evidence of a crime or infraction of a school rule. Otherwise, items can be searched outside the Fourth Amendment if they are deemed abandoned property.

Limitations in Executing a Consent Search

A search must not only be reasonable at its inception, but must also be conducted in a reasonable manner. Consent to search a place or object does not provide authorization to damage

the property in the process.

Consent provides authorization to search only those places or areas where consent to search has been given. Ordinarily, a person's general consent to search an area, without express limitations, impliedly permits a search of all closed containers within that area. *See Florida v. Jimeno*, 500U.S. 248 (1991). For example, if a student gives consent to search his or her locker without expressly withholding consent to search specific places, objects, or containers located within the locker, the locker and any containers or objects located within the locker may be searched, so long as the container is physically capable of holding the object sought.

A student may, however, limit the scope of consent. If a student does so, the scope of the search is limited to the scope of the consent. For example, a student may consent to a search of a backpack, but may expressly withhold consent to search a purse. Similarly, a student may consent to search of a locker, but may expressly withhold consent to search any or all containers located in the locker. (Moreover, students can withdraw consent at any time. The school official must honor this withdrawal of consent unless they have already established the requisite reasonable suspicion to continue the search.)

School officials and law enforcement officers may not draw negative inferences from a limitation on the consent to search. For example, the refusal to give consent to search a particular place or object may not be used as evidence to establish reasonable suspicion that the contraband being sought is concealed in the object for which consent to search has been withheld.

If during the course of a valid consent search contraband or evidence of a crime or violation of school rules is discovered, the object may be seized. Furthermore, the discovery may provide reasonable grounds to conduct a search that goes beyond the scope of the consent that was given initially.

Other Considerations

In attempting to obtain a student's consent to search his or her belongings, school officials or law enforcement should advise the student as to what is being sought and why it is believed that the sought-after object(s) will be in the student's

belongings. For example, if consent is being sought to open a student's locker because a drug-detection dog has alerted to the locker, the official should explain to the student that the dog has alerted to the locker. Although the law does not require that this information be provided to the student, it will help to demonstrate that the consent is valid. Courts might be skeptical of the validity of the consent if law enforcement officers or school officials refuse to explain to a student why permission to search is being sought in response to a direct question posed by the student.

Because a student has the right to refuse consent to search, the fact that he or she declines to give consent cannot be used as evidence that the student has "something to hide." In other words, a refusal to give consent cannot be used in any way to establish "reasonable suspicion" to conduct a search under the authority of *New Jersey v. T.L.O.*

KEY POINTS

- In order for consent to be valid, the consent must be voluntary and the person giving consent must have the authority to do so.
- Consent does not have to be in writing but it is preferable that it be so.
- A refusal to consent does not give a school official reasonable suspicion to believe the student is hiding something.
- It is recommended that the student be advised as to what a school official is searching for prior to asking for consent to search.
- Consent to search a generalized area is a consent to search any items found in that area.

NON-CONSENSUAL SEARCHES OF THE STUDENT'S PERSON AND PERSONAL BELONGINGS

General Guidelines

School officials may search a student's person or personal belongings if they have a reasonable suspicion that the student has violated or is violating either the law or the rules of the

school, and if they have a reasonable suspicion to believe that the search of the person or specific personal belongings will reveal evidence of that violation. Under the standards established in *New Jersey v. T.L.O.* and *State v. Angelia D.B.*, the measures used to conduct a search of a student must be reasonably related to the objectives of the search. Additionally, the search must not be excessively intrusive in light of the age and sex of the student and the nature of the violation.

Searches of a student's person or personal belongings should be conducted outside the presence of other students. A search of the student's person or personal belongings may lead to the discovery of contraband or personal objects. Conducting the search in the presence of other students may subject the student to unnecessary embarrassment and ridicule. Additionally, school officials should always be careful to consider the emotional well-being of the student and the risk that discovery of items of personal hygiene, contraceptives, personal notes from friends, love notes, cartoons or caricatures of school officials, or other highly personal items might embarrass a sensitive student. A school official of the same gender as the student should do any physical touching of the student. School officials cannot, under any circumstance, perform a strip search of a student. Wis. Stat. §§118.32, 948.50.

Searches of a Student's Personal Belongings

When school officials have reasonable suspicion to believe a student has contraband or evidence of a violation in his or her jacket or other outer clothing, backpack, purse, or other bag, the student should be asked to put the object down and remove any outer clothing so that these objects can be searched without physically touching the student's person. It is especially important to give the student the option to "come clean" with the object being sought without touching the student because searches of the student's person are particularly invasive.

Note: There may be circumstances where this practice should not be followed. For example, where there is a suspicion that a firearm is being kept in a backpack, it would be imprudent and unwise to afford the suspect student an opportunity to handle the weapon. The better practice might be to call the police rather than to

confront the student.

School officials should start the search in the place where the sought-after object is most likely to be, keeping in mind whether the object to be searched is physically capable of concealing the object being sought. For example, it would be unreasonable to search for a stolen textbook or laptop computer in a student's purse if that purse is simply too small or otherwise ill suited to conceal the missing object.

School officials should look to see if they can visually identify the item(s) they are looking for before touching or rummaging through personal belongings. The outside of a soft-bodied container such as a bag or backpack should be felt to determine whether the sought-after object is likely to be inside before opening the container and exposing all of its contents.

School officials should stop searching when the sought-after item is found unless at that moment there is a reasonable suspicion to believe additional evidence would be found if the search were to continue.

Searches of a Student's Person

A search of a student's person is a more serious intrusion into the student's privacy. As a result, school officials should be especially cautious when conducting such a search. School officials should not begin by searching a student's person when there is a reasonable suspicion to believe that the sought-after item(s) is being kept in a backpack, purse, or a jacket that can easily be separated from the student's person. This does not hold true, however, if the information school officials relied upon to conduct the search suggests that the item(s) will most likely be found directly on the student's person.

Additionally, the United States Supreme Court expressly warned in *New Jersey v. T.L.O.* that the scope of the search must not be "excessively intrusive in light of ... the nature of the [suspected] infraction." 469 U.S. at 326. This suggests that students should ordinarily not be subjected to a physical touching to find evidence of comparatively minor infractions of school rules such as chewing gum or candy.

Although the Court in *T.L.O.* made clear that school officials are authorized to enforce all school rules, and to conduct searches upon reasonable suspicion to secure evidence of any infraction, school officials must always use common sense and should carefully consider the seriousness of the suspected infraction before conducting a physical search of the student's person. A physical search of a student's person is more likely to be appropriate where the object of the search poses a direct threat to students, such as weapons and drugs.

KEY POINTS

- A school official may search a student or his/her belongings if they have a reasonable suspicion that the area being searched contains contraband or evidence of a violation.
- School officials should balance the intrusion of the search with the severity of the violation involved.
- A school official of the same gender as the student should do any physical touching of a student.
- School officials may not strip search students.

LOCKER SEARCHES

In the case of *In Interest of Isiah B.*, 76 Wis.d 639, 500 N.W.2d 637 (1993), school officials at Milwaukee Madison High School faced a series of complaints and incidents involving guns in and around the school. The number and severity of incidents increased over a one-month period. On November 19, 1990, school officials received information that multiple firearms had been brought into the school that day and a confrontation between armed students was inevitable. Due to the heightened fear and tension, and significant risk of imminent, serious harm to students and faculty, the school principal ordered school security personnel to conduct a random locker search while he continued to gather information about who was actually carrying weapons. The random search of the lockers included a search of Isiah B.'s locker, which produced a gun and a bag of cocaine.

The Milwaukee Public School system had the following written policy in place at the time of the search:

“School lockers are the property of Milwaukee Public Schools. At no time does the Milwaukee public school district relinquish its exclusive control of lockers provided for the convenience of students. School authorities for any reason may conduct periodic general inspections of lockers at any time, without notice, without student consent, and without a search warrant.”

Of importance was the fact that the school district had taken steps to reinforce the policy by informing students and parents of the policy and by prohibiting students from putting private locks on their assigned lockers.

The Wisconsin Supreme Court held that under the facts of this case, Isiah B. did not have a reasonable expectation of privacy in his locker. Consequently, Isiah B. had no Fourth rights concerning the locker, and there was no Fourth Amendment violation. **The court explained that when a school district has a written policy retaining ownership and possessory control of school lockers, and notice of the policy is given to students, students have no reasonable expectation of privacy in those lockers.**

The Wisconsin Legislature has codified the Supreme Court's holding in *Isiah B.* in Wisconsin Statute §118.325 which provides:

Wis. Stat. §118.325 Locker searches. An official, employee or agent of a school or school district may search a pupil's locker as determined necessary or appropriate without the consent of the pupil, without notifying the pupil and without obtaining a search warrant if the school board has adopted a written policy specifying that the school board retains ownership and possessory control of all pupil lockers and designating the positions of the officials, employees or agents who may conduct searches, and has distributed a copy of the policy to pupils enrolled in the school district.

KEY POINTS

- School officials may make random searches of lockers if the school has a written policy as to this practice and the policy is widely disseminated to the student body.
- The Legislature recently passed Wis. Stat. §118.325, which codifies the school's right to random searches of lockers.

VEHICLE SEARCHES

School officials may search the contents of a vehicle that is owned or operated by a student and that is parked on school grounds if (1) the school has a reasonable suspicion that there is evidence or contraband in the vehicle, or (2) the student has given consent to the search of the vehicle.

School officials should not conduct a non-consensual search of a student-owned or operated vehicle that is not parked on school grounds. (The police, within the restraints of the Fourth, may conduct such a search.)

Schools can have written policies advising students who park on campus that their vehicles might be subject to random searches. Students who use campus lots knowing this policy are, by implication, consenting to a vehicular search.

KEY POINTS

- School officials may search a vehicle parked on school premises if they have a reasonable suspicion that the vehicle contains contraband or evidence of a violation.
- School officials may also search a vehicle with the consent of the student.

DRUG-DETECTION CANINES

Increasingly, school officials are bringing drug-detection canines into schools to ferret out controlled substances that may be stored in lockers. Schools typically advise students of the possibility of canine searches at the beginning of the year and then conduct the searches on a periodic basis during the year. Wisconsin courts

have held that canine searches conducted on public grounds do not engage the Fourth Amendment, as they do not violate any reasonable expectation of privacy. However, this remains a dynamic area of the law and the most prudent policy is to resist targeted canine sniffing unless there is reasonable suspicion. So, a general dog sniff, done on an occasional basis is permissible without reasonable suspicion, but a dog sniff of a particular person's property should be predicated by reasonable suspicion.

A drug-detection dog represents a hybrid form of search; the legal nature of this governmental conduct (and hence the applicable legal standard) will usually change during the course of the inspection episode. At the outset, the schoolwide canine inspection or "sweep" falls neatly within the definition of a general or suspicionless search and, under federal law and state law, this conduct need not be justified under the *T.L.O.* reasonable suspicion test. Once a drug-detection dog alerts to the presence of controlled dangerous substances, however, the ensuing act of searching the item (such as a locker, car, or bookbag) in response to the dog's alert clearly constitutes a particularized, suspicion-based "search" for purposes of Fourth Amendment analysis.

The Wisconsin Courts have endorsed the federal law position that a properly trained canine which alerts to a particular area provides sufficient probable cause to believe that the area has drugs. This is true if two factors are present: (1) the dog is properly trained and (2) observer of the dog's activity is properly trained to understand and interpret the canine's indicators. *State v. Miller*, 2002 WI App 150, 256 Wis. 2d 80, 647 N.W.2d 348.

Because the "reasonable suspicion" standard used to determine the lawfulness of a search conducted by school officials is more flexible and less exacting than the "probable cause" standard used by police, it is even more likely that a positive alert by a scent dog will justify the subsequent search into the area alerted to by the dog.

If police initiated the canine sweep that results in an alert, the police must still secure a search warrant or consent to search. However, if school officials requested police assistance to conduct the canine search, the dog's alert satisfies the reasonable suspicion standard and school

officials may search or request the police to search without a search warrant or consent.

Naturally, school officials wish to maintain a positive learning environment for students and the presence of canines can undermine this objective. Accordingly, the searches are normally conducted when the students are in the classroom.

Using Canines to Search Persons and Clothing

Despite the severity of the drug and weapons problem facing our schools, it is generally inappropriate to use scent dogs to examine a student's person, including articles of clothing, while the student is wearing such clothing. Scent dogs are often trained to use active or aggressive alert cues or "keys," including scratching, pawing, barking, and growling. School officials and law enforcement agencies that are considering the use of drug-detection canines in schools should also be mindful that police dogs, even scent dogs, may evoke painful memories of past governmental overreaching in the United States and abroad. In some communities, the use of police-controlled animals to search or intimidate persons — especially students — will be met by a visceral negative reaction.

KEY POINTS

- Random canine searches on school property are permissible, as they do not constitute a search within the meaning of the Fourth Amendment.
- If a properly trained canine alerts to any piece of property, this constitutes probable cause upon which to justify a search of the alerted to area.

COMPUTER SEARCHES

The United States Supreme Court has long afforded constitutional protection to private conversations. As a general rule, people have a reasonable expectation of privacy in their private conversations, and this expectation may be reasonable, even if the conversations are occurring through the use of electronic mail via school-owned computers. Absent the consent of a participant in a conversation, *see* Wis. Stat. §968.31, the monitoring and recording of a

conversation through trapping or other devices may constitute an infringement of one's reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347 (1967). Further, both state and federal law strictly limit the use of surveillance devices to monitor communication, including electronic mail. Wis. Stat. §§968.27-968.31; 18 U.S.C. §§2510-2521. Federal law also places restrictions upon the authority of governmental entities to access stored electronic communications such as e-mail. 18 U.S.C. §§2701-2711. With few exceptions, school monitoring of communication by students or staff may expose the school district and its officials to both civil and criminal liability. Accordingly, school officials should not monitor these types of communication without guidance from their legal counsel.

KEY POINTS

- Absent consent of one of the participants the monitoring of e-mail communications may be a violation of the students' expectation of privacy.
- Always check with your legal counsel before attempting to monitor e-mail communications.

Data Stored by the Student on the School Computer's Hard Drive

School officials or law enforcement agents may have the desire to inspect the hard drives of school-owned computers to determine what information has been stored on the system that may suggest unlawful conduct (including files downloaded from the Internet or student-created files). This area of law is largely unsettled. Clearly, inspection of student electronic files stored on school computers may be done with the consent of the student or with a valid search warrant. The inspection or search may be unlawful if the student has a reasonable expectation of privacy in records the student maintains on the school's system and the inspection is done without the student's consent and without a search warrant.

A student's expectation of privacy may be reasonable if access to those records is protected by a password and the school does not have a computer use policy that indicates otherwise. A student will likely not have a reasonable expectation of privacy if the school district has a written policy retaining control of the data stored

on its computers, and notice of the policy is given to students. For example, if the school distributes an acceptable use of information technology policy, and the policy informs students that school employees may monitor use and compliance with the policy, it is unlikely that the student will be found to have a reasonable expectation of privacy in the data he or she stores on school computers. *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000).

KEY POINTS

- Inspection of student electronic files stored on school computers may be done with the consent of the student or search warrant.
- A written school policy disseminated to the students may reduce or eliminate any expectation of privacy the student might have in such materials.

Search of Cell Phones

Cell phones have become an integral part of the school environment. While these phones are useful for scheduling and possible safety concerns, they can cause unwarranted disturbances in the classroom or be instruments for criminal activity. Accordingly, schools are encouraged to have a written cell phone use policy.

If a student violates the school cell phone policy, but it is not suspected that the student was engaging in illegal or inappropriate behavior, the prudent course is to confiscate the phone but not to search it. This is true, because under Wisconsin law people have an expectation of privacy in their cell phone contents.

However, if a school official has a reasonable suspicion that there is illegal material on the cell phone, they can search it and can solicit the police to assist in this process. Naturally, school officials can always ask the student for consent to search the cell phone.

Sexting

Unfortunately, while not common, students can send compromising photos to each other through their cell phones. This practice is called sexting and while Wisconsin, unlike some other states, does not have a law specifically for sexting,

minors caught sexting sexually explicit images can be charged under the state's child pornography laws. Under Wisconsin child pornography laws, it is a felony to produce, possess, or distribute images/videos containing minors engaging in sexually explicit acts. Consequently, when a school official has a reasonable suspicion that sexting might be occurring they should immediately solicit assistance from law enforcement.

KEY POINTS

- Schools are encouraged to have a written cell phone use policy.
- Sexting may involve felony conduct.
- When a school official has a reasonable suspicion that sexting might be occurring, they should immediately solicit assistance from law enforcement.

POINT OF ENTRY/EXIT INSPECTIONS

In some school districts, school authorities require students to open their bookbags and knapsacks for cursory inspection by a security officer or other school employee before they are allowed to enter the school building. Sometimes, these random inspections are conducted in conjunction with the use of metal detectors. In addition, a number of schools require students to open their handbags and knapsacks for inspection before leaving the library or media center. This is done to discourage students from removing library books and other materials without proper authorization.

Requiring all students to submit to this form of search represents a somewhat greater intrusion on privacy interests than does the use of metal detectors, since this technique permits school officials to look inside closed containers. While more intrusive, this procedure can serve as a useful means to discourage students from bringing drugs and other non-metallic contraband that could not be revealed by a metal detector.

While requiring a student to open a closed container for inspection clearly constitutes a "search" for purposes of the Fourth Amendment, this conduct is permissible provided that school authorities follow district rules created to

minimize the discretion of school employees in determining which students are subject to this form of inspection. In addition, school officials must take certain steps to minimize the degree of intrusion to the greatest extent possible. One of the most important safeguards is to provide students with advance notice as to when and under what circumstances they will be required to submit to this form of search. Accordingly, school officials should provide all students and their parents and/or legal guardians with written notice prior to the school year that these security procedures will be implemented. In addition, notice should be provided to visitors by means of posting warning signs at points-of-entry to the school where these inspections will be conducted. The best means of protecting against arbitrary discretion is to ensure the even-handed application of the policy to all students and visitors entering the school. By subjecting everyone to this form of intrusion, there is minimal stigma attached to the search.

KEY POINTS

- Random inspection of student items at specific locations is permissible if the school has a clear policy as to this practice, clearly marks the area involved, and performs these inspections in a fair and even-handed way.

METAL DETECTORS

In some schools, officials have deemed it necessary to use metal detectors to discourage students from bringing firearms, knives, and other metal weapons on to school grounds. The use of metal detectors is now common in airports, courthouses, and other public buildings across the country.

There are essentially two distinct types of metal detection equipment: stationary magnetometers that are strategically placed at entrances and through which students or visitors must pass; and portable, hand-held devices or “wands” that can be used to scan student clothing and packages. Often, the two types of detectors are used in conjunction with one another because each performs a slightly different function. Both types of metal detectors are used as screening devices to determine whether a further physical search is appropriate. The use of metal detectors thus serves to reduce the number of persons who

are subject to a physical “search.” Presumably, those who do not activate a metal detector would not be subject to any further delay or intrusion.

In determining whether to deploy metal detectors, school officials should note that the effectiveness of these devices depends to a large extent on the ability of school officials to maintain security at all entrances to the school building. Because it is often not possible to prevent students who are determined to bring weapons into the school from using unauthorized (and unprotected) means of access to school buildings, to some extent, the use of stationary metal detectors serves as a symbolic as well as practical response to the problem.

One of the most important means to minimize the degree of intrusion caused by the use of metal detectors is to provide advance notice to students and their parents and/or legal guardians. In addition to providing notice to all enrolled students by means of publication in the student handbook, written warning notices should be posted conspicuously at the entrances of the school so as to provide notice to visitors that they will be subject to this form of inspection.

Hand-held metal detectors or “wands” are far more versatile than stationary units. These portable devices can be used in a number of applications, including (1) to conduct initial “sweep” inspections of students and their property as they enter the school building; (2) to verify and focus on the specific location of metal that was detected by a stationary walk-through unit; or (3) examine the clothing or property of specific students who are suspected to be carrying concealed weapons. However these portable metal detection devices are used, it is important that school officials develop a written policy that guards against the arbitrary exercise of discretion. (As noted above, the best means of protecting against arbitrary discretion is simply to ensure the even-handed application of metal detectors to all students, visitors, and hand luggage entering the school.)

When hand-held metal detectors are used to scan students who are already in the school building (at locations other than points of entry) care must be taken to ensure that students are not subjected to unreasonable inspections. Even though a metal scan may not constitute a full-blown “search” for Fourth Amendment purposes, it is recommended that individually

selected students not be scanned unless school officials have some articulable suspicion that the student being examined may be carrying a weapon.

KEY POINTS

- Metal detectors are considered minor intrusions and thus can be justified without reasonable suspicion or consent.
- The use of the "wand" metal detector is more intrusive than a stationary unit and should be limited to those occasions where the school official has an articulable suspicion.

Weapons in Schools

The Wisconsin Legislature passed laws that allow citizens to lawfully carry concealed weapons if they have a carrying concealed weapon permit. These permits are relatively easy to obtain, but the applicant must be over 21 years of age, be otherwise permitted to carry a firearm, have proof of the requisite training, and be a Wisconsin resident. Because of the age requirement, no student will be entitled to obtain the permit. Also, no person, whether they have the permit or not, can carry a firearm in a school unless they are an active or retired law enforcement officer.

SURVEILLANCE TECHNOLOGY & SEARCH ISSUES

In an effort to monitor school campuses for evidence of violent behavior, school personnel and resource officers are increasingly relying upon technology such as surveillance cameras to assist them. As a general rule and within certain limits, school personnel and law enforcement may lawfully utilize surveillance technology that enhances their ability to protect the health, welfare, and safety of a school's students and staff. Because of the legal pitfalls inherent with the use of this technology, school officials and law enforcement officials should carefully discuss these issues with their legal counsel before deploying surveillance technology in school settings.

Video Surveillance

School officials may utilize video surveillance in any place on school premises where staff or students lack a reasonable expectation of privacy. Common areas of the school in which students, staff, and members of the public would probably lack a reasonable expectation of privacy include hallways, classrooms, the cafeteria, library, and the parking lot. Just as school officials have the right to be personally present and monitor activities in these common areas, so too can they rely upon video technology to aid them in monitoring these areas.

Even within the school setting, staff and students do not completely forfeit their expectations of privacy. As such, school officials must be more circumspect in utilizing video surveillance in areas where students or staff have a right to exclude others. For example, staff may retain a reasonable expectation of privacy in private offices and work areas assigned to them. Likewise, students may possess an expectation of privacy in areas where they have the right to exclude others. These places include bathroom stalls, locker rooms, and assigned lockers. Without independent legal justification, video monitoring of these areas would probably infringe upon a student or staff member's Fourth Amendment rights.

In addition to Fourth Amendment considerations, school and police officials must also be conscious of Wisconsin Statutes, which limit their ability to utilize video surveillance technology. To protect people from unsuspecting voyeurs, the Legislature has passed several statutes to protect people from being videotaped or photographed in a nude or partially nude state without consent. The installation or use of a surveillance device as sophisticated as a camera or as simple as a peephole with the intent to observe even a partially nude person constitutes a criminal invasion of privacy. Wis. Stat. §942.08. Likewise, the taking or possession of a photograph or making of a recording of a person depicted nude without his or her knowledge and consent constitutes a felony. Wis. Stat. §944.205.

To minimize the risk of violating these statutes, school officials should not deploy video surveillance to monitor activity in any area in which there is a possibility that someone may appear even in a partially nude state. Locker rooms and bathroom stalls are areas where the use of surveillance technology should be avoided.

Finally, state employees also have certain statutory protections against video monitoring. Wis. Stat. §230.86 prohibits the state from taking disciplinary action against state employees based in whole or in part through surveillance unless the employee's supervisor authorizes the surveillance and it is conducted pursuant to administrative rules.

Audio Surveillance

The United States Supreme Court has long afforded constitutional protection to private conversations. As a general rule, people have a reasonable expectation of privacy in their private conversations, even if these conversations occur in places open to the public. This expectation exists whether the conversation occurs in person or through some other medium such as the telephone. Absent the consent of a participant in a conversation, the monitoring and recording of a conversation through devices such as concealed microphones, parabolic dishes, or telephone monitoring equipment constitutes an infringement of one's reasonable expectation of privacy. *United States v. Katz*, 389 U.S. 347 (1967).

In the school setting, school officials may only utilize surveillance equipment to monitor or record any conversations that the official could hear with an unaided ear. Likewise, school officials should not monitor telephone conversations of students or staff without the consent of a participant in the conversation.

Both state and federal law strictly limit the use of surveillance devices to monitor communication, including in-person conversations, telephone conversations, and electronic mail. Wis. Stat. §§968.27-31; and 18 U.S.C. §§2510-2521. But for a few exceptions, school monitoring of communication by students or staff may expose the school district and its officials to both civil and criminal liability. Accordingly, school officials should

not monitor these types of communication without guidance from their legal counsel.

KEY POINTS

- School officials may use visual surveillance in any area where a student does not have a reasonable expectation of privacy.
- School officials should refrain from visual surveillance in areas where it is likely that students could be observed in a partially nude state.
- Audio surveillance is a Fourth Amendment intrusion and schools should not engage in monitoring telephone conversations without the consent of one of the participants in the conversation.

DRUG TESTING IN SCHOOLS

The United States Supreme Court has held that students engaged in school athletic programs are subject to random drug testing. Recently this school right to random drug testing has been expanded to include all students engaged in school sponsored extracurricular activities. Otherwise drug testing of a student by a public school official is a search that must comply with the requirements of the Fourth Amendment.

More school teachers and administrators are being trained in drug recognition techniques. Documented training in this area facilitates a school official reaching the requisite reasonable suspicion of drug activity.

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FREE SPEECH IN SCHOOLS

INTRODUCTION

“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.” *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969) (Students allowed to wear black armbands to protest the Vietnam war).

PROTECTED SPEECH

Speech expressing merely an unpopular viewpoint. In *re Douglas D.*, 2001 WI 47, ¶43, 243 Wis. 2d 204, 626 N.W.2d 725.

Speech which causes discomfort and unpleasantness. *Tinker, supra*, 393 U.S. at 508, 509.

Temporary interruption of class time by a sit-in. *Gonzalez on behalf of A.G. v. Burley H.S.*, 404 F.Supp. 3d 1269, 1283 (D. Idaho 2019)

Speech which is controversial. *M.C. through Chudley v. Shawnee Mission U.S.D.*, 363 F.Supp. 3d 1182, 1202 (D. Kan. 2019)

Speech which is political in nature or context, which is conditional, or is hyperbole or received by an audience with laughter. *Pillault v. U.S.*, 371 F.Supp. 3d 325, 340 (N.D. Miss. 2019)

Speech with creates nothing more than remote apprehension of a disturbance. *Bell v. Itawamba County School Bd.*, 799 F.3d 379,397 (5th Cir. 2015)

ACTIONABLE SPEECH

A student “may express his opinions ... if he does so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of

others”. [*Tinker*, 393 U.S. at 513] (alteration in original) (emphasis added) (internal quotation marks omitted). Put another way, “conduct by the student, in class or out of it, which for any reason ... materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized ...”. *Id.* (emphasis added). Approximately three years after *Tinker*, our court held this standard can be satisfied either by showing a disruption has occurred, or by showing “demonstrable factors that would give rise to any reasonable forecast by the school administration of ‘substantial and material’ disruption.” *Shanley v. Ne. Indep. Sch. Dist., Bexar Cnty., Tex.*, 462 F.2d 960, 974 (5th Cir. 1972).

“The pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction advocated by Bell, ‘mak[ing] any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools’. *Layshock*, 650 F.3d at 220–21 (Jordan, J., concurring).” *Bell v. Itawamba*, 799 F.3d at 395-396.

Factors to be considered in applying the test “to forecast substantial disruption of or material interference with school activities,” *Bell v. Itawamba*, 799 F.3d at 398, include:

- Nature and content of the speech
- Objective and subjective seriousness of the speech
- Severity and possible consequences should the speaker take action
- Relationship of speech to school
- Intent of speaker to disseminate or keep private the speech
- Nature and severity of school’s response in disciplining the student/s
- Whether the speaker names educators or students
- How the speech reached the school community
- Past incidents arising out of similar speech

- Other occurrences involving the same speaker and extent of measures taken to deal with those event

THREATENING SPEECH IN SCHOOLS

Student speech that disrupts school activities – especially speech that threatens physical harm – may subject the student not only to disciplinary action, but also to criminal prosecution for disorderly conduct. The Wisconsin Supreme Court discussed the application of the disorderly conduct statute to disruptive student speech, as well as the constitutional limitations on prosecuting such speech, in two decisions, *In the Interest of Douglas D.*, 2001 WI 47, ¶ 14, 243 Wis. 2d 204, 626 N.W.2d 725, and *In the Interest of A.S.*, 2001 WI 48, 243 Wis. 2d 173, 626 N.W.2d 712.

In *Douglas D.*, an eighth-grade student turned in a creative writing essay to his English teacher in which the fictional protagonist, also an eighth-grade student, assaulted his teacher. Some of the events in the story paralleled recent events involving the student and the teacher. The teacher and the school administration viewed the essay as a threat, and the student ultimately was adjudicated delinquent on a charge of disorderly conduct.

The Wisconsin Supreme Court held that speech threatening a school teacher could be punished under the disorderly conduct statute even though it was not accompanied by any disorderly physical acts. Noting the increasing public concern with violence in schools, the court concluded that threatening a public school teacher while in school is the type of conduct that tends to cause or provoke a disturbance, and thus was disorderly conduct.

However, the court also held that the essay was protected by the First Amendment because it was not a “true threat,” which the court defined as “a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views or other similarly protected speech.” Given the

sometimes humorous nature of the essay, the fact that it was submitted as part of a creative writing exercise and the fact that part of the assignment was that it was to be passed on to another student to add to it, the court concluded that the essay was not a true threat.

The court’s conclusion relied heavily on the fact that the threat was contained in a creative writing assignment – the court noted that “[h]ad Douglas penned the same story in a math class, for example, where such a tale likely would be grossly outside the scope of his assigned work, we would have a different case before us.” The court also stated that “[a]lthough the First Amendment prohibits law enforcement officials from prosecuting protected speech, it does not necessarily follow that schools may not discipline students for such speech.”

The court reached a different conclusion with regard to the constitutional protection for the student’s speech in the *A.S.* case. A week after the Columbine High School shootings, 13-year-old A.S. told some friends at a youth center that he was going to kill everyone at his middle school; his statements included graphic details about how he would kill or seriously harm specific individuals. As in *Douglas D.*, the Supreme Court concluded that this speech constituted disorderly conduct because the student’s threatening speech had a tendency to create a disturbance, especially in light of the recent Columbine shootings. Unlike *Douglas D.*, however, the court found no constitutional protection for these threats. Given the nature of the threats and the manner in which A.S. spoke them, the court concluded, A.S. should have foreseen that his statements would be interpreted by the listener as a serious expression of his intent to intimidate or inflict bodily harm.

These cases establish that student speech that threatens physical harm is potentially punishable as disorderly conduct, if it is uttered in circumstances where the speech would tend to provoke a disturbance. However, if the content and context of the speech demonstrate that the speech does not represent a “true threat,” the speech will be found to be constitutionally protected.

KEY POINTS

- Student speech in school can be prosecuted as disorderly conduct if under the circumstances the speech would tend to provoke a disturbance.
- Threatening speech that may not be sufficient for a disorderly conduct charge can be the basis for school discipline.

TERRORIST THREATS

It is inevitable that in a time of repeated senseless violence—in which the violent actors are often discovered, in hindsight, to have signaled their violent intent in some way—that we should be increasingly prone to treat those violent signals as truly threatening.

Threats of violence are not protected by the First Amendment because people need to be protected from the fear of violence, the disruption that fear of violence engenders and the possibility that the threatened violence will occur. *State v. Perkins*, 2001 WI 46, ¶17, 243 Wis. 2d 141.

Whoever threatens to cause death or bodily harm to any person, or damage to any property, where, for instance, the person intends to, or creates an unreasonable and substantial risk of, the prevention of the occupation of, or the evacuation of, school premises, or the causing of public panic or fear, has committed the felony crime of **Terrorist Threats**. Wis. Stat. §947.019(1).

Whoever intentionally communicates, or causes to be communicated, any threat, or false information (knowing it to be false), about an attempt or even an alleged attempt being made, or to be made, to destroy any property by means of explosives has committed the felony crime of **Bomb Scare**. Wis. Stat. §947.015.

MANDATORY REPORTING

The statutes do not define “threat.” The word’s common meanings, Wisconsin courts have found, are “an expression of an intention to inflict injury” and “an indication of impending

danger or harm.” *In re the Commitment of Michael H.*, 2014 WI 127, ¶4, 359 Wis. 2d 272, 856 N.W.2d 603.

Any person listed in Wis. Stat. §48.981(2)(a) (see Appendix B) shall report if such mandatory reporter believes, in good faith, based on a threat made by an individual, seen in their professional capacity, regarding violence in or targeted at a school, that there is a serious and imminent threat to the health or safety of a student, school employee, or the public. Wis. Stat. §175.32(2)(a). In other words, a person privy to a potential threat is to exercise reasonable care, that is, such care as would be exercised by a reasonable person under the same circumstances, to report whenever it is reasonably foreseeable that a person’s conduct may cause harm to another. *Schuster v. Altenberg*, 144 Wis. 2d 223, 239, 424 N.W.2d 159 (1988).

A mandatory reporter of school threats of violence is to immediately inform, by telephone or personally, a law enforcement agency of the facts and circumstances leading up to their belief that there is a serious and imminent threat to the health or safety of a student, school employee or the public. Wis. Stat. §175.32(3). Such a reporter is immune from liability for such a disclosure, Wis. Stat. §175.32(4), but failure to report as required can result in a fine of up to \$1000 or imprisonment for not more than 6 months or both. Wis. Stat. §175.32(5).

Once the threat is disclosed, schools are expected to implement the guidelines and procedures created by the district to assess and respond to threats of school violence and bomb threats, as set forth in the school safety plan as required by Wis. Stat. §118.07(4)(bm).

KEY POINTS

- All school personnel are mandatory reporters of threats to school safety.
- A mandatory reporter is to exercise reasonable care that the potential threat is serious and imminent.

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BULLYING IN SCHOOL

INTRODUCTION

All pupils should be able to enjoy their school environment free from harassment, intimidation, and isolation. Teachers, pupils, coaches, administrators, and all school related personnel should have a zero tolerance for bullying so that everyone can learn and participate in school and school related activities without fear, embarrassment, or harm.

The phrase “sticks and stones can break my bones but names can never hurt us,” has proven to be untrue. Bullied pupils can be traumatized and the victimization can have devastating effects. Schools, parents, pupils, and law enforcement share in the responsibility to put an end to bullying. Wisconsin recognizes that pupil bullying is a major problem and in an effort to prevent bullying enacted Act 309, which aims to stop bullying through awareness, education, and prohibitions.

REQUIREMENTS FOR SCHOOLS

2009 *Wisconsin Act 309* required the Department of Public Instruction to develop a model policy and a model education and awareness program on bullying, and that these models be posted. Wis. Stat. §118.46(1). DPI’s model policy is set forth in Appendix D. The Department posted a model policy that defines bullying as deliberate or intentional behavior using words or actions, intended to cause fear, intimidation, or harm. Bullying may be repeated behavior and involves an imbalance of power. This behavior can include physical, verbal, and indirect conduct. Indirect conduct can include rumor spreading, gestures, and social exclusion. It also includes cyber bullying which is defined as “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.” Cyber bullying also includes using media such as the internet, social networking sites, instant messaging, blogging, impersonation, interactive gaming, and more.

All school boards are required to adopt a policy prohibiting pupil bullying and retaliation for reporting bullying, which includes a definition

of bullying and a confidential reporting procedure. Wis. Stat. §118.46(1)1.-4.

The school board policy should also include a procedure investigating bullying reports. A school district employee shall be identified as the one responsible for conducting an investigation and the parent of each pupil involved must be notified. The policy shall also identify a person to whom the investigation reports are made, and list all the disciplinary alternatives for pupils that engage in bullying or who retaliate against a person who reports a bullying incident. Wis. Stat. §.46(1)6.-8. The policy will identify where, including vehicles used for pupil transportation, and at what school-related events the policy applies. Wis. Stat. §118.46(1)8.-10.

The school board shall provide a copy of the policy to anyone who requests it and annually distribute the policy to all pupils enrolled in the school district and to their parents or guardians. Wis. Stat. §118.46(2).

BULLYING AS A CRIME

In addition to school discipline, the bullying conduct may be severe enough to warrant prosecution as an ordinance or criminal matter. There is not a specific ordinance or crime entitled bullying, but the bullying conduct may constitute the crimes of:

- Wis. Stat. §947.01 - Disorderly conduct
- Wis. Stat. §947.012 - Unlawful use of telephone
- Wis. Stat. §947.0125 - Unlawful use of computerized communication systems
- Wis. Stat. §947.013 - Harassment
- Wis. Stat. §940.32 - Stalking
- Wis. Stat. §943.201 - Unauthorized use of an individual’s personal identifying information or documents.

Relationship of Bullying and Stalking

The word “stalking” is only used for purposes of identifying the portion of the statutes, Wis. Stat. §940.32, in which it appears. It could have easily been entitled “bullying” instead of “stalking” as the crime covers almost all possible bullying activity. “Stalking” by bullying behavior is a real problem in schools. The legislature’s appreciation of the seriousness of this conduct is reflected in its classification of the stalking of persons under 18 years of age as a Class H felony. Applying the DPI model policy to the stalking statute reveals that:

- stalking involves intentional conduct, such as bullying, repeated two or more times, over a period of time, no matter how short or long, that shows a continuity of purpose, to target a specific person. (Wis. Stat. §940.32(1))
- stalking involves conduct towards the victim that would cause a reasonable person under the same circumstances to suffer serious emotional distress or fear bodily injury or death to themselves or a member of their family; as stated in the introduction to this section, bullying can cause victims to be traumatized and can have devastating effects of serious emotional distress.
- stalking, like bullying, involves the bully who knows or should know that at least one of the bullying acts constitutes a course of conduct towards the victim that would cause the victim to suffer serious emotional distress, or fear bodily injury or death to themselves or a member of their family.
- Commonly occurring bullying activities covered by the stalking statute include, but are not limited to:
- maintaining visual or physical proximity to the victim. (940.32(1)(a)1.)
- Approaching or confronting the victim with harassing statements, or calling a person names or swearing at them or insulting their family. (940.32(1)(a)2.)
- Appearing at the victim’s home or contacting the victim’s neighbors, to get information about the victim’s whereabouts or to spread information about the victim. (940.32(1)(a)4.)
- Contacting the victim by telephone or causing the victim’s or another’s telephone to ring whether or not a conversation ensues. (940.32(1)(a)6.)
- Photographing, video recording, audio recording, or through any other electronic means monitoring or recording the activities of the victim. (940.32(1)(a)6m.)
- Sending material by any means, including all forms of electronic social media, to the victim or to others in order to disseminate information about the victim. (940.32(1)(a)7.)
- Placing or delivering any object to a place where the victim may be or so that it will eventually get to the victim. (940.32(1)(a)8.,9.)

KEY POINTS

- DPI developed a model policy and a model education program on bullying.
- While there is no specific crime of bullying, such conduct can implicate various criminal statutes.

CHILD ABUSE INVESTIGATIONS IN OUR SCHOOLS

ROLE AND AUTHORITY OF CHILD PROTECTIVE SERVICES AND LAW ENFORCEMENT AGENCIES IN CHILD MALTREATMENT INVESTIGATIONS

Wisconsin law assigns to law enforcement and the county departments of social or human services in each county (including the Milwaukee Bureau of Child Welfare) the responsibility and authority to investigate certain reports of child maltreatment. Schools do not have statutory authority to investigate reports of child maltreatment. Consequently, they must refrain from conducting investigations, leaving these investigations to trained CPS and law enforcement personnel. A report of suspected or threatened sexual abuse must be referred by the county department to local law enforcement and must be investigated jointly by CPS and local law enforcement. The county department must also have a written policy on what other types of physical, emotional, and /or neglect abuse, that it will routinely report to the local law enforcement agency. Child maltreatment is broadly defined in Wisconsin. It includes, but is not limited to, sexual, physical, and emotional abuse; as well as neglect. Appendix A provides a list of the statutes that define the various forms of abuse and neglect.

Certain professionals are required to report abuse by law, including threatened or suspected abuse, to the county department or local law enforcement. A child abuse or neglect report must be made when “mandated” reporters, including all school employees, have reasonable cause to suspect a child seen in the course of professional duties has been abused or neglected. A child abuse or neglect report must also be made when these mandated reporters have reason to believe that a child is threatened with abuse or neglect and that abuse or neglect will occur. They are required to report their suspicions to the local department of social or human services or the law enforcement agency with jurisdiction to investigate the matter. In cases of sexual exploitation, the law requires a coordinated investigative response.

2011 Wisconsin Act 81 expanded the mandatory reporting requirement to include any school employee. Appendix B lists all mandatory reporters. The Act also requires that every employee of the school district, governed by the school board, receive training provided by the department in identifying abused or neglected children. And they also must be trained in the laws and procedures under s. 48.981, governing the reporting of suspected or threatened child abuse and neglect. A school district employee shall receive this training within the first 6 months after commencing employment with the school district, and at least once every 5 years thereafter.

Wisconsin law also requires that if a report alleges abuse, neglect, or threatened abuse or neglect by certain caregivers or relatives of the child, or unknown maltreaters, the investigation must include an observation or an interview of the child, or both if possible. The law also requires a home visit when the caregiver or relative continues to reside in the same home as the child.

CPS is authorized by Wisconsin Statutes to interview the child anywhere, except the child’s home, without consent of the child’s parent, guardian, or legal custodian. However, the power of social workers and law enforcement officers to investigate claims of child abuse in private or parochial schools is more limited. A discussion of the limits is set forth later in this chapter. The CPS agency is not required to notify the child’s parents before conducting an investigative interview in a public school.

The statutes also allow CPS to exclude school personnel from interviews based on professional judgment and in accordance with applicable standards. The interview should be conducted by the social worker in conjunction with law enforcement, when appropriate. While monitoring or participation by school personnel may be appropriate--even valuable--in certain cases, it must occur at the discretion of the social worker or law enforcement investigator.

KEY POINTS

- Schools do not have statutory authority to investigate reports of child maltreatment.
- A child abuse or neglect report must be made when “mandated” reporters, including all school employees, have reasonable cause to suspect a child seen in the course of professional duties has been abused or neglected. When in doubt, report to law enforcement.
- CPS is authorized by Wisconsin Statutes to interview the child anywhere, except the child’s home, without consent of the child’s parent, guardian, or legal custodian.

MULTIDISCIPLINARY TEAMS AND CHILD ADVOCACY CENTERS

Wisconsin Statutes authorize county departments to recognize multidisciplinary child abuse and neglect investigative teams (MDTs) of professionals who work together to ensure an effective response to reports of child abuse or neglect. MDTs may focus on investigation or policy issues involving treatment of victims, their families, and perpetrators.

An express goal of Chapter 48, the Children’s Code, is to encourage “innovative and effective prevention, intervention and treatment approaches, including collaborative community efforts” to implement child protection strategies. Child protective services agencies are required to cooperate with law enforcement officials, court, tribal government, and other human services agencies to prevent, identify and treat child abuse and neglect and unborn child abuse. Wisconsin law permits the free exchange of otherwise confidential child abuse and neglect information between members of multidisciplinary child protection teams recognized by the county department, and to staff members of child advocacy centers recognized by the county board or department. Educational professionals may play a valuable role in a multidisciplinary team approach to child abuse and neglect by helping identify and work with maltreated children. The use of multidisciplinary investigative teams and child advocacy centers (CAC’s) lessens trauma for

child victims, better coordinates the delivery of services to the child and produces investigations that are more reliable. Appendix C provides a more detailed description of multidisciplinary teams and child advocacy centers.

INTERVIEWING AND OBSERVING A CHILD

Wisconsin Statute section 48.981(3) requires that certain reports of abuse or neglect be investigated if they are made by a person with reason to suspect that a child has been abused or neglected or that a child has been threatened with abuse or neglect and abuse or neglect will occur.

A CPS worker may interview a child on public school property if there is reasonable cause to suspect, *i.e.*, reasonable suspicion that a child has been abused or neglected by his or her parents or guardians, or is in imminent danger of such abuse or neglect. “Reasonable suspicion” or “reasonable cause to suspect” involves a belief, based on evidence but short of proof that an ordinary person would reach as to the existence of child abuse. A reasonable suspicion is based on articulable facts, which would lead a reasonable CPS worker or police officer to suspect that abuse or neglect has occurred or that the child has been threatened with abuse or neglect. It is more than a hunch but less than probable cause. As noted above, Wisconsin Statutes authorize social workers to contact, interview or observe a child at almost any location.

A report by a mandated reporter who has reasonable cause to suspect a child has been or is threatened with abuse or neglect should provide as much detailed information as possible in order to constitute sufficient evidence to justify and enhance an investigative interview.

It may also be possible in some cases for the CPS workers to seek further verification of the report of abuse as permitted by time and circumstances before contacting a child. For example, if a report is received from a neighbor, it may be appropriate for the social worker to seek additional information from the teacher or other school staff regarding the child’s general condition or care before interviewing the child. This is particularly true in cases where the report is from a minor, the reporter is

anonymous, or the source’s reliability might otherwise be reasonably suspect.

Depending on the nature of the allegation and other information, it may be necessary to make a visual inspection of the child, including parts of the body that are normally clothed. As discussed below, absent an emergency or exigent circumstance, a visual inspection by CPS of the body of a child who may have been a victim of child abuse requires “probable cause” or a search warrant.

Before searching a child in an effort to corroborate evidence of child abuse or to determine the child’s need for medical care, there must be an attempt to seek whatever verification of the report is permitted by time and circumstances. This may include interviewing school staff, other students, and the child who is the subject of the report, unless it would be counterproductive under the circumstances.

KEY POINTS

- Wisconsin law permits the free exchange of otherwise confidential child abuse and neglect information between members of multidisciplinary child protection teams recognized by the county department, and to staff members of child advocacy centers recognized by the county board or department.
- Wisconsin Statute section 48.981(3) requires that certain reports of abuse or neglect be investigated if they are made by a person with reason to suspect that a child has been abused or neglected or that a child has been threatened with abuse or neglect and abuse or neglect will occur.
- A social worker may interview a child on public school property if there is reasonable cause to suspect, i e., reasonable suspicion that a child has been abused or neglected by his or her parents or guardians, or is in imminent danger of such abuse or neglect.

TAKING A CHILD INTO CUSTODY

Under Wisconsin law, a CPS worker has the same power as a law enforcement officer to take

a child into custody if the child comes voluntarily or if the CPS worker believes on reasonable grounds that the child is suffering from illness or injury or is in immediate danger from his or her surroundings, and removal from those surroundings is necessary. Most courts have concluded that a CPS worker may place a child in temporary custody when he or she has evidence giving rise to a belief on reasonable grounds that the child has been abused or is in imminent peril of abuse. “Reasonable grounds to believe” appears to be the same as “probable cause to believe.”

A CPS worker should also pursue reasonable avenues of investigation before depriving parents of custody. Children suspected of being abused or neglected cannot be taken into custody unless reasonable avenues of investigation are first pursued, particularly where it is not clear that a crime has been--or will be--committed. Whether a reasonable avenue of investigation exists, however, depends in part upon the need for immediate action and nature of the allegations.

Under Wisconsin law a CPS worker, who has reasonable grounds to believe a child was abused or neglected or that a child is in immediate danger of abuse or neglect, may take a child into custody. This may include transporting the child to a hospital or CAC center to continue the investigation.

Generally, law enforcement officers and CPS workers have broad authority and discretion to investigate claims of child abuse and neglect in public schools. As noted above, Wis. Stat. §48.981(3)(b) and (c) set forth the duties and authority of social workers and law enforcement officers to conduct these investigations. CPS workers in particular may contact, observe, and/or interview the child at any location, including public schools, without permission from the child’s parent, guardian, or legal custodian if necessary to determine if the child is in need of protection or services, except that the person making the investigation may enter a child’s dwelling only with consent or court order to do so.

Although the Fourth Amendment regulates the investigative behavior of CPS workers just as it does law enforcement, a lower standard of scrutiny applies to searches and seizures conducted by government officials on public

school property. The law permits law enforcement officers and CPS workers to go to a public school, interview and observe the child without consent or a court order as long as they have a reason to suspect, that is, a reasonable suspicion that, the child has been or will be abused and or neglected. Thus, a law enforcement officer and/or CPS worker may enter a school and have a child removed from the classroom; *i.e.*, seize the child, and move the child to a more private place on school grounds in an effort to investigate the abuse report. If, during the interview and observation of the child, the law enforcement officer or CPS worker develops reasonable grounds to believe, that is, probable cause to believe, the child has been abused or is in immediate danger from his or her surroundings and removal from those surroundings is necessary, the child may be taken into custody and transported to a hospital or child advocacy center to provide for the needs of the child and further the investigation to determine whether abuse or neglect has occurred or is likely to occur. The rules are different, however, when the child abuse investigation occurs in private or parochial schools, or on other private property.

The power of CPS workers and law enforcement officers to investigate claims of child abuse on private property, and in particular, private or parochial schools, is more limited. *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003).

In *Heck*, the federal court ruled that the authorization in Wis. Stat. §48.981(3)(c)1.b. to

observe or interview the child at any location without permission from the child's parent, guardian, or legal custodian if necessary to determine if the child is in need of protection or services, except that the person making the investigation may enter a child's dwelling only with permission from the child's guardian or legal custodian or after obtaining a court order to do so

is unconstitutional if CPS workers and law enforcement officers search the premises of a private or parochial school and/or seize a child attending that school for purposes of conducting an interview without a warrant, court order, probable cause, consent, or exigent circumstances. The court definitively ruled that in order to conduct an investigation in a private or parochial school, or on other private property,

social workers and law enforcement officers need a court order, probable cause to believe the child has been abused or is in imminent danger of being abused, emergency circumstances, or consent. "Investigation" includes an interview, a visual inspection or both.

KEY POINTS

- Under Wisconsin law, a social worker has the same power as a law enforcement officer to take a child into custody if the child comes voluntarily or if the social worker believes on reasonable grounds that the child is suffering from illness or injury or is in immediate danger from his or her surroundings, and removal from those surroundings is necessary.
- The law permits law enforcement officers and social workers to go to a public school, interview and observe the child without consent or a court order as long as they have a reason to suspect; *i.e.*, a reasonable suspicion that the child has been or will be abused and or neglected.
- The power of social workers and law enforcement officers to investigate claims of child abuse on private property; and in particular, private or parochial schools, is more limited. *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003).
- To conduct an investigation in a private or parochial school, or on other private property, social workers and law enforcement officers need a court order, probable cause to believe the child has been abused or is in imminent danger of being abused, emergency circumstances, or consent.

DEFINING KEY LEGAL TERMS

Probable cause has been defined in various ways in Wisconsin. In this context, probable cause is best described as that amount of information which would lead a reasonable investigator to believe the child has been abused or neglected, or threatened with abuse or neglect and that abuse or neglect will occur. It is not necessary that the information be sufficient to prove abuse

or neglect “beyond a reasonable doubt” for guilt in criminal court, or by “clear and convincing evidence” that a child is in need of protection and or services (CHIPS), or even by a “preponderance of the evidence” for maltreatment substantiation purposes; it is only necessary that the information lead a reasonable investigator to believe that abuse or neglect is more than a possibility. Thus, probable cause follows reasonable suspicion in the continuum of proof. The more evidence you have that something happened, the more authority you have to act.

In Wisconsin, the “emergency doctrine” allows law enforcement and child welfare workers to make warrantless entries into private premises to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, if they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to their life, health, or property as long as they do not enter with an accompanying intent to either arrest or search.

Since the Fourth Amendment applies to the activities of child welfare workers as well as the police, this doctrine regulates their ability to enter private property as well.

“Exigent circumstances” requires the existence of probable cause and an emergency before one is allowed to proceed without consent or a court order. When law enforcement officers or child welfare workers have an “emergency” and “probable cause,” they have greater authority to act than if they simply have an emergency. They may respond to the emergency and they may investigate for child maltreatment as well. However, if they only have an emergency, they can investigate generally the emergency and respond only to the emergency. As discussed above, their ability to investigate any potential crime is limited. CPS workers, like law enforcement officers, are subject to the constraints of the Fourth Amendment when it comes to investigating child abuse and neglect reports.

Consent may be obtained from the parent, legal guardian, or school officials since they act in place of the parents in private school settings. Consent is very desirable in that it may grant the

investigators greater authority to act than the constitution, case law, or statutes would otherwise provide. But, if the parent or guardian refuses to consent to an investigative request, the parent or guardian’s wishes control and the investigators do not have a legal right to see, search, or seize the child for investigative purposes regardless of whether the school official consented to the request.

Therefore, in private school settings, unless one has consent from the parent or school, exigent circumstances, or an emergency in which it appears there is risk of further abuse, in other words, a substantial threat of imminent danger to life, health, or property, a warrant or a court order must be obtained to interview a child and take them into protective custody as circumstances so dictate.

KEY POINTS

- The “emergency doctrine” provides that law enforcement officers and child welfare workers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to their life, health, or property and provided, further, that they do not enter with an accompanying intent to either arrest or search.
- “Exigent circumstances” requires the existence of probable cause and an emergency before one is allowed to proceed without consent or a court order. When law enforcement officers or child welfare workers have an “emergency” and “probable cause,” they have greater authority to act than if they simply have an emergency.
- Consent may be obtained from the parent, legal guardian, or school officials since they act in place of the parents in private school settings.

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QUESTIONING OF JUVENILES BY LAW ENFORCEMENT OFFICERS AND SCHOOL EMPLOYEES

INTRODUCTION

The following sections pertain to the questioning of juveniles suspected of committing school rule violations and/or crimes. They briefly summarize the relevant legal standards.

Law enforcement officers will quickly recognize that the professional standards normally governing criminal investigation and interrogation of adults also apply in situations involving juveniles. However, officers should expect courts to scrutinize the investigative and interview techniques used to obtain information from juveniles closely.

Law enforcement officers who question a student about possible criminal activity must comply with *Miranda* principles. However, school officials are not required to use *Miranda*. School officials are strongly encouraged to seek input from law enforcement prior to questioning any student about criminal involvement.

COMPLIANCE WITH *MIRANDA V. ARIZONA*

The United States Constitution protects persons against compelled self-incrimination. Persons subjected to *custodial* interrogation by law enforcement officers regarding matters that might tend to incriminate them are entitled to the procedural safeguards outlined in *Miranda v. Arizona*, 384 U.S. 436 (1966). Specifically, they must be warned before questioning that they have a right to remain silent, that any statement made may be used as evidence against them, and that they have a right to either appointed or retained counsel.

A person is “in custody” for purposes of *Miranda* as soon as his freedom is curtailed to the degree associated with formal arrest. The test is whether, under the totality of the circumstances, reasonable people in the subject’s position would consider themselves to be in custody.

A person is “interrogated” for purposes of *Miranda* if he is subjected not only to express

questioning, but also to any words or actions by law enforcement officers, other than those normally attendant to arrest and custody, that the officers should know are reasonably likely to elicit an incriminating response from the person. Typically a person in school is not considered to be in custody for *Miranda* purposes. However, more and more courts are looking more closely at this issue and it is possible that under certain circumstances a student at school could be viewed as being in custody. If law enforcement wishes to remove any doubt, the safest course would be to remind the student that they are not in custody and are free to terminate the questioning at any time and to return to their classroom.

In 2011, the United States Supreme Court added the age of the subject into the custody calculus. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011). Consequently, the younger the subject, the more likely a court might determine for *Miranda* purposes that a reasonable person in the juvenile subject’s position would not have felt free to terminate the interview and leave. The best practice is not to crowd the interview room with too many authority figures when interrogating a student.

A student’s volunteered statements to a law enforcement officer may be used against him without prior *Miranda* warnings. Similarly, a student’s responses to an officer’s general, on-the-scene investigatory questions may be used against him without prior *Miranda* warnings. Law enforcement officers must comply with *Miranda* even if the person is a juvenile. **School employees are not required to comply with *Miranda*, as long as they are not acting as agents of law enforcement officers.** If officers direct, control, or involve themselves in the questioning of a juvenile in custody by using a school employee in a way likely to induce the juvenile to make an incriminating statement without the presence of counsel, then any resulting statements are subject to suppression under *Miranda*.

KEY POINTS

- *Miranda* warnings are required for a police interrogation of a subject in custody.
- School officials are not bound by *Miranda* and do not have to give the warning unless they are acting as a direct agent for the police.

WAIVER OF *MIRANDA* RIGHTS BY A JUVENILE

Miranda rights may be waived if the waiver is made knowingly and intelligently. The determination of whether a valid waiver has been made depends upon the particular facts and circumstances of each case, including the background, experience, and conduct of the accused.

Juveniles may waive their *Miranda* rights, and may do so without a parent being present. However, reviewing courts will closely review the facts and circumstances of the waiver to assure that it was voluntary. Many factors may be considered, including the juvenile's age, education, intelligence, and emotional characteristics; his previous experience with the criminal justice system; the time of day; and the presence of a parent or other adult concerned about the juvenile's welfare.

In obtaining a *Miranda* waiver great care should be taken to assure that the juvenile understands his/her rights. Mere recitation of the standard *Miranda* warnings will not be good enough. Law enforcement officers must take steps to ensure that the juvenile really understands his rights and the gravity of the situation. They must demonstrate that the juvenile has the mental capacity to comprehend the significance of *Miranda* and the rights waived. At minimum, officers should ask the juvenile to explain, in his own words, his understanding of each individual right. In certain cases (such as younger juveniles), officers might go so far as to explain what services an attorney might perform for the juvenile, and might take special care to explain the concept of self-incrimination.

VOLUNTARY STATEMENTS BY JUVENILES TO LAW ENFORCEMENT OFFICERS

Courts will look at the totality of the circumstances to decide whether a juvenile's statement was voluntary. The test is whether the statement was made freely and voluntarily, without improper coercion or inducement. See *Colorado v. Connelly*, 479 U.S. 157, 167, 170 (1986); *State v. Clappes*, 136 Wis. 2d 222, 239, 401 N.W.2d 759 (1987).

Factors to consider include the age, education and intelligence of the juvenile, the length of questioning, whether the juvenile was informed of his constitutional rights, and whether he was subjected to physical coercion or punishment. Other relevant factors include the juvenile's emotional characteristics, his previous experience with the juvenile and/or criminal justice system, and whether his statement was obtained or induced by police deception. Courts will also look for evidence that the accused was offered leniency in return for his statement, or received other offers or promises that induced his statement. Additional factors include the time of day for the interview, the length of the interrogation and the presence of a parent or other adult caretaker concerned about the juvenile's welfare during the questioning.

While the presence or absence of a parent is a factor that courts will consider in determining voluntariness, there is no *per se* rule that a parent must be present during questioning. However, courts have held that police conduct that frustrates a parent's attempt to speak with their child before or during questioning is a significant factor in deciding whether a statement was given voluntarily.

Clearly, statements obtained from juveniles during police interrogation will invite special attention from reviewing courts. They will be carefully scrutinized, not only for evidence of physical or psychological coercion, but also for some demonstration that the juvenile understood his *Miranda* rights, appreciated the gravity of the situation, freely agreed to waive those rights, and gave a completely voluntary statement.

LAW ENFORCEMENT INTERVIEWS WITH JUVENILES AT SCHOOLS

Law enforcement officers investigate reports of crime. Interviews of juvenile victims, witnesses, and perpetrators are a necessary part of that process. In certain situations, the school is the best location for that interview.

The Wisconsin Supreme Court has held that all custodial interrogations of juveniles for delinquent matters (matters that would be crimes if they were adults) must be recorded, either video or audio or both. In determining whether or not the interview should be recorded, law enforcement must ask itself whether or not the interrogation is custodial. If it is, the interrogation must be recorded, even if it takes place in the school. If the setting is non-custodial there is no requirement to record the interrogation.

School officials are responsible for maintaining an appropriate educational environment. Minimizing disruption in schools is a necessary part of that process.

While schools may adopt reasonable policies regarding law enforcement access to schools and students on school grounds, we encourage mutual cooperation between the two groups in the development of these policies. Further information on this issue can be found in *OAG 5-94*, a Wisconsin Attorney General Opinion.

KEY POINTS

- The rules as to waiver and voluntariness apply to juveniles and adults.
- While it is not required to have parents or any trusted adult present at the interview site, their inclusion makes it easier to demonstrate voluntariness if the statements are challenged.
- Schools may adopt policies concerning police questioning which take place at the school.

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THE AUTHORITY AND ROLE OF SCHOOL RESOURCE OFFICERS

INTRODUCTION

Driven in part by law enforcement's movement towards community policing as well as the increased perception of school violence, having law enforcement officers present in our schools has become more commonplace. Recognizing the value of formalizing relationships between school districts and law enforcement, schools and law enforcement officers have mutually agreed to the assignment of law enforcement officers to schools. The evolving role of the school resource officer has served two objectives: (1) It has helped in maintaining a safe environment in the school, and (2) has added to mutual respect between students and law enforcement.

These school resource officers (SRO) assist school administrators in the investigation of complaints concerning weapons violations, drug possession, and gang-related activity. SRO's also provide school administrators with information such as criminal, delinquency, and protective placement matters occurring off school property that may affect the school.

WHAT IS A SCHOOL RESOURCE OFFICER?

A school resource officer is a "law enforcement officer." Wisconsin law defines a law enforcement officer as "any person employed by the state or any political subdivision of the state, for the purpose of detecting and preventing crime and enforcing laws or ordinances and who is authorized to make arrests for violations of the laws or ordinances that the person is employed to enforce." Wis. Stat. §165.85(2)(c).

Because a school district is not a "political subdivision" as defined in Wis. Stat. §165.85(2)(d), a school district lacks the authority to employ its own law enforcement officers. This limitation would not preclude a school district from employing security personnel or funding a resource officer employed by a political subdivision such as a county, city, village, or town, Wis. Stat. §§118.125(1)(be), (bL)1.,2., to enforce laws,

make referrals, and maintain physical security and safety at a public school.

Basic Powers of a Law Enforcement Officer

School resource officers retain their law enforcement authority even while on school property. Consequently, the rules governing search and seizure for police govern the conduct of a school resource officer on school grounds. As will be discussed later, there may be some variations to these principles if the SRO is acting upon the invitation and direction of the school. The following is a short synopsis of these rules so that school officials might have a better understanding and appreciation of the constitutional requirements placed on police enforcement activity.

Law enforcement officers possess broad authority to arrest individuals and to search and seize evidence. While the law prefers that an officer conduct an arrest or search with a warrant, courts have recognized a number of exceptions to the warrant requirement. An officer does not relinquish this law enforcement authority upon entering school grounds.

Whether on or off school property, an officer may conduct a warrantless arrest if the officer has reasonable grounds to believe that the person has committed or is committing a crime. Wis. Stat. §968.07(1)(d).

Officers may not enter property under the possession and control of third parties to arrest an individual without a search warrant authorizing entry to make the arrest or consent of the person in possession and control. Thus, when an officer enters school property to effectuate an arrest, the officer should not enter areas closed to the general public without a warrant or the school's consent.

While making an arrest, the officer may command the aid of any person, including school officials, who then acquire the same power as that of a law enforcement officer. Wis. Stat. §968.07(2).

Courts have identified several common situations where an officer may conduct searches without a search warrant. Assuming that the officer has a right to be present in the place where the search is to occur on school property, the officer might conduct the following types of searches in a school setting.

- An officer may conduct a search of a person and the person's belongings with the person's consent. The consent must be freely and voluntarily given from a person who has the actual or apparent authority to grant this consent. The consent search may not exceed its scope. This means that an officer may only conduct a search pursuant to the parameters outlined in the officer's request for consent or limitations placed upon the search by the person. (For further discussion of consent see the discussion of consent searches earlier in this manual.)
- An officer may conduct a search of a person incident to the person's arrest. The area where an officer may search includes the person and the lunge area, that is, any area within the immediate vicinity of the arrest where the person could obtain access to a weapon or destroy evidence.
- An officer may temporarily detain a person if the officer has a reasonable and articulable suspicion that the person has committed, is committing or is about to commit a crime. The detention may only last as long as is reasonably necessary to dispel these concerns. If the officer has a reasonable and articulable suspicion that the person has a weapon, the officer may frisk the outer garments of a person and the exterior of any belongings that the person is carrying. The sole purpose of the frisk is to look for weapons.
- An officer may search an automobile if the officer has probable cause to believe that contraband is contained within the vehicle. The officer may search any compartments or containers within the automobile in which the suspected contraband might be found.
- An officer may conduct a warrantless search when there is an imminent danger to life or health. A warrantless entry is

valid under the emergency doctrine if the officer is actually motivated by a perceived need to render aid and if a reasonable person under the circumstances would have thought an emergency existed. *State v. York*, 159 Wis. 2d 215, 464 N.W.2d 36 (Ct. App. 1990).

In response to an emergency, authorities may remove items believed to be dangerous to the authorities or the public—even when authorities also suspect that the items seized may be evidence of criminal activity. They may also analyze those items for the purpose of identifying them and take whatever action is necessary to render them safe. *State v. Milashoski*, 163 Wis. 2d 72, 471 N.W.2d 42 (1991).

SPECIAL SEARCH AUTHORITY FOR SCHOOL RESOURCE OFFICERS

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the United States Supreme Court granted school officials the authority to conduct warrantless searches as long as the officials have a reasonable suspicion to believe that the student possesses evidence of a crime or violation of school rules. When the Wisconsin Supreme Court adopted the *T.L.O.* standard, it specifically upheld the authority of a police resource officer to conduct a *T.L.O.* type search. *State v. Angelia D.B.*, 211 Wis. 2d 140, 564 W.2d 682 (1997). A school resource officer may participate in a *T.L.O.* type search as long as the officer is acting in conjunction with school officials and in furtherance of the school's objective to maintain a safe and proper educational environment. In extending the authority to search under the *T.L.O.* standard to school resource officers, the Wisconsin Supreme Court recognized that school resource officers possess specialized training in dealing with potentially dangerous situations without subjecting themselves or others to danger.

Interplay Between Police Rules and School Official Rules

As more particularly described earlier in the manual, school officials are burdened by Fourth restraints, but to a lesser degree than are law enforcement officers. For example, a school official may search a student, without consent, with reasonable suspicion but a police officer

cannot search a student, without consent, unless the officer has sufficient probable cause to take the child into custody. However, under Wisconsin law if the police are invited by a school official to participate in a search the police may “bootstrap” onto the more permissive rules governing school officials. Conversely if the police are leading the investigatory charge the more restrictive police rules would control.

Absent danger to the student or others, SRO’s should probably not engage in *T.L.O.* searches at the request of school officials for evidence of activities that merely violate school rules, but not other laws that the officers typically enforce. In *Angelia D.B.*, the court approved of the use of SRO’s to conduct searches precisely because of the danger posed by weapons in the school. Such concerns are not present when school officials are searching for evidence of behavior that merely violates school rules.

KEY POINTS

- School resource officers are law enforcement officers and thus bound by police rules while operating in a school.
- School resource officers may conduct searches on the lesser standard of reasonable suspicion **if** the school invites them to participate in the search.

School Resource Officer’s Legislative Authority to Conduct Searches

The Wisconsin Legislature has granted school officials authority to conduct certain types of searches and prohibited them from performing other types of searches. Awareness of these legislative parameters provides necessary guidance to resource officers who will often be asked by school officials to assist them in their endeavor.

School district officials are statutorily authorized to conduct locker searches pursuant to a policy that conforms to Wis. Stat. §118.325. Under this section, the school board must identify the positions of the “officials, employees or agents who may conduct searches.”

Absent a policy adopted by the school board designating the school resource officer as an agent of the school district for purposes of

locker searches, and absent any other independent authority to conduct a search, the SRO should not conduct a school locker search. Assuming that the policy designates that an SRO may conduct a locker search and lacking another justification for conducting a warrantless search, the officer should only conduct the locker search under the direction of school officials.

Under Wis. Stat. §118.45, a school board may adopt a written policy authorizing an employee or agent of the school board, or a law enforcement officer, to conduct a breath test of a student. The employee, agent, or officer must have reasonable suspicion to believe that the student is under the influence of alcohol before requiring the student to submit to the test. The student may only be required to provide the sample if the student is on school grounds, is an occupant of a school owned or chartered vehicle, or is participating in a school function. Absent an express school board policy or an independent legal basis compelling a student to provide a sample, the SRO should not request a student to provide a breath sample for alcohol testing purposes.

Wisconsin Statutes §118.32 and 948.50 prohibit school officials from conducting strip searches. A strip search includes any requirement that a person disrobe such that “genitals, pubic area, buttock or anus, or a female person’s breast, is uncovered and either is exposed to view or is touched by a person conducting the search.” Wis. Stat. §948.50(2)(b). As such, SRO’s should not conduct a strip search at the request of school officials. An SRO may conduct a strip search only if the SRO independently concludes that a strip search is warranted under the officer’s employing agency’s guidelines for conducting strip searches. Wis. Stat. §968.255.

KEY POINTS

- School resource officers may conduct a random locker search for the school, if the school's policy on locker searches specifically identifies them as having this authority.
- School officials are statutorily prohibited from conducting strip searches of students.

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CONFIDENTIALITY OF RECORDS

INTRODUCTION

Under Wisconsin's public records law, Wis. Stat. §19.31-19.39, there is a presumption that records created and kept by the public sector, including public schools, will be made accessible to members of the public upon request. Wis. Stat. §19.31. This presumption of openness yields, however, to other statutory provisions that provide confidentiality for certain categories of records or information. Wis. Stat. §19.35(1)(a). Access to records of student misconduct created or maintained by schools, law enforcement, and the courts is largely controlled, therefore, not by the public records law but by the provisions of Wis. Stat. chs. 48, 118, and 938, and the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. §1232g. Relevant sections of Wis. Stat. §118.125 are set forth in Appendix E.

Subject to a number of exceptions that will be discussed in this section, Wisconsin law requires students' records maintained by a public school to be kept confidential. Wis. Stat. §118.125(2). Wisconsin law defines "pupil records" to include: "all records relating to individual pupils maintained by a school." Wis. Stat. §118.125(1)(d). Pupil records do not include notes and other records kept by teachers and other licensed school personnel if those notes are not made available to others. *Id.* The definition also excludes records necessary for the psychological treatment of a student, if those records are available only to personnel involved in the student's treatment. *Id.*

Similarly, any school or school district that receives federal funding is obligated by federal law not to release records that include personally identifying information (students' or parents' names, addresses, or other identifying information) without the consent of either the student's parent or the student, if the student is over 18 years of age. 34 C.F.R. §99.30. This general limitation on disclosure is also subject to a number of exceptions, including exceptions for disclosure of records maintained by a school's law enforcement unit (34 C.F.R. §99.8) or disclosure of records or information in response to a health or safety emergency involving the

student (34 C.F.R. §§99.31(a)(10) and 99.36).

Law enforcement and court records relating to students who get involved with these systems are also generally protected from disclosure to schools and other outside entities except under the circumstances that will be discussed later. *See, e.g.*, Wis. Stat. §§48.396(1), (2), and 938.396(1m), (2).

Despite the broad confidentiality protections afforded to student records, state and federal laws permit the sharing of otherwise confidential information under a variety of circumstances, particularly where the needs of law enforcement and school safety are at stake. This section focuses on the information sharing among schools, law enforcement, the courts, and students and their parents that is permitted and, in some cases, required by these provisions. This section is intended to address only records that may be generated as a result of, or that relate to, student misconduct. In this section, the term "student" is used to refer to a primary or secondary school student who is under 18 years of age.

WHAT INFORMATION MAY LAW ENFORCEMENT OBTAIN FROM A SCHOOL WITHOUT A COURT ORDER?

Schools must provide attendance records to law enforcement, fire investigators, and county departments of social services.

If the school receives written verification from a law enforcement officer or agency that a student is being investigated for truancy, delinquency, or criminal conduct, the school must provide that student's attendance record to the law enforcement representative. Wis. Stat. §118.125(2)(cg). The law enforcement representative must attest that he or she will not further disclose this information except as may be permitted by Wis. Stat. ch. 938. When the school provides an attendance record as part of a truancy investigation, the school is required to notify the student or the student's parent or guardian, as soon as practicable after disclosure,

that this record has been provided to law enforcement. *Id.*

A school must also provide a student's attendance record to a fire investigator if the student is part of an arson investigation. Wis. Stat. §118.125(2)(ch). Before the school releases the record, the fire investigator must attest in writing that the student is under investigation, that the attendance record is necessary for the investigation, and that the record will be used and disclosed only for purposes of the investigation. *Id.*

If school attendance is a required condition as part of a court's dispositional order on a petition under Wis. Stat. ch. 48 or ch. 938 and the student has an unexcused absence from school, the school must notify the county department that is supervising the student, such as the county department of human or social services, of the absence within five days of that absence. Wis. Stat. §118.125(2)(cm).

Pupil records shall be provided to education or School Resource Officers who are individually designated by the school board and assigned to the school district. Wis. Stat. §118.125(2)(d).

A school may disclose pupil records to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of an individual. Wis. Stat. §118.125(2)(p).

KEY POINTS

- Schools must provide attendance records to law enforcement and their representatives. If schools forward this information they must notify parents/guardians that this information has been provided to law enforcement.
- Schools may release information to school or school district personnel as to an identified risk that a student may engage in conduct, which would be physically harmful to another person.

Federal law permits schools to disclose records of law enforcement units.

Although Wisconsin law does not currently permit disclosures under this exception, FERPA

also permits records of a "law enforcement unit" to be disclosed, without student or parent permission, to anyone, including other law enforcement agencies, the courts, and the media. 34.F.R. §99.8(d). In order to qualify for this exception, the law enforcement unit, such as a unit of school police officers or security guards, must be specifically authorized or designated by the school to enforce federal, state or local law, or maintain safety and security in the school.

The records created by the law enforcement unit that are subject to disclosure under this exception must have been [c]reated for a law enforcement purpose...." 34 C.F.R. §99.8(b)(1)(ii). Records that may be kept by the law enforcement unit, but that were not created by that unit for a law enforcement purpose, are not subject to this exception. For example, a school police officer may write an incident report regarding a dispute between two students, and that officer may also receive and keep in his or her files a copy of a letter written by the assistant principal to the students' parents about the same incident. The incident report is considered a law enforcement unit record that can be disclosed under this exception, while the letter is not.

WHAT INFORMATION CAN THE COURT OBTAIN FROM THE SCHOOL?

A school must release student records in response to a court order.

If a student has been determined by court order to be in need of protection or services under Wis. Stat. Ch. 48, or delinquent under Wis. Stat. Ch. 938, the court must enter an order directing the school to release the student's records. In each of the examples discussed under this subsection, the school must make a reasonable effort to notify the student's parent or guardian before releasing records under a court order.

If a student has been ordered by a court to attend an alternative school or educational program, the court must order the student's records released to the county department or child welfare agency responsible for supervising the student's compliance with the court's order. Wis. Stat. §§118.125(2)(L), 48.345(12)(b) and 938.34(7d)(b).

The court may enter an order directing the release of student records to law enforcement for the purposes of investigating alleged criminal or delinquent activity, including arson investigations. Wis. Stat. §118.125(2)(L) and 938.396(1m)(c), (d). Law enforcement agencies and fire investigators that receive student records under such a court order may use those records only for purposes of their investigations, and may disclose those records only to other employees of their agencies who are working on the investigation.

The court must also order a school to release student records to a county agency providing juvenile welfare services, such as a county department of human or social services, provided that those records are used by the county agency only for the treatment or care of the student and are released only to employees of the county agency who are providing treatment or care for the student. Wis. Stat. §§118.125(2)(L) and 938.78(2)(b) 2.

Finally, a school is required to release student records in response to a valid subpoena. Wis. Stat. §118.125(2)(f). The statute limits the use of records obtained through subpoena to confidential inspection by the trial court, for the purpose of discrediting or impeaching a witness who is testifying in the court proceeding. The court may also provide the records to the parties and their attorneys if the records are relevant and material to a witness's credibility or competency to testify. *Id.*

A school may release student progress records in response to a request from a state or federal court.

Any state or federal court may request that a school provide to the court the progress records of any student involved in a legal proceeding before that court, and the school is obligated to provide records in response to such a request. Wis. Stat. §118.125(2)(c). "Progress records" are defined as:

the pupil's grades, a statement of the courses the pupil has taken, the pupil's attendance record, the pupil's immunization records, any lead screening records required under s.254.162 and records of the pupil's extracurricular activities.

A student, and the student's parent or guardian are also entitled to a copy of these progress records upon request. Wis. Stat. §118.125(2)(a).

KEY POINTS

- There are many statutory provisions, which entitle the court to receive student records from a school.
- These requests will typically be in the form of some kind of court order.

WHAT INFORMATION MAY THE SCHOOL OBTAIN FROM LAW ENFORCEMENT?

A school may obtain information from law enforcement relating to various types of misconduct by students.

A law enforcement agency may provide to a school, on its own initiative or at the request of a school district administrator, any information in its records relating to alleged misconduct by a student enrolled in that school district, including:

- the use, possession, or distribution of use, possession, or distribution of alcohol or a controlled substance;
- illegal possession of a dangerous weapon;
- An act for which a juvenile enrolled in the school district, private school, or tribal school was taken into custody under 938.19, based on a law enforcement officer's belief that the juvenile was committing or had committed a violation of any state or federal criminal law
- any act for which the student has been adjudged delinquent by a court.

Wis. Stat. §938.396(1)(c)3. a.-d.

An adult student, parent, or guardian of a minor student are entitled to review student behavior records.

An adult student, and the parent or guardian of a minor student, are entitled upon request to review the student's behavior records, which are defined to include law enforcement records obtained by the school, in the presence of

someone qualified to interpret and explain the records, and to obtain a copy of the records if desired. Wis. Stat. §118.125(2)(b).

A school must keep records it obtains from law enforcement separate from other records.

If the school obtains records from law enforcement as described in this part, it must maintain those records separately from the student's other records. Wis. Stat. §118.125(3). In addition, the school may disclose information obtained from law enforcement only to teachers and other school district employees who have a legitimate educational interest in the information, including interests based on safety concerns. The information may also be disclosed to employees of the school or school district, such as social workers, counselors, or psychologists, who have been designated by the school or school district to provide treatment programs for students. Wis. Stat. §118.127.

Records obtained from law enforcement or the courts cannot provide the sole basis for disciplinary action against a student.

A school may not use records it obtains from law enforcement, or records it obtains from court proceedings under Wis. Stat. Chs. 48 or 938 as the sole basis for taking any disciplinary action against a pupil, but these records **may be used** as the sole basis for taking action against a pupil under the school district's athletic code. Wis. Stat. §§118.125(5)(b) and 118.127.

If a school's request for information from law enforcement is denied, it may seek a court order to obtain the records.

In the event that the school's request for information from law enforcement is denied, the school may petition the court to order release of the requested information. Wis. Stat. §§938.396(1j) and 48.396(5)(a). If the school files such a petition, the court will notify the student, the student's attorney, the student's parents, and the affected law enforcement agency that the petition has been filed. If any of these entities objects, the court will hold a hearing to determine whether the records should be released to the school. Wis. Stat. §§938.396(1j) and 48.396(5)(a).

KEY POINTS

- A law enforcement agency may provide to the school, on its own initiative, records it has on a student concerning drug or alcohol use, illegal possession of a dangerous weapon, or conduct committed by a student 14 years of age or older, that would be criminal, if committed by an adult.
- Whenever a school receives this kind of information from the police it must notify the student/subject and his/her parents/guardians of the information obtained.
- School officials must keep records they receive from law enforcement separate from other records.
- A school must follow the same rules for release of law enforcement records as does a law enforcement agency.

WHAT INFORMATION MAY THE SCHOOL OBTAIN FROM THE COURTS?

Court records of those 10 years of age or older who are prosecuted criminally in adult court, are not protected from disclosure by special confidentiality provisions.

As a general matter, the courts are required to keep confidential their files relating to actions involving minors in need of protection or services or alleged to be delinquent. Wis. Stat. §§48.396(2) and 938.396(2). However, not all records relating to misconduct by minors must be protected from disclosure. For example, no special confidentiality provisions apply to a student who is 10 years of age or older who is being prosecuted as an adult in adult criminal court. Wis. Stat. §§48.396(1) and 938.396(1). In addition, the court records of any student who is 17 years old and is alleged to have violated a state or federal criminal law, or any civil law or municipal ordinance, are not protected from disclosure as "juvenile" records. The discussion in this subsection, therefore, applies to records of students under 17 years old who are not being prosecuted criminally in adult court.

The court must notify the school district if a student is alleged to have committed a delinquent act that would be a felony if committed by an adult.

When a petition is filed with a court alleging that a student has committed a delinquent act that would be a felony if committed by an adult, the clerk of court is required to notify the clerk of the school district that the petition has been filed and the nature of the allegations are. Wis. Stat. §938.396(2g)(m). Within five days of the court's dispositional order on the petition, the court clerk must also notify the school if any of the following occur:

- The court finds the student to be delinquent. The clerk must also notify the school of the nature of the violation committed, and the disposition ordered by the court.
- The court finds the student to be delinquent because the student committed a delinquent act that would be a felony if committed by an adult, at the request of or for the benefit of a criminal gang. The clerk must also notify the school of the nature of the violation committed, and the disposition ordered by the court.
- The court finds the student to be delinquent and orders the student to enroll in a different school district as part of the dispositional order. In this case, the court clerk must notify the new school district of the nature of the violation committed, and the disposition ordered by the court, as well as any previous delinquency adjudications, and previous dispositional court orders, involving that student.
- If the delinquency petition is dismissed or withdrawn, the court must notify the school district that the court proceeding has been terminated without a finding of delinquency.

Wis. Stat. §938.396(2g)(m)6.

If a school obtains information from a court under these provisions, it may only disclose it to school employees who are working directly with the student or who have been determined to have legitimate educational interests, including safety interests, in the information. Wis. Stat.

§938.396(2g)(m)6. Any employee to whom this information is provided may not further disclose that information to anyone. *Id.* The school board may not use information obtained from a court under these provisions as the sole basis for expelling or suspending a student. *Id.*

The rules regarding the confidentiality of school, law enforcement, and court records are complex. It is recommended that each school designate an individual to familiarize themselves with these rules and to act as a liaison to all who request information from the school and to all who provide information to the school.

KEY POINTS

- Wisconsin statutes require the courts to notify schools about certain court proceedings and determinations involving a student.
- The schools may only disclose information received from a court to school employees who are working directly with the student or who otherwise have legitimate educational interests in the information.
- The school board may not use the information received from the court as the sole basis for expelling a student.
- Rules regarding the confidentiality of school, law enforcement, and court records are exceedingly complex. It is recommended that each school designate an individual to familiarize themselves with these rules and act as a liaison to all who request information from the school and to all who provide information to the school.

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COMMONLY ASKED QUESTIONS AND ANSWERS

1. Are police school resource officers, considered police or school officials for 4th amendment purposes?

Answer: They are considered to be police officers regardless as to whom might be paying for their services.

2. What does a school official need to make a search of a student?

Answer: A reasonable suspicion that the student might be engaging in illegal activity.

3. Does a school official need to have a reasonable suspicion before asking a student for consent to search?

Answer: No

4. Does a school official need to worry about the *Miranda* warning before questioning a student about possible criminal activity?

Answer: No, the *Miranda* warning is only applicable for the police.

5. If a school official is searching a locker can they search any item found in the locker, regardless of ownership?

Answer: Yes

6. If a student parks his vehicle outside of school property but during school hours can the school search with reasonable suspicion?

Answer: No, since the vehicle is not on school grounds any search should be conducted by the police and under police 4th amendment guidelines which require probable cause or consent before a lawful search can take place.

7. When both school officials and police join in a stop or search whose rules control?

Answer: It depends. For example if the school asks the police for assistance then the school's less stringent 4th amendment rules would control but if the police initiate the investigation then their standards of probable cause and warrant would be applicable.

8. What is meant by the term "exigent circumstances?"

Answer: Exigent circumstances are those kind of emergency situations, which allow the police to make warrantless searches and seizures. In a school setting a bomb threat would be an example of an exigent circumstance.

9. Is there an obligation for the police to contact the parents before interviewing a student on school grounds?

Answer: No. However, most schools have a policy requirement that they notify the parents in such a circumstance and this policy should be followed.

10. If a school official interviews a student and a police officer is present does the school official have to read the *Miranda* warning?

Answer: No, but the police officer should have an observer non-participatory role. If the officer joins in the questioning, *Miranda* might be required if the setting is viewed to be

custodial. To emphasize the intent not to make the setting custodial the officer should preface the questioning by advising the student that he/she should feel free to end the interview anytime they wish.

APPENDIX A: ABUSE AND NEGLECT TERMS UNDER THE CHILDREN'S CODE AND CRIMINAL CODE

ABUSE DEFINED

Child Welfare Definition of Abuse

48.02(1) "Abuse," other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:

- (a) Physical injury inflicted on a child by other than accidental means. [Note that under 48.02(14g) "Physical injury" includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm, as defined in s. 939.22(14).]
- (b) Sexual intercourse or sexual contact under s. 940.225, 948.02, 948.025, 948.085.
- (c) A violation of s. 948.05 (Sexual exploitation of a child).
- (cm) A violation of s. 948.051 (Trafficking of a child).
- (d) Permitting, allowing or encouraging a child to violate s. 944.30(1m) (Prostitution).
- (e) A violation of s. 948.055 (Causing a child to view or listen to sexual activity – for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child).
- (f) A violation of s. 948.10 (Exposing genitals or pubic area - for purposes of sexual arousal or sexual gratification).
- (g) Manufacturing methamphetamine in violation of s. 961.41(1)(e) under any of the following circumstances: 1. with a child physically present during the manufacture, 2. in a child's home, in a motor vehicle on the premises of a child's home, 3. under circumstances in which a reasonable person should have known that the manufacture would be seen, smelled, or heard by a child.
- (gm) Emotional damage for which the child's parent, guardian or legal custodian has neglected, refused or been unable to for reason other than poverty to obtain the necessary treatment or to take steps to ameliorate the symptoms.

Criminal Definition of Physical Abuse of a Child

948.03 Physical abuse of a child.

948.03(1) Definitions. In this section, "recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child.

(2) Intentional Causation of Bodily Harm.

- (a) Whoever intentionally causes great bodily harm to a child is guilty of a Class C felony.
- (b) Whoever intentionally causes bodily harm to a child is guilty of a Class H felony.
- (c) Whoever intentionally causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class F felony.

948.03(3) Reckless Causation of Bodily Harm.

- (a) Whoever recklessly causes great bodily harm to a child is guilty of a Class E felony.
- (b) Whoever recklessly causes bodily harm to a child is guilty of a Class I felony.
- (c) Whoever recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class H felony.

948.03(4) Failing to Act to Prevent Bodily Harm.

- (a) A person responsible for the child's welfare is guilty of a Class F felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused great bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of great bodily harm by the other person or facilitates the great bodily harm to the child that is caused by the other person.
- (b) A person responsible for the child's welfare is guilty of a Class H felony if that person has knowledge that another person intends to

cause, is causing or has intentionally or recklessly caused bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of bodily harm by the other person or facilitates the bodily harm to the child that is caused by the other person.

(6) Treatment Through Prayer. A person is not guilty of an offense under this section solely because he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981(3)(c)4. or 448.03(6) in lieu of medical or surgical treatment.

Definitions of physical abuse related terms

939.22(4) “Bodily harm” means physical pain or injury, illness, or any impairment of physical condition.

939.22(38) “Substantial bodily harm” means bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.

939.22(14) “Great bodily harm” means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

EMOTIONAL DAMAGE AND MENTAL HARM

Child Welfare Definition of Emotional Damage

48.02(1) “Abuse,” other than when used in referring to abuse of alcohol beverages or other drugs, means any of the following:

(gm) Emotional damage for which the child’s parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to obtain the necessary treatment or to take steps to ameliorate the symptoms.

(5j) “Emotional damage” means harm to a child’s psychological or intellectual functioning. “Emotional damage” shall be evidenced by one or more of the following

characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; or a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child’s age and stage of development.

Criminal Definition of Mental Harm

948.01(2) “Mental harm” means substantial harm to a child’s psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior. “Mental harm” may be demonstrated by a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child’s age and stage of development.

948.04(1) Causing mental harm to a child. Whoever is exercising temporary or permanent control of a child and causes mental harm to that child by conduct which demonstrates substantial disregard for the mental well-being of the child is guilty of a Class F felony.

(2) A person responsible for the child’s welfare is guilty of a Class F felony if that person has knowledge that another person has caused, is causing or will cause mental harm to that child, is physically and emotionally capable of taking action which will prevent the harm, fails to take that action and the failure to act exposes the child to an unreasonable risk of mental harm by the other person or facilitates the mental harm to the child that is caused by the other person.

NEGLECT

Child Welfare Definition of Neglect

48.02(12g): “Neglect” means failure, refusal or inability on the part of a caregiver, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter to seriously endanger the physical health of the child. (Note that “seriously endanger” includes potential as well as actual harm to the child. Actual physical injury need not occur for the child to be seriously endangered; it is sufficient that such harm could happen except for the intervention of others." *In the Interest of A.E. v. State*, 163 Wis. 2d 270 (Wis. App. 1991).)

Criminal Definition of Neglect

948.21(2) NEGLECT. Any person who is responsible for a child's welfare who, through his or her action or failure to take action, for reasons other than poverty, negligently fails to provide any of the following, so

as to seriously endanger the physical, mental, or emotional health of the child, is guilty of neglect and may be penalized as provided in sub. (3):

- (a) Necessary care.
- (b) Necessary food.
- (c) Necessary clothing.
- (d) Necessary medical care.
- (e) Necessary shelter.
- (f) Education in compliance with s. 118.15.
- (g) The protection from exposure to the distribution or manufacture of controlled substances, as defined in s. 961.01 (4), or controlled substance analogs, as defined in s. 961.01 (4m), or to drug abuse, as defined in s. 46.973 (1) (b).

(3) PENALTIES. A person who violates sub. (2) is guilty of the following:

- (a) A Class D felony if the child suffers death as a consequence.
- (b) A Class F felony if any of the following applies:
 - 1. The child suffers great bodily harm as a consequence.
 - 2. The child becomes a victim of a child sex offense as a consequence.
- (c) A Class G felony if the child suffers emotional damage as a consequence.
- (d) A Class H felony if the child suffers bodily harm as a consequence.
- (e) A Class I felony if the natural and probable consequences of the violation would be a harm under par. (a), (b), (c), or (d) although the harm did not actually occur if one of the following applies:
 - 1. The child had not attained the age of 6 years when the violation was committed.
 - 2. The child has a physical, cognitive, or developmental disability that was known or should have been known by the actor.
- (f) A Class A misdemeanor if the natural and probable consequences of the violation would be a harm under par. (a), (b), (c), or (d) although the harm did not actually occur.

History: 1987 a. 332; 2001 a. 109; 2007 a. 80; 2017 a. 283.

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APPENDIX B: WHAT MUST BE REPORTED AND WHO MUST REPORT

48.981(2) PERSONS REQUIRED TO REPORT. (a) Any of the following persons who has reasonable cause to suspect that a child seen by the person in the course of professional duties has been abused or neglected or who has reason to believe that a child seen by the person in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur shall, except as provided under subs. (2m) and (2r), report as provided in sub. (3):

1. A physician.
2. A coroner.
3. A medical examiner.
4. A nurse.
5. A dentist.
6. A chiropractor.
7. An optometrist.
8. An acupuncturist.
9. A medical or mental health professional not otherwise specified in this paragraph.
10. A social worker.
11. A marriage and family therapist.
12. A professional counselor.
13. A public assistance worker, including a financial and employment planner, as defined in s..141(1)(d).
14. A school teacher.
15. A school administrator.
16. A school counselor.
- 16m. A school employee not otherwise specified in this paragraph.
17. A mediator under s. 767.405.
18. A child care worker in a child care center, group home, or residential care center for children and youth.
19. A child care provider.
20. An alcohol or other drug abuse counselor.
21. A member of the treatment staff employed by or working under contract with a county department under s. 46.23, 51.42, or 51.437 or a residential care center for children and youth.
22. A physical therapist.
- 22m. A physical therapist assistant.
23. An occupational therapist.
24. A dietitian.
25. A speech-language pathologist.
26. An audiologist.
27. An emergency medical services practitioner.
28. An emergency medical responder, as defined in s. 256.01(4p).
29. A police or law enforcement officer.
30. A juvenile corrections officer

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APPENDIX C: MULTIDISCIPLINARY TEAMS AND CHILD ADVOCACY CENTERS

MULTIDISCIPLINARY TEAMS

A multidisciplinary team (MDT) is a child-focused group of professionals who work together in a coordinated and collaborative manner to ensure an effective response to reports of child abuse and neglect. Members of a MDT represent public and private entities responsible for investigating crimes against children and protecting and treating children in a community.

MDT's promote well-coordinated child maltreatment investigations that benefit from the input and attention of many different areas of expertise, in child protective services, law enforcement, prosecution, medical and mental health services, to ensure a successful conclusion to the investigation and to minimize additional trauma to the child victim.

Research and procedural requirements related to child abuse have increased dramatically over the past two decades. More information than ever before, in the areas of specialized child development issues, victim and offender dynamics, diagnostic imaging, traumatic memory, linguistics, forensic pathology, and other disciplines, is available to help practitioners discover the truth of a child maltreatment report. In addition, to meet the competing demands of child protection, family rights and preservation, laws have been repeatedly changed and refined in the rules of evidence, investigative procedures, as well as the very definitions of abuse and neglect. The existence of such abundant yet diverse information and legal obligations places significant demands upon professionals who investigate and prosecute these difficult cases. MDT's bring specialized expertise in these areas to improve the investigation, treatment and remediation of child abuse.

CHILD ADVOCACY CENTERS

A child advocacy center (CAC) builds on the MDT approach to child maltreatment by providing a child focused environment where investigation and treatment and prosecution of child maltreatment cases can be conducted by

team members and where appropriate supportive services to victims and their families can be provided.

A CAC provides a centralized and neutral location with the necessary facilities to allow:

- Team members to meet to discuss the investigation, treatment and prosecution of cases.
- Team members to effectively conduct joint interview of child and family.
- Team members to work together to prevent further victimization of children.

The child victim and non-offending family to remain in one safe, secure, and friendly location to be interviewed and receive support services.

RECOGNIZED BENEFITS OF MDT'S AND CAC'S

For Investigation and Prosecution of Child Abuse Cases:

- Less "system inflicted" trauma to children and families.
- Better agency decisions, including more accurate investigation and more appropriate interventions.
- More efficient use of limited agency resources.
- More effective prosecutions.

Information on the status of cases is shared, allowing monitoring of progress and minimizing the possibility of cases falling through the cracks.

For the Child Victim and Family:

- Reducing the number of child victim interviews.
- Receiving prompt and ongoing services that are tailored to their specific needs and family situations, and help ensure their protection.

- Empowering non-offending parents to protect and support their children throughout the intervention process and beyond.
- Providing more efficient medical and mental health services or referrals.

For Participating Agencies:

- Through enhanced communication with team members, each discipline is able to make better and informed decisions.
- Professionals interact regularly providing each other needed support and reducing burnout.
- Professionals gain a better understanding of and respect for each other's roles and expertise.

Coordinated investigations lead to more efficient use of each agency's resources and staff time.

Types of MDT's and CAC's

MDT's and CAC's can take several forms and may involve different locales:

- Some MDT's are part of a CAC which provides a child-friendly facility where forensic interviews, and sometimes medical examination and treatment, are conducted. The CAC may serve as the site for team meetings and training and may also house representatives of member agencies. CAC's also often do

community outreach and public education.

- Other MDT's may not provide the more comprehensive services of a CAC but may establish a particular place for conducting interviews. Such teams may be based in hospital, prosecutors' offices, or within child protective services agencies.

Many effective teams are not part of a CAC and do not have special interview facilities. These teams use available resources to accomplish, in different but effective ways, many of the same purposes, including reducing trauma to victim and families, improving the accuracy of information obtained during the investigation, and easing the strain on member agencies and investigators.

It is well accepted that the best response to the challenge of child abuse and neglect investigations is the formation of an MDT or CAC. Effective teamwork can prevent further abuse to children and can bring those who harm children to justice.

Excerpted and adapted from "Forming a Multidisciplinary Team to Investigate Child Abuse," U.S. Department of Justice, Office of Justice Programs, Office of the Juvenile Justice and Delinquency Prevention and "New York State Child Advocacy Resource and Consultation Center Child Advocacy Center Description."

APPENDIX D: MODEL BULLYING POLICY

The following is a model policy designed to provide guidance to school districts. School boards may add to, modify or delete any elements of the model policy in creating their district policy.

The requirement to establish policies to address bullying does not change the statutory requirements regarding pupil non-discrimination. Wisconsin Statute §118.46 mandates a bullying policy which is reproduced below.

INTRODUCTION

The _____ School District strives to provide a safe, secure, and respectful learning environment for all students in school buildings, on school grounds, and school buses and at school-sponsored activities. Bullying has a harmful social, physical, psychological, and academic impact on bullies, victims, and bystanders. The school district consistently and vigorously addresses bullying so that there is no disruption to the learning environment and learning process.

Definition

Bullying is deliberate or intentional behavior using words or actions, intended to cause fear, intimidation, or harm. Bullying may be repeated behavior and involves an imbalance of power. The behavior may be motivated by an actual or perceived distinguishing characteristic, such as, but not limited to: age; national origin; race; ethnicity; religion; gender; gender identity; sexual orientation; physical attributes; physical or mental ability or disability; and social, economic, or family status.

Bullying behavior can be:

- Physical (e.g. assault, hitting or punching, kicking, theft, threatening behavior)
- Verbal (e.g. threatening or intimidating language, teasing or name-calling, racist remarks)
- Indirect (e.g. spreading cruel rumors, intimidation through gestures, social

exclusion, and sending insulting messages or pictures by mobile phone or using the internet – also known as cyber bullying)

PROHIBITION

Bullying behavior is prohibited in all schools, buildings, property, and educational environments, including any property or vehicle owned, leased, or used by the school district. This includes public transportation regularly used by students to go to and from school. Educational environments include, but are not limited to, every activity under school supervision.

PROCEDURE FOR REPORTING/ RETALIATION

All school staff members and school officials who observe or become aware of acts of bullying are required to report these acts to _____ (a school staff member or administrator designated by the Board of Education to be a recipient of such reports.) Any other person, including a student who is either a victim of the bullying or is aware of the bullying or any other concerned individual is encouraged to report the conduct to _____ (a school staff member or administrator designated by the Board of Education to be a recipient of such reports.)

Reports of bullying may be made verbally or in writing and may be made confidentially. All such reports, whether verbal or in writing, will be taken seriously and a clear account of the incident is to be documented. A written record of the report, including all pertinent details, will be made by the recipient of the report.

The school official receiving a report of bullying shall immediately notify the school district employee assigned to investigate the report. The following school district employees have been identified as the investigator: (a list that contains the names of district employees and schools who have the responsibility to receive the information and conduct the investigation.)

There shall be no retaliation against individuals making such reports. Individuals engaging in retaliatory behavior will be subject to disciplinary action.

PROCEDURE FOR INVESTIGATING REPORTS OF BULLYING

The person assigned by the district to conduct an investigation of the bullying report shall, within one school day, interview the person(s) who are the victim(s) of the bullying and collect whatever other information is necessary to determine the facts and the seriousness of the report.

Parents and/or guardians of each pupil involved in the bullying will be notified prior to the conclusion of the investigation. The district shall maintain the confidentiality of the report and any related pupil records to the extent required by law.

SANCTIONS AND SUPPORTS

If it is determined that students participated in bullying behavior or retaliated against anyone due to the reporting of bullying behavior, the school district administration and school board

may take disciplinary action, including: suspension, expulsion, and/or referral to law enforcement officials for possible legal action as appropriate. Pupil services staff will provide support for the identified victim(s).

DISCLOSURE AND PUBLIC REPORTING

The policy will be distributed annually to all students enrolled in the school district, their parents and/or guardians and employees. It will also be distributed to organizations in the community having cooperative agreements with the schools. The school district will also provide a copy of the policy to any person who requests it.

Records will be maintained on the number and types of reports made, and sanctions imposed for incidents found to be in violation of the bullying policy.

An annual summary report shall be prepared and presented to the school board, which includes trends in bullying behavior and recommendations on how to further reduce bullying behavior. The annual report will be available to the public.

APPENDIX E: WIS. STAT. §118.125

(2) **CONFIDENTIALITY AND DISCLOSURE OF PUPIL RECORDS.** All pupil records maintained by a public school shall be confidential, except as provided in pars. (a) to (q) and sub. (2m). The school board shall adopt policies to maintain the confidentiality of such records and may adopt policies to promote the disclosure of pupil records and information permitted by law for purposes of school safety.

(a) A pupil, or the parent or guardian of a minor pupil, shall, upon request, be shown and provided with a copy of the pupil's progress records.

(b) An adult pupil or the parent or guardian of a minor pupil shall, upon request, be shown, in the presence of a person qualified to explain and interpret the records, the pupil's behavioral records. Such pupil or parent or guardian shall, upon request, be provided with a copy of the behavioral records.

(c) 1. The judge of any court of this state or of the United States shall, upon request, be provided by the school district clerk or his or her designee with a copy of all progress records of a pupil who is the subject of any proceeding in such court.

2. Names of dropouts shall be provided to a court in response to an order under s. 118.163 (2m)(b).

(cg) The school district clerk or his or her designee shall provide a law enforcement agency with a copy of a pupil's attendance record if the law enforcement agency certifies in writing that the pupil is under investigation for truancy or for allegedly committing a criminal or delinquent act and that the law enforcement agency will not further disclose the pupil's attendance record except as permitted under s. 938.396 (1) (a). A school district clerk or designee who discloses a copy of a pupil's attendance record to a law enforcement agency for purposes of a truancy investigation shall notify the pupil's parent or guardian of that disclosure as soon as practicable after that disclosure.

(ch) The school district clerk or his or her

designee shall provide a fire investigator under s. 165.55 (15) with a copy of a pupil's attendance record if the fire investigator certifies in writing that the pupil is under investigation under s. 165.55, that the pupil's attendance record is necessary for the fire investigator to pursue his or her investigation and that the fire investigator will use and further disclose the pupil's attendance record only for the purpose of pursuing that investigation.

(ck) The school district clerk or his or her designee shall make pupil records available for inspection or, upon request, disclose the contents of pupil records to authorized representatives of the department of corrections, the department of health services, the department of justice, or a district attorney for use in the prosecution of any proceeding or any evaluation conducted under ch. 980, if the pupil records involve or relate to an individual who is the subject of the proceeding or evaluation. The court in which the proceeding under ch. 980 is pending may issue any protective orders that it determines are appropriate concerning pupil records made available or disclosed under this paragraph. Any representative of the department of corrections, the department of health services, the department of justice, or a district attorney may disclose information obtained under this paragraph for any purpose consistent with any proceeding under ch. 980.

(cm) If school attendance is a condition of a child's dispositional order under s. 48.355 (2)(b) or 938.355 (2) (b) 7., the school board shall notify the county department that is responsible for supervising the child within 5 days after any violation of the condition by the child.

(d) Pupil records shall be made available to persons employed by the school district which the pupil attends who are required by the department under s. 115.28 (7) to hold a license, law enforcement officers who are individually designated by the school board and assigned to the school district, and other school district officials who have been determined by the school board to have legitimate educational interests, including safety interests, in the pupil

records. Law enforcement officers' records obtained under s. 938.396 (1) (c) 3. shall be made available as provided in s. 118.127. A school board member or an employee of a school district may not be held personally liable for any damages caused by the nondisclosure of any information specified in this paragraph unless the member or employee acted with actual malice in failing to disclose the information. A school district may not be held liable for any damages caused by the nondisclosure of any information specified in this paragraph unless the school district or its agent acted with gross negligence or with reckless, wanton, or intentional misconduct in failing to disclose the information.

(e) Upon the written permission of an adult pupil, or the parent or guardian of a minor pupil, the school shall make available to the person named in the permission the pupil's progress records or such portions of the pupil's behavioral records as determined by the person authorizing the release. Law enforcement officers' records obtained under s. 48.396 (1) or 938.396 (1) (b) 2. or (c) 3. may not be made available under this paragraph unless specifically identified by the adult pupil or by the parent or guardian of a minor pupil in the written permission.

(f) Pupil records shall be provided to a court in response to subpoena by parties to an action for in camera inspection, to be used only for purposes of impeachment of any witness who has testified in the action. The court may turn said records or parts thereof over to parties in the action or their attorneys if said records would be relevant and material to a witness's credibility or competency.

(g) 1. The school board may provide any public officer with any information required to be maintained under chs. 115 to 121.

2. Upon request by the department, the school board shall provide the department with any information contained in a pupil record that relates to an audit or evaluation of a federal or state-supported program or that is required to determine compliance with requirements under chs. 115 to 121.

(h) Information from a pupil's immunization records shall be made available to the department of health services to carry out the purposes of s. 252.04.

(hm) Information from any pupil lead screening records shall be made available to state and local health officials to carry out the purposes of ss. 254.11 to 254.178.

(i) Upon request, the school district clerk or his or her designee shall provide the names of pupils who have withdrawn from the public school prior to graduation under s. 118.15 (1) (c) to the technical college district board in which the public school is located or, for verification of eligibility for public assistance under ch. 49, to the department of health services, the department of children and families, or a county department under s. 46.215, 46.22, or 46.23.

(j) 1. Except as provided under subs. 2. and 3., directory data may be disclosed to any person, if the school has notified the parent, legal guardian or guardian ad litem of the categories of information which it has designated as directory data with respect to each pupil, has informed the parent, legal guardian or guardian ad litem of that pupil that he or she has 14 days to inform the school that all or any part of the directory data may not be released without the prior consent of the parent, legal guardian or guardian ad litem and has allowed 14 days for the parent, legal guardian or guardian ad litem of that pupil to inform the school that all or any part of the directory data may not be released without the prior consent of the parent, legal guardian or guardian ad litem.

2. If a school has notified the parent, legal guardian or guardian ad litem that a pupil's name and address has been designated as directory data, has informed the parent, legal guardian or guardian ad litem of the pupil that he or she has 14 days to inform the school that the pupil's name and address may not be released without the prior consent of the parent, legal guardian or guardian ad litem, has allowed 14 days for the parent, legal guardian or guardian ad litem of the pupil to inform the school that the pupil's name and address may not be released without the prior consent of the parent, legal guardian or guardian ad litem and the parent, legal guardian or guardian ad litem has not so informed the school, the school district clerk or his or her designee, upon request, shall provide a technical college district board with the name and address of each such pupil who is expected to graduate from high school in

the current school year .

3. If a school has notified the parent, legal guardian or guardian ad litem of the information that it has designated as directory data with respect to any pupil, has informed the parent, legal guardian or guardian ad litem of the pupil that he or she has 14 days to inform the school that such information may not be released without the prior consent of the parent, legal guardian or guardian ad litem, has allowed 14 days for the parent, legal guardian or guardian ad litem of the pupil to inform the school that such information may not be released without the prior consent of the parent, legal guardian or guardian ad litem and the parent, legal guardian or guardian ad litem has not so informed the school, the school district clerk or his or her designee, upon request, shall provide any representative of a law enforcement agency, district attorney, city attorney or corporation counsel, county department under s. 46.215, 46.22 or 46.23 or a court of record or municipal court with such information relating to any such pupil enrolled in the school district for the purpose of enforcing that pupil's school attendance, investigating alleged criminal or delinquent activity by the pupil or responding to a health or safety emergency.

(k) A school board may disclose personally identifiable information from the pupil records of an adult pupil to the parents or guardian of the adult pupil, without the written consent of the adult pupil, if the adult pupil is a dependent of his or her parents or guardian under 26 USC 152, unless the adult pupil has informed the school, in writing, that the information may not be disclosed.

(L) A school board shall disclose the pupil records of a pupil in compliance with a court order under s. 48.236 (4) (a), 48.345 (12) (b), 48.9795(3)(c), 938.34 (7d) (b), 938.396 (1) (d), or 938.78 (2) (b) 2. after making a reasonable effort to notify the pupil's parent or legal guardian.

(m) A parent who has been denied periods of physical placement with a child under s. 767.41 (4) does not have the rights of a parent or guardian under pars. (a) to (j) with respect to that child's pupil records.

(n) For any purpose concerning the juvenile justice system and the system's ability to effectively serve a pupil, prior to adjudication:

1. A school board may disclose pupil records to a city attorney, corporation counsel, agency, as defined in s. 938.78 (1), intake worker under s. 48.067 or 938.067, court of record, municipal court, private school, or another school board if disclosure is pursuant to an inter- agency agreement and the person to whom the records are disclosed certifies in writing that the records will not be disclosed to any other person except as otherwise authorized by law. For the purpose of providing services to a pupil before adjudication, a school board may disclose pupil records to a tribal school if disclosure is pursuant to an agreement between the school board and the governing body of the tribal school and if the school board determines that enforceable protections are provided by a tribal school policy or tribal law that requires the tribal school official to whom the records are disclosed not to disclose the records to any other person except as permitted under this subsection.

2. A school board shall disclose pertinent pupil records to an investigating law enforcement agency or district attorney if the person to whom the records are disclosed certifies in writing that the records concern the juvenile justice system and the system's ability to effectively serve the pupil, relate to an ongoing investigation or pending delinquency petition, and will not be disclosed to any other person except as otherwise authorized by law.

(p) A school board may disclose pupil records to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of any individual.

(q) On request, a school board may disclose pupil records that are pertinent to addressing a pupil's educational needs to a caseworker or other representative of the department of children and families, a county department under s. 46.215, 46.22, or 46.23, or a tribal organization, as defined in 25 USC 450b (L), that is legally responsible for the care and protection of the pupil, if the caseworker or

other representative is authorized by that department, county department, or tribal organization to access the pupil's case plan. A department, county department, or tribal organization that receives pupil records under this paragraph may not further disclose those pupil records or any personally identifiable information contained in those pupil records except as follows:

1. To a person who is engaged in addressing the pupil's educational needs, who is authorized by that department, county department, or tribal organization to receive that disclosure, and to whom that disclosure is authorized under this section or under a substantially similar tribal law.
2. Upon request, to any court of this state or of the United States that needs to review those records or that information for the purpose of addressing the educational needs of a pupil who is the subject of a proceeding in that court.
3. In response to an order of a court conducting proceedings under s. 48.135, 48.21, 938.135, 938.18, 938.183, or 938.21,

proceedings related to a petition under s. 48.13, 48.133, 48.42, 938.12, or 938.13, or dispositional proceedings under subch. VI or VIII of ch. 48 or subch. VI of ch. 938 or in response to a subpoena issued in such a proceeding, to any person who is engaged in addressing the educational needs of the pupil and who is authorized to receive that disclosure under that order or subpoena. Except as provided in 20 USC 1232g (b) (2) (B), a department, county department, or tribal organization that is issued an order or subpoena described in this subdivision shall provide notice of the order or subpoena to the pupil's parent or guardian before complying with the order or subpoena.

(2m) CONFIDENTIALITY OF PUPIL PHYSICAL HEALTH RECORDS.

- (a) Except as provided in par. (b), any pupil record that relates to a pupil's physical health and that is not a pupil physical health record shall be treated as a patient health care record under ss. 146.81 to 146.84.
- (b) Any pupil record that concerns the results of an HIV test, as defined in s. 252.01 (2m), shall be treated as provided under s. 252.15.