



Thrun Law Firm, P.C.  
2024 MASA Midwinter Conference  
**Analyzing Student Threats: A Framework**

**Analyzing Student Threats: A Framework**

 Michigan Association of Superintendents & Administrators

Jessica E. McNamara  
January 25, 2024

 **THRUN**  
LAW FIRM, P.C.

1

These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.

**Caution**

Future legal developments may affect these topics.

This document may not be reproduced or redistributed, in whole or in part, without the express written permission of Thrun Law Firm, P.C.

2

**Agenda: The Framework**

- ▶ The Report of a Threat
  - ▶ Can I search?
  - ▶ Should I conduct a threat assessment?
- ▶ Considering Student Discipline
  - ▶ Defining a Threat
  - ▶ Substantial Disruption Considerations
- ▶ Preparing for Student's Return
- ▶ Other Considerations
  - ▶ Special Education Evaluation?
  - ▶ Releasing Information
- ▶ Closing Thoughts

3

**The Report of a Threat**


Keeping your school safe.

4

**Fourth Amendment**

*"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ."*

US Const, Am IV



5

**Two Types of Unlawful Search Cases**

- Criminal litigation**
  - "Fruit of the poisonous tree"
  - Apply "exclusionary rule" to keep contraband out of evidence
- Civil litigation**
  - Seek monetary damages for civil rights violation
  - Successful plaintiff gets attorney fees

6

Thrun Law Firm, P.C.  
2024 MASA Midwinter Conference  
**Analyzing Student Threats: A Framework**

### New Jersey v TLO 469 US 325 (1985)



- ▶ Reasonable suspicion, not probable cause, is needed for school officials to search students
- ▶ Was the search
  - ▶ Justified at inception?
  - ▶ Reasonable in scope?

7

### Search Justified at Inception?



The presence of “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”

T.L.O., 469 US at 342

8

### Reasonable in Scope?



A school search “will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”

T.L.O., 469 US at 342

9

### Threat Assessment Considerations

- ▶ Follow your school's threat assessment guidelines for conducting a threat assessment.
  - ▶ Threat assessments likely have a low standard, so you may be conducting them often!
  - ▶ Ensure staff has received proper training.
  - ▶ Comply with all Board Policy and administrative guideline requirements!

10

### Threat Assessment Referral

- ▶ What is purpose?
- ▶ Who will conduct?
  - ▶ Training
  - ▶ Validated instrument
- ▶ Parent consent (PPRA)
- ▶ Who pays?
- ▶ Student status while awaiting results?



11

### PPRA Notice/Consent

Written consent if:

- Survey/assessment
- Funded with federal \$
- Asks about protected information

Notice/right to opt out if:

- Survey/assessment
- Funded with state/local \$
- Asks about protected information

12

Thrun Law Firm, P.C.  
2024 MASA Midwinter Conference  
**Analyzing Student Threats: A Framework**

### “Protected Information”

- Political affiliations/beliefs of parent or student
- Mental or psychological problems of student or family
- Sex behaviors/attitudes
- Illegal, anti-social, self-incriminating behavior
- Critical appraisals of close family
- Legally recognized privilege
- Religious practices/affiliations/beliefs
- Income

13

### Board Policy Considerations

- ▶ Even if Board Policy says threat assessment may continue without parent consent, Board Policy does not trump law.
- ▶ Always consider whether parent consent is necessary!

14

### Student Discipline Considerations

True Threat vs. Substantial Disruption

15

*Tinker v Des Moines Indep SD*  
393 US 503  
(1969)

*“Public school students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”*

16

### Types of Threats

**Direct:** Specific act against specific target and delivered in clear manner. Ex: *“I am going to shoot up the school.”*

**Indirect:** Vague, unclear. Ex: *“If I wanted to, I could kill everyone at school.”*

**Veiled:** Implies, but does not expressly threaten violence. Ex: *“We would be better off if the principal died.”*

**Conditional:** Warns that violence will happen unless terms are met. Ex: *“If Mr. Smith does not give me an ‘A’, I will shoot up the school.”*

17

### SCOTUS: “True Threat”

▶ “[T]hose statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”

▶ *Virginia v Black*  
538 US 343 (2003)

18

Thrun Law Firm, P.C.  
2024 MASA Midwinter Conference  
**Analyzing Student Threats: A Framework**

**McNeil v Sherwood Sch Dist (CA 9, 2019)**

- ▶ Student wrote "hit list" of other students in a personal journal
- ▶ Mother found journal, informed therapist, therapist informed police, who informed school
- ▶ School expelled student
- ▶ **Court:** Although student intended speech to remain private and it was created and maintained off-campus, speech content, student's access to firearms, and proximity of his home to the high school justified disciplinary decision
  - ▶ 9<sup>th</sup> Circuit upholds this test in light of *Mahanoy* in 2022 in *Chen v Albany Sch Dist*
  - ▶ Again upheld district's decision to discipline students for off-campus speech that constituted harassment

19

**Nexus to School Environment**

*"[T]here is always a sufficient nexus between the speech and the school when the school district reasonably concludes that it faces a credible, identifiable threat of school violence."*

20

**Counterman v Colorado (June 27, 2023)**


- ▶ 7-2 SCOTUS decision to overturn stalking conviction for making online threats against local singer
- ▶ A true threat requires speaker's *conscious disregard of substantial and unjustifiable risk that speech will cause harm*
- ▶ Although criminal case, analysis could apply to student "speech" situations

21

**"Threat" Continuum**

- ▶ Figure of speech
- ▶ Joke
- ▶ Fleeting expression of anger
- ▶ Attention-seeking
- ▶ Thrill of causing disruption
- ▶ Attempt to intimidate/frighten
- ▶ Warning of impending violence

High Level of First Amendment Protection



Not Protected

22

**True Threats: Not Protected by First Amendment**


- ▶ Rely on Student Handbook for appropriate level of discipline.
- ▶ Know what your handbook says!
- ▶ Consider whether it implicates the Revised School Code

23

**Revised School Code: Verbal Assault/Bomb Threat**

Student in grade 6+ commits

Verbal assault, or Bomb threat or similar threat directed at school building, event, or property

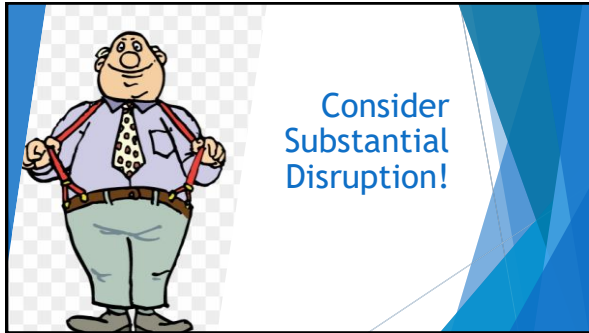


Board "shall suspend or expel the pupil from the school district for a period of time as determined in the discretion of the school board."

MCL 380.1311a(2), subject to 1310d factors

24

Thrun Law Firm, P.C.  
2024 MASA Midwinter Conference  
Analyzing Student Threats: A Framework



25

### Tinker Requirements

- ▶ School must prove that speech would **"materially and substantially disrupt"** school work or discipline or have a **"reasonable forecast"** of disruption
- ▶ Cannot suppress speech due to **"undifferentiated fear or apprehension of disturbance"**



26

### Substantial Disruption

▶ "Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."

*Tinker v Des Moines Indep Sch Dist*  
393 US 503, 509 (1969)

27

### Mahaffey v Aldrich (ED Mich, 2002)

- ▶ Suspension for creating "Satan's web page" which listed
  - ▶ Student names of
    - ▶ "People Who Are Cool"
    - ▶ "People Who Should Die"
  - ▶ Satan's "Mission of the Week"
- ▶ Expulsion proceedings began and student withdrew and sued

28


### Satan's Mission For You This Week

- ▶ "Stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do it unless I'm there to watch - Or just go to Detroit. Hell is right in the middle. Drop by and say hi."
- ▶ PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK?

29

### Mahaffey Court Ruling

- ▶ First Amendment violated
- ▶ No nexus to school
- ▶ No "true threat" because there was no serious expression of intent to harm
- ▶ No Tinker substantial disruption



30

Thrun Law Firm, P.C.  
2024 MASA Midwinter Conference  
**Analyzing Student Threats: A Framework**

***D.J.M. v  
Hannibal  
Pub Sch Dist  
(CA 8, 2011)***

- ▶ District suspended student who threatened, in instant message, to get a gun and kill classmates
- ▶ Student had access to weapons and named specific names
- ▶ Court rules for school
  - ▶ Instant message was a “true threat”
  - ▶ Substantial disruption established

31

*“It’s pretty simple / I have a sweet gun /  
My neighbor is giving me 500 rounds /  
dhs [Douglas High School] is gay /  
I’ve watched these kinds of movies so  
I know how NOT to go wrong /  
I just cant decide who will be on my hit list /  
and that’s totally deminted and it scares  
Even my self.”*

*“and ill probably only kill the  
people I hate? who hate me / then  
a few random to get the record”*

*“that stupid kid from vtch. He didn’t do shit and got a  
record. I bet I could get 50+people / and not one bullet  
would be wasted.”*

32

***Wynar v Douglas Co Sch Dist  
(CA 9, 2013)***

- ▶ Student expelled for threatening IMs to shoot specific students and “take out” others on Virginia Tech anniversary
- ▶ Reasonable forecast of substantial disruption as school officials “reasonably could have predicted that they would have to spend considerable time dealing with [parents’ and students’] concerns and ensuring that appropriate safety measures were in place.”

33

**Deference to  
School  
Officials**

*“[I]n the context of student speech favoring  
violent conduct, it is not for courts to  
determine how school officials should  
respond. School administrators are in the  
best position to assess the potential for  
harm and act accordingly.”*

34

***C1.G v Siegfried  
(CA 10, 2022)***

**When?** Friday evening, September 2019

**Where?** Local thrift store, then SnapChat

**What?** Author removed post within a few hours, stating, “I’m sorry for that picture it was ment [sic] to be a joke.”



35

**School Response**

- Student first suspended for 5, then 10 days
- Principal message to students, parents, staff
- Media coverage
- More parents contact school
- Student then expelled
- School used one advisory period to discuss C.G.’s post and promote conversation about harmful speech

36

*Thrun Law Firm, P.C.*  
**2024 MASA Midwinter Conference**  
**Analyzing Student Threats: A Framework**

### School: Disruption Because...

- Post widely circulated throughout area Jewish community
- Post “scared, angered, and saddened” family who said their son was worried about having class with C.G.
- Principal received 4 emails from parents about post
- Advisory period discussion



37

### Court: No Disruption

*“We cannot consider CCHS’s choice to discuss C.G.’s post during an advisory period (a schedule block twice a week implemented specifically for dealing with such matters) substantial disruption. Neither can news reports nor four emails from parents be evidence of substantial disruption. These facts fall short of ‘Tinker’s demanding standard.’”*

38

### *Kutchinski v Freeland SD* (CA 6, 2023)

Court upheld 10-day suspension for student who (while off campus) created fake Instagram profile of his teacher, even though two classmates posted graphic, harassing, and threatening content about other teachers

- (1) Student was responsible for speech, and
- (2) Speech substantially disrupted, or was reasonably predicted to disrupt, classwork

Plaintiff filed cert. petition with SCOTUS

39



*“[W]hen a student causes, contributes to or affirmatively participates in harmful speech, the student bears responsibility for the harmful speech. And because H.K. contributed to the harmful speech by creating the Instagram account, granting K.L. and L.F. access to the account... he bears responsibility for the speech related to the Instagram account.”*

40

### Always Consider the Mandatory Factors §1310d

Before suspending or expelling a student, school “*shall consider*”

- Student’s age
- Disciplinary history
- Disability status
- Seriousness of behavior
- Whether behavior threatened safety
- Use of restorative practices
- Whether lesser intervention would “properly” address behavior

41

### Preparing for Student Return

Or addressing students who cannot be disciplined.

42

*Thrun Law Firm, P.C.*  
2024 MASA Midwinter Conference  
**Analyzing Student Threats: A Framework**

### Non-Disciplinary Removal

- ▶ Unless discipline is appropriate, there is direct threat of harm, or parent agrees, unilateral removal is typically not authorized.

43

### Direct Threat of Harm?

- ▶ Direct threat of harm (not misconduct) for “significant risk to health or safety of others that cannot be eliminated by modification of policies, practices, or procedures, or by the provision of auxiliary aids and services.”
- ▶ Do not code as suspension
- ▶ This is a temporary fix - consider what this looks like moving forward.

44

### Consider Student Placement

- ▶ If Student is considered a “threat,” but has not engaged in misconduct, consider where the Student should be while the issue is being resolved.
  - ▶ Remote learner?
  - ▶ Office conference room?
- ▶ Not a long term solution!
- ▶ Always consider special education implications

45

### Safety Plan Considerations

- ▶ Daily or periodic check-ins
- ▶ Backpack/person searches, with parent consent
- ▶ No backpack or clear backpack; dress code
- ▶ Counseling (school or outside)
- ▶ No alone time
  - ▶ Buddy system
- ▶ Eyes on plan
- ▶ Escorts



46

### Other Threat Considerations

47

### Evidence of Possible Disability?

- ▶ Referral for threat assessment?
- ▶ Information ascertained through threat assessment
- ▶ Pattern of behavior giving rise to threat assessment
- ▶ Note: any time school prohibits student from attending counts as “removal” for special ed. purposes

48



Thrun Law Firm, P.C.  
2024 MASA Midwinter Conference  
**Analyzing Student Threats: A Framework**

### Exclusion?

Sudden concern that 11<sup>th</sup> grader would harm himself

District required assessment of student's current emotional state before returning to school

Student allowed to return after 9 school days, without assessment

Michigan School District (OCR, 2015)

49

### Violation of Section 504

*"OCR...finds that the principal viewed the Student as having a mental impairment due to his emotional state and that the principal excluded him from the District's educational program based on unfounded fears, prejudices, and stereotypes associated with her perception of his perceived mental impairment."*

50



### OCR Findings

Student should have remained in school with a 504 evaluation

Resolution agreement

Revise policies

Reimburse for evaluation

Compensatory "musical experience"

51

### Violating Student Privacy



52

### No "Police" Exemption

► If an education record, disclose *only* if:

- Prior written consent from parent
- Application of consent exception
  - Directory information
  - Subpoena or court order (including search warrant)
  - Health/safety emergency



53

### "Directory Information"

► Information in a student's education record that is generally not considered "harmful or an invasion of privacy if disclosed."

54

Thrun Law Firm, P.C.  
2024 MASA Midwinter Conference  
**Analyzing Student Threats: A Framework**

### Court Order or Subpoena

**FERPA:** Before disclosing student records, school must make "reasonable effort" to notify parent

**RJA § 2165:** school must have parent consent before disclosing school records or student communications in any state court proceeding

55

► "... if knowledge of the information is necessary to protect the health or safety of the student or other individuals."

Health &  
Safety  
Emergency

56

### Emergency Exception

- Disclosure under the health or safety emergency exception **only** if school determines, on a case-by-case basis:
- Specific situation presents imminent danger or threat to students or other members of the community, **or**
- Requires immediate need for information to avert or diffuse serious threats to the safety or health of a student or other individuals

*Letter to Baise (FPCO 2004)*

57

Keep  
everyone  
safe!

58



[WWW.THRUNLAW.COM](http://WWW.THRUNLAW.COM)

[@THRUNLAW](https://twitter.com/THRUNLAW)

59