

# The Threat in Threat Assessments

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## Agenda

- ▶ The Threats
  - ▶ Threat #1: It's Not Really a Threat
  - ▶ Threat #2: Disciplining for Non-Misconduct Threats
  - ▶ Threat #3: Failing To Receive Parent Consent
  - ▶ Threat #4: Forgetting Child Find
  - ▶ Threat #5: Violating Student Privacy
- ▶ Closing Thoughts

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## Threat #1: It's Not Really a Threat.

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## 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."

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## "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

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**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)

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**Sixth Circuit:  
“True Threat”**

- ▶ Whether reasonable person would:
  - ▶ Take statement as serious expression of intent to inflict bodily harm, *and*
  - ▶ Perceive such expression of intent to inflict bodily harm as being communicated to effect some change or achieve some goal through intimidation
- ▶ *U.S. v Landham*, 251 F3d 1072 (CA 6, 2001)

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**Objective Test**

- ▶ Would a “reasonable person” view the statement as a serious expression of intent to cause a present or future harm?
- ▶ Distinguish from hyperbole, jest, political views
- ▶ From whose viewpoint
  - ▶ Speaker?
  - ▶ Recipient?

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**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

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**Mandatory Factors §1310d**

- 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

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**First Amendment & School Nexus**

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**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.”

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**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”



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**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)

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**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

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**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?

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**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




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*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

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*"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."*

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*"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."*

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*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."*

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**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."*

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*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

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## 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."*

McNeil v Sherwood Sch Dist (CA 9, 2019)

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## Threat #2: Disciplining for Non-Misconduct Threats

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### 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



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### Non-Disciplinary Removal

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

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## Threat #3: Failing to Receive Parental Consent

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### 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

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## “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

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## 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!

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## Threat #4: Forgetting Child Find Obligations

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## 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

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## 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)

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## 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.”

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## OCR Findings

Student should have remained in school with a 504 evaluation

Resolution agreement

- Revise policies
- Reimburse for evaluation
- Compensatory "musical experience"

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## Threat # 5 Violating Student Privacy

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## 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

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## "Directory Information"

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

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## 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

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

## Health & Safety Emergency

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## 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)*

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## Closing Thoughts

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## Threat Assessment Referral

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



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## Proper Documentation

What is required by Board Policy and AGs?

Consider fluid, flexible process.

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Keep everyone safe!

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