

TABLE OF CONTENTS

FOREWORD	1
INTRODUCTION	2

Q11. What is the role of law enforcement in threat assessment?

The aftermath of emergencies and recent mass tragedies in our schools often leaves communities sorting

INTRODUCTION

The overarching goal of schools is to create a safe, supportive environment where students can thrive and learn. This begins with a dedication to students' social and emotional well-being, and effective policies and programs that create a culture of trust. Such a culture provides an optimal learning environment, and is also a proactive step towards avoiding conflict, violence, and legal liability. But to do school safety right is a herculean task that touches virtually every aspect of school policy and operations, and extends well beyond into the community at large, including every level of government, public safety agencies, community services programs, private agencies, places of faith, social research arms, families, and students themselves.

No one resource can address every issue or question that you might have as you attempt to do your part to keep children safe. This updated guide provides a renewed look, through a legal lens, at key areas of concern that have emerged as looming issues that need our attention as we work to improve school safety. These include student mental health, crisis management, working with law enforcement, and legal liability. We recognize that there are many issues that are not addressed here that will affect the decisions that school board members have to make to keep students safe. For example, this guide does not discuss building security, a key component of a school safety plan. The guide is intended as a primer for school boards and school leaders to begin their exploration into this important subject.

The guide is designed to give school board members, as policy-makers for the district, an overview of:

- schools' legal obligations and liability concerns;
- best practices; and
- available resources.

We encourage you to join with others in your community, including your member of the Council of School Attorneys (COSA), and your state school boards association, as you continue your work to give students the best chance to thrive in schools—safe from harm.

I.

achieve, to make friends and to seek out assistance from staff. Such an environment can be sustained only if concerns and challenges are spotted and addressed, so students get the support and services they need.¹

Q2. What steps can school districts take to ensure that students receive needed mental health services?

Students' mental health is critical to their success and safety. Although school district personnel are familiar with addressing the needs of students with disabilities under the Individuals with Disabilities Education Act (IDEA)² and Section 504 of the Rehabilitation Act,³ some do not have the expertise to assess and treat mental health conditions on their own and require the assistance of school psychologists, counselors, and social workers. Some schools have partnerships with community providers to supplement what is offered at school and to work with those students who have intense long term needs. To ensure the best possible care for their students, school boards may adopt mental health policies that require designated school personnel to collaborate as part of a team that includes parents, medical and mental health professionals, and community agencies.⁴ School district policy can clarify the role of personnel in identifying and supporting students with mental health needs. (See page 4.) Districts could also outline protocols and procedures for working with outside mental health professionals,⁵ including crisis intervention and threat assessment protocols that specify a screening assessment and referral process to ensure that each student is assisted based on immediate social and emotional needs.⁶

To ensure these policies and procedures are optimal, school personnel involved in supporting students with

- The Family Educational Rights and Privacy Act¹⁷ (FERPA) requires educational institutions that receive federal funds through the Department of Education to allow parents and eligible students access to education records and prohibits the disclosure of student records without parental consent. There are enumerated exceptions that allow disclosure without consent under specific situations, including a health and safety emergency. School districts may need signed releases to share student mental health information.
- The Health Insurance Portability and Accountability Act¹⁸ (HIPAA) prohibits the disclosure of certain patient information without consent. Mental health professionals may need signed releases to share mental health information about students being evaluated or undergoing treatment.
- Most states have privacy laws relating to the provision of mental health services. Some of these laws may impose more stringent disclosure restrictions than federal law and may allow student access to mental health records at a younger age than federal law.¹⁹
- Mental health care providers (counselors, psychologists, social workers, etc.) are bound by professional ethics rules that may limit the circumstances in which they may disclose patient information without consent.

II. THREAT ASSESSMENT

Q6. What is the purpose of a threat assessment?

“The goal of threat assessment is to identify students of concern, assess their risk for engaging in violence or other harmful activities, and identify intervention strategies to manage that risk,” according to a recent report by the United States S,” accocre(s)0 (al o)8 (f thr)25 (e)7 (at as)10 (s)7 (e)8 (s3 (t(ocre(7uag5)7 (oniE(or)24 (db)19k11 O O 111 11 9

multidisciplinary threat assessment, but not a replacement.²² But keep in mind that a diagnosis that a student has a mental health condition is by itself insufficient to determine that a threat exists to the safety of the student or others at school.

Rather than focusing on a set of traits or characteristics, a threat assessment process should focus on gathering relevant information about a student's behaviors, situational factors, and circumstances to assess the risk of violence or other harmful outcomes.²³ It is also crucial to keep in mind that there are limitations on the accuracy of predicting a person's dangerousness or tendency to commit mass violence.

be followed, unless some greater interest dictates departure from it. Most assessments of threats of violence follow the same general process, though reordering can occur based on the facts:

- Notification of possible threat;
- Notification of appropriate response personnel;
- Review/investigation of possible threat;
- Reporting to law enforcement/911;
- Lockdown/closure of school facilities;
- Emergency removal of students of concern;
- Further investigation as appropriate:
 - Interviews
 - Records
 - Expert assessment as appropriate;
- Response to alleged threat and student outcomes:
 - Student discipline;
 - Support and/or safety plan; and
 -

Q10. When is emergency removal of a student justified?

Whenever a legitimate safety concern exists, the student causing that concern may be removed from school within the bounds of the law. (See Q3.) Law enforcement should be contacted. Where a student or staff member is a specific target, any threat or safety concerns should be reviewed and disclosed as appropriate in consultation with an experienced COSA attorney. Obtaining parental agreement to an alternative placement for the troubled student may help to avoid problems caused by statutory time limits on removals and allow sufficient time for a full assessment and completion of support and supervision plans.

Q11. What is the role of law enforcement in threat assessment?

Where school personnel determine an expression of threat is real, law enforcement should be contacted. School personnel should consult with their school attorney to be sure that the requirements of applicable privacy laws, including FERPA²⁹ are met. This legal consultation is particularly important when an SRO or other law enforcement officer participates on the threat assessment or other team and has access to education records.³⁰ While school officials understandably may be hesitant to share personal information for fear of violating federal or state laws, it is vital to understand the breadth of health and safety exceptions in these laws to facilitate information sharing in critical instances.

Law enforcement can escalate resources, conduct significant investigation in a short time, perform welfare checks at student residences, and, if deemed necessary, station a uniformed officer at every school at issue to put students, staff, and stakeholders at ease. Because anonymous messaging and email can make it difficult to identify the origin of a threat, increased involvement of law enforcement can bring needed resources to bear that many school districts cannot on their own, whether because of skill set limitation or a lack of legal authority.

Collaboration with law enforcement can also serve to deflect criticism of the school district's reaction. Often law enforcement will complete an initial investigation and conclude there is no criminal threat and that a return to

enforcement may not pursue a warrant where they don't perceive an alleged or potential crime. Subterfuge or covert surveillance to access information restricted by passwords or closed discussion groups is not recommended due to privacy concerns and possible violation of the Stored Communications Act (SCA).³² Some states also regulate educational institutions' ability to request or access student passwords for applications that are not publicly available. Consult with your school attorney to weigh these options.

Q13. When can a school district discipline a student based on expression of a threat?

Schools have broad authority to discipline students for making statements that are "true threats," which are not protected by the First Amendment. The Supreme Court has defined "true threats" as "those 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. . . . The speaker need not actually intend to carry out the threat."³³ Generally, a statement constitutes a true threat when "a reasonable person would foresee that the statement would be interpreted. . . as a serious expression of intent to harm or assault."³⁴ Even where no true threat exists, school districts generally may discipline students for statements where school officials can reasonably forecast material and substantial disruption of school operations.³⁵ Because these legal principles are complex and courts have not always agreed about the extent of school authority,³⁶ school administrators should consult closely with a qualified school attorney when making these determinations.

Q14. When should school districts communicate known threats to the target? Parents? Larger school community?

The disclosure of known and valid threats should be made in accordance with the district's established communications protocol. Typically, a team of designated individuals, which should include the district's counsel, makes a decision that balances safety, privacy, logistical issues, and legal concerns. The district's protocol could include procedures for notifying both law enforcement and parents. Particularly when a threat is valid and credible, those procedures should be aimed at preventing instances of mass violence like school shootings. Notification plans must take into consideration the impact of communications to the larger school community with an eye towards minimizing potential interference.

III. SCHOOL SAFETY PLANS

Q16. Are school districts required to have school safety plans?

Yes. At least 43 states and the District of Columbia require school districts to have a school safety or crisis management/emergency response plan in place. Other states have recommended safety procedures or safety requirements such as emergency drills and/or resources available to assist districts in maintaining safe schools.³⁸

Under the federal Every Student Succeeds Act (ESSA), school districts must include school safety data in their annual report cards.³⁹ States may also choose to include school safety as one of their measures of school quality.⁴⁰ ESSA also provides certain funding streams that schools can use to promote student safety and a positive school climate.⁴¹ After the attack at Marjorie Stoneman Douglas High School in February 2018, Congress passed the STOP School Violence Act, which expands the Secure our Schools program and provides grants through the Department of Justice's Bureau of Justice Assistance (BJA) and Office of Community Oriented Policing Services (COPS office).⁴²

Q17. What are the key elements of a crisis management/emergency response plan?

In developing a crisis management/emergency response (school safety) plan, school districts should consider widely-accepted best practices, including that the plan:⁴³

C o m m u n i c a t i o n

- Follow internal communication plan:
 - Use the internal warning system to advise students and staff of the potential threat and immediate action steps; provide status updates as appropriate; and
 - Communicate with district personnel about the need to preserve evidence and protocol for handling external requests for information.
- Follow external communication plan:
 - Notify the district's insurers through your school attorney, and coordinate insurer requests for information and interviews through that attorney to protect work product and attorney-client privilege;
 - Communicate with parents and the community in a timely manner, keeping these priorities in focus:
 - providing factual content to control the rumor mill;
 - building trust and credibility to sustain support during and after the crisis;
 - modeling empathy and caring;
 - demonstrating the district's competence, expertise, honesty, openness, commitment and dedication; and
 - In responding to media inquiries:
 - avoid political and personal agendas;
 - balance privacy rights with the public's right to know;
 - focus on healing and a return to normalcy;
 - stay on message and speak with one clear voice; and
 - respond to all reasonable requests and develop guidelines for access to students and staff.

Phase 4—Recovery

- Tap state/national school associations for available resources;
- Develop a plan for inspections and access to the school, including sign-in, confidentiality, and approved

- Provide grief counseling; involve community partners as needed;
- Seek federal and state grants and other assistance to help recovery efforts;
- Review all district insurance policies in place on the date of the incident; file claims as appropriate with the assistance of counsel;
- Allow time for healing and commemoration; and
- Update the emergency plan as needed.

IV. WORKING WITH LAW ENFORCEMENT

Q19. How can school districts work effectively with law enforcement agencies to promote school safety?

Law enforcement agencies can play a key role in the development, implementation and review of a school district's comprehensive school safety plan. Because of overlapping authority and complex legal rules, it is important that, for each phase of emergency management and threat assessment, the roles and responsibilities of law enforcement in school settings and during school emergencies are clearly set out. School districts must abide by any state requirements to report certain crimes that occur on school grounds but must keep the requirements of student privacy laws in mind as well. There may be a need for one or more memoranda of understanding (MOU). For example, the district may wish to clarify the plan for sharing records, including surveillance videos, between the district and law enforcement agency.

Some states have model memoranda of understanding, such as New Jersey's *A Unified State Model Memorandum of Understanding Between Education and Law Enforcement Officials*.⁴⁶

unit; in others, an SRO may be employed directly by the school district. A district may also contract with a private security firm to provide uniformed officers or to employ directly school security officers (SSOs). Contracted security officers and those directly employed by the district do not have police powers.

A school district should consider several issues before determining whether to hire its own security personnel or to contract for a sworn officer from the local law enforcement agency, including:

- employment issues such as overtime requirements,
- liability concerns,
- size of the school/district,
- history of safety/violence in the district,
- purpose of the officer's presence,
- functions the officer will be expected to serve,
- information sharing,
- supervisory structure and reporting protocols, and
- availability of expertise and experience outside the local law enforcement agency.

Q21. If a school district decides to have an SRO on campus, what issues should be addressed in a memorandum of understanding (MOU) or contract with the local law enforcement agency?

When constructing the school district's relationship with the officer and/or the local law enforcement entity, it should consider addressing the following items, preferably in a written MOU or contract.⁴⁸

- **Officer Selection** — If the district opts to use a law enforcement officer, it should ensure that it has input into the officer's selection, and the right to reject at any time an officer who behaves inappropriately for the school environment. Having the right officer is crucial to the success of the program. The district may wish to develop a set of qualifications for SROs. Officers should want to be at the school and not be compelled by the law enforcement agency. School districts may also wish to perform their own background check on the officer.
- **Officer and Staff Training** — Training of the school officer is equally important. The school district should ensure that it has input into the types of training beyond law enforcement techniques and principles the officer receives before being placed in schools. Officers placed in schools should have training specific to working with young people, as well as their role in the school environment -- unique aspects of the SRO's work that differ from an officer working a beat.
- **Officer Purpose and Role** — The functions and responsibilities of the officer should be clearly established, as the applicable legal rules and standards that apply to police officers conducting criminal investigations differ from those applicable to school personnel carrying out similar functions. The contract should detail the SRO's specific duties within the school district and, in return, the school

violating the law or school rules; but the search must be reasonable both at its inception and in its scope.⁵⁰ Courts that examine school searches after-the-fact usually consider the school officials' degree of certainty that the student had violated a school rule or the law and the extent to which the student's expectation of privacy would be infringed by the search. The lower the expectation of privacy, the less certainty required to make a search reasonable.

Searches should be based on reasonable, individualized suspicion and should be conducted by a school administrator or under the supervision of a school administrator. An SRO should conduct searches of students and their belongings or interrogations of students only under the direction and supervision of a school administrator. Courts will closely scrutinize an SRO's actions to determine whether the relaxed constitutional standards applicable to school officials or more stringent criminal justice standards apply.⁵¹

Q23. What factors should a school district consider before deciding whether to arm officers and/or school personnel?

Armed Officers — Aside from the effect on the quality of the learning environment, whether an SRO should be armed will depend on a number of factors, including state law, potential liability in the event of a shooting by the officer, history of violence in the school, and the purpose of placing the officer in the school. Many schools have a combination of armed and unarmed officers, but the community culture may determine how schools approach this issue.

Armed School Personnel — Schools should keep in mind the Gun-Free School Zones Act^{culture may determine how schools appro}

LESSONS LEARNED FROM UVALDE



V. LIABILITY AND INSURANCE

Q24. What liability exposure does a school district have when students or staff are harmed by others at school or a school-sponsored event?

Fede a. C.a. ⁵⁷

In general, a school district does not have a constitutional duty “to protect an individual against private violence.”⁵⁸ Courts have recognized two limited exceptions and have recognized potential liability where there is: (1) a special relationship; or (2) a state-created danger.⁵⁹ Generally, courts have found that these exceptions do not apply to public schools⁶⁰ or have set out various multi-factor tests.⁶¹

Despite these court rulings, victims of violence or their families who want to assert a violation of their constitutional or other federal legal rights can do so under 42 U.S.C. Section 1983.⁶² To win a Section 1983 claim, the victims or their families have to meet a standard much higher than the negligence standards used in state tort law claims.⁶³ Generally, to hold the school district liable, the alleged victim must prove that an official policy violated an established federal right or authorized or directed the deprivation of a federal right, and the policy was adopted or maintained with deliberate indifference to its known or obvious consequences.⁶⁴ Districts generally will not be held liable under Section 1983 where an employee happens to apply a policy in an unconstitutional manner.⁶⁵

Where the district employs armed school personnel, a person who suffered an injury during a crisis might assert a federal claim that the school failed to properly train or supervise its armed personnel. The injured person would have to prove that the district had an official custom or policy of failing to adequately train or supervise its staff and that the policy was adopted by official policymakers with deliberate indifference towards the person’s constitutional rights.⁶⁶ Mere negligence on the part of the district in implementing a training program falls short of the deliberate indifference standard.⁶⁷ Because of the very high standard necessary to

66

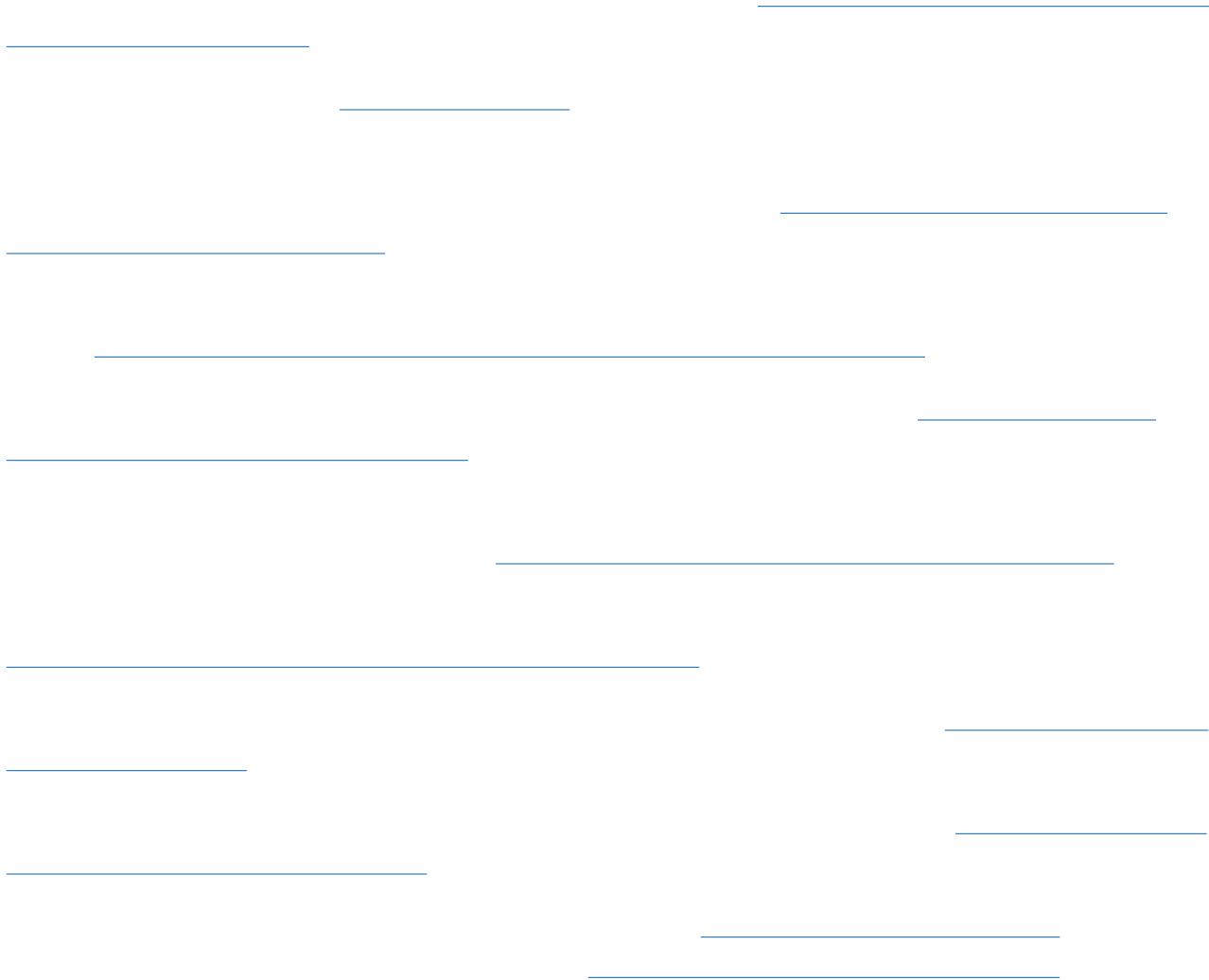
RESOURCES

Federal

Centers for Disease Control, Safe Youth, Safe Schools resource page, <https://www.cdc.gov/features/safeschools/index.html>.

Federal Bureau of Investigation, THE SCHOOL SHOOTER, A THREAT ASSESSMENT PERSPECTIVE (1999), <https://www.fbi.gov/le-repository/stats-services-publications-school-shooter-school-shooter/view>.

National Center of Education Statistics, INDICATORS OF SCHOOL CRIME AND SAFETY (2017), [https://nces.ed.gov/pubs2018/20180\(/\)ot\(.\)26.pdf\(/\)JFETFEMC F/P Lang \(en-US\)/MCID 4028 BDC FBTF0 0 0 1 kF/GS1 gsF/T1_0 1 Tff11 0 0 11 8](https://nces.ed.gov/pubs2018/20180(/)ot(.)26.pdf(/)JFETFEMC F/P Lang (en-US)/MCID 4028 BDC FBTF0 0 0 1 kF/GS1 gsF/T1_0 1 Tff11 0 0 11 8)



U.S. Secret Service & U.S. Department of Education, THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND CREATING SAFE SCHOOL CLIMATES (2018), https://www.secretservice.gov/data/protection/ntac/USSS_NTAC_Enhancing_School_Safety_Guide_7.11.18.pdf.

U.S. Secret Service & U.S. Department of Education, Prior Knowledge of Potential School-Based Violence: Information Students Learn May Prevent a Targeted Attack (May 2008), https://rems.ed.gov/docs/DOE_BystanderStudy.pdf.

State/Local Governments

Check your state department of emergency/crisis management.

Minnesota, U.S. Attorneys' Office, School Safety: Lessons Learned (2006), <http://www.justice.gov/usao/mn/downloads/schoolbrochure.pdf>.

Salem-Keizer (OR) School District, Salem-Keizer System, <http://studentthreatassessment.org> is a multi-agency

International Association of Chiefs of Police, GUIDE TO PREVENTING AND RESPONDING TO SCHOOL VIOLENCE (2007), www.theiacp.org/portals/0/pdfs/schoolviolence2.pdf.

National Association of Elementary School Principals, SCHOOL SAFETY RESOURCES _____

Endnotes

¹ See National Association of School Psychologists et al., *A Framework for Safe and Successful Schools* (2013) <https://www.nasponline.org/resources-and-publications/resources-and-podcasts/school-safety-and-crisis/systems-level-prevention/a-framework-for-safe-and-successful-schools>.

² 20 U.S.C. § 1400 et seq.

³ 29 U.S.C. § 794.

⁴ William Dikel, *School Safety and Student Mental Health: A Role for the National School Boards Association*, published by the National School Boards Association (2012).

⁵ *Id.*

⁶ Andrew Manna, Christopher Borreca, & Lawrence Altman, *WHERE IS THE LINE? MENTAL HEALTH SERVICES AND FAPE – UNDERSTANDING THE PUBLIC SCHOOL RESPONSIBILITY* (NSBA Council of School Attorneys, Webinar March 2, 2016).

⁷ *Id.*

⁸ Dikel, *supra*, at n. 4.

⁹ Los Angeles United School District, SMH Referral Procedures, <https://achieve.lausd.net/domain/260https://achieve.lausd.net/Page/12124> (last visited July 5, 2022).

¹⁰ Manna et al., *supra* at n. 6.

¹¹ See, e.g., *LaV, et al. v. B.A., et al.*, 257 F.3d 981 (9th Cir. 2001); *De v. Mece I. v. d Sc. D.*, No. C06-395JLR, 2007 WL 215858 (W.D. Wash. 2007); *De v. Le v. e Sc. De*, 263 F. Supp. 2d 195 (D. Mass.

²¹ *Id.* at 3.

²² U.S. Department of Homeland Security, United States Secret Service, PROTECTING AMERICA'S SCHOOLS: A U.S. SECRET SERVICE ANALYSIS OF TARGETED SCHOOL VIOLENCE (Nov. 2019).

²³ *Id.* at 4.

²⁴ See, e.g., *Jacobs v. Waide, Jr., Corp., Inc.*, 142 Wn. App. 819, at 824, 176 P.3d 545 (2008).

²⁵ U.S. Department of Homeland Security, United States Secret Service, ENHANCING SCHOOL SAFETY, *a*, at n. 20 (July 2018).

²⁶ Charles Leitch, *Addressing School Districts' Threat of Violence*, NSBA Council of School Attorneys, School Law Practice Seminar Presentation (Oct. 20-22, 2016).

²⁷ U.S. Department of Homeland Security, United States Secret Service, PROTECTING AMERICA'S SCHOOLS, *a*, at n. 22 (Nov. 2019).

²⁸ *Id.*; see also U.S. Department of Homeland Security, United States Secret Service, ENHANCING SCHOOL SAFETY, *a*, at n. 20 (July 2018).

²⁹ 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

³⁰ See NSBA Statement to the Federal Commission on School Safety on FERPA and School Safety https://cdn-les.nsba.org/s3fs-public/reports/NSBA_Statement_FCSS_Meeting-7-11-18.pdf (July 11, 2018).

³¹ Leitch, *a*, at n. 22.

³² 18 U.S.C. §§ 2701-2712 (2018), as amended; Leitch, *a* at n. 22, at *13 (2016).

³³ *Village of Arlington Heights v. International City of Chicago*, 538 U.S. 343, 359-60 (2003).

³⁴ *Leitch v. P. a U. ed Sc .D .*, 90 F.3d 367, 372 (9th Cir. 1996).

³⁵ *T. v. De M. v. I. de . Sc .D .*, 393 U.S. 503 (1969); see also Leitch, *a*, at n. 22; Stuller, *a*, at n. 12.

³⁶ See, e.g., *D. e. . P. a U. ed Sc .D .*, 306 F.3d 616, 621-23 (8th Cir. 2002) (en banc). After the attack on Columbine, some courts have interpreted the concept of a true threat broadly, e.g., *P. e. . A ce . Pa . Sc . Bd.*, 301 F.Supp. 2d 576 (M.D. La. 2004) (drawing of a school being destroyed constituted a true threat); *C. (C) S ec a5a a. S) (EF. (.) (22 BDC BT1121 Tf11 0 0 11 4. 225. DC BT1121 T M. MO 0 11 12544 24*

³⁷ Cal. Penal Code § 18100 (2021); Colo. Rev. Stat. § 13-14.5-103 (2022); Conn. Gen. Stat. § 29-38c (2020); Del. Code Ann. tit. 10, § 7704 (2021); D.C. Code § 7-2510.02 (2022); Fla. Stat. § 790.401 (2021); Haw. Rev. Stat. Ann § 134-65(a) (2021); 430 Ill. Comp. Stat. 67/40 (2022); Md. Code Ann., Pub. Safety § 5-602(a) (2021); Mass. Gen. Laws ch. 140, § 131R (2022); Nev. Rev. Stat. § 33.560 (2021); N.J. Rev. Stat. § 2C:58-23(a) (2022); N.M. Stat. Ann § 40-17-8 (2021); N.Y. C.P.L.R. Law § 6341 (2021); Or. Rev. Stat. § 166.527 (2021); 8 R.I. Gen. Laws §§ 8-8.3-5(a) (2021); Vt. Stat. Ann. tit. 13, § 4054(a)(1) (2022); Va. Code Ann. § 19.2-152.13 (2022); Wash. Rev. Code § 7.94.030(2) (2022).

³⁸ Heidi Macdonald & Zeke Perez Jr., *50-State Comparison of K-12 School Safety*, Education Commission of the States, <https://www.ecs.org/50-state-comparison-k-12-school-safety/> (Feb. 25, 2019).

³⁹ Pub. L. No. 114-95, 129 Stat. 1836 (2015).

⁴⁰ 129 Stat. 1848.

⁴¹ *Id.* at 2032.

⁴² STOP School Violence Act, Pub. L. No. 115-141, 132 Stat. 348 (2018).

⁴³ U.S. Department of Education, Practical Information On Crisis Planning: A Guide For Schools and Communities (2007), <https://www2.ed.gov/admins/lead/safety/emergencyplan/crisisplanning.pdf>.

