School Violence: What to Do When Red Flags Appear

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In the years since the attack on Columbine High School, school districts have undertaken a number of measures to predict and prevent school violence, including searching for "red flags" that foreshadow potential school violence. The process of threat assessment rests on two principles: (1) all threats and threateners are not equal, and (2) most threateners are unlikely to carry out their threats.[1] However, as a panel assembled by the Federal Bureau of Investigation reminds us, "all threats must be taken seriously and evaluated."[2]

Genuine threats of targeted school violence are extremely rare. Rarer still are actual incidents of school violence. Nonetheless, conduct that gives rise to a concern that a student may be on the path toward targeted violence is not at all uncommon. Some examples of troubling behavior include: a graphic and violent creative writing story; a project for a video production class about high school revenge; MySpace photos of a student brandishing weapons; angry internet postings; rumors of a student having a gun at school; ominous text messages; or restroom graffiti.

Evaluation takes time, judgment, and professional distance. The challenge for school attorneys is giving school officials and an appropriately constituted threat assessment team the time and distance to appropriately discern whether conduct giving rise to a concern truly indicates that a student poses a risk of targeted school violence. This article discusses the use of disciplinary removals and investigative removals as tools to prevent school violence.

Disciplinary Removals

The top priority in responding to a potential threat is to contain and remove the threat as quickly as possible. Often a "threat" can be removed through a brief investigation. School officials and law enforcement can interview the student, his or her peers, teachers, and parents to determine the seriousness of the concern. For example, an intercepted text message that says, "I'll be blasting horseshoes and hand grenades in the locker room at 4 pm tomorrow" may be nothing more than a promise to play the compact disc of a promising rock band as part of a pre-game ritual.[3]

If the preliminary investigation does not diminish the concern, school officials may wish to remove the student from the school environment. "When confronted with a problem, professionals often choose the tools with which they are most familiar: Police officers arrest; Mental health professionals commit; Workplace managers fire; Principals suspend or expel."[4] Thus, school officials generally inquire whether there are bases for a disciplinary removal.

If the communication giving rise to the concern amounts to a "true threat," state law likely provides a basis for imposing a disciplinary removal.[5] Likewise, in the case of a "true threat" the First Amendment does not impose an impediment to discipline.[6] Generally, a statement constitutes a true threat when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[7] Nonetheless, the analysis varies by federal circuit[8] and by application of each court. In the wake of the attack on Columbine, some courts have interpreted the concept of a true threat broadly,[9] while other courts have not.[10]

Even if the conduct giving rise to the concern does not amount to a true threat, it may still be possible to remove the student for disciplinary reasons without First Amendment impediment if the communication caused a material and substantial disruption of the school environment.[11] For example, a court has upheld the disciplinary removal of a student for creating an internet posting disparaging his teacher in profane terms and depicted blood dripping from the teacher's severed head.[12] Similarly, another court upheld the short term suspension of a kindergarten student who told friends during recess, "I'm going to shoot you."[13] The court's reasoning in the latter case focused more on the school's responsibility to teach students how to speak and interact appropriately than what we might ordinarily consider to be a material and substantial disruption. Nonetheless, school districts should not assume that courts will inevitably agree with a disciplinary removal to teach appropriate behavior, and therefore must be prepared to put forward evidence of a disruption.[14]

Investigative Removals

While a disciplinary removal often is the default reaction of school officials, threat assessment

experts caution that "[t]he response with the greatest punitive power may or may not have the greatest preventative power"[15] because "a student who is suspended or expelled without alternative educational placement may be under less supervision than if he or she were to remain in a school setting."[16] School officials should be mindful of the fact that the day after being expelled from school for possessing a weapon, Oregon high school student Kip Kinkel returned to the school and shot 24 classmates.[17] Therefore, while threat removal is important, investigation is more important. The typical trajectory in these incidents is the perception of the threat, discipline leading to removal, and then a more thorough investigation. A body of case law is developing, however, that allows school officials to change this order of intervention to perception of the threat, removal pending investigation, and discipline if the investigation reveals that discipline is warranted.

In the case of a short term suspension, students have a property interest in a public education that they may not be deprived of without due process of law, notice, and an opportunity to be heard.[18] Expulsions require more elaborate procedures. While school officials are most familiar with these procedures in the disciplinary setting, it does not follow that students may be removed from the regular school environment only for disciplinary reasons. State statutes typically allow officials to place a person on short-term involuntary commitment-an undisputed deprivation of liberty-not because the person has done something sanctionable, but out of concern that the person may do harm to himself or others if left in the general population.[19]

In some instances a student may be sufficiently agitated to require formal involuntary commitment. However, the intermediate point is that due process analysis is sufficiently flexible to permit the temporary removal of a student from the general school setting so long as a sufficient countervailing state interest exists-safety of the student and classmates-and appropriate procedures are used to reduce the risk of an erroneous deprivation.[20]

The groundwork for this sort of intervention was laid in the Ninth Circuit's decision in *LaVine v. Blaine School District*.[21] In this case, a student turned in a poem in which a first person narrator described shooting 28 classmates.[22] The student's teacher notified the counselor who was aware that the student had expressed suicidal ideations, had a no-contact order pending with respect to his father, had recently broken up with his girlfriend, and had been involved in prior school discipline incidents including a fight. The student was expelled on an emergency basis and allowed to return after he underwent a psychiatric evaluation at the school district's expense to determine whether it was safe for him to return to school.[23]

The student and his parents filed suit against the school district alleging that the removal violated his First Amendment rights. The court refused to address the question of whether the poem was a "true threat."[24] Rather, the court applied *Tinker*, noting that forecasting disruption is unmistakably difficult and that *Tinker* does not require certainty that a disruption will occur, only the existence of facts that might reasonably lead school officials to forecast substantial disruption.[25] The court then concluded that based on the school's knowledge of the student's troubled history, there were sufficient circumstances to reasonably forecast a disruption of the school environment.[26] The fact that the student's expulsion was emergency, rather than disciplinary, was crucial to the court's analysis. The court took the district to task for placing negative documentation in the student's file, and ordered that it be removed.[27]

While *LaVine* was decided on First Amendment principles, the court's analysis reflected a balancing approach. More specifically, the court weighed the incursion on the student's rights against the school district's concern for student safety, an analysis similar to the traditional due process inquiry.[28] Since *LaVine* other courts have upheld what might be called "evaluation suspensions," or the short term removal of a student from the general school environment, not for the purpose of disciplining the student, but to determine whether the student poses a threat of harm to himself or herself or others.[29]

An evaluation suspension should, to the extent appropriate or possible, be preceded by a Goss-type hearing at which the student is given the opportunity to explain the conduct that gave rise to the concern. In addition, the removal should be, if possible, from the general school environment, rather than complete termination of school services. That is, homework or homebound or online instruction should be provided. Throughout the process, school officials should make clear that the removal is not disciplinary in nature and will not result in negative documentation unless the fuller investigation demonstrates that discipline is in fact warranted. Finally, the threat assessment team should be assembled as soon as possible so that a determination can be made as to whether it is safe for the student to return to the school environment.[30]

The remaining question then is what to do if the threat assessment determines that the child is not safe to return to the school environment. While schools certainly bear some measure of responsibility in assuring student safety, in some instances the authority of school districts-which generally ends at expulsion-is not commensurate with that responsibility. In these instances, other entities need to be involved in ensuring that students who do pose a threat to themselves or others receive appropriate treatment. Most states allow some form of involuntary outpatient treatment.[31] The scope of such statutes, however, varies from state to state.

Conclusion

In the end, the advice of threat assessment experts is sobering: reliably predicting any type of violence is extremely difficult. Predicting that an individual who has never acted out violently in the past will do so in the future is still more difficult. Seeking to predict acts that occur as rarely as school shootings is almost impossible.[32] School officials, however, should take solace in the fact that attempting to make such predictions can result in the identification of students who are in need of counseling even if their need has not reached the point of contemplating violence. Getting such students help can assure a sense of safety in public schools which are, in the end, very safe places already. **I&A**

End Notes

1. FED. BUREAU OF INVESTIGATION, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 6 (2000), *available at* http://www.fbi.gov/publications/school/school2.pdf.

2. *Id*.

3. Fat Maw Rooney, Horseshoes and Hand Grenades (Grassroots Music 2006).

4. U.S. SECRET SERV. & U.S. DEPT. OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 64 (2002), *available at* http://www.secretservice.gov/ntac/ssi_guide.pdf.

5. *E.g.*, Colo. Rev. Stat. § 22-33-106(1)(c) (2000) (student may be suspended or expelled from school for behavior that is detrimental to the welfare or safety of other students or school personnel).

6. *See Watts v. United States*, 394 U.S. 705 (1969) (reversing a conviction for threatening the life of the President of the United States where the remark was political hyperbole, not a statement of intent, but noting that the statute prohibiting threats to the President was constitutional on its face); *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996) (student could be disciplined for making a threatening remark to a counselor).

7. *Lovell, supra* note 6, at 372.

8. For a good discussion of the variations *see Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 621-23 (8th Cir. 2002) (en banc).

9. *See Pulaski County Special Sch. Dist., supra* note 8, at 321-27 (violent letter to ex-girlfriend is a threat); *Lovell, supra* note 6, at 372 (high school student's statement made while experiencing difficulties scheduling a class that "I'm so angry I could just shoot someone" constituted a true threat); *Porter v. Ascension Parish Sch. Bd.*, 301 F. Supp. 2d 576 (M.D. La. 2004) (drawing of a school being destroyed constituted a true threat); *Commonwealth v. Milo M.*, 740 N.E. 2d 967, 969 (Mass. 2001) (twelve year old student's drawing of a student shooting a teacher constituted a true threat).

10. *See State v. Kilburn*, 84 P.2d 1215, 1224 (Wash. 2004) (student's statement to a classmate that he was going to bring a gun to school and shoot everyone was not a true threat); *In re Douglas D.*, 626 N.W. 2d 725, 730 (Wis. 2001) (student's creative writing story regarding killing a teacher was not a true threat).

11. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

12. *J.S. v. Bethlehem Area Sch. Dist.*,757 A.2d 412 (Pa. Comwlth. 2000).

13. *S.G. Sayreville Bd. of Educ.*, 333 F.3d 417 (3d Cir. 2003).

14. *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 1998) (discipline impermissible for website of mock student obituaries with a poll to select who should "die," that is, be eulogized, next where there was no evidence of disruption).

15. U.S. SECRET SERV. & U.S. DEPT. OF E