SCHOOL SAFETY ISSUES:

OPEN CARRY, LOCKDOWNS, BULLYING, STATE SCHOOL SAFETY REQUIREMENTS, SAFETY-RELATED MANDATORY DISCIPLINE, AND OTHER ISSUES

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Open Carry and Schools

May public schools in Michigan prohibit the open carry of firearms on school premises?

No state statute answers the question.

No case law answers the question.

Federal Gun-Free School Zones Act (GFSZA)

Bans possession or use of firearms around schools.

- **18 USC §922(q)(2)**

But specifically exempts a firearm that is properly licensed under state law – *i.e.*, subject to a concealed weapons permit.

MCL §750.237a(4)

Prohibits firearms in a "weapons free school zone."

Exceptions

- police officer
- person with permission
- adult picking up or dropping off, with unloaded firearm in trunk (or passenger compartment if no trunk)
- "an individual licensed by this state or another state to carry a concealed weapon."

MCL §28.425o

Prohibits possession of a concealed firearm in a number of sensitive settings.

- **schools**
- **churches**
- **day care centers**
- **bars**
- **stadiums**

But this says nothing about "open carry" of firearms.

Open Carry and Schools

Thus: State law

1) **bans all concealed weapons on school property;**
2) **bans any possession of a firearm at school unless person has a concealed weapons permit;**
3) **but does not ban open carry of firearm at school by person with concealed weapons permit.**

So the question: may schools or districts take their own action to ban open carry on school premises?

CADL v MOC

Capital Area District Library v Michigan Open Carry, Inc. **[298 Mich. App. 220 (2012)]**

CADL was formed by a city and a county under the provisions of the District Library Act.

CADL banned firearms from its premises; MOC member challenged the ban

When Lansing Police refused to enforce the ban, CADL brought declaratory judgment action against MOC to validate ban.

CADL v MOC

MCL §123.1102:

Forbids a "local unit of government" from regulating, banning, etc. the ownership, transportation or possession of pistols or other firearms.

" 'Local unit of government' means a city, village, township or county."

No mention of district libraries.

No mention of schools.

CADL v MOC – Circuit Court

CADL contended MCL §123.1102 did not apply, since it is not a city, village, township or county.

Also contended open carry of firearm constitutes "brandishing" in public – forbidden by MCL §750.234e

- **Statute does not define "brandishing."**
- **Michigan Attorney General Opinion No. 7101 – (2002) – indicates that gun being carried in holster, not being waved or displayed in a threatening manner, is not being "brandished."**

Circuit Court agrees with CADL that MCL §123.1102 did not apply by its terms to district libraries.

CADL v MOC – Court of Appeals

Court of Appeals reverses Circuit Court in 2-1 decision; rules in favor of MOC.

Agrees District Library Act gives district libraries broad authority to set rules, regulate their property.

- **Similar to MCL §380.11a(3) for schools.**

Also agrees district library is not a "city, village, township or county" under MCL §123.1101 and .1102.

CADL v MOC – Court of Appeals

But – Court holds that that does not end the inquiry.

Court applies the doctrine of "field pre-emption," determines that even though district libraries are not mentioned in statute, CADL may not regulate firearms on its premises.

"Although a district library is not a local unit of government as defined by MCL 123.1101(a), legislative history, the pervasiveness of the Legislature's regulation of firearms, and the need for exclusive, uniform state regulation of firearms possession as compared to a patchwork of inconsistent local regulations indicate that the Legislature has completely occupied the field [of firearms regulation]."

CADL v MOC – Court of Appeals

In dissent, Judge Gleicher says this is a pure case of judicial legislation.

Where statute clearly lists four units of government that are covered, then other units of government are not covered; "field pre-emption" analysis is appropriate only to determine legislative intent; but when the language is clear, that states the intent.

CADL v MOC – Supreme Court

Court of Appeals decision issued October 25, 2012.

CADL asked the Supreme Court for leave to appeal in January 2013.

Supreme Court's Republican majority was thus presented an interesting dilemma – presumably some sympathy to gun ownership, but Court preaches against judicial legislating, in favor of construing statutes as written.

CADL v MOC – Supreme Court

Unfortunately, Court apparently couldn't resolve its philosophical dilemma.

On November 20, 2013, the Supreme Court punted – it denied the application for leave to appeal.

Court of Appeals' decision became final.

Does *CADL* decision bind schools?

It is poor public policy to permit open carry of guns within schools.

It makes little sense to say that persons with concealed weapons permits may not carry concealed weapons in schools, but may, simply because they have a concealed weapons permit, open carry in schools.

The *CADL* decision is badly reasoned, since it stretches a limited, specific statute all out of proportion.

Having said all that – I don't think it can be said that *CADL* decision and reasoning are inapplicable to schools.

Does *CADL* bind schools? (continued)

Strictly speaking, *CADL v MOC* applies only to district libraries.

Schools have their own rights and responsibilities; MCL § 380.11a gives schools broad discretion to regulate what goes on at school, on school property.

- **probably not distinguishable from similar statute applicable to district libraries.**

More importantly, Court of Appeals' reasoning that Legislature meant to pre-empt the field of gun regulation, even though it said nothing about schools, would be used by lower courts and police agencies to conclude schools could not ban open carry on school property.

What Can Schools Do?

A number of districts have passed Board resolutions asking the Legislature to amend the law to prevent open carry or other possession of firearms at schools.

HB 4104 – introduced January 2013 – would forbid open carrying at school; bill has gone nowhere; current legislative climate is not promising.

I also recommend Board resolution forbidding guns on school premises; may not be enforceable, but helpful if law changes (or you have a friendly police force).

What Can Schools Do? (continued)

If someone enters school carrying a gun, schools have every right to ensure he/she has concealed weapons permit; under MCL §750.237a(4), the exception to state law ban applies to person with concealed weapons permit.

- if no concealed weapon permit, police probably will enforce law.

What Can Schools Do? (continued)

If person does have concealed weapons permit, best practice might be to quietly, respectfully ask that guns not be carried to avoid frightening students and staff.

Some schools have had success with this approach; often if their position is respected or at least acknowledged, open carry proponents will respect schools' request.

What Can Schools Do? (continued)

If person insists on open carrying – can call police to ask to have school's firearms ban enforced.

But many police departments won't get involved, particularly after *CADL* result.

- **Lansing Police Department's refusal to enforce Library's ban prompted *CADL* case.**
- **Kent County – has notified districts it does not wish to be called for persons open carrying, unless there is improper conduct – brandishing, threatening, etc.**

What Can Schools Do? (continued)

The Clio approach (next page)

- **immediate lockdown if person carrying weapon in school.**
- **posted notices – goes past "friendly persuasion."**

Wonder what local law enforcement feels about this.

Rockford has similar procedure in place.

ATTENTION

CPL HOLDERS:

Please be advised that all Clio Area School District buildings and grounds have been declared Weapons Free Zones by Board of Education Policy.

IF YOU INTEND TO ENTER THIS BUILDING OR REMAIN ON SCHOOL GROUNDS CARRYING A FIREARM, THE BUILDING ADMINISTRATOR HAS BEEN DIRECTED TO FOLLOW THE COUNTY-WIDE EMERGENCY RESPONSE PROCEDURE TO PLACE THIS FACILITY INTO "LOCKDOWN" MODE UNTIL LOCAL LAW ENFORCEMENT OFFICIALS ARRIVE.

As the implementation of a lockdown causes all educational services to cease, your ARMED presence in this building or on its grounds constitutes an unwarranted disruption to normal school activities, you will be asked to leave.

YOUR COOPERATION IN KEEPING THIS FACILITY A WEAPONS FREE ZONE DURING HOURS WHEN STUDENTS ARE PRESENT IS GREATLY APPRECIATED.

LOCKDOWNS

MCL §29.19 requires all schools to conduct fire drills, tornado drills and:

“a minimum of two drills in which the occupants are restricted to the interior of the building and the building secured is required for each school year.”

LOCKDOWNS

Lockdown drills are to be conducted in coordination with the local emergency management coordinator and local law enforcement.

Emergency management division of State Police to develop model to lockdown drills.

LOCKDOWN MODEL

A lockdown model has been developed and is close to being completed and released.

- awaiting passage of HB 4713, which will increase mandatory lockdown drills from 2 to 3; passage appears close.

I have an advance copy of model, but am not allowed to release it until it is ready for release statewide.

LOCKDOWN MODEL

Model contains a number of organized, common-sense protocols to be followed for lockdowns, including checklists, rules such as turning off all student cell phones, designation of lines of authority and timing of procedures, etc.

Stay tuned – should be helpful to have uniform protocols in place.

LOCKDOWN DEVELOPMENTS

Unfortunately, equipment for lockdowns is a growth industry – New Town, etc.

A company in Michigan that has developed a tool that upon lockdown can easily be slipped over classroom doors from the inside to prevent them from being opened, with access by key for those who should enter.

BULLYING

“Matt’s Safe School Law” – PA 241 of 2011 – designed to deal with bullying at school [MCL §380.1310b].

Required all districts no later than June 2012 to enact policy prohibiting bullying “at school,” submit policy to State.

Haven’t heard of districts not complying.

Definition of “bullying”

"Bullying" means any written, verbal, or physical act, or any electronic communication, that is intended or that a reasonable person would know is likely to harm 1 or more pupils either directly or indirectly by doing any of the following:

- **Substantially interfering with educational opportunities, benefits, or programs of 1 or more pupils.**
- **Adversely affecting the ability of a pupil to participate in or benefit from the school district's or public school's educational programs or activities by placing the pupil in reasonable fear of physical harm or by causing substantial emotional distress.**
- **Having an actual and substantial detrimental effect on a pupil's physical or mental health.**
- **Causing substantial disruption in, or substantial interference with, the orderly operation of the school.**

Definition of “at school”

“At school” has two components:

Traditional: “. . . in a classroom, elsewhere on school premises, on a school bus or other school-related vehicle, or at a school-sponsored activity or event whether or not it is held on school premises.”

Also: “’At school’ includes conduct using a telecommunications access device or telecommunications service provider that occurs off school premises if the telecommunications access device or the telecommunications service provider is owned by or under the control of the school district or public school academy.”

Cyberbullying

#2 - Sounds a little like cyberbullying – if using district's equipment, internet service.

What is not "at school?"

Bullying that takes place off-campus using privately owned equipment and internet service account.

That is, most of what we know of as "cyberbullying" – but stay tuned.

Bullying Policy

Act requires 9 different components in a bullying policy; exact language is up to schools.

- statement prohibiting bullying
- statement prohibiting retaliation
- statement that bullying is prohibited regardless of subject matter or motivation
- job title of persons responsible for implementation
- statement of how policy is to be publicized
- procedure for notifying parents of victim and perpetrator
- procedure for reporting bullying
- procedure for investigating, including responsible party
- procedure for documenting and reporting bullying

Immunity Provision

Student, staff member, administrator, parent, etc. who reports in good faith an act of bullying to the person designated in the policy and in compliance with the procedures under policy is

- **immune from a cause of action for damages arising out of the reporting itself;**
- **immune from any failure to remedy the reported incident.**

However, this immunity does not apply to the person designated as responsible to implement the policy, or person who is responsible for remedying the bullying.

Immunity Provision

Curious thing about immunity provision:

Act nowhere requires district to take any action against bullying; no obligation to remedy bullying; only reference to remedy is immunity provision.

Act only requires a policy, and that bullying be investigated.

Obligation to remedy is certainly implied; but poor policy to rely on implications and assumptions.

Bullying

Concept of bullying has become part of the public consciousness, which is good.

When that happens, term gets thrown around way too freely; sometimes it seems when one child looks sideways at another, someone yells “bullying.”

Remember that definition of bullying emphasizes action whose consequences are “substantial.”

Cyberbullying

2011 statute largely punted on “cyberbullying.”

SB 74 now pending in Legislature; passed Senate committee unanimously on October 9, but then seems to have ground to a halt – no activity since October 9.

Has been subject of media attention; sponsoring senator paints himself as filling a hole in “Matt’s Safe School Law.”

Not really.

Cyberbullying – SB 74

Here is the sole provision about cyberbullying:

District's policy prohibiting bullying "<u>shall include cyberbullying as a form of bullying and shall define cyberbullying.</u>"

That's it – that's the language that will protect against cyberbullying.

Cyberbullying – SB 74

Two major flaws in SB 74.

First – no definition of cyberbullying; it is expressly left up to each district. Will produce numerous different definitions – narrow, broad, clear and unclear.

If Legislature has determined there is an evil to be remedied, it should define what that evil is.

Cyberbullying – SB 74

Second major flaw in SB 74 is potentially more important.

No indication of the extent to which schools may regulate off-campus cyberbullying (however defined) using private equipment and internet service.

Many cases challenging cyberbullying discipline have turned on that – and courts have been reluctant to give schools much leeway.

Cyberbullying – S.B. 74

One of the earliest – and fairly typical of subsequent cases:

***Mahaffey v Aldrich,* 236 F Supp 2d 779 (ED Mich 2002), decided by Judge Avern Cohn.**

Student created "Satan's web page," with Satan's assignment to "stab someone for no reason then set them on fire, throw them off a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face."

Cyberbullying – SB 74

Website listed "people I wish would die;" added, "please don't go killing people and stuff and blaming it on me."

Court: Under *Tinker v Des Moines Independent School District*, school can only punish for conduct that "substantially interfered with the work of the school or impinged upon the rights of other students."

No record of disruption to school or campus activity; thus, discipline violates First Amendment.

Cyberbullying – S.B. 74

S. B. 74 does not address this issue at all; direct schools to prohibit cyberbullying, but then gives no assistance in allowing schools to reach most cyberbullying.

Puts schools in position of being compelled to deal with cyberbullying, while most case law will prevent it from happening.

At very least, any cyberbullying legislation should contain 1) a statewide definition of cyberbullying – like the definition of bullying in original Act – and 2) some standards to help schools combat it.

School Safety Statutes

In April 1999, two students at Columbine High School in Colorado went on a shooting rampage at their school, during which they killed 12 people and wounded 24 more. Both students had been discipline problems at their school, and had shown signs of mental illness that, if recognized and acted upon, might have prevented the massacre.

In Michigan, the Legislature within the next 90 days passed a group of bills in reaction to the Columbine events; other states did similarly.

School Safety Statutes

MCL §380.1308 required, by October 1999, the creation of a "statewide school safety information policy," to identify types of incidents occurring at school that must be reported to police, protocols for sharing of information among agencies.

"School Safety Response Guide" created.

Statewide School Safety Information Policy

I know that Statewide School Safety Information Policy and School Safety Response Guide were created at the time – 1999-2000 time frame; I saw copies of one, still have copy of other.

But they seem to have disappeared. I have tried several times to find on MDE website – no luck.

School Safety Response Guide

School Safety Response Guide had some common sense guidelines for offenses requiring police to be called.

- **some anomalies – like requiring police to be called for a minor in possession of tobacco.**

Local meetings called for, took place, produced local agreements that seem to have disappeared from view.

Information Guide; Safety Response Guide

I don’t know if they still in effect or still exist other than on someone’s shelf or the file of old attorneys.

The statutory requirements are still there.

If anyone has any information – do tell.

“Zero Tolerance” Discipline

Post-Columbine statutes enacted a number of new mandatory discipline requirements.

- **Drafting left much to be desired; e.g., use of “suspension” and “expulsion” as synonymous; also referred to “permanent expulsion;” others discussed below.**

Almost no case law on these statutes.

Permanent Expulsion Required

- **MCL 380.1311:**
  - **Permanent expulsion required when a pupil possesses in a weapon free school zone a weapon that constitutes a dangerous weapon, commits arson in a school building or on school grounds, or commits criminal sexual conduct in a school building or on school grounds.**

- **MCL 380.1311a:**
  - **Permanent expulsion required when a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by or engaged as a volunteer or contractor by the school board.**

“Dangerous Weapon”

- **Permanent expulsion required when a pupil possesses in a weapon free school zone a weapon that constitutes a dangerous weapon.**
  - **“Dangerous weapon”: a firearm, dagger, dirk, stiletto, knife with a blade over 3 inches in length, pocket knife opened by a mechanical device, iron bar, or brass knuckles. (MCL 380.1313).**
  - **Exceptions:**
    - **object or instrument not possessed by pupil for use as a weapon or for delivery to another student for use as a weapon.**
    - **weapon was not knowingly possessed by the pupil.**
    - **pupil did not know or have reason to know the object constituted a dangerous weapon.**
    - **weapon was in possession of pupil at suggestion, request, or direction of, or express permission of school or police.**

Permanent Expulsion Required: "Criminal Sexual Conduct"

- **Permanent expulsion required when a student commits criminal sexual conduct in a school building or on school grounds**
  - **The statute refers to several provisions in the Penal Code in defining criminal sexual conduct. (MCL 750.520b, 520c, 520d, 520e, or 520g)**

- **Does any sort of CSC result in mandatory expulsion – including CSC 4th, which is a misdemeanor?**

- **What of the word "criminal;" does that require criminal prosecution, conviction; or are schools to determine if crimes occur?**

Permanent Expulsion Required: "Arson"

- **Permanent expulsion required when a student commits arson in a school building or on school grounds.**

  — **Definition of "arson" for this statute is limited to <u>felony</u> arson convictions under (MCL 750.71 to 750.80); fire in trash can does not require expulsion.**

Permanent Expulsion Required : “Physical Assault” on School Employee, Volunteer, etc.

- **MCL 380.1311a:**
  - **Permanent expulsion required when a pupil enrolled in grade 6 or above commits a physical assault at school against a person employed by or engaged as a volunteer or contractor by the school board,**
  - **"Physical assault" means intentionally causing or attempting to cause physical harm to another through force or violence.**
  - **This is a little clearer – but still some ambiguity; contrast a push to get past a staff member with hauling off and belting one.**
    - **provides school with some discretion, flexibility.**

Suspension or Expulsion Required: "Verbal Assault" against school employee, volunteer, etc.

- **MCL 380.1311a:**

  Suspension or expulsion required when:

  — **a pupil enrolled in grade 6 or above commits a "verbal assault," as defined by school board policy, at school against a person employed by or engaged as a volunteer or contractor by the school board**

  OR

  — **if a pupil enrolled in grade 6 or above makes a bomb threat or similar threat directed at a school building, other school property, or a school-related event..**

  — **No minimum or maximum exclusion; up to school; but district shall act.**

  — **No definition of "verbal assault;" school district to define.**

Physical assault on another pupil

MCL §380.1310:

If a pupil enrolled in grade 6 or above commits a physical assault at school against another pupil, then the school shall suspend or expel the pupil from the school district for up to 180 school days.

- **is it "suspension" or "expulsion?"**
- **how can an exclusion for a finite period be an "expulsion?"**
- **what does "for up to 180 school days" mean? No minimum time; 1 day to 180?**

Physical assault on another pupil.

Definition: "physical assault" means intentionally causing or attempting to cause physical harm to another through force or violence.

Generally regarded as different, more serious than "fighting;" 1 assailant vs. 2 willing participants.

One district is not required to enroll someone "expelled" from another district for physical assault against another student during the "expulsion."

State-Mandated Expulsion vs. Expulsion Pursuant to Board Policy

- **If a student's conduct constitutes an expulsion offenses under the zero tolerance statutes, expulsion is <u>mandatory.</u>**
  - **mandatory expulsion under state law requires expulsion from every public school in the state.**

- **If the student's conduct is serious but does not constitute one of the expulsion offenses under state law, the school may still punish the student based upon a violation of Board policy – even up to expulsion (but only from the district itself).**

- **Ex: K*nife shorter than 3 inches is not a "dangerous weapon," as defined in the statute; thus, permanent expulsion is not mandated , but the school may still expel or suspend for a violation of its own code of conduct.***

Mandatory Expulsion Is Subject to Possible Reinstatement

Permanent Expulsion under MCL 380.1311 and 1311a:

- **Parent or student may petition the school board for reinstatement after 150 days, with no reinstatement until 180 school days (1 year) after the expulsion (60 days/90 days for under grade 6)..**

- **Statute gives parent/student the right to apply for reinstatement; but no right to be reinstated. It is a matter of grace.**

- **Statute provides criteria to be considered, procedure to be followed in deciding whether to reinstate.**

Students with Disabilities: Extra Protections

- **Students with disabilities have extra protections when the school proposes to change their educational placement due to a violation of school rules.**
  - **These extra protections also apply when the student's misconduct falls under the mandatory expulsion and suspension statutes in the Revised School Code (MCL 380.1311 and 380.1311a).**
- **These protections apply to students with IEPs and 504 plans (Section 504 of the Rehabilitation Act)..**
- **Be aware of these protections and rules; but not subject of this presentation.**

“Dear Colleague” Letter of January 8, 2014

Joint publication of Civil Rights Division of Department of Justice and Office of Civil Rights of Department of Education.

Target – racial disparities in issuance of discipline that excludes students from school.

Letter refers to discipline that involves “different treatment” – intentionally disciplining similarly situated students differently because of their race.

- **hard to dispute aggressively challenging “different treatment.”**

“Dear Colleague” Letter of January 8, 2014

Letter also talks about facially neutral policies that have a “disparate impact” on particular racial groups.

Three-part inquiry:

1) Has the policy resulted in adverse impact on students of one race as opposed to students of another race?

- Examples – students disciplined at higher rates, or subjected to more severe sanctions.

“Dear Colleague” Letter of January 8, 2014

2) **Is the policy at issue necessary to meet an important educational need? [Similar to “legitimate, non-discriminatory reason” inquiry in employment discrimination litigation].**

3) **Are there effective alternatives that would meet the educational goal while reducing the adverse impact on the disproportionately affected racial group; or is the school’s justification a pretext for discrimination.**

“Dear Colleague” Letter of January 8, 2014

The sentence that got the most attention from the media was the following:

“Examples of policies that can raise disparate impact concerns include policies that impose mandatory suspensions, expulsion or citation (*e.g.,* ticketing or other fines or summonses) upon any student who commits a specified offense . . .”

Mandatory expulsion seems to be directly in the sights of the federal government.

“Dear Colleague” Letter of January 8, 2014

Federal scrutiny of mandatory expulsions presents a potential conundrum for Michigan districts.

State law mandates expulsions or suspensions for particular infractions; but complying with state law may get us in trouble with the feds.

I can’t recommend that districts ignore state law; but they had best be certain – as they should have been all along – that all races are treated the same in imposing mandatory consequences.

Stay tuned.

Questions?

Questions?

Thank you.

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