ON CAMPUS STUDENT INTERVIEWS AND SEARCHES BY SCHOOL DISTRICT EMPLOYEES

This Member Alert has been triggered by new litigation and threats of litigation by the American Civil Liberties Union ("ACLU") and parents/parent groups regarding potentially illegal student interviews and searches. It also addresses ongoing Member questions regarding the right of school district employees to interview students and search their property (including backpacks, cell phones/cameras, etc).

I. OVERVIEW

School districts are obligated to reasonably protect the safety and welfare of students, also serving as the legal protector of students' rights when under the districts' custody or supervision.[1] School district employees are also government agents for purposes of the Fourth Amendment's prohibition against arbitrary and capricious detentions and unreasonable searches and seizures. Despite these important roles and obligations, school districts have broader rights than other public agencies to interview students and search their property. Yet, with the ACLU stating an intention to pursue claims against Members allegedly violating student privacy and/or liberty rights, compliance with the standards below is critical.

II. LEGAL STANDARDS

A. Student Interviews.

School district officials may briefly detain and question a student regarding a specific potential violation of law or school district policy, as long as the detention/interview is not arbitrary, capricious, or performed in a harassing manner. *In re Randy G.*, 26 Cal.4th 556, 567 (2001). If a student or parent asserts that a particular interview was wrongful, it is up to the school district to prove that the interview did not violate a student's and/or parent's rights. The district must show that the reason for the interview was not arbitrary or capricious, with the interview limited in time and scope only to the identified issue of concern, so that the interview did not become "harassing." *In re Cody S.*, 121 Cal.App.4th 86 (2004). Key concepts are therefore: (1) short in duration, (2) focused solely on issue triggering the reason for the interview, and (3) not engaging in adversarial or threatening tones or behaviors as finders of fact. School officials generally cannot threaten adverse action against students not involved in potential misconduct (i.e., a potential victim), must not engage in "fishing expeditions" into issues beyond the immediate reason for the interview, or make threats of disciplinary action unless the employee has the personal authority to impose such consequences (i.e., counselors, teachers, or other staff members should never make threats of consequences; those issues should be addressed by the principal).

Before conducting student interviews in private areas, employees should consider the sex of the interviewer/interviewee, the types of issues being investigated, the expected length of the interview, and the information hoped to be gained through the interview. Based on such issues, it may be wise to have a second employee attend potentially challenging or adversarial interviews. Employees should also give due consideration to early parent involvement, particularly given the school's divergent and competing roles as investigator (into misconduct) and protector of students' legal rights when parents are not present.

[1] *Brown v. Shasta Union High School Dist.*, not reported, 2010 WL 3442147 ["Public school officials are government agents for purposes of the protection of students' constitutional rights."], citing *In re William G.*, 40 Cal.3d 550, 558-562 (1985); *Austin B. v. Escondido USD.*, 149 Cal.App.4th 860 (2007); *Harper ex rel. Harper v. Poway Unified School Dist.*, 345 F.Supp.2d 1096 (S.D.Cal., 2004).

B. Searches of Student Property/Phones.

School district officials may conduct searches of student property if there is a "reasonable suspicion" that the student **currently** possesses illegal or prohibited property or evidence of a crime or breach of school district policy. Because students have a right of privacy at school, even though that right is more limited than in other settings, there must be a showing of "reasonable suspicion" before the search can occur. "Reasonable suspicion" exists only when a school district employee can articulate objective facts that would give rise to a belief that (1) the student is currently in violation of the law or school rules, and (2) the search is expected to provide evidence of the violation. *E.g., In re K.S.*, 183 Cal.App.4th 72 (2010).

Except for general pat down or metal detector searches related to verifiable general safety needs that cannot otherwise be adequately addressed, random or indiscriminate searches are prohibited. *In re Lisa G.*, 125 Cal.App.4th 801, 805 (2004). The search must relate to the specific violation in question. *In re William G.* (1985) 40 Cal.3d 550 [mere fact that student is tardy, truant or absent from class, or that student has a seemingly abnormal "bulging calculator case," did not independently provide basis for search]; *In re Lisa G.*, 125 Cal.App.4th 801, 805 (2004) [student's disruptive behavior and departure from class did not permit search of purse left behind in class].

Student's cell phones/smartphones/cameras raise particularly challenging issues. The ACLU is actively pursuing litigation against school districts who confiscate cell phones and review text messages, pictures, or contact information arguably unrelated to an alleged rule violation (i.e., rule violation for talking on a cell phone during class provides no basis to review texts/call lists, which do not relate to the violation). In fact, downloading/saving information from the device to district computers may result in criminal charges against the district employee; no employee should ever download/save private cell phone/camera information – the device should be confiscated, catalogued, safely stored and returned at the appropriate time. Thus, if it is reasonably believed that a "bullying" or "threatening" text was sent to by one student to another student, the phone/PDA can be checked for that message (and then retained as evidence), but other texts or irrelevant information must not be reviewed.

C. Relationships with Other Agencies.

School district employees must never perform student interviews or searches at the express or implied request of any law enforcement or social service agency. The district might receive information from another public agency triggering a basis for school district employees to conduct an administrative interview and/or search of a student in keeping with District policy. However, there must be no express or implied expectation that discovered information will be shared with law enforcement or social service employees. Those agencies are subject to higher and materially different legal standards. A district employee acting on behalf of such agencies might properly be considered acting outside of the course and scope of their employment, creating significant personal exposures.

Once a student interview or search produces information the employee is required by law or district policy to report to other public service agencies, the employee should promptly make the report, end the interview/search, and turn the matter over to appropriate authorities.

III. GUIDANCE TO MEMBERS

Given the updated ACLU attention, and the going risk exposures, Members should review their internal BPs/ARs to ensure they are up to date and compliant (attached potential updated language provided). Training should also be provided to ensure that these standards are understood by all employees in order to ensure that their interests, the district's interests, and the students' interests are all protected.

PROPOSED BP/AR 5145.12 Students

Search and Seizure

The California Constitution provides that all students and staff at public schools have the right to attend campuses which are safe, secure, and peaceful. Students cannot learn, and staff cannot effectively teach, when harmful or illegal activity is allowed to negatively impact the safety or health of students and staff or the educational process.

In protecting and promoting a safe school environment, school officials may need to conduct interviews of students. The interviews will be limited in time and scope to the question of whether a student has violated a district policy or a law directly relating to the district, its staff, students, or property, which shall not be conducted in an arbitrary, capricious, or harassing manner. School officials may also conduct interviews of potential victims of misconduct or witnesses to violations of law or district policy, whose cooperation is important in meeting the district's needs and goals.

School officials may also search individual students and their property (backpacks, purses, cell phones/PDAs, computers, cameras) when there is a reasonable suspicion that the search will uncover evidence that (1) the student is presently violating the law or district policy and (2) that the item being searched is expected to have evidence of the misconduct. The search will be no greater than necessary to determine whether the suspected violation of law or policy can be substantiated. The nature and extent of the search will need to be determined based on the facts of each situation.

Absent exigent circumstances, searches will be conducted by, or under the direct supervision of, the school site administrator. All searches must be conducted by at least two district employees, at least one of which must be certificated. Searches of a student's body must also include at least one certificated employee of the same gender as the student. Employees will not conduct strip searches or body cavity searches. When possible, district employees shall use a metal detector, pat down search, or other less invasive tools or resources when searching an individual for weapons or other items that might be concealed.

As to items owned by the district used by students (lockers, desks), school district officials may open and inspect such areas without student permission if they have reasonable suspicion that the search will disclose evidence of a violation of law or district policy. For health and safety reasons, school district officials may also schedule regular inspection of such areas (announced weekly/monthly inspections) or at intermittent intervals on 24 hours notice.

The District also reserves the right to use metal detectors or other screening devices to determine whether a student or guest is bringing to a district site or to a district-sponsored event weapons or other items in violation of law or district policy. Before this decision is made, the Superintendent or designee shall determine that there exists a general risk of harm that cannot be more safely or cost-effectively managed by other devices or protective procedures. Such detectors or devices will be used in a reasonable and respectful manner intended to minimize privacy intrusions.

ON CAMPUS STUDENT INTERVIEWS AND SEARCHES BY NON-SCHOOL DISTRICT EMPLOYEES (Law Enforcement and Social Service Workers)

This Member Alert, triggered by the Supreme Court's decision in the *Camreta* case and recent claims against Member districts, addresses Members' obligations with respect to requests by law enforcement and social service agencies to conduct on-campus student interviews.

I. OVERVIEW

School districts are obligated to reasonably protect the safety and welfare of students, also serving as the legal protector of students' rights when under the districts' custody or supervision.[2] Although school districts have certain rights to interview students and search their property (see Member Alert – On Campus Student Interviews and Searches by School District Employees), non-school district employees (i.e., law enforcement officers and social workers) are governed by different legal standards and obligations. Members must therefore ensure compliance with a different legal framework in determining whether non-district employees can conduct interviews of students while they are on campus.[3]

II. LEGAL STANDARDS AND CONSIDERATIONS

In *Greene v. Camreta*, 588 F.3d 1011, 1021 (9th Cir.2009), the Ninth Circuit Court of Appeals held that non-school district personnel could interview students during the school day only upon a showing of parental consent, a court order or warrant, or "exigent circumstances" evidencing a likelihood of potential immediate harm to the student if he/she were to return home that day without intervention. In May 2011, for procedural reasons, the U.S. Supreme Court vacated the *Camreta* decision. *Camreta v. Greene*, 131 S.Ct. 2020 (U.S., 2011). Based on the Supreme Court's procedural order, on October 31, 2011, the Ninth Circuit vacated the portion of its opinion analyzing the standards for on-campus student interviews by non-district personnel.

Because the Supreme Court's and Ninth Circuit's actions were based on procedural considerations, the Ninth Circuit and/or other state and federal courts may later directly affirm/uphold the *Camreta* standard. This potential, and the associated risk exposures that should be avoided, is analyzed below.

A. California Law.

California Penal Code Section 11174.3 authorizes non-school district employees (other than social workers already assigned to a student) to interview students while on campus when deemed necessary to investigate "suspected child abuse or neglect" "in the child's home or out-of-home care facility. **The statute does not allow for any other questions to be asked**.

The investigating party must first advise the student, in an affirming manner, that he/she has "option of being interviewed in private" or to select to be present "any adult who is a member of the staff of the school." If the student exercises this right, the staff member will be there only for support, must not "participate" (ask

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[2] *Brown v. Shasta Union High School Dist.*, not reported, 2010 WL 3442147 ["Public school officials are government agents for purposes of the protection of students' constitutional rights."], citing *In re William G.*, 40 Cal.3d 550, 558-562 (1985); *Austin B. v. Escondido USD.*, 149 Cal.App.4th 860 (2007); *Harper ex rel. Harper v. Poway Unified School Dist.*, 345 F.Supp.2d 1096 (S.D.Cal., 2004).

[3] This standard does not relate to the right of a social worker, already directly assigned to protect the welfare and interests of a foster care student or a ward of the State, to have reasonable access to such a student.

questions), or discuss with the student the circumstances leading to the interview. However, the staff member must still meet his/her duty to protect the student's legal rights if the investigating officer asks questions outside the scope of Section 11174.3 or takes other actions in violation of the student's rights.

B. Federal Law.

Following *Camreta*, numerous legal opinions were issued expressing various views on how school districts could interpret or comply with the decision. With the decision now procedurally nullified, the question is whether the *Camreta* standard still applies. While several legal opinions suggested that *Camreta* was an aberration, the decision is arguably consistent with a long line of authorities – that remain valid and enforceable -- holding it to be a violation of a minor's and/or parent's federally protected civil rights to interview minors regarding potential abuse claims without a parent's consent, a warrant, or "exigent circumstances." E.g., *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir., 1999).[4] Consequently, absent further case authority to the contrary, it is unwise to conclude that the *Camreta* standard no longer applies.

C. Reconciling Section 11174.3 and Existing/Potential Federal Civil Rights Standards.

Regardless of particular perspectives on the continued existence of the *Camreta* standard, there is an easy and legally appropriate way to reconcile the competing laws and viewpoints:

> Absent a court order, warrant, or parental consent, a social worker or law enforcement agent may come onto campus and interview a student if they can truthfully represent: (1) They have an objective basis to conclude that the child faces an imminent threat of physical harm from a parent/guardian upon returning home that day unless a preliminary screening interview is conducted for the purpose of determining whether protective services may be needed; (2) they are acting for the primary purpose of protecting the child's health and welfare, not for a law enforcement purpose (i.e., to investigate a crime/potential crime or collect evidence).[5]

While this approach largely mirrors the *Camreta* "exigent circumstances" test, it is based on the express purpose and limitations of Section 11174.3, including its "deemed necessary" language, as well as the governing standards applied in both pre- and post-*Camreta* cases to the ability of law enforcement and social service employees to interview minors outside the presence of their parents/guardians.[6]

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[4] Federal courts are using *Camreta*-derived standards in various aspects of their decisions. *E.g., C.B. v. Sonora School Dist.*, __ F.Supp.2d __, 2011 WL 4590770 (E.D.Cal., Sept. 30, 2011), noting: "Traditional Fourth Amendment protections are lowered "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Greene, v. Camreta*, 588 F.3d 1011, 1026, 1030 (9th Cir.2009), vacated in part on other grounds by *Camreta v. Greene*, ––U.S. ––, 131 S.Ct. 2020, 179 L.Ed.2d 1118 (2011) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987))." See also, *Berman v. McManus*, 2011 WL 2144411, (E.D.Cal., 2011)

[5] The approach is consistent with cases holding that the more stringent Fourth Amendment and "probable cause" standards are only inapplicable when the social worker or law enforcement officer has a primary desire to protect the health or safety of the minor. B*arnes v. County of Placer*, 654 F.Supp.2d 1066 (E.D.Cal., 2009), citing *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir.2000). Other courts agree. E.g., *Good v. Dauphin County Social Servs.*, 891 F.2d 1087 (3d Cir.,1989).

[6] "Exigent circumstances" involves a reasonable belief, based on all known facts, that there is an immediate threat of physical harm to a child that requires investigation that cannot be delayed until after a court could hear the matter on an expedited basis and issue an appropriate protective or search order. Law enforcement officials acting in a protective capacity – as opposed to a law enforcement role – are subject to "exigent circumstance" standards.

If the legally permitted brief interview develops facts justifying further action (protective or criminal in nature), the social worker or law enforcement agent should then promptly terminate the interview, take the child into protective custody, and remove him/her from campus to a place where appropriate protective measures can be further implemented. If facts supporting such a protective action are not supported by the brief interview, the interview should be terminated. In either case, the District employee involved should attempt to notify the parents of the interview as soon as it is completed.

If the investigating officer or social worker asks questions beyond the limited scope permitted by Section 11174.3, or the interview becomes inappropriately repetitive or harassing, the school district employee should direct that the interviewer (in a private conversation) return to the permissible legal scope of questioning. Upon a refusal to do so, or repeated failures to limit the questions, the district employee should terminate the interview, notify the Superintendent or the District's legal counsel of the situation, and separate the student from the interviewer until further instructions are received. The Superintendent or district's legal counsel will contact the interviewer's supervisor or legal counsel in order to develop an agreed course of action.

III. GUIDANCE TO MEMBERS

District employees should work cooperatively with law enforcement and social service employees under Section 11174.3. District employees nevertheless have separate legal obligations to protect the rights of their students, and cannot "turn a blind eye" to interviews that are not legally authorized. Doing so may not only subject the district to liability, but a willful or conscious disregard of the employee's duty to protect the rights of students may subject them to personal liability.

To assist Members and their employees ensure compliance with these important duties, the attached form can be used when a law enforcement or social service worker requests an on-campus student interview. The form, to be completed by the investigating party, contains an agreement to comply with all governing laws, describes the factual basis for allowing the on-campus interview to occur, and notes the important monitoring role of the district in fulfilling its separate legal duties to the student.

REQUEST FOR ACCESS TO STUDENT FOR NON-CRIMINAL INVESTIGATION INTO POTENTIAL IN-HOME ABUSE OR NEGLECT

(Penal Code Section 11174.3)

I, _____ [print name], am a

- ☐ Licensed clinical social worker employed by the State of California or the County in which the student is a resident (Identification No. _____);
- ☐ Police/Sheriff's Department law enforcement officer (Badge No.:_____); or
- ☐ Duly authorized representative from the district attorney's office (ID No._____).

Under the penalty of perjury, the following is true and correct:

1. I or my office/department have received credible information indicating that student _____ may presently be suffering abuse/neglect in his/her home or residential care facility by a parent, legal guardian, or care provider;

2. Based on presently available information, with no other reasonable time or location for an interview existing, I or my office/department deem it necessary to conduct an on-campus interview to investigate these allegations; and (**Select One**):

- ☐ I have parental consent to conduct the interview. Write in the name of the parent or legal guardian providing consent and the date/time/method such consent was given: _____;
- ☐ I have a Court order or warrant allowing for the interview (copy provided and attached); or
- ☐ I or my office/department reasonably believe there is a substantial risk of immediate or imminent physical harm to the student, before a warrant, court order, or parental consent could reasonably be obtained, such that exigent circumstances for an immediate screening interview exist to determine if protective services are needed (not for law enforcement or evidence gathering purposes).

4. If conducted pursuant to the exigent circumstances provision, I will conduct the interview solely for the purpose of determining whether there is a potential for in home/facility abuse or neglect by a parent, legal guardian, or care giver such that urgent protective services are needed. I will not question the student about any other issue. If the school district becomes aware of any additional questioning, the school district will report such facts to the student's parent/legal guardian and to agencies responsible for determining whether the involved public agency or interviewer has violated the student's or parent's/guardian's legal rights. I will advise the student that he/she has the right to have a school district employee or volunteer aide be present for my interview and I will in no manner attempt to dissuade or discourage the student from exercising this right.

5. Should the interview uncover information indicative of the existence of a crime and/or the need for protective custody, I will promptly terminate the interview, assume emergency protective custody of the student in conformity with governing laws and the adopted procedures of my office/department, and give notification of my action to all appropriate parties.

Date:_____ Signature:_____