

“HE DIDN’T MEAN IT WHEN HE SAID HE WAS GOING TO KILL YOU”

THREAT ASSESSMENTS

WG

WALSH GALLEGOS
TREVINO KYLE & ROBINSON P.C.

Denise Hays

Attorney at Law / Shareholder

Copyright 2023: Walsh Gallegos

1

Case 2:21-cv-12871-MAG-APP ECF No. 1, PageID.1 Filed 12/09/21 Page 1 of 46

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEFFREY FRANZ and BRANDI FRANZ, as
NEXT FRIEND For RILEY FRANZ, a Minor,
and JEFFREY FRANZ and BRANDI FRANZ,
as NEXT FRIEND For BELLA FRANZ, a
Minor,

Case No.:
Plaintiffs, Hon.

Vs.

OXFORD COMMUNITY SCHOOL DISTRICT,
SUPERINTENDENT TIMOTHY THORON,
PRINCIPAL STEVEN WOLFE, DEAN-OF-
STUDENTS SPAN HANCOCK EDWARDS,
AS COACHES OF A STATE MEMBER,
TEACHERS and PARENTS
of the Plaintiff(s)

Defendants:

GEOFFREY N. FIEGER (P90441)
JAMES E. HARRINGTON (P65351)
ROBERT G. KAMENEC (P3583)
NOCCY HANNA (P80067)
MILICA FILIPOVIC (P80189)

Fieger, Fieger, Arney & Harrington, P.C.
Attorneys for Plaintiffs
19390 West Ten Mile Road
Southfield, MI 48075
P: (248) 355-5555
F: (248) 355-5148
g.fieger@fiegertlaw.com
j.harrington@fiegertlaw.com
r.kamenec@fiegertlaw.com
n.hanna@fiegertlaw.com
m.filipovic@fiegertlaw.com

COMPLAINT AND DEMAND FOR JURY TRIAL

2

2

DISTRICT LIABILITY AND PERSONAL LIABILITY IN THE CONTEXT OF STUDENT VIOLENCE

Can a school district be held liable for the death or injury of victims of school violence?

Maybe. 42 U.S.C., Section 1983 provides an avenue of recourse for citizens when a governmental entity deprives them of a federal statutory or constitutional right.

There are monetary damages available under this provision.

3

3

DISTRICT LIABILITY AND PERSONAL LIABILITY IN THE CONTEXT OF STUDENT VIOLENCE

- Can an individual be held liable for the death or injury of victims of school violence?
 - Yes. Under Section 1983, individuals who are government officials, including employees, school board members, and administrators, may be sued. However, individuals may assert the defense of qualified immunity when confronted with claims under Section 1983.

4

4

DISTRICT LIABILITY AND PERSONAL LIABILITY IN THE CONTEXT OF STUDENT VIOLENCE

For victims of school violence, what constitutional right would be implicated?

The 14th Amendment of the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5

5

DISTRICT LIABILITY AND PERSONAL LIABILITY IN THE CONTEXT OF STUDENT VIOLENCE

In order for the school district to be held liable under Section 1983, a plaintiff must show:

- The existence of a **policy or custom** attributable to the district that was the “moving force” behind the deprivation of rights.
- That the policymaker of the district showed **deliberate indifference** to any violations of constitutional rights.
- The district’s **failure to train** its employees.
- The district’s **failure to protect** a student from the actions of third parties.

6

6

DISTRICT LIABILITY AND PERSONAL LIABILITY IN THE CONTEXT OF STUDENT VIOLENCE

Do school districts have a duty to warn of the known or reasonable foreseeable danger of a student with a propensity to commit school violence?

It depends.

- For a district to be liable under Section 1983, a plaintiff must establish that the district was deliberately indifferent to the rights of the victim.
- In order for failure to warn to be constituted deliberately indifferent is likely contingent upon the extent of knowledge of the school and its failure to take any measures to protect students and staff from harm.

7

7

DISTRICT LIABILITY AND PERSONAL LIABILITY IN THE CONTEXT OF STUDENT VIOLENCE/THREAT ASSESSMENTS

The goal of a 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.

8

8

DISTRICT LIABILITY AND PERSONAL LIABILITY IN THE CONTEXT OF STUDENT VIOLENCE/THREAT ASSESSMENTS

As a district employee serving in the role of an LSSP, diagnostician, special education director or special education teacher, how does the *Threat Assessment Guide / Model* implicate me?

Special education teachers have access to records, such as full and individual evaluations, psychological reports, and functional behavioral assessment that may contain information deemed helpful for deciding on precautionary measures.

9

9

DISTRICT LIABILITY AND PERSONAL LIABILITY IN THE CONTEXT OF STUDENT VIOLENCE/IDEA CLAIMS

Could an IDEA claim be implicated in the context of school violence?

Yes, but only if the petitioner can establish that the student was denied a free appropriate public education (FAPE).

10

10

CONFIDENTIALITY AND STUDENT VIOLENCE IN THE SCHOOL

Does FERPA prohibit a school official from disclosing information obtained through personal knowledge or observation and not a student's educational records?

No. FERPA applies to the disclosure of education records and from information derived from education records.

A school official may disclose what he overheard to appropriate law enforcement authorities.

11

11

CONFIDENTIALITY AND STUDENT VIOLENCE IN THE SCHOOL/THREAT ASSESSMENT TEAMS

- Threat Assessment Teams:
 - Follow FERPA – Board Policy FL
 - Students who may pose risk of targeted violence are protected by FERPA
 - THE EXCEPTION → Health and Safety exception → threat deemed **articulable and significant** → FPCO won't second guess

12

12

CONFIDENTIALITY AND STUDENT VIOLENCE IN THE SCHOOL/EVALUATORS

After conducting a psychological evaluation of a student, which included a number of projective measures, the results indicated the student had homicidal thoughts and ideations and showed personality traits that fell clearly in line with the *Threat Assessment Guide / Model*. Can I disclose to local law enforcement?

This information may be disclosed to school officials as previously discussed. However, it would have to satisfy the health and safety exception under FERPA to be disclosed to local law enforcement.

13

13

CONFIDENTIALITY AND STUDENT VIOLENCE IN THE SCHOOL/EVALUATORS

During the course of this psychological evaluation, the student gave me the names of students he wished were dead. Should I notify the parents of those students?

If the health and safety exception was satisfied under FERPA, share information with law enforcement.

It would be both prudent and consistent with FERPA to disclose that specific information to school officials so that internal protections could be put in place.

14

14

CONFIDENTIALITY AND STUDENT VIOLENCE IN THE SCHOOL/THE COUNSELOR

As a school counselor, isn't it true that student communications in the context of counseling are confidential and cannot be disclosed to other parties, including other school officials?

Not necessarily. While school counselors should remain diligent to preserve the confidentiality inherent to the counseling relationship, they are also district employees responsible for determining when to disclose information and to comply with mandatory reporting requirements.

15

15

DO SCHOOL DISTRICTS HAVE A DUTY TO WARN OF THE KNOWN OR REASONABLE FORESEEABLE DANGER OF A STUDENT WITH A PROPENSITY TO COMMIT SCHOOL VIOLENCE?

It depends.

- First of all, as set forth above, the district would be liable under § 1983 for a violation of due process rights under the Fourteenth Amendment, if the plaintiff can establish that the district was deliberately indifferent to the rights of the victims. In other words, the issue is whether the district turned a blind eye to the dangerous situation.
- Plaintiffs have argued in lawsuits filed against *Virginia Tech*, that the school violence was caused by a mentally disturbed student of which the school was aware yet failed to warn the victims of the danger.

16

16

Below is language from a respondent superior claim against Virginia Tech from a complaint filed by the family of one of the victims.

165. Defendant Virginia Tech is liable respondent superior for the negligence, gross negligence and deliberate indifference of the Cook Counseling Center and its agents and employees.

166. The university's anticipated defense that the killings and the maimings were the act of a demented student over which it had no control and less responsibility, are belied by the abject failure of the officers, agents and employees associated with the Cook Counseling Center to meet anything close to the applicable standard of professional care, their failure to render Seung-Hui Cho mental health services of any kind or form, despite being literally begged to do so by concerned faculty members, the failure of the officers, agents and employees of the Cook Counseling Center to heed the warnings of those concerned faculty members, and their failure to create even a case file on Seung-Hui Cho which might alert other mental health professionals to this student in need.

17

17

DOES A THREAT ASSESSMENT TEAM OR PROGRAM MITIGATE AGAINST LIABILITY?

Yes, depending on the training and expertise of the members of the team, and implementation, including risk management. While a Behavioral Threat Assessment policy or program constitutes a recognized deliberate effort by a school to systematically prevent targeted school violence, the implementation of the policy, in conjunction with adherence to all federal laws, including FERPA and IDEA, is paramount to the success of the program and defense of legal challenges.

18

18

AS AN LSSP OR SCHOOL COUNSELOR, I MAY NOT WANT TO REPORT A THREAT OF VIOLENCE BY A STUDENT AS IT WILL THWART MY RAPPOR, WHAT IS MY DUTY TO REPORT?

In the State of Texas, the mental health provider's duty to warn potential victims or contact law enforcement of imminent physical injury is permissive. Tex. Health and Safety Code Ann. Section 611.004 outlines the duty to warn as follows:

“A mental health professional may disclose information only to medical or law enforcement personnel if the professional determines that there is a probability of imminent physical injury by the patient or others or there is a probability of immediate mental or emotional injury to the patient”

(Watch out for TAT requirement to report to Superintendent TEC Section 37.115 (h)
(Checkout your professional licensing requirements)

19

19

WHEN SCHOOL PERSONNEL ARE CONDUCTING RISK OR THREAT ASSESSMENTS OF A CHILD WITH A DISABILITY, HOW MUST THE LEA ENSURE FAPE IS PROVIDED?

- FAPE must be protected throughout any threat assessment process
- School personnel involved with conducting the threat or risk assessment process must be
 - Aware the child has a disability
 - Sufficiently knowledgeable about the obligation to ensure FAPE to the child including IDEA's discipline provisions
 - Coordinating with child's IEP Team

20

20

So, the Threat Assessment Team has completed an assessment, and determined the student, has made a significant threat to harm others in a violent manner, the team has decided that the student is not permitted to return to school until he undergoes a psychiatric evaluation and immediately sent him home. Does a Threat Assessment team have that authority since we have a Return to School/Transition Form as part of our threat assessment packet?

No. First of all, there is no legal option to send a student home just because he made a significant threat to cause harm. Your statutory authority for disciplinary removal off campus would be expulsion, suspension, or placement in the DAEP. All of which have due process and limitations implicated.

21

21

What if the same student was known to be violent, with a severe emotional dysregulation, received special education services, and had documented threats and intent to harm others, and had previously been discharged from a psychiatric hospital, yet returned to the school setting, what authority does the Threat Assessment Team have to restrict the student's return to school?

- The student has procedural safeguards as set forth in the IDEA and the right to a FAPE. The 2022 Q/A USDE have made it clear that despite findings of threats of violence by a threat assessment team, the student with a disability is entitled to IDEA procedural safeguards and a FAPE.
- The TAT, should be referring these decisions to an IEP team. For example, if additional psychological or even medical evaluations are needed in response to threats of violence, the District should seek notice and consent for an evaluation
- In terms of disciplinary removals for students with disabilities, the procedural safeguards are implicated, including a manifestation determination.
- Change of Placement decisions are made by the IEP team and not a State Level Threat Assessment Team.

22

22

DOES THE THREAT ASSESSMENT TEAM HAVE ANY OBLIGATION TO FOLLOW THE DISTRICT'S SPECIAL EDUCATION REFERRAL PROCESS WHEN IDENTIFYING STUDENTS WHO HAVE THREATENED HARM TO SELF OR OTHERS?

Yes. Members of the TAT are school employees who should be very familiar with the District's special education referral process. The child find obligation remains in effect even when a threat of harm to others has been made by a student not yet identified as IDEA eligible. The bottom-line is if there is a reason to suspect a disability and because of the disability, the child is in need of special education services, then make a referral. It is recommended that a referral for special education form be maintained with the Threat Assessment Team.

23

23

THE THREAT ASSESSMENT TEAM HAS RECOMMENDED THE USE OF A STAY AWAY AGREEMENT AND SAFETY PLAN, IS THAT PERMISSIBLE FOR STUDENTS WITH DISABILITIES?

Yes. However, make sure any TAT interventions are consistent with the student's BIP or other behavioral individualized plans determined appropriate by the IEP team.

24

24

FOR STUDENTS WITH DISABILITIES, WHENEVER THE SCHOOL HAS BEEN MADE AWARE OF SIGNIFICANT THREATS OF HARM AND VIOLENCE, ACCOMPANIED BY INVOLVEMENT WITH LAW ENFORCEMENT, TREATMENT IN PSYCHIATRIC FACILITIES, OR INTERVENTION BY PRIVATE MENTAL HEALTH PROVIDERS, WHAT STEPS SHOULD THE TAT OR IEP TEAM TAKE?

At this point, the special education department should be involved. Seek a release to exchange confidential information with any private mental health providers from the parent. Upon a signed release, the LSSP may request admission and discharge records from a psychiatric facility, any private psychological evaluations, probation records to the extent available, as a means to inform the school district of how to manage the risk. This may include IEP team consideration of placement in a 24/7 residential treatment center.

25

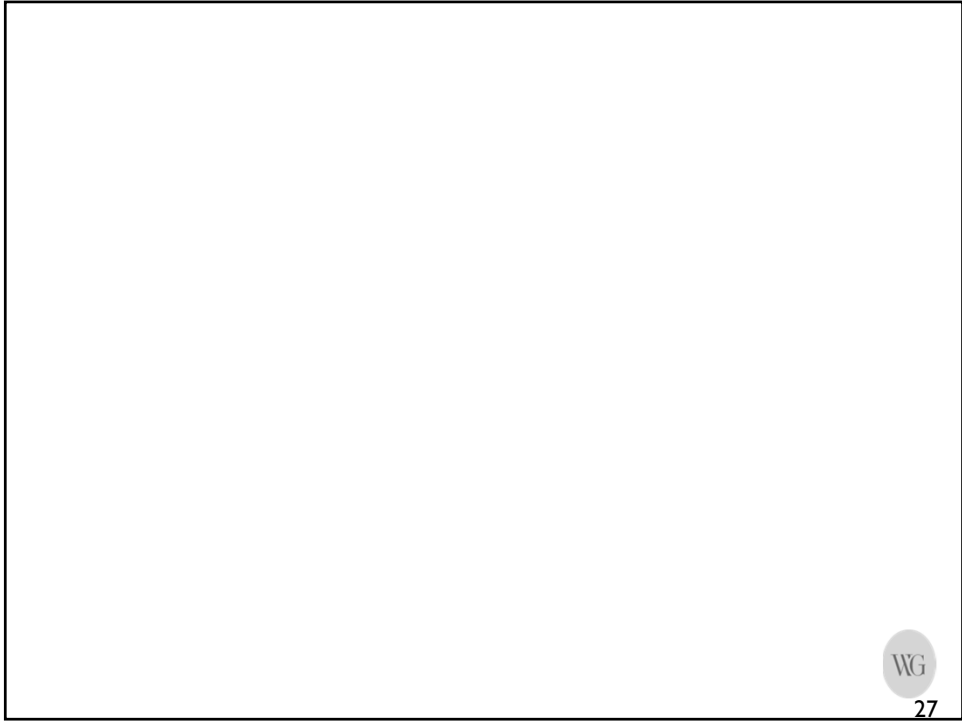
25

AS AN ADMINISTRATOR AND MEMBER OF THE TAT, PARENTS OF THE VICTIMS SUBJECTED TO PHYSICAL ACTS OF VIOLENCE BY THE STUDENT PERPETRATOR ARE ANGRY. THEY ARE ON SOCIAL MEDIA, IN MY OFFICE, AND WANT AN EXPLANATION AS TO WHY STUDENT PERPETRATOR, HAS NOT BEEN SENT TO THE DISCIPLINE ALTERNATIVE EDUCATION PROGRAM AND REMAINS ON CAMPUS. IN THIS SITUATION, COULD I SHARE WITH THESE PARENTS THAT THE STUDENT IS ELIGIBLE FOR SPECIAL EDUCATION AS A STUDENT WITH AN EMOTIONAL DISTURBANCE, AND THAT MY DISCIPLINARY OPTIONS ARE LIMITED UNDER THE IDEA?

No. There is no exception under FERPA for this disclosure. However, if the student made an articulable and significant threat of harm against a student, precautionary measures may be taken as contemplated by the health and safety exception of FERPA, set forth above.


26

26



27

27

Denise Hays dhays@wabsa.com	
	WALSH GALLEGOS TREVIÑO KYLE & ROBINSON P.C.
Austin Office P.O. Box 2156 Austin, Texas 78768 P: 512-454-6864 F: 512-467-9318	
28	

28

The information in this presentation was prepared by Walsh Gallegos Treviño Kyle & Robinson P.C. It is intended to be used as general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.