

Education Law for the Law Enforcement Advisor


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Political Subdivision of the State of Texas

- An independent school district in Texas is a political subdivision of the state, which means it is not an agency of the state, but rather has jurisdiction over a designated portion of Texas.
- Schools are governed by an independent board of “trustees” that are elected by the local community. Most school districts, by statute, have seven trustees that serve the community as a whole, but some school districts have up to nine trustees that serve designated areas within the school district.
- School districts are subject to the oversight of their local school board, local municipality, county, state and federal governments.

▶ When and how am I (or my client) most likely to interact with the local school district?

- Providing school-based law enforcement services
 - familiarizing yourself with all the law enforcement options for school districts
- Investigations involving schools or school students
 - accessing students, staff or records
- Responding to a call for service involving the school
 - how to build effective and mutually beneficial relationships with your local school systems



▲ School-based
law enforcement
services

History of School-Based Law Enforcement in Texas

- In 1973, the 63rd Texas Legislature added Section 21.483 to the Texas Education Code, which allowed public school districts to employ peace officers for campus security purposes and in 1993 amended it to allow commissioning school district peace officers.
 - This section is currently codified in Section 37.081.
- Today, there are over 200 Texas school districts with their own police force and over 70% of the 1,029 public school districts in Texas have school resources officers on their campuses.

School Safety Personnel Options for Texas Public Schools under TEC 37.081

- School Resource Officers (SROs)- local jurisdiction police officers who are assigned to a school campus through a Memorandum of Understanding between the school district and the municipality.
- The Office of Community Oriented Policing Services (COPS) was a federal action that established funding for school districts to hire local law enforcement officers for schools across the US, primarily through a grant program in the early 1990s.
 - This led to a significant increase in the number of schools across the country with law enforcement officers on campus— over 70% of schools by 2016.
- SROs are the primary avenue for school-based law enforcement in Texas.

School Safety Personnel Options for Texas Public Schools under TEC 37.081

- School District Commissioned Peace Officers (ISD PD)- Section 37.081 specifically provides for school districts to “commission peace officers” to perform law enforcement functions in the schools.
- ISD PDs growing in popularity in Texas, especially in last twenty years.
- If a school district has an ISD PD, it must have an MOU with each law enforcement agency with overlapping jurisdiction

School Safety Personnel Options for Texas Public Schools under TEC 37.081

- ISD Security Officers- local school districts may choose to hire school security officers, but they may not carry a firearm unless the person is a commissioned peace officer.
- Contract Security Services- state law does not directly address a school district's ability to contract the services of a security company whose employees carry firearms. It appears that if the school district authorized these individuals to carry firearms on the premises it would not be prohibited by law.

School Safety Personnel Options for Texas Public Schools under TEC 37.0811

- School Marshals- in 2013, the Texas Legislature enacted Section 37.0811, called the Protection of Texas Children Act, which allows public and private schools and junior colleges to appoint one or more school marshals.
- The marshal may carry or possess a handgun on the premises of the school as provided by the written regulations of the school district.
 - The handgun must be concealed or maintained in a locked and secured safe if the marshal has direct, regular contact with students.
- The marshal may not act unless it is to prevent or abate the commission of an offense that threatens serious bodily injury or death.
- There are numerous training and licensing requirements, including a psychological exam.

▸ School Safety Personnel Options for Texas Public Schools- Guardian Plan

- The federal Gun Free School Zones Act and Texas Penal Code authorize school districts to grant written permission for anyone, including designated employees, to carry firearms on campus. See 18 USC § 922(q)(2)(B); Tx. Penal Code § 46.03(a)(1).
- The Texas Attorney General in 2014 issued an opinion clarifying that an individual authorized by a school district to carry a firearm on school premises is not carrying pursuant to a handgun license, but rather pursuant to the written authority granted under the Penal Code, Section 46.03. See Tex. Att’y Gen. Op. No. GA-1051 (2014).
- In most cases, the authorization is limited to commissioned peace officers. However, there are some school districts in Texas that have authorized employees under the Guardian Plan, most notably Harrold ISD since 2007.
- As compared to the Marshal plan, there are no training requirements, although most school districts require DPS’s School Safety Training for the authorized employees. See Tx. Govt. Code §411.1901



Investigations
involving your
local school

Student Records: confidentiality and exceptions that may allow access

- Most interactions between local law enforcement and schools involve requested access to student records.
- The Family Educational Rights and Privacy Act (FERPA) is a federal law that generally prohibits a school from disclosing a student's educational record without parent permission, unless a specific statutory exception under FERPA applies. See 20 USC §1232g; 34 CFR 99.
- An educational record is broadly defined to include any record maintained by the school district that is directly related to a student containing personally identifiable information, such as direct (name) and indirect (date of birth) identifiers of the student including biometric data such as the image, voice and handwriting of a student.

Student Records: confidentiality and exceptions that may allow access

- Relevant exceptions to the general written consent requirement for disclosure include:
 - School officials with a legitimate educational interest in the record;
 - Law enforcement unit records;
 - Juvenile justice systems for pre-adjudication services;
 - Health or safety emergencies;
 - Lawfully issued subpoenas and court orders; or
 - Directory information not excluded from disclosure by parents.

See 34 CFR 99.31

Student Records: confidentiality and exceptions that may allow access

- Officers working in the schools as SROs may have access to educational records in order to do their jobs if certain actions have been taken in advance by the local school district.
- FERPA provides that prior consent is not required for “disclosure to other school officials...determined to have legitimate educational interests.” This law further requires that school districts provide annual notice to parents and students of who is considered a “school official.”
- Most school district include in their annual definition their contractors for law enforcement services.

Student Records: confidentiality and exceptions that may allow access

- Key limitations to remember:
 - The access must be for an educational purpose and not a law enforcement purpose. As such campus SROs cannot access educational information for a law enforcement purpose unrelated to school.
 - Limitations on redisclosure of educational information accessed pursuant to an exception under FERPA. 34 CFR 99.33 provides that disclosure of an educational record to an individual pursuant to an exception can only be done “on the condition that the party to whom the information is disclosed will not disclose the information to any other party” except in compliance with FERPA.

Student Records: confidentiality and exceptions that may allow access

- Records of an in-house police department versus records maintained by the school district.
- Under FERPA, law enforcement unit records are not educational records. FERPA defines a law enforcement unit as any office, department or division of a school district that is authorized to enforce local, state or federal law or maintain the physical security and safety of the school district.
 - A law enforcement unit record is one that was (1) created by the law enforcement unit, (2) for a law enforcement purpose, and (3) is maintained by the law enforcement unit.
 - Student discipline records and any other records created by the campus are NOT a law enforcement unit records, even if a copy is comingled with other LEU records.

Student Records: confidentiality and exceptions that may allow access

- Key limitations to remember:
 - Employees of the law enforcement unit who are designated school officials and acquire copies of educational records, cannot transform those records into law enforcement unit records.
 - Educational records should not be maintained as part of a law enforcement unit's record, in order to prevent inadvertent disclosure.

Student Records: confidentiality and exceptions that may allow access

- Interagency sharing of educational records of a student between juvenile service providers.
 - FERPA provides an exception for disclosure to state and local officials of the juvenile justice system for their ability to serve a student, prior to adjudication, if the official certifies in writing that the information will not be disclosed to any other party, except as provided by state law or with written parent consent.
 - Texas Family Code § 58.0051 provides for interagency sharing between juvenile service providers (including ISDs and juvenile justice agencies) but has a very narrow application and requires written certification that the confidential information will not be redisclosed.

Student Records: confidentiality and exceptions that may allow access

- Key limitations to remember:
 - This exception only applies to students 17 years of age and younger. See Tex. Fam. Code §58.0051(a)(3).
 - The educational information may not be used for purposes other than identifying the student and providing delinquency prevention or treatment services. See Tex. Fam. Code §58.0051(e)(2).
 - Written certification of non-disclosure must be provided prior to receiving the educational information. See Tex. Fam. Code §58.0051(e)(1)
 - It is advisable to create a form utilized by both the ISD and the law enforcement agency and capture the limitations and confidentiality requirements in any MOU between the entities.

Student Records: confidentiality and exceptions that may allow access

- Health and safety emergency exceptions under FERPA.
- FERPA's health and safety emergency exception allows a school district to disclose confidential student records without consent in circumstances involving an actual, impending or imminent significant health or safety emergency. See US Dept. of Education FAQ: *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act* (Feb. 2019); 34 CFR § 99.36(c).
 - School officials must be able to explain, based on the available information, what the actual threat is and why it is significant when the disclosure of confidential information is made.
 - School officials must record the parties to whom the information was disclosed as well as any further disclosures made by local, state or federal authorities.

Student Records: confidentiality and exceptions that may allow access

- Key limitations to remember:
 - The disclosure must be necessary to protect the health and safety of the student or other individuals. See 34 CFR § § 99.31(a)(10); 99.36.
 - The disclosure is limited to the period of the emergency and does not allow for a continuing or blanket disclosure.
 - The emergency must be significant, specific and impending.
 - The disclosure is limited to those appropriate parties whose knowledge of the information is necessary to protect the health and safety of the student or other persons.
 - Typically, this could include law enforcement officials, medical professionals and parents.

Student Records: confidentiality and exceptions that may allow access

- Judicial orders and lawfully issued subpoenas.
 - FERPA provides that a school district may disclose confidential student records in order to comply with a judicial order or a lawfully issued subpoena, but only after providing reasonable advance notice to the parent or adult student. See 34 CFR § 99.31(a)(9)(ii).
 - However, FERPA also provides for a narrow exception to the advance notice requirement for a federal grand jury subpoena or any other subpoena that orders the existence or contents of the subpoena remain confidential. See 34 CFR § 99.31(a)(9)(ii)(A)-(B).
 - Unlike other exceptions to the consent requirement, there are not limitations on re-disclosure outside of any limitations within the legal proceeding for which the subpoena was issued.

Student Records: confidentiality and exceptions that may allow access

- Key limitation to remember:
 - For court orders and non-grand jury subpoenas, the advance notice must be of a reasonable time period in order to allow the parent/adult student sufficient time to seek protective action.
 - School districts will typically have established procedures for providing the notice that includes time to make the required disclosure and notice of the subpoena.
 - No specific statutory guidance on “reasonable” but it must be of a sufficient period of time in order to allow a parent or adult student to file a protective order.
 - Many school districts consider 10 days to be a reasonable and sufficient time period prior to providing responsive documents.

Student Records: confidentiality and exceptions that may allow access

- Information designated by the school district as “directory information” may be disclosed if the school district has given notice to parents of the types of information designated as directory-type information and when and how the parent can refuse to allow disclosure. See 34 CFR § § 99.31(a)(11); 99.37.
 - School districts will include their disclosure of directory information categories in their local board policy FL as well as in the student handbooks annually.
 - Most school districts include the following information as directory: student name; address; phone; photograph; month and year of birth; degrees, honors, and awards received; schools attended; dates of attendance; grade level; participation in officially recognized activities and sports; and weight and height of members of athletic teams.

Student Records: confidentiality and exceptions that may allow access

- Key limitation to remember:
 - If parents choose to make their students' directory information confidential, then that information may not be disclosed unless another exception under FERPA applies.

Access to Students During the Instructional Day


- Generally, school administrators may question students at school regarding school-related matters without parent permission or presence, as part of the in loco parentis responsibility for students.
- However, law enforcement personnel, for matters unrelated to school matters, do not fall under this same standard under local district policy and/or state and federal law.
- School districts will typically have a local policy that limits access to students for matters that are unrelated to school or a child abuse investigation.
 - See, e.g., Cypress-Fairbanks ISD Board Policy GRA (local):
[https://pol.tasb.org/Policy/Download/587?filename=GRA\(LOCAL\).html&title=RELATIONS WITH GOVERNMENTAL ENTITIES&subtitle=STATE AND LOCAL GOVERNMENTAL AUTHORITIES](https://pol.tasb.org/Policy/Download/587?filename=GRA(LOCAL).html&title=RELATIONS WITH GOVERNMENTAL ENTITIES&subtitle=STATE AND LOCAL GOVERNMENTAL AUTHORITIES)

Access to Students During the Instructional Day

- Questioning and searching students for school-related misconduct that also potentially involves criminal conduct can invoke heightened criminal law standards, including *Miranda* warnings, if the questioning is done by law enforcement or by administrators at the request of law enforcement.
 - The concept of custodial versus non-custodial questioning of students in the school setting is a complicated, fact intensive analysis. See *J.D.B. v. North Carolina*, 564 US 261 (2011).
 - State supreme courts have applied the JDB decision in differing ways and most recently, the Indiana State Supreme court held that students being questioned by school staff in the presence or at the behest of law enforcement make them more vulnerable to coercion and the belief that they are in custody. See *B.A. v. State*, 100 N.E.3d 225, 230 (Ind. 2018).

Access to Students During the Instructional Day

- As with questioning, the searches of students by school administrators involves a different legal standard, which can be heightened if it is ultimately determined that the search was initiated or controlled by law enforcement instead of the school administrator.
 - The US Supreme Court has left open the issue of what standard should apply to a search in the school context involving a law enforcement official *See New Jersey v. T.L.O.*, 469 US 325 (1985)(limiting the Court's opinion to the legality of searches conducted solely by school officials).
- When school staff initiate and complete searches, even with SROs or ISD police present, courts have generally held the reasonable suspicion test should be used.
- However, when outside law enforcement initiate a search themselves or through school staff, the probable cause standard has generally applied. *See Russell v. State*, 74 S.W.3d 887 (Tex. App—Waco 2002, pet. denied).



Calls for service
involving your
local school

School Offenses and Class C Misdemeanors

- In 2013, the Texas Legislature revised provisions in Chapter 37 of the Texas Education Code to prohibit a peace officer, law enforcement officer, or school resource officer from issuing a citation to a child who is alleged to have committed a school offense. See Tex. Educ. Code § 37.143
 - Child= student between ages 10-17; and
 - School offense= a Class C misdemeanor other than a traffic violation that occurs on school property See Tex. Educ. Code § 37.141.
- School offenses include: disorderly conduct (fighting, profanity, indecent exposure), disruption of class, disruption of transportation, trespass and minor in possession of alcohol.





School Offenses and Class C Misdemeanors

- A school district that commissions its own peace officers can develop a system of graduated sanctions for filing a complaint against a student for disruption of classes, disruption of transportation and disorderly conduct.
 - Examples of graduated sanctions include a behavior contract, school-based community service and/or referral for counseling or community services.
- If a student fails to comply with graduated sanctions, then the school police may file a complaint against the student in criminal court, so long as the specific requirements for such a complaint are met (i.e., sworn statement by school staff and special education status).



Threat Assessment Teams

- In 2019, following the tragic school shooting in Santa Fe, Texas, the Texas Legislature passed Senate Bill 11, which was a comprehensive school safety bill.
 - Senate Bill 11 required each school district to establish threat assessment teams, which included individuals with knowledge in the areas of mental health, safety, law enforcement, special education and classroom behavior management.
 - As a result, school districts without in-house police departments worked with their local law enforcement agencies to provide law enforcement personnel to serve on their threat assessment teams.
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Threat Assessment Teams

- The threat assessment teams are responsible for developing and implementing safe and supportive school programs that have multitiered support systems that address students' social, emotional, behavioral, and mental health needs.
- The supportive school programs must also allow for a multiagency, collaborative approach to risk assessment and threat assessment in school, which provide for appropriate interventions.
 - This includes expanded information to school district under Texas Code of Criminal Procedure 15.27 when a threat assessment and/or safety plan may be necessary related to the student.



Potential Resources

- General Counsel's Office for your local school district.
- Superintendent's Office for your local school district
- Texas Association of School Boards, Legal Services Division, to determine the local school district's outside legal counsel
 - 1-800-580-5345



Thank you!

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