

**SOLUTION OR SETBACK: LEGAL AND
PRACTICAL IMPLICATIONS OF SCHOOL
THREAT ASSESSMENTS FOR OHIO STUDENTS
WITH DISABILITIES**

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I. INTRODUCTION.....	167
II. BACKGROUND	170
A. <i>Threat Assessments in Schools</i>	171
B. <i>Threat Assessment Legislation Across the United States</i>	172
C. <i>School Violence, Mental Health, and Disability</i>	175
1. School Violence	175
2. School Violence & Disability	178
III. ANALYSIS	180
A. <i>School Board Liability</i>	180
B. <i>Disability Law</i>	184
1. Threat Assessments’ Overlap with Disciplinary Processes	184
2. Individuals with Disabilities in Education Act.....	186
3. Section 504 and the Americans with Disabilities Act.....	189
C. <i>Student Records</i>	191
D. <i>Civil Rights Claims</i>	193
IV. POLICY RECOMMENDATIONS	194
V. CONCLUSION	196

I. INTRODUCTION

As predictable as a morning cup of coffee, receiving news of the latest mass shooting seems to have become a commonplace part of daily life in America. In the early morning hours of August 5, 2019, twenty-four-year-

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old Connor Betts opened fire into a crowd of bar-goers in Dayton, Ohio's popular Oregon District, killing nine people.¹ Within hours, reports flooded the media of Betts's troubled teenage years, including a prior high school suspension, alleged "hit list" and "rape list," and suspected mental illness.²

In response to the violence in Dayton, Ohio Governor Mike DeWine proposed multi-faceted reform measures, including the development of a School Safety Center, which, among other activities, created a multi-disciplinary threat assessment team.³ A frenzied national conversation ensued, with typical polarized arguments regarding who, or more aptly, *what* was to blame.⁴ Two choices presented themselves on supposed opposite ends of an ideological spectrum: guns and mental illness.⁵

While mental health advocates assert that the link between mental illness and gun violence is "simplistic and inaccurate," conservative government officials and mental health experts alike have identified common ground in the creation of threat assessment teams in schools and workplaces.⁶ However, this support is not unqualified, as the American Psychological Association ("APA") has advised against using threat assessments to narrowly focus on mass shootings only and instead adapted a threat assessment model that encompasses, more broadly, targeted violence, i.e., violence planned in advance.⁷ In addition to gun violence, threat assessments can be used to intervene when students are on a path towards suicidal, homicidal, bullying, or other unsafe behavior.⁸ Preventing mass shootings, including school shootings and mass shootings where the individual, like Betts, exhibits "red flags" while attending school, is but one goal of implementing threat assessment procedures in educational institutions.⁹

¹ Sarah Aarthur & Emanuella Grinberg, *What We Know About the Shooting in Dayton, Ohio*, CNN (Aug. 4, 2019, 7:22 PM), <https://www.cnn.com/2019/08/04/us/dayton-ohio-shooting-what-we-know/index.html>.

² *Id.*; Erik Ortiz et al., *Dayton Gunman Reportedly Had Hit Lists, Fascination With Shootings: 'Everyone Knew Who he Was'*, NBC NEWS (Aug. 6, 2019, 7:55 AM), <https://www.nbcnews.com/news/us-news/dayton-gunman-reportedly-had-hit-lists-fascination-shootings-everyone-knew-n1039391>.

³ Jeremy P. Kelly & Sarah Franks, *DeWine Creates School Safety Center to Deal with Shootings, Threats*, DAYTON DAILY NEWS (Aug. 21, 2019), <https://www.daytondailynews.com/news/state--regional-govt--politics/dewine-creates-school-safety-center-deal-with-shootings-threats/bN48xKto2pvtl6cbZXJgJJ/>.

⁴ See Jacqueline Howard, *Blaming Mass Shootings on Mental Illness is 'Inaccurate' and 'Stigmatizing,' Experts Say*, CNN (Aug. 5, 2019, 5:05 PM), <https://www.cnn.com/2019/08/05/health/mass-shootings-mental-illness-trump/index.html>.

⁵ *Id.*

⁶ See AM. PSYCHOL. ASS'N, GUN VIOLENCE: PREDICTION, PREVENTION, AND POLICY 2 (2013), <https://www.apa.org/pubs/info/reports/gun-violence-report.pdf> ("[I]t should be noted that behavioral threat assessment is becoming a standard of care for preventing violence in schools, colleges, and the workplace and against government and other public officials.") [hereinafter GUN VIOLENCE]; Press Release, Arthur C. Evans, Jr., Statement of APA CEO on Gun Violence and Mental Health (Aug. 5, 2019), <https://www.apa.org/news/press/releases/2019/08/gun-violence-mental-health>.

⁷ GUN VIOLENCE, *supra* note 6 at 5.

⁸ *Id.* at 1.

⁹ See *id.*; see also Richard Wilson & Thomas Gnau, *Dayton Daily News, WHIO Sue School District to Get Shooter's Records*, DAYTON DAILY NEWS (Aug. 9, 2019), <https://www.daytondailynews.com/news/local/dayton-daily-whio-file-suit-get-shooter-records/7ul5NUbkn1AEf7gWHYeYqJ/>.

Although mass shootings appear seemingly commonplace, they occur rarely in comparison to the myriad of other acts of targeted violence committed by students and adults alike in educational institutions.¹⁰

Yet, it has been in the wake of several high-profile mass shootings, most notably, the 2007 Virginia Tech shooting, that threat assessment teams have become an important part of education safety, specifically in the realm of higher education.¹¹ These post-secondary institutions have also been the subject of litigation regarding disparate treatment of students with mental illnesses due to discriminatory threat assessment policies, violations of the Family Educational Rights and Privacy Act (“FERPA”), and breach of the university’s duty of care owed to both an at-risk student and other students on the campus.¹² Though differences exist in the nature of the relationship between universities, local school districts, and their students, post-secondary threat assessment litigation and subsequent federal agency guidance can serve as a tool for Ohio in developing its own standardized threat assessment policies and procedures for elementary, middle, and secondary schools.¹³

While threat assessment procedures can be a critical tool in maintaining the safety of students and schools, the development and implementation of these procedures must consider the potential for discrimination on the basis of disability, which is a likely consequence of threat assessment procedures created, or applied, without a basic understanding of mental health, disabilities, and student rights.¹⁴ The APA

¹⁰ W. David Watkins & John S. Hooks, *The Legal Aspects of School Violence: Balancing School Safety with Students’ Rights*, 69 MISS. L.J. 641, 645–46 (1999). Recent data indicates that while “[h]omicide is the second leading cause of death among youth aged 5-18[.] . . . [l]ess than 2% of these homicides occur on school grounds, on the way to/from school, or at or on the way to/from a school-sponsored event.” *School-Associated Violent Death Study*, CTR. FOR DISEASE CONTROL & PREVENTION (Oct. 24, 2019), <https://www.cdc.gov/violenceprevention/youthviolence/schoolviolence/SAVD.html>. “Multiple-victim incidents accounted for only 10% of all school-associated youth homicide incidents from 1994[–]2016, but involved a disproportionate number of all youth homicide victims (18.6%) during this time.” *Id.* However, “[w]hile single-victim school-associated youth homicide rates remained stable from 1994–2016, multiple-victim school-associated youth homicide incidence rates increased significantly from July 2009 to June 2018.” *Id.*

¹¹ Rebecca Bolante & Cass Dykeman, *Threat Assessment in Community Colleges*, 2 J. OF THREAT ASSESSMENT & MGMT., 23, 23 (2015).

¹² See Dana Martin, *Higher Education Institutions’ Treatment of Students Deemed a “Direct Threat” to Themselves and the ADA*, 12 NW. J.L. & SOC. POL’Y 111, 124 (2017).

¹³ The relationships between schools at various levels in the educational process inevitably differ based on the age of the children and the corresponding custodial responsibilities of the schools. For example, a university’s relationship with its adult students creates a much different dynamic than an elementary school’s relationship with its young, minor children.

¹⁴ See Charles P. Fox & Marilyn Green-Rebnord, *Threat Assessment Plans and Students with Special Needs*, SPECIAL EDUC. L. BLOG (May 22, 2018, 6:20 PM), <https://blog.foxspecialdew.com/2018/05/threat-assessment-plans-and-students-with-special-needs-by-charles-p-fox-and-marilyn-green-rebnord.html>; Miriam A. Rollin, *Here’s How ‘Threat Assessments’ May Be Targeting Vulnerable Students*, EDUC. POST (Dec. 12, 2019), <https://educationpost.org/heres-how-threat-assessments-may-be-targeting-vulnerable-students/>; Valerie Strauss, *Civil Rights, Disabilities Groups Urge Florida to Stop Building Student Database They Call ‘Massive Surveillance Effort’*, WASH. POST (July 10, 2019, 3:55 PM), <https://www.washingtonpost.com/education/2019/07/10/civil-rights-disabilities-groups-urge-florida-stop-building-student-database-they-call-massive-surveillance-effort/>; Ike Swetlitz, *When Kids Are Threats: The Assessments Unfairly Targeting Students with Disabilities*, THE GUARDIAN (Oct. 15, 2019, 2:00 AM),

has cautioned that “[doing] a better job of identifying and acting on early warning signs . . . requires research to ensure we are making decisions based on data, not prejudices and fear.”¹⁵ Legal consequences of decision-making based on implicit or explicit biases, stereotypes, and fear are likely to lead to disability discrimination and violation of students’ individual rights.¹⁶

To analyze the implications of threat assessments procedures, Part II provides background information regarding the history of threat assessment procedures in schools and the psychology of school violence. Part III analyzes state and federal law addressing the use of threat assessments in educational institutions; the intersection of threat assessments with disability law in elementary and secondary schools; and potential legal claims that might be brought against school districts by students with disabilities and disability advocates as a result of threat assessments. Lastly, Part IV provides policy recommendations for developing threat assessments to avoid discrimination against students with disabilities. This Comment demonstrates that while threat assessment procedures have been shown to be helpful tools in addressing targeted violence, their development must include consideration of ill effects for students with disabilities and the potential for litigation based on disability discrimination.

<https://www.theguardian.com/us-news/2019/oct/14/when-kids-are-threats-the-assessments-unfairly-targeting-students-with-disabilities>. *But see* Mike Marsee, *Threat Assessment Model Catching on in Kentucky Schools*, KY. TCHR. (Dec. 3, 2019) (“Research shows that the [threat assessment] model’s use has led to a reduction in suspension rates for students of color and students with disabilities.”). Although this Comment focuses on the implications of threat assessment teams and procedures on students with disabilities, many of the same negative implications and policy recommendations discussed are also applicable to students belonging to racial minorities, especially, black or African American students. *See* ERIC MADFIS, *THE RISK OF SCHOOL RAMPAGE: ASSESSING AND PREVENTING THREATS OF SCHOOL VIOLENCE* 91–92 (2014). Studies show that racial bias plays a significant role in school discipline, as black students are overrepresented in suspensions and expulsions, even when socioeconomic indicators are held constant. *Id.*

It is important to note the intersectionality across students’ race and disability. A disproportionate number of students of color are diagnosed with learning, cognitive, and emotional disabilities. Compared with their White peers, Black students are “twice as likely to be identified as ED [emotionally disturbed] and 2.7 times as likely to be identified as CI [cognitively impaired]” and Native American students are almost “twice as likely to be identified as SLD [specific learning disability].” Researchers attribute this disproportionality to cultural or linguistic differences that “may be misinterpreted as symptoms of a learning disability” or differences in methods of referring students for special education services. It is also possible that the diagnoses are valid, due to “early experiences influenc[ing] brain development” related to low socio-economic status.

Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 156 (2015) (alterations in original) (quoting Amanda L. Sullivan & Advin Bal, *Disproportionality in Special Education: Effects of Individual and School Variables on Disability Risk*, 79 EXCEPT’L CHILD. 475, 476 (2013); Dara Shifrer et al., *Disproportionality and Learning Disabilities: Parsing Apart Race, Socioeconomic Status, and Language*, 44 J. OF LEARN. DISABILITIES 246, 247–48 (2011)).

¹⁵ Evans, *supra* note 6 (internal quotations omitted).

¹⁶ *See generally* U.S. SECRET SERV. & U.S. DEP’T OF EDUC., *THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES* (July 2004), <https://www2.ed.gov/admins/lead/safety/threatassessmentguide.pdf>.

II. BACKGROUND

School boards must strike a balance between looking after students' safety from violence while at the same time protecting students' individual rights.¹⁷ Schools face the possibility of liability for student-initiated violence under theories involving negligent supervision, violations of constitutional rights, or discriminatory responses to violence on the basis of gender, race, and disability.¹⁸

Public safety officials have encouraged leaders in private and public institutions to utilize assessments where an individual demonstrates the potential to engage in violence.¹⁹ However, because inappropriate or ill-informed interventions can escalate violent behavior, harm students identified as violent, and threaten the safety of student bystanders, it is important for organizations to create policies and procedures to guide school staff in conducting threat assessments.²⁰ A lack of evidence-based procedures, trained staff, and clear, written procedures can increase the likelihood of arbitrary decision-making regarding threats, thus increasing the likelihood of discrimination for students with disabilities.²¹

A. Threat Assessments in Schools

A school threat assessment “is a violence prevention strategy that involves [first,] identifying student threats to commit a violent act, [second,] determining the seriousness of the threat, and [third,] developing intervention plans that protect potential victims and address the underlying problem or conflict that stimulated the threatening behavior.”²² An effective threat assessment identifies struggling students and connects them with resources to address the underlying reasons for the behavior, thereby hopefully preventing future violence.²³

The U.S. Secret Service developed the most well-known threat assessment model as a method for evaluating threats of violence against the president of the United States.²⁴ In 2002, the U.S. Secret Service collaborated

¹⁷ See generally RONALD T. HYMAN, *DEATH THREATS BY STUDENTS: THE LAW AND ITS IMPLICATIONS* (2006).

¹⁸ Jeff Horner & Wade Norman, *Student Violence and Harassment*, in *SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS 1* (James C. Hanks ed., 2004).

¹⁹ See Bill Badzmierowski & Renée Fucilla, *Taking Threats Seriously: Establishing a Threat Assessment Team and Developing Organizational Procedures*, CRISIS PREVENTION INST. (2002), <https://www.crisisprevention.com/Blog/April-2011/Taking-Threats-Seriously-Establishing-a-Threat-Ass>.

²⁰ *Id.*

²¹ Marsee, *supra* note 14.

²² *Threat Assessments for School Administrators and Crisis Teams*, NAT'L ASS'N OF SCH. PSYCHOLOGISTS, <https://www.nasponline.org/resources-and-publications/resources-and-podcasts/school-climate-safety-and-crisis/systems-level-prevention/threat-assessment-at-school/threat-assessment-for-school-administrators-and-crisis-teams> (last visited Apr. 25, 2021).

²³ *Id.*

²⁴ James C. Hanks & Danielle Jess Haindfield, *Threats and Threatening Communications at School*, in *SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS*, *supra* note 18, at 143.

with the U.S. Department of Education to adapt threat assessment procedures for school settings.²⁵ Approximately 42% of all public schools in the United States use some form of threat assessment, and recently, publicized instances of violence have increased the demand for remaining schools to adopt them.²⁶

Data varies regarding whether the use of threat assessments actually reduces incidences of violence.²⁷ A study of schools implementing threat assessment procedures found that 70% of cases were resolved quickly as fleeting, temporary threats, while the remaining 30% were more serious and required a more extensive evaluation and intervention plan.²⁸ Almost all students referred for the assessment were able to remain in school or return to school after a brief suspension.²⁹ Few students were expelled, and none of the violence threatened by the students was brought to fruition.³⁰ Proponents of threat assessment procedures have used this data to demonstrate the safety potential of these continually developing policies and procedures.³¹ Still, acceptance of threat assessment procedures has varied depending on the education level of the school, i.e., primary vs. secondary, a school's location, i.e., urban vs. rural, and the nature of the interventions resulting from the assessment.³²

B. Threat Assessment Legislation Across the United States

Since 2013, in response to major shootings, ten states have adopted laws implementing threat assessments in schools.³³ Officials in several other states have encouraged the adoption of threat assessment procedures but do

²⁵ *Id.*

²⁶ Swelitz, *supra* note 14.

²⁷ *Id.* Note, however, few studies have addressed threats of violence which were planned but did not come to fruition, as most assessments do not result in law enforcement intervention or another party recording the outcome. MADFIS, *supra* note 14, at 8.

²⁸ Dewey G. Cornell et al., *Guidelines for Student Threat Assessment: Field-Test Findings*, 33 SCH. PSYCHOL. REV. 527, 527 (2004).

²⁹ *Id.* at 541.

³⁰ *Id.*

³¹ *Id.* at 543.

³² See generally EDUC. WK. RSCH. CTR., SAFETY AND SOCIAL-EMOTIONAL LEARNING: PERSPECTIVES FROM AMERICA'S SCHOOLS (2015), <https://epe.brightspotcdn.com/5f/52/c340d1e84a4c8909d89ad46a946c/ewrc-selreport-june2015.pdf> [hereinafter "Safety & SEL"]. The most requested measures by teachers to increase safety in schools include access to counselors, school psychologists, or other mental health professionals; social-emotional learning programs or strategies; and programs to help parents address students' social emotional challenges. *Id.* at 29. However, restorative practices are viewed differently depending on grade level, with high school teachers finding them least effective and elementary school teachers finding them most effective. EDUC. WK. RSCH. CTR., SAFETY AND SOCIAL-EMOTIONAL LEARNING: RESULTS OF A NATIONAL SURVEY 12 (2019), <https://www.edweek.org/media/safety-and-sel-national-survey-education-week-research-center-2019.pdf>. Threat reporting systems have teacher support at about 9–20% depending on the grade level being taught. *Id.* at 13. Additionally, 79% of teachers believe that lawmakers should prioritize funding additional mental health resources and require social and emotional learning programs. *Id.* at 15. Despite these preferences, the most common method utilized to address school safety is "hardening" or utilizing drills, school resource officers, monitored doors, physical barriers, threat reporting systems, or security cameras. *Id.* at 13.

³³ Rollin, *supra* note 14.

not require them.³⁴ The federal government explicitly and implicitly supported the implementation of such procedures by creating resources and making federal funds available for trainings.³⁵

Colorado is among the states implementing some form of threat assessment procedure in K–12 schools.³⁶ In response to the infamous 1999 Columbine shooting, Colorado passed the School Safety Act, requiring all public schools to create a school safety plan and train staff to respond to crises.³⁷ State officials in Colorado continued to develop its safety response, adding an anonymous safety tip line in 2004 and creating a School Safety Resource Center to provide training in threat assessment procedures in 2008.³⁸ After the 2013 shooting of a high school student, Claire Davis, the state legislature enacted the Claire Davis Act, which removed governmental immunity for violence occurring on school grounds, opening school boards to liability for negligence relating to targeted violence by students.³⁹

An independent review by multiple university research centers determined that Davis’s death could have been prevented if the school had conducted a more thorough threat assessment that was consistent with evidence-based models created by the School Safety Resource Center.⁴⁰ Although the high school threat assessment team had previously assessed the student who attacked Davis months earlier, they determined that he was a “low” threat.⁴¹

Since the Claire Davis Act was implemented, Colorado has seen a steep rise in the number of threat assessments being conducted in schools.⁴² Some proponents of the increased use assert that there are no negative consequences of conducting more assessments, and students in need are more likely to be identified and provided with resources.⁴³ However, critics point out that districts are still largely left to make their own policies without defined standards, and the success of assessments depends on whether mental

³⁴ *Id.* Virginia was the first state to adopt threat assessment procedure in their schools in 2013. *Id.* In the aftermath of the 2018 school shooting in Parkland, Florida, many states followed suit and adopted laws requiring school threat assessments, including Colorado, Florida, Kentucky, Maryland, Pennsylvania, Rhode Island, Tennessee, Texas and Washington. *Id.* In addition, some states, such as Idaho, encourage use of threat assessments through training and practical guidance although they do not require them. *Id.*

³⁵ *Id.*

³⁶ Christopher Osher & Jennifer Brown, *Twenty Years After Columbine, Colorado Schools are Assessing an Astonishing Number of Student Threats*, COLO. SUN (Apr. 10, 2019 5:03AM), <https://colorado.sun.com/2019/04/10/colorado-school-threat-assessments/>

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* The student who attacked Claire Davis underwent a threat assessment after he threatened to kill members of the debate and speech team three months prior to his attack on Davis. *Id.* The student’s assessment was never updated, despite subsequent events, including repeatedly banging on the door after a minor disagreement with a classmate and stating to another classmate that he would meet his rifle. *Id.*

⁴² *Id.*

⁴³ *Id.*

health resources are available to students after they are identified as posing a safety threat.⁴⁴

Ohio has followed suit in encouraging K–12 schools to create threat assessment procedures to evaluate and address student safety issues.⁴⁵ On March 6, 2019, the First House of the Ohio General Assembly introduced the Safety and Violence Education Students Act (“SAVE Students Act”) to address the issue of school violence.⁴⁶ Passed into law in March 2021, the SAVE Students Act requires the Ohio Department of Education (“ODE”) to engage in violence prevention through developing and mandating participation in training to address violence, suicide, and social isolation.⁴⁷

Most notably, the SAVE Students Act requires officials in all school boards to create a threat assessment team for each school building serving students in grades six through twelve, along with mandating participation in threat assessment training.⁴⁸ To supplement these programs, each school district must enter into a contract with an anonymous reporting program that would forward information regarding threats to school threat assessment teams and law enforcement.⁴⁹ The SAVE Students Act also requires the ODE and the Ohio Attorney General to create a model threat assessment plan for school boards to consult and/or use.⁵⁰ The goals of the plan should include identifying types of threatening behavior; identifying reporting structure and personnel; providing guidelines for identification, evaluation, intervention, and follow-up; and creating guidelines for collaboration with law enforcement and outside agencies.⁵¹

While the SAVE Students Act was pending in the state legislature, by executive order on August 1, 2019, Ohio Governor Mike DeWine created the Ohio School Safety Center (“OSSC”) to protect students and schools, citing multiple instances of school violence in Ohio’s history.⁵² The

⁴⁴ See Erica Meltzer, *How Colorado Lawmakers are Trying to Make Schools Safer*, CHALKBEAT (July 12, 2019, 9:12 PM), <https://chalkbeat.org/posts/co/2019/07/12/how-colorado-lawmakers-are-trying-to-make-schools-safer/>.

⁴⁵ See H.B. 123, 133d Gen. Assemb., Reg. Sess. (Ohio 2019).

⁴⁶ See *id.* The original bill was substituted on June 19, 2019, passed the House of Representatives on October 2, 2019, passed in the Senate on July 21, 2020, and became effective on March 24, 2021. *Ohio House Bill 123*, LEGISCAN, <https://legiscan.com/OH/bill/HB123/2019> (last visited Apr. 25, 2021).

⁴⁷ H.B. 123, 133d Gen. Assemb., Reg. Sess. (Ohio 2019). The SAVE Students Act also provides online education to staff and students on the topics of suicide awareness, violence prevention, and social inclusion. *Id.* It additionally requires students in grades six through twelve to receive one standard class period evidence-based suicide prevention instruction and one class period of evidence-based social inclusion instruction per school year. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* The SAVE Students Act additionally requires data collection and the creation of a student-led violence prevention club. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Ohio Exec. Order No. 2019-21D (Aug. 21, 2019) (“Ohio has experienced several incidents of violence in schools over the past seven years, including shootings at Chardon High School in 2012, Madison Junior/Senior High School in 2016, and West Liberty-Salem High School in 2017. In addition, suicide is the second leading cause of death among youth and young adults aged 10-24 years . . .”).

multifaceted order included a provision “to assist local schools and law enforcement in preventing, preparing for, and responding to threats and acts of violence, including self-harm, through a holistic, solutions-based approach to improving school safety.”⁵³ The order directed the OSSC to create and implement threat assessment team training, create and monitor an anonymous tip line, allowing the information received to be shared with law enforcement officials, create online school safety resources, develop an annual school safety summit and working group, and review emergency management plans.⁵⁴

C. School Violence, Mental Health, and Disability

Without sufficient knowledge of the psychological dynamics and causal factors of targeted violence in the educational setting, threat assessment teams are at an increased risk of misidentifying individuals as high-risk and unsuccessfully identifying high-risk individuals as such.⁵⁵ Communicated threats of violence should never be ignored. However, they may not convey a high degree of risk for targeted violence insofar as they are determined to be utterances of an individual with less developed reasoning ability, impulse control, and judgment, and the statement is made in the absence of capability, planning, or preparation for violent behavior.⁵⁶ Failing to understand the social-emotional development and background of students and work within the unique ethical and legal contexts that apply in educational settings may impact the ability of threat assessment teams to function effectively.⁵⁷

1. School Violence

Violence in schools includes acts extending far beyond mass shootings, which, although rare, often occupy the forefront of the public’s mind when considering school violence.⁵⁸ Violence directed towards oneself, such as self-harming behaviors and suicide, claims the lives of youth on a significantly greater scale than shootings or other homicides.⁵⁹ Also, more

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Rollin, *supra* note 14.

⁵⁶ Gale M. Morrison & Russell Skiba, *School Discipline Indices and School Violence: An Imperfect Correspondence*, in APPRAISAL AND PREDICTION OF SCHOOL VIOLENCE: METHODS, ISSUES, AND CONTENTS 120 (Michael J. Furlong, et al. eds., 2004).

⁵⁷ See *Id.*; Watkins & Hooks, *supra* note 10, at 645.

⁵⁸ Watkins & Hooks, *supra* note 10 at 646.

⁵⁹ See Horner & Norman, *supra* note 18, at 1; Meltzer, *supra* note 44. For example, of the 14,869 threat assessments conducted during the 2017–18 school year, 56% involved threats to self only, including suicide, 39% involved threats to others only, and 5% involved threats to themselves and others. Donna Michaelis, *The Value of Threat Assessment Teams*, NAT’L INST. OF JUST. (Nov. 12, 2019), <https://nij.ojp.gov/topics/articles/notes-field-value-threat-assessment-teams>. Suicide is currently the second leading cause of death among our nation’s youth. SALLY C. CURTIN & MELONIE HERON, NAT’L CTR. FOR HEALTH STAT., DEATH RATES DUE TO SUICIDE AND HOMICIDE AMONG PERSONS AGES 10–24: UNITED STATES, 2000–2017 1 (Oct. 2019), <https://www.cdc.gov/nchs/data/databriefs/db352-h.pdf>.

common are incidences involving minor brawls between students, sexual harassment, bullying, gang violence, and rape.⁶⁰ On an individual level, many of these violent acts can be characterized as either targeted or impulsive violence.⁶¹

Although the distinction is subtle, differentiating these types of violence is critical because each is associated with unique factors that require particularized interventions.⁶² Impulsive violence involves the inappropriate expression of emotion, such as extreme anger, or a response to a perceived threat.⁶³ It is reactionary and significantly more common than targeted violence.⁶⁴ A *violence risk* assessment is used to determine a student's general potential to engage in a violent act during an unspecified, open period of time, emphasizing different factors than a threat assessment would.⁶⁵ On the other hand, *threat* assessments serve to address targeted violence, which occurs when "a person intends to carry out a specific threatened act, usually toward a targeted victim or group, within a relatively short timeframe."⁶⁶ This type of assessment focuses on case-specific factors and quick resolution of or reduction in the risk posed.⁶⁷

Threat assessment models may categorize the two types of violence in a slightly different manner, as either transient or substantive threats of violence.⁶⁸ Transient threats involve a broad category of threats that do not reflect a genuine intent to harm another, which vary widely in motive and context, while substantive threats represent a serious risk of harm to others based on qualities such as planning or other warning behaviors.⁶⁹ More simply stated, the distinction is "a student [who *makes*] a threat versus [a] student who [*poses*] a threat."⁷⁰ To distinguish between transient and substantive threats, assessment teams must look beyond merely what the student is saying and consider the context of the statement, the student's behavior, and the input of others (e.g., family members, teachers, mental health professionals) who may be able to shed light on the seriousness of and motivation behind the student's threat.⁷¹

Using the wrong type of assessment (violence risk assessment versus threat assessment) may lead to unintentional profiling of students based on

⁶⁰ Horner & Norman, *supra* note 18, at 1.

⁶¹ GUN VIOLENCE, *supra* note 6, at 17.

⁶² *Id.*

⁶³ Erin K. Nekvasil & Dewey G. Cornell, *Student Threat Assessment Associated With Safety in Middle Schools*, 2 J. OF THREAT ASSESSMENT MGMT 98, 99 (2015).

⁶⁴ *Id.*; Anna Grace Burnette et al., *The Distinction Between Transient and Substantive Student Threats*, 5 J. OF THREAT ASSESSMENT & MGMT. 4, 6 (2018).

⁶⁵ Burnette et al., *supra* note 64, at 6.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 7.; Fox & Green-Rebnord, *supra* note 14.

⁶⁹ Burnette et al., *supra* note 64, at 7.

⁷⁰ Fox & Green-Rebnord, *supra* note 14 (emphasis added).

⁷¹ Burnette et al., *supra* note 64, at 7.

aspects of their lives that they cannot control.⁷² For example, a violence risk assessment identifies “risk factors,” which, although increasing the likelihood of a person’s general capability to commit violence, do not predict violent behavior.⁷³ A focus on “characteristics” can also be harmful when they are related to an immutable personal trait, such as the presence of a disability.⁷⁴

Because developing profiles of violent individuals based on risk factors and immutable characteristics has proven to be unsuccessful through research, the use of behavioral-focused assessments is more common.⁷⁵ These assessments concentrate less on immutable external or internal factors and instead on what an individual’s responses to these factors are, which are often objectively observable.⁷⁶ While many students are exposed to violence risk factors, such as poor academic performance and witnessing domestic violence, a majority of these students do not go on to commit acts of targeted violence.⁷⁷ Therefore, how students respond to their life circumstances or act on their beliefs provides a more accurate understanding of their likelihood to commit violence.⁷⁸

Examples of observable behaviors associated with violence include concrete actions, such as making a “hit list,” giving away personal belongings due to perceived impending death, and talking to other students about obtaining weapons.⁷⁹ Some behaviors can lie on a border between “behaviors” and “characteristics,” including social isolation, cultural approval of violence, availability of weapons, and past actions of violence.⁸⁰

⁷² See *id.*; *Addressing Risk of Violent Behavior in Youth*, U.S. DEP’T OF HEALTH AND HUM. SERVS., SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. 9, <https://www.samhsa.gov/sites/default/files/addressing-youth-violence.pdf> (last visited Oct. 20, 2019) [hereinafter “HHS”]. These characteristics include student age, poor impulse control, exposure to violence, history of past violence, family isolation, social rejection, poor academic performance, and lack of community involvement. *Id.* at 17–19. Students experiencing social or personal stress are at an increased risk of violence. *Id.* at 9.

⁷³ See HHS, *supra* note 72, at 8–9.

⁷⁴ See *id.* Despite dissuading the use of characteristics—specific features, qualities, or traits—in threat assessments, some experts have identified several consistencies of individuals who engage in targeted violence, for example, access to firearms and voiced hatred of women. Julia Bosman, Kate Taylor & Tim Arango, *A Common Trait Among Mass Killers: Hatred Toward Women*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10/us/mass-shootings-misogyny-dayton.html>; *Characteristic*, AM. PSYCHOL. ASS’N, <http://dictionary.apa.org/characteristic> (last visited Apr. 25, 2021).

⁷⁵ See Douglas O. Cacialli, *The Unique Role and Special Considerations of Mental Health Professionals on Threat Assessment Teams at Institutions of Higher Education*, 62 INT’L J. OF L. & PSYCHIATRY 32, 32–33 (2019).

⁷⁶ See HHS, *supra* note 72, at 21.; Cacialli, *supra* note 75, at 32–33; *Behavior*, AM. PSYCHOL. ASS’N, *supra* note 74.

⁷⁷ See Morrison & Skiba, *supra* note 56, at 120.

⁷⁸ See *id.*

⁷⁹ See, e.g., Ortiz et al., *supra* note 2; Osher & Brown, *supra* note 36.

⁸⁰ See Cacialli, *supra* note 75, at 34–35; *Mental Illness and Violence*, HARV. MED. SCH. (Jan. 2011), https://www.health.harvard.edu/newsletter_article/mental-illness-and-violence. However, these studies do not identify the cause of past violence, which could include any combination of individual, family, and community risk factors. See *id.* Nor do most studies focus more on individual characteristics of students who break rules or engage in violence but less so on the classroom and school environment, yet it is apparent that these factors contribute significantly to school disciplinary action and outcomes. See

Motives for engaging in targeted violence vary depending on a student's age and level of development, among other factors.⁸¹ For example:

Throughout adolescence, the relevance of social identity and peer acceptance substantially increases the psychological impact resulting from peer victimization and may cause the child who does not conform to popular notions of 'cool' to engage in extreme behavior to improve their social standing or exact revenge on the individuals viewed as responsible for their position in the social hierarchy.⁸²

The challenges in determining the type of threat; the large number of potentially relevant behaviors to consider in a threat analysis; and the difficulties in differentiating between the permissible "behaviors" and the impermissible "risk factors" and "characteristics" significantly complicate finding the delicate balance of school safety and acknowledging the rights of students with disabilities.

2. School Violence & Disability

A potential problem that implicates both the development and implementation of threat assessment procedures is that the assessments are likely to target students who are not actual threats, such as students with disabilities, thus causing significant and lasting harm to misidentified students without actually making the school environment any safer.⁸³ Disabilities not only include intellectual, developmental, and physical impairments but emotional disabilities as well.⁸⁴ The latter type of disability creates a challenge in that students with emotional disabilities, by the very nature of their diagnosis, experience behavioral and relationship issues.⁸⁵

Emotional disabilities are not merely identified by mental illness diagnoses but are determined based on the diagnoses' intensity and impact on school performance and how they affect the students' abilities to conduct basic daily activities.⁸⁶ The manifestations of students' disabilities in the threat assessment context consist of a wide range of conduct, including a student with autism or language deficits parroting violent talk that they overheard; a student with anxiety shouting threats when emotionally overwhelmed; or a student with poor impulse control making inappropriate

R. MURRAY THOMAS, *VIOLENCE IN AMERICA'S SCHOOLS: UNDERSTANDING, PREVENTION, AND RESPONSES* 119–20 (2006).

⁸¹ See Morrison & Skiba, *supra* note 56, at 120.

⁸² *Id.*

⁸³ Rollin, *supra* note 14.

⁸⁴ See Fox & Green-Rebnord, *supra* note 14.

⁸⁵ *Id.*

⁸⁶ Christina A. Samuels, *Students With Emotional Disabilities: Facts About This Vulnerable Population*, EDUC. WK. (Mar. 27, 2018), <https://www.edweek.org/ew/articles/2018/03/21/students-with-emotional-disabilities-facts-about-this.html>.

social media posts.⁸⁷

Because acts of violence by people with mental illness have been highly publicized, stigmatization of individuals with mental illness alters the public's perception of violence.⁸⁸ Despite stigma and stereotypes, students receiving special education services for an emotional disability are not more likely than their peers to perpetrate targeted violence, especially mass shootings.⁸⁹ The mischaracterization of mental illness as a risk factor for violence also stems from the complex nature of violence.⁹⁰ Research reveals that when individuals with mental illness engage in violence, such acts are not dissimilar to violence engaged in by the general population and “stems from multiple overlapping factors interacting in complex ways[, including] family history, personal stressors (such as divorce or bereavement), and socioeconomic factors (such as poverty and homelessness).”⁹¹

Threat assessments can lead to negative results for students with disabilities in several ways, including inaccurate reporting of threats, flaws in procedures, unfair or disproportionate consequences for students, disparities in application for students with disabilities, and privacy violations.⁹² Normal, developmentally-appropriate behavior may potentially be misinterpreted as threatening, when such behavior is meant to be humorous or release frustration in the moment.⁹³ Although most threat assessment recommendations discourage profiling students based on demographics or personal characteristics, such internal biases can be difficult to compartmentalize when deciding whether to report a threat or how to assess a threat.⁹⁴

However, even when threat assessments are appropriately recommended, the practice itself can “involve inappropriate processes, including ignoring basic investigation and evidence-gathering techniques.”⁹⁵ One Colorado threat assessment was deemed improper when “[t]he school just didn't know the family and was making assumptions”⁹⁶ Merely undergoing a threat assessment can have a negative impact on a student by escalating that student's behavior (if behavior is attention-seeking) or causing trauma for students with disabilities who may not understand the implications of their actions.⁹⁷ Threat assessments have the potential to lead to inappropriate school disciplinary action, inappropriate arrest or referral to law

⁸⁷ Fox & Green-Rebnord, *supra* note 14.

⁸⁸ *Mental Illness and Violence*, *supra* note 80.

⁸⁹ *Id.*; Samuels, *supra* note 86.

⁹⁰ See *Mental Illness and Violence*, *supra* note 80.

⁹¹ *Id.*

⁹² Rollin, *supra* note 14.

⁹³ *Id.*

⁹⁴ See *id.*

⁹⁵ *Id.*

⁹⁶ Osher & Brown, *supra* note 36.

⁹⁷ See Swetlitz, *supra* note 14.

enforcement, and disparities in application for children with disabilities.⁹⁸

The criteria officials use to determine whether students should be deemed threats and at what level the threats should be evaluated provide yet another source of potential disability discrimination.⁹⁹ Many of the characteristics commonly found in violent students are also likely to apply to many more students who do not engage in violent behaviors, including studies showing that violent students were not all loners and most had some friends; nearly all were bullied or teased and perceived themselves to be outcasts; and students tended to live in small, tightly knit homogenous, rural or suburban community.¹⁰⁰ Though the use of characteristics to assess a threat is discouraged by evidence-based threat assessment models, school officials have nonetheless reported utilizing characteristics and weighing heavily both formally and informally diagnosed mental health issues when conducting threat assessments, which were often mistakenly understood to be indicative of an increased likelihood of violence.¹⁰¹

III. ANALYSIS

Threat assessment procedures can implicate multiple areas of law.¹⁰² First, school boards may be open to liability based on common law negligence theory.¹⁰³ Second, the distinction between threat assessments as safety-related or quasi-disciplinary can result in claims under the Individuals with Disabilities in Education Act (“IDEA”).¹⁰⁴ Third, assessments can lead to violations of Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and the Americans with Disabilities Act (“ADA”).¹⁰⁵ Lastly, disability discrimination claims may even prompt lawsuits and/or U.S. Department of Education’s Office of Civil Rights (“OCR”) complaints or compliance reviews.¹⁰⁶

A. School Board Liability

The prospect of facing civil liability for failing to respond to perceived unsafe student behaviors can potentially motivate school boards to proactively and appropriately implement threat assessment procedures or can cause school boards to react inappropriately based on fear and bias.

⁹⁸ See Rollin, *supra* note 14; Fox & Green-Rebnord, *supra* note 14.

⁹⁹ See HYMAN, *supra* note 17, at 130–31.

¹⁰⁰ *Id.* at 131.

¹⁰¹ MADFIS, *supra* note 14, at 47.

¹⁰² See Stephen Sawchuk, *What Schools Need to Know About Threat Assessment Techniques*, EDUC. WK. (Sep. 3, 2019), <https://www.edweek.org/ew/articles/2019/09/04/what-schools-need-to-know-about-threat.html>.

¹⁰³ See *infra* Part III.A.

¹⁰⁴ Lynn M. Daggett, *Book ‘em? : Navigating Student Privacy, Disability, and Civil Rights and School Safety in the Context of School-Police Cooperation*, 45 URB. LAW. 203, 215–22 (2013).

¹⁰⁵ See *infra* Part III.B.3.

¹⁰⁶ Daggett, *supra* note 104, at 218–22.

Jurisdictions vary in the level of duty that schools owe to their students in protecting them from acts of violence.¹⁰⁷ Many district courts have held that schools are responsible for violence that is foreseeable under a negligence theory.¹⁰⁸

In Ohio, school boards generally receive immunity from negligence claims as political subdivisions performing the governmental function of providing a system of education, unless an exception applies.¹⁰⁹ Ohio has abrogated sovereign immunity for public entities subjected to tort claims only in limited scenarios, most of which are unlikely to apply to a claim involving school violence.¹¹⁰ However, immunity would not apply if an injured party demonstrates that a school board or school employee acted with malicious purpose, bad faith, or in a wanton or reckless manner.¹¹¹

If a court decides that an exception to immunity applies, a school board may still reinstate immunity by demonstrating that the school board or employee acted in a manner “necessary or essential to the exercise of powers of the political subdivision or employee”; the act or failure to act was “within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee”; or the injury claimed “resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.”¹¹²

Relatively few claims involving student violence have succeeded in Ohio.¹¹³ For example, a state appellate court dismissed the negligence claims

¹⁰⁷ Horner & Norman, *supra* note 18, at 2.

¹⁰⁸ *See id.* at 2–3; *see also* OHIO REV. CODE ANN. § 2744.03(A) (West 2019).

¹⁰⁹ *See* § 2744.01(F); *see also id.* § 2744.02(A)(1).

¹¹⁰ *See id.* § 2744.02(B). A political subdivision may be liable for injuries caused by: (1) the negligent operation of a motor vehicle by an employee; (2) the negligence of an employee with respect to proprietary functions; (3) the political subdivision's negligent failure to keep the public roads in repair and free from obstruction; (4) the negligence of an employee with respect to physical defects occurring within, or on the grounds of, buildings; and (5) civil liability that is expressly imposed by statute on the political subdivision. *Id.*

¹¹¹ *Id.* § 2744.03(A)(5)–(6). When exercising discretion in determining how to use personnel and resources, a school board and its officials are not open to liability unless they exercised their discretion with malicious purpose, bad faith, or in a wanton or reckless manner. *Id.* § 2744.03(A)(5).

¹¹² *Id.* § 2744.03(A)(2)–(3), (5).

¹¹³ *See Moore v. Southeastern Local Sch. Dist.*, No. 95-CA-23, 1996 Ohio App. LEXIS 1188, at *1 (Ohio Ct. App. Mar. 29, 1996) (holding that although plaintiff had alleged negligence that would expose the school employee to liability when a student was hit in the head with a shot put thrown by another student in gym class, the supervision of students was a discretionary act meeting the defenses in Ohio Revised Code section 2744.03(A)(3) and (5) and plaintiff failed to allege that he acted with malicious purpose or in bad faith); *J.H. v. Hamilton City Sch. Dist.*, No. CA2012-11-236, 2013 Ohio App. LEXIS 3006, at *6–15 (Ohio Ct. App. July 8, 2013) (holding that the school employee was not liable when he broke a child's leg while pushing a wheelchair because such conduct was not done in bad faith or in a reckless manner); *Aratari v. Leetonia Exempt Vill. Sch. Dist.*, No. 06 CO 11, 2007 Ohio App. LEXIS 1448, at *1 (Ohio Ct. App. Mar. 26, 2007) (holding that because the assaulting student's prior disciplinary history did not include unprovoked assaults that would have led to foreseeability of his actions, there was no breach

brought by plaintiffs representing injured and deceased students from a 2012 shooting at Chadron High School because immunity could not be overcome.¹¹⁴ Although the trial court found that plaintiffs had sufficiently alleged school employees had acted in a reckless, malicious, willful, and wanton manner in failing to provide appropriate security (i.e., the school had not hired a School Resource Officer), on a motion to dismiss, the trial court ultimately granted the school board's motion for summary judgment due the plaintiffs' failure to support such claims.¹¹⁵

Although negligence claims involving student violence have rarely succeeded in Ohio, school boards may also hesitate to intervene when threats arise because of the fear of inviting litigation that would require a school to defend its actions, potentially implicating a student's constitutional rights to freedom of expression and freedom of speech.¹¹⁶ Thus, difficulty arises when determining how school officials should lawfully respond to threats of violence because mass shootings often involve a complex set of circumstances that come about when multiple causes interact with each other.¹¹⁷

Due to the burden a plaintiff must overcome to abrogate immunity, it is unlikely that a school board will be held civilly liable for failing to prevent violence by a student without extreme recklessness.¹¹⁸ Ohio case law reveals that even if recklessness is shown, a plaintiff still must overcome a school board's reinstatement of immunity.¹¹⁹ Although a plaintiff's mere bringing a suit against a school board can become costly, a majority of cases involving negligent or reckless conduct of school employees are resolved by the courts at an early stage in the litigation process— few making it past a motion to dismiss—thus keeping litigation costs relatively low.¹²⁰

Addressing student threats based on fear of litigation is thus unnecessary because the focus of a threat assessment should be safety for the larger student population and the provision of needed resources or services for the student posing a threat. An intervention is more likely to be successful

of the duty of supervision by the school employees, and the plaintiffs could not overcome the school district's immunity, adding that even if the immunity was excepted, the district would not be liable because it acted within its discretion based on its awareness of the assaulting student's history). *But see* *Wencho v. Lakewood Sch. Dist.*, 895 N.E.2d 193, 197 (Ohio Ct. App. 2008) (denying summary judgment for the school district when the plaintiff alleged the school acted negligently when a student was sexually assaulted in hazing incidents and that school officials were "deliberately indifferent to plaintiff's predicament, that they knew of the assaults but blamed him for his 'inability to deal with anxiety and stress' and that their conduct was wanton, willful and reckless.").

¹¹⁴ *Parmertor v. Chardon Local Sch.*, 47 N.E.3d 942, 951, 954 (Ohio Ct. App. 2016).

¹¹⁵ *Id.* at 952–53; *Parmertor v. Chardon Local Sch.*, 119 N.E.3d 436, 453 (Ohio Ct. App. 2017).

¹¹⁶ HYMAN, *supra* note 17, at 100.

¹¹⁷ *Id.* at 132.

¹¹⁸ *See Wencho*, 895 N.E.2d at 195–97.

¹¹⁹ *See, e.g., id.*; *Parmertor*, 47 N.E.3d at 951; *see also* OHIO REV. CODE ANN. § 2744.03 (West 2019).

¹²⁰ *See, e.g., Parmertor*, 47 N.E.3d at 951; *Wencho*, 895 N.E.2d at 195–97; *Aratari v. Leetonia Exempt Vill. Sch. Dist.*, No. 06 CO 11, 2007 Ohio App. LEXIS 1448, at *1 (Ohio Ct. App. Mar. 26, 2007).

if intervention is not due to a fear of danger and litigation but rather due to a desire to intervene because a student is “troubled or there’s conflict or people are worried about them . . . [and thus] [p]revention becomes a bonus or a secondary gain from dealing with the underlying issue.”¹²¹ Even though the likelihood that students with disabilities will engage in targeted violence is no higher than the general population, the nature of their disabilities and their behavior can mislead threat assessment teams to incorrectly label the student as a “high” threat.¹²² School boards, which have less familiarity with mental health and disabilities, may be more likely to engage in disability discrimination in a well-meaning attempt to keep other students safe and prevent exposure to liability.¹²³

The mere prospect of negative publicity alone may lead to a similar outcome.¹²⁴ It is more likely that the decision to remove a student with an emotional disability who is perceived to pose a threat will be supported, as opposed to keeping the student enrolled and providing supportive services.¹²⁵ School boards may face pressure from the majority, non-disabled community to act, whether that pressure is well-founded or simply based on stereotypes.¹²⁶

Because Ohio has yet to see a successful suit brought against a school board for failure to protect students from violence, with most cases being dismissed due to governmental immunity, a legislative change would need to be made to allow for suits to overcome immunity, such as the Colorado legislature’s enactment of the Claire Davis Act.¹²⁷ Such legislation must be considered cautiously, if at all, as it leaves school boards better able to justify harsh responses to students with disabilities who they deem to be a threat on the basis of avoiding litigation by potential victims.¹²⁸ While the lack of successful litigation should not encourage schools to be non-responsive to safety threats, it should allow threat assessment teams to make thoughtful,

¹²¹ Fox & Green-Rebnord, *supra* note 14.

¹²² See Rollin, *supra* note 14.

¹²³ See *id.*; Fox & Green-Rebnord, *supra* note 14.

¹²⁴ See Fox & Green-Rebnord, *supra* note 14.

¹²⁵ Although an Oakwood, Ohio student was not alleged to have had any disability, his Snapchat post stating “[y]ou arent [sic] even prepared for tomorrow” caused “[e]veryone [to be] on edge . . .” Tyler Kingkade, *The False Alarms That Get Kids Arrested*, ATLANTIC (Oct. 21, 2019), <https://www.theatlantic.com/politics/archive/2019/10/fake-school-shooting-threats-getting-kids-arrested/600238/>. Oakwood City School District administrators informed parents that the student was not believed to pose a threat yet did not allow the student who made the threat to return to class. *Id.* Although the student was recommended for expulsion, this was set aside, and he had to attend an alternative school and take a mental health assessment. *Id.* This is likely due, at least in part, to the public perception of allowing a “dangerous” student who allegedly made a threat to continue to attend school with “innocent” children and teens.

¹²⁶ See Fox & Green-Rebnord, *supra* note 14.

¹²⁷ See Osher & Brown, *supra* note 36; see also *supra* Part III.A. The SAVE Students Act does not eliminate governmental immunity. See H.B. 123, 133d Gen. Assemb., Reg. Sess. § 3133.669 (D) (Ohio 2019).

¹²⁸ See generally Haley DiRenzo, Note, *The Claire Davis School Safety Act: Why Threat Assessments in Schools Will Not Help Colorado*, 93 DENV. L. REV. 719 (2016).

objective decisions not based on fear of civil liability.

B. Disability Law

The rising safety concerns in schools have prompted many schools to adopt strict safety policies.¹²⁹ However, these policies may have negative legal consequences when applied to students with disabilities, especially students with emotional or behavioral disabilities.¹³⁰ Model threat assessments often ignore the mandates of special education law, which requires due process for students with disabilities and limitations on the use of suspension and expulsion.¹³¹ Additionally, school personnel frequently view procedural rights for disabled students as an obstacle to running schools in the manner they wish.¹³² When considerations of disability law are not included in procedures, these assessments can result in misinformed decisions and “inappropriate consequences, including labeling a student as dangerous and stigmatizing them among school personnel.”¹³³ States must decide if the efficacy of strict safety policies justifies the academic, social, and emotional impacts that will potentially affect their most vulnerable student populations.

1. Threat Assessments’ Overlap with Disciplinary Processes

Threat assessment procedures must be properly developed in and of themselves and as part of the larger school safety scheme.¹³⁴ Popular methods used as an alternative or in conjunction with threat assessment teams, including zero-tolerance disciplinary policies and the use of resource officers and surveillance, may create further legal dilemmas or practical difficulties.¹³⁵

The type of assessment used can also exacerbate or create discrimination by using assessments that profile students, exercising misguided professional judgment or misidentified warning signs, and using automated, generalized decision-making.¹³⁶ These considerations play a part not only in threat assessment procedures but in disciplining students as well.¹³⁷ The difference between threat assessment recommendations and discipline is one of motive, not necessarily of result.¹³⁸ Framing assessment consequences as disciplinary can result in the forgoing of mental health services for a student with special needs, making the process punitive as

¹²⁹ Ann Majestic et al., *Disciplining the Violent Student with Disabilities*, in *SCHOOL VIOLENCE: FROM DISCIPLINE TO DUE PROCESS*, *supra* note 18, at 155.

¹³⁰ *Id.* at 156.

¹³¹ Rollin, *supra* note 14.

¹³² Fox & Green-Rebnord, *supra* note 14.

¹³³ Rollin, *supra* note 14.

¹³⁴ *See infra* Part III.D.

¹³⁵ MADFIS, *supra* note 14, at 11–13.

¹³⁶ *Id.* at 14–16.

¹³⁷ *See* Rollin, *supra* note 14.

¹³⁸ *See id.*

opposed to rehabilitative.¹³⁹ The result of classifying behavioral consequences, especially suspension or expulsion, as either safety-related or discipline-related, can also have significant impact on a school board's compliance with the IDEA and Section 504.¹⁴⁰

The primary goal of threat assessments is to prevent students from committing acts of violence against themselves or others and, perhaps most importantly, to get them the help they need; it is not meant to be a disciplinary process.¹⁴¹ Although conceptually distinct, caution must be exercised to prevent threat assessment procedures from becoming punitive rather than rehabilitative—in theory or in practice.¹⁴² A shift in focus may result in underreporting of threats by peers and bystanders, aggravation of a student's violence, or frustration due to inadequate interventions.¹⁴³

Many threat assessment teams already used in the higher education setting do not have disciplinary authority; rather, they operate as a “triage mechanism.”¹⁴⁴ With this distinct focus, school officials can avoid inconsistent results, conflict between separate disciplinary processes, and displacement of the disciplinary and procedural expertise of others.¹⁴⁵ Allowing threat assessment teams to have disciplinary authority “can have a

¹³⁹ See Fox & Green-Rebnord, *supra* note 14.

¹⁴⁰ See *infra* Part III.B.2.

¹⁴¹ Michaelis, *supra* note 59.

¹⁴² Mischaracterizing threat assessments as punitive implies that the solution to the threat will be suspension, expulsion, alternative or therapeutic school placements, or otherwise excluding the student from participating in the general academic environment. See Rollin, *supra* note 14. The efficacy of threat assessments with a rehabilitative focus must be considered frankly in light of scarce mental health resources. While the push to implement threat assessment procedures is on the rise, the availability of mental health services to students is not. See *id.*; Press Release, ACLU, ACLU Report Highlights Staff Shortages, Over-Policing, and Discriminatory Discipline in Schools (Mar. 4, 2019), <https://www.aclu.org/press-releases/aclu-report-highlights-staff-shortages-over-policing-and-discriminatory-discipline>. Data readily supports the existence of such disparity, considering that:

The National Association of School Psychologists recommends a school psychologist serve no more than 500-700 students. But the ACLU report reveals that school psychologists across the country serve more than 1,500 students on average. Given that only around 20 percent of youth access mental health services—and, of those who do, around 80 percent get these services in schools—it's unacceptable that nearly half of schools report having no school psychologist on staff whatsoever.

Angela Mann, *Why School Psychologists Are Worried About the Mental Health of America's Students*, ACLU (Mar. 22, 2019, 10:15 AM), <https://www.aclu.org/blog/racial-justice/race-and-inequality-education/why-school-psychologists-are-worried-about-mental>.

¹⁴³ See UNITED EDUCATORS, THREAT ASSESSMENT TEAMS FOR TROUBLED STUDENTS: PUTTING THE PIECES TOGETHER 13 (2014), https://www.nccpsafety.org/assets/files/library/Threat_Assessment_Teams_for_Troubled_Students.pdf.

¹⁴⁴ *Id.* at 5. Generally, a triage process “serves to screen cases and determine their appropriateness for review and/or action by the full team. If the team elects to implement a triage process, at least two members of the team will review initial reports of concern to determine if existing resources and mechanisms are sufficient to address those concerns, or whether the full team should further assess and manage the situation.” VA. DEP'T OF CRIM. JUST. SERVS., THREAT ASSESSMENT IN VIRGINIA PUBLIC SCHOOLS: MODEL POLICIES, PROCEDURES, AND GUIDELINES, THREAT ASSESSMENT IN VIRGINIA PUBLIC SCHOOLS: MODEL POLICIES, PROCEDURES, AND GUIDELINES 10 (2d ed. 2016), <https://www.dejs.virginia.gov/sites/dejs.virginia.gov/files/publications/law-enforcement/threat-assessment-model-policies-procedures-and-guidelinespdf.pdf>.

¹⁴⁵ UNITED EDUCATORS, *supra* note 143, at 5.

chilling effect on the reporting of information [because p]eople would be less likely to report behaviors to the team if that report would potentially get the subject in trouble.”¹⁴⁶

Students with disabilities are particularly prone to involvement in school discipline actions and later involvement with the juvenile justice system.¹⁴⁷ In 2000, a review of state and national databases indicated that students with disabilities represent 20% of all students suspended, while their representation in the overall population is around 11%.¹⁴⁸ Students in the juvenile justice system have a higher incidence of learning and emotional problems (diagnosed and undiagnosed) than the general population.¹⁴⁹ Students with disabilities are arrested at a higher rate than their non-disabled peers, are more likely to be subjected to severe punishments in the school setting, and are less likely to receive moderate consequences, like in-school suspension.¹⁵⁰

2. Individuals with Disabilities in Education Act

Students covered by the IDEA, who meet the criteria for having intellectual, physical, and/or emotional disabilities, are provided with special protections to ensure that they are not excluded from participation in education.¹⁵¹ These requirements apply, even when students have not been identified as having disabilities, in situations when school officials have possible knowledge of such disabilities as evidenced by students’ behaviors, performances, and when parents and/or school personnel express concerns.¹⁵² Before educators can change a student’s placement, if the student is not identified as having disabilities, officials must first obtain parental consent in writing to complete comprehensive assessment processes, culminating in the development of an Individualized Education Plan (“IEP”).¹⁵³ If a student has an existing IEP, then educators must reconvene teams to re-assess the status of the student and discuss where they can be placed prior to the actual change in placement.¹⁵⁴

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., Peter E. Leone & Matthew J. Mayer, *Safety, Diversity, and Disability: “Goodness of Fit” and the Complexities of the School Environment*, in APPRAISAL AND PREDICTION OF SCHOOL VIOLENCE: METHODS, ISSUES, AND CONTENTS, *supra* note 56, at 148–50.

¹⁴⁸ *Id.* at 149.

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* at 121.

¹⁵¹ Majestic et al., *supra* note 129, at 156; 20 U.S.C. § 1401(3)(A)–(B).

¹⁵² Majestic et al., *supra* note 129, at 165.

¹⁵³ See 34 C.F.R. § 300.116 (2019); *id.* § 300.503(a). A student’s educational placement is determined by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options and conforms to the requirement that a student is placed in the least restrictive environment possible. *Id.* § 300.116. Ideally, a student’s educational placement would be close to the student’s home, in the school the child would have been but for the student’s need for services, and services take place in general education classrooms, where possible. *Id.*

¹⁵⁴ Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 40 (2000).

Students with disabilities receive additional procedural and substantive protections when they receive discipline.¹⁵⁵ This does not mean protected students are exempt from standard school disciplinary policies; rather, they are entitled to notice and review of their IEPs and consideration of whether the behaviors resulting in discipline are a manifestation of the student's disability.¹⁵⁶

When determining appropriate disciplinary measures for a student with disabilities, a school may not unilaterally change a student's placement based on dangerousness alone unless it is also accompanied by a weapons or drug violation.¹⁵⁷ When a student's conduct implicates the weapons and drug provision, school officials must request a hearing officer for permission to remove a student with a disability who has engaged in violence to an appropriate interim alternative educational setting for up to forty-five days.¹⁵⁸ In all other circumstances, a school is not permitted to remove a student for disruption, however severe, in the absence of actual, violent behavior, without providing further procedural protections.¹⁵⁹ When attempting to remove a student because of safety concerns only, a school must demonstrate by a preponderance of the evidence that the student with a disability is "substantially likely" to injure himself or others.¹⁶⁰

A 2015 suit brought against a Colorado school district for failure to conduct an IEP meeting before changing a student's placement and failure to consider whether the student's behavior was a manifestation of the student's disability demonstrates the legal implications of classifying threat assessment responses as disciplinary- or safety-related.¹⁶¹ The State Complaints Officer ("SCO") found that the school district had violated the student's procedural due process rights regarding a change in placement.¹⁶² But, the SCO also found that it did not need to consider whether the student's behavior was a manifestation of his disability with a Manifestation Determination Hearing because that protection is only available when a student is disciplined, not when a student is removed as the result of a threat assessment.¹⁶³ While this case was decided at the lowest level with a SCO, it exemplifies the issue of whether threat assessment procedures are practically distinct from disciplinary procedures, despite it being commonly accepted that they are

¹⁵⁵ See 20 U.S.C. § 1415(k)(1)(C), (G).

¹⁵⁶ See Majestic et al., *supra* note 129, at 156.

¹⁵⁷ *Id.* at 168. Depending on a special education student's level of need and the resources that a school is able to provide to a student (among other factors), a student may be able to receive special education in a regular education setting, in a self-contained classroom at the student's public school, or other more specialized placements, such as therapeutic schools. See *id.* at 174.

¹⁵⁸ See § 1415(k)(1)(C), (G)(i).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* § 1415(k)(3)(A).

¹⁶¹ Decision at 1, Colo. Dep't of Educ., Jefferson Cnty. Dist. R-1 (May 28, 2015) (No. 2015:504) [hereinafter "Colo. SCO Decision"].

¹⁶² *Id.* at 3–5.

¹⁶³ *Id.*

theoretically distinct.¹⁶⁴

Such framing of threat assessment procedures could allow “[t]he threat assessment [to become] the gatekeeper to disciplinary removal, to suspensions or expulsions.”¹⁶⁵ Legal advocates have already noted that many school districts utilize threat assessments in a discriminatory nature and blatantly and arbitrarily label students as dangerous because of their disabilities.¹⁶⁶ A school board in Florida addressed this area of uncertainty head-on by specifically describing the procedural and substantive protections for students with disabilities in its threat assessment training manual so that all school personnel were aware of the IEP and Manifestation Determination requirements.¹⁶⁷ The manual goes even further to warn school staff about making referrals based on generalizations and stereotypes about students with disabilities.¹⁶⁸

Even if threat assessments do not result in a change of placement, the assessments themselves still may negatively impact a student. The implications of undergoing threat assessments for students include marks on a student’s record regarding the assessment, which can impact a student years after the assessment took place.¹⁶⁹ Stigmatization of students with emotional and behavioral disabilities can aggravate existing stereotypes about disabilities and result in further ostracization.¹⁷⁰ Simply put, “[i]n well-meaning attempts to prevent gun violence and keep students safe, districts around the country have implemented threat assessment procedures that can stigmatize whole groups of students, most notably kids with disabilities.”¹⁷¹

In cities such as Albuquerque, New Mexico, where threat assessments are a common practice in schools, students in special education were disproportionately represented in threat assessment referrals.¹⁷² Although the district stated that it does not refer students for threat assessments based on their special education-related diagnoses, these groups are nonetheless overrepresented.¹⁷³ Some threat assessment forms go so far as to expressly list certain disabilities as reasons to consider a student as threatening.¹⁷⁴ Parents and administrators agree that the disproportionality is likely because

¹⁶⁴ *See id.*

¹⁶⁵ Osher & Brown, *supra* note 36 (internal quotations omitted).

¹⁶⁶ *Id.*

¹⁶⁷ *See* SCH. BD. OF BROWARD CNTY., FLA., BEHAVIORAL THREAT ASSESSMENT (BTA) PROCEDURES MANUAL 6 (Aug. 21, 2019), https://www.browardschools.com/cms/lib/FL01803656/Centricity/Domain/13477/2019_BTA_Procedure_Manual.pdf.

¹⁶⁸ *Id.* at 15.

¹⁶⁹ *See* Swetlitz, *supra* note 14.

¹⁷⁰ Fox & Green-Rebnord, *supra* note 14; *see also* Daniel Trunk et al., *Disability Stigma on Campuses: Helping Students with Psychiatric Impairments to Succeed*, 33 J. OF POSTSECONDARY EDUC. AND DISABILITY 115, 122 (2020).

¹⁷¹ Swetlitz, *supra* note 14.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

many students who experience emotional and behavioral disabilities struggle to manage their own behavior and communicate in an appropriate, non-threatening way.¹⁷⁵ However, disagreement arises regarding whether this is a natural, but necessary consequence of threat assessments, or if it is an impermissible, yet remediable situation.¹⁷⁶

3. Section 504 and the Americans with Disabilities Act

Section 504 prohibits institutions receiving federal financial assistance from discriminating against individuals with disabilities who are otherwise qualified to receive the benefits of the federally-funded program or activity.¹⁷⁷ All individuals are covered under Section 504, regardless of age, provided that they meet eligibility requirements, which includes, among other possible criteria, having a “physical or mental impairment which substantially limits one or more of such person’s major life activities”¹⁷⁸ Unlike the IDEA, plaintiffs seeking relief under Section 504 need not exhaust administrative remedies.¹⁷⁹

The ADA prevents discrimination against students on the basis on their disabilities, requiring both public and private educational institutions to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”¹⁸⁰ The ADA and Section 504 define remaining eligibility requirements analogously, resulting in many students qualifying for protection under both statutes, thus allowing students to bring suits under both statutes simultaneously.¹⁸¹

The use of threat assessment teams in the educational setting, although a relatively new phenomenon, has become the most widespread in institutions of higher education, resulting in ADA and Section 504 litigation regarding disability discrimination.¹⁸² In the higher education setting, the OCR enforces Section 504 and Title II of the ADA.¹⁸³ Both statutes provide protection for students with disabilities in the context of threat assessments. Under the ADA, educational institutions “may impose legitimate safety requirements necessary for the safe operation of its services, programs, or

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 29 U.S.C. § 794.

¹⁷⁸ ALLAN G. OSBORNE & CHARLES J. RUSSO, SPECIAL EDUCATION AND THE LAW: A GUIDE FOR PRACTITIONERS 269 (3d ed. 2014) (quoting 29 U.S.C. § 705).

¹⁷⁹ *Id.* at 192, 196.

¹⁸⁰ 28 C.F.R. § 35.130(b)(7)(i) (2019).

¹⁸¹ OSBORNE & RUSSO, *supra* note 178, at 271, 275.

¹⁸² *See, e.g.*, H.B. 510, 127th Gen. Assemb. Reg. Sess. (Ohio 2007).

¹⁸³ Arne Duncan & Russlynn Ali, *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Sep. 2011), <https://www2.ed.gov/about/offices/list/ocr/transition.html#reproduction>.

activities,” but the school must also “ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.”¹⁸⁴

Likewise, Section 504 does not require a school to retain a student who poses “a direct threat to the health or safety of others,” but does require that when assessing a threat, the institution “must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence”¹⁸⁵ The goal of the assessment should be to determine “the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modification of policies, practices, or procedures of the provision of auxiliary aids or services will mitigate the risk.”¹⁸⁶

Because limited case law exists regarding threat assessment procedures in elementary, middle, and secondary schools, litigation from higher education settings can be utilized for comparison, albeit with recognition of the differences between the two settings that may create different concerns in the development and implementation of threat assessment procedures.¹⁸⁷ In 2002, a Northern Michigan University (“NMU”) student with Bipolar Depression filed a complaint with the OCR on the grounds that the university engaged in disability discrimination in violation of Section 504 of the ADA when it threatened to disenroll her, required her to submit to psychological assessments, and required her to sign a fairly detailed behavioral agreement that barred her from discussing her suicidal thoughts or actions with any other students.¹⁸⁸ These consequences were the result of the student telling her friends about a conversation with her doctor about suicidal ideation and depression.¹⁸⁹ The OCR found that NMU’s policies led the university to take action against students with mental health disabilities who did not pose an actual risk of serious harm and that the university’s response, in some cases, was prompted by anonymously reported concerns that did not have a factual basis.¹⁹⁰ In addition, the Department of Justice provided guidance, stating that imposing discipline on students for merely expressing that they have had thoughts of self-harm, without conducting an individualized assessment of the immediacy or legitimacy of the actual risk, is a violation of the anti-discrimination provisions of the

¹⁸⁴ § 35.130(b)(7)(h).

¹⁸⁵ *Id.* § 35.139(b).

¹⁸⁶ *Albra v. Bd. of Trs. of Miami Dade Coll.*, 296 F. Supp. 3d 181, 184 n.33 (D.D.C. 2018) (quoting U.S. DEP’T OF EDUC., OFF. OF CIV. RTS., LETTER OF RESOLUTION 6 (2016)).

¹⁸⁷ OSBORNE & RUSSO, *supra* note 178, at 283.

¹⁸⁸ SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICAN AND NORTHERN MICHIGAN UNIVERSITY UNDER THE AMERICANS WITH DISABILITIES ACT ¶ 4 (Oct. 17, 2018), https://www.ada.gov/nmu_sa.html [hereinafter “NMU SETTLEMENT AGREEMENT”].

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* ¶ 6.

ADA.¹⁹¹

Although differences exist in the nature of the relationship a school has with its students in K–12 schools as opposed to post-secondary schools, similar concerns regarding disability discrimination are faced.¹⁹² When developing threat assessments for the K–12 setting, schools can use post-secondary litigation, such as the NMU case, to anticipate potential litigation as threat assessments become more popular across the United States.¹⁹³ While Section 504 does not provide nearly the same level of procedural protections as the IDEA and relatively minimal substantive protections, school boards should nonetheless be mindful of the objectivity of the assessment process, not just in theory, but in implementation: the need for more than a mere threatening statement to qualify as a true, substantive threat, and the need for an individualized assessment, not based on generalizations or stereotypes related to a student’s diagnosis.

C. Student Records

Record-keeping procedures and the collection of information regarding threats can likewise negatively impact students with disabilities.¹⁹⁴ FERPA partially addresses these concerns by providing broad rules to protect student records exchanged as part of a threat assessment and documentation of threat assessment results.¹⁹⁵ FERPA violations, even though not actionable alone, can be brought by injured parties through the IDEA dispute resolution process.¹⁹⁶

Additionally, FERPA provides parents the right to access their children’s education records, seek to have the records amended, and have limited control over the disclosure of “personally identifiable information” contained in a student’s educational records.¹⁹⁷ When students turn eighteen years old, or enter a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student.¹⁹⁸ Although an outsider’s access to student records is limited, the Secretary of Education has advised that an educational agency or institution may disclose education records to threat assessment team members who are not employees of the district or institution if they qualify as “school officials” with “legitimate educational

¹⁹¹ *Id.* ¶ 12.

¹⁹² See OSBORNE & RUSSO, *supra* note 178, at 283.

¹⁹³ See generally NMU SETTLEMENT AGREEMENT, *supra* note 188; U.S. SECRET SERV. & U.S. DEP’T OF EDUC., *supra* note 16.

¹⁹⁴ Strauss, *supra* note 14.

¹⁹⁵ See John Van Dreal & Martin Speckmaier, *Level 2 Student Threat Assessment Team Operations*, in *ASSESSING STUDENT THREATS: A HANDBOOK FOR IMPLEMENTING THE SALEM-KEIZER SYSTEM* 94–95 (John Van Dreal ed., 2011). However, “FERPA governs only records, not observations, communications, and so on.” *Id.* at 96.

¹⁹⁶ See JAMES A. RAPP, 5 EDUCATION LAW § 13.04[3][c] (2003).

¹⁹⁷ See 20 U.S.C. § 1232g(a)(4); 34 C.F.R. § 99.3 (2019).

¹⁹⁸ RAPP, *supra* note 196, at § 13.04[3][f][i].

interests.”¹⁹⁹ To receive the education records under the “school officials” exception, members of the threat assessment team must be under the direct control of the educational agency or institution with respect to the maintenance and use of personally identifiable information from education records.²⁰⁰ Institutional officials may disclose personally identifiable information from education records when and if their threat assessment team determines that a health or safety emergency exists.²⁰¹

The “school officials exception” allows for broad discretion in school personnel’s decisions to share student records.²⁰² While discretion allows for threat assessment teams to have the flexibility to evaluate more records with the goal of making the most accurate, objective evaluation of a student’s threat, the wide discretion can also result in the oversharing of sensitive information.²⁰³ Information regarding mental health diagnoses and trauma history can easily be framed as relevant to student safety. While such information may be relevant to better understanding a student’s emotional disability, if placed in the hands of individuals who are not trained to appropriately interpret the information, the doors to disability discrimination are opened wider.

The competing interest in protecting privacy is allowing for the sharing of information about substantive threats with appropriate people when necessary.²⁰⁴ In the aftermath of the mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, the hesitancy of school personnel to share information with law enforcement was identified as a point of failure in violence prevention.²⁰⁵ Thus, the provision of latitude in information-sharing for threat assessment teams may increase the efficacy of threat assessment procedures in schools.²⁰⁶

Additional concerns arise from threat-reporting policies, prompting parents and advocacy groups to voice concerns regarding the collection of sensitive information deterring, rather than encouraging, the reporting of violent threats.²⁰⁷ Students with mental health issues or disabilities may be

¹⁹⁹ *Id.* § 13.04[4][b][iii].

²⁰⁰ *Id.* “For example, a representative from the city police who serves on a school’s threat assessment team generally could not give the police department any [personally identifiable information] from a student’s education records to which he or she was privy as a member of the team.” *Does FERPA Permit the Sharing of Education Records With Outside Law Enforcement Officials, Mental Health Officials, and Other Experts in the Community Who Serve on a School’s Threat Assessment Team?*, U.S. DEPT OF EDUC., <https://studentprivacy.ed.gov/faq/does-ferpa-permit-sharing-education-records-outside-law-enforcement-officials-mental-health> (last visited Apr. 29, 2021).

²⁰¹ RAPP, *supra* note 196, at § 13.04[8][a][iii].

²⁰² Megan M. Davoren, Note, *Communication as Prevention to Tragedy: FERPA in a Society of School Violence*, 1 ST. LOUIS U. J. HEALTH L. & POL’Y 425, 428–29 (2008).

²⁰³ See RAPP, *supra* note 196, at § 13.04[8][b][i]–[ii].

²⁰⁴ See, e.g., Davoren, *supra* note 202, at 442; Strauss, *supra* note 14.

²⁰⁵ Osher & Brown, *supra* note 36.

²⁰⁶ See *id.*

²⁰⁷ Strauss, *supra* note 14.

hesitant to report violence directed towards them for fear of being flagged themselves due to the nature of their social-emotional struggles.²⁰⁸ Moreover, students in K–12 schools may be less likely to report threats of violence, fearing social stigmatization and ostracization by peers due, in part, to the unique social development of children.²⁰⁹ These students may also struggle with problem-solving, impulse control, self-perception, and environmental perception, possibly resulting in further reporting inaccuracies, although these differences can be quickly resolved through the appropriate implementation of threat assessments first as a triage mechanism.²¹⁰ Reporting systems involving an anonymous tip line are meant to encourage reporting but may also lead to the reporting of unreliable threats that lack factual support due to the ease of reporting and ability for callers to remain anonymous.²¹¹

A secondary issue implicating FERPA likely arises regarding the data collection and storage of information that is acquired through both anonymous tip lines and completed threat assessments, which may “create new disciplinary or law-enforcement records with no time limit or opportunity to purge those records.”²¹² Further, assessments can impact others beyond the individual student in areas outside of education, such as family immigration status, child custody, public benefits, and department of family services for parents, siblings and other family members.²¹³

D. Civil Rights Claims

Although threat assessment referral practices are typically facially neutral, they can have a disparate impact on students with disabilities, which can potentially violate disability law.²¹⁴ The disparate impact claim represents an important legal tool that can be utilized to address policies and practices that are not *intended* to discriminate against individuals with disabilities but, in reality, have a discriminatory impact.²¹⁵ Although primarily utilized in the employment setting, the Supreme Court has held that disparate impact analysis also can be used to challenge disability discrimination where a neutral policy has the effect of denying individuals with disabilities meaningful access to a state benefit.²¹⁶

Data patterns for school suspensions suggest that disciplinary policies

²⁰⁸ *See id.*

²⁰⁹ *See* Nekvasil & Cornell, *supra* note 63, at 99.

²¹⁰ *Id.* at 99–100.

²¹¹ Rollin, *supra* note 14.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *See* Daggett, *supra* note 104, at 219.

²¹⁵ RUTH COLKER & PAUL D. GROSSMAN, *THE LAW OF DISABILITY DISCRIMINATION FOR HIGHER EDUCATION PROFESSIONALS 1* (2014).

²¹⁶ *Alexander v. Choate*, 469 U.S. 287, 309 (1985); *see generally* COLKER & GROSSMAN, *supra* note 215.

disparately impact students with disabilities.²¹⁷ Several studies have shown students with disabilities are disproportionately represented in suspension; the majority of suspension-related behaviors are generally nonviolent; and the nature of the suspension-related behaviors of students with disabilities is not fundamentally different than the behaviors of non-disabled peers.²¹⁸ While it is unlikely that a student would successfully bring a claim under the oft-utilized Civil Rights Act of 1981, it remains a possibility for school board liability.²¹⁹

IV. POLICY RECOMMENDATIONS

Threat assessments have become increasingly popular as “the chicken soup of school shootings”²²⁰ However, they are far more complex than the expression indicates. The practical and legal implications of threat assessments for students with disabilities do not necessitate their eradication, rather, their development must be approached with care and caution.²²¹ Prevention of disability discrimination and other legal problems requires not only legal solutions but practical, disability-informed solutions. This requires marrying the principles of psychology, human behavior, and the law.

First, discrimination can be prevented early in the threat assessment procedure development phase by providing better guidance regarding the difference between “characteristics” and “traits” in threat assessment policies to prevent reporting of students based solely on stereotypes and non-factual information. Education about the nature of targeted and impulsive violence and the nature of emotional and developmental disabilities is also critical. Once procedures are developed, school boards should create and implement proper training of school personnel and members of the threat assessment team. In addition, the inclusion of a variety of professionals like school administrators, teachers, and counselors, each with their own unique interests and perspectives, is likely to create a more effective team.²²²

Second, the participation of parents and students throughout the threat assessment process should not be overlooked, as these are the individuals most intimately involved with and affected by threats of violence. Parental

²¹⁷ Leone & Mayer, *supra* note 147, at 149.

²¹⁸ *Id.*

²¹⁹ *Macias v. Sch. Dist. of Allentown*, No. 5:15-cv-3730, 2016 U.S. Dist. LEXIS 40901, at *4–5 (E.D. Pa. Mar. 29, 2016) (quoting *Frazer v. Temple Univ.* 25 F. Supp. 3d 598, 609 (E.D. Pa. 2014) (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196–97 (1989)) (“[S]uch a duty arises only where the state actor takes a person into its custody without consent, and by virtue of this custody, limits the individual's freedom to act. A ‘special relationship’ exists only in the limited circumstances where the state has taken a person into custody or otherwise prevented that person from helping him/herself.”).

²²⁰ Rollin, *supra* note 14.

²²¹ *Id.*

²²² *Watkins & Hooks, supra* note 10, at 699 (“Violence-prevention plans are most effective when designed by a diverse group of people from the school and the surrounding community.”).

support of school policies is helpful for the longevity of threat assessment policies and their efficacy. For example, parents understanding assessments as rehabilitative and safety-focused, as opposed to punitive and discriminatory, makes it more likely that they will be cooperative throughout the process. For similar reasons, students themselves should be informed of the legal basics of threat assessments.

It is likewise important that the policies are understood and accepted by the community.²²³ Individual, group, and community education should not only include education about threat assessment policies and procedures but should also information about legal requirements for school boards and rights of students and parents, which are often misunderstood on both sides. School boards seeking to limit liability while protecting the safety interests of the general student body is only natural. However, such goals can come as a cost to the needs and interests of certain student populations, especially those students with disabilities. An informed community could prevent acquiescence to systemic discrimination against students with disabilities and dispel myths of violence associated with students, thereby preventing decision-making based on fear and providing the opportunity for the community to hold a school district accountable.

Third, mental health should be a central focus of threat assessment procedures with the mandatory inclusion of mental health professionals in threat assessment teams. Meaningful connection to and development of mental health resources in conjunction with threat assessment legislation must be pursued, as threat assessments can only be effective if the threat is actually addressed through the provision of resources and services for troubled students. The separation of threat assessment procedures from disciplinary procedures could further prevent discriminatory treatment of students with disabilities by framing threat assessments and subsequent recommendations as rehabilitative, mental-health-informed intervention as opposed to punishment.²²⁴

Lastly, geographical and cultural difference must be acknowledged instead of ignored. In Ohio, the unique characteristics of urban versus rural populations must be considered, as mental health programming is less popular in rural districts, and hardening measures are more accepted in urban districts.²²⁵ Research has demonstrated that most teachers will engage a student in conversation when they sense that a student is isolating themselves.²²⁶ However, high school teachers and teachers from smaller

²²³ *Id.* at 699–700.

²²⁴ See MOLLY M. SPEARMAN, STATE OF S.C. DEP'T OF EDUC., SCHOOL-BASED BEHAVIORAL THREAT ASSESSMENT & MANAGEMENT: BEST PRACTICES GUIDE FOR SOUTH CAROLINA K–12 SCHOOLS 2 (May 8, 2020), <https://ed.sc.gov/districts-schools/school-safety/resources-and-training/safety-resources/sc-school-based-threat-assessment-guide/>.

²²⁵ Safety & SEL, *supra* note 32, at 21, 23.

²²⁶ *Id.* at 28.

districts are least likely to do so.²²⁷ Teachers from smaller districts and rural districts are less likely to make contact with families and instead rely on referrals when they sense a student is experiencing mental health issues.²²⁸ Understanding cultural differences will allow school boards to identify areas where additional education is needed or where more oversight of threat assessment procedures may be necessary.

V. CONCLUSION

By adopting threat assessment procedures for the K–12 setting, school boards can keep students safe and prevent discrimination against minority groups, such as students with disabilities, by developing clear, objective methods for evaluating whether a student poses a substantive threat.²²⁹ While threat assessments have been shown to be a helpful tool in addressing targeted violence, their development must include consideration of ill effects for students with disabilities and the potential for litigation based on disability discrimination. Protecting students posing a threat to the safety of non-violent students is unlikely to be the rallying cry of the public when the next mass shooting occurs, and it is revealed that the individual exhibited “warning signs” throughout their educational career. However, putting in extra effort to examine the impact of threat assessments on students with disabilities is not meant to garner sympathy for those who struggle to function intellectually, physically, or emotionally in the school setting; rather, it is meant to create a more effective system of identifying and responding to threats. Despite the heated arguments that inevitably ensue after the latest incident of mass violence, both proponents of student safety and advocates for disability rights can find common ground in the creation of effective, objective, and responsible methods for keeping all students safe, including students with disabilities.

²²⁷ *Id.* at 29, 32.

²²⁸ *Id.* at 38.

²²⁹ See VA. DEP’T OF CRIM. JUST. SERVS., *supra* note 144, at 26–28.