CORRESPONDENCE/MEMORANDUM **DEPARTMENT OF JUSTICE**

Date: October 24, 2008

To: Russ Whitesel
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From: Kevin St. John
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Subject: Possible Statutory Language to Implement Recommendations of Attorney General J.B. Van Hollen to Make Schools Safer By Facilitating Information Sharing

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MEMORANDUM

On September 9, 2008, Wisconsin Attorney General J.B. Van Hollen presented testimony to the Legislative Council Special Committee on School Safety. The Attorney General's testimony focused on facilitating information sharing within schools and between schools and the criminal justice community as a virtually no-cost way to enhance school safety.

The Special Committee has a copy of the Attorney General Van Hollen's prepared testimony, and this memorandum is not intended to duplicate those remarks. Instead, this memorandum is to be read in combination with the Attorney General Van Hollen's testimony and is being offered at your invitation to propose particular statutory language to the Special Committee and Special Committee staff for your deliberations.

This memorandum tracks Attorney General Van Hollen's eight specific recommendations appearing at pages 5-7 of his testimony.

Please feel free to contact me to discuss any of these recommendations.

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(1) ***Repeal Wis. Stat. § 118.128 in its entirety***

Comment: The purpose of repealing Section 118.128 is to encourage information sharing within school districts by removing unnecessary barriers to information sharing. Current law has the effect of limiting information that can be shared within school districts about a pupil's potential to harm others in the school community. By requiring "reasonable cause" to believe that a student will harm others, based solely on past behavior, school districts are largely prevented from disseminating to teachers and employees skilled in risk assessment information about students that may place students and others in the school community at risk.

Notably, state pupil records law already provides certified teachers and other employees the right to access pupil *records* for school safety purposes. *See* Wis. Stat. § 118.125(2)(d). Repealing Section 118.128 extends that concept to other information. Further, funneling information about safety risks to a person or group of persons skilled in risk assessment is a highly recommended school safety tool. *See, e.g.,* National Association of Attorneys General Task Force On Campus and School Safety, "Reports and Recommendations," p. 2-4 (Sept. 2007) (available at http://www.doj.state.wi.us/news/files/NAAGSchoolSafetyReport.pdf).

Repeal would leave to the school district with the discretion to disseminate to the school district employees all information the school district believe relates to the harm a pupil may present to others. When information is shared, school personnel can better assess risk and the educational needs of both the student presenting a risk of harm to others and other children. With Section 118.128 repealed, school districts may want to adopt policies that encourage the reporting of information relating to harm posed by a pupil to others (and the Committee may wish to consider statutory language that would encourage the development of such policies).

(2) ***Simply Mechanisms For Sharing Pupil Records With Law Enforcement; require sharing of records to law enforcement and prosecutors concerning juvenile justice investigations and pre-adjudication juvenile proceedings***

Possible statutory amendment: Amend Wis. Stat. § 118.125(n)

118.125(n) For ~~the~~ any purpose concerning the juvenile justice system and the system's ability to effectively serve a pupil, prior to the filing or adjudication of any petition: ~~of providing services to a pupil before adjudication,~~

(1) a school board may disclose pupil records to a ~~law enforcement agency, district attorney,~~ city attorney, corporation counsel, agency, as defined in s. 938.78 (1), intake worker under s. 48.067 or 938.067, court of record, municipal court, private school, or another school board if disclosure is pursuant to an interagency agreement and the person to whom the records are disclosed certifies in writing that the records will not be disclosed to any other person except as ~~as permitted under this subsection~~otherwise authorized by law;

(2) a school board shall disclose pupil records to an investigating law enforcement agency or district attorney if the person to whom the records are disclosed certifies in writing that the records are for juvenile justice purposes, relate to an ongoing investigation or pending delinquency petition, and will not be disclosed to any other person except as otherwise authorized by law.

Comment: The purpose of the amendment is to require school districts to share records with law enforcement and district attorneys when those law enforcement entities are investigating or pursuing a juvenile justice matter. The current statutory structure is cumbersome, requiring Memorandum's of Understanding to be developed with every law enforcement agency. Multiple

agencies may have jurisdiction within a given school district, and individual MOU's may be impractical. Further, current statutory structure enables school districts to withhold information from law enforcement that may be vital to determining the proper adjudication of a juvenile justice matter, including whether a petition should be brought at all. Attorney General Van Hollen believes that law should facilitate getting all relevant information to law enforcement decisionmakers *before* they make charging and other decisions relevant to juvenile justice.

Note: The Attorney General was primarily concerned with information sharing with law enforcement and prosecutors, and understands their needs for having access to information during an investigation and prior to an adjudication, and the suggested language is narrowly tailored to that concern. However, the Department of Justice does not object to expanding the list of mandatory recipients to include the other categories of requesters identified in Section 118.125(n).

(3) ***School Liaison officers should be defined as "school officials" for the purpose of record-sharing***

Possible statutory amendment: Amend Wis. Stat. § 118.125(d)

118.125(d) Pupil records shall be made available to persons employed by the school district which the pupil attends who are required by the department under s. 115.28 (7) to hold a license, ~~and~~ other school district officials who have been determined by the school board to have legitimate educational interests, including safety interests, in the pupil records, and police school liaison officers working in the school district. Law enforcement officers' records obtained under s. 938.396 (1) (c) 3. shall be made available as provided in s. 118.127 (2). A school board member or an employee of a school district may not be held personally liable for any damages caused by the nondisclosure of any information specified in this paragraph unless the member or employee acted with actual malice in failing to disclose the information. A school district may not be held liable for any damages caused by the nondisclosure of any information specified in this paragraph unless the school district or its agent acted with gross negligence or with reckless, wanton, or intentional misconduct in failing to disclose the information.

Comment: Attorney General Van Hollen believes that police school liaison officers serve a valuable role in keeping schools safe and should be permitted the same access to records as teachers. The term "police school liaison officer" is intended to encompass officers employed by law enforcement agencies who, through agreements with school districts, are assigned to schools. *See* Wisconsin Department of Justice, "Safe Schools: Legal Resource Manual," p. 27 (Oct. 2007).

(4) ***Fourth, conform the state definition of directory data to federal law of "directory information***

Possible statutory amendment: Amend Wis. Stat. § 118.125(1)(b) to match 34 C.F.R. § 99.3.

118.125(1)(b) "Directory data" means those pupil records that would not generally be construed harmful or an invasion of privacy if disclosed. It ~~which~~ includes, but is not limited to, the pupil's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, photographs, degrees and awards received and the name of the school most recently previously attended by the pupil.

Comment: The purpose change is to encourage information sharing by making the current list of documents identified as "directory data" to be illustrative of a principle rather than an exhaustive list. The general principle is taken directly from federal regulations: the only records subject to confidential treatment are those that would generally be considered harmful or an invasion of privacy if disclosed. The state's list currently codified at 118.125(1)(b) and the federal list currently codified at 34 C.F.R. § 99.3 track one another but have slight differences. Significantly, "directory data" which is identified by type may be shared if there is constructive consent pursuant to Wis. Stat. § 118.125(2)(j).

Note: The proposed amendment does not alter the list itself to mimic the federal list. Attorney General Van Hollen does not recommend altering the list. His rationale is that by taking items off the list that are not duplicated in the federal list (such as photographs (which might appear in a yearbook)), there is a potential that a court could interpret the revision to *exclude* the item from the definition of directory data.

(5) ***Schools should be required to report crimes occurring on campus***

Comment: Attorney General Van Hollen proposed in his testimony that schools report to law enforcement crimes of violence or acts that constitute a felony when there are reasonable grounds to believe that a felony has occurred or will occur on school grounds. The Attorney General's testimony cited Texas's mandatory reporting requirement as a possible blueprint. *See* Tex. Educ. Code Ann. § 37.015. The Attorney General's office does not have statutory text at this time, but suggests that, as a starting point for deliberations, the committee consider language involving the following elements:

- Who should report? The Attorney General's office suggests placing this responsibility on the principal of *each* public and private K-12 school and all other persons designated by the school district. Alternatives include (1) all school district employees; (2) a subset of school district employees; (3) principal *or* designee.
- To whom must the report be made? Law enforcement in the jurisdiction in which the school is located.
- What is the criteria for reporting? Reasonable grounds to believe that a crime has occurred or will occur in school, on school property, or at a school-sponsored event, whether or not the crime has been committed by student or employees of the school district. The committee should consider adding mandatory notification where the principal or designee has reason to believe that a student is a victim of a crime that has occurred or will occur, whether or not that crime occurs in school, on school property, or at a school-sponsored event.

- What is a "crime" that must be reported? The Attorney General's testimony suggested all felonies. Texas's statute contains a long listing of serious crimes. Should the committee wish to enumerate crimes, the Attorney General's Office would appreciate the opportunity to help develop a list of crimes. The Department of Justice is primarily concerned with the reporting of crime involving serious injury or weapon use, sexual assault, child enticement/solicitation, drug crimes, gang-related crime, and terroristic threats.
- ***Other potential considerations:***
  - Limit civil liability of reporter for good-faith reporting.
  - Affirmatively state that notification is not required if principal has reasonable belief that crime has not occurred.
  - State minimal elements of what must be reported: e.g., name and address of persons involved (if known), statement of facts giving rise to reasonable belief that a crime has been committed.
  - Allow some discretion at the school district level to develop policies to report crimes around factors noted above.

(6) Schools should get notification of legal proceedings when a student is tried as an adult

Note: The Department of Justice has not drafted particular language at this time, but the concept is to take the mandatory notifications required under Wis. Stat. § 938.396(2g)(m). and have them occur when a K-12 student is being tried in the criminal justice system, so school districts receive notification when charges are filed against a student and the disposition of those charges. The Department believes these obligations would most efficiently be undertaken by victim/witness coordinators, who could be assigned the responsibility by district attorneys if Wis. Stat. § 950.08(2r) were amended. DOJ believes that, at a minimum, information to schools include notification of the filing of any charges and notification of the dismissal or adjudication of those charges.

(7) ***Repeal Wis. Stat. § 118.127(1)***

Comment: The intent of repealing Wis. Stat. § 118.127(1) would be to encourage law enforcement to share information with schools in situations where law enforcement might withhold information out of concern that student- and guardian-notification could undermine an active investigation. This is achieved by repealing *mandatory* notification. The intent is not to prevent school districts notifying students and parents when appropriate.

(8) ***Section 118.125 should include a statement of purpose that it is not intended to be an obstacle to school safety and encourage information sharing***

Possible statutory amendment: Amend 118.125(2)

118.125(2) ~~**Confidentiality**~~**Disclosure of Pupil records.** All pupil records maintained by a public school shall be confidential, except as provided in pars. (a) to (p) and sub. (2m). The school board ~~shall~~ may adopt regulations to maintain the confidentiality of such records and may

adopt regulations to promote the disclosure of record-sharing permitted by law for purposes of school safety.

Comment: An additional statement of purpose stating that Section 118.125 is not intended to be an obstacle to school safety may also be desirable. Representatives of the Wisconsin Association of School Boards recommended to DOJ representatives that the term "policies" be used instead of "regulations." The Department of Justice does not object to using "policies" instead of "regulations," but believes the terminology should be consistent with respect to confidentiality rules and disclosure rules.