WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 3

TO: MEMBERS OF THE SPECIAL COMMITTEE ON SCHOOL SAFETY

FROM: Russ Whitesel, Senior Staff Attorney and Melissa Schmidt, Staff Attorney

RE: Information Sharing

DATE: November 5, 2008

This Memo is prepared for the Joint Legislative Council's Special Committee on School Safety, created by the Legislative Council. The Memo discusses possible changes to state statutes relating to information sharing between schools and law enforcement personnel. The committee has received testimony and documents on the issue from numerous sources, most notably from Wisconsin Attorney General J.B. Van Hollen in his testimony before the committee on September 9, 2008, and in a memorandum dated October 24, 2008, and included as **Enclosure 1** with this Memo. In addition, Tony Evers, Deputy State Superintendent, Department of Public Instruction (DPI) testified that the department generally supports removing barriers to information sharing by schools, but unlike the Attorney General, he did not make any specific recommendations for statutory changes.

The Memo is organized according to specifically proposed language changes in the statutes suggested by the Attorney General. Each change is presented separately with the text of the current statute and the change suggested in most cases by the Attorney General in his testimony or subsequent memorandum. Due to its length, the primary pupil records statute, s. 118.125, Stats., is included as **Enclosure 2** for the Special Committee's reference, instead. In each section, there is a brief discussion of the issues or concerns that may relate to such a change along with a set of possible options with regard to the changes for the committee to consider.

The options are not intended to be the exclusive list of possibilities; they are intended to serve as a general framework for committee discussion.

In each section, the Memo also includes an indication of the positions or concerns of the Wisconsin Association of School Boards (WASB). [See WASB memorandum, dated October 28, 2008, included as **Enclosure 3** of this Memo.]

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It should be noted that the committee discussed some of the general privacy concerns in the educational context as well as safety concerns at the October 7, 2008 meeting. Each of the proposals relates to additional information sharing regarding pupils and as such, involves the balancing of privacy and safety considerations by the committee.

A. Repeal Section 118.128, Stats., Relating to Providing Pupil Information Relating to Pupil Harm to Others

Background

The Attorney General proposes that s. 118.128 be repealed. In his testimony, the Attorney General argued that this repeal would remove an ambiguity and enable teachers and safety officials to have full information to serve kids and protect all students and teachers.

Section 118.128 Stats., provides as follows:

> **118.128 Information related to pupil harm to others.** If a school district determines, based on evidence that a pupil engaged in behavior that seriously physically harmed another individual within the previous 12 months or that a pupil has engaged in a pattern of behavior causing serious physical harm to another individual, that there is reasonable cause to believe that the pupil may engage in behavior at school or while under the supervision of a school authority that is physically harmful to another individual, the school district may provide information concerning the pupil's physically harmful behavior to the pupil's teachers and to any other school district official who has a legitimate educational or safety interest in the information. The information provided under this section shall be limited to information reasonably necessary to meet the educational needs of the pupil and the safety needs of other pupils and school personnel. A teacher or other school district official may not disclose information provided to him or her under this section to any other person.

Section 118.125 (2) (d), Stats., requires all pupil records to be made available to teachers and other designated school officials who have legitimate educational interests, including safety interests. However, s. 118.128 implies that school districts may ***not*** share ***information*** that a student is a physical risk to others with teachers and law enforcement units within schools, unless the school district has "reasonable cause" to believe, based only on past acts, that the student presents a risk of physically harming others.

The Attorney General argues that: "Repeal would leave the school district with the discretion to disseminate to the school district employees all information the school district believes 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)."[1]

WASB supports repealing this section.

Options

1. Repeal the section.

2. Amend the section to allow for the sharing of information for specified school officials but delete the language regarding the "reasonable cause" limitation on the sharing of information.

3. Make no recommendations for changes in the statute.

B. Simplify Mechanisms for Sharing Pupil Records With Law Enforcement

Background

The Attorney General pointed out in his testimony that federal law permits the disclosure of a student's education records for juvenile justice purposes prior to any adjudication concerning the student. He noted that under state law, these disclosures take a variety of forms. Judges, for example, are entitled to progress reports when requested, such as transcripts and attendance records. Law enforcement and fire investigators are entitled to specific attendance records upon request (see s. 118.125 (2) (ch), Stats.). Courts can further order any pupil record to be provided to investigating law enforcement personnel and school districts must comply. Moreover, state law permits, but does not require, school districts to make any record available to any public officer. Further, state law specifically permits school districts to enter into an agreement with law enforcement officials to share pupil records related to juvenile justice purposes. The Attorney General has proposed that a simpler, more effective information sharing mechanism would require the release of pupil records to law enforcement agencies who make requests and certify that it is for juvenile justice purposes. His proposed language amending s. 118.125 (n) would read as follows:

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

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[1] Attorney General memorandum, October 24, 2008, p. 2.

be disclosed to any other person except as ~~permitted under this subsection~~ otherwise authorized by law;

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(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.

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WASB indicated that they may be able to support the proposal with the following clarifications:

- How would a law enforcement agency "certify" that the records are to be used for juvenile justice purposes?
- Would the requirement to release pupil records also apply to students 18 years of age and older for law enforcement purposes?
- Because this recommendation would remove school officials' discretion in sharing pupil records, the WASB believes it would be appropriate to remove school officials from any liability for pupil records released to law enforcement agencies upon their request.

Options

1. Adopt the amended statutes (as set out above) proposed by the Attorney General.
2. Consider making changes to incorporate some or all of the clarifications noted by WASB relating to information sharing.
3. Consider whether the new provision should apply only to the pupil's attendance record (similar to the fire inspector provision noted above) or whether it should be drafted to include all pupil records relating to a student.
4. Clarify whether the disclosure would apply only to a specific, named student, or could apply to group of students.
5. Retain current law without the change in information sharing.

C. Clarify s. 118.125 (2) (d), Relating to Providing Information to any "Public Officer"

The Attorney General suggested amending the statutes to allow school boards to provide information to police school liaison officers. Sections 118.125 (2) (g) 1. and (2) (d), Stats., were discussed by the Attorney General in his testimony before the committee. Section 118.125 (2) (g) 1., Stats., provides as follows:

> **118.125 (2)** (g) 1. The school board may provide any public officer with any information required to be maintained under chs. 115 to 121.

> 2. Upon request by the department, the school board shall provide the department with any information contained in a pupil record that relates to an audit or evaluation of a federal or state-supported program or that is required to determine compliance with requirements under chs. 115 to 121.The department shall keep confidential all pupil records provided to the department by a school board.

The Attorney General pointed out that the statute does not specify whether a school liaison officer is a "public officer" for purposes of this section. He advocated that the law should specify that school liaison officers are "public officers" with respect to this section, and therefore permit them access to any records teachers can access. To accomplish this result, the Attorney General has proposed amending s. 118.125 (2) (d) as follows:

> **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, 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.

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It should be noted that in the Attorney General's proposal, there is no definition of who would be considered a "police school liaison officer."

WASB has indicated that they support this proposal.

Options

1. Approve the proposal by expanding the access to information under this section to include a "police school liaison officer," without defining the term.

2. Allow the information to be shared with the police school liaison officer but define the term for purposes of the statutory section.

3. Allow information to be shared with school liaison officers who are specifically designated by the school board to receive the information and provide that there be some safeguards as to the disclosure of such information to other entities.

4. In addition to requiring designation and limiting additional disclosures, the authority could be limited by a time certain, such as one year or one school year.

5. Leave the statute as is and make no modification in current law.

D. MODIFY THE STATE DEFINITION OF "DIRECTORY DATA" TO CONFORM TO FEDERAL LAW UNDER THE FAMILY EDUCATION RIGHTS AND PRIVACY ACT (FERPA)

Background

The Attorney General advocated modifying the state statute relating to directory information found in s. 118.125, Stats., and to conform to the FERPA definition of the same term on the federal level. The state law defines "directory data" in s. 118.125 (1) (b), Stats., to mean those pupil records that include 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 in the name of the school most recently and previously attended by the pupil.

Federal law specifically defines "directory data" as any information "that would not generally be considered harmful or an invasion of privacy if disclosed" and then provides a nonexclusive list of category types. The Attorney General suggests that conforming state law to federal law would mean that there would not be different standards based on different laws and that schools could use one set of standards for determining whether to release such information. He also suggests that the law should not attempt to treat confidential things for which there is no reasonable expectation of privacy.

The Attorney General proposes amending the statutes as follows:

> **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.

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The Attorney General states that the purpose of the 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. s. 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 s. 118.125 (2) (j), Stats.[2]

The Attorney General noted that 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 stated 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."[3]

WASB indicated that it supports the proposed change. However, WASB also suggested that the public records statute [subch. II, ch. 19] s. 19.21, Stats., should be amended to assure that all directory data is not required to be disclosed to any person that may be looking for lists of pupils. WASB did not suggest any specific language to make this change.

Options

1. Adopt the language proposed by the Attorney General as a replacement for the current state definition of "directory information."

2. Amend the public records law to implement the WASB concerns.

3. Retain current law.

E. Require Mandatory Reports of Criminal Activities by Schools

Background

The Attorney General suggested that the committee consider a mandatory reporting requirement to law enforcement officials of criminal activities occurring on school grounds. He pointed out that this is not currently required in Wisconsin. He cited Texas law as an example of how this reporting could be done. In Texas, the principal of a private or public school has a legal duty to notify law enforcement if there are reasonable grounds to believe that criminal activities are taking place or have taken place in school. The principal in Texas is also required to notify teachers having regular contact with the pupils in question. The Attorney General noted that currently Wisconsin school officials and teachers must report cases of abuse and neglect to authorities when there is reasonable cause to believe that it has occurred or has been threatened. The Attorney General suggested that schools be required to report crimes of violence or acts that constitute a felony to law enforcement agencies when there are reasonable grounds to believe the crime has occurred or will occur on school grounds. He suggested that this could possibly be expanded to cases where the victim of the crime is a student, whether or not the crime occurs at school.

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[2] Attorney General memorandum, dated October 24, 2008, p. 4.

[3] Attorney General memorandum, dated October 24, 2008, p. 4.

The Attorney General provided no specific language to implement this but suggested that the scope of such a provision could be set by the committee. Through questions he posed for the committee's review, the Attorney General suggested the committee could consider are the following:

- 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; or (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 students 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 (DOJ) is primarily concerned with the reporting of crimes involving serious injury or weapon use, sexual assault, child enticement/solicitation, drug crimes, gang-related crime, and terroristic threats.

The Attorney General also suggested other potential considerations:

- Limiting civil liability of reporter for good-faith reporting.

- Affirmatively stating that notification is not required if principal has reasonable belief that crime has not occurred.

- Stating 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. [4]

WASB has indicated possible support for a proposal, but raised several issues. Specifically, they have raised the following concerns:

- How would all school district employees be trained to identify crimes of violence or acts that constitute a felony to ensure they were reporting incidents accurately?

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[4] Attorney General memorandum, dated October 24, 2008, pp. 4 and 5.

- How would all school employees be trained to predict when a crime of violence or act that constitutes a felony will occur on school grounds?

- What would be the liability for school districts and its employees if an incident did occur and it was not reported to law enforcement ahead of time?

- How much time would a school district and its employees have to report an incident or predicted incident?

- What would be the liability of a school district and its employees for incidents that occurred on school grounds, but when school was not in session?

- What would be the liability of a school district and its employees for incidents which occurred on school district property, but not on school grounds, or when students were attending a school-sponsored event held off school district grounds?

- Would school district employees have the discretion to discipline students based on the unique circumstances of an incident without involving law enforcement?

- Would this requirement create unintended negative consequences by potentially bringing children into the law enforcement and juvenile justice systems at an earlier age rather than addressing some incidents solely through a school district's disciplinary process?[5]

Options

1. Have staff prepare a draft incorporating the Special Committee's responses and directives regarding the above questions and concerns for review by the Special Committee.

2. Have staff prepare a draft to allow individual school districts to adopt specific mandatory reporting policies.

3. Make no changes in the statute.

F. Require Notification of Legal Proceeding When Student is Tried as an Adult

Attorney General Van Hollen noted that state law permits law enforcement in the juvenile justice system to keep schools informed of their activities. For example, courts must notify schools whenever a delinquency petition is filed where the delinquent act would have been a felony if committed by an adult [See s. 938.396 (2g) (m) 1.] He noted that when a student of the school district is either a juvenile tried as an adult, or the student is 17 years or older, there is no mandatory notification to the school regarding the criminal charges and verdicts. He suggested that schools should be informed of charges filed against their students and the resolution of the case and suggested that prosecutors or victim/witness

[5] WASB memorandum, dated October 28, 2008, p. 2.

coordinators would likely be the place to put this reporting responsibility. The Attorney General did not propose any specific language to implement this requirement but it would appear that it would necessitate creating reporting requirements within the adult court statutes. DOJ has suggested that these obligations could be undertaken most efficiently by victim/witness coordinators, and could be assigned the responsibility by district attorneys if s. 950.08 (2r), Stats., 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.

WASB has indicated they support this recommendation.

Options

1. Have staff prepare a draft for the Special Committee's review directing notification of schools of actions relating to juveniles tried as adults.

2. Make no change in statutes.

G. Repeal the Requirement that Schools Notify Students and Guardians When They Receive Information From Law Enforcement

Section 118.127 (1), Stats., requires a school district administrator or private school administrator who receives information regarding a law enforcement action notify any people named in the information and the parent or guardian of any minor pupil named in the information of that information. Section 118.127 reads as follows:

> **118.127 Law enforcement agency information. (1)** Upon receipt of information from a law enforcement agency under s. 48.396 (1) or 938.396 (1) (b) 2. or (c) 3., the school district administrator or private school administrator who receives the information shall notify any pupil named in the information, and the parent or guardian of any minor pupil named in the information, of the information.
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> **(2)** A school district or private school may disclose information from law enforcement officers' records obtained under s. 938.396 (1) (c) 3. only to persons employed by the school district who are required by the department under s. 115.28 (7) to hold a license, to persons employed by the private school as teachers, and to other school district or private school officials who have been determined by the school board or governing body of the private school to have legitimate educational interests, including safety interests, in that information. In addition, if that information relates to a pupil of the school district or private school, the school district or private school may also disclose that information to those employees of the school district or private school who have been designated by the school board or governing body of the private school to receive that information for the purpose of providing treatment programs for pupils enrolled in the school district or private school. A school district may not use law enforcement officers' records obtained under s.

> 938.396 (1) (c) 3. as the sole basis for expelling or suspending a pupil or as the sole basis for taking any other disciplinary action, including action under the school district's athletic code, against a pupil.

The Attorney General recommended that this mandatory disclosure in s. 118.127 (1), Stats., should be repealed because it may deter the sharing of information with the schools. He is not recommending repeal of s. 118.127 (2), Stats., which is shown here only for reference. He suggested that for safety and investigative purposes law enforcement may not want the student to know which claims are being investigated in order to protect public safety as well as individual safety. The Attorney General has stated that the intent of repealing s. 118.127 (1), Stats., 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.

According to the Attorney General, this is achieved by repealing mandatory notification. The intent is not to prevent school districts notifying students and parents when appropriate.[6]

WASB has indicated that it supports repeal of this section.

Options

1. Repeal s. 118.127 (1).
2. Retain s. 118.127 (1), but make disclosure permissive, not mandatory. Some consideration may need to be given to specifying the appropriate reasons for not disclosing information.
3. Make no changes in statute.

H. Include a Statement Within s. 118.125 Regarding Disclosure of Records for School Safety

Background

This provision proposed by the Attorney General in his testimony was characterized as a further expansion of the purpose of the pupil records law. The Attorney General suggested amending s. 118.125 (2) as follows:

> **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

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[6] Attorney General memorandum, dated October 24, 2008, p. 5.

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

The proposed language permits (but does not require) school boards to adopt regulations to maintain the confidentiality records and also permits (but does not require) school boards to adopt regulations designed to promote the disclosure of record-sharing permitted by law for school safety. It should be noted that such a statement would conflict with provisions in other statutory sections that are intended to be for the protection of privacy rights.

The Attorney General suggested that: "an additional statement of purpose stating that s. 118.125, Stats., is not intended to be an obstacle to school safety may also be desirable. Representatives of WASB recommended to DOJ representatives that the term "policies" be used instead of "regulations" in the draft language. The DOJ does not object to using "policies" instead of "regulations," but believes the terminology should be consistent with respect to confidentiality rules and disclosure rules."[7]

WASB has indicated its support for the proposal as drafted.

Options

1. Adopt Attorney General's proposal as drafted.

2. Make no changes in statute.

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Enclosures

[7] Attorney General memorandum, dated October 24, 2008, p. 6.