School Related Issues Pertaining to Juvenile Delinquency and Persons in Need of Supervision Prosecutions

Victor A. Civitillo, Esq.
Linda D. Fakhoury, Esq.

SCHOOL RELATED LAW ISSUES PERTAINING TO JUVENILE DELINQUENCY AND PINS PROSECUTIONS

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Dutchess County Department of Law

Victor A. Civitillo-Senior Assistant County Attorney

Linda D. Fakhoury-Senior Assistant County Attorney

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PART 1:
ISSUES IN JUVENILE DELINQUENCY CASES

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School Interrogation/Huntley Issues

A. Definition of Custody – Custody occurs when a reasonable juvenile, innocent of any crime, would have believed he or she was not free to leave. *Matter of Kwok T.*, 43 NY2d 213 (1977). See also *Matter of Jemar J.*, 307 AD2d 929 (2d Dept. 2003), *lv. den.* 1 NY3d 506 (2004)

B. Mere presence of police during principal's interview with suspect at school does not necessarily indicate custody:

1. *Matter of Angel S.*, 302 AD2d 303 (1st Dept. 2003).

   - Presence of fire marshalls (who constitute police officers in NYC) who did not participate in principal's interview with respondent did not transform the interview in principal's office into a custodial interrogation requiring Miranda warning. Respondent was aware of the presence of the marshalls, and that they were investigating a fire, and they did not wear uniforms or shields, and did nothing to suggest he was in custody. Respondent was never restrained and allowed to return to classes after the interview. "[P]rincipal's office setting was not an additional restraint beyond the ordinary conditions of a high school student who literally is not free to leave without permission during school hours."

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2. *Matter of Tateana R.*, 64 AD3d 459 (1st Dept. 2009), *lv. den.* 13 NY3d 709 (2009).

- Public school dean was questioning a student accused of stealing an iPod and the dean's goal was to get the thirteen year old student to return it. Two uniformed police officers assigned to a number of schools happened to be at the school, and the dean asked them to stay while the dean questioned the appellant. One officer sat in on the forty-five minute interview in dean's office, while the other waited outside the office. The parent of the victim was at school, did not want to press charges, and wanted the iPod returned. When the respondent said she was not giving back the iPod, the officer told her she could be arrested. She was arrested.
- The presence and minor participation of the police was not custodial. The interview was not instigated by the police and was not in furtherance of a "police designated objective."
- Dean's office is not an additional restraint beyond that of any other student at school.
- A reasonable thirteen year old innocent of any crime would not have believed that she was in custody even though the dean did not allow her to leave the office

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C. Respondent over sixteen years old – Police are not required to follow special procedures of FCA 305.2(2) and sub(3) for questioning in a school setting.

- *Matter of Christopher QQ*, 40 AD3d 1183 (3d Dept. 2007); Respondent turned sixteen before he was questioned at school by police. FCA 305.2(2) and sub(3) do not require police to contact a sixteen year old delinquency suspect's parents before conducting custodial interrogation. *See also* – *Matter of Eduardo E.*, 91 AD3d 505 (1st Dept. 2012) (FCA 305.2[2] interrogation procedures not required for sixteen year olds)
  - Based on the above case and statutes, police are also not required to conduct the interview in a certified juvenile room if delinquency suspect is sixteen or older.
  - Do *not* advise police to intentionally wait an extended period of time for a respondent to turn sixteen in order to evade the requirements of FCA 305.2(3), and sub(4).
  - If police are not present for an interview at school, the principal is free to interview the student without Mirandizing the student, without using an OCA-approved room, and without contacting a parent first. The police should be instructed to obtain a deposition from the principal describing the interview with the student and what he/she admitted to doing.

School-Arranged Identification Procedures

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- School officials sometimes use a school yearbook or do a "show-up" of sorts to help a victim identify another student who committed a criminal act.
  - The Presentment Agency is not required to give FCA 330.2(2) notice of its intent to offer an out-of-court identification procedure conducted solely by school officials and that was not the product of police action. *Matter of Thomas B.*, 57 AD3d 1455 (4th Dept. 2008); *In re Gilbert C.*, 15 AD3d 172 (1st Dept. 2005); *Matter of Gabriel A.*, 12 AD3d 666 (2d Dept. 2004); *Matter of William J.*, 203 AD2d 144 (1st Dept. 1994).
  - If a police officer is present for, but not involved in, a school-arranged identification procedure, *suppression should be denied. In re Kenneth G.*, 39 AD3d 337 (1st Dept. 2007).
    - However, Presentment Agency, out of an abundance of caution, should give notice pursuant to FCA 330.2(2) if police were present during a school identification procedure, even if they did not participate in questioning.
  - Note: Presentment Agency must give Notice of Intent under FCA 330.2(2) for physical evidence seized at school, even though school official is not law enforcement.

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FERPA ISSUES

- The Family Educational Rights and Privacy Act of 1974(FERPA)(20 USC§1232g) generally protects the confidentiality of students' records.
- FERPA does not protect records compiled to "maintain the physical security and safety of the agency or institution". *Culbert v. City of New York*, 254 AD2d 385 (2d Dept. 1998) 34 CFR §99.8[a][1][ii]; 34 CFR §99.3.
- There is no private cause of action for a FERPA violation. *Goins v. Rome City School District*, 27 AD3d 1149 (4th Dept. 2006).

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- School security video is *not* protected by FERPA. *Rome City School Dist. Disciplinary Hearing v. Grifasi*, 10 Misc.3d 1034(Sup. Ct., Oneida Co. 2005).
  - Despite the plain language in the Code of Federal Regulations and the authority of court decisions above, the Family Policy Compliance Office (a division of the US Dept. of Education), which is referred to in *Rome City*, apparently advises school districts that security videos are protected by FERPA.
  - When a school district refuses to turn over a security video, the Presentment Agency should advise school district lawyers of these court decisions.

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- Public Directory information may be released by the school if the child's parent did not "opt-out". 20 USC § 1232g(a)(5)(B).
  - Directory information includes: student's name, address, telephone listing, date and placed of birth, major field of study, participation in officially recognized activities and sports, weight and height or members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous education agency or institution attended by the student" 20 USC § 1232g(a)(5)(B).
  - A school yearbook contains directory information. Obviously, if a parent has not "opted-out," a yearbook is public information.

What if a police department purchases a yearbook every year and used the yearbook to conduct a photo identification wherein a witness or victim identified the respondent whose parent "opted-out" of directory information?

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- Compare to a 1996 Committee on Open Government opinion:
  - "While records identifiable to students ordinarily may be withheld pursuant to FERPA, in the case of a yearbook, by its nature, those identified have consented to disclosure. Moreover, any purchaser of a yearbook has acquired personally identifying details concerning students that appear throughout the yearbook, i.e. through photographs of individuals, classes, teams, clubs, etc. Because those details have been and could be made known to any purchaser of a yearbook and any others with whom the contents of the yearbook have been shared, the district would not have any basis for denying access to a yearbook. Moreover, frequently yearbooks are kept and made available to the public at public libraries. If you cannot view the yearbooks at a public library, again, it is my view that the District must make them available for inspection" *FOIL-AO-f9618*

- In addition, a 1998 opinion from Committee on Open Government notes that:
  - One's status or interest, the identity of the applicant requesting records, and the intended use of the records are irrelevant to rights of access. See *FOIL-AO-f10816*; *See also* *Burke v. Yudelson*, 368 NYS 2d 779 (If a record is accessible under the Law, it must be made equally available to any person, without regard to one's status or interest); *confirmed by* *M. Farbman & Sons. v. New York City Health & Hosps. Corp.*, 62 NY2d 75 (1984)

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APPLICABLE NYS PENAL LAW

Assault Second Degree – PL §120.05(10) reads as follows:

Acting at a place the person knows, or reasonably should know is on school grounds and with intent to cause physical injury, he or she:

a) Causes such injury to an employee of a school or public school district; or
b) Not being a student of such school or public school district causes physical injury to another, and such other person is a student of such school who is attending or present for educational purposes. For purposes of this subdivision, the term "school grounds" shall have the meaning set forth in subdivision fourteen of section 220.00 of this chapter. (emphasis added).

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- *Matter of Isaiah W.*, 84 AD3d 514 (1st Dept. 2011): Evidence was sufficient to support an Attempted Assault Second Degree finding (PL §§110.00 and 120.05(10)(a)) when respondent "...grabbed, twisted and shook his teacher's wrist while threatening to 'deck' or 'kill' him on school grounds".

- The doctrine of "transferred intent," that a person can be found guilty of an assault on a person who was not the intended target, does not apply to Penal law § 120.05(10)(a), in that to be found guilty under this subdivision the intended target of the assault must be the school employee, *not* another student. See *Matter of Jenna V.*, 55 AD3d 1341 (4th Dept. 2008).

- *In re Troy F.*, 40 AD3d 352 (1st Dept. 2007): Evidence was sufficient to support Attempted Assault Second Degree finding (PL §§ 110.00/120.05(10)(a) where respondent's conduct included punching teacher twice and threatening her.

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- Note that Assault in the Second Degree (under any subdivision) is an important charge to include in a petition if the facts and law support it. Assault Second is a "two-strike" designated felony act under FCA 301.2(8)(v).
  - If a juvenile is found to have committed an Assault Second Degree or a Robbery Second Degree, or certain designated felony acts, and later commits another Assault Second Degree or Robbery Second Degree while age fourteen or fifteen, (and before the respondent turns sixteen years old), the latter act constitutes a designated felony, and therefore carries significantly more serious dispositional consequences. *See* FCA 353.5 (Restrictive Placement) and CPL §720.10(2)(c) (rendering criminal defendants ineligible for youthful offender treatment).
- Designated Felony Act Petitions must be prominently marked as such, and certified copies of prior fact-finding orders suffice to allege predicate felonies. FCA § 311.1 (5).

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Obstructing Governmental Administration, Second Degree, PL § 195.05

- In many assaults on school staff, the assault itself may also constitute Obstructing Governmental Administration in the Second Degree and the assault may accompany other acts that constitute an attempt to prevent the school employee from performing an official function.
  - Teacher stopping students from entering a class who do not belong there while permitting others to enter is an official function. *Matter of Manny P.*, 33 AD3d 330 (1st Dept. 2006).
  - Teacher enforcing school rules by confiscating a student's identification to prepare a disciplinary infraction is an official function. *Matter of Miguel R.*, 99 AD3d 419 (1st Dept. 2012).
  - School safety agent bringing student to principal's office is an official function. *Matter of Joe R.*, 44 AD3d 376 (1st Dept. 2007).

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- School principal and safety officer investigating and removing an object (a hammer) from a student's possession that could pose a threat to safety and order without proof of intent to use it unlawfully is an official function, as well as a lawful duty. *Matter of Sheyna T.*, 79 AD3d 449 (1st Dept. 2010).

- Teacher confiscating a hat worn in violation of school rules is an official function. *Matter of Isaiah W.*, 84 AD3d 514 (1st Dept. 2011).

- Respondent obstructed teacher's performance of maintaining order "...when, among other things, she put her foot in the door to the dean's office...and then punched the teacher in the face when he and the other victim attempted to close the door." *Matter of Jahmeka W.*, 130 AD3d 437 (1st Dept. 2015), *lv. den.* 26 NY3d 909 (2015).

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Definitions of School Grounds

- Penal Law §220.00(14) defines school grounds for certain controlled substance offenses and is directly incorporated by reference into certain other sections of the penal law.
- Penal Law §220.00(14) reads as follows:
  - "School grounds" means
    a) In or on or within any building structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or

    a) Any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants.

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§220.44 Criminal sale of a controlled substance in or near school grounds

- A person is guilty of criminal sale of a controlled substance in or near school grounds when he knowingly and unlawfully sells:

1. A controlled substance in violation of any one of subdivision one through six-a of section 220.34 of this article, when such sale takes place upon school grounds or on a school bus; or

2. A controlled substance in violation of any one of subdivisions one through eight of section 220.39 of this article, when such sale takes place upon school grounds or on a school bus; or

3. A controlled substance in violation of any one of subdivisions one through six of section 220.34 of this article, when such sale takes place upon the grounds of a child day care or educational facility under circumstances evincing knowledge by the defendant that such sale is taking place upon such grounds; or

4. A controlled substance in violation of any one of subdivisions one through eight of section 220.39 of this article, when such sale takes place upon the grounds of a child day care or educational facility under circumstances evincing knowledge by the defendant that such sale is taking place upon such grounds.

5. For purposes of subdivision three and four of this section, "the grounds of a child day care or educational facility: means (a) in or on or within any building, structure, athletic playing field, a playground or land contained within the real property boundary line of a public or private child day care center as such term is defined in paragraph (c) of subdivision one of section three hundred ninety of the social services law, or nursery, pre-kindergarten or kindergarten, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such facility or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such facility. For the purposes of this section an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants.

6. For the purposes of this section, a rebuttable presumption shall be established that a person has knowledge that they are within the grounds of a child day care or educational facility when notice is conspicuously posted of the presence or proximity of such facility.

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- Under PL § 220.44(2), one thousand feet is measured in a straight line from the nearest school/property boundary line and point of sale, even if buildings or other obstructions make it impossible to walk a straight line between the two points. *People v. Robbins*, 5 NY3d 556 (2005).
- Prosecutor is not required to prove that defendant knew he was on school grounds for purposes of PL § 220.44(2). *People v. Gonzalez*, 240 AD2d 255 91997), *lv. denied* 90 NY 2d 1011 (1997).
- Note that PL §120.05(10) (Assault Second Degree) specifically incorporates the expansive PL §220.00(14) definition of "school grounds".

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Criminal Possession of a Weapon on School Grounds – PL § 265.01-a:

- A person is guilty of criminal possession of a weapon on school grounds when he or she knowingly has in his or her possession a rifle, shotgun, or firearm in or upon a building or grounds, used for educational purposes, of any school, college, or university, except the forestry lands, wherever located, owned and maintained by the State University of New York College of environmental science and forestry, or upon a school bus as defined in section one hundred forty-two of the vehicle and traffic law, without the written authorization of such educational institution.

- Criminal sale of a controlled substance in or near school grounds is a class B felony.

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- Criminal possession of a weapon on school grounds is a class E felony.
- Penal Law § 265.01-a *does not* incorporate PL §220.00(14), so the more limited, ordinary definition of "school grounds" applies. *See People v. Wright*, 42 Misc.3d 428 (Sup. Ct., Kings Co. 2013).
- The possession of a machine gun or firearm by a fourteen or fifteen year old in violation of PL 265.03, *while on school grounds,* as defined in PL 220.00(14), is a juvenile offender crime (see PL §10(18). As with all juvenile offender crimes, it becomes a designated felony act when removed from a criminal court to Family Court. *See* FCA 301.2(8)(iv).

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Criminal Trespass in the Third Degree – PL §140.10(c) and PL 140.10(b)

- A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property:

1) Which is fenced or otherwise enclosed in a manner designed to exclude intruders; or
2) Where the building is utilized as an elementary or secondary school or a children's overnight camp as defined in section one thousand three hundred ninety-two of the public health law or a summer day camp as defined in section one thousand three hundred ninety-two of the public health law in violation of conspicuously posted rules or regulations governing entry and use thereof; or
3) Located within a city with a population in excess of one million and where the building or real property is utilized as an elementary or secondary school in violation of a personally communicated request to leave the premises from a principal, custodian or other person in charge thereof; or
4) Located outside of a city with a population in excess of one million and where the building or real property is utilized as an elementary or secondary school in violation of a personally communicated request to leave the premises from a principal, custodian, school board member or trustee, or other person in charge thereof; or

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- Criminal trespass in the third degree is a class B misdemeanor.
- No trespassing signs located inside school on sides of main entrance doorway and no trespassing sign located outside main entrance with inaccurate statutory penal law reference was sufficient notice to satisfy "conspicuously posted rule or regulations" element of PL 140.10[b]. *Matter of Robert Joseph G.*, 55 AD3d 908 (2d Dept. 2008).

Making a Terroristic Threat – PL §490.20

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1. A person is guilty of making a terroristic threat when with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense.

2. It shall be no defense to a prosecution pursuant to this section that the defendant did not have the intent or capability of committing the specified offense or that the threat was not made to a person who was a subject thereof.

- Making a terroristic threat is a class D felony.
- Evidence was sufficient even though defendant may not have had weapons to execute his threat. *People v. Rizvi*, 126 AD3d 1172 (3d Dept. 2015), *lv. den.* 25 NY3d 1076 (2015)
- So long as victim believed that threat could be carried out without warning, the threat need not be "imminent". *People v. VanPatten*, 8 Misc.3d 224 (County Court, Madison County 2004), *rev'd on other grounds* 48 AD3d 30 (3d Dept. 2007), *lv. den.* 10 NY3d 845 (2008)

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Discovery

- Names and addresses of presentment agency witnesses are generally not discoverable in a delinquency case. *Matter of Terry D.*, 81 NY2d 1042 (1993).
- This case is noteworthy because here the respondent demanded names and addresses of presentment agency witnesses through a subpoena duces tecum served on a school in a school assault case.

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Rosario Issues

- *Rosario* material is any written or recorded statement of a prosecution witness that relates to the witness' direct testimony. *Rosario* material must be turned over to defense counsel prior to defense cross of the witness.
  - School-created operations report not made at the direction of the police or presentment agency, and not in actual possession of Presentment Agency, do not constitute *Rosario* material. *See Matter of Dwayne H.*, 173 AD2d 466 (2d Dept. 1991), *lv. den.* 79 NY2d 752 (1992)
  - School suspension hearing minutes containing a prior statement of a presentment agency witness (not in custody of police or presentment agency) is not *Rosario* material. *Matter of Jermaine P.*, 146 Misc.2d 443 (Fam. Ct., Kings Co. 1990).
- If a school-created document or recording contains the statement of a presentment agency witness which relates to the subject matter of that witness' testimony at trial is in the possession of the police or presentment agency, then it is *Rosario* material and therefore must be turned over to the defense.

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SCHOOL SEARCHES

- In the school context, a lawful search may be predicated upon "reasonable suspicion", rather than upon probable cause. The application of this lower standard to support the lawfulness of a search within a school recognizes the "substantial need of teachers and administrators for freedom to maintain order in the schools". *See New Jersey v. TLO*, 469 US 325 (1985) (Fourth Amendment applied to searches by school officials, that were based on reasonableness)

- A student's expectation of privacy is diminished in a school setting.
  - A balance must be made between protecting personal rights and safeguarding the security of all the students.
  - In *New Jersey v. TLO*, the Supreme Court ruled in favor of the school. Students have "legitimate expectations of privacy," the Court said, but that must be balanced with the school's responsibility for "maintaining an environment in which learning can take place."

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- The legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry:
  1) First, one must consider 'whether the ... action was justified at its inception'. *Terry v. Ohio*, 392 US 1, 20 (1968).
  2) Second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place' *Terry*, 392 U.S. at 20, 88 S.Ct. 1868.

- Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating the law or the rules of the school. *New Jersey v. TLO*, 469 US 325 (1985)
  - Such a search will be permissible in its scope when the measures are adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction. *New Jersey v. TLO*, 469 US 325 (1985)

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- A school safety officer's suspicion, that results from a metal thud that was heard when a student's book-bag was placed upon a metal shelf, while not rising to the level of reasonable suspicion, still justifies the minimal intrusion of the safety officer patting the outside of the book-bag. When the safety officer then feels the outline of a gun, this in turn justifies the further search of the inside of the bag, from which the gun is recovered. *Matter of Gregory M.*, 82 NY2d 588 (Ct. of Appeals, 1993).

- A reasonable administrative search in a school includes a pat-down search of all students in an effort to prevent egg-throwing in and around the school on Halloween. *Matter of Haseen N.*, 251 AD2d 505 (2d Dept. 1998)

- Identified citizen witnesses, including minors, can be the reasonableness basis for conducting a search of a student. *In re Jake M.*, 130 AD3d 427 (1st Dept. 2015)
  - *In re Jake M.* recognized that school officials received reliable first-hand information from numerous identified students that appellant had brought a firearm to school and exhibited it.
  - The pat-down of appellant's clothing amply met the standards for searches by school officials, "particularly in light of the urgency of interdicting weapons in schools". *Matter of Steven A.*, 308 AD2d 359 (1st Dept. 2003)

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CELL PHONE SEARCHES

- Police need a warrant to search the contents of a person's cell phone, absent special circumstances. *Riley v. California*, 134 S. Ct. 2473 (2014)
  - In *Riley v. California*, Chief Justice John Roberts noted that "It is true that this decision will have some impact on the ability of law enforcement to combat crime. But the Court's holding is not that the information on a cell phone is immune from search; it is that a warrant is generally required before a search. The warrant requirement is an important component of the Court's Fourth Amendment jurisprudence, and warrants may be obtained with increasing efficiency. In addition, although the search incident to arrest exception does not apply to cell phones, the continued availability of the ***exigent circumstances*** exception may give law enforcement a justification for a warrantless search in particular cases.

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PART 2:
ISSUES IN PERSONS IN NEED OF SUPERVISION (PINS) CASES

Persons In Need of Supervision (PINS)

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- When the County Attorney's office is assigned to prosecute a PINS petition (see FCA 254(a)), the County Attorney is an independent prosecutor, not counsel to the petitioner. *See Matter of Matthew F.F.*, 179 AD2d 928 (3d Dept. 1992)
- Thus, a school official or school district that files a PINS petition should be treated as a complainant in a PINS proceeding.
- At the initial appearance on a PINS, the court is required to review the diversion services plan. FCA 742(b). During the diversion process, the school is required to make efforts to improve the respondent's behavior/attendance. FCA 732(a).
  - The court may (and arguably should) re-order diversion services to resume at the initial appearance.
  - Therefore, it is important to try to have a school district representative at the initial appearance to provide any relevant information on the present efforts to help improve the respondent's attendance/behavior.
  - This is especially true in counties where diversion efforts are terminated by the lead agency once a petition is filed and there is no probation monitoring and no services for the respondent between when diversion is terminated and the initial appearance.

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Truancy

- The definition of a PINS includes a respondent who, among other things, does not attend school in violation of Part I of Article 65 of the Education Law. FCA 712(a).
- The petition must allege that respondent is a "habitual truant". FCA 732(a)(i).
- Although there is no clear rule specifying a minimum number of days or classes that would suffice to prove that a respondent was truant in violation of the Education Law, the following caselaw below provides some guidance.

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- *Matter of Nicole T.*, 201 AD2d 844 (3d Dept. 1994). The evidence was *insufficient* to prove that a fact-finding based on testimony that the child was tardy to class on four occasions, was disruptive in one class, and did not go directly home after school because she stayed at school to speak to friends.

- *Matter of Shena SS.*, 263 AD2d 809 (3d Dept. 1999). Here, the parties agreed that the child missed 9½ days of school, and the legal sufficiency of the number of days was not the issue raised in the appeal. The issue was whether the evidence was sufficient to prove that she was *illegally* absent on those days. The court held that it need not be proven that she *specifically intended to be truant and* that a prima facie case was presented through evidence that she was absent from school without lawful excuse. The court accepted the Family Court's credibility determination which rejected the child's mother's claim that the absences should have been excused for illness and other reasons.

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- *Matter of Toni Ann O.*, 56 AD3d 563 (2d Dept. 2008). Respondent entered an admission to "more than three illegal absences" and the PINS finding was upheld, however, the court's decision suggests that the PINS "finding" that it affirmed was based also on dispositional information. Therefore, this decision is somewhat confusing.

- *Matter of Sharon D.*, 274 AD2d 702 (3d Dept. 2000). Respondent's admission that she missed school approximately 35 times over the course of eight months, misbehaved while at school, and failed to appear for a screening on two occasions was legally sufficient.

- The failure to attach a notice required under FCA 735(g)(ii)(B) alleging that diversion was terminated and that respondent will not benefit from further diversion efforts is a jurisdictional defect which may be raised for the first time on appeal. *Matter of Sage G.*, 121 AD3d 985 (2d Dept. 2014).

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SUFFICIENCY OF BAD ACTS

➢The word "habitual" in FCA 712(a) modifies only the word 'disobedience' in that only one act of *ungovernability* or *incorrigibility* need be proven to sustain a fact-finding order beyond a reasonable doubt. *In re Christine M.*, 98 AD3d 920 (1st Dept. 2012).

- This case appears to contradict previous decisions and the long-held assumption that multiple bad acts must be proven to sustain a PINS fact-finding. *See Matter of Raymond O.*, 31 NY2d 730 (1972); *Matter of David W.*, 28 NY2d 589 (1971). *Matter of LaToya D.*, 224 AD2d 524 (2d Dept. 1996). The *Christine M.* decision does not even mention *Raymond D., David W., or Latoya D.*, however, these cases did not address the precise question of statutory interpretation answered in *Christine M.*

- The holding in *Christine M.* is consistent with FCA 311.4, which permits the substitution of a PINS petition for a delinquency petition or a PINS dispositional finding for a delinquency finding. Otherwise, every delinquency petition that alleged a single criminal transaction that is converted to a PINS petition or PINS disposition would be dismissed for insufficiency because the respondent committed only one act.

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Educationally Disabled PINS

- Filing a PINS petition against a respondent with a special education disability may trigger procedural protections under the Individuals With Disabilities Act (IDEA), however "...the need to follow IDEA procedures turns on whether there is a contemplated change in the child's educational placement". *In re Beau II*, 95 NY2d 934 (2000).
- If a respondent was not classified as disabled under the IDEA prior to the PINS proceeding, he/she is not entitled to the procedural rights specified in *Beau II*. *Matter of Daniel V.*, 281 AD2d 485 (2d Dept. 2001).
- The IDEA was *not* designed to prevent Family Court from protecting a respondent, especially where "exigent health and safety issues" arise between filing a petition and drafting the individualized education plan. *Matter of Charles U.*, 40 AD3d 1160 (3d Dept. 2007), *lv. den.* 9 NY3d 807 (2007).
- The issue of whether or not the filing of a PINS petition violates the IDEA can be avoided if the lead agency (typically probation or DSS in some counties) advises potential school petitioners that the school must afford respondent his procedural rights under the IDEA *prior to filing* the complaint with the lead agency.

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QUESTIONS?

THANK YOU!

Dutchess County Department of Law
(845) 486-2110

Victor A. Civitillo-Senior Assistant County Attorney
vcivitillo@dutchessny.gov

Linda D. Fakhoury-Senior Assistant County Attorney
lfakhoury@dutchessny.gov