



June 2, 2023

VIA E-MAIL

NJ Senator and Assemblyperson
N.J. Legislature
Trenton, NJ 08625-0500

RE: Threat assessment legislation (Bill A4075) and guidelines

Dear NJ Legislators:

Education Law Center (ELC) advocates for the legal right of New Jersey's public school children to a high quality education under state and federal laws, particularly our state's at-risk students, students with disabilities, and students of color. We submit this letter with the support of other New Jersey groups advocating for students' rights: the American Civil Liberties Union of New Jersey, the Irvington NAACP, Make the Road New Jersey, March for Our Lives New Jersey, Newark Communities United for Accountable Policing, the New Jersey Coalition for Bullying Awareness and Prevention, New Jersey Policy Perspective, the New Jersey Public Education Coalition, NJ21United, the Paterson Education Fund, the People's Organization for Progress, Save Our Schools NJ, and SPAN Parent Advocacy Network.

We understand the New Jersey Legislature (the Legislature) drafted and passed P.L.2022, c.83 (codified at N.J.S.A. 18A:17-43.4 to 43.6), the law requiring each school district, charter school, and renaissance school to establish threat assessment teams, in response to horrific incidents of school violence across the nation. We appreciate that lawmakers intended to better protect New Jersey students and educators by passing this law. However, based on our understanding of school discipline disparities and threat assessment team best practices, we are concerned that implementing this law will negatively impact New Jersey students, particularly students of color and those with disabilities. We believe this law must be amended to avoid harming these students, contravening threat assessment team policy guidance, and conflicting with current legal protections for students. Further, we believe the guidelines contemplated in section three of the act, or N.J.S.A. 18A:17-43.6, are rules, and their promulgation by the New Jersey Department of Education (NJDOE) must adhere to the New Jersey Administrative Procedure Act (NJAPA).

I. Potential harm to students caused by threat assessments

We believe increasing funding and support for school-based mental health services and improving school culture through initiatives such as social and emotional learning are better responses to school violence than implementing threat assessment teams.¹ Those well-versed in school-based threat assessment implementation state that “what really saves our students” is cultivating positive relationships between students and staff.² The National Association of School Psychologists (NASP) reiterates this idea: “The greatest method of violence prevention is creating a positive school environment where students (and staff) feel physically and psychologically safe.”³ Educational equity advocates stress that addressing school violence requires holistically improving school climate instead of channeling money to school hardening measures, such as behavioral threat assessments.⁴

While threat assessments are one potential response to students threatening violence, they may also result in the same negative outcomes as school discipline.⁵ This includes schools disproportionately referring students of color and students with disabilities to threat assessment teams.⁶ Even threat assessment proponents caution about how implicit bias and prejudice can detrimentally affect outcomes. “Biases and stereotypes, if not properly identified, understood,

¹ See Donna Michaelis, *The Value of Threat Assessment Teams*, NAT’L INST. OF JUSTICE (Nov. 12, 2019), <https://nij.ojp.gov/topics/articles/value-threat-assessment-teams> (“[I]f we intervene with a child and realize that they need mental health support, but the community lacks these supports, then we are not helping that student.”); Terri A. Erbacher & Kerby L. Wycoff, *A Tale of Two Pandemics: Equitable and Trauma-Informed Threat Assessment Processes*, 49 COMMUNIQUÉ 6, 8. (2021), https://pak12threatassessment.org/wp-content/uploads/2021/12/NASP-A-Tale-of-Two-Pandemics-Equitable-and-Trauma-Informed-Threat-Assessment-Processes_2020.pdf.

² Michaelis, *supra* note 1.

³ Erbacher & Wycoff, *supra* note 1, at 6.

⁴ Press Release, Education Trust, Joint Letter Regarding U.S. Senate School Safety Recommendations from National Whole Child and Educational Equity Organizations (June 20, 2022), <https://edtrust.org/press-release/joint-letter-regarding-u-s-senate-school-safety-recommendations-from-national-whole-child-and-educational-equity-organizations/> (explaining schools can better protect the safety and wellbeing of students by investing in staff training, social-emotional learning practices, restorative practices, and mental health services); Jazmyne Owens, *Threat Assessment Systems as a School Safety Strategy*, NEW AM. (Dec. 15, 2021), <https://www.newamerica.org/education-policy/briefs/threat-assessment-systems-as-a-school-discipline-safety-strategy/>.

⁵ Dewey Cornell & Jennifer Maeng, *Student Threat Assessment as a Safe and Supportive Prevention Strategy, Final Technical Report*, OFF. OF JUSTICE PROGRAMS’ NAT’L CRIM. JUSTICE REFERENCE SERV. 24 (Aug. 2020), <https://www.ojp.gov/pdffiles1/nij/grants/255102.pdf> (stating “that referrals for threat assessment could be subject to the same influences that lead to the higher rates of disciplinary referrals for Black students”).

⁶ Stuart Ritchie, *Predicting the Next School Shooting May Never Be Possible*, 23 EDUC. NEXT (Dec. 13, 2022), <https://www.educationnext.org/predicting-next-school-shooting-may-never-be-possible-is-threat-assessment-best-alternative/>; See Ike Swetlitz, *Who’s the Threat*, SEARCHLIGHT N.M. (Oct. 15, 2019), <https://searchlightnm.org/whos-the-threat/> (noting that, during the 2018-2019 school year in New Mexico, students with disabilities were subject to 56% of threat assessments while comprising only 18% of the total student population and African-American children made up 9.6% of students given threat assessments while constituting only 2.6% of the total student population).

and mitigated, can inappropriately influence” threat assessment teams and procedures.⁷ Further, implementing threat assessment teams without adequate guidance and training can compound trauma students face and violate their civil rights.⁸ A February 2022 report by nine educational equity and civil rights organizations expounds upon how threat assessments implicate students’ civil rights.⁹ These organizations found that threat assessments can result in: “profiling of and discrimination against” students of color and students with disabilities; “inappropriate sharing of private student information with law enforcement;” sidestepping due process protections codified in school discipline regulations; and unnecessarily placing law enforcement in direct contact with students.¹⁰

Minimal research exists nationally on how threat assessments impact students of color and students with disabilities, and no federal agency collects data on school threat assessments.¹¹ The existing research suggesting threat assessment team referral does not result in racial disparities focuses solely on disciplinary *outcomes* for Virginia students.¹² Conversely, other Virginia studies as well as studies from other states do show that students with disabilities and students of color are disproportionately *referred* to threat assessment teams. A U.S. Department of Justice-funded study of Virginia Schools published in February 2020 demonstrated that “students receiving special education services were 3.9 times more likely to be referred for threat assessment” than students not receiving special educational services.¹³ Additionally, the study found “Black students were referred for threat assessment at a rate 1.3 times higher than [w]hite students.”¹⁴ Reports from Colorado and New Mexico demonstrate how schools remove students for behaviors related to their disabilities, flouting special education protections and refusing to abide by their state’s threat assessment team procedures.¹⁵ A 2022 study from Colorado shows

⁷ Melissa Reeves & Courtenay McCarthy, *Upholding Student Civil Rights and Preventing Disproportionality in Behavioral Threat Assessment and Management (BTAM)*, NAT’L ASS’N OF SCH. PSYCHS. (2021), https://www.nasponline.org/assets/Documents/Resources%20and%20Publications/Resources/Crisis/SSC_BTAM-SPED.pdf.

⁸ NAT’L DISABILITY RTS. NETWORK ET AL., NAT’L K-12 THREAT ASSESSMENT PROCESSES 4 (Feb. 2022), <https://www.ndrn.org/wp-content/uploads/2022/02/K-12-Threat-Assessment-Processes-Civil-Rights-Impacts-1.pdf>; Carrie Jung, *Study: Assessing A Student As A Threat Can Affect Their Well-Being*, WBUR (Mar. 08, 2019), <https://www.wbur.org/news/2019/03/08/threat-assessment-effects> (“Even when it’s shown that their threat was transient, [the assessment] can really torpedo a student’s education,” said lead study author Nancy Rappaport, a professor of psychiatry at Harvard Medical School.... “The study helped us understand how much stigma and shame is associated for students and families when they do have these safety assessments[.]”).

⁹ NAT’L DISABILITY RTS. NETWORK ET AL., *supra* note 8, at 2-4. The Center for Civil Rights Remedies at the Civil Rights Project, Center for Disability Rights, Council of Parent Attorneys and Advocates, The Daniel Initiative, Education Law Center (PA), Federal School Discipline and Climate Coalition, National Center for Youth Law, National Disability Rights Network, and Open Society Policy Center authored the report. *Id.* at 17-19.

¹⁰ *Id.* at 2-4.

¹¹ *Id.* at 8; Steven Yoder, *Do protocols for school safety infringe on disability rights?* HECHINGER REPORT (Dec. 28, 2022), <https://hechingerreport.org/do-protocols-for-school-safety-infringe-on-disability-rights/>.

¹² Dewey Cornell et al., *Racial/Ethnic Parity in Disciplinary Consequences Using Student Threat Assessment*, 47 SCH. PSYCH. REV. 183-195 (June 2018), <https://www.ojp.gov/library/publications/raciaethnic-parity-disciplinary-consequences-using-student-threat-assessment>.

¹³ Owens, *supra* note 4. Cornell & Maeng, *supra* note 5.

¹⁴ *Id.*

¹⁵ Yoder, *supra* note 11; Swetlitz, *supra* note 6.

that during the 2014-2015 academic year, students receiving special education services, Black students, and Indigenous students were overrepresented in threat assessments.¹⁶ It also shows that students receiving special education services “were significantly more likely to have a threat rated as serious than those not in special education.”¹⁷ These issues occur even when states provide schools with threat assessment team training and the teams include special education professionals.¹⁸

The funding needed to adequately implement threat assessment teams and avoid harmful disparities would be better spent improving school-based mental health services, school climate, and school culture. Further, as explained below, the current threat assessment law is rife with problematic language that will further contribute to disparate outcomes for students of color and students with disabilities.

II. Necessary amendments to the statute

Threat assessments can harm students when they result in: racial and disability disparities in application; inappropriate threat assessment referral; law enforcement contact; and student privacy violations.¹⁹ Unfortunately, the language of NJ’s statute may allow for all of these problems to occur.

To avoid the negative consequences of threat assessments, we urge the New Jersey State Legislature to amend N.J.S.A. 18A:17-43.4 to 43.6 by incorporating the following recommendations: 1) utilize and incorporate existing Intervention and Referral Services, as well as School Safety Teams established by the Anti-Bullying Bill of Rights; 2) narrow the grounds for which a threat assessment referral can be made to prevent profiling; 3) ensure the threat assessment process does not supplant legal and regulatory standards; 4) limit law enforcement involvement to specified situations; 5) improve student privacy protections; and 6) add a data reporting requirement.

1. Utilizing and incorporating existing Intervention and Referral Services and School Safety Teams

Threat assessment teams purportedly address threatening behaviors to prevent future violence. However, New Jersey law already provides for mechanisms and services to adequately respond to students threatening violence: Intervention & Referral Services (I&RS) and School Safety Teams (SSTs). Under the current law, threat assessment teams will effectively duplicate many services already provided by I&RS and SSTs. We ask the Legislature to consider whether I&RS and SSTs already fulfill the goals of threat assessment teams. If the Legislature believes threat

¹⁶ Fanci Crepeau-Hobson & Nancy Leech, *An Exploratory Investigation of Threat Assessment Practices in Colorado Schools*, 26 CONTEMP. SCH. PSYCHS. 458-468 (2022), <https://link.springer.com/article/10.1007/s40688-021-00356-7>.

¹⁷ *Id.*

¹⁸ Yoder, *supra* note 11.

¹⁹ Miriam Rollin, *Here's How 'Threat Assessments' May Be Targeting Vulnerable Students*, EDUC. POST (Dec. 12, 2019), <https://www.edpost.com/stories/heres-how-threat-assessments-may-be-targeting-vulnerable-students>.

assessment teams will serve an independent purpose, we recommend amending the law to ensure threat assessment teams do not replicate I&RS and SST functions through a new, siloed process.

N.J.S.A. 18A:17-43.4 references “delivering intervention strategies to manage the risk of harm for students.” This language is broad, indefinite, potentially harmful, and not directly connected to the services schools are already legally required to provide. Without supplementary definition, “intervention strategies” could mean anything from referral to in-school counseling to referral to law enforcement. The law should directly connect to the Intervention & Referral Services (I&RS) established and defined by N.J.A.C. 6A:16-8.1 and 8.2.

I&RS already provides crucial intervention and de-escalation strategies to support students who make threats.²⁰ NJDOE’s I&RS Resource Manual states, “[t]here is ample evidence that prevention and early intervention efforts, such as I&RS teams, **can reduce violence and other troubling behaviors in schools**. Applying *research-based practices* can help schools recognize the early warning signs of factors that lead to violence and provide appropriate types of support to prevent potential crises.”²¹ Integrating I&RS into N.J.S.A. 18A:17-43.4 helps accomplish the law’s goal: reducing the risk of school violence and student harm.

The activities of the threat assessment teams created by N.J.S.A. 18A:17-43.4 should also be coordinated with the School Safety Teams (SSTs) created by N.J.S.A. 18A:37-21. Each school already has an SST “to develop, foster, and maintain a positive school climate... and to address issues” affecting school climate and culture, such as HIB.²² Further, SSTs are an important resource in addressing the root cause of threats or threatening behavior, including harassment, intimidation, and bullying (HIB).²³ The U.S. Secret Service National Threat Assessment Center (NTAC) analyzed incidents where school violence was averted and found students planning violence “frequently experience[d]” bullying and social isolation.²⁴ SSTs are uniquely positioned to identify and address instances or patterns of HIB contributing to threatening behavior because they are statutorily mandated to receive HIB complaints and investigation reports.²⁵ Adequately

²⁰ *Intervention & Referral Services*, N.J. DEPT. OF EDUC., <https://www.nj.gov/education/njtss/resources/irs/> (last visited Mar. 30, 2023) (defining I&RS as “an interdisciplinary team of professionals... who come together throughout the school year to formulate coordinated services and team delivery systems to address the full range of student learning, behavior, social, and health problems in the general education program as well as for students determined to be in need of special education programs and services”); N.J. DEPT. OF EDUC., RESOURCE MANUAL FOR INTERVENTION AND REFERRAL SERVICES (I&RS) 36-37 (Oct. 2002), <https://www.nj.gov/education/njtss/resources/irs/manual/manual.pdf>.

²¹ N.J. DEPT. OF EDUC., RESOURCE MANUAL FOR INTERVENTION AND REFERRAL SERVICES (I&RS) 36 (emphasis added to “can reduce violence and other troubling behaviors in schools”).

²² N.J. DEPT. OF EDUC., GUIDANCE FOR SCHOOLS ON IMPLEMENTING THE ANTI-BULLYING BILL OF RIGHTS ACT 10 (Dec. 2011), <https://www.nj.gov/education/safety/sandp/hib/docs/guidance/guidance.pdf>.

²³ N.J.S.A. 18A:37-21; N.J. DEPT. OF EDUC., GUIDANCE FOR SCHOOLS ON IMPLEMENTING THE ANTI-BULLYING BILL OF RIGHTS ACT (Dec. 2011), <https://www.nj.gov/education/safety/sandp/hib/docs/guidance/guidance.pdf>.

²⁴ U.S. SECRET SERV. NAT’L THREAT ASSESSMENT CTR., AVERTING TARGETED SCHOOL VIOLENCE: A U.S. SECRET SERVICE ANALYSIS OF PLOTS AGAINST SCHOOLS 53 (Mar. 2021), https://www.secretservice.gov/sites/default/files/reports/2021-03/USSS_Averting_Targeted_School_Violence.2021.03.pdf.

²⁵ N.J.S.A. 18A:37-21.

evaluating and fully understanding a student’s behavior requires threat assessment team and SST collaboration.

N.J.S.A. 18A:17-43.4 should incorporate and coordinate with I&RS and SSTs instead of creating an entirely new mechanism to provide interventions, services, and information related to students’ behavior.

2. *Narrowing the grounds for student referral to threat assessment teams to prevent profiling*

The law’s first section, codified in N.J.S.A. 18A:17-43.4, directly contradicts threat assessment best practices. It states the purpose of a threat assessment team is “to provide school teachers, administrators, and other staff with assistance in *identifying students of concern*....”²⁶ The law departs from recommendations by public safety agencies, experts, and organizations because it focuses on individual students and their characteristics, rather than student behaviors.

The U.S. Secret Service NTAC states, “there is no profile of a student attacker.”²⁷ Instead, the threat assessment process evaluates a student’s risk for violence based on their communications and behaviors.²⁸ Dewey Cornell, a leading threat assessment proponent and author of the Comprehensive School Threat Assessment Guidelines (CSTAG), advises that school threat assessment teams should respond to threats of violence, not identify students who might make threats in the future.²⁹ Further, NASP asserts the goal of behavioral threat assessment is “to identify, assess, and manage potentially dangerous or violent *situations* where someone is intending to injure or kill others.”³⁰

By establishing “identifying students of concern” as its goal, New Jersey’s law conflicts with existing threat assessment recommendations and research. It is much closer to profiling individual students rather than evaluating behaviors or communications. Nothing in the law’s language prevents threat assessment teams from focusing on a student’s “characteristics,” which may result in focusing on a student’s “immutable personal trait[s]” or disability.³¹ Threat assessment referral should be triggered by behaviors or communications, rather than a student’s identity, to ensure New Jersey threat assessment teams do not profile students.

²⁶ N.J.S.A. 18A:17-43.4 (emphasis added).

²⁷ U.S. SECRET SERV. NAT’L THREAT ASSESSMENT CTR., U.S. DEPT. OF HOMELAND SEC., ENHANCING SCHOOL SAFETY USING A THREAT ASSESSMENT MODEL: AN OPERATIONAL GUIDE FOR PREVENTING TARGETED SCHOOL VIOLENCE 1 (July 2018), https://www.cisa.gov/sites/default/files/publications/18_0711_USSS_NTAC-Enhancing-School-Safety-Guide.pdf.

²⁸ *Id.*

²⁹ Ritchie, *supra* note 6.

³⁰ Reeves & McCarthy, *supra* note 7 (emphasis added).

³¹ Margaret Miles, *Solution or Setback: Legal and Practical Implications of School Threat Assessments for Ohio Students with Disabilities*, 46 U. DAYTON L. REV. 167, 177 (Mar. 1, 2021), <https://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1576&context=udlr>.

3. Ensuring the threat assessment process does not supplant legal and regulatory standards

Additionally, the law uses vague terminology to define when students are referred to threat assessment teams and what happens after their referral: teams will assess students' risk for engaging in "violence or harmful activities" and address "aberrant behavior."³² Perhaps NJDOE plans to define these terms in the guidelines it is tasked to develop pursuant to section 3 of the law, or N.J.S.A. 18A:17-43.6. As written, however, the law permits threat assessment teams to respond to a wide range of behaviors.

Using imprecise language such as "harmful activities" and "aberrant behavior" gives schools inordinate discretion to arbitrarily decide which student behaviors result in threat assessment team referral. Further, these terms are not connected to any existing laws or regulations governing student behavior and discipline.³³ In fact, N.J.A.C. 6A:16-6.3(c) defines a specific instance where school employees must contact a designated law enforcement official: when the employee "develops reason to believe a student has threatened, is planning or otherwise intends to cause death, serious bodily injury, or significant bodily injury to another person under circumstances in which a reasonable person would believe the student genuinely intends at some time in the future to commit the violent act or carry out the threat."

N.J.S.A. 18A:17-43.4 should narrowly and precisely define the behaviors resulting in threat assessment team referral to prevent conflicting with existing laws and regulations.³⁴ Linking the threshold for threat assessment team evaluation to particular behaviors, such as those encompassed by N.J.A.C. 6A:16-6.3(c), also protects against subjective definitions of "harmful activities" and "aberrant behavior."

4. Limiting law enforcement involvement to specified situations

N.J.S.A. 18A:17-43.4 mandates that threat assessment teams include "to the extent possible" a "safe schools resource officer or school employee who serves as a school liaison to law enforcement." Due to the documented harms resulting from student contact with school resource officers (SROs), we believe an SRO or other law enforcement liaison should not be a member of the threat assessment team. Research indicates that SROs make schools less safe, not more, and that students of color and students with disabilities are more likely to experience

³² N.J.S.A. 18A:17-43.4.

³³ See N.J.A.C. 6A:16; N.J.A.C. 6A:14; N.J.S.A. 18A:37.

³⁴ Yoder, *supra* note 11 (demonstrating how schools may avoid IDEA compliance by labeling removals by threat assessment teams as not disciplinary removals). While the Individuals with Disabilities Education Act (IDEA) does not address threat assessments, it limits the ability to remove students with disabilities to instances in which "maintaining the current placement of such child is substantially likely to result in injury to the child or to others." See 20 U.S.C. 1415(k)(3)(A) & (3)(B)(ii)(II); OFF. OF SPECIAL EDUC. & REHABILITATIVE SERVS., U.S. DEPT. OF EDUC., QUESTIONS AND ANSWERS: ADDRESSING THE NEEDS OF CHILDREN WITH DISABILITIES AND IDEA'S DISCIPLINE PROVISIONS (July 19, 2022), <https://sites.ed.gov/idea/files/ga-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf>.

adverse impacts from their presence.³⁵ However, tying threat assessment referral to N.J.A.C. 6A:16-6.3(c) would limit SRO or law enforcement involvement to a circumstance where school officials are already required to contact law enforcement.³⁶ Involving an SRO or a law enforcement liaison only after the other members of the threat assessment team reasonably believe the reported behavior or threat is credible, as required by N.J.A.C. 6A:16-6.3(c), adds another layer of protection between students and the justice system. Any further definition necessary to delineate this already existing standard can be provided by NJDOE.

5. *Improving student privacy protections*

N.J.S.A. 18A:17-43.5(a)(5) authorizes the threat assessment team to disclose information obtained during the assessment process “to pursue appropriate action pursuant to” providing social, developmental, and law enforcement resources. This section employs circular language and does not adequately protect students’ privacy during and after threat assessment team referral. An existing regulation, N.J.A.C. 6A:16-8.2(9), already sets forth the legal and regulatory guidelines applicable to any collected and maintained student information; there is no reason to establish separate standards for threat assessment teams.³⁷ Instead of allowing each school

³⁵ See James Paterson, *Making Schools Safe and Just*, NEA TODAY (Apr. 28, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/making-schools-safe-and-just#:~:text=Yet%20research%20shows%20that%20SROs,suspensions%2C%20expulsions%2C%20and%20arrests> (“Yet research shows that SROs do little to reduce on-campus violence or mass shootings, and their presence is often damaging to students of color and students with disabilities. Having SROs in schools can actually create higher rates of behavioral incidents and spikes in suspensions, expulsions, and arrests.”); Samaila Adelaiye & Lauren Ruth, *Protecting or Pushing Out: The Prevalence and Impact of School Resource Officers in Connecticut*, CT VOICES FOR CHILDREN 20 (Dec. 2021), https://ctvoices.org/wp-content/uploads/2021/12/SRO-FINAL-Full-Acknowledgements.pdf?utm_source=The+Narrative+Project&utm_campaign=ee37e379fc-EMAIL_CAMPAIGN_2019_11_05_02_57_COPY_01&utm_medium=email&utm_term=0_1c461053a5-ee37e379fc-387571413&mc_cid=ee37e379fc&mc_eid=a40b67a6e9 (“In general, students in schools with SROs were 1.58 times as likely to be expelled as those without an SRO. We also found this to be the case for Black, white, and Latino/a/x students. Black or African American children attending schools with SROs were at 1.83 times greater risk of being expelled than Black or African American children attending schools without SROs. Hispanic or Latino/a/x children attending schools with SROs were at 2.32 times greater risk of being expelled than Hispanic or Latino/a/x children attending schools that do not have SROs.”); Amir Whitaker et al., *Cops and No Counselors*, ACLU 6-7 (2019), <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/cops-and-no-counselors> (“Research has indicated that having school-based police contributes to less inclusive school climates, and this makes students less safe... increased police presence in schools results in an expansion in the types of roles police play in schools, an increase in student referrals to police, an increase in student arrests, and accountability problems from student-police contact.”).

³⁶ N.J.A.C. 6A:16-6.3(c) mandates law enforcement contact when a school employee “develops reason to believe a student has threatened, is planning or otherwise intends to cause death, serious bodily injury, or significant bodily injury to another person under circumstances in which a reasonable person would believe the student genuinely intends at some time in the future to commit the violent act or carry out the threat.”

³⁷ N.J.A.C. 6A:16-8.2(9) (“Maintain records of all requests for assistance and all intervention and referral services action plans and all related student information, according to the requirements of 20 U.S.C. § 1232g, Family Educational Rights and Privacy Act; 34 CFR Part 99, Family Educational Rights and Privacy; 20 U.S.C. § 1232h, Protection of Pupil Rights; 34 CFR Part 98, Student Rights in Research, Experimental Programs, and Testing; P.L. 104-191, Health Insurance Portability and Accountability Act; 45 CFR Part 160, General Administrative

district to create its own distinct policy concerning disseminating students' information, the law should refer to existing requirements and safeguards encapsulated by N.J.A.C. 6A:16-8.2(9).

6. *Adding a data reporting requirement*

Finally, because students with disabilities and students of color are often disproportionately, negatively impacted by school discipline, and because data exists in other states showing that those groups of students are overrepresented in referrals to threat assessment teams, data should be collected on student referrals to threat assessment teams to determine any resulting disproportionalities.³⁸ Instituting a state-wide, K-12 threat assessment program must involve measuring what threat assessment teams are doing.³⁹ If there are disparities, NJDOE must act to change training practices or regulations to ensure the referral process is protected from implicit bias and prejudice.

Below are our suggested amendments to the current statutory language:

- Instead of defining the threat assessment teams' purpose in N.J.S.A. 18A:17-43.4(a) as "identifying students of concern," we suggest that the threat assessment teams "provide school teachers, administrators, and other staff with assistance in addressing student threats and threat-related behaviors..." This ties threat assessment teams to evaluating communicated threats or threatening behavior, rather than profiling students.
- Additionally, "violence or harmful activities" and "aberrant behavior" in N.J.S.A. 18A:17-43.4(a) should be replaced by the standard in N.J.A.C. 6A:16-6.3(c), permitting threat assessment referral when a school employee "develops reason to believe a student has threatened, is planning or otherwise intends to cause death, serious bodily injury, or significant bodily injury to another person under circumstances in which a reasonable person would believe the student genuinely intends at some time in the future to commit the violent act or carry out the threat."
- To tie threat assessment referral to existing resources, amend N.J.S.A. 18A:17-43.4 to mandate threat assessment teams coordinate with the Intervention & Referral Services Teams established and defined by N.J.A.C. 6A:16-8.1 and 8.2 and the School Safety Teams described in N.J.S.A. 18A:37-21.

Requirements; 20 U.S.C. § 7165, Transfer of school disciplinary records; 42 CFR Part 2, Confidentiality of Substance Use Disorder Patient Records; N.J.S.A. 18A:40A7.1, Confidentiality of certain information provided by pupil, exceptions; N.J.A.C. 6A:16-3.2, Confidentiality of student alcohol and other drug information; N.J.S.A. 18A:36-19, Pupil records, creation, maintenance and retention, security and access, regulations, nonliability; N.J.S.A. 2A:4A-60, Disclosure of juvenile information, penalties for disclosure; N.J.A.C. 6A:32-7, Student Records; N.J.A.C. 6A:14-2.9, Student records; as well as other existing Federal and State laws and rules pertaining to student records and confidentiality.").

³⁸ See Crepeau-Hobson & Leech, *supra* note 16; NAT'L DISABILITY RTS. NETWORK ET AL., *supra* note 8, at 8; Yoder, *supra* note 11.

³⁹ Michaelis, *supra* note 1.

- Amend N.J.S.A. 18A:17-43.4(b) to permit SRO or law enforcement liaison involvement in the threat assessment process only after a behavior is reasonably believed to satisfy the standard in N.J.A.C. 6A:16-6.3(c).
- Amend N.J.S.A. 18A:17-43.5(a)(5) to read: “A threat assessment team shall not disclose or disseminate information according to the requirements listed in N.J.A.C. 6A:16-8.2(9).”
- Add provisions to the law mandating NJDOE collect data on which students are referred to threat assessment teams. The provisions should read:
 - a. The Department of Education shall annually collect data from school districts, educational services commissions, and approved private schools for students with disabilities, disaggregated as set forth in subsection b. below, on the number of students who were referred to a threat assessment team, and the number of the various types of outcomes of the threat assessment team referrals, including services provided. For students removed from school after a threat assessment team referral, the duration of the student’s removals. For any students who were referred to a threat assessment team more than once during the reporting period, the number of those students shall be reported and disaggregated by the number of times each was removed in addition to the disaggregation required by subsection b. of this section.
 - b. The Department shall annually publish the data collected pursuant to subsection a. of this section on its website in a manner that protects student privacy and each school district, educational services commission, and approved private school for students with disabilities shall annually publish its own data on its website in the same manner. The data published on the websites shall be disaggregated by general education students and students with disabilities, by school district, and by race/ethnicity, gender, and age of the student.

III. N.J.S.A. 18A:17-43.6 is *de facto* rule-making and must be done pursuant to the NJAPA

As of the date of this letter, NJDOE has yet to promulgate guidelines or initiate rule-making pursuant to N.J.S.A. 18A:17-43.6. However, promulgating guidelines under N.J.S.A. 18A:17-43.6 would constitute *de facto* rule-making which must be done pursuant to the New Jersey Administrative Procedure Act (NJAPA).⁴⁰ The guidelines in N.J.S.A. 18A:17-43.6 can only have the force of law if they are adopted as rules after notice to and comments from the public.⁴¹

In a separate letter, which we have attached to this letter, we ask NJDOE to follow formal rule-making procedures compliant with the NJAPA. However, if the Legislature amends N.J.S.A. 18A:17-43.4 to 43.6, we believe the Legislature should further clarify NJDOE’s responsibilities by specifically stating the guidelines must be adopted pursuant to the NJAPA’s formal rule-making procedures. Therefore, we request the Legislature amend N.J.S.A. 18A:17-43.6 to read “shall develop implementation regulations, compliant with the New Jersey Administrative Procedures Act, N.J.S.A. 52:14B-1 *et seq.*”

⁴⁰ N.J.S.A. 52:14B-1 *et seq.*

⁴¹ See N.J.S.A. 52:14B-2; N.J.S.A. 52:14B-4(a).

IV. Stakeholder involvement in amending 18A:17-43.4 to 43.6

When implementing state-wide threat assessment teams, “it is critical that proposed legislation be fully vetted and reviewed by educators before implementation, so everyone understands the width and breadth of what is trying to be accomplished.”⁴²

Given the potential harms of the statute, we ask the Legislature to consider necessary amendments to the statute. In doing so, we request the Legislature to actively seek out and involve stakeholders in the process, including from the undersigned organizations. Additionally, in contributing to statutory amendments and/or shaping implementing regulations, NJDOE should seek input from stakeholders, community members, mental health professionals, and current school staff, particularly those involved in Intervention & Referral Services and serving on School Safety Teams.

V. Conclusion

Each of the undersigned organizations understands the importance of a safe learning environment for all students. We believe school safety can be achieved by focusing resources on improving school culture and climate, by using existing standards and resources, and by inserting guardrails limiting threat assessment teams’ potential to compromise the rights and adversely impact the lives of New Jersey students. We thank you for considering our request for the Legislature to amend the current threat assessment law, as codified in N.J.S.A. 18A:17-43.4 to 43.6, and to require NJDOE to follow NJAPA procedures in implementing guidelines under N.J.S.A. 18A:17-43.6. We are available to answer any questions or address any concerns.

Sincerely,



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Powell Legal Fellow



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⁴² Michaelis, *supra* note 1.

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