

EDUCATION LAW WORKSHOP

Safe Schools and Effective Collaboration: 2016 Update

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SPECIALIST ACADEMY

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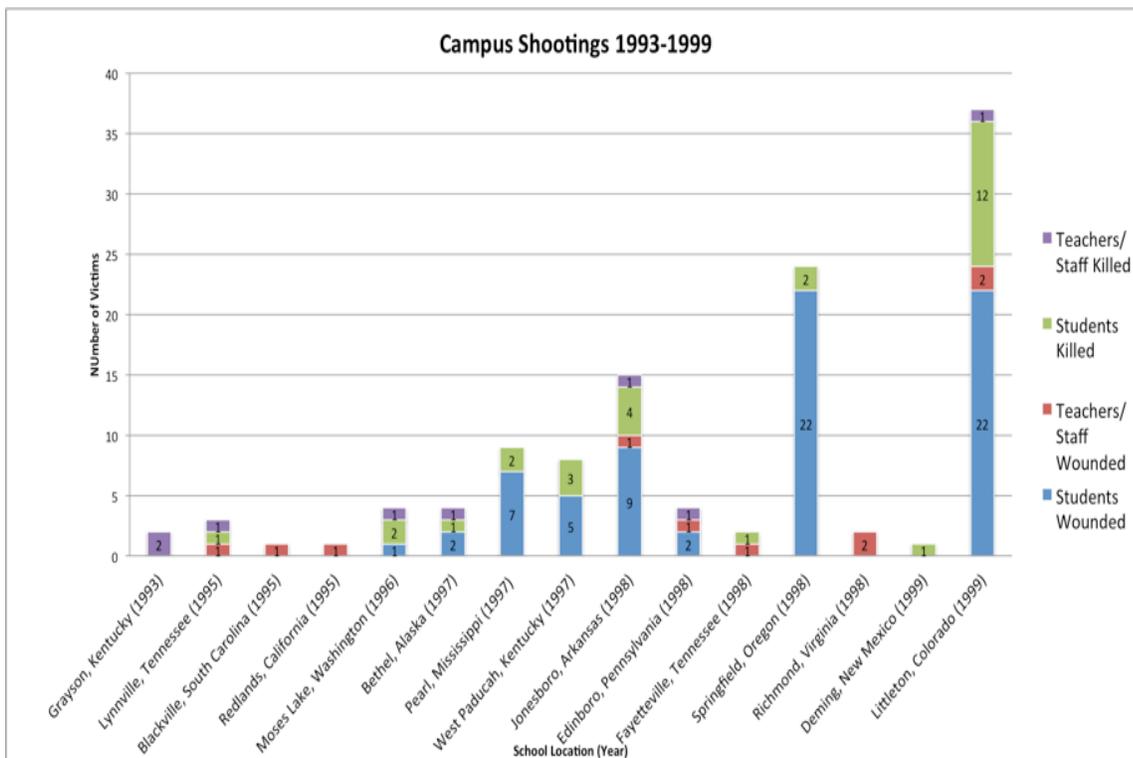
Book Excerpt:

Bernard James, *The Law of School Safety: Rights, Duties, and Liabilities.*

The school safety branch of education reform is developing at a rapid pace with a variety of competing policies. Although “school safety law” started as a small branch on the deeply rooted tree of education law, it has become a ponderous limb with unique features on constitutional rights, government authority, and liability. Having said this, it is now essential to consider precisely why and how the law is changing.

The public school campus is not the same as it was 20 years ago, or even ten years ago. During the late 20th century, policymakers and courts began to speak in a new voice about law that did not formally exist in American jurisprudence. The elements of school safety law were random, scattered about in a few cases and statutes about student free speech rights,ⁱ the right of parents to direct the upbringing of their children,ⁱⁱ and the common law of tort liability.ⁱⁱⁱ

Then from 1980 to 1999, the climate on public school campuses began to shift - beyond reason, it seemed. During this period, research on child welfare and data on campus incidents began to point to a viral spread of violence, victimizations, and deaths. The formalization of school safety law occurred ominously during the 1990s, prompted by the 15 deadly, highly publicized campus rampages that occurred from 1993–1999.^{iv}

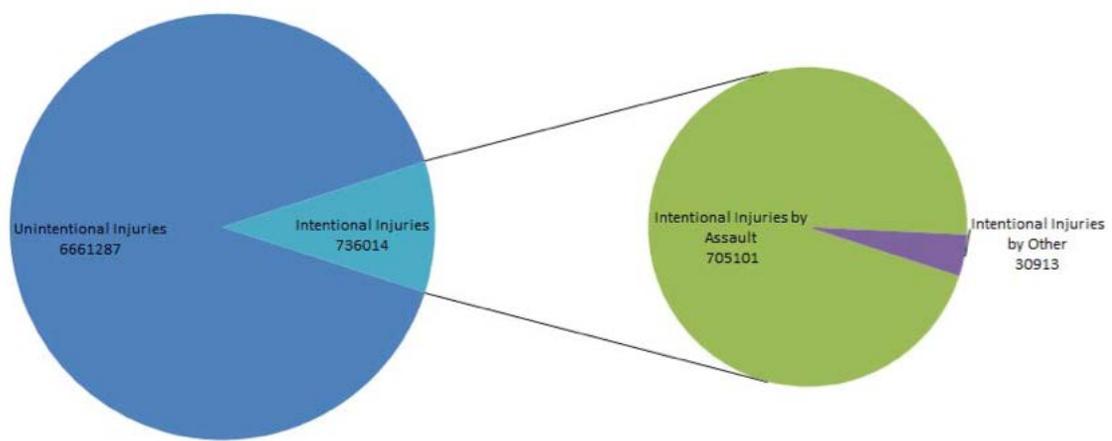


The chart above on the campus shootings between 1993-1999 suggests that there are significant differences between the small city schools prominent on the list and urban schools that are

underrepresented. But nothing could be further from the truth. The safety data from urban schools is roughly the same in proportion; violence has proven to be nearly an incorrigible statistical trait notwithstanding the persistent measures applied to abate its effects on the learning environment.^v As a whole, the situation was recently illustrated by an NBC News survey of campus crime dockets in cities across America over a three-week period in 2013.^{vi} There were at least 48 incidents involving students in possession of a gun on campus. This works out to nearly an average of two gun incidents per day. On one day alone, there were five incidents nationally, all but one in a big city school district: Atlanta, Georgia; Augusta, Kansas; Chicago, Illinois; Raleigh, North Carolina; and Winston-Salem, North Carolina. The survey is misleadingly underinclusive, constrained by the fact that juvenile delinquency records are confidential in all states. So it is very easy to adjust school violence numbers upward to more accurately depict the epidemic of violence on campuses.

The most conspicuous feature of the shift in the climate on campus is the sharp increase in bullying. In 2014, the Journal of the American Academy of Pediatrics released a study of emergency-room visits by children in U.S. hospitals from 2001 to 2008. Seven million hospital visits were made because of injuries at school. More than 700,000 of those injuries were victimizations, accounting for about 92,000 emergency-room visits a year on average. Ninety-six percent of those injuries were from assaults.^{vii}

Emergency Room Visits in School Setting 2001-2008



Notes
 Source: Amanullah, Heneghan, Steele, Mello, Linakis, *Emergency Department Visits Resulting From Intentional Injury In and Out of School*; Pediatrics Vol. 133 No. 2 (February 1, 2014). Pages 254-261.
 Totals, 2001-2008: 7,397,301 Total ERVs from school setting; Average of 92,002 Intentional Injury Emergency Room Visits per year. 96% of the intentional injuries were from assaults.

Yet compulsory attendance defines education in America; its claim on school-aged children is nearly absolute and inexorable. One response to this paradox is becoming a national spectacle – the sudden and dramatic increase in the number of parents who now prefer to educate their children at home.^{viii} Ninety-one percent of homeschooled students had parents who said that a concern about the campus climate was

an important factor for homeschooling their child.^{ix} The latest statistics on private school attendance compliments this trend, suggesting that transfers out of public school are more likely to take place in the secondary-school years.^x Taking this all into account, the central theme for this book is that important changes are occurring in schools across America.

Simply stated, school safety law is emerging out of necessity. The demand for solutions has persuaded courts and policymakers to revise the rules. In the words of President Barack Obama, delivered in the aftermath of the campus shooting that killed 26 at Sandy Hook Elementary School, the real point of the story is the children:

“Can we honestly say that we’re doing enough to keep our children, all of them, safe from harm? I’ve been reflecting on this the last few days, and if we’re honest with ourselves, the answer’s no.” We can’t tolerate this anymore. These tragedies must end. And to end them, we must change.”^{xi}

Faced with this situation, a new order is emerging. The legal reform is changing the rules of campus management - the urgency and effort that school officials are required to bring to maintaining a safe learning environment. Something is happening in education policymaking, the consequences of which fall more heavily on children who are now in need of a buffer of protection in more ways than these materials can explore. Although this new order has not yet replaced its predecessor, the tide is clearly rising in its favor. As the legal rules change, the old order of policymaking in education is being swept away.

Nowhere is this new order more evident than in the growing role of multi-disciplinary teams in school safety. The old-school educator, isolated and autonomous, hoping against hope to avert a crisis with neither information nor resources - is nearly gone. The educators of the old order are indistinguishable from their new order colleagues with one enormous exception. After a disruption, the Lone Rangers would simply pick themselves up, dust themselves off, declare the tragedy an aberration, and reset their hopes that another crisis would not occur. In the new order, educators increasingly utilize collaborative resources to make decisions based on comprehensive, individualized assessments that are targeted to nurture and protect students as well as prevent disruptive behavior. This change - imposed, in varying degree in all 50 states - has led local juvenile justice and child welfare systems to serve the community *with* schools as a means of improving outcomes for children. The primary benefit is striking in its potential; children are more likely to remain in the learning environment rather than put out on the streets. In this new order, isolated, autonomous school discipline and campus management is so soundly discredited, that it would be odd, for an educator—for any reason—to obstruct the collaborative approach to serving and protecting children. It is important to emphasize that although “school safety” is a national phenomenon that has stimulated an increase in a good many laws, the reform is not intended to fundamentally change or usurp the local control of public schools. The goal of the reform is systemic: to improve the decision-making of school officials in light of the known risk factors and protective factors of the children placed in their care.

Another conspicuous feature of the new order is the presence of the school resource officer (SRO). The SRO is a law enforcement officer, specifically selected, and trained as part of a comprehensive strategy to assist educators with campus safety. The first SRO program was instituted in 1953 in Flint, Michigan and later spread, in 1968, to Fresno, California. SRO programs expanded hardly at all until the 1990s. In 2013, after the fatal shootings at Sandy Hook Elementary School in Newtown, Connecticut, nearly all state and federal policymakers began introducing legislation that would create or greatly expand school

resource officer programs in schools. The SRO is becoming an essential credential of educators' and students' feelings of safety. The empirical data on school safety confirm these perceptions of wellness. The expansion of SRO programs coincides with a shift in the tide of data on campus safety. After 1992, all indicators of school crime begin to shift downward. In 2011, incidences of school-associated deaths, violence, nonfatal victimizations, and theft all continued their downward trend.^{xii} This trend mirrors that of juvenile arrests in general, which fell nearly 50% between 1994 and 2009—17% between 2000 and 2009 alone.^{xiii}

It is important to emphasize here that the new order in education reform does not, by any means, simplify the legal issues. Instead, the legal reform is complicating policymaking. As these materials will set forth, some of the important hindrances to safe schools are products of the educators' way of thinking about their authority in the light of the law. To begin with, efforts by educators to maintain safe campuses are not being opposed by hostile authorities or superior forces. The implementation of effective policies appears to be hampered to a surprising degree by obstacles within the educational environment itself.

Powerful constraints appear to work against the intentions of educators to maintain a safe learning environment – the climate of the surrounding community, the risk and protective factors of the students they inherit, parental demands, race prejudice, cultural differences, economic status, insufficient resources, and institutional indifference. It must be stated at the outset that while several levels of explanations are possible, no full explanation of these challenges can be given. But a thorough inquiry into the emerging law strongly suggests that these constraints are not acceptable explanations for the lack of effective policies to protect children on campus.

Today, a surprising number of school officials, their legal counsel, and interagency partners do not know what the law permits and what it requires on the subject of safe schools. In other words, a situation exists in which, in a very real sense, uncertainty and timidity prevail as the primary explanations for the failure of schools to protect the students placed in their care. A clear symptom of this timidity is the inertia-causing statement that is frequently spoken without elaboration in policy discussions; “we cannot do this; it may be against the law.” This tension is infectious, and can give rise to what the courts now call “deliberate indifference. Even among seasoned educators, otherwise learned, there are chronic doubts, causing an unfortunate many to lose their footing about school safety as a practical matter.

Three themes shape these materials. The first theme is to plainly state what the law permits and what it requires on the subject of safe schools. The goal is to empower policymakers and school officials to see more clearly the bright line that separates legitimate educational interests from arbitrary, abusive, and discriminatory school policies. The second theme is to encourage school officials to seize the moment that school safety law creates to produce better outcomes for campus perpetrators and victims alike. This objective may seem imprudent; nevertheless, these materials aim to inspire the reasonable expectation of educators who desire their schools to be safe learning environments and all of the wonderful things that go with it. In this sense, the book is offered as hope for school officials who, for whatever reason, may lack it. The third and final theme is about the future: laying the groundwork for a more practical discourse about the rights of children for whose benefit the law is changing. It is the hope that policymakers will find themselves energized by the structure of school safety law in a way that restores their initial attraction to the profession – to make a difference in the lives of children who are “our most valuable resource.”^{xiv}

NOTE: Endnotes at end of handout on page 69.

Court Decisions – School Safety

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CHRISTOPHER SMITH V. STATE OF INDIANA
No. 18S02–1304–CR–297. | March 27, 2014. | Rehearing Denied June 30, 2014.

Opinion

On Petition to Transfer from the Indiana Court of Appeals, No. 18A02–1204–CR–331

DAVID, Justice.

The Indiana Code requires certain school officials to immediately report instances of suspected child abuse occurring within their institutions to the Department of Child Services or law enforcement. Here, a high school principal was convicted for failing to comply with this requirement after a student at his school told him she had been raped by a fellow student, and he did not notify the police or the Department of Child Services for four hours. We affirm.

Facts and Procedural History

G.G. was a sixteen-year-old student at Muncie Central High School. G.G. had previously been found to be a child in need of services and made a ward of the Madison County office of the Indiana Department of Child Services. She resided, by court order, at the Youth Opportunity Center in Muncie. The YOC served as G.G.’s custodial parent and provided care, room, and board to G.G. pursuant to a contract with DCS.

Between 12:20 and 12:25 p.m. on November 9, 2010, a fellow student brought G.G. to the office of Kathy McCord, the assistant principal at Muncie Central. G.G. told McCord that she had been raped (during lunch) by a fellow student, S.M., in a bathroom at the school. McCord immediately went to the office of Christopher Smith, then the principal at Muncie Central, and told him of the rape allegation.

*671 Smith and McCord returned to McCord’s office, where G.G. repeated the allegation. Smith contacted Trudy Anderson, the school nurse, at approximately 12:40, and also Jackie Samuels, the associate principal, informing them of the allegation and asking them to come to McCord’s office. Anderson went into McCord’s office to sit with G.G., and Smith, Samuels, and McCord went to Smith’s office. Smith directed McCord to review the school’s security footage to identify the whereabouts of the two students—a process that took McCord about an hour. Anderson sat with G.G. until McCord returned, and at some point during that time G.G. was directed to provide a handwritten statement of her allegation, which she did.

At the time, there were between three and five commissioned and sworn police officers on school grounds, serving as security officers. Samuels asked Smith if she should contact one of those officers, call the YOC, or find S.M. Smith directed her to call the YOC. Samuels spoke on the phone with Crystal Dunigan, a staff member at the YOC responsible for G.G.'s cottage, and informed her of the alleged rape. Dunigan asked Samuels to call back, because Dunigan needed to talk to other individuals at the YOC.

Sometime between 12:45 and 1:00, Smith called the administration for the Muncie Community School District and spoke to the director of secondary education, Joann McCowan. Smith was trying to reach Tim Heller, the assistant superintendent. Smith relayed G.G.'s allegation to McCowan, and said his question for Heller was whether a security officer should be present if S.M. was questioned. McCowan reached the district's director of human resources, Lon Sloan, who told her that Smith should have another administrator present, but did not need a security officer as they were not sure if it was a criminal matter or not. Both McCowan and Sloan were headed to Muncie Central later that afternoon for job interviews.

Samuels called Dunigan a second time, shortly before 1:00. Dunigan explained that the YOC would send a driver to take G.G. to the emergency room. The two also discussed G.G.'s credibility, including an incident earlier that year in which Anderson believed G.G. had faked a seizure, and an attendance issue in which G.G. lied about where she had been. After the conversation concluded, Samuels told Smith that the YOC was coming to take G.G. to the emergency room.¹

¹ The YOC driver, Tameka Ross, arrived at a little before 2:00. Ross and G.G. arrived at Ball Memorial Hospital in Muncie at around 2:30. Within about an hour, the hospital's staff contacted the police to report the possible sexual assault, and officers arrived at the hospital just before 4:00.

Smith then directed Samuels, at about 1:25, to go get S.M.—who had spent the intervening time finishing lunch and then attending a science class—and bring him to Smith's office. Smith asked the Muncie Central athletic director, Thomas Jarvis, to be a witness while he questioned S.M. Jarvis asked Smith if this should be a police matter instead, but Smith said that it was still a school matter.

Smith questioned S.M. about the allegation, but S.M. denied raping G.G. He was not asked to provide a written statement. The questioning last between fifteen and twenty minutes, and S.M. was then allowed to return to his class and—at the end of the school day—eventually went home.

After S.M. left, Smith asked Jarvis to search S.M.'s and G.G.'s lockers. S.M. indicated during the questioning that he *672 and G.G. had exchanged several notes, but that he had thrown them away; but Jarvis and Smith believed the letters would still be in the students' lockers. Jarvis contacted one of the school's security officers, Officer Mike Edwards of the Muncie Police, and

asked him for assistance in the search. Jarvis did not, however, tell Officer Edwards that there had actually been an allegation of a rape occurring on school grounds—nor did anyone else at the school.

After completing the search, Officer Edwards continued his normal duties until 3:30, when he left the school for the day. Later that afternoon, Officer Edwards's supervisor with the police department informed him of the rape, and that it had occurred at Muncie Central. Officer Edwards immediately went to Ball Memorial. He served as the lead investigator briefly, before another officer—Detective George Hopper—assumed that function two days later.

Meanwhile, back at Muncie Central, Samuels, Smith, Sloan, and McCowan proceeded to conduct interviews with candidates for an open administrator position. The interviews lasted until after 4:00.

At the conclusion of the second interview, Sloan realized that Heller and the superintendent for the district, Dr. Eric King, still had not yet been notified of the alleged rape. With Sloan and McCowan in the room, Smith then called Heller. Smith explained to Heller that G.G. had reported that she had been raped, and that she was then at the hospital. Heller told Smith to contact DCS.

A little after 4:30, Sloan placed a call to the Indiana Child Abuse Hotline, operated by DCS. Smith then explained the circumstances of G.G.'s allegations to the hotline operator, who indicated that because S.M. was also sixteen, "this would be something I believe that we would probably refer to law enforcement," and that "this looks like something we are going to screen out on our end," but she would forward the report to her supervisors. (Joint Ex. 3 at 1, 6, 8.) Smith told the operator that he would contact law enforcement.

Smith then tried several times to contact the YOC to check on G.G., before finally getting ahold of Ross at the hospital, sometime between 4:30 and 4:50. The rape kit had not yet been completed at that time, and Smith asked Ross if the YOC intended to report the allegation, or if Muncie Central should do it. Ross replied that she assumed Muncie Central should make the report, as the rape occurred at the school.

Sloan then called the district's chief of security and operations, Brian Lipscomb, and asked—hypothetically—what Lipscomb's response would be if a student were sexually assaulted at school. Lipscomb responded that he would call the police. Sloan then informed Lipscomb of G.G.'s allegations, and that she was now at Ball Memorial. Lipscomb immediately went to the hospital, where he met with Officer Edwards, and Smith arrived there at about 5:30. Smith remained until about 6:10 and then left for a school board meeting, because he was recognizing several coaches and the volleyball team at the meeting. Lipscomb remained for about another thirty minutes—until G.G. was taken back to the YOC. At no point did Smith, Muncie Central, or the district ever directly contact the Muncie Police Department to report the rape.

On November 11, Detective Hopper began his investigation into the alleged rape. Six days into

the investigation, S.M. admitted to raping G.G., and he was arrested *673 and later pleaded guilty.² At a point, however, the investigation shifted focus to Smith; why he did not contact the police at all—or DCS sooner—after G.G. informed him of the rape, and why district officials were then claiming G.G. had recanted, been vague in her accusation, or somehow changed her story over the course of the day. Smith told police he assumed that notifying the YOC and getting G.G. to the hospital would take care of the police notification.

² The precise charge(s) S.M. faced, the charge(s) to which he pleaded guilty, and his sentence are not available from the record. We can assume he was charged as an adult, though, because our juvenile courts do not have jurisdiction over a sixteen-year-old alleged to have committed rape. *See* Ind.Code § 31-30-1-4(a)(4)(2008).

The State eventually charged Smith with failure report G.G.’s allegation to DCS or local law enforcement, a class B misdemeanor under Indiana’s statutory scheme requiring school officials to report instances of child abuse.³ Ind.Code § 31-33-22-1(a) (2008). Smith filed a motion to dismiss the charges, claiming the State had inappropriately combined the reporting requirements of two statutes, and also arguing that the reporting statute was void for vagueness. The trial court denied Smith’s motion and affirmed the constitutionality of the criminal provision, but amended the charging information to cure Smith’s claim that the information inappropriately combined two statutory provisions.⁴ Smith was convicted following a bench trial, sentenced to 120 days in jail, all suspended to probation, ordered to serve one hundred hours of community service, and also ordered to pay a fine of one hundred dollars along with court and probation costs.

³ The case was initially opened as an obstruction of justice investigation. *See* Ind.Code §§ 35-44-3-4 (2008), 35-44.1-2-2 (Supp.2013) (effective July 1, 2014).

⁴ The statutory provisions—and the nature of this amendment to the charging information—are discussed in greater detail below.

Smith appealed, claiming the evidence was insufficient to sustain his conviction and also reiterating his claim that the criminal statute was unconstitutionally vague. In a split opinion, the Court of Appeals reversed and vacated Smith’s conviction. *Smith v. State*, 982 N.E.2d 348, 363 (Ind.Ct.App.2013).

Without needing to reach the question of the statute’s constitutionality, the majority concluded that the State failed to present sufficient evidence that Smith had reason to believe G.G. had been a victim of child abuse as required by the reporting statute, because neither he nor his fellow administrators believed that a student-on-student rape was child abuse as defined by the Indiana Code, and it also interpreted the statutory scheme to permit a reasonable investigation made in good faith. *Id.* at 362–63. Judge Vaidik dissented, believing that the majority’s interpretation of the reporting requirements to first allow a reasonable investigation undermined the purpose behind the statutory scheme and might operate to discourage, rather than encourage, the reporting of child

abuse. *Id.* at 363–66 (Vaidik, J., dissenting).

We granted transfer, thereby vacating the Court of Appeals opinion. *Smith v. State*, 987 N.E.2d 70 (Ind.2013) (table); Ind. Appellate Rule 58(A).

Criminal Liability Under Indiana’s Child Abuse Reporting Statutes

Indiana Code article 31–33 contains a statutory structure to govern the reporting and investigation of child abuse and neglect. The structure’s purpose is to:

- *674 (1) encourage effective reporting of suspected or known incidents of child abuse or neglect;
- (2) provide effective child services to quickly investigate reports of child abuse or neglect;
- (3) provide protection for an abused or a neglected child from further abuse or neglect;
- (4) provide rehabilitative services for an abused or a neglected child and the child’s parent, guardian, or custodian; and
- (5) establish a centralized statewide child abuse registry and an automated child protection system.

Ind.Code § 31–33–1–1 (2008). In furtherance of those aims, the statutes in this article provide that “an individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report as required by this article.” Ind.Code § 31–33–5–1 (2008). If the individual is “a member of the staff of a medical or other public or private institution, school, facility, or agency, the individual shall immediately notify the individual in charge.” Ind.Code § 31–33–5–2(a) (2008). That “individual in charge ... shall report or cause a report to be made.” Ind.Code § 31–33–5–2(b). The report must be made “immediately ... to: (1) the department [DCS]; or (2) the local law enforcement agency.” Ind.Code § 31–33–5–4 (2008).

An individual has “reason to believe” a child is a victim of child abuse or neglect when the individual is presented with “evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected.” Ind.Code § 31–9–2–101 (2008). And at the time of the incident here, a “victim of child abuse or neglect” was defined in relevant part as “a child described in: (1) IC 31–34–1–1 through IC 31–34–1–5.” Ind.Code § 31–9–2–133(a) (2008).⁵

⁵ Similarly, “child abuse or neglect,” for purposes article 31–33, referred to “a child who is alleged to be a child in need of services as described in IC 31–34–1–1 through IC 31–34–1–5.” Ind.Code § 31–9–2–14(a) (2008).

That range of statutory provisions—“IC 31–34–1–1 through 31–34–1–5”—establishes the fixed set of circumstances under which a child might be found to be a child in need of services, or CHINS. Of those circumstances, section 31–34–1–3 applies here, as it provides that

(a) A child is a child in need of services if, before the child becomes eighteen (18) years of age:

(1) the child is a victim of a sex offense under:

(A) IC 35–42–4–1;

* * *

and

(2) the child needs care, treatment, or rehabilitation that:

(A) the child is not receiving; and

(B) is unlikely to be provided or accepted without the coercive intervention of the court.

Ind.Code § 31–34–1–3(a) (2008).⁶ And, finally, the relevant portion of *675 Indiana Code § 35–42–4–1—the criminal provision for rape—defines that offense as occurring when a person “knowingly or intentionally has sexual intercourse with a member of the opposite sex when: (1) the other person is compelled by force or imminent threat of force.” Ind.Code § 35–42–4–1(a) (2008).

⁶ At several points in its brief, the State argues that it did not need prove the child’s need for care, treatment, or rehabilitation through court intervention as an element of the offense. This reflects an incorrect analysis of the statute’s evolution.

In 2012, the General Assembly amended sections 31–9–2–14 and 31–9–2–133 to provide that children identified as being victims of child abuse or neglect by application of the CHINS statutes found in sections 31–34–1–1 through 31–34–1–5 were victims of child abuse or neglect “regardless of whether the child needs care, treatment, rehabilitation, or the coercive intervention of a court.” Ind.Code §§ 31–9–2–14, –133 (Supp.2013); *see* Act of March 14, 2012, P.L. 48–2012, §§ 11, 22, 2012 Ind. Acts 850, 856. But this amendment is explicitly made effective as of July 1, 2012. *See id.* And this language did not exist in the statute at the time Smith was charged and tried.

Therefore, if the State were to pursue this charge against a defendant today, subsection (a)(2) of Indiana Code § 31–34–1–3 would not be an element of the offense. But at the time of Smith’s trial, the State was still required to prove that subsection beyond a reasonable doubt.

The statutes presume that a person making such a report is acting in good faith, and immunize such good-faith conduct from civil or criminal liability. Ind.Code §§ 31–33–6–1, –3 (2008). But failure to comply with section 31–33–5–1 is a class B misdemeanor. Ind.Code § 31–33–22–1(a).⁷

7 Smith’s original charging information alleged that Smith, “a person who had reason [to] believe that a child may be the victim of child abuse or neglect,” failed to comply with the reporting statutes, citing Indiana Code §§ 31–33–5–1, 31–33–5–4, and 31–33–22–1(a). (App. at 13.) In his motion to dismiss, Smith argued that criminal penalties were only assigned, by section 31–33–22–1(a), to violations of section 31–33–5–1, requiring a reason to believe that the child *is* a victim of child abuse or neglect—and not to violations of 31–33–5–4, requiring the (presumably lower) standard that a child *may be* a victim of child abuse or neglect.

The trial court’s solution was to require the State to amend the charging information, striking “may be” and replacing it with “was.” (App. at 79; Tr. at 1–2; Appellant’s Br. at 17.) This approach is consistent with how appellate courts have applied these statutes. *See, e.g., C.T. v. Gammon*, 928 N.E.2d 847, 853 (Ind.Ct.App.2010) (citing sections 31–33–5–1 and 31–33–5–4 as basis for requirement that “an individual who has reason to believe that a child is a victim of child abuse or neglect” must make report); *Anonymous Hosp. v. A.K.*, 920 N.E.2d 704, 706 (Ind.Ct.App.2010) (“Indiana law requires that an individual who has reason to believe that a child is a victim of child abuse or neglect shall immediately make a report to either the department of child services or the local law enforcement agency.”).

While Smith initially claimed in his motion to dismiss that this rendered the charges against him unconstitutionally vague, he no longer makes this specific argument on appeal. But Smith is correct that we have previously taken constitutional issue with the use of the word “may” in criminal statutes, *see State v. Downey*, 476 N.E.2d 121, 123 (Ind.1985) (use of phrase “may endanger” in neglect of dependent statute “ha[d] a broadness and vagueness which would prevent it from meeting constitutional muster”), *reh’g denied*, but there we simply construed the statute narrowly to save it from nullification, noting that doing so “[did] not establish a new or different policy basis and [was] consistent with legislative intent,” *id.*

As in *Downey*, we think that “the use of the word ‘may’ ... does not indicate a critical legislative choice or represent the resolution of important issues within the social problem involved,” and “[t]he overall purpose of the statute as contemplated by the legislature would be well-served without the dimension in scope added by the term ‘may.’ ” *Id.* We think instead the use of that word in section 31–33–5–4 most likely reflects a legislative intent to incorporate the scope of the “reason to believe” language found in section 31–33–5–1, and thus construe the former statute narrowly—as the trial court did—to require a report to DCS or law enforcement when a defendant has reason to believe that a child *is* a victim of child abuse or neglect. *Cf. id.*

Therefore, in order for the State to successfully convict Smith of the class B misdemeanor offense of failure to report child abuse or neglect, it was required to prove beyond a reasonable doubt that Smith:

- (1) had reason to believe;
- (2) that G.G. was a victim of child abuse or neglect as
 - (a) a victim of rape
 - *676 (b) who needed care, treatment, or rehabilitation that she was not receiving and that was unlikely to be provided or accepted without the coercive intervention of the court; and
- (3) Smith knowingly;
- (4) failed to immediately make a report to
 - (a) DCS or
 - (b) a local law enforcement agency.

Smith's contentions on appeal relate to elements (1), (2)(b), and (4), as we list them above. He argues that the evidence at trial was insufficient to show beyond a reasonable doubt that he had reason to believe G.G. was a victim of child abuse, or that G.G. was a victim of child abuse as that term is defined by statute. And in a related sense, he argues that the phone call to the YOC satisfied his reporting obligation under the statutes and, alternatively, that his report to DCS four hours after G.G.'s allegation was "immediate." He also claims that the criminal provision through which he was subjected to punishment was unconstitutionally vague as it was applied to him. We address his constitutional claim first.

I. The Reporting Requirement Is Not Unconstitutionally Vague

[1] [2] [3] [4] When challenging the constitutionality of a statute, a party must clearly overcome a presumption of constitutionality. *Fry v. State*, 990 N.E.2d 429, 434 (Ind.2013). We observe a high level of deference with respect to the General Assembly's decision-making, and any doubts are resolved in favor of constitutionality. *Id.* "We have no right to substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives." *State v. Downey*, 476 N.E.2d 121, 122 (Ind.1985) (citing *Sidle v. Majors*, 264 Ind. 206, 209, 341 N.E.2d 763, 766 (1976)). We therefore review such challenges de novo. *Lock v. State*, 971 N.E.2d 71, 74 (Ind.2012).

[5] [6] [7] A criminal statute is unconstitutionally vague if the conduct sought to be prohibited is not clearly defined. *Brown v. State*, 868 N.E.2d 464, 467 (Ind.2007). Such a due process failing may be reflected in one of two distinct statutory flaws: "(1) for failing to provide notice enabling ordinary people to understand the conduct that it prohibits, and (2) for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement." *Id.* (citing *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999)). We have therefore said that "there must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trial acts and omissions will not occur. It cannot be left to juries, judges, and prosecutors to draw such lines." *Downey*, 476 N.E.2d at 123. Likewise, the statute must define the offense with sufficient particularity that it "does not encourage arbitrary and discriminatory enforcement" and may not "vest[] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute." *Kolender v. Lawson*, 461 U.S. 352, 357–58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

[8] [9] Smith's challenge primarily falls under the first category of vagueness claims,⁸ which means the challenged statute *677 must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden so that 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Brown*, 868 N.E.2d at 467 (quoting *Healthscript Inc. v. State*, 770 N.E.2d 810, 816 (Ind.2002)). It must "convey sufficiently definite warning as to the proscribed conduct when measured by common understanding." *Rhinehardt v. State*, 477 N.E.2d 89, 93 (Ind.1985). We will affirm a statute's constitutionality against a vagueness challenge "if individuals of ordinary intelligence could comprehend it to the extent that

it would fairly inform them of the generally proscribed conduct.” *Klein v. State*, 698 N.E.2d 296, 299 (Ind.1998). This challenge is assessed as the statute was applied to the particular defendant, “in light of the facts and circumstances of each individual case.” *Brown*, 868 N.E.2d at 467.

8 He briefly claims that the statute also fails the second test because, he says, it lacks “ascertainable standards” and therefore “authorizes and encourages arbitrary and discriminatory enforcement.” (Appellant’s Br. at 39.) But we think our resolution of this issue addresses both points.

[10] Smith argues that the word “immediately” in Indiana Code § 31–33–5–4 is unconstitutionally vague as it was applied to his reporting duty under section 31–33–5–1. We disagree.

Smith made this same argument in his motion to dismiss, and the trial court also rejected it. Citing to an ordinary dictionary, Judge Cannon defined “immediately” as being “in an immediate manner; specifically, a) without intervening agency or cause; directly; b) without delay; at once; instantly.” (App. at 78 (citing Webster’s New World Dictionary of the American Language, College Edition (1968)).) He therefore found the word to be one commonly understood by ordinary individuals, that “rather straightforwardly and fairly informs a reasonably intelligent person when suspected child abuse must be reported.” (App. at 78.) We agree with Judge Cannon’s assessment.

Because Smith’s claim hinges upon how ordinary people understand statutory language, we will also look to ordinary dictionaries for assistance. And those dictionaries tell us that “immediately” means without any intermediate intervention or appreciable delay.⁹ In other words, when considered within the context of Indiana’s reporting statutes, the use of the word “immediately” in Indiana Code § 31–33–5–4 conveys a required strong sense of urgency in action and primacy of purpose in fulfilling the duty to report. *See Anonymous Hosp. v. A.K.*, 920 N.E.2d 704, 707 (Ind.Ct.App.2010) (use of phrase “shall immediately” in reporting statute “makes clear that time is of the essence in such a situation”); *cf. Barber v. State*, 863 N.E.2d 1199, 1206 (Ind.Ct.App.2007) (evidence sufficient to show defendant failed to stop immediately after accident when defendant slowed on interstate, observed accident, and turned off at next exit), *trans. denied*; *Jenkins v. State*, 596 N.E.2d 283, 283–84 (Ind.Ct.App.1992) (affirming conviction for driving-related offenses after defendant caused accident and “did not stop immediately after the accident, but just ‘kept going’ for approximately one block”).

9 *See* Webster’s II New College Dictionary 552 (1995) (defining immediately as “[w]ithout intermediary” and “[w]ithout delay”); Webster’s Third New International Dictionary 1129 (1976) (defining immediately as “without intermediary,” “in direct connection or relation,” “without interval of time,” and “without delay”).

We think this ordinary view of the term comports with the General Assembly’s intent in enacting the reporting statutes—to encourage effective reporting of potential child abuse or neglect, to facilitate quick investigation of allegations by the proper authorities, and to protect the victims—and is not beyond the rational understanding of a reasonably intelligent person. *678 Such a

person would read this statute and clearly understand that his or her highest priority must be to report—or facilitate the report of—the known or suspected child abuse or neglect.¹⁰

¹⁰ For the same reasons, we do not believe this word’s inclusion in the statute renders it subject to arbitrary enforcement.

So we reject Smith’s implication that the statute must be vague without some explicit time limitation or boundary defining immediately. But alternatively, he argues that the statute could be narrowly construed to incorporate such a boundary—and specifically, he asks for the boundary of “immediately” to be up to twenty-four hours later. He analogizes his reporting requirement to the time frame found in Indiana Code § 31–33–8–1(b) (2008), which provided that when DCS received a report that a child may be a victim of child abuse, it was to initiate an investigation “immediately, but not later than twenty-four (24) hours after receipt of the report.”

There are several problems with this approach. For one thing, it would hardly serve the purpose of the reporting statutes to permit—under every circumstance—school administrators to effectively sit on a report of potential (or even confirmed) child abuse for a full day before reporting it to the authorities. As perhaps the most dangerous resulting hypothetical, this would mean that a child could arrive to school with a black eye, that the child could tell a school official it came from his or her parent, and that the school could then send that child home at the end of the day—back to the abuser’s “care”—and not make a report until the following morning. Additionally, this would mean that the DCS investigation might not begin for yet *another* day, meaning that a full forty-eight hours might pass from a school official noticing a child was being beaten at home to when the State could bring its full protective powers to bear.

^[11] There is no rational way to permit such a universally broad view of the reporting statutes, given that they exist to quickly and effectively begin the process of investigating incidents of child abuse and removing those victims from their harmful surroundings. Put simply, the statutory scheme contemplates that individuals like teachers, school administrators, and hospital workers are often the first ones to become aware of serious problems in a child’s life. The State therefore entrusts those people to be the first lines of defense with respect to our most vulnerable citizens, and it likewise imparts on them a sterner obligation of intervention.

For another thing, the General Assembly itself has rejected Smith’s all-encompassing approach for the very statute he uses as authority. The current version of section 31–33–8–1 provides multiple outer limits for DCS, each reflecting different factual circumstances, but all under the broader heading of “immediately.” For example, when the report alleges that a child may be a victim of child abuse, “the assessment shall be initiated immediately, but not later than twenty-four (24) hours after receipt of the report,” Ind.Code § 31–33–8–1(e) (Supp.2013), but when it is believed that “a child is in imminent danger of serious bodily harm,” the assessment shall be initiated “immediately, but not later than one (1) hour, after receiving the report.” Ind.Code § 31–33–8–1(d) (Supp.2013). We will not construe a statute in a manner so clearly contrary to the

General Assembly's view on the subject.

[12] But finally, a criminal statute need not list with absolute specificity the *679 prohibited conduct; “rather, it must inform the individual of the conduct generally proscribed.” *Brown*, 868 N.E.2d at 467 (citing *State v. Lombardo*, 738 N.E.2d 653, 655 (Ind.2000)); *see also Vaillancourt v. State*, 695 N.E.2d 606, 610 (Ind.Ct.App.1998) (“The statute need only inform the individual of the generally proscribed conduct; a statute need not list, with itemized exactitude, each item of conduct prohibited.”) (quoting *Mallory v. State*, 563 N.E.2d 640, 644 (Ind.Ct.App.1990), *trans. denied*), *trans. denied*. And we think that the statute here does so inform.

Under the facts of this case, no reasonable person of ordinary intelligence would have difficulty determining whether or not Smith acted with a sense of urgency or primacy of purpose when his report came after a four-hour delay that included doing intermediary tasks such as conducting a personal interrogation of the alleged rapist, ordering the search of the involved students' lockers for evidence corroborating the alleged rapist's defense, *declining* to contact the police when asked (even though there were multiple officers in the building), and—most notably—conducting two hours' worth of unrelated and purely administrative job interviews. Nor do we think this case indicates that the statute was arbitrarily enforced by the police when the perpetrator of a sex crime was allowed to remain in the general student population and eventually returned home, and the scene of the assault was unsecured and left open for other students to use—all things resulting directly from the delay, which threatened to contaminate (or destroy) evidence of the crime, and all things which were imminently avoidable by the more prompt involvement of law enforcement. We therefore reject Smith's claim that Indiana Code § 31–33–5–4 is unconstitutionally vague as it was applied to him.

II. The Evidence Was Sufficient to Sustain Smith's Conviction

In our review of a challenge to the sufficiency of the evidence underlying a conviction, we will neither reweigh evidence nor assess the credibility of witnesses. *Bailey v. State*, 979 N.E.2d 133, 135 (Ind.2012). All probative evidence, even where it might be conflicting, and the reasonable inferences to be drawn from that evidence are viewed in the light most favorable to the judgment of conviction. *Id.* So long as an inference may be reasonably drawn from the evidence to the verdict, we will affirm unless no reasonable trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *Lock*, 971 N.E.2d at 74; *Gray v. State*, 957 N.E.2d 171, 174 (Ind.2011). “It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence.” *Id.*

Smith, as we noted above, presents several challenges to the sufficiency of the evidence underlying his conviction. Specifically, he argues (1) that the evidence was insufficient to show that he had reason to believe G.G. was the victim of child abuse because there was no evidence that he had reason to believe (a) that a minor-on-minor rape was child abuse, and (b) that G.G. would only receive care, treatment, and rehabilitation through the coercive intervention of a court,

and; (2) that the evidence was insufficient to show that he failed to make an immediate report.

A. Was the Evidence Sufficient to Show That Smith Had Reason to Believe That G.G. Was a Victim of Child Abuse?

As we laid out above, whether Smith had “reason to believe” that G.G. was a victim of child abuse meant the State was required to prove that he was presented with “evidence that, if presented to individuals *680 of similar background and training, would cause the individuals to believe that a child was abused or neglected.” Ind.Code § 31–9–2–101. And in his case, that required him to have reason to believe two things: that G.G. was a victim of rape, and that she was a child in need of services.

1. Smith had reason to believe G.G. was a victim of rape.

[13] Smith argues that of the five individuals of similar background and training who testified—Sloan, McCowan, Samuels, Jarvis, and McCord—none believed (at the time) that an allegation of a sixteen-year-old student raping another sixteen-year-old student constituted child abuse.¹¹ Smith concedes that Heller testified that he was aware of the need to immediately report the allegation, but argues that Heller was not an “individual of similar background and training” because Heller, Smith says, apparently had a much broader and lengthier level of experience in education and school administration.¹²

11 Sloan testified that he did not think the allegation constituted child abuse, and when he called the DCS hotline the operator asked if he was calling to report an instance of child abuse. Sloan said “[w]ell, I’m not sure, but, that is why I called is to let you tell me.” (Joint Ex. 3 at 1.) McCowan testified that “I didn’t see it as child abuse,” (Tr. at 115), and Samuels testified that “I didn’t think of it as child abuse. I thought of it more as a crime.” (Tr. at 97.) McCord and Jarvis both knew the allegation was of a student sexually assaulting another student, but when asked if they thought that might be child abuse, they both testified “No.” (Tr. at 36, 242.)

12 Heller testified that when he was finally notified of the rape allegation, he told Smith to immediately call DCS because he knew Smith had a duty to report the allegation, and he knew this because “I had a superintendent friend in another state where I worked that didn’t report child abuse that day, wanted to take another day, wanted to make an investigation himself. Sheriff come picked him up and took him to jail.” (Tr. at 274.) “I knew that you needed to, uh, take the responsibility and get help.” (Tr. at 275.)
At several points in his brief, Smith tries to highlight that neither the police nor the DCS hotline operator initially treated a minor-on-minor rape allegation as potential child abuse either. But if Heller’s testimony cannot, for the sake of argument, be relevant to whether an “individual of similar background and training” to Smith had reason to believe this sort of allegation constituted child abuse, the views of a police officer and a DCS hotline operator are even less relevant.

Smith also points to a number of exhibits admitted into evidence at his trial—administrative guidelines and manuals promulgated by the school district and, in one instance, edited and approved by DCS and the Delaware County Prosecutor’s office—either not defining child abuse or defining child abuse as a sexual act between an adult and a child.¹³ Thus, he says, to the *681 extent the statutory definition of “reason to believe” encompasses “training,” the evidence shows that he was trained to know that he had a duty to report child abuse, but not trained to believe G.G.’s allegation would have been child abuse.¹⁴

13 The district’s Board of School Trustees’ policy on child abuse and neglect provides that “[e]ach staff member employed by this Corporation shall be responsible for reporting immediately every case, whether ascertained or suspected, of abuse, abandonment, cruelty, or neglect resulting in physical or mental injury to a student by other than accidental means.” (State’s Ex. 1.) It directs staff to “immediately call the Delaware County Division of Family and Children or Muncie Policy [sic] Department Juvenile Aide Division,” and secure “prompt medical attention for any such injuries reported.” (State’s Ex. 1.) It also lists as authority several Indiana Code provisions: specifically, Indiana Code §§ 16–21–8–1 and 31–9–2–133, and chapters 31–33–5 and 33–34–1.

The district’s Administrative Guideline on child abuse and neglect similarly stated that “[i]t is the responsibility of each staff member employed by the Muncie Community Schools to report immediately every case, whether ascertained or suspected, of abuse, abandonment, cruelty or neglect resulting in physical or mental injury to a student by other than accidental means.” (State’s Ex. 2.) It then set forth the procedure to be followed, which included directing the principal to “immediately call the Delaware County Division of Family and Children of [sic] the Juvenile Aid Division of the Muncie Police Department.” (State’s Ex. 2.)

And a training pamphlet entitled “Child Abuse Prevention & Reporting: Roles and Responsibilities,” was provided to staff at Muncie Central. (Tr. at 99.) Funded in part by the Delaware County DCS office and revised in 2007 by the Delaware County Prosecutor (Defendant’s Ex. A at 3), the pamphlet defines child abuse as “any mistreatment or neglect of a child that results in non-accidental harm or injury and which cannot *reasonably* be explained,” (Defendant’s Ex. A at 5 (emphasis in original).) It provides that child abuse can include “physical abuse, emotional abuse, sexual abuse, and neglect,” and defines “sexual abuse” as “[a]ny sexual act between an adult and child. This includes fondling, penetration, intercourse, exploitation, pornography, exhibitionism, child prostitution, group sex, oral sex, or forced observation of sexual acts.” (Defendant’s Ex. A at 5.) It notes the statutory duty to report “suspected child abuse and neglect,” and also directs school officials that “[y]our role and responsibility is not to investigate, but to report the abuse, set in motion the process of getting help for the child, and be supportive of the child.” (Defendant’s Ex. A at 14.)

14 This is a somewhat hollow assertion, given that the transcript of Smith’s police interview—which was admitted at trial—shows unequivocally that he never read any of these policies anyway (or even knew that they existed), despite having access to them.

Clearly Smith, Sloan, Samuels, Jarvis, McCowan and McCord were all wrong in their belief that G.G.’s allegation of rape by another minor could not constitute child abuse—likewise, the training pamphlet available at the school was incorrect.¹⁵ As the statutory scheme we outlined above makes clear, rape is one of the predicate sex crimes that supports a CHINS determination and therefore, in turn, would constitute an instance of child abuse. *See* Ind.Code §§ 31–9–2–133(a), 31–34–1–3(a), 35–42–4–1(a). And the crime of rape has no limitation or qualification with respect to the ages of either the victim or the perpetrator. *See* Ind.Code § 35–42–4–1. A sixteen-year-old perpetrator commits the same crime as a forty-year-old perpetrator, so the minor victim of the sixteen-year-old would be a victim of child abuse just the same as the victim of the forty-year-old. Smith does not contest his mistake of law.

15 Arguably, however, the district’s administrative guidelines and policies directed the reporting of a sufficiently broad category of conduct that they might fairly encompass the proper definition of child abuse.

The real issue in his claim is whether (or how) his error—shared as it was by the training pamphlet and his peers—impacts his culpability for the offense. Does the required “reason to believe” refer to the defendant’s awareness that the committed conduct satisfies the statutory definition of child abuse? Or does the phrase refer to the defendant’s “reason to believe” that the conduct alleged actually occurred as a factual matter?

The State argues for the latter perspective. Because rape, as a matter of law, is a predicate offense to child abuse with no age qualification, the State interprets the statutory reporting scheme to mean

that “Smith had a duty to immediately report that G.G. may be a rape victim when he knew information which would cause ‘individuals of similar background and training ... to believe that’ G.G. had been raped.” (Appellee’s Br. at 11–12.)

The State views the statute’s reference to training and background as gauging “the duty to report according to the training and background of the individual with knowledge of the facts,” with the baseline *682 standard being “a person of ordinary background and training.” (Appellee’s Br. at 13.) And the statute operates to excuse such an ordinary person from liability “merely on proof that he or she had observed signs or symptoms that could only have caused a trained expert to reasonably believe that abuse or neglect had occurred.” (Appellee’s Br. at 13.) “On the other hand, a trained emergency-room physician, or psychologist, might have such knowledge,” and in that example assessment of what others with similar backgrounds and training might think would be relevant to such a defendant’s criminal liability. (Appellee’s Br. at 14.) Under this approach, the State argues, the element refers to Smith’s knowledge of *factual* information, events, and circumstances, and how he—or other school administrators—would view those facts, and it is irrelevant whether he was operating under an incorrect *legal* assessment of the scope of the child abuse definition: *ignorantia juris non excusat*.

On one hand, Smith’s claim has merit in that a person would only “knowingly” fail to report child abuse or neglect when they actually knew that the conduct constituted child abuse or neglect under the statutory scheme. And the State’s position would then criminalize ignorance—that is, if a defendant in good faith did not know that the conduct complained of constituted child abuse or neglect (perhaps a question of negligent behavior on the part of the defendant), they would be subjected to criminal liability. In some cases, Smith’s position might be proper.¹⁶

¹⁶ For example, under certain (particularly federal) regulatory schemes with punitive consequences for non-compliance, there is some argument for requiring the strictest of “knowing” mens reas—that the defendant both affirmatively knew that the conduct was prohibited/required, and that the defendant acted intentionally regardless—as a way to avoid over-exposing the ordinary citizen to criminal liability under an increasingly large and obtuse body of criminal statutes. *See, e.g., U.S. v. Wilson*, 159 F.3d 280, 293–96 (7th Cir.1998) (Posner, C.J., dissenting). In such cases, as Chief Judge Posner wrote, “the law is not a deterrent. It is a trap.” *Id.* at 295.

But Smith’s is not one of those cases. Instead, this more readily falls into Chief Judge Posner’s other category of offenses, where more stringent liability is permissible: that category where “the defendant is warned to steer well clear of the core of the offense ... or to take the utmost care ... or to familiarize himself with the laws relating to his business.” *Id.* at 296 (emphasis added).

In light of the purpose of the reporting statutes, however, we think the State’s view is correct. As we mentioned above, the General Assembly has expressly charged particular individuals—like Smith—with a significant responsibility: to serve as the first responders to incidents of child abuse and neglect, and to act swiftly to ensure the child is protected from further harm. In furtherance of this responsibility, it has imposed a particular duty, with particular consequences for failure in that duty. Smith does not challenge the existence or propriety of that duty—only whether he can be punished for not knowing its scope.

But if Smith’s mistaken interpretation of the law were a defense to his criminal liability, it would

remove all incentives from any such professionals to understand the scope of that statutory duty. And it would, in effect, vitiate the duty entirely. The statutes are aimed at “encourag[ing] effective reporting of suspected or known incidents of child abuse or neglect ... provid [ing] effective child services to quickly investigate reports of child abuse or neglect ... [and] provid[ing] protection for an abused or a neglected child from further abuse or neglect,” Ind.Code § 31–33–1–1(1)–(3), but Smith would have us announce today that the obligations—and *683 penalties—imposed to further those purposes can be avoided by accidental, or even willful, avoidance of learning what falls under the statutory scheme.¹⁷

¹⁷ And why limit Smith’s approach to these reporting statutes? Our general criminal culpability statutes define “knowingly” in a way similar to Smith’s contention that his “reason to believe” is a nearly absolute certainty of knowledge. *See* Ind.Code § 35–41–2–2(b) (2008) (defendant “engages in conduct ‘knowingly’ if, when he engages in the conduct, he is *aware of a high probability* that he is doing so” (emphasis added)). And more than one criminal provision incorporates statutory definitions that might be subject to misinterpretation.

So would Smith have us excuse from criminal culpability the serious violent felon who possesses a shotgun, truthfully not knowing that it meets the definition of a firearm? *See* Ind.Code §§ 35–47–1–5, –4–5 (2008). Do we forgive the individual who, after his driver’s license is suspended, is caught driving a bus but claims he did not know a bus was a motor vehicle? *See* Ind.Code §§ 9–13–2–105, –30–10–16 (2010). Surely the answer to these questions must be “no,” even if those criminal statutes included consideration of legal opinions from other serious violent felons or suspended drivers.

[14] The primary goal of statutory interpretation is to give effect to the General Assembly’s intent, *Nicoson v. State*, 938 N.E.2d 660, 663 (Ind.2010), not to undermine it. And to say this approach would chill reporting of child abuse or neglect in Indiana would grossly understate its impact. It would tacitly encourage administrators and other professionals to simply not read the statutes in full because, to sum up Smith’s defense: if you just don’t learn what child abuse is, you’ll never get in trouble for not reporting it. It would reward systemic ignorance in entire school districts and corporations, to the obvious detriment of the very children the statutes are supposed to be protecting. And it would turn the high school principal’s decision-making process, when faced with a traumatized child, into a Bar exam question.

And in fact, we think the statutory scheme contemplates just the opposite of Smith’s argument: it is designed, if anything, to err on the side of *over* reporting suspected child abuse or neglect. To that end, the statutes presume a report is made in good faith and immunize from civil or criminal liability the person who makes such a report. Ind.Code §§ 31–33–6–1, –3. The statutes do not, however, presume that a *failure* to file a report was done in good faith, or immunize from liability those persons who, even in good faith, believe that a report is not necessary.

In other words, the General Assembly has protected those who report and are mistaken, not those who are mistaken (or intentionally ignorant) and do not report. Our decision today may increase the number of individuals who fall into the former category, but if we did as Smith suggests we would certainly risk increasing the number of individuals in the latter. One outcome comports with the General Assembly’s stated intent; the other most certainly does not.

[15] Having resolved this, we reach the question of whether the evidence was sufficient to show that Smith had reason to believe G.G. was the victim of child abuse by virtue of her rape

allegation.¹⁸ And in *684 this regard the record shows that a fellow student brought G.G. to McCord’s office, where G.G. told Smith—and every subsequent administrator brought into the room—that she had been raped. G.G. was “humped over, drawn inward, hands, she kept her hands, her face in her hands. Not really making eye contact with [McCord]. Just talking,” and she was crying. (Tr. at 13.) She also clearly articulated her attacker’s identity, the circumstances, the time she was attacked, and the location of the attack.

¹⁸ Smith argues to the effect that the required “reason to believe that G.G. *was*” a victim of child abuse—as opposed to the initially charged “reason to believe that G.G. *may be*” a victim of child abuse—requires an absolute level of certainty on his part. (Appellant’s Br. at 34–35.) But despite our misgivings with the use of the potentially overbroad phrase “may be,” we reject his proposition that he had to know, effectively beyond a reasonable doubt, that G.G. was a victim of child abuse before he was required to report.

Smith’s level of certainty need not have been that high. Cf. *Duran v. State*, 930 N.E.2d 10, 15–16 (Ind.2010) (in context of warrantless entry into home, “it is ‘generally accepted’ that reason to believe ‘involves something less than’ probable cause”) (quoting 3 Wayne R. LaFave, *Search and Seizure*, § 6.1(a), at 265 (4th ed. 2004)); *Lebo v. State*, 977 N.E.2d 1031, 1038–39 (Ind.Ct.App.2012) (“The failure to report statute does not require that an individual have actual knowledge of child abuse or neglect. Rather, a duty to report is imposed on an individual who merely has ‘reason to believe’ a child is the victim of such a crime.”). To the extent the ultimate outcome of the report requires proof beyond a reasonable doubt, it is the responsibility of DCS, law enforcement, and the prosecutor to gather that proof.

It is apparent that Smith had some doubts as to G.G.’s veracity, but it is equally apparent that Smith took the allegation seriously enough to summon the school nurse and direct Samuels to contact the YOC, call the senior administrators in the district to ask for guidance, begin his own personal interrogation of the perpetrator, and direct the search of student lockers. And when reviewing a sufficiency of the evidence claim, we view “[t]he evidence—even if conflicting—and all reasonable inferences drawn from it ... in a light most favorable to the conviction.” *Bailey*, 979 N.E.2d at 135. And doing so here leads us to conclude that there was sufficient and substantial evidence of probative value to support the fact-finder’s determination that Smith had reason to believe that the factual circumstances alleged by G.G. actually occurred—that she was the victim of a rape.

2. Smith had reason to believe G.G. was a child in need of services.

^[16] As we explained, the definition of “victim of child abuse or neglect” at the time of Smith’s trial required more than just a reason to believe the predicate offense occurred. The State must also have shown that Smith had reason to believe “the child need[ed] care, treatment, or rehabilitation that: (A) the child [was] not receiving; and (B) [was] unlikely to be provided or accepted without the coercive intervention of the court.” Ind.Code § 31–34–1–3(a). This is, as Smith says, because “the General Assembly ha[d] simply adopted the CHINS categories as the definition of child abuse or neglect.” (Appellant’s Br. at 31.)

At the outset, though we acknowledge that the General Assembly adopted the CHINS statutes in crafting its definition of child abuse, we doubt that its intent in doing so was to require school and hospital officials to make accurate assessments of whether a particular child needed particular care, treatment, or rehabilitation that he or she was not receiving and that could only be provided

through court intervention. Under the reporting statutes, this assessment is to be completed by DCS, through its local offices, following the receipt of a report of suspected child abuse or neglect from medical or school personnel. *See* Ind.Code § 31–33–8–1 (2008). Similarly, the filing of a CHINS petition—seeking treatment, care, or rehabilitation through coercive intervention of a court—is a DCS (or prosecutor) responsibility, *see* Ind.Code § 31–34–9–1 (2008), and the scope of any resulting care, treatment, or rehabilitation is a determination the statutes *685 entrust to the presiding juvenile court judge, *see* Ind.Code § 31–34–19–10 (2008).

This aspect of the statutory CHINS definition involves a determination made after deliberate, in-depth, and specialized inquiry and assessment. We cannot imagine it being something that the General Assembly expected a school principal to perform “immediately.” We think, and the recent statutory amendments to sections 31–9–2–14 and 31–9–2–133 of the Indiana Code reflect, that the General Assembly intended instead for individuals like Smith to identify—and report—the factual circumstances indicating that the child abuse or neglect was occurring. And by this we mean the “symptoms” of child abuse or neglect, as it were: the marks of physical trauma, signs of malnourishment, or changes in personality or interaction that might be the first visual indications of the underlying “disease” of an abusive environment or neglectful parents.

Nevertheless, this was an aspect of the statutory definition of “child abuse or neglect” at the time Smith was charged and tried, and it is thus a part of his conviction for which there must have been sufficient evidence introduced at his trial. But under the particular facts of this case, we still think such evidence was present.

Smith concedes that G.G. had already been adjudicated as a child in need of services by the Madison Superior Court—a circumstance known to Smith and the other administrators at the time G.G. informed them of the rape. He argues, however, that the necessity for care, treatment, or rehabilitation pursuant to his present conviction must arise “as a result of this incident.” (Appellant’s Br. at 29.) And he says that to the extent G.G. *did* receive care, treatment, and rehabilitation as a result of this incident, she received those things without the necessity of court intervention.

But the need for care, treatment, or rehabilitation does not have to arise “as a result of this incident,” as Smith claims. The CHINS statute provides that “the child needs care, treatment, or rehabilitation that ... the child is not receiving; and ... is unlikely to be provided or accepted without the coercive intervention of the court.” Ind.Code § 31–34–1–3(a)(2). There is no requirement that this be a new and distinct determination for each subsequent incident, either in the reporting statutes or the CHINS statutes generally.

In fact, the CHINS statutes presume that once a dispositional decree is made regarding a child’s CHINS status, such a decree remains in force with periodic reviews and progress reports subjecting it to modification, until the goals of the decree are met and the child is discharged by the court—unless a determination is made that the goals will never be met and a permanency plan is established. *See generally* Ind.Code chapters 31–34–20, –21, and –23. Additionally, the CHINS

structure is designed to operate “on a county-by-county basis,” with the individual DCS county offices or county prosecutors filing the petitions and representing the interests of the State, with a county caseworker doing the predispositional investigation and assessment, a judge from the county adjudicating the petition, and the county itself funding the court-ordered treatment. *In re E.I.*, 653 N.E.2d 503, 509 (Ind.Ct.App.1995). So absent a rarer circumstance in which a child moves to a different county, we do not think it likely that those actors would file a new CHINS petition if a dispositional decree were already in place—they would simply seek to modify that current decree.

Put another way, both the statutory scheme and the manner in which it operates show that once coercive intervention is sought and provided, that coercive intervention *686 would remain the method through which the child’s care, treatment, and rehabilitation were provided. Thus, any new or additional care, treatment, or rehabilitation needed—even if arising from a new or additional incident—would likewise only come as a result of the prior coercive intervention of the court.

We acknowledge that Smith’s case may be unique, in that the General Assembly’s amendments to the reporting statutes mean the State no longer must prove that a defendant charged with failure to report had reason to believe the child needed care, treatment, or rehabilitation that could only be provided through the coercive intervention of a court. And the inverse impact of this amendment is that going forward, the duty to report for school and medical officials is significantly stricter. They must immediately report suspected child abuse or neglect to DCS or law enforcement when they have reason to believe it has occurred—regardless of whether the child is being cared for by his or her parents, guardians, or the State, and regardless of how the official assesses the quality of that care.

To be sure, nothing in the statutes prohibited Smith from making a report to the police or DCS even absent his knowledge of G.G.’s status as a CHINS, as a matter of good practice, decency, or common sense. But in this case we are dealing only with when those statutes specifically obligated him to report such that it was a crime for him to do otherwise. And here, but for G.G.’s pre-existing status as a CHINS—and Smith’s knowledge of that status—Smith’s conviction might not stand.

Consider, for example, if G.G. was *not* a CHINS and lived instead with her mother, and Smith knew that G.G.’s mother would provide the care, treatment, and rehabilitation that she needed. Under those circumstances, a rape by another student occurring within the school’s halls would probably not give Smith any reason to believe that coercive intervention of the court was necessary to get G.G. help—and thus he would have had no obligation to immediately make a report to DCS or law enforcement. Similarly, if G.G.’s status as a CHINS was still pending disposition, or was a matter kept concealed from the school’s officials, Smith might still rightly have assumed that her mother would provide the necessary care, treatment, and rehabilitation, and would also probably not give Smith any reason to believe that G.G. required the coercive intervention of a court.

But here the evidence admitted at his trial shows that Smith knew that G.G. was already subject to a CHINS decree making her a ward of DCS and ordering her to remain in the care of the YOC in order to “ensure that [G.G.] has a safe and stable environment where her well-being is not compromised.”¹⁹ (Def.Ex.D.) And in the event she needed *any* care, treatment, or rehabilitation—for this incident or *any* incident—the record shows that Smith knew it must be provided by the YOC, which would only occur a result of the prior—and continuing—coercive intervention of the Madison Superior Court. This is apparent from, if nothing else, the fact that Smith directed Samuels to call the YOC and not G.G.’s mother when he heard the allegation: *687 because he knew the YOC, not G.G.’s mother, was the entity that would come to the school, pick up G.G., take her to the hospital, and get her treatment.

¹⁹ In addition to G.G.’s dispositional decree being admitted into evidence at trial, Samuels testified that Smith directed her to call the YOC (as opposed to the police), and that she knew the YOC was G.G.’s “custodial parent.” (Tr. at 62.) Samuels “knew [G.G.] had been placed there by [the] Division of Child Services or by a judge and that they needed to know.” (Tr. at 62–63.) It is a reasonable inference to be drawn from this—and Smith’s several phone calls to the YOC himself—that Smith also knew G.G.’s status as a CHINS.

Under the particular evidence presented at Smith’s trial, and viewing “all reasonable inferences drawn from it,” *Bailey*, 979 N.E.2d at 135, we conclude that a reasonable fact-finder could have found beyond a reasonable doubt that Smith had reason to believe G.G. needed care, treatment, or rehabilitation that could only be provided through the coercive intervention of a court.

B. Was the Evidence Sufficient to Show That Smith Failed to Report Immediately?

Smith also challenges his conviction with respect to whether he failed to make an immediate report to DCS or local law enforcement. He claims first that his phone call to the YOC satisfied his statutory obligation to report to DCS or local law enforcement and second, that even if the call to the YOC were insufficient, his eventual report four hours later was “immediate.”²⁰ We disagree on both claims.

²⁰ To an extent, these are claims that Smith presented evidence tending to show his compliance with the statute; his innocence. They are therefore at least somewhat improper under our standard of review, as they ask this Court to reweigh the evidence presented at trial.

1. Smith’s phone call to the YOC was not a report pursuant to the statutes.

[17] The reporting statutes required Smith to make his immediate report to DCS or a law enforcement agency. Ind.Code § 31–33–5–4. Smith argues the evidence was insufficient to show that he failed in this obligation because the YOC, which he directed Samuels to contact immediately after hearing G.G.’s allegation, is an agent of DCS (both at the state and county levels), and pursuant to that agency relationship “notification to the YOC is the legal equivalent

of notification to DCS. Therefore, DCS was timely given notice of the reported assault, and no liability for failure to report exists.” (Appellant’s Br. at 25, 27.) There are a number of reasons why this is incorrect.

First, the statutes explicitly designate two agencies to which the report must be made: DCS or law enforcement. And unlike the YOC, both are neutral and detached entities tasked with investigating and assessing allegations of child abuse and neglect. If we permitted a private entity—into whose care a child is placed in lieu of parents—to also serve as an agent for DCS for purposes of the reporting statutes, we would leave vulnerable to abuse or neglect those children placed with those entities because school officials could simply report the abuse to the abuser and be done with the matter. For example, if G.G. arrived at school with fresh bruises, and a teacher reported those bruises to Smith believing they were signs of child abuse occurring at the YOC, under Smith’s rationale he could simply call the YOC and everything would be okay. Moreover, assuming such a third-party agency would then contact DCS to initiate an investigation and assessment, Smith’s agency theory adds yet another layer of bureaucracy to what is supposed to be an “immediate” report. Clearly this would support neither the statutes’ purposes of encouraging effective reporting, quick investigation, and protecting children, nor the General Assembly’s intent in enacting the statutes.

And second, though the Indiana Code permits DCS to designate a public or private agency to investigate reports of child abuse or neglect in cases involving children *688 in the care of a public or private institution, Ind.Code § 31-33-9-1(a) (2008), Smith points us to no evidence in the record where that designation was made “[t]hrough a written protocol or agreement,” as that statute requires. Smith claims that the YOC’s master contract authorizes the YOC to “provide, or arrange for routine or emergency medical, surgical, hospital, or psychiatric hospital care for [G.G.], as needed” while residing at the YOC, (Appellant’s Br. at 25–26), but this is a far cry from DCS delegating its investigative authority or empowering the YOC to serve as the recipient of a report of suspected child abuse or neglect.²¹

²¹ For that matter, the portion of the placement contract that Smith cites to is not in the trial exhibit as it is presented to us in the appellate record. The copy of the master contract provided skips from page 2 to page 8.

But in any event, the essence of Smith’s claim is that the placement agreement between DCS and the YOC regarding G.G., read alongside the YOC’s master contract with DCS, is a “unified contract, specifically the reporting duties it imposes, [that] renders the YOC an agent of the DCS.” (Appellant’s Br. at 25.) In reality, the contract does the precise opposite of what Smith claims.

Section 21 of the YOC’s master contract provides:

Both parties hereto, in the performance of this Contract, shall act in an individual capacity *and not as agents*, employees, partners, joint venturers or associates of one another. The employees or agents of one party *shall not be*

deemed or construed to be the employees or agents of the other party for any purposes whatsoever.

(Def. Ex. C at 22 (emphasis added).)

We can think of no clearer repudiation—by both the YOC and DCS—of Smith’s theory. Thus, even were we to accept his idea as a policy matter (which we do not), we would have to reject it as a matter of agency and contract law. His phone call to the YOC could not, and did not, satisfy his responsibility under the reporting statute, and therefore his argument that “the undisputed evidence was that [Smith] caused a report to be made to the agent of DCS within 25 minutes, and DCS received actual notice from its agent within approximately 40 minutes, both of which time frames should be deemed sufficiently immediate as a matter of law,” must fail. (Appellant’s Br. at 28.)

2. Smith’s eventual report was not immediate.

[18] Finally we reach the ultimate question in this case: was Smith’s eventual report to DCS—his phone call to the DCS hotline made about four hours after he became aware of G.G.’s rape allegation—sufficiently immediate as to relieve him of criminal liability? He argues that the statutes governing DCS’s investigation requirements provide a twenty-four-hour deadline, that the YOC’s master contract also provided a twenty-four-hour deadline, and that DCS trained educators that they had twenty-four hours to report abuse. He also asserts that “[s]chool policy was to collect information before reporting matters to the authorities ... and certainly the statute permits a citizen some time to assess and reflect before he reports, without penalty of being labeled a criminal and having his job and license in peril.” (Appellant’s Br. at 34.)

Smith’s argument that a report made within twenty-four hours should be considered immediate overlaps with his alternative relief sought in his claim that the reporting statutes are unconstitutionally vague. We rejected it in that context, and for the same reasons do so here.

***689** We also reject his claim that the school policy permitted him to conduct the level of investigation that he now says justifies his delay in reporting, even assuming his school’s policy could trump the statutory requirement and common understanding of the word “immediately” as we provided above. Though McCowan testified that when a report was made, “they are going to ask specific questions about the student’s age, the address, where it occurred,” and therefore “you have to collect some information,” (Tr. at 126), this is not evidence that the school’s policy of collecting information included interrogating the perpetrator, conducting a search of the victim’s and perpetrator’s lockers, and seizing notes found in those lockers. McCowan was referring to making sure that the administrator had certain biographical information available to provide to DCS or the police before reporting the child abuse or neglect (all of which Smith already had); but what Smith did was conduct a criminal investigation. And conducting an investigation is expressly forbidden in the training materials that Smith failed to read.

And we also reject his belief that the reporting statutes permit a citizen to delay reporting in order to “assess and reflect” before facing criminal liability and professional censure. In fact, the statutes do the opposite—they *require* immediate reporting of suspected child abuse or neglect, and in furtherance of that aim immunize from criminal and civil liability those who immediately report conduct that turns out after later assessment and reflection *by DCS or law enforcement* to have been innocent.

Smith cites to *Phillips v. Behnke*, 192 Wis.2d 552, 531 N.W.2d 619 (Ct.App.1995), as support for his position that he was permitted to assess and reflect before making his report. We find that case inapposite for several reasons.

In *Behnke*, the young daughter of two parents—one of whom was a school principal—filed a report with law enforcement that she was being touched inappropriately by a teacher at school. The parents conducted their own investigation and then reported the allegation to the school district’s superintendent. The superintendent interviewed several students to substantiate the claim, then notified the county office of Wisconsin’s Social Services Department. The abusive teacher’s license was later revoked, and that teacher then sued the parents, the superintendent, and others, claiming—amongst other things—that the parents and superintendent failed to immediately report the abuse as required by Wisconsin’s reporting statutes. The parents and superintendent sought summary judgment based on immunity provisions contained in those same statutes. The trial court granted their motions and the Wisconsin Court of Appeals affirmed.

The statutes in effect at the time were broadly similar to Indiana’s, requiring school officials “having reasonable cause to suspect” that a child was being abused or threatened with abuse to “immediately” report the facts and circumstances giving them that belief. *Id.* at 621–22 (quoting Wis. Stat. § 48.981(2), (3)). They also provided immunity for persons “participating in good faith in the making of a report.” *Id.* at 622 (quoting Wis. Stat. § 48.981(4)). Under the statutes, both the parents and the administrators were therefore required to report the suspected abuse once they had “reasonable cause to suspect” that it had occurred.

In affirming the trial court’s grant of summary judgment, the Wisconsin Court of Appeals rejected “any suggestion that reasonable attempts at verification deprive *690 a reporter of immunity under the statute.” *Id.* at 622–23. The statutory scheme was “void of any consequence for a delay in the reporting of information,” and “expending a reasonable amount of time to verify a child’s allegation of sexual misconduct is consistent with the statute’s requirement that such information be reported immediately.” *Id.* at 623. Because of the harm that an unfounded allegation of inappropriate sexual conduct has on the accused’s reputation and career, “investigating the reasonableness of one’s belief that a teacher has engaged in sexual misconduct prior to making a report is proper and does not deprive the individual of immunity.” *Id.*

One particular difference between this case and the one before us is the absence of “any consequence for a delay in the reporting of information.” Clearly Indiana’s statutes attach a

consequence for delay, otherwise Smith’s cause would not be before this Court.²² And from a procedural standpoint, the State of Wisconsin was not pursuing the action against the parents and superintendent as a criminal matter for failure to report, as we have here with Smith. Instead it was the perpetrator of the sexual misconduct who filed a civil complaint and sought to undermine the defendants’ claims of immunity by arguing that their reports were not made immediately.

²² Although we note that when *Behnke* was decided, Wisconsin’s reporting statutes—as they still do now—contain a penalty provision for “[w]hoever intentionally violates this section by failure to report as required,” subjecting that person to a fine of up to one thousand dollars and/or six months in prison. Wis. Stat. § 48.981(6).

And while we acknowledge—and share—the *Behnke* court’s respect for the gravity of a charge of sexual misconduct, our statutory structure has protections in place to ameliorate the implications of a false report and deter intentional false reporting. The Indiana Code criminalizes the intentional communication of a known false report of child abuse or neglect, and also provides a private right of action for the victim of such an act. *See* Ind.Code § 31–33–22–3 (Supp.2013). Additionally, when a report is investigated and found to be unsubstantiated, any interested person may petition DCS to expunge information related to that assessment. Ind.Code § 31–33–27–3(b) (Supp.2013). And in any event, DCS is required to expunge child abuse or neglect information no later than the twenty-fourth birthday of the youngest child named in the assessment, if the report is unsubstantiated. Ind.Code § 31–33–27–3(a).

To the extent there remains risk to an alleged abuser’s reputation arising from an unsubstantiated report, we think the General Assembly has made that risk secondary to the statutory scheme’s overall aim of promoting more reports, not fewer, in an effort to provide better protection for children in this state. It is not our place to say whether this is a correct balancing or not. “[W]e will not substitute our judgment or opinion on such matters for that of the legislature.” *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 418 N.E.2d 207, 212 (1981).

Also, as we discuss above, it is not the school administrator’s responsibility to investigate. That responsibility is firmly placed with DCS and law enforcement. The school administrator, under our statutes, is the “trip-wire” that triggers the investigation and assessment, not the one who undertakes the investigation and assessment. And on that point, we have already determined that Smith had reason to believe G.G. was the victim of child abuse without his needing to conduct any further inquiry.

***691** Finally, even if we were to accept the *Behnke* rationale that “immediately” includes some “reasonable amount of time” to confirm the suspected child abuse or neglect, that case does not provide any frame of reference off of which we may proceed. It is not clear how long the superintendent investigated the claim, how long it took the parents to conduct their investigation, or the scope and extent of the investigation. We do not know if the delay was greater than, less than, or the same as the four-hour period Smith took before contacting DCS. It therefore stands as an unhelpful guidepost to our review.

As Smith himself says, “it is left to the trier of fact to determine whether under the circumstances of the case the report was made fast enough in keeping with the purpose of the statute.” (Appellant’s Br. at 33.) And under the definition of “immediately” that we believe most people of ordinary intelligence would employ in such a case—and the one employed by the finder of fact here—the length of the delay is not the only thing that matters. What also matters is the urgency with which the person files the report, the primacy of the action, and the absence of an unrelated and intervening cause for delay.

Judge Vaidik, in her dissent below, proposed several factors to help make this assessment:

- (1) the identity of the person to whom the victim reports abuse;
- (2) the impact of any delay in reporting the abuse to the authorities might have on evidence of the alleged crime;
- (3) the length of time between the victim’s report and the report to the authorities;
- and (4) the circumstances of any delay in reporting.

Smith, 982 N.E.2d at 365. We think this proposal reflects our definition of “immediately” quite well, but because fact-finders can properly apply this definition using their common understanding, we do not need to adopt a specific factor-based test.

But as Judge Vaidik’s proposed test implies, this is necessarily a case-specific and fact-specific question. For example, if a school administrator on a backcountry camping trip with a school group discovered bruises on one of his students that gave him reason to believe the child was being abused, we likely would not uphold a conviction for failure to immediately report the child abuse even if it took days for the administrator to hike back to civilization and make the report. But we might think differently if, say, the same school administrator completed the camping trip, allowed the abused student to return home, and waited until the next available business day before he called DCS or law enforcement. Similarly, if a school principal received notice at the beginning of the school day that a student was a victim of child abuse, and severe storms then required his staff and students to take shelter for four hours, we would probably find a report made after the emergency conditions had passed to be immediate. But we would not look so favorably on a four-hour delay during which, hypothetically, the principal spent his time conducting teacher training or something else of a lesser administrative priority than reporting child abuse.

And here it is the lack of primacy of action and the presence of an unrelated intervening cause for delay that seals Smith’s fate. Even if we were to accept that he did not have “reason to believe G.G. had been raped” without first interrogating S.M. and searching G.G.’s and S.M.’s lockers, which we do not, Smith then ignored repeated opportunities to contact the police—several of whom were in his building—or call DCS, and proceeded to instead conduct several hours of job interviews for open administrator positions. *692 At that point Smith was neither reporting nor investigating—he was ignoring the issue. And it was only after these meetings, and after Smith spoke to Heller on the phone, that Smith called DCS. And during this period, S.M. was allowed to return to the student population and then eventually went home, and the restroom in which G.G. said the attack occurred was left unsecured and open to contamination.²³

23 By way of comparison, the staff at Ball Memorial Hospital called the police within an hour of G.G.'s arrival, with that delay apparently attributable to the lack of an immediately available sexual assault nurse.

In sum, it appears from the record as though when time was of the essence, Smith dawdled, delayed, and did seemingly everything he could to *not* contact DCS or the police. It is therefore a reasonable inference to draw, from this evidence, that Smith knowingly failed to “immediately” report the child abuse as he was obligated to do by statute.

Conclusion

It is apparent that Christopher Smith failed in his duty to help protect one of his trusted charges. Whether this failure was out of ignorance, a desire to protect the reputation of the perpetrator, or perhaps a wish to keep his school from receiving negative publicity on his watch is not clear. But none of those possible reasons are excuses under the Indiana Code's statutory provisions compelling him to report instances of child abuse or neglect or face criminal liability. We therefore affirm Smith's conviction and sentence.

DEMETRIUS WALKER v. STATE OF INDIANA

No. 49S02–1312–CR–804. | Dec. 12, 2013.

Opinion

On Petition to Transfer from the Indiana Court of Appeals, No. 49A02–1205–CR–380

DAVID, Justice.

Just because an individual refuses to comply with a police officer’s order does not necessarily subject that individual to criminal liability under Indiana’s resisting law enforcement statute. The individual must “forcibly” resist the officer’s lawful execution of his or her duties. But in this case the defendant refused repeated orders to lay down on the ground and advanced aggressively, with his fists clenched, to within a few feet of the police officer issuing the orders before ultimately being tased. We find this conduct was sufficient to support his conviction for resisting law enforcement, and therefore affirm the trial court.

Facts and Procedural History

Early on the morning of March 25, 2012, Indianapolis Metropolitan Police Department Officer Jason Ehret was dispatched to a fight in progress. When he arrived on-scene, he saw two males standing in the middle of an intersection, yelling back and forth. Officer Ehret announced himself, but the men continued yelling. The men began walking towards each other and Officer Ehret told them to separate; instead they began throwing punches.

Officer Ehret continued yelling at them to stop, and to lay down on the ground; after ten or fifteen seconds of the men continuing to fight, he warned them that he would employ his taser if they did not *726 comply. One man immediately dropped to the ground with his arms outstretched; the other—Demetrius Walker—turned toward Officer Ehret, who was at that point about ten feet away, and with fists clenched, stared at Officer Ehret and began to approach.

Officer Ehret ordered Walker to stop and get down on the ground several times, but Walker continued his advance with his arms and fists clenched “in an aggressive manner”—at one point raising his fists. When Walker got within three or four feet of Officer Ehret, Officer Ehret drew his taser and pointed it; Walker continued forward. Officer Ehret tased Walker, who immediately fell to the ground “and after that point was very cooperative.” (Tr. at 12.) Officer Ehret was then able to handcuff and arrest Walker without any further struggle.

The State charged Walker with resisting law enforcement, as a class A misdemeanor, and disorderly conduct, as a class B misdemeanor. After a bench trial, the judge found Walker guilty of resisting law enforcement and sentenced him to ninety days in the Marion County jail, with credit for fifty days of time served.¹

¹ The trial court, on Walker’s motion, dismissed the disorderly conduct charge.

Walker appealed, arguing that the evidence was insufficient to sustain his conviction for resisting law enforcement. The Court of Appeals affirmed, *Walker v. State*, 984 N.E.2d 642 (Ind.Ct.App.2013), and Walker sought transfer to this Court. We heard oral argument on August 22, 2013, and now grant transfer, thereby vacating the Court of Appeals opinion. Ind. Appellate Rule 58(A). We likewise affirm.

.....

Discussion

A person commits the crime of resisting law enforcement when he or she “knowingly or intentionally ... forcibly resists, obstructs, or interferes with a law enforcement officer ... while the officer is lawfully engaged in the execution of the officer’s duties.” Ind.Code § 35–44.1–3–1(a)(1) (Supp.2013).² Barring certain aggravating factors, the offense is a class A misdemeanor. Ind.Code § 35–44.1–3–1(a). Such a seemingly simple statute, however, has proven to be complex and nuanced in its application.

² At the time of his arrest and trial, this offense was codified at Indiana Code § 35–44–3–3. There was no change to the substance of the statute when it was recodified to its current location.

In *Spangler v. State*, we held that the word “forcibly” is an essential element of the crime and modifies the entire string of verbs—resists, obstructs, or interferes—such that the State must show forcible resistance, forcible obstruction, or forcible interference. 607 N.E.2d 720, 722–23 (Ind.1993). We also held that the word meant “something more than mere action.” *Id.* at 724. “[O]ne ‘forcibly resists’ law *727 enforcement when strong, powerful, violent means are used to evade a law enforcement official’s rightful exercise of his or her duties.” *Id.* at 723. “[A]ny action to resist must be done with force in order to violate this statute. It is error as a matter of law to conclude that ‘forcibly resists’ includes all actions that are not passive.” *Id.* at 724.

But even so, “the statute does not demand complete passivity.” *K.W. v. State*, 984 N.E.2d 610, 612 (Ind.2013). In *Graham v. State*, we clarified that “[t]he force involved need not rise to the level of mayhem.” 903 N.E.2d 963, 965 (Ind.2009). In fact, even a very “modest level of resistance” might support the offense. *Id.* at 966 (“even ‘stiffening’ of one’s arms when an officer grabs hold to position them for cuffing would suffice”).

Furthermore, we have never held that actual physical contact between the defendant and the officer has been required to sustain a conviction for resisting law enforcement. In fact, from the beginning we have said just the opposite. *See Spangler*, 607 N.E.2d at 724 (noting “no movement or threatening gesture made in the direction of the official” (emphasis added)); *id.* (defining “forcible” in part by comparison to statutory definition of “forcible felony” which included felonies involving “the use or threat of force against a human being” and those “in which there is imminent danger of bodily injury to a human being” (emphasis added) (citing Ind.Code § 35–41–1–11)); *see also Price v. State*, 622 N.E.2d 954, 963 n. 14 (Ind.1993) (citing *Spangler* for proposition that “an individual who directs strength, power or violence towards police officers or who makes a threatening gesture or movement in their direction,” may be charged with resisting law enforcement (emphasis added)).

And this notion has been applied to affirm convictions when a defendant makes such a threatening gesture or movement, or otherwise presents an imminent danger of bodily injury. *See Pogue v. State*, 937 N.E.2d 1253, 1258 (Ind.Ct.App.2010) (display of box cutter and refusal to drop it “amounted to a visual showing of strength and a threat of violence” sufficient to sustain conviction), *trans. denied*; *see also Stansberry v. State*, 954 N.E.2d 507, 511–12 (Ind.Ct.App.2011) (vacating conviction for “attempted” resisting law enforcement when defendant charged at officer and had to be pepper-sprayed, but citing *Pogue* as holding that “merely showing strength and a threat of violence is sufficient to prove forcible resistance, obstruction, or interference”).

[3] [4] So in summary, not every passive—or even active—response to a police officer constitutes the offense of resisting law enforcement, even when that response compels the officer to use force. Instead, a person “forcibly” resists, obstructs, or interferes with a police officer when he or she uses strong, powerful, violent means to impede an officer in the lawful execution of his or her duties. But this should not be understood as requiring an overwhelming or extreme level of force. The element may be satisfied with even a modest exertion of strength, power, or violence. Moreover, the statute does not require commission of a battery on the officer or actual physical contact—whether initiated by the officer or the defendant. It also contemplates punishment for the active *threat* of such strength, power, or violence when that threat impedes the officer’s ability to lawfully execute his or her duties.

Still, these cases are necessarily fact-sensitive, and since *Spangler* appellate courts have attempted to place them along a spectrum of force, though often with the facts varying only by slight degrees. A side-effect of this approach can be a degree *728 of unpredictability in outcome, for both the defendant and the State.

For example, in *K.W.*, we held that the evidence was insufficient to sustain a juvenile adjudication for resisting law enforcement when the juvenile began to pull away and turn from a school resource officer attempting to cuff him, 984 N.E.2d at 612–13, and in *A.C. v. State*, the Court of Appeals similarly found that a juvenile did not act forcibly when he refused to stand when asked

and leaned away from an officer, 929 N.E.2d 907, 911–12 (Ind.Ct.App.2010). But in *Johnson v. State*, the Court of Appeals found forcible resistance because that defendant turned and pushed away from officers as they attempted to search him, and stiffened up as they put him in a transport vehicle. 833 N.E.2d 516, 518–19 (Ind.Ct.App.2005).

And in *Pogue v. State*, the Court of Appeals held that a defendant acted forcibly when he displayed a box cutter and refused to drop it when asked, but instead seemed to try to put it back in his pocket. 937 N.E.2d 1253, 1258–59 (Ind.Ct.App.2010), *trans. denied*. But in *Colvin v. State*, the Court of Appeals found that a defendant did not act forcibly just because he refused an order to remove his hands from his pockets but had to be taken physically to the ground by an officer. 916 N.E.2d 306, 309 (Ind.Ct.App.2009), *trans. denied*.

Nevertheless, we still remain unconvinced that there needs to be any strict bright-line test for whether a defendant acts “forcibly”—at least, not one with any more definitiveness than the language already in use by our case law. Some things are appropriately suited for such tests, *see, e.g., Bailey v. State*, 979 N.E.2d 133, 141–42 (Ind.2012) (identifying reasons that bright-line rule that any degree of physical pain may constitute bodily injury is preferred over “case-by-case comparison to determine whether a victim’s pain is sufficiently significant”), and some things are not, *see id.* at 141 n. 17 (no bright-line rule dividing pain and extreme pain, but “extreme pain” is something well within common understanding of average fact-finder).

We think whether conduct is “forcible,” such that it may support a conviction for resisting law enforcement, falls into the latter of these two camps. Given the definition we have articulated, we feel confident that triers of fact will make the proper determinations when confronted with the facts of the cases before them, and our body of case law provides ample guideposts for appellate review.

[5] And here, when viewed in a light most favorable to the conviction, we believe the evidence is sufficient to sustain Walker’s conviction. Officer Ehret’s testimony indicates that he arrived as Walker and another man were arguing, and he ordered the two men to the ground several times—neither complied until Officer Ehret threatened to use his taser as the argument escalated to violence. At that point, one combatant dropped to the ground, but Walker turned towards Officer Ehret and began advancing on him. With his fists clenched—and at a point raised—and acting in an aggressive manner, Walker ignored repeated warnings and orders from Officer Ehret and advanced to near striking distance. At that point, Officer Ehret deployed his taser and was able to subdue Walker.

Walker argues that his refusal to lay down on the ground, and the fact that Officer Ehret had to use force to eventually get Walker on the ground, does not in and of itself, prove any forcible action on Walker’s part. He also argues that simply walking toward Officer Ehret, in and of itself, does not constitute the use of strong, powerful means to resist law enforcement. *729 He is correct on both points, and if those were the only actions Walker had taken (or refused to take), this might be a different case.

Where Walker’s argument fails is in the attempt to distinguish his case factually from *Pogue* and *Stansberry*. He acknowledges that those cases are representative of the idea that the threat of violence can support a conviction for resisting law enforcement, but argues that unlike in *Pogue*, he did not display a weapon in his encounter with Officer Ehret, and that unlike in *Stansberry*, there was no evidence of “purposefully aggressive behavior in defiance of arrest” directed at Officer Ehret. (Appellant’s Br. at 9–10.)

For one thing, Walker did display a weapon—his fists—and while he appears to claim that his fists were simply still clenched as a result of a racially-charged fight, this is asking this Court to engage in speculation as to what Walker might have done had he closed the distance completely between he and Officer Ehret. There was no direct evidence presented as to who Walker’s aggression was aimed at or why his fists were clenched. Given the totality of Walker’s conduct, however, we think it is a reasonable inference to conclude that his aggression was at that point directed at Officer Ehret. We think this is sufficient to show an active threat of strength, violence, or power.

And as for his argument that he showed no evidence of “purposefully aggressive behavior in defiance of arrest,” we note first the statute does not require his action to specifically be “in defiance of arrest,” only a forcible resistance, obstruction, or interference with Officer Ehret’s execution of his duties. And second, if advancing in an aggressive manner and with fists clenched to within three or four feet of the only police officer on the scene, who has been ordering you to the ground, is not at least “purposefully aggressive behavior,” then we are not clear what conduct might ever merit such a label.

Conclusion

We therefore affirm Walker’s conviction for resisting law enforcement.

9 N.E.3d 230
Court of Appeals of Indiana.

M.S.D. OF MARTINSVILLE v. REBECCA JACKSON
No. 55A01–1304–CT–182. | May 19, 2014.

Opinion

OPINION

MATHIAS, Judge.

After Martinsville West Middle School students C.J. and B.K. were injured during a school shooting by former student Michael Phelps (“Phelps”), C.J. and B.K. each filed lawsuits against the Metropolitan School District of Martinsville (“the School District”) alleging that the School District breached its duty to keep C.J. and B.K. safe. The School District filed a motion for summary judgment, which the trial court denied.

The School District now appeals the denial of its motion for summary judgment and argues (1) that it is immune from liability pursuant to the Indiana Tort Claims Act, (2) that the School District did not breach its duty to C.J. and B.K., and (3) that C.J. was contributorily negligent.

We affirm.

Facts and Procedural History

On March 25, 2011, C.J. was an eighth-grader at Martinsville West Middle School (“MWMS”). C.J. and Phelps, who had also been an eighth-grader at MWMS, were once friends, but their relationship had deteriorated during the preceding few years and had grown particularly antagonistic in 2011 after they both began sporadically dating the same girl, N.A. Phelps remained close with N.A. In the spring of 2011, C.J. allegedly began to spread offensive rumors about N.A., which caused further hostility between C.J. and Phelps. Although the boys had never had a physical altercation at school, Phelps once tried to start a fight with C.J. on a local street after a school basketball game.

During the four years Phelps was enrolled at MWMS,¹ he accumulated a total of fifty discipline referrals, forty-three of which were for disrespect toward school *233 personnel or failure to follow school rules. Phelps also had seven discipline referrals for harassing, threatening, and physically assaulting other students. On March 2, 2011, three weeks before the shooting, Phelps commented to some of his classmates that he wanted to “just blow up the school.” Appellant’s App. p. 712. After Phelps’s classmates reported his remark, the school suspended Phelps for ten

days. Phelps remained barred from entering school property except to take the ISTEP test. Because of his overall disciplinary history, the school's principal, Suzie Lipps ("Principal Lipps") also initiated expulsion proceedings against Phelps.² However, before Phelps was expelled, and about a week before the shooting, his mother withdrew him from school.

¹ Phelps repeated the sixth grade.

² Principal Lipps also notified Phelps's probation officer of Phelps's threat. Following a March 2010 incident where Phelps threatened another student, Phelps was adjudicated a delinquent and placed on probation for six months. After Phelps threatened to "blow up" the school, Phelps's probation officer unsuccessfully sought to revoke Phelps's probation.

Two days after Phelps made his comment about blowing up the school, on March 4, 2011, while Phelps was on school property to take the ISTEP test, he had an argument with C.J. about N.A. A MWMS teacher overheard the argument and told C.J. "not to feed into it and to walk away." Appellant's App. p. 137. According to C.J., this is the only conversation he had with any school personnel regarding his ongoing problems with Phelps. Around the same time, about two weeks before the shooting, Phelps again threatened C.J. after a school basketball game. C.J.'s girlfriend, A.M., testified that she told two MWMS teachers that Phelps had threatened C.J. According to A.M., those teachers did not report Phelps's threats to the school administration.

A.M. also testified that seven days before the shooting, on the afternoon of March 18, 2011, N.A. and A.M. were riding the school bus together when A.M. heard N.A. tell Phelps over the phone that C.J. had made fun of her again. Phelps apparently made yet another threat against C.J. during this conversation. After ending the phone call with Phelps, N.A. told A.M. that "[C.J.] is doomed." Appellant's App. p. 158. A.M. testified that she later warned C.J. of Phelps's threat and C.J. responded, "I'm a big boy." *Id.* Neither A.M. nor C.J. reported this threat to school personnel.

On the morning of the shooting, March 25, 2011, Phelps's Facebook status read "[t]oday is the day" and "[d]on't use your mind, use your nine." Appellant's App. pp. 562, 751. Phelps arrived at the school around 7:00 a.m. He was wearing a dark-colored hooded sweatshirt with the hood pulled over his head and moved toward the building so as to avoid detection.

Principal Lipps had developed a safety plan for the school³ and the school's three surveillance cameras, positioned at three of the school entrances, were functioning properly that morning. One of the school's entrances was unlocked from 6:30 a.m. to 7:30 a.m.; two other entrances were unlocked from 7:10 a.m. to 7:30 a.m.; and the five school employees who were assigned to various positions around the school's exterior to monitor student arrival were in place beginning at 7:00 a.m. All of the monitors knew Phelps and were aware that he was prohibited from being on school property. None of the monitors *234 noticed Phelps when he arrived at the school, although several students did. No students reported Phelps's presence to school personnel, even though "everybody knew" that he was banned from school property and even though the students saw

that Phelps carried in his back pocket what appeared to be a wrench covered in a cloth. Appellant's App. pp. 141, 252–53.

³ The safety plan also provided for a school anti-bullying policy which requires that anyone who is a victim or witness to bullying report the behavior to the school office. Principal Lipps is responsible for investigating claims of bullying.

Immediately before Phelps approached C.J. that morning, N.A. sought out C.J. in the school's vestibule and told him that Phelps had arrived at the school and planned to "kick [C.J.'s] ass."⁴ Appellant's App. pp. 138–39. C.J. replied, "I don't care." *Id.* at 138. C.J. then sent a text message to his mother to tell her that Phelps wanted to fight him. C.J.'s mother told him via text message to go to the school's office. However, C.J. remained in the school's vestibule because he wanted to show Phelps that he was not afraid of him and because he didn't believe that Phelps would actually assault him. Another MWMS student, B.K., and two other students also remained in the vestibule with C.J.

⁴ N.A. apparently knew that Phelps possessed a gun, and Phelps had stated to N.A. that he wanted to shoot C.J., but N.A. did not warn C.J. that Phelps had a gun because she did not believe Phelps would really use the gun to attack C.J.

Phelps entered the school's vestibule and confronted C.J. around 7:15 a.m. He threatened that C.J. "was about to get [expletive] up." Appellant's App. pp. 138–39, 497. Phelps then left the vestibule, only to return a few minutes later. C.J. and B.K. were both still in the vestibule when Phelps arrived. C.J. told Phelps that he did not wish to fight and Phelps responded, "too bad," pulled a stolen handgun⁵ from his waistband, and fired two shots into C.J.'s stomach. The ejected shell casings from the bullets hit B.K., injuring his hand. After the shooting, Phelps fled the scene. C.J. was transported via Lifeline to Methodist Hospital in Indianapolis.

⁵ Phelps apparently stole the handgun from the home of his former stepfather.

The State subsequently charged Phelps with attempted murder, aggravated battery, carrying a handgun without a license on school property, trespassing on school property, possession of a firearm on school property, and theft. The State later dismissed all counts except for the attempted murder count. The juvenile court waived jurisdiction and, following a bench trial on July 11, 2011, Phelps was found guilty of attempted murder. He was sentenced to thirty-five years executed in the Department of Correction, with five years suspended and five years of probation.

On September 20, 2011, approximately six months after the shooting, C.J. and his mother, Rebecca Jackson sued the Martinsville Metropolitan School District, claiming that the School District failed to protect C.J. from Phelps. Specifically, C.J. argued that the School District was negligent when it left Door 2 unlocked, allowing Phelps to enter the school; when it failed to warn personnel monitors that Phelps posed a threat and to instruct them to specifically look for Phelps

on school grounds after he was suspended; and when it failed to instruct personnel monitors to call 911 if Phelps was spotted on school property.

Seven months later, on March 22, 2012, B.K.’s mother, Kelli Dearth (“Dearth”) filed a similar lawsuit. The trial court consolidated C.J. and B.K.’s complaints. On January 25, 2013, the School District filed its motion for summary judgment, arguing that it was immune from liability pursuant to the Indiana Tort Claims Act, *235 that C.J. was contributorily negligent, and that the School District did not breach its duty to C.J. and B.K. The parties filed briefs, and the trial court held a hearing on the motion on March 8, 2013. That same day, the trial court issued an order denying the School District’s motion for summary judgment.

The School District now appeals.⁶⁷

6 B.K. declined to file a separate appellate brief, but instead joined in C.J.’s appellee’s brief.

7 We held oral argument in this appeal on April 26, 2014, at Taylor University in Upland, Indiana. We extend our gratitude to the faculty, staff, and students for their hospitality and commend counsel for the quality of their written and oral advocacy.

.....

I. Indiana Tort Claims Act Discretionary Function Immunity

[1] The School District argues that, because “the challenged actions involve the performance of a discretionary function,” it is entitled to immunity under the Indiana Tort Claims Act. Appellant’s Br. at 15. The Indiana Tort Claims Act (“ITCA”), Indiana Code section 34–13–2–1 et seq., was enacted after our supreme court abrogated the common law sovereign immunity of governmental units from tort liability. The ITCA governs tort claims against governmental entities and public employees. *236 *Harrison v. Veolia Water Indianapolis, LLC*, 929 N.E.2d 247, 251 (Ind.Ct.App.2010). Pursuant to the ITCA, “governmental entities can be subjected to liability for tortious conduct unless the conduct is within an immunity granted by Section 3 of [the] ITCA.” *Oshinski v. N. Ind. Commuter Transp. Dist.*, 843 N.E.2d 536, 543–44 (Ind.Ct.App.2006). The party seeking immunity bears the burden of establishing that its conduct comes within the ITCA. *Peavler v. Bd. of Comm’rs of Monroe Cnty.*, 528 N.E.2d 40, 46 (Ind.1988).

The ITCA provides that a governmental entity or governmental employee who acts within the scope of that employee’s duty will not be liable if a loss results from “[t]he performance of a discretionary function[.]” Ind.Code § 34–13–3–3(7). The party who seeks immunity bears the burden of establishing that its conduct falls within the discretionary function exception.

Prior to our supreme court’s decision in *Peavler v. Bd. of Comm’rs of Monroe Cnty.*, we distinguished between ministerial and discretionary acts in order to determine if certain conduct

is included within the immunity exception. Discretionary acts were immune and ministerial acts were not. *Harvey v. Bd. of Comm'rs of Wabash County*, 416 N.E.2d 1296 (Ind.Ct.App.1981).

Historically, Indiana courts defined a ministerial act as “one which a person performs in a given state of facts in a prescribed manner, in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done.” *Dep't of Mental Health v. Allen*, 427 N.E.2d 2, 4 (Ind.Ct.App.1981). We classified conduct as discretionary “when it involves [discretion] on the part of the officer to determine whether or not he should perform a certain act, and, if so, in what particular way[.]” *Adams v. Schneider*, 71 Ind.App. 249, 124 N.E. 718, 720 (1919).

However, in its 1988 decision, *Peavler v. Bd. of Comm'rs of Monroe Cnty*, our supreme court expressly rejected the ministerial/discretionary distinction analysis, concluding that, unless they can be properly characterized as *policy* decisions that have resulted from a conscious balancing of risks and benefits and/or weighing of priorities, discretionary judgments are not immune from legal challenge under the ITCA. In rejecting the ministerial/discretionary distinction analysis, the supreme court observed that:

The ministerial/discretionary test does not advance the public policy of government immunity because it does not consider the type of decision protected by immunity. Rather, it considers only the resulting conduct and attempts to label that conduct. The ministerial/discretionary test defines “discretionary” in the negative: anything which is non-ministerial is discretionary. The test does not require an affirmative finding that the governmental action arose from the type of policy-making decision protected by governmental immunity.

Peavler, 528 N.E.2d at 45–46.

The supreme court chose instead to adopt the planning/operational test, defining planning activities as those that “include acts or omissions in the exercise of a legislative, judicial, executive or planning function which involves formulation of basic policy decisions characterized by official judgment or discretion in weighing alternatives and choosing public policy” as well as “[g]overnment decisions about policy formation which involve assessment of competing priorities and a weighing of budgetary considerations or the allocation of scarce resources are also planning activities.” *Id.* at 45.

Under *Peavler*, then, the discretionary function exception of the ITCA insulates from liability only planning activity, characterized *237 as “only those significant policy and political decisions which cannot be assessed by customary tort standards” and as “the exercise of political power which is held accountable only to the Constitution or the political process.” *Id.* at 45. The supreme court was unambiguous in its declaration that it did not intend all decisions that involve “judgment or discernment” to be immune from liability, since “[i]t would be difficult to conceive of any

official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance.” *Id.* at 43, 45. *See also Veolia Water Indianapolis, LLC v. Nat’l Trust Ins. Co.*, 3 N.E.3d 1 (Ind.2014) (holding that the City’s failure to require for-profit water company to follow terms of management agreement by properly maintaining water supply to fire hydrants was not a discretionary function, and thus, statutory immunity under the ITCA did not protect the city from liability for damages that resulted from a fire that destroyed a restaurant when firefighters’ efforts were delayed due to a frozen fire hydrant; the city made no deliberate policy decision to fail to require company to follow the terms of a management agreement by properly maintaining fire hydrants’ water supply, or make a conscious decision about policy formation which involved assessment of competing priorities and a weighing of budgetary considerations or the allocation of scarce resources).

¹²¹ The School District contends that the safety plan implemented by Principal Lipps and in place the morning of the shooting “resulted from a conscious balancing of risk and benefits” and thus was entitled to immunity. *Id.* at 19. An affidavit by Principal Lipps states, in relevant part:

6. As the West Principal, I am responsible for all facets of West’s operation. I supervise staff, perform staff evaluations, oversee curriculum development and implementation and am responsible for overall student performance and achievement. In many respects, I am the Chief Executive Officer of West.

7. Overseeing school operations so that students and staff have safe learning and working environments is also part of my responsibilities as Principal. Thus, I am responsible for the development of a plan for student and staff safety at West.

8. West’s Code of Conduct for Students and Discipline Policy is an important part of the safety environment at West. An excerpt from the Student Planner setting forth these provisions is attached. The Anti–Bulling [sic] Policy provides that that [sic] “anyone who is a victim of or a witness to any type of hurtful or aggressive act to an individual student or group of students should immediately report the incident to the office.”

9. A school safety plan must balance competing factors and resource limitations that must be considered in providing a learning environment for an educationally diverse student population. A school safety plan must weigh the competing needs of providing a safe environment against the obligation to creating [a] stimulating and open learning environment where students have a reasonable degree of freedom and choices. Because of financial limitations, which have become even more restrictive over the last several years, school administrators throughout the State of Indiana and the M.S.D. Martinsville must constantly prioritize all projects and programs requiring funding to assure that a reasonable balance is struck between educational programming and building security needs.

***238** 10. Providing a safe environment for staff and students requires a multi-faceted approach. Prevention of acts of violence, while very important, is not the only concern of a school safety

plan. West is a public school and, as such, it must accommodate the needs of students and visitors who, as a practical matter, must have reasonable access [to] the building at various times throughout the school day and at other times for after school activities or other events.

11. With regard to building access, I, as principal, developed a plan that was in place at the time of the shooting in this case and that considered these factors. For example, the M.S.D. Martinsville has a system for numbering the exterior doors of each school to guide emergency personnel to the appropriate part of the school in the event of a fire or medical emergency. As Principal, I made certain that each entrance to West has a unique number which is placed above the entrance consistent with the district's numbering system....

12. Second, I developed a plan with the assistance of other staff that limited access to the school. All exterior doors ... were generally locked during the day to prevent access to the building.

13. Staff and students must have reasonable access to the building. Therefore, as part of the school safety plan, I determined that Doors 1, 2, and 3 needed to remain unlocked from 6:30 to 7:30 a.m. when students and staff generally arrived for the school day.

14. To increase student and staff safety, especially during school arrival times when three of the doors are unlocked, I took other steps to reduce the chances of violent incidents. I had cameras installed at all exterior doors that were used by students to enter the building so as to record activity at those doors and to act as a deterrent to misconduct. By recording all activity at these entrances, I believed, based on my experience and training, that the likelihood of violence would be reduced because students and staff would know that their actions by these doors would be preserved for future disciplinary or criminal proceedings. I also determined that based upon the layout of the school building, financial resources, competing building needs, and the utility of additional cameras that the placement and number of cameras was sufficient to provide a safe school environment.

* * *

17. I specifically considered how to place personnel during the mornings to monitor arrivals. One staff member was placed at a location where he or she could observe Door 2 as well as the front of the School....

18. Before the shooting, I participated in regular meetings with the M.S.D. Martinsville's leadership team and the district safety committee. A variety of school safety issues were discussed at these meetings. I, and the assistant principal, frequently re-evaluated West's school safety plan in light of these meetings to determine what improvements or changes should be made to the security at West.

Appellant's App. pp. 94–98 (internal citations omitted).

The School District declares that the decisions made by Principal Lipps with respect to MWMS's

safety plan are “quintessential discretionary functions” and argues, “[t]he fact that Plaintiffs may disagree with the ultimate decisions the School made regarding its safety policy does not alter the underlying nature of the *239 School’s decision in the first place.” *Id.* at 21, 22.⁸

⁸ Here, the School District cites *Leo Mach. & Tool, Inc. v. Poe Volunteer Fire Dep’t, Inc.*, 936 N.E.2d 855, 862 (Ind.Ct.App.2010) *aff’d on reh’g*, 940 N.E.2d 384 (Ind.Ct.App.2011) (designated evidence that a different course of action would have been better does not alter the immunity analysis as long as the decision being challenged was in fact “undertaken after a conscious and informed risk/benefit analysis”).

To support its argument, the School District cites several cases from other jurisdictions concluding that a school’s safety and security decisions are discretionary functions which are immune from liability. In *Mosley v. Portland School Dist.*, 315 Or. 85, 843 P.2d 415 (1992), a high school student who was stabbed with a knife during a fight with another student on school property brought a personal injury claim against the school district and officials, alleging negligence in the school’s failure to properly supervise its students, failure to provide adequate security for students, failure to prevent weapons from being brought onto school grounds, and failure to end the fight before the knife was used. The trial court entered judgment against the student. The Oregon Supreme Court affirmed, observing that a “public body that owes a particular duty of care (such as that owed by a school district to its students who are required to be on school premises during school hours) has wide policy discretion in choosing the means by which to carry out that duty.” *Id.* at 419.

The School District also cites *Randell v. Tulsa Independent School Dist.*, 889 P.2d 1264 (Ok.Ct.App.1994), where a student sued the school district and the school’s assistant principal for negligence. The plaintiff had been struck in the face after the assistant principal broke up a fight between the plaintiff and three other students. In his complaint, the plaintiff argued that the school district failed to spend all of the money it had available for security, that it did not have an adequate policy for breaking up crowds or identifying student gang members, that it did not create or enforce policies to report criminal acts of students to police, that it did not have security cameras, and that it failed to act reasonably and prudently. The Court of Appeals of Oklahoma held that the policies created by the school board regarding security were “discretionary acts for which no liability can be imposed.” *Id.* at 1267.

Next, the School District cites *Kelly v. Lewis*, 221 Ga.App. 506, 471 S.E.2d 583 (1996), where the estate of a high school student killed in a shooting sued the school’s principal and one of its teachers, arguing that the defendants were aware of the risks of violent crime against the students and failed to use ordinary care to protect the decedent, failed to enforce the school’s security rules, and failed to provide adequate security. The Georgia Court of Appeals affirmed the trial court’s judgment granting the defendants’ motion to dismiss, noting that “ ‘making decisions requiring the means used to supervise school children is a discretionary function of a school principal,’ ” and that “the teachers’ task to monitor, supervise, and control students is a discretionary action protected by the doctrine of official immunity.” *Id.* (quoting *Guthrie v. Irons*, 211 Ga.App. 502, 506, 439 S.E.2d 732 (1993)). It is important to note, however, that the Georgia court reached its

decision using the discretionary/ministerial act analysis expressly rejected by our supreme court in *Peavler*.

Finally, the School District cites *Pletan v. Gaines*, 494 N.W.2d 38, 44 (Minn.1992), where the Minnesota Supreme Court held that the school district's district-wide bus- *240 boarding policy entitled the school district to discretionary function immunity.

We first note that C.J.'s complaint does not allege that the MWMS safety plan was negligently *formulated*. Rather, it claims that C.J.'s injury resulted from negligent *implementation* of the plan. See *Greathouse v. Armstrong*, 616 N.E.2d 364 (Ind.1993) (under the *Peavler* planning-operational test, decisions involving formulation of basic policy are entitled to immunity while decisions regarding only execution or implementation of that policy are not). We further note that even if C.J. did allege negligent formulation of the safety plan, MWMS's safety plan was not created in a way that would entitle the School District it to immunity.

In its reply brief, the School District cites two repealed sections of the Indiana Code which provided that “[p]rincipals have the authority to hire, transfer, suspend, lay off, promote, discharge, and discipline school employees,” Ind.Code § 20–7.5–1–2(h) (repealed in 2005), and that “[a] principal may take any action concerning the principal’s school or a school activity within the principal’s jurisdiction that is reasonably necessary to carry out or prevent interference with an educational function or school purposes.” Ind.Code § 20–8.1–5.1–5 (repealed in 2005). The School District also quotes *Beeching v. Levee*, 764 N.E.2d 669, 679 (Ind.Ct.App.2002), where another panel of this court noted that school principals “have the authority to write regulations governing student conduct” and that “to the general public, a principal is perceived to have responsibility and authority for operating a school and overseeing the education of its students.”

Importantly for our case, however, the court in *Beeching* went on to note that

under Indiana law the only publicly elected, local school officials are school board members. While these elected school board members could easily be determined to be “public officials” because of their elective office, building principals are at least two employment levels removed from school board members. In most, if not all Indiana public school systems, building principals are appointed by system superintendents and ratified by vote of the system’s school board.

Beeching, 764 N.E.2d at 679 (internal citations omitted). The *Beeching* court declared that, under the circumstances of that case, “public school principals are not ‘public officials.’ ” *Id.* Although this conclusion was made in the context of a defamation action the school principal brought against defendant *Beeching*, the court’s analysis is relevant to the question of whether Principal Lipps’s safety plan constituted policy-making immune from liability under the *Peavler* planning/operation test. Like the principal in *Beeching*, Principal Lipps had the authority to, and did, write regulations governing the conduct of students at Martinsville West Middle School. Like

the principal in *Beeching*, Principal Lipps stated in her affidavit that she is largely responsible for “all facets of West’s operation.” Appellant’s App. p. 94. However, also like the principal in *Beeching*, Principal Lipps is not a public official, and her role is not that of policymaker. She is “at least two employment levels removed from [the] school board members” who are elected public officials. *Id.*

Indeed, language found in Indiana Code Article 20 indicates that a school principal’s role is mostly administrative, while the responsibility for creating policy lies with the school board. Indiana Code section 20–18–2–14 provides that “ ‘Principal’ refers to the chief *administrative* officer of a school” (emphasis added). And while Indiana Code section 20–33–8–10 states that “[a] principal may take action concerning *241 the principal’s school or a school activity within the principal’s jurisdiction that is reasonably necessary to carry out or prevent interference with an educational function or school purposes,” including “writ[ing] regulations that govern student conduct,” Indiana Code section 20–23–16–26 makes clear that it is the school board which “make[s] decisions pertaining to the general conduct of the schools.”

.....

While it may be the case that, in developing the MWMS safety plan, Principal Lipps was required to “balance competing factors and resource limitations that must be considered in providing a learning environment for an educationally diverse student population,” *Id.* at 94, it is important to note that Principal Lipps’s development of the plan was not an action mandated by statute under the General Assembly’s policy-making authority. Furthermore, unlike the Oregon, Oklahoma, and Minnesota cases cited by the School District, *Mosley*, *Randell*, and *Pletan*, there is no evidence in the record that the elected officials on the school board, the School District’s policy-making body, played any role in developing or approving the safety plan. And the Georgia appellate court case, *Kelly v. Lewis*, has marginal, if any, relevance to our inquiry since it reaches its conclusion using a ministerial/discretionary function analysis that has been considered and rejected by our supreme court.

Peavler dictates that the discretionary function exception under the ITCA grant immunity only to those decisions and actions which constitute “the exercise of political power ... held accountable only to the Constitution or the political process.” *Peavler*, 528 N.E.2d at 45. Here, we have been directed to nothing to support the School District’s contention that Principal Lipps’s development of the safety plan was an exercise of political power under *Peavler*. At best this plan might be immune under the pre-*Peavler* definition of the word “discretionary,” but it is not the type of policy-making that our supreme court has since determined should be exempt from liability under the planning/operation test. As with most discretionary decisions, Principal Lipps may well have balanced factors and resource considerations in developing her plan, but that does not mean that this activity rises to the level of protected policy-making by the school board. Under these facts and circumstances, the School District is not entitled to immunity under the discretionary function exception of the ITCA.

II. Breach of Duty

The School District next argues that “the School exercised reasonable care for the protection of its students and that it was not foreseeable to the School that [Phelps] would trespass onto school property *243 the morning of March 25th and shoot [C.J.]”

[3] [4] [5] [6] Negligence consists of: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty by the defendant; and (3) injury to the plaintiff proximately caused by that breach. *Foddrill v. Crane*, 894 N.E.2d 1070, 1075 (Ind.Ct.App.2008). “An indispensable element of an action for negligence is that the act complained of must be the proximate cause of the accident producing the injury.” *Havert v. Caldwell*, 452 N.E.2d 154, 158 (Ind.1983). In defining proximate cause, the Indiana Supreme Court has stated that a “negligent act or omission is the proximate cause of an injury if the injury is a natural and probable consequence which, in light of the circumstances, should reasonably have been foreseen or anticipated.” *Id.* Foreseeability of the injury is the critical test for determining the defendant’s liability. *Nat’l. R.R. Passenger Corp. v. Everton*, 655 N.E.2d 360, 366 (Ind.Ct.App.1995). The foreseeability of whether the defendant’s act proximately caused the plaintiff’s injuries is a question for the trier of fact. *Id.* at 366–67.

In cases involving an alleged breach of a school’s duty owed to its students, Indiana courts have held that schools have a “special duty,” beyond regular premises liability, to exercise the level of care an ordinary, prudent person would exercise under the same or similar circumstances. *Swanson v. Wabash College*, 504 N.E.2d 327, 330 (Ind.Ct.App.1987); *see also Miller v. Griesel*, 261 Ind. 604, 611, 308 N.E.2d 701, 706 (1974) (“[T]he relationship of school pupils and school authorities should call into play the well recognized duty in tort law that persons entrusted with children, or others whose characteristics make it likely that they may do somewhat unreasonable things, have a special responsibility recognized by the common law to supervise their charges.”).

Because there is “some remote risk of injury in all human existence,” *Norman v. Turkey Run Cmty. School Corp.*, 274 Ind. 310, 316, 411 N.E.2d 614, 617 (1980), the duty imposed upon Indiana schools to protect their students has been necessarily defined by the specific circumstances of each case. Under facts similar to those in the present case, this court has held that a plaintiff has established that a school had a duty to protect its student from criminal attack and breached that duty where the attacker had a propensity towards violence; the school system or school personnel was aware of this propensity; and school personnel’s failure to provide adequate supervision allowed the attacker the opportunity to assault the student, proximately causing his injuries. *See McClyde v. Archdiocese of Indianapolis*, 752 N.E.2d 229, 233 (Ind.Ct.App.2001). Consequently, we must determine whether genuine issues of material fact exist as to whether the School District conformed to the standard of conduct required by its duty with respect to C.J. *See Ashcraft v. Ne. Sullivan Cnty. Sch. Corp.*, 706 N.E.2d 1101, 1104 (Ind.Ct.App.1999).

A. Foreseeability of the Shooting

[7] The School District argues that summary judgment in its favor is appropriate in this case because the School District could not have foreseen that Phelps would come to the school on

March 25, 2011 to shoot C.J. The School District declares that public schools “do not have the luxury of picking and choosing who they can educate” and that, therefore, “school corporations are not and cannot be considered insurers against all risks posed by a student towards others.” Appellant’s Br. at 32. The School District quotes *244 *Roe v. North Adams Community School Corp.*, 647 N.E.2d 655, 660 (Ind.Ct.App.1995), where another panel of this court held, “[i]n order for the plaintiffs to recover [against the school district], they were also bound to show that [the other student’s] conduct was foreseeable by the school.” The School District emphasizes that Phelps’s shooting of C.J. was a criminal act by a third party and that the “duty to anticipate and to take steps against a criminal act of a third party arises only when the facts of the particular case make it reasonably foreseeable that a criminal act is likely to occur.” Appellant’s Br. at 34 (quoting *Schlotman v. Taza Cafe*, 868 N.E.2d 518, 521 (Ind.Ct.App.2007)).

[8] In analyzing the foreseeability factor of duty, we focus on whether the injured person actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable. *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind.1991). Such foreseeability does not mean that the precise hazard or exact consequences should have been foreseen, but neither does it encompass anything which might occur. *Crull v. Platt*, 471 N.E.2d 1211, 1215 (Ind.Ct.App.1984), *reh’g denied, trans. denied*. Here, as the moving party, the School District has the burden of demonstrating that, as a matter of law, Phelps’s assault on C.J. was not foreseeable. *See Kroger Co.*, 930 N.E.2d at 7.

In this regard, the School District first argues that the affidavit of Phelps’s and C.J.’s classmate, C.H., is “insufficient to create a genuine issue of fact” and must be stricken from the record. Appellant’s Br. at 25. During a June 28, 2011 deposition taken in criminal proceedings against Phelps, C.H. testified that she did not learn of Phelps’s plan to shoot C.J. until she saw Phelps’s Facebook status¹¹ on the morning of March 25, 2011. She also testified that, prior to the shooting, she never notified Principal Lipps that Phelps planned to shoot C.J.¹² However, in a April 30, 2012 affidavit containing the transcript of a recorded statement C.H. made as part of C.J.’s civil proceeding against the School District, C.H. stated that she had learned of Phelps’s plan sometime prior to March 25, 2011. In the affidavit, she further stated that, prior to the shooting, she “went to Mrs. Lipps and told her there was going to be a shooting, but [Lipps] said [C.H. was] nothing but a liar ... she said that in her whole school career she never saw a shooting and she was never going to see one.”¹³ Appellant’s App. p. 39.

11 Phelps’s status read, “Today is the day” and “Don’t use your mind, use your nine.” Appellant’s App. pp. 750–752.

12 The following exchange occurred between C.H. and Phelps’s defense counsel:
Q: Did you and [N.A.] and a whole bunch of sixth graders tell Mrs. Lipps that [Phelps] was going to shoot [C.J.]?
A: No. I didn’t tell Mrs. Lipps anything.
Appellant’s App. pp. 753–54.

The School District requested that the trial court strike the affidavit because “a nonmovant may not create issues of fact by pointing to affidavit testimony which contradicts the witnesses [sic] sworn testimony in a prior deposition.” Appellant’s Br. at 27 (quoting *Miller v. Monsanto Co.*, 626 N.E.2d 538, 544 (Ind.Ct.App.1993)). The School District notes that the trial court did not rule on the School District’s motion to strike the affidavit. The School District asks that this court “strike the portions of [C.H.’s] Affidavit that contradict her prior deposition testimony.” Appellant’s *245 Br. at 28. The School District further argues that “[e]ven if not stricken, this Affidavit is insufficient to create a genuine issue of fact as to whether the School had actual knowledge of [Phelps’s] threat to shoot [C.J.] prior to the shooting.” *Id.*, citing *Gaboury v. Ireland Rd. Grace Brethren, Inc.*, 446 N.E.2d 1310, 1314 (Ind.1983) (“contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion”).

The School District acknowledges that MWMS teacher Mrs. Kempe overheard an argument between Phelps and C.J. when Phelps was on school grounds to take the ISTEP test and that C.J. subsequently told Mrs. Kempe that Phelps wanted to fight with him. The School District argues, however, that this is “insufficient to establish that the School should have known that [Phelps] intended to harm [C.J.] the morning of March 25,” emphasizing that the conversation between C.J. and Kempe occurred three weeks prior to the shooting. Appellant’s Br. at 24. The School District also underscores that, prior to the shooting, Phelps had been withdrawn from school by his mother; that Phelps and C.J. had never been involved in a physical altercation with each other at school; that Phelps had never been involved in physical violence at school beyond fist fights; and that even the juvenile court did not consider Phelps to be enough of a danger to others to revoke his probation after he commented that he wanted to blow up the school. Appellant’s Br. at 29.

It is well settled that summary judgment is especially inappropriate where the critical question for resolution is whether a defendant exercised the requisite degree of care under the factual circumstances. *Randolph Co. Hospital v. Livingston*, 650 N.E.2d 1215, 1217 (Ind.Ct.App.1995), *trans. denied*. Under the facts and circumstances before us in the record prior to trial, we conclude that there exist genuine issues of material fact on this issue and that the School District has not proved as a matter of law that the shooting was not foreseeable. Phelps had a lengthy history of serious misbehavior in school; threatened to blow up the school; and was on school grounds, presumably in close proximity to the personnel monitors, for thirty minutes prior to the shooting. He had made threats against C.J., of which at least one MWMS teacher was aware. The day before the shooting, another MWMS student had made a threat to shoot a teacher. Given these facts, a jury could conclude that it is foreseeable that a shooting would occur at MWMS. The unstricken affidavit of C.H. also creates genuine issues of material facts as to whether the School District had specific warning about Phelps’s attack. *See McClyde*, 752 N.E.2d at 235 (concluding that an affidavit relied on exclusively by plaintiff can be sufficient to create genuine issues of material

fact precluding grant of defendant's motion for summary judgment).

We further note that the School District's argument regarding the affidavit containing C.H.'s recorded statement is misguided. The principles the School District cites do not apply to the use of C.H.'s affidavit. While it is true that our courts have held that "contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant," *Gaboury v. Ireland Rd. Grace Brethren, Inc.*, 446 N.E.2d 1310, 1314 (Ind.1983), the stated purpose for this rule is to "prevent a party from generating its own genuine issue of material fact by providing self-serving contradictory statements without explanation." *246 *Crawfordsville Square, LLC. v. Monroe Guar. Ins. Co.*, 906 N.E.2d 934, 939 (Ind.Ct.App.2009) (emphasis added). Here, it is the deposition and affidavit of a *non-party* witness that allegedly conflict. Furthermore, the deposition with which C.H.'s affidavit allegedly conflicts occurred within a different case altogether, Phelps's criminal proceeding. Therefore, it is not likely the case that C.H. made contradictory statements in a self-serving attempt to avoid a damaging admission she made in a deposition in a separate proceeding.

Under these facts and circumstances, we conclude that the question of whether the shooting was foreseeable to the School District is one that is best resolved by the trier of fact rather than through summary judgment.

B. Implementation of Safety Plan

^[9] The School District next contends that it exercised reasonable care in providing for the safety of its students, noting that Principal Lipps had implemented (1) a school-wide policy prohibiting threats, bullying, and fighting; (2) a door numbering system; (3) an electronic door locking system; (4) a video surveillance system; and (5) the placement of personnel monitors around school grounds during the time in which students arrived in the morning. The School District further emphasizes that when Phelps threatened to "blow up the school," he was suspended immediately and expulsion proceedings were initiated. The School District declares, "there is no scenario whereby a school can go into the type of extended lockdown requested by Plaintiffs every time two students are threatening to fight each other—occurrences that law enforcement in this case described as 'typical' among adolescent boys." Appellant's Br. at 33.

Given the unresolved question of whether the shooting was foreseeable, it follows that there remains this question: if the School District knew or should have known that Phelps posed a threat to C.J.'s safety, should it have taken more steps to protect C.J. from Phelps? A recent opinion by another panel of this court, *Prancik v. Oak Hill United Sch. Corp.*, 997 N.E.2d 401 (Ind.Ct.App.2013) *trans. denied*, involves facts that are somewhat similar to the facts of this case, but can be distinguished in two important ways. There, a junior high school teacher left two students unsupervised in her classroom during a four-minute passing period to supervise the hallway. While the teacher was in the hallway, one of the students assaulted the other, injuring him. This court affirmed the trial court's grant of the school's motion for summary judgment,

concluding that the school was not negligent for failing to prevent the attack since there was no evidence that the school was on notice that the attacker could be violent and no evidence that the assault happened as a result of any failure by the teacher to follow school protocol.

Viewing the facts liberally in a light most favorable to C.J., as our standard of review requires, it seems to us that reasonable persons could differ as to whether there is a sufficient relationship between the School District's general duty to supervise and protect its students and its alleged failure to take adequate measures to protect C.J. from Phelps. There exist genuine issues of material fact here, in light of the continued conflict between the two boys, Phelps's extensive disciplinary history, including discipline referrals for harassing, threatening, and assaulting other students, and Phelps's threat to blow up the school. Therefore, this issue is more appropriately a question for the trier of fact. *See Drake by Drake v. Mitchell Cmty. Sch.*, 628 N.E.2d 1231, 1234–35 (Ind.Ct.App.1994) *aff'd in part, vacated in part on other grounds* (holding that summary judgment was inappropriate where a reasonable *247 jury could have found that a school hosting a social event inside a grain elevator “breached its duty to exercise reasonable care to warn the students and/or protect them from a known danger, exposure to histoplasmosis” resulting from pigeon droppings inside the elevator).

III. C.J.'s Contributory Negligence

[10] The School District next argues that summary judgment in its favor is required because C.J. was contributorily negligent “in failing to follow his mother’s directions to leave the vestibule and go to the office and report the threats.” Appellant’s Br. at 36.

[11] “Contributory negligence” is the failure of a plaintiff to exercise the reasonable care an ordinary person would use for his own protection and safety. *Funston v. Sch. Town of Munster*, 849 N.E.2d 595, 598 (Ind.2006). In 1985, Indiana largely put to rest its common law defense of contributory negligence “that barred recovery on a plaintiff’s negligence claim if the plaintiff was even slightly at fault.” *Penn Harris Madison Sch. Corp. v. Howard*, 861 N.E.2d 1190, 1193 (Ind.2007). In its place, Indiana’s Comparative Fault Act created a modified comparative fault scheme whereby “ ‘any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages....’ ” *Hopper v. Carey*, 716 N.E.2d 566, 575 (Ind.Ct.App.1999), *trans. denied* (quoting Ind.Code § 34–51–2–5). But “the claimant is barred from recovery if the claimant’s contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant’s damages.” Ind.Code § 34–51–2–6.

[12] However, the legislature specifically provided that the new comparative fault scheme would not apply to governmental entities. *See* Ind.Code § 34–51–2–2. “This exemption for governmental entities from comparative fault means that the common law contributory negligence principles apply when a governmental entity is the defendant in negligence litigation.” *Penn Harris Madison Sch. Corp. v. Howard*, 861 N.E.2d 1190, 1193 (Ind.2007). And “Indiana law requires that contributory negligence on the part of the plaintiff bars any recovery against government actors.”

Clay City Consol. Sch. Corp. v. Timberman, 918 N.E.2d 292, 300 n. 6 (Ind.2009).

Since the School District is a governmental entity, if C.J. were found to be contributorily negligent, he would be barred from recovery. *Roddel v. Town of Flora*, 580 N.E.2d 255, 259 (Ind.Ct.App.1991). The general rule on the issue of the plaintiff's contributory negligence is that the plaintiff must exercise that degree of care to protect his or her own safety that an ordinary reasonable person would exercise in like or similar circumstances. *Sawlani v. Mills*, 830 N.E.2d 932, 941 (Ind.Ct.App.2005), *trans. denied*. Contributory negligence is conduct on the part of the plaintiff that contributes as a legal cause to the harm he has suffered and falls below the standard to which he is required to conform for his own protection. *Piatek v. Beale*, 994 N.E.2d 1140, 1147–48 (Ind.Ct.App.2013) *aff'd on reh'g, trans. denied*.

[13] [14] Contributory negligence is generally a question of fact for the jury where the facts are subject to more than one reasonable inference. *Jones v. Gleim*, 468 N.E.2d 205, 207 (Ind.1984). However, where the facts are undisputed and only a single inference can reasonably be drawn therefrom, the question of contributory negligence becomes one of law. *Id.* Indiana courts have found contributory negligence as a matter of law in cases in which the voluntary conduct of the plaintiff exposed him to imminent and obvious dangers *248 which a reasonable man exercising due care for his own safety would have avoided. *Id.*

The School District claims that C.J. “had actual knowledge of the specific risk of an imminent attack from [Phelps] that could result in serious injury or even death.” Appellant’s Br. at 41. The School District emphasizes that:

[Phelps] had previously threatened [C.J.] with a chain outside school grounds. A student of [C.J.’s] age could appreciate the risk of serious injury that could result from [Phelps’s] use of such a weapon. Further, as discussed in the preceding subsection, [C.J.] himself has admitted that he had actual knowledge and appreciation of the specific risk that [Phelps] presented with the threats to “kick his ass” and that he “was about to get [expletive] up.”

Nevertheless [C.J.] chose to stay in the vestibule and wait for [Phelps] to come back, despite being told by his mother to leave and go to the office.

Id.

For the trial court to have ruled that contributory negligence was present as a matter of law, “the evidence would have had to overwhelmingly establish, and without grounds upon which reasonable men may disagree,” that C.J. was able to realize and appreciate the danger with which he was confronted. *Dibortolo v. Metro. Sch. Dist. of Washington Twp.*, 440 N.E.2d 506, 512 (Ind.Ct.App.1982). The School District has laboriously argued that Phelps’s shooting of C.J. was unforeseeable to the School District, yet it claims that C.J. should have foreseen that he would be vulnerable to a shooting when he decided to remain in the vestibule in which Phelps confronted C.J. This is precisely the type of genuine issue of material fact that should be resolved by a jury.

Moreover, in a society where bullying is a pervasive and confusing problem, especially among young, school-aged children, we question whether the issue of contributory negligence can be properly resolved as a matter of law, especially when, as here, a victim is not the initial aggressor in an altercation, but merely fails to meekly walk away from an attacker who is violently disposed, and especially where the victim appears to have been unaware that the attacker was armed. Because the issue of contributory negligence is generally not appropriate for summary judgment and because, in the present case, the facts are subject to more than one reasonable inference, we conclude that the trial court did not err in finding that the issue of C.J.'s contributory negligence is most appropriately a matter for the jury. *See Randolph Co. Hospital*, 650 N.E.2d at 1217; *Maldonado by Maldonado v. Gill*, 502 N.E.2d 1371, 1373 (Ind.Ct.App.1987); *see also Stowers v. Clinton Cent. Sch. Corp.*, 855 N.E.2d 739 (Ind.Ct.App.2006) (holding that material issues of fact exist as to whether a high school student football player was contributorily negligent, as a matter of law, and whether the student had actual knowledge of the specific risk and incurred the risk, thus precluding grant of summary judgment to school on wrongful death claim brought by parents of the student, who collapsed due to heat related problems after summer football practice and later died).

IV. Conclusion

For all of these reasons, we conclude that the trial court's denial of the School District's motion for summary judgment was proper. The School District has not met its burden of showing that it is entitled to discretionary function immunity under the ITCA, since C.J. and B.K. challenge the implementation rather than formulation of the safety plan, and since the safety plan was not the result of the type *249 of policy decision-making protected by the statute. Furthermore, there exist genuine issues of material fact as to whether the School District breached its duty to protect C.J. and B.K. and whether C.J. was contributorily negligent in a manner which proximately caused his injuries.

Affirmed.

129 So.3d 1121
District Court of Appeal of Florida,
Third District.

K.P. v. STATE of Florida

No. 3D12–1925. | Dec. 26, 2013.

Opinion

LOGUE, J.

1 Based upon an anonymous tip to a gun bounty program that K.P. was carrying a firearm, the assistant principal of his high school took possession of his book bag, removed him from a classroom full of students, and escorted him to the principal’s conference room. A search of the book bag revealed a loaded, semi-automatic handgun. K.P. appeals the denial of his motion to suppress the evidence of the firearm, arguing that the search of his book bag violated his Fourth Amendment right to be free from unreasonable searches.

Admittedly, an anonymous tip like the one at issue may not constitute a sufficiently reliable indicator that a crime was occurring to justify a search of K.P. by police officers on a public street. However, the level of reliability required to justify a search is lower when the tip concerns possession by a student of a firearm in a public school classroom. The Fourth and Fourteenth Amendments require that searches be reasonable in light of all the circumstances. Here, the lower level of reliability reflected in such an anonymous tip is more than offset because (1) a student’s expectation of privacy in the school setting is reduced, and (2) the government’s interest (protecting the vulnerable population of children assembled within the confines of the school from a firearm) is heightened. We therefore reject K.P.’s arguments and uphold the decision of the court below.

FACTS AND PROCEDURAL BACKGROUND

On October 12, 2011, the Miami–Dade County Police Department Gun Bounty Program received an anonymous tip that K.P., a student at Miami Northwestern Senior High School, was possibly in possession of a firearm. After being informed of this tip, a school resource officer, employed by the Miami–Dade County Schools Police Department and assigned to the high school, confirmed that K.P. attended the school after searching for his name in an electronic public school database system. The officer then notified the assistant principal and school security guards of the tip.

The assistant principal and two school security guards went to K.P.'s classroom, took possession of K.P.'s book bag, and escorted K.P. to the principal's conference room. Upon entering the room, the assistant principal handed over the book bag to the school resource officer. The officer opened the book bag and discovered a loaded, semi-automatic handgun.

K.P. was subsequently charged as a juvenile with carrying a concealed weapon, possession of a firearm on school grounds, and possession of a firearm by a minor. He moved to exclude the handgun from evidence, arguing that the search of his book bag violated his Fourth Amendment right to be free from unreasonable searches and seizures. The trial court denied the motion. Following a bench trial, *1125 the trial court withheld adjudication and imposed fifteen days in secure detention and one year of probation. This appeal followed.

ANALYSIS

A. The Fourth Amendment and Anonymous Tips.

**2 ^[1] The Fourth Amendment to the United States Constitution states, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Because the “central inquiry under the Fourth Amendment” is “reasonableness in all the circumstances,” *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), no single level of reliability applies in every situation. “Neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.” *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). As discussed in this section, a substantial body of law addresses the level of reliability that an anonymous tip must demonstrate in order to justify a search under the Fourth Amendment. In this regard, the level of reliability that an anonymous tip must demonstrate in order to satisfy the Fourth Amendment is lower both when an extraordinary danger is threatened and where legitimate expectations of privacy are reduced.

[2] ^[3] Anonymous tips, which are more susceptible to abuse than a tip by a known informant, may be less reliable than other investigative leads. *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). The government’s interest in conducting a search based upon an anonymous tip, therefore, is usually measured by examining the tip’s “indicia of reliability.” *Id.* Generally, a search based upon an anonymous tip withstands scrutiny under the Fourth Amendment only if the tip contains sufficient details and information that can be independently corroborated by the police to establish a level of reliability regarding the information in the tip.

Id. at 270–71, 120 S.Ct. 1375. In the words of a noted jurist and scholar in this area, the anonymous tip must show “that the tipster has some inside knowledge about the suspect, and that the tipster’s accusation of illegal activity is entitled to some credence.” Phillip A. Hubbart, *Making Sense of Fourth Amendment Law: A Fourth Amendment Handbook* 197 (2005).

In the case of *Alabama v. White*, 496 U.S. 325, 332, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), for example, the Court held that an anonymous tip was sufficient to justify an investigative stop that led to a consensual search of a vehicle which uncovered marijuana. The Court focused on the extensive, predictive details regarding the suspect’s appearance, automobile, time of departure, and route included in the tip that allowed the police to test the informant’s knowledge and credibility. *Id.* at 331–32, 110 S.Ct. 2412. When the police were able to verify this information, the Court explained, they had “reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.” *Id.* at 332, 110 S.Ct. 2412.

[4] In contrast, the Court later held an anonymous tip did not provide sufficient corroborating detail to justify an investigative stop and frisk on a public street when the tip consisted entirely of a statement that an African–American youth standing at a certain bus stop wearing a plaid shirt was carrying a gun. *J.L.*, 529 U.S. at 271–72, 120 S.Ct. 1375. The Court held that the tip must be reliable, not only to identify *1126 the suspect, but also to indicate the crime was being committed: “[t]he reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” *Id.* at 272, 120 S.Ct. 1375. A tip that does no more than accurately describe a suspect’s readily observable location and appearance on a public street is insufficient to pass Fourth Amendment muster because it fails to “show that the tipster has knowledge of concealed criminal activity.” *Id.*

****3** When weighing the legitimacy of the government’s interest to conduct a search based upon the anonymous tip in *J.L.*, the Court focused largely on the reliability of the information used by the officer to decide to initiate the stop and frisk. *Id.* at 271, 120 S.Ct. 1375. For this reason, the Court in *J.L.* expressly declined to make “an automatic firearm exception to our established reliability analysis,” whereby a stop and frisk would always be justified by any anonymous tip indicating a person was carrying a firearm. *Id.* at 272, 120 S.Ct. 1375. “Firearms are dangerous ... [but] the Fourth Amendment is not so easily satisfied.” *Id.* at 273, 120 S.Ct. 1375.

Nevertheless, it would be wrong to read *J.L.* as establishing an irreducible minimum of reliability that applies to all anonymous tips in all circumstances, and regardless of the extent of the threat that the tip revealed. Although the Court in *J.L.* set forth a required level of reliability needed for an anonymous tip to justify a stop and frisk

on a public street, the Court was careful to note the Fourth Amendment did not establish a minimum level of reliability required in all circumstances.

In fact, the Court expressly recognized that there may be circumstances justifying “protective searches on the basis of information insufficient to justify searches elsewhere.” *Id.* at 274, 120 S.Ct. 1375. For example, “extraordinary dangers sometimes justify unusual precautions.” *Id.* at 272, 120 S.Ct. 1375. In other words, the Court recognized that a search may be justified under the Fourth Amendment based upon an anonymous tip reflecting a lesser level of reliability than the tip in *J.L.* if the tip concerned a greater danger than possession of a firearm on a public street. The Court noted:

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.

Id. at 273–74, 120 S.Ct. 1375.

[5] [6] Under this line of authority, federal and state courts have routinely upheld searches targeting specific individuals based upon anonymous tips containing less indicia of reliability than that involved in *J.L.* when the government interest was more immediate, substantial, and grave than the interest involved in *J.L.*¹ Indeed, *1127 where the danger is sufficiently substantial, and other factors are met, a search may satisfy the Fourth Amendment even when there is no individualized suspicion.²

1 *See, e.g., United States v. Holloway*, 290 F.3d 1331, 1339 (11th Cir.2002), *cert. denied*, 537 U.S. 1161, 123 S.Ct. 966, 154 L.Ed.2d 897 (2003) (upholding the fruits of an investigative detention and search of individuals on a front porch based upon anonymous tip that shots had been fired: “when an emergency is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the caller”); *People v. Wells*, 38 Cal.4th 1078, 45 Cal.Rptr.3d 8, 136 P.3d 810, 815 (2006), *cert. denied*, 550 U.S. 937, 127 S.Ct. 2246, 167 L.Ed.2d 1096 (2007) (holding that an uncorroborated, anonymous report of a possibly intoxicated driver “weaving all over the roadway” justified an investigatory detention).

2 Under the rubric of “special needs” searches, where the discretion of government officials is strictly circumscribed and the government’s interest in the search is particularly heightened, a search may qualify as reasonable under the Fourth Amendment without any individualized suspicion. *See, e.g., Cassidy v. Chertoff*, 471 F.3d 67, 83 (2d Cir.2006) (upholding the search of vehicles and luggage on commuter ferries because of the high risk that they might be targets of terrorist attacks); *U.S. v. Edwards*, 498 F.2d 496, 500 (2d Cir.1974) (holding that the search of carry-on luggage at airports meets the test of reasonableness because of the “enormous dangers to life and property from terrorists, ordinary criminals, or the demented”).

In addition, the Court in *J.L.* explained that the level of reliability that it established for the anonymous tip in *J.L.* was not necessarily intended to apply in schools:

Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and schools, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.

****4** *Id.* at 274, 120 S.Ct. 1375 (internal citations omitted); *see also J.L. v. State*, 727 So.2d 204, 209 n. 5 (Fla.1998) (Harding, J., concurring), *aff'd*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (noting that the result of *J.L.* “might have been different had the frisk been conducted by a school official on school grounds”).

In recognizing that schools are one of the “quarters where the reasonable expectation of Fourth Amendment privacy is diminished” such that “public safety officials” may well “conduct protective searches on the basis of information insufficient to justify searches elsewhere,” the Court merely acknowledged well-established precedent, which we discuss in the next section.

B. The Fourth Amendment in Schools.

^[7] ^[8] Any analysis of a search in a school must begin with the principle that the school setting “requires some modification of the level of suspicion of illicit activity needed to justify a search.” *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). In the leading case of *T.L.O.*, the United States Supreme Court held that searches by school officials in public schools “should depend simply on the reasonableness, under all of the circumstances, of the search.” *Id.* at 341, 105 S.Ct. 733. Thus, the search of a student on school grounds is not governed by probable cause, but is instead governed by the less demanding standard of reasonable suspicion. *Id.*; *State v. D.S.*, 685 So.2d 41, 43 (Fla. 3d DCA 1996). This is also the standard that applies to a stop and frisk on a street. *Terry*, 392 U.S. at 30, 88 S.Ct. 1868.

In *T.L.O.*, an assistant principal of a high school searched a student’s purse for cigarettes (which were forbidden on school grounds) based upon a teacher’s observation that the student was smoking in a lavatory. 469 U.S. at 328, 105 S.Ct. 733. The assistant principal found marijuana, and the student ultimately confessed to selling the drug at school. *Id.* at 328–29, 105 S.Ct. 733. The student subsequently moved to suppress the contraband and confession. *Id.* at 329, 105 S.Ct. 733.

^[9] The Court concluded that the search of the student’s purse “was in no *1128 sense unreasonable for Fourth Amendment purposes.” *Id.* at 343, 105 S.Ct. 733. In doing

so, the Court held that a child did not waive his or her “rights to privacy in such items merely by bringing them onto school grounds.” *Id.* at 339, 105 S.Ct. 733. An invasion of privacy results from a “search of a child’s person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult.” *Id.* at 337–38, 105 S.Ct. 733.

The Court, however, also held that the child’s legitimate expectation of privacy must be weighed against the interest of the school to maintain order and, pertinent to the instant case, to protect children from violence in schools:

Against the child’s interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but *in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.*

****5** *Id.* at 339, 105 S.Ct. 733 (emphasis added).

In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), the Court returned to application of the Fourth Amendment to searches in schools when it held that a public school could require students playing interscholastic sports to undergo random drug tests without any individualized suspicion of wrongdoing. “As the text of the Fourth Amendment indicates,” the Court reasoned, “the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’ ” *Id.* at 652, 115 S.Ct. 2386. And “whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” *Id.* at 652–53, 115 S.Ct. 2386 (internal quotation omitted).

^[10] ^[11] When balancing these considerations, the Court emphasized that students in school generally have a “decreased expectation of privacy.” *Id.* at 664, 115 S.Ct. 2386. “Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere.” *Id.* at 656, 115 S.Ct. 2386. The relationship of the school to the student is “custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.” *Id.* at 655, 115 S.Ct. 2386. Therefore, “while children assuredly do not shed their constitutional rights ... at the schoolhouse gate, the nature of those rights is what is appropriate for children at school.” *Id.* at 655–56, 115 S.Ct. 2386 (internal citation and quotation omitted).

In weighing the “severity of the need” for a search, moreover, the Court also made clear that the nature of the government interest is not “a fixed, minimum quantum

of governmental concern, so that one can dispose of a case by answering the question in isolation: is there a compelling state interest?” *Id.* at 661, 115 S.Ct. 2386. Instead, the Court held, “the phrase describes an interest that appears *important enough* to justify the particular search at hand.” *Id.* Nor was the government’s legitimate interest contingent upon a pre-determined, minimum level of suspicion: “[t]he school search we approved in *T.L.O.*, while not based on probable cause, was based on individualized suspicion of wrongdoing. As we explicitly acknowledged, however, the Fourth Amendment imposes no irreducible requirement of such suspicion.” *Id.* at 653, 115 S.Ct. 2386 (internal quotation omitted).

Balancing “the decreased expectation of privacy, the relative unobtrusiveness of the *1129 search, and the severity of the need,” the Court concluded that requiring students playing interscholastic sports to undergo random drug tests was reasonable even without individualized suspicion of wrongdoing. *Id.* at 664–65, 115 S.Ct. 2386. “[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the findings of need made by the District Court, we conclude that in the present case it is.” *Id.* at 665, 115 S.Ct. 2386.³

³ In an important sense, the school searches at issue in *T.L.O.* and *Acton* are at almost opposite ends of the spectrum of permissible searches. Whereas the *T.L.O.* search was based on individualized suspicion, the *Acton* search involved no individualized suspicion. We do not mean to suggest any false equivalency between these searches. To the contrary, the searches are different in regards to their nature, potential for abuse, and safeguards required to pass Fourth Amendment muster. Consistent across both cases, however, is the Fourth Amendment analysis used by the Court which involved balancing the expectation of privacy at issue, the intrusiveness of the search, and the government’s interest.

****6** The dangers involved in *T.L.O.* and *Acton* were cigarette or drug use. The threat of a student carrying a firearm on school grounds obviously presents a more immediate and grave threat to the lives of students.

C. The Threat of Gun Violence in Schools.

The need to protect children in schools from violence rests not only on common sense—on “what every parent knows”—but has been expressly recognized by the highest court in the land.

As noted above, the majority opinion in *T.L.O.* is based upon the recognition of the need for school officials to address “violence in the schools.” In concurring, Justice Powell, joined by Justice O’Connor, placed even greater reliance than the majority on the importance of protecting teachers and students from the rising levels of crime in schools:

[A]part from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect

teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.

T.L.O., 469 U.S. at 350, 105 S.Ct. 733 (Powell, J., concurring).

Justice Blackmun's concurrence in *T.L.O.* also emphasized the need for a lower Fourth Amendment standard in schools to protect students and teachers from violence:

[G]overnment has a heightened obligation to safeguard students whom it compels to attend school. The special need for an immediate response to behavior that threatens either the safety of school children and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests.

Id. at 353, 105 S.Ct. 733 (Blackmun, J., concurring).

Justice Stevens dissented in *T.L.O.*, in part because the decision authorized a search of a purse for cigarettes, and therefore reduced Fourth Amendment protections for "even the most trivial school regulation or precatory guideline for student behavior." *Id.* at 377, 105 S.Ct. 733 (Stevens, J., dissenting). Justice Stevens contrasted such "trivial" problems, which he believed did not justify a lower Fourth Amendment standard, with violence in the schools, which he believed would:

***1130** Violent, unlawful, or seriously disruptive conduct is fundamentally inconsistent with the principal function of teaching institutions which is to educate young people and prepare them for citizenship. When such conduct occurs amidst a sizable group of impressionable young people, it creates an explosive atmosphere that requires a prompt and effective response.

Id. at 376, 105 S.Ct. 733.

[12] The Supreme Court's recognition in *T.L.O.* of the government's interest in addressing "violent crime in the schools" may appear almost prescient. "Judges cannot ignore what everybody else knows: violence and the threat of violence are present in the public schools.... The incidences of violence in our schools have reached alarming proportions." *State v. J.A.*, 679 So.2d 316, 320 (Fla. 3d DCA 1996) (internal citation and quotation omitted) (approving random classroom searches of high school students with hand-held metal detector wands). Since *T.L.O.*

was written, our Country has experienced an outbreak of catastrophic mass shootings of children in schools.⁴ In light of this grim development, no reasonable person would contest that the government’s interest in protecting students from gun violence is entitled to substantial weight when deciding whether a particular search at a school is reasonable under all of the circumstances.

- 4 The worst such incident occurred at the Virginia Polytechnic Institute and State University at Blacksburg, Virginia, on April 16, 2007, when a student shot and killed thirty-two students and wounded seventeen others. But focusing only on middle and high schools, other incidents include, but are not limited to, the following:
- 1) On October 21, 2013, at Sparks Middle School in Sparks, Nevada, a student at the school shot and wounded two twelve-year-old students, and then shot and killed a teacher and himself.
 - 2) On December 14, 2012, at Sandy Hook Elementary School in Newtown, Connecticut, an adult shooter invaded the campus and killed twenty children and six adult staff members.
 - 3) On February 27, 2012, at Chardon High School in Chardon, Ohio, a student opened fire, killing one student and wounding four others.
 - 4) On January 5, 2011, at Millard South High School in Omaha, Nebraska, a student shot and killed the vice-principal, wounded the principal, and killed himself.
 - 5) On February 5, 2010, at Discovery Middle School in Madison, Alabama, a student shot and killed another student in the hallway.
 - 6) On October 2, 2006, at the West Nickel Mines School in Nickel Mines, Pennsylvania, a shooter invaded a schoolhouse, released the male students, shot and killed five female students, and injured five others.
 - 7) On March 21, 2005, at Red Lake High School on the Red Lake Indian Reservation in Minnesota, a student fatally shot five students, a teacher, and a guard, and wounded seven others before committing suicide.
 - 8) On March 5, 2001, at Santana High school in Santee, California, a student shot and killed two fellow students and wounded thirteen others.
 - 9) On April 20, 1999, at Columbine High School in Columbine, Colorado, two students opened fire, killing twelve students, one teacher, and wounding twenty-four others.
 - 10) On March 24, 1998, at Westside Middle School in Jonesboro, Arkansas, two middle school students opened fire, killing four students, a teacher, and wounding ten others.
 - 11) On January 17, 1989 in Stockton, California, an ex-student attacked a crowded school playground, killing five children and wounding twenty-nine others.
- See Timeline: Deadliest U.S. Mass Shootings*, LOS ANGELES TIMES (Jun. 7, 2013), <http://timelines.latimes.com/deadliest-shooting-rampages/>.

D. The Search of K.P.’s Book Bag Was Reasonable.

****7** ^[13] Was the anonymous tip that a named student in a certain school possibly possessed a gun enough to justify the ***1131** search of K.P.’s book bag? Applying the law discussed above, we hold that it was.

1. Expectation of Privacy.

^[14] First, while K.P. had a reasonable expectation of privacy in the contents of his book bag on school property, *T.L.O.*, 469 U.S. at 339, 105 S.Ct. 733, K.P.’s expectation of privacy was tempered by the special characteristics of the school setting. Schools are one of the “quarters where the reasonable expectation of Fourth Amendment privacy is diminished” such that “public safety officials” may well “conduct protective searches on the basis of information insufficient to justify searches elsewhere.” *J.L.*, 529 U.S. at 274, 120 S.Ct. 1375; *see also Bd. of Educ. v. Earls*, 536 U.S. 822, 830, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (“A student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health and safety.”); *T.L.O.* 469 U.S. at 348, 105 S.Ct. 733 (Powell, J., concurring) (noting “the special characteristics of

elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a non-school setting”).

2. Intrusiveness of Search.

Second, the search was only moderately intrusive. The search of a book bag carried onto school grounds is certainly invasive. Some book bags will contain children’s personal diaries, letters, photographs, items of personal hygiene, or other effects of a private nature whose public disclosure could offend a student’s reasonable expectations of privacy. Here, however, the search of K.P.’s bag was conducted in the privacy of the principal’s conference room. Only school officials, no students, were present.

[15] More importantly, the search was presumably limited in good faith to actions necessary to uncover a metal object like a pistol. Such a search would not include an intentional hunt for other contraband, although if discovered, such items need not be ignored. For example, such a search would not entail reading written materials, scrutinizing photographs, activating cellphones, or inspecting small pockets, crevices, wallets, containers, or purses too small to harbor a gun. Understood in this manner, the search of K.P.’s book bag appears no more intrusive than the search that occurs when a traveler brings a suitcase into the passenger compartment of an airliner, an attorney carries her brief case into a courtroom, a commuter totes a shopping bag on the New York City subway, or a citizen carts a box of petitions to his Senator at the State Capital.

In the Fourth Amendment context of special needs searches, examination of personal effects similar to the search of K.P.’s book bag have passed constitutional muster for airports, courthouses, government buildings, and public transportation, with some of the highest courts in the land characterizing such searches as “minimally intrusive.” *See, e.g., United States v. Aukai*, 497 F.3d 955, 962 (9th Cir.2007) (en banc) (holding the escalating intrusiveness of airport screen search from metal detector, to pat down, to emptying and searching pockets was “minimally intrusive”); *MacWade v. Kelly*, 460 F.3d 260, 273 (2d Cir.2006) (holding that a random visual and manual search of bags and packages carried onto the New York City subway was “minimally intrusive.”); *United States v. Hartwell*, 436 F.3d 174, 180 (3d Cir.2006) (holding that a search of bags carried onto an airplane was “minimally intrusive”). Although the searches in these cases were not based on individual suspicion, the holdings shed light on the issue of the intrusiveness of the search here. And, *1132 while we may not agree that the intrusiveness of such searches qualifies as minimal, we do find that the search of K.P.’s book bag could be proportionate to the legitimate purpose of detecting a

firearm.

****8** In this regard, we note that alternative searches would not be as accurate or safe. Not every school has the budget to buy metal detectors; and detectors can be set off by many innocent metal objects often contained in a book bag like keys, cellphones, pens, coins, and pencil boxes. Frisking the outside of the bag to feel for a firearm would not discover a pistol located between bulky textbooks. Groping the bag could trigger an accidental discharge. Interrogating the suspected student to seek further information solely to justify the search may go nowhere if the child remains resistant and impassive. Summoning parents may prove useless if the parents are unavailable or uncooperative.

[16] On balance, therefore, the intrusiveness of the search at issue was not disproportionate. This analysis is not altered because the search was conducted by a school resource officer assigned full time to work at the school because such an officer is more akin to a school official than an officer on the street and the purpose of the search was to protect students, not to establish guilt. *M.D. v. State*, 65 So.3d 563, 566–67 (Fla. 1st DCA 2011).

3. Government’s Interest in Conducting the Search.

[17] [18] Finally, when judging the reasonableness of the search, courts must consider “the severity of the need” and determine whether the government’s legitimate interest “appears *important enough* to justify the particular search at hand.” *Acton*, 515 U.S. at 661, 115 S.Ct. 2386. As the Supreme Court has recognized time and again, the government’s interest in protecting juveniles assembled in the classroom under the aegis of governmental authority is “substantial.” *T.L.O.* 469 U.S. at 339, 105 S.Ct. 733. The danger of a juvenile with a gun in a classroom is different in degree and kind even from the danger of a juvenile with a gun on a street. We have little difficulty holding that firearms at schools represent a heightened danger.

[19] [20] Of course, the vice-principal who supervised the search of K.P.’s book bag did not know for certain at the outset that it contained a gun. The only information he had was the anonymous tip. Here is the nub of the Fourth Amendment problem. Fourth Amendment jurisprudence teaches us to take an objective look at the information used by the government official to initiate a search: the decision to conduct the search must be “justified at its inception.” *Terry*, 392 U.S. at 20, 88 S.Ct. 1868. In making this determination, however, we must be mindful that the level of reliability required to justify a search is less where the danger is sufficiently heightened and the expectation of privacy is reduced. Both factors occurred here. Thus, a tip in these circumstances—a gun in a classroom—justifies “searches on the basis of information insufficient to justify searches elsewhere.” *J.L.*, 529 U.S. at 274, 120 S.Ct. 1375.

In this regard, while the school official did not know for certain that the book bag contained a gun, he was not operating on a mere “hunch.” The anonymous tip at issue contained indicia of reliability. It accurately identified a student by name, K.P., and the specific school he attended. This aspect of the tip limited the discretion of school officials concerning who could be searched.

****9** This aspect of the tip also demonstrated that the caller knew K.P., and was possibly a student attending the same high school, ***1133** thereby “narrowing the likely class of informants” and suggesting that the caller had inside knowledge of K.P.’s activities. *See id.* at 275, 120 S.Ct. 1375 (Kennedy, J., concurring) (“It seems appropriate to observe that a tip might be anonymous in some sense yet have certain other features, either supporting reliability or *narrowing the likely class of informants*, so that the tip does provide the lawful basis for some police action.”) (emphasis added). Next, school officials acted on the tip before it could become stale. Finally, the fact that the tipster contacted a gun bounty program, which offered monetary rewards to members of the community who report the whereabouts of illegal firearms, suggests that the caller had an incentive to offer an accurate report.

Given the reduced expectation of privacy, the relatively-moderate intrusiveness of search, the gravity of the threat, and the consequent reduced level of reliability necessary to justify a protective search, the decision to search K.P.’s book bag was reasonable. Admittedly, the tip at issue in this case may not be sufficient to have justified a stop and frisk of K.P. for weapons on a public street (much less an outright search of his book bag) because it may not contain sufficient indicia of reliability reflecting that K.P. was actually carrying a firearm. But the circumstances supported reasonable suspicion of wrongdoing in the context of preventing the threat of gun violence in a classroom.

CONCLUSION

[²¹] “[W]hen the government acts as guardian and tutor [of students in school] the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.” *Acton*, 515 U.S. at 666, 115 S.Ct. 2386. An anonymous tip that a named student has a gun in school is not something that school administrators may lightly ignore. It is not a matter that warrants no response. Nor is it a matter that must await further developments before school officials address the threat. Considering the totality of the circumstances, the conclusion appears inescapable that a reasonable guardian and tutor of a group of school children might well conduct a search of the student’s book bag to address such a substantial threat to the children assembled at school.

Affirmed.

ⁱ *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

ⁱⁱ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*. 406 US 205 (1972).

ⁱⁱⁱ See the Restatement of the Law, Second, Torts, which provides for tort liability against persons who injure the persons or property of others in a variety of contexts for which money damages is the primary remedy. See also Restatement of the Law Third, Torts: Products Liability and the Restatement of Torts, Third, Liability for Physical and Emotional Harm.

^{iv} Grayson, Kentucky (1993), Lynnville, Tennessee (1995), Blackville, South Carolina (1995), Redlands, California (1995), Moses Lake, Washington (1996), Bethel, Alaska (1997), Pearl, Mississippi (1997), West Paducah, Kentucky (1997), Jonesboro, Arkansas (1998), Edinboro, Pennsylvania (1998), Fayetteville, Tennessee (1998), Springfield, Oregon (1998), Richmond, Virginia (1998), Deming, New Mexico (1999), and Littleton, Colorado (1999). See Robert C. Cloud, Federal, State, and Local Responses to Public School Violence, 120 Ed. Law Rep. 877 (1997). See also, Landra Ewing, When Going to School Becomes an Act of Courage: Students Need Protection from Violence, 36 Brandeis J. Fam. L. 627 (1997-98).

^v The data show that prior to the spate of shootings in the 1990s, big city school accounted for most of the deadly incidents. September 15, 1959 - Edgar Allen Poe Elementary - Houston, Texas. March 18, 1975 - Sumner High School - St. Louis, Missouri. February 22, 1978 - Everett High School - Lansing, Michigan. May 18, 1978 - Murchison Junior High School - Austin, Texas. January 29, 1979 - Grover Cleveland Elementary - San Diego, California. March 19, 1982 - Valley High School - Las Vegas, Nevada. January 20, 1983 - Parkway South Junior High - St. Louis, Missouri. February 24, 1984 - 49th Street School - Los Angeles, California. January 17, 1989 - Cleveland Elementary School - Stockton, California. November 25, 1991 - Thomas Jefferson High School - Brooklyn, New York. February 26, 1992 - Thomas Jefferson High School - Brooklyn, New York. See the CNN "Fast Facts" Library for a comprehensive, 100 year list of deadly rampages on American campuses: http://www.cnn.com/2013/09/19/us/u-s-school-violence-fast-facts/index.html?hpt=hp_t1

^{vi} Read the summary of the survey: http://usnews.nbcnews.com/_news/2013/02/05/16841405-pistol-packing-pupils-becoming-an-everyday-occurrence?lite.

^{vii} Amanullah, Heneghan, Steele, Mello, Linakis, *Emergency Department Visits Resulting From Intentional Injury In and Out of School*; Pediatrics Vol. 133 No. 2 (February 1, 2014).

^{viii} In the year of this publication, the number of children homeschooled in the U.S. is nearly four percent of all students enrolled in any school. The total number of students enrolled K-12: 55,000,000. The number of students homeschooled is 2,090,000 children or 3.8% of total enrollment. The state with the largest population of homeschooled children is California (3% of 7 Million students or 200,000). For resources, see U.S. Department of Education, National Center for Education Statistics, *Parent and Family Involvement Survey of the 2007 National Household Education Surveys Program*. See also, U.S. Department of Education, National Center for Education Statistics (NCES Number 2006042); *Homeschooling in the United States: 2003*; (February 2, 2006).

^{ix} U.S. Department of Education, National Center for Education Statistics (NCES Number 2006042); *Parent and Family Involvement in Education, from the National Household Education Surveys Program of 2012: First Look*; (August 2013).

^x See, U.S. Department of Education, National Center for Education Statistics (NCES Number 2014083); *The Condition of Education: Private School Enrollment*; (May 28, 2014). According to the Report the percentage of all students in private schools decreased from 12 percent in 1995–96 to 10 percent in 2011–12. Private school enrollment in prekindergarten through grade 12 increased from 5.9 million in 1995–96 to 6.3 million in 2001–02, then decreased to 5.3 million in 2011–12. Similar to overall private school enrollment, private school enrollment in prekindergarten through grade 8 increased from 4.8 million in 1995–96 to 5.0 million in 2001–02, then decreased to 4.0 million in 2011–12. However, private school enrollment in grades 9 through 12 increased from 1.2 million in 1995–96 to 1.3 million in 2011–12.

^{xi} See, *Remarks by the President at Sandy Hook Interfaith Prayer Vigil*;
<http://www.whitehouse.gov/photos-and-video/video/2012/12/16/president-obama-speaks-newtown-high-school#transcript>.

^{xii} NATIONAL CENTER FOR EDUCATION STATISTICS & BUREAU OF JUSTICE STATISTICS,
Indicators of School Crime and Safety: 2011 (2011).

<http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2012002> [hereinafter Indicators].

^{xiii} U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE
AND DELINQUENCY PREVENTION, *Juvenile Offenders and Victims: National Report Series,
Juvenile Arrests 2009* (Dec. 2011), <http://www.ojjdp.gov/pubs/236477.pdf> [hereinafter *Juvenile Offenders
and Victims*].

^{xiv} Laurence J. Peter, *Peter's Quotations* 81 (1977) (quoting Herbert Hoover, 31st U.S. President:
"Children are our most valuable resource."