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Special Update

Subject: Statutory changes regarding use of force by school resource officers.

Principal Issues: Use of force by school resource officers and other officers who are agents of a school district; Minnesota Statutes, sections 121A.58, 121A.582, and 609.06, subdivision 1(1); reliance on attorney general opinions.

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Executive summary:

As a result of recent changes to Minnesota law, and subsequent interpretations of these changes by the Minnesota Attorney General:

- School resource officers (SROs) and officers contracted to work in a school district (contracted officers) may use reasonably necessary force toward students under the circumstances enumerated in Minnesota Statutes section 609.06, subdivision 1(1).

- Outside the circumstances enumerated in section 609.06, subdivision 1(1), SROs and contracted officers may only use force, including prone and compressive restraint, when necessary to restrain a student to prevent death or bodily harm to the student or another.

Background:

Minnesota Statutes chapter 121A governs student rights, responsibilities, and behavior. In 2023, lawmakers included two provisions in the education bill amending this chapter to limit the use of force toward students by SROs and contracted officers.

This is the third Special Update on this topic since August, as our basis for understanding the effects of the amendments on police practice has kept changing. The Minnesota Attorney General (AG) is empowered by law to issue binding guidance on legal issues relating to public schools.[1] The AG has exercised this power twice now regarding the amendments to Chapter 121A, once on August 22[2] and again on September 20, 2023.[3] The AG's opinions rendered the earlier Special Updates on this topic obsolete and they have been withdrawn.

This Special Update is based on the 2023 legislation governing the use of force by SROs and contracted officers toward students and the AG's statutorily authorized September 20 interpretation of that legislation.

2023 statutory amendments:

The 2023 amendments were addressed to sections 121A.58 and 121A.582. As amended, section 121A.58 prohibits SROs and contracted officers from using prone or compressive restraint toward students.[4] Prone restraint consists of "placing a child in a face-down position."[5] Compressive restraint is "any form of physical holding that restricts or impairs a pupil's ability to breathe; restricts or impairs a pupil's ability to communicate distress; places pressure or weight on a pupil's head, throat, neck, chest, lungs, sternum, diaphragm, back, or abdomen; or results in straddling a pupil's torso."[6]

Section 121A.582, subdivision 1(b), governs the use of force toward students by school employees

[1] Minn. Stat. § 8.07 (2022).
[2] Recent Amendments to Student Discipline Laws, Op. Att'y Gen. 169f (August 22, 2022), *available at* https://www.ag.state.mn.us/Office/Opinions/169f-20230822.pdf (hereinafter, "August AG Opinion").
[3] Recent Amendments to Student Discipline Laws, Op. Att'y Gen. 169f (August 22, 2023) supplemented (September 20, 2023), *available at* https://www.ag.state.mn.us/Office/Opinions/169f-20230920.pdf (hereinafter "September AG Opinion").
[4] Laws 2023 Ch. 55, Art. 2, sec. 36.
[5] *Id*.
[6] *Id*.

and agents of a school district. Before the recent amendments, this law permitted the use of reasonable force to "restrain a student *or* to prevent bodily harm or death to another."[7] Notably, the word "or" has been stricken from the operative language. Thus, following the amendments, subdivision 1(b) permits agents of a school district to use reasonable force only "when it is necessary under the circumstances to restrain a student *to* prevent bodily harm or death to the student or to another."[8]

The Attorney General opinions:

Briefly summarized, the August AG Opinion concluded that the amendments to Chapter 121A did not impose an outright ban on the use of prone and compressive restraint by SROs and contracted officers toward students.[9] Instead, the opinion held that section 121A.582 permits the use of these techniques when necessary to prevent bodily harm or death to the student or another.[10] Though answering this question, the August opinion offered no guidance on whether SROs could lawfully use force in situations that do *not* involve a threat of death or bodily harm, such as to arrest a student for trespassing or criminal damage to property.[11]

The September AG Opinion addressed these latter issues. It states in relevant part:

> The Amendment [to Chapter 121A] does not limit the types of reasonable force that may be used by school staff and agents to prevent bodily harm or death. It also does not limit the types of reasonable force that may be used by public officers to carry out their lawful duties, as described in Minnesota Statutes section 609.06, subdivision 1(1).
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> [B]ecause chapter 609 is referenced in section 121A.58, subdivision 3, as well as in section 121A.582, subdivisions 3 and 4, the restrictions on prone and compressive restraints do not apply under the circumstances enumerated in section 609.06, subdivision 1(1). Therefore, all peace officers, including those who are "school resource officers" or otherwise agents of a school district, may use force as reasonably necessary to carry out official duties, including, but not limited to, making arrests and enforcing orders of the court. See Minn. Stat. § 609.06.[12]

Authority to use force under section 609.06:

The September AG Opinion supplemented the earlier one by determining that the authority of SROs and contracted officers to use force is, like that of peace officers generally, governed by section 609.06, subdivision 1(1).[13] This law states:

> Except as otherwise provided in subdivisions 2 and 3, reasonable force may be used upon or toward the person of another without the other's consent when the following circumstances exist or the actor reasonably believes them to exist:
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> (1) when used by a public officer or one assisting a public officer under the public officer's direction:
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> (i) in effecting a lawful arrest; or
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> (ii) in the execution of legal process; or
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> (iii) in enforcing an order of the court; or
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> (iv) in executing any other duty imposed upon the public officer by law….[14]

Arrests and other duties imposed by law:

It should not be difficult for SROs and contracted officers to recognize when they are involved in effecting a lawful arrest, executing legal process,

[7] 2023 Minn. Laws Chap. 55, Art. 12, sec. 4 (emphasis added).
[8] *Id*.
[9] *See generally* August AG Opinion, *supra* note 2.
[10] *Id*.
[11] *See id*.
[12] September AG Opinion, *supra* note 3, at 2-3.
[13] *Id*.
[14] Minn. Stat. § 609.06, subd. 1(1) (2022).

or enforcing an order of the court. But knowing when one is "executing any other duty imposed… by law" is an important focus under this new legal framework.

It is crucial for SROs and contracted officers to consider that they may be called on in a school environment to perform "duties" that fall outside those covered by section 609.06, subdivision 1(1). In those circumstances, the statute provides no authority to use force, so sections 121.58 and 121A.582 are controlling. Section 121A.582 permits SROs and contracted officers to use force only as necessary to prevent death or bodily harm.[15] The net practical effect is that SROs and contracted officers may use reasonable force toward students to carry out a duty that exists by virtue of law, but may not use force to enforce a school rule or policy. The case law provides a helpful framework for determining when an officer is performing a duty imposed by law.

In *State v. Ivy*, the court considered whether a St. Paul police officer was performing a duty imposed by law when the defendant, Ivy, assaulted him.[16] The officer was working off-duty at Regions Hospital. Ivy had sneaked into the locked emergency room, yelled profanities and racial epithets, and became verbally aggressive toward staff. Ivy assaulted the officer as he was escorting her out of the building. Ivy argued that the officer was not performing a legal duty but was instead only enforcing a hospital policy as a private security guard.[17]

The court took a two-step approach to determining whether the officer was carrying out a duty imposed by law. It first considered, at a general level, whether off-duty officers working at Regions performed any duties that the law imposed on regular, on-duty officers. The court observed that peace officers are responsible by law for the "prevention and detection of crime and the enforcement of the general criminal laws of the state…."[18] Their duties also include "exercises of professional judgment that are legitimately calculated to protect the health, safety, and general welfare of the public."[19] The evidence in the case showed that hospital peace officers at Regions were tasked with handling "police matters" that arose at the hospital, and thus they had some of the same duties that the law imposed on regular, on-duty officers.[20]

Next, the court turned to the question of whether the officer was *actually performing* a duty imposed by law when Ivy assaulted him. The court found that he was. Ivy's behavior had amounted to disorderly conduct, and "By escorting [her] out of the emergency room, the officer was protecting the health and safety of the hospital's patients and preventing [a] breach of the peace."[21]

The Minnesota Court of Appeals has issued some unpublished decisions that, while not precedential, nevertheless illustrate how courts approach the question of whether an officer is carrying out a duty imposed by law:

- In *State v. Boudreau*, a state trooper was assaulted while making a traffic stop.[22] The court held that the trooper's duties under the law included enforcement of the traffic code.[23]

- In *State v. Steenerson*, an officer assigned to work at a block party told the defendant he could not bring an outside beverage into a beer tent.[24] The defendant got rid of the beverage, became "highly agitated," and tried to reenter the tent. When the officer held up a hand to stop him, the defendant pushed the officer to the ground.

  Although the encounter started with the officer enforcing a private policy against outside beverages, the defendant's agitated behavior gave rise to a reasonable concern that he posed a "threat to breach the peace." Therefore, the officer was carrying out a duty imposed by law

[15] 2023 Minn. Laws Ch. 55, Art. 12, sec. 4.
[16] 873 N.W.2d 362, 366 (Minn. Ct. App. 2015).
[17] *Id*. at 367-68.
[18] *Id*. at 368; Minn. Stat. 626.84, subd. 1.
[19] *Ivy,* 873 N.W.2d at 368 (quoting *In re Claim for Benefits by Sloan*, 729 N.W.2d 626, 629-30 (Minn. Ct. App. 2007)).
[20] *Id*.
[21] *Id.* at 368-69.
[22] No. CX-89-1684, 1990 WL 61279, at *2 (Minn. Ct. App. May 15, 1990).
[23] *Id*. at 3.
[24] No. C0-99-1405, , 2000 WL 943564, at *1 (Minn. Ct. App. July 11, 2000).

when he tried to stop the defendant from reentering the beer tent.[25]

- In *State v. Carter*, uniformed officers were providing off-duty security at an event when a vehicle jumped the curb and veered toward several pedestrians.[26] An officer ran toward the car, drew his gun, and ordered the driver to stop. The driver reversed course and drove toward the officer, who had to jump out of the way to avoid being struck.[27] The officer was responding to a "deadly force situation" when the driver came at him, and was therefore carrying out a duty imposed by law.[28]

These cases illustrate that officers have a duty (or authority) under the law to respond to instances of disorderly conduct, to prevent assaults and breaches of the peace, and to take other actions they reasonably deem necessary to protect public safety. Statutory law imposes additional duties on peace officers that could potentially be relevant to SROs. These include, for example, taking children into custody who have run away from home or are found in dangerous conditions,[29] and effecting transport holds on persons in crisis.[30] Because all these duties are imposed by law, section 609.06, subd. 1(1)(iv) permits officers to use force as reasonably necessary to accomplish them.

There are limits, however, on what constitutes a duty imposed by law, as illustrated by *Reetz v. City of St. Paul*, a 2021 decision of the Minnesota Supreme Court.[31] The officer in *Reetz* worked off-duty at a St. Paul homeless shelter.[32] His responsibilities there included searching clients' bags to keep weapons and alcohol from entering the facility.[33] One client stabbed another. The victim sued the officer for failing to detect the knife used in the assault.[34] The officer asked the city to defend and indemnify him against the lawsuit, claiming that it arose from his performance of peace officer duties.[35] The court disagreed. The claim against the officer was that he negligently carried out the shelter's policy against weapons and alcohol. His job searching clients' bags did not involve the actual exercise of law enforcement powers.[36] The court observed that the officer would have had "no authority *as a police officer* to confiscate the knife from the client."[37]

In the case of SROs, schools may have rules against speaking disrespectfully to teachers or other students, or engaging in verbal harassment. But unless the behavior that violates these rules also amounts to disorderly conduct or threatens a breach of the peace, then SROs and contracted officers would have no authority to use force in enforcing them. Similarly, a teacher might tell a student who is wearing a T-shirt with vile language to leave their classroom and go to the office. If the student refuses, the SRO would have no authority to use force in dealing with the situation, unless and until the matter escalates into something criminal or threatening. As in *Reetz*, where an officer is acting only to enforce a school policy or rule, then the officer is not engaged in a duty imposed by law. Accordingly, the officer would not be permitted to use force to carry out that duty.

Reliance on AG opinions:

The September AG Opinion provides guidance that can be relied upon, pending further developments in the courts. Minnesota Statutes, section 8.07, provides that opinions of the AG on school matters are "decisive until the question involved shall be decided otherwise by a court of competent jurisdiction."[38] The Minnesota Supreme Court has held that such opinions are "binding" until reversed by the courts.[39] Indeed, the September AG September Opinion declares that it may be relied upon.[40] In addition, attorney general opinions are entitled to "careful

[25] *Id*. at *2.
[26] No. C6-00-1514, 2001 WL 1117568, at *1 (Minn. Ct. App. Sept. 25, 2001)
[27] *Id*.
[28] *Id*. at *4-5.
[29] Minn. Stat. § 260C.175, subd. 1 (2022).
[30] Minn. Stat. 253B.051 (2022).
[31] 956 N.W.2d 238 (Minn. 2021).
[32] *Id*. at 241.
[33] *Id*.
[34] *Id*.
[35] *Id*. at 241-42 (citing Minn. Stat. § 466.07).
[36] *Id*. at 246.
[37] *Id*. at 248 (emphasis in original).
[38] Minn. Stat. § 8.07.
[39] *Eelkema v. Bd. of Educ. of City of Duluth*, 11 N.W.2d 76, 78 (1943).
[40] September AG Opinion, *supra* note 3, at 1.

consideration" by the courts.[41] Thus, while it is possible a court would reach a different conclusion than the AG Opinion, it is reasonable to rely upon the opinion until someone challenges it in court *and* obtains a decision that reverses it. [42]

Finally, answering whether the AG opinions regarding SROs afford protection to officers against criminal charges is beyond PATROL's function as a training partner. An examination of this issue would need to consider many factors. One of them would be whether officers who act in reliance on these opinions could still have "clear notice," sufficient to satisfy due process concerns, that their conduct was prohibited by law.[43] Agencies may wish to make appropriate inquiries to their city and county attorneys to determine if they will seek to challenge the September AG Opinion in court.

Application scenarios:

1. Officer Josh is an SRO. A student is causing a disturbance in the lunchroom by screaming and throwing food trays on the floor. Staff and students are backing away from the area. The student's behavior would constitute a breach of the peace and disorderly conduct. Officer Josh may attempt de-escalation, if safe and appropriate. He also has the option of arresting and escorting the student away from the area and may use force as reasonably necessary to do so.

2. SRO Fran works at the high school. The principal complains that a student, Charlotte, got in a conflict with a teacher and is presently in a hallway kicking locker doors and bending them. Charlotte is committing criminal damage to property. Hopefully, SRO Fran will be able to de-escalate Charlotte and persuade her to stop the destructive behavior. If not, SRO Fran may use reasonably necessary force to make an arrest or otherwise intervene in the situation.

3. Deputy Jamie is providing security at a football game under a contract with the school district. A 911 caller reports that a person with a gun is threatening others in the parking lot of the school where the game is occurring. Deputy Jamie responds and conducts a high-risk stop of the person who was reported to have a gun, ordering the person to lie face-down on the ground. The limitations on prone restraint in Chapter 121A have no bearing on this situation. This is because Deputy Jamie is responding to a reported life-threatening emergency and threat to public safety, not a violation of a school rule. Therefore, Deputy Jamie is authorized to use reasonable force under section 609.06, subdivision 1(1).

4. Student Quinn returned to the school building after being expelled for disciplinary reasons. The principal orders Quinn to leave and not return until the expulsion is over. Quinn refuses to depart. The principal calls SRO Madison and, with Madison present, repeats the order to leave. Quinn still refuses to depart. SRO Madison may place Quinn under arrest for trespassing. Under section 609.06, subdivision 1(1), SRO Madison may use reasonably necessary force to complete the arrest and overcome any resistance.

5. Student Dorfman hurls a series of swear words and biting insults at Assistant Principal Johnson. Dorfman is neither loud nor threatening. Dorfman's conduct is not disorderly in a criminal sense, and it does not indicate that violence is about to unfold. Dorman's behavior, however, violates two or three different rules in the student handbook.

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[41] *Village of Blaine v. Indep. Sch. Dist. No. 12, Anoka Cnty.*, 138 N.W.2d 32, 39 (1965); *Minnesota Daily v. Univ. of Minnesota*, 432 N.W.2d 189, 194 (Minn. Ct. App. 1988).

[42] *See Cnty. of Hennepin v. Cnty. of Houston*, 39 N.W.2d 858, 861, 229 Minn. 418, 424 (1949) (court ruled contrary to attorney general's opinion issued in the same case).

[43] *State v. Welke*, 216 N.W.2d 641, 648 (Minn. 1974) (a criminal statute must give the defendant clear notice of what is prohibited); *see also Bouie v. City of Columbia,* 378 U.S. 347, 352-53 (1964) (defendants do not have fair warning of what is prohibited when the courts expand the reach of a criminal statute); *State v. Miller*, No. A13-2094, 2014 WL 7343794, at *5 (Minn. Ct. App. Dec. 29, 2014) (unpublished) (defendant could not "be punished for conduct that was not effectively defined as criminal.")

An SRO confronting this situation could certainly try to speak with or de-escalate Dorfman, but would have no authority to use force.

6. Two students got in a fistfight in a classroom. Very minor injuries ensued. The fight is over when SRO Nancy arrives. School procedures dictate that the two students should be sent to the principal's office. SRO Nancy can *ask* them to go to the office but cannot use force to make them go. Engaging in brawling or fighting is a misdemeanor under the disorderly conduct statute, section 609.72. But the fight was over by the time Nancy arrived. The "completed misdemeanor" rule applies so Nancy cannot make a custodial arrest for the offense. The requirement to go to the office is a school rule, not a legal one, so SRO Nancy may not use force to achieve compliance with it.