6. INTERVIEWS AND INTERROGATIONS

All citizens, including students, have specific rights that are guaranteed by the Fifth and Sixth Amendments, including the Fifth Amendment right against self-incrimination. The exact nature and application of these Fifth and Sixth Amendment rights depends to a large extent on who is asking the questions. Just as school officials are given more leeway than police in conducting searches (recall that the standard governing school officials is less stringent that the one that applies to searches conducted by police), so too, the legal standards governing interviews conducted by school officials are significantly different from the rules and procedures that law enforcement officers must follow when they conduct a custodial interrogation.

6.1. Interrogations Conducted by Law Enforcement Officials.

More than thirty years ago, the United States Supreme Court in the landmark case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 684 (1966), held that police officers must first provide a precise set of warnings (the so-called "Miranda rights") to any person who is subject to "custodial interrogation," which is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 86 S.Ct. at 612. "Questioning" moreover, is defined as any words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response from the person in custody. See Rhode Island v. Innis, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), cert. denied, 456 U.S. 930, 120 S.Ct. 1980, 72 L.Ed.2d 447(1980).

In State in the Interest of R.W., 115 N.J. Super. 286 (App. Div. 1971), aff'd 61 N.J. 118 (1972), the court held that the Miranda rule should not be mechanically applied when dealing with juveniles. The court in that case concluded that the test, ultimately, is whether the juvenile was "treated with the utmost fairness and with every consideration that his age and all surrounding circumstances indicate should be accorded him." Id. at 295. Thus, if a child is not old enough to understand and waive his or her Miranda rights, "questioning may go forward even without the Miranda warning, provided it is conducted with the utmost fairness, without force or other improper influence, mental or physical, and in accordance with the highest standards of due process and fundamental fairness." Id. at 296.

As a general proposition, juveniles are afforded *greater protection* during the course of police questioning than adults precisely because children are inherently more susceptible to psychological pressure exerted by adults, and especially authority figures,

such as police officers. Accordingly, the requirements of Miranda v. Arizona should be fully observed during the custodial interrogation of juveniles by law enforcement officers. See In the Interest of B.T., 145 N.J. Super. 268 (App. Div. 1976) certif. denied 73 N.J. 49 (1977); State in the Interest J.P.B., 143 N.J. Super. 96 (App. Div. 1976).

A juvenile should be informed of his or her Miranda rights immediately after being taken into custody and before any police officer attempts to ask a question that is designed or reasonably likely to elicit an incriminating response. (It is not a violation of Miranda to ask the juvenile to give his or her name or address, or to ask how the juvenile's parents or legal guardians can be reached, since the answers to these kinds of pedigree questions are not "testimonial" in nature and do not pose a risk of self-incrimination. Compare Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).) Police officers should assume that a student is "in custody" for purposes of Miranda if the questioning occurs in the office of a school official, even if the officer has not formally arrested or taken the juvenile into custody, since courts are likely to conclude that a student in these circumstances is not free to leave.

A police officer must also make all reasonable efforts to ensure that a juvenile understands the Miranda rights. Because children are impressionable, police must take extra precautions to make certain that any statements made by a juvenile in response to police questioning are voluntary. In construing the validity and voluntariness of a waiver of constitutional rights by a juvenile, reviewing courts will consider the juvenile's age, level of education, mental capacity, background, and prior experience that the juvenile has had with the juvenile justice or criminal justice systems.

Importantly, New Jersey courts have ruled that because children are more easily subjected to psychological coercion (and, presumably, psychological "ploys") than adults, police should ordinarily not question a juvenile (or engage in any actions that are designed or reasonably likely to elicit an incriminating response from the juvenile) without a parent or legal guardian present, especially in any inherently coercive environment such as a police station. By their comforting presence, parents are deemed to be able to allay the fear or pressure placed on a juvenile who is being questioned by police in an unfamiliar or inherently intimidating setting. See State in the Interests of J.P.B., supra.

Under New Jersey law, the questioning of a juvenile by police may proceed in the absence of a parent or legal guardian only if the child refuses to divulge their names and addresses, if they cannot be located after a good faith effort has been made to do so, or if the parents or legal guardians refuse to attend. Law enforcement officers should never refuse to contact a parent or guardian, or refuse to admit them to the interrogation. See

State In the Interest of Carlo, 48 N.J. 224, 240-241 (1966); State In the Interest of J.F., 286 N.J. Super. 89, 98 (App. Div. 1995).

However, the presence of a parent or a guardian is not absolutely required, and statements given by juveniles have been admitted into evidence notwithstanding that the questioning was conducted without a parent or legal guardian being present. In determining whether an interrogation is permissible in the absence of a parent or guardian, courts will consider the efforts by police to locate a parent, the parent's willingness to be present, or the presence of someone else close to the juvenile in lieu of a parent. See State In the Interests of A.B.M., 125 N.J. Super. 162 (App. Div. 1973) aff'd 63 N.J. 531 (1973); State In the Interest of S.H., 61 N.J. 108, 114-115 (1972) (whenever possible and especially in the case of young children, no child should be interviewed by police except in the presence of his or her parents or guardians); State in the Interest of J.F., supra, 286 N.J. Super. at 98. Ordinarily, however, a school official — especially one who has a responsibility to maintain order and discipline in the school — should not be relied upon in lieu of a parent, notwithstanding that school officials are often said to stand in loco parentis. Although a school official may earnestly be trying to protect the legal interests of the student, the fact remains that the official has a competing if not conflicting interest in protecting the school environmental by having the student admit to the offense, especially if the offense occurred on school property.

In the event that it is not possible to secure the presence of a parent or guardian at the time of questioning, law enforcement authorities should keep a careful record of the attempts that were made to locate a parent or guardian, and police should document the responses of the parents or guardians once located. Police should also make a careful record if the juvenile refuses to reveal the names, addresses, or location(s) of a parent or guardian. Even where a juvenile refuses to divulge such information, however, reasonable efforts should be made to locate a parent or guardian by, for example, attempting to secure the necessary information from appropriate school authorities.

Once the presence of a parent or guardian has been secured, the Miranda warnings should be repeated. The juvenile must clearly waive his or her rights before questioning begins. Both the juvenile and parent or guardian present should be asked to sign the written Waiver of Miranda Rights form, and the parent or guardian should remain present throughout the course of the interview.

6.2. Interviews Conducted by School Officials.

In State v. Biancamano, 284 N.J. Super. 654 (App. Div. 1995) certif. denied, 143 N.J. 516 (1996), the court concluded that:

> We have no doubt ... that the T.L.O. standards concerning Fourth Amendment searches are equally applicable to defendant's Fifth Amendment claim. A school official must have leeway to question students regarding activities that constitute either a violation of the law or a violation of school rules. This latitude is necessary to maintain discipline, to determine whether a student should be excluded from the school, and to decide whether further protection is needed for the student being questioned or for others.
> [284 N.J. Super. at 662.]

The Appellate Division thus refused to extend the Miranda rule to interviews conducted by school officials, notwithstanding that the student being questioned may not be free to leave and that the questions posed were designed or reasonably likely to elicit an incriminating response. The court easily distinguished other cases that held that the Miranda rule sometimes applies to interviews conducted by individuals who are not normally thought of as being part of the law enforcement community. Compare State v. Helewa, 223 N.J. Super. 40 (App. Div. 1988), a case where the Appellate Division determined that Miranda warnings should have been provided during the course of an investigation conducted by a Division of Youth and Family Services' (DYFS) caseworker. See also State v. P.Z., 152 N.J. 86 (1997) (Court distinguished State v. Helewa, a case in which the DYFS caseworker interviewed a defendant who had been arrested and was incarcerated during the interview in a county correctional facility. The interview in the P.Z. case, in contrast, was *non*custodial).

The court in State v. Biancamano found no reason, however, to extend the Helewa decision to apply to questioning of students by a school administrator. The court noted that:

> School officials are neither trained nor equipped to conduct police investigations. However, as a matter of necessity, they must regularly conduct inquiries concerning both violations of school rules and violations of law. While the police may eventually be summoned, the need to question students to determine the existence of weapons, drugs, or

> potential violence in the school requires that latitude be given to school officials.
> [284 N.J. Super. at 663.]

The New Jersey court in Biancamano relied heavily on the decision by the Supreme Judicial Court of Massachusetts in Commonwealth v. Snyder, 413 Mass. 521, 597 N.E.2d (1992). According to the Biancamano court, the Massachusetts Supreme Judicial Court "minced no words" when it stated:

> There is no authority requiring a school administrator not acting on behalf of law enforcement officials to furnish Miranda warnings. Even if we were to assume that, during the questioning in the principal's office the environment was coercive because Snyder was in custody (or because his freedom was significantly restricted) and that, therefore, Miranda warnings would have been required if the questioning would have been by the police ... [the principal and assistant principal] were not law enforcement officials or agents of such officials. The Miranda rule does not apply to a private citizen or school administrator who is acting neither as a instrument of the police nor as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile... . The fact that the school administrators had every intention of turning the marihuana over to the police does not make them agents or instrumentalities of the police in questioning Snyder.
> [597 N.E.2d at 1369.]

The court in Biancamano thus agreed with the Massachusetts court and flatly rejected the defendant's claim that he was entitled to receive Miranda warnings before being questioned by the vice-principal. Needless to say, the result would be different if, in fact, a school official were acting as an agent of law enforcement. The problem is similar to the one arising under the Fourth Amendment with respect to the so-called "silver platter" doctrine discussed in Chapter 4.5D4(a).

The Appellate Division in Biancamano noted that this issue was simply not before it, since there was no allegation that the vice-principal had questioned defendant at the behest of the police. The mere fact that school administrators intend or are even duty-bound by law and regulation to turn over drugs, weapons, or information to police does not transform them into police agents who would be required to administer Miranda warnings before questioning a student.

A recent New Jersey Supreme Court decision strongly supports the proposition that the existence of a statute or regulation that requires civilian authorities to turn over information to law enforcement does not mean that the lawfulness of a search or interview conducted by those civilian authorities must be judged according to the stricter standards and rules governing police-initiated searches or interrogations. See State v. P.Z., 152 N.J. 86 (1997). The P.Z. case involved an interview conducted by a Division of Youth & Family Services' (DYFS) worker. The Court noted that in child abuse cases, DYFS, the civil authority, must provide information about suspected abuse and neglect to the county prosecutor, the criminal authority. See N.J.S.A. 9:6-8.30a. See also N.J.A.C. 10:129-1.1a, which requires that DYFS officials "refer to county prosecutors all cases that involve suspected criminal activity on the part of a child's parent, caretaker, or any other person." (Note that this statutory and regulatory requirement for DYFS officials to turn over information to appropriate law enforcement authorities is roughly analogous to the regulatory duty that school officials have pursuant to N.J.A.C. 6:29-10.5 to report to law enforcement authorities information concerning firearms and controlled dangerous substances.) The New Jersey Supreme Court in P.Z. rejected the defendant's argument that where "parallel" civil and criminal systems are both operating, the defendant must receive Miranda warnings before being interviewed in a noncustodial setting by the DYFS employee. While the Court was "sensitive to the potential for manipulation," it did not find any such manipulation in the exchange of information between DYFS and the county prosecutor in that case.

If, however, police were to request or even suggest that school officials pose certain questions, then the result would almost certainly be different. In State in the Interest of J.P.B., 143 N.J. Super. 96 (App. Div. 1976), the court made clear that the obligation to administer Miranda warnings extends to *anyone* who is acting in an official capacity as an agent of the police. In that case, a supervisor at a state-maintained custodial institution informed a probation officer and a state trooper of incriminatory information learned from a juvenile resident. At the trooper's request, the supervisor posed further questions to the juvenile. In these circumstances, the supervisor was deemed to be acting as a police agent and was thus required to provide Miranda warnings before posing these additional questions.

It bears repeating that the New Jersey Supreme Court in State v. P.Z., supra, cautioned that courts must be "sensitive to the potential for the state's deliberately manipulating" a noncriminal procedure in order to obtain evidence against a criminal defendant. The Court in P.Z. cited to the Law Division opinion in State v. Flower, 224 N.J. Super. 208 (Law Div. 1987), aff'd, 224 N.J. Super. 90 (App. Div. 1988). In that case, the trial court had found that the only purpose motivating a DYFS investigator when she interrogated the defendant was to assist in the defendant's prosecution. The

New Jersey Supreme Court in P.Z. observed that the court in Flower had "properly held that Miranda warnings were required." 152 N.J. at 116, n. 7.

The New Jersey Supreme Court in P.Z. ultimately held that the DYFS employee was not required to provide Miranda warnings during a noncustodial interview because: "[t]here was no indication that the DYFS caseworker interviewed the defendant with the purpose of aiding in his criminal prosecution or, as Justice Pollock suggests in his dissent, that the caseworker had a 'hidden agenda' to obtain an 'incriminating statement' from P.Z." 152 N.J. at 120. The record of that case, according to the majority, contained no reference to regular interaction between the civil and criminal authorities, let alone "manipulation" of DYFS by the county prosecutor so as to obtain information specifically to help the criminal authorities. Id.

The New Jersey Supreme Court in P.Z. nonetheless issued a strong warning: "If there was evidence that a DYFS worker met with defendant simply as a subterfuge to achieve law enforcement purposes, we might well reach a different result." 152 N.J. at 20.

Justices Pollock and Coleman, working with the same factual record, reached a decidedly different conclusion, finding ultimately that the DYFS caseworker had been acting for *both* DYFS and the county prosecutor. According to Justice Pollock, even if she was acting primarily to protect the best interests of the injured child, it remains that she was also acting on behalf of the county prosecutor. "In sum," Justice Pollock concluded, the DYFS caseworker was a "dual agent." The "proof of the pudding," according to Justice Pollock, was that the county prosecutor had expressly *authorized* the DYFS caseworker to take a statement. 152 N.J. at 128-129 (Pollock, J., dissenting) (emphasis added).

In light of the majority decision in P.Z., and especially in view of the concerns raised by the dissent, although county prosecutors are authorized by Attorney General Directive 1988-1 to provide legal advice to school officials with regard to the legality of a search (see Chapter 14.5), prosecutors should never "authorize" much less request or direct school officials to undertake an interview in circumstances where the interviewed student is likely to make an incriminating statement. Nor should the prosecutor or police "suggest" specific questions to be asked by school officials.

Furthermore, Attorney General Directive 1988-1 provides in no uncertain terms that:

> No law enforcement officer shall direct, solicit, encourage, attend, or otherwise participate in the questioning of any juvenile by school officials unless such questioning could be lawfully conducted by the law enforcement officer acting on his or her own authority in accordance with the rules and procedures governing law enforcement interrogations and interviews.
> [Attorney General Directive 1988-1, Part V (k)(1).]

In light of this Attorney General Directive, the mere presence by a police officer during questioning of a juvenile would seem to trigger the requirement to provide Miranda warnings and to seek the attendance of the juvenile's parent or legal guardian, notwithstanding that the interrogation took place in a principal's office and notwithstanding that the questions were actually being posed to the student by a school official.

Finally, it would appear that, unlike police officers, school officials acting independently may routinely question students about suspected school rule infractions or even criminal law violations without first having to reach out to parents or legal guardians, provided that police officers do not attend or otherwise participate in the questioning.

6.3. Interview Principles That Apply to Both School and Law Enforcement Officials: The Requirement of Voluntariness.

It is well-settled that a person invoking the privilege against self-incrimination may do so "in *any* ... proceeding, civil or criminal, formal *or informal*, where the answers might tend to incriminate him in future criminal proceedings." Minnesota v. Murphy, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141, 79 L.Ed.2d 409, 418 (1984) (emphasis added). However, as a general proposition, this privilege is not self-executing under either federal or state law. Rather, it is the duty and responsibility of the person claiming the privilege to invoke it. Murphy, supra, 465 U.S. at 428-429, 104 S.Ct. at 1142-1143, 79 L.Ed.2d at 419-420. Accord, State v. Reed, 133 N.J. 237, 251 (1993). Thus, when the privilege against self-incrimination is not asserted and the person being questioned chooses to answer, the choice to respond is considered voluntary.

As is well-known, an exception to this general rule was created by the United States Supreme Court more than thirty years ago in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Court in Miranda determined that a

custodial interrogation by law enforcement officers is inherently coercive, thus automatically triggering the Fifth Amendment privilege against self-incrimination. As the New Jersey Supreme Court recently noted, "Miranda warnings" are now household words in the United States. "Today, even schoolchildren know that when a person in police custody is questioned by law enforcement, he must be told that he has the right to remain silent, that any statement he makes may be used against him, he has the right to an attorney, and that if he cannot afford an attorney, one will be provided for him." State v. P.Z., 152 N.J. 86, 102 .

The New Jersey Supreme Court in P.Z. cautioned that custodial interrogations by law enforcement officers are not the only special circumstances in which the Fifth Amendment privilege against self-incrimination is "self-executing." Id. at 106. The United States Supreme Court and New Jersey courts have consistently held that the government may not force an individual to choose between his or her Fifth Amendment privilege and another important interest, because such choices are deemed to be inherently coercive. These cases are based on the principle that the Fifth Amendment is violated "when a state compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered." Id. at 106-107 (citations omitted).

Long before Miranda v. Arizona was decided, the United States Supreme Court held that certain interrogation techniques are so offensive to a civilized system of justice that they must be condemned under the due process clause. See Miller v. Fenton, 474 U.S. 109, 106 S.Ct. 445, 449, 88 L.Ed.2d 405, 410 (1985). The Miranda decision, according to the New Jersey Supreme Court, established a per se rule to counteract the inherently coercive nature of custodial interrogations by law enforcement; it did *not* eliminate the due process requirement that all statements given during an interrogation must be voluntary. State v. P.Z., 152 N.J. at 112-113.

To determine whether a statement is made voluntarily, the courts will consider whether the statement was "the product of an essentially free and unconstrained choice by its maker," or whether instead the person's "will has been overborne and his capacity for self-determination critically impaired." See Schneckloth v. Bustamonte, 412 U.S. 218, 225-226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854, 862 (1973); State v. Galloway, 133 N.J. 631, 654 (1993). This issue, in turn, can be resolved only after an assessment of the "totality of the circumstances" surrounding the statement. Galloway, supra, 133 N.J. at 654 (observing also that, in New Jersey, the state must prove voluntariness beyond a reasonable doubt) .

Reviewing courts will look at the characteristics of the person being questioned as well as the details of the interrogation itself. Schneckloth v. Bustamonte, supra, 412

U.S. at 226, 935 S.Ct. at 2047, L.Ed.2d at 862. Relevant factors include the age, education, and intelligence of the person being questioned; whether and in what manner the person was advised of his or her constitutional rights; the length of detention; whether the questioning was repeated and prolonged in nature; and whether physical punishment or mental exhaustion was involved. See State v. Miller, 76 N.J. 392, 402 (1978).

In light of these cases, it bears noting that even though school officials, acting independently and on their own authority, are not required to administer Miranda warnings or to postpone questioning until a parent or legal guardian is present, the admissibility of a juvenile's statement will depend on whether the statement was voluntary. If school officials use coercive, intimidating, or overbearing tactics, it is likely that any resulting statements will be deemed to be inadmissible, and if such statements provide the factual basis for conducting a search (whether by school officials or by police), the ensuing search may be deemed to be the "fruit" of the improper interrogation, and physical evidence found as a result of the search may thus be subject to the exclusionary rule.