

**Proceed With Caution:
The Five Most Common Liability
Issues that Schools Face and How
to Avoid Being a Casualty of Litigation**

Great Start Workshop

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I. Claims That Can More Commonly Result in Liability.

- A. Personal Injury Negligence Claims: Involve allegations that a school district acted negligently in failing to protect staff and students against foreseeable injury. When the plaintiff is a student these lawsuits are frequently cast as a failure to supervise claim.
- B. Employment Discrimination Claims: Involve allegations that a school district engaged in some adverse employment action on prohibited grounds. State and/or federal law prohibit discrimination on the basis of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age.
- C. Harassment/Bullying Claims: These claims are essentially a subset of broader discrimination actions. They are based upon a school district's obligation to provide a non-hostile work or learning environment - at least with respect to prohibited forms of harassment.
- D. Special Education Disputes: Parents of special education students can assert claims that their children have been denied a free appropriate educational program. Parents that prevail in these claims are not entitled to money damages. However, denial of FAPE claims can be utilized to support subsequent disability discrimination claims and can result in liability for the parent's attorney fees if the parent prevails.
- E. Data Practices Claims: School districts that release private data pertaining to employees or students without appropriate grounds under the Minnesota Government Data Practices Act can face punitive consequences and may be liable for resulting injuries from the prohibited release of information.
- F. Constitutional Claims: Public schools are state actors that are subject to Constitutional provisions protecting the rights of individuals. (i.e. 1st Amendment Issues and Due Process Claims). As a result, when a student or teacher brings suit against a school district it is common that Constitutional or civil rights claims are pursued in the litigation.
- G. Other Claims: Public education is a highly regulated sector. As a result, there are a number of laws that give rise to potential lawsuits and liability. Furthermore, like any other municipal corporation school districts face many "routine" liability issues in the operation of their business. (i.e. contract disputes, real-estate matters, etc.).

Question # 1: In your experience as a school official what type of claims do you believe to be the most common? (Chose from A to G above)

II. Personal Injury Negligence Claims.

A. Applicable Legal Standards.

Negligence Standard: The elements of a negligence claim are duty, breach of that duty, proximate cause, and damage. *See, Hud v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982). School districts by law have a duty to exercise ordinary care to prevent foreseeable misconduct of other students. While school districts may not be liable for sudden, unanticipated misconduct, they are nevertheless liable for sudden conduct that was foreseeable and that "probably could have been prevented by the exercise of ordinary care." *Raleigh v. Independent Sch. Dist. No. 625*, 275 N.W.2d 572, 576 (Minn. 1978).

Question #2: Ms. Smith left several 8^h grade students unattended in an area adjacent to a baseball field. Several players on the field, who were not students from the school, began throwing rocks at the unaccompanied students for over 3 minutes while Ms. Smith was in the building. One student who was struck in the eye lost her vision in that eye. Could the District be held liable for the injury to the student?

- A. No, because a school district cannot be held liable for the irresponsible actions of third parties.
- B. Yes, because the school district is required to ensure the safety of its students under all circumstances.
- C. Yes, because it is foreseeable that the unsupervised children could be subjected to this type of behavior and the presence of a teacher could have prevented harm to the student.

Question #3: Prior to the season-opening football game the school's cheerleaders decided to create banners to hang at the homes of the team's players. The teacher/supervisor of the cheerleaders was present when they discussed their plan. The cheerleaders were permitted to use the school gym and some school supplies to make the banners; however, the cheerleaders used their own family vehicles when "bannering" between 30 to 60 homes in one night. On the night of the "bannering" activity, a cheerleader in one of the cars was injured when another cheerleader who was driving the car rolled through a stop sign and was struck by a drunk driver. Could the School District be held liable for the student's injury?

- A. No, because a school district cannot be held liable for the actions of its students off school property and after school hours.
- B. Yes, because the cheerleading squad was a school approved-organization and the District had assumed some level of control or supervision for the squad in the bannering activity.

- C. Yes, because cheerleaders are reckless by nature and the district knew or should have known that they would engage in out of control behavior.**

Official Immunity: Official immunity protects a public official charged by law with duties involving judgment or discretion from personal liability unless the official acts willfully or maliciously. *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988). It "protects public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Id.* at 678 (citations omitted). Official immunity requires the discretion to be exercised on at least an operational level and is something more than the performance of merely "ministerial" duties. *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992). The exercise of some level of discretion or judgment will not necessarily confer immunity.

Statutory Immunity: Minnesota Statute provides that a municipality is exempt from tort liability for "[a]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." "In applying the discretionary function exception ... [Minnesota courts have] drawn a distinction between conduct at a planning level (protected) and conduct at an operational level (unprotected)." See, *S. W. v. Spring Lake Park Dist. 16*, 580 N.W.2d 19, 22 (Minn. 1998). The underlying purpose of statutory immunity is to prevent the judicial branch of government from, "through the medium of tort actions, second-guess[ing] certain policy-making activities that are legislative or executive in nature." *Id.*

Question #4: The industrial tech staff had developed a protocol that it taught to all students to disengage the blade guard of a circular saw and use a push stick when cutting pieces of wood less than 4 inches wide. Phil, the industrial arts teacher, instructed a student to cut wood for his class using the "push stick" method consistent with the protocol. After observing the student perform several cuts the shop teacher attended to other tasks. Thereafter the student accidentally got his finger caught in the saw when trying to remove wood from the saw table. Could the District be held liable for the student's injury?

- A. Yes, because the shop teacher should have never permitted the student to use the saw without the blade guard and the injury was foreseeable.**
- B. Yes, because shop class is an inherently dangerous activity and injury to students is foreseeable because of the nature of machinery utilized.**
- C. No, the "push stick" policy employed by the district staff was discretionary and therefore the District was entitled to immunity.**

B. Limiting Liability.

- Conduct regular school "walk-troughs" to identify security and safety concerns
- Pay particular attention to areas of known concern (i.e.

playgrounds, shop and physical education), assess risks in these areas and develop *written* procedures to guard against foreseeable risks

- Where practical and possible, consult with area experts (e.g. law enforcement, security agencies, etc.) to identify problem areas and solutions
- Review policies to ensure that extra or more onerous duties are not created
- Document "planning or operational level" decisions and your rationale (e.g. decision to reduce hall monitors and lock additional doors)
- Develop and train all staff on comprehensive *supervision and visitor* procedures or policies.
- Ensure that volunteers are trained and knowledgeable about supervision policies and expectations
- Avoid any formal or tacit approval (and where appropriate discourage) non-sanctioned activities of school sponsored groups
- Establish codes of conduct for all students and student organizations that prevents against foreseeable risks

III. Employment Discrimination.

A. Applicable Legal Standards.

Minnesota Human Rights Act. The MHRA states with respect to employment: "Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of *race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age* to: (a) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (b) discharge an employee; or (c) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment. Minn. Stat. Sec. 363A.08.

Federal Anti-Discrimination Statutes. Title VII of the Civil Rights Act of 1964, states that it is "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The ADA (Americans with Disability Act) and the ADEA (Age Discrimination in Employment Act) have extended similar protections to the disabled and the elderly.

Anatomy of an Illegal Discrimination Claim. All illegal employment discrimination claims are analyzed under a common framework. The employee has the initial burden of establishing a prima facie case of discrimination, which creates a presumption that the employer unlawfully discriminated against the employee. To make a *prima facie* discrimination case, an employee must show that he/she is a member of a protected class, that his/her job performance met the employer's legitimate expectations and that he/she was

subject to an adverse employment action. The burden of production then shifts to the employer to rebut the presumption by producing evidence of a legitimate non-discriminatory reason for its action. If the employer is able to show that a legitimate non-discriminatory reason exists for its action the employee can preserve a claim if they can show that the reported reason was merely pretext for discrimination.

Question # 5: Ellen, a 71-year-old teacher, had been employed as a special education teacher by the District for 3 years. During her routine teacher evaluations, Ellen was rated as "proficient" or "exceeds expectations" in all areas. However, during the second year of her employment a co-worker, Terri, who was responsible for overseeing special education due process compliance, allegedly informed Ellen that she was "too old" and that she "should retire." Terri also informed Ellen around this time that Ellen was making too many due process mistakes. Terri informed the Principal that she talked to Ellen about retiring and that if she didn't retire, an improvement plan should be implemented. Ellen complained to the Principal that Terri was trying "to force her to retire" but the Principal did not believe the allegations because Terri was not her supervisor. A growth plan was put in place and reportedly Ellen met the expectations of the plan in the following school year. Despite her compliance with the "growth" plan, Ellen did receive a complaint from the parent of a special education student because she failed to accommodate the needs the student who required additional time for class work. After Ellen's 3rd year, the Principal recommended that she not be issued a new contract because Ellen continued to make critical mistakes in her special education paperwork and procedures. Ellen's employment was terminated at the end of her 3rd year. Does Ellen have a potential age discrimination claim against the District?

- A. No, because Ellen was a probationary teacher and the District could terminate her for any reason during her probationary period.
- B. No, because the District had a legitimate, non-discriminatory reason for terminating Ellen's employment.
- C. Yes, because even though the District had legitimate, non-discriminatory reasons for terminating Ellen, age may have played a role in and influenced the termination decision.

B. Limiting Liability.

- Clearly outline job descriptions and expectations for all employees
- Be honest and accurate in employee observations and evaluations
- Conduct thorough and effective investigations into workplace complaints
- Be comprehensive and thorough when documenting employment concerns and corrective actions (for letters of deficiency include history, statement of relevant facts, expectations and potential consequences for failure to perform)

- Provide specific and objectively obtainable corrective measures (e.g. corrective action should state more than "will be a team player" or "will be more diligent in completing assigned duties")
- Avoid unnecessary "casual" written communications regarding employee concerns
- Be fair, balanced and consistent in disciplinary actions and other employment decisions
- Ensure that objective "honest brokers" are completing investigations and making decisions with respect to disciplinary actions

IV. Harassment Claims.

A. Applicable Legal Standards.

Hostile Work Place Standard: In order to establish a "hostile environment harassment" claim, a plaintiff needs to show the following: (1) that she/he was a member of a protected group; (2) the occurrence of unwelcome harassment; (3) a causal nexus between the harassment and her membership in the protected group; (4) that the harassment affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. *See Carter v. Chrysler Corp.*, 173 F.3d 693, 700 (8th Cir.1999).

Hostile Educational Environment: In order to make a successful claim for a hostile educational environment based upon a student's protected status it must be found: 1) the student is a member of a protected group (e.g. special education student or a particular race or religion); 2) the harassment was sufficiently severe or pervasive that it altered the condition of the student's education and created an abusive environment; 3) the school/defendant knew about the harassment; and 4) the school/defendant was deliberately indifferent to the harassment.

Minnesota Statute 121 A.03 Subd. 2 that states: "A school board must adopt a written sexual, religious, and racial harassment and sexual, religious, and racial violence policy that conforms with chapter 363A. The policy shall apply to pupils, teachers, administrators, and other school personnel, include reporting procedures, and set forth disciplinary actions that will be taken for violation of the policy. Disciplinary actions must conform with collective bargaining agreements and sections 121A 41 to 121A.56. The policy must be conspicuously posted throughout each school building, given to each district employee and independent contractor at the time of entering into the person's employment contract, and included in each school's student handbook on school policies. Each school must develop a process for discussing the school's sexual, religious, and racial harassment and violence policy with students and school employees."

Question # 6: Mary is an office worker in the administrative offices at the school district. For several years she has received positive performance reviews and some promotions. Eight years into her employment, she joined a revival movement in the Catholic Church. On several occasions after her conversion she complained to co-workers about their swearing, their generally vulgar

behavior and their work ethic. She alleged that around this time she started to be subjected to taunting and rude and offense behavior by coworkers. The plaintiff alleged that her coworkers often times criticized the Catholic Church, her self-righteousness and her ardent religiosity. She alleged that she was referred to by fellow employees as "Mother Teresa" after she complained about their vulgar behavior and she was subjected to a bawdy Christmas carol that was sung to her by a co-worker with less seniority. She also alleged that she was given a Christmas card by her supervisor that had a picture of a pig wearing a rosary next to her birth date. Mary's supervisors were aware of her mistreatment and they failed to stop the continued abusive conduct. The school district admits that Mary was treated rudely by coworkers but it denied that a hostile environment based on her religion existed. Could the District be liable to Mary for a "hostile environment" based on religious discrimination?

- A. No, because the supervisors at the office were not predominantly responsible for the harassment;
- B. Yes, because the school district admitted that Mary's work environment was rude and offensive and it is responsible for ensuring a workplace free from vulgar and offensive behavior;
- C. Yes, but only if Mary can show that the remarks and offensive behavior to which she was subjected were based on her religious beliefs and that they were objectively and subjectively offensive.

Question #7: Parents of special education student informed members of their daughter's IEP team that their daughter is constantly being teased by her school peers. The bullying is reported to occur daily and includes intentionally staying away from the student; pushing the student away; tripping her; refusing to touch things she touched; drawing derogatory pictures of the Student; and a prank phone call to the Student's home. Several staff members have reported that the atmosphere surrounding the Student has been hostile. The Parents are told by the school that these teasing concerns were not an appropriate discussion for the IEP team and that these concerns could be discussed later. A follow up meeting with the Parents never occurs and the Student's IEP does not include aids and services to prevent against bullying. The Parents ultimately remove the child from the school, placed her in a private school program and seek tuition reimbursement in a due process hearing. They also later bring a lawsuit against the District and claim that the District engaged in disability discrimination by failing to stop peers from harassing the Student. Are the Parents and Students entitled to tuition reimbursement? What about damages for disability harassment?

- A. The Parent/Student can only get monetary damages if they are able to show that the Student was physically harmed by one of her peers, that the harm was foreseeable and the school district did not take reasonable measures to prevent the Student' injury.
- B. The Parents cannot claim that the District has denied their child a free appropriate public education (FAPE) based upon an allegation that she was

bullied by her peers.

- C. The Parents may be entitled to tuition reimbursement based upon a denial of FAPE and they may also be able to obtain monetary damages if they can show that the Student's IEP team didn't address a disability related need and that the District was deliberately indifferent to the bullying that the Student experienced because she was disabled.**

B. Limiting Liability.

OCR Guidance Regarding Harassment of Students: With respect to disability harassment or bullying claims the OCR has stated: Regardless of the form of the harassment, once on notice of the problem, pursuant to 34 C.F.R. 106.8(b), a District must provide for the "prompt and equitable" resolution of complaints that allege such harassment has occurred. In practice, a school must take immediate and appropriate steps to stop the harassment and prevent it from happening again. A school may also be obligated to correct the effects of the harassment on the student. The judgment and common sense of teachers and administrators are important elements of any response. However, the school is responsible for taking all reasonable steps to ensure a learning environment free of harassment based on disability. *Gateway(CA) Unified School Dist., 48 IDELR 50 (OCR 2006).*

- Ensure that school harassment policies comply with state requirements
- Train and in-service staff on the law of harassment and the District's policy
- Educate students about bullying and harassment and the school policy against harassment
- Develop procedures for resolving harassment complaints that make it "comfortable" for victims of harassment to come forward
- Respond to all allegations of prohibited harassment by conducting prompt and sufficiently thorough investigations
- Don't require "magic words" to trigger an investigation (if student or teacher says its disability, etc. harassment - investigate)
- Take steps to ensure for the protection of victims and witnesses from retaliation
- Immediately implement appropriate corrective actions that prevent reoccurrence
- Avoid remedies that further victimize the alleged victim
- Conduct follow up inquires to ensure no further harassment/retaliation

V. Data Practice Claims.

A. Applicable Legal Standards.

MGDPA: According to the Minnesota Government Data Practices Act "a responsible authority or government entity which violates any provision of [the MGDPA] is liable to a person or representative of a decedent who suffers any damage as a result of the violation, and the person damaged or a representative in the case of private data on decedents or confidential data on decedents may bring an action against the responsible authority or government entity to cover

any damages sustained, plus costs and reasonable attorney fees. In the case of a willful violation, the government entity shall, in addition, be liable to exemplary damages of not less than \$100, nor more than \$10,000 for each violation."

Question # 8: A school district received several complaints from teachers, students, and parents regarding Mr. Baxter's teaching, his treatment of students, and his ability to control his classroom. The District commenced an investigation and placed Mr. Baxter on a paid leave of absence. The principal informed parents at the school in writing that the teacher was placed on "medical leave" and that the school had received some "alarming" complaints about a teacher. After being contacted and interviewed by the media, the school issued a press release that "[t]he allegations are serious enough and substantiated enough that we took the action of suspending the teacher and testing the students." The principal also stated in the press release that "it's unusual in terms of number of parents calling the Superintendent and myself." Could the District be liable to Mr. Baxter for emotional distress caused by the District's disclosure of information to the community through the Principal's letter or press release?

- A. No, because the District is permitted to release the existence and status of any complaints or charges against an employee and such information is public data.
- B. Yes, because disclosure of any information regarding an employee is private data that should not be released.
- C. Yes, because the use of the terms "alarming," "serious enough and substantiated enough" and they were "unusual in terms of the number of parents calling" when referring to the receipt of complaints went beyond disclosing the existence and status of complaints.

B. Limiting Liability.

Train school staff, volunteers, etc. about data privacy laws and requirements

- Consult with legal counsel when disseminating personnel or student information to third parties
- Review contracts with private entities to ensure that contractors comply with data practice requirements applicable to the school
- Beware of email pitfalls and develop procedures that limit the pitfalls of casual email communication
- Review records retention policies to ensure compliance with Department of Administration standards for storage and destruction of government data
- Consult with area experts regarding computer security
- When in doubt -- don't let it out (wait for a release or court order)

VI. IDEA/Special Education Claims.

A. Applicable Legal Standard.

The Individuals with Disabilities Education Act, "ensure[s] that all children with disabilities *have available to them . . .* a free appropriate public education that emphasizes special education and related services designed to meet their unique needs ..." 20 U.S.C. § 1400(d)(emphasis added).

Question # 9: Jack is a 13-year-old, 8th grade student who has received special education services under the category of EBD for 5 years. He has a diagnosis of bi-polar disorder and depression. His verbal and physical aggression towards peers has resulted in numerous removals from school and a gradual increase in the "restrictiveness" of his placement over the years. He has made some minor progress in his academic performance, but his behavior has not improved over the years. The District has conducted 4 evaluations of the Student over the 5-year period, has added numerous supports to his IEP (e.g. behavior plans, paraprofessional support, counseling, etc.) and it has gradually increased the restrictiveness of his educational setting (i.e. removed him from regular education environments and placed him separate educational settings with increased support). The Parents have requested that Jack be placed in a private therapeutic school to address his needs and the district has denied the request. The Parents have brought a due process hearing to obtain tuition reimbursement for the private placement. They also are requesting monetary relief for the educational harm they believe occurred because of the District's "ineffective" educational programming. Could the District be held liable under the IDEA?

- A. Yes, because the IDEA requires that schools ensure the educational progress of disabled students.
- B. No, because the IDEA does not require school districts to pay for private school placements.
- C. No, so long as the District can show that its past and present IEPs were reasonably calculated to result in educational benefit.

B. Limiting Liability.

- Ensure procedural compliance by emphasizing parental involvement
- Instruct staff on the development of reasonable and measurable goals and objectives
- Diligently document educational progress or lack of progress
- Diligently document communications with parent
- Don't delay in the completion of FBA's or the development of BIPs for students with significant behavior issues
- Ensure compliance with the requirements for progress reporting
- Establish site or district wide "experts" or specialist through targeted training (e.g. train staff member in Orton Gillingham)
- When appropriate rely on outside evaluations or consultants to objectively review student performance and make recommendations
- Be Proactive -- when a student is not making progress, promptly work through IEP team to make continued changes to the student's program
- Never say "never"

- Don't propose IEPs that are offered only to appease the Parent - remember the right to a FAPE belongs to the Student
- Educate regular education staff regarding their responsibilities under the IDEA.