



# The Five Most Common Liability Issues that Schools Face

and How to Avoid Being a  
Casualty of Litigation

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**MASA - Great Start Workshop**



# 1. Claims That Can More Commonly Result in Liability

- A. Personal Injury Negligence Claims**
- B. Employment Discrimination Claims**
- C. Harassment/Bullying Claims**
- D. Special Education Disputes**
- E. Data Practices Claims**
- F. Constitutional Claims**
- G. Other Claims:**



Question  
#1:

In your experience as a school official, **what type of claims do you believe to be the most common?**



## II. Personal Injury Negligence Claims

### Negligence Standard:

- The elements of a negligence claim are duty, breach of that duty, proximate cause, and damage.
- School districts by law have a duty to exercise ordinary care to prevent foreseeable misconduct of other students.



## Question #2:

School district decided to show a documentary on MLK at a local theater to senior students from multiple high schools & no parental consent to attend was sought. Racial tensions was reportedly high in the district. Students were allowed to sit at any location in the theater. After the show was completed a white student had her wrist slashed and purse stolen by two female black students. When peers sought to help the student it reportedly took several minutes to locate a school official to provide support. **Could the district be held liable for the injury to the student?**



# Could the district be held liable for the injury to the student?

- A. No, because a school district cannot be held liable for the 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 students 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?**



# 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 squad was a school-approved organization and the district assumed control/supervision of its banner 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.





# 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."





## 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?**



# 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.

# 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. Discrimination

### Minnesota Human Rights Act

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.



## III. Discrimination

### 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."
- ADA (Americans with Disability Act) and the ADEA (Age Discrimination in Employment Act) have extended similar protections to the disabled and the elderly.
- Title IX Provides similar protections for educational programs/acitvities



## III. Discrimination

### Anatomy of an Illegal Discrimination Claim

- Employee has initial burden to presumption of discrimination. Employee must show that: (1) he/she is a member of a protected class; (2) that his/her job performance met the employer's legitimate expectations; and (3) that he/she was subject to an adverse employment action.
- Burden shifts to employer to provide evidence **legitimate non-discriminatory reason for its action.**
- If the employer shows legitimate non-discriminatory rationale employee can preserve claim by showing employer's reason was pretext.



## Question #5:

Ellen, a 71-year-old teacher, had been employed as a special education teacher by the District for 3 years. On teacher evaluations, rated as "proficient" or "exceeds expectations" in all areas. Co-worker, Terri, who was responsible for overseeing sped. due process compliance informs Ellen that she was "too old" and that she "should retire." Terri also informs her she is 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. Growth plan put in place and Ellen met the expectations. Despite compliance with the "growth" plan, Ellen received complaint from the parent because she failed to accommodate the needs of her student who required additional time for class work. After Ellen's 3<sup>rd</sup> year, Principal recommended she not be issued a new contract because Ellen continued to make mistakes in her paperwork. Ellen's employment was terminated at the end of her 3<sup>rd</sup> year.

Does Ellen have a potential age discrimination claim against the District?



## 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.



# 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

- ▶ **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.



## 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?**



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, place 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?**



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.



# 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).



# Limiting Liability

- ▶ 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 inquiries to ensure no further harassment/retaliation



## V. Data Practice Claims

**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.[statute has changed to \$1000 and \$15,000]



## 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?**



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.



# 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 Standards

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?**



## 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.



# 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.