

Understanding Common Liability Issues for School Districts



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Litigation Against School Boards



- **Negligence-based actions**
 - **Premises liability** (ex. slip and fall, non-school group use of school facilities [N.C.G.S. §115C-524])
 - **Negligent supervision** of students and/or teachers (ex. playground injuries, classroom injuries, bullying)
 - **Negligent hiring/retention** (ex. sexual harassment/assault—employee on employee/employee on student, assault and battery)

Litigation Against School Boards, cont.



- **Student/employee state and federal rights violations**
 - **Sexual harassment/assault** (ex. Title IX—employee on student, student on student)
 - **First Amendment/Free Speech violations** (ex. Confederate flag cases, school uniform policies)
 - **Employment disputes** (ex. employee dismissals, contract non-renewals, FLSA, FMLA)
 - **Discrimination/civil rights violations** (ex. ADA; age, race, or sex discrimination)
 - **Student discipline** (ex. corporal punishment, search and seizure, suspensions/expulsions, false imprisonment)
 - **Special education**
 - **Leandro claims** of failure to provide a sound basic education



Litigation Against School Boards, cont.



- **Various other specific causes of action**
 - **Defamation — libel and slander** (ex. statements to media)
 - **Real estate/property disputes** (ex. damage to property of adjacent landowner)
 - **Breach of contract** (ex. school construction)
 - **Open meetings law and public records law violations**
 - **Charter school funding disputes**
 - **Cyber liability**

State Liability Issues: Immunity



- **Definitions:**

- **Immune** -- “exempt, not affected or responsive.” (Webster’s Dictionary)
- **Governmental tort immunity** means that the federal, state, and local governments are free from tort liability except when they have consented by statute to be sued. (e.g., Federal Tort Claims Act, state tort claims acts) (Black’s Law Dictionary)
- **Tort** -- A wrongful act or omission that causes injury or damage to a person’s property or reputation by one on whom society has imposed a duty to act for that person’s safety and protection.

Whether and what type of immunity applies depends on who is being sued and the type of claim asserted.



State Liability Issues: School Boards As Defendants



- **Negligence/tort actions against the school board** (*i.e.*, premises liability)
- **School board as employer**
 - ***Vicarious liability***: an employer can be liable for the negligent acts or omissions of its employees acting *in the course and scope of their employment* (*i.e.*, injury to a child caused by a teacher's negligent supervision).
 - ✦ The North Carolina Supreme Court has held that a school board was not vicariously liable for the sexual assault that a principal committed on a student because the principal's actions were outside the course and scope of his employment with the board. *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990)
- **Negligent employment claims** -- The board may be liable for employees' actions that are *outside the scope of employment* (*e.g.*, negligent hiring/supervision/retention).
 - To establish direct liability on the employer, Plaintiff has to show that:
 - 1) the employee was unfit for the employment;
 - 2) the employment of the person was the proximate cause of the person's injuries; and
 - 3) the employer knew or should have known that the employee was unfit for the job.



Sovereign and Governmental Immunity: State Law Claims



Sovereign and governmental immunity bar suits against the state, its agencies, and its public officials sued in their official capacities.

- ***Sovereign immunity*** applies unless the state has consented to be sued. The concept comes from the English common law that “the King can do no wrong.”
- ***Governmental immunity*** is distinct from sovereign immunity. It only applies to tort liability and is based on the policy decision that governmental agencies should not have to pay money damages.

Waiver of Sovereign Immunity



- **Federal Tort Claims Act/Tucker Act:** The United States government has waived sovereign immunity to a limited extent, mainly through the *Federal Tort Claims Act* (28 U.S.C. §§1346(b), 2671-2680), which applies when a federal employee's tortious act causes damage. The *Tucker Act* (28 U.S.C. §1491) waives immunity for contract claims when the federal government is a party to the contract.
- **State Tort Claims Acts:** States waive sovereign immunity by statute. North Carolina's Tort Claims Act (N.C.G.S. §143-291 *et seq.*) partially waives sovereign immunity. A person injured by state employees' negligence while in the course and scope of their employment may file a claim with the Industrial Commission.
- **Local Government Tort Claims Acts:** There is limited uniformity among states, but most can be grouped into one of two categories: closed-ended or open-ended.
 - North Carolina does not have a Local Government Tort Claims Act.



Governmental Immunity and Risk Management Protection



- **Waiver of Governmental Immunity**

- **N.C.G.S. §115C-42:** Local school boards can waive their governmental immunity by purchasing liability insurance. All school boards have governmental immunity for state tort and negligence claims except to the extent that they purchase insurance.

- **Protection from school liability risks**

- **North Carolina School Boards Trust:** The majority of North Carolina public school boards participate in the North Carolina School Boards Trust, which is an alternative to insurance. It provides protection to its members by allowing them to preserve their governmental immunity to certain claims, providing them protection for risk exposures for which they don't have immunity, and by defending them in litigation. The Trust is a member-funded, member-managed risk management program and does not duplicate the State's liability insurance for public school employees.
- **Commercial insurance:** Most school boards that do not participate in the Trust purchase commercial liability insurance. By purchasing commercial insurance, those boards waive their immunity to the extent of their insurance coverage. Like the Trust's coverage, insurance policies contain coverage limits and deductibles, as well as exclude coverage for certain types of claims.
- **Self-insurance:** School boards that don't participate in the Trust or purchase insurance either participate in some type of local government arrangement or self-insure their exposures up to a certain level and purchase excess insurance above that limit.



Immunity: Governmental vs. Proprietary Action



The government provides unique services to benefit the public, and actions taken toward that end merit immunity protection. Governmental immunity only applies to governmental functions, not proprietary functions.

- **Public education, school transportation, and student discipline are governmental functions.** *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 477 S.E.2d 179 (1996); *Benton v. Bd. of Educ.*, 201 N.C. 653, 161 S.E.2d 96 (1931); *Herring v. Winston-Salem-Forsyth Co. Bd. of Educ.*, 137 N.C. App. 680, 529 S.E.2d 458 (2000).
- **What is a governmental function, and what is a proprietary function?** The North Carolina courts have tried to clarify this area of the law.
 - *Williams v. Pasquotank County Parks and Recreation and Pasquotank County*, 336 N.C. 195, 732 S.E.2d 137 (2012):
 - ✦ If an activity can only be performed by a governmental agency, it's a governmental function, and governmental immunity applies.
 - ✦ If an activity could be performed by a governmental agency or a private entity, the court should engage in a fact-specific inquiry that considers the following questions:
 - Is the service traditionally provided by the government?
 - Does the government charge a substantial fee for the service?
 - Does the fee cover more than mere operating costs?
 - *Bynum v. Wilson County, et al.*, 367 N.C. 355, 758 S.E.2d 643 (2014): Maintenance of government buildings is a governmental function, and governmental immunity applies.
 - *Bellows v. Asheville City Bd. of Educ., et al.*, ___ N.C. App. ___, 777 S.E.2d 522 (2015), *disc. review denied*, ___ N.C. ___, 781 S.E.2d 482 (2016): The question presented to the court was whether a school board's maintenance of walkways constitutes a governmental function or a propriety function.
 - Plaintiffs: Maintenance of sidewalks by municipalities is a proprietary function, and this rule should apply to school boards. The Board should not be able to take advantage of governmental immunity, and the Board's Motion to Dismiss should be denied.
 - Defense: The Board is not a municipality, so the rule for municipal sidewalks should not apply. The Board should be entitled to governmental immunity, and the Board's motion should be granted.
 - ✦ The trial court agreed with Plaintiffs and denied the Board's Motion to Dismiss, so the Board appealed to the North Carolina Court of Appeals. The Court of Appeals reversed and held that the Board's immunity did apply. Plaintiffs filed a Petition for Discretionary Review with the North Carolina Supreme Court, which was denied.



State Constitutional Claims



- **Attorneys' attempt to get around governmental immunity**
 - **Their argument:** If governmental immunity bars plaintiffs' claims, then they have no adequate remedy at law. If their state constitutional rights have been violated, they can bring a claim directly under the North Carolina Constitution. *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992).
- ***Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009)**
 - If immunity completely bars a plaintiff's claim, then the remedy is inadequate because the North Carolina Constitution is a check on the government. Immunity cannot prevent suit for true constitutional wrongs committed by the government.
 - **Life after *Craig*:** State constitutional claims are being included in many lawsuits against school boards. If plaintiffs' tort claims are precluded by immunity, their cases can still survive if they can prove a violation of their state constitutional rights.
 - ✦ To date, no court has recognized a successful *Craig* claim. See, e.g., *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 731 S.E.2d 245 (2012); *Mack v. Bd. of Educ. of the Public Schools of Robeson County*, 228 N.C. App. 282, 748 S.E.2d 774 (2013).



Use of School Facilities



- **N.C.G.S. §115C-524(c)**

- School boards can adopt rules and regulations that let them enter into agreements allowing non-school groups to use their property for non-school purposes, except for school buses, as long as the use is consistent with the preservation and care of the school property.
- If the use of school property is compliant with the agreement, and the agreement is compliant with the board's rules and regulations, school boards and individual board members have no liability for personal injuries that result from the use of school property.
- Helpful guidance on formulating boards' agreements with non-school groups for use of school property:
 - ✖ Contain a provision in the agreement confirming that the board and board members shall have no liability for injuries resulting from the non-school group's use of the property.
 - ✖ Consider requiring the non-school group to provide a certificate of liability insurance.
 - ✖ Remember that boards' immunity under this statute does *not* apply where the school district does not comply with its policies and procedures.

- **N.C.G.S. §115C-524(d)**

- School boards can make outdoor school property available to the public for recreational purposes, subject to any terms and conditions that the board may deem appropriate, when the property is not otherwise being used for school purposes and as long as the use is consistent with the preservation and care of the outdoor school property. The board and individual board members shall not be liable for personal injuries that result from the use of such school property.



Individual School Defendants



- **Official capacity lawsuits:** Plaintiff sues the Defendant in his/her official capacity.
 - These lawsuits are really actions against the position the defendant holds in the school system and are subject to the same immunity that the board has.
- **Personal capacity lawsuits:** Plaintiff sues the Defendant in his/her individual or personal capacity.
 - The defendant is personally responsible for all damages if he/she is found to be negligent and liable to the plaintiff.
 - Teachers, principals, superintendents, and school board members can all be sued in their personal capacity.
- **White v. Trew, 366 N.C. 360, 736 S.E.2d 166 (2013)**
 - Complaints against public employees must clearly specify in the caption of the lawsuit, the body of the Complaint, and in the prayer for relief that the suit is against the defendants *in their individual capacity*. Otherwise, all claims against the defendants are considered to be official capacity claims and are subject to the defense of governmental immunity.
- **Public official immunity:** Public officials sued in their individual capacities may not be held liable for negligently carrying out their job duties. *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 101 (1999). *But*, there is no immunity for acts committed outside the course and scope of their employment, such as malicious or corrupt acts, or for intentional torts (*i.e.*, assault and battery, defamation, intentional infliction of emotional distress).
 - **Who is a “public official?”** The courts have recognized superintendents, principals, directors of federal programs, and school board members as public officials. The courts have also held that teachers are *not* public officials and do not have public official immunity.
 - × **The courts’ test to determine whether the Defendant is a public official and has public official immunity:**
 - 1) Was the defendant’s position created by the Constitution or statutes?
 - 2) Does the defendant exercise a portion of sovereign power?
 - 3) Does the defendant exercise discretion in his/her job duties (and not just perform ministerial duties)?



Other Tort Liability Issues in the School Context



- **Negligence claims**

- Elements:
 - ✦ Duty
 - ✦ Breach
 - ✦ Causation
 - ✦ Damages
- Foreseeability issues

- **Specific school situations**

- Vocational education classes
- Science classes
- Physical education classes and recreation
- During non-school hours
- During extracurricular activities
- Going to and from school
- Liability for injuries on school premises

- **School system liability for the acts of others**

- Acts of employees
- Acts of volunteers
- Acts of students
- Acts of outsiders on campus

- **Defenses to tort actions**

- Governmental immunity
- Statutory immunity
- Statutory limitations on liability
- Contributory negligence
- Releases and assumption of risk



Automobile Liability Issues in the School Context



- **Federal Motor Vehicle Safety Standards and the use of vans**
- **Use of school buses and activity buses**
 - Use and operation of school buses (N.C.G.S. §115C-242)
 - Use of school buses by senior citizen groups (N.C.G.S. §115C-243)
 - Purchase of activity buses by local school boards (N.C.G.S. §115C-247)
 - Repair of school property and use of buildings for non-school purposes (N.C.G.S. §115C-524)
- **Yellow school buses/maintenance vehicles and the State Tort Claims Act**
 - Payment limitations
 - Immunity above limits
 - In-state vs. out-of-state (immunity limitations)
 - Extends to actions of maintenance personnel, drivers, transportation safety assistants, and bus monitors
- **Employee use of personal auto for school business**
- **Garage liability**
 - High school shop class accidents



Federal Liability Issues



- **Civil rights lawsuits**

- Most civil rights violations are raised under the federal statute that authorizes people to file lawsuits against public officials who have violated their federal rights (42 U.S.C. §1983).
- **Elements of a §1983 claim:**
 - ✦ A “person”
 - ✦ Acting “under color of State law”
 - ✦ Violated the complainant’s rights
 - ✦ Under the United States Constitution (*i.e.*, the First Amendment)
 - ✦ Or under the complainant’s federal statutory rights (*i.e.*, FERPA).



School Defendants



- **School boards as defendants**

- School boards can be sued under Section 1983 and may be ordered to pay damages if their official policies violate someone's federal rights. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).
- HOWEVER, boards are NOT liable under Section 1983 for the violation of a person's civil rights if the violation was caused *solely* by the wrongful acts of the board's employees or agents.
- *Owens v. City of Independence*, 445 U.S. 622 (1980)
 - ✦ Local governing bodies (*i.e.*, boards of education) cannot assert qualified immunity. Boards of education are *strictly liable* for federal rights violations caused by their officers and employees when implementing the board's official policy.

- **Public officials as defendants**

- Board members and board employees may be sued for violating someone's federal rights. The claimant must prove that the official's conduct *caused* the violation. Usually, these claimants assert claims against the responsible school official in his/her official *and* individual/personal capacities.
- **Personal capacity lawsuits:** Lawsuits alleging civil rights violations may be filed directly against the public official personally. If found liable, the public official must pay any award of damages *out of their own personal resources*.
- **Official capacity lawsuits:** Lawsuits alleging civil rights violations may also be filed against the public official in his/her official capacity. These lawsuits are in effect lawsuits against the board of education. If the official is found liable, *the school board is responsible for paying any award of damages*, not the individual.



Available Defenses for School Officials



- **No violation of federal law**

- A school official's best defense is that the alleged actions did not violate a person's civil rights.

- **Qualified immunity**

- If a school official's actions *do* violate the person's civil rights, the official may be able to assert *qualified immunity*.
- "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
 - ✦ The *Harlow* test: A public official can assert qualified immunity and will not be found liable if the claimed right was not *clearly established* when the violation occurred.
 - If the public official has violated a federal right after the right has become clearly established, the official cannot claim qualified immunity.
 - Public officials need to stay up-to-date on legal developments affecting their responsibilities!
 - ✦ Public officials cannot escape liability by relying on their good faith or lack of legal knowledge about their constitutional or statutory duties. They should know what the law is, and if their actions cross the line of those "well-marked boundaries," officials may be forced to pay money damages. *Slakan v. Porter*, 737 F.2d 368, 376 (4th Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985).
- The question of whether a school official is entitled to qualified immunity is usually decided early in the case on a motion for summary judgment.



Remedies Available for Successful Claimants



Remedies available for claimants who are successful in a Section 1983 case include:

• Damages

- **Compensatory damages:** This type of damages is designed to make the injured person whole and is limited to damages for actual injury or harm. *Carey v. Phipus*, 435 U.S. 247 (1978).
 - ✦ Types of compensatory damages include out-of-pocket expenses (i.e., medical bills), lost wages and back pay (employment cases), damages for mental or emotional distress and humiliation, and injury to professional reputation.
- **Punitive damages:** This type of damages is intended to punish the wrongdoer and deter similar future conduct. Punitive damages may be awarded if the plaintiff can establish that the actions were committed with a reckless disregard of or a deliberate indifference to his/her rights. To recover punitive damages, actual malice and/or ill will are not required. *Smith v. Wade*, 461 U.S. 30 (1983).
 - ✦ May not be awarded against a school board in a Section 1983 suit. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).
 - ✦ May be awarded against public officials in their personal capacity, along with compensatory damages. The jury decides the amount of punitive damages awarded.
- **Attorneys' fees:** Under 42 U.S.C. §1988, the court may, in its discretion, award attorneys' fees to the prevailing party in a Section 1983 action.

• Injunctive relief

- Compensatory damages do not always make an injured plaintiff whole. In those cases, the court may combine an injunction with a monetary award to address gaps not covered by the damages.
 - ✦ If the court enters an injunction against school officials, the officials must pay the plaintiff's attorneys' fees, which can be substantial.



Liability Coverage Questions



Does your board's school leaders liability policy (errors and omissions policy) provide coverage for the claim?

- **Typical exclusions in a school leaders liability policy that are often triggered by §1983 claims:**
 - Claims alleging a willful violation of the law
 - Claims alleging fraudulent, dishonest, or criminal acts
 - Claims alleging an intentional disregard or violation of school board policies, regulations, or directives
 - Claims alleging intentional acts or acts of deliberate indifference
 - Claims seeking punitive or exemplary damages
 - Claims seeking declaratory, injunctive, or other equitable relief, or the cost of seeking such relief
 - Claims arising out of a breach of fiduciary duty, responsibility, or obligation in connection with any employee benefit or pension plan, or any claim seeking amounts due under any fringe benefit or retirement program



Thank you!



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