North Carolina School Boards Association
Core Training
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Common Liability Issues for School Districts

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LITIGATION AGAINST SCHOOL BOARDS

- Premises liability (ex. slip and fall)
  - --Non-school group use of school facilities (NCGS 115C-524)
- Negligent supervision of students and/or teachers (ex. playground injuries; classroom injuries, bullying)
- Negligent hiring/retention (ex. sexual harassment/assault by employee on another employee or on a student; assault and battery)
- Defamation - libel and slander (ex. statements to media)
- Student discipline (ex. corporal punishment; search and seizure; suspensions/expulsions; false imprisonment)
- Real estate/property disputes (ex. damage to property of adjacent landowner)
- Breach of contract (ex. school construction)
- Special education
- Sexual harassment/assault (ex. Title IX – employee on student, student on student)
- Open meetings law and public records law violations
- First Amendment/Free Speech Violations (ex. confederate flag cases; school uniform policy)
- Employment disputes (ex. employee dismissals; non-renewal of contracts; FLSA; FMLA)
- Discrimination/civil rights violations (ex. ADA; age, race or sex discrimination)
- *Leandro* claims of failure to provide a sound, basic education
- Charter school funding disputes
- Cyber liability

LEGAL LIABILITY ISSUES FOR SCHOOL BOARDS

State Liability Issues

Immunity

(General Definitions)

- Webster's Dictionary defines ***immune*** as "exempt, not affected or responsive."
- According to Black's Law Dictionary ***governmental tort immunity*** means that the federal, and derivatively, the state and local governments are free from liability for torts committed except in cases in which they have consented by statute to be sued (e.g. Federal Tort Claims Act; state tort claims acts).
- ***Tort* -** A wrongful act or wrongful failure to act that causes a personal injury or damage to a person's property or reputation by one on whom society has imposed a duty to act for the safety and protection of that person.

(Determining applicability)

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

School Boards As Defendants

Types of claims:

- **Negligence/tort actions against School Board –** (i.e., premises liability)
- **School Board as Employer –**Under the doctrine of vicarious liability, an employer can be liable for the negligent acts or omissions of an employee acting in the course and scope of his/her employment (i.e., injury to a child caused by a teacher's negligent supervision during school activities).
  - The NC Supreme Court has held that a school system was not liable under the doctrine of vicarious liability for the sexual assault that a principal committed upon a student because the principal's acts were outside the course and scope of his employment for the Board. *Medlin v. Bass*, 327 N.C. 587 (1990).
- **Negligent Employment Claims** – A school board may be sued for actions of employees outside the scope of employment - (e.g., negligent hiring, negligent supervision, negligent retention)
  - To establish direct liability on the part of the employer, a plaintiff must show that the employee was unfit for employment, that the employment of the unfit person was the proximate cause of the person's injuries, and that the employer knew or reasonably should have known of the employee's unfitness.

- Negligent employment claims include claims of "negligent hiring" (the candidate for employment was unfit at the time of hiring and the employer was negligent in hiring the person nonetheless) and "negligent supervision or retention" (the employer learned or should have learned about the employee's unfitness after hiring and then failed to adequately correct the unfitness or dismiss the employee, to the detriment of the injured person.)

Doctrines of Sovereign and Governmental Immunity In State Law Claims: The doctrines of sovereign and governmental immunity bar suits against the state, its agencies, and its public officials sued in their official capacities. A board of education is a governmental agency and therefore may not be liable in a tort action except insofar as it has waived its immunity from liability.

- **Sovereign immunity** is a common law concept which took its roots from an English doctrine which held that "the King can do no wrong." Sovereign immunity is the state's immunity from a lawsuit of any kind unless the state consents to be sued.
- **Governmental immunity** is distinct from sovereign immunity. It is immunity from tort liability only and is based not on sovereign immunity and the "king can do no wrong" concept but instead on the policy decision that government agencies should not have to pay money damages.
- **<u>Waiver of Sovereign and/or Governmental Immunity</u>**
    - **Federal Tort Claims Act/Tucker Act -** The United States has waived sovereign immunity to a limited extent, mainly through the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671-2680) which waives immunity if a tortious act of a federal employee causes damage. The Tucker Act (28 U.S.C. § 1491) waives immunity over claims arising out of contracts to which the federal government is a party.
    - **State Tort Claims Acts** – States have waived sovereign immunity by statute. The NC Tort Claims Act (N.C.G.S. § 143-291 *et seq*.) partially waives the state's sovereign immunity. Under the Act, a person injured by the negligence of a state officer or employee acting in the course and scope of employment may file a claim for damages with the North Carolina Industrial Commission. The Commission has the authority to award damages within the statutory limit of $1,000,000.
    - **Local Government Tort Claims Acts** –While there is very little uniformity in local government tort claims acts across the country, most acts can be grouped into one of two categories.
        - The first category is the closed-ended type (17 states in this category) where government maintains immunity except for a list of exceptions, which usually consists of torts for which insurance coverage is readily available.
        - The second category is the open-ended type where the governmental entity waives immunity except for a list of exclusions.
        - North Carolina does NOT have a local government tort claims act.

- **N.C. General Statute 115C-42 –** This statute authorizes local boards of education in North Carolina to waive governmental immunity through the purchase of liability insurance. All school boards in North Carolina have governmental immunity to state tort and negligence claims, except to the extent that they waive their immunity to such claims by purchasing insurance.
- **Protection for School Liability Risks** - North Carolina school boards currently choose to cover their risk exposures in several ways.
    - *The North Carolina School Boards Trust* – The majority of school boards in the state participate in the North Carolina School Boards Trust (the "Trust"), a member-funded and member-managed risk management program. The Trust provides protection to its members for risk exposures for which they do not have immunity, allows members to preserve their governmental immunity to certain claims, and provides defense coverage in litigation. Coverage provided through the Trust does not duplicate state-funded liability insurance for public school employees.
    - *Commercial Insurance* –Most school boards in North Carolina that do not participate in the Trust choose to purchase commercial insurance to cover their risk exposures. By purchasing commercial insurance, those school districts waive their immunity to the extent of their insurance coverage. Like the Trust coverage, commercial insurance policies contain coverage limits and deductibles, as well as various exclusions for certain types of claims, for which no coverage is provided.
    - *Self-insure* - Those school districts that do not participate in the Trust or purchase commercial insurance either participate in some type of local government arrangement or self-insure their exposures up to a certain level and purchase excess insurance for claims above that limit.
- **Governmental v. Proprietary Acts** - Governmental immunity only applies to governmental functions and not proprietary functions. The basis for governmental immunity is that the government provides services to benefit the public at large which are essentially unique to the government and merit protection from liability. On the other hand, local governments sometimes conduct activities similar or the same as activities conducted by the private sector. These activities are considered proprietary activities and have not presented a rationale for protection from liability.
    - Public education, school transportation, and student discipline are all governmental functions and thus, school boards are entitled to governmental immunity. *Hallman v. Charlotte-Mecklenberg Bd. of Educ.*, 124 N.C. App. 435 (1996); *Benton v. Bd. of Educ.*, 201 N.C. 653 (1931); *Herring v. Winston-Salem-Forsyth Co. Bd. of Educ.*, 137 N.C. App. 680 (2000).

- In 2012, the North Carolina Supreme Court attempted to clarify the law on questions of governmental versus proprietary activities in the case of *Estate of Williams v. Pasquotank County Parks and Recreation and Pasquotank County,* 366 N.C. 195, 732 S.E.2d 137 (2012), which involved a drowning at a public park facility that had been rented to a private party. The Court stated that a court should first determine to what degree the legislature has addressed whether a particular activity is governmental or proprietary. For those activities that have not been addressed by the legislature, the Court set out rules and principles for courts to apply in analyzing this issue but acknowledged that each case would require a fact intensive inquiry.

    - If the activity is "one in which *only* a governmental agency could engage," it is governmental in nature.

    - If the activity or service can be performed publicly or privately, the inquiry involves consideration of the following factors:

        - whether the service is *traditionally* provided by government;

        - whether a substantial fee is charged for the service; and

        - whether the fee covers more than mere operating costs.

    - The Court also found that although a general activity may be considered governmental, certain phases of that activity may be proprietary, and vice versa. The Court also held that even if prior cases have held that the expenditure of funds in connection with a particular activity is for a public purpose, that activity is not ipso facto a governmental function.

- The North Carolina Supreme Court further clarified the law in this area in *Bynum v. Wilson County, et al.,* 367 N.C. 355, 758 S.E.2d 643 (2014). In *Bynum*, the plaintiff fell down the stairs while paying his water bill at a building leased by the County and sustained injuries. Plaintiff argued that he was injured while paying his water bill, and because the private sector could operate a water system, the County was engaged in a proprietary function and had therefore waived its governmental immunity. The Court disagreed, holding that the plaintiff's allegations that related to his injury arose out of the County's maintenance of its building, not out of its operation of a water system. The Court stated that the General Assembly had established that maintenance of government buildings was a governmental function. Therefore, the Court reasoned, the County had not waived its immunity from Mr. Bynum's lawsuit.

- In the case of *Bellows v. Asheville City Bd. of Educ., et al.,* 243 N.C. App. 229, 777 S.E.2d 522 (2015), *disc. review. denied,* ___ N.C. ___, 781 S.E.2d 482 (2016), Plaintiff was injured during a school open house when she fell from her wheelchair after its wheels became stuck in a grate on one of the school's

walkways. Plaintiff filed a negligence action against the Asheville City Board of Education regarding the condition of the walkway, and the Board filed a motion to dismiss based on governmental immunity. Plaintiff argued that courts have long held that municipalities' maintenance of walkways and sidewalks was a proprietary function, not a governmental function, and that the same standard should apply to school districts and that governmental immunity was not available to the Board in this case. The trial court agreed with plaintiffs, but the Court of Appeals reversed the trial court and held that the Board's governmental immunity did apply. Plaintiffs filed a Petition for Discretionary Review with the North Carolina Supreme Court, which was denied.

- **<u>State Constitutional Claims</u>**

  - Attorneys try to get around governmental immunity by bringing claims directly under the State Constitution, arguing that if governmental immunity precludes a plaintiff's claim, then the plaintiff has no adequate remedy at law. In the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under the NC State Constitution. *Corum v. University of North Carolina*, 330 N.C. 761 (1992).

  - ***Craig v. New Hanover County Bd. of Educ.,* 363 N.C. 334 (2009)** - Plaintiff, a mentally disabled student, filed an action against defendant board of education, asserting a negligence claim and constitutional claims. The student alleged that the board failed to adequately protect him from sexual assault. The Supreme Court held that the student's negligence claim was not an adequate remedy at state law because it was entirely precluded by governmental immunity. The student was allowed to move forward in the alternative, bringing his colorable claims directly under the State Constitution based on the same facts that formed the basis for his common law negligence claim.

    - Bottom-line rationale of the *Craig* case: If immunity totally bars the claim, the remedy is not adequate because the Constitution is a check on the government, and immunity cannot prevent suit for true constitutional wrongs by the government.

    - Since *Craig,* state constitutional claims are being included in many lawsuits against school boards. In those cases, a plaintiff's state tort claims may be barred by immunity, but their case will 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., 2*22 N.C. App. 359, 731 S.E.2d 245 (2012); *Mack v Bd. Of Educ. Of the Pub. Schs. of Robeson County*, 228 N.C. App. 282, 748 S.E.2d 774 (2013).

- **Use of School Facilities**
  - **N.C. General Statute 115C-524(c)** provides that "local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. No liability shall attach to any board of education or to any individual board member for personal injury suffered by reason of the use of such school property pursuant to such agreements.
    - Agreements and contracts should contain a provision confirming that no liability will attach to board for injuries resulting from non-school group's use of property.[1]
    - Consider requiring non-school groups to provide a certificate of liability insurance.
    - Immunity under N.C.G.S. 115C-524(b) is not available where there is a failure to comply with the school district's policy/procedures for non-school group use of school property.
  - **N.C. General Statute 115C-524(d)** provides that "[l]ocal boards of education may make outdoor school property available to the public for recreational purposes, subject to any terms and conditions each board deems appropriate, (i) when not otherwise being used for school purposes and (ii) so long as such use is consistent with the proper preservation and care of the outdoor school property. No liability shall attach to any board of education or to any individual board member for personal injury suffered by reason of the use of such school property."

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[1] Sample fact pattern from an actual case: Principal A signed a contract with Corporation B for Corporation B to hold a football camp at the school. During the camp, Student C was seriously injured while practicing without wearing the required equipment. Corporation B's employees were responsible for instructing and supervising the students during camp. Student C filed a lawsuit against the Board of Education and Corporation B. The School Board denied liability, and Corporation B had no liability insurance. The contract between the school and Corporation B contained a clause which said that the school would indemnify and hold Corporation B harmless from any injury or damage that arose as a result of the football camp. Principal A had no express authority to sign the contract and had not discussed the legal ramifications with the Superintendent. However, Principal A was acting within the course and scope of his employment in signing the contract. When examining this fact pattern, it is important to keep in mind issues such as whether the indemnification clause would be enforceable, whether the Principal had apparent authority to act on the Board's behalf, whether your Board policy addresses who has the authority to bind the Board to contracts, and whether your general liability policy or coverage agreement would provide coverage to your Board in this instance, if the contract were found to be enforceable against the Board. This issue should also be addressed in contracts between schools and cities/counties for the provision of security guards at school events or the use of city or county owned recreational facilities for school events.

Individual School Defendants

- *Official Capacity Lawsuits* **-** Plaintiff may sue Defendant in his/her official capacity.
  - Official-capacity action is really an action against the position Defendant holds in the school system and can be precluded by the same immunity that the Board enjoys.
- *Personal Capacity Lawsuits* **–** Defendant is sued in his/her individual or personal capacity.
  - Teachers, principals, superintendents, and school board members can all be sued in their personal capacity.
  - This means that the defendant is personally responsible for all damages if he/she is found to be negligent and liable to Plaintiff.
- The case of *White v. Trew*, 366 N.C. 360, 736 S.E.2d 166 (2013), clarified that if a plaintiff's complaint against a public employee does not clearly specify in the case caption, body of the complaint, and in the prayer for relief that the plaintiff is seeking relief against the defendant in his or her *individual* capacity, all claims against the defendant are considered to be made in his or her *official* capacity and can therefore be subject to the defense of governmental immunity.
- **Public Official Immunity –** *Public Officials* sued in their individual capacity for the performance of their job-related duties may not be held liable for mere negligence with respect to those duties. *Isenhour v. Hutto*, 350 N.C. 601 (1999).
  - Public officials enjoy no immunity for acts performed outside the scope of their official duties, and would be personally liable for harm caused by their intentional torts.
  - The test for public official immunity requires that: (1) the position is created by the constitution or statutes; (2) the public official exercises a portion of sovereign power; and (3) the public official exercises discretion in his or her position, as opposed to ministerial duties.
  - Intentional torts for which public officials enjoy no public official immunity and will be personally responsible include assault and battery, defamation, intentional infliction of emotional distress, false imprisonment, tortious interference with contract, and malicious prosecution.
  - **School Public Officials Entitled to Public Official Immunity** –
    - NC courts have held that superintendents and principals are public officials for purposes of claiming public official immunity, except for malicious or corrupt acts. *Gunter v. Anders*, 114 N.C. App. 61, 441 S.E. 2d 167 (1994). Public official immunity has also been extended to a director of federal programs. *Farrell v. Transylvania County Bd. of Educ.*, 175 N.C. App. 689, 625 S.E.2d 128 (2006).

    - School board members are public officers and entitled to public official immunity. *Old Fort v. Harmon*, 219 N.C. 241, 13 S.E.2d 423 (1941).
    - North Carolina does not recognize public official immunity for teachers.
  - Public officials may not be sued in their individual capacities for violations of the NC Constitution.

Other Tort Liability Issues in the School Context

Negligence claims

Elements:

- Duty
- Breach
- Proximate cause
- Injury

Foreseeability issues

Specific school situations

How much supervision is required?

- 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

The school system's liability for 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

- Federal Motor Vehicle Safety Standards and the use of vans
- Use of school buses and activity buses
  - N.C.G.S. §115C-242 (Use and operation of school buses)
  - N.C.G.S. §115C-243 (Use of school buses by senior citizen groups)
  - N.C.G.S. §115C-247 (Purchase of activity buses by local boards)
  - N.C.G.S. §115C-524 (Repair of school property; use of buildings for other than school purposes)
- Yellow school buses/maintenance vehicles and the State Tort Claims Act
  - Payment limitations
    - $3000 medical payments
    - $1,000,000 liability limits
  - Immunity above limits
  - In state vs. out of state use (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 claims of civil rights violations are raised under 42 U.S.C. § 1983, a federal statute that authorizes lawsuits by persons who contend that a public official has violated their federal rights. The elements of a Section 1983 claim are that a "person", acting "under color of State law", violated the complainant's rights under the United States Constitution (i.e. the First Amendment) or federal statutory rights (i.e. FERPA).

School Boards As Defendants

- A local board of education may be sued under Section 1983 and may be ordered to pay damages when its official policy violates someone's federal rights. *Monell v. Department of Social Services,* 436 U.S. 658 (1978). Thus, the board may be liable for injury caused by the implementation of its policy or custom.
- However, the board is not liable under Section 1983 for the violation of an individual's civil rights caused solely by the independent wrongful acts of the board's employees or agents.
- In *Owen v. City of Independence,* 445 U.S. 622 (1980), the Supreme Court held that local governing bodies (i.e. boards of education) could not assert the qualified immunity defense. In effect, the Court held that boards of education are strictly liable for federal rights violations caused by their officers and employees in implementing the official policy of the board.

Public Officials As Defendants

Public officials, including members of boards of education and their employees, may be sued for violating a person's federal rights. To hold a school official responsible for an alleged civil rights violation, a claimant must prove that the official's conduct *caused* the violation. Persons alleging a violation of their federal rights usually assert claims against the responsible school official in both his or her individual/personal and official capacities.

- **Personal-Capacity Lawsuits-** Civil rights lawsuits may be filed directly against the public official personally. School board members and other school officials who are sued in their personal capacity and are found liable for violating someone's civil rights must pay any award of damages to that person out of their own personal resources.
- **Official-Capacity Lawsuits-** Civil rights lawsuits may also be filed against school officials and school employees in their official capacity. An official-capacity lawsuit is really a lawsuit against the board of education for the alleged violations. Any judgment obtained in an official-capacity suit is paid out of the funds of the board, and not the school official's personal assets.

Available Defenses

- **No violation of federal law -** A school official's best defense to a lawsuit alleging a violation of someone's civil rights is that his alleged actions did not violate federal law.
- **Qualified Immunity -** Where a school official's actions do violate a person's federal rights, the school official may be able to assert the defense of *qualified immunity.*
  - The United States Supreme Court, in its landmark 1982 decision *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), held that "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." In essence, public officials are entitled to the defense of qualified immunity.
    - Based on the *Harlow* objective test, a public official who is charged with violating someone's civil rights can successfully assert a qualified immunity defense and will not be found liable if the claimed right was not clearly established when the violation occurred. However, a public official cannot claim qualified immunity if he violates a federal right after the right becomes clearly established. This imposes on public officials a duty to keep up to date on legal developments affecting their official responsibilities.
    - "Harlow reaffirmed the principle that a public official cannot escape §1983 liability by relying solely on his subjective good faith or lack of actual knowledge about the extent of his constitutional or statutory duties…[H]e is presumed to know what the law requires and may be forced to pay money damages when his actions cross those well-marked boundaries." *Slakan v. Porter,* 737 F.2d 368, 376 (4th Cir. 1984), *cert. denied,* 470 U.S. 1035 (1985). Ignorance of settled law will not protect a school official who has violated someone's clearly established federal rights.
  - The question of whether the school official is entitled to qualified immunity in a given case is usually decided early in the case, on a motion for summary judgment.

Remedies Available For Successful Claimants

The types of remedies available in a Section 1983 case include:

- **Damages**
  - Compensatory damages - Compensatory damages are damages designed to make an injured person whole. In a Section 1983 case, compensatory damages are limited to damages for actual injury or harm. *Carey v. Piphus*, 435 U.S. 247 (1978). Compensatory damages can include out of pocket expenses (i.e. medical bills), lost wages and back pay (employment cases), damages for mental/emotional distress and humiliation and injury to professional reputation.

- Punitive damages - Punitive damages are exemplary damages intended to punish the wrongdoer and to deter future conduct. The Supreme Court has held that punitive damages may be awarded if the plaintiff can establish a reckless disregard of or deliberate indifference to his rights. Actual malice and ill will are not required to recover punitive damages. *Smith v. Wade*, 461 U.S. 30 (1983).
  - In personal-capacity lawsuits under Section 1983, public officials may be ordered to pay both compensatory and punitive damages. The amount of punitive damages awarded is within the discretion of the jury.
  - Punitive damages may not be awarded against a board of education in a Section 1983 lawsuit. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).
- Attorney's fees - 42 U.S.C. §1988 addresses the issue of counsel fees in Section 1983 actions. Pursuant to that statute, "the Court in its discretion may allow the prevailing party…a reasonable attorney's fee as part of the costs."

- **Injunctive relief -** In some cases, an award of monetary damages does not make an injured plaintiff whole. In those cases, an injunction (court order) may be combined with a monetary award to plaintiff to address gaps not covered by monetary damages.
  - If an order for injunctive relief is entered against school officials, they must pay the plaintiff's attorneys fees, which are often substantial.

Liability Coverage Questions: Does the board's school leaders liability policy (errors and omissions policy) provide coverage for the claim?

When a board of education, its board members, or other school officials are sued, an immediate concern is whether the claims being asserted are covered by the board's liability insurance policy.

Typical exclusions contained in a school leaders liability policy (errors and omissions policy), which are often triggered by claims in Section 1983 lawsuit, include:

- 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.

APPENDIX

§ 115C-42. Liability insurance and immunity.

Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

Any contract of insurance purchased pursuant to this section shall be issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance and shall by its terms adequately insure the local board of education against liability for damages by reason of death or injury to person or property proximately caused by the negligent act or torts of the agents and employees of said board of education or the agents and employees of a particular school in a local administrative unit when acting within the scope of their authority. The local board of education shall determine what liabilities and what officers, agents and employees shall be covered by any insurance purchased pursuant to this section. Any company or corporation which enters into a contract of insurance as above described with a local board of education, by such act waives any defense based upon the governmental immunity of such local board of education.

Every local board of education in this State is authorized and empowered to pay as a necessary expense the lawful premiums for such insurance.

Any person sustaining damages, or in case of death, his personal representative may sue a local board of education insured under this section for the recovery of such damages in any court of competent jurisdiction in this State, but only in the county of such board of education; and it shall be no defense to any such action that the negligence or tort complained of was in pursuance of governmental, municipal or discretionary function of such local board of education if, and to the extent, such local board of education has insurance coverage as provided by this section.

Except as hereinbefore expressly provided, nothing in this section shall be construed to deprive any local board of education of any defense whatsoever to any such action for damages or to restrict, limit, or otherwise affect any such defense which said board of education may have at common law or by virtue of any statute; and nothing in this section shall be construed to relieve any person sustaining damages or any personal representative of any decedent from any duty to give notice of such claim to said local board of education or to commence any civil action for the recovery of damages within the applicable period of time prescribed or limited by statute.

A local board of education may incur liability pursuant to this section only with respect to a claim arising after such board of education has procured liability insurance pursuant to this section and during the time when such insurance is in force.

No part of the pleadings which relate to or allege facts as to a defendant's insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this section. Such liability shall not attach unless the plaintiff shall waive the right to have all issues of law or fact relating to insurance in such an action determined by a jury and such issues shall be heard and determined by the judge without resort to a jury and the jury shall be absent during any motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto unless the defendant shall request a jury trial thereon: Provided, that this section shall not apply to claims for damages caused by the negligent acts or torts of public school bus, or school transportation service vehicle drivers, while driving school

buses and school transportation service vehicles when the operation of such school buses and service vehicles is paid from the State Public School Fund. (1955, c. 1256; 1957, c. 685; 1959, c. 573, s. 2; 1961, c. 1102, s. 4; 1977, 2nd Sess., c. 1280, s. 3; 1981, c. 423, s. 1; 1985, c. 527.)

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NO. COA02-253

&nb sp;
NORTH CAROLINA COURT OF APPEALS

&nb sp;
Filed: 3 December 2002

SHARON LUCAS,
Plaintiff,
v.

SWAIN COUNTY BOARD OF EDUCATION, and FARLEY CONSTRUCTION CO., INC.
Defendants.

Appeal by defendant Swain County Board of Education from order entered 15 November 2001 by Judge J. Marlene Hyatt in Swain County Superior Court. Heard in the Court of Appeals 15 October 2002.

Bridgers & Ridenour, PLLC, by Ben Oshel Bridgers and Eric Ridenour, for plaintiff-appellee.

Roberts & Stevens, P.A., by Sarah Patterson Brison Meldrum, for defendant-appellant Swain County Board of Education.
Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher; and Allison Schafer, for the North Carolina School Boards Association, amicus curiae.

Ferguson Stein Chambers Wallas Adkins Gresham & Sumter, P.A., by S. Luke Largess, for the North Carolina Academy of Trial Lawyers, amicus curiae.

MARTIN, Judge.

Swain County Board of Education ("defendant") appeals an order granting partial summary judgment in favor of Sharon Lucas ("plaintiff") on the issue of defendant's governmental immunity. For reasons stated herein, we affirm in part, reverse in part, and remand.

The facts pertinent to this appeal are as follows: plaintiff
was injured on 18 September 1999 when she allegedly fell down concrete steps at the Swain County High School Football Stadium,located on land owned by defendant. On 12 June 2000, plaintiff filed a complaint against defendant and the construction company which had constructed the steps, alleging their negligence caused her injuries. The construction company's motion to dismiss plaintiff's complaint was granted on 18 April 2001. On 20 September 2001, plaintiff moved for partial summary judgment against defendant, asserting defendant had waived its governmental immunity pursuant to G.S. § 115C-42 through the purchase of insurance from the North Carolina School Boards Trust ("the Trust"). The statute provides, in relevant part:

Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

Any contract of insurance purchased pursuant to this section shall be issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance . . . .

N.C. Gen. Stat. § 115C-42 (2001) (emphasis added). The evidence showed that at the time of plaintiff's accident, defendant had entered into a General Liability Trust Fund Agreement ("Agreement") with the Trust wherein the Trust agreed to pay damages resultingfrom claims against defendant for bodily injury up to $100,000. The Agreement also provided for excess insurance coverage for claims between $100,000 and $1,000,000.

In support of her motion, plaintiff filed an affidavit in an unrelated case from Peter Kolbe of the Department of Insurance, which had been given prior to plaintiff's injury. In the affidavit, Mr. Kolbe stated that he considers the Trust to be engaged in the business of insurance. In addition, plaintiff offered the deposition testimony of Edwin Dunlap, Jr., Executive Director of the North Carolina School Boards Association, and Treasurer of the Trust. Dunlap's deposition established that under the agreement with the Trust, defendant's excess coverage for claims between $100,000 and $1,000,000 was provided by a commercial insurer, not the Trust itself.

In response to plaintiff's motion, defendant filed the affidavit of William Hale, Deputy Insurance Commissioner, stating that Mr. Kolbe's opinion that the Trust is an insurer does not represent the official position of the Department of Insurance, and that the Trust is neither licensed and authorized to execute insurance contracts in this State, nor a qualified insurer as determined by the Department of Insurance. In addition, defendant moved to strike Mr. Kolbe's affidavit as not having been given for the case at issue.

On 21 September 2001, defendant moved for summary judgment on the ground that it is immune from suit under the doctrine of governmental immunity. Defendant offered two affidavits in supportof its motion, one from Patsy Earley, defendant's finance officer, and the other from Edwin Dunlap. Both affidavits established the Trust is not authorized and licensed to execute insurance contracts in this State and that it is not considered a qualified insurer as determined by the Department of Insurance. In addition, the trust fund coverage agreement was in evidence and provided:

[t]he NCSBT Coverage Agreement is not a contract of insurance by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance. Therefore, the NCSBT Coverage Agreement expressly is not considered a waiver of governmental immunity as provided in G.S. 115C-42.

On 15 November 2001, the trial court entered an order denying defendant's motion and granting plaintiff's motion for partial summary judgment, holding that defendant had waived its governmental immunity to the full extent of the coverage, $1,000,000, provided by this Agreement. Defendant appeals.

Although defendant's appeal is interlocutory in nature, it is well-established that the denial of a motion for summary judgment grounded on governmental immunity affects a substantial right and is immediately appealable; thus, defendant's appeal is properly before us. *See Craig v. Asheville City Bd. of Educ.*, 142 N.C. App. 518, 543 S.E.2d 186 (2001). By two of its three assignments of error, defendant argues the trial court erred in denying its motion for summary judgment and in granting plaintiff's motion for partial summary judgment where plaintiff's claims are barred bygovernmental immunity as a matter of

law. The standard for ruling upon a motion for summary judgment is well-settled: summary judgment should only be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2002). We first address whether a genuine issue of fact exists as to whether defendant waived its immunity by entering into the Agreement for coverage provided directly by the Trust for claims of up to $100,000.

"'As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity.'" *Herring ex rel. Marshall v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (citation omitted), *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). "'A county or city board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority.'" *Seipp v. Wake County Bd. of Educ.*, 132 N.C. App. 119, 121, 510 S.E.2d 193, 194 (1999) (citation omitted). That statutory authority is established by G.S. § 115C-42, set forth above.

Under the plain language of G.S. § 115C-42, a school board such as defendant can only waive its governmental immunity where itprocures insurance through (1) a company or corporation licensed and authorized to issue insurance in this State; or (2) a qualified insurer as determined by the Department of Insurance. This requirement was reiterated by this Court in *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 477 S.E.2d 179 (1996). In that case, the plaintiff sued the defendant board of education for an injury she sustained while on the property of a county school. The evidence showed the board had liability coverage for claims of up to $1,000,000 through its participation in the City of Charlotte's Division of Insurance and Risk Management ("DIRM") program. *Id.* at 436, 477 S.E.2d at 180. The board moved for summary judgment, asserting it had not purchased insurance, and was therefore protected from liability by governmental immunity. *Id.* In support of its motion, the board filed an affidavit from DIRM's manager to the effect that DIRM was not licensed and authorized to execute insurance contracts in this State and was not regulated or supervised in any respect by the Department of Insurance. *Id.* at 438-39, 477 S.E.2d at 181. The plaintiff did not offer evidence in opposition to the board's motion.

We rejected the plaintiff's argument that the board's participation in DIRM constituted a waiver of immunity under G.S. § 115C-42. Noting that our courts have strictly construed G.S. § 115C-42 against waiver, we emphasized that the board's supporting affidavit established that DIRM did not meet either of the two criterion under G.S. § 115C-42, and that the plaintiff had failedto contradict this evidence. *Id.* Thus, we held summary judgment should have been granted for the board, as its "participation in the City of Charlotte's risk management agreement [was] not tantamount to the purchase of liability insurance as authorized by G.S. § 115C-42 and does not constitute a waiver of its governmental immunity pursuant to the statute for claims not covered by insurance." *Id.* at 439, 477 S.E.2d at 181.

Plaintiff argues *Hallman* is not controlling, and that we should follow this Court's opinion in *Vester v. Nash/Rocky Mount Bd. of Educ.*, 124 N.C. App. 400, 477 S.E.2d 246 (1996), filed the same date as *Hallman*. The plaintiff in *Vester* was injured while being transported on a county school bus. *Id.* at 401, 477 S.E.2d at 247. The trial court dismissed the plaintiff's claim against the defendant board on grounds that the board was immune from suit and jurisdiction was lacking. *Id.* at 402, 477 S.E.2d at 248. The plaintiff appealed, arguing the board had waived its governmental immunity through the purchase of insurance from the North Carolina School Boards Insurance Trust ("NCSBIT"). *Id.* The board's coverage agreement with NCSBIT provided an exemption for claims arising out of the operation of an automobile. *Id.* at 403, 477 S.E.2d at 248. The court stated that the issue on appeal was whether the plaintiff's injury arose out of the operation of the school bus, and the legal discussion in the opinion was centered on that issue only. *Id.* Having determined the plaintiff's injury fell within the coverage exemption, we concluded the trial court had properly dismissed the plaintiff's claim. *Id.* at 405, 477S.E.2d at 249. The Court did not discuss plaintiff's contention that the defendant board had waived its immunity through its participation in NCSBIT.

Although *Hallman* and *Vester* were filed on the same date, *Hallman* dealt directly with the application

of G.S. § 115C-42 to a claim that a school board had waived its governmental immunity, whereas *Vester* makes no mention of G.S. § 115C-42 or the requirements necessary for a board to waive its immunity. We believe *Hallman* is the most analogous case to the issues pertinent here, and we follow that decision. *Hallman* reaffirms the plain language of the relevant statute: the only way a plaintiff can establish that a board has waived its immunity is by showing the contract of insurance was issued by (1) an entity licensed and authorized to execute insurance contracts in this State; or (2) a qualified insurer as determined by the Department of Insurance. Nothing in our *Vester* decision negates the plain requirement of G.S. § 115C-42 as applied in *Hallman.*

Applying that statutory requirement here, it is clear plaintiff did not forecast evidence to establish that the Trust meets either of these two criterion. Plaintiff made no showing in support of her motion for summary judgment that the Trust is a licensed and authorized insurer, nor does plaintiff attempt such an argument on appeal. Plaintiff's only argument as to why the Trust is a "qualified insurer as determined by the Department of Insurance" is that the Trust must be qualified in the Department's view, because the Department is aware of the Trust's activities andthe Department has failed to take action against the Trust for providing insurance without authorization. However, it is an equally, if not more, plausible explanation that the Department has not chosen to take action against the Trust because it does not consider the Trust a provider of insurance. Moreover, defendant established through three affidavits from Hale, Earley and Dunlap that the Trust is neither a licensed and authorized insurer, nor a qualified insurer as determined by the Department. These affidavits were sufficient to rebut plaintiff's motion, to support defendant's motion, and to then shift the burden to plaintiff, to forecast evidence that the Trust fits one of the two statutory criterion. Plaintiff simply failed to do so. "Once the moving party has made and supported its motion for summary judgment, section (e) of Rule 56 provides that the burden is then shifted to the non-moving party to introduce evidence in opposition to the motion, setting forth 'specific facts showing that there is a genuine issue for trial.' At this time, the non-movant must come forward with a forecast of his own evidence." *Crowder Const. Co. v. Kiser*, 134 N.C. App. 190, 196, 517 S.E.2d 178, 183 (citation omitted), *disc. review denied*, 351 N.C. 101, 541 S.E.2d 142 (1999). Accordingly, as in *Hallman*, plaintiff failed to show the existence of a genuine issue of material fact as to whether defendant waived its immunity to the extent of the Trust's coverage of up to $100,000. The entry of summary judgment in favor of plaintiff on this issue was therefore error, and defendant's motion for summary judgment should have been granted as to this issue. However, we agree with the trial court that defendant was covered for claims between $100,000 and $1,000,000 by an insurer meeting at least one of the requirements of G.S. § 115C-42. The Dunlap deposition attached to plaintiff's motion established that defendant's excess coverage for claims beyond $100,000 was provided by a commercial insurance company. Defendant did not present evidence in response tending to show the excess coverage was not provided by an insurer meeting the statutory criteria, nor does defendant make this argument on appeal. Instead, defendant argues that despite the excess coverage being provided by a commercial insurer, defendant has not waived its immunity because it was the Trust, not defendant itself, that actually dealt with the excess coverage provider.

We are not persuaded by this argument. Under G.S. § 115C-42, a school board waives its immunity when it "secur[es]" or "obtain[s]" insurance from entities such as a commercial insurer. The evidence shows defendant knew its excess coverage was being provided by a commercial insurance company. We do not interpret the statute so narrowly as to exempt a school board from waiver where the board contracts with an intermediary to then procure the board's insurance through the commercial insurance market, nor do we believe such an interpretation consistent with the policy and purpose of G.S. § 115C-42.

This Court has previously addressed a similar issue in the context of a county's statutory waiver of its governmental immunity through the purchase of insurance. *See Wood v. Guilford County*, 143 N.C. App. 507, 546 S.E.2d 641 (2001), *affirmed in part and reversed in part on other grounds*, 355 N.C. 161, 558 S.E.2d 490 (2002). In that case, we held the trial court correctly denied the defendant county's motion to dismiss the complaint based on governmental immunity where the complaint alleged the county entered into a contract with an entity requiring that the entity obtain a liability policy from an insurance company

PAGE 7

and name the county as an additional insured. We held it was not necessary for the county to have directly purchased the insurance from the insurance company for it to have waived its immunity under the relevant statute, providing that the "[p]urchase of insurance" pursuant to that subsection waives the county's governmental immunity to the extent of coverage:

Although Defendant did not 'purchase' a liability insurance policy from an insurance company, we do not read section 153A-435(a) as requiring the purchase of insurance from an insurance company in order to waive governmental immunity. By requiring Burns to obtain an insurance policy and name Defendant as an additional insured, Defendant contracted, within the meaning of section 153A-435(a), to have itself insured and, thus, waived its governmental immunity.

Id. at 513, 546 S.E.2d at 645-46.

As in *Woods*, we hold defendant's action in contracting with the Trust, which then contracted with a commercial insurer to provide excess coverage to defendant, constitutes a waiver of defendant's immunity under G.S. § 115C-42 to the extent of that coverage. The evidence establishes defendant waived its immunity for claims between $100,000 and $1,000,000 by securing coveragefrom a commercial insurer for that amount. Therefore, partial summary judgment in favor of plaintiff was proper as to this issue.

In its remaining assignment of error, defendant argues the trial court erred in considering the Kolbe affidavit where that affidavit was not given in connection with the present case and Kolbe had no personal knowledge of the facts of this case when giving the affidavit. Although Kolbe opined in the affidavit that he believed the Trust was engaged in the business of insurance, he made no representations as to whether the Trust met either of the two criterion under G.S. § 115C-42, and thus, his affidavit and the trial court's consideration thereof have no import in light of our decision. Accordingly, we need not address whether the trial court erred in considering the affidavit.

The order granting partial summary judgment in favor of plaintiff is reversed to the extent it determined defendant waived its governmental immunity for claims up to $100,000; the judgment is affirmed to the extent it determined defendant waived immunity for claims between $100,000 and $1,000,000. *See Jones v. Kearns*, 120 N.C. App. 301, 303, 462 S.E.2d 245, 246 (holding defendant city entitled to partial summary judgment to the extent it had not waived its immunity through the purchase of insurance for claims under $250,000, but not as to claims exceeding that amount for which the city had excess coverage), *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995). This matter is remanded to the trial court for entry of partial summary judgment in favor of defendant on the issue of governmental immunity for claims of up to $100,000and in excess of $1,000,000, and for such further proceedings as may be required.

Affirmed in part, reversed in part, and remanded.

Judges GREENE and BRYANT concur.

**** Converted from WordPerfect ****

NOTE: Footnotes are for reference only. They should be eliminated from an individual board's policy.

LIMITED CLAIM SETTLEMENT

Policy Code: **8341**

A. APPLICABILITY TO CERTAIN CLAIMS

On occasion, the board of education is presented with claims against the board from students, parents or other citizens for injuries to person or property sustained while on a board property or at a school-sponsored event. The board adopts this policy in order that it may consider and process all such claims in a fair and equitable manner, taking into consideration the economic resources available to the board.

The board will only consider claims under this policy when the applicable insurance agreement and/or coverage agreement, if any, does not provide for the consideration, settlement and/or adjustment of claims prior to legal action being filed by the claimant in a court of competent jurisdiction. Upon the filing of a complaint, the board will immediately refer all claims to the appropriate insurance company or coverage provider for appropriate action.

B. PROCEDURE FOR FILING CLAIM

All claims must be made to the superintendent in writing and must include a detailed account of how the injury occurred, whether board employees were involved, and the amount of damages suffered by the claimant. The claimant should include all supporting documentation and any other information he or she believes is relevant. The superintendent or designee shall investigate the incident and, if necessary, provide supplemental information to the board.

After receiving the claim, the board, in consultation with its attorney, will determine whether to pay the claim, deny the claim or make an offer to settle the claim.

C. SETTLEMENT

In determining whether to settle a claim prior to the filing of a legal action, the board will consider the factors listed below. Before any final decision is reached, the board attorney shall ensure that these factors were considered by the board in arriving at its final decision.

1. Whether there is a reasonable possibility that the potential defense costs to be paid by the board, including an estimate of personnel time and school system resources, will exceed the amount for which the case can be settled.

2. The extent to which an employee's actions or omissions may have caused, or contributed to, an injury.

3. Whether an employee intentionally caused an injury.

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4. Whether there are any affirmative defenses available to the board in the event of litigation. However, the board will not assert or consider the availability of Sovereign/Governmental Immunity for any pre-litigation claim.

5. Whether the demand is within the retention or deductible level for monetary payments pursuant to any applicable insurance or coverage agreement.

Each claim will be evaluated based upon the specific circumstances. All factors need not be given equal weight, and no one factor will be controlling.

The payment of any claim will be subject to the claimant's execution of a full release of liability in favor of the board, its employees and its agents. The release must be on a form approved by the board attorney.

By considering whether to settle a claim, the board does not waive any affirmative defenses available to it or its employees, including but not limited to the defenses of governmental, sovereign, qualified or public official immunity, or contributory negligence. The board may assert these defenses should the claimant choose to file a lawsuit.

Legal References: *Dobrowolska v. City of Greensboro*, 138 N.C. App. 1 (2000)

Cross References:

Issued: April 7, 2008

Revised:

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COMMUNITY USE OF FACILITIES

Policy Code: **5030**

The board endorses the goals of the Community Schools Act. The board will make specified indoor and outdoor school facilities available for use by eligible community groups under agreements developed in accordance with this policy. The board also will make some outdoor school facilities available for limited recreational use by the general public when not inconsistent with the board's use of the facilities. Public use is subject to Section H of this policy.

A. GENERAL PRINCIPLES

The use of school facilities by community groups should be consistent with the educational program and the goals and objectives of the board and school system.

Priority for facility use will be given to community groups as outlined below in Section B. For-profit groups are not permitted to use school facilities.[1]

Use of school facilities will not be approved for activities that do any of the following:

1. violate federal, state, or local laws;
2. violate board of education policies or regulations;
3. advocate imminent violence;
4. damage or have the potential to damage school buildings, grounds, or equipment; or
5. are in conflict with scheduled school activities.

B. PRIORITY IN USE/FEE STRUCTURE

School-sponsored groups and activities, such as school athletic events, and school drama and choral productions, and meetings of student organizations, including organizations permitted to meet under the Equal Access Act, will have first priority in the use of school facilities.

Priority in the use of school facilities by other groups and the fee structure for such groups will be in accordance with law and the following user categories.[2] Priority in use

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[1] Alternatively, for-profit groups may be listed as a user category.

[2] The user categories and fee structure may be modified, except that (1) political parties have a statutory right to use school facilities for annual or biennial precinct meetings and county and district conventions (see G.S. 163A-1046 and 115C-527); and (2) youth groups listed as patriotic societies in Title 36 of the United States Code, such as the Boy Scouts and Girl Scouts, must be given priority in use if the school system receives state funds to implement a community schools program (see G.S. 115C-207). If the board denies priority access to such a patriotic youth

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among groups within the same user category will not be based upon the viewpoints of the groups (see policy 1710/4021/7230, Prohibition Against Discrimination, Harassment, and Bullying). All groups within the same user category will be charged for facility use according to the uniform fee structure.

1. In accordance with G.S. 163A-1046, as a polling place on election days

2. School-related groups (organizations formed to support the school in some manner, such as the PTA, PTO, teachers' and principals' organizations, and booster clubs)[3]

   Fees: Fees for use of kitchens will be charged to cover costs. Custodial or other supervisory services may be charged.

3. In accordance with G.S. 115C-527, political parties for the express purpose of annual or biennial precinct meetings and county and district conventions

   Fees: Custodial and utility fees may be charged.

4. Local government and youth organizations, including, but not limited to, scouts and 4-H

   Fees: Utility fees for the use of facilities may be charged. Custodial, kitchen, and/or supervisory fees will be charged.

5. All other non-profit groups (all groups not included in the other categories as well as political parties when meeting for purposes other than precinct meetings or county or district conventions)[4]

   Fees: Rental, kitchen, utility, custodial, and supervisory fees will be charged.

Prior to the beginning of each school year, the superintendent shall submit for board approval a fee structure that lists the amount or method of calculating rent and fees to be charged for facility use.

C. REQUESTS FOR USE OF FACILITIES[5]

An eligible individual or group that wishes to apply for permission to use a school facility must submit a written application to the principal of the school in which the facility is

group, it must provide a written statement of the reason the priority access was denied. Boards that receive community schools program funds may want to modify the priorities in Section B to reflect the statutory requirement regarding priority for patriotic youth groups.

[3] Student organizations with purposes unrelated to the school may be specifically identified in category two or four.

[4] The list also may include for-profit groups.

[5] This process may be modified to reflect local practices.

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located. Facility use request forms will be available in the school administrative office.

D. FACILITIES AVAILABLE FOR USE[6]

The board permits eligible individuals or groups to use the facilities of those schools designated by the board as "community schools." A list of community schools and the facilities at each site that are available for community use will be available to the public at the superintendent's office and each principal's office.[7]

The superintendent is authorized to develop a list of school facilities available for community use. Among the types of facilities that may be available for community use are auditoriums, athletic fields, dining areas, kitchens, designated classrooms, gymnasiums, media centers, and playgrounds.[8]

Other school facilities may be used only in exceptional circumstances based on a justified need and as approved by the superintendent or designee. The superintendent is authorized to determine the fees for the use of facilities in such circumstances.

E. RULES GOVERNING USE OF SCHOOL FACILITIES

The superintendent shall develop regulations consistent with this policy. The regulations will include an application process and provisions regarding the supervision of groups using facilities, the care of facilities, prohibited conduct, and other issues deemed appropriate by the superintendent. A copy of the regulations will be provided to all applicants at the time they receive the facilities use application form. In addition to the regulations established by the superintendent, users of school facilities must comply with the following rules:

1. Users must comply with all federal, state and local laws and all rules established by the board, the superintendent or designee, and the principal.
2. Users must comply with the requirements of the Americans with Disabilities Act (ADA) (particularly Subchapter III pertaining to Public Accommodations and Services Operated by Private Entities) and the federal regulations that have been adopted for the implementation of the ADA.
3. Users must comply with board policy and legal requirements forbidding the use of tobacco products in school facilities and on school grounds (see policy 5026/7250, Smoking and Tobacco Products).

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[6] All provisions in this section may be modified.
[7] The board may choose to direct the superintendent to create a list of school facilities that are available for public use rather than to create a list of designated "community schools." Alternatively, this policy may simply specify that a list of facilities available for community use is available at the superintendent's office, at the principal's office, and on the school website.
[8] The board may add or remove specific types of facilities from this list.

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4. Users must not consume or possess alcohol or drugs on school grounds (see policy 5025, Prohibition of Drugs and Alcohol).

5. Users must not possess weapons or explosives while on school grounds, except in the limited circumstances permitted by state law and policy 5027/7275, Weapons and Explosives Prohibited.

6. Users are responsible for supervising their activity and the people present at their activity. Users are responsible for maintaining order and safety during their activity.

A user's violation of the provisions of this policy or any applicable regulations is grounds for suspending the user's privilege to use school facilities for a period of time deemed appropriate by the principal, subject to the review of the superintendent and the board of education.

F. DAMAGES AND LIABILITY INSURANCE

Users of school facilities are responsible for all damage to school facilities, property or equipment that occurs while the facility is being used by the group, regardless of who caused the damage. Users also are responsible for the conduct of all persons involved in the users' activities while on school property.

All user groups, except school-sponsored groups, must furnish a certificate of insurance for general liability coverage with a total limit coverage of $1,000,000 for each claim made. Alternatively, the superintendent or designee may require the user group to execute a waiver of liability that states that no liability will be attached to the board of education, individually or collectively, for personal injury or personal property damage by reason of use of the school property.[9]

G. TERM AND ACCEPTANCE OF LEASE

The superintendent is authorized to enter into agreements with community groups for the lease of school property for terms of one year or less.[10] All such leases must be reviewed and approved in advance by the board attorney. The superintendent shall inform the board of the execution of any lease at its next regularly scheduled meeting. Leases may be renewed following the same process.

Absent unusual circumstances, leases will not be granted for a term longer than one year. A lease for more than one year must be approved in advance by the board. Long-term

[9] An insurance requirement is recommended. The waiver provision is optional but is intended to provide a means of allowing groups that cannot afford insurance access to facilities. The waiver acknowledges that the user is aware of the "no liability" provision in G.S. 115C-524(b).
[10] The process and terms of the agreements may be modified.

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exclusive leases are subject to the provisions of policy 9400, Sale, Disposal, and Lease of Board-Owned Real Property.

H. Use of Outdoor School Facilities by the General Public

Outdoor property and facilities of the school system will be open to limited use by members of the general public in accordance with rules to be established by the superintendent or designee. Public use will be permitted only to the extent that it 1) is not inconsistent with the proper preservation and care of the outdoor school property; 2) does not interfere with the safe and efficient operation of the schools and school activities; and 3) does not conflict with use by any community group operating under a facility use agreement described in this policy. The superintendent is authorized to establish all terms, conditions, and rules necessary to regulate the use of outdoor facilities by members of the general public consistent with these requirements.

I. Review of Decisions Concerning Use of School Facilities

Any person or organization may request a review of any decision made by a school employee pursuant to this policy in accordance with policy 1740/4010, Student and Parent Grievance Procedure.[11]

Legal References: Americans with Disabilities Act, 42 U.S.C. 12101 *et seq*., 28 C.F.R. pt. 35; Equal Access Act, 20 U.S.C. 4071-4074, 28 C.F.R. pt. 36; Boy Scouts of America Equal Access Act, 20 U.S.C. 7905, 34 C.F.R. pt. 108; 36 U.S.C. 20101 *et seq*.; G.S. 14-269.2; Community Schools Act, G.S. 115C-203 to -209.1; 115C-524, -527; 160A-274; 163A-1046

Cross References: Prohibition Against Discrimination, Harassment, and Bullying (policy 1710/4021/7230), Student and Parent Grievance Procedure (policy 1740/4010), Prohibition of Drugs and Alcohol (policy 5025), Smoking and Tobacco Products (policy 5026/7250), Weapons and Explosives Prohibited (policy 5027/7275), Sale, Disposal, and Lease of Board-Owned Real Property (policy 9400)

Issued: June 1997

Revised: December 20, 2006; August 1, 2007; April 7, 2008; June 30, 2009; September 30, 2010; January 27, 2012; September 30, 2015; March 31, 2016; March 31, 2017; March 29, 2018; September 28, 2018

[11] The board may establish a different review process.

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CARE AND MAINTENANCE OF GROUNDS AND OUTDOOR EQUIPMENT

Policy Code: **9210**

The board strives to make the physical grounds at each school campus part of a safe, orderly and inviting educational environment. To further this goal, the principal shall seek opportunities to involve employees, parents and students at that school in the decisions related to the school grounds and shall make reasonable efforts to maintain the grounds and outdoor equipment in a manner consistent with board goals.

The board recognizes that chromated copper arsenate-treated wood ("arsenate-treated wood") has been found to pose health hazards to students and has been removed from the marketplace for residential uses. Thus, the board prohibits the purchase or acceptance of arsenate-treated wood for future use on school grounds. To the extent possible, the principal[1] or designee shall ensure that existing arsenate-treated wood in playground equipment is sealed.[2]

The principal shall inspect playgrounds and outdoor equipment for other health and safety hazards on a regular basis and as required by law and post warnings of any hazards as necessary to alert the public, staff and students of those hazards.[3] The principal shall notify the superintendent immediately of repairs needed to meet safety standards.

Legal References: G.S. 115C-12(34)(a), -36, -47, -524

Cross References: Student Safety (policy 1510/4200/7270)

Issued: June 1997

Revised: December 20, 2006; June 30, 2009

[1] Designate appropriate position, if not the principal.

[2] Alternatively, the board may adopt a timeline for removing existing arsenate-treated wood from playground equipment according to the guidelines to be established by the State Board of Education pursuant to G.S. 115C-12(34)(a).

[3] Playgrounds with poorly maintained equipment or ground surfaces can be a potential source of serious accidents and liability. Additional procedures may be provided at the administrative level to ensure that playgrounds are safe.

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NOTE: Footnotes are for reference only. They should be eliminated from an individual board's policy.

SCHOOL SAFETY

Policy Code: **1510/4200/7270**

Safe schools are critical to creating a learning environment in which students can succeed.[1] Staff and students share the responsibility for taking reasonable[2] precautions and following established safety measures to create and maintain safe schools. The following safety measures must be implemented at each school.

A. SUPERVISION OF STUDENTS

Students must be reasonably supervised while in the care and custody of the school system. This supervision must occur throughout school hours, including during class, between classes, on the playground, and during recess or lunch periods; during authorized school field trips; and on school buses. Reasonable precautions should be taken to protect the safety of students on school grounds and on buses before, during, and after school.

Students who are subject to policy 4260, Student Sex Offenders, and are receiving educational services on school property must be supervised by school personnel at all times.

B. SUPERVISION OF VISITORS

School administrators shall strictly enforce policies 5015, School Volunteers, and 5020, Visitors to the Schools.

C. SAFETY OF SCHOOL BUILDINGS AND GROUNDS

The superintendent and each building principal shall comply with all duties set out for their respective positions in G.S. 115C-288(d) and G.S. 115C-525 to minimize fire hazards. The principal is required to inspect school buildings, playgrounds, and equipment for health, fire, and safety hazards on a regular basis, as required by law, and to notify the superintendent immediately of unsanitary conditions or repairs needed to meet safety standards.

Any employee who observes any potential hazards must notify the principal or the employee's supervisor immediately.[3]

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[1] The board may modify this policy.

[2] Throughout this policy, a "reasonableness" standard is used. Consult with your board attorney before modifying this standard.

[3] G.S. 115C-524 provides that principals, teachers, and janitors are responsible for the safekeeping of school property. Specifically, under G.S. 115C-524(b) "It shall be the duty of all principals, teachers, and janitors to report to their respective boards of education immediately any unsanitary condition, damage to school property, or needed repair." This policy requires reporting to the superintendent as he or she is the ex officio secretary to the board pursuant to G.S. 115C-41 and policy 2210, Duties of Officers. Alternatively, this policy may be revised to require

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All warning systems must meet building and equipment codes required by law and must be properly maintained. When necessary, proper signs indicating potential hazards or recommended safety precautions must be posted.

D. ESTABLISHING PROCESSES TO ADDRESS POTENTIAL SAFETY CONCERNS AND EMERGENCIES

1. Responding to Student Altercations and Other Threats to Safety[4]

All school system employees have a duty to be alert at all times to situations that may pose a threat to the safety of students, employees, or visitors on school property, at school events, or in other situations in which the students are under the authority of school employees. Even an employee who does not have responsibility for supervising students is expected to make an immediate report if the employee observes or has reason to suspect that a situation poses a threat to safety and no administrator, teacher, or other supervisory employee is present and aware of the potential threat.

Teachers, teacher assistants, coaches, and other employees with responsibility for supervising students will use appropriate student behavior management techniques to maintain order and discipline on school property, at school events, and anywhere that students are under the employees' authority. Such employees must enforce the Code of Student Conduct and address student behavior in accordance with the school plan for management of student behavior (see policy 4302, School Plan for Management of Student Behavior).

When employees with responsibility for supervising students have personal knowledge or actual notice of a student altercation or other situation that poses an immediate threat to safety, they shall use their professional judgment to determine how best to address the situation to protect the safety of everyone in the vicinity. Emergency procedures identified in a student's Behavior Intervention Plan shall be followed to the maximum extent possible under the circumstances. For minor threats or altercations or altercations involving young children, the employee shall intervene directly to end the fight or address the safety threat if the employee can do so safely. An employee who encounters a situation that cannot be managed safely and effectively by that employee immediately shall request assistance from other employees or administrative staff and shall take steps to remove bystanders from the area. Only the degree of force or physical control reasonably necessary shall be used to re-establish a safe environment.

Employees should take further action as appropriate in accordance with any

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that such reports be made to the "local board of education," as specified in G.S. 115C-524.

[4] G.S. 115C-390.3 requires boards to have policies which provide guidelines for an employee's response if the employee knows of a student altercation. The information in this subsection is intended to address that requirement.

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response protocols established by the principal or superintendent. All employees are responsible for knowing and following such protocols to the fullest extent reasonable under the circumstances at the time.

2. School Rules

The principal or designee shall develop rules to help prevent accidents in school buildings, on school buses, and on school grounds.

3. Training for Staff and Students

Staff training must include detailed instruction on how to respond to a variety of emergency situations. Staff should also be able to recognize and respond to behavior, information, and related indicators that warn of impending problems. In addition, middle and high school employees must receive adequate training on the operation of the school's anonymous safety tip line.[5]

School personnel must teach and review with students (1) safety procedures, including fire safety procedures; (2) precautions for handling chemicals or potentially dangerous equipment; and (3) appropriate responses to threats to school safety. Middle and high school students must also be informed of the anonymous safety tip line and its purpose and function.[6]

4. Safety Equipment

School employees shall provide students and visitors with safety equipment as required by law and shall enforce school rules pertaining to wearing safety equipment.[7] School employees shall wear and use appropriate safety equipment as required for the safe performance of their specific job assignments.

5. Planning for Emergencies and Conducting Fire Drills and Other Emergency Drills

The board, in coordination with local law enforcement and emergency management agencies, will adopt a school risk management plan relating to incidents of school violence for each school in the school system.[8] The

[5] See G.S. 115C-105.51(b).

[6] See G.S. 115C-105.51(b).

[7] For example, G.S. 115C-166 and -167 require students, teachers, and visitors in certain shop and lab courses to wear industrial-quality eye protective devices when involved in certain types of instructional activities. In addition, students may be required to wear certain safety equipment in order to participate in certain physical education or athletic activities. G.S. 115C-47(49a)(a) requires the board to certify to the State Board of Education that all high school and middle school laboratories are equipped with appropriate personal protective equipment for students and teachers.

[8] See G.S. 115C-47(40). The board must use the school risk and response management system established by the Division of Emergency Management, Department of Public Safety, in creating and maintaining the plan. S.L. 2015-241, Section 8.26.(k) requires the school risk management plans to be adopted by March 1, 2017.

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superintendent must provide the Department of Public Safety's Division of Emergency Management (Division) with emergency response information[9] it requests for the school risk management plan and updated emergency response information when such updates are made.[10] The superintendent must also provide the Division and local law enforcement with schematic diagrams,[11] including digital schematic diagrams, of all school facilities and updates of the schematic diagrams when the school system makes substantial facility modifications, such as the addition of new facilities or modifications to doors or windows.[12] Schematic diagrams must meet any standards established by the Department of Public Instruction for the preparation and content of the diagrams.[13] In addition, the superintendent shall provide local law enforcement with (1) either keys to the main entrance of all school buildings or emergency access to key storage devices for all school buildings and (2) updated access to school buildings when changes are made to the locks of the main entrances or to the key storage devices.[14]

At least one school-wide tabletop exercise and drill that meets the requirements of state law and is based on the procedures documented in the school risk management plan will be held annually at each school.[15] Principals shall also conduct fire drills as required by law.[16]

6. Reporting Risks to the School Population

Students should notify any staff member of any acts of violence, harassment, or bullying or any other unusual or suspicious behavior that may endanger safety. Middle and high school students may also use the anonymous safety tip line to report any risks to the school population or buildings.[17] Ongoing student

[9] G.S. 115C-105.54(b) clarifies that such emergency response information is not considered a public record under state law.

[10] See G.S. 115C-105.54(a).

[11] G.S. 115C-105.53(c) and G.S. 115C-105.54(b) clarify that schematic diagrams are not considered a public record under state law.

[12] See G.S. 115C-105.53(a) and G.S. 115C-105.54(a).

[13] See G.S. 115C-105.53(b).

[14] See G.S. 115C-105.53(a).

[15] A tabletop exercise involves key personnel conducting simulated scenarios; a drill is a school-wide practice exercise. See G.S. 115C-105.49. The drill must include a practice school lockdown due to an intruder on school grounds. Each school is encouraged to hold a tabletop exercise and drill for multiple hazards included in its school risk management plan. Schools are strongly encouraged to include local law enforcement and emergency management agencies in the tabletop exercises and drills. The purpose of the tabletop exercises and drills will be to permit participants to: (1) discuss simulated emergency situations in a low-stress environment; (2) clarify their roles and responsibilities and the overall logistics of dealing with an emergency; and (3) identify areas in which the school risk management plan needs to be modified. The Department of Public Safety, Division of Emergency Management, and the Center for Safer Schools will provide guidance and recommendations on the types of multiple hazards to plan and respond to, including intruders on school grounds.

[16] See G.S. 115C-288(d).

[17] G.S. 115C-105.51(a) requires the board of each secondary school, defined as a school serving grades six or higher, to develop and operate an anonymous tip line, in coordination with local law enforcement and social services

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education efforts will aim at minimizing any fear, peer pressure, embarrassment, or other impediments to students reporting potential problems.

Maintaining a safe school environment that is conducive to learning requires staff to be proactive in dealing with violence, harassment, and bullying. Staff members must report immediately to the principal any information regarding unusual or suspicious behavior or acts of violence, harassment, or bullying.[18]

Every principal is required to investigate and act upon any report of such behavior, including, when appropriate, reporting criminal activities to law enforcement, the State Board, and the superintendent or designee (see policies 1710/4021/7230, Prohibition Against Discrimination, Harassment, and Bullying, 1720/4015/7225, Discrimination, Harassment, and Bullying Complaint Procedure, and 4335, Criminal Behavior).

7. Potential Threats of Registered Sex Offenders

The principal of each school shall register with the North Carolina Sex Offender and Public Protection Registry to receive e-mail notification when a registered sex offender moves within a one-mile radius of the school.[19]

8. Student Behavior Standards

Students are expected to meet behavior standards set forth in board policies.

Legal References: G.S. 14-208.18; 115C-36, -47, -105.49, -105.51, -105.53, -105.54, -166, -167, -288, -289.1, -307, -390.3, -391.1, -521, -524, -525; State Board of Education Policies SSCH-000, SCFC-005

Cross References: Prohibition Against Discrimination, Harassment, and Bullying (policy 1710/4021/7230), Discrimination, Harassment, and Bullying Complaint Procedure (policy 1720/4015/7225), School Improvement Plan (policy 3430), Student Sex Offenders (policy 4260), Student Behavior policies (4300 series), School Volunteers (policy 5015), Visitors to the Schools (policy 5020), Registered Sex Offenders (policy 5022), Weapons and Explosives Prohibited (policy 5027/7275), Public Records – Retention, Release, and Disposition (policy 5070/7350), Relationship with Law Enforcement (policy 5120), Occupational Exposure to Hazardous Chemicals in Science Laboratories (policy 7265), Staff Responsibilities (policy 7300), Security of Facilities (policy 9220)

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agencies, to receive anonymous information on internal or external risks to the school population, school buildings, and school-related activities.

[18] G.S. 115C-307(a) specifically requires teachers, student teachers, substitute teachers, voluntary teachers and teacher assistants to report acts of violence. In addition, G.S. 115C-289.1 requires supervisors to report to the principal any known assault on a school employee that results in physical injury. This policy expands the reporting requirements to all staff and incorporates suspicious behavior.

[19] The board may opt to require the principal to register for notification within a larger radius of the school, such as a five-mile radius.

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Other Resources: *Practical Information on Crisis Planning: A Guide for Schools and Communities*, U.S. Department of Education Office of Safe and Drug-Free Schools (January 2007), available at http://www2.ed.gov/admins/lead/safety/crisisplanning.html

Issued:

Revised: March 6, 1998; September 24, 1999; January 31, 2006; June 30, 2008; October 15, 2008; December 1, 2009; March 31, 2011; September 30, 2011; September 27, 2012; September 13, 2013; September 30, 2014; November 13, 2015; April 28, 2017; September 29, 2017; September 28, 2018

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§ 115C-524. Repair of school property; use of buildings for other than school purposes.

(a) Repair of school buildings is subject to the provisions of G.S. 115C-521(c) and (d).

(a1) Local boards of education may employ personnel who are licensed to perform maintenance and repairs on school property for plumbing, heating, and fire sprinklers pursuant to Article 2 of Chapter 87 of the General Statutes.

(b) It shall be the duty of local boards of education and tax-levying authorities, in order to safeguard the investment made in public schools, to keep all school buildings in good repair to the end that all public school property shall be taken care of and be at all times in proper condition for use. It shall be the duty of all principals, teachers, and janitors to report to their respective boards of education immediately any unsanitary condition, damage to school property, or needed repair. All principals, teachers, and janitors shall be held responsible for the safekeeping of the buildings during the school session and all breakage and damage shall be repaired by those responsible for same, and where any principal or teacher shall permit damage to the public school buildings by lack of proper discipline of pupils, such principal or teacher shall be held responsible for such damage: Provided, principals and teachers shall not be held responsible for damage that they could not have prevented by reasonable supervision in the performance of their duties.

(c) Notwithstanding the provisions of G.S. 115C-263 and 115C-264, local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. No liability shall attach to any board of education or to any individual board member for personal injury suffered by reason of the use of such school property pursuant to such agreements.

(d) Local boards of education may make outdoor school property available to the public for recreational purposes, subject to any terms and conditions each board deems appropriate, (i) when not otherwise being used for school purposes and (ii) so long as such use is consistent with the proper preservation and care of the outdoor school property. No liability shall attach to any board of education or to any individual board member for personal injury suffered by reason of the use of such school property. (1955, c. 1372, art. 15, s. 9; 1957, c. 684; 1963, c. 253; 1981, c. 423, s. 1; 1985 (Reg. Sess., 1986), c. 975, s. 23; 1991 (Reg. Sess., 1992), c. 900, s. 79(a); 2015-64, s. 1; 2016-105, s. 4.)

§ 143-300.1. Claims against county and city boards of education for accidents involving school buses or school transportation service vehicles.

(a) The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise as a result of any alleged mechanical defects or other defects which may affect the safe operation of a public school bus or school transportation service vehicle resulting from an alleged negligent act of maintenance personnel or as a result of any alleged negligent act or omission of the driver, transportation safety assistant, or monitor of a public school bus or school transportation service vehicle when:

(1) The driver is an employee of the county or city administrative unit of which that board is the governing body, and the driver is paid or authorized to be paid by that administrative unit,

(1a) The monitor was appointed and acting in accordance with G.S. 115C-245(d),

(1b) The transportation safety assistant was employed and acting in accordance with G.S. 115C-245(e), or

(2) The driver is an unpaid school bus driver trainee under the supervision of an authorized employee of the Department of Transportation, Division of Motor Vehicles, or an authorized employee of that board or a county or city administrative unit thereof,

and which driver was at the time of the alleged negligent act or omission operating a public school bus or school transportation service vehicle in accordance with G.S. 115C-242 in the course of his employment by or training for that administrative unit or board, which monitor was at the time of the alleged negligent act or omission acting as such in the course of serving under G.S. 115C-245(d), or which transportation safety assistant was at the time of the alleged negligent act or omission acting as such in the course of serving under G.S. 115C-245(e). The liability of such county or city board of education, the defenses which may be asserted against such claim by such board, the amount of damages which may be awarded to the claimant, and the procedure for filing, hearing and determining such claim, the right of appeal from such determination, the effect of such appeal, and the procedure for taking, hearing and determining such appeal shall be the same in all respects as is provided in this Article with respect to tort claims against the State Board of Education except as hereinafter provided. Any claim filed against any county or city board of education pursuant to this section shall state the name and address of such board, the name of the employee upon whose alleged negligent act or omission the claim is based, and all other information required by G.S. 143-297 in the case of a claim against the State Board of Education. Immediately upon the docketing of a claim, the Industrial Commission shall forward one copy of the plaintiff's affidavit to the superintendent of the schools of the county or city administrative unit against the governing board of which such claim is made, one copy of the plaintiff's affidavit to the State Board of Education and one copy of the plaintiff's affidavit to the office of the Attorney General of North Carolina. All notices with respect to tort claims against any such county or city board of education shall be given to the superintendent of schools of the county or city administrative unit of which such board is a governing board, to the State Board of Education and also to the office of the Attorney General of North Carolina.

(b) The Attorney General shall be charged with the duty of representing the city or county board of education in connection with claims asserted against them pursuant to this section where the amount of the claim, in the opinion of the Attorney General, is of sufficient import to require and justify such appearance.

(c) In the event that the Industrial Commission awards damages against any county or city board of education under this section, the Attorney General shall draw a voucher for the amount required to pay the award. The funds necessary to cover the first one hundred fifty thousand dollars ($150,000) of liability per claim for claims against county and city boards of education for accidents

involving school buses and school transportation service vehicles shall be made available from funds appropriated to the State Board of Education. The balance of any liability owed shall be paid in accordance with G.S. 143-299.4. Neither the county or city boards of education, or the county or city administrative unit shall be liable for the payment of any award made pursuant to the provisions of this section in excess of the amount paid upon a voucher by the Attorney General. Settlement and payment may be made by the Attorney General as provided in G.S. 143-295.

(d) Except as otherwise provided in this subsection, the Attorney General may, upon the request of an employee or former employee, defend any civil action brought against the driver, transportation safety assistant, or monitor of a public school bus or school transportation service vehicle or school bus maintenance mechanic when the driver or mechanic is employed and paid by the local school administrative unit, when the monitor is acting in accordance with G.S. 115C-245(d), when the transportation safety assistant is acting in accordance with G.S. 115C-245(e), or when the driver is an unpaid school bus driver trainee under the supervision of an authorized employee of the Department of Transportation, Division of Motor Vehicles, or an authorized employee of a county or city board of education or administrative unit. The Attorney General may afford this defense through the use of a member of his staff or, in his discretion, employ private counsel. The Attorney General is authorized to pay any judgment rendered in the civil action not to exceed the limit provided under the Tort Claims Act. The funds necessary to cover the first one hundred fifty thousand dollars ($150,000) of liability per claim shall be made available from funds appropriated to the State Board of Education. The balance of any liability owed shall be paid in accordance with G.S. 143-299.4. The Attorney General may compromise and settle any claim covered by this section to the extent that he finds the same to be valid, up to the limit provided in the Tort Claims Act, provided that the authority granted in this subsection shall be limited to only those claims that would be within the jurisdiction of the Industrial Commission under the Tort Claims Act.

The Attorney General shall refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the Attorney General determines that:

(1) The act or omission was not within the scope and course of his employment as a State employee; or

(2) The employee or former employee acted or failed to act because of actual fraud, corruption, or actual malice on his part; or

(3) Defense of the action or proceeding by the State would create a conflict of interest between the State and the employee or former employee; or

(4) Defense of the action or proceeding would not be in the best interests of the State. (1955, c. 1283; 1961, c. 1102, ss. 1-3; 1967, c. 1032, s. 1; 1975, c. 589, s. 1; c. 916, ss. 1, 2; 1977, c. 935, s. 1; 1979, 2nd Sess., c. 1332, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, s. 30; 1998-212, s. 9.17(b); 2000-67, ss. 7A(f), 7A(g); 2001-424, s. 6.18.)

NOTE: Footnotes are for reference only. They should be eliminated from an individual board's policy.

USE OF STUDENT TRANSPORTATION SERVICES *Policy Code:* 6320

Student transportation services will be made available in a manner consistent with the board goals set out in policy 6300, Goals of Student Transportation Services.

A. School System Transportation Services

The first priority of the school system transportation services is to provide eligible students[1] transportation to and from school. The school system may make other transportation services available as funding permits and in accordance with legal requirements, board policy, and the following standards.

1. Yellow school buses may be used for instructional programs directly related to the curriculum when the trip and use of the bus are approved in accordance with board policy.[2]

2. Yellow school buses may be used only for purposes expressly allowed by G.S. 115C-242.

3. Yellow school buses may not be used for athletic activities or extracurricular activities.

4. [3]Activity buses and other vehicles meeting federal safety standards may be used for travel to athletic activities[4] and travel to other approved school-related activities.[5] In addition to students receiving regular school bus safety training, safety instruction will be provided to students traveling on activity buses or commercial buses as needed.[6]

5. The board encourages the superintendent and principals to provide transportation services to enable students at risk of not meeting promotion standards to take advantage of additional or enhanced opportunities for learning.

B. Special Use of School Buses

The board may authorize special uses of yellow school buses as provided by G.S. 115C-

[1] The term "eligible students" may be modified to "students most in need of the services."
[2] State funds must be reimbursed for these purposes. This requirement may be specifically stated.
[3] The board could specify the color of its activity buses here and throughout the policy to provide further clarification. For example, "white activity buses."
[4] This provision is required by G.S. 115C-247. This provision includes travel to regular season and playoff athletic activities.
[5] The requirement that federal standards be met means that passenger vans may not be used to transport students. This restriction is strongly recommended by the Department of Public Instruction and NCSBA.
[6] See State Board of Education Policy TRAN-006.

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242 and 115C-254 and of activity buses and yellow school buses as provided by G.S. 115C-243 and 115C-247. The board may also authorize the special use of activity buses for the purposes described in G.S. 66-58(c)(9b).

The superintendent shall present to the board any requests for special uses and the statutory support for allowing such authorization.

C. TRANSPORTATION FOR STUDENTS WITH DISABILITIES

A student who is identified as having a disability following procedures in the North Carolina *Policies Governing Services for Children with Disabilities* will be provided with transportation services as required by law. When the school system's transportation services are unable to provide transportation for a student with a disability, the board may contract with public or private carriers to provide this service, pursuant to policy 6340, Transportation Service/Vehicle Contracts.

Legal References: Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq*.; 49 U.S.C. 30125, 30165; G.S. 66-58(c)(9a) and (9b); 115C-239, -242, -243, -247, -254; *Policies Governing Services for Children with Disabilities*, State Board of Education Policy EXCP-000; State Board of Education policies TRAN-000, -006; Memorandum to All Superintendents from Eddie M. Speas, Jr., Special Deputy Attorney General, January 14, 1988, available at http://www.ncsba.org/wp-content/uploads/2017/03/AG-Memo-1988.pdf

Cross References: School Trips (policy 3320), Goals of Student Transportation Services (policy 6300), Safety and Student Transportation Services (policy 6305), Transportation Service/Vehicle Contracts (policy 6340)

Issued:

Revised: August 31, 2006; April 7, 2008; April 28, 2009; January 27, 2012; March 31, 2017

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Public Schools of North Carolina

State Board of Education
Phillip J. Kirk, Jr., Chairman

Department of Public Instruction
Michael E. Ward, State Superintendent

http://www.dpi.state.nc.us

January 27, 1998

TO: Distribution

FROM: Derek Graham, Section Chief
Transportation Services

SUBJECT: The Use of Passenger Vans for Transporting Students

The following information may be of interest to Local Boards of Education in deciding the extent to which vans and other passenger vehicles are used to transport students to school related events.

1) According to the National Highway Traffic Safety Administration, US Dept. of Transportation, a School Bus is a vehicle built to transport 11 or more passengers (including the driver) and is used to transport students to school or school-related events. This includes both School Buses and Activity Buses as defined by the State of North Carolina.

2) According to a 1988 memorandum from Eddie Speas, Special Deputy Attorney General, "State law requires that all vehicles used to transport students for instructional purposes be designed and equipped in accordance with federal school bus construction specifications. Thus, a school system may not use a van that does not meet federal standards to transport students for instructional purposes." These specifications include all Federal Motor Vehicle Safety Standards applicable for school buses, including roll-over protection, side impact strength, joint strength, passenger seating and many more.

3) According to the same memo from Mr. Speas, "State law does not require that vehicles used to transport students for extracurricular purposes be designed and equipped in accordance with federal standards." He goes on to say that "School systems should consult their attorneys for advice regarding the possibility of enhanced liability in connection with accidents involving vans that do not meet federal school bus safety standards, and to determine whether liability insurance protects the board and board members in such circumstances."

4) Consistent with that memorandum, the Department of Public Instruction has maintained that the decision to use vans for school-related events is a local decision.

5) An automotive dealer is prohibited by federal law from selling a school bus (as defined in (1) above) that does not meet federal school bus safety standards. Several dealers have been fined by the National Highway Traffic Safety Administration (NHTSA) for violating this law, including two dealers in North Carolina. (According to NHTSA, Flow Automotive in Winston-Salem and Kieffer Dodge in Charlotte have paid fines for violating this law.)

6) Our agency has received several pieces of correspondence from NHTSA over the past 2-3 years pointing out the issues described in (1) and (5) above, requesting that we "take steps to assure that all schoolchildren in your State are carried on certified school buses." The most recent correspondence was received October 15, 1997 and is signed by the Administrator of NHTSA, Dr. Ricardo Martinez. From the legal as well as safety perspectives, we have felt it our responsibility to advise North Carolina school districts (as well as private schools and charter schools) on this issue so they can make a well-informed decision.

FILE COPY

State of North Carolina
Department of Justice
P.O. BOX 629
RALEIGH
27602-0629

H. THORNBURG
ORNEY GENERAL

January 14, 1988

MEMORANDUM

TO: All Superintendents

FROM: Edwin M. Speas, Jr., Special Deputy Attorney General

SUBJECT: Use of Vans to Transport Students

In June, 1987 many of you received materials from a bus company that implied that school systems could not use a van to transport students unless the van complied with federal school bus specifications. Through the efforts of Senator Terry Sanford, federal officials have confirmed in writing that federal law does not contain such a limitation, and many of you have received correspondence from the Senator in that regard.

The purpose of this memorandum is to explain the limitations that do exist on the use of vans, and to outline factors school systems may want to consider in deciding whether to continue to use vans.

1. Federal law does not prohibit a school system from using a van that does not meet federal school bus construction specifications to transport students (see attached letter).

2. State law requires that all vehicles used to transport students for instructional purposes be designed and equipped in accordance with federal school bus construction specifications. Thus, a school system may not use a van that does not meet federal standards to transport students for instructional purposes. See G.S. 115C-240(c) and 242.

3. State law does not require that vehicles used to transport students for extracurricular purposes be designed and equipped in accordance with federal standards. Thus, a school system may use a van that does not meet federal standards to transport students for extracurricular purposes. See G.S. 115C-247. Vans used for this purpose, however, must not be painted "school bus yellow" or be marked "school bus".

4. In deciding whether or not to use vans that do not meet federal standards to transport students for extracurricular purposes, local boards will want to consider, among other things, the safety of students and the possibility of enhanced liability in the event of an accident.

5. School systems should consult their attorneys for advice regarding the possibility of enhanced liability in connection with accidents involving vans that do not meet federal school bus standards, and to determine whether liability insurance protects the board and board members in such circumstances.

EMSjr/ed

Attachment