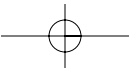
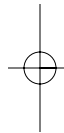
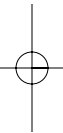
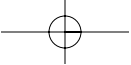


PART I

A Review of the Legal Environment and the Function of Law



1

Why Me?

The vast majority of educators are competent, capable, caring people. Yet even honorable professionals run the risk of making a bad decision or unintentionally causing harm. When someone is injured on school property or at a school-sponsored event, it's important to understand that an educator's intent is irrelevant; it is the impact of the educator's action or inaction that is important. As a school leader, you have to think like a risk manager and objectively assess the potential consequences of every situation. In our litigious society, when people believe that they have been harmed, they look for someone to hold responsible. When the injury occurs in your school or district, this search may well focus on you. The problem facing school districts and, ultimately, you is not whether you are immune from lawsuits, but whether you can develop solutions to minimize your legal liability. Before we turn our attention to the anatomy of a lawsuit, let's take a moment to remind ourselves why lawsuits, and the subsequent litigation, occur in our profession.

Standards of Care

Whether you're a member of a school district's academic team (teacher, director, principal, or superintendent) or a member of the district's support team (secretary, custodian, lunchroom worker, etc.), the prospect of being involved in litigation sometime in your career is clearly possible in today's society. Regardless of the specific incident on which a lawsuit is based, generally, the critical question for the

court to decide is whether or not your actions as a school district employee met the standard of care expected for the education profession. If you can prove that your actions met or exceeded the accepted standard of care, you will likely not be found liable. However, if your actions or, in some cases, the actions of your subordinates, did not meet the standards of the profession, you may well be found liable.

In most cases involving an allegation that a school employee has harmed a student (or parent, fellow employee, or patron), the employee's immediate supervisor, i.e. the school principal, is also named as a defendant. In addition, under the concept of *Respondeat Superior*, the superintendent and each member of the district's Board of Education are usually named in the lawsuit. Generally, the plaintiff attempts to show that the alleged harm would not have occurred if the supervisor(s) or other school employees had performed their duties according to the standard of care required of the profession¹.

In education, as in other professions, the standard of care is the degree of skill and knowledge that can reasonably be expected of a normal prudent practitioner with the same experience and standing. In some professions the professional standards are quite well-established. For example, in medicine, various treatment procedures and protocols are well documented in the literature, and the medical profession generally agrees on the standard of medical care for a given disease or condition. These standards are seldom controversial, and where disagreement does exist, the standards are illustrated by scientific principles; laboratory procedures; and approved, accepted methodologies.

In the field of education, professional standards of care are not only the concern of education professionals and professionals in training, but are issues of real legal liability. The "standard," as understood by a judge and jury, is likely to be influenced by the professional literature and opinions of recognized experts in the field of education administration. Increasingly, the standard of care is being interpreted to mean behavior consistent with recent literature published by recognized authorities in the field of education administration and leadership.

Negligence

Regardless of the specific injury that is alleged, much of the litigation surrounding school administration includes some claim of negligence. Although the law of negligence is a complex area, there are some fundamental principles that apply. People are negligent when they

act without due care and attention or they fail to act, and a person whose welfare they ought to have considered is injured by their actions or their failure to act.

Suits for negligence fall under the legal heading of torts—legal wrongs. Negligent torts are historically classified into three categories:

- The direct invasion of someone's legal right (i.e., invasion of privacy)
- The breach of some public duty that causes some damage to an individual (i.e., denial of constitutional rights)
- The violation of some private obligation that causes some damage to an individual

The underlying concept of torts involves the relationship between individuals. Under our system of law, individuals have the right to be free from injury (physical, psychological/emotional, property, financial, etc.) whether intentionally or carelessly caused by others. Negligence may occur in one of three ways: nonfeasance, misfeasance, or malfeasance.

Nonfeasance—the failure to act when there is a duty to act. Nonfeasance is an act of omission, or passive inaction, because of which an injury occurs, due to a lack of the protections that the law expects of a reasonable individual. In order for nonfeasance to result in liability for negligence, a duty to take positive action or to perform a specific act must be established. This duty may be established by a legal statute or by the relationship (for example, principal/teacher/student) between the parties involved. An example of nonfeasance is illustrated by *Gammon v. Edwardsville* (1980). In this case, an eighth-grade girl complained to the school guidance counselor that she feared being physically harmed, based on the verbal threats of another student. The other student was summoned to the counselor's office and was told that fighting would not be tolerated and would result in suspension. Later, in the school yard, the other student struck the complaining girl in the eye with her fist, causing a serious injury. The injured student claimed that the school's response to a given and known threat of violence on school premises was inadequate. The court ruled in favor of the injured girl.

Misfeasance—acting in an improper manner. Misfeasance is taking an improper action when there is a duty to act, and may be either an act of omission, or an act of commission. An act of omission is illustrated by *Libby v. West Coast Rock Co. Inc.* (1975). In this case, a student fell into a ditch while attempting to catch a pass in a game of football

played during the school's lunch period. The principal was aware of the ditch on the school's property, but had made minimal attempts to warn students and no attempt to fill the ditch. The student was injured and claimed that the school district, knowing of the hazard, did not take proper steps to protect him. The court ruled in favor of the student.

An act of commission is illustrated by *Magabgab v. Orleans Parish School Board* (1970). In this case, a football player passed out on the football field and was treated by school personnel for heat exhaustion instead of the actual illness, heat stroke. The student died as a result of the latter, as well as from the amount of time that the supervisors took before contacting the parents or seeking emergency aid. The court ruled in favor of the parents of the student.

Malfeasance—acting, but guided by a bad motive. Malfeasance is an illegal act that should not have been performed at all. In the school setting, it can occur when an individual acts beyond the scope of duty. A hypothetical case may illustrate the salient points best. Assume that a teacher administers corporal punishment to a student even though school district policy prohibits corporal punishment. The student is injured as a result of the punishment and brings charges against the school district. The court would likely rule for the student because the act was illegal under school district policy.

The Concept of Foreseeability

Foreseeability is the “degree to which the defendant could have or should have reasonably been able to anticipate the risk of injury or harm to the plaintiff that might result from the action or inaction” (Alexander & Alexander, 2001, p. 560). The expectation of foreseeability regarding the risks inherent in an education setting is greater for educators, because of their superior knowledge, special skills, and professional experience working in an education environment, than it would be for the average citizen who is not professionally trained and experienced as an educator. If you could have, or should have, foreseen or anticipated an accident, your failure to do so may be ruled negligence.

For example, let's suppose that Sally, a sixth-grade student, or even Sally as a twelfth-grade student, slips and falls on spilled spaghetti left on the floor during lunch time in your school's cafeteria. Sally suffers a severe laceration as a result of her fall. The spaghetti, according to other students, had been on the floor for at least

20 minutes. Your duty of care can be understood by answering the following questions:

- Was there a reasonably foreseeable risk of harm for Sally?
- What adult action would have been needed to avoid the harm to Sally?
- Could the adult in question, i.e. lunchroom worker, custodian, supervising teacher, etc., reasonably have been expected to take that action?
- Was the conduct of any person a departure from the standard of care?
- Was there a cause-effect relationship between the negligence and the harm or damage caused?

And what if a teacher (Steve) who went to help Sally also slipped and fell? As a result of his fall and his efforts to help Sally, Steve suffered severe and long-term back injuries that may prevent him from returning to work. The same questions would apply to determine your duty of care regarding Steve. You can use those five basic questions in assessing your own liability in any situation in which a child, adult, or even a visitor is physically injured while under your sphere of supervision.

The concept of foreseeability expects you to perform as a reasonably prudent person of similar training and circumstances should perform. This degree of care is based on the relative age, training, maturity, and experience, as well as any other related characteristics of the educator. The law does not require you to be able to predict everything that might happen in the immediate future, nor do the courts require the educator to completely ensure the safety of students and others. Courts do, however, expect you to act in a reasonable and prudent manner. If the ordinary exercise of prudence and foresight could have prevented an accident that caused an injury, courts have ruled educators negligent.

Your *In Loco Parentis*² Duty as a School Leader to Provide a Safe Learning Environment

Our society generally assumes that during the time a student is away from home and involved in school activities, the student's interests, welfare, and safety are directed by, and under the control of, reasonable,

responsible, trained adults. As a school leader, you are responsible for the safety and welfare of the students placed in your care, custody, and control.

Education reform literature emphasizes that a safe and orderly learning environment is essential for learning. The professional literature further holds that building administrators (principals and assistant principals) are the most important players in ensuring a positive learning environment. You are responsible for supervising students, teachers, and support staff, and for ensuring that your school is a safe and healthy place to learn. You are also responsible for ensuring compliance with all school district policies and state laws.

Some negligence cases against school districts have been based on the argument that the school has a constitutional or statutory duty to protect students because of a "special" relationship between the child and the school. Although this argument is frequently put forward, courts, in general, have not been willing to extend the protection of the special relationship with schoolchildren infinitely. While laws mandate school attendance, the courts have generally agreed that the state has not assumed responsibility for the children's entire lives. Children and their parents retain substantial freedom to act and are responsible for their actions.

Section 1983

Section 1983 of the Civil Action for Deprivation of Rights Act is one of the most commonly used causes of action to redress violations of federal constitutional rights by government officials. Section 1983 holds "every person" acting under color of state law liable for depriving any other person in the United States of "any rights, privileges, or immunities secured by the Constitution and laws." To recover damages against a government official under section 1983, a plaintiff must establish that:

A constitutional right existed.

The defendant violated that right under color of state law.

The defendant's act is the proximate cause of the plaintiff's injury.³

Plaintiffs can bring a successful action under section 1983 if individuals acting under color of state law deprived them of a constitutional right, and they were deprived of their constitutional rights

without the due process of law. Although individuals who violate someone's rights while acting outside the scope of their authority may be held personally liable, section 1983 provides qualified or conditional immunity from civil prosecution to individuals as long as they are acting clearly within the scope of their authority.

Knowing and Assimilating Your School District's Policies and Procedures

One of the clearest statements of your duties and standard of care, as a school leader, is contained in your school district's official policies and procedures. In the event that a complaint is filed against you, the first question likely to be asked is whether or not your actions (or inaction) were in compliance with district policies and procedures. To the extent that they were, your personal liability will certainly be limited, since you were acting in a prudent manner. It's important, therefore, that you be fully cognizant of your district's policies and procedures and ensure that you and your faculty and staff follow them at all times.

Ethics Versus the Law

The distinction between ethical and legal issues is often vague. Ethical concepts become legal principles only when a legislature enacts a specific law or a court publishes a decision. If there is a conflict between your ethics and the law, you are bound to comply with the law. For example, in a case of suspected child abuse, you may know and understand the state's child abuse law, but be reluctant to report your suspicion because you don't want to risk damaging another person's reputation without "proof of abuse." Every state has a statute that identifies school leaders as mandatory reporters of "suspected" child abuse. Based on your sense of ethics and fairness, you may be tempted to personally investigate the situation before reporting the suspected abuse to state authorities. However, laws override ethical principles, which do not have the strength of law. You must report the suspected abuse, even at the risk of harming an innocent person's reputation.

Sometimes your personal loyalties can conflict with your legal duty. You have an affirmative responsibility, no matter what the consequences may be, to provide a learning/teaching environment that's

as safe as possible. If you have knowledge of practices or procedures that are legally questionable, you must make every effort to observe the employee whose behavior is questionable and to advise him or her to immediately cease that behavior. However, once a formal complaint has been discussed or filed, you must refrain from any actions that could be construed as interference with an impending or ongoing investigation by appropriate authorities.

What Constitutes Acceptable Behavior by You as an Education Professional

In the final analysis, what constitutes acceptable behavior for education leaders is decided by society, as represented by federal and state constitutions, federal and state statutes, administrative law, local district policy, court-made law, standards of the profession, and the “best practice of the profession,” as presented by various professional organizations and other recognized authorities in the field of education.

The three sources of law that most directly affect the operation of schools are statutes, administrative law, and case, or common, law. Statutes are laws enacted by state or federal legislatures. Administrative laws are regulations promulgated by administrative agencies (the U.S. Department of Education, state boards of education, etc.). Both are published after enactment. Statutes are considered the primary source of law. School leaders are expected to know and obey all of the laws and regulations that control the operation of schools.

In contrast to statutes, common law, or case law, is the body of judge-made law (e.g., legal decisions that interpret prior case law and statutes). Experts believe that statutes are not law until they have been tested and adjudicated in a court of law. When a court is confronted with an issue that can't be resolved by reference to pertinent statutory or administrative law, it decides the case according to common law.

The common law tradition interprets how laws are to be understood. Case law follows the doctrine of *stare decisis* (to stand by things already decided), in which lower courts make decisions that are consistent with the decisions of higher courts, under the principle of “precedent.” Common law is not automatic but must be applied by a court. When courts decide specific disputes, they examine constitutional, statutory, and administrative law. The court determines the facts of the case and then examines prior judicial decisions to identify legal precedents.

After federal and state statutes and legal precedents, standards of professional organizations and professional literature are the most common sources for definitions of duty and standards of care. These professional standards are often used to delineate or benchmark the expected standard of care. During the testimony of a school district employee in a court case, it is a common practice for the plaintiff's attorney to ask the employee to agree that a certain source is authoritative. For example, the attorney might say, "Mr. Jones, as principal of Shady Brook High School, do you agree that the National Association of Secondary School Principals is the leading professional organization for secondary school principals?" Once it is established that Principal Jones agrees that the National Association of Secondary School Principals (NASSP) is a nationally respected association for school administrators, the attorney then attempts to point out where Jones' behavior did not conform to the standards presented in various documents from this organization. (Note: Other principals' organizations, such as the National Association of Elementary School Principals, have similar published standards.)

In recent years, several sets of comprehensive standards have been developed to guide the professional development of school leaders. One of the earliest of these standards is *Guidelines for the Preparation of School Administrators*, published by the American Association of School Administrators in 1983. These guidelines were followed by two significant NASSP publications: *Performance-Based Preparation of Principals: A Framework for Improvement* (1985) and *Developing School Leaders: A Call for Collaboration* (1992). In 1990, the National Commission for the Principalship published *Principals for Our Changing Schools: Preparation and Certification* and the National Association of Elementary School Principals published *Principals for the Twenty-First Century*. These publications paved the way for the subsequent standard-building work of the National Policy Board for Educational Administration (NPBEA). NPBEA is a consortium of nine associations representing the education administration profession.⁴

As a result of two decades of collaborative research, two publications have emerged that include what are generally accepted as the performance standards for principals. These standards are included in *21 Performance Domains of the Principalship* (1992), produced by NPBEA, and *Six Standards for School Leaders* (1996), developed by the Interstate School Leaders Licensure Consortium (ISLLC).

Both of these publications identify benchmarks against which a principal's performance will likely be measured. ISLLC Standards 5 and 6 address the relationship of the standards to practice. Standard

5 states that “a school administrator is an educational leader who promotes the success of all students by acting with integrity, fairness, and in an ethical manner” (p. 18). This standard has been interpreted to mean that an administrator has knowledge and understanding of the purpose of education, the role of leadership in modern society, and the values of the diverse school community. Consequently, the administrator

serves as a role model, accepts responsibility for school operations, considers the impact of one’s administrative practices on others, treats people fairly, equitably, and with dignity and respect, protects the rights and confidentiality of students and staff, demonstrates appreciation for and sensitivity to the diversity in the school community. . .[and] will demonstrate integrity and exercise ethical behavior, and applies laws and procedures fairly, wisely, and considerately. (Skarla, Erlandson, Reed, & Wilson, 2001, p. 112)

Standard 6 states that “a school administrator is an educational leader who promotes the success of all students by understanding, responding to, and influencing the larger political, social, economic, legal and cultural context” (p. 19). This standard has been interpreted to mean that an education leader

“Know[s] the law as it relates to education and schooling”

Is “committed to using legal systems to protect student rights and improve student opportunities”

Is required to “work within the framework of policies, laws, and regulations enacted by local, state, and federal authorities”

“Promotes the success of all students by understanding, responding to, and influencing the larger political, social, economic, legal, and cultural context”

Recognizes the importance of diversity and equity in a democratic society

Facilitates process and engages in activities ensuring that the school community works within the framework of policies, laws, and regulations enacted by local, state, and federal authorities. (Skarla et al., 2001, pp. 122–123)

As a school leader, to manage your personal and professional risk of litigation, you should know, at a minimum:

- The state statutes that govern the operation of a school
- School board approved policies and procedures
- Leading state and federal court cases that govern the operation of the school.

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- Garcia v. City of New York*, 646 NYS2d 509 (1996).
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- United States v. Classic*, 313 U.S. 299 (1941).

Notes

1. *Respondeat Superior*: Based on English common law, this doctrine holds that a master is liable in certain circumstances for the negligent acts of his servant if the negligent acts occurred in the course of employment. Courts have generally held the employer liable only for actions that are outrageous, motivated by personal interests, or not serving a rational business purpose, or where the employer deliberately remained ignorant of criminal conduct. The contemporary justification for this doctrine is that if an employer knows that it may be held liable for the actions of its employees, it is more likely to exercise care in the selection, employment, and supervision of its employees.

2. *In Loco Parentis*: The doctrine of in loco parentis holds that when children leave the protection of their parents, the school takes over physical custody and control of the children and effectively takes the place of their parents (*Garcia v. City of New York*, 1996). The U.S. Supreme Court acknowledged there is an "obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children . . ." (*Bethel School District No. 403 v. Fraser*, 1986).

3. To act "under color of state law" means to act beyond the bounds of lawful authority, but in such a manner that the unlawful act is done while the official is purporting or pretending to act in the performance of his or her

official duties. In other words, the unlawful act must consist of an abuse or misuse of power that the official possesses only because he or she is an official. For example, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under the color of' state law." (*United States v. Classic*, 1941).

4. The NPBEA consortium includes: American Association of Colleges for Teacher Education, Association of School Business Officials, Council of Chief State School Officers, National Association of Secondary School Principals, National School Boards Association, American Association of School Administrators, Association for Supervision and Curriculum Development, National Association of Elementary School Principals, National Council of Professors of Educational Administration, and University Council for Educational Administration.

5. For a detailed discussion of the 21 Performance Domains that define the basis for exemplary principal performance, see Skarla et al. (2001).

Some material in this chapter is drawn from "Identifying a Standard of Care," by Robert J. Shoop, 2002, *Principal Leadership*, 2, and is used with permission of the National Association of Secondary School Principals.