

2013 Spring Academy



School District Liability: *General Concepts*

Dan Mallin, WASB Staff Counsel

May 4, 2013

State and Federal Sources of Liability

State Law:

- “Torts” (breach of a duty of care)
- Contract claims
- Statutory/regulatory claims
- Worker’s compensation
- Unemployment benefits
- State constitutional claims

Federal Law:

- Statutory/regulatory claims
 - Private claims/suits
 - Direct federal enforcement
 - *Examples: IDEA; Sec. 504; employment; Title IX; FERPA*
- Federal constitutional claims
 - *Examples: First Amendment; Fourth Amendment; Due Process; Equal Protection*

Caution: Local decisions can either increase or decrease a school district’s liability risk under state and federal law (e.g., policies/contracts)



Examples of “Torts”

- ▶ Negligence:
 - Conduct that a reasonable person would engage in (or avoid) to prevent another from suffering damages from a foreseeable risk of harm.

- ▶ Fraud, interference with a contract

- ▶ Defamation (libel, slander)

- ▶ Property torts (e.g., trespass, conversion)

- ▶ Intentional torts:
 - Assault, battery, false imprisonment, intentional infliction of emotional harm



Protection from liability

Legal:

- Immunity
- Statutes of limitations (and similar)
- Damages limitations (type/amount)
- Denying a private right of action
- Indemnification
- Mandatory exhaustion of administrative remedies
- Worker's compensation

Local:

- Policies, procedures, and training
- Insurance
- Bonding of school officials
- Risk shifting via contract / waivers
- Forum selection via contract (including arbitration clauses)
- Settlements

Caution: There are often “exceptions to the protections”



Example: Protection from Liability Under Certain State Tort Claims

- ▶ “Notice of Claim” requirement (sec. 893.80):
 - A claimant must provide written notice of the circumstances of a claim within 120 days of the happening of the event giving rise to the claim.

- ▶ Governmental immunity (sec. 893.80)
 - Most important exceptions in tort cases: “ministerial” actions; known dangers

- ▶ \$50,000 damages cap applicable to tort claims against a school district, officer, employee, or agent (sec. 893.80)
 - Example of an exception: \$250,000 / injured person for a school employee’s negligent operation of a motor vehicle (sec. 345.05)

- ▶ Governmental indemnification (sec. 895.35 and sec. 895.46)
 - The school district must reimburse school officials and employees for civil judgments and costs (including reasonable attorney fees)
 - Example of an exception: Most intentional torts



Example: Protection from individual liability **under certain federal constitutional claims**

- ▶ Wisconsin's state law "Notice of Claim" requirement, governmental immunity statute, and tort claim damages limitations do NOT apply to federal claims.
- ▶ Federal courts will consider claims of "qualified immunity" for individual public employees who are sued for damages for alleged violations of others' constitutional rights.
 - Qualified immunity is available where the individual being sued did not violate any rights that were "clearly established" under applicable law at the time of the incident.
 - Qualified immunity is not available when the suit is against the school district as an entity.
- ▶ Wisconsin's governmental indemnification statutes generally will apply even if "qualified immunity" is not granted (sec. 895.35 and sec. 895.46).

The qualified immunity doctrine sometimes requires you to be a better legal scholar than a federal judge!





What's new in liability land?



1. **2013 Legislative Session:** Nothing yet
2. **2011 Legislative Session:** (In addition to Act 10)
 - Elimination of compensatory and punitive damages for violations of various state-law employment discrimination and related claims (under the WFEA).
 - The legislature amended sec. 893.80 to:
 - Expressly include (as “agents” of the district) unpaid volunteers who are working with the express or implied consent of the school district.
 - Clarify that the procurement of insurance coverage does not act as a waiver of limitations on liability.
 - School districts may enter to “recreational agreements” with groups seeking to use school district facilities; proper agreements result in limited immunity for the school district.
 - Modified the duty of care owed to trespassers / liability limitations
 - Restraint and seclusion legislation



What are the risk management implications of the liability environment in which school officials find themselves?

1. The various state statutes that grant immunity from liability protect against a fairly narrow range of claims;
 2. The governmental indemnification statutes protect officials/employees against a broad range of claims and judgments; and
 3. The costs of defending against a claim (even when the school district ultimately prevails) can be very substantial.
-

1. Understand how all of the district's liability mitigation measures, including its insurance policies, are working together; identify and address areas of weakness;
2. Conduct a regular insurance review; address specific coverage issues and other questions with your insurers;
3. Ensure key personnel understand risk management principles and procedures;
4. Determine whether budget decisions may need to account for potential liabilities.



Some points to include in an insurance review ...

1. What are key events which should trigger a report to the insurer of a possible claim? What kinds of incidents should not trigger a report?
2. Is there any pre-claim assistance available under the policy?
3. Is there an exact match between policy coverage and the district's statutory governmental indemnification obligations?
4. What is the general scope / purpose of the policy's exclusions from coverage? (e.g., acts of "terrorism," mold damage, flood damage, etc.)
5. Who is covered? Examples:
 - School volunteers? Any conditions precedent?
 - School-related groups (such as boosters/PTOs)
 - Community partners
 - Student workers

(Continued on next slide...)



Some points to include in an insurance review ...

5. What is covered? Some examples...

- Employment claims (by type of claim and type of damage award; e.g., are backpay awards covered?)
- Alternative vehicles / drivers (e.g., non-owned and “borrowed” vehicles)
- Attorneys fees (defense fees and, where applicable, the fees of the prevailing party); choice of counsel procedures
- Allegations that, if proven, would not be covered; but the employee/district denies the allegations and the defense prevails in court
- Public records litigation
- Contractual liability claims (e.g., defense of a breach of contract case; costs of liabilities that were assumed solely via contract)
- Insurer expectations regarding subrogation (e.g., in a property damage scenario, the district makes a claim—will the insurer seek to sue the student or community group who caused the damage/loss?)
- Defense of IDEA due process complaints, OCR investigations, and other enforcement actions.



A sample of additional WASB resources available on the general topic of liability...

WASB Legal Comments (available at www.wasb.org) :

- 9/10 [Exceptions to governmental immunity for employee negligence](#)
- 8/10 [Reporting errors and omissions insurance claims](#)
- 9/08 [Employee use of personal vehicles is risky business](#)
- 12/07 [Indemnifying and insuring employees' actions](#)
- 11/07 [The legal significance of school board policies](#)
- 5/02 [School officials' and employees' civil liability protection](#)
- 8/01 [Employee references and employer liability](#)



© 2013

This presentation is a product of the Wisconsin Association of School Boards, Inc. This presentation is intended to provide authoritative general information, with commentary, as a service to WASB members. The materials and information provided in this presentation should not be relied upon as legal advice. If needed, legal advice regarding any topic, issue, situation or incident should be obtained from the school district's legal counsel.

