Nova Law Review

Volume 33, *Issue* 3 2009 *Article* 5

Guideline for Handling Cases Involving Sexual Abuse of a Minor by a Public School Teacher

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GUIDELINE FOR HANDLING CASES INVOLVING SEXUAL ABUSE OF A MINOR BY A PUBLIC SCHOOL TEACHER

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I. KNOW YOUR CASE

Cases involving sexual abuse of students are extremely sensitive and demanding in several aspects. As the victim's attorney, these cases require thorough preparation and dedication. It is essential to spend sufficient time interviewing the minor client and appropriate family members in order to obtain all essential details of the abuse so as to be able to properly investigate the case and initiate legal proceedings. You will want to meet and obtain statements from other victims or potential victims and witnesses, as well as obtain all available school documents and meet with parents of other children in order to gather up all necessary data for your case. As the victim's lawyer, you need to get involved with the State or District Attorney and/or the local investigating agency with jurisdiction over the criminal matter and obtain as much police investigation as is available. Next you want to make sure that your client(s) is/are obtaining appropriate psychological care for his/her/their injuries. You will need to know the appropriate law in your jurisdiction applicable to the facts of your case in order to determine which legal remedies are available for you to proceed on. Because of the potentially high profile nature of these cases, you will need to be available to respond to media attention while, at the same time, protecting your client and his/her family from the media to protect their privacy.

A. *Identify Your Client(s)*

It is important to identify who your clients are in each particular case. The most identifiable client is the student who has been abused. However, it

is also important to identify other family members who may have viable claims, e.g., for intentional or negligent infliction of emotional distress, or for cost of medical or psychological treatment of the minor plaintiff. Because of the extremely sensitive and often embarrassing topic of sexual abuse, some family members will not directly disclose the damages that they have sustained as a result of the injuries caused to their children. It is, however, important to engage in open discussions with the parents and potentially other family members in order to ferret out these claims.

B. *Develop Your Minor Client's Trust in You, Such That There Will Be Open and Complete Disclosure of All Facts*

Early on in the process, it is very important that your minor client feels comfortable in disclosing all the facts with as much detail as possible to assist you in building your case. Because of the very sensitive and potentially embarrassing nature of these claims, it will be very important for the client to feel comfortable enough with you to open up and discuss things that he or she may not even wish for his or her parents to know. You need to caution the parent to allow this process, and you should consider bringing in a psychotherapist or guardian ad litem to assist you with this process early on.

II. BUILD YOUR CASE WITH AS MANY FACTUAL DETAILS AS POSSIBLE IN ORDER TO BE ABLE TO PROVE FORESEEABILITY

A. *Obtain Names of All Teachers and/or Other School Administrators and Employees Who May Have Witnessed Any Unusual Behavior*

Many jurisdictions agree that the mere fact that sexual "abuse occurred on school district property does not make the school district automatically liable for abuse by its employee."[1] Hence, in many jurisdictions it is necessary to establish that the sexual abuse was or should have been foreseeable in order to hold the school district liable for negligence under different theories, for example negligent supervision.[2]

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1. *See, e.g.*, Godar v. Edwards, 588 N.W.2d 701, 707 (Iowa 1999).

2. *See, e.g.*, P.L. v. Aubert, 545 N.W.2d 666, 668 (Minn. 1996). "A school district cannot be held liable for actions that are not foreseeable when reasonable measures of supervision are employed to insure adequate educational duties are being performed by the teachers, and there is adequate consideration being given for the safety and welfare of all students in the school." *Id.*; *see Godar*, 588 N.W.2d at 707.

Because cases involving sexual abuse by a public school teacher typically contain many hurdles, one such hurdle being foreseeability, it is very important to gather extremely detailed information, including names of all teachers who may have witnessed any circumstances alleged early on while the details are fresh in the victim's memory.[3]

III. EARLY ON DECIDE IF YOU WILL NEED AN EXPERT IN THE APPROPRIATE FIELD TO HELP EDUCATE AND INFORM THE COURT ON THE ISSUE OF FORESEEABILITY AS IT APPLIES TO THE FACTS OF YOUR CASE

In the preparation of your case, decide early on if you may need an expert to assist you in developing liability. In Minnesota, the state supreme court, in *P.L. v. Aubert*,[4] determined that the plaintiff student did not prevail because he failed to retain an expert to prove implied foreseeability.[5]

The Supreme Court of Minnesota compared the school board case involving a teacher who had an ongoing sexual relationship with a student to an earlier decision involving a psychologist who made "improper sexual advances to patients during and immediately after therapy sessions."[6] In the *P.L.* school board case, the court held that despite the fact "that teachers have power and authority over students," there was "no expert testimony or affidavits" that a relationship between a teacher and a student is a well known hazard, and "thus, there can be no implied foreseeability."[7]

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3. *See, e.g.*, *P.L.*, 545 N.W.2d at 668.

4. 545 N.W.2d 666 (Minn. 1996).

5. *See id.* at 668.

6. *Id.* at 667–68; Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 307 (Minn. 1982).

7. *P.L.*, 545 N.W.2d at 668. Conversely, earlier Minnesota case law held that liability lies with the employer when the source of the attack is related to the "'duties of the employee and occur[] within work related limits of time and place.'" *Marston*, 329 N.W.2d at 310–11 (quoting Lange v. Nat'l Biscuit Co., 211 N.W.2d 783, 786 (Minn. 1973)). The *Marston* case involved an employee, who was a psychologist, who made unwelcomed and improper sexual advances to patients during and immediately after therapy sessions in his office. *See id.* at 308. The court held that there was a fact issue as to whether the acts were "within the scope of [the doctor's] employment." *Id.* at 311. "[I]t should be a question of fact whether the acts of [the defendant] were foreseeable, related to and connected with acts otherwise within the scope of employment." *Id.* (citing Todd v. Forest City Enter., Inc., 219 N.W.2d 639, 640 (Minn. 1974)). The issue of foreseeability was raised because of expert testimony at the trial court that sexual relations between doctors and patients were "a well-known hazard and thus . . . foreseeable." *Id.* It was the foreseeability of the risk that determined the outcome of that case. *See Marston*, 329 N.W.2d at 311.

IV. KNOW THE CURRENT STATE OF THE LAW IN YOUR JURISDICTION AND IN OTHER JURISDICTIONS INVOLVING SEXUAL ABUSE CASES BY PUBLIC SCHOOL TEACHERS

Plaintiff victims of sexual abuse by school officials who proceed with civil state law claims allege the following theories of liability in their complaints: negligent hiring, negligent retention, negligent supervision, negligence and negligence per se, and respondeat superior.[8] School administrators have been held liable when their officials knew or should have known that school employees or applicants had a history of sexual abuse, the school retained or hired the person despite the person's record, as well as situations where their personnel knew or should have known that an employee sexually abused a student, and the school retained the employee notwithstanding this knowledge.[9]

A. *Immunity of School Officials*

"[M]any states have governmental immunities that block negligent hiring and retention claims against public schools."[10] The reason provided by the courts for granting immunity "is that the hiring and supervision of school

8. *See* Robin Cheryl Miller, Annotation, *Liability, Under State Law Claims, of Public and Private Schools and Institutions of Higher Learning for Teacher's, Other Employee's, or Student's Sexual Relationship with, or Sexual Harassment or Abuse of, Student*, 86 A.L.R. 5th 1, 22, 36–37 (2001) (providing a comprehensive outline and discussion of various state and federal cases discussing the state tort or statutory liability of entities involved in the operation of public or private schools or institutions of higher learning, when not precluded by sovereign or charitable immunity, for an injury sustained by a student during a sexual relationship with, or sexual harassment or abuse by, a teacher or other school employee, or another student at the school).

9. *See id.* at 22–23.

10. William W. Watkinson, Jr., Note, *Shades of* DeShaney*: Official Liability Under 42 U.S.C. § 1983 for Sexual Abuse in the Public Schools*, 45 CASE W. RES. L. REV. 1237, 1272 (1995) ("Governmental immunity is a doctrine that absolves government[al] agencies and officials from tort liability when they are acting in their official capacities."). *See* Bruce Beezer, Commentary, *School District Liability for Negligent Hiring and Retention of Unfit Employees*, 56 EDUC. L. REP. 1117, 1119 (1990) (stating that courts in New Mexico, Michigan, Missouri, Pennsylvania, and Wisconsin have upheld governmental immunity for school officials in negligent hiring and retention actions); *see also* Scott J. Borth, Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 540–46 nn.23–48 (1983) (demonstrating that in thirteen states, municipal governments and officials have absolute immunity from tort liability, twenty-four states retain tort immunity but provide for exceptions in certain circumstances, and fifteen states have abolished governmental tort immunity).

personnel is a discretionary governmental function that is necessary to carry out public education."[11]

Conversely, other jurisdictions have rejected the immunity argument and have held that school officials may be held liable for negligence in hiring or retaining unfit school personnel.[12] In *Doe v. Durtschi*,[13] an Idaho case where there was admitted sexual abuse of four female students and allegations of negligent hiring and retention, the Supreme Court of Idaho rejected the school district's argument of immunity and held that the district may be liable for its own negligence in retaining a teacher where it was informed of the teacher's dangerous behavior.[14] The court further held that the exemption under the immunity statute for employee acts that arise out of assault and battery did not apply in this situation.[15] Likewise, in the Florida case of *School Board of Orange County v. Coffey*,[16] which involved allegations of a teacher's sexual abuse of a student, the Fifth District Court of Appeal held that "[t]he retention and supervision of a teacher by a school board are not acts covered [within] sovereign immunity."[17]

In Ohio, sovereign immunity was argued in *Massey v. Akron City Board of Education*.[18] Based upon arguments made by the defense, as to the applicable sovereign immunity statute, the court concluded "that the plaintiff[s] could succeed only if they [could] show [that the school] board acted with malice, in bad faith, or in a wanton or reckless manner."[19] The court found that on the facts presented, there was "sufficient evidence to raise a genuine issue of material fact" where the school board so acted, and therefore, denied the school board's motion for summary judgment.[20]

B. *Respondeat Superior Claims in Sexual Abuse by Public School Teacher Cases*

In California, the state "[s]upreme [c]ourt has held that the conduct of teachers who sexually molest students under their supervision will not be

11. Beezer, *supra* note 10, at 1119.
12. *See, e.g.*, Doe v. Durtschi, 716 P.2d 1238, 1245 (Idaho 1986).
13. *Id.* at 1238. "Governmental immunity is a doctrine that absolves government[al] agencies and officials from tort liability when they are acting in their official capacities." Watkinson, *supra* note 10, at 1272.
14. *Durtschi*, 716 P.2d at 1240–41, 1245.
15. *Id.* at 1243–44.
16. 524 So. 2d 1052 (Fla. 5th Dist. Ct. App. 1988).
17. *Id.* at 1053.
18. 82 F. Supp. 2d 735, 747–48 (N.D. Ohio 2000).
19. *Id.* at 748.
20. *Id.*

imputed to school districts to permit recovery by injured students from the employing districts under the doctrine of respondeat superior."[21]

Conversely, the doctrine of respondeat superior was held to apply so as to render a school district liable for a teacher's sexual molestation of a student when applying Nevada law.[22]

C. *Negligent Hiring Cases*

In California, although the courts do not recognize a theory for respondeat superior in cases involving sexual molestation of students, the courts do recognize causes of action for negligent hiring.[23]

D. *Negligent Supervision Cases*

In Illinois, the appellate court held that "[a] cause of action for negligent supervision exists against the School District if it is alleged and established that the School District had a duty to supervise its employees, that the School

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21. *See* Virginia G. v. ABC Unified Sch. Dist., 19 Cal. Rptr. 2d 671, 675 (Cal. Ct. App. 1993) (citing John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 953 (Cal. 1989)).

22. Doe v. Estes, 926 F. Supp. 979, 989–90 (D. Nev. 1996) (denying the district's motion for summary judgment on the student's battery claim). The district was held liable, in that case, to the student under the doctrine of respondeat superior. *Id.* at 989. The court referred to a Nebraska case in which a casino was held vicariously liable for injuries suffered by a patron punched by a blackjack dealer. *Id.* The court held that it "fail[ed] to discern any principled legal distinction between a battery claim against a casino whose blackjack dealer slug[ged] a patron and the same claim against a school district whose teacher fondle[d] a student." *Id.* In both cases, the court reasoned, "the plaintiff was on the defendant's premises for the purpose of enjoying the defendant's services" and in neither case did "the employee's duties included acts of common-law battery." *Id.*

23. *Virginia G.*, 19 Cal. Rptr. 2d at 675. In *Virginia G.*, the court held that while the teacher-perpetrator's conduct in molesting the student

> will not be imputed to the District, if individual District employees responsible for hiring and/or supervising teachers knew or should have known of [the teacher's] prior sexual misconduct toward students, and thus, that he posed a reasonably foreseeable risk of harm to students under his supervision, including [the student at issue], the employees owed a duty to protect the students from such harm.

Id. Thus, the court held that the plaintiff

> may be able to amend her pleading[s] to allege a cause of action against the District based on the negligence of its employees who were responsible for the hiring and/or supervision of [the teacher] if such employees knew or should have known of [the teacher's] history of sexual misconduct with students under his supervision.

Id. at 676. The court further concluded that the "[d]etermination of the question whether the District is immune from liability to" the student based on the immunity provisions must await the plaintiff's "further pleading and the requisite factual determinations, if any." *Id.*

District negligently supervised [the teacher-perpetrator], and that such negligence proximately caused [the] plaintiff's injuries."[24]

E. *Negligent Retention Cases*

In Indiana, the district court denied summary judgment and held that a negligent retention claim was supportable against a university for retaining a professor who sexually harassed a student, where the professor had previously engaged in similar misconduct, and the university had ignored the conduct.[25]

V. MAKE A RECORD: BRING OUT THE FACTS WHICH SHOW FORESEEABILITY—DO NOT BASE YOUR CASE ON SIMPLY THE FACT THAT THE BAD ACTS WERE COMMITTED ON SCHOOL PREMISES WITHOUT SHOWING HOW THE SCHOOL DISTRICT KNEW OR SHOULD HAVE KNOWN OF THE PERPETRATOR'S ACTIONS

The way to prevail in state civil court on these cases is by using the facts of your case to show how the school district knew or should have known of the perpetrator's actions or propensities.[26] If you simply rely on the egregiousness of the occurrence(s), regardless of whether they occurred on school property, without demonstrating that the actions were foreseeable by school district officials, you may not succeed in getting your case to the jury.[27]

For example, in a Washington case, a minor and his parents sued a school district and its principal "for negligence in hiring, retaining and supervising a teacher" and librarian.[28] On two different occasions, in secluded areas of the auditorium and library, the teacher/librarian engaged in oral sex with the student.[29] The trial court's granting of summary judgment for the district and the principal was affirmed by the higher court.[30]

The Washington court focused on the following question: "Did the district know, or in the exercise of reasonable care should it have known, that

24. Mueller v. Cmty. Consol. Sch. Dist. 54, 678 N.E.2d 660, 664 (Ill. App. Ct. 1997).
25. Chontos v. Rhea, 29 F. Supp. 2d 931, 937–39 (N.D. Ind. 1998).
26. *See, e.g.*, Peck v. Siau, 827 P.2d 1108, 1112–13 (Wash. Ct. App. 1992).
27. *See id.*
28. *Id.* at 1109.
29. *Id.*
30. *Id.* at 1109, 1113.

[the teacher/librarian] was a risk to its students?"[31] Without evidence "in the record to so indicate," the appellate court answered this question in the negative.[32]

The court explained that:

> When a pupil attends a public school, he or she is subject to the rules and discipline of the school, and the protective custody of the teachers is substituted for that of the parent. As a result, a duty is imposed by law on the school district to take certain precautions to protect the pupils in its custody from dangers reasonably to be anticipated. This duty is one of reasonable care, which is to say that the district, as it supervises the pupils within its custody, is required to exercise such care as a reasonably prudent person would exercise under the same or similar circumstances. The basic idea is that a school district has the power to control the conduct of its students while they are in school or engaged in school activities, and with that power [comes] the responsibility of reasonable supervision.[33]

"A school district's duty requires that it exercise reasonable care to protect students from physical hazards in the school building or on school grounds. . . . [I]t also requires that the district exercise reasonable care to protect students from the harmful actions of fellow students."[34] Quoting several cases and the Restatement (Second) of Torts, the Washington court concluded that:

> [T]he district is not liable merely because such activities occur. ([The] school district [is] not an insurer of the safety of its pupils). Rather, the district will be liable only if the wrongful activities are foreseeable, and the activities will be foreseeable only if the district knew or in the exercise of reasonable care should have known of the risk that resulted in their occurrence.[35]

31. *Peck*, 827 P.2d at 1113.
32. *Id.*
33. *Id.* at 1112 (citations omitted).
34. *Id.*
35. *Id.* at 1112–13 (citations omitted).

VI. FEDERAL CAUSES OF ACTION

After you have reviewed the pertinent facts of your case and the case law which governs your jurisdiction, you should decide if it is advantageous to proceed with a state or federal cause of action.

A. *Reasons to Proceed with Federal Causes of Action*

In some jurisdictions, the courts are reluctant to find liability for negligent hiring and retention in school board cases.[36] In addition, state tort law generally cannot hold school officials liable for their deliberate indifference toward sexual abuse.[37] Another reason to turn to federal law for relief is due to sovereign immunities, which may bar state causes of action in certain jurisdictions.[38] Holding school systems liable under 42 U.S.C. § 1983 is necessary because "'[c]omplicated state law immunities may protect municipalities and school districts from many state tort claims but will not insulate them from a constitutional tort suit.'"[39]

B. *Criteria to Proceed with a Federal 42 U.S.C. Section 1983 Cause of Action*

Some plaintiffs have proceeded with claims under Federal Statutes. A Nevada federal court has held that a defendant school district could be liable

36. Watkinson, *supra* note 10, at 1272.

37. *See id.*

38. *See id.*

39. *Id.* at 1273 (quoting Steven F. Huefner, Note, *Affirmative Duties in the Public Schools after* DeShaney, 90 COLUM. L. REV. 1940, 1961 (1990)). According to the author of the Note, *Shades of* DeShaney, there is controversy in federal court cases as to whether the schools can be liable for the sexual abuse of their students based on predicating special relationships on custody. *See id.* at 1283. *Doe v. Taylor Independent School District* interpreted custody broadly and held the school liable. *See* Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451 n.3 (5th Cir. 1994). However, *D.R. v. Middle Bucks Area Vocational Technical School*, subscribed to a narrow definition of custody. *See* D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1369–72 (3d Cir. 1992). Thus, the court in *Middle Bucks* found that the school district did not have an affirmative duty to protect its students. *Id.* at 1384. The *Shades of* DeShaney article discusses later federal cases which offer an alternative liability theory, removing the custody controversy where a school employee is the perpetrator of the sexual abuse. Watkinson, *supra* note 10, at 1250–57. The later cases hold that school systems and its officials are not liable under section 1983 without a finding of a special relationship between the school and the student. *See* discussion *infra* Part V.

under 42 U.S.C. § 1983 if some policy or custom it followed can be said to have legally been the cause of the complained constitutional violation.[40]

The school district may be liable under section 1983 for constitutional torts committed by its employees when their choice, from among various alternatives, to follow a particular course of action reflects a "deliberate indifference" to the constitutional rights of the plaintiffs.[41]

For officials to be liable under section 1983, they must be deliberately indifferent to the plight of a student.[42] Mere negligence upon the part of an official will not trigger liability.[43] If schools are found to have an affirmative duty of protection, school officials will be liable only in cases like *Doe v. Taylor Independent School District*[44] and *D.R. v. Middle Bucks Area Vocational Technical School*,[45] where the officials know that the abuse is occurring but do nothing to stop it.[46]

VII. CONCLUSION

Your emphasis should remain in preparing your case and discovering all pertinent facts to establish foreseeability and liability of the school district. Once the facts are revealed, you can apply them to the laws which govern your jurisdiction. Without obtaining the relevant facts, and ensuring that the laws in your jurisdiction provide you with an adequate remedy, you will be unable to establish what you need to prove to the court: that the egregious violation of your victim/client's rights and their resulting lifetime damages

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40. *See* Doe *ex rel.* Knackert v. Estes, 926 F. Supp. 979, 986–87 (D. Nev. 1996). In *Doe ex rel. Knackert v. Estes*, the court granted judgment as a matter of law as to the school board. *See id.* at 989–90. The court found that the defendants failed to demonstrate that "the absence of any genuine issue[] of material fact [existed] with respect to the question [as to] whether the defendant school district's pre–1990 failure to prevent the sexual molestation of its students was a policy for which the district could be liable under [s]ection 1983." *Id.* at 988. The court concluded that:

> [The] [p]laintiffs [presented] evidence that the defendant school district had until the arrest of [the perpetrator] in 1990 no policy [in effect] regarding the reporting of suspected incidents of sexual abuse of students, had never instructed its employees in the techniques of recognizing the warning signs of suspected sexual abuse of students, [and] had never provided its staff with guidelines for dealing with such suspicions.

Id.

41. *Id.*

42. City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 270 (1987) (O'Connor, J., dissenting).

43. *See* City of Canton, Ohio v. Harris, 489 U.S. 378, 388–89 (1989) (explaining the deliberate indifference standard for section 1983 liability by inaction).

44. 15 F.3d 443 (5th Cir. 1994).

45. 972 F.2d 1364 (3d Cir. 1992).

46. *Taylor*, 15 F.3d at 445; *D.R.*, 972 F.2d at 1366.

are issues which should get to the jury to decide the liability of the school district for the acts of its employee, or the liability of the school district for failing to properly supervise or carefully hire its employees.