

STUDENT AND STAFF SAFETY: WHAT YOU NEED TO KNOW

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WHAT'S YOUR LEGAL OBLIGATION IF:



- Jeff, a special education student who lives in your District, wants to enroll after having been expelled from a neighboring District for assault with a deadly weapon against the principal?
- What are Jeff's rights?
- How do you ensure the safety of other students and staff?
- Can you:
 - Refuse him enrollment?
 - Enroll him but put him in an off-campus facility away from the other students?
 - Ask the neighboring District to send in reinforcements?



“School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways ... Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students’ movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.”

Morse v. Frederick, 551 U.S. 393, 424 (2007) (Alito, J., concurring).

INCREASED THREAT = INCREASED RESPONSIBILITY

- ❑ The evolving case law on governmental immunity from torts makes clear that a District may be liable under the negligent operation or maintenance of a building exception to the Torts Claim Act for injuries sustained due to:
 - An actual physical defect in a building
 - Dangerous conditions on property surrounding the building
 - Lack of/or negligent implementation of safety protocols
 - Injury on property not owned by the District
 - Student-on-student violence

NEW MEXICO TORT CLAIMS ACT

- ❑ For public policy purposes, the NM Tort Claims Act Grants **qualified immunity** from legal liability and suit for personal injury, wrongful death, and property damage caused by the negligence of a governmental entity (including school districts) and public employees while acting within the scope of their duties. NMSA 1978, § 41-4-4(A).

IMMUNITY EXCEPTIONS

- ❑ Two exceptions commonly applied to schools create exposure for liability are injuries sustained:
 - In the operation or maintenance of any motor vehicle, NMSA 1978, § 41-4-5; or
 - In the operation or maintenance of any building, public park, machinery, equipment, or furnishings, NMSA 1978, § 41-4-6.

EVOLUTION OF THE NEGLIGENT OPERATION OF A BUILDING EXCEPTION

- ❑ 1987 – *Pemberton v. Cordova*
 - No waiver of immunity under Negligent Operation of a Building Exception without “a dangerous condition on the premises.”
 - “Single act of student-on-student violence does not render the premises unsafe.”
 - Statute requiring teachers to supervise students did not create waiver of immunity.
 - Injury must be result of actual defect in building.



KEY QUOTE

- ❑ Plaintiffs ask us to expand the scope of [the negligent operation of a building exception] to include negligent supervision of students. Where the areas of waiver of immunity are specifically presented, we have no authority to read other exceptions into the statute. To allow plaintiffs to sue under this exception would be to read into the Act language which is not there. This we will not do. (internal citations omitted)

EVOLUTION OF BUILDING EXCEPTION (CONT.)

- ❑ “Building” includes dangerous conditions on surrounding property:
 - Traffic exiting fairgrounds (1991)
 - Dogs running loose (1988)
- ❑ “Negligent Operation or Maintenance” includes:
 - Lack of/or negligent implementation of safety protocols (1994)

WILLIAMS V. CENTRAL CONSOLIDATED SCHOOL DISTRICT (1998)

- ❑ Student suffered severe lacerations when his arm went through a school window while fighting with another student. Plaintiff sued the school district for negligence in failing to install shatterproof glass and adequate guards around the window to prevent accidents.
- ❑ Judgment for parent.



UPTON V. CLOVIS MUNICIPAL SCHOOL DISTRICT (2006)

- ❑ Exception applied to failure to follow safety procedures.
- ❑ Student with a disability collapsed and died from an asthma attack after being required by a substitute teacher to exercise in PE class;
- ❑ Student's Individualized Education Program (IEP) indicated student had asthma, but substitute did not receive a copy; and
- ❑ District failed to take adequate steps to respond to the asthma attack.
- ❑ Holding: Failure to follow procedures established for at-risk students created a dangerous condition.

KEY QUOTES

- ❑ [A] police officer at the school called 911 immediately upon seeing Sarah in the hallway. The school's limited response to Sarah's emergency was an attempt to give her an inhaler treatment, followed by a decision to place her in a wheelchair and push her out to the sidewalk. CPR was never administered even though, according to the allegations, it was clear from the onset of the attack that Sarah was not breathing well and was turning blue. Evidence indicates that Sarah may already have been dead when the ambulance arrived, suggesting that it should have been clear to school personnel that Sarah required immediate medical attention.

KEY QUOTES (CONT.)

- ❑ The School District's alleged failure to follow procedures established for at-risk students appears to fall comfortably within the Section 41-4-6 waiver for "operation or maintenance" of a public building.... [a] school simply cannot operate in a safe, reasonable, and prudent manner without affording, at the very least, the health and safety services that students have been promised, and upon which parents have relied.

C.H. v. LOS LUNAS BOARD OF EDUCATION (2012)

- ❑ Exception applied to failure to educate students of risks.
- ❑ Student was allegedly physically and sexually assaulted by other students in a locker room.
- ❑ Holding: School was negligent by failing to create a safe environment for students because the school had not educated the students about hazing policies.

C.H. v. LOS LUNAS (CONT.)



❑ Key Quote:

- The Defendants allegedly knew or should have known that football players alone in a locker room presented a danger based on [other New Mexico football program] hazing incidents, much like the roaming dogs or prison gangs presented a danger to certain populations if left unchecked. A teenager, like a loose dog, is not an obvious danger, but given the right circumstances a defendant may have reason to know or suspect that the loose dog presents a dangerous condition....

ENCINIAS V. WHITENER LAW FIRM, P.A. (2013)

- ❑ Expanded to peer-on-peer injury when “a pattern of violence” was known to school;
- ❑ Legal malpractice case filed by a student against his attorney for failing to timely file suit against a school district;
- ❑ Student was badly beaten by a high school classmate;
- ❑ In an area adjacent to school property that had been cordoned off by the school and was monitored by school;
- ❑ School’s assistant principal referred to the area as a “hot zone” due to the history of problems, including fights.
- ❑ Holding: School had a duty to refrain from permitting conditions that could lead to an unreasonable risk of harm to others beyond the property’s borders; and
- ❑ Pattern of violence was a dangerous condition.

FRAIRE V. BELEN CONSOLIDATED SCH. DIST. (Oct. 6, 2016)

- ❑ Analyzing *Encinias*, the NM Ct. of Appeals held:
 - The NM Supreme Court “abandoned any distinction between the government’s waiver of its sovereign immunity under [the Negligent Operation of a Building Exception] and premises liability for private parties in general.
 - A school may be liable for the acts of its students if, by the exercise of reasonable care, it could have discovered the acts were being done or about to be done and could have protected against the injury.

FRAIRE V. BELEN CONSOLIDATED SCH. DIST. (CONT.)

- ❑ The Facts:
 - Student (East) was out of class to talk to wrestling coach.
 - Coach “as a matter of protocol” promptly called school security to ensure East would return to class and told East to wait while he set up his class.
 - While waiting, East assaulted a peer, causing “significant injuries.”
 - East had prior disciplinary record at another district for fighting with peer and threatening a teacher.

FRAIRE V. BELEN
CONSOLIDATED SCH. DIST. (CONT.)

- At Belen, East had pushed a peer during the prior school year.
- Principal testified that he wasn't aware of discipline record from prior district and if he had been, he would have placed East on discretionary "strict" behavior contract.
- 911 transcript following assault asked for two police officers because East "can be a little violent" and "when [East] gets pissed off, he loses it[.]"



FRAIRE V. BELEN
CONSOLIDATED SCH. DIST. (CONT.)

- The District's Position:
 - All student-on-student assaults fall outside the exception.
 - The District did not owe the Plaintiff a duty of care because it was required by law to enroll East.
 - The ruling in *Encinias* is limited to situations in which a evidence of student-on-student violence is foreseeable in a geographic area.
 - A behavior contract is discretionary and the lack of a contract is an administrative decision that doesn't fall within the exception.

FRAIRE V. BELEN CONSOLIDATED SCH. DIST. (CONT.)

- ❑ The Court's holding:
 - Pemberton is now limited to situations in which "a single act of student-on-student violence" is the "only evidence" of negligence.
 - The District's obligation to enroll East goes to foreseeability and whether it was reasonable to expect the District to prevent the harm.
 - The Operation of Building exception applies when the foreseeability of danger exists in a known area due to a dangerous student.

FRAIRE V. BELEN CONSOLIDATED SCH. DIST. (CONT.)

- ❑ "Characterizing the District's acts and omissions as 'administrative decisions' that" don't fit within the exception "would require us to revise the distinction between ordinary liability in tort and the waiver....or undertake our own evaluation of the reasonableness of the school district's conduct..."

IMPORTANT POINTS TO NOTE

- ❑ *Freire* was a reversal of a summary judgment; not a determination that the District failed to exercise reasonable care.
- ❑ If appealed, the NM Supreme Court may provide further distinction.

TAKE AWAYS

- ❑ Develop procedures for an on-going audit to identify and address unsafe conditions, including:
 - school characteristics and environment;
 - school grounds and building exterior;
 - school building interior;
 - monitoring and surveillance practices;
 - communications and information systems;
 - school climate and culture; and
 - school threats.
- ❑ Perform risks and threat assessments for individual situations or students.
- ❑ Ensure that all school staff and substitutes are informed of any procedures in place for students with 504 plans or an IEP.



A DIFFICULT BALANCE

- ❑ Under the Americans with Disabilities Act, Section 504, and the Individuals with Disabilities Act, school districts are prohibited from discriminating against students based on their disability and are required to educate students in the least restrictive environment.
- ❑ Students with disabilities are entitled to a free, appropriate public education even if they commit an expellable offense.
- ❑ The duty under those federal laws does not relieve the district from liability that may arise under the New Mexico Torts Claim Act.

OTHER DISCIPLINE CONSIDERATIONS

- ❑ Liability for injury caused by corporal punishment has been found when the punishment administered was “so severe or brutal that it shocks the conscience.”

Harris, 273 F. 3d at 930-31.



PRIVATE SCHOOL PLACEMENT

- ❑ Does a district waive immunity if it places a special education student in a private school, day-treatment program, or residential facility under the IDEA?
- ❑ In *Quevedo v. NM CYFD* (Aug. 2016), the Ct. of Appeals held that the Negligent Operation of a Building exception may apply when an agency provides housing to a client when permitted or required to do so under specific statutory authority.
- ❑ “Statutes, regulations, and contracts [are] sources of duties of ordinary care.”

QUALIFIED IMMUNITY UNDER FEDERAL LAW

- ❑ Qualified Immunity under NM Torts Claim Act does not extend to claims under federal law.
- ❑ No Qualified Immunity under federal law for the School District.
- ❑ Individual employees are entitled to qualified immunity unless:
 - the employee’s actions violated a constitutional or statutory right; and
 - “the right was so clearly established that a reasonable person would have known that [the] conduct violated that right.” *Harris v. Robinson*, 273 F.3d 927, 931 (10th Cir. 2001).

ADA AND SECTION 504

- ❑ To recover compensatory damages against a School District, the plaintiff must show:
 - Bad faith
 - or
 - Deliberate indifference
- ❑ Negligence is insufficient to support damages.

SECTION 1983

- ❑ Elements:
 - The defendant deprived the plaintiff of a constitutional right.
 - Under color of state law.
- ❑ For District to be liable for the act of its employee, plaintiff must show:
 - The District “through its *deliberate* conduct” was the “moving force” behind the injury.
 - “[C]onstitutional deprivation must be the result of an established policy, a longstanding practice or custom, or the conduct or decision of a final policymaker.” *Ashford v. Edmond Public Sch. Dist.*, 822 F.Supp.2d 1189, 1199 (W.D. Ok. 2011).

RISK AND THREAT ASSESSMENT

- ❑ The United States Secret Service and United States Department of Education has issues a guide, “Threat Assessment in Schools: A guide to Managing Threatening Situations and to Creating Safe Schools Climates” (July 2004).

<https://www2.ed.gov/admins/lead/safety/prevntingattacksreport.pdf>

ADDITIONAL RESOURCES

For threat and risk assessments

- ❑ <https://www2.ed.gov/admins/lead/safety/threatassessmentguide.pdf>
- ❑ <https://www.nasponline.org/resources-and-publications/resources/school-safety-and-crisis/threat-assessment-at-school/threat-assessment-for-school-administrators-and-crisis-teams>
- ❑ <http://www.jmu.edu/counselingctr/resources/faculty-staff/dangerous-students.shtml>
- ❑ <http://www.alleganaesa.org/cms/lib07/MI01908021/Centricity/Domain/20/Entry%20Exit/GATDBS.pdf>
- ❑ <http://www.k12.wa.us/safetycenter/Threat/default.aspx>

- ❑ School safety requires a coordinated and comprehensive approach that involves the entire community and addresses not only intervention and response, but also prevention.



ANTI-BULLYING POLICIES



- ❑ Each District must have written policies to address bullying.
- ❑ Policies must include, at a minimum:
 1. Definitions;
 2. An absolute prohibition against bullying;
 3. A method to ensure initial and annual dissemination of the anti-bullying policy to all students, parents, teachers, administrators and all other school or district employees;

ANTI-BULLYING POLICIES (CONT.)

4. Procedures for reporting incidents of bullying which ensure confidentiality to those reporting bullying incidents and protection from reprisal, retaliation or false accusation against victims, witnesses or others with information regarding a bullying incident;
5. Consequences for bullying which include consideration of compliance with state and federal IDEA requirements;
6. Consequences for knowingly making false reports pursuant to the anti-bullying policy;

ANTI-BULLYING POLICIES (CONT.)

7. Procedures for investigation by administration of incidents reported pursuant to the anti-bullying policy;
8. A requirement that teachers and other school staff report any incidents of bullying; and
9. A requirement that anti-bullying is included as part of the health education curriculum as set forth in 6.30.2.19 NMAC (“content standards – health education”).

6.12.7.8(C) NMAC.

BULLYING AND CYBERBULLYING PREVENTION PROGRAMS

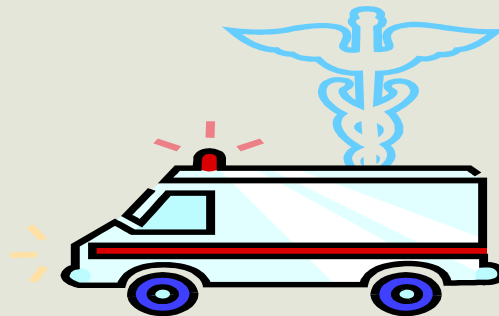
“Bullying means any repeated and pervasive written, verbal or electronic expression, physical act or gesture, or a pattern thereof, that is intended to cause distress upon one or more students in the school, on school grounds, in school vehicles, at a designated bus stop, or at school activities or sanctioned events. Bullying includes, but is not limited to, hazing, harassment, intimidation or menacing acts of a student which may, but need not be based on the student’s race, color, sex, ethnicity, national origin, religion, disability, age or sexual orientation.”

6.12.7.7(A) NMAC.



SCHOOL EMERGENCY OPERATION PLAN

President Obama signed *Presidential Policy Directive (PPD) 8*, which lists five key components of emergency planning.



SCHOOL EMERGENCY OPERATION PLAN (CONT.)

1. Prevention – the ability to avoid, deter, or stop an imminent crime or casualty.
 - Conduct a district-wide assessment of all potential hazards, whether natural or man-made.
 - Consider the location of special student or staff populations (e.g. those with disabilities) to ensure that they are not near inaccessible areas.
 - Involve the school custodian or the maintenance director (who can offer insights into physical changes that might make a building safer) in the planning stage.

SCHOOL EMERGENCY OPERATION PLAN (CONT.)

2. Protection – physical safety of students, teachers, staff, visitors, networks, and property.
 - When emergency protocols are developed, local emergency management, law enforcement, health, and mental health personnel should be involved.
 - Be sure parents know the emergency plans at their child's school so that confusion and panic can be reduced in the event of an incident.
 - Frequent drills are essential and help ensure that staff and students know their responsibilities and the "routine" during an emergency.

SCHOOL EMERGENCY OPERATION PLAN (CONT.)

3. Mitigation – eliminating or reducing the impact of an emergency event on injury, loss of life, and property damage.
4. Response – stabilizing an emergency when it occurs.
 - Good planning aids in a successful response.
 - It is a great help when emergency responders know the overall makeup and population of the school as well as the physical layout of district facilities



SCHOOL EMERGENCY OPERATION PLAN (CONT.)

5. Recovery – restoring the learning environment.
 - Returning to school after an emergency will require coordination of necessary resources.
 - This could include: providing on-site trauma or counseling teams, restoring district administrative functions, conducting assessments of damage to school buildings and grounds, determining lessons learned.
 - Developing lists of qualified mental health professionals and community organizations during the preparedness phase is recommended.
 - In the event buildings are damaged relocation of staff and students to alternate sites may be needed.

SAFETY ISSUES BEYOND THE CLASSROOMS

- School Bus Transportation
- Traffic flow into and off of school property, as well as on school property
- Playground conditions
- Conditions and procedures for field trips and extra-curricular activities
- Infectious diseases
- School food services

MENTAL HEALTH INTERVENTIONS AND SUBSTANCE ABUSE PREVENTION

- Reporting Obligations:
 - A school employee who knows or in good faith suspects any student of using or abusing alcohol or drugs shall report such use or abuse pursuant to procedures established by the local school board.
 - No school employee who in good faith reports any known or suspected instances of alcohol or drug use or abuse shall be held liable for any civil damages as a result of such report or his efforts to enforce any school policies or regulations regarding drug or alcohol use or abuse.
NMSA 1978, § 22-5-4-4 (1986)

BEST PRACTICES



- Make sure there is ample student access to information regarding mental health resources.
- If they do not already exist, create school-based programs and services designed to support students with mental health issues. Create connections from the school to existing mental health services in the community.
- Educate the entire school, including providing information in an age-appropriate health curriculum.
- Provide transition services for students who leave school temporarily to receive treatment.

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