

## 15. Are State Tort Remedies Available in the School Setting?

**F**ailure to provide aid to or protect children may be the basis for state tort claims. However, many states recognize immunity precluding claims.

### 15.1 What state tort claims are available against school districts?

State tort remedies may be available where school officials had a duty to act and breached that duty, provided school officials do not have immunity from tort suits and other requirements for bringing a claim are met. The law of torts varies from state to state, especially with respect to whether a public or private school or its employees are immune from liability. Negligence claims may be asserted where schools fail to provide care and treatment for students. Unlike anti-discrimination law, tort claims are only available after a student has suffered actual harm (such as physical injury).

### 15.2 What is the duty to aid or protect?

Where a special relationship exists a duty to provide aid and protection arises. Such a duty exists between schools and students for state tort law purposes.

#### Notes

Tort law generally holds that there is no duty to provide aid or protection to another person. *See Restatement (Second) of Torts §314 (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”)*. A duty to take some affirmative action to aid or protect may arise, however, where a special relationship exists between parties. Although the usual school-student relationship is not sufficient to give rise to a constitutional duty, this relationship ordinarily is sufficient to give rise to a duty to aid or protect under state tort law. *See Pirkle v. Oakdale Union Grammar Sch.*, 40 Cal. 2d 207, 253 P.2d 1 (1953); Prosser and Keeton on The Law of Torts 376-77 (5<sup>th</sup> ed. 1984) (noting that there “is now respectable authority” imposing an affirmative duty on a school to aid and protect its pupils).

The classic statement of the rule is provided by Restatement (Second) of Torts §314A. Under the Restatement, a duty to provide aid or protection is imposed on, among others: “One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection ....”

The duty imposed requires the person “to take reasonable action”:

- “(a) to protect them against unreasonable risk of physical harm, and”
- “(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.”

The status of a person on property of another is frequently classified based on whether a trespasser, licensee, or invitee, with an “invitee” having the most favored status. It is the “invitee” to whom the Restatement’s duty to aid and protect extends. Students attending school or participating in school activities are usually considered invitees. *See, e.g., Jesik v. Maricopa County Community College Dist.*, 125 Ariz. 543, 611 P.2d 547 (1980); *Vreeland v. State of Arizona Bd. of Regents*, 9 Ariz. App. 61, 449 P.2d 78 (1969); *Peterson v. San Francisco Community*

*College Dist.*, 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984); *Reyea v. State*, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980); *Walker v. Daniels*, 407 S.E.2d 70 (Ga. Ct. App. 1991); *Schultz v. Gould Academy*, 332 A.2d 368 (Me. 1975); *McIntosh v. Omaha Pub. Schs.*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Waltz v. Wake County Bd. of Educ.*, 409 S.E.2d 106 (N.C. Ct. App. 1991); *Eberle v. Benedictine Sisters of Mt. Angel*, 235 Or. 496, 385 P.2d 765 (1963); *McDonald v. University of W. Va.*, 444 S.E.2d 57 (W. Va. 1994). The school-student relationship may itself establish the requisite special relationship for tort law purposes. As such, school officials have a duty to reasonably respond to a student's medical needs.

### **15.3 Must school officials know the need for aid or protection?**

School officials must know or have reason to know the need for aid or protection. Therefore, school officials must be aware that a child has diabetes and the nature and extent of care that might be required.

#### **Notes**

The Restatement (Second) of Torts §314A provides these comments:

The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. (Comment e.)

The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. (Comment f.)

### **15.4 What aid or protection must be provided?**

There is no hard and fast rule as to what care is needed. What is required is that school officials exercise reasonable care under the circumstances. Of course, the nature of chronic illnesses is such that what aid or protection might be needed is quite predictable.

#### **Notes**

The Restatement (Second) of Torts §314A states:

In the case of an ill or injured person, [a person] will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance. (Comment f.)

The sorts of claims that may be alleged (and, thus, the duties violated) were summarized in *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 775 P.2d 640 (Idaho 1989) (factual issues precluded summary judgment on claim that district was negligent in treating otherwise healthy student who developed an airway obstruction and subsequently died; listing a number of specific duties the district was alleged to have violated in relation to providing emergency medical care).

At a minimum, “[a] school is required to do whatever a reasonably prudent school would do in safeguarding the health of its students, providing emergency assistance to them when required and arranging for appropriate medical care if necessary.” *Federico v. Order of St. Benedict in Rhode Island*, 64 F.3d 1, 4 (1<sup>st</sup> Cir. 1995). Under tort law, schools are not expected to guarantee the health of students or assume roles for which they are not qualified. “[A] school must act as a reasonable school in responding to medical needs of the students.” *Federico*, 64 F.3d at 4 (holding that duty was met although there was no standing order to permit nurse to administer epinephrine subcutaneously in the event of allergic reaction to nuts; parent rejected advice to allow child to have epinephrine in a self-administered form to be immediately available to him and state law prohibited a nurse from administering epinephrine in the absence of a prescription or order).

### **15.5 Can a school district be liable if it fails to take preventive aid or protective measures?**

---

It is reasonable to expect schools to anticipate and take measures to prevent avoidable harm to children with diabetes. However, because a school is not a guarantor or insurer of health and safety, it is not required to undertake preventive measures to address any and all emergencies that could arise.

#### **Notes**

Where a duty exists, preparation to prevent avoidable harm is required. Under the Restatement (Second) of Torts § 300, “want of preparation” is considered in evaluating negligence. It is obvious, for example, that a school maintaining an athletic program fails in its duty of care where it does not provide competent personnel, give sufficient training and instruction to participants, and ensure that athletes are provided safe equipment. So too, if reasonable under the circumstances schools must prepare so as to prevent harm to a child with a disability. On the other hand, reasonableness does not require that a school or others provide any and all medical care that they could conceivably be required. See, e.g., *Salte v. YMCA of Metropolitan Chicago Foundation*, 351 Ill. App. 3d 524, 286 Ill. Dec. 622, 814 N.E.2d 610 (2004) (YMCA was not required to have a defibrillator on premises).

### **15.6 Can a school district be liable if it prohibits a student’s immediate access to medication or items required for care?**

---

A school may be found negligent where it has a policy prohibiting students from carrying medication where that medication is necessary for the child’s care.

#### **Notes**

In *Gonzalez v. Hanford Elementary School District*, 2002 Cal. App. Unpub. Lexis 1341 (2002), a judgment for the plaintiff was upheld where a child died after a severe asthma attack. Under a written school policy, all student medication was required to be stored in a place inaccessible to other students. A fifth grader and his mother understood this to mean that the student could not carry his inhaler to treat his severe asthma. Pursuant to this policy, the student’s nebulizer (used to administer medication to treat asthma) was kept in the school office and when it was needed the student had to be assisted by school staff. On the day the student died, he had left his classroom to use the restroom. Minutes later he appeared in the school office exhibiting symptoms of a severe asthma attack. A school secretary, trained in the use of a nebulizer, attempted to assist him, but before effective help could be rendered

the student collapsed and died later that afternoon. Application of the policy was found negligent.

### **15.7 What tort immunities can protect schools from liability?**

---

Traditionally, common law immunity for governmental and charitable institutions has been recognized by case law. Although these absolute immunities have been abrogated in many states, narrower immunities which apply in certain situations have been created in most states by statute or judicial decision. For example, immunity is often recognized for government officials performing discretionary functions (as opposed to functions mandated by state law). Immunity can be subject to a number of exceptions.

#### **Notes**

Immunity has been found to preclude claims that medical care was not timely or appropriately provided. *See, e.g., Lennon v. Petersen*, 624 So. 2d 171 (Ala. 1993) (discretionary function immunity barred claim following injury of athlete); *Teston v. Collins*, 217 Ga. App. 829, 459 S.E.2d 452 (1995) (decisions relating to medical care discretionary; immunity applied); *Montgomery v. City of Detroit*, 181 Mich. App. 298, 448 N.W.2d 822 (1989) (immunity and other considerations applied to reject claim where school and associated defendants failed to provide sufficiently prompt emergency care to student who died from heart attack while running during physical education class). However, there are exceptions to immunity that sometimes apply. *See, e.g., Trotter v. School District 218*, 315 Ill. App. 3d 1, 247 Ill. Dec. 899, 733 N.E.2d 363 (2000) (immunity did not apply to claim that district failed to train instructors to respond to emergency situations in swimming class); *Upton v. Clovis Municipal Sch. Dist.*, 141 P.3d 1259 (N.M. 2006) (immunity not applied where student died from asthma attack after being required to continue exercising in physical education class; district failed to follow through on its safety policies for students with special needs and students in acute medical distress and this constituted an act of negligence in the operation of the school district which resulted in waiver of immunity).

Many states expressly provide immunity with regard to the administration of medication in schools. This may include administration of medication by school personnel (*e.g.*, Mich. Code § 380.1178) or self-administration by a student (*e.g.*, Indiana Code § 34-30-14-6).

### **15.8 Do school personnel have immunity when providing emergency medical care to students?**

---

Where emergency care is provided, states generally recognize immunity. This immunity is provided under what are known as “Good Samaritan” laws, as well as other school immunity or diabetes-specific laws.

#### **Notes**

A Good Samaritan law “exempts from liability a person (such as an off-duty physician) who voluntarily renders aid to another in imminent danger but negligently causes injury while rendering the aid.” Black’s Law Dictionary 702 (7<sup>th</sup> ed. 1999). Every state and the District of Columbia have adopted some form of Good Samaritan law. Black’s Law Dictionary at 702.

Good Samaritan statutes usually apply to teachers or other school personnel. Indeed, some statutes expressly reference school personnel. *See, e.g.*, Connecticut General Statutes §52-557(b) (“a teacher or other school personnel on the school grounds or in the school building or at a school function .... who renders emergency aid to a person in need thereof, shall not be liable to such person assisted for civil damages for any personal injury which results from acts or omissions by such person in rendering the emergency first aid, which may constitute ordinary negligence”).

A Good Samaritan law is in addition to general immunity applicable to schools. Therefore, other grounds for immunity might well exist.

### **15.9 Does refusing to provide health care services by school personnel constitute unprofessional conduct?**

School personnel must perform competently and professionally. Where negligent or intentionally inconsistent with their expected duties and responsibilities, licensing, or certification boards may take disciplinary action.

#### **Notes**

Licensing and certification boards uniformly have standards which, if not followed, may warrant discipline. Proof of violation of these standards is less demanding than that required under tort law. A professional may be disciplined, for example, where he or she acts in a manner inconsistent with the health or safety of persons under the professional's charge or care. *See, e.g.*, *Mississippi Bd. of Nursing v. Hanson*, 703 So. 2d 239 (Miss. 1997) (nurse's license revoked on various charges for unsafely caring for infants including carrying them around naked, washing them in sinks, flipping levers on their incubators to stimulate them, etc.).