

Litigation Evasion

The best way to deal with lawsuits is to prevent them. Some practical tips for avoiding liability in your school district.

By **BRENDA C. LISS, ESQ.**

Life isn't simple. Governing and administering public schools isn't easy. There are volumes full of statutes, rules and regulations concerning school law, new rules are added all the time and lawsuits are filed at the drop of a hat. It's hard to know how to meet all of a board of education's obligations, do the right thing and avoid potential liability.

But a few practical tips can go a long way. The tips presented here are not "Everything You Need to Know about Public Education Law." They aren't intended to oversimplify, to suggest that the law is black and white or that every situation can be addressed by referring to a handy guide. They are offered as a few practical lessons learned from experience and judicial decisions in cases where the action, or inaction, of well-intentioned public school officials has been challenged. And, come to think of it, these tips may be just as useful outside of school, as a few basic rules for life.

Know Where Your Children Are Not only at ten o'clock, but after school as well.

About a year ago the New Jersey Supreme Court made clear what we already knew – that boards of education may be liable for reasonably foreseeable injuries to their students. The court also made it clear that this rule applies not only during the school day, but after students are dismissed, too, if their injuries are reasonably foresee-

able results of the actions of school officials. The Court ruled, in *Jenkins v. Anderson*, that boards may be liable for injuries that occur after school if the district does not have, or does not communicate to parents, dismissal procedures with provisions for what to do if parents don't show up at the end of the day. A corollary rule here could be 'have a procedure in place and enforce it,' but the more basic lesson is that responsibility, and potential liability, does not end at the dismissal bell. Teachers and administrators don't need to know exactly where every student is going at 3 pm, but at least for elementary students, they need to know that every student is going somewhere with a responsible adult unless their parents have advised in writing that they are permitted to leave by themselves. The same rule applies, even more strongly, during the school day.

Use Common Sense, and Speak Up A few years earlier, the N.J. Supreme Court made clear another self-evident rule, that schools officials' most basic obligation to students

is not to teach them, but to protect them from harm. The board of education in *Frugis v. Bracigliano* was found liable for injuries to children caused by a principal's sexual abuse. Unfortunately, the most distressing part of the story was that for years, school staff, administrators and board members had ignored telltale signs of inappropriate conduct. The rule here could be 'never let a principal cover the windows in his (or her) office door,' but again, the case teaches a more basic lesson: if something seems amiss or if common sense tells you something is wrong, do not ignore it. Speak up. Don't assume someone else will. Don't believe someone in authority can do no wrong. Adults serving in the district need to know that if their instincts tell them someone, especially children, may be in danger, they must tell someone. If there is evidence of child abuse, they must report it to appropriate authorities.

Focus on the Big Picture In *L.W. v. Toms River Board of Education*, the Court made clear that the duty to keep students safe





includes taking steps to keep them free from harassment on the basis of any characteristic protected by the Law Against Discrimination. In so ruling, it established a rule that may now seem obvious, but wasn't so clear at the time to school administrators and lawyers: students are entitled to protection from harassment in school to the same extent that the law extends such protection to employees in the workplace. It also established that whether harassment has occurred must be considered from the point of view of the victim: if a reasonable student in the victim's position would believe he is being subjected to conduct so severe or pervasive that the school environment has become hostile, then the board, through its administrators, has a duty to take effective corrective action. The rule here is that appropriate discipline should reflect the impact on the victim as well as the circumstances of the perpetrator, especially where a student has been subjected to harassment by many different classmates, each of whom may have misbehaved only once. More broadly, the lesson is that every

incident may be a sign of more pervasive problems. Look at the forest, not just the trees. Focus on the big picture – and take reasonable steps to protect all students and foster learning – rather than on each individual case.

Don't Overreact. This tip may seem contrary to the previous one – but, as we told you, the law is not black and white. Even as you focus on the big picture, don't jump to conclusions or overreact. In *Sypniewski v. Warren Hills Reg. H.S. Dist. Board of Education*, a student was suspended for violating a policy prohibiting items of clothing “depicting or implying racial hatred or prejudice.” When the student filed suit challenging the suspension, the court acknowledged the board's good intentions – to address perceived racial tension in the district – but looked closely at whether the student had a First Amendment right to wear the t-shirt at issue, which said, “You Might Be a Redneck If ...” and listed ten characteristics of rednecks. The Court found that the evidence on which the board relied did not support the conclusion that the t-shirt was likely to contribute to racial tension or cause material, substantial disruption of the educational program (the standard for deciding First Amendment cases). It ruled, in essence, that the board had overreacted. The lesson here is that even when you believe your action is justified, be sure the facts support your conclusion. Don't go overboard. Don't act in haste or based on assumptions that aren't borne out by the evidence. Good intentions aren't enough.

Be Consistent It didn't help, in the *Sypniewski* case, that another student had been permitted to wear the same t-shirt without receiving any discipline. This weakened the board's case, and strengthened the argument that the board's fear of disruption or increased racial tension was unsupported. Rules should be enforced consistently, so that every action can be defended against claims of arbitrariness, unfairness and discrimination.

Be sure you can articulate a reason. Boards have wide discretion in their enforcement of academic and disciplinary policies and decisions regarding hiring and firing of employees (other than in tenure cases, where discretion is limited). Still, don't be too relaxed. Even in areas where boards are permitted to act for any reason or no reason, such as nonrenewal of nontenured employees, they may not act in violation of statutory or constitutional rights. In the event of a claim of such violation, the board will need to identify a legitimate non-discriminatory reason for its action. In areas of curriculum and instruction, it will need to identify a legitimate pedagogical reason. Because such claims may arise when you least expect them, it's good to anticipate the possibility in every case. Ask yourself the reason for every decision you make. If you can't articulate a legitimate reason, the board could be at risk.

A Few Final Tips Don't go it alone. As a board member, don't try to think like the board lawyer, even if you are an attorney. Especially if a decision may be questionable, discuss it with others, preferably board counsel. Notwithstanding recent state regulations that seem to limit consultation with counsel, a call to the board attorney could save a lot of trouble and expense. Just make sure you follow the proper procedures for contacting your board's attorney.

Remember: Better safe than sorry. That's a good rule, not only for avoiding liability in your school district, but for life.

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