



SICK DAZE:

ARE YOU

LIABLE?

Understanding and minimizing your school's **negligence liability** for student injuries and illnesses at school.

BY CONSTANCE H. BAKER, ESQ. AND CELIA E. LANDGREN, ESQ.

You are the head of an independent high school. After a long week of work, you receive a call at 9 p.m. on a Friday from your school's athletic director. The quarterback of the school's football team was injured during the game that night, and is on his way to the hospital with a possible concussion.

Now, imagine that you are a second grade teacher at an independent primary school. One of your students with a known peanut allergy eats a piece of candy containing peanut oil and goes into anaphylactic shock. You administer the student's prescribed epinephrine, as you were trained to do in this type of emergency situation.

In each of these incidents, the educator's immediate concern is to help the student get appropriate medical attention so that his or her injury or illness is appropriately treated. However, the potential fallout from such an incident could bring a parade of lawsuits, lawyers and legal bills in the event that the student's parents bring legal action against the school or its administrators, teachers, coaches or other personnel.


While a lawsuit may be filed against them, the school and its personnel normally will not be liable for damages that arise. Schools are not required to prevent all injuries or illnesses from happening.

Instead, they are expected to anticipate those incidents that are foreseeable, institute appropriate

practices and safeguards to prevent injuries to the extent reasonably possible, and respond to the injuries or illnesses that do occur.

While a school or its personnel may be subject to a legal claim when a student falls ill or is injured at school, whether they will be found liable for the resulting damages depends on a host of factors, including the reasonableness of their conduct.

Scope of the Problem


 We have all heard accounts of incidents such as those described above. But what is the true scope of the student accident and injury problem in our schools?

According to Safe Kids Worldwide, an estimated 2.2 million children ages 14 and under sustain school-related injuries each year, and one in 14 students suffers a medically-attended or temporarily disabling injury at school annually. These statistics are not surprising since Safe Kids Worldwide reports that school-age children in the United States spend almost one quarter of their waking hours at school or on school property.

The National Institutes of Health reports that chronic illnesses affect at least 10–15 percent of American children. Common chronic conditions among school-age children include asthma, allergies, diabetes and epilepsy, all of which require comprehensive and coordinated care at home and at school.

In light of these striking statistics, schools should assess their readiness to reduce the risks presented by student injuries and illnesses and respond reasonably to them.

Negligence Theory of Liability

 Probably the most common legal claim asserted against schools and school officials arising from student injuries or illness is the tort claim of negligence. A tort is a civil wrong that results in an injury or other harm that constitutes the basis for a legal claim by the injured party against the wrongdoer.

A claim for negligence may arise where a plaintiff demonstrates that (1) the defendant owed the plaintiff a legal duty; (2) the defendant breached that duty; (3) the plaintiff suffered an injury; and (4) the defendant's breach was the proximate cause of the plaintiff's injury.

Courts across the country have held that schools and school personnel are required to exercise ordinary care to prevent harm to students from foreseeable hazards. This is known as the "duty to protect."

Practically speaking, this means that schools, administrators, teachers and other school personnel have a responsibility to anticipate potential dangers to students, and to take reasonable steps to reduce those dangers. Schools are not required to prevent all injuries and other



accidents from occurring. Instead, the school's obligation is limited to acting reasonably to reduce harm posed by those hazards that are foreseeable.

Where a school or its personnel fail to exercise reasonable care in protecting the safety and well-being of students, it may be found to have breached its duty. A court will assess the conduct of the school and its personnel based on how a reasonable person would have acted under similar circumstances.

Several factors will be considered when determining how a reasonable person would have acted under similar circumstances, including his or her training and experience, the student's age and special needs, the environment in which the injury occurred, and the proximity of the teacher in charge, among others.

Where the duty of care is breached, a court will then assess whether there is a connection, known as proximate cause, between the breach of the duty and the student's injury that results from it. Specifically, a court will determine

Protection for Good Samaritans

School personnel may wonder whether state Good Samaritan laws provide them with legal protection for giving assistance to students who are injured or ill.

Good Samaritan laws were initially intended to encourage medical personnel to provide emergency assistance at roadside accident scenes by providing them with immunity from civil and criminal liability.

Some states have expanded the scope of these laws to protect the actions of any individual who provides emergency assistance to someone in peril. The scope of these laws varies greatly by state.

In the context of school personnel, states are increasingly passing legislation that grants some measure of immunity to school nurses and/or school employees that administer epinephrine to students with severe allergic reactions.

However, these laws also vary by state, and may require that the school employee have certain training or be supervised by a school nurse in order to qualify for immunity. Schools should consult with their legal counsel to determine the Good Samaritan Laws that may apply in their states.

whether the injury could have been foreseen and prevented by the school or school personnel exercising a standard of reasonable care.


The student must have sustained an actual physical or mental injury in order to prevail on a negligence claim. Even if it is established that the school or school personnel owed a duty of care to the student and breached that duty, a negligence claim will not be successful unless the student proves that he or she sustained an actual injury that was proximately caused by the breached duty.

Schools may be directly subject to the type of negligence claim described above. However, they may also be subject to a claim of vicarious liability stemming from the negligence of a school employee under the doctrine of *respondeat superior*.

Respondeat superior holds employers, including schools, liable for the negligent acts or omissions of their employees in the course of employment. As such, the parents of injured students may be able to seek damages from the school that employs the teacher, as well as the employee himself or herself.

While a school may be sued on a negligence claim, it is unlikely that it will be found liable for injuries or accidents, unless the school or its personnel were found to have breached their duty of care to the student, and such breach was found to be the proximate cause of the injury that resulted.

Injuries in the Classroom

 Students spend most of their day in the classroom, so it's not surprising that injuries occurring in the classroom are common. Schools should consider the following potential risk areas when acting in accordance with their duty to protect students in the classroom setting:

- ⊗ Is the student-to-teacher ratio sufficient so that the teacher can adequately supervise the students?
- ⊗ Has the school established supervi-

sion expectations with its teachers for classroom activities, assemblies and other daily events? Is the school enforcing these expectations when teachers fail to comply with them?

- ⊙ Are the students old enough and mature enough to participate in a particular classroom activity?
- ⊙ Has the school established classroom behavioral expectations with the students? Is the school enforcing these behavioral expectations?
- ⊙ Are the classrooms and hallways clear of physical hazards?
- ⊙ Does the school require the services of a part-time or full-time school nurse?
- ⊙ If the school has a nurse on-site, are the nurse's license and other credentials in good standing? Does the nurse have appropriate training and experience in the school setting? Does an administrator have adequate oversight over the nurse's job performance?
- ⊙ Does the school have an emergency response plan and training related to that plan, including the use of CPR and external defibrillators?



Injuries on the Playground

+ Safe Kids Worldwide reports that playground injuries are the leading cause of injury among children ages 5–14 in the school setting. Schools should consider the following when assessing the potential risk of injuries on the playground:

- ⊙ Are the playground equipment and surface safe and free from potential physical hazards?
- ⊙ Are the playground equipment and surface periodically inspected and serviced?
- ⊙ Do the students have adequate supervision by teachers or other adults during recess?
- ⊙ Has the school established supervision guidelines for teachers and other adults who supervise recess? Is the school enforcing these guidelines where teachers and other adults fail to comply with them?
- ⊙ Has the school established behavioral expectations with the students pertaining to their use of the playground? Is the school enforcing these expectations where students do not meet them?
- ⊙ Is there an increasing number of student injuries resulting from certain playground games? If so, would banning these games help to curtail the number of injuries?

Injuries during Sporting Activities

+ According to Safe Kids Worldwide, 34 percent of school-related injuries requiring hospitalization arise from sports activities. Additionally, some of the most catastrophic injuries can result due to participation in school athletics. As a result, schools should consider the following risk areas with respect to both physical education classes and organized sports:

- ⊙ Are the students old enough and mature enough to participate in a particular physical education class activity or organized sport?

Protecting Confidentiality of Medical Records


A variety of federal and state laws, as well as ethical guidelines, apply to the obligations of schools and their licensed health care personnel to keep students' medical records confidential. Schools should consult with their legal counsel to determine if any of the following laws or guidelines may apply with respect to the records maintained by the school:

- **FERPA:** The Family Educational Rights and Privacy Act (FERPA) only applies to independent schools that receive federal funding.
- **HIPAA:** The Health Insurance Portability and Accountability Act (HIPAA) only applies to independent schools that bill payers electronically for health care services rendered. Most schools do not bill for health care services in this manner, so HIPAA typically does not apply to medical records maintained by schools.
- **State Professional Licensure Requirements:** Your school's licensed health care professionals, such as the school nurse and school counselor, may have independent obligations of confidentiality by virtue of their state professional licenses. Confidentiality is typically owed to the licensed professional's "client," which may be the school or the student being treated, depending on the licensed professional's duties and responsibilities.
- **State Mandatory Reporting Obligations.** All 50 states and the District of Columbia have laws that require certain persons to report suspected child abuse and neglect to the authorities under specific circumstances. School personnel are typically included in the class of mandatory reporters.
- **Professional Ethical Guidelines.** National industry organizations, such as the National Association of School Nurses and the American School Counselor Association, have established ethical guidelines and codes for licensed health care professionals working in the school environment. These guidelines tend to encourage confidentiality between the licensed professional and the student, at the expense of sharing information with school administrators and parents. However, these guidelines defer to applicable laws that may require disclosure, such as the mandatory reporting obligations summarized above.



- ⊙ Do the school's physical education teachers and coaches have training and experience with regard to handling student injuries?
- ⊙ Does the school provide athletic trainers or other medical personnel at athletic practices or games for those sports with the highest risk of injury?
- ⊙ Does the school have a plan in place for responding to different types of student injuries during practices and games?
- ⊙ Does the school have a concussion management policy? Does that policy include management of the period immediately following the injury, as well as the student's return to the classroom?


Chronic Illnesses

 An increasing number of Americans are dealing with chronic health issues, and children are no exception. For school-age children, two of the more common chronic illnesses are food allergies and asthma. Schools should consider the following items when assessing their potential risk as it pertains to students' chronic illnesses:

- ⊙ Does the school have a medication administration policy for students who need to take prescription or over-the-counter medications during the school day?

- ⊙ If the school does not require the services of a nurse, are there adequate numbers of trained unlicensed assistive personnel who can assist with medication administration and other emergent health needs of students?
- ⊙ Does the school have a policy in place for identifying students with known chronic illnesses?
- ⊙ Does the school work with the parents of students with known chronic illnesses to develop a plan for addressing the students' illnesses, including routine maintenance and acute exacerbations of the illnesses?
- ⊙ Is the school located in a state that permits or even mandates that the school procure and make available epinephrine for undesignated use (such as epinephrine that can be used for any student who requires emergent treatment for anaphylaxis, regardless of past history of allergies)?

Best Practices for Minimizing Liability

 Schools should consider the potential negligence of risk areas set forth above, and take appropriate action to establish and enforce policies, guidelines and expectations to help minimize these risks.

Schools should take advantage of existing guidelines that can assist in

the development of these policies. For example, "Guidance for the Administration of Medication in School," published by the American Academy of Pediatrics, can assist schools with creating or updating their medication administration policies.

Additionally, the "Voluntary Guidelines for Managing Food Allergies in Schools and Early Care and Education Centers," published by the U.S. Department of Health and Human Services, provides helpful guidelines to schools with respect to students with chronic illnesses.

In the area of concussion management, many states have passed legislation setting forth concussion management guidelines that schools may consider. An article, "Heads Up: Concussion Management Can Protect Student Athletes and Institutions," in *Reason & Risk* magazine, published by United Educators, details this trend.

Industry associations, such as the American Physical Therapy Association, are working with members of Congress to pass federal legislation that would allow for the development of national concussion management guidelines that address the prevention, identification, treatment and management of concussions in school-age children. As such, schools should keep abreast of further developments in this area as they further refine their policies on this topic.

Creating written policies is not enough. Schools should educate teachers, students and parents regarding these policies, and create a culture of safety and accountability.

Additionally, administrators should speak with their school's insurance carrier to determine whether the school has adequate levels of insurance. As of January 1, 2014, public and independent high schools in Illinois are required to provide catastrophic injury insurance to cover up to \$3 million worth of medical costs if a student is injured while participating in school-sponsored or school-supervised interscholastic athletic events sanctioned by the Illinois High School Association. Such policies

cover the students' medical expenses in excess of \$50,000. Independent schools in other states should be familiar with any similar mandates that may apply to them.

Finally, schools should work with their legal counsel and insurance carriers to assist with identifying risk areas specific to their school programs, and take reasonable action to help reduce any additional risks that are identified. ■

Constance H. Baker, formerly a Partner at Venable LLP in Baltimore, Maryland, concentrates her practice in health care law and independent school law. Email: connie@chbakerlaw.com.

Celia E. Landgren, an Associate at Venable LLP in Baltimore, Maryland, also concentrates her practice in health care law and independent school law. She previously served as in-house legal counsel for a national pharmacy benefit management company. Email: celandgren@venable.com.

MORE RESOURCES

The following resources provide additional background on medical liability issues:

- **Students With Chronic Illnesses: Guidance for Families, Schools, and Students**, published by the National Heart, Lung and Blood Institute. www.nhlbi.nih.gov/health/public/lung/asthma/guidfam.pdf.
- **Policy Statement – Guidance for the Administration of Medication in School**, published by the American Academy of Pediatrics, 2009.
- **Voluntary Guidelines for Managing Food Allergies in Schools and Early Care and Education Centers**, published by the Centers for Disease Control and

Prevention, U.S. Department of Health and Human Services, 2013.

- **“Heads Up: Concussion Management Can Protect Student Athletes and Institutions,”** an article authored by Julie Britt in *Reason & Risk* magazine, published by United Educators Ins. 2012.
- **Legal Issues in School Health Services**, by Nadine C. Schwab & Mary H.B. Gelfman eds., Authors Choice Press, 2005.
- **Tort Liability 101: When Are Teachers Liable?**, by John M. Drye, published by Educator Resources National Office. www.educator-resources.com/pdf/Teacher%20Tort%20Liability.pdf.

RETIREMENT PLAN CONSULTING SERVICES

Retirement plan operations requires your increasing attention. Regulatory complexity can be time consuming, stressful and mistakes are costly. We offer affordable peace of mind.

- Plan Design
- Deferred Compensation Arrangements
- Operational and Regulatory Compliance Administration
- Consulting



NEW PINNACLE
CONSULTING GROUP, LLC

704.900.5566 | info@newpcg.com | www.newpcg.com

