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MY BROTHER'S KEEPER: VIOLENCE AND SCHOOL LIABILITY

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Violence has become a major issue for employers, and regrettably schools have not been immune to this development. As the incidents of school violence have increased, so have the opportunities for litigation. This article discusses the most recent court cases arising from school violence concerns and provides recommendations for educators in the following areas: documenting student misbehaviors, especially violent incidents; providing clear behavioral rules for school and school-related activities and instructions about how to follow those rules; negligence; peer harassment; weapons at school; and foreseeability.

Results of a 1999 survey conducted by Metropolitan Life illustrate with startling clarity the pervasive fears that are the consequence of violence in American schools. The survey reveals that 25% of students surveyed have been the victim of a violent act that occurred in or around school. Elementary children are just as likely to be victims as those in secondary schools. Twenty-eight percent of students, 23% of teachers, and 30% of law enforcement officials surveyed think that violence in local public schools will increase in the next two years. Private and parochial schools have no immunity from similar scenarios (The Metropolitan Life Insurance Company, 1999).

Violence in our schools is not a new phenomenon, but its escalation in recent years necessitates a renewed vigilance in how we respond to smaller incidents of a violent nature. In examining relevant case law, it is possible to find valuable lessons which will allow school personnel to respond more efficiently to violence in a school setting and hence to foster a safer learning environment for school personnel and students alike.

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In a case which addresses a common form of school violence (*McLoughlin v. Holy Cross High School,* 1987), 14-year-old Francis McLoughlin, a tenth-grade student at Holy Cross High School, was injured when another student entered his classroom and began a fight. The teacher was absent from the room when the incident occurred. The plaintiff's opening statement indicated that McLoughlin's attacker was "a bully and tough guy" whose reputation was well known.

While the plaintiff's lawsuit in *McLoughlin* (1987) was unsuccessful because he failed to allege that the school should have foreseen the feasibility of an assault by a chronically violent student, it does illustrate the necessity of documentation of student behaviors by administrators either to prove precedent or to record steps taken to discipline students who pose a threat to themselves or others. Foreseeability would have been the significant issue if there had been an allegation of negligent supervision. *McLoughlin* also provides an opportunity for a discussion of the ramifications of a teacher's absence from the classroom. It is not inconceivable that a teacher may be required to leave students unattended briefly, and such absences are generally acceptable in emergency situations and within limits; however, school policy should dictate procedures for all school personnel to take if it should become necessary to leave students unattended. Under no circumstances should students with documented histories of violence or threatening behaviors be left unattended.

In a case which underscores the necessity of documenting attempts to address violent behaviors, the parents of nine-year-old Aja Templar brought action against the school district alleging willful and wanton misconduct resulting from injuries sustained when Aja was hit in the eye by a rock thrown by another student as they both waited for the school doors to open (*Templar v. Decatur Public School District,* 1989). The Circuit Court granted the school district's motion for directed verdict, and the plaintiffs appealed. The Appellate Court held that the school district did not engage in willful and wanton misconduct and, therefore, was not liable for Aja's injury.

Particularly important in *Templar* (1989) is the court's reliance on section 24-24 of the School Code (Ill. Rev. Stat. 1987, ch. 122, 24-24) that indicates the following:

> Teachers and other certified educational employees shall maintain discipline in the schools, including school grounds, which are owned or leased by the board and used for school purposes and activities. In all matters relating to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians of the pupils. This relationship shall extend to all activities connected with the school program...and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.

The Illinois Supreme Court has repeatedly held that educators are not subjected to any greater liability than parents, and they are, therefore, liable only for willful and wanton misconduct, but not for mere negligence. Because the school had knowledge of harassing behavior toward Aja and had answered complaints with documented disciplinary action toward the aggressive student and also changed his bus stop to minimize contact with Aja, the district had exercised ordinary care in attempts to prevent injury and could not be held liable for willful and wanton misconduct as the plaintiff alleged.

Templar (1989) therefore demonstrates for administrators the necessity of providing instructions for student behavior on buses and at bus stops and for documenting repetitive behaviors as well as the actions taken by school personnel in response to those behaviors.

In a similar circumstance (*Smart v. Hampton County School District*, 1993), Gary Smart, a 13-year-old student at Estill Middle School, had complained to his parents and teacher about harassment by two classmates for a period of five months. The two boys had been sent to the office and had been disciplined several times as a result. The teacher had also disciplined the boys, including a paddling on one occasion. On the day of the incident in question, however, when Smart complained of harassment, the teacher instructed the boys to stop but harassment continued when her back was turned. At the end of class, a fight ensued and Smart's leg was broken.

The Smarts brought action against the school district alleging negligence, and the Circuit Court entered judgment on jury verdict for the plaintiff. The school district appealed, and the Court of Appeals affirmed that the district's gross negligence was the proximate cause of the injury.

Although *Smart* (1993) may appear to be very similar to *Templar* (1989), in which a student was harassed and injured despite the school board's actions to limit interaction between the two parties, there exists a significant difference. The defendant in *Templar* responded to all complaints by physically moving the harassing student to prevent an encounter which might prove injurious to one party or another. In *Smart,* while initial complaints by the plaintiff were heeded and addressed, the last complaint to his teacher was not. Smart was apparently seated between the two students who harassed him, and evidence indicated that the teacher had used the arrangement of desks in the classroom as a management tool on other occasions; however, on this occasion, she did not.

The courts have defined gross negligence in a variety of ways; however, it is generally regarded to differ from ordinary negligence in the degree of inattention to consequences. Willful and wanton misconduct implies that the actor ought to have known the potential for injury and implies reckless behavior in regard to another's safety. In *Smart,* the court held that the teacher failed to exercise slight care by moving either Smart or the boys who harassed him to avoid altercations. Hence, failure to address threatening

behaviors properly and consistently resulted in a student injury and liability for the school.

Such failures to address harassing behaviors related to gender have become a particularly prominent area of litigation in the past five years as well. As recently as November 2000, schools have found themselves in a position of liability stemming from allegations of hostile environment harassment wherein sexual harassment creates an intimidating, abusive, or hostile environment for students which goes unaddressed by school personnel. Behaviors which had previously been viewed as relatively innocuous are now viewed differently when the pattern of harassing behavior impedes a child's progress by creating an intimidating school environment.

The newest front for sexual harassment to draw the courts' attention under Title IX of the Education Amendments of 1972 exists in the area of peer harassment. The courts have expressly stated in both *Franklin v. Gwinnett County Public Schools* in 1992 and *Gebser v. Lago Vista Independent School District* in 1995 that schools may be liable for damages under Title IX where school officials are deliberately indifferent to known acts of teacher-student sexual harassment; however, recent cases indicate that the same liability may also be applicable in cases of peer harassment wherein school officials are deemed to have remained deliberately indifferent to repeated complaints of student-student harassment. In *Davis v. Monroe County Board of Education* (1999) fifth-grader LaShonda Davis was repeatedly harassed by a classmate for several years. She had made repeated attempts to seek help from both her teachers and the school principal to no avail. At one point a teacher refused her request to speak with the principal with the statement, "If (the principal) wants you, he'll call you." During one meeting with the principal, he asked LaShonda why she "was the only one complaining." In order to create Title IX liability, the harassment, according to the courts, must be so severe, pervasive, and objectively offensive that the victim is effectively prevented from access to educational opportunity, but the courts in *Davis* were hesitant to approach that slippery slope by making schools responsible for controlling student harassment which seems to have existed since the inception of organized schools. While *Davis* did not initially result in a ruling which awarded damages to the plaintiff, the same issue of student-student harassment and a school's duty to act on complaints was tested again in November 2000, when a federal appeals court upheld a $200,000 verdict awarded to Alma McGowen (*Vance v. Spencer County Public School District,* 2000). The 19-year-old woman claimed that school officials in Spencer County, Kentucky, had remained indifferent to her reports of harassment and assault over a period of years while she was in middle and high school. In McGowen's complaint, she cited incidents where students touched her, struck her, called her names, pulled off her blouse, asked her for sex, and threatened her with rape. On one occasion when she spoke to the principal,

he advised her that the boys were flirting with her because she was cute and said she should "be friendly." Evidence presented at the trial indicated that school officials did nothing other than talk to the student harassers and were not able to present documentation that they had taken other steps to resolve the problem (*Vance,* 2000). To win, McGowen had to show that school officials were aware of the likelihood that she would be harmed by the harassment but still failed to take action to stop the perpetrators. The *Vance* decision conveys for schools nationwide a forceful message that complaints of harassment must be addressed aggressively and documented rigorously if school personnel, including counselors, administrators, and teachers, hope to avoid liability for peer harassment.

It is worth noting as well that the courts are ready to address sexual orientation harassment claims in the same manner. A federal district court ruled in November 2000 that a Minnesota student might proceed with a claim that his school did nothing in response to his complaints of abuse and harassment over an 11-year period. He was able to provide evidence that he had made hundreds of complaints to teachers, counselors, school monitors, bus drivers, and the superintendent of schools about the abuse stemming from his supposed sexual orientation and his failure to meet masculine stereotypes. The school had done nothing but issue verbal reprimands until his suit was filed, and the boy claimed that the persistent harassment engendered an environment that was so intimidating and hostile that it hampered his educational progress. The court ruled that actual knowledge of harassment by school personnel could be sufficient grounds to create school liability under Title IX (*Montgomery v. Independent School District No. 709,* 2000). Minnesota is one of several states, including California, Illinois, and Wisconsin, which have specifically prohibited sexual harassment in high schools and post-secondary schools (Minn. Stat. 127.46 and 135A.15, 1991); however, it is not inconceivable that others will rapidly follow suit.

The courts appear consistent in their support of aggressive attempts by school personnel to address peer harassment as is illustrated in *Iwenofu v. St. Luke School* (1999). In *Iwenofu,* the principal of a Catholic school not only suspended an eighth-grade boy for repeatedly grabbing the breasts and buttocks of female students, but also reported his behavior to the Ohio Department of Human Services and the local police because under law these parties must be contacted if there is any reason to believe that sexual abuse or violence has occurred involving a child under the age of 18. The parents alleged that such reporting amounted to malicious criminal prosecution and sued both the school and the diocese. The Court of Appeals of Ohio, however, concluded that the school's actions were appropriate.

Because there exists an in loco parentis relationship between student and school, every student has the right to expect that he or she will be protected from persistent harassing behavior. Many courts have found that the primary

determiner in cases involving sexual harassment is the presence or absence of an effective, well-publicized, and consistently enforced sexual harassment policy, which specifies both the complaint procedure and the graduated consequences for harassing behavior. School officials should therefore adopt such a policy to establish a reporting procedure both for students and school personnel and deal with complaints by conducting a thorough investigation. If school officials determine that harassment is occurring or has occurred, they should implement corrective action and document all actions taken. Finally, it is in the best interests of all members of the school community to take part in training that clarifies behaviors which may be regarded as harassing as well as the specifics of the reporting procedure and the harassment policy itself.

The presence of weapons in a school environment presents an entirely different set of problems. According to a report by the U.S. Department of Education (1999), a total of 3,930 students were expelled for bringing a firearm to school. Three percent of students in grades 6 through 12 in public schools carried a gun to school in the last year (Parent Resource Institute of Drug Education, 1999). With the increasing frequency of weapons in the schools, the 1990 case of *Clark v. Jesuit High School of New Orleans* clarifies in part the issue of foreseeability as it relates to school liability. In this case, the parents of a high school student filed suit, alleging negligence on the part of school officials when another student shot their son with a gun outside the doors of the school building. The plaintiffs based their complaint on two elements: negligent supervision of the area and whether Jesuit officials had actual or constructive knowledge of the gun. The District Court granted summary judgment for the school; and, upon appeal by the plaintiff, the Court of Appeals affirmed the judgment that the school was neither negligent nor strictly liable.

A noteworthy issue in *Clark* (1990) deals with the concepts of *actual knowledge* and *constructive knowledge.* School personnel, despite vigilant supervision, had no reason to suspect that Mel Clark's attacker had a gun in his possession. If there had been reasonable suspicion, school personnel could have investigated, but the student indicated that he had taken great care to hide the gun from everyone. Because there was no doubt that school personnel did not have actual knowledge, the plaintiff alleged that school personnel had constructive knowledge, that is the condition was so inherently dangerous that school officials should have known about it; however, cases involving constructive knowledge customarily have related to some aspect of facilities management such as broken windows, slick floors, or loose railings which are under the control of the school.

The student had no record of prior violence, nor were violent acts so much the norm at the school so as to require heightened supervision. Because the burden of proof was on the plaintiff, the existence of adequate supervision

and the absence of knowledge of the gun on the part of school officials precluded a finding of negligence in the defendant's supervision. The court also indicated that spontaneous acts of violence on school grounds do not create liability as long as there exists adequate supervision. Even if supervision had been inadequate in this case, the plaintiff would still have had to prove a causal connection between the lack of supervision and the injury.

The issue of foreseeability also came into play in the 1997 case of *Hill v. Safford Unified School District.* Two students became involved in a confrontation during school hours. An assistant principal spoke to both parties in his office and believed that the conflict had been defused. After school hours, one of the students shot the other to death in a rural area away from school grounds. The parents of the murdered student filed a wrongful death suit alleging that school officials had knowledge of a dangerous situation, which they did not act to prevent. The Arizona superior court awarded summary judgment to the district, and the family appealed to the Court of Appeals of Arizona. While the court agreed that school officials have a duty to protect students from foreseeable harm, it also reasoned that the only way to prevent the altercation off school grounds would have been to incarcerate the other student, which did not lie within the school's power.

The courts have consistently asserted that schools cannot be the sole insurers of a student's safety and have been wary of infringing too excessively on the freedom of school officials to establish and implement policies which allow for the proper management, maintenance, and conduct of schools. Court support for these policy decisions is found in *Davis v. Hillsdale Community School District* (1997). A Michigan school district had adopted a dangerous weapons policy which prescribed expulsion for students who possessed weapons in a school zone. While the policy specified that BB guns were included in the policy, it also made reference to a Michigan law, which does not define BB guns as dangerous weapons. When two expelled students filed suit, the Michigan trial court noted the difference between the school's policy and the state law and ordered the school to rescind the expulsions. Upon appeal by the district, the Michigan Court of Appeals indicated that the school board, in maintaining its inherent disciplinary powers, had the authority to prohibit BB guns on school property, and nothing in the state law limited this authority. Hence, the expulsions were deemed legitimate and consistent with both state law and school policy.

Adequate supervision and appropriate response to threatening circumstances emerge then as key issues in addressing school violence; and, in attempts to address these key issues, many schools have begun to establish specific safety policies and develop crisis plans. While such plans and policies are crucial steps in responding to threatening situations, they are of little use unless all personnel are trained and diligent in their implementation. The ramifications of noncompliance are evident in the 1993 case of *Mirand v. City*

of New York. While Virna Mirand was waiting for her sister, Vivia, to be dismissed from class, she accidentally bumped into another student who became enraged and threatened her. Virna ran to the security office to request assistance, but no one responded to her knock. She stopped a passing teacher who told her to return to the security office, where she again received no response. At dismissal, her sister joined her, and both began to exit the building through an entrance usually monitored by security personnel. As she exited, the same girl who had threatened Virna attacked Virna and her sister. The girl wielded a hammer while another unidentified student stabbed both sisters. Eventually the sisters were able to make their way back into the school building and return to the security office where they found four or five security officers.

On the day of the attack, 13 school safety officers who had been trained in security operations and wore uniforms were assigned to the school. Each officer was to cover a specific area of the school building or its surrounding grounds during dismissal in accordance with the school's security plan. The plan also outlined procedures for teachers to follow when they encountered an incident which they felt required attention.

The plaintiff brought action against the board of education, and the jury returned verdict for the students. The Supreme Court, however, granted the motion of the board of education to set aside the verdict and dismiss the complaint. Upon appeal, the Supreme Court, Appellate Division, held that the evidence was sufficient to indicate that the board had violated its duty to provide supervision when and where it was most necessary; and the jury's verdict, therefore, was reinstated.

In *Mirand* (1993) there was a great deal of evidence presented to indicate that the area outside the school doors was an area in which students tended to congregate in large numbers and in which fights were the norm. Armed with that knowledge, school officials had instituted a security plan which was designed to deploy uniformed security guards to serve as a deterrent to violent activity. However, the guards were not at their assigned posts during afternoon dismissal, a time which the court viewed as critical because there was a larger concentration of students in a relatively small area. In short, the board had breached its duty by failing to follow its own security plan to provide adequate supervision of students on school grounds.

A report by the Office of Juvenile Justice and Delinquency Prevention (1999) indicated that violent crimes by juveniles peak in the afternoon between 3 p.m. and 4 p.m., the hour at the end of the school day. Such evidence would seem to stress the necessity of added vigilance on the part of school officials in monitoring students as they leave school grounds and the necessity of incorporating into existing safety plans additional security elements to oversee open areas where students may tend to congregate immediately after dismissal. Such an element was part of the school's safety policies in *Mirand* (1993) but had been disregarded on the day of the attack on the sisters.

The importance of following policy is a crucial element in *Mirand* (1993). The fact that the school board had perceived a need and addressed it with an extensive plan indicated that members recognized and understood the potential risks associated with leaving certain areas of the school grounds unsupervised. Nor could school officials assert that the attack was unforeseeable because of Virna's conversation with the teacher relating the threat.

Many such attacks are not altogether unforeseeable. On December 1, 1997, a 14-year-old student at Heath High school in Paducah, Kentucky, shot and killed three students and wounded five others. A complaint filed in McCracken County Circuit Court on behalf of the families of the three students who were killed detailed what they believed were warning signals exhibited by their killer. Among those warning signs were violent stories and essays written as class projects as well as reports of disciplinary actions for such offenses as theft and bringing an ice pick to school and stabbing the wall of a classroom. The complaint also cited the failure of the school and the McCracken County Board of Education to establish a model school safety plan as recommended by the 1993 Kentucky School Board Association's task force convened to study school violence. The families contended that greater vigilance on the part of the school would have saved their children. Similar allegations followed in the wake of the disaster at Columbine in April 1999. Perhaps as a result of these allegations, schools appear to have become more proactive in their response to threatening behavior on the part of students.

An Ohio juvenile court found that an award-winning art student was properly charged with inducing public panic after her comments about carrying bombs to school shortly after the Columbine incident caused 300 students to stay away from school. Long before the deaths at Columbine, the student had created a comic book character who wore a black trench coat. When students at her school created a sympathy card to send to the students at Columbine, she drew the character on the card flashing the peace sign. School officials removed the character deeming it insensitive because of its similarities to the killers at Columbine. After the removal of the figure and the confiscation of a similar statue that she had created, the student made remarks that she "wanted to wear a trench coat that had bombs in it" and wanted to kill the faculty (*In the Matter of McCoy,* 2000).

In the same manner, the Ohio Court of Appeals supported a juvenile court conviction for menacing in a case in which a 14-year-old student wrote in his journal a threatening response to the prompt "When people lie to me, I..." Several days before, the student had been sent to the principal's office, and as he left the room, the teacher heard him utter the word "bitch." In his journal entry later, he indicated that "if you lie like a bitch you will be killed like a bitch." He also wrote "you can't stop me when I am out of control." The appeals court determined that the student knew that his teacher would read

the journal and view it as a threat, and therefore, the charge of menacing was justifiable (*In the Matter of Cleo W.*, 2000).

There is much to be done to meet the challenge of increasing violence in our schools, and precedent evidenced in relevant case law stresses the immediate need for specific action steps to make our schools more secure: heightened supervisory vigilance, consistent response to and documentation of threatening or violent behaviors, and the establishment and implementation of school safety plans that are tailored to meet the needs of specific school models. These plans should be properly disseminated to all members of the school community and should make clear the responsibilities of all parties in the provision of a safe learning environment for both school personnel and students.

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