THE BOARD REPORT

STATE-CREATED DANGER – IS YOUR DISTRICT AT RISK?

In a decision announced August 22, 2011, Western District Judge David Cercone dismissed a lawsuit by granting the summary judgment motion filed by MB&M in favor of a client school district against a plaintiff who alleged a state-created danger claim arising out of an alleged student-on-student assault on school property. In recent years, there has been a sharp increase in the number of federal state-created danger lawsuits against school districts. These kinds of claims can be very costly and time-consuming to defend, even if defeated. With a new school year beginning, everything possible should be done to stop these types of claims from occurring. In this article, we'll explore the recent caselaw addressing state-created danger claims and propose preventive measures your district may consider to head off such claims.

As a general matter, governmental entities such as school districts have no affirmative legal duty to protect citizens from harm by third parties. An exception to this principle is where a governmental entity or employee either creates or increases the danger to which a person is subjected. This type of circumstance, referred to generally as "state-created danger," was described memorably by the Seventh Circuit Court of Appeals: "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."

The state-created danger doctrine has not been adopted in all jurisdictions, and the jurisdictions that have adopted it have formulated different factors to determine whether the requirements are met. Pennsylvania has recognized the state-created danger doctrine but requires that a plaintiff prove the following four elements: (1) the harm suffered by the plaintiff was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship existed between the state and the plaintiff such that the plaintiff was a foreseeable victim, as opposed to a member of the public in general; and (4) a state actor affirmatively used authority in a manner which created a danger to the plaintiff or rendered the plaintiff more vulnerable than if the state had not acted at all. This is generally a difficult standard to meet. The most notable Pennsylvania case where a state-created danger claim was permitted to go forward involved a husband and wife staggering home after a night of carousing. The police stopped the couple and told the husband to go home. The wife, who was in a state of severe and apparent intoxication, was left alone to find her way home, fell down a slope and died of exposure. The husband's claim against the police was permitted to go forward; while the police did not directly cause the woman's death, they increased the risk of harm to her by removing her protection in the form of her husband without otherwise providing a way for her to get home while she was in a visibly vulnerable state.

In school-related cases, state-created danger claims typically arise in the context of violent acts where the victim claims the district should have taken action to prevent the violence. For example, in *McQueen v. Beecher Community Schools*, a student was shot after her teacher left her alone with a student who had a concealed weapon. The court rejected her family's state-created danger claim as the danger would have existed regardless of whether the teacher was present or not. In *King v. East St. Louis School District*, a student stayed late to meet with a counselor, missed her bus and then was not permitted to re-enter the school building in accordance with district policy. She went across the street to a public bus station and was abducted and raped. Her state-created danger claim was rejected by the court because the school's policy was generally sound, and its misapplication by school personnel was negligent only and not conscience-shocking.

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State-Created Danger continued…

Cases where school-based state-created danger claims have been successful generally involve some overt removal of protection from students or a known, recurring dangerous situation. In *Armijo v. Wagon Mound Public Schools*, a student with psychological issues, past suicide threats and known access to firearms was suspended and then driven home by a counselor during the school day. This was a violation of school policy. The student, alone in the home, killed himself. The court permitted the family to advance claims against the district on the basis that the school created a dangerous situation by leaving the student home without his parents. In *Taylor v. Altoona Area School District*, a boy with acute bronchial asthma died after his classroom teacher failed to administer his inhaler despite his complaints of breathing difficulty. School personnel also failed to administer medications or resuscitation after the boy stopped breathing. On these facts, a claim was permitted to go forward on the basis that the behavior of the teacher shocked the conscience.

What lesson can school districts learn from these cases? These types of claims often arise when school employees do not follow established policy, or do not fully or properly investigate known risks of harm. For example, in both of the cases cited in the preceding paragraph, the failure to follow established school policy resulted in a finding of conscience-shocking behavior. If the school officials had followed school policy, the claims would not have been successful. To that end, it is worthwhile to continually review and train your employees in school policy and investigative procedure. While it is commonplace to make harassment and anti-bullying training an annual event, you should also determine when your staff members were last trained in routine health and safety policies and protocols. In this area, as often, an ounce of prevention is worth a pound of cure.

SUPERINTENDENT'S CORNER

RECENT LEGISLATION/COURT DECISIONS IMPACT SCHOOL DISTRICTS

While school districts are very familiar with the state budget's impact on education appropriations (Act 1A of 2011), additional recent legislation and Court decisions have significantly impacted school district operations including:

- Omnibus School Code Amendments (Act 24 of 2011) regarding background checks – This Act expands the list of prohibited offenses and establishes a life-time ban from school employment for those convicted of serious violent offenses against children.

- Act 1 Restrictions (Act 25 of 2011) – This Act reduces the backend referendum exceptions from 10 under Act 1 to only 4 and implements significant modifications to the remaining 4 exceptions.

- Sunshine Law Penalties (Act 56 of 2011) – This Act amends the Sunshine Act to increase the penalty on public officials who participate in a meeting with the intent and purpose of violating the Sunshine Act and further provides that the fines cannot be paid by the public body.

- Student Free Speech (Layshock/J.S. Federal Litigation) – The Third Circuit Court of Appeals issued recent decisions which found that both students' First Amendment rights had been violated when they were disciplined by their school districts for creating fake myspace profiles off campus of their school principals.

- Public Access to W-2 Records – In an appeal from an OOR decision, the Commonwealth Court determined that W-2 forms are confidential under the Internal Revenue Code and cannot be disclosed in response to an RTKL request.

Please visit our website, **www.mbm-law.net**, for a detailed summary and analysis of how the above legislation and Court decisions impact your school district.