



THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

CEPI Education Law Newsletter

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

FEBRUARY 2011 : Vol. 9-6

STUDENT SAFETY: STANDARD OF CARE REVISITED

Overview

Local school board members, school principals, classroom teachers, and coaches know full well the possibility of and potential liability for student injury—especially when students are involved in “high risk” activities. In today’s litigious environment standard policy in local public school systems requires that: (1) each school has an emergency/crisis intervention plan and team, and (2) all staff and students are made aware of and understand specific requirements and protocols that must be followed. What complicates the matter, however, is the fact that students (“as kids”) sometimes behave in unpredictable, impetuous, and immature ways with injurious consequences. Fortunately, courts have made it clear that while school personnel have a responsibility to keep students safe, liability does not attach where sudden and unforeseen actions were the *proximate cause* of a student’s injury. Jones v. Jackson Public Schools (Miss. 2000) and Swan v. Town of Brookhaven (N.Y. 2006)

Standard of Care. In public school work no uniform “one size fits all” standard of care exists to cover all contingencies. *Due care* is a fact bound concept and depends on the totality of circumstances and characteristics found in a given situation. In essence, the expected behavior of school personnel when working with students is that which a reasonable and prudent person, of similar qualifications and experience, would have, or should have, or should not have done in the same of similar circumstances. (Vacca and Boshier 2008)

To evaluate the adequate level of care required in a given situation the following factors are considered: (1) the *setting* in which students have been working or performing (laboratory, gymnasium, athletic field, pool, classroom, playground), (2) the *age, maturity, and number* of the students present (pre-school, elementary school, middle school, high school), (3) the *nature and degree of difficulty* of the student activity (e.g., science experiment, athletic exercise or movement, operation of shop equipment), (4) the *inherent dangers*, if any, involved in performing an activity, (5) the proper use of *materials and supplies* (e.g., chemicals, paints), (6) the *duration* of the activity, (7) the need for and proper use of *protective devices and equipment* (e.g., protective glasses, athletic equipment), and (8) whether or not the school staff member in charge had *actual, prior knowledge* of dangerous conditions or defective equipment but still let the student(s) proceed with the activity. The behavior of the student(s) is also factored into the analysis—especially where *contributory negligence* is alleged. (Vacca and Boshier, 2008)

LaPorte Community School Corporation v. Rosales (Ind. App. 2010)

Suffice it to say, establishing and maintaining a safe and secure environment for students in today's public schools is a difficult, time consuming, and daunting task. Ironically, while protecting students from the ravages of violence (including bullying), mayhem, dangerous weather, and toxic substances, some areas of daily operation sometimes go unnoticed. With the exception of such high profile areas as interscholastic football (especially focusing on head injuries and including spectator control), little is said about school buses, or the playground, or vocational shops and science laboratories, or field trips, or the school's hallways, gymnasium, and cafeteria—where potential and serious safety issues loom on a daily basis.

Recently, I found and reviewed a case decided by the Court of Appeals of Indiana in which the school's cafeteria was the scene of a tragic happening. Decided on October 27, 2010, LaPorte Community School Corporation v. Morales involved a wrongful death suit brought by the parent of an elementary school child who died as a result of choking in the cafeteria during lunch period. Briefly summarized the facts are these.

Facts. Indiana State Board of Education regulations require school systems to prepare emergency preparedness and crisis intervention plans. Hailmann Elementary School (as a part of the LaPorte Community School Corporation) complied with this requirement. Hailmann's school safety/crisis intervention plan required the school nurse to develop and coordinate a first aid team, coordinate an annual CPR and first aid training session, and provide a list of CPR trained individuals to the school principal.

In 2006, the school nurse shared her time between Hailmann and another elementary school in the district. Prior to 2006, the school nurse had never seen the school's plan and the principal had not talked to her about the plan or CPR training. Also, prior to September 2006, the school nurse had not coordinated a first aid team, or coordinated annual CPR training at Hailmann, or provided the principal a list of trained CPR staff members at Hailmann.

On September 12, 2006, the school nurse was assigned to the other elementary school. Juan, a nine year old third grader at Hailmann, was eating in the school's cafeteria. The head custodial was on duty in the cafeteria during that lunch period. He told Juan and other boys, who were "joking around" at Juan's lunch table, to calm down and eat. A minute later one of the boys at the table informed the custodian that Juan was choking. The custodian informed the noon assistant and sent her for help. The custodian went over to Juan's table. Juan had his hand on his throat. He told the custodian that he was choking. The custodian leaned Juan over the table and gave him three or four blows to the back. Juan vomited.

When the school principal and school secretary arrived on the scene they saw Juan standing with his hand on his mouth. The school secretary attempted a Heimlich maneuver but was unsuccessful in dislodging the object in Juan's throat. The principal sent the secretary to make an "All-Call" announcement for anyone who knew the Heimlich maneuver to report to the cafeteria. The custodian returned to Juan when he heard the "All-Call" announcement. He attempted to do another Heimlich maneuver on Juan. Several other staff members and teachers also responded and unsuccessfully attempted to do a Heimlich maneuver on Juan. At some point Juan lost consciousness. They put him on his stomach and attempted to do stomach thrusts on him. They also did finger sweeps of Juan's mouth and throat. Another teacher picked up Juan and did the Heimlich maneuver until a police officer arrived. The police officer attempted stomach thrusts and chest compressions on Juan until an ambulance arrived. When a paramedic found that Juan did not have a pulse or respiration he opened Juan's airway with a laryngoscope blade and with forceps removed a large piece of corn dog. According to the

paramedic the corn dog was not lodged in Juan's trachea—it was in his “oral cavity,” which included the throat. Despite the efforts made by school and emergency personnel Juan later died at the hospital.

Trial Court Judgment. On October 23, 2006, the parent (Rosales), individually and as the parent and natural guardian, filed a tort claim notice with the school corporation on January 26, 2007; filed a complaint for wrongful death against the school corporation; and in January 2008, filed an amended complaint for wrongful death alleging negligence and emotional distress. In response the school corporation alleged, in part, that the damages were a proximate result of Juan's contributory negligence.

A jury trial was held in LaPorte Circuit Court (September 2009). The jury returned a verdict in favor of the parent and against the school corporation in the amount of \$5,000,000 which was subsequently reduced—a judgment was entered for \$500,000. The school corporation appealed.

Court of Appeals of Indiana Rationale. Four issues were raised on appeal. First, whether the trial court properly admitted expert witness testimony. Second, whether the trial court properly denied the school corporation's motion for judgment on the evidence on the issue of negligence. Third, whether the trial court properly granted the parent's motion for judgment on the evidence on the issue of contributory negligence. Four, whether the trial court properly instructed the jury regarding negligence.

Regarding issue *number one* the appellate court made it clear that it would reverse only for an abuse of discretion. The expert witness had testified in his deposition that the standard of care owed the deceased student was breached. Although the school's plan was reasonable it failed to implement the plan. What is more, he said that while Indiana law does not require schools to have a certain percentage of staff to have CPR training “the reasonable standard of care is that people involved in the supervision and have responsibility in a daily basis for children, will have reasonable levels of training in regards to those things that can and will occur. Particularly, a choking child. A choking child is a very common experience and particularly in elementary schools.”

Because he was unable to testify, the trial court allowed the expert's deposition to be read to the jury. The school corporation objected to the testimony on grounds that it was unreliable, somewhat limited, lacked specificity, and could not be empirically tested. Subsequently, the school corporation's motion to strike the experts testimony was denied. The trial court also denied a motion for summary judgment on the parent's negligence claim, but granted summary judgment to the school corporation on the parent's emotional distress claim. The Court of Appeals characterized the expert's opinions as being grounded solely in his training, knowledge, experience and review of the facts surrounding Juan's choking. As such, the trial court did not abuse its discretion in admitting it into evidence.

Regarding issue *number two* the appellate court concluded that it was for a jury to decide whether or not the school corporation exercised the level of care that an ordinary, prudent person would exercise under the same circumstances. During the trial evidence was given by an emergency room physician that conflicted with that of the expert witness. In the physician's opinion it was clear that school staff members were not adequately trained in basic life support and the staff did not properly perform basic life support. In his opinion if they had been trained Juan would have survived. It should be noted, however, that the Court of Appeals opined that the school's emergency preparedness plan could not set a higher standard than that required by state regulations.

In discussing issue *number three* the Court first cited Indiana law which defined contributory negligence as “the failure of a plaintiff to exercise the reasonable care an ordinary person would for his own protection and safety.” Penn Harris Madison School Corporation v. Howard (Ind. 2007) The Court added that the law “... recognizes a

rebutable presumption that children between the ages of seven and 14 are incapable of contributory negligence.” Citing and quoting from Clay City School Corporation v. Timberman (Ind. 2009), the Court added that children of this age group “are required to exercise due care for their own safety under the circumstances of children of like age, knowledge, judgment, and experience.” In this case, said the Court, Juan (a nine-year-old child) was eating in the school cafeteria when he choked on a corn dog. A few minutes before he and the other boys were earned to calm down and eat. When one of the boys at the table made a duck face with Pringles Juan laughed and choked on his food. The only thing that he did was laugh.

The school corporation had argued that sufficient evidence existed for the issue of contributory negligence to be presented to the jury, and that Indiana law requires that contributory negligence on the part of the plaintiff bars any recovery against government actors. However, in this case the Court concluded that no substantial evidence existed that Juan failed to exercise the reasonable care of an ordinary nine-year-old boy of like knowledge, judgment, and experience for his own protection and safety. Thus, said the Court, because the school corporation failed to rebut the presumption the trial court properly granted the parent’s motion for judgment.

On the final issue the appellate court concluded that the jury was not properly instructed regarding negligence and this erroneous instruction was a reversible error. Because of the differing interpretations of the facts “the conflicting instructions misled the jury as to the law regarding the standard of care.”

Decision. The Court of Appeals affirmed, in part, and reversed, in part, the trial court’s decision and remanded the case for a new trial.

Concurring Opinions. Two justices filed concurring opinions. One of the Justices concurred (on *issues 1, 2, and 3*) but dissented (on *issue 4*). In his view the jury was properly instructed on the relevant standard of care regarding negligence and it was properly left for a jury to determine whether the school’s alleged conduct contributed to a failure to comply with the standard of care, *i.e.*, negligence.

Policy Implications

While the LaPorte (2010) case offers an accurate snapshot of what could happen in any contemporary public school, the reader is reminded that the statutes and case law of their particular state (especially regarding possible immunity) must be applied in matters of student injury where *negligence* is alleged. In my view, however, the Court of Appeals of Indiana’s fact analysis and rationale yield generally applicable information worth considering as local school boards in other jurisdictions revisit their own policies.

School system policies must make it clear that:

- Safety and security are high priority system-wide goals and shall be continually stressed with all administrators, staff (including support staff), parents, and students.
- School administrators and staff (including support staff) are expected to work toward and maintain a safe, secure, and disruption-free learning environment for students.
- School system *emergency preparedness and crisis intervention plans* shall be made available and explained to all administrators, staff (including support staff), and parents.
- School system *emergency preparedness and crisis intervention plans* shall be consistently followed by all administrators and all staff—and up-dated on a regular basis.

- Administrators and staff (including support staff) shall receive in-service training regarding the requirements and procedures related to the school system's emergency and crisis intervention plan requirements and procedures—including suggested precautionary measures to be followed or avoided.
- Students shall be informed of behavioral expectations and consequences on school property (classrooms, hallways, playground, gymnasium, cafeteria, school bus, after school programs) and/or while attending school sponsored and/or sanctioned activities.

The reader is reminded that local school system *emergency and crisis intervention plans* must be in compliance with appropriate and applicable federal and state requirements and guidelines.

Resources Cited

Clay City School Corporation v. Timberman, 918 N.E.2d 292 (Ind. 2009)

Jones v. Jackson Public Schools, 760 So.2d 730 (Miss. 2000)

LaPorte Community School Corporation v. Morales, 936 N.E.2d 281 (Ind. Ct. App. 2010)

Morales v. LaPorte Community School Corporation. Cause No. 46C01-0701-CT-39 (2009)

Penn-Harris Madison School Corporation v. Howard, 861 N.E.2d 1190 (Ind. 2007)

Swann v. Town of Brookhaven, 821 N.Y.S.2d 265 (N.Y.A.D. 2 Dept. 2006)

Vacca, Richard S. and Boshier, William C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Seventh Edition (LexisNexis 2008)

Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.