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NEGLIGENT HIRING, SUPERVISION, AND RETENTION REVISITED

Overview

While several factors influence the quality of education provided in a school (e.g., socio-economic condition of families, parent involvement, physical condition of facilities, safety and security, appropriateness and vintage of materials and supplies, community engagement and support) experience teaches us the *sine qua non* of quality is the competence of administrators, classroom teachers, counselors, and support staff—especially classroom teachers. However, in recent years the task of local school systems filling a growing number of vacant teaching positions has become increasingly more difficult in a variety of specialty areas such as mathematics, science, and special education. At the same time states are moving to enact legislation to increase the standards of pre-employment preparation as well as to require local school systems to expedite the dismissal of individuals shown to lack on-the-job competence to carry out contractual obligations, and local budgets are lacking in funds to hire new teachers.

Local School Board Authority. It is a basic tenet of education law that local school boards possess discretionary legal authority (grounded in state statutory law) for making all personnel decisions in the "best interests of the students." Over the years courts of law, embracing a good faith presumption, have been reluctant to interfere with personnel decisions unless it can be shown that school officials acted unconstitutionally, or arbitrarily, or capriciously, or in violation of the board's own policies, or beyond the scope of state statutory authority. (Vacca and Bosher, 2012)

As a general rule and as a part of exercising their authority local school officials possess the legal prerogative to screen applicants, select, and assign personnel based on an individual's fitness—including but not limited to academic preparation and past experience. As the United States Supreme Court opined several years ago, teacher competence is a broad term. Beilan v. Board of Public Education (1958) However, while board authority to screen applicants extends beyond the boundaries of academic preparation and professional experience, contemporary school officials must tread with caution given the potential of offending federal and state constitutional protections and federal and state privacy statutes.

Here in Virginia, for example, while the law specifies that local school boards must look to see whether or not an applicant for a teaching position "holds a license or provisional license issued by the Board of Education, or a three-year eligibility license issued by a local school board…," (Code of Virginia, 22.1-299) the Code of Virginia also mandates that in addition to "fingerprinting" (*i.e.*, criminal background checking of all applicants (Code of Virginia, 22.1-296.3), and "as a condition of employment for all of its public school employees, whether full-time or part-time, permanent, or temporary, every school board shall require on its application for employment certification (i) that the applicant has not been convicted of a felony or any offense involving the sexual molestation, physical or sexual abuse or rape of a child; and (ii) whether the applicant has been convicted of a crime of moral turpitude." (Code of Virginia, 22.1-296.1) A search of the registry of "founded complaints of child abuse and neglect maintained by the Department of Social Services…," (Code of Virginia, 22.1-296.4) is also specified.

Allegations of Negligent Hiring

Ironically, while local school system personnel departments seek to carefully select individuals who are both capable and competent, there is no guarantee that a newly hired employee might not later pose a threat to the safety and well-being of students. In recent years allegations of *negligent hiring* have surfaced, especially in situations where an on-the-job employee (classroom teacher, coach, community volunteer, school bus driver, and others) becomes involved in unlawful conduct with a student or students. It is in these situations that the following questions are often asked, after the fact: "Did school officials carefully screen this employee before offering a contract?" "Does this employee have a past record of similar behavior?" "Were school officials derelict in their duty of care and as a direct result were students put in harm's way?"

Allegations of Negligent Supervision and Retention

A corollary to selecting and placing employees is the obligation of school administrators and supervisors to continually monitor the educational environment. As a general rule the legal responsibility to administer and supervise the school environment falls directly on the shoulders of the building principal. Where an employee (new or continuing) fails to provide the services for which he/she was hired, or in some way poses a threat of harm to students, school principals are expected to take immediate and appropriate action. To put it another way, while the school principal did not make the initial hiring decision, he/she is obligated to provide appropriate and sustained supervision of the school's environment and to recommend appropriate action where the employee engages in inappropriate behavior. Was the employee's harmful act foreseeable? And, if so, was immediate and appropriate action taken to prevent harm to the student? Given evidence of inappropriate, harmful behavior, why was this employee retained?

In cases involving employee-on-student sexual harassment, where allegations of negligent hiring and/or negligent supervision, and/or negligent retention are alleged, the judicial analysis often searches for acts of gross negligence, deliberate indifference, and/or reckless or substantial lack of concern to determine whether or not school officials failed to take reasonable actions to stop the situation and to prevent acts of future harassment. Henderson v. Walled Lake Consolidated Schools (6th Cir. 2006) As a general rule public school officials have been held liable for the actions

of an employee where *deliberate indifference* is shown. Franklin v. Gwinnett (1992) *See also*, Shaul v. Cherry Valley-Springfield School District (2nd Cir. 2004) where the court emphasized the need for school officials to take "immediate and appropriate action."

C.A. v. William S. Hart Union High School

Recently I came across a decision handed down by the Supreme Court of California where negligent hiring, negligent supervision, and negligent retention were alleged. In my view the detailed judicial analysis applied to the issues presented in this case is generally applicable in other situations involving public school systems in other states.

In this case a trial court had found that the school district could not be held vicariously liable for the negligence of supervisory or administrative personnel who "allegedly knew, or should have known" of the propensities of the offending employee and "nevertheless hired, retained, and inadequately supervised her." The Court of Appeal affirmed and the case next went to the Supreme Court of California.

Facts. Plaintiff, a 14 year old male high school student, was assigned to a female head counselor at his high school. The counselor had expressed an interest in helping him do well in school. As a result, she began to spend more time with plaintiff both on and off school grounds and in driving him home each day. Subsequently, plaintiff alleged that his counselor engaged in sexual activities with him and required that he participate in these activities. The incidents occurred between January 2007 and into September 2007.

Trial Court Action. Ultimately, plaintiff student, through a guardian ad litem, sued his guidance counselor (employee) and the school district (agency) for damages claiming that he was subjected to sexual abuse and harassment—the result of which caused him "emotional distress, anxiety, nervousness, and fear." In his cause of action plaintiff claimed (1) the unlawful acts were done within the course and scope of the agency and employment, (2) the counselor exploited her employment position of authority and trust, and (3) the agency knew or should have known that the counselor "had engaged in unlawful sexually-related conduct with minors in the past, and/or was continuing to engage in such conduct." Plaintiff based his arguments on "personnel and/or school records of defendants" that reflect numerous incidents of inappropriate sexual conduct and conduct with minors reported by teachers, staff, coaches, counselors, advisors, mentors, and others, including incidents (both on- and off-school premises) involving this same counselor.

Plaintiff based his prayer for relief both on a theory of *negligent supervision*—alleging (on information and belief) that school officials, "through their employee," knew or should have known of the counselor's "dangerous and exploitive propensities" and "nevertheless "failed to provide reasonable supervision" over her; and on a theory of *negligent hiring and retention*—alleging that defendant school officials were "on notice" of his counselor's "molestation of students both before and during her employment by the District," but did not "reasonably investigate" her and failed to use reasonable care to "prevent her abuse of plaintiff."

Trial Court Decision. The school district demurred to the complaint, arguing "the negligent supervision and negligent hiring and retention causes of action failed to state a claim because the

lack of statutory authority for holding a public entity liable for negligent supervision, hiring or retention of its employees." The trial court sustained the demurrer without leave to amend and dismissed the action. Subsequently, the Court of Appeal affirmed in a divided decision. Citing California law a dissenting judge opined: "the failure of a school administrator to exercise ordinary care in protecting students from harm should render a school district liable…where the administrator hires an applicant known to have a history of molesting students or where, after hiring an applicant, the administrator first learns about an employee's sexual misconduct and does not properly supervise, train, or discharge her." The Supreme Court of California granted plaintiff's petition for review.

Supreme Court Opinion. Specifically referencing California statutory law covering the liability of a public entity arising out of the acts of an employee, the Court made it clear that under California law "the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person…and the public entity is vicariously liable for any injury which its employee causes…to the same extent as a private employer…."

The Court first focused on the *standard of care* owed students. In the Court's view, "[w]hile school districts and their employees have never been considered insurers of the physical safety of students, California law has long imposed on school authorities a duty to 'supervise at all times the conduct of the children on school grounds and to enforce those rules and regulations necessary to their protection'…." The uniform standard of care, said the Court, is that degree of care "which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances." And, "[e]ither a total lack of supervision…or ineffective supervision…may constitute a lack of ordinary care on the part of those responsible for student supervision." Citing California case law, the Court opined that "a school district is vicariously liable for injuries proximately caused by such negligence."

The Court then discussed the link between *special relationship*, *duty of care*, and *foreseeability*. Here the Court expressed an *in loco parentis* attitude when it held that under California court decisions "a school district and its employees have a special relationship with the district's pupils arising from the mandatory character of school attendance and the comprehensive control over students exercised by school personnel…" in many ways like "the relationship between parents and children." This special relationship imposes on school personnel a *duty of care* to take "reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally."

The Court disagreed with the school districts contention that while a special relationship does exist, a school principal, superintendent, or other administrator cannot be held liable on such a theory. In the Court's view, the responsibility for the safety of students "is not solely borne by instructional personnel." "School principals and other supervisory employees, to the extent their duties include overseeing the educational environment and the performance of teachers and counselors, also have the responsibility of taking reasonable measures to guard pupils against harassment and abuse from foreseeable sources, including any teachers or counselors they know or have reason to know are prone to such abuse."

The Court also disagreed with the school district's contention that because state law grants personnel hiring and termination decisions to the governing board it absolves district administrators and supervisors of liability for their negligence in initiating or failing to initiate those decisions. Plaintiff alleged that administrators and employees "knew or should have known" of the counselor's dangerous propensities but "nevertheless hired, retained and failed to properly supervise her." These allegations if proven, said the Court, "could make the District liable under a vicarious liability theory…." However, the Court made it clear that the scope and effect of its holding on individual liability is limited by requirements of *causation* and *duty*—elements of liability that must be established in every tort action. In essence the facts of each case must be established and the ultimate decision regarding potential school district liability must be based on the evidence presented within that factual context.

Decision. Within the limits stated above, the Supreme Court of California concluded that a public school district may be *vicariously liable* for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student. However, "[w]hether plaintiff in this case can prove the District's administrative or supervisory personnel were actually negligent in this respect is not a question we address in this appeal from dismissal on the sustaining of a demurrer." As such, the Supreme Court of California held that the judgment of the Court of Appeal "is reversed and the matter remanded to the court for further proceedings consistent with our opinion."

Policy Implications

Acknowledging that past commentaries have discussed negligent hiring, supervision, and retention, as well as policy issues associated with employee-on-student sexual harassment, and recognizing that the C.A. case is but one case from one jurisdiction, in my view the judicial analysis applied to the facts and issues in this case presents the reader with important implications for local school board policy formulation and implementation and these are they.

School system policies must make it clear that:

- The intent of the Board is to recruit, screen, select, and contract with individuals qualified to provide all district students with equal access to quality and appropriate educational opportunities.
- Professional and support staff shall be assigned to positions and combinations of positions for which they are qualified.
- School administrators and supervisors are charged with the duty of supervising and monitoring the on-the-job performance and productivity of all professional and support staff working within their sphere of responsibility.
- Where problems become evident school administrators and supervisors have a duty to investigate the situation and to take immediate and appropriate action to remedy the situation and to prevent further occurrences of such problems.
- Any member of the professional staff and/or support staff who engages in illegal, inappropriate, or other forms of harmful relationships with students shall be subject to

immediate removal from his/her position in the school system and, where appropriate, dismissal from employment and possible future legal action.

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

Note of Gratitude. The author wishes to thank Dr. William C. Bosher, Jr., Marti Collier, and the CEPI staff for their prayers and support during my time of medical leave from writing and posting the December, January, and February commentaries. I am happy and excited to report that the March commentary marks my return to active participation in CEPI activities.