

Your Best Defense: Advice from an Expert Witness

Strategies to keep your district out of the courtroom.

By David Perrodin, Ph.D.



boards of education have complied with bullying, harassment, and non-discrimination laws and regulations, policies, and obligations relating to student safety. Attorneys recognize my expertise in matters of threat reporting, threat assessment, discrimination, bullying, harassment, intimidation, special education, and student assistance programs and services in schools.

They retain me to review materials and to render my professional opinion per the standard of “reasonable degree of probability.” In other words, I opine about whether or not litigants met the “professional” standard of care. This is my ultimate duty to the court.

Professional standard of care is defined as the level and type of care that a reasonably competent and skilled professional—with a similar background and in the same setting—would have provided under the circumstances that led to the alleged wrongdoing. It is the watchfulness, attention, caution, and prudence that a reasonable person would exercise in the circumstance. If someone’s actions do not meet this standard, then those actions fail to meet the duty of care and therefore fall outside the professional standard of care.

An expert witness’s purpose is not to position findings to best support the plaintiff’s claims. The expert witness is impartial and extracts from personal expertise to facilitate the

Anyone can be sued. Anyone in education—from board member to administrator to teacher—can be the subject of allegations of failure to educate, failure to supervise a classroom, or failure to respond to or prevent bullying.

Fortunately, school districts purchase a liability policy designed to protect not only teachers but also school board members, administrators, volunteers, student teachers, and other members of the educational staff.

A standard policy includes coverage for a *wrongful act*—an actual or alleged breach of duty, neglect, misleading statement, and other errors or omissions of an insured educator in his or her capacity or scope of

employment on behalf of the educational institution. Such coverage is commonly referred to as the district’s “errors and omissions” policy.

Having a liability policy does not preclude districts from being sued—districts and their employees may still find themselves in court. I am not an attorney, and the information I will share does not represent legal advice. However, I do offer the perspective of an expert legal witness hired by counsel representing plaintiffs who are litigating against schools and school districts.

My Role as an Expert Legal Witness

As an expert legal witness, I render expert opinions on whether, and to what degree, school personnel and

court's understanding of a variety of technical aspects that are fundamental to the case.

I draw from my 20 years of experience serving children with special needs in school settings as a speech-language pathologist and as an administrator of pupil services. I collaborated with principals, superintendents, and school boards and also supervised school psychologists, social workers, nurses, counselors, special-education teachers, and paraprofessionals.

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I investigated approximately 100 bullying, harassment, or discrimination claims and participated in over 1,000 individualized education plan (IEP) meetings for students with disabilities. I can review school documents rife with lingo, which I strip away to reveal a layperson's interpretation of "this is what this means."

Fundamentals of the Case

The plaintiff's counsel asks me to share my expertise on a set of 5-10 questions deemed fundamental to the case. I have been asked to

- Describe the school district's governance model and how it relates to monitoring student services programs, such as school counseling.
- Describe the manner in which the student's IEP reflected concerns of school staff members and parents. Were IEP services targeted at the areas of concern documented by educators?
- Describe the minimal standard of care a litigant would have been

expected to demonstrate with knowledge of a student's threat to harm himself.

- Describe the district's professional development process for educating staff, parents, and students about bullying prevention and reporting of alleged acts of bullying.

To assemble responses into an extensively cited expert witness report, I review (a) the complaint filed in the case; (b) police reports; (c) school district policies, bylaws,

and administrative guidelines; (d) student records; (e) professional development documents and staff training items; and (f) correspondence between school staff members, parents, and other relevant parties.

I anticipate expending months to review thousands of pages of documents. It's a tedious undertaking—raw at times.

Approach to Discovery

To assist legal counsel, I typically request the following documents that help establish patterns of organizational or individual behavior:

1. Board of education policies, bylaws, and administrative regulations relevant to the topic. Additionally, meeting agendas and minutes enable me to determine whether the board regularly reviewed policies and procedures. Considerations:
 - Are policies up-to-date? Are school leaders making the board aware of the status of educational services and programs? What community input

has been presented at board meetings?

2. Job descriptions. Considerations:
 - Are responsibilities and expectations clearly stated?
3. Student records for the plaintiff's child (for lawsuits in which the parent has alleged that wrongdoing by the school affected his or her child). Considerations:
 - Was there a pattern of student behavior, such as increased discipline referrals, absenteeism, or declining behavior?
4. Materials used in professional development of staff members for the topic at issue, including dates of the training and attendance logs as well as logs denoting training of staff members hired after the training.
5. Student handbooks. Considerations:
 - How did the handbook communicate the expectations, policies, procedures, and practices for the school year for all students and their families?
6. Correspondence between relevant parties, including emails.

All of that information helps me help the plaintiff's counsel develop the case.

Districts' Best Defense

Depositions reveal the disheveled thoughts of stressed educators who never anticipated being asked 200 questions over eight hours. Grief is woven into their utterances when they realize that their hazy recollections are not tethered to documentation or records.

The "forgetting curve" is a well-studied phenomenon involving the degradation and conflating of memory recall in humans. Documentation is the district's best defense against allegations of professional negligence. It's also the countermeasure to the forgetting curve.

Let's clarify the difference between documents and records. The district creates documents by planning what needs to be done; records are

created when something is done. The records that the district keeps include a date, the parties involved, the topics addressed, and the next steps. A lesson plan is a document. Indicating that the lesson was taught—including probes to check whether the lesson was received and comprehended—is a record.

Documentation and the production of records are often proportional to the amount of discretion afforded the administrator or teacher. Decisions made without supporting documentation reduce the forensic material available to corroborate whether a matter was addressed and the manner in which the educator handled it.

I've read countless depositions in which educators broadly answered, "I was aware of this issue and investigated it." That response is the equivalent of opening a garage door during mosquito season. As opposing counsel probes, responses not grounded in documents or records pressure the deponent to postulate facts from memory.

- When being questioned about an issue, educators should be prepared to respond to specific questions, such as the following:
- When did you become aware of this issue? What was the date?
- What were your sources of information?
- Who did you interview, what questions did you ask, and what were the responses?
- Who else did you inform about these concerns?
- What district policies or procedures are in place for handling this type of matter?
- What steps did you take to resolve this issue?
- How did you determine whether your actions had improved the situation?

Knowing the kinds of questions that you may be asked during an investigation or in court can help you determine the kinds of records you should be keeping.

Common Legal Terms

Defendant. In a civil case, the person or organization against whom the plaintiff brings suit; in a criminal case, the person accused of the crime.

Deposition. An oral statement made before an officer authorized by law to administer oaths. Such statements are often taken to examine potential witnesses, to obtain discovery, or to be used later in trial.

Discovery. Procedures used to obtain disclosure of evidence before trial.

Litigation. A case, controversy, or lawsuit. Participants (plaintiffs and defendants) in lawsuits are called litigants.

Plaintiff. A person or business that files a formal complaint with the court.

Source: United States Courts Glossary of Legal Terms Website, www.uscourts.gov/glossary.

Changing Tactics

Administrators and teachers should be aware of a trend of some boards of education (or districts) to separate themselves from the employees during litigation, stating that the individuals acted beyond their job description or were grossly negligent in executing district policies and practices.

Therefore, school administrators or teachers might consider consulting with their private insurance provider about the potential value of an umbrella liability policy as an additional layer of protection beyond what the district may or may not provide.

Because of the proliferation of right-to-work laws, American teachers unions are losing power to advocate for educator working conditions. This weakened support structure has made individual educators more vulnerable to litigation independent of the school district—or as a litigant in addition to the school district. Hence, the school district, as a litigant, could settle the portion of the suit directed at it, which usually includes the members of the board of education.

Remaining litigants, such as principals, teachers, or other staff members, would then be left to negotiate a dismissal or settlement or to toss the dice on a trial.

This situation might result in a principal or teacher suing the district—arguing that the employee's actions were within the scope of professional practice and subject to coverage and representation of counsel by the district's errors and omissions coverage—while defending himself or herself against the plaintiff. It can get messy.

Staying Out of Court

Schools and districts can take some easy measures to protect themselves from potential liability. Foremost, keeping policies and practices current to changing laws and trends helps focus the priorities of boards of education, school administrators, and teachers. Priorities will set the agenda of training and professional development to promote effective school operations and to target outcomes.

The following will help keep educators in the classroom and out of the courtroom:

Boards of education should:

- Put all policies on a review cycle—I recommend five or seven years. A policy that has not been reviewed for 20 years will not meet the standard of care.
- Not overstep their collective expertise. Instead, consult the

district’s attorney for advice on legal matters.

- Understand the vertical and horizontal leadership and management structures of the school district, including the role of the board of education in such constructs.
- Have the district’s insurance carrier describe the parameters of the liability policy to employees.

School administrators should:

- Document all professional development training provided to staff members and maintain training materials and attendance rosters.
- Follow up with personnel not present for training and have an induction process for those hired during the school year.
- Pay attention to student and family handbooks. Asking for a signature to verify that a parent or student has “read and understands” the document teeters on the threshold of meeting the minimal standard of care.

In addition, analyze the handbook text with a readability tool, such as the Flesch-Kincaid grade-level formula, to ensure that the target audience will likely understand the content. Many handbooks are difficult to understand because of jargon and are therefore ineffective in conveying key information to students and parents.

- Investigate, document, and record claims of bullying, harassment, or discrimination. Be cognizant of discretion afforded to staff members; not holding staff members accountable to keep documentation diminishes the availability of critical records.
- Encourage staff members to ask clarifying questions about matters that relate to the safe operation of the school.

Teachers should:

- Review their job descriptions and seek clarification from their supervisor regarding any duties or

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expectations that are confusing or subjective.

- Become familiar with existing student records; review cumulative files and IEPs.
- Document all communications with students, other staff members, parents, and outside providers regarding concerns for the well-being of a student. Timestamp documents and act on them per defined school protocols. Produce records for matters that have been acted on.
- Ask questions if they are uncertain of how to respond to a situation. It is better to seek clarification than to stretch the discretion that they perceive is afforded to them. Send a follow-up email (record) to the person who responded to your question. For example:

Thank you for meeting on Tuesday to help me better understand my role in supervising the primary school exit during end-of-day dismissal. I was concerned that parents were entering the school while children were exiting the building. I am now directing parents to wait outside for their child or to come into the school through the main entrance so that front office staff can properly check them in.

Thank you for adding signage to the doors and indicating that you will remind parents of the proper student pickup procedures in next month’s newsletter.

- During an urgent matter when additional guidance is unavailable, make a decision they deem

to be in the best interest of the child and document the rationale for their decision, including a description of the context and situation.

Discretion and Best Interest

Processes and outcomes subsequently will be improved. Discretion is central to improving vertical and horizontal school processes, and that entails the freedom to choose among many possible options.

Absent a chain of command, administrators and teachers are autonomous and function without prescribed steps in a set of connected events. Under this configuration, people default to a standard operating procedure of taking action without communicating or collaborating with others. Discretion is necessary for the operation of a school system.

However, discretion does not supplant school board policies, bylaws, and administrative guidelines.

Researchers Stefkovich and O’Brien (2004) contend that the discretion and authority afforded school officials must enhance student rights beyond what is provided for in the U.S. Constitution; they must use their discretion to make ethically wise decisions based on the best interests of the student.

Reference

Stefkovich, J. A., and M. O’Brien, M. 2004. Best interests of the student: An ethical model. *Journal of Educational Administration* 42 (2): 97–214.

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