



Teacher-student sexual abuse: wrongs, rights and remedies

With increasing accounts of teacher-student episodes, young crime victims have the right to seek redress in state and federal civil courts.

BY WILLIAM S. FRIEDLANDER

[Ed. note: This article was originally published under the title of *Civil Actions for Criminal Acts* and presented on October 19, 2008, at the national conference of the Crime Victims Bar Association held in Chicago.]

Your client's young son, who has been acting out for some weeks now, comes home from school in tears. Under questioning by your client, the boy blurts out that ever since the start of the school year, a teacher has been singling him for attention, and this week, in the guise of giving him private tutoring, has been touching him inappropriately. Your client, shocked, calls the school principal, who passes the boy's account off as juvenile fantasy.

Your client is not convinced. She contacts the police, who on a simple records check, discover that the boy's teacher has a history of multiple sex abuse convictions in another state. Further investigation reveals that, a few years back, there had been another complaint of harassment and inappropriate touching against the same teacher in another building in your client's school district. In addition, several students come forward to corroborate the son's accounts



of untoward attention and attempts at physical contact. The police investigation eventuates in indictment of the teacher on charges of sexual abuse. The boy begins a course of counseling in which he reveals additional instances of harassment and touching by the teacher during the previous year. Your client asks you what civil remedies her son may have against the teacher, the principal and/or the school district.

Potential causes of action

In the past two decades, case law has clarified the rights and remedies available to the child victims of abusive teachers, under state tort law and state and federal statutes. Successful claims include the following:

- As against the offending teacher, claims of assault, battery and other intentional torts may be established in accord with state tort law. In addition, where state tort law permits, the child's parents may have a claim against the offending teacher for their emotional damages.
- As against a school district, while a teacher's abusive conduct only rarely gives rise to liability based *respondeat superior* liability, a district may be held liable for authorizing or ratifying the teacher's conduct.
- More importantly, courts of many states have held that victims of abuse will have a common-law cause of action against a school district and district administrators for negligence in the hiring, retention, supervision or training of teachers, and/or for the negligent supervision of the student.
- State statutes – for instance, statutory prohibitions on sex discrimination, mandatory reporting requirements, or other school hiring or policy mandates – may also give rise to school district or ad-



ministrators' liability, either by including an explicit or implicit right of action or by setting the standard for a negligence per se claim.

- Other state law claims against a school district or school administrators may include civil conspiracy, state constitutional tort, intentional infliction of emotional distress and negligent failure to comply with the school's own policies.

- In addition, in cases where school districts or administrators may be found to have acted egregiously, with deliberate indifference to known violations of students' rights, victims of teacher abuse may have recourse under 42 U.S.C. §1983 and/or Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.

Many of these causes overlap. The practitioner is advised, in pleadings and in gathering and presenting proof, to make sure that he or she understands the elements of each cause and the nature of the proof required. A few of the more common causes are profiled below.

Negligent hiring, retention, training and supervision

As with all negligence actions, a claim for school district negligence rests on a showing of duty, breach, causation and injury:

- **Duty:** It is generally agreed that school authorities have a common law duty to protect the safety of students, (see, e.g., *Shante D. by Ada D. v. City of New York* (1st Dept. 1993) 190 A.D.2d 356, 598 N.Y.S.2d 475 (school district's duty to supervise care of students arises from fact of physical custody over them), which includes a duty of due care in the hiring and supervision of school staff), (see, e.g., *Marquay v. Eno* (N.H. 1995) 662 A.2d 272 (school district has a duty not to hire or retain employees that it knows or should know have a propensity for sexually abusing students, and/or a duty to exercise over students the degree of supervision a reasonably prudent parent would exercise in the same circumstances), (cf., *Mary KK v. Jack LL* (N.Y.App. 1994) 611 N.Y.S.2d 347, *Mur-*

ray v. Research Foundation of State University of New York (N.Y. App. 2001) 723 N.Y.S.2d 805 (district's duty to supervise students' contacts with teachers).) In addition, a duty may arise from statutory mandates for the screening of teacher candidates or the continuing assessment of teacher qualifications, from mandatory reporting statutes or from school policies regarding hiring, training or supervision. (See, e.g., *Mueller by Math v. Community Consol. School Dist. 54* (Ill.App. 1997) 678 N.E.2d 660 (statutory duty to conduct background check in hiring teachers).)

- **Breach:** Breach of duty requires proof that the district failed to take due care in the hiring, retention, training and/or supervision of staff, or failed to adhere to statutory mandates or school policies regarding hiring or supervision of staff, or failed to adequately supervise student-teacher contacts. Most often, proof in negligent hiring, retention or supervision cases highlights the district's failure to perform an adequate background check on a new hire, or to make adequate inquiry or investigation when evaluating the conduct of current staff, or to take appropriate steps when information regarding a teacher's abusive history or conduct surfaces. (See, e.g., *Mueller by Math v. Community Consol. School Dist. 54* (Ill.App. 1997) 678 N.E.2d 660 (complaint alleges failure to perform background check before or after hiring wrestling coach with criminal history), *Godar v. Edwards* (Iowa 1999) 588 N.W.2d 701 (invoking Restatement 2d, Agency § 213, to recognize viability of negligent hiring claim where plaintiff can show that adequate reference check would have revealed propensity to molest or required further investigation), *Flores v. Saulpaugh* (N.D.N.Y. 2000) 115 F.Supp.2d 319 (under New York law, district may be liable for inadequate training or supervision in response to parent's complaint regarding teacher's conduct towards child), *Murray v. Research Foundation of State University of New York* (N.Y.App. 2001) 723 N.Y.S.2d 805 (dis-

trict may be liable for failure to supervise student when it permitted student to be closeted alone with program director despite school policy prohibiting one-on-one contact behind closed doors).)

- **Causation:** Causation generally has two aspects. First is causation-in-fact, which is generally established, pursuant to pertinent state law, by showing either a "but for" or "substantial factor" relationship between the district's conduct and the plaintiff's injuries. (See, e.g., *Doe A v. Coffee County Bd. of Educ.* (Tenn.App., 1996) 925 S.W.2d 534 (failure to abide by policy requiring that students have ready egress from all schoolrooms not a "substantial factor" in coach's abuse of students behind locked office doors).) Second, and more critical, is proximate causation, generally measured by the foreseeability that the district's conduct will lead to the plaintiff's injuries. In the case of teacher abuse, the requirement of proximate causation is deemed satisfied by proof that school authorities were aware, or could have discovered through adequate inquiry or investigation, that a teacher had a history of abusive, aberrant or suspicious conduct making molestation of a student foreseeable. (See, e.g., *Mueller by Math v. Community Consol. School Dist. 54* (Ill.App. 1997) 678 N.E.2d 660 (record of criminal conviction could have been discovered upon inquiry).) Notably, the precise nature of the harm suffered by the student need not have been foreseen. (See, e.g., *Kansas State Bank & Trust Co. v. Specialized Transp. Services* (Kan. 1991) 819 P.2d 587.)

- **Injury and damages:** Proof of injury will generally focus on mental and emotional injuries, which will generally require expert testimony. Damages may include the costs of medical treatment and psychotherapy, the costs of special schooling or housing needed in consequence of the abuse, future disability and income loss, physical and mental pain and suffering. (See, e.g., *Kansas State Bank & Trust Co. v. Specialized Transp. Services* (Kan. 1991) 819 P.2d 587.) Damages against the school district may also



be awarded the victim's parents for emotional distress. (See, e.g., *Phyllis P. v. Superior Court* (Cal.App. 1986) 228 Cal.Rptr. 776.) Damages may be allocated against the perpetrator as well as the school district. (See, *Ortega v. Pajaro Valley Unified School Dist.* (Cal.App. 1998) 75 Cal.Rptr.2d 777.) State statutory damage limitations may apply.

Vicarious liability and ratification

Most courts have held that a school district is not vicariously responsible for the abusive conduct of a teacher, because such conduct – even if it relies on the teacher's employment-based authority – is clearly outside the scope of the teacher's employment. (See, e.g., *Mary KK v. Jack LL* (N.Y.App. 1994) 611 N.Y.S.2d 347, *John R. v. Oakland Unified School Dist.* (Cal. 1989) 769 P.2d 948; but see, *Doe By and Through Knackert v. Estes* (D.Nev. 1996) 926 F.Supp. 979 (applying Nevada law to deny school district summary judgment on claim of vicarious liability for teacher's battery of abused student; teacher's use of employer's authority and premises may constitute conduct within scope of employment), see also, *John R. v. Oakland Unified School Dist.* (Cal. 1989) 769 P.2d 948 (concurring and dissenting opinions).)

However, it is possible for school authorities to be held liable when shown to have authorized, condoned or ratified a teacher's conduct. Liability on this ground would require a showing that the district had actual knowledge of a teacher's abuse or harassment of a particular student but took no steps to remedy it. (Cf., *Saville v. Houston County Healthcare Authority* (M.D. Ala. 1994) 852 F. Supp. 1512.)

State statutory actions

In addition to statutory or regulatory mandates for the hiring, retention, or supervision of teachers – which, as noted above, may be actionable in themselves or may set standards of care in common-law negligence actions, (see, e.g., *Mueller by Math v. Community Consol. School Dist.* 54 (Ill.App. 1997) 678 N.E.2d 660) – state statutes may support a cause

of action for a school administrator's or teacher's failure to comply with state mandatory-reporter requirements; or state courts may allow such requirements to establish the element of duty in a negligence claim. Commonly, a claim for failure to report arises when an administrator shrugs off a complaint of teacher-student abuse or intimacy – often from a student or another teacher – and makes no report. State statutory schemes govern the availability of this action as against an individual mandated reporter; the employer of such a reporter and/or any municipal entity. (See, e.g., *Craig v. Lima City Schools Bd of Educ.* (N.D. Ohio 2005) 384 F.Supp.2d 1136 (claim that district is liable for teacher's reporting failure survives summary judgment under Ohio statutory scheme), *Kimberly S.M. v. Bradford Central School* (N.Y.App. 1996) 649 N.Y.S.2d 588 (assuming, without discussing, school district's liability for teacher's failure to report under New York reporting statute).)

Other state torts

Other state torts upon which liability may be premised include conspiracy, state civil rights violations or constitutional torts, and intentional infliction of emotional distress or outrage.

- In California, a district may be liable for *civil conspiracy* when administrators engage in conduct to cover up complaints of teacher abuse; its liability is not for the abuse itself, but for its efforts to hide or dissuade complaints. (See, e.g., *Ortega v. Pajaro Valley Unified School Dist.* (Cal.App. 1998) 75 Cal.Rptr.2d 777.)
- A possible avenue for liability lies in *state civil rights statutes* and/or state constitutional jurisprudence providing vindication for violation of state-protected civil rights. (See, e.g., *Marquay v. Eno* (N.H. 1995) 662 A.2d 272.)
- An action for *intentional infliction of emotional distress* or outrage, if permitted under state law, may lie where a court finds that a reasonable observer, upon hearing the fact that a principal was deliberately indifferent to a teacher's ongoing sexual relationship with his student,

might be prone to exclaim, "outrageous." (See, e.g., *Chancellor v. Pottsgrove School Dist.* (E.D.Pa. 2007) 501 F.Supp.2d 695.) Many states, however, disfavor this cause of action, requiring a showing of extreme conduct and/or physical symptoms. (See, e.g., *Wills v. Brown University* (1st Cir. 1999) 184 F.3d 20 (under Rhode Island law, summary judgment properly granted on emotional distress claim; plaintiff failed to show school's actual knowledge of prior abusive incident, where prior complainant refused to pursue complaint, forestalling school's investigation).) In other states, such an action is unavailable against a public institution or against a person acting in an official capacity. (See, e.g., *Craig v. Lima City Schools Bd of Educ.* (N.D. Ohio 2005) 384 F.Supp.2d 1136.)

1983 and Title IX

A successful 1983 claim against a school district requires proof that district policy or custom, amounting to intentional violation of, or deliberate indifference to, plaintiffs' constitutional rights, played an affirmative role in the sexual abuse of plaintiff; critical to such a claim is evidence that the district's supervisory or policy-making administrators were aware of a risk – generally, by specific complaint evidencing a pattern of abuse – and, by policy or custom, deliberately ignored it. (See, *Monell v. Department of Social Services of the City of New York* (1978) 436 U.S. 658, *Black by Black v. Indiana Area Sch. Dist.* (3d Cir.1993) 985 F.2d 707, 712-13, *Schrum v. Kluck* (8th Cir. 2001) 249 F.23d 773, *Davis v. DeKalb County School District* (11th Cir. 2001) 233 F.3d 1367, *Johnson v. Elk Lake School Dist.* (3d Cir. 2002) 283 F.3d 138.)

Likewise, a 1983 claim against a district administrator requires a showing that the administrator was aware of a pattern of abuse, yet through policy or deliberate indifference took no or clearly-inadequate responsive action. (See, *Hartley v. Parnell* (11th Cir. 1999) 193 F.3d 1263 (plaintiff must establish superintendent's actual knowledge of abuse, or policy giving teacher reason to



believe abuse would be condoned), *Baynard v. Malone* (4th Cir. 2001) 268 F.3d 228, 236 (plaintiff must establish supervisory personnel's knowledge of abuse or pattern of abuse, lack or inadequacy of response amounting to deliberate indifference, and causative link between administrative failure and student's injury).)

A prima facie 1983 case against a district or administrator is made out when the evidence shows repeated overt sexual contacts on school premises, observed and ignored by staff and administration, as well as a history of inadequate response to prior complaints or instances of abuse. (See, e.g., *Craig v. Lima City Schools Bd of Educ.* (N.D. Ohio 2005) 384 F.Supp.2d 1136, see also, *Chancellor v. Pottsgrove School Dist.* (E.D. Pa. 2007) 501 F.Supp.2d 695 (1983 case against administrator based on evidence that principal had notice of teacher's sexual liaisons from many sources and took no action in response).) Notably, an offending teacher who admits to sexual contact may be held liable for a 1983 violation as a matter of law. (See, e.g., *Craig v. Lima City Schools Bd of Educ.* (N.D. Ohio 2005) 384 F.Supp.2d 1136.)

Under Title IX, 20 U.S.C. § 1681(a), a district may be liable in monetary damages for the sexual abuse or harassment of a student if it is shown that an authoritative decision-maker had actual knowledge of the abuse and responded with deliberate indifference. (See, *Gebser v. Lago Vista Independent School District* (1998) 524 U.S. 274.) Post-Gebser cases have litigated, often with differing conclusions, what constitutes harassment, which administrators have authority, what constitutes actual notice, and what responses amount to deliberate indifference. (Cf., *Chancellor v. Pottsgrove School Dist.* (E.D. Pa. 2007) 501 F.Supp.2d 695 (concluding, upon consideration of competing arguments, that student's "consensual" sex with teacher still constitutes harassment for Title IX purposes, since student is legally incapable of consenting to sex

with teacher), *Warren v. Reading School District* (3d Cir. 2002) 278 F.3d 163 (3d Circuit concludes principal has authority), *Baynard v. Malone* (4th Cir. 2001) 268 F.3d 228 (4th Cir. concludes principal lacks authority, and finds knowledge of past abuse and physical contact insufficient to provide actual notice of present abuse), *Davis v. Dekalb County School District* (11th Cir. 2001) 233 F.3d 1367 (leaving aside question of principal's authority, concluding that notice of past touching does not afford actual notice of present abuse), *Doe v. Dallas Independent School District* (5th Cir. 1998) 153 F.3d 211 (leaving open question of principal's authority and adequacy of notice, but concluding district's one-sided investigation defeats claim of deliberate indifference).) Notably, courts have held that Title IX supports an action only against a school district, not against individual administrators or teachers, and that Title IX liability subsumes 1983 liability, so that only the Title IX claim will ultimately be allowed to go forward against a district. (See, *Zamora v. North Salem Cent. School Dist.* (S.D. N.Y. 2006) 414 F.Supp.2d 418, citing, *Bruneau v. South Kortright Cent. Sch. Dist.* (2d Cir. 1998) 163 F.3d 749, 759.)

Practical considerations

Notwithstanding the merits of your client's claims, there are important practical concerns that limit or shape his or her remedies. Primary among these are the issues of sovereign immunity and qualified immunity. Other considerations to be aware of include the statute of limitations, state notice of claim requirements, pending criminal proceedings or investigations and issues of investigation, discovery and proof.

Limitations and notice of claim requirements

In some jurisdictions, claims relating to teacher abuse will be governed by a state tort claims act; in others, there may be a statute specific to child sexual abuse claims. (Cf., *Ortega v. Pajaro Valley Unified School Dist.* (Cal.App. 1998) 75

Cal.Rptr.2d 777 (two-year limitations period established in state tort claims act), *Doe v. Indian Mountain School, Inc.* (D.Conn. 1995) 921 F.Supp. 82 (claims against district governed by Connecticut's extended child sex abuse limitations statute).) State limitations periods may be tolled for the minority of the plaintiff, may commence on disclosure rather than perpetration of the abuse and/or may differ depending on whether the claims asserted against a school district are for direct or vicarious liability. (See, *Doe v. First United Methodist Church* (Ohio 1994) 629 N.E.2d 402 (tolling limitations period for minority, discussing applicability of discovery rule in child sex abuse cases, and applying differing limitations period to different claims).)

Notice of claim requirements for claims against municipal defendants, including public schools, will also impinge on the plaintiff's commencement of an action and/or the availability of remedies. Failure to file a timely notice of claim will result in dismissal of the action, unless there is provision for late notice, which may have its own timeliness requirements. (See, e.g., *Ortega v. Pajaro Valley Unified School Dist.* (Cal.App. 1998) 75 Cal.Rptr.2d 777 (under California law, late claims may be made within a year of accrual of the cause of action).) Some states toll the filing of notice during the plaintiff's minority and/or apply the discovery rule to the filing requirements. (See, e.g., *Doe v. Durtschi* (Idaho 1986) 716 P.2d 1238 (notice tolled during minority and subject to discovery rule).) And a district which encourages the plaintiff to delay in filing a claim may be estopped from challenging the timeliness of the filing. (See, *Ortega v. Pajaro Valley Unified School Dist.* (Cal.App. 1998) 75 Cal.Rptr.2d 777.)

Pending criminal proceedings

The commencement, pendency and termination of criminal proceedings against the offending teacher can offer both challenges and advantages to the plaintiff in a civil action. Clearly, where the teacher has been convicted of abuse



relating to the plaintiff, issues of proof regarding the existence, nature or severity of sexual contact are resolved. In addition, where the teacher has been convicted of other prior instances of abuse, plaintiff's challenges in discovering and proving a district's knowledge or constructive knowledge of the abuser's proclivities and/or of the probable results of a proper investigation or records check, are diminished. Conversely, where there has been no criminal conviction for abuse of plaintiff, or for previous abusive contacts, plaintiff's burdens are heightened; clearly, an acquittal on criminal charges arising from the relationship with your client's child should give you pause in assessing the likely outcome of a civil case, notwithstanding the lesser burden of proof in civil actions.

Where a criminal indictment has been handed up, but the criminal case has not yet come to trial or plea, questions about the availability of grand jury minutes or police investigative notes may arise. In one recent case, the defendant district sought access to the complainant's grand jury testimony for impeachment purposes. The trial court denied the request on the issue of liability, since the teacher had already admitted to sexual contact in connection with school disciplinary proceedings, but left open the possibility of renewal if access to the grand jury minutes became pertinent on the issue of damages. (See, *Craig v. Lima City Schools Bd of Educ.* (N.D.Ohio 2005) 384 F.Supp.2d 1136.)

Investigation, discovery and proof

As is evident from the foregoing, whatever the nature of the claims or causes, a case against a school district and its administrators will largely turn not only on proof of the immediate abusive conduct of a district teacher, but on the teacher's past history and the district's or administrators' knowledge or investigation thereof. The plaintiff must therefore make meticulous investigation of the teacher's background and history, as well as of the teacher's contacts with

the plaintiff, other students, and staff, and the district's or administrative staff's awareness of and response to the teacher's conduct. Considerable persistence may be required.

The teacher's resume or employment application is a starting point. Items to look for include job hopping, gaps in employment, dated or incomplete reference contacts, vague or incomplete answers to questions. A background check with state criminal justice data banks, child abuse hotline records, and/or the criminal check system established by the National Child Protection system should be made, and evidence of such a check should appear in the teacher's employment file, as should evidence of a reasonable reference check. The district's employment files should also chronicle regular evaluations of the teacher's performance, including a record of curricular and extracurricular teaching duties, as well as reports of any prior and current complaints against the teacher, which can be cross-checked with local police records if earlier complaints of abuse have surfaced. District employment and policy manuals will show the hiring, evaluation, supervision and training protocols the district itself deems reasonable, and may be cross-referenced to state and federal policy mandates regarding harassment, abuse, discipline and the like. In addition, teacher assignment calendars, class records and evaluations of student work may offer insights into the teacher's contacts and course of conduct vis a vis the plaintiff and any other complainants. Discovery of such documents should be routine, but may also require litigation, particularly as district records may – in this writer's experience – be dispersed among school or administrative sites and may conveniently lack critical records withdrawn or forwarded to another location in the course of an after-the-fact investigation.

The student's own notes, assignment books and diaries may also offer a chronology or evidence of untoward relations; and careful interviews of the stu-

dent's peers, other teachers, coaches and confidantes should be conducted, for signs of observations and concerns regarding the plaintiff's school activities and relationships. (Cf., *Nelson v. Almont Community Schools* (E.D.Mich. 1996) 931 F.Supp. 1345 (student's diaries and notes evidence intimate relationship between student and teacher). School administrators responsible for hiring, evaluation, supervision and investigation of complaints should be deposed, as should school-based witnesses – such as fellow teachers and other staff – who may have observed or suspected abusive, secretive or untoward activities on the part of the abusive teacher.

Proof of the teacher's prior abusive conduct should be readily admissible at trial. (See, e.g., *Ortega v. Pajaro Valley Unified School Dist.* (Cal.App. 1998) 75 Cal.Rptr.2d 777, cf. FRE 415 (allowing for the introduction of evidence of past sexual assaults in civil cases in which the claim for damages is predicated on the defendant's alleged commission of a sexual assault).)

Proof of prior conduct may include not only criminal and police records, abuse reports and disciplinary measures, but testimony regarding instances of undocumented abuse with other children. Expert testimony will also be important to establish that abuse occurred, particularly with younger child victims, and that injuries and disabilities were and continue to be suffered. In addition, expert testimony may address the shortcomings in the school district's procedures, investigations, policies and attempts at remediation. (See, *Shante D. by Ada D. v. City of New York* (N.Y. App. 1993) 598 N.Y.S.2d 475, aff'd 638 N.E.2d 962 (N.Y. 1994).)

Final considerations

However diligent your investigation and preparation, however strong your claims, children who are the victims of sexual abuse are often fragile witnesses. A trial may tax them and their families with endless repetitions of a painful ex-



MARCH 2009

perience, with the ever-present possibility of minimal reward.

A settlement offer that can compensate your client and her son for fiscal and emotional strains in obtaining medical attention, counseling and academic services in the immediate aftermath of abuse, and that can also address the child's emotional and academic needs in the future, may be your client's best outcome. On the other hand, the litigation process may help your client and his or her child achieve justice and closure, and is likely to compel reluctant school districts and administrators to take seriously the need

for clear policies and strict enforcement against sexual contacts between teachers and students.

As a plaintiff's attorney, it is up to you to draw a balance for your client and her son that is both realistic and just, with due regard to the sensitivity of the subject area and the pervasiveness and harmfulness of the problem.

William S. Friedlander specializes in school violence, safety and misconduct litigation, nursing home abuse, and birth injury cases. He is a President's Club member of the American Association for Justice and is active



Friedlander

in the AAJ sections. He currently serves as Chair-elect of the AAJ Small Firm Section. He is co-founder of the AAJ Schools: Violence, Safety, and Misconduct Litigation Group. He serves as a member of the Board of Directors of the New York

Academy of Trial Lawyers and is active in the New York State Trial Lawyers Association and the Pennsylvania Justice Association. Mr. Friedlander is a member of the firm Friedlander, Friedlander, and Arcesi, P.C. in Ithaca, New York.