Making the grade

A primer on litigating sexual-abuse cases against public school districts

By Jane Reilley

Civil litigation is a powerful weapon in the fight to eradicate sexual abuse from California's public schools. Now, in the midst of California's childhood sexual-abuse claims revival window, more victims than ever are pursuing civil justice against their abusers and the school districts who employed them. While immensely rewarding, childhood sexual abuse cases against school districts are complex, hard-fought and require a deep understanding of an intricate and ever-changing body of law. This article provides an overview of some of the key statutory and case law that plaintiffs' attorneys should be aware of when representing victims in these challenging and incredibly meaningful cases.

Recent amendments to C.C.P. § 340.1

Code of Civil Procedure ("C.C.P.") section 340.1 governs the statute of limitations applicable to all actions "for recovery of damages suffered as a result of childhood sexual assault," including those against public school districts and their employees. At the beginning of 2020, with the enactment of AB 218, the California State Legislature amended C.C.P. section 340.1 to significantly lengthen the statute of limitations for child sexual abuse cases, as well as to temporarily revive claims that were previously time-barred.

Claims revival period

AB 218 amended C.C.P. section 340.1 to create a three-year "lookback window," which revives all civil claims arising from childhood sexual assault that were barred as of January 1, 2020, "because of the applicable statute of limitations, claim presentation deadline, or any other time limit had expired." (C.C.P. § 340.1, subd. (q).) This revival period was further extended by California's Emergency Rule 9 – implemented as a result of the COVID-19 pandemic – which tolled all statutes of limitations and repose that exceed 180 days, from April 6, 2020, to October 1, 2020.

Taken together, C.C.P. section 340.1, subdivision (q) and Emergency Rule 9 permit any victim of child sexual assault to file a timely claim against any responsible defendant – including a public school district and its employees – on or before June 27, 2023, regardless of when the abuse occurred. This presents a tremendous opportunity for victims who, prior to the Me Too movement and the resulting increased public awareness surrounding the epidemic of childhood sexual abuse, may have been discouraged from coming forward to seek civil justice for their abuse.

Extension of statute of limitations beyond revival period

In addition to creating the three-year revival period, AB 218 substantially extended the statute of limitations for causes of action arising from childhood sexual abuse. As amended by AB 218, C.C.P. section 340.1(a) provides that a victim of childhood sexual abuse may bring a claim: (1) any time before his or her 40th birthday or (2) within five years of the date that he or she discovered or reasonably should have discovered that the psychological injuries and/or illness suffered during adulthood were caused by the childhood sexual abuse, whichever period expires later (prior to the enactment of AB 218, the cut-off date was 26 years of age rather than 40, and the "delayed discovery" period was three years long, rather than five years). Thus, under the newly expanded statute, children who are sexually abused within the California public school system have at least 22 years to file suit against the perpetrator and the responsible public school district.

Filing requirements when plaintiff is over 40

Although California law permits childhood sexual abuse victims who are over the age of 40 to file suit within five years of discovering the nexus between the abuse and their psychological injury or illness, strict filing requirements apply to plaintiffs who proceed under this "delayed discovery" provision. Specifically: (1) certificates of merit executed by plaintiffs' counsel and a licensed mental-health provider must be submitted to the court,

(2) the complaint may not be served on the defendants until the court has reviewed those certificates of merit and determined that reasonable and meritorious cause for filing the action exists; and (3) all defendants must be named only by "Doe" designation in all pleadings and papers until an application to amend the complaint to substitute the true names of the defendants has been granted. These filing requirements also apply to claims that are filed within C.C.P. section 340.1, subdivision (q)'s claims revival period, where the plaintiff is over 40 years old at the time of filing. Before filing a case on behalf of a victim who is over 40, be sure to carefully review these additional requirements, which are set forth in C.C.P. section 340.1, subdivisions (f)-(o). The failure to abide by these rules not only provides defense counsel with grounds for dismissal via demurrer or motion to strike, but can also constitute unprofessional conduct and may result in attorney discipline.

No government tort claim requirement

As a general rule, any plaintiff who seeks to sue a public entity, including a public school district, must first file a government tort claim pursuant to the California Tort Claims Act. If victims of childhood sexual abuse were required to comply with the Tort Claims Act before bringing a claim against the responsible school district, they would be barred from filing suit unless they filed a government tort claim within a mere six months of the date of their abuse – a draconian procedural requirement that would undermine C.C.P. section 340.1's expansive statute of limitations and prohibit the vast majority of victims from seeking justice in civil court.

Fortunately, the California Legislature recognized this issue and expressly abolished the tort claim-filing requirement for "claims made pursuant to [C.C.P. § 340.1] for the recovery of damages suffered as a result of childhood sexual assault." (Gov. Code, § 905 subd. (m).) Thus, when representing a victim of childhood sexual abuse in a case against any public entity – including a public school district – you are *not* required to submit a government tort claim before filing suit.

Negligence claims against school districts

The most straightforward way to hold a public school district liable for its students' sexual abuse is via negligence. In virtually every case involving childhood sexual abuse by a public school district employee, the sexually abusive acts fall outside the scope of the perpetrator's employment, such that the school district cannot be held liable for the sexual abuse itself via respondeat superior. (See *John R. v. Oakland Unified School Dist.*, (1989) 48 Cal.3d 438.) Thus, negligence claims against public school districts must be predicated upon the districts' own negligent acts and omissions in failing to prevent their employees from sexually victimizing their minor students.

School districts stand in a special relationship with their minor students, "so as to impose an affirmative duty on the district to take all reasonable steps to protect its students." (*Rodriguez v. Inglewood Unified School District* (1986) 186 Cal.App.3d 707, 715.) This special relationship also exists between the school district's individual employees and its minor students. (*Leger v. Stockton Unified School District,* (1988) 202 Cal.App.3d 1448, 1958-1459.) As a result of this special relationship, California courts impose a duty of care on school districts and their employees "to use reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally." (*C.A. v. William S. Hart Union High School District,* (2012) 53 Cal.4th 861, 869.)

Above and beyond this duty to supervise, under the Child Abuse and Neglect Reporting Act ("CANRA"), all adult employees of California's public-school districts are "mandated reporters," meaning that they are required to report any reasonable suspicion that a minor student has been the victim of child abuse or neglect – including childhood sexual abuse – to law enforcement "immediately or as soon as is practically possible." (Pen. Code, § 11164, et. seq.) Per CANRA, school districts are obligated to explicitly inform each of their employees, in writing, of their duties as mandated reporters, and an employee who fails to report his or her reasonable suspicion of childhood sexual abuse may be charged criminally.

Sexual harassment (Education Code)

Public school districts may also be held liable for failing to affirmatively combat childhood sexual abuse on their campuses under Chapter 2 of California's Education Code. "It is the policy of the State of California to afford all persons in public schools, regardless of their… gender…equal rights and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor." (Ed. Code, § 200.) Among these prohibited acts is sexual harassment, defined as "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions […] [t]he conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment." (Ed. Code, § 212.5.) Violations of this chapter of the Education Code "may be enforced through a civil action." (Ed. Code, § 262.4.)

Sexual harassment (Civ. Code § 51.9)

Sexual harassment (as defined by Civil Code § 51.9) is another powerful cause of action that victims of childhood sexual abuse can bring against perpetrators and the school districts that employ them. A plaintiff prevails on a Civil Code section 51.9 sexual harassment claim upon meeting the following four elements: (1) there was a business, service, or professional relationship between the plaintiff and defendant (which, per Civil Code § 51.9, subd. (a)(1)(e), includes the relationship between a plaintiff and a "teacher"); (2) the defendant made sexual advances or engaged in other conduct of a sexual nature or of a hostile nature based on gender, that was unwelcome and pervasive or severe; (3) the plaintiff could not easily terminate the relationship; and, (4) the plaintiff has suffered or will suffer economic loss or disadvantage or personal injury. Sexual harassment may be alleged directly against the perpetrator, as well as against the defendant school district via ratification. (See *C.R. v. Tenet Healthcare Corp.*, (2009) 169 Cal.App.4th 1094, 1111 ["Principles of ratification apply to a section 51.9 cause of action."].) Asserting a sexual harassment claim in childhood sexual abuse cases can be extremely advantageous, as it entitles the plaintiff to seek attorney's fees pursuant to Civil Code section 52.

Recently, defendant school districts have attempted to challenge Civil Code section 51.9 claims against school districts by citing *Brennon B. v. Superior Court* (2020) 57 Cal.App.5th 367, review granted Feb. 24, 2021. *Brennon B.* held that public school districts are not "business establishments" for purposes of the Unruh Civil Rights Act (Civ. Code, § 51) and thus cannot be held liable under the Unruh Act. However, Civil Code section 51.9 is not part of the Unruh Act; it is an entirely separate statute, which does not include a requirement that the defendant be a "business establishment." (See *Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1450 [holding that the Unruh Act "comprises *only* (Civil Code) Section 51"].) Thus, even if the California Supreme Court upholds the *Brennon B.* decision, Civil Code section 51.9 sexual-harassment claims against public school districts would still be proper.

Private attorney-general attorney fees

Another avenue by which a claim for attorney's fees may be made against a public school district is the private attorney-general doctrine, which is codified by C.C.P. section 1021.5. This provision allows the court to award attorney's fees in favor of the prevailing party "in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." Civil claims brought by childhood sexual abuse victims against public school districts substantially benefit the general public by identifying and exposing sexual predators (as well as those who fail to properly supervise and/or report those predators) within the public school system, and thus can support an award of attorney's fees under C.C.P. section 1021.5.

Defendant school districts often argue that plaintiffs are not entitled to attorney's fees under C.C.P. section 1021.5 because they stand to receive a monetary benefit from the litigation. However, "the purpose of section 1021.5 is not to compensate with attorney fees only those litigants who have altruistic or lofty motives, but rather all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify the litigation in economic terms." (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1210.) Consider adding a prayer for damages under C.C.P. section 1021.5 to your complaint, in order to preserve your right to move for attorney's fees once you prevail at trial.

Consent is not a defense

California law rightfully recognizes that minor children cannot, and should not, be held responsible for the sexual abuse inflicted upon them by school district employees. In 2014, an attorney representing the Los Angeles Unified School District infamously attempted to argue that a fourteen-year-old girl consented to – and, thus, was partially at fault for – the statutory rape that she suffered at the hands of her middle school teacher. Just over a year later, the California Legislature amended the Code of Civil Procedure to expressly prohibit public school districts and their employees from attempting to blame minor victims for their own sexual abuse. C.C.P. section 1708.5.5 provides that "consent shall not be a defense in any civil action [for sexual battery] if the person who commits the sexual battery is an adult who is in a position of authority over the minor." The statute goes on to expressly define "position of authority" as including teachers, coaches and youth leaders. As a corollary to C.C.P. section 1708.5.5, Evidence Code section 1106, subdivision (c) prohibits defendants from presenting evidence of the minor victim's sexual conduct with the adult perpetrator to prove consent or absence of injury to the plaintiff.

Confidential settlement agreements are prohibited

Finally, when negotiating a settlement on behalf of any victim of childhood sexual abuse – including one who was sexually abused within the public school system – confidentiality and non-disparagement clauses are prohibited. In any settlement agreement for a claim of childhood sexual assault, as defined in C.C.P. section 340.1, it is unlawful to include any provision that prevents the disclosure of factual information related to

the action, including information regarding the underlying abuse. (See C.C.P. § 1002.) In addition to serving the critical public interest of exposing childhood sexual abuse within California's public school system, this provision also affords victims the freedom to speak openly about their abuse (should they choose to do so) without fear of jeopardizing their recovery.

Conclusion

Plaintiffs' attorneys who represent victims who were sexually abused within California's public school system play an important role in fighting the epidemic of childhood sexual abuse in our schools. Handling these difficult and high-stakes cases requires a commitment to learning a complex and ever-developing area of the law. By having a full understanding of the intricacies of the statutory and case law governing childhood sexual abuse claims, litigators can bring justice and healing to victims, while at the same time enacting institutional change that will protect future students from these despicable crimes.


Reilley

Jane Reilley is an attorney at Manly, Stewart & Finaldi. *Her practice focuses exclusively on representing adult and minor victims of sexual abuse, sexual assault and sexual harassment.*