

Why It Is So Difficult to Successfully Sue Public Schools and Educators for Failing to Prevent Physical Harm, Including Bullying, to Students

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Oftentimes, parents will ask if they can sue their child's public school, school district, teachers and/or principal for failing to prevent a bullying incident in which their child was the victim. To understand the answer to this question, we will first need to review the doctrines of sovereign and official immunity.

Sovereign Immunity

As discussed below, sovereign immunity protects county-wide school districts and therefore makes it difficult for parents to sue when their child is injured at school by a bully. Georgia recognizes, and has recognized in some fashion or another since 1784, the "doctrine of sovereign immunity",ⁱ which protects the state and its subdivisions from being sued without their consent. Gilbert v. Richardson, 264 Ga. 744, 745-46, 452 S.E.2d 476, 478 (1994). In practical terms what this means is that if the state or one of its subdivisions is sued and the doctrine of sovereign immunity applies, it will be entitled to rely on that doctrine to be dismissed from the suit at a very early stage, such as at a motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment. In Georgia, the doctrine is also explained as a way to protect public funds. Gilbert at 749 n.7, 452 S.E.2d at 480 n.7.

Official Immunity

Official immunity provides similar protections to county-wide school board members, educators, principals and, where employed by the school district, school resource officers from suits involving failure to prevent a bullying incident which causes personal injuries. See discussion below.

Under the Georgia Constitution:

Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.

Ga. Const. of 1983, Art. I, Sec. II, Par. IX(d) (as amended 1991).

Thus, if a person employed by a school negligently performs or fails to perform a *ministerial* act or function,ⁱⁱ then he or she may be liable for the injury or damage that resulted. If, however, that

person negligently performs or fails to perform a *discretionary* act or function,ⁱⁱⁱ so long as that person does not act with “actual malice”^{iv} (defined below) or with “actual intent to cause injury”, that person will not be liable for the injury or damage that resulted.

Moreover, “a deliberate intention to do wrong such as to constitute the actual malice necessary to overcome official immunity must be the intent to cause the harm suffered” by the student-plaintiff. Murphy v. Bajjani, 282 Ga. 197, 203, 647 S.E.2d 54, 60 (2007) (citations and original quotations omitted).

The rationale that is generally given for official immunity is as follows:

The basis of the immunity has been not so much a desire to protect an erring officer as it has been a recognition of the need of preserving independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits. This, together with the manifest unfairness of placing any person in a position in which he is required to exercise his judgment and at the same time is held responsible according to the judgment of others, who may have no experience in the area and may be much less qualified than he to pass judgment in a discerning fashion or who may now be acting largely on the basis of hindsight, has led to a general rule that tort liability should not be imposed for conduct of a type for which the imposition of liability would substantially impair the effective performance of a discretionary function.

Gilbert v. Richardson, 264 Ga. 744, 750, 452 S.E.2d 476, 481 (1994) (quoting Restatement (Second) of Torts §895D comment b).

School Districts Are Protected From Liability By Sovereign Immunity

County-wide school districts are entitled to sovereign immunity under the 1991 amendment to the Georgia Constitution of 1983. Coffee County School District v. Snipes, 216 Ga. App. 293, 294, 454 S.E.2d 149, 150 (Ga. Ct. App. 1995). The Snipes case involved negligent supervision claims against the county school district, a five-year old child’s teacher and paraprofessional teacher’s aide, when the child severely fractured her elbow while playing at recess. The appeals court found that the county school district was entitled to summary judgment under the doctrine of sovereign immunity. See also Teston v. Collins, 217 Ga. App. 829, 830, 459 S.E.2d 452, 454 (Ga. Ct. App. 1995) (county school district immune under sovereign immunity from suit brought by student injured by a former high school student who struck him in the chest and back with a rubber mallet during shop class, on the grounds that neither the Georgia Tort Claims Act or any other act passed by the General Assembly has waived such immunity); Payne v. Twiggs County School District, 232 Ga. App. 175, 176, 501 S.E.2d 550, 551 (Ga. Ct. App. 1998) (county school district immune under sovereign immunity from suit).

While the parents of a publicly-educated child are not barred under Georgia law from suing a county school district, if they do, the school district would be entitled to a complete defense under the doctrine of sovereign immunity. Bear in mind that there are penalties for bringing frivolous lawsuits or engaging in other harassing litigation conduct under O.C.G.A. §9-15-14(a)-(b). Inasmuch as Georgia courts have found – since at least 1995 - that school districts are

entitled to sovereign immunity for suits brought by parents, suing a county school district for damages would likely invite a motion for fees and expenses under O.C.G.A. §9-15-14(a) and/or (b).

School Boards Are Not Legally Capable of Being Sued (Although They Are)

County boards of education, unlike the school districts they manage, are not corporate bodies capable of being sued and bringing suit. Leake v. Murphy, 274 Ga. App. 219, 220 n.1, 617 S.E.2d 575, 577 n.1 (Ga. Ct. App. 2005) (citation omitted) (overruled in limited part on other grounds by Murphy v. Bajjani, 282 Ga. 197, 199, 647 S.E.2d 54, 57 (2007)). Thus, they are not subject to suit, although they do get sued. Once sued, however, they get dismissed early on in the case since the law does not recognize them as capable of being sued.

School Board Members Are Protected From Liability By Official Immunity

School board members are entitled to official immunity in the same fashion as school district employees. See Murphy v. Bajjani, 282 Ga. 197, 197-98, 647 S.E.2d 54, 56-57 (2007) (applying test of ministerial or discretionary function to acts of school board members in suit involving student on student attack). Thus, whether they would be entitled to rely on the doctrine of official immunity would depend on the same factors that would determine whether school officials would be immune from suit under official immunity.

School Administrators, Educators And Other School Employees Are Protected From Liability By Official Immunity

School principals, teachers, aides, bus drivers and others employed by a school district are entitled to official immunity. See e.g., Smith v. McDowell, 292 Ga. App. 731, 733, 666 S.E.2d 94, 96 (Ga. Ct. App. 2008) (“Absent malice or intent to injure, which are not alleged here, public school officials and employees may be held personally liable only for the negligent performance of ministerial acts.”) (citation omitted).

Georgia courts have consistently reached the conclusion that when school officials are monitoring, supervising or controlling students, they are performing “discretionary functions”. Payne v. Twiggs County School District, 232 Ga. App. 175, 177, 501 S.E.2d 550, 552 (Ga. Ct. App. 1998). Furthermore,

[s]upervision of students is considered discretionary even where specific school policies designed to help control and monitor students have been violated. The rule that principals and teachers are immune from actions involving supervising and monitoring students has been applied uniformly in cases where students have been injured or killed.

Leake v. Murphy, 274 Ga. App. 219, 225, 617 S.E.2d 575, 580 (Ga. Ct. App. 2005) (citations omitted) (overruled in limited part on other grounds by Murphy v. Bajjani, 282 Ga. 197, 199, 647 S.E.2d 54, 57 (2007)).

Even where courts have found that a school official was performing a discretionary function, they will sometimes analyze the facts of the case under traditional principles of negligence, to point out further obstacles in a student-plaintiff’s case, such as proximate cause or an

unforeseeable, intervening third party criminal act. See e.g., Wright v. Ashe, 220 Ga. App. 91, 94, 469 S.E.2d 268, 271 (Ga. Ct. App. 1996) (truant's injuries were caused by third party criminal act of other truant student who was the reckless driver of the car the two were riding in when it crashed). Cf. Rawls v. Bulloch County School District, 223 Ga. App. 234, 235, 477 S.E.2d 383, 385, (Ga. Ct. App. 1997) (finding that even if sovereign immunity did not apply to school district, the act of the student who attacked the other student with a hammer was an unforeseeable and intervening third party criminal act which broke the chain of causation and provided another defense to the school district).

The law is harsh against students under these circumstances. Below are summaries of cases handed down by the Georgia appeals courts over the past couple of decades where, despite sometimes horrific facts, school personnel successfully defended themselves against damages claims on the basis of official immunity:

Murphy v. Bajjani, 282 Ga. 197, 647 S.E.2d 54 (2007)) (facts taken from Bajjani v. Gwinnett County School District, 278 Ga. App. 866, 630 S.E.2d 103, (Ga. Ct. App. 2006))

Male student at North Gwinnett High School responded to another male student's question in an "inflammatory" way which led to the second student severely beating the first student (kicking him in the face and stomach and stomping on his head while he lay unconscious on a concrete floor). The principal and assistant principal found the beaten student in the hallway, still unconscious and bleeding profusely. The school had the school nurse clean his wounds but did not call 911 until after the parents were notified and his mother had come to the school and found her son "still covered in blood, writhing in pain, begging for help and unable to say what had happened to him." The student's brain was leaking spinal fluid, he was vomiting and his injuries included severe head trauma, subdural hematoma, temporal skull fracture, three facial fractures. He had to have surgery, extensive dental work and suffers from seizures, inability to sleep and difficulty eating. There was evidence that because the school system did not want the stigma of having a school designated as "persistently dangerous" under No Child Left Behind, the system grossly underreported student discipline data and, that at this school, teachers had been specifically instructed to never call 911 for any injury on school grounds. There was also evidence that the assailant had a history – known to both his parents and school officials – of explosive, violent behavior, including fights both on and off school grounds. The parents won at the Court of Appeals but the Georgia Supreme Court reversed, finding that the school superintendent and school board members were entitled to official immunity for the discretionary act of creating a school safety plan required by O.C.G.A. §20-2-1185 and that the school's failure to seek immediate medical attention for the student did not rise to the level of "actual malice" and thus was not enough to overcome official immunity.

Payne v. Twiggs County School District, 232 Ga. App. 175, 501 S.E.2d 550 (Ga. Ct. App. 1998)

Female student who had an ongoing conflict with another female student and had told assistant principal of such conflict, was severely cut on the face by the second student while riding the bus. Both the bus driver and the assistant principal were granted summary judgment by the trial court on grounds of official immunity after the court found that the acts of enforcing the school's weapons policy and supervising, monitoring and controlling the students were discretionary functions.

Rawls v. Bulloch County School District, 223 Ga. App. 234, 477 S.E.2d 383 (Ga. Ct. App. 1997)
Student who had previous altercation with another student on the bus attacked student with a hammer 10-30 feet away from bus on way into school. The victim suffered a fractured skull requiring a metal plate, multiple broken teeth and some left-side paralysis. The school district was the only defendant in this case and was entitled to sovereign immunity. Even if the school district wasn't entitled to sovereign immunity, the causal chain (proximate cause) was broken by the unforeseeable intervening criminal act of the hammer-wielding student.

Kelly v. Lewis, 221 Ga. App. 506, 471 S.E.2d 583 (Ga. Ct. App. 1996)

Male high school student was attacked on his way to school by a gang of teenage boys, beaten, and shot in the head. He died one month later. The student's grandparents (guardians during his life and co-administrators of his estate after his death) filed suit against the school district, the principal and a teacher/coach. The school district was dismissed on sovereign immunity grounds. The principal and coach were dismissed on grounds of official immunity, after the court found that the school personnel's acts in monitoring the arrival of students to school were discretionary acts.

Guthrie v. Irons, 211 Ga. App. 502, 439 S.E.2d 732 (Ga. Ct. App. 1994), *disapproved in part by* Gilbert v. Richardson, 264 Ga. 744, 750, 452 S.E.2d 476, 481 (1994) (finding the term "governmental immunity" to be synonymous with "sovereign immunity" and not a term covering both "sovereign immunity" and "official immunity"))

Male student was punched and kicked to death by another male student wearing steel-toe boots in the hallway during class change. There was evidence that at this particular high school, the police had been called to the school 48 times in the two years prior to the attack and nearly 100 pages of transfer requests had been submitted by parents who were fearful for their children's safety, including the mother of the student who was killed in this case. Most of the transfer requests were denied. There was also evidence that the school board had established a rule that required that teachers stand in their hallways during class change to monitor the hallways and that this rule was not consistently followed or enforced at this school. The trial court found, and the appeals court affirmed, that the school personnel's acts of monitoring and supervising the students during class change were discretionary and, as there was no evidence of actual malice or intent to injure, they were granted summary judgment on the basis of official immunity.

Doe v. Howell, 212 Ga. App. 305, 441 S.E.2d 767 (Ga. Ct. App. 1994)

Second grade boy told another second grade boy to come into the closet with him while the teacher was using the overhead projector. Once inside, he forced the boy to perform oral sex on him and then performed oral sex on the victim. The trial court concluded that the teacher was immune from suit under the doctrine of official immunity for claims of negligent supervision and also that the aggressor's sexual assault was a superseding criminal act that was not reasonably foreseeable. The court of appeals agreed. *This case did not contain or discuss whether any constitutional violations would have supported a 42 U.S.C. §1983 lawsuit based on gender discrimination or peer sexual harassment and the discussion of same is beyond the scope of this letter.

Sapp v. Effingham County Board of Education, 200 Ga. App. 695, 409 S.E.2d 89 (Ga. Ct. App. 1991)

Male student who had been minimally cut with a knife by another student (who was younger than the victim by four years) in the lunchroom was severely injured by that same student during an altercation in the parking lot later that day. At the time this case was decided, a county board of education was not entitled to rely on the doctrine of sovereign immunity if it had purchased liability insurance, which this county board of education had done; thus the appeals court analyzed this case along basic principles of negligence and affirmed the trial court's grant of summary judgment to the county board of education on grounds that the student: (1) failed to show that with any different training, the assistant principal would have discovered the attacker's identity before the second attack or prevented the second attack; (2) assumed the risk of the second attack when he deliberately confronted the attacker, who then retrieved a much larger knife out of his brother's car and slashed the student from his mid-back to his rib cage.

Conclusion

Under current case law, unless a parent can point to a "ministerial act" – and the courts have been very reluctant to find any in the past decade or so,^v or a parent can overcome the "actual malice/actual intent to cause injury" requirement, and then overcome any defenses to negligence or other tort defenses, the doctrine of official immunity effectively ensures that school employees get dismissed from suits at an early stage and never have to face a jury even when a child under their supervision is injured or dies.

Parents may have other remedies, however, even if their ability to recover monetary damages on behalf of their injured child (or on behalf of his or her estate in the event of a child who has died) is severely restricted by the doctrines of official and sovereign immunity. Such remedies may include: (1) suing the bully for assault or battery or other applicable torts (if he or she is at least 13 years of age); (2) suing the bully's parents (if they negligently furnished or permitted the child access to an instrumentality with which the child would likely injure another person or the parents knew of the child's proclivity or propensity for the specific dangerous activity and failed to prevent it); (3) bringing delinquency or criminal charges against the bully for assault or battery or other applicable charges; (4) monitoring any student discipline that is imposed on the bully, and making sure that the school officials comply with the requirements imposed by school policies and O.C.G.A. §20-2-751.4; and/or (5) bringing an ethics complaint with the Georgia Professional Standards Commission against the educator responsible for the alleged negligent supervision.

ⁱ "Sovereign immunity is a judicial doctrine that prevents the government or its political subdivisions, departments, and agencies from being sued without its consent. The doctrine stems from the ancient English principle that the monarch can do no wrong". See <http://legal-dictionary.thefreedictionary.com/Sovereign+Immunity> (accessed 12/18/11).

ⁱⁱ A "ministerial act" is "commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty." Murphy v. Bajjani, 282 Ga. 197, 199, 647 S.E.2d 54, 57 (2007) (citations omitted).

ⁱⁱⁱ A "discretionary act" requires "the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." Murphy v. Bajjani, 282 Ga. 197, 199, 647 S.E.2d 54, 57 (2007) (citations omitted).

^{iv} “Actual malice” means “express malice”, that is, “a deliberate intention to do wrong”; however it does not include “implied malice”, which is defined as “the reckless disregard for the rights or safety of others”. Murphy v. Bajjani, 282 Ga. 197, 203, 647 S.E.2d 54, 60 (2007) (citations and original quotations omitted).

^v See discussion of this reluctance in Smith v. McDowell, 292 Ga. App. 731, 734-37, 666 S.E.2d 94, 96-98 (Ga. Ct. App. 2008) (noting, among others, that “[t]he rules of official immunity should be consistently applied to all state actors, including the distinction between ministerial and discretionary acts. Yet it is plain upon a review of recent decisions that a de facto absolute immunity for school employees has developed gradually across the last decade. Not one recent case exists in which the Georgia courts have found a ministerial duty on the part of a school employee” and, “On the one hand, the General Assembly requires that parents entrust their small children to the public schools, unless they have the resources to educate them privately or at home. O.C.G.A. §20-2-690.1. On the other hand, our courts increasingly allow school employees to avoid responsibility for all harm to the children placed in their custody by law. At some point, this accelerating trend must come to a halt. Otherwise, the most flagrant failure to follow *any* school policy, no matter how plainly and unambiguously stated, is ‘discretionary’ and therefore without legal consequences.”), *aff’d by* McDowell v. Smith, 285 Ga. 592, 678 S.E.2d 922 (2009). However, in Cotton v. Smith, 31 Ga. App. 428, 439-41, 714 S.E.2d 55, 63-64 (Ga. Ct. App. 2011) the Georgia Court of Appeals reversed the grant of summary judgment to a high school front office employee who released a 14 year old girl to a 52 year old man who claimed to be her uncle and who later sexually molested her, finding that the school employee negligently performed and/or failed to perform more than one ministerial duty and that it was up to a jury to decide whether the perpetrator’s actions were unforeseeable intervening criminal acts that broke the causal chain.