School Bullying Cases: Holding School Districts and Officials Accountable in Illinois

by Antonio M. Romanucci, Martin D. Gould, Nicolette Ward

Zachary was a 12-year-old boy with autism. For approximately seven months, he was repeatedly attacked and bullied by two older and bigger students on their small school bus. The abuse included, among other things, being suffocated, punched, choked, taunted and intimidated. After bus rides to and from school, Zachary would be told “snitches get stitches” – a threat the bus driver overheard. The bus driver initially turned a blind eye and ignored the abuse. But as the months went on, he began laughing about the abuse with the two bullies – and on at least one occasion encouraged it.

While Zachary had difficulty expressing himself as a result of his neurological condition, he did make several reports of being “hit” to his parents, who in turn reported the bullying to school administrators. School administrators responded by assigning all the students involved seats on the same bus and warning them of consequences should the bullying continue. When asked what was going on during the bus rides, the bus driver lied about or minimized the abuse. The abuse continued. Ultimately, a video of one beating on the school bus was distributed by the bullies at school, resulting in their eventual expulsion.

Zachary was so afraid of going back to school he was home-schooled for the remainder of his education, and sustained long-term psychological trauma. Zachary’s parents want to hold the school district, school administrators, and the bus driver accountable for failing to adequately respond to the bullying and protect their child. Naturally, when a parent puts their child on a school bus and sends them to school, they expect the school and its staff to do everything in their power to keep their child safe. If the school fails, how can Illinois parents hold the institution accountable?

I. Discretionary Immunity under 745 ILCS 10/2-201

The biggest hurdle in any school bullying case is 745 ILCS 10/2-201 of the Illinois Tort Immunity Act. In our example, as expected, the school administrators and bus driver allege they are immune from any liability because of §2-201 of the Illinois Tort Immunity Act, which states:

[a] public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

Notably, this powerful provision immunizes governmental bodies from “liability for both negligence and willful and wanton misconduct.”

The Illinois Supreme Court has established a two-part test to determine which employees may be granted immunity under section 2–201 of the Tort Immunity Act. First, an employee may qualify for immunity “if he holds either a position involving the determination of policy or a position involving the exercise of discretion.”

If the employee satisfies the first part of the test, he must then show he engaged in both the determination of policy and the exercise of discretion when performing the act or omission from which the plaintiff’s injury resulted. “Determination of policy” and “exercise of discretion” are terms of art defined by courts interpreting the Tort Immunity Act. Whether an employee’s conduct constituted a “policy determination” or “discretionary act” is a fact-sensitive determination made on a case-by-case basis.

“Policy determinations” are decisions which require the employee to balance competing interests and make a judgment call as to what will best serve each of those interests.

A. Question 1: Did the school employee serve in a position involving the exercise of discretion?

Generally, the higher the employee’s position in the relevant chain of command, such as a school dean or principal, the more likely it is that the position involves the determination of policy or exercise of discretion. The statute is “concerned with both the type of position held by the employee and the type of action performed or omitted by the employee.” The courts, however, interpret this language liberally and will consider whether any government employee’s position involves the determination of policy or the exercise of discretion on a case-by-case basis. Thus, even general laborers charged to carry out seemingly mundane tasks, such as filling in potholes, can satisfy the first prong of Section 2-201 under the particular circumstances of a case, so long as some “personal judgment” is needed to execute the duties assigned to the position.

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B. Question 2: What was the employee’s act or omission?

The crucial question under Section 2-201 is whether the claim concerns a “discretionary policy determination.” For discretionary immunity to apply, the subject employee must have engaged in both the determination of policy and the exercise of discretion when performing the act or omission from which the plaintiff’s injury is alleged to have resulted. In no case will a local public body or employee receive discretionary immunity from liability for the performance of a “ministerial” task.

In short, policy determinations involve decisions that require the subject employee to utilize his or her particular expertise to balance competing interests and to make a judgment call as to what procedure, solution, or course of action will best serve each of those interests. Policy choices are not only those choices left up to administrative-level employees, such as school district principals and deans. In many circumstances, courts have also found that lower-level employees, such as teachers and coaches, also make many daily decisions “determining policy” for the purposes of Section 2-201. Courts have held that decisions made by public school employees, at any level, which require the employee to weigh a student’s or students’ interests in safety, and then make a judgment call as to how to address those interests, are “policy determinations.”

Did the employee’s response to the alleged bullying incidents involve the exercise of discretion?

The critical final step of the test requires the court to classify the act or omission giving rise to the complaint as either discretionary or ministerial in nature. “Discretionary acts” are acts or omissions which are “unique to the particular office,” whereby the employee exercises personal deliberation and judgment in deciding how and in what manner the act should be performed or whether to perform the particular act in the first place. Ministerial acts, on the other hand, are those which a person performs “on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official’s discretion as to the propriety of the act.”

Discretionary acts immunize the employee from liability, ministerial acts do not. Although a municipality is immune from liability in its performance of discretionary tasks, it cannot claim immunity for the improper performance of ministerial tasks.

The designation of acts as either discretionary or ministerial is highly particularized, and must be made by the court in light of the particular facts and circumstances presented in each case. If local, state or federal law require a public employee to take certain actions when confronted with a certain situation, then the failure to perform those prescribed acts is likely to be considered ministerial.

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For example, in *Hill v. Galesburg Cnty. Unit Sch. Dist.* 205, a student was performing an experiment in chemistry class when a glass breaker exploded, causing injury to the student’s eye; the student was not wearing eye protection at the time of the explosion. In denying the school district’s motion to dismiss, the court held that because the Illinois Eye Protection Act required the teacher to ensure that plaintiff was wearing eye protection, the teacher had no discretion to permit the class to proceed without the students wearing eye protection. The teacher’s conduct under that set of facts was ministerial, and not discretionary; in nature, and the Illinois Tort Immunity Act providing immunity for discretionary acts of public employees did not apply.

In that same vein, pleading that a school district and officials knew of prior sexual misconduct by a teacher that was not punished or reported under the Illinois Abused and Neglected Child Reporting Act (ANCRA) can be sufficient to survive a motion to dismiss and to allow a claim for willful and wanton conduct to proceed. ANCRA provides that school personnel “having reasonable cause to believe” a child known to them in their professional or official capacity may be an abused child “shall immediately report or cause a report to be made to [DCFS].” The Illinois Administrative Code describes and categorizes specific harms that must be reported. In *Doe v. Dimovski*, the appellate court reversed a 2-615 and 619 dismissal of willful and wanton retention and supervision claims against a high school district and its officials based on the allegations that the high school and the individual defendants had prior knowledge of misconduct by a teacher. The court held that “[g]iven the statute’s mandatory language, we find in this case that the [School] Board was divested of the exercise of discretion and the determination of policy based on the failure to report.” The Supreme Court court made clear that its decision that the school board is not immunized under sections 2-201 and 3-108 “is limited to the claim of the failure to report.”

Illinois appellate courts and federal courts interpreting Illinois law have limited the Dimovski opinion to the application of Section 2-201’s discretionary immunity, distinguishing the duty analysis from the immunity analysis. The Illinois Supreme Court has not yet addressed the issue of whether the failure to report abuse creates a private cause of actions under ANCRA. Nevertheless, Illinois appellate courts and federal courts interpreting Illinois law have held that ANCRA does not create a private right of action against those that fail to report abuse, noting that ANCRA only provides for criminal charges against a mandatory reporter who fails to report.

If a school employee lies or attempts to cover-up abuse or bullying – or worse, participates – the immunity does not apply. In our case study, in denying summary judgment, the trial court found that...
the bus driver was, at the very least, obligated to tell the truth about the bullying when school administrators asked him about it. In support of its opinion, the Woodford County court cited to the Illinois Supreme Court’s decision in *Jane Doe-3 v. McLean County Unit Dist. No. 5 Bd. of Directors.*

In *Jane Doe-3 v. McLean County* involved plaintiffs that were sexually abused by their teacher at an elementary school in Urbana. Prior to his employment at the elementary school, the Doe-3 defendant teacher was employed in the McLean County school district in Normal, Illinois, where the McLean administrators allegedly acquired actual knowledge of the teacher’s teacher-on-student sexual harassment, sexual abuse, and/or sexual “grooming” of minor female students.

McLean County School District, however, never recorded these incidents in the teacher’s personnel file or employment record. While the teacher was ultimately disciplined, the defendant school district concealed the sexual abuse history as part of a severance agreement and even created a falsely positive letter of reference for the teacher. Plaintiffs alleged that the elementary school relied on the false information provided by McLean County School District and hired the teacher, who went on to sexually abuse plaintiffs.

While the Illinois Supreme Court in *Jane Doe-3 v. McLean County* did not directly deal with Section 2-209, it did hold that McLean County School District owed a duty of care to the sexually abused students to provide accurate information to the elementary school about the teacher’s history, reasoning that the assault of plaintiff was reasonably foreseeable. The Illinois Supreme Court cited to three out of state cases as examples to further the point. In *Randi W. v. Murpoe Joint Unified School District,* the California state court held that plaintiff’s assault by school administrator was reasonably foreseeable by school districts who provided favorable recommendations for the administrator, omitting past instances of sexual misconduct involving students. In *Davis v. Board of County Commissioners,* the New Mexico state court held that the former employer of a detention sergeant hired by a hospital in reliance on an unqualifiedly favorable employment reference has a duty to exercise reasonable care so as not to misrepresent the employee’s record when, to do so, would create a foreseeable risk of physical injury to third parties. And finally, in *Golden Spread Council, Inc. v. Akins,* the Texas state court held that the local council who recommended scoutmaster, in light of information council had received about scoutmaster’s alleged prior conduct with other boys, should have foreseen that it was creating an unreasonable risk of harm to scouts in another troop.

1. School District’s Bullying Policies

All Illinois school districts, per state statute, must implement and file with the State Board of Education written anti-bullying policies, addressing how teachers investigate reported acts of bullying. How does the existence of such policies impact a school employee’s responsibilities and the protections afforded under discretionary immunity?

The First Appellate District’s opinion in *Mulvey v. Carl Sandburg High School* is instructive. The *Mulvey* plaintiffs alleged their daughters suffered injuries as a result of bullying at her high school. The high school in question had issued student handbooks including policies regarding the prevention of bullying, including provisions for investigations of bullying, the progressive discipline of students who violate bullying policy, and the requirement for athletic coaches to supervise player behavior.

The defendants asserted that they were entitled to discretionary immunity, despite the existence of the written policy. The court agreed. Noting that the policy at issue was “discretionary in nature and does not mandate a specific response to every set of circumstances,” the court determined that the application of the policies to particular students’ behavior required the balance of competing interest by school employees. Though a written anti-bullying policy may, on its face, outline the obligations that a school district has to its students in
the prevention and punishment of bullying, courts have routinely held that the failure to follow anti-bullying policies is insufficient to overcome discretionary immunity under Section 2-201.49

II. Vicarious Liability – Illinois Tort Immunity Act Section 2-109

Section 2-109 of the Illinois Tort Immunity Act provides that: “[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.”50 Under the Tort Immunity Act, if alleged wrongdoing relates to discretionary act(s) of an employee, there is immunity both for the employee and the public entity, regardless of whether the employee is a party defendant.51 For the purposes of the Tort Immunity Act, an “employee” is “a present or former officer, member of a board, commission or committee, agent, volunteer, servant or employee.”52

Accordingly, Section 2-109 does not confer discretionary immunity to a unit of local government directly.53 Rather, it allows municipalities and other local public entities to obtain protection from the immunity granted to their employees by Section 2-201.54

III. Common Carrier Standard: Intentional Torts or Criminal Acts on the School Bus

Under Illinois law, a “public educational system” has a duty to provide for the physical safety of its students.55 Illinois courts have repeatedly held that the duty of care school bus owners and operators owe to their minor passengers is identical to that of a common carrier.56 The policy reasons for applying this same high standard of care are simple: school districts and/or school bus companies that transport students perform the “same basic function” as other common carriers.57 “Like a passenger on a common carrier, a student on a school bus cannot ensure his or her own personal safety but must rely on the school district [or school bus company] to provide fit employees to do so.”58 In fact, Illinois courts have maintained that there are “more compelling” reasons to hold school bus owners and operators to the highest standard of care vis-à-vis other common carriers because children are “the most vulnerable members of society.”59 Accordingly, school buses (whether private or publicly owned) owe children the highest duty of care (i.e., the “common carrier” standard) while they are transporting the children to and from school.60

As the Illinois Supreme Court has made clear, “if an employee of a common carrier intentionally injures a passenger, the common carrier is liable for the passenger’s injuries,” even if the intentional act is outside the employee’s scope of employment and does not benefit the employer.61 Thus, “a common carrier could [even] be liable

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for the sexual assault of one of its passengers by one of its employees.66

There are two Illinois cases directly on point: Green v. Carlmiille Community Unit Sch. Dist. No. 1 and Dennis v. Pace Suburban Bus Serv.64 In Green, a school bus driver employed by the school district sexually molested a kindergarten student and other children over the course of several months while he drove the children to and from school.65 The plaintiff parents filed suit against the school district and the bus driver to recover damages for the sexual assaults. In reversing the trial court's grant of summary judgment, the appellate court held that the school district could be liable because "school districts that operate school buses owe their students the highest degree of care."66 The court noted that it was irrelevant "whether the school bus passenger suffered his injury as a result of negligence or an intentional act," as the school district could be found liable either way.67

Similarly, in Dennis, the plaintiff passenger, who was "clearly intoxicated," boarded a bus owned and operated by Pace and driven by Pace's employee.68 During her transport, the plaintiff was passing in and out of consciousness and missed her stop several times.69 Instead of calling for medical attention or law enforcement intervention, the bus driver took the plaintiff to his home and sexually assaulted her.70 Plaintiff filed suit against Pace under theories of respondeat superior.71 Drawing from the Illinois Supreme Court's 1882 opinion in Chicago & Eastern R.R. Co. v. Flexman,72 and its progeny, the First District reversed the trial court's dismissal of the battery and false imprisonment claims reasoning that "Pace's potential liability for the intentional acts of its employee is based upon respondeat superior and Pace's status as a common carrier."73

Not all courts have relied on the doctrine of respondeat superior in finding liability.74 In Doe v. Sanchez,75 a school bus driver employed by a private contractor was accused of inappropriately touching a student.76 Finding that the employer could be liable for his employees' misconduct outside the scope of employment, the Second Appellate District noted that it was not relying on a theory of respondeat superior, but instead relied on a "common carrier's nondelegable duty."77 Regardless of which theory the court relies upon, the effect is the same nonetheless.78

If the incident occurred on a school bus where the highest duty of care is applied, how does that impact the protections afforded by the Illinois Tort Immunity Act? It does not. Courts have found that the there is a distinction between finding a duty and applying immunity; i.e., the existence of a duty and the existence of an immunity are separate issues.79 As the court in Doe v. Sanchez explained in finding the highest duty of care was owed to the students on the bus: "Even if the legislature provides an immunity, as it has for various public employees through the Tort Immunity Act, the initial duty analysis is not affected."80

Conclusion
In our case study, the following questions were asked. (1) After being informed of reports of bullying, the school administrators took some action. They assigned the bullies and victim different seats and there were warnings of potential consequences should the abuse continue. Is taking some action (i.e. moving/warning the students) but arguably insufficient action sufficient to overcome the immunities? Likely not. The school administrators held positions that involved determinations of policy and discretion (i.e. how the school should respond to bullying incidents), and they are provided immunity even if the discretion is abused.

(2) After witnessing the bullying, the school bus driver failed to immediately report the abuse. Is this sufficient to overcome the immunity? Maybe. While the failure to report child abuse can be a criminal offense, some courts have indicated it is insufficient to establish civil liability.

(3) After witnessing the bullying, the school bus driver encouraged it and even lied about it to school administrators. Is this sufficient to overcome the immunity? Yes.

In sum, the immunities afforded to school districts and their employees for bullying injuries to students under their care are often intensely fact-specific. An attorney bringing claims against a school defendant must carefully assess a number of factors, including the target entity or employee, that defendant's specific role in the injury, and specific laws or policies that may factor into the defendant's decision making.

Endnotes
3 Id. at 517 (citing Harinek v. 161 N. Clark St. Ltd. Partnership, 181 Ill.2d 355 (1998)).
4 Id. (emphasis added) (citing Harinek v 161 North Clark Street Ltd. Partnership, 181 Ill.2d 335, 341 (1998)).
5 Id.
6 Id.
7 Id. at 516-17.
8 Harrison v. Harain CUSD No. 1, 197 Ill.2d 466 (2001).
10 Id.
11 Wrobel v. City of Chicago, 318 Ill. App. 3d 390, 395 (1st Dist. 2000) ("The degree to which a pothole should be prepared, and specifically how much loose asphalt and moisture will be removed, is a matter of a worker's..."
personal judgment, and encompassed within that judgment are policy considerations of time and resource allocation during a given workday.


13 Harinek, 181 Ill. 2d at 341.


16 Courson ex rel. Courson v. Danville Sch. Dist. No. 118, 333 Ill. App. 3d 86, 91 (4th Dist. 2002) (explaining that in certain circumstances, a coach, teacher and even a janitor can be charged with balancing various interests that might compete for the time and resources, including the interests of efficiency and safety); Harinek, 181 Ill. 2d at 342 (A principal who refuses a student's request to leave school early because of inclement weather is making a policy decision).

17 Arteman v. Clinton Cnty. Unit Sch. Dist. No. 15, 198 Ill. 2d 475, 487 (2002) (holding that the school district's decision not to provide roller-blade safety equipment was a discretionary policy determination and thus school district had immunity under Section 2–201 of the Illinois Tort Immunity Act).

18 See e.g., Maloney, 66 N.E.3d 507, 518 (“it is clear that teachers and administrators must balance various interests which may compete for the time and resources of the school district, including the interests of student safety.”); Hascall v. Williams, 2013 Ill. App. (4th) 121331, ¶ 25 (“The acts and omissions of which plaintiffs complain [failure to respond appropriately to incidents where student was bullied] constituted [both] discretionary acts and policy determinations”); Albers v. Breen, 346 Ill.App.3d 799, 808 (5th Dist. 2004) (“A school principal dealing with a disciplinary matter must balance competing interests . . . and make a judgment as to what balance to strike among them.”); Wrobel, 318 Ill. App. 3d at 395 (finding that laborers’ decisions concerning how to fill potholes involved a determination of policy and an exercise of discretion).


20 Id.

21 Id.

22 Vill. of Bloomingdale v. CDG Enterprises, Inc., 196 Ill. 2d 484, 496 (2001) (citation omitted).


24 Id. at 517.

25 Id.

26 Id.

27 Doe v. Dimoski, 336 Ill. App. 3d 292, 297-300 (There is no discretion school bullying continued on page 60.
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or policy choice when the reporting requirements of the Illinois Abused and Neglected Child Reporting Act are triggered, and when there are prior allegations that make it reasonably foreseeable that another female student could be harmed); Doe v. Chicago Board of Education, 339 Ill.App.3d 848, 857 (1st Dist. 2003) (In following Dimovski, immunity does not attach when there are allegations of prior misconduct which make it reasonably foreseeable that another student could be harmed in the future); Doe 20 v. Board of Education, 680 F.Supp.2d 957, 988-89 (Drawing generalizations about immunity under § 2-201 is difficult which should defer a decision on immunity until the factual record is developed through discovery).


[29] Id. (citing 89 Ill. Adm. Code § 300 app. B. (2002)).

[30] Id. at 299-300.

[31] Id. at 296 (citing Mueller v. Community Consolidated School District 54, 287 Ill. App.3d 337, 346 (1997) (section 2–201 did not grant school board immunity for failure to conduct required criminal background check); Munoz v. City of Chicago, 222 Ill.App.3d 50, 55 (1991) (immunity did not attach because local ordinance negated discretion)).


[33] See, e.g., Doe ex rel. Doe v. White, 627 F. Supp. 2d 905, 920 (C.D. Ill. 2009) (applying Illinois law) (“Dimovski did not address whether a private right of action exists based on failing to report under ANCRA. Dimovski’s decision was limited to section 2–201 discretionary immunity . . . To the extent Dimovski implies that a tort action exists for the violation of ANCRA reporting duties, the court must disagree with that conclusion. In the court’s opinion, Cayler’s holding that ANCRA does not create a private cause of action for tort liability is dispositive of Counts XI and XIII; immunity is irrelevant.”).

[34] Jane Doe 3 v. McLean County Unit Dist. No. 5 Bd. of Directors, 2012 IL 112479, ¶ 27 n. 7.

[35] Sheetz v. Norwood, 608 Fed. Appx. 401, 406 (7th Cir. 2015) (unpublished) (applying Illinois law); McLean County Unit Dist. No. 5 Bd. of Directors, 2014 IL App (4th) 131004-U, ¶ 29-30 (“The threat of facing criminal charges for failing to report abuse not only serves as an effective means of enforcement of a reporter’s duty, but as a deterrent as well, making an action for civil damages unnecessary for remedial purposes.”).


[37] McLean County Unit Dist. No. 5 Bd. of Directors, 2012 IL 112479.

[38] Id. at ¶ 3.

[39] Id. at ¶ 4-5.

[40] Id. at ¶ 6-7.

[41] Id. at ¶ 19-20.


105 ILCS 5/27-23.7.

Muhe, 66 N.E.3d at 510. Id.

Muhe, 2016 IL App. (1st) 151615 at *48-51. See also Hascall v. Williams, 2013 IL App (4th) 121131 (holding that, despite the existence of an anti-bullying policy, a school’s application and enforcement of the policy was discretionary); Mainiski v. Grayslake Cnty. High Sch. Dist. 127, 2014 IL App (2d) 130685 (“[A] policy may afford a school district with the discretion to determine whether bullying has occurred, what consequences will result, and any appropriate remedial actions. Therefore, the implementation of an anti-bullying policy . . . does not necessarily render defendant’s actions ministerial.”).

Muhe, 66 N.E.3d at 517. See also Castillo v. Bd. of Educ. of City of Chicago, 2018 IL App (1st) 171053, ¶ 19 (unpublished) (“[the anti-bullying] statute only mandates that every school district create a policy on bullying; it does not mandate that a school respond to a particular instance of bullying in a particular way. The Board complied with the statute by creating an anti-bullying policy, and so [plaintiff] cannot evade section 2–201 immunity by relying on the statute alone”).

745 ILCS 10/2-109.


745 ILCS 10/1-202.


Id.


Id.

Due v. Sanchez, 2016 IL App (2d) 150554, ¶ 39, 52 N.E.3d 618, 627 (“public policy compels that we impose the highest standard of care on a transporter of students, regardless of whether that transporter is a private contractor or a public entity”).

Green, 381 Ill.App.3d at 212-13 (citing Chicago & Eastern R.R. Co. v. Flexman, 103 Ill. 546, 552 (1882)).

Id. at 213.

Id.

Dennis v. Pace Suburban Bus Serv., 2014 IL App (1st) 132397.

381 Ill.App.3d at 209.

Id. at 213.

Id.

Dennis, 2014 IL App (1st) 132397, ¶ 2.

Id.

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Id. at ¶ 2-4.

103 Ill. 546, 552 (1882).

Id. at ¶ 19, 28.

Doe v. Sanchez, 2016 IL App (2d) 150554, ¶ 2.

2016 IL App (2d) 150554, ¶ 2.

Id. at ¶ 2.

Id. ¶ 46.


Sanchez, 2016 IL App (2d) 150554, ¶¶ 36-38.

Id. (citing Barnett v. Zion Park District, 171 Ill.2d 378, 386–88 (1996)).

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