

LEGAL RIGHTS

Education Support Professionals



Prepared by the MTA Division of Legal Services

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INTRODUCTION

Education Support Professionals are crucial members of the education workforce, ensuring student success from preschool through college. They have a wealth of knowledge, experience and passion — and their roles are critical in the school community.

ESPs work in classrooms as paraeducators, teacher aides and special education paraprofessionals. They work in health, administrative and student services, in technical and trades roles, and in facilities maintenance, food preparation, security and transportation.

All of these roles pose different challenges affecting an ESP's legal obligations and liabilities.

BASIC CONCEPTS

Avoid Physical Contact.

Getting physical with students, whether for disciplinary purposes or as a form of communication (whether appropriate or inappropriate) can expose a school employee to *criminal charges* or a “51A” *child abuse report*, or both, as well as *civil liability* and *suspension or discharge*, especially if the circumstances suggest that the ESP behaved *unreasonably* or with *intent to frighten or injure*. Likewise, becoming too involved with or close to your students can lead to unforeseen problems.

Obtain School Guidance

It is always in the employee's interest to get *administration authorization and guidance* on issues of disciplining students, interfering in student fights, attending to students' medical, physical or emotional needs, and any unusual or off-site activities. Ask for guidance about the employer's expectations in the form of in-service programs, developing school committee policies, written "permission slips" and forms or administrative directives.

Be Aware of Disciplinary Consequences

Because of statutory immunities and NEA liability insurance, MTA members need be less concerned about *civil liability* than about the possible *disciplinary consequences* of their conduct.

Contact the Union

Policies and directives regarding employee conduct are generally *mandatory subjects of bargaining*. Your local association can be helpful in clarifying the employer's expectations regarding an ESP's responsibilities in breaking up fights, administering medications, driving students in one's personal vehicle, etc.

ASSAULT & BATTERY IN A SCHOOL CONTEXT

“Assault” occurs when a person intends to hurt or scare someone and causes that person to believe that they are in danger of immediate harm.

“Battery” occurs when someone intends to touch or hurt a person without that person’s consent, and does so.

When the ESP Is Accused

Corporal Punishment is prohibited under Massachusetts General Law Chapter 71, section 37G. But the law does allow ESPs to use “such reasonable force as is necessary to protect pupils, other persons, and themselves from an assault by a pupil.”

The Department of Elementary and Secondary Education’s Restraint Regulations (603 CMR 46.00) are designed to “ensure that every student . . . is free from the use of physical restraint that is inconsistent with [the regulations].”

Physical restraint may be used only in “emergency situations of last resort, after other lawful and less intrusive have failed or been deemed inappropriate, and with extreme caution.” (603 CMR 46.01(3)). The regulations require that school departments institute procedures and staff training for implementing student restraints. The union can demand to bargain about these procedures and training, about restrictions on any resulting discipline of ESPs, and for methods of preventing or attempting to minimize school violence.

Criminal Proceedings

Any unwelcome physical contact could amount to “battery,” but, while the police may investigate and question an ESP, the district attorney is unlikely to prosecute unless the circumstances are relatively serious.

If an association member has been or is concerned that they may be accused of assault and battery, steps should be taken to:

- Notify the administration and try to have the school nurse verify the injury.
- Obtain legal assistance through the MTA Legal Services Policy before the member discusses the situation in detail with any non-attorney. This is because “attorney-client privilege” only applies to conversations between an attorney and the member.

The member is entitled to be represented by an MTA attorney during any questioning by the employer, police and/or Department of Children and Families investigator.

Sometimes the student or parents bring a criminal complaint even when the police have not done so. In this case a “show cause” hearing will be held before a District Court magistrate. The member is entitled to be represented by an MTA attorney at such a hearing.

In the case of a criminal complaint against a member, the MTA Legal Services Policy provides up to \$5,000 in attorneys’ fees and costs. If the member is exonerated, NEA’s Educators Employment Liability (EEL) Program will pay for up to an additional \$35,000 in legal fees and costs. If the assault arises out of a corporal punishment situation, the NEA policy provides attorneys’ fees regardless of outcome.

When the ESP Is the Victim

The Massachusetts Education Reform Act of 1993 buttressed a school district’s obligation to provide a safe workplace for staff.

- For example, students in possession of dangerous weapons or certain

drugs and students who assault staff members may be subject to expulsion (G.L. c. 71, § 37H).

- School districts must publish student and employee conduct policies and those policies must include, among other things, “standards and procedures to assure school building security and safety of students and school personnel.” (G.L. c. 71, § 37H).
- The law requires that “any school department personnel shall report in writing to their immediate supervisor an incident involving a student’s possession or use of a dangerous weapon on school premises at any time.” (G.L. c. 71, § 37L).
- The law also allows a principal to suspend a student charged with a felony, whether or not school-related, and to expel that student upon conviction, after affording certain due process rights set forth in the statute. (G.L. c. 71, § 37H1/2).

Federal law also requires a school superintendent to expel for at least one year any student who has brought a firearm to school.

A member who has suffered an assault at work can ask the police to bring charges and/or can file an assault and battery charge on their own against the student. At the “show cause” hearing, the member is entitled to be accompanied by an MTA attorney.

Massachusetts General Law c. 265, § 13D, applies a stricter penalty on individuals who commit an assault and battery on a school employee or other public employee who is engaged in the performance of their duties at the time of the offense. It provides for imprisonment of not less than 90 days and a fine of not less than \$500.

Parental Liability Law.

The law (G.L. c. 231, § 85G) makes parents liable within limits for the willful acts of their minor children that result in injury, death or property damage, although recovery is limited to \$5,000. Sometimes ESPs file such actions in small claims court, where the recovery is limited to \$1,500, but no attorney is necessary and the relatively relaxed atmosphere is more conducive to amicable resolution.

Threats to Commit a Crime.

The law (G.L. c. 275, § 2) permits a person who has been the victim of a threat to commit a crime against their person or property to file a complaint in court, leading to an investigation (probably by a magistrate) about the circumstances of the threat and perhaps the issuance of a complaint.

Occupational Safety and Health Act.

As of Feb. 1, 2019, the federal Occupational Safety and Health Act, 29 U.S.C. § 651, et seq. (Employee Safety Act) applies to state and local government employees. According to G.L. c. 149, s.6 ½(b), “[p]ublic employers shall provide public employees at least the level of protection provided under the federal Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et. seq., including standards and provisions of the general duty clause contained in 29 U.S.C. 654.” The general duty cause requires that an employer:

Shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees.

29 U.S.C. § 654(a)(1).

The Occupational Health and Safety Administration (OSHA), the federal Department of Labor agency that enforces the Employee Safety Act, does not have a specific regulatory standard for workplace violence, but OSHA may and does cite employers for failure to protect employees from harm due to workplace violence under the “general duty clause.” OSHA Instruction CPL 02-01-058* provides guidance about the principles that OSHA applies to determine whether an incident of workplace violence constitutes a breach of the employer’s general duty to provide a safe working environment. Two key factors that OSHA applies in determining whether there has been a violation is whether the incident of violence was reasonably foreseeable and whether there was a feasible method to mitigate the hazard. In the case of a student with a known propensity for violence (Which often happens with our ESPs), the hazard is reasonably foreseeable and informing staff who work with the student about that risk and steps taken to address it is a feasible way to mitigate the risk.

*The Instruction is available at https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-01-058.pdf.

STUDENT DISCIPLINE SITUATIONS

Corporal punishment is prohibited, as discussed earlier. (G.L. c. 71, § 37G).

Physical Restraints and “Isolation”

As previously mentioned, the DESE has issued regulations regarding physical restraint. Those regulations address, among other things, when physical restraint may be used, limitations and prohibitions on the use of physical restraint, and the need for the development of written procedures and the training of school personnel. (See, for example, 603 CMR 46.03 and 46.04.) Again, the union can demand to bargain about those and related matters. Whether an ESP has acted appropriately will normally depend upon a case-by-case determination of the circumstances and the “reasonableness” of the ESP’s conduct. Some additional guidelines, however, can be suggested:

- Ask for administrative guidance in the form of policies, directives, and in-service programs from trained professionals. The union can negotiate over the content of these policies and in-service programs. As much as possible, try to obtain administrative intervention early in the process of handling a disruptive student.
- If administrative directives or policies are issued, follow them!
- If the child is a special education student and is known to have behavior problems, the Individualized Education Program should

address the issue thoroughly, such as providing for a classroom aide, providing for psychological and/or behavioral services, describing the form of physical restraint and/or isolation that may be applied and the circumstances in which it should be applied, setting forth protocols to follow in case of disruptive behavior, and otherwise providing for the security of the classroom teacher/ESP and the other children. Regular education ESPs should try to participate in team process and the formulation of the IEP to make sure their concerns are addressed.

Special Ed Students: Do Special Rules Apply?

YES! Both federal and state special education laws strictly regulate the situations in which special needs students may be excluded from school. DESE has guidelines on disciplining special education students, which can be found on the DESE website: <https://www.doe.mass.edu/sped/advisories/discipline/>.

Students whose special needs include behavioral issues that could lead to disruptive or violent conduct must have those needs identified and addressed in the IEP. This should include a behavioral intervention plan — including a consideration of what alternative educational settings would be appropriate if needed — for students for whom problematic behavior is an issue.

A special education student may be excluded (including suspended) even over a parent's objection. If a student is excluded for more than 10 cumulative days in a school year, the school must place the student in an appropriate alternative setting that will continue the child's education. The exclusion may not last more than 10 school days, unless it is for carrying a weapon to school, for using or possessing illegal drugs at school, or because the student's presence at school is "substantially likely to result in injury" to the student or others. In those circumstances, the child can be excluded for up to 45 days.

Federal and state law require the school districts and the IEP teams engage in certain timely assessments and interventions where special education student discipline is an issue.

Making sure these regulations are complied with is the school

administration's responsibility. However, the staff members are responsible for knowing what the student's IEP contains and following those requirements.

When the IEP does not seem to be effective in managing the student's behavior, staff members should promptly bring this concern to the attention of school administrators and the student's team liaison. The staff member can ask that the IEP team reconvene, although this decision would remain in the hands of the administration unless there are local school district policies that provide otherwise.

CHILD ABUSE REPORTING LAW (51A)

The focus of a “51A” report (filed pursuant to G.L. c. 119, § 51A) is to identify children at risk and intervene when necessary. The Department of Children and Families enforces this law, and it maintains the file in the child’s name.

- **“Abuse”** means the non-accidental commission of any act by a caretaker (which can include ESPs and other school employees) upon a child under age 18 which causes, or creates a substantial risk of, serious physical or serious emotional injury, or constitutes a sexual offense under the laws of the Commonwealth” (110 CMR 2.00).
- **Emotional Injury** means an impairment to or disorder of the intellectual or psychological capacity of a child as evidenced by observable and substantial reduction in the child’s ability to function within a normal range of performance and behavior.” 110 CMR 2.00.
- **Physical Injury** means (a) death; or (b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such non-trivial injury; or (c) soft tissue swelling or skin bruising depending upon such factors as the child’s age, circumstances under which the injury occurred, and the number and location of bruises.” 110 CMR 2.00.
- **Sexual Abuse** involves molestation, incest, and sexual exploitation.
- **Neglect** includes abandonment, denial of medical care, nutritional deprivation, lack of proper food/clothing/hygiene, exposure to health hazard, permitting chronic truancy, or failure to enroll child in school.

“Neglect” can occur without causing an actual physical injury. *Lindsay v. Dept. of Soc. Servs.*, 439 Mass. 789, 797 (2003)

When the ESP Is Accused

A charge of child abuse may be filed by anyone, and there is no liability from making such a charge if it is made in good faith. If a parent or guardian brings allegations to the attention of school district administrators or other mandated reporters such as other staff members, the administration must investigate and, where the allegations appear to have validity, must file a report with DCF.

If the conduct of an association member is under investigation by DCF for alleged child abuse under “51A,” the member is entitled to an MTA attorney throughout such proceedings.

Note that, apart from the DCF proceedings, the member could be subjected to discipline by the employer and, in that event, would be entitled to representation just as in any disciplinary proceeding.

How the Filing Process Works

If the 51A report passes an initial screening at DCF, the DCF will investigate by interviewing the alleged victim and other “witnesses,” including the accused perpetrator. The investigator will prepare a report recommending that the allegations be “unsupported” or “supported.” If “supported,” the DCF may keep the case open for a while and offer services to the child. When DCF finds the allegations “supported” and believes there is reason to protect the child from the alleged perpetrator, DCF may enter the perpetrator’s name in the “Central Registry.” The perpetrator has a right to a “fair hearing” to challenge this decision.

The courts have overturned two DCF designations of individuals as “alleged perpetrators” in the Central Registry, on the ground that the DCF determination was based upon evidence that was not credible, was exclusively hearsay, or was otherwise insubstantial. The court noted that such a designation was “likely to cast a shadow over the person concerned indefinitely.” *Arnone v. Comm’r of DSS*, 43 Mass. App. Ct. 33 (1997); see also *Edward E. v. DSS*, 42 Mass. App. Ct., 478 (1997).

Mandated Reporters

Most ESPs are mandated reporters. Regardless, an awareness of 51A is helpful to all school personnel.

What triggers the reporting requirement? “Reasonable cause to believe that a child under 18 is suffering serious physical or emotional injury resulting from abuse inflicted upon him,” including sexual abuse, neglect or malnutrition.

OTHER SITUATIONS

Breaking Up Student Fights

Essentially, with or without a specific directive to intervene in a fight, an ESP who accidentally injures a student while responding reasonably (or who allows a student to be injured by failing to intervene) would be protected from liability under Chapter 258. Nonetheless, the more guidance from the administration the better in terms of defining when and how an ESP is expected to respond. To a large extent, the union would have a right to negotiate over the content of these policies or protocols.

NOTE: The “Good Samaritan” Act (G.L. c. 71, § 55A) immunizes public school employees from civil liability for their acts or omissions when, acting in good faith, they render “emergency first aid or transportation” to “injured or incapacitated” students. This law does not require an ESP to intervene. However, a school district might require such intervention by policy or directive.

Members Accused of Sexual Harassment

Sexual harassment is a form of sex discrimination that violates both state and federal law. There are two kinds:

- **“Quid Pro Quo” Harassment**, which occurs when a school employee explicitly or implicitly conditions a privilege, a benefit, a grade, an evaluation, or other services upon another person’s submission to sexual advances.
- **“Hostile Environment,”** which occurs when a person is the victim

of severe or pervasive physical or verbal acts of a sexual nature that impair their ability to work or learn. This can take the form of sexual insults and name-calling, off-color jokes, intimidation by words or actions, offensive touching, and pressure for sexual activity. A person who is not the target of the sexually offensive behavior, such as another student in the class, could be the victim of the “hostile environment” that is thereby created.

It is more likely that the employer, rather than the individual employee, would be sued for sexual harassment that is committed by ESPs at school, whether against students or other staff members. However, sexual harassment could be viewed as a civil rights violation, in which case Chapter 258 does not indemnify the individual employee. Moreover, it is possible that an individual employee could be the subject of a discrimination charge at the Massachusetts Commission Against Discrimination.

If a member is sued for sexual harassment, the NEA Legal Services Policy provides a defense. If the offense is categorized as a civil rights matter, the member is insured for up to \$300,000 in damages assessed against them.

If a member is disciplined by the employer in a member-against-member situation, the local union usually must investigate and make a reasoned and good-faith determination about which member’s claim to support. Usually an accused member will be provided representation at least through the employer’s investigation.

Handling Students’ Sensitive or Confidential Information

It is difficult to offer general comprehensive guidance about how school personnel should handle sensitive information disclosed by students.

As discussed in the preceding section, “51A” requires a staff member to report information indicating serious physical or emotional abuse. M.G.L. c. 71 § 56 requires school officials to notify parents or guardians “if any child is found to be suffering from any disease or defect, or if any child is found to have any defect or disability requiring treatment.”

At least arguably, this requirement applies to information about pregnancy, alcoholism, sexually transmitted diseases, and suicidal suggestions or intentions. Staff should also keep in mind that the law protects the privacy of student records, which may not be disclosed to anyone besides the student and their parents without written consent.

(G.L. c. 71, § 34D; 603 CMR 23.07). Health care workers must also keep confidential any information they receive about venereal diseases and HIV status (G.L. c. 111, §§ 70F and 119). Revelations about sexual harassment can be particularly difficult for staff members to handle, especially if the harassment does not amount to “abuse” under 51A. Many school districts have sexual harassment policies that require staff members to inform school administrators about incidents of harassment so that the school district can intervene.

Employees Called as Witnesses

Generally, members will find that they do not need MTA’s legal assistance in situations where they are called as witnesses in connection with a suit against the school district, such as special education appeals, defending against negligence lawsuits, or defending against discrimination charges. This is because the ESP is not a “party” to the proceeding and their interests are generally protected by the attorneys for the actual parties.

However, ESPs sometimes fear that their testimony may give rise to disciplinary proceedings against them. While ESPs must fulfill the obligation to be completely truthful while testifying, the union may be able to assist the ESP beforehand by obtaining assurances from the employer that no disciplinary consequences will flow from the ESP’s testimony.

Transporting Students in Personal Vehicles

In order to obtain the protection of Chapter 258, it is best to obtain written permission or directives from administrators and parents before transporting students off school grounds, especially in personal vehicles. Naturally, ad-hoc situations may arise in which staff members simply must exercise good judgment about transporting students and in which permission cannot be obtained, as a practical matter. In all likelihood, the

ESP's private auto insurance would provide coverage in those situations.

If staff members find that they must routinely transport students in personal vehicles, then (1) written authorization should be obtained; (2) the staff member should consult with their auto insurance agent about coverage; and (3) the association may wish to negotiate for the school district to pay any additional premium costs. (Note that the NEA EEL insurance policy does not usually cover operating vehicles, except for driver's education and some voc-ed instructors).

Administration of Medications and Other Quasi-Medical Duties

Prescription Medications.

The state Department of Public Health has issued comprehensive regulations governing the circumstances under which a school district may require personnel other than registered nurses to dispense prescription medications. In a nutshell, the district must have registered with DPH for this purpose and must have adopted a delegation policy based upon a proposal developed by the school nurse. The district's policy should specify the circumstances under which personnel other than nurses may dispense medications and must provide training and supervision by the school nurse. Association officials can inquire about the district's compliance with the DPH regulations and may wish to negotiate about related issues that affect ESPs' working conditions.

Epi-Pen Injections.

The DPH has adopted a regulation allowing school districts to delegate the task of administering Epi-Pen (epinephrine) injections, even if the district does not choose to explore or adopt a wholesale prescription medication delegation policy. Before directing any non-medically licensed staff member to administer Epi-Pen injections, the school district must adopt a policy governing such situations, including the prior selection of such individuals and prior training by the school nurse. The child's individual medical plan must specify the individuals who are authorized and trained to administer the drug and the protocols under which that will be done, and the child's individual health plan or IEP must also specify these situations and individuals. The school's policy must provide for

immediate notification of local emergency services as well as the school nurse, student's parents, and student's physician, in the event the Epi-Pen must be administered. The policy must also meet several requirements regarding storage, review of incidents, etc., as set forth in the regulations. As with any other decision to impose non-teaching duties upon teaching staff, the school district must bargain with the association before adopting an Epi-Pen policy.

Other Quasi-Medical Duties.

ESPs, especially special education and inclusion classroom ESPs, are sometimes asked to perform such quasi-medical duties as changing an ileostomy bag, suction a tracheotomy tube, feed a child through a tube, or toilet a child. Such directives are probably not unlawful, but they would be subject to various special education laws and regulations and to the collective bargaining law. For example, before non-medically licensed staff members undertake quasi-medical duties, they might wish to make sure that the child's IEP and/or Individual Health Plan specify the duties to be performed, the staff members authorized to perform those duties, the training provided to nonlicensed personnel in order to perform the duties, and the circumstances under which the services would be provided. The association may wish to negotiate with the school district about these and other issues governing working conditions that are associated with such directives.

School Surveillance

Video surveillance in schools is legal and the use of security camera systems in schools is increasingly common. Nevertheless, unions should demand to bargain with school districts seeking to install video surveillance in schools, as it affects the working conditions of union members. Unions should ensure that bargaining demands are timely and come in the same time period as notification of a school district's intent to install surveillance cameras. Failure to submit a timely demand to bargain may waive your rights to bargain over these issues.

As with any demand to bargain, the process is a negotiation with no guaranteed outcome. Regardless, unions should seek to negotiate prohibitions or limits on the use of surveillance information as it pertains

to union members' terms and conditions of employment. Unions should consider negotiating regarding the location of security cameras (including whether such cameras should be excluded from individual classrooms and other school locations), should seek to exclude information collected by security cameras from union members' disciplinary proceedings, and should seek to prevent employers from using video surveillance to monitor union members in the performance of their job duties.

Internet and Email Use in Schools

Many, and perhaps most, ESPs have access to the school system's computer network for both professional and personal use. Access to the internet and to the e-mail system at school has provided invaluable benefits, but it also brings perils that all employees must be aware of. Remember: The school system's network belongs to the school system and all school email correspondence is considered public record. You do not have a right of privacy in your own educational research, personal web surfing activities or email correspondence when you are using the school network. *Almost every employer has an **Acceptable Use Policy** that applies to internet and email use at work. Be aware of it. Misuse can have disciplinary consequences.*

It is strongly recommended that you refrain from logging into the school network when using personal electronic devices, such as cell phones or personal computers, at school for personal or union business. Be aware of any restrictions on personal device usage during the school day in the applicable Acceptable Use Policy.

Student use of the school computer network poses a different set of potential problems for ESPs. While most schools have a student Acceptable Use Policy, inappropriate web surfing and downloading are not uncommon. The amount of supervision that you can reasonably be expected to provide to your students in their computer activities will differ from class to class. The association and the administration should discuss how much control an ESP can reasonably be expected to exercise.

Bullying of ESPs

Bullying is the act of seeking to coerce, intimidate or harm someone perceived to be physically or socially vulnerable. In the context of education staff, bullying of ESPs may originate from administrators, teachers, colleagues, parents or students.

Massachusetts codified student anti-bullying legislation, but this legislation does not punish instances of workplace bullying. Local unions throughout Massachusetts are attempting to gain anti-bullying workplace protections for education staff, including ESPs, in collective bargaining agreements. If you are being bullied at work, consult your collective bargaining agreement and contact your local union. Your union may be able to provide you with additional resources and support.

CHAPTER 258: STATUTORY PROTECTION FROM LIABILITY

Massachusetts General Laws Chapter 258 § 2 frees ESPs and other public employees from liability for any accidental injury that the employee causes to another person in the course of the employee's duties. This law also provides that the employee will be represented by a "public attorney" if a claim that is covered by the statute is brought against the employee.

This immunity is conditioned upon the employee cooperating with the employer in investigating and defending claims of negligence.

Because this immunity only pertains to activities undertaken within the scope of your employment, it is wise (though not always necessary) to have the employer clearly and in writing authorize or direct activities that involve leaving school premises, transporting in your vehicle, giving medications, intervening in fights, and other activities that are outside the normal classroom routine. The idea is to have the administration assume responsibility for these decisions as much as possible.

Intentional Torts.

The law does not shield you from liability for injuries that you may cause recklessly or intentionally. But it does allow your employer to indemnify you for many of those injuries. This extra indemnification sometimes is negotiated into the contract by the union. (Note: The NEA EEL insurance policy will provide a legal defense and cover a member for damages for

injuries caused through recklessness, although it may not cover a damage award in the very few cases where intentional conduct has been proved.)

Civil Rights Violations.

The statute does not immunize ESPs from liability for violating another individual's civil rights. Sexual harassment, for example, could be viewed as a civil rights violation. As with intentional torts, Section 9 of the statute allows the school district to agree to indemnify its employees for civil rights violations, unless an ESP is proven to have been "grossly negligent, willful or malicious" in violating another person's civil rights. (As noted above, the NEA liability insurance policy provides up to \$300,000 worth of defense, settlements or judgments for proceedings involving civil rights.)

Criminal Indictments and Ethics Charges.

The statute does not authorize a municipality to reimburse an employee for legal fees and costs incurred in defending against criminal indictments or ethics charges, even if the employee is acquitted or the defense is successful, *Triplett v. Town of Oxford*, 439 Mass. 720, 720 (2003)

School District Liability.

The school district will be liable for an employee's negligence and the employee must cooperate in defending such a lawsuit. The school district is not liable for an employee's unauthorized actions or intentional torts. However, the school district might be sued for negligently supervising an employee who engages in such activities. In *Doe v. Blandford*, 402 Mass. 831 (1988), the school district was found to be liable for failing to properly hire, supervise and control a guidance counselor who committed indecent assault and battery upon the plaintiff, a child.

NOTE: Disciplinary Consequences.

Even if an ESP is immunized for damages arising out of a particular incident, the employer may still impose discipline upon the ESP for their actions. In that case, the ESP would have the same rights as any other ESP facing discipline for job-related issues.

DISCIPLINARY CONSEQUENCES FOR MISCONDUCT WITH STUDENTS

The most likely consequence of an alleged mishandling of a student by an ESP is that the administration would impose discipline on the ESP.

Unless covered by civil service law, an ESP's rights to challenge an unfair dismissal depend on contract provisions.

For suspension, but not for dismissal, the statute provides all employees a right to "counsel" before being interrogated by a supervisor.

Weingarten Rights.

Whenever an employee is called for questioning that may lead to discipline, the employee is entitled to be accompanied by a representative. This is called a "Weingarten" right, named after the case in which the right was first enunciated.

Important Note: The employee must ask for this representation. The law does not require the employer to notify the employee of their Weingarten rights unless this requirement is set forth in the collective bargaining agreement.

HOW THE UNION CAN HELP

Collective Bargaining

The association can try to negotiate for clear and limited directives and policies from management regarding handling disruptive students, physical contact with students, protocols for intervening in student fights, protocols for transporting students or administering medication, student use of the internet, etc.

In bargaining, the union can seek in-service programs or trainings regarding these expectations. The union can also try to negotiate civil liability indemnification up to the statutory limits under Chapter 258.

Student Discipline

As noted earlier, the Education Reform Act of 1993 included several provisions addressing disruptive or violent students. The union can use these laws to obtain policies or contract language requiring that:

- The primary responsibility for dealing with dangerous students lies with administrators rather than ESPs.
- An ESP who relies on an administrator to quell a disruptive or violent student will not be penalized in any manner or evaluated negatively for having done so.
- The administration should impose the maximum possible discipline upon students who assault staff.
- The administration should seek expulsion information for incoming

students (M.G.L. 71 § 37H specifies that no school district is required to accept a student who has been expelled for assaulting a staff member).

- The administration should actively support an ESP in pursuing criminal charges against assaultive students, for example by accompanying the ESP to the probable cause hearing and/or supplying supportive evidence.
- The ESP will not lose sick leave for days out of school connected to a student assault.
- The administration should cover any defense costs for an ESP when a student who has been disciplined files a criminal charge against the ESP.

Inclusion/Special Ed Protocols

The union can advocate for a districtwide set of inclusion protocols addressing issues such as class sizes, special ed/non-special-ed ratios, support services, security and liability protection, collaboration and training release time and funding, and procedures ensuring staff input into formulating and revising the IEP.

Representation

If an ESP is called in for an investigatory interview, the employee must affirmatively ask for a union representative to be present. This serves several purposes: keeping the conversation less emotional, avoiding unnecessary admissions, and having a witness who can later testify about what occurred.

When requested by local union leaders, the MTA's professional consultants will represent ESPs in predisciplinary meetings and in arbitrating suspensions or dismissals. MTA professional assistance is usually necessary when the allegations against the ESP are very serious or have criminal implications. MTA attorneys represent members who have been suspended or terminated in enforcing any contractual or statutory rights.

NEA Liability Insurance Policy

With certain exceptions set forth in the policy, members are protected from incurring personal financial liability as a result of accidents or other alleged negligence, including recklessness (which is not covered under the statutory immunity), during the course of employment up to \$1 million. While this policy excludes actions ultimately found to have been intentional, the insurer generally provides a legal defense when members are sued for such conduct in order to argue that the conduct was not intentional. As indicated earlier, the policy does not generally cover automobile accidents.

ADDITIONAL INFORMATION

In the event that you need additional information concerning your legal rights, visit the Massachusetts Teachers Association website at **www.massteacher.org/legal** or the Department of Elementary and Secondary Education website at **www.doe.mass.edu**.

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