CHAPTER VI

DISTRICT LIABILITY

LIABILITY OF PUBLIC EMPLOYERS AND EMPLOYEES

A. Introduction

Liability with respect to districts is generally based on the legal theory of negligence. For a plaintiff to prove negligence, four elements must be proven:

1. Legal duty;
2. A breach of legal duty;
3. Proximate cause; and
4. Damages or injury.

One of the main legal duties of districts is supervision. Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care, which could lead to liability. Districts may be held liable for injuries to students caused by other students if there was a lack of reasonable supervision.

Other standards of care include the duty to warn parents of possible harm to their children and duty to warn of dangerous conditions on school property. The courts have held that in determining foreseeability, the courts have considered the immaturity of children as a factor. The duty to supervise school children is imposed in large part in recognition of the fact that without such supervision, students would not always conduct themselves in accordance with school rules as safely as they should. Therefore, it is foreseeable that young children will act impulsively and disregard directives regarding their own safety, and therefore, school districts must take reasonable steps to protect children from dangerous conditions on school property.

School districts will be held liable for injuries to students when a student leaves one of its buses prior to the bus's departure from the school. The court held that under Education Code section 44808 districts are not responsible or in any way liable for the conduct or safety of any pupil when the pupil is not on school property. However, the school district will be liable for not safely supervising a student's exit from the bus prior to the bus's departure from school.

Generally, under Education Code section 44808, a school district is not liable for the injury of a student that occurred when the student crossed the street after school. Under Section 44808, the school district does not have a duty to supervise students off campus once the students are released from school. However, in a case where a school district creates a situation which makes the property more dangerous or causes students to cross a dangerous intersection, the school district could be held liable.

The Education Code provides for immunity from liability for injuries sustained by a student while on a voluntary field trip. The courts have upheld broad immunity for districts and district employees with respect to field trips.

With respect to liability for sports injuries, the California Supreme Court has ruled that districts may be found liable only if the instructor intentionally injures a student, or engages in conduct that is reckless in the sense that it is totally outside the range of the ordinary activity involved in teaching or coaching a sport. The court rejected an ordinary negligence standard holding that an ordinary negligence standard would discourage coaches from instructing students and encouraging them to excel in sports.

The courts have also found that students who engage in sports and other inherently dangerous activity assume the risk of injury, that the district is not an insurer of the student's safety and the district will not be held liable unless the instructor gave specific direction that increased the risk of harm to the student over and above the risk inherent in the sport. The courts have also upheld properly drafted release forms that inform the parent or student appropriately of the impact of the risk involved.

In most cases, districts will be required to defend and indemnify employees who are sued for negligence or under federal civil rights laws. The district may only refuse to defend and indemnify the employee if the employee acted outside the scope of their employment, acted with fraud, corruption, malice, or defense of the employee would create a specific conflict of interest.

B. Definition of Negligence

Liability with respect to districts and district employees is generally based on the legal theory of negligence. Negligence has been defined as: the omission to do something which a reasonable man would do or the doing of something which a prudent and reasonable man would not do; the failure to exercise ordinary care under the circumstances; conduct that a reasonably prudent man should realize involves an unreasonable risk of causing invasion of another's interest; or, a failure to do an act that is necessary for the protection or assistance of another.[1]

For a plaintiff to prove negligence, generally, four elements must be proven:

1. Legal duty;
2. A breach of legal duty;
3. Proximate cause; and
4. Damages or injury.[2]

Legal duty means conforming to a certain standard of care for the protection of others against unreasonable risks.

[1] Donnelly v. Southern Pacific Company, 18 Cal.2d 863, 118 P.2d 465 (1941); People v. Young, 20 Cal.2d 832, 129 P.2d 353 (1942).
[2] Budd v. Nixen, 6 Cal.3d 195, 200, 98 Cal.Rptr. 849 (1971).

Under the California Tort Claims Act,[3] a public entity is not liable for a breach of legal duty except as provided by statute. All government tort liability for injury arising from an act or omission must be based upon breach of a statute.[4] The California Tort Claims Act provides that a public agency is liable for injuries proximately caused by an act or omission of an employee of the public agency within the scope of his employment if the act or omission would have given rise to a cause of action against that employee.[5] A public employee is liable for injuries caused by his or her acts or omissions to the same extent as a private person[6] and the public agency is vicariously liable for any injuries caused by the employee to the same extent as a private employer.[7]

C. Duty to Supervise Students on School Grounds

In the context of the public schools, one standard of care is reasonable supervision of students.[8] Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision.[9] Other standards of care include the duty to warn parents of possible harm to their children and duty to warn of dangerous conditions on school property.[10]

The extent of the duty to provide safe schools for students was discussed in Rodriquez v. Inglewood Unified School District.[11] The issue was whether the district was liable for the injuries sustained by a student when he was stabbed, on school grounds, by a nonstudent. The Court of Appeal found that the school had a duty to protect its students but it found no statute which provided for liability.

A different conclusion was reached by the Court of Appeal in Leger v. Stockton Unified School District.[12] In Leger, a student sued the district, the principal and his coach for failure to protect him from an attack by a nonstudent in a school restroom. The court held that there may be liability on the part of the employees of the school for failing to warn him or guard him from dangers which they knew or should have known about.

The case of Peterson v. San Francisco Community College District[13] raised the issue of the duty to warn students of known dangers. The plaintiff was a female college student who was attacked by an unidentified male who jumped from behind dense bushes adjoining the stairway she was using. The California Supreme Court held that the district was not immune from liability for failure to warn its students of known dangers posed by criminals on the campus.

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[3] Government Code section 810 et seq.
[4] Hoff v. Vacaville Unified School District, 19 Cal.4th 925, 932, 80 Cal.Rptr.2d 811 (1998).
[5] Government Code section 815.2(a).
[6] Government Code section 820(a).
[7] Government Code section 815(b); Hoff v. Vacaville Unified School District, 19 Cal.4th 925, 932, 80 Cal.Rptr.2d 811 (1998).
[8] Dailey v. Los Angeles Unified School District, 2 Cal.3d 741, 87 Cal.Rptr. 376 (1970).
[9] Ibid.
[10] Phyllis P. v. Superior Court, 183 Cal.App.3d 1193 (1986); Peterson v. San Francisco Community College District, 36 Cal.3d 799 (1984).
[11] 186 Cal.App.3d 707 (1986).
[12] 202 Cal.App.3d 1448 (1988).
[13] 36 Cal.3d 799 (1984).

The issue of whether school districts have the duty to provide safe schools to all students and are therefore liable when a student is stabbed or injured by an outside intruder on a school campus remains unclear as a result of conflicting court decisions.

Additional duties to students include exercising due care when keeping children after school. In Perna v. Conejo Valley Unified School District,[14] two minor students who had been kept after school were struck by a vehicle in an intersection while walking home. The complaint alleged that the teacher was negligent in keeping children after school in that she knew or should have known that the crossing guard would no longer be on duty when the children arrived at that intersection. The Court of Appeal held that it was up to the jury to decide whether the district's failure to exercise due care in supervising the children was the proximate cause of the children's injuries.

The duty to warn was also the issue in Phyllis P. v. Superior Court.[15] The mother of an eight year old female student brought suit against the district and its employees for failure to inform her that a 14 year old male student has sexually assaulted her daughter several times. The girl's teacher, school principal and school psychologist, after counseling the students, chose not to inform the mother of the incidents. The girl was subsequently raped by the boy. The mother contended that had she known of the assaults, she could have taken steps to prevent the rape. The Court of Appeal held that the school had a duty to notify the mother when the first sexual assault became known.

School employees have the responsibility to hold pupils to a strict account for their conduct on the way to and from school, on the playground, during recess and lunch time. Teachers have the legal duty to prevent misconduct on the part of pupils which could result in injury to a pupil and which may lead to school district liability. In Forgnone v. Salvadore Union Elementary School District,[16] the Court of Appeal held that the issue of whether the absence of a school employee proximately caused a student's injury was a factual issue for the jury to determine.

In later cases, the California Supreme Court has reiterated the principle that school employees have a legal duty to supervise pupils and if there is a breach of the legal duty to supervise students that proximately caused an injury to a pupil, the district may be held liable. In the majority of these cases, the California Supreme Court has remanded the matter to the lower courts to apply the legal principles established to the particular circumstances in that case.

For example, in Dailey v. Los Angeles Unified School District,[17] the question was whether the absence of a teacher patrolling the grounds during lunch proximately caused the injury to the pupil. The student, Michael Dailey, was killed when he and another student were "slap fighting" in the school gym during lunch recess. The boys had been "fighting" for five to ten minutes when Michael fell backwards and fractured his skull. He died later that night. The physical education teacher, who may have had responsibility for supervising the gym during the lunch hour, was eating lunch in the gym's office while the "fighting" was going on. The

[14] 143 Cal.App.3d 292 (1983).
[15] 143 Cal.App.3d 292 (1983).
[16] 41 Cal.App.2d 423, 106 P.2d 932 (1940).
[17] 2 Cal.3d 741 (1970).

California Supreme Court stated, "[e]ither a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for students' supervision."[18] The case was remanded to the trial court so a jury could decide the factual issues.

In Hoyem v. Manhattan Beach City School District,[19] the issue was whether the failure of a teacher to report the absence of an elementary school pupil from class proximately caused the injury to the child. The student, Michael Hoyem, 10 years old, was attending summer school when the incident occurred. Michael left the grounds before the end of scheduled classes and was struck and seriously injured by a motorcycle. Michael's mother filed suit alleging negligence by the school. The California Supreme Court found that a school district has a duty to supervise students while on school premises during the school day and may be held liable for injuries caused by the failure to exercise reasonable care. The California Supreme Court held that the school district may be liable and remanded the case back to the trial court for the jury to decide the factual issues.

The Court of Appeal, in M.W. v. Panama Buena Vista Union School District,[20] held that a school district was liable for supervising students on school grounds during noninstructional times when school grounds are open to students. In M.W., an eighth grade special education student was molested by another student prior to the beginning of class. The school district provided only general supervision at that time according to the Court of Appeal, under which no adult was specifically responsible for supervision of the students on campus. A jury returned a verdict against the school district in excess of $2 million.

The Court of Appeal affirmed the jury verdict and held that the district owed the student a duty of care to protect the student from assault by another student under the facts of the case.

The Earl Warren Junior High School is a 20-acre campus operated by the Panama Buena Vista Union School District with seventh and eighth grade students. During the 1996-1997 school year, the gates to the school were unlocked at approximately 7:00 a.m. when custodial and cafeteria staff arrived. Custodial staff unlocked the bathrooms sometime between 7:00 a.m. and 7:45 a.m. The school principal typically arrived at 7:15 a.m. and the vice principal between 7:20 a.m. and 7:30 a.m. Office staff arrived between 7:00 a.m. and 7:30 a.m. The teachers were required to be on duty to supervise at 7:45 a.m. and they arrived at varying times before the start of their shifts. School started at 8:15 a.m. Prior to 8:15 a.m., student access to the campus was unrestricted.

During the 1996-1997 school year, there were 560 students enrolled at the school. The majority of the students arrived on campus between 7:45 a.m. and 8:05 a.m. According to the testimony of the principal, at 7:15 a.m. there were no more than five or ten students on campus

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[18] Id. at 747; see, also, Lucas v. Fresno Unified School District, 14 Cal.App.4th 866, 18 Cal.Rptr.2d 79 (1993) (school district had a duty to supervise playground and may be held liable for injury to student resulting from dirt clod fight during recess if there was a lack of supervision). Iverson v. Muroc Unified School District, 32 Cal.App.4th 218, 38 Cal.Rptr.2d 35 (1995) (district may be held liable for injury during soccer game in physical education class if there was a lack of supervision; statutory immunity for hazardous recreational activities does not apply since activity during P.E. class is not a "recreational activity" within the meaning of the statute).

[19] 22 Cal.3d 508 (1978).

[20] 110 Cal.App.4th 508, 1 Cal.Rptr.3d 673, 178 Ed.Law Rep. 404 (2003).

and sometimes no students at all. Prior to May 21, 1997, there were no reported problems in the morning before the start of school.

In May 1997, M.W., who was 15 years old at the time, was enrolled in the eighth grade at Earl Warren in a special education class. M.W. had a third grade mentality and the school categorized him as mentally retarded. M.W. had previously complained to school personnel about being teased by other students. M.W.'s mother, a teacher with the district, routinely dropped the minor off at school between 7:15 a.m. and 7:20 a.m. on her way to work. The minor's mother testified that she dropped her son off in front of the school office. The school never advised the mother not to drop off her son that early and never advised her that there was no supervision prior to 7:45 a.m.

Another student, Chris J., who was also a special education student, had been disciplined over 30 times during his seventh and eighth grade years at Earl Warren. His discipline record included 14 acts of defiance of authority, nine bus tickets for violating bus rules, disrupting class, damaging school property, displaying an inappropriate attitude, throwing food at the principal, and calling the yard supervisor a profanity. Chris J. was also disciplined for spitting food at a student, kicking a male student in the groin, fighting with a student at the bus stop, making obscene gestures to a student, and punching and teasing M.W. As a result, Chris J. received numerous suspensions from school.

In November 1996, Chris' bus privileges were suspended in his eighth grade year and afterward, Chris' father dropped him off at 6:20 or 6:30 a.m. before the school gates opened. Chris frequently tormented M.W. and ridiculed him before school started. On May 21, 1997, Chris J. assaulted M.W. in the restroom and threatened to kill M.W. if he told anyone of the assault. M.W. told his mother later that day.

As a result of the assault, M.W. has suffered severe emotional distress. A 15-day trial was heard and the district was found 85 percent liable and judgment was entered against the district in excess of $2 million dollars.

The Court of Appeal held that given Chris J.'s prior conduct, it was foreseeable that he might assault M.W. and cause him injury. The Court of Appeal held that under these circumstances, the school district had a duty to protect M.W. from such assault by providing additional supervision.

D. Duty to Supervise – Employee Misconduct toward Students

In Steven F. v. Anaheim Union High School District,[21] the Court of Appeal ruled that a school district is not liable to the relatives of an injured person for their emotional distress caused by an injury they did not witness and which the victim actively tried to conceal from them. Specifically, the parents of a student in the Anaheim Union High School District sued the school district for emotional distress when they discovered that their daughter, who had just completed the 11th grade, had been engaged in an intimate relationship with one of her teachers since early in the 10th grade.

[21] 112 Cal.App.4th 904, 6 Cal.Rptr.3d 105, 182 Ed.Law Rep. 565 (2003).

The teacher was convicted of a criminal offense and sent to jail. A civil case was brought against the district and the claims brought by the student against the district were settled. The parents' claim for emotional distress was appealed to the Court of Appeal.[22]

The Court of Appeal reviewed the facts of the case and determined that the student went to great lengths to conceal her relationship with the teacher and told no one about it. The Court of Appeal noted that there was no evidence that any other district teacher or supervisory employee knew of the relationship between the teacher and the student. The Court of Appeal held that there was no evidence in the case that the school district was negligent in hiring the teacher or in continuing to employ the teacher. The Court of Appeal found no evidence that the school district negligently supervised the teacher or allowed the relationship between the teacher and the student to begin or to continue. The Court of Appeal noted that for recovery for negligent infliction of emotional distress by third party relatives, the third party relatives must either be a bystander or a direct victim. In essence, the relatives must be present at the scene of the injury at the time it occurred and aware of the injury that it is causing to the victim to maintain an action for negligent infliction of emotional distress. In the Steven F. case, the Court of Appeal found that the parents were not bystanders or direct victims.[23]

The Court of Appeal reviewed the traditional seven factors the courts use to determine whether a party has a duty to another. The Court of Appeal analyzed each of the seven factors and found no liability on the part of the district. The Court of Appeal noted that if a court imposed liability on the district under these circumstances, it would burden the school district and impair the relationship between teachers and students.[24] The Court of Appeal stated:

> ". . . [T]he burden on a school district of preventing relationships beyond what it is already doing would be intolerable. It would be a reign of terror. Let us elaborate further. Teachers would be forced to be spies on their fellow teachers, with pain of discipline if they didn't. Mandatory tattling. Student-teacher camaraderie would not only suffer, but would have to be virtually outlawed. No hugging, ever. No being in the same room alone, ever. No unchaperoned rides in a teacher's car, ever. No gifts, ever. Policies or guidelines counseling teachers not to give rides to students would be made absolute, without allowance for the possibility of human compassion, sickness, or rain. From the point of view of students and teachers the rule would be: Assume the worst. Any possibility of a student-teacher friendship would be sacrificed on the altar of risk aversion."[25]

The Court of Appeal's decision establishes a reasonable balance between concerns for the safety of students and the imposition of reasonable liability.

[22] Id. at 906.
[23] Id. at 908-911.
[24] Id. at 911-918.
[25] Id. at 918.

E. Adequate Supervision on School Grounds

In J.H. v. Los Angeles Unified School District,[26] the Court of Appeal held that a school district may be liable for injuries to a second grade student due to a sexual assault that occurred in an unlocked storage shed during a district-operated after school program. The Court of Appeal held that the school district had a duty to adequately supervise the after school program, reversed the lower court's summary judgment in favor of the school district, and remanded the matter back to the lower court for trial.

In J.H., the second grade student attended one of the school district's after school programs which was held on the school's playground. According to the declaration submitted by the school district, the school district operates an after school playground program at nearly all of its elementary schools. There is no formal enrollment in the after school program and it is free of charge to students. The after school program is taxpayer funded. Students who have used the after school program have the discretion to arrive and leave whenever they choose and no sign in or sign out procedure is in place.[27]

According to a declaration submitted by the school district, the after school program was operated on a portion of the northernmost end of the school's four acre campus. The after school program did not provide supervision beyond the boundaries of the playground, and the remainder of the campus was closed and off limits to the children participating in the after school program. The area where the April 8, 2005, incident occurred was in an unlocked storage shed located in the southernmost part of the school's campus, approximately 170 yards beyond the boundaries of the after school program area. Classroom buildings prevented the shed from being seen from the after school program area.[28]

The playground supervisor stated in his declaration that his duties as an after school playground supervisor included supervising the children who chose to participate in the after school program on any particular day. The program operated from 2:25 p.m., when school was dismissed, to 6:00 p.m.[29]

According to the trial court record, parents were given a bulletin by the school district stating that the after school program was supervised, but that the after school program was not a childcare program and participants may arrive and leave at their own discretion. The trial court record also indicated that members of the school staff were given bulletins regarding "good supervision," which stated that various levels of supervision are required in different situations, and that good supervision requires foresight (the ability to anticipate and eliminate or minimize potential hazards) and control of the situation. The bulletin also stated that supervision also requires both quantity (enough supervisors to attend to all participants) and quality (training in the specific activity and in supervisory skills).[30]

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[26] 183 Cal.App. 4th 123 (2010).
[27] Id. at 127-128.
[28] Id. at 128-130.
[29] Id. at 131.
[30] Id. at 132-135.

On the day of the incident, the trial record indicated that there was one adult supervisor for approximately 113 students. The principal testified in her deposition that the sheds are locked for the security of the items placed in them and for the students' security, and that it would be difficult to supervise students in a shed that was unlocked because they are out of sight. The program supervisor testified in his deposition that he told the children on a periodic basis that they were not to go beyond the boundaries of the playground, but there were no physical barriers to prevent children from going beyond those boundaries and behind the bungalows where the shed was located. The playground supervisor testified that he would from time to time check behind the bungalow classrooms to see if students were back there, but that prior to the incident, he had no knowledge that students were going into the shed and he had never seen students playing back there.[31]

In her deposition, the mother of the student testified that it was her understanding that the after school program would provide adequate adult supervision for her child until she could pick up her child after work. The mother testified that she had a discussion with the principal of the school and that the principal admitted that supervision of the children in the after school program was seriously flawed and changes needed to be made so that such incidents would not happen again. The mother testified that the principal indicated that children in the after school program would be concentrated in a smaller area in the future and that three adult supervisors would be present. The mother stated in her deposition that had she known about the inadequate supervision in the after school program, she would not have allowed her child to participate.[32]

In the context of public schools, the court has held the standard of care or legal duty is reasonable supervision of students.[33] Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision.[34]

The Court of Appeal noted that the compulsory nature of education is not the only factor to consider in determining whether a duty of care existed when a child is injured on school grounds.[35] The Court of Appeal in J.H. stated, "Thus, while it may be compulsory education that brings children to school, children engage in non-compulsory activities while there, both before and after the regular school day."[36]

The Court of Appeal further noted that, in addition to the lack of supervision or inadequate supervision that may create liability on the part of the school district, the plaintiff must also show that the type of injury is reasonably foreseeable. The court held that the trier of fact (i.e., the judge or jury) would have to determine whether the absence of supervision contributed to the cause of the injury, which would depend on the particular circumstances established at trial.

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[31] Id. at 135-136.
[32] Id. at 136-137.
[33] Dailey v. Los Angeles Unified School District, 2 Cal.3d 741, 87 Cal.Rptr. 376 (1970).
[34] Ibid.
[35] See, Leger v. Stockton Unified School District, 202 Cal.App.3d 1448, 249 Cal.Rptr. 688 (1988).
[36] Id. at 142.

The Court of Appeal held that in determining foreseeability, the courts have considered the immaturity of children as a factor.[37] The duty to supervise schoolchildren is imposed in large part in recognition of the fact that without such supervision, students would not always conduct themselves in accordance with school rules as safely as they should.[38]

The Court of Appeal noted that in the instant case, it is foreseeable that young children will act impulsively and disregard directives regarding their own safety and that spoken boundaries may be disregarded. The court noted that exploring a hidden area beyond those boundaries, such as a hidden, unlocked shed is attractive to young children, and that it is foreseeable that young children may be injured in a hidden area or that a child may be victimized by a third party in that hidden area.[39]

The Court of Appeal held that it is not necessary to prove that the very injury which occurred must have been foreseeable by school authorities in order to establish that the failure to provide additional safeguards constituted negligence and a breach of legal duty. The Court of Appeal held, "Their negligence is established if a reasonably prudent person would perceive that injuries of the same general type would be likely to happen in the absence of such safeguards."[40] The Court of Appeal went on to state that it is for the trier of fact, the judge or jury, to determine whether an unreasonable risk of harm was foreseeable under the facts of this case, and the Court of Appeal reversed the trial court's summary judgment in favor of the school district and remanded the matter back to the trial court for further proceedings.[41]

Based on the ruling in J.H. and prior cases, school districts should review their after school programs to be sure that adequate supervision is being provided to children in their programs. School districts should review the adult to student ratio, the physical characteristics and safety of the school campus and the foreseeability of any injuries that could occur at the particular school. School districts should take steps to ensure that hidden areas are inaccessible to students, that there is an adequate number of adults supervising children and that reasonable steps are taken to keep track of each of the children present in each program. Students should be required to be enrolled in after school programs and each child should be checked in and checked out each day, to be sure that children are not lost, missing or injured.

F. Potential Liability for Lack of Supervision

In Jimenez v. Roseville City School District,[42] the Court of Appeal reversed the lower court and remanded a matter back to the trial court to deny the school district's summary judgment motion. The Court of Appeal held that there were two viable theories of liability.

The underlying facts were that plaintiff, Uriel Jimenez, was injured at a middle school in the Roseville City School District. The 14-year-old Jimenez was in a classroom where fellow

[37] Frognone v. Salvador Union Elementary School District, 41 Cal.App.2d 423, 426, 106 P.2d 932 (1940). In addition, Section 5552 of the California Code of Regulations states that teachers should supervise students who are on school grounds during intermissions and before and after school, if special playground supervision was not otherwise provided.
[38] Hoyem v. Manhattan Beach City School District, 22 Cal.3d 508, 520, 150 Cal.Rptr. 1, 585 P.2d 851 (1978).
[39] Id. at 144-145.
[40] Id. at 146.
[41] Id. at 146-147.
[42] 247 Cal.App.4th 594 (2016).

middle school students were purportedly practicing break dancing and performing flips. Performing flips violated school rules, which prohibited performing flips and required teachers to supervise students when they were dancing in a classroom. Jimenez was seriously injured when other students waited for the teacher to leave them unsupervised, and then induced Jimenez to attempt a flip. The trial court granted the school district's summary judgment, concluding that Jimenez assumed the risk of injury by participating in break dancing.

However, the Court of Appeal reversed. There was deposition testimony that teachers and other staff observed students doing flips and did not prevent them from doing so, and that students frequently practiced their dancing unsupervised. The Court of Appeal held that there was a triable issue of fact as to whether the school district, by neglect, increased the risk of harm to Jimenez. The Court of Appeal held that a jury could find that the school district did not take adequate steps to disseminate and enforce the "no flip" policy and that this failure increased the inherent risks of ordinary break dancing, causing Jimenez' injury.

The Court of Appeal held that the teacher may have allowed students in his classroom, without any supervision, to break dance in violation of school policy, and therefore the jury might find negligent supervision. The Court of Appeal concluded that the school district could be liable on the theory of negligent supervision or failure to communicate the "no flips" policy to students.

G. Duty to Supervise Students on School Bus

In Eric M. v. Cajon Valley Union School District,[43] the California Court of Appeal held that a school district may be held liable when a student leaves one of its buses – prior to the bus's departure from the school – and is then injured on his way home.

Eric M. was six years old at the time of the incident. At the end of the day, Eric boarded the school bus, but then told the driver that he saw his father's car. The driver questioned Eric, asking him if he was sure that he saw his father's car, and then allowed Eric to get off the bus. In fact, Eric's father was not present. Eric then began to walk to the bus stop from which he was typically picked up by his parents. After about a half a mile, he crossed a busy street and was hit by a car. His mother sued the school district on his behalf.[44]

The Court considered whether the district was immune for damages under Education Code section 44808, which provides that districts are not responsible or in any way liable for the conduct or safety of any pupil at any time when the pupil is not on school property, unless such district has undertaken to provide transportation to and from the school premises, has undertaken a school-sponsored activity off the premises, has otherwise specifically assumed such responsibility or liability, or has failed to exercise reasonable care under the circumstances. The district argued that at the time of the accident, it was not providing transportation to Eric and, therefore, could not be liable for his injuries.[45]

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[43] Eric M. v. Cajon Valley Union School District, 174 Cal.App.4th 285, 95 Cal.Rptr.2d 428 (2009).
[44] Id. at 288.
[45] Id. at 291.

The Court, however, rejected this argument. The Court held that the transportation undertaking covers the boarding and exiting process for school buses, as part of the departure from school. In so holding, the Court relied on the district's Transportation Safety Plan, which requires drivers to ensure students are properly supervised at all times, including monitoring the boarding and exiting of buses at the school site or trip destination.[46]

The Court also focused on the student's young age in holding that triable issues of fact existed as to whether the duty of immediate and direct supervision of pupils was invoked and breached under these circumstances, in which a young child took it upon himself to depart the bus: "A reasonable juror could conclude that it was foreseeable that a six-year-old child might make a bad decision to leave the school bus, under an erroneous belief that his parents were outside, and could be harmed on the street."[47] The Court, thus, overturned the summary judgment that had been granted in the district's favor and allowed the case to proceed to trial.[48]

This case reminds districts that once they undertake to transport pupils, whether that be for home-to-school transportation, field trips or other events, districts may be held responsible for negligent conduct relating to students' boarding and exiting the bus, as well as negligent conduct occurring while the bus is in motion. Districts should ensure that drivers and other staff are aware of their obligations to ensure the safety of students, particularly those who are of a young age and may lack the judgment reasonably expected of older students. We recommend that drivers not release young children from the bus at a place other than the regular bus stop unless the student is released directly to the parent, or if another staff member takes responsibility for the child and contacts a parent.

H. Duty to Supervise Students off School Grounds

In Guerrero v. South Bay Union School District,[49] the Court of Appeal held that a school district was not liable for injury to a student that occurred when the student crossed the street after school. The court held that, pursuant to Education Code section 44808, the school district did not have a duty to supervise students off campus once students are released from school.

The student was seriously injured when a car struck her on a street next to an elementary school. On the day of the accident, the student was a six year old first grade student. First and second graders are dismissed at 2:00 p.m. and the student's class was dismissed on schedule the day of the accident. The student's older brother was a fourth grader at the school and on the day of the accident was dismissed from class at 2:25 p.m. The accident occurred at approximately 2:30 p.m.[50]

The accident apparently occurred when the student was waiting with her older brother and other siblings to be picked up from school. The student's older brother saw a boy playing with a toy across the street from the school and crossed the street to get a closer look. The student then crossed the street, as well. A short while later, the student decided to return to the

[46] Id. at 292-294.
[47] Id. at 299.
[48] Id. at 298-300.
[49] 114 Cal.App.4th 264, 7 Cal.Rptr.3d 509, 183 Ed.Law Rep. 508 (2003).
[50] Id. at 266-267.

side of the street where the school is located. As the student was crossing the street, she was struck by a car.[51]

The student filed a complaint in Superior Court against the school district alleging breach of its duty of care by failing to supervise the students when school ended and failing to provide adequate procedure and control for the students to be picked up by parents and others after school.[52]

The Superior Court granted a summary judgment against the student based on the language of Education Code section 44808 which states:

> "Notwithstanding any other provision of this code, no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district, board or person has undertaken to provide transportation for such pupil to and from sponsored activity off the premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances.
>
> "In the event of such a specific undertaking, the district board, or person shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board."

The Court of Appeal affirmed and ruled in favor of the school district. The Court of Appeal noted that in prior cases, the school district has acted in a manner that caused or led to the possible injury of the student. In the present case, the Court of Appeal ruled that the school district did nothing to increase the possibility of injury to the student.[53] The Court of Appeal stated:

> "We are convinced, however, that the statutory scheme in this case neither requires nor permits the extension of a duty of care to the schools of California to supervise children properly dismissed from school until their parents arrive. In order to provide the level of supervision in this case, the district would have to have sufficient staff to control each of the students it dismissed to ensure that the student is either safely home or safely picked up by parents or guardians. Perhaps such added supervision would be

[51] Id. at 267.
[52] Ibid.
[53] Id. at 269-274.

> in the public interest; however, policy decisions of that nature should be made by the Legislature or by the administration of the school districts, not on a case by case basis. Section 44808 has struck a balance in which the Legislature has immunized the schools from tort liability for off campus conduct unless the district has undertaken such responsibility or the negligence occurs in the discharge of the school's ordinary, on campus, during school hours activities. The case before us does not come within any of the exceptions to that legislatively declared immunity. We decline to judicially expand the statutory exceptions."[54]

In Mosley v. San Bernardino City Unified School District,[55] the Court of Appeal held that the school district was immune from liability for injuries suffered by a student off school grounds.

A student at a school in the San Bernardino City Unified School District was injured when she fell off the rear portion of a van being driven by a district employee. The student died several days after the accident.[56]

The parents of the student sued the school district for damages. The accident did not occur at or on the way to a school sponsored activity. The Complaint alleged that the school district knew or should have known that the coach did not have sufficient experience, training, mental and psychological stability, and skill in the operation of motor vehicles to competently and safely operate a motor vehicle at the time of the accident.[57]

The Superior Court dismissed the lawsuit and the Court of Appeal affirmed.

The Court of Appeal held that under Education Code section 44808, the district would not be liable for injuries off campus and after school unless the accident was the result of the district's negligence occurring on school grounds or was the result of some specific undertaking by the district which was then performed in a negligent manner. The parents alleged that by hiring the coach the school district knew there was a foreseeable risk of exposing students to harm. The Court of Appeal disagreed.[58]

The Court of Appeal noted that the coach was hired to coach the women's basketball team not as a bus driver. The Court of Appeal stated:

> "First, we note that Allen is the coach of the school's women's basketball team; she is not a bus driver, nor was she hired as a driver for the school. Second, we find it presumptuous of plaintiffs to suggest that the district is in a better position than the Department of Motor Vehicles of the State of California to decide

[54] Id. at 274.
[55] 134 Cal.App.4th 1260, 36 Cal.Rptr.3d 724 (2005).
[56] Id. at 1262.
[57] Id. at 1262-1263.
[58] Id. at 1263-1264.

> whether Allen possessed sufficient experience, training or psychological stability necessary to safely and competently operate a motor vehicle. Third, and more importantly, plaintiff's arguments suggest that there is no action by a teacher for which a district would not be liable so long as it may be traced back to negligent hiring and supervision. We are unaware of any case law that extends such liability that far, nor are we inclined to do so."[59]

This decision makes it clear that districts are only liable for student injuries in automobile accidents when the district undertook transportation of the students which usually occurs when a school activity or school attendance is involved.

In Bassett v. Lakeside Inn, Inc.,[60] the Court of Appeal held that the parents of a high school student, who was killed by a drunk driver while she was walking to school in a crosswalk at an intersection where the school district had designated a school bus pick up point, could not bring a lawsuit for wrongful death against the school district. The Court of Appeal held that because the student was not injured while she was on school property or under direct supervision of the school, the district was entitled to statutory immunity from liability.

The parents of the student brought a lawsuit against the driver and two other individuals and numerous entities for wrongful death, including the Lake Tahoe Unified School District. The trial court dismissed the Lake Tahoe Unified School District and the parents appealed. The parents contended that the school district had liability because it designated a school bus stop at a dangerous intersection. The Court of Appeal held that the district had immunity under Education Code section 44808 because the accident occurred off campus and outside the supervision of the school district.[61]

The underlying facts were that on September 2, 2003, at about 7:00 a.m., the student was on her way to her first day of high school and as she crossed the street at a crosswalk, she was struck by a car driven by a drunk driver. She died later that day. The school district had designated a school bus pick up point at that intersection.[62]

The Court of Appeal noted that the school district may be liable under Government Code section 835 if the school district owns or controls the property. The school district argued that it did not own or control the bus stop.[63]

The Court of Appeal also noted that the school district's liability is limited by Education Code section 44808. The Court of Appeal held that under Section 44808, the school district could only be held liable if it failed to exercise reasonable care in the event of a specific undertaking (e.g., transporting a student on a school bus).[64] The Court of Appeal concluded:

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[59] Id. at 1265.
[60] 140 Cal.App.4th 863, 44 Cal.Rptr. 3827 (2006).
[61] Id. at 866.
[62] Id. at 866-867.
[63] Id. at 868.
[64] Id. at 869-871.

> "Since Marissa was injured not on school property and not while she was, or should have been, under the direct supervision of the school, Section 44808 applies and the district has immunity."[65]

In Cerna v. City of Oakland,[66] the Court of Appeal held that a school district was not liable for the death and injuries to a family caused by a motorist who ran into the family as they crossed a city street on their way to school.

The Court of Appeal held that under Education Code section 44808 the school district was not negligent in failing to assure safe school access. The Court of Appeal also held that the City of Oakland was not liable for creating a dangerous condition under Government Code section 830.2.[67]

The courts have interpreted Section 44808 as not creating a common law form of general negligence. The courts have generally limited liability under Section 44808 to the failure to exercise reasonable care applies when the school district undertakes a school-sponsored activity or to provide transportation.[68] The Court of Appeal stated, ". . . school districts are not responsible for the safety of students outside school property absent a specific undertaking by the school district and direct supervision by a district employee."[69]

In addition, the Court of Appeal held that the failure of the school district or city to provide crossing guards at the intersection did not create liability. The court held that:

- A school district does not affirmatively assume responsibility for student safety by the bare promise of a crossing guard in the indefinite future.
- Crossing guards are a municipal obligation outside the responsibility of school districts.
- Crossing guards provide essentially a police function in providing traffic control and enforcing traffic laws and public entities are immune from liability for asserted failures to provide police and security services.[70]
- The lack of a crossing guard was not a proximate cause of the injuries suffered in this case.[71]

I. Liability for Dangerous Condition on School Property

The Court of Appeal, in Joyce v. Simi Valley Unified School District,[72] upheld a jury verdict against the Simi Valley Unified School District in an amount exceeding $2.8 million.

[65] Id. at 872.
[66] 161 Cal.App.4th 1340, 75 Cal.Rptr.3d 168 (2008).
[67] Id. at 1344.
[68] Id. at 1352-59.
[69] Id. at 1357.
[70] Government Code section 845.
[71] Id. at 1360.
[72] 110 Cal.App. 4th 292, 1 Cal.Rptr.3d 712, 178 Ed.Law Rep. 421 (2003).

The jury found that an open school gate constructed next to a dangerous intersection constituted a dangerous condition of public property within the meaning of Government Code sections 830, subdivision (a), and 835. Based on the ruling in this case, districts should review their school sites and campuses to determine if any similar dangerous conditions exist and take measures to reduce the potential for injury.

On May 11, 1989, then 13 year old Jennifer Joyce was struck in a marked crosswalk in the city of Simi Valley. Jennifer was on her way to Sequoia Junior High School. The crosswalk had no signals and crossed a busy four lane street. It allowed children access to the adjacent school through an opened school yard gate.[73]

A motorist struck Jennifer as she crossed the street, resulting in severe head injuries. The motorist settled the matter for $50,000 and Jennifer sued the district and the city of Simi Valley. The student's complaint alleged that prior accidents and "near misses" had occurred at the subject crosswalk, that the open schoolyard gate encouraged students to use the crosswalk, and that the district failed to warn students and parents about the dangerous intersection, or direct students to use the signaled crosswalk near the front of the school.[74]

The district demurred (moved to dismiss) on the ground that the open gate was not a dangerous condition of public property within the meaning of Government Code section 835. The trial court dismissed the matter and the student appealed. On appeal, the Court of Appeal held that the open schoolyard gate could be a dangerous condition if it encouraged students to cross a dangerous intersection next to the school, and remanded the matter back to the trial court. A total of three trials were held (the first two trials were reversed due to jury instruction error and attorney misconduct).[75]

At the third trial, the school principal testified that he ordered a hole cut in the fence shortly after the school opened in 1970. The fence opening was built next to the crosswalk to encourage students to cross at the intersection in question. The principal did not consult an architect, engineer, or traffic safety expert before cutting the hole.[76]

At the trial, a traffic engineer testified that the opening in the fence was a focal point or funnel point for school children to gain access to the school. It concentrated the pedestrian flow in to one area where students crossed a wide roadway where cars traveled at moderate to high speeds. Because of the T-shaped intersection, according to the traffic engineer, the line of sight of motorists was restricted and there was a potential for "hiding" pedestrians using the crosswalk. As the area grew, the roadway became a secondary highway with a traffic volume of more than 15,000 vehicles per day.[77]

Prior to the accident, parents and district employees complained about the intersection. A playground aide testified that she heard screeching brakes and saw near misses almost every day and that she notified school officials, but no corrective action was taken.[78]

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[73] Id. at 295.
[74] Id. at 295-296.
[75] Id. at 296.
[76] Ibid.
[77] Id. at 296-297.
[78] Id. at 297.

A school bus driver testified that she saw motorists speed through the intersection and complained about near miss accidents. The bus driver testified that the crosswalk was hard to see because it was right after the top of the crest of a hill.[79]

Several months after the student was injured, the city conducted a traffic study and determined that 85 percent of the motorists drove 49 miles per hour on the street. The posted speed limit was 35 miles per hour when children were not present, and 25 miles per hour when children were present. The city later raised the speed limit to 40 miles per hour when children were not present.[80]

The president of the school's booster club testified that she was concerned about the speed increase and conducted meetings on the perceived traffic hazard. The principal and other school officials attended these meetings. The traffic safety expert from the police department spoke at one of the meetings and recommended that students cross at the signal near the front of the school.[81]

The principal was concerned about speeders and appeared before the city council 6-8 times. The principal testified that more than 1,200 students entered and left the school each day, and when the principal became aware of the proposed speed increase by the city, the principal testified that the city told him to direct the students to cross at the traffic light at the front of the school. The principal testified that his responsibility ended at the fence lines and that he refused to close the schoolyard gate near the intersection without a traffic signal. The principal testified that he did not consult with his superiors. The principal testified that the school district stationed personnel at the front of the school to supervise students coming to and from school via the intersection with the traffic signal, but the principal did not request a monitor or crossing guard for the intersection in question, which did not have a traffic signal.[82]

At the conclusion of the testimony at the third trial, the jury found that the open schoolyard gate was a dangerous condition, and that the district did not take reasonable action to protect against the risk of injury. The jury apportioned liability and entered a net judgment in the amount of $2,887,022.90, plus costs against the school district as its portion of the judgment.[83]

The school district appealed and the Court of Appeal held that the opening in the fence was a dangerous condition of public property that created a substantial risk of injury to persons on adjacent property.[84] The Court of Appeal stated:

> "Although district did not control the crosswalk, it did control whether an opening in the fence should be made. The open gate was built next to the crosswalk to encourage students to cross at an uncontrolled intersection. It diverted children from a safer, signal controlled intersection less than 500 feet away. We concluded that a reasonable trier of fact [e.g. jury] could find that

[79] Ibid.
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Id. at 297-298.
[84] Id. at 298-300.

> the open gate was a dangerous condition that could have been remedied by simply closing the fence opening and directing the students to cross at the signal."[85]

The Court of Appeal noted that the California Supreme Court, in Bonanno v. Central Contra Costa Transit Authority,[86] held that the transit district could be held liable to a bus patron who used a crosswalk to get to the transit district's bus stop due to the location of the bus stop. Even though the crosswalk was not the property of the transit authority, the California Supreme Court held that if the location of the bus stop, which the transit authority controlled, caused users of the bus stop to be at risk from the immediately adjacent property, then the transit authority could be held liable. The Court of Appeal held that the situation in Joyce was substantially similar and upheld the jury verdict.[87]

Based on the ruling in Joyce, districts should review the traffic conditions surrounding their school sites and campuses to determine if there are any conditions on their property which might increase the risk of injury to students and employees on adjacent property.

In Biscotti v. Yuba City Unified School District,[88] the Court of Appeal held that a school district, as a matter of law, was not liable for injury to a nine year old student who alleged that the school district maintained a dangerous condition on its property.

The underlying facts were that nine year old Christian Biscotti and his friends were riding bicycles on the grounds of a public school operated by the Yuba City Unified School District. The boys decided to pick oranges from a tree located in a neighbor's yard which is separated from the school's grounds by a metal chain link fence. The fence, which was installed when the school was constructed in 1959, had metal prongs across its top edge.[89]

After the boys had picked all the oranges they could reach from the ground, Christian placed a bicycle next to the chain link fence, poking one handlebar through an opening in the fence to help stabilize the bicycle. He then climbed up and stood on the bicycle, balancing himself with one foot on its seat and the other foot on the bar. While Christian reached over the fence and yanked on an orange, the bicycle slipped and he fell onto the fence. His left arm struck the metal tines and was cut. For at least 16 years prior to the accident, there had been no reported complaints about the safety of the fence and no reported accidents or injuries related to the fence.[90]

In California, public entity liability for personal injury is governed by statute. Government Code section 835 sets out the exclusive conditions under which a public entity may be held liable for injuries caused by a dangerous condition on public property. Government Code section 835 provides that a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was:

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[85] Id. at 299.
[86] 30 Cal. 4th 139 (2003).
[87] Joyce v. Simi Valley Unified School District, 110 Cal.App.4th 292, 299-300 (2003).
[88] 158 Cal.App.4th 554, 69 Cal.Rptr. 3d 825 (2007).
[89] Id. at 557.
[90] Id. at 557.

1. In a dangerous condition at the time of injury.
2. That the injury was proximately caused by the dangerous condition.
3. That the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.
4. Either a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition or the public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.[91]

A "dangerous condition" on public property is defined as "a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property … is used with due care in a manner in which it is reasonably foreseeable that it will be used."[92] Based on these statutory provisions, the Court of Appeal in Biscotti concluded:

> "… a condition is not a dangerous condition within the meaning of the Government Code 'if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.'"[93]

The Court of Appeal noted that the intent of the Government Code is to impose liability only when there is a substantial danger which is not apparent to those using a property in a reasonably foreseeable manner with due care.[94] Generally, the issue of whether a given set of facts and circumstances amounts to a dangerous condition poses a question of fact. However, if no reasonable person could conclude that the property's condition is dangerous, the question may be decided as a matter of law. In such cases, summary judgment is proper since the plaintiff has the burden to establish that the condition is one which creates a hazard to persons who foreseeably would use the property with due care.[95]

Both the trial court and the Court of Appeal concluded that the plaintiff could not establish he was exercising due care by using the fence in a manner that was reasonably foreseeable. Both the trial court and the Court of Appeal reasoned that Christian, even though he

[91] Id. at 558.
[92] Government Code section 830(a).
[93] Id. at 558; citing Government Code section 830.2.
[94] Id. at 558, citing Fredette v. City of Long Beach, 187 Cal.App.3d 122, 131 (1986).
[95] Id. at 557-58, citing Dominguez v. Solano Irrigation District, 228 CalApp.3d 1098, 1103 (1991); Schonfeldt v. State of California, 61 Cal.App.4th 1462, 1465 (1998); Mathews v. City of Cerritos, 2 Cal.App.4th 1380, 1382 (1992); Davis v. City of Pasadena, 42 Cal.App.4th 701, 704 (1996).

was nine years old, had to be aware of the danger of using his bike as a ladder in leaning over the fence. Both courts concluded that the danger was obvious, that fences are not meant to be climbed but are meant to keep people out of certain areas. The court concluded that the danger was obvious even to a nine year old boy that there was a danger of falling from the fence and being injured.[96] The Court of Appeal stated:

> "Application of that proposition to this case is proper where common sense demonstrates that any reasonable user, even a child of Christian's age, could see and appreciate the danger of injury from falling created by using a bicycle as a ladder in order to reach over a chain link fence."[97]

The Court of Appeal also held that Christian's use of the bicycle as a substitute ladder to reach over the fence did not constitute use in a manner in which it was reasonable or foreseeable that the fence would be used. The Court concluded that Christian failed to exercise due care and used the property in an abnormal manner. Therefore, a public entity may not be held liable for failing to take precautions to protect such persons. The Court of Appeal noted that there is a limit as to how far society can go to protect individuals from their own carelessness or self-destructive behavior, including the behavior of young children.[98]

In Metcalf v. County of San Joaquin,[99] the California Supreme Court held that in order to prevail in a lawsuit, the plaintiff must establish that the public entity negligently or wrongfully created the dangerous condition, or that the public entity had notice of the dangerous condition for a long enough time to protect against the danger.

The California Supreme Court based its decision on Government Code section 835. Government Code section 835 states:

> "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior

[96] Id. at 559-60.
[97] Id. at 560.
[98] Id. at 560-61.
[99] 42 Cal.4th 1121 (2008).

to the injury to have taken measures to protect against the dangerous condition."

In a previous case, the California Supreme Court interpreted Section 835 to mean that to establish public entity liability for injury caused by a dangerous condition of its property; the statute requires a plaintiff to prove, among other things, that either of the following two conditions is true:

1. A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition, or

2. The public entity had actual or constructive notice of the dangerous condition, under Section 835.2, a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.[100]

The underlying facts were that the plaintiff was seriously injured in an automobile accident that occurred at an intersection controlled by the County of San Joaquin. The plaintiff alleged that the design of the intersection was a dangerous condition. The case went to trial and the jury found that the intersection was controlled by the County of San Joaquin, the property was in a dangerous condition at the time of the incident, but found that the dangerous condition was not the result of the negligent or wrongful conduct of an employee of the county acting within the scope of his or her employment, and also found that the county did not have notice of the dangerous condition for a long enough time to have protected against it. Since the jury did not find the dangerous condition was created by the negligent or wrongful act of an employee of the county, and the jury did not find that the county had notice of the dangerous condition for a long enough time to have protected against it, the trial court ruled in favor of the County of San Joaquin. The Court of Appeal and the California Supreme Court affirmed the trial court's decision.[101] The California Supreme Court concluded:

> "In sum, we conclude that negligence under Section 835, subdivision (a), is established under ordinary tort principles concerning the reasonableness of a defendant's conduct in light of the foreseeable risk of harm. The plaintiff has the burden to demonstrate that the defendant's conduct was unreasonable under this standard, or that it had notice under Section 835, subdivision (b)…In this case, because the jury found the County neither acted negligently nor had notice of the dangerous condition, the County is not liable for plaintiff's injuries."[102]

[100] Brown v. Poway Unified School District, 4 Cal.4th 820, 824 (1993).
[101] Metcalf v. County of San Joaquin, 42 Cal.4th 1121, 1126-27 (2008).
[102] Id. at 1139.

J. Liability for Acts of Employees

In John R. v. Oakland Unified School District,[103] the California Supreme Court addressed the issue of a school district's liability for the actions of its employees. A 14 year old boy was sexually assaulted by his math teacher while he was at the teacher's apartment participating in an officially sanctioned extracurricular program. The teacher allegedly told the student that the sexual conduct was part of his role as a teacher, was designed to help the boy with his problems and allegedly threatened the student with poor grades if he did not comply with the teacher's request to engage in sexual acts. John R.'s parents sued the teacher and the district alleging that the district was vicariously liable for the teacher's acts and directly liable for its own negligence.

Vicarious liability holds an employer responsible for the torts of an employee which are committed in the employee's scope of employment. If the employee substantially departs from his or her duties for purely personal reasons, it is not within the scope of employment and the employer is not liable.[104]

The California Supreme Court held that under the vicarious liability doctrine, the school district was not liable since the teacher substantially departed from his duties. The majority of the court refused to impose liability in part because of the damage it might do to the educational process. In its opinion, the majority stated that there was a significant and unacceptable risk that school districts would be dissuaded from permitting teachers to interact with their students on any but the most formal and supervised basis if the court imposed liability.[105]

The decision allowed the plaintiffs to proceed in the lower court on the theory that the school district might be directly liable for its own negligence. The court stated the district might be negligent for failing to provide safeguards for its programs such as requiring the presence of other students or adults when the activity was to occur in a private location.

The United States Court of Appeals, in Doe v. State of Hawaii,[106] held that an elementary school vice principal who taped a second grade student's head to a tree for disciplinary purposes could possibly be held liable for damages under federal law.[107]

The Court of Appeals affirmed a lower court's decision denying the vice principal's motion for summary judgment on the basis of qualified immunity and remanded the matter back to the district court for a jury to decide whether a school district and elementary school vice principal should be held liable under the circumstances.[108]

The Court of Appeals summarized the facts by stating that in February 1998, the plaintiff, John Doe, a second grader, was sent to the vice principal's office to be disciplined for fighting and refused to stand still against a wall for his time out punishment. The vice principal threatened the student by stating that he would take him outside and tape him to a nearby tree if he did not stand still. The student continued to refuse to stand still and the vice principal used

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[103] 48 Cal.3d 438 (1989).
[104] Id. at 447-448.
[105] Id. at 452.
[106] 334 F.3d 906, 178 Ed.Law Rep. 677 (9th Cir. 2003).
[107] 42 U.S.C. § 1983.
[108] Doe v. State of Hawaii, 334 F.3d 906, 908 (9th Cir. 2003).

masking tape to tape the second grade student's head. The tape remained for about five minutes until a fifth grade student told the vice principal that she did not think that the vice principal should tape a student's head to a tree and the vice principal instructed the student to remove the tape.[109]

The Court of Appeals noted that a public official is not entitled to qualified immunity if the employee violates clearly established constitutional rights of which a reasonable person would have known. The Court of Appeals noted that the vice principal's conduct in taping a second grade student's head to a tree may have violated the student's rights under the Fourth Amendment to be free of unreasonable seizures and therefore, the student's claim of unreasonable seizure under the Fourth Amendment may proceed to a jury trial for a determination as to whether an actual violation occurred. The Court of Appeals noted that a seizure occurs when there is a restraint on liberty to the degree that a reasonable person would not feel free to leave. Being taped to a tree for five minutes, if found to be true by the jury, may constitute such a restraint on the student's liberty and constitute a seizure within the meaning of the Fourth Amendment's prohibition of unreasonable search and seizure.[110]

The Court of Appeals indicated that the test for the jury would be whether the seizure was objectively unreasonable under the circumstances. In applying the Fourth Amendment in the school context, the Court of Appeals held that the jury must decide the reasonableness of the seizure in light of the educational objectives the vice principal was trying to achieve, and the vice principal's actions must not be excessively intrusive in light of the age and the sex of the student, and the nature of the infraction.[111]

The Court of Appeals went on to note that the right of a student to be free from excessive force at the hand of teachers employed by the state was clearly established when the events giving rise to this case occurred. Therefore, the Court of Appeals held that the matter may proceed to trial for a jury or judge to decide whether a violation occurred and whether damages should be assessed.[112]

The facts in this case, if true, are very unusual in this day and age and may violate current clearly established constitutional standards for discipline of students. In such cases, districts can be held liable both under federal and state law.

The best way for districts to avoid liability for the use of excessive force or unreasonable searches and seizures of students is to ensure the proper training of school administrators in disciplining students.

In Austin B. v. Escondido Union School District,[113] the Court of Appeal upheld a unanimous jury verdict in favor of the school district, denying a student's claim for battery and negligence involving a student with autism.

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[109] Id. at 907-908.
[110] Id. at 908-909.
[111] Id. at 909.
[112] Id. at 909-910.
[113] 149 Cal.App.4th 860 (2007).

The underlying allegations were that employees of the school district committed battery and negligently provided care and supervision of a student with autism. The student was a preschooler and the parents alleged that the preschool instructor in the Escondido Union School District engaged in abusive conduct against the student while he was attending school.[114]

Numerous allegations were made against the school district and the employee. Most of the allegations were dismissed by the judge prior to trial by jury. The only remaining allegations for the jury to decide were the issues of battery and negligence.[115]

The parents alleged that between November 2001 and February 2002, the teacher engaged in actions that included bending the child's hand back to force the child to stand or sit, pinching a child, clinging to a child's hand so tightly to prevent them from bolting that his own knuckles turned white, holding the child's wrist and hand while walking with them in a way that would cause discomfort if they attempted escape, using too much pressure on a child's hand when the student was engaged in an activity such as coloring, applying unreasonable pressure on a child's neck, putting pressure on a child's shoulders to the point where they would cry, stepping on children's fingers and feet, and tossing children through the air.[116]

The principal met with the teacher to address the allegations and filed a report with Child Protective Services. The teacher denied harming any child or inflicting any pain on any student.[117]

The teacher testified that he guided his hand through a coloring activity, but denied ever using pressure points to cause pain with respect to the student involved in the lawsuit. The teacher testified that he would place his hand on a child's shoulder or around his neck to motor him through activities. The teacher denied ever pinching the student and testified that he never applied pressure to exert a response from the student. The teacher testified that he never stepped or stood on Austin's fingers and denied ever bending Austin's wrist back. The teacher admitted to putting his hand on Austin's thigh, but not applying force. He denied ever holding Austin above his head, and denied that Austin would flinch or cower when he approached Austin. The teacher testified that he did pinch another student, but only as a gesture of what a pinch was in order to teach the other child not to pinch other students. The teacher admitted picking up Austin and throwing him into a plastic ball pit, not to hurt him, but because Austin liked it.[118]

The teacher testified that he would use physical approaches with children to help them pay attention to the task at hand and get them through an activity. The teacher described in detail the deep pressure touching that was necessary to calm Austin. The teacher testified he would use heavy touching, hugs, and pressure on different parts of his body and that although he would use firm pressure, the teacher testified he never did this with the intent to cause pain. The teacher testified that the deep pressure technique would cause Austin to disengage from what was distracting him and then engage in the task to which he should be paying attention. The teacher

[114] Id. at 865-866.
[115] Id. at 870.
[116] Id. at 868-869.
[117] Ibid.
[118] Ibid.

testified that Austin would not cry, except when he began an activity in which he did not want to engage.[119]

The teacher testified that Austin would wear a weighted vest as it was calming to him, and the vest would help him focus more precisely on assigned tasks. The teacher testified that he worked with Austin's parents to use the deep pressure techniques when Austin was having tantrums at home and when the parents did so, it appeared to have some effect in calming Austin. The teacher testified that he used these techniques when Austin arrived at school, and he would hold Austin when he was leaving with his parents in the evening until he calmed down.[120]

A teacher's aide who worked with the instructor for a year while Austin was in his class testified that Austin liked the sensory touching and that she never saw the instructor hurt Austin in any way.[121]

The case was tried before a jury and the jury was given special verdict forms and asked the following question:

> 1. Did the teacher touch Austin with the intent to harm or offend him?

The jury answered this question in the negative and found that the teacher did not touch Austin with the intent to harm or offend him.[122]

The Court of Appeal upheld this jury instruction and the finding of the jury by noting that teaching children with autism by touching and guiding them is not unlawful, and students, by attending school, consent to some touching necessary to control them and protect both their safety and the safety of others.[123] The Court of Appeal stated:

> "Indeed, plaintiffs did not contend at trial that Priest [the teacher] could not touch them at all. Rather, they argued that some of the touching exceeded what was proper and constituted child abuse. Because we are presented with the unique situation of a teacher/pupil setting, where it is undisputed that some touching was necessary to control and guide those students, both an intent to harm and the reasonableness of the touching were at issue and the instructions and special verdict form on battery were not erroneous."[124]

The Court of Appeal cited Education Code section 44807, which states that a teacher shall not be subject to criminal prosecution or criminal penalties for the exercise, during the performance of their duties, of the same degree of physical control over a pupil that a parent

[119] Ibid.
[120] Ibid.
[121] Id. at 869-870.
[122] Id. at 871-872.
[123] Id. at 872-876.
[124] Id. at 873.

would be legally privileged to exercise, but which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning. The court noted that the relationship between school personnel and students is analogous in many ways to the relationship between parents and children, and that school officials stood "in loco parentis" (in the place of the parents), with respect to their students.[125] The Court of Appeal noted that the doctrine of "in loco parentis" particularly applies to children with autism and stated:

> "This is particularly true where, as here, the students are autistic children that admittedly need, and in some circumstances desire, touching to calm, guide and control them. If the reasonableness of the touching was eliminated as an element of battery in such circumstances, that could lead to a form of strict liability for battery as to special education teachers that engage in therapeutic touching of students. The court did not err in requiring that the jury find that [the teacher's] touching be unreasonable."[126]

With respect to the issue of negligence, the Court of Appeal upheld the trial court's jury instruction that instructed the jury to determine whether any of the named defendants, which included the teacher, principal and several other employees, were negligent, rather than if any other person was negligent. The jury found that none of the named defendants were negligent. The Court of Appeal also rejected claims for discrimination, finding that there was no evidence presented at trial that Austin did not attend school or that the teacher attempted to cause the student not to attend school.[127]

The Court of Appeal also affirmed the lower court's granting of attorneys' fees to the district against the parents' attorneys for filing a frivolous civil action for discrimination. The court found that there was no basis for that cause of action.[128]

In C.A. v. William S. Hart Union High School District,[129] the California Supreme Court unanimously held that students may sue school districts on a theory of vicarious liability for negligent hiring, retention, and supervision if they allege that they have been abused by a school district employee. The court held that school personnel owe students under their supervision a protective duty of care and if the school district breaches that duty, the school district may be

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[125] Id. at 874; see, also, Hoff v. Vacaville Unified School District, 19 Cal.4th 925, 935 (1998).
[126] Id. at 874-875.
[127] Id. at 876-878.
[128] Id. at 887-888.
[129] 53 Cal.4th 861, 138 Cal.Rptr.3d 1(2012). In contrast, in Regents of the University of California v. Superior Court, 240 Cal.App.4th 1296 (2015), the Court of Appeal held that, unlike K-12 schools, a university did not owe a duty to protect a student from third party criminal conduct based on her status as a matriculated student. The Court of Appeal held that while the California Supreme Court held in C.A. v. William S. Hart Union High School District, 53 Cal.4th 861, 870-871, 138 Cal.Rptr.3d 1, 270 P.3d 699 (2012), that a school district and its employees have a special relationship with the district's pupils and have a duty to use reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally, a university does not.

held vicariously liable (i.e., the school district may be held liable for the negligence of its employees).[130]

The plaintiff was a student at Golden Valley High School in the William S. Hart Union High School District. The student alleged that he was subjected to sexual harassment and abuse by the head guidance counselor at the school. The student was 14-15 years old at the time of the sexual harassment and abuse which is alleged to have begun in January 2007 and continued through September 2007.[131]

The plaintiff alleged that the school district and its employees knew that the guidance counselor had engaged in unlawful conduct with minors in the past and knew, or should have known and/or were put on notice, of the guidance counselor's past sexual abuse of minors and her propensity and disposition to engage in such abuse. The complaint alleged that the school district knew, or should have known, that the guidance counselor would commit wrongful sexual acts with minors including plaintiff. The plaintiff alleged that his injuries were the result not only of the abuse by the guidance counselor, but of the district's employees, administrators, and/or agents failing to properly hire, train, and supervise the guidance counselor and prevent her from harming plaintiff. The plaintiff alleged that the school district failed to have in place or implement a system or procedure for investigating and supervising personnel to prevent sexual misconduct and abuse of children.[132]

The California Supreme Court reviewed the lower court's dismissal of the case and held that plaintiff had sufficiently pleaded the case. The court held under Government Code section 815, public entity tort liability is exclusively statutory. Under Government Code section 815.2, the court held that a public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would have given rise to a cause of action against that employee or his personal representative. Government Code section 820 states that a public employee is liable for injury caused by his act or omission to the same extent as a private person. The court summed up its analysis of these statutory provisions by stating that the general rule is that an employee of a public entity is liable for his or her torts to the same extent as a private person and the public entity is vicariously liable for any injury which its employee causes to the same extent as a private employer.[133]

The California Supreme Court then analyzed the case law with respect to school districts and stated that while school districts and their employees have never been considered insurers of the physical safety of students, California law has long imposed on school authorities a duty to supervise at all times the conduct of the children on school grounds and to enforce those rules and regulations necessary to their protection. The court held that the standard to which school employees are held is the degree of care which a person of ordinary prudence, charged with comparable duties would exercise under the same circumstances. Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those

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[130] Id. at 865, citing Dailey v. Los Angeles Unified School District, 2 Cal.3d 741, 747 (1970); Leger v. Stockton Unified School District, 202 Cal.App.3d 1448, 1458-1461 (1988).
[131] Id. at 865.
[132] Id. at 865-67.
[133] Id. at 868, citing Societa per Azioni de Navigazione Italia v. City of Los Angeles, 31 Cal.3d 446, 463 (1982).

responsible for student supervision, and under Government Code section 815.2(a), a school district is vicariously liable for injuries proximately caused by such negligence.[134]

The California Supreme Court went on to state that a school district and its employees have a special relationship with the district's pupils, a relationship arising from the mandatory character of school attendance, and the comprehensive control over students exercised by school personnel, analogous in many ways to the relationship between parents and their children.[135] The court held that the duty of care owed by school personnel includes the duty to use reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally, including cases of employees' alleged negligence resulting in injury to a student by another student.[136]

In Virginia G. v. ABC Unified School District, the Court of Appeal alleged that the school district had performed an inadequate background check before hiring a teacher who had been fired from another school for sexual misconduct with students and who had then sexually harassed and assaulted the plaintiff. The Court of Appeal held that the district could be liable for the student's injuries under a theory of vicarious liability for other school personnel's negligent hiring and supervision of the perpetrator.[137]

The California Supreme Court noted that responsibility for the safety of public school students is not borne solely by instructional personnel, but that school principals and other supervisory employees, to the extent their duties include overseeing the educational environment and the performance of teachers and counselors, also have the responsibility of taking reasonable measures to guard students against harassment and abuse from foreseeable sources, including any teachers or counselors they know or should have reason to know are prone to such abuse. The court noted that administrators and supervisors have the power to initiate disciplinary action against a teacher or counselor and, therefore, have the authority to initiate disciplinary procedures if they knew or should have known of a guidance counselor or teacher's dangerous propensities and ongoing misconduct. If the district employees did nothing to prevent or stop harassment and abuse of plaintiff despite knowledge of the harassment or abuse, the employees would be negligent and the school district would be vicariously liable.

However, the court held that while public school administrators and supervisors may be held legally responsible for their negligence in hiring and retaining, as well as supervising school staff, the scope and effect on individual liability is limited by requirements of causation and duty. The court held that the plaintiff must demonstrate that the individual employee's proposal or recommendation or failure to take action was a substantial factor in causing the perpetrator to be hired or retained. The court held that unless the individual alleged to be negligent in a hiring or retention position knew or should have known of the dangerous propensities of the employee

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[134] Id. at 869. See, also, Dailey v. Los Angeles Unified School District, 2 Cal.3d 741, 747 (1970); Hoff v. Vacaville Unified School District, 19 Cal.4th 925, 932-933 (1998); Hoyem v. Manhattan Beach City School District, 22 Cal.3d 508, 513 (1978).
[135] Ibid. See, M.W. v. Panama Buena Vista Union School District, 110 Cal.App.4th 508, 517 (2003); Leger v. Stockton Unified School District, 202 Cal.App.3d 1448 (1988).
[136] Id. at 870. See, also, J.H. v. Los Angeles Unified School District, 183 Cal.App.4th 123, 128-129, 141-148 (2010); Leger v. Stockton Unified School District, 202 Cal.App.3d 1448 (1988); M.W. v. Panama Buena Vista Union School District, 110 Cal.App.4th 508 (2003); Virginia G. v. ABC Unified School District, 15 Cal.App.4th 1848, 1851-1855 (1993).
[137] Id. at 1851-1854.

who injured the plaintiff, there is little or no moral blame attached to the person's action or inaction.[138]

The court emphasized that a district's liability must be based on evidence of negligent hiring, supervision or retention, not on assumptions or speculation. The fact that an individual school employee has committed sexual misconduct with a student or students does not establish or raise any presumption that the employing district should bear liability for the resulting injuries. The court further stated that even when negligence by an administrator or supervisor is established, the greater share of fault will ordinarily lie with the individual who intentionally abused or harassed the student than with any other party and that fact should be reflected in any allocation of comparative fault.[139] The California Supreme Court concluded:

> "Within these limits, we conclude a public school district may be vicariously liable under Section 815.2 for the negligence of administrators or supervisors in hiring, supervising, and retaining a school employee who sexually harasses and abuses a student. Whether plaintiff in this case can prove the district's administrative or supervisory personnel were actually negligent in this respect is not a question we address in this appeal…"[140]

The California Supreme Court then remanded the matter back to the trial court for further proceedings. The plaintiffs will then be required to prove their allegations at trial.

In S.M. v. Los Angeles Unified School District[141], the Court of Appeal held that absent extraordinary circumstances, evidence of a plaintiff's sexual history cannot be admitted in a civil suit brought against the Los Angeles Unified School District for negligent supervision of a teacher who had sex with the middle schooler.

The Court of Appeal noted that the Supreme Court has held that a minor is wronged by the adult's conduct even if the minor consents to a sexual relationship.[142] In Tobias, California Supreme Court held that the minor, even if the willing participant in the defendant's conduct is a victim.[143] The law puts the burden on the adult to avoid the sexual relationship.[144]

The Court of Appeal held that the school district has the duty of supervision that includes an obligation to offer a student some protection against their own lack of mature judgment.[145] Such supervision is necessary because it is commonly known that students engage in impulsive behavior which exposes them to the risk of serious physical harm.[146] Thus, the Court of Appeal stated:

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[138] C.A. v. William S. Hart Union High School District, 53 Cal.4th 861, 870-71, 138 Cal.Rptr.3d 1 (2012).
[139] Id. at 871-79.
[140] Id. at 879.
[141] 240 Cal.App.4th 543 (2015).
[142] People v. Tobias, 25 Cal.4th 327 (2001).
[143] Id. at 334.
[144] Id. at 337.
[145] Kahn v. Eastside Union High School District, 31 Cal. 4th 990, 1017 (2003).
[146] Dailey v. Los Angeles Unified School District, 2 Cal.3d 741, 748 (1970).

> "Thus, Plaintiff's lack of mature judgment in 'cooperating' with her abuser was a source of the District's responsibility to her, not a partial excuse from that responsibility. Plaintiff cannot be held partially responsible for the sexual abuse committed on her by Hermida, an adult teacher."[147]

Therefore, the Court of Appeal held that absent extraordinary circumstances, inquiry into the victim's sexual history should not be permitted, either in discovery or at trial.[148]

K. Liability for Holiday Parties Attended by District Employees

The question often arises as to whether the school district would be liable if a school hosts a staff holiday party at a private residence and a staff member consumes alcohol, leaves the party under the influence of alcohol in their automobile, and causes an accident. If the holiday party is sponsored or hosted by the school, then the school district is potentially liable. If the party is a private party (not sponsored by the school), then the school district would not potentially be liable.

Generally, the employer is not liable for the act of its employee unless the employee is acting within the scope of their employment. Under the doctrine of *respondeat superior*, an employer may be held vicariously liable for torts committed by an employee within the scope of employment.[149] Under the *respondeat superior* doctrine, the term "scope of employment" has been interpreted broadly.[150]

The employer's liability extends beyond the actual or possible control of the employee to include risks inherent in or created by the employer's business.[151] The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude the attribution of liability to the employer.[152] Therefore, an employer's vicarious liability may extend to the employer's negligence, willful and malicious torts, or acts that contravene an express company rule and confer no benefit to the employer.[153]

The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of employment.[154] The imposition of *respondeat superior* liability is not dependent on the employer's undertaking any act or upon any fault by the employer.[155]

Rather, an employer may be vicariously liable for an employee's tort if the employee's act was an outgrowth of his employment, inherent in the working environment, typically of or broadly incidental to the employer's business, or in a general way, foreseeable from the employee's duties.[156] Foreseeability in the context of *respondeat superior* liability means that in

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[147] 240 Cal.App.4th 543, 564 (2015).
[148] Id. at 564.
[149] Mary M. v. City of Los Angeles, 54 Cal.3d 202, 208, 285 Cal.Rptr. 99 (1991).
[150] Farmers Insurance Group v. County of Santa Clara, 11 Cal.4th 992, 1004, 47 Cal.Rptr.2d 478 (1995).
[151] Id. at 1003.
[152] Id. at 1004.
[153] Ibid.
[154] Mary M. v. City of Los Angeles, 54 Cal.3d 202, 209 (1991).
[155] Perez v. Van Groningen & Sons, Inc., 41 Cal.3d 962, 967 (1986).
[156] Lisa M. v. Henry Mayo Newhall Memorial Hospital, 12 Cal.4th 291, 298-299 (1995).

the context of the particular enterprise, an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.[157]

In McCarty v. Workman's Compensation Appeals Board,[158] the California Supreme Court held that an employee's intoxication at an office party arose in the course of his employment. The court concluded that the employee's social and recreational activity on the company premises, endorsed with the express or implied permission of the employer, falls within the course and scope of employment if the activity was conceivably of some benefit to the employer or otherwise was a customary incident of the employment relationship.[159]

In McCarty, the California Supreme Court found that the employer's purchase of alcoholic beverages for recurrent gatherings on the premises of the business demonstrated that it considered the gatherings to be company activities that benefitted the business by fostering company camaraderie and the discussion of company business.[160] The court concluded that the employee's attendance at the party came within the scope of employment because it conceivably benefitted the company and the record demonstrated that these parties had become a recognized, established, and encouraged custom.[161]

In Harris v. Trojan Fireworks Company,[162] the Court of Appeal held that the plaintiffs pleaded sufficient facts, which if proved, would support a jury's determination that an employee's intoxication occurred at a party, that the employee's attendance at the party and intoxication occurred within the scope of his employment, and it was foreseeable that the employee would attempt to drive home while still intoxicated and might have an accident. The Court of Appeal stated:

> "Thus, we think it can be fairly said that liability attaches where a nexus exists between the employment or the activity which results in an injury that is foreseeable. Foreseeable is here used in the sense that the employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."[163]

The Court of Appeal went on to state that it is foreseeable that at an employer holiday where alcohol is served an employee would become intoxicated, the employee might leave the party in their automobile under the influence of alcohol and cause an accident. The court also held that it may be inferred that the party was for the benefit of the employer and that the purpose of the party was to improve employer-employee relations and to improve relations between the employees by providing the employees with an opportunity for social contact.

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[157] Farmers Insurance Group v. County of Santa Clara, 11 Cal.4th 992, 1004 (1995).
[158] 12 Cal.3d 677 (1974).
[159] Id. at 681-682.
[160] Id. at 682.
[161] Id. at 683.
[162] 120 Cal.App.3d 157, 174 Cal.Rptr. 452 (1981).
[163] Id. at 163.

In Trojan Fireworks Company, the party was held at work during working hours and the employees were paid to attend. The court inferred that the employer intended for the employees to consume alcohol since the employer furnished the alcoholic beverages.[164] The Court of Appeal stated, ". . . that the pivotal consideration was . . . whether there was a sufficient business relationship between the employment and the banquet at which the defendant became intoxicated to hold the employer liable for the employee's negligent driving."[165]

In Boynton v. McKales,[166] the attendance at the company party was optional, the party occurred after work, the employees were not paid to attend, and the party took place at a location other than the employee's place of employment. In Boynton, the Court of Appeal stated:

> "The only decisive question is therefore whether the character of the banquet and the employer's relation to it were such that Brooks' attendance could be reasonably considered within the scope of employment. If there is any substantial conflict in the evidence in this respect or conflicting inferences can reasonably be drawn from it, such is a question of fact for the jury."[167]

In the most recent case, the Court of Appeal summed up the case law relating to employer liability by stating:

> "Thus, existing California case law clearly establishes that an employer may become liable for its employee's torts as long as the proximate cause of the injury occurred within the scope of employment. It is irrelevant that foreseeable effects of the employee's negligent conduct occurred at a time the employee was no longer acting within the scope of his or her employment. Here, there is sufficient evidence in the records to support a finding that Landri breached a duty of due care owed to the public by becoming intoxicated at the party."[168]

In summary, there is potential liability for the school district if the party is sponsored by the school. Whether a party is sponsored by the school is a question of fact and will depend upon the particular circumstances. One factor will be the invitation and how it is phrased. If the invitation indicates that it is a party sponsored by the school, then it will most likely be found by a jury to be school sponsored. If the invitation states that you are invited to an employee's house for a holiday party and does not mention the school, then it is more likely that the jury will find it to be a private party not sponsored by the school district. The history of the party (i.e. whether it is an annual event), the attendance of the employees at the party, and whether the employers are expected to attend the party will also be factors.

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[164] Id. at 164.
[165] Id. at 165.
[166] 139 Cal.App.2d 777 (1956).
[167] Id. at 790.
[168] Purton v Marriott International, Inc., 218 Cal.App.4th 499, 159 Cal.Rptr.3d 912 (2013).

If it is a school sponsored party and alcohol is served, there is potential school district liability if an employee leaves the party under the influence of alcohol, and as a result of being intoxicated causes an automobile accident.

L. Liability for Suicide of Student

In Corales v. Bennett,[169] the Ninth Circuit Court of Appeals held that a school district and its site administrators were not liable for the death of an 8th grade student by suicide. The student had killed himself within a few hours of receiving a stern lecture from his vice principal for leaving school without authorization in order to attend a protest regarding immigration reform. It was alleged that the vice principal told the group of students who had left school that they would have to pay a $250 fine and that he would "get the cops involved." The vice principal also told the students they would be losing a year-end activity, such as a trip to Disneyland.[170]

The student had a previous history of discipline as he had brought a knife to school the previous year and was on probation. The student allegedly told a friend – after the vice principal's lecture – that he was worried about juvenile hall and about the $250 fine. He spoke to his mother by telephone after school and informed her of the vice principal's lecture. When she arrived home, she discovered he had shot himself.[171]

The student's parents sued for First Amendment retaliation, intentional infliction of emotional distress, negligence and other causes of action. The Court dismissed all of the claims on a motion for summary judgment. On the First Amendment claim, the Court held that while the students were engaged in expressive conduct during their walk-out, the school nevertheless had a right to discipline the students for the act of leaving school without permission. The Court held that the district's anti-truancy rule is a content-neutral rule that furthers important interests (enforcing compulsory education and keeping minors safe) unrelated to the suppression of expression. The plaintiffs also failed to prove the vice principal intended to retaliate against the students for their expressive conduct.[172]

The Court held that the vice principal's warning to the students was not extreme and outrageous conduct and, therefore, the elements of the intentional infliction cause of action were not met. The Court held that the student's suicide was unforeseeable and extraordinary and, thus, the plaintiff's negligence cause of action was dismissed.[173]

M. Liability for Threatening E-Mails

In Delfino v. Agilent Technologies, Inc.,[174] the Court of Appeal held that an employer could not be held liable for the threatening e-mails sent by one of its employees. The Court of Appeal held that under the Communications Decency Act (CDA) of 1996,[175] employers who provide their employees Internet access are immune from liability for threatening e-mails sent by

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[169] 567 F.3d 554 (9th Cir. 2009).
[170] Id. at 559-60.
[171] Id. at 560-61.
[172] Id. at 561.
[173] Id. at 571-73.
[174] 145 Cal.App.4th 790, 52 Cal.Rptr.3d 376 (2006).
[175] Id. at 802, citing 47 U.S.C. § 230(c)(1).

their employees unless the employer was somehow involved in drafting, authoring, or transmitting the threatening messages.[176]

The plaintiffs in Delfino filed a complaint in state court against the employer and the employee claiming intentional infliction of emotional distress and negligent infliction of emotional distress. The plaintiffs claimed that the employee sent a number of threats over the Internet and that he used the employer's computer system to send the threats. The plaintiff alleged that the employer was aware that the employee was using its computer system to threaten plaintiffs and it took no action to prevent its employee from continuing to make threats over the Internet.[177]

The Court of Appeal noted that the Communications Decency Act[178] states that no provider or user of an interactive computer service (including employers) shall be treated as the publisher or speaker of any information provided by another information content provider. The statute goes on to provide that causes of action inconsistent with the Communications Decency Act are prohibited and no liability may be imposed under any state or local law that is inconsistent with federal law. One of the important purposes of the CDA was to encourage Internet service providers to self-regulate the dissemination of offensive materials over their Internet services. The Court stated:

> "Thus, Section 230(c)(2) immunizes from liability an interactive computer service provider or user who makes good faith efforts to restrict access to material deemed objectionable."[179]

A second objective of the CDA was to avoid the chilling effect upon Internet free speech that would occur by the imposition of tort liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery. The court noted that in Zeran v. America Online, Inc.,[180] the Court of Appeals held that AOL was immune from liability from plaintiff's claims that AOL delayed removing defamatory messages posted by an unidentified third party. The court in Zeran held that the CDA immunity provisions were the result of Congressional recognition of the threat that tort based lawsuits posed to freedom of speech over the Internet and Congress' desire to encourage service providers to self-regulate the dissemination of offensive material over their services. The court in Zeran held that Section 230(c)(1) conferred broad immunity applicable to all interactive computer service providers, irrespective of whether they were publishers or distributors of the alleged defamatory matter authored by the information content provider (i.e. another party).[181] Three other federal circuit courts have followed the Fourth Circuit's decision in Zeran.[182] The California Supreme Court and several state court of appeal decisions have also followed Zeran.[183]

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[176] Id. at 795.
[177] Id. at 795-96.
[178] Id. at 802, citing 47 U.S.C. § 230(c)(1).
[179] Id. at 802.
[180] 129 F.3d 327, 331 (4th Cir. 1997).
[181] Id. at 331-334.
[182] Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Green v. America Online, 318 F.3d 465 (3d Cir. 2003); Ben Erra, Weinstein & Co. v. America Online, Inc., 206 F.3d 980 (10th Cir. 2000).
[183] Barrett v. Rosenthal, 40 Cal.4th 33 (2006); Gentry v. Ebay, Inc., 99 Cal.App.4th 816 (2002); Kathleen R. v. City of Livermore, 87 Cal.App. 4th 684 (2001).

The Court of Appeal noted that there are three essential elements that a defendant must establish in order to claim immunity under the CDA:

1. The defendant is a provider or user of an interactive computer service.
2. The cause of action treats the defendant as a publisher or speaker of information and;
3. The information at issue was provided by another information content provider.[184]

The Court of Appeal then went on to analyze these three elements and noted that the courts have interpreted the term "interactive computer service" broadly. The court held an employer that provides its employees with Internet access through the company's internal computer system is among the class of parties potentially immune under the CDA. The court noted that Agilent provides or enables computer access by multiple users to a computer server and the court noted that thousands of its employees in the United States access the Internet in this manner.[185]

The Court of Appeal went on to conclude that the plaintiff treated the defendant as a publisher or speaker of the information in that they alleged that the employer knew the employee was sending threatening messages and that he was using the employer's computer system to send them. The defendant in their summary judgment motion denied knowledge of the threatening messages and the plaintiffs presented no evidence in opposition that Agilent had such knowledge. The courts have held that the imposition of tort liability on service providers for the communications of others represented, for Congress, another form of intrusive government regulation of speech and for that reason Congress provided broad immunity for service providers that provide Internet access.[186]

The Court of Appeal noted that in Kathleen R. v. City of Livermore,[187] the Court of Appeal held that the CDA granted the City of Livermore immunity from a broad array of claims arising out of a public library providing access to the Internet through use of its computers, including a taxpayer action for waste of public funds and a claim for violation of due process.

Under the third element, the court found that the employee was the party who authored the offensive e-mails and postings and there was no evidence that the employer played any role whatsoever in the creation or development of the messages. Therefore, the court held that the employer was immune.

In summary, employers, including public agencies such as community college districts, school districts and regional occupational programs, will be found to be immune from liability

[184] Delfino v. Agilent Technologies, Inc., 145 Cal.App.4th 790, 805, 52 Cal.Rptr.3d 376 (2006).
[185] Id. at 807. In Kathleen R. v. City of Livermore, 87 Cal.App.4th 684, 692-693 (2001), the Court of Appeal held that the city library was immune from liability because of its government entity status.
[186] Id. at 806-08.
[187] 87 Cal.App.4th 684 (2001).

for the e-mail messages sent by employees unless the employer was involved in authoring or transmitting the offensive e-mail messages or was somehow otherwise involved.[188]

N. Liability for Libel and Slander

In Lee v. Fick,[189] the Court of Appeal held that a high school baseball coach could not sue parents for libel and slander based on a letter written by the parents to the school district complaining about the coach's job performance. The Court of Appeal dismissed the lawsuit.

Michael Lee, a certificated teacher and varsity baseball coach, sued the parents of several players on the baseball team for libel and slander, alleging they made false statements in the letter to the school district. The letter contained the following statements about the coach:

1. He is manipulative to the players, the parents and the other coaches.
2. He is verbally abusive to the kids.
3. He is emotionally abusing the kids with his outbursts of anger and favoritism to certain players.
4. There were players who quit during the season because they could not deal with him.
5. The man threw a fit in the dugout and verbally attacked my son for not respecting his authority.
6. Who knows what he is capable of next because of his emotional and mental instability.
7. He does not stop his destructive behaviors even when warned by parents and administrators.

The teacher alleged that the letters were an attempt to have him fired as baseball coach. The complaint also alleged that the following oral statements were made by the parents to school district officials:

1. He is a bad coach and we want to have him fired.
2. He is unethical.
3. He has severe anger and emotional problems.
4. He is abusive, verbally and physically, to players.

[188] 145 Cal.App.4th 790, 808 (2006).
[189] 135 Cal.App.4th 89 (2005).

The Court of Appeal held that the alleged libel is privileged under Civil Code section 47(b), which states that any statement made in any legislative proceeding, judicial proceeding or any other official proceeding authorized by law is privileged. The privilege is designed to provide the utmost freedom of communication between citizens and public authorities whose responsibility is to investigate wrongdoing.[190] Communications to an official agency intended to induce the agency to initiate action or an investigation is part of an official proceeding. Therefore, complaints to school authorities about a teacher, principal or employee in the performance of their official duties are privileged.[191]

In Lee, it was undisputed that the letter was written pursuant to the principal's instructions to the parents to put their complaints in writing and that the letter was delivered to the school district. The parents did not provide the letter to any other person. The letter was an attempt to have Lee removed as baseball coach. School authorities investigated the complaint and initially school authorities decided to rehire Lee as baseball coach but ultimately school authorities decided to remove Lee as coach. Based on these undisputed facts, the Court of Appeal concluded that the letter was written to prompt official action and was thus privileged under Civil Code section 47(b), which means that the letter cannot be the basis for a lawsuit for libel or slander.

The Court of Appeal also rejected the teacher's argument that the parents had talked to each other about the complaint and stated:

> "In order to be effective in pressing their complaints to school authorities, parents must be free to communicate to each other without fear of liability…such communications between interested parties are protected by the privilege."[192]

This decision should protect parents, employees, and others from lawsuits for libel and slander when they complain to school administrators about the conduct of district employees and the performance of their job duties.

O. Vicarious Employer Liability for Automobile Accident Caused by Employee

In Lobo v. Tamco,[193] the Court of Appeal held that an employer could be held liable under the theory of vicarious liability since it required the employee to be available to visit customers using his private vehicle.

On October 11, 2005, the employee was leaving the premises of his employer, Tamco, and drove his car out of the driveway and onto Arrow Highway. The employee failed to notice three motorcycle deputies approaching with lights and sirens activated. Deputy Lobo was unable to avoid colliding with the employee's car and suffered fatal injuries.[194]

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[190] Brody v. Montalbano, 87 Cal.App.3d 725, 733, 151 Cal.Rptr. 206 (1978).
[191] Id. at 731-735; Martin v. Kearney, 51 Cal.App.3d 309, 124 Cal.Rptr. 281 (1975).
[192] Lee v. Fick, 135 Cal.App.4th 89, 97 (2005).
[193] 182 Cal.App.4th 297, 105 Cal.Rptr.3d 718 (2010).
[194] Id. at 299.

Tamco filed a motion for summary judgment contending that the evidence established as a matter of law that Tamco was not vicariously liable for Deputy Lobo's death and that the employee was not acting within the course and scope of his employment, but was merely leaving work at the end of his work day, intending to go home, and was driving his personal vehicle.[195]

The Court of Appeal reversed and noted that there is a line of cases that makes an exception to the "going and coming" rule where the use of the car gives some incidental benefit to the employer.[196]

The Court of Appeal ruled that the evidence at trial showed that the employee was a metallurgist who was employed by Tamco as its manager of quality control. He had held that position for 16 years. One of his responsibilities was to answer all customer complaints and, if necessary, visit customers' facilities to gain information and/or maintain customer relations. Therefore, if a customer called with quality concerns, he would accompany a sales engineer to the site so that he could answer any technical questions. The company did not provide a company car for that purpose. On occasion, the employee would use his own car for that purpose if no sales engineer was available. When the employee used his own car to visit a customer site, he was reimbursed for mileage.[197]

During 2005, the employee testified that he visited customer sites five times or less, and on some of those occasions he drove his own car. On the date of the accident, he was going home. However, if he had been asked to visit a customer site, he would have gotten in his car and used his car to go to that facility. The employee kept boots, a helmet and safety glasses in his car for customer visits.[198]

The Court of Appeal held that this evidence was sufficient to support the conclusion that Tamco requires the employee to make his car available whenever it is necessary for him to visit customer sites and that Tamco derives a benefit from the availability of the employee's car. The Court of Appeal rejected the employer's contention that the employee's occasional use of his own car to visit customers was insufficient as a matter of law to invoke the exception.[199] The Court of Appeal stated:

> "If the employer requires or reasonably relies upon the employee to make his personal vehicle available to use for the employer's benefit, then the employer derives a benefit from the availability of the vehicle, the fact that the employer only rarely makes use of the employee's personal vehicle should not, in and of itself, defeat the plaintiff's case. Here, Crompton testified that Tamco required Del Rosario to make his car available rather than providing him with a company car in part because the need arose infrequently. Thus, the availability of Del Rosario's car provided

[195] Id. at 300.
[196] Id. at 301. See, State Farm Mutual Auto Insurance Company v. Haight, 205 Cal.App.3d 223, 241 (1988); Tryer v. Ojai Valley School, 9 Cal.App.4th 1476, 1481 (1992); Hinojosa v. Workmen's Compensation Appeals Board, 8 Cal.3d 150, 152 (1972); County of Tulare v. Worker's Compensation Appeals Board, 170 Cal.App.3d 1247, 1253 (1985).
[197] Id. at 301-02.
[198] Id. at 302.
[199] Id. at 302-03.

Tamco with both the benefit of ensuring that Del Rosario could respond promptly to customer complaints even if no sales engineer was available to drive him to the customer site, and the benefit of not having to provide him with a company car. Based on this evidence, a reasonable trier of fact could find that the "required-vehicle" exception does apply. …"[200]

P. Liability for Field Trips

In Wolfe v. Dublin Unified School District,[201] the Court of Appeal held that a school district was immune from liability for injuries sustained by a student while on his way home from a voluntary field trip. The court held that the special field trip provisions of Education Code section 35330 controlled over the more general provisions of Education Code section 44808.

The plaintiff was a first grade student who attended a field trip with his class during normal school hours. Attendance was voluntary. Those students not having parental consent would have remained at the school in alternative activities, although in fact all students in the class did attend the field trip. Transportation was provided in private cars owned by parent volunteers. The plaintiff was injured while on his way home from the activity.[202]

The plaintiff contended that the district was liable under Education Code section 44808 which essentially grants a school district immunity unless a student was or should have been directly supervised by the district during an activity undertaken off district property. The district contended that it was immune from liability under Education Code section 35330 which provides that "[a]ll persons making the field trip or excursion shall be deemed to have waived all claims against the district . . . for injury, accident, illness, or death occurring during or by reason of the field trip or excursion. . . ."[203]

The court granted the school district's motion for summary judgment, holding that the special field trip provisions of Education Code section 35330 control over any application of the more general off-premises provisions of Section 44808. The court relied on the Court of Appeal decision in Castro v. Los Angeles Board of Education.[204] The Wolfe court cited with approval the following language from the Castro decision:

> "Students who are off of the school's property for required school purposes are entitled to the same safeguards as those who are on school property, within supervisorial limits. Students who participate in non-required trips or excursions, though possibly in furtherance of their education but not as required attendance, are effectively on their own; the voluntary nature of the event absolves the district of liability."[205]

[200] Id. at 303.
[201] 56 Cal.App.4th 126 (1997).
[202] Id. at 128.
[203] Id. at 130.
[204] 54 Cal.App.3d 232 (1976).
[205] Id. at 135.

Based on the analysis in the Castro decision, the Wolfe court distinguished between required "school sponsored" activities conducted off school property and voluntary field trips or excursions. Under Education Code section 44808, a district may be exposed to liability for injuries which occur during required school-sponsored activities. Under Section 35330, a district is immune from liability for injuries occurring during voluntary field trips or excursions.[206]

In Casterson v. Superior Court,[207] the California Court of Appeal extended the immunity from liability for field trips to employees and ruled that the provisions of Education Code section 35330 apply to employees of a school district as well as the school district. The Court of Appeal held that even though the language of Section 35330 does not expressly include employees, the legislative intent to protect school districts from personal injury claims arising from field trips would be undermined by the school district's vicarious liability for acts or omissions of employees under Government Code section 815.2, subdivision (a), if employees did not receive immunity under Education Code section 35330, as well.[208]

Government Code section 815.2, subdivision (a), states that a public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would have given rise to a cause of action against that employee. In the Casterson case, a special education student was injured during a school field trip to Sacramento. The student sued an employee of the Pajaro Valley Unified School District who was acting in the course and scope of her employment while supervising the field trip. The Court of Appeal dismissed the lawsuit against the school employee, holding that if the student could prevail in a lawsuit against the public employee, under Government Code section 815.2, subdivision (a), the school district would be required to indemnify the school employee and pay the judgment, thus defeating the legislative intent of Education Code section 35330, which was to provide immunity to school districts for liability arising from school field trips.[209]

The Court of Appeal concluded, ". . . it is consistent with legislative intent to construe Section 35330 as extending field trip immunity to school district employees in order to protect a school district from vicarious liability for an employee's alleged negligence in the course and scope of employment during a field trip."[210]

In summary, the Court of Appeal upheld broad immunity for districts and district employees with respect to field trips. The decision could be appealed to the California Supreme Court.

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[206] In Roe v. Callahan, 678 F.Supp.2d 1008, 254 Ed.Law Rep. 774 (E.D. Cal. 2009), the Unified States District Court held that Education Code section 35330 did not provide immunity to a school district for violation of 42 U.S.C. Section 1983, 42 U.S.C. Section 1985, or Title IX. The U.S. District Court held that a state immunity statute, although effective against a state tort claim, has no force or effect when applied to a suit under the Civil Rights Act. The court held that the supremacy clause of the Constitution prevents a state from immunizing entities or individuals alleged to have violated federal law. The court stated, "Were the rule otherwise, a state legislature would be able to frustrate the objectives of a federal statute." Id. at 1019; citing Wallis v. Spencer, 202 F.3d 1126, 1143-44 (9th Cir. 2000).

[207] 101 Cal.App.4th 177, 123 Cal.Rptr. 637, 167 Ed.Law Rep. 875 (2002).

[208] Id. at 180.

[209] Id. at 180-190.

[210] Id. at 190.

In Sanchez v. San Diego County Office of Education,[211] the Court of Appeal held that the San Diego County Office of Education was immune from liability under Education Code section 35330, when a school district conducts on property owned and operated by the San Diego County Office of Education. The Court of Appeal found that the San Diego County Office of Education was a school district for purposes of field trip immunity.

The San Diego County Office of Education owned and operated a facility known as Camp Fox, an outdoor school facility located at the base of the Palomar Mountains. All of the employees of Camp Fox were employed by the San Diego County Office of Education. Camp Fox provides science-related programs to student attendees under Education Code section 35335.[212]

In February 2006, Virginia Sanchez was a sixth grade student attending McCabe Elementary School in the McCabe Union School District. During the week of February 13, 2006, Virginia attended Camp Fox for a five-day field trip. Attendance on the field trip was voluntary.[213]

On February 16, 2006, while at Camp Fox, Virginia suffered an asthma coronary attack. Camp counselors gave Virginia her asthma inhaler and performed CPR until paramedics arrived. However, by the time the paramedics were able to air lift Virginia to the hospital, Virginia died from natural causes. As a result of Virginia's death, her parents filed an action for damages against the San Diego County Office of Education alleging that it was negligent in not providing adequate medical staffing at Camp Fox. The Court of Appeal held that the San Diego County Office of Education was immune from liability under Education Code section 35330.[214]

In Roe v. Gustine Unified School District,[215] the United States District Court held that while Education Code section 35330 immunizes school districts and their employees from liability under state law on a field trip or excursion but not from federal law. The court stated:

> "A state immunity statute, although effective against a state tort claim, has no force when applied to suits under the Civil Rights Act. The supremacy clause of the Constitution prevents a state from immunizing entities or individuals alleged to have violated federal law. This result follows whether the suit to redress federal rights is brought in the state or federal court. Were the rule otherwise, a state legislature would be able to frustrate the objectives of a federal statute."[216]

The district court held that a football camp at another school is a "field trip" or "excursion" under Section 35330, because the camp was a school-related athletic activity that was voluntary, the student did not receive a grade or credit for attendance, and is consistent with

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[211] 182 Cal.App.4th 1580, 106 Cal.Rptr.3d 750 (2010).
[212] Id. at 1582.
[213] Ibid.
[214] Id. at 1582-1583.
[215] 678 F.Supp.2d 1008, 254 Ed.Law Rep. 774 (E.D. Cal., 2009).
[216] Id. at 1019.

Section 35330's legislative intent to protect school districts from exposure to personal injury claims arising from field trips.[217]

The court held that under California law, if a student is injured while off campus for a school-sponsored activity (which is defined as an activity that requires attendance and for which attendance credit may be given), the student's injury is treated, for liability purposes, in the same manner as an on-campus injury. However, if a student is injured while on a field trip or excursion, the student is deemed to have waived all claims against the district for injury, accident, illness, or death.[218] A field trip is defined as a visit made by students and usually a teacher for purposes of first-hand observation (as to a factory, farm, clinic, museum).[219] An excursion is defined as a journey chiefly for recreation, usually a brief trip.[220]

Q. Liability for Sports Injuries

The California Supreme Court ruled in Kahn v. East Side Union High School District,[221] that a sports instructor or coach may be found to have breached a duty of due care to a student or athlete only if the instructor intentionally injures a student or engages in conduct that is reckless in the sense that it is totally outside the range of the ordinary activity involved in teaching or coaching a sport. The court refused to apply a lower standard of simple negligence holding that the relationship of a sports instructor or coach to a student or athlete is different and that a significant part of the instructor's or coach's role is to challenge or push a student or athlete to advance in his or her skill level and to undertake more difficult tasks. If the court were to apply an ordinary negligence standard, the court ruled that the lower standard would improperly chill or discourage a coach from instructing students and encouraging them to excel in sports. This decision should be beneficial to districts.

In Kahn, the plaintiff was a 14 year old member of the junior varsity swim team. She was participating in a competitive swim meet when she executed a practice dive into a shallow racing pool and broke her neck. The plaintiff alleged that the injury was caused in part by the failure of her coach, a school district employee, to provide her with any instruction in how to safely dive into a shallow racing pool. The student also alleged that the lack of adequate supervision and the coach's insisting that she dive at the swim meet despite her objections and her fear of diving led to her injuries.[222]

The California Supreme Court reviewed the alleged facts in the Kahn case and ruled that the trial court should not have dismissed the case but allowed the case to go to a jury trial to determine whether the coach in the Kahn case met the standard set by the court (i.e., intentionally injured the student or engaged in conduct that was reckless and totally outside the range of ordinary activity involved in the teaching or the coaching of the sport). The court held that the allegations that the coach failed to provide the plaintiff with training in shallow water

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[217] Id. at 1040; citing, Myricks v. Lynwood Unified School District, 74 Cal.App.4th 231, 239, 87 Cal.Rptr.2d 734 (1999); Barnhart v. Cabrillo Community College, 76 Cal.App.4th 818, 90 Cal.Rptr.2d 709 (2002); Ramirez v. Long Beach Unified School District, 105 Cal.App.4th 182, 189, 129 Cal.Rptr.2d 128 (2002).
[218] Id. at 1040.
[219] Id. at 1040-41; citing, Wolfe v. Dublin Unified School District, 56 Cal.App.4th 126, 132-133, 65 Cal.Rptr.2d 280 (1997).
[220] Ibid.
[221] 31 Cal.4th 990, 4 Cal.Rptr.3d 103 (2003).
[222] Id. at 995.

diving, the coach's alleged awareness of plaintiff's intense fear of diving into shallow water, the coach's alleged conduct in lulling plaintiff into a false sense of security by promising her she would not be required to dive at competitions, the coach's alleged last minute breach of this promise in the heat of a competition, and the coach's alleged threat to remove the student from competition or at least from the meet if she refused to dive, could possibly meet the standards set by the court and should be left to a jury to decide.[223]

This decision should be beneficial to districts in most cases. Unless a jury finds a coach intentionally injured a student or engaged in reckless conduct totally outside the range of ordinary activity involved in teaching or coaching the sport, the district and the coach will not be found liable.

R. Liability for Student-on-Student Harassment

In Donovan v. Poway Unified School District,[224] the Court of Appeal held that money damages are available in a private enforcement action under Education Code section 262.3, for a school district's failure to investigate and prevent peer sexual orientation harassment under Education Code section 220. The court also held that the "deliberate indifference" standard for liability should apply.[225]

The plaintiffs were two gay students, a boy and a girl, who endured sexual orientation harassment while attending Poway High School. The harassment included death threats, being spit on, physical violence and threats of physical violence, vandalism, and being subject to anti-gay epithets. Both students left the high school after their junior year, and completed their senior year through an independent study program.[226]

The students sued the school district, the high school principal and assistant principal, and the district superintendent, alleging a failure to adequately respond to peer sexual orientation harassment. At the trial court level, the jury found liability and awarded damages in the amount of $300,000, and costs and attorneys' fees in the amount of $450,000.[227]

On appeal, the court addressed two principal issues: (1) whether money damages are available for sexual orientation harassment under Education Code section 220; and (2) what is the correct standard for liability.[228]

Education Code section 220 prohibits discrimination on specified bases, including sexual orientation. Education Code section 262.3(b) provides that "civil law remedies, including, but not limited to, injunctions, restraining orders, or other remedies or orders may also be available to complainants" who allege discrimination under Section 220.[229]

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[223] Id. at 1018.
[224] 167 Cal.App.4th 567 (2008).
[225] Id. at 579.
[226] Id. at 579-581.
[227] Id. at 580-581.
[228] Id. at 581-582.
[229] Id. at 588-589.

Applying the rules of statutory construction, the court interpreted the term "civil law remedies" as including money damages. The court also reviewed the legislative history of Sections 220 and 262.3, and concluded that the Legislature intended that anti-discrimination in California education law should be interpreted as consistent with Title IX of the federal Education Amendments of 1972.[230] When Education Code sections 220 and 262.3 were enacted, the United States Supreme Court had already decided that a private right of action for money damages existed under Title IX. Interpreting "civil law remedies" to include money damages thus ensures that state law is consistent with the remedies available under Title IX, on which Education Code section 220 is based.

In Donovan, the appellant school district argued that the Title IX "deliberate indifference" standard should apply in a private right of action for damages under Education Code section 220, rather than the more lenient Fair Employment and Housing Act (FEHA) standard.[231]

The court held that the Title IX standard should apply, again reviewing legislative history indicating the Legislature's intent to rely on Title IX to shape anti-discrimination laws in the Education Code. The court concluded that to prevail on a claim under Education Code section 220 for peer sexual orientation harassment, a plaintiff must show: (1) he or she suffered "severe, pervasive, and offensive" harassment, which effectively deprived plaintiff of the right of equal access to educational benefits and opportunity; (2) the school district had "actual knowledge" of that harassment; and (3) the school district acted with "deliberate indifference" in the face of such knowledge.[232]

Although the court concluded that the trial court erred when it applied the FEHA standard of liability (in which no knowledge of the employee's actions is required), the court found that the error was harmless because the elements of the "deliberate indifference" standard were satisfied. With regard to the first and second elements of this standard, there was no dispute between the parties that the plaintiffs had suffered "severe, pervasive, and offensive" harassment, and that the school district had "actual knowledge" of that harassment.[233]

With regard to the third, "deliberate indifference" element of the test, this term means that a defendant's response or lack of response to alleged harassment was clearly unreasonable in light of all the known circumstances, or the initial measures chosen to respond to the harassment were ineffective. The court concluded that there was sufficient evidence for the jury to have concluded that the defendant school district and the two high school administrators were "deliberately indifferent." Although the plaintiffs had filed several written complaints, the administrators failed to follow up with the plaintiffs after an initial meeting. The administration and administrators also failed to investigate certain allegations or follow up with witnesses. The administrators continued to recommend action that had already been proven ineffective at preventing the harassment.[234]

[230] Id. at 581; see, also, 20 U.S.C. § 1681 et seq.
[231] Id. at 604-605; see, also, Government Code section 12900 et seq.
[232] Id. at 588-620.
[233] Ibid.
[234] Ibid.

In summary, the Donovan decision holds that money damages are available under Education Code section 262.3 for harassment prohibited by Section 220. The decision holds that plaintiffs have the heavier burden of proof imposed by the Title IX "deliberate indifference" standard of liability.

The decision is a reminder to districts that they must take allegations of peer harassment seriously, and must conduct thorough investigations, including interviews with relevant witnesses. In addition, districts must take effective action to halt the harassment, up to and including disciplinary action.

S. Liability for AEDs

Education Code section 49417(a) authorizes a public school to solicit and receive non-state funds to acquire and maintain an AED. These funds shall only be used to acquire and maintain[235] an AED and to provide training to school employees regarding the use of an AED.

Education Code section 49417(b) states that except as provided in subdivision (d), if an employee of a school district complies with Section 1714.21 of the Civil Code in rendering emergency care or treatment through the use, attempted use, or nonuse of an AED at the scene of an emergency, the employee shall not be liable for any civil damages resulting from any act or omission in the rendering of the emergency care or treatment. Section 49417(c) states that except as provided in subdivision (d), if a public school or school district complies with the requirements of Health and Safety Code section 1797.196, the public school or school district shall be covered by Section 1714.21 of the Civil Code and shall not be liable for any civil damages resulting from any act or omission in the rendering of the emergency care or treatment. Section 49417(d) states that subdivisions (b) and (c) do not apply in the case of personal injury or wrongful death that results from gross negligence or willful or wanton misconduct on the part of the person who uses, attempts to use, or maliciously fails to use an AED to render emergency care or treatment. Section 49417(e) states that Section 49417 does not alter the requirements of Health and Safety Code section 1797.196.

Health and Safety Code section 1797.196(b) states that any person or entity that acquires an AED is not liable for any civil damages resulting from any acts or omissions in the rendering of emergency care under Civil Code section 1714.21 if that person or entity does all of the following:

1. Complies with all regulations governing the placement of an AED.

2. Notify an agent of the local EMS agency of the existence, location and type of AED acquired.

3. Ensures all of the following:

[235] Districts may contract with private companies to maintain their AEDs. Private funds that are raised may be used for this purpose.

a. The AED is maintained and tested according to the operation and maintenance guidelines set forth by the manufacturer.

b. Ensure that the AED is tested at least biannually and after each use.

c. Ensure that an inspection is made of all AEDs on the premises at least every 90 days.

d. Ensure that records of the maintenance and testing are maintained.

4. When an AED is placed in a public or private K-12 school, the principal shall ensure that the school administrators and staff receive information annually that describes sudden cardiac arrest, the school's emergency response plan, the proper use of an AED, and the location of all AEDs on the school campus.

Civil Code section 1714.21(b) states that any person who, in good faith and not for compensation, renders emergency care or treatment by use of an AED at the scene of an emergency is not liable for any civil damages resulting from any acts or omissions in rendering the emergency care.

Civil Code section 1714.21(d) states that a person or entity that requires an AED for emergency use pursuant to Section 1714.21 is not liable for any civil damages resulting from any act or omission in the rendering of emergency care if that person or entity has complied with the provisions of Health and Safety Code section 1797.196(b). A physician and surgeon or other health care professional that is involved in the selection, placement, or installation of an AED pursuant to Health and Safety Code section 1797.196 is not liable for civil damages resulting from acts or omissions in the rendering of emergency care by use of an AED. The protections specified in this section do not apply in the case of personal injury or wrongful death that results from the gross negligence or willful or wanton misconduct of the person who renders emergency care or treatment by the use of an AED. Section 1714.21 does not relieve a manufacturer, designer, developer, distributor, installer, or supplier of an AED of any liability under any applicable statue or rule of law.

Health and Safety Code section 1797.196(c) states that when an AED is placed in a public or private K-12 school, the principal shall ensure that the school administrators and staff annually receive information that describes sudden cardiac arrest, the school's emergency response plan, and the proper use of an AED. The principal shall also ensure the instructions, in no less than 14-point type, on how to use the AED are posted next to every AED. The principal shall, at least annually, notify school employees as to the location of all AED units on the campus. This section does not prohibit a school employee or other person from rendering aid with an AED. A manufacturer or retailer supplying an AED shall provide to the acquirer of the

AED all information governing the use, installation, operation, training, and maintenance of the AED.

In summary, if school districts comply with all of the requirements governing the placement of an AED at school that are listed above, school districts will not be liable for any act or omission resulting in personal injury or wrongful death, except in cases of gross negligence or willful or wanton misconduct on the part of the person who uses, attempts to use or maliciously fails to use an AED to render emergency care or treatment.

T. Assumption of the Risk

In Aaris v. Las Virgenes Unified School District,[236] the Court of Appeal held that the common law doctrine of primary assumption of the risk barred a cheerleader's action against a school district. The court held that cheerleading is a sport with numerous gymnastic routines which are inherently dangerous and that when students voluntarily choose to participate in hazardous sports activities they assume the risk of injury.[237] The court held that in a sports setting the scope of the defendant's duty is a legal question which depends on the nature of the activity.[238] The instructor is not an insurer of the student's safety and will not be held liable unless the instructor gave specific directions which increased the risk of harm to the student over and above that inherent in the sport.[239] Where there is no evidence that the instructor increased the risk of harm, the student's cause of action will be barred.[240]

The court in Aaris went on to state that Education Code section 44807 which requires teachers to supervise student activities does not preclude a defense of assumption of the risk. The court held that Section 44807 does not impose a greater duty to supervise and that asking students to try activities which, with hindsight, turn out to be beyond their abilities, does not create liability. The court held that the gymnastic activity itself created the risk of harm and to extend liability to situations where instructors challenge their students would be detrimental to the learning process and the learning of new skills.[241]

In Patterson v. Sacramento City Unified School District,[242] the Court of Appeal held that a school district could be held liable for injuries to an adult student under the theory of negligent supervision and that the doctrine of assumption of the risk did not apply. The plaintiff was injured while participating in a truck driver training course offered by the Sacramento City Unified School District.

In 2003, the plaintiff enrolled in the district's California Heavy-Duty Truck Driving Program. The truck driving course provided students with the training and hands-on experience

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[236] 64 Cal.App.4th 1112, 75 Cal.Rptr.2d 801 (1998).
[237] Id. at 803.
[238] Id. at 803.
[239] Ibid.
[240] Id. at 804.
[241] Id. at 804-805. See, also, Lilley v. Elk Grove Unified School District, 68 Cal.App.4th 939, 80 Cal.Rptr.2d 638 (1998) (doctrine of assumption of the risk applied to injury suffered by student while participating in demonstration of common wrestling technique with instructor).
[242] 155 Cal.App.4th 821, 66 Cal.Rptr.3d 337 (2007).

they needed to become professional truck drivers. The district assigned a credentialed instructor to teach each segment of the course.[243]

On May 9, 2003, during the first week of the hands-on segment of the training course, the plaintiff and several other students participated in a community service project which involved picking up bleachers from several locations, loading them on to a flatbed trailer attached to a tractor, and transporting them to the site of the rugby tournament. The classroom curriculum covered freight loading in a basic sense, but did not cover the specifics of loading flatbed trucks or trailers. According to the instructors, the primary goal of the community service assignment was to teach students how to load the trailer safely. The instructors typically critiqued the students after they loaded the cargo.[244]

The instructor was present when the students picked up aluminum bleachers at the first location and loaded them on the trailer without incident. The instructor told the students to pick up the bleachers at the second location on their own. The instructor did not know how much prior training or experience the students had in loading trailers.[245]

The bleachers at the second location were made of heavy wood. The instructor had not seen the wooden bleachers before assigning the students to pick them up. Because there were no instructors present, and none of the students were considered to be in charge, the unsupervised students decided as a group how to load the wooden bleachers. It took six students to carry each section of wooden bleachers. The plaintiff and another student stood on the trailer bed. The plaintiff had never climbed on the flatbed trailer before he and other students arrived at the second pick up location. The plaintiff and one other student pulled on the wooden bleachers while the remaining students pushed the bleachers from below. The plaintiff cautioned the students who were pushing to slow down when he recognized that he was running out of room at the edge of the trailer but the remaining students pushed the bleachers and the plaintiff fell backward off the trailer and was injured.[246]

The plaintiff filed a lawsuit alleging that the district had a duty to supervise, train, educate, instruct, and oversee the conduct of its truck driver training students on proper techniques for loading and unloading flatbed trucks and trailers and to exercise ordinary care to protect students from the type of injury that the plaintiff suffered. The district maintained that under the doctrine of assumption of risk, it owed the plaintiff no duty of care.[247]

The Court of Appeal concluded that the plaintiff was not engaged in an inherently dangerous activity and that therefore the doctrine of assumption of risk did not apply. The Court of Appeal concluded that the matter should be reversed and remanded to the lower court for a determination on the facts.[248]

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[243] Id. at 825.
[244] Id. at 825.
[245] Id. at 825.
[246] Id. at 825-26.
[247] Id. at 824.
[248] Id. at 842-43.

U. Duty to Third Party Nonstudents

In Hoff v. Vacaville Unified School District,[249] the California Supreme Court held that neither a school district nor its employees owe a legal duty to a third party pedestrian struck by a student motorist leaving a high school parking lot. In Hoff, the plaintiff suffered serious injuries when a student exiting a high school parking lot jumped the curb with his car and struck Hoff on the sidewalk across the street. The 16 year old student at Vacaville High School lost control of his car as he exited the school's parking lot. In exiting the parking lot, the student floored the accelerator, "fishtailed," jumped the curb, and hit Hoff who was walking on the sidewalk across the street. The student had been driving for six months, had no history of misbehavior, and obeyed school officials.[250]

The court noted that while under case law, school officials have a duty to supervise students, the purpose of that statutory duty was to protect students, not third party nonstudents. The court concluded that school officials who lack specific knowledge about the dangerous propensities of a particular student have no duty to off campus nonstudents. Consequently, the court affirmed the trial court's dismissal of Hoff's lawsuit.[251]

V. Liability for Independent Contractors

In Camargo v. Tjaarda Dairy,[252] held that an employee of an independent contractor may not sue the hirer of the contractor on a negligent hiring theory.

Alberto Camargo was killed when his tractor rolled over as he was driving over a large mound of manure in a corral belonging to Tjaarda Dairy. Camargo was an employee of Golden Cal Trucking and Golden Cal Trucking was an independent contractor Tjaarda Dairy had hired to scrape the manure out of its corrals and to haul it away in exchange for the right to purchase the manure at a discount. Camargo's wife and five children sued Tjaarda Diary on the theory, among others, that they were negligent in hiring Golden Cal Trucking, because Golden Cal Trucking failed to determine whether Camargo was qualified to operate the tractor safely.[253]

The trial court granted defendant's motion for summary judgment with regard to the cause of action for negligent hiring, relying on the California Supreme Court's decision in Toland v. Sunland Housing Group.[254] On appeal, the California Supreme Court held that the hirer of the independent contractor should not have to pay for injuries caused by the contractor's negligent performance, because the workers' compensation system already covers those injuries. The court reasoned that the rule of workers' compensation exclusivity, which shields an independent contractor who pays for workers' compensation coverage for on-the-job employee injuries, should equally protect the property owner who, in hiring the contractor, is indirectly paying for the cost of such coverage, which the contractor most likely has calculated into the contract price. The court pointed out that to permit such recovery would give these employees something that is denied to other workers, the right to recover tort damages for industrial injuries

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[249] 19 Cal.4th 925, 80 Cal.Rptr.2d 811 (1998).
[250] Id. at 814.
[251] Id. at 815-821.
[252] 25 Cal.4th 1235 (2001).
[253] Id. at 1238.
[254] 18 Cal.4th 253 (1998).

caused by their employer's failure to provide a safe working environment. In effect, this would exempt a single class of employees, those who work for independent contractors, from the legally mandated limits of workers' compensation. In addition, the court held that to impose vicarious liability for tort damages on a person who hired an independent contractor for specialized work would penalize those individuals who hire experts to perform dangerous work, rather than assigning such activity to their own inexperienced employees.[255]

The decision in Camargo applies to both public and private employers who hire independent contractors to perform specialized work. Districts should continue to ensure that when hiring independent contractors that the independent contractors provide evidence of workers' compensation insurance coverage for their employees, so that the employees of the contractor will be barred from suing the district due to the negligence of the independent contractor.

W. Release of Liability

The courts have held that properly drafted release forms that inform the parent appropriately of the impact of signing the release form are valid and can release a school district and school district employees from liability for injuries to a student. In Hohe v. San Diego Unified School District,[256] the Court of Appeal upheld the validity of release forms signed by parents. The court held that if release forms are properly drafted and signed by a parent they can validly release a school district and its employees from liability for injuries to a student.[257] The Court of Appeal stated:

> "The more troublesome issue before us is the scope and effect of the release forms. Hohe contends the executed forms do not clearly and unequivocally release School District and PTSA from liability for negligence. . . .
>
> "A valid release must be simple enough for a layman to understand and additionally give notice of its import."[258]

The Court of Appeal ruled that the scope of the waiver language in the release was ambiguous and remanded the issue of the sufficiency of the language to the trial court to make a factual determination (e.g., based on testimony of the intent of the parties) on the issue of sufficiency.[259]

In Aaris v. Las Virgenes Unified School District,[260] the Court of Appeal found the language of the release signed by the parent of the student sufficient to release the school district and its employees from liability. The release stated in part:

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[255] 25 Cal.4th 1235, 1241-1245 (2001).
[256] 224 Cal.App.3d 1559, 274 Cal.Rptr. 647 (1990).
[257] Id. at 649-650.
[258] Id. at 650.
[259] Id. at 651-652.
[260] 64 Cal.App.4th 1112, 75 Cal.Rptr.2d 801 (1998).

> "I, the undersigned, hereby release and discharge the Las Virgenes Unified School District, officers, employees, agents, servants and volunteers . . . from all liability arising out of or in connection with the above described activity or all liabilities associated with any and all claims related to such activity that may be filed on behalf of or for the above named minor. . . ."[261]

The court dismissed the student's lawsuit based on the doctrine of assumption of the risk and the signing of the release.[262]

X. Immunity from Liability

In Ramirez v. Long Beach Unified School District,[263] held that the Long Beach Unified School District was not liable for the death of a student. The Court of Appeal held that the school district was immune from liability under Education Code section 44808.

In August 2000, Thomas was a student at Reid High School in the Long Beach Unified School District. Thomas was 15 years of age and a high-achieving student from a low income family. Thomas' mother filed a lawsuit against the school district claiming the school district was liable for the death of her son.[264]

The plaintiff's complaint alleged that Thomas was advised by school district staff and administration to apply to participate in the program at R.M. Pyles Camp, located in Sequoia National Forest. The camp was a non-profit organization providing a program for low income, at-risk youths. It was designed to provide students with leadership skills.[265]

The superintendent of the school district was a board member of the camp. The complaint alleged that the school district, through its administrators and faculty, identified potential candidates for the camp, advertised, recruited, encouraged, and convinced students and parents to participate in the program. On behalf of the camp, allegedly the school district provided participants and their parents with applications and other documentation such as medical forms. The school district opened its campuses to host meetings with parents and the camp. The school district personnel who were present at such meetings allegedly promoted the program and made statements about its safety.[266]

School district staff and administrators allegedly assisted Thomas in applying for the camp. It was alleged that school staff recommended to Thomas that the camp would be beneficial to him, that school officials presented Thomas with a pamphlet and video tape about the camp, and represented that the camp was fun, safe and a maturing experience. Thomas' mother also alleged that the school district and the camp were partners in a joint venture in the camp activities.[267]

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[261] Id. at 805.
[262] Ibid.
[263] 105 Cal.App.4th 182, 129 Cal.Rptr.2d 128 (2002).
[264] Id. at 185.
[265] Id. at 185-186.
[266] Ibid.
[267] Ibid.

On August 3, 2000, the school district hosted the camp on a school district campus. At the event, Thomas' mother inquired about the safety of the program. Camp representatives described its activities, and camp personnel allegedly stated that there would be more than one trained adult supervising the children. School district personnel were present when camp officials told plaintiff that the camp was safe. School district officials allegedly told Thomas' mother that the camp was safe, the counselors were trained, that there would be more than one counselor supervising the children, and that Thomas' mother should not worry.[268]

The complaint alleged that Thomas went to the camp and participated in a backpacking trip by a single camp counselor with no direct supervision or assistance. The five day backpacking trip took place in rugged terrain in a remote part of the Sequoia National Forest, 18 miles from the nearest town. For emergencies, the counselor carried only a walkie-talkie. The complaint alleged that counselors were free to encourage swimming, even though there were no lifejackets, swimming gear, lifeguard, or life saving equipment and the swim would occur in high-altitude mountain lakes. The complaint alleged that the counselors were not trained in life saving techniques or as lifeguards, and that the camp did not test the swimming abilities of the youths.[269]

The complaint alleged that on August 19, 2000, the school district provided transportation for Thomas from his home to Reid High School so he could catch a bus to the camp and that on August 23, 2000, during the backpacking part of the camp program, Thomas and seven other boys were encouraged to swim in Little Kern Lake without lifejackets or other emergency equipment. The complaint alleged that there was only one counselor present and that Thomas drowned due to the lack of safety procedures at the camp.[270]

Based on these allegations which the Superior Court and Court of Appeal, both the superior court and the Court of Appeal dismissed the lawsuit against the Long Beach Unified School District.[271]

The Court of Appeal held that under Education Code section 44808, school districts are not responsible for the safety of pupils when the pupils are not on school property unless the school district has undertaken to provide transportation for such pupil, has undertaken a school sponsored activity off the school premises, has otherwise assumed such responsibility or liability, or has failed to exercise reasonable care under the circumstances. In the event of a specific undertaking, Education Code section 44808 states that the District shall be liable or responsible for the conduct or the safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of the school district.[272]

The Court of Appeal held that Section 44808 grants the school district immunity unless the student was or should have been directly supervised by a school employee during the activity. The Court of Appeal held that the activity was not a school sponsored activity since it was not an activity that required attendance, and for which attendance credit was given. In addition, the Court of Appeal held that the school district did not furnish transportation to and

[268] Ibid.
[269] Id. at 186-187.
[270] Ibid.
[271] Ibid.
[272] Id. at 188-189.

from the school premises to the camp and that the school district did not otherwise assume responsibility or liability for at the camp. The Court of Appeal held that insufficient facts were alleged that while at the camp Thomas was or should have been or was expected to have been under the immediate and direct supervision of school district employees.[273]

The Court of Appeal rejected the plaintiff's argument that the school district assumed responsibility for Thomas' participation in the camp by agreeing to identify, recruit and advertise the camp to disadvantaged, at-risk youth, and by promoting and encouraging student participation in the camp program. The Court of Appeal ruled that Thomas was involved in an activity not undertaken by the school district and that the school district did not supervise the activities of the camp. The Court of Appeal held that school districts are not responsible for the activities of organizations such as the scouts and the camp unless they are supervised or controlled by the school district. Therefore, the Court of Appeal ruled that the school district was immune from liability under Section 44808.[274]

The decision in Ramirez should be helpful to districts in situations where students participate in non-school sponsored events. However, districts should clearly inform parents when activities are not school sponsored, even if the district encourages students to participate.

Y. Child Abuse Reporting – Immunity from Liability

In Cuff v. Grossmont Union High School District,[275] the Court of Appeal held that a school counselor was not immune from liability under the Child Abuse and Neglect Reporting Act[276] for making an alleged improper disclosure of known or suspected child abuse to an unauthorized person. In Cuff, the school counselor disclosed the contents of her child abuse report to the father of the alleged victims. As discussed below, the unauthorized disclosure of a child abuse report could expose a school district and a school district employee to potential liability.[277]

In addition, the Court of Appeal ruled that child abuse reports are not pupil records. Therefore, child abuse reports should be kept in a separate confidential file.[278]

Tina Cuff (mother) and James Godfrey (father) had two sons, T.G. and D.G. At the time of the incident, T.G. was 13 years old and D.G. was 16 years old.[279]

Mother and Father began divorce proceedings in 1997. At that time, Mother was awarded sole legal and physical custody of their sons. In 2001, a few years after the divorce, Mother made arrangements with Father for him to have regular visitation with the children.

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[273] Ibid.
[274] Id. at 189-193.
[275] 221 Cal.App.4th 582, 164 Cal.Rptr.3d 487, 298 Ed.Law Rep. 964 (2013).
[276] Penal Code section 11165 et seq.
[277] 221 Cal.App.4th 582, 585 (2013).
[278] Id. at 592.
[279] Id. at 585.

At some point, Mother asked Father to move into her home so that he could assist her in taking care of the boys while she was working. Father moved in on a permanent basis as of August 2009.[280]

On October 23, 2009, while Mother was at work, Father went with the boys to their school, El Capitan High School. The boys met with the school counselor outside of Father's presence, and reported to the school counselor that they were being verbally and physically abused by Mother.[281]

In her role as a school counselor, the school counselor is a "mandated reporter," as defined in Penal Code section 11165.7(a), which means she is required to report suspected child abuse and neglect to law enforcement and child welfare agencies. The school counselor prepared a suspected child abuse report which she faxed to the Child Welfare Services that day. The school counselor also made a telephone call to Child Welfare Services at approximately 10:00 a.m. that day to register the report. Child Welfare Services instructed the school counselor to contact a law enforcement officer who could take the boys into protective custody.[282]

The school counselor contacted the School Resource Officer at the high school. The School Resource Officer declined to take the children into custody and instead assisted the school counselor in contacting other governmental agencies for directions as to how to proceed. According to the school counselor, someone suggested that she give a copy of the suspected child abuse report to the father and allow the father to take the boys to the Sheriff's Department with the suspected child abuse report that the school counselor had prepared.[283]

The school counselor made a copy of the suspected child abuse report and gave it to Father. She told Father that he should take the suspected child abuse report to a law enforcement agency so that authorities could take the boys into custody.[284]

Instead of taking the boys to a law enforcement agency, the Father took them to the East County Courthouse where he intended to file for a protective order against Mother and seek custody of the boys. Father completed an application for order and supporting declaration in which he referred to the suspected child abuse report. Father filed the application on October 27, 2009, and included the suspected child abuse report as an exhibit.[285]

After a hearing, the trial court ordered that Mother would retain sole legal and physical custody of the boys.[286]

Mother filed a government tort claim against the school counselor and Grossmont Union High School District on April 19, 2010. The claim was rejected on April 20, 2010.[287]

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[280] Ibid.
[281] Id. at 585-86.
[282] Id. at 586.
[283] Ibid.
[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Id. at 587.

On January 13, 2011, Mother filed a complaint against the school counselor and Grossmont Union High School District alleging invasion of privacy based on a violation of Penal Code section 11165 et seq. On December 2, 2011, the school district filed a motion for summary judgment. On May 25, 2012, the trial court entered judgment in favor of the school counselor and the school district.[288]

Mother filed a timely notice of appeal. On appeal, Mother argued that the trial court erred in granting summary judgment in favor of the school counselor and Grossmont Union High School District by determining that the defendants were immune from liability.[289]

The Court of Appeal held that Grossmont Union High School District could be liable for breach of a mandatory duty, pursuant to Government Code section 815.6, or derivatively liable for the negligent acts or omissions of its employee, pursuant to Government Code section 815.2.[290]

Government Code section 815.6 states:

> "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

Government Code section 815.2 states:

> "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.
>
> "(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

The Court of Appeal held that under the Child Abuse and Neglect Reporting Act,[291] mandated reporters are required to report known or reasonably suspected child abuse or neglect. Penal Code section 11166(a) requires a mandated reporter to make a report to a child welfare agency or law enforcement agency, which includes a police department, sheriff's department, county probation department, or county welfare department. Penal Code section 11167.5(a) states that reports of known or suspected child abuse shall be confidential and may only be

[288] Ibid.
[289] Id. at 587-88.
[290] Id. at 588.
[291] Penal Code section 11165 et seq.

disclosed as authorized in Penal Code section 11167.5(b). Section 11167.5 provides a criminal penalty for any violation of the confidentiality requirements.

Penal Code section 11172(a) states that no mandated reporter shall be civilly or criminally liable for any report required or authorized by this article, and this immunity shall apply even if the mandated reporter acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of his or her employment. The Court of Appeal held that Section 11172 provides limited immunity to a mandated reporter for the act of making the actual report of known or suspected child abuse. The court held that a mandated reporter may not be sued for making a required or authorized report to an authorized agency. The court stated, "However, this provision clearly does not immunize a mandatory reporter's conduct that does not comply with the strict confidentiality provisions of the statute."[292]

The Court of Appeal rejected the defendants' argument that the immunity provisions of Penal Code section 11172(a) were broad enough to immunize the school counselor and the school district for disclosing the suspected child abuse report in violation of Section 11167.5 to an unauthorized person (i.e., the father). The court also rejected the defendants' argument that the school counselor was authorized to release the report to the Father as a student record pursuant to Education Code section 49076. The court rejected the argument that a suspected child abuse report is a pupil record. The court stated:

> "Further, given the extreme confidentiality that SCARs [Suspected Child Abuse Report] are accorded under Section 11167.5, and given the fact that their disclosure outside the limits provided in that section are subject to criminal sanctions, in the absence of some direct statutory authority provided that a SCAR is a 'pupil record,' we conclude that SCARs are not 'pupil records,' as that term is defined in the Education Code. If a SCAR was or deemed to be a pupil record, this would allow access to the SCAR by persons who are not identified in Section 11167.5 as among those to whom disclosure of a SCAR is permitted. Any disclosure of a SCAR to persons or entities not identified in Section 11167.5 would be a violation of that provision. Thus, to interpret the Education Code as including a SCAR as a 'pupil record' would undermine the specific confidentiality provisions of CANRA [Child Abuse and Neglect Reporting Act]. We decline to interpret the Education Code in this manner. We conclude that Saunders' [the school counselor] release of a copy of the SCAR to Godfrey [Father], allegedly in response to an 'emergency' is not immunized pursuant to the Education Code provision that authorizes the release of certain information from 'pupil records' in an emergency situation."[293]

[292] Id. at 591.
[293] Id. at 593.

In addition, the Court of Appeal held that Government Code section 820.2, which states that a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him or her, whether or not such discretion would be abused does not apply. The court held that a mandatory reporter, such as a school counselor, does not have the discretion to disclose the suspected child abuse report to anyone other than those entities identified in Section 11167.5(b) (e.g., law enforcement or child welfare agencies). Penal Code section 11167.5(b) strictly limits to whom the mandatory reporter may provide the suspected child abuse report and expressly prohibits a mandatory reporter from disclosing the suspected child abuse report to the father who is not one of the individuals or entities identified in Penal Code section 11167.5.[294]

The Court of Appeal reversed the judgment entered in favor of the school counselor and the school district. The holding in this case highlights the importance of training mandated reporters and updating mandated reporters on the requirements of the Child Abuse and Neglect Reporting Act. Mandated reporters must be vigilant in disclosing child abuse reports only to those agencies authorized to receive such reports.

The unauthorized disclosure of child abuse reports will strip mandated reporters of their statutory immunity and expose the school district and employee to potential liability. In addition, the Court of Appeal ruled that child abuse reports are not pupil records. Therefore, child abuse reports should be kept in a separate confidential file.[295]

Z. Settlement Agreements – Sexual Offenses

On September 30, 2016, Governor Brown signed Assembly Bill 1682,[296] amending Code of Civil Procedure section 1002 effective January 1, 2017.

Code of Civil Procedure section 1002(a) states notwithstanding any other provision of law, a provision within a settlement agreement that prevents the disclosure of factual information related to the action is prohibited in any civil action, the factual foundation for which establishes a cause of action for civil damages for any of the following:

1. An act that may be prosecuted as a felony sex offense.

2. An act of childhood sexual abuse.

3. An act of sexual exploitation of a minor or conduct prohibited with respect to a minor.

4. An act of sexual assault.

Code of Civil Procedure section 1002(b) prohibits a court from entering a stipulation or an order that restricts the disclosure of information in violation of Code of Civil Procedure section 1002(a). Section 1002(c) states that the disclosure of any medical information or

[294] Id. at 594.
[295] Id. at 592.
[296] Stats. 2016, ch. 876.

personal identifying information regarding the victim of the offense, or of any information reviewing the nature of the relationship between the victim and the defendant, may not be disclosed. Section 1002(d) states that any settlement agreement that prevents the disclosure of factual information prohibited by Section 1002(a) that is entered into on or after January 1, 2017, is void as a matter of law and against public policy.

Code of Civil Procedure section 1002(e) states that an attorney's failure to comply with the requirements of Section 1002 by demanding that a provision be included in a settlement agreement that prevents the disclosure of factual information as a condition of settlement, or advising a client to sign an agreement that includes such a provision, may be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such case brought to its attention.

AA. Federal Limitations on Liability

Congress passed limitations on the liability of school district officers and employees when it enacted the No Child Left Behind Act (NCLB).[297] The NCLB applies not only to teachers but to all officers (i.e., school board members) and employees of the school district. The Act does not apply to school districts as an entity. Section 6732[298] states that the purpose of the Act is to provide teachers, principals and other school professionals the tools they need to undertake reasonable actions to maintain order, discipline and an appropriate educational environment. The Act applies to states that receive Title I funds and is a condition of the state receiving Title I funds.

Section 6736[299] of the Act limits the liability of school officers and employees for acts or omissions on behalf of the school if:

1. The officer or employee was acting within the scope of employment or responsibilities to a school or governmental entity;

2. The actions of the officer or employee were carried out in conformity with federal, state and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel or suspend a student or maintain order or control in the classroom or school;

3. The officer or employee was properly licensed, certified or authorized by the appropriate authorities for the activities or practice involved in the state in which the harm occurred, where the activities were, or practice was undertaken within the scope of the officer or employee's responsibility, if appropriate or required;

[297] 20 U.S.C. § 6301 et seq.
[298] 20 U.S.C. § 6732.
[299] 20 U.S.C. § 6736.

4. The harm was not caused by willful or criminal misconduct, gross negligence, recklessness misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the officer or employee; and

5. The harm was not caused by the officer or employee operating a motor vehicle, vessel, aircraft or other vehicle for which the state requires the operator or owner of the vehicle, craft or vessel to possess an operator's license or maintain insurance.

Section 6735[300] indicates that the Act preempts the laws of any state to the extent such laws are inconsistent with the Act but does not preempt any state law that provides additional protection from liability for school officers and employees. The Act does not apply to any civil action in a state if the state legislature enacts a state statute which cites the authority of Section 6735, declares the election of the state legislature that Section 6735 shall not apply and containing no other provisions. Section 6736, subdivision (b),[301] states that a state law, despite the preemption of the Act, may:

1. Require a school or governmental entity to adhere to risk management procedures including mandatory training of teachers;

2. Make the school or governmental entity liable for the acts or omissions of its officers or employees to the same extent as an employer is liable for the acts or omissions of its employees;

3. Limit liability if the civil action was brought by an officer of a state or local government pursuant to state or local law.

Section 6736, subdivision (c),[302] states that punitive damages may not be awarded against a school officer or an employee in an action brought for harm based on the act or omission of an officer or employee acting within the scope of the officer or employee's employment or responsibilities to a school or governmental agency unless the plaintiff establishes by clear and convincing evidence that the harm was proximately caused by an act or omission of such officer or employee that constitutes willful or criminal conduct or a conscious flagrant indifference to the rights or safety of the individual harmed. Section 6736, subdivision (c), authorizes other federal and state laws to further limit the award of punitive damages.

Section 6736, subdivision (d),[303] states that the limitations on the liability of a school officer or employee shall not apply to any misconduct that:

[300] 20 U.S.C. § 6735.
[301] 20 U.S.C. § 6736(b).
[302] 20 U.S.C. § 6736(c).
[303] 20 U.S.C. § 6736(d).

1. Constitutes a crime of violence or act of international terrorism for which the defendant has been convicted in a court;

2. Involves a sexual offense as defined by applicable state law for which the defendant has been convicted in any court;

3. Involves misconduct for which the defendant has been found to have violated a federal or state civil rights law; or

4. Where the defendant was under the influence of intoxicating alcohol or any drug at the time of misconduct as determined pursuant to applicable state law.

In addition, Section 6736, subdivision (d),[304] states that the limitations on liability under the Act shall not apply to misconduct during background investigations or during other actions involved in the hiring of a school officer or employee. Section 6736, subdivision (e),[305] states that nothing in the Act shall be construed to affect any civil action brought by any school or governmental entity against any school officer or employee of such school or to affect any state or local law, rule or regulation or policy pertaining to the use of corporal punishment.

Section 6737[306] limits the amount of liability of each defendant who is a school officer employee to the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant for harm to the plaintiff. Section 2367 requires the court to render a separate judgment against each defendant and requires the trier of fact (i.e., a jury in a jury trial or the judge in a court trial) to determine the percentage of responsibility of each person responsible for the plaintiff's harm whether or not such person is a party to the action. Under present law, and individual defendant can be required to pay the entire judgment and then seek reimbursement from the other defendant. Section 6737 will require the plaintiff to seek recovery from each defendant in portion to their percentage of responsibility. However, in most cases, under state law, the public agency will be required to defend all school officers and employees and pay the judgment.[307]

Section 6738[308] states that the Act shall apply to any claim for harm caused by an act or omission of a school officer or employee if that claim is filed on or after April 8, 2002, without regard to whether the harm that is the subject of the claim or the conduct that caused the harm occurred before April 8, 2002.

In summary, these NCLB provisions limit the individual liability of school board members and employees. The provisions of the Act do not, however, limit the liability of the school district itself.

[304] 20 U.S.C. § 6736(d).
[305] 20 U.S.C. § 6736(e).
[306] 20 U.S.C. § 6737.
[307] See, Government Code section 995 et seq.
[308] 20 U.S.C. § 6738.

THE ELEVENTH AMENDMENT, SOVEREIGN IMMUNITY AND ITS IMPACT ON SCHOOL DISTRICTS

A. The Seminole Tribe Decision

A quiet revolution in sovereign immunity jurisprudence is changing the relationship between states and the federal government. That revolution appears to be increasing the sovereign rights of the states and decreasing power of the federal government, particularly the power of Congress over the states. This historic shift has profound implications for school districts as well as state agencies since a number of appellate courts have held that school districts are instrumentalities of the state under state law, and therefore, entitled to invoke the defense of sovereign immunity.

As a result, school attorneys are scrambling to understand this complex and esoteric aspect of constitutional law which is currently undergoing revolutionary change due to recent United States Supreme Court decisions. School attorneys are attempting to understand how the one obscure doctrine of sovereign immunity applies to school districts and under what circumstances the doctrine may be raised as a litigation defense.

This quiet revolution began with the Supreme Court's 1996 decision in Seminole Tribe of Florida v. Florida.[309] In Seminole Tribe, the Supreme Court held that the Eleventh Amendment presupposes that each state is a sovereign entity in our federal system and that it is inherent in the nature of sovereignty that a state would not be subject to the suit of an individual without the states' consent.

The text of the Eleventh Amendment states:

> "The Judicial power of the United States shall not be construed to extend to any suit and law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects or any Foreign State."

The court in Seminole Tribe stated that the doctrine of sovereign immunity is not limited by the terms of the Eleventh Amendment and that Eleventh Amendment immunity generally prevents an unwilling state from being sued in federal or state court. The Eleventh Amendments protection also may reach to state officials and state agencies and to suits brought against the state by citizens of that same state.[310]

The court in Seminole Tribe established a two part test to determine whether Congress has abrogated the States sovereign immunity:

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[309] 517 U.S. 44, 116 S.Ct. 1114 (1996). On April 17, 2000, the U.S. Supreme Court granted cert. in University of Alabama v. Garrett, 121 S.Ct. 955 (2001). The Court of Appeals in Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999), held that states are not immune from suits by state employees under the American with Disabilities Act and the Rehabilitation Act of 1973.

[310] See, Hans v. Louisiana, 134 U.S.1, 15, 10 S.Ct. 504 (1890); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267, 117 S.Ct. 2028 (1997).

1. Whether Congress unequivocally expressed its intent to abrogate the States sovereign immunity.

2. Whether Congress acted pursuant to a valid exercise of power in abrogating the States immunity.[311]

The Court in Seminole Tribe went on to state that the power to abrogate must be derived from a constitutional provision granting Congress the power to abrogate. The court in Seminole Tribe identified Section 5 of the Fourteenth Amendment as a constitutional provision giving Congress the power to abrogate the sovereign immunity of the States and disapproved other constitutional provisions as possible sources if the power to abrogate.[312] The court stated:

> "Even when the Constitution rests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents Congressional authorization of suits of private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[313]

In several cases, the appellate courts have held that the doctrine of sovereign immunity applies to school districts, community college districts and county offices of education. This article will explore the extent to which the doctrine of sovereign immunity and Eleventh Amendment immunity applies to school districts and the impact it may have on lawsuits brought by individual citizens against and school districts under various federal statutes.

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[311] Id. at 1123.
[312] Id. at 1124-25.
[313] Id. at 1131-32. The dissenting opinions of Justices Stevens and Souter at 1133-1186, vigorously disagree with the premise and historical analysis of the majority. In their view, the majority have misinterpreted the historical background of the doctrine of sovereign immunity and have expanded the meaning of the Eleventh Amendment. In their view, the issue of state sovereign immunity was unsettled at the time of the adoption of the Constitution, the decision in Chisholm v. Georgia, 2 Dall. 419 (1793) was not contrary to the settled understanding of the time, and the passage of the Eleventh Amendment was designed to simply overturn the holding in Chisholm v. Georgia and prevent citizens of other states from suing a State in federal court. In their view, Congress has the authority under Article I of the Constitution to create a private federal cause of action against a State for violation of a federal right. Justice Souter argued that the majority took, at most, what was a common law doctrine of sovereign immunity, and elevated the status of this unsettled common law doctrine to a constitutional doctrine which does not have a proper written foundation. In Justice Souters' view, neither the text of the Eleventh Amendment, judicial precedent or historical records support the majority's view of the constitutional doctrine of state sovereign immunity which Congress cannot abrogate. Justice Souter opined that judicial precedent cited by the majority was dicta and that Hans v. Louisiana, 134 U.S. 1, 15 10 S.Ct. 504 (1890), which first discussed a preexisting principle of sovereign immunity was wrongly decided. Justice Souter stated:

> History confirms the wisdom of Madison's abhorrence of constitutionalizing common-law rules to place them beyond the reach of congressional amendment. The Framers feared judicial power over substantive policy and ossification of law that would result from transforming common law into constitutional law . . .

I know of only one other occasion in which the Court has spoken of extending its reach so far as to declare that the plain text of the Constitution is subordinate to judicially discoverable principles untethered to any written provision. Id. at 1176-77.

B. Application of Doctrine of Sovereign Immunity oo California School Districts

In Belanger v. Madera Unified School District,[314] the Court of Appeals held that school districts in California are state agencies entitled to assert Eleventh Amendment immunity from suits in federal court.

The plaintiff, a former principal assigned to the classroom, brought suit alleging that she was reassigned because of her gender and in retaliation for testifying against the school district in a separate discrimination action. The school district disputed the teacher's allegations and claimed that the former principal was reassigned because of her extremely poor performance as a principal. The school district believed that the former principal had failed to work effectively with parents and teachers and illegally altered student records when she was a principal.

The former principal brought an action against the school district under 42 U.S.C. 1983. The District Court determined that as a matter of law, the school district is a state agency that is immune from suit in federal court under the Eleventh Amendment to the United States Constitution and granted the school district's motion for summary judgment.[315]

The court in Belanger noted that whether a school district is state agency for purposes of the Eleventh Amendment turns on the application of a multi-factored balancing test established in Mitchell v. Los Angeles Community College District.[316] In Mitchell, the Court of Appeals established a five part test to determine whether a governmental agency is an arm of the state:

1. Whether a money judgment would be satisfied out of state funds.
2. Whether the entity performs central governmental functions.
3. Whether the entity may sue or be sued.
4. Whether the entity has the power to take property in its own name or only the state.
5. The corporate status of the entity.[317]

The court noted that these five factors must be analyzed in light of California law and how California law treats school districts.[318] The most crucial question is whether the school district has such independent status that a judgment against the school district would not impact the state treasury.[319] In Edelman v. Jordan, the Supreme Court held that if a retroactive award of

[314] 963 F.2d 248, 75 Ed. Law Rptr. 118 (9th Cir. 1992).
[315] Id. at 249-50.
[316] 861 F.2d 198, 201 (9th Cir. 1988).
[317] Id. at 250-251.
[318] Id. at 251.
[319] See, Edelman v. Jordan, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358 (1974); Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir.1982).

monetary relief will be paid from state treasury funds, it is barred by the Eleventh Amendment.[320]

In Belanger, the Court of Appeals noted that California school districts have budgets that are controlled and funded by the state government rather than local school districts. The school district's budget is made up of funds received from the state's general fund pursuant to a state calculated formula. California's centralized control of school funding can be attributed to two key factors - decisions by the California Supreme Court in 1971 and 1976 in Serrano v. Priest and the adoption of Proposition 13 by the voters in 1978.[321]

In Serrano I, the California Supreme Court determined that the system of public school financing in California failed to equalize school spending for each student and it was therefore unconstitutional. The California Legislature responded by enacting Senate Bill 90 as an attempt to equalize public school funding. The Legislature significantly increased state funding for school districts and created revenue limits which were limits on the expenditures per pupil in school districts with ample local funding.[322]

In Serrano II, the California Supreme Court ruled that the equal protection provisions of the California Constitution required strict statewide equalization of school spending per pupil and, therefore, the state must prevent wealthier school districts from raising an excessive amount of local revenue so that California may equalize school district budgets through state limits on spending.[323]

The court noted that Proposition 13 property tax limitations inadvertently helped California achieve the result mandated in Serrano II by reducing property taxes and capping the property tax revenues used to fund local schools. Proposition 13 ensured that the state, rather than local school districts, would control funding for public schools.[324]

The result of the Serrano decisions and Proposition 13 has been strict state control of public school funding. California sets a revenue limit for each school district based on average attendance, subtracts property tax revenues from that limit and allocates the balance to the school district from the state school fund. Therefore, the state determines the amount of money that school districts may spend per pupil and then provides the necessary state funds.[325]

In Belanger, 75 percent of the Madera Unified School District's budget came directly from the state treasury. The court rejected the teacher's argument that a judgment could be satisfied out of the 25 percent of the district's budget derived from local property taxes, noting that if the judgment were paid out of local funds the state would be required to increase the amount of state funds provided to the Madera Unified School District. The court also noted that

[320] Id. at 668.
[321] 5 Cal.3d 584, 96 Cal.Rptr. 601 (1971) (Serrano I) and Serrano v. Priest, 18 Cal.3d. 728, 135 Cal.Rptr. 345 (1976) (Serrano II).
[322] Id. at 251.
[323] Id. at 251.
[324] Id. at 251.
[325] Id. at 252.

the local character of the property tax revenues is lost when it is commingled with state funds under a state controlled revenue limit.[326]

The court noted that California law treats public schooling as a statewide or central governmental function. California has assumed total control over the funding of public schools and exercises substantial centralized control over other public school decisions. The court noted, for example, that the state government dictates when students may be expelled or suspended and the state exercises control over the textbooks that are used in public schools. The court noted that in California, public schools have long been treated as state agencies under California law and that the California Constitution requires the state legislature to provide for a system of common schools and sets forth detailed requirements for those schools.[327] In Hall v. City of Taft,[328] the California Supreme Court recognized that public schools are a central governmental function in California by stating:

> "The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the state Constitution and the state Legislature is given comprehensive powers in relation thereto."[329]

The Hall decision went on to state that school districts are agencies of the state for the local operation of the state school system.[330] The Court of Appeals in Belanger concluded that through the state constitution, statutes and supreme court decisions California has made public schooling a state governmental function and that state law governs whether a school district is a state agency.[331]

The Court of Appeals in Belanger, noted that California school districts can sue and be sued in their own name and can hold property in their own name but that these factors do not override the fact that any monetary judgment would be paid from state funds. The court concluded that under California law school districts are agents of the state itself.[332]

The holding in Belanger may apply to other states as well if those states control school funding in a manner similar to California. The law of each state needs to be reviewed in light of the factors set forth in Mitchell and Belanger.[333]

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[326] Id. at 252.
[327] Id. at 253; see California Constitution, Article IX, Sections 5, 6.
[328] 47 Cal.2d 177 (1956).
[329] Id. at 576.
[330] Id. at 577.
[331] Id. at 253.
[332] Id. at 254.
[333] In Mitchell v. Los Angeles Community College District, 861 F.2d 198, 50 Ed.Law Rptr. 69 (9th Cir. 1988), the Court of Appeals held that community college districts were immune from lawsuits brought in federal court under 42 U.S.. section 1981, 1983 and 1985 under the Eleventh Amendment.

In Eaglesmith v. Ward, 73 F.3d 857, 106 Ed.Law Rptr. 104 (9th Cir. 1995), the Court of Appeals held that Eleventh Amendment immunity applied to the county superintendent in a lawsuit brought by an employee under 42 U.S.C. section 1983. The Court of Appeals applied the five part test from Mitchell and Belanger and held that the county superintendent was an agent of the state. Id. at 860.

C. Alden V. Maine - Historical Origins of The Sovereign Immunity Doctrine

In Alden v. Maine,[334] the Supreme Court reviewed the history of the doctrine of sovereign immunity and Eleventh Amendment immunity. The Court noted that although the Constitution established a national government with broad authority over matters within its recognized competence the Constitution specifically recognizes the States as sovereign entities that entered into the federal system with their sovereignty intact.[335] The Court noted the limited and enumerated powers granted to the legislative, executive and judicial branches of the national government and the vital role reserved to the States by the constitutional design. The Court noted, any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power.[336] The Tenth Amendment states, The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[337]

The court in Alden noted that the federal system established by our constitution preserves the sovereign status of the states in two ways. First, it reserves to the States a substantial portion of the nation's primary sovereignty, together with the dignity and essential attributes inherent in that status. Second, even as to matters within the competence of the national government, the constitutional design secures the founding generation's rejection of the concept of a central government that would act upon and through the States in favor of a system in which the state and federal government would exercise concurrent authority over the people.[338] The court noted that the States are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.[339]

The framers of the Constitution considered immunity from private suits central to sovereign dignity.[340] The framers were influenced by the work of Blackstone, the preeminent authority on English law at the time, who underscored the close and necessary relationship between sovereignty and immunity from suit as follows:

> "And, first, the law ascribes to the King the attribute of sovereignty, or pre-eminence. . . hence it is, that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power. . ."[341]

The doctrine that a sovereign could not be sued without its consent was universal in the States when the constitution was drafted and ratified. The ratification debates underscored the importance of state sovereign immunity to the American people.[342] The leading advocates of

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[334] 119 S.Ct. 2240 (1999).
[335] Id. at 2247.
[336] Id. at 2247.
[337] U.S. Constitution, Tenth Amendment.
[338] Id. at 2247.
[339] Id. at 2247.
[340] Id. at 2247-2248.
[341] 1 W.Blackstone, Commentaries on the Laws of England 234-235 (1765); Alden v. Maine, 119 S.Ct. 2240, 2248 (1999).
[342] Id. at 2248.

the Constitution assured the people in no uncertain terms that the Constitution would not strip the states of sovereign immunity.

In the Federalist No. 81, Alexander Hamilton stated that it is inherent in the nature of sovereignty that States would not be amenable to the suit of an individual without their consent.[343] Statements by James Madison and John Marshall at the Virginia ratifying convention reaffirmed the belief that the Constitution as drafted preserved the states immunity from private suits.[344]

Despite the assurances of the Constitution's leading advocates and the expressed understanding of the state conventions, the Supreme Court, five years after the Constitution was adopted, held that Article III of the Constitution authorized a private citizen of another state to sue the state of Georgia without its consent.[345] The Court's decision shocked the nation and a proposal to amend the Constitution was introduced into the House of Representatives the day after the decision in Chisholm was announced.[346] A short time later, both the House and the Senate approved the Eleventh Amendment.

The court in Alden rejected the argument that the Chisholm decision was a correct interpretation of the constitutional design and that the Eleventh Amendment represented a deviation from the original understanding. Rather, the court in Alden reviewed the separate opinions of the court and held that Congress, in enacting the Eleventh Amendment, restored the original constitutional design.[347] The enactment of the Eleventh Amendment overruled the court's decision in Chisholm but did not redefine the federal judicial power set forth in Article III of the Constitution.[348] The court in Alden stated:

> "The more reasonable interpretation, of course, is that regardless of the views of four justices in Chisholm, the country as a whole - which had adopted the Constitution just five years earlier - had not understood the document to strip the states of their immunity from private suits."[349]

The court in Alden concluded that the events leading to the adoption of the Eleventh Amendment made clear that the individuals who believed that the Constitution stripped the states of their immunity from suit were, at most, a small minority. The court noted that the ratification debates and the events leading to the adoption of the Eleventh Amendment revealed the original understanding of the states' constitutional immunity from suit and underscored the importance of sovereign immunity to the founding generation. In essence, the court noted, The Constitution never would have been ratified if the states and their courts were to be stripped of their sovereign immunity except as expressly provided by the Constitution itself.[350]

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343 Id. at 2248.
344 Id. at 2249.
345 See, Chisholm v. Georgia, 2 Dall. 419 (1793).
346 Id. at 2250.
347 Id. at 2250-53.
348 Id. at 2251.
349 Id. at 2252.
350 Id. at 2253 , quoting from Atascadaro State Hospital v. Scanlon, 105 S.Ct. 3142, 473 U.S. 234, 239, n.2 (1985); Edelman v. Jordan, 94 S.Ct. 1347, 415 U.S. 651, 660 (1974).

The Supreme Court looked at the history of the adoption of the Eleventh Amendment and the views expressed by Hamilton, Madison and Marshall during the ratification debates rather than the literal text of the Eleventh Amendment in determining the scope of the States' constitutional immunity from suit.[351] Following this approach, past decisions of the Supreme Court have upheld States' assertions of sovereign immunity in various contexts falling outside the express language of the Eleventh Amendment. In Hans v. Louisiana,[352] the Supreme Court held that sovereign immunity barred a citizen from suing his own state in federal court and rejected the argument that the Eleventh Amendment, by its language, applied only to suits brought by citizens of other states:

> "It seems to us that the views of those great advocates and defenders of the Constitution were most sensible and just, and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dream of."[353]

Later decisions rejected similar arguments to limit the principle of sovereign immunity to the strict language of the Eleventh Amendment. In Smith v. Reeves,[354] the court held that states were immune from suits brought by federal corporations. In Blatchford v. Native Village of Noatak,[355] the Supreme Court held that sovereign immunity is a defense to suits in admiralty even though the text of the Eleventh Amendment addresses only suits in law or equity.

The court in Alden noted these prior decisions reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.[356] The court stated:

> "The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the states immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design. . . . [357]
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> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it

[351] Id. at 2253.
[352] 34 U.S.1, 10 S.Ct. 504 (1890),34 U.S.1, 10 S.Ct. 504 (1890).
[353] Id. at 14-15.
[354] 178 U.S. 436 (1900).
[355] 501 U.S. 775 (1991).
[356] Id. at 2254; see also, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267-268 (1997) (acknowledging the broader concept of immunity implicit in the Constitution).
[357] Id. at 2254.

> confirms . . . That presupposition, first observed over a century ago in Hans v. Louisiana . . . has two parts: first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. . . ."[358]

In Alden, the Supreme Court held that neither the enumerated powers of Congress set forth in the Constitution nor the Supremacy Clause authorized the abrogation of a States immunity from suit in federal or state court.[359] The court rejected arguments that these provisions override the sovereign immunity of the States. The court stated:

> "The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within it enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself, but from the national power."[360]

The Court went on to reject any contention that substantive federal law by its own force overrides the sovereign immunity of the States. The Court held that when a State asserts its immunity to suit, the question is not the supremacy of federal law but the implementation of the law in a manner consistent with the constitutional sovereignty of the states.[361]

The Court in Alden, went on to state that Article I of the Constitution enumerating the powers of Congress and the Necessary Proper Clause in Article I do not authorize Congress to subject the states to private suits as a means of achieving objectives otherwise within the scope of Congress' enumerated powers.[362]

The Court in Alden, noted that the Tenth Amendment states that powers not delegated to the federal government nor prohibited to the States are reserved to the States or to the people and that caution should be exercised before concluding that unstated limitations on state powers were intended by the framers. The federal government by contrast can claim no powers which are not granted to it by the Constitution and that the powers actually granted must be such as expressly given or given by necessary implication.[363]

Whether Congress has the authority under Article I to abrogate a States immunity from suit in its own state courts was a question of first impression in Alden. The Court reviewed the history of the doctrine of sovereign immunity and the Eleventh Amendment and concluded that it was not the intent of the framers of the Constitution that Congress have the authority to abrogate a state's immunity from suit in its own courts. The Court stated:

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[358] Id. at 2254; quoting from Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 517 U.S. 44, 54 (1996).
[359] Id. at 2254-55.
[360] Id. at 2255.
[361] Id. at 2255-56.
[362] Id. at 2256.
[363] Id. at 2259.

> "We believe . . . that the founders silence is best explained by the simple fact that no one, not even the Constitutions most ardent opponents, suggested the document might strip the states of the immunity. In light of the overriding concern regarding the States war-time debts together with the well known creativity, foresight and vivid imagination of the Constitutions opponents, the silence is most instructive. It suggests the sovereigns right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution. . . .
>
> To read this history as permitting the inference that the Constitution stripped the states of immunity in their own courts and allowed Congress to subject them to suit there would turn on its head the concern of the founding generation - that Article III might be used to circumvent state court immunity. In light of the historical record, it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the federal government a power to subject nonconsenting states to private suits in these fora."[364]

The Court in Alden went on to note that although the Constitution grants broad powers to Congress, federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the nation. The framers of the Constitution believed that the states of the Union retained a large amount of sovereignty which had not been delegated to the United States.[365] Subjecting to States to private suits without their consent presents the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties and is not consistent with the doctrine of sovereign immunity. Id. at 2264. The Court stated:

> "In some ways . . . a Congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to State sovereignty than a power to authorize the suits in a federal forum. Although the immunity of one sovereign in the courts of another has often depended in part on comity or agreement, the immunity of sovereign in its own courts has always been understood to be within the sole control of the sovereign itself. . . A power to press a States own courts into federal service to coerce the other branches of the State, furthermore, is the power for us to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals. . . Such

[364] Id. at 2260-61.
[365] Id. at 2263.

> plenary federal control of state governmental processes then denigrates the separate sovereignty of the States."[366]

The Alden court noted that stripping the States of their immunity from privates suits in their own courts would subject the States to control of their public policy and administration of their public affairs to the mandates of judicial tribunals without their consent.[367] A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern itself in accordance with the will of its citizens. The allocation of scare resources among competing needs and interests lies at the heart of the political process and while the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for state funds. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive political issues must be made. If the principle of representative government is to be preserved to the states, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the state, not by judicial decree, mandated by the federal government and invoked by a private citizen.[368] When the federal government asserts authority over a States most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government.[369]

The Alden court observed that were Congress able to abrogate a States sovereign immunity in state court, the federal government would wield greater power in the state courts than in its own federal courts. The court in Alden held that the federal power under Article III does not give Congress authority to pursue its objectives through the state judiciaries and, therefore, the Court in Alden held that States retain immunity from private suit in their own courts, an immunity beyond the Congressional power to abrogate by Article I legislation.[370]

The Court in Alden noted however that there are limits to the doctrine of sovereign immunity. The first of these limits is that sovereign immunity bars suits only in the absence of consent by the State. In many cases, states on their own initiative have enacted statutes consenting to a wide variety of suits.[371] The Court also noted that the federal government does not lack the authority or means to seek the States voluntary consent to private suits.[372]

The Court in Alden also held that the adoption of the Fourteenth Amendment required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution so that Congress may authorize private suits against nonconsenting States pursuant to its Section 5 enforcement power under the Fourteenth Amendment. The Court noted that the Fourteenth Amendment, by imposing explicit limits on the powers of the States and granting Congress the power to enforce the limits in the Fourteenth Amendment, fundamentally altered the balance of state and federal power struck by the Constitution. When Congress enacts appropriate legislation to enforce the Fourteenth Amendment, federal interests are paramount

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[366] Id. at 2264.
[367] Id. at 2264.
[368] Id. at 2264-65.
[369] Id. at 2265.
[370] Id. at 2265.
[371] Id. at 2267.
[372] Id. at 2267, citing South Dakota v. Dole, 483 U.S. 203 (1987). (e.g. federal grant programs).

and Congress may assert authority over the States which it would be otherwise unauthorized by the Constitution.[373]

The third important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State nor does sovereign immunity bar all suits against state officers. Some suits against state officers are barred by the rule that sovereign immunity is not limited to suits which name the state as a party if the suits are, in fact, against the state. Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself so long as the relief does not come from the state treasury but from the officer personally.[374]

D. Abrogation of Sovereign Immunity

In College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board,[375] the court addressed the issue of whether the two circumstances for allowing a suit against a state by a private individual were present (e.g. whether Congress may authorize such a suit in the exercise of its Fourteenth Amendment enforcement power or whether the State consented to such a suit). The lawsuit involved the College Savings Bank of New York which had since 1987 marketed and sold annuity contracts for financing future college expenses. College Savings obtained a patent for its financing method to provide investors sufficient funds to cover the cost of future college tuition. College Savings filed a patent infringement lawsuit against the Florida Prepaid Post-Secondary Education Expense Board, a state agency. Florida Prepaid administers a similar tuition prepayment program available to Florida residents. College Savings claimed that Florida Prepaid directly and indirectly infringed on its patent and engaged in unfair competition under the federal Lanham Act. The Court in College Savings Bank reviewed Florida Prepaids defense of sovereign immunity and held that a States waiver of sovereign immunity must be express and unequivocal.[376] The Court concluded that the sovereign immunity of the State of Florida was neither validly abrogated by the Trademark Remedy Clarification Act nor voluntarily waived by the states activities and interstate commerce.

A companion case, Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank,[377] the court held that the federal statute did not abrogate the State of Floridas sovereign immunity because it cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendments due process clause. The court held that Congress does not have the power under Article I to abrogate a states immunity but may only do so under Section 5 of the Fourteenth Amendment.[378]

The court noted that under it decision in Seminole Tribe, Congress may not abrogate state sovereign immunity pursuant to its Article I powers. Hence, the Patent Remedy Act cannot be

[373] Id. at 2267.
[374] Id. at 2267-68.
[375] 119 S.Ct. 2219 (1999).
[376] Id. at 2226.
[377] 119 S.Ct. 2199 (1999).
[378] Id. at 2206.

sustained under either the Commerce Clause or the Patent Clause.[379] The court held that a state infringement of a patent, though interfering with a patent owners right to exclude others, does not by itself violate the Constitution. Only where the state provides no remedy or only inadequate remedies to injured patent owners for its infringement of their patent could a deprivation of property without due process result.[380] However, Congress barely considered the availability of state remedies for patent infringement and whether the States conduct might have amounted to a Constitutional violation under the Fourteenth Amendment. The Court reviewed the legislative history of the federal statute and found only fleeting references to state remedies.[381] Instead the court found that Congress made all States immediately amenable to suit in federal court for all kinds of possible patent infringement and for a indefinite duration. The court found that the Patent Remedy Acts indiscriminate scope offends the principle that the Fourteenth Amendment enforcement provision in Section 5 was intended to be a remedy to prevent unconstitutional state action.[382] The court stated:

> "The historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under Section 5 of the Fourteenth Amendment. The examples of States of avoiding liability for patent infringement by pleading sovereign immunity in a federal court patent action are scarce enough, but any plausible argument that such action on the part of the State deprived patentees of property and left them without a remedy under state law is scarcer still. The statutes apparent and more basic aims were to provide a uniform remedy for patent infringement and to place states on the same footing as private parties under that regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after Seminole Tribe."[383]

E. Age Discrimination and Sovereign Immunity

In Kimel v. Florida Board of Regents,[384] the Supreme Court reviewed whether the Age Discrimination in Employment Act of 1967 (ADEA),[385] which makes it unlawful for an employer, including a state, to discriminate against any individual because of the individuals age abrogates a States immunity under the doctrine of sovereign immunity and the Eleventh Amendment. The Supreme Court concluded that although the ADEA contains a clear statement of Congress intent to abrogate the States immunity. The abrogation exceeded Congress authority under Section 5 of the Fourteenth Amendment.

The Court in Kimel, reviewed two issues. First, whether Congress unequivocally expressed its intent to abrogate the states sovereign immunity and, second, if Congress did unequivocally express the intent to abrogate the states immunity, did Congress act pursuant to a

[379] Id. at 2205.
[380] Id at 2006.
[381] Id. at 2006.
[382] Id. at 2207.
[383] Id. at 2210-11.
[384] 528 U.S. 62 (2000).
[385] 29 U.S.C. section 621.

valid grant of constitutional authority. The Court noted that to determine whether a federal statute properly subjects States to suits by individuals, the courts apply a simple but stringent test - Congress may abrogate the states constitutionally secured immunity from suit in federal court only by making it intention unmistakably clear in the language of the statute.[386]

The Kimel court reviewed the language of the ADEA and noted that 29 U.S.C. section 626 (b) clearly provides for suits by individuals against states. Section 626(b) defines a public agency as including the government of a state or political subdivision thereof and any agency of a state or a political subdivision of the state. Therefore, the court held that read as a whole, the plain language of these provisions fully demonstrated Congress intent to subject the states to suit to money damages at the hands of individual employees.

The court then turned to the second issue of whether Congress acted pursuant to a valid grant of constitutional authority. The court noted that in EEOC v. Wyoming,[387] it held that the ADEA constituted a valid exercise of Congress power to regulate commerce among the several states pursuant to Article I, section 8, clause 3 of the Constitution. The Supreme Court held that the ADEA did not transgress any external restraints imposed on the commerce power by the Tenth Amendment. The Court in EEOC v. Wyoming, refrained from deciding whether the ADEA also could be supported by Congress power under Section 5 of the Fourteenth Amendment.

The Court noted that in Seminole Tribe, the Supreme Court held that Congress lacks power under Article I to abrogate the states sovereign immunity and the Court reaffirmed the holding in Seminole Tribe in three cases decided in 1999.[388]

In College Savings Bank, the Supreme Court overruled a prior decision allowing constructive waiver of sovereign immunity.[389]

The court in Kimel, concluded, Under a firmly established precedent . . . if the ADEA rest solely on Congress Article I commerce power, the private petitioners in todays cases cannot maintain their suits against their state employers.[390] The Court in Kimel then reviewed the power of Congress under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity. In Fitzpatrick v. Bitzer,[391] the Supreme Court recognized that the Eleventh Amendment and the principal of state sovereignty which it embodies are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment.[392] The Court reaffirmed its decision in Fitzpatrick, in College Savings Bank, Florida Prepaid, and Seminole Tribe. The court held that to maintain their ADEA lawsuits against the State of Alabama and Florida, the plaintiffs must show that the ADEA is appropriate legislation under Section 5 of the Fourteenth Amendment.

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[386] Id. at ___; see also Dellmuth v. Muth, 491 U.S. 223, 228 (1989); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985).
[387] 460 U.S. 226, 243 (1983).
[388] See, College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 666, (1999); Alden v. Maine, 527 U.S. 706 (1999).
[389] See, Parden v. Terminal Railroad Company Alabama Docks Department, 377 U.S. 184 (1964).
[390] Id. at ____.
[391] 427 U.S. 445 (1976).
[392] Id. at 456.

The Fourteenth Amendment provides in relevant part:

> "Section I. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

In City of Boerne v. Flores,[393] the Supreme Court recognized Section 5 of the Fourteenth Amendment as an affirmative grant of power to Congress stating that it is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment and that Congress conclusions are entitled to much deference. The Court noted that Congress Section 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress has the power to enforce the Fourteenth Amendment both to remedy and to deter violation of rights guarantee under the Fourteenth Amendment by prohibiting a somewhat broader range of conduct, including conduct which is not itself forbidden by the Fourteenth Amendment. The Court in City of Boerne also recognized that the same language in Section 5 that serves as a basis for the affirmative grant of Congressional power also serves to limit that power. The Court stated that Congress cannot decree the substance of the Fourteenth Amendments restrictions on the States and that Congress has only been given the power to enforce not the power to determine what constitutes a constitutional violation. The ultimate interpretation and determination of the substantive meaning of the Fourteenth Amendment remains the province of the judicial branch.[394]

In City of Boerne, the Supreme Court applied the congruence and proportionality test and held that the Religious Freedom Restoration Act of 1993 (RFRA) was not appropriate legislation under Section 5 of the Fourteenth Amendment. The Court noted that there was very little evidence in the legislative record of unconstitutional conduct targeted by the RFRA and found that the RFRA was so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior.[395] In Florida Prepaid, the Supreme Court reached a similar conclusion that there was insufficient evidence to show that a statute which subjected states to patent infringement lawsuits was appropriate legislation under Section 5 of the Fourteenth Amendment.

The Court, in applying the same congruence and proportionality test in Kimel, concluded that the ADEA is not appropriate legislation under Section 5 of the Fourteenth Amendment. The Court noted that in three prior cases, the Supreme Court held that age classifications did not violate the Equal Protection Clause.[396] The Court in Kimel stated:

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[393] 521 U.S. 507, 517 (1997).
[394] Id. at 519-520.
[395] Id at 531-532.
[396] See, Gregory v. Ashcroft, 501 U.S. 452 (1991); Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

> "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). Older persons, again, unlike those whose suffer discrimination on the basis of race or gender, have not been subjected to a history of purposeful, unequal treatment . . . Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. . . Accordingly, as we recognized in Murgia, Bradley and Gregory, age is not a suspect classification under the Equal Protection Clause. . . .
>
> States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. . . ."[397]

The Court in Kimel noted that remedies to discrimination on the basis of race or gender are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[398] The Court held that the Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if the reasons for doing so may not be valid in the majority of cases.[399] The Court noted that Congress never identified any pattern of age discrimination by the States, much less any discrimination that rose to the level of a constitutional violation.[400] The Court stated:

> "A review of the ADEAs legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. . . . Congress failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad, prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Acts substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress power under Section 5 of the Fourteenth Amendment. The ADEAs proported abrogation of the states sovereign immunity is accordingly invalid.
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> We hold only that in the ADEA, Congress did not validly abrogate the states sovereign immunity to suits by private

[397] Id. at ___.
[398] Id. at ____.
[399] Id. at ___.
[400] Id. at 25.

> individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every state of the Union. . ."[401]

F. The IDEA and Sovereign Immunity

In Bradley v. Arkansas Department of Education,[402] the Court of Appeals held that the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. sections 1400 et seq., contained a valid abrogation of state sovereignty. The court in Bradley held that the IDEAs language in 20 U.S.C. section 1403 was sufficiently clear to satisfy the first part of the Seminole Tribe test that requires that a federal statute contain an unequivocal expression of Congress intent to abrogate the states immunity. The second part of the Seminole Tribe test requires that a federal statute be an appropriate exercise of Congress constitutional powers. Legislation is an appropriate exercise of Congress Section 5 Fourteenth Amendment enforcement power only when it is preventative or remedial. The Court in Bradley found that the IDEAs abrogation provision was invalid because the IDEA was not an appropriate exercise of Congress Section 5 power. However, the Court of Appeals in Bradley found that the State of Arkansas waived its Eleventh Amendment immunity by receiving funds appropriated under the IDEA. The Court held that the Supreme Court continues to recognize that Congress, if acting within its spending power, may condition a states participation in a federal spending program on the states waiving its Eleventh Amendment immunity to claims arising from that program.[403]

G. Section 504 and Sovereign Immunity

The Court of Appeals in Bradley then reviewed whether private individuals could sue the State of Arkansas under Section 504 of the Rehabilitation Act. The Court noted that in response to the Supreme Court's decision in Atascadero State Hospital v. Scanlon, Congress enacted an abrogation provision codified at 42 U.S.C. section 2000d-7. This abrogation provision states that a state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of Section 504 of the Rehabilitation Act and several other statutes. The court found that Section 2000d-7 satisfied the first prong of the Seminole Tribe test.

In reviewing the second part of the Seminole Tribe test which requires that a statute be an appropriate exercise of Congress constitutional powers for the statutes abrogation provisions to have effect, the Court of Appeals in Bradley concluded that Section 504 reaches beyond the scope of Congress Section 5 power. The court cited its earlier decision in Alsbrook which concluded that Title II of the Americans with Disabilities Act (ADA) exceeded Congress Section 5 power because the ADA is not merely remedial but provides substantive rights in excess of those that are protected by the Constitution from impairment by government action. The court in Bradley stated that it was compelled by the Alsbrook decision to reach the same conclusion because the ADA and Section 504 provide essentially the same protection for the same group of individuals. The court stated:

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[401] Id. at 27.
[402] 189 F.3d. 745 (8th Cir. 1999).
[403] Id. at 753; See also, College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board, 119 S.Ct. 2219, 2231 (1999).

> "This court determined in Alsbrook that the ADA employment provisions were not an appropriate exercise of Congress Section 5 power because the ADA imposes duties upon the States exceeding those commanded by the Fourteenth Amendment. Applying the reasoning of Alsbrook, we conclude that Section 504 does not abrogate the states Eleventh Amendment immunity."[404]

The Court of Appeals in Bradley then considered whether Arkansas had waived its Eleventh Amendment immunity with respect to claims arising under Section 504 by accepting federal funds. The court noted that under Atascadero and Pennhurst State School and Hospital v. Halderman,[405] three requirements must be satisfied if a states participation in a federal spending program is to be held to constitute a waiver of the states Eleventh Amendment immunity against claims arising under that program. The requirements are:

1. The federal spending program must represent a valid exercise of Congress' spending power,

2. The statute creating the federal spending program must contain a clear unambiguous warning that Congress intends to require the waiver of Eleventh Amendment immunity as a condition for participating in the program; and,

3. The state must have participated in the federal spending program.[406]

The Court of Appeals in Bradley went on to note that Section 504 failed the first requirement because it was not a valid exercise of Congress spending power. While College Savings recognized that Congress may require States to comply with conditions that Congress may require to receive federal funds including the waiver of their Eleventh Amendment immunity, the financial inducements offered by Congress cannot be so coercive as to pass the point of which pressure turns into compulsion.[407] In addition, the conditions imposed by Congress on the receipt of federal funds must bear some relationship to the purpose of the federal spending. The court held that the provisions of Section 504 mandate that Arkansas waive its Eleventh Amendment immunity to all claims arising under Section 504 if it receives any federal funding, even funding unrelated to the States obligations to comply with Section 504 or the rest of the Rehabilitation Act. The court in Bradley found that such a broad condition amounted to impermissible coercion in that Arkansas would be forced to renounce all federal funding including funding wholly unrelated to the Rehabilitation Act if it did not want to comply with Section 504. The court stated:

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[404] Id. at 756.
[405] 451 U.S. 1 101, S.Ct. 1531 (1981).
[406] Id. at 757.
[407] Id. at 2231.

> "Congressional imposition of such a condition does not give Arkansas, or any other state, a meaningful choice regarding whether to receive federal funding and waive its Eleventh Amendment immunity to suits arising under Section 504 or reject funding and retain its Eleventh Amendment immunity to such suits.
>
> The conditions Section 504 imposes on recipients of federal funds exceeds the ordinary quid pro quo involved in a proper exercise of Congress spending power. ...
>
> Therefore, Section 504 is not a valid exercise of Congress spending power and Arkansas, by receiving federal funds, did not waive its Eleventh Amendment immunity to suits arising from alleged violation of Sections 504."[408]

H. The ADA and Sovereign Immunity

In Alsbrook v. City of Maumelle,[409] the Court of Appeals held that an action brought under the Americans With Disabilities Act (ADA) against several state agencies was barred by the doctrine of sovereign immunity. The Court of Appeals held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment.

Alsbrook began his employment with Maumelle Department of Public Safety. In January 1993, as a public safety officer. Alsbrook's right eye had a corrected vision of 20/30 and could not be corrected to 20/20 due to a congenital condition called amblyopia. At the time he was hired by the Maumelle Department, Alsbrook submitted a letter from his doctor stating that his amblyopia would not impair his ability to perform any activity or type of work.[410]

In May 1993, Alsbrook submitted an application for enrollment in an officer training course at the Arkansas Law Enforcement Training Academy, a state agency. In the application, Alsbrook's supervisor certified that Alsbrook met the minimum standards for appointment as a law enforcement officer as required by state law. Alsbrook was accepted into the course and successfully completed it in December, 1993. He was then employed as a law enforcement officer with the Maumelle Department. However, because the Maumelle Department never filed a request for certification on Alsbrook's behalf after he completed the training course, Alsbrook was technically functioning as an uncertified law enforcement officer during this time period.[411]

In 1995, Alsbrook applied for a position with the Little Rock Police Department which he believed would offer him better career opportunities. After being notified of the result of the eye exam, Alsbrook took his prior application to the Little Rock Police Department and having reviewed the documentation on Alsbrook's eye condition on file at the Maumelle Department,

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[408] Id. at 757-758.
[409] 184 F.3d 999 (8th Cir. 1999); cert. granted 528 U.S. 1146 (2000). The Alsbrook case subsequently settled prior to a decision by the U.S. Supreme Court. See, National Disability Law Reporter, Vol. 17, Issue 2 (March 9, 2000).
[410] Id. at 1002.
[411] Id. at 1002.

the Little Rock Police Department informed Alsbrook that he needed to obtain a waiver from the State exempting him from the visual acuity requirement before he could be hired.[412]

On September 5, 1995, Alsbrook appeared before the Arkansas Commission on Law Enforcement Standards and Training (ACLEST) requesting a waiver of the visual acuity requirement. ACLEST determined that it did not have the authority to waive the requirement. Due to his inability to obtain a waiver, Alsbrook was denied employment with the Little Rock Police Department. He remained with the Maumelle Department but was barred from responding to any police calls or working on any police related paperwork or duties. All parties agreed that Alsbrook successfully completed all requirements to be a certified law enforcement officer in the State of Arkansas other than having a corrected vision of 20/20 in his right eye. Alsbrook then brought a lawsuit in federal district court for injunctive relief as well as compensatory and punitive damages on the grounds that his rights had been violated under Title II of the ADA and 42 U.S.C. Section 1983.[413]

The Alsbrook court applied the test in Seminole Tribe of Florida v. Florida,[414] and found that Congress unequivocally expressed its intent to abrogate the sovereign immunity of the states when it passed the ADA. However, the court found that Congress exceeded its power under Section 5 of the Fourteenth Amendment and, therefore, the abrogation of Arkansas immunity was invalid.[415]

In Kimel v. State of Florida Board of Regents,[416] the Court of Appeals for the Eleventh Circuit reached a contrary conclusion. The Kimel court applied the two part test in Seminole Tribe and found that when Congress passed the ADA it specifically abrogated state sovereignty and made specific findings of discrimination against the disabled to support its invocation of the powers under Section 5 of the Fourteenth Amendment.[417]

In Garrett v. University of Alabama,[418] the Court of Appeals for the Eleventh Circuit, held that states are not immune from suit by state employees under the Americans with Disabilities Act and the Rehabilitation Act of 1973. The Court of Appeals held that the abrogation of state immunity was unequivocally expressed in the respective statutes and that the abrogation was validly exercised under the 14th Amendment.[419]

I. California Eleventh Amendment Immunity

In Sato v. Orange County Department of Education,[420] the Ninth Circuit Court of Appeals held that the Orange County Department of Education is protected by Eleventh

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[412] Id. at 1003.
[413] Id. at 1003.
[414] 517 U.S. 44, 55, 116 S.Ct. 1114 (1996).
[415] Id. at 1005-1006.
[416] 139 F.3d 1426 (11th Cir. 1998), cert. granted ___ S.Ct.___ (1999). The Kimel case subsequently settled prior to a decision by the U.S. Supreme Court. See, National Disability Law Reporter, Vol. 17, Issue 2 (March 9, 2000).
[417] See, also, Clark v. State of California, 123 F.3d 1267 (9th Cir. 1997) (upholding Congress= abrogation of state immunity from suit in the ADA). This conflict in the circuits should be resolved by the Supreme Court in the near future.
[418] 193 F.3d 1214 (11th Cir. 1999), cert. granted ___ S.Ct. ____ (2000).
[419] Ibid.
[420] 861 F.3d. 923 (9th Cir. 2017).

Amendment immunity as an arm of the State of California, and was immune from suit under the Eleventh Amendment. The Court of Appeals affirmed the lower court's dismissal of the lawsuit seeking damages for wrongful termination under 42 U.S.C. § 1983.

The Court of Appeals that when the California Legislature enacted the Local Control Funding Formula (LCFF), it streamlined public education financing and decentralized educational governance, but it did not modify the court's previous holdings that school districts and county offices of education were immune from suit as arms of the state and the Eleventh Amendment.[421]

Under the Eleventh Amendment, agencies of the state are immune from private damages or suits for injunctive relief brought in federal court.[422] State sovereign immunity does not extend to county and municipal governments unless state law treats them as arms of the state. To determine whether a government entity is an arm of the state, five factors are considered:

1. whether a money judgment would be satisfied out of state funds;

2. whether the entity performs central governmental functions;

3. whether the entity may sue or be sued;

4. whether the entity has the power to take property in its own name or only the name of the state; and,

5. the corporate status of the entity.

The Court of Appeals noted that in California, county offices of education and school districts cannot raise property taxes, and that the state equalizes per-pupil spending throughout the state.[423] The Court of Appeals noted that under LCFF, districts and county offices of education receive the base grant amount for each student. Districts may receive additional supplemental grant and concentration grant funding depending on the number of low income and English language learner students they have. Supplemental grants provide school districts with additional funding equal to 20% of the base grant for each low income or English language learner student in the district. Concentration grants provide an additional 50% of the base grant amount for each low income or English language learner student if the proportion of low income or English language learner students exceeds 55% of total enrollment.[424]

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[421] See, Belanger v. Madera Unified School District, 963 F.2d 248 (9th Cir. 1992); Mitchell v. Los Angeles Community College District, 861 F.2d 198 (9th Cir. 1988); Eaglesmith v. Ward, 73 F.3d 857 (9th Cir. 1995).
[422] Savage v. Glendale Union High School District, 343 F.3d 1036, 1040 (9th Cir. 2003).
[423] See, Serrano v. Priest, 487 P.2d 1241 (1971); Serrano v. Priest, 557 P.2d 929 (1976).
[424] See, Education Code §§ 2574 and 42238.02.

The Court of Appeals stated:

> "While the passage of AB 97 provided districts and COEs with additional flexibility in their budgets, we note, however, that AB 97 did not eliminate the 'centralized' system of 'strict state control' over local districts' funding . . .."

The Court of Appeals went on to state that by capping local property tax revenue under Proposition 13, the State of California transferred control over local government finances to the state.[425] The Court of Appeals stated:

> "In sum, we find that AB 97 left in place the fundamental elements of Belanger: equalization of per-pupil spending and centralized control over local education budgets. Because the LCFF keeps in place a maximum per-pupil funding formula, state and local funds are still 'hopelessly intertwined,' and 'any change in the allocation of property tax revenue has a direct effect on the allocation of state funds.' . . . The first Mitchell factor therefore weighs in favor of Eleventh Amendment immunity."

The Court of Appeals went on to state that the second factor of whether the government entity performed central government functions was satisfied as well. The court held that California law treats public schooling as a statewide or central governmental function.[426]

The Court of Appeals found that the third factor (whether the government entity may sue or be sued) and the fourth factor (whether the entity has the power to take property in its own name or only the name of the state) weigh in favor of Sato. However, the fifth factor (whether school districts have corporate status) weighs in favor of Eleventh Amendment immunity because the California Supreme Court has ruled that local school districts are the state's agents for local operation of the common school system.[427] The Court of Appeals concluded by stating:

> "Considering all of the Mitchell factors together, we hold that California school districts and COEs, including defendant OCDE, remain arms of the state and continue to enjoy Eleventh Amendment immunity. AB 97 reformed the financing and governance of California public schools in important ways, but it did not so fundamentally alter the relationship between COEs and the state as to abrogate our decision in Belanger. Sato's claims against OCDE were properly dismissed."

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[425] California Redevelopment Association v. Matosantos, 267 P.3d 580, 589 (2011).
[426] Butt v. State, 842 P.2d 1240, 1247 (1992).
[427] Id. at 1240, 1248.

LIABILITY FOR AUTO ACCIDENTS

A. Introduction

Our office is frequently asked to advise districts with respect to liability resulting from an automobile accident involving school district employees. Frequently, the school district employs workers who use their own personal vehicle for their work duties (i.e., within the scope of their employment). If the employee were to be involved in a traffic accident, districts have asked whether the employee would be primarily liable if the accident was the fault of the employee.

As discussed below, liability is determined based on whether the driver of the vehicle involved in the accident was negligent and caused injury or damage to another person or vehicle. If the employee caused the accident and the employee was acting within the course and scope of their employment, the employee would be primarily liable and the school district would be secondarily liable. The school district would have a duty to defend the employee with respect to any claim or civil action except in cases of actual fraud, corruption or actual malice. If the employee has automobile liability insurance as required by law, the employee's insurance coverage would be primarily liable and the school district's insurance coverage would be secondarily liable and cover excess liability.[428]

B. Insurance Coverage

Many districts maintain insurance coverage through the Alliance of Schools for Cooperative Insurance Program (ASCIP). The General and Automobile Liability Memorandum of Coverage outlines the district's insurance coverage.

Section II of the Memorandum of Coverage states that ASCIP shall have the right and duty to defend any claim or suit against a covered party. Section IV of the Memorandum of Coverage includes employees of the school district as covered parties. Under Section VII D, the district's coverage is excess coverage when the employee has automobile liability insurance coverage. These provisions are typical of many district policies. However, districts should review the provisions of their coverage with their risk manager or insurance administrator.

As discussed below, liability would be determined based on negligence. If the employee driving the vehicle was negligent and responsible for the accident, the employee would be liable. If the employee caused the accident by a negligent or wrongful act or omission in the operation of their motor vehicle and was acting within the scope of their employment, the employee and school district would be liable, and the school district, in most cases, would have a duty to defend the employee with respect to any claim or civil action. If the employee has automobile liability insurance as required by law, the employee's insurance coverage would be primarily liable and the school district's insurance coverage would be secondarily liable and cover excess liability.[429]

[428] For discussion of vicarious employer liability for automobile accidents caused by employees, see pages 34-35.

[429] If the employee does not have automobile insurance in violation of California law, the school district's insurance coverage would cover the liability. The school district should require all employees to have automobile liability insurance if they drive their personal vehicle in the course and scope of their employment.

Employees should not be alarmed if they are in an accident while acting in the course and scope of their employment. For example, community workers who travel from home to home of parents in community would actually be better protected if an accident occurs while working than when they are not working for the school district. When not working, the employee is only covered by their own personal automobile insurance. When working and acting in the course and scope of their employment, in the event of an accident caused by their negligence, the employee has the backing and protection of two insurance policies – their own personal policy and the excess coverage of the school district's policy. If the damages from the accident exceed the policy limits of their personal policy, the school district's policy would pay the excess liability and the employee would suffer no out-of-pocket costs.

While some may feel it is unfair that the employee's insurance policy is primary, the public policy and legislative and judicial philosophy behind the provisions in the Insurance Code is that the driver of a vehicle who is negligent and causes injury and damage to another should bear the primary responsibility, particularly since automobile liability insurance is mandatory in California. Employees who are not at fault when an accident occurs within the scope of their employment will be defended by the school district at no cost to the employee. If the other driver was at fault, the employee may pursue civil remedies against the other driver.

C. Liability of Employee

In California, every person driving a motor vehicle, including public employees acting in the course and scope of their employment, owes a duty of care to avoid injury to other motorists and a breach of that duty proximately causing injury will make the negligent motorist liable for a resulting injury to another.[430] A motorist who causes injury to another or damage to another's property by reason of his or her negligence in operating a motor vehicle is liable for damages for the injuries caused.[431] A public entity's duty to defend an employee who is sued for negligence for causing injury or damage to another, for example, in a motor vehicle accident, arises if the employee was acting in the course and scope of their employment.

In addition, the owner of a motor vehicle is liable and responsible for the death or injury of a person or damage to property resulting from a negligent or wrongful act or omission in the operation of the vehicle, whether in the business of the owner or otherwise, by any person using or operating the owner's vehicle with the owner's permission.[432] The vehicle owner's statutory liability is primary and direct as to the plaintiff, but secondary as to the owner and the driver. An owner's liability is secondary to that of the operator. The owner essentially serves as a guarantor of their joint liability.[433] While the owner is liable as a joint tortfeasor up to the statutory limit, the imposition of liability is not based on fault but imposed by statute.[434] The statutory limit on

[430] Watson v. Department of Transportation, 68 Cal.App.4th 885, 80 Cal.Rptr.2d 594 (1998); Thornton v. Luce, 209 Cal.App.2d 542, 26 Cal.Rptr. 393 (1962); Hamm v. San Joaquin and Kings River Canal Co., 44 Cal.App.2d 47, 111 P.2d 940 (1941).
[431] Willis v. Gordon, 20 Cal.3d 629, 143 Cal.Rptr. 723 (1978); Schwartz v. Helms Bakery Limited, 67 Cal.2d 232, 60 Cal.Rptr. 510 (1967).
[432] Vehicle Code section 17150.
[433] Walker v. Belvedere, 16 Cal.App.4th 1663, 20 Cal.Rptr.2d 773 (1993).
[434] Rashtian v. BRAC-BH, Inc., 9 Cal.App.4th 1847, 12 Cal.Rptr.2d 411 (1992).

liability for an automobile owner for an injury caused by a person using the vehicle with the owner's permission does not apply to liability based on the vehicle owner's own negligence.[435]

The statutory liability of the owner is predicated on the theory of imputation of wrongdoing and is entirely independent from any liability based on his or her own negligence or on the relationship of principal and agent or employer and employee.[436] The statute is designed for the protection of the public, and places on the owner the responsibility of ascertaining the character, ability and responsibility of the person to whom he or she entrusts his or her automobile.[437] The purpose of the statute is to protect the public and impose liability on the owner who has permitted the use of his or her car by another, though he or she personally may not be guilty of wrongdoing.[438]

In addition, it should be noted that an employee has a duty to obtain automobile liability insurance in the event of an accident.[439] California law requires that the automobile liability insurance policy include policy limits for liability in the amount of $15,000 for bodily injury to one person, $30,000 for bodily injury to two or more persons in any one accident, and $5,000 for destruction of property in any one accident.[440]

D. Liability of Public Agency

Vehicle Code section 17001 states that a public entity is liability for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his or her employment. In order for a public employee's negligent or wrongful act or omission to be in the operation of any motor vehicle so as to subject the public agency to statutory civil liability for injury caused by the act or omission, the vehicle must be in a state of being at work or in the exercise of some specific function by performing work or producing effects at the time and place the injury is inflicted. It is not sufficient that a motor vehicle somehow be involved in a series of events that results in the injury.[441]

A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his or her employment if the act or omission would have given rise to a cause of action against that employee or his personal representative.[442] A public entity employer is vicariously liable for the torts of its employees committed within the scope of employment. However, alleged sexual misconduct by an employee falls outside the scope of employment and the public entity would not be vicariously liable in such circumstances.[443] Public employees are liable for injuries caused by their acts or omissions to

[435] Fremont Compensation Insurance Co. v. Hartnett, 19 Cal.App.4th 669, 23 Cal.Rptr. 567 (1993).
[436] Burgess v. Cahill, 26 Cal.2d 320, 158 P.2d 393 (1945); Estate of Gonzalez, 219 Cal.App.3d 1598, 269 Cal.Rptr. 68 (1990).
[437] Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183 (1937); Burton v. Gardener Motors Inc., 117 Cal.App.3d 426, 172 Cal.Rptr. 647 (1981).
[438] Burgess v. Cahill, 26 Cal.2d 320, 158 P.2d 393 (1945); Rosenthal v. Harris Motor Co., 118 Cal.App.2d 403, 257 P.2d 1034 (1953); Mason v. Russell, 158 Cal.App.2d 391, 322 P.2d 486 (1958).
[439] Vehicle Code sections 16050 et seq.
[440] Vehicle Code section 16056.
[441] Hernandez v. City of Pomona, 146 Cal.4th 501, 519-20, 94 Cal.Rptr.3d 1, 207 P.3d 506 (2009).
[442] Government Code section 815.2 (a).
[443] See M.P. v. City of Sacramento, 177 Cal.App.4th 121, 98 Cal.Rptr.3d 812 (2009).

the same extent as private persons.[444] The public entity is vicariously liable for any injury which its employee causes to the same extent as a private employer.[445]

E. Primary Insurance Coverage Versus Excess Insurance Coverage

Under Government Code section 825, a public entity is required to pay any judgment, compromise or settlement of any claim or civil action arising out of any act or omission (e.g., negligence) of a public employee acting in the course and scope of employment. As discussed in the cases below, a public entity may satisfy this statutory obligation by utilizing the public employee's personal automobile liability insurance as primary coverage and the public entity's insurance as excess coverage. The public entity may not require the public employee to pay any judgment or settlement from the employee's own funds or assets[446] other than the employee's insurance policy which is considered an asset of the public entity as well as an asset of the public employee.[447]

In Oxnard Union High School District vs. Teachers Insurance Company,[448] a history teacher, while acting in the course and scope of his employment as an assistant football coach of the district and while driving his own automobile, struck a motorcycle operated by Robert L. Chambers. Chambers was injured in the accident and filed negligence actions against the assistant football coach, Ova L. Farrow, and the Oxnard Union High School District.

Teachers Insurance Company (Teachers) was Farrow's insurer and the United Pacific Insurance Company (United) was the school district's insurer. The trial court ruled that Teachers insurance was liable for $100,000, its policy limits, and United, the district's insurer was liable for $15,000, in excess coverage, and that the liability for the attorney's fees and costs should be divided between the two insurers proportionately to the principal liabilities. The trial court's rationale was that Teachers insurance policy covering Farrow and the district as an additional insured afforded primary coverage and United's insurance policy covering the district afforded only coverage excess to that provided by Teachers. Teachers challenged this result on the ground that it is contrary to the Government Torts Claims Act.[449]

Under Government Code section 825, if an employee of a public entity requests in writing, not less than 10 days before trial, that the employer defend an action against the employee for injury arising out of an act or omission incurring within the scope of employment, the public entity shall pay, among other things, any settlement of the action to which the public entity has agreed. Government Code section 995 requires a public entity upon request of an employee to provide the employee with the defense of any civil action brought against the employee on account of an act or omission in the scope of employment.[450]

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[444] Government Code section 820.
[445] Hoff v. Vacaville Unified School District, 19 Cal.4th 925, 932, 80 Cal.Rptr.2d 811, 968 P.2d 522 (1998); Thomas v. City of Richmond, 9 Cal. 4th 1154, 1157, 40 Cal.Rptr.2d 442, 892 P.2d 1185 (1995).
[446] Except in limited circumstances when the employee acted outside the scope of employment or acted with actual fraud, corruption or actual malice. See, Government Code sections 995 et seq.
[447] Government Code section 825. See, also, Younker v. County of San Diego, 233 Cal.App.3d 1324, 1329-1331, 285 Cal.Rptr. 319 (1991).
[448] 20 Cal.App.3d 842, 99 Cal.Rptr.478 (1971).
[449] Id. at 844.
[450] Id. at 845.

The school district contended that it met its obligations under the Tort Claims Act through the insurance policies of Farrow and the school district. The Court of Appeal concluded:

> "We believe that all Section 1017(a)(2) [now Section 35208] requires of a school district is that it insure its employees fully and completely for the liability specified. In this case, the district's policy with United provided such protection through its other insurance clause (which brought in teacher's $100,000 policy as the primary coverage) and through its own excess coverage beyond the limits of teacher's policy. We hold that the district properly discharged its liability under the Government Tort Claims Act by means of the insurance policies of itself and of Farrow in the manner that the trial court found and adjudicated."[451]

In Government Employees Insurance Company v. Gibraltar Casualty Company,[452] the Court of Appeal held that the school district was entitled to coverage as an additional insured under the teacher's private automobile policy and the private automobile policy provided primary coverage and the school district's insurer provided excess coverage.

The plaintiff, Government Employees Insurance Company (GEICO) (the teacher's insurer) appealed a Superior Court summary judgment in favor of the Rialto Unified School District and Gibraltar Casualty Company. The Court of Appeal affirmed.

GEICO contended that since the Rialto Unified School District was not an insured under the GEICO policy, the public entity should be primarily responsible for damages. On May 8, 1982, a music teacher acting within the scope of their employment by the school district, was driving her own private automobile when her automobile struck Mr. Gauthier and severely injured him. Gauthier filed a timely suit against McClellan, but did not file a government tort claim or a lawsuit against Rialto Unified School District.[453]

On August 5, 1983, Ms. McClellan, through attorneys retained for her defense by GEICO, filed a demand upon the district to defend and indemnify her pursuant to Government Code section 825. The school district did not deny that Ms. McClellan was acting within the scope of her employment at the time of the accident, but the school district's attorneys contended that the district's liability was purely excess over the automobile insurance of the employee and that it was GEICO's duty to defend and indemnify McClellan and the district to the full extent of its policy limits. GEICO eventually settled the suit with Gauthier for its $100,000 policy limit.

GEICO then brought a lawsuit against the school district and its insurer, Gibraltar, attempting to recoup the amount of the settlement it had paid to Gauthier, and the amount of the attorneys' fees it had expended in defending McClellan in Gauthier's suit against her. Both sides moved for summary judgment. The motion of the school district in Gibraltar was granted and the motion of GEICO was denied.[454]

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[451] Id. at 846.
[452] 184 Cal.App.3d 163, 229 Cal.Rptr. 57, 34 Ed.Law. Rptr. 186 (1986).
[453] Id. at 165.
[454] Id. at 165-66.

The Court of Appeal noted that under Government Code section 825, since Ms. McClellan was acting within the scope of her employment at the time of the accident, the school district was obligated to defend her and pay any judgment against her or any compromise or settlement of the claim or action to which the public entity had agreed. The Court of Appeal noted, "That district was required to defend employee McClellan and pay the $100,000 settlement is, under the facts of this case, abundantly clear. Also abundantly clear is the fact that McClellan paid nothing and that GEICO paid the entire settlement and defense costs. She is thus clearly not, as the defense asserts she is, required to 'shoulder the burden of the loss.'"[455]

The Court of Appeal goes on to state that nothing in Government Code sections 825, 825.4, 996.4 or Education Code section 1017 [now 35208] prevents the public entity from satisfying its obligation to pay any judgment, compromise, settlement or defense costs through funds available to it through any insurance policy. The court noted that this is so whether the public entity is a named insured in the insurance policy or merely has that coverage available to it as an additional insured under such policy.[456]

The Court of Appeal relied on the provisions of Insurance Code section 11580.9(d), which provides that where two or more policies affording valid and collectible liability insurance apply to the same motor vehicle or vehicles in the occurrence of which a liability loss arises, it shall be conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated as an owned automobile shall be primary and the insurance afforded by any other policy or policies shall be excess.

The Court of Appeal then turned to the question of whether the district was insured under GEICO's policy. The Court of Appeal concluded that the district was entitled to coverage as an additional insured under the GEICO policy pursuant to Insurance Code section 11580.1(b)(4), which requires that all motor vehicle liability policies issued or delivered in California must provide coverage for anyone legally responsible for the use of the motor vehicle described in that policy. GEICO's policy provided coverage by defining as "persons insured" any other person or organization for his or its liability because of the acts or omissions of any insured. Ms. McClellan was the named insured under the GEICO and under that policy, the school district was clearly a person or organization which was liable because of the acts or omissions of Ms. McClellan in the operation or use of her vehicle at the time of the accident. "We thus conclude that district was itself an insured under the GEICO policy…"[457]

The Court of Appeal concluded that GEICO had a clear duty under the terms of its policy to pay on behalf of the district as well as on behalf of McClellan the amount of the settlement and the attorneys' fees incurred in the defense of Gauthier's claim against McClellan. The Court of Appeal held that as between the two insurance policies between Gibraltar and GEICO, it must be conclusively presumed that the insurance afforded by GEICO in which McClellan was the named insured and her motor vehicle was described is the primary insurance and the school district's insurance is excess.[458] The Court of Appeals stated:

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[455] Id. at 167.
[456] Id. at 167.
[457] Id. at 171.
[458] Id. at 171-172.

> "Ms. McClellan's private vehicle was the described and rated owned vehicle in the GEICO policy and not in the Gibraltar policy. It therefore appears clear to us that under the plain language of Section 11580.9, GEICO's policy is primary and Gibraltar's is excess"[459]

The Court of Appeal concluded that the language of Insurance Code sections 11580.8 and 11580.9 expressing the total public policy of the state respecting the order in which two or more liability insurance policies covering the same law shall apply is not in conflict with Government Code section 825.[460]

In Younker v. County of San Diego,[461] the Court of Appeal held that a county employee's personal automobile liability insurance, which provided coverage for any person or organization with respect to his or her liability because of acts or omissions of insured was the primary coverage and that the County of San Diego was entitled to coverage for a claim asserting employee's responsibility for injuries to a minor pedestrian.

On February 21, 1983, Younker, an assistant fire chief of the Dehesa Volunteer Fire Department, responded to a report of a fire. While driving his personal vehicle toward the fire, Younker received a radio message to cancel his response. Younker headed home. En route, Younker's vehicle struck and injured minor pedestrian Aaron Allen.[462]

On February 23, 1983, the self-insured county admitted its responsibility to defend and indemnify Younker if a claim were filed on Erin's behalf. On April 1, 1983, Aaron's mother, Kay Knight, filed a claim on the youth's behalf against the county. On April 7, 1983, the county asserted that Westfield, Younker's insurer, was the provider of primary coverage for the matter. On November 15, 1985, the court approved a settlement agreement obligating Younker and Westfield to pay $43,329 in settlement of the case. On February 10, 1986, Younker and Westfield filed a claim with the county seeking reimbursement for expenses incurred in defending and settling the case.[463]

On March 14, 1986, Younker and Westfield filed suit in San Diego Superior Court. After trial, the court entered judgment favoring Westfield against the county for $59,382.26, representing costs of settlement and attorneys' fees. The county appealed.

The Court of Appeal reversed, holding that Westfield's policy extended coverage to the county as the employer of Westfield's named insured Younker. The county contended that Westfield's obligation prevailed over the county's general obligation to defend and indemnify Younker's conduct. The Court of Appeal concluded that the Superior Court should have entered judgment for the county.[464]

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[459] Id. at 172.
[460] Id. at 174.
[461] 233Cal.App.3d 1324, 285 Cal.Rptr. 319 (1991).
[462] Id. at 320-21.
[463] Id. at 1326.
[464] Id. at 1327-28, citing Government Employees Insurance Company v. Gibraltar Casualty Company, 184 Cal.App.3d 163, 229 Cal.Rptr. 57 (1986).

The Court of Appeal held that under Insurance Code section 11580.1(b)(4), the employee's insurance company, Westfield, was the insurer not only of public employee Younker, but also of the county itself. The Westfield policy coverage was an asset of the county as well of Younker.[465] The Court of Appeal held that the county satisfied its statutory obligation to defend and indemnify Younker with respect to the claim through the Westfield policy. The Court of Appeals stated:

> "Where, as here, a public employee is fully covered, there is no proscription against the public entity satisfying its statutory obligation by availing itself of insurance designating its employee as the named insured…Thus, the county properly looked to the Westfield policy to comply with its statutory obligation to Younker. Westfield had a clear duty under the terms of its policy to pay on behalf of the county as well as on behalf of Younker the amount of the settlement and the attorneys' fees incurred in defending Aaron's claim against Younker."[466]

Therefore, by law, if the employee has an insurance policy which insures the employee and the vehicle involved in the accident, the employee's insurance policy is the primary coverage and the school district's insurance provides excess coverage.

F. Summary

In summary, liability is determined based on whether the driver of the vehicle involved in the accident was negligent and caused injury or damage to another person or vehicle. If the employee caused the accident and the employee was acting within the course and scope of their employment, the employee would be primarily liable and the school district would be secondarily liable. The school district would have a duty to defend the employee with respect to any claim or civil action except in cases of actual fraud, corruption or actual malice. If the employee has automobile liability insurance as required by law, the employee's insurance coverage would be primarily liable and the school district's insurance coverage would be secondarily liable and cover excess liability.

TORT CLAIMS PROCEDURE

A. Defense and Indemnification of Employees – Civil Actions

The Government Code establishes a procedure by which a person may file claims against public agencies, including school districts, for acts or omissions of its employees.[467] The Government Code also provides that in civil actions, public agencies, including school districts, are required to provide a legal defense for public employees when the action is brought in their

[465] Id. at 1329.
[466] Id. at 1331.
[467] Government Code section 810 et seq. See, Freeny v. City of Buenaventura, 216 Cal.App.4th 1333, 157 Cal.Rptr.3d 768 (2013), wherein the Court of Appeal held that Government Code section 800 et seq. prohibits plaintiffs from suing public employees for decisions made on the job. Specifically, public employees are not responsible for losses caused by their negligent or intentional misrepresentations, unless they are guilty of actual fraud, corruption, or acting deliberately to cause harm.

official or individual capacity on account of an act or omission in the scope of their employment as an employee of the school district.[468]

Generally, in civil actions, a public entity has a duty to defend a public employee.[469] A public entity may refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines:

1. The act or omission was not within the scope of his or her employment;

2. He or she acted or failed to act because of actual fraud, corruption or actual malice;

3. The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee. "Specific conflict of interest" is defined to mean a conflict of interest or an adverse or pecuniary interest.[470]

If an employee or former employee requests in writing that the public entity through its designated legal counsel provide a defense, the public entity shall, within 20 days, inform the employee or former employee whether it will or will not provide a defense and the reason for the refusal to provide a defense.[471] If an actual and specific conflict of interest arises after the 20 day period following the employee's written request for defense, the public entity may refuse to provide further defense to the employee. The public entity shall inform the employee of the reason for the refusal to provide a further defense.[472]

The public entity is not required to provide for the defense of an action to remove, suspend or otherwise penalize its own employee or former employee or an appeal from such an action.[473] The public entity is also not required to provide for the defense of an action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity.[474]

B. Defense and Indemnification of Employees – Administrative Actions

A public entity is not required to provide for the defense of an administrative proceeding brought against an employee or former employee, but a public entity may provide such a defense if:

1. The administrative proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; and

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[468] Government Code section 995 et seq.
[469] Government Code section 995.2.
[470] Government Code section 995.2(a).
[471] Government Code section 995.2(b).
[472] Government Code section 995.2(c).
[473] Government Code section 995.4.
[474] Government Code section 995.4(b).

2. The public entity determines that such defense would be in the best interest of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice, and in the apparent interest of the public entity.[475]

C. Defense and Indemnification of Employees – Criminal Actions

The public entity is not required to provide for the defense of a criminal action or proceeding brought against an employee or former employee but a public entity may provide for the defense of criminal action or proceeding if:

1. The criminal action or proceeding is brought on account of an act or omission in the scope of employment as an employee of the public entity; and

2. The public entity determines that such defense would be in the best interest of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interest of the public entity.[476]

In City of Bell v. Superior Court,[477] the Court of Appeal held that Robert Rizzo, the former Chief Administrative Officer of the City of Bell, was not entitled to indemnification for his criminal defense. Rizzo was criminally charged with multiple counts of misappropriation of public funds. Rizzo filed a complaint for declaratory relief, seeking a judgment that the city is contractually obligated to provide him with a defense to civil and criminal actions arising from the allegations. The Court of Appeal concluded that, as a matter of law, the city does not owe Rizzo such a defense.

The Court of Appeal concluded:

> "Public policy necessarily rejects the concept that a public entity allegedly victimized by a corrupt employee must provide that employee with a defense to those charges. The Tort Claims Act does not require such a result. A contract term intended only to provide the employee with indemnification from, and a defense to, third party actions, cannot be interpreted to require that result. Moreover, to the extent that we are concerned with the provision of a defense to criminal actions, a contract could not require that result, even if the parties had intended it."[478]

[475] Government Code section 995.6.
[476] Government Code section 995.8.
[477] 220 Cal.App.4th 236, 163 Cal.Rptr.3d 90 (2013).
[478] Id. at 261.

D. Scope of Duty to Defend Employees in Civil Actions

The California Government Code provides that in civil actions, public agencies, including school districts, are required to provide a legal defense for public employees when the action is brought against them in their official or individual capacity on account of an act or omission in the scope of their employment for the school district. This duty would include the defense of Section 1983 lawsuits.[479]

Government Code section 995.2 states in part:

> "A public entity has the right to refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines any of the following:
>
> "a) The act or omission was not within the scope of his or her employment;
>
> "b) He or she acted or failed to act because of actual fraud, corruption or actual malice;
>
> "c) The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee . . ."

In Stewart v. City of Pismo Beach,[480] Stewart, a city police officer, participated in an undercover investigation of a bar called Harry's. The owners of the bar sued, alleging selective law enforcement and violation of their due process and equal protection rights under the United States Constitution. The city hired two attorneys to represent Stewart, the city council, chief of police and the other police officers named in the suit. Stewart, however, gave an interview to the plaintiff's investigator and signed a declaration indicating that Harry's had indeed been illegally targeted. Under Government Code section 995.2, the city did not have to continue to provide a defense for Stewart as he had created a conflict of interest and failed to cooperate with the defense attorneys.

The public entity may provide for a defense by using its own attorney, hiring other counsel or by purchasing insurance that requires the insurer to provide the defense. The public entity has no right to recover for the expenses of the defense from the employee.[481]

If an employee requests that the public entity provide a defense in a civil action and the public entity fails or refuses to provide the defense and the employee hires his own counsel, the employee is entitled to recover from the public entity reasonable attorney fees, costs and expenses. However, the employee is not entitled to reimbursement if the public entity

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[479] Williams v. Horvath, 16 Cal.3d 834, 129 Cal.Rptr. 453 (1976).
[480] 42 Cal.Rptr.2d 382, 35 Cal.App.4th 1600 (1995).
[481] Government Code section 996.

establishes that the employee acted or failed to act because of actual fraud, corruption or actual malice.[482]

In Daza v. Los Angeles Community College District,[483] the Court of Appeal interpreted the provisions of the California Tort Claims Act[484] requiring public employers to defend and indemnify their employees from third party claims arising out of acts within the scope of employment.

Under Government Code sections 995, et seq., a public entity must provide a defense to its employees and pay any claim or judgment against them.[485] When the public entity refuses to defend, the employee can seek a writ of mandate or, in the alternative, fund their own defense and then sue for reasonable attorney's fees, costs and expenses incurred if the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity. Recovery, however, is barred if the agency establishes the employee acted or failed to act because of actual fraud, corruption or actual malice.[486]

In Daza, an adult student sued the Los Angeles Community College District and Igor Daza, a guidance counselor employed by the community college district, alleging Daza sexually assaulted her when she went to his office for counseling services. The community college district refused to defend Daza, so he paid for his own defense and filed a cross complaint denying the allegations of sexual assault and seeking indemnity and reimbursement for his defense. After the district settled the main lawsuit without admitting liability and without a factual determination of whether Daza was acting within the scope of his employment, the student dismissed with prejudice all her claims against the district and Daza. The district then demurred to Daza's cross complaint, arguing the student's allegations of sexual assault in the main lawsuit fell outside the scope of Daza's employment as a matter of law. Daza opposed, arguing he was not limited to the allegations in the main lawsuit and carrying his burden to prove the act fell within the scope of his employment. The trial court agreed with the district and refused to look beyond the allegations in the main lawsuit to hold as a matter of law that the alleged acts of sexual assault fell outside the scope of Daza's employment.

The Court of Appeal reversed. The Court of Appeal held that the trial court was correct that the sexual assault alleged in the main lawsuit fell outside the scope of Daza's employment as a matter of law, but under Government Code section 996.4, the Court of Appeal held that the "determination of whether an employee acted within the scope of employment is factual and cannot be limited to the third party's allegations in the underlying lawsuit when the employee denies those allegations, and the employee's version of events would demonstrate acts within the scope of employment."

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[482] Government Code section 996.4.
[483] 247 Cal.App.4th 260 (2016).
[484] Government Code sections 810, et seq.
[485] Government Code sections 825, et seq.
[486] Government Code section 996.4; Stone v. Regents of the University of California, 77 Cal.App.4th 736, 746 (1999).

In Chang v. County of Los Angeles,[487] the Court of Appeal held that the County of Los Angeles may refuse to indemnify a public employee under a reservation of rights clause in its agreement with employees.

The County of Los Angeles provided a defense to three employees under a reservation of rights then refused to pay the resulting judgment for battery and civil rights violations on the ground that the employees acted with actual malice. The employees sought indemnification from their employer under Government Code section 825.

The trial court granted summary judgment in favor of the employees. On appeal, the County of Los Angeles contended that because the defense was conducted under a reservation of rights, the employees had to satisfy the requirements of Government Code section 825.2 for indemnification. The Court of Appeal held that section 825.2 applies when a public entity employer provides a defense under a reservation of rights that includes a reservation of the right not to indemnify for acts committed with actual fraud, corruption or actual malice. An employer's reservation of the right to indemnify the employee for acts committed with actual fraud, corruption or actual malice is necessarily a reservation of the right not to indemnify the employee for such acts.

The Court of Appeal reversed the trial court, and held that the County of Los Angeles was justified in refusing to indemnify the three employees who allegedly used pepper spray on a prison inmate.

E. Duty to Defend in Federal Civil Actions

In Williams v. Horvath,[488] the California Supreme Court held that the California Tort Claims Act,[489] is consistent with Section 1983, and that the State of California may defend and indemnify public employees sued in their individual or personal capacity in Section 1983 actions. The court stated:

> "There is nothing whatever in the language of Section 825 to suggest that governmental employees are to be indemnified only if the cause of action upon which liability was predicated had its source in the Tort Claims Act. On the contrary, the specific reference in Section 825 to any claim or action negates this inference.
>
> "Nor, as an analysis of the leading federal cases shows, is there anything in Section 1983 which precludes a state from indemnifying public employees when liability is founded upon that section."[490]

[487] 1 Cal.App.5th 25 (2016).
[488] 16 Cal.3d 834, 129 Cal.Rptr. 453 (1976).
[489] Government Code section 815.
[490] Id. at 459.

The California Supreme Court noted that while indemnification allows a plaintiff to recover from the public entity for injuries inflicted by an employee of the public entity, the court held that there was nothing in the legislative history of Section 1983 that suggests Congress wanted to limit recoveries by plaintiffs. The California Supreme Court noted that while Congress may have intended to limit recoveries brought directly against governmental entities under Section 1983, states may, on their own accord, defend and indemnify public employees by paying judgments under state law.

The California Supreme Court ruled that such state provisions were consistent with federal law. The court held that Congress did not intend to preclude a state from imposing vicarious liability as a matter of state law on public entities. The court held that state law provisions allowing indemnification do not obstruct the intent of Congress, but enhance the purpose of Section 1983 by ensuring that individuals will be able to recover any awards granted by the courts. The court stated:

> "A rule forbidding indemnification in Section 1983 actions would subject police officers to unlimited and unforeseeable personal liability for acts committed in the course and scope of employment. This liability would be dependent not on the degree of culpability of the acts themselves, but on the purely fortuitous circumstances of whether a given plaintiff chose to ground his complaint on the Tort Claims Act or on Section 1983. The employee's personal liability would thus be a matter totally beyond his control. The Legislature can not have intended this haphazard result."[491]

The court went on to state that in truly egregious cases, the indemnification statutes of state law expressly forbid reimbursement by the public entity. The court also listed a number of public policy considerations favoring indemnification:

1. The indemnification provisions facilitate the bringing of actions against erring public servants because the plaintiff is ensured that the financial resources of the public entity will stand behind the judgment;

2. Indirect public entity liability through indemnification will cause the public entity to exercise an additional degree of caution in the hiring and supervision of employees whose functions carry a greater risk of potential liability.

The California Supreme Court concluded that the indemnification provisions of the Tort Claims Act are applicable whether the actions brought under the Tort Claims Act or under Section 1983.[492]

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[491] Id. at 462.

[492] Id. at 462. See, also, Choate v. County of Orange, 86 Cal.App.4th 312, 329, 103 Cal.Rptr.2d 339 (2001); Travino v. Gates, 99 F.3d 911 (9th Cir. 1996); Cunningham v. Gates, 229 F.3d 1271 (9th Cir. 2000); Brewster v. Shasta County, 275 F.3d 803 (9th Cir. 2001); Navarro v. Block, 250 F.3d 729 (9th Cir. 2001).

F. Means of Providing Defense in Civil Actions

The public entity may provide for a defense pursuant to these statutory provisions by its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense. All of the expenses of providing defense are proper charges against the district. The district has no right to recover such expenses from the employee or the former employee.[493] If, after requested to do so, a district fails or refuses to provide an employee or former employee with a defense against a civil action or proceeding brought against him and the employee retains his own counsel to defend the action or proceeding, the employee is entitled to recover from the district such reasonable attorney fees, costs and expenses as are necessarily incurred by the employee in defending the action or proceeding if the action or proceeding arose out of an act or omission in the scope of employment as an employee of the public agency. However, he is not entitled to such reimbursement if the district establishes:

1. That he acted or failed to act because of actual fraud, corruption, or actual malice; or

2. That the action or proceeding was an action to remove, suspend or otherwise penalize the public agency's own employee.[494]

G. Tort Claims – Public Record

In Poway Unified School District v. Superior Court,[495] the Court of Appeal held that a school district must provide a copy of the tort claim filed by a student to the press with the identifying information redacted. The Court of Appeal held the tort claim does not exempt from disclosure under the Public Records Act.

H. Breach of Contract Claims

In City of Stockton v. Superior Court,[496] the California Supreme Court held that individuals and entities seeking to file lawsuits against local agencies, including school districts and community college districts, in breach of contract claims, must file a claim under the Government Claims Act.[497]

In City of Stockton, the California Supreme Court held that Government Code section 905 requires the presentation of all claims for money or damages against local public entities. Claims for personal injury and property damage must be presented within 6 months after accrual and all other claims must be presented within a year.[498] No suit for money or damages may be brought against a public entity in the cause of action for which a claim is required to be presented unless a written claim has been presented to the public entity and has been acted upon or has

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[493] Government Code section 996.
[494] Government Code section 996.4.
[495] 62 Cal.App.4th 1496, 49 Cal.Rptr.3d 519 (1998).
[496] 42 Cal.4th 730, 68 Cal.Rptr.3d 295 (2007).
[497] Also known as the Tort Claims Act.
[498] Government Code section 911.2.

been deemed to have been rejected.[499] The failure to timely present a claim for money or damages to the public entity bars a lawsuit against that entity.[500]

The purpose of the claims statute is to provide the public entity sufficient information to enable the public entity to adequately investigate claims and settle them, if appropriate, without the expense of litigation. The claims statute also enables the public entity to engage in fiscal planning for potential liabilities and to avoid similar liabilities in the future.[501]

The court held that contract claims fall within the plain meaning of the requirement that all claims for money or damages be presented to a public entity.[502] The statute governing the contents of claims against both state and local entities requires specification of the date, place, and other circumstances of the occurrence or transaction which gave rise to the claims asserted and a general description of the indebtedness, obligation, injury, damage, or loss incurred.[503] Claims against local public entities for supplies, materials, equipment or services need not be signed by the claimant if presented on an invoice regularly used in the conduct of the business of the claimant.[504]

Based on these statutory provisions and the legislative history of Government Code sections 905 and 945.4, the California Supreme Court held that the claims requirements in the Government Claims Act were intended to include contract claims.[505]

I. Filing of Tort Claim – Sexual Abuse

In A.M. v. Ventura Unified School District,[506] the Court of Appeal held that the guardian ad litem for a minor who sued the Ventura Unified School District and its employees for negligence for allowing male students to sexually abuse her daughter while at school was not required to file a tort claim. The Court of Appeal held that pursuant to Government Code section 905(m), claims are not required for violations of Code of Civil Procedure section 340.1 where the legal cause of action is based on childhood sex abuse.

The Court of Appeal rejected the school district's argument that the exemption applies only if the alleged childhood sexual abuse was committed by an employee, volunteer, representative or agent of the public entity.

J. Filing of Tort Claim – Statute of Limitations

In Shirk v. Vista Unified School District,[507] the California Supreme Court held that a former student may not file suit against the school district for sexual misconduct which occurred 25 years before.

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[499] Government Code section 945.4.
[500] State of California v. Superior Court (Bodde), 32 Cal.4th 1244, 1249 (2004).
[501] Baines Pickwick Ltd. v. City of Los Angeles, 72 Cal.App.4th 298, 303 (1999).
[502] Government Code section 905.
[503] Government Code section 910.
[504] Government Code section 910.2.
[505] 42 Cal.4th 730, 737-47, 68 Cal.Rptr.3d 295 (2007).
[506] 3 Cal.App.5th 1252 (2016).
[507] 42 Cal.4th 201, 64 Cal.Rptr.3d 210 (2007).

The California Supreme Court held that amendments to the statute of limitations for sexual molestation enacted by the Legislature in 2002 which allowed victims of childhood sexual abuse to file legal actions during calendar year 2003 against a person or an entity that had reason to know or was on notice of any unlawful sexual conduct by an employee, volunteer, representative or agent and failed to take reasonable steps to implement reasonable safeguards to avoid acts of unlawful sexual misconduct, did not apply to public agencies. The California Supreme Court held that these provisions applied to nonpublic employers only.[508]

The California Supreme Court held that when the Legislature amended Civil Code section 340.1 in 2002 it did not amend the government claims statutes. Before suing a public entity, the plaintiff must present a timely written claim for damages to the entity.[509] Such claims must be filed with the governmental entity no later than six months after the cause of action occurs.[510] In 2002, when the Legislature amended Civil Code section 340.1, it did not amend the government claims statute. Timely presentation of a claim is a condition precedent to a plaintiff suing a public entity.[511] Civil complaints that do not allege facts demonstrating that a claim was timely filed or that compliance with the claims statute is excused are dismissed by the courts.[512]

In short, the plaintiff acknowledged that she failed to present a claim to the school district in 1980 (within six months of the sexual molestation) and, therefore, the California Supreme Court affirmed the dismissal of her lawsuit. The California Supreme Court concluded that the legislative history of the 2002 amendments made no mention of an intent to revive the deadline by which to present a claim to a public entity and that the notice requirement under the government claims statutes were based on a recognition of the special status of public entities, affording them greater protections than nonpublic entity defendants, because unlike nonpublic defendants, public entities whose acts or omissions are alleged to have caused harm will incur costs that must ultimately be borne by the taxpayers.[513]

In J.M. v. Huntington Beach Union High School District,[514] the Court of Appeal affirmed a lower court decision dismissing a student's lawsuit against a public entity for tort relief. The Court of Appeals held that compliance with the Government Tort Claims Act is mandatory and failure to present a claim is fatal to the cause of action.[515]

The Court of Appeal held that the student failed to present a claim to the governing board of the Huntington Beach Union High School District within six months of the date on which the cause of action occurred, as required by Government Code section 945.4 and 911.2. The student retained counsel and filed an application under Government Code section 911.4 to present a late claim on the ground that J.M. was a minor. The school district did not act on the application and as a consequence under Government Code section 911.6(c), the student's application was deemed denied by operation of law.

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[508] Id. at 204-05.
[509] Ibid., citing Government Code section 911.2.
[510] Ibid.
[511] Williams v. Horvath, 16 Cal.3rd 834, 842 (1976).
[512] State of California v. Superior Court, 32 Cal.4th 1234, 1245 (2004).
[513] Id. at 210-14.
[514] 240 Cal.App.4th 1019 (2015).
[515] McMartin v. County of Los Angeles, 202 Cal.App. 3d 848, 858 (1988).

The Orange County Superior Court dismissed the application and the Court of Appeal affirmed the lower court's decision holding that although Government Code section 946.6 is a remedial statute, it can only be construed in favor of relief when that is possible. J.M. had six months from December 8, 2012 to petition the Superior Court for relief from the claim requirement under Section 946.6. The student did not meet that deadline. Therefore, the Court of Appeal affirmed.

K. Presentation of Tort Claim

In Dicampli-Mintz v. County of Santa Clara,[516] the California Supreme Court held that the presentation of a tort claim to the County of Santa Clara must be served in compliance with Government Code section 915(a). Government Code section 915(a) states:

> "(a) A claim, any amendment thereto, or an application to the public entity for leave to present a late claim shall be presented to a local public entity by either of the following means:
>
> (1) Delivering it to the clerk, secretary, or auditor thereof.
>
> (2) Mailing it to the clerk, secretary, auditor, or to the governing body at its principal office."

Government Code section 915(e) states that a claim shall be deemed to have been presented in compliance with Section 915 if it is actually received by the clerk, secretary, auditor, or board of the local entity. The court held that if the claim is served or mailed to another individual within the organization that is not sufficient compliance.

L. Filing of a Late Claim

In D.C. v. Oakdale Joint Unified School District,[517] the Court of Appeal held that the school district's notice of the board action denying an applicant's late claim under Government Code section 911.8(a) must include not only information as to whether the board granted or denied the application, but also the date upon which the grant or denial was made. The Court of Appeal held that unless the date of the board's action is contained in the denial notice, a public entity might be estopped from relying on Government Code section 946.6(b) to deny the application for a late claim.

In Oakdale Joint Unified School District, the claimant attempted to present to the school district a late claim alleging mishandling of a child's behavioral difficulties. On June 9, 2009, the school district sent the claimant a letter which stated in part:

> "The application for leave to present a late claim that you filed with the Oakdale Joint Unified School District on behalf of D.C.…was denied by the Board of Trustees."[518]

[516] 55 Cal.4th 983, 289 P.3d 884 (2012).
[517] 203 Cal.App.4th 1572, 138 Cal.Rptr.3d 421 (2012).
[518] Id. at 1577.

The notice further provided that pursuant to Government Code section 946.6, the claimant could file a petition with the appropriate court for an order. Such petition must be filed with the court within six months from the date your application for leave to present a late claim was denied.[519]

The Stanislaus County Office of Education sent a similar notice. Neither of these notices contained the date upon which the respective boards denied the application. The applicant then filed a petition with the court alleging that the late claim was denied by the school district on June 9, 2010, and by the Stanislaus County Office of Education on June 11, 2010. The school district submitted a declaration from its superintendent stating that the claim had, in fact, been denied on May 10. The Superior Court agreed with the school district and the Stanislaus County Office of Education and denied the petition. The claimant appealed.[520]

The Court of Appeal reversed and held that the notice of the board's action upon the filing of the late application must include not only information as to whether the board granted or denied the application, but also the date upon which the grant or denial was made. The Court of Appeal remanded the matter to the Superior Court with instructions to allow the claimant the opportunity to amend his petition to allege that the school district and the Stanislaus County Office of Education are estopped (i.e., prohibited from asserting) to assert the six month defense in Government Code section 946.6(b).[521]

Districts should review their procedures and forms to make sure that when giving notice to claimants of a denial of their late claim that the date of the grant or denial of the application be included in the notice.

In E.M. v. Los Angeles Unified School District,[522] the Court of Appeal held that a minor student's application for leave to present a late tort claim, filed within one year of accrual of the cause of action, was timely. The Court of Appeal reversed the lower court's decision and remanded the matter back to the trial court for trial.

On June 11, 2008, the student filed a claim against the Los Angeles Unified School District seeking damages of $5.5 million based on allegations that she had been molested by a basketball coach. The claim stated that while the minor student was a high school senior, the basketball coach engaged in a sexual relationship with the student. The last encounter occurred in September 2007, approximately nine months earlier.[523]

The school district returned the claim on the ground that it was not presented within six months after the event or occurrence as required by law.[524] On August 4, 2008, the student filed an application for a leave to present a late claim. As required by Section 911.4, the late claim application set forth the following reasons for the delay in presenting the claim, including control

[519] Ibid.
[520] Id. at 1577-78.
[521] Id. at 1579-82.
[522] 194 Cal.App.4th 736, 125 Cal.Rptr.3d 200 (2011).
[523] Id. at 739.
[524] Id. at 739. See, Government Code sections 901 and 911.2.

by the coach over the student's playing time and communication with colleges in offering her an athletic scholarship, fear, and the student's shame about what happened.[525]

On September 25, 2008, the school district notified the student's attorney that her application for leave to present a late claim was rejected by the board of education at a meeting on September 9, 2008. The notice included a statement required by Section 911.8, stating that if the student wished to file a court action in this matter, the student must first petition the appropriate court for an order relieving the student from the provisions of Government Code section 945.4, which required the filing of a timely claim before filing a lawsuit. The notice also cited Government Code section 946.6, which requires that the petition must be filed with the court within six months from the date the student's application for leave to present a late claim was denied.[526]

On February 25, 2009, five months after the district rejected the application for leave to present a late claim, the student filed a tort action against the school district in Los Angeles County Superior Court. Seven months after the district rejected the late claim application, the student filed a petition to file a late claim. The Superior Court dismissed the lawsuit and petition, and the student appealed.[527]

The Court of Appeal noted that before suing the public entity, the plaintiff must present a timely written claim for damages to the entity.[528] The claim must be presented to the governmental entity no later than six months after the cause of action accrues.[529] Timely claim presentation is a condition precedent to the student's maintaining an action against the school district.[530] Only after the public entity has acted upon the claim or is deemed to have rejected the claim, may the plaintiff bring a lawsuit alleging a cause of action in tort against the public entity.[531] Generally, the lawsuit must be commenced within six months of notice of rejection of the claim.[532]

On June 11, 2008, plaintiff filed a tort claim with the district seeking damages based on the alleged molestation by the basketball coach. The claim indicated that the last sexual encounter occurred nine months earlier. Therefore, the Court of Appeal ruled that the initial claim which plaintiff presented was untimely.[533]

However, the Court of Appeal ruled that pursuant to Government Code sections 911.4 and 911.6, the student filed a timely application to file a late claim. Section 911.4 states that a written application may be made to the public entity for leave to present a claim within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reasons for the delay in presenting the claim. Section 911.6 provides that the board shall grant

[525] Id. at 739-40. See, Government Code sections 911.4 and 911.6.
[526] Id. at 740-41.
[527] Id. at 741.
[528] Id. at 740. See, Government Code section 911.2; Shirk v. Vista Unified School District, 42 Cal.4th 201, 208, 64 Cal.Rptr.3d 210 (2007).
[529] Id. at 744. Government Code section 911.2.
[530] Shirk v. Vista Unified School District, 42 Cal.4th 201, 209, 64 Cal.Rptr.3d 210 (2007).
[531] Id. at 744. Government Code sections 912.4 and 945.4; Shirk v. Vista Unified School District, 42 Cal.4th 201, 209, 64 Cal.Rptr.3d 210 (2007).
[532] Id. at 745. Government Code sections 913, 945.6.
[533] Id. at 745.

the application where the person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim.[534]

The Court of Appeal held that the Legislature intended to establish different standards for the consideration of late claim applications that are filed on behalf of injured adults as opposed to those that are filed on behalf of injured minors.[535] The Court of Appeal held that Section 911.6 requires adults to show that the failure to present the claim in a timely manner was due to mistake, inadvertence, surprise or excusable neglect and that the public entity was not prejudiced by the failure to present the claim, but with respect to minors, Section 911.6 provides simply that the late claim application must be granted so long as the injured person was a minor during the claim period.[536]

The Court of Appeal noted that the plaintiff filed her application for leave to present a late claim within the one-year period and that at all times relevant the plaintiff was a minor. Because the plaintiff was a minor, the Court of Appeal ruled that the district was required to grant the application for leave to present the late claim since it was filed within one year of the accrual of the cause of action.[537]

The Court of Appeal reversed the lower court's decision and allowed the student's lawsuit to go forward. The Court of Appeal stated, "Thereafter, the complaint for damages filed February 25, 2009, was timely because it was filed within six months of the district's September 25, 2008, rejection of plaintiff's application for leave to present a late claim."[538]

Districts should be aware of the different rules that apply to adults and minors with respect to filing late tort claims.

M. Filing of Claims – Additional Requirements

In Arntz Builders v. City of Berkeley,[539] the Court of Appeal held that if a claimant has complied with a contractually mandated claims procedure under Government Code sections 930, et seq., then the claimant is not required to present an additional statutory claim pursuant to Government Code sections 905 and 910 prior to filing a lawsuit, unless it is expressly mandated by the contract. The Court of Appeal held that the two procedures are intended to be parallel, not sequential, unless it is expressly mandated by the contract that the claimant must comply with both procedures.[540]

N. Waiver of Requirement to File Claim

In J.P. v. Carlsbad Unified School District,[541] the Court of Appeal upheld a lower court jury decision finding that Carlsbad Unified School District liable for negligently supervising an elementary school teacher. The jury awarded economic and non-economic damages after

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[534] Id. at 745-46.
[535] Id. at 746. See, Hernandez v. County of Los Angeles, 42 Cal.3d 1020, 232 Cal.Rptr. 519 (1986).
[536] Id. at 746-47.
[537] Id. at 747.
[538] Id. at 748.
[539] 166 Cal.App.4th 276, 82 Cal.Rptr.3d 605 (2008).
[540] Id. at 289.
[541] 232 Cal.App.4th 323(2014).

entering a judgment on the jury's verdict. The trial court denied the school district's motion for judgment notwithstanding the verdict and for a new trial.

On appeal, the school district contended that the trial court erred in denying its motion for nonsuit alleging that the minor did not file a government claim within the required six month period under Government Code section 911.2.

The Court of Appeal held that the school district repeatedly told the minor's parents that they should not discuss molestations with anyone due to the criminal investigation. The school district's repeated instruction to stay silent exerted a powerful influence on the parent's action. As a result, the parents delayed filing a civil action against the school district.

The Court of Appeal held that equitable estoppel should apply. The Court of Appeal held that the school district's instruction to keep the molestations confidential prevented the minor's parents from filing a government claim and therefore, equitable estoppel applies.

SUMMARY

Liability with respect to districts is generally based on the legal theory of negligence. For a plaintiff to prove negligence, four elements must be proven:

1. Legal duty;
2. A breach of legal duty;
3. Proximate cause; and
4. Damages or injury.

One of the main legal duties of districts is supervision. Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care, which could lead to liability. Other standards of care include the duty to warn parents of possible harm to their children and duty to warn of dangerous conditions on school property.

The Education Code provides for immunity from liability for injuries sustained by a student while on a voluntary field trip. The courts have upheld broad immunity for districts and district employees with respect to field trips.

With respect to liability for sports injuries, the California Supreme Court has ruled that districts may be found liable only if the instructor intentionally injures a student, or engages in conduct that is reckless in the sense that it is totally outside the range of the ordinary activity involved in teaching or coaching a sport. The court rejected an ordinary negligence standard holding that an ordinary negligence standard would discourage coaches from instructing students and encouraging them to excel in sports.

The courts have also found that students who engage in sports and other inherently dangerous activity assume the risk of injury, that the district is not an insurer of the student's safety and the district will not be held liable unless the instructor gave specific direction that increased the risk of harm to the student over and above the risk inherent in the sport. The courts

have also upheld properly drafted release forms that inform the parent or student appropriately of the impact of the risk involved.

In most cases, districts will be required to defend and indemnify employees who are sued for negligence or under federal civil rights laws. The district may only refuse to defend and indemnify the employee if the employee acted outside the scope of their employment, acted with fraud, corruption, malice, or defense of the employee would create a specific conflict of interest.