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## *Preventive Law*

### *Developing Risk and Crisis Management Programs*

*Accidents, incidents, or transgressions are organizational and managerial problems, not always, as we tend to think, people problems. Regardless of the cause of problems that may lead to litigation, such events are too often dealt with ex post facto rather than by means of a well-planned, proactive program of risk anticipation and litigation prevention. Risk factors diminish with a well-defined, proactive program of preventive law. The function of preventive law is to regulate human conduct to ensure a harmonious society by attempting to strike a balance between allowing individuals as much freedom as possible and enabling society to function without unreasonable interference from the conduct of individuals.*

School districts should make preventing liability a high priority in daily operations. In many school districts, responsibility for preventing litigious actions or inaction and loss is relegated to middle- and low-level staff members. The longstanding misperception is that safety and loss programs involve minor personnel matters and relatively insignificant details. Yet when a major incident, accident, or loss occurs, it requires significant top-level time and energy. A senior manager should be assigned the responsibility for a district's risk management prerogatives. In the development and implementation of policies and procedures, school districts, in cooperation with their legal counsel, should include the concepts and practice of preventive law as a major component of their overall risk management program. A tendency in many

school districts is to temporize and downplay the significance of legal problems, seeking answers to such problems at the operational level rather than at the organizational level, and school districts often rely on legal counsel only after they are in trouble. That said, despite district initiatives, principals can significantly reduce their exposure to liability by incorporating and practicing preventive law as outlined below.

### **FOCUS POINT: Tenets of Preventive Law and Risk Management**

The concepts of preventive law and the management of risk, which are interwoven throughout this book, are illustrated by six general beliefs or tenets:

1. *An understanding of the substance of law limits an education organization's culpability and exposure.* Effective principals base their day-to-day decision making on substantive law, which consists of both an understanding of the basic tenets of law and knowledge of current education litigation decisions.
2. *The proper application of procedures, informed decision making, and foreseeability reduces liability and environmental and organizational loss.* Effective principals adhere to procedures and precedents established by law, exercise reasonable and prudent judgment in situations not directly addressed by the law, and integrate foreseeability when practicing preventive law, thus minimizing exposure to liability and loss.
3. *Working with counsel reduces budget loss.* When they have questions about legal issues that are not directly addressed in established laws and procedures, effective principals consult legal counsel.
4. *Flexibility endangers system stability but enhances conflict resolution.* Although principals must strictly adhere to, enforce, and monitor all policies and procedures, effective principals demonstrate flexibility and reduce conflict (and avoid litigation) by fostering a school climate in which divergent ideas may be presented, respected, permitted to flourish, and channeled into productive results for the school.
5. *Knowledge of precedent, constitutional compliance, and public information needs enhances crisis and motivational management and monitoring.* Effective principals understand the legal ramifications of precedent-setting cases and consider the significant protections provided to students, teachers, and others under various interpretations of the Constitution when making decisions. They also know that it is often up to them to educate parents and others about how court actions influence the daily operations of the school.
6. *Leadership in the education enterprise must be coupled with leadership in preventive law.* Effective education leadership sometimes involves taking calculated risks when complicated situations warrant decisive action; however, such risks must be legal and must demonstrate a commonsense commitment to preventive law.

## FOCUS POINT: What Is Preventive Law?

Preventive law is generally defined as a program, supported by policies, procedures, and regulations, that endeavors to minimize the risk of litigation or to secure, with more certainty, legal rights and duties. Preventive law emphasizes the importance of *pre facto* planning to avoid legal problems and their consequences should litigation ensue. There are four components of preventive law—all of which should be put into everyday practice at the building level by principals:

1. The *anticipation* of legal challenges (foreseeability);
2. The *evaluation* of the legal merits of potential challenges;
3. A *consideration* of the policies (in effect or proposed) affected by potential challenges; and
4. *Implementation or modification*, where appropriate, in response to the first three steps.

## FOCUS POINT: Identifying Potential Risks

To the extent that human behavior and the law are reasonably foreseeable, informed school principals practicing preventive law and common risk management methods can predict certain legal risks and reduce their scope through policy, procedure, and practice. In those areas in which the law is less certain, principals can at least *identify* and *analyze* risk and choose courses of action that are less precarious than others. *Risk identification* focuses on the question, “What losses can happen?” whereas *risk analysis* goes further, asking, “How likely is it that the loss will happen, and, if the loss happens, how serious will it be, and how often might it occur?” Thus consideration is given to both frequency and severity probabilities. Figure 1.1 provides a simple tool to analyze foreseeable risks. The figure presents a formula that integrates three key factors of preventive law: (1) How *likely* an event is to occur, (2) the *frequency* with which the opportunity exists for such an occurrence, and (3) the *potential consequences* of such an event. The formula provides numerical ratings for each factor that, when multiplied together, produce a risk score. In other words, *likelihood* times *exposure* times *potential consequences* equals the level of *potential risk* ( $L \times E \times PC = R$ ).

The following example shows how the formula can be used to support districtwide or site-based risk management. Examples that principals can apply to their own buildings and operations follow.

A newspaper reports the explosion of a water heater in a local office building. There are several fatalities, severe injuries, and significant structural damage to the building. Your school district records indicate that the water heaters in most of your buildings are more than ten years old and have not been inspected for seven years. Should your district allocate resources for a full inspection of its facilities’ water heaters? If yes, when should this be done? First, the *likelihood* of an explosion needs to be identified. Most

Figure 1.1 Risk Analysis Model

Likelihood Scale		Exposure Scale		Potential Consequences Scale		Risk Scale	
Probable	10	Continuous	10	<b>Catastrophe</b> (many fatalities, critical financial loss, critical public relations problem)	10	Very high risk; consider discontinuing operation	Risk
Might well be expected	9		9		9		
Quite possible, could happen	8	Frequent (daily)	8	<b>Disaster</b> (multiple fatalities, critical financial loss, critical public relations problem)	8	High risk; immediate correction required	
	7		7		7		
	6		6	<b>Very serious</b> (fatality, significant financial loss, significant public relations problem)	6		
Unusual, but possible	5	Regular (once a week)	5	<b>Serious</b> (disability results, serious financial loss, serious public relations problem)	5	Substantial risk; timely correction required	
	4		4		4		
Remotely possible	3	Occasional (monthly)	3	<b>Important</b> (serious injury, serious financial loss, serious public relations problem)	3	Possible risk; non-routine attention required	
Conceivable, but unlikely	2	Minimal (a few times a year)	2		2		
Practically impossible	1	Rare (once a year or less)	1	<b>Noticeable</b> (minor injury, potential financial loss, minimal public relations problem)	1	Known risk; routine attention recommended	
Likelihood	X	Exposure	X	Potential Consequences	=	Risk	

people would probably rate the likelihood as 5 (unusual but possible). The *exposure* rating usually depends on how frequently the piece of equipment is in use.

In the case of a water heater, that rating would normally be a 10 (continuous). However, school officials might be concerned with how frequently people are in the vicinity of the operating water heater and might rate the exposure as 8 (frequent, daily). In this example, a school official might use a composite rating of 9. The third factor is an estimate of the *potential consequences* of an explosion. The potential consequence scale suggests three interrelated types of consequences: physical injury, financial loss, and public relations problems. In this example, the school official assumed that the potential consequences ranged between 7 (very serious) and 8 (disaster), for a composite rating of 7.5. To estimate the risk, the school official multiplied 5 times 9 times 7.5, which produced a risk score of 337.5. This score indicates that a *substantial risk* exists and *timely correction* (inspection) is advised.

Although the risk analysis model presented here is clearly subjective, it provides at least a consistent way of thinking about risk and preventive law, as well as a simplified way of reporting. Finally, and perhaps most important, the model aids in the process of forecasting, an important concept in the law, commonly called *foreseeability*. (Foreseeability is discussed in detail in Chapter 15.)

The usefulness of the model in both scope and diversity is further demonstrated in the following selected examples derived during field testing.

Example 1: A school principal calculated the school's risk regarding injuries related to slippery entry areas during inclement weather as follows:

- *Likelihood* = 10 (Probable)
- *Exposure* = 3 (Occasional)
- *Potential consequences* = 1 (Noticeable). The resultant risk score of 30 indicates a *known risk* with routine attention recommended.

Example 2: A school principal calculated the school's risk regarding injuries related to children falling over the sides of a playground slide as follows:

- *Likelihood* = 3 (Remotely possible)
- *Exposure* = 10 (Continuous)
- *Potential consequences* = 4 (Serious). The resultant risk score of 120 indicates a *possible risk* with nonroutine or focused attention advised.

Example 3: A school principal calculated the school's risk regarding injuries related to students traveling on field trips in school-owned vehicles as follows:

- *Likelihood* = 6.75 (average of 3–8, from Remotely possible to Quite possible, could happen)
- *Exposure* = 5 (Regular)
- *Potential consequences* = 6 (average of 4–7, from Serious to Very serious). The resultant risk score of 202 indicates a *possible risk* with nonroutine or focused attention advised.

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Example 4: A high school principal in a mid-Atlantic state calculated the school's risk regarding injuries related to a disturbance resulting from a group of students displaying a Confederate flag as follows:

- *Likelihood* = 6 (average of 5–7, from Unusual but possible to Quite possible, could happen)
- *Exposure* = 8 (Frequent)
- *Potential consequences* = 1 (Noticeable). The resultant risk score of 48 indicates a *known risk* with routine or focused attention advised.

Example 5: A school principal in an *urban* environment calculated the school's risk regarding the sexual molestation of a student during the school day by an outsider as follows:

- *Likelihood* = 8 (Quite possible)
- *Exposure* = 8 (Frequent)
- *Potential consequences* = 5 (average of 3–7, from Important to Very serious). The resultant risk score of 320 indicates a *substantial risk* with timely correction required.

A *rural* school principal, on the other hand, calculated this same example as follows:

- *Likelihood* = 3 (Remotely possible)
- *Exposure* = 8 (Frequent)
- *Potential consequences* = 5 (average of 3–7, from Important to Very serious). This official's risk score of 120 indicates a *possible risk* with nonroutine attention advised.

### **FOCUS POINT: Affirmative Duty of School-Based Personnel in Risk Management and Prevention**

#### **A. Duty of Building Administrator (Principal, Headmaster, Headmistress) to Students and Parents (at a minimum)**

1. Ensure compliance with applicable federal, state, and local laws and regulations; enforce established school policies, procedures, and rules; and establish additional rules, as necessary and appropriate in the particular education environment, to ensure the safety and well-being of students while under the care of the school.
2. Provide effective supervision of the education program (including the development, oversight, and evaluation of appropriate curricular, intracurricular, and extracurricular activities).

3. Promote the hiring of competent administrative, teaching, and support staff appropriately trained in specific disciplines.
4. Provide effective supervision of staff (including the appropriate delegation of authority, formalization and assignment of specific responsibilities, direction of daily work activities, and observation and evaluation of performance).
5. Manage the school's physical facilities and material and financial resources to ensure the maintenance of a safe and productive learning environment.
6. Develop and maintain communication channels and media that promote effective two-way communication about school-related issues (including student progress) between administrators and parents, administrators and teachers, administrators and students, teachers and parents, and teachers and students.

**B. Duty of Education Administrator (Associate or Assistant Principal, Dean, Supervisor, Department Chair et al.) to Students and Parents (at a minimum)**

1. Adhere to applicable federal, state, and local laws and regulations; adhere to and enforce established school policies, procedures, and rules in the performance of assigned duties and responsibilities; and recommend additional policies, procedures, and rules, as appropriate, within the scope of delegated authority.
2. Provide effective supervision of the instructional activities presented by staff members of programs within the scope of delegated authority.
3. Provide effective supervision of all staff members assigned to, or working with, programs within the scope of delegated authority.
4. Facilitate effective two-way communication about school-related issues (including student progress) in programs within the scope of delegated authority, between administrators and parents, administrators and teachers, administrators and students, teachers and parents, and teachers and students.

**C. Duty of Teacher to Students and Parents (at a minimum)**

1. Adhere to applicable federal, state, and local laws and regulations; adhere to and enforce established school policies, procedures, and rules in the performance of assigned duties and responsibilities.
2. Develop and present instructional activities that are appropriate to and consistent with the approved education program and specifically designed to increase students' knowledge; facilitate the development of learning skills, life skills, and appropriate social behavior; and prepare students to interact effectively in general society.

3. Provide effective supervision of students participating in instructional activities that are within the scope of assigned responsibility to ensure students' safety and general well-being.
4. Facilitate effective two-way communication about school-related issues (including student progress) in programs within the scope of assigned responsibility, between administrators and parents, administrators and teachers, administrators and students, teachers and parents, and teachers and students.

### **FOCUS POINT: Adopting a Preventive Law Mindset**

During the preceding century, changes in American culture created numerous conflicts in society. These conflicts led to new issues. New issues required new laws. Needless to say, for effective principals to practice preventive law and risk management, it is imperative that they seek out current updates on laws, policies, and procedures that affect education. All too often, unfortunately, the need to know is considered *ex post facto*. Effective principals do not wait for legal counsel to provide preservice—they take the time to read, listen, and actively apply what they know to their schools to prevent harm to students and others and to short-circuit incidents that might lead to litigation. Although it is not suggested that principals walk around with Figure 1.1 in their hands, the model presented here gives principals a framework for a mindset in practicing preventive law—an effective way for principals to think about risk and liability prevention as they go about business as usual.

### **Crisis Management and School Safety**

A crisis or emergency is a situation that occurs unpredictably; requires immediate action; and poses a threat of injury, loss of life, or significant damage to property (Dunklee & Shoop, 1993). In the past few years, an unprecedented number of crisis situations have been reported in our nation's schools. Some of these emergencies were caused by natural disasters, others were the result of accidents, and still others the result of violence and malicious or suicidal acts. School districts and individual school administrators are accountable and can be held legally liable for the safety and well-being of students, district employees, and visitors to the district's facilities. The direct and indirect costs when losses occur can be great. Creating and maintaining a safe environment require both an active risk management program—to prevent foreseeable dangers—and an effective crisis management program—to manage the emergency and limit the damage once crisis occurs.

A key element in crisis management is preparedness. Effective response in emergency situations requires structure, order, discipline, and linear thinking and action on the part of crisis managers.

When a crisis appears or is impending, a school district's response is critical. To safeguard resources, certain actions must be preplanned so that responses to crises are

prompt and effective. Effective crisis management protects the integrity of the *in loco parentis* responsibilities to students that are inherent in the education enterprise. Effective crisis planning integrates and coordinates school procedures with similar crisis plans at the district, municipal, county, and state levels.

As a result of past and recent school shootings, parents are asking for, and holding schools accountable for, more specific school safety plans, including security procedures and emergency preparedness plans and guidelines. It is imperative that school districts train school administrators, teachers, and support staff (i.e., secretaries, custodians, bus drivers, etc.) regarding school violence prevention and school security and actively include the community in school emergency planning. Any plan needs to include a working partnership with public safety officials. Although most schools have emergency plans and crisis teams named on paper, many plans have not been refined—much less put into practice—since the Columbine incident in 1999. There are a number of well-planned and carefully developed up-to-date models for schools and school districts to use as foundational material available from a variety of state, regional, and national organizations.

Below are a few of the most important “musts” for school leaders to consider.

- The first and best line of defense is a well-trained, highly alert school staff and student body.
- Security is often associated with equipment such as metal detectors, surveillance cameras, and other physical, tangible methods. Although these measures are necessary and play an important part, *such equipment is only as good as the human element supporting or operating it*. When security equipment is used in schools, it must be viewed as a supplement to, but not a substitute for, a more comprehensive school safety program.
- Gaps in previous emergency plans may include problematic outdated content in the original plans, a lack of training of school staff on emergency plans, and a lack of exercising plans in cooperation with public safety officials. For example, school safety or emergency plans should address preparedness procedures such as lockdowns, evacuations, parent-student reunification procedures, mobilizing school transportation during the school day, emergency communications protocols with parents and the media, and mobilizing mental health services. In addition, schools should work with public safety officials to identify potential staging areas for media, parents, medical personnel, and others who are expected to respond in an emergency.
- School officials should meet annually with public safety officials—police, fire, emergency medical services, and emergency management agencies—to discuss safety, security, and emergency planning strategies.
- Schools should practice lockdown drills over the course of a school year in the same manner they practice fire drills, tornado drills, and so on. All drills should be practiced in a realistic manner, not simply when it is convenient and least disruptive to the school day. Schools must practice in the times and manner they might experience in a real emergency.

- Schools should number each entrance/exit door so first responders can easily identify specific entrances/exits when called to respond to an incident and/or to manage a tactical response. In addition, schools should provide police and fire departments with updated floor plans and blueprints for their reference for tactical responses.

### Examples of Management Cues

The list of potential emergencies is long, and schools should have plans in place to address, at a minimum, all the following:

- Bomb threat
- Chemical spill or biohazard
- Death or suicide
- Fire or explosion
- Gun or other weapon on campus
- Hostage situation
- Kidnapping, parental child abduction, or missing student
- Major student disruption
- Medical emergency
- Natural gas or other toxic odor
- Public demonstration
- Sexual assault
- Shooting or stabbing
- Tornado, hurricane, or other severe weather
- Violent visitor or staff member

Once an emergency occurs, the goal is to save lives and to preserve property—to minimize the organization's actual losses of physical and human resources—so that normal activity can be restored promptly.

### Suggested Risk Management Guidelines

As stated previously, all schools should have a written crisis management plan that includes the specific procedures to be followed in emergencies. The following information is often included in crisis management procedure manuals:

- The purpose, scope, and organization of the manual
- The structure of the crisis management organization, including key contact personnel (most important: who's in charge!)
- Evacuation instructions, including explanations of alarm signals and diagrams of exit routes
- Communication procedures to be followed during and after the emergency
- Potential sites of emergencies
- Appropriate responses to emergencies

- Arrangements for obtaining assistance from emergency service organizations and local government agencies
- Procedures for coordinating use of district resources and personnel during emergencies
- Available district resources
- A system for informing the district of the emergency and for notifying parents or guardians
- Plans for taking the following actions, if appropriate:
  - School cancellation
  - Early dismissal
  - Evacuation
  - Sheltering

In addition,

- Develop, disseminate, and implement a comprehensive crisis management plan that clearly identifies and communicates the procedures to be followed in the event of emergencies.
- Provide training to appropriate personnel to ensure that they will be able to respond promptly and effectively in a crisis.
- Coordinate crisis planning with appropriate district, municipal, and county agencies.

### **FOCUS POINT: Working With the Media**

During and after a crisis, schools need effective communications with the media, employees, students, parents, and the community at large. Post-crisis communications should inform employees and patrons as soon as possible of the extent of the losses caused by the crisis and describe the school district's or school site's short- and long-term recovery plans.

#### **Suggested Risk Management Guidelines (Note: Should be tailored to meet school district policies or procedures)**

- Although schools are public buildings, administrators do not have to allow the media on campus.
- Permission must be granted by the administration for members of the press to be on campus.
- Police answer questions regarding criminal investigations. Administrators should focus on what the school is doing to secure student safety and maintain student welfare.
- Identify one school spokesperson.
- Identify and maintain a media staging area. (This should be coordinated with police.)

- Do not let reporters wander.
- Direct all media to the school spokesperson to maintain consistency.
- Prepare factual written statements for the press in cooperation with the police and your school district's community relations personnel. Provide updates, when appropriate.
- Be certain that every media member receives the same information.
- Be accurate. If uncertain, do not speculate. When appropriate, refer media to other agencies, such as the police or the health department.
- Set limits for time and location.
- When giving an interview:
  - Ask in advance what specific questions will be asked.
  - Do not say, "No comment." If an answer is not known, offer to get information and to get back to the reporter. Do not speak "off the record."
  - Keep answers brief and to the point.
  - Emphasize positive action being taken. Turn negative questions into simple positive statements.
- Ensure that the sensitivities of those who are touched by the crisis are respected by the reporters.
- Before agreeing to let staff members be interviewed, obtain their consent.
- Students under the age of eighteen may not be interviewed on campus without parental permission.
- Yearbook and school newspaper photographs are public documents. Access to them must be provided.

## Chapter Resource

Dunklee, D. R., & Shoop, R. J. (1993). *A primer for school risk management: Creating and maintaining district and site-based liability prevention programs*. Needham Heights, MA: Allyn & Bacon.