School Bus Safety: What Can Our Schools do to Protect Our Children?

By Thomas J. Dargan and Adam H. Silverstone

School districts and school bus contractors are entrusted with the most important of all road users – our nation's children. In the wake of recent newsworthy accidents and attention grabbing headlines regarding unfit bus drivers, claims premised upon school bus accidents have become increasingly tangential and, in turn, personal injury attorneys have become increasingly creative in the application of theories to support these claims.

Two things occur when bus safety is taken lightly. First, children may get hurt. Second, personal injury attorneys seek to punish and expose potential defendants. The attorneys do so by using safety regulations as their sword.

To fully appreciate the impact of these claims, it is important to understand how New York State's laws and regulations regulate the retention of school bus contractors and how personal injury attorneys seek to hold both school bus contractors and school districts liable under alternative theories of 'negligent hiring' and 'negligent retention.'

Under 8 NYCRR§156, contracts for transportation are required "to be in writing and approved by each school's superintendent, who is charged with conducting an investigation into the drivers, routes, time schedules and other matters involving safety." [Education Law §3635(3)]; *Chainani by Chainani v. Board of Education of the City of New York,* 87 N.Y.2d 370 (1995). Essentially, the superintendent of schools is the bargaining agent for a school district [Civil Service Law §201[10], [12].

The Education Commissioner's regulations further requires that

> "[a]pplication for the approval of all bus routes and bus capacities, together with transportation contracts, including contracts for the operation of district-owned conveyances and all contracts for the maintenance and/or garaging of district-owned conveyances shall be filed by the superintendent or district superintendent of schools…. In addition thereto, such superintendent or district superintendent of schools shall file with the commissioner the instructions to bidders, bid forms and specifications upon which such contracts were awarded, a summary of bids submitted, a statement of the actions taken to solicit bids … and such other information as the commissioner may require."
> See 8 NYCRR§§ 156.1, 156.2 and 156.3.

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There are many broadly written state statutes and regulations in New York that govern school bus contractors and drivers. For example, Article 19-A of the New York State Vehicle and Traffic Law (hereinafter "V.T.L.") requires employers of bus drivers to obtain from bus driver applicants: current physical examinations, an employment background check, driving and drug test results, among other items. Although Article 19-A of the V.T.L. is broad in its scope and requires bus company employers and their employees to perform many tests, undergo various checks and report the results of these findings, as is the case with many regulatory statutes, the statute's follow up and compliance measures fall woefully short in ensuring that drivers are actually undergoing the mandated tests and training. In many cases, there are no affirmative compliance mandates to ensure adherence to the provisions within V.T.L. §19-A.

Even if a school bus contractor completes and files all of the appropriate V.T.L. §19-A regulatory paperwork, a single newsworthy or catastrophic event will lead to extremely close scrutiny and discovery of either detailed safety efforts or a lack of safety efforts by the school district and/or school bus contractor. *Everyone and everything is under the microscope should a serious accident occur.*

Insurance coverage also plays a large role. Several employers are misinformed when it comes to insurance coverage and mistakenly rely upon the fact that they simply have liability insurance with high limits in place. Most school districts do require that the school bus contractor name the school district as an additional insured on their bus policies and require indemnification inuring to the benefit of the district in case of a serious liability event.

However, when there is a catastrophic or newsworthy incident, there are often allegations seeking punitive damages against the school district and the bus contractor for recklessness and/or gross negligence. It is well settled in New York that courts will not enforce liability insurance covering punitive damages. *Hartford Accident and Indemnity Company v. Village of Hempstead,* 48 N.Y.2d 218 (1979).

Therefore, no New York licensed broker may lawfully place insurance coverage that would cover punitive damages because New York has ruled that insurance coverage for punitive damages is contrary to public policy. New York is not alone in this regard. California, Colorado, Illinois, Ohio, New Jersey, Rhode Island, and Utah among other states also have prohibitions against liability insurance coverage for "punitive damages." Additionally, many insurance policies do not cover sexual molestation claims and without the proper endorsements for alleged improper sexual acts, there may not be actual insurance coverage for claims of sexual abuse. According to a 2014 *School Transportation News* survey of school administrators, 76 percent of respondents do not know if their district's insurance policy includes liability coverage for sexual abuse cases involving employee and/or student perpetrators.

According to 2011 data from the federal Child Abuse Prevention and Treatment Act (CAPTA), approximately 61,472 children aged 1 to 21 reported that they were victims of sexual abuse. Unfortunately, sexual molestation claims are on the rise across the country. The hiring of an alleged predator or an alleged driver on drugs may leave a company or school district extremely vulnerable to such claims.

In the case where a high profile plaintiff's attorney has made allegations that may inflame a jury, the mere reliance upon insurance limits and indemnity agreements is foolish.

What can go wrong

A basic search for examples of school districts held liable by juries for the actions of school bus drivers reveals countless examples of high verdicts each and every week.

Recently, a San Joaquin, California jury found that the Lodi School District negligently hired a bus driver who had molested an 8 year old special needs student. The case settled for $4.75 million dollars after the verdict was rendered against the district. By way of background, the school bus driver was 60, with a clean record. However, it was discovered that in 2000, he was *arrested* for solicitation of sex with an adult prostitute. Indemnity agreements were in place, however, the jury found the Lodi School District *90 percent liable* for the sexual molestation acts and found the driver, Richard Evans, only *10 percent liable*. The plaintiff's attorney contended

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that the School District was liable for negligently hiring Evans and that the defendant School District ignored certain facts about the driver that could have been discovered with reasonable due diligence. The defendant School District had argued that a criminal background check was performed by the California Department of Justice and had confirmed that the alleged arrest had been dismissed and expunged, however, the jury still found the district liable for negligent hiring by placing a higher standard of responsibility upon the district.

Recently, there was a case involving an infant passenger upon a school bus within a school district in Suffolk County, New York. The plaintiff passenger alleged that the school bus operator caused the bus to swerve and veer at a high rate of speed.

The infant plaintiff's head and face reportedly struck a glass window along side the seat. The force of the collision with the window allegedly caused the window to crack. The infant, by his mother and natural guardian, filed a lawsuit against the school district, bus driver, school transportation supervisor, superintendent and school bus contractor. Several allegations of negligence were asserted for the operation of the school bus and gross negligence allegations were asserted against the school district and its contractor for negligently hiring and retaining the driver. Unbelievably, even though the parties entered into a high/low agreement which essentially capped the damages of any verdict to between $300,000 - $1,750,000, the jury determined that a brain injury was sustained as a result of the accident and awarded $3.175 million for pain and suffering and $600,000 for medical expenses per year for a period of 50 years. The jury award was for millions of dollars more than the agreed upon cap put in place. The Appellate Court reduced the award to $1,750,000 pursuant to the agreed upon high/low agreement.

The lesson learned is that when a catastrophic event occurs involving a child, a jury, even conservative juries, may award multiple seven figure verdicts that will either be outside of the insurance policy coverages or above liability limits.

Best Practices

Transporting minor children is a great responsibility. It is incumbent upon the school district to make sure that the selected bus contractor is not merely the lowest bidder. It is imperative that the bus contractors strictly comply and document compliance with the mandates of Article 19-A of the Vehicle and Traffic Law. When evaluating competing bids, the following considerations should be made:

- Safe and well maintained vehicles;
- Safety conscious and fit drivers (actual compliance with drug testing requirements on a regular basis);
- Competent bus contractors (i.e., school bus contractors that make their drivers and driver files available for 'spot reviews' by school districts).

Bus contractors that "go through the motions" when it comes to safety will be exposed and discovered in the event of a catastrophic incident. Discovery proceedings conducted by personal injury attorneys are conducted with microscopic attention to detail. In addition, if a given driver is no longer employed by the bus company at the time of his or her deposition two or three years after the accident (as is often the case), that driver is often willing to implicate the bus contractor with respect to their inattention to safety and training.

Preparation, vigilance, and due diligence is the key toward best practices for transporting children. Representatives of a school district or a bus contractor do not want to be featured in headlines indicating that the school district and/or bus contractor performed the bare minimum with respect to safety.

Richard Gallagher, Director of Transportation for the Bay Shore Union Free School District, made the following statement:

> "I believe that all carriers transporting students should, at a minimum, submit proof of performing all required testing and procedures required for school bus drivers. These should include drug and alcohol testing reports, and proof of driver assignment of drivers to a specific drug testing pool. At least 10 percent of drivers assigned to a school district should be interviewed by the school district to ensure that all procedures in place for the safety of students are being done. In addition, semi-annual review and evaluation of carrier performance should be done."

Toward that end, Mr. Gallagher has created a Contractor/District Review form that is attached as Exhibit "A." The attached checklist form is recommended for use by each and every school district. The New York Association approved the form for Pupil Transportation ("NYAPT").

There are currently no plans to wholly revamp Article 19-A of the New York Vehicle and Traffic Law and there are simply not enough compliance measures in place. Nonetheless, New York's laws and the Education Commissioner's regulations clearly place the burden squarely on the school superintendant to carefully select and oversee all bus transportation contracts. The Appellate Division, Third Department in the *Donlon v. Mills* matter stated

> "A superintendent of schools is charged with the power and duty to be the chief executive officer of the school district and to enforce all provisions of law and all rules and regulations relating to the management of the schools (*see,* Education Law § 1711[2][a], [b])."

See Donlon v. Mills, 260 A.D.2d 971, 973, 689 N.Y.S.2d 260, 263 (3d Dept. 1999). *See also* 94 N.Y. Jur. 2d Schools, Universities, and Colleges § 100 (2014).

Thus, it is up to the superintendant and bus contractor to be self-policing and vigilant in their decision-making so as to protect our children from serious preventable accidents due to driver misconduct. The potential fallout that can and will occur when it is discovered that safety took a back seat during this process is much worse than the initial steps necessary to make sure that safety is a priority. Everyone knows that accidents happen on the road every day. However, if a driver is unfit and should not have been allowed to drive in the first place, it can be ruinous for a lax school district and its superintendant.

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