



Common Errors  
and Safety Liability  
Concerns for Schools

August 30, 2016  
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What are the common errors and  
safety liability concerns?

1. Not conducting an expanded criminal history check/expanded child protection index check and not advising prospective employers of a substantiated report of child abuse or neglect.
2. Failing to keep policies up to date or having policies that differ from actual practices
3. Failing to appropriately address bullying
4. Failing to maintain proper documentation of poor employee performance and misconduct
5. Use of school facilities by outside agencies
6. Failing to immediately report child abuse and neglect

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What are the common errors and  
safety liability concerns?

7. Claims for sexual harassment, misconduct or assault
8. Injuries to students at school and on playgrounds
9. Supervision of students with special needs
10. Seclusion and restraint of students
11. Appropriately addressing potentially dangerous students
12. Data security breaches

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1. Expanded criminal history check, expanded child protection index check, and employment references

IC 20-26-5-10 was amended by HEA 1068/PL 98, effective 7-1-15, to add the following requirements for an "expanded criminal history check":

- a. Verification of the applicant's identity;
- b. A search of all names associated with the applicant; and

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1. Expanded criminal history check, expanded child protection index check, and employment references

- c. If the expanded criminal history check is public records based, include a search of the United States district court records from the districts where the applicant resided and a multistate criminal data base search.

Expanded criminal history checks also can be fingerprint based, in which case they must include a check of sex offender registries in all 50 states or the national sex offender registry maintained by the Department of Justice.

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1. Expanded criminal history check, expanded child protection index check, and employment references

IC 20-26-5-10 was amended again in 2016 to extend the requirement for a governing board to adopt a policy requiring background checks for new hires to **include non-public schools**, regardless of their accreditation status, that employ one or more employees.

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1. Expanded criminal history check, expanded child protection index check, and employment references

Additionally, the required background check in IC 20-26-5-10 was expanded in 2016 to include both the expanded criminal history check and a **new expanded child protection index check**. Both must be completed before or not later than three months after the applicant's employment by the school.

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1. Expanded criminal history check, expanded child protection index check, and employment references

Per IC 20-26-2-1.3, an "expanded child protection index check" means:

1) an inquiry with the department of child services as to whether an individual has been the subject of a substantiated report of child abuse or neglect and is listed in the child protection index established under IC 31-33-26-2;

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1. Expanded criminal history check, expanded child protection index check, and employment references

2) an inquiry with the child welfare agency of each state in which the individual has resided since the individual became eighteen (18) years of age as to whether there are any substantiated reports that the individual has committed child abuse or neglect; and

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1. Expanded criminal history check, expanded child protection index check, and employment references

3) for a certificated employee, an inquiry with the department of education or other entity that may issue a license to teach of each state in which the individual has resided since the individual became eighteen (18) years of age as to whether the individual has ever had a teaching license suspended or revoked.

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1. Expanded criminal history check, expanded child protection index check, and employment references

Also, a new law was passed in 2016 that is intended to try to stop schools from "passing the trash."

IC 20-26-5-11.5 requires that schools advise any school that requests an employment reference for a current or former employee of any incident known by the school in which the employee committed an act resulting in a substantiated report of child abuse or neglect.

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1. Expanded criminal history check, expanded child protection index check, and employment references

This requirement applies even if the school and the current/former employee entered into a confidentiality agreement (or nondisclosure agreement) which prohibits the school from providing such information in an employment reference.

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1. Expanded criminal history check, expanded child protection index check, and employment references

However, the school may not disclose information that identifies a student or is deemed confidential student information under the Family Educational Rights and Privacy Act.

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1. Expanded criminal history check, expanded child protection index check, and employment references

Any confidentiality agreement entered into or amended after June 30, 2016, by a school and an employee is not enforceable against the school if the employee committed an act resulting in a substantiated report of child abuse or neglect.

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2. Policies not updated/implemented

Policies should be reviewed at least every few years to determine if consistent with current law

Law is changing quickly in certain areas right now – transgender issues are hot

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2. Policies not updated/implemented

All staff should be familiar with Board policies

All staff should implement policies consistently among school buildings

All staff should implement policies consistently among students

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3. Bullying

Not identifying and reporting bullying – cyberbullying in particular

Treating it solely as a disciplinary matter and not as a bullying issue

Not thoroughly investigating complaints of bullying

Not appropriately disciplining the bully

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3. Bullying

Not initiating a Title VI, Title IX or Section 504 investigation where warranted

Lack of remedial action taken

Lack of follow up with victim

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### 3. Bullying

- Not addressing bullying of student based on disability
  - Often arises when student has been disciplined
  - Can require school to oversee behavior that occurs off school grounds and after school hours
  - May require both investigation of bullying incident as a disciplinary matter and via Section 504 complaint procedure
  - Can be found to result in denial of FAPE

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### 3. Bullying

- Due to a failure to address bullying allegations, the hostile environment at a Hawaii school deprived a student of educational benefit, concluded an IHO in ruling the Hawaii ED's placement offer was inappropriate. Administrators never notified the student's parent of any incidents, but a teacher and a classmate's parent informed the parent that the student was being bullied. The parent reported the bullying to the principal numerous times. The student allegedly became introverted and extremely anxious, unable to concentrate on schoolwork.

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### 3. Bullying

- The IHO explained that a student with a disability may be deprived of FAPE due to bullying if 1) the child was a victim of bullying; 2) school authorities knew or should have reasonably known; 3) authorities were deliberately indifferent; and 4) the bullying substantially restricted the student's learning.

*Department of Educ., State of Hawaii, 114 LRP 48811 (HI SEA 10/29/14)*

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#### 4. Failing to maintain documentation

"One of most common errors I run into is the lack of paper documentation to support a decision. Be it a due process claim, an allegation of improper termination or a discrimination allegation, the one constant I see is the lack of proper documentation. We need to emphasize the necessity for the schools to have supports to back the decisions they make regarding students and staff. With consistently providing proper documents the schools will be able to send a message that they are doing what is best for their students and staff."

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#### 4. Failing to maintain documentation

If you don't properly document poor performance issues or employee misconduct, you will have difficulty terminating the employee

Critical to maintain this documentation to meet the statutory grounds for termination of a teacher

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#### 4. Failing to maintain documentation

Proper documentation can provide a defense to claims of discrimination by employees and students

Documentation is essential when it comes to students with IEPs

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### 5. Use of School Facilities

Allowing outsiders to use school facilities and someone gets hurt

This is especially problematic when there are no agreements in place between the school and the outside user

No good deed goes unpunished!

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### 6. Failing to immediately report child abuse and neglect

This is one of the hot issues in the news media

Past cases – not immediately reporting alleged rape at high school

More recent cases – not immediately reporting teacher texting nude picture to student

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### 6. Failing to immediately report child abuse and neglect

If there's any doubt, report it

Must report not only that same day but as soon as you are aware of the alleged incident

Report to CPS may not be enough – may need to notify local law enforcement

Document reports!

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7. Claims for sexual harassment, misconduct or assault

"In general, sexual misconduct, assault or harassment in education or employment comes to mind. Retaliation claims also have potential."

"Sexting between teachers and students. Teachers should never give students their personal cell phone numbers."

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7. Claims for sexual harassment, misconduct or assault

"Sexual molestation cases usually have the highest potential value"

"There are cases (student on student) where special education students are involved and the aides aren't attentive – often this occurs on a bus while they are being transported and that lack of supervision leads to a liability finding or a settlement"

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7. Claims for sexual harassment, misconduct or assault

Cell Phone Issues:

Have a policy in place

Prohibit or limit communications between teachers and students via cell phone

Monitor use of school equipment

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7. Claims for sexual harassment, misconduct or assault

Take prompt action to address inappropriate communications between teachers and students and among students

Report all suspected incidents of child abuse or neglect

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7. Claims for sexual harassment, misconduct or assault

Make sure sexual harassment policies are up to date (should have harassment policy that covers all types of discrimination but can have a separate policy that explicitly addresses sexual harassment)

Make sure to investigate any allegations of sexual harassment by employees or students

Report all crimes of sexual violence to police

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7. Claims for sexual harassment, misconduct or assault

Document thoroughly

Take appropriate remedial action

Take appropriate disciplinary action

Consider whether additional training is needed

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8. Injuries to students

“Playground safety – upkeep of equipment and sufficient mulch”

“We get plenty of claims in which the school has the children help – move tables, get out gym equipment, set up displays. These tasks are usually done with little to no supervision.”

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9. Supervision of students with special needs

“Claims arising out of the supervision of special needs children”

Children who elope are especially high risk-  
Damar student who went onto Hwy. 67

Students who are medically fragile also pose risks – Student with shunt prone to falls

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9. Supervision of students with special needs

Ensuring student is within eyesight – student who was working at table outside door left school and walked home – teacher subject to CPS finding of substantiated neglect

Teacher failed to supervise special needs students who committed rape of another special needs student while teacher was in the room

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10. Seclusion and restraint

Ensuring student is supervised during seclusion or restraint

Having to employ a restraint

Is CPI training required?

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10. Seclusion and restraint

**IC 20-20-40-15**

**Immunity**

Sec. 15. (a) Nothing in this chapter may be construed to prevent a school employee from stopping a physical altercation, acting to prevent physical harm to a student or another individual, or acting to address an emergency until the emergency is over, whether or not the school employee has received training under this chapter.

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10. Seclusion and restraint

**IC 20-20-40-15**

**Immunity**

(b) This chapter may not be construed to give rise to a cause of action, either civil or criminal, against the state, the department, a school corporation, an accredited nonpublic school, the commission, or a member of the commission.

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### 10. Seclusion and restraint

#### IC 20-20-40-15

##### Immunity

(c) In all matters relating to the plan adopted under section 14 of this chapter, school corporation or accredited nonpublic school personnel have qualified immunity with respect to an action taken to promote student conduct under a plan adopted under section 14 of this chapter if the action is taken in good faith and is reasonable.

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### 11. Appropriately addressing potentially dangerous students

Steps to reduce the danger:

- First, know your student
  - Is he/she able to appreciate what he/she is doing?
  - Is he/she capable of controlling the behavior?
- Next, know your staff
  - Are they trained to know how to handle the student in a manner to avoid escalating behaviors?
  - Are they trained to handle behaviors once they occur?

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### 11. Appropriately addressing potentially dangerous students

Steps to reduce the danger:

- Third, know the parents
  - Are the parents generally cooperative?
  - Or are these the parents a proverbial burr in your saddle (aka the PITA parent)?
- Fourth, what data do we have about the student's behavior?
  - Has anyone tracked his behavior?
  - Have we completed a FBA?

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**11. Appropriately addressing potentially dangerous students**

Steps to reduce the danger – assessment:

- Was the evaluation thorough?
- Have all areas of suspected disability been appropriately identified?
- Were the right tests administered?
- Did the evaluation cover all parent and teacher concerns?
- Was behavior assessed?

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**11. Appropriately addressing potentially dangerous students**

Steps to reduce the danger – assessment:

- Was a FBA completed?
- Was it conducted by someone trained in doing appropriate FBAs?
- Was it thorough?
- Did it include all behaviors of concern?
- Are there new behaviors that were not assessed previously?
- Is there a need for an independent FBA?

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**11. Appropriately addressing potentially dangerous students**

Steps to reduce the danger – IEP/BIP:

- Are there goals in the IEP to address behavior?
- Is there a BIP?
- Does it address the behaviors in the FBA?
- Is it appropriate?
- Has staff been informed of the BIP steps?
- Are staff capable of implementing the BIP?

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11. Appropriately addressing potentially dangerous students

How does the school use its SROs?:

- Are they guiding traffic?
- Are they patrolling the parking lots?
- Are they monitoring the hallways?
- Are they called to address student behavior generally?
- Are they contacted only if a crime is committed?

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11. Appropriately addressing potentially dangerous students

Need for partnering with SROs to address students' mental health issues:

- An increase in student mental health problems has translated to a need for SROs to also be well-versed in emotional and behavioral issues.
- In the wake of recent school shootings, stakeholders have recommended placing more resource officers in school buildings to protect students' physical safety.

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11. Appropriately addressing potentially dangerous students

What steps to take? :

- Emphasize mental health training for SROs and other school personnel.
- Distinguish the roles of SROs from those of school psychologists and other student support team members to ensure everyone works together to help students.
- Encourage SROs to communicate regularly with students and parents to build trusting relationships and reduce feelings of intimidation.
- Personnel also should be able to consult school resource officers about potential threats.

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11. Appropriately addressing potentially dangerous students

What training have SROs received?:

- Is their law enforcement training current?
- Have they been trained in the IDEA/Article 7?
- Have they had any training regarding students on the Autism Spectrum or students with Emotional Disabilities?
- Have they received crisis intervention training?

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11. Appropriately addressing potentially dangerous students

What training have SROs received?:

- Have they been trained regarding the school's restraint/seclusion plan?
- Do they have the disposition to work with special education students?
- Have they been trained regarding this student's disability and how it impacts him or her?

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12. Data security breaches

Prince George's County Public School System in Virginia had a data security breach in November 2014:

- Data that was compromised: personnel data (including social security numbers, dates of birth and employee identification numbers) of around 10,000 of the school district's 23,785 employees.
- What happened? According to school officials, sensitive data was inadvertently included in a routine monthly report that went out via e-mail to principals.

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### 12. Data security breaches

What did the school do when it learned of the breach?

- Instructed the IT Department to suspend the e-mail accounts while they removed the e-mail from the recipient's inboxes.
- In the process of removing the e-mail from inboxes, the school system learned the e-mail had already been sent outside of the school system.
- School providing one year of free credit monitoring to all those affected by the breach.

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### 12. Data security breaches

Seattle Public Schools:

- In November 2014, a law firm hired by the school district to handle a complaint against the district inadvertently released personally identifiable student information to a person involved in the case.
- Number of students impacted: At least 8,000 special education students.

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### 12. Data security breaches

Seattle Public Schools:

- Data released: Names, addresses, student identification numbers, test scores, disabilities, and "many more personal details."
- The individual who received the unredacted records reported the security breach to the School District.
- What did the School District do? Fired the law firm and notified parents of every student impacted by the breach.

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## 12. Data security breaches

DC Public Schools:

- Around February 2015, DC Public Schools reported a security breach of confidential student data and teacher data that had been going on for four years.

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## 12. Data security breaches

DC Public Schools:

- What happened? The public was able to access an internal intranet web site that contained information pertaining to special education students and teachers. The internal site went up in 2010 and contained training materials and database login information. Through the website, anyone could search through internal documents, usernames, passwords and addresses of special education teachers and students.

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## 12. Data security breaches

DC Public Schools:

- What did the School District do? Immediately locked the website and notified parents and students and staff.
- How was the breach discovered? BuzzFeed reporters.

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## 12. Data security breaches

Examples of Legal Implications That May Result From Security Breaches:

- Tort claims and other civil actions
- Administrative FERPA complaints
- States are starting to pass legislation imposing criminal penalties for some violations.
- Legislation continues to develop, so the legal implications involving data collection, security and breaches will continue to evolve.

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### QUESTIONS?

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