

The Legal Intelligencer

Federal Judge Tackles 'Sexual Abuse' Exception to Sovereign Immunity—Twice

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In the three years since Pennsylvania adopted a 10th exception to the Political Subdivision Tort Claims Act (PSTCA), 42 Pa.C.S.A. Section 8522(b)(10), which recognizes claims of “sexual abuse” as an exclusion to the sovereign immunity typically afforded to political subdivisions in negligence cases, courts have seen an increase in litigation involving sexual abuse of school students. In two recent instances of first impression, one federal judge opines on the factual allegations necessary for a student-plaintiff to survive a motion to dismiss state tort claims where he/she seeks damages from a school district and its administrators arising from sexual assault by a peer.

Under the “sexual abuse” exception, where a local government agency or its employees’ negligent actions or omissions constitute a criminal offense under 42 Pa.C.S. Section 5551(7)—rape, sex trafficking, sexual servitude, sexual assault, institutional sexual assault, involuntary, and incest where the victim is under the age of 18, the injuries the plaintiff alleges may not be defended by sovereign immunity. “The intended purpose of this amendment to the PSTCA was to ‘waive sovereign immunity for public entities



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guilty of covering up childhood sexual abuse.” See *Cunning v. West Chester University*, 2021 U.S. Dist. LEXIS 35874, *6-7 (E.D. Pa. Feb. 25, 2021) (quoting PA. H.R. LEGIS. JOURNAL, 203rd Assy., Reg. Sess., at 510 (Apr. 10, 2019)). In his three opinions in two different cases, Chief Judge Matthew W. Brann for the U.S. District Court for the Middle District of Pennsylvania found that negligence sexual abuse claims against political subdivisions arising from a child’s abuse by a minor student will not survive unless the plaintiff alleges penetration by his/her assailant.

Defeating Sovereign Immunity Sans Intercourse

On April 27, 2023, Brann issued his opinion in *Doe v. Williamsport Area School District*, no. 4:22-cv-01387, 2023 U.S. Dist. LEXIS 73835 (M.D. Pa.) where the plaintiff, Doe, was a member of Williamsport Area High School's (WAHS) baseball team, which took a trip to Myrtle Beach, South Carolina to compete in an annual tournament. While members of the team were left unsupervised in a hotel room, the plaintiff "was held down by multiple teammates and one of his attackers sodomized him with a television remote" while B.M., his principal attacker, placed his genitals and buttocks on the plaintiff's face. A third teammate filmed the entire episode and later disseminated the video on social media.

The plaintiff brought claims, including negligence, negligent infliction of emotional distress, and negligent failure to rescue against the school district, its administrators, the baseball team's coaches, and others. WAHS and its employees sought to dismiss the tort claims, arguing that they were afforded immunity because every criminal offense listed in 42 Pa.C.S. Section 5551(7)—other than institutional sexual assault—which trigger exceptions to the PSTCA, "require the actor to have engaged in intercourse with or otherwise penetrate the victim." The court agreed, finding that Doe alleges that B.M. touched his face with his genitalia and, "although abhorrent, B.M.'s actions do not constitute penetration."

Brann then turned his attention to institutional sexual assault, which criminalizes sexual intercourse, deviate sexual intercourse, and indecent contact with a student, which is defined as "any

touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person." See Section 3124.2(a.2)(1); 18 Pa.C.S. Section 3101. Examining the complaint, the court found that Doe did not allege that his assailant touched the plaintiff's "intimate parts," rather he claimed B.M. touched the plaintiff's face with his own genitalia. Similarly, Doe's claims fail to satisfy the elements of institutional sexual assault because he does not allege that B.M. had any sexual desire or that his attackers exhibited authority over him, which are required by statute. Indeed, when a perpetrator is neither a volunteer nor an employee of a school, institutional sexual assault is inapplicable unless he/she exhibits "care, supervision, guidance, or control" over the student. The federal court dismissed Doe's negligence claims, without prejudice, providing him the opportunity to amend his complaint.

In cases where a plaintiff alleges sexual abuse by a fellow student, Brann's opinion is significant because the court establishes a demarcation between those claims alleging intercourse by the assailant and those which do not. In instances where penetration is not alleged, the only potential exception to the PSTCA available is institutional sexual assault. Institutional sexual assault, however, may not be applicable unless the plaintiff alleges:

- touching of their "intimate parts;"
- the attacker did so for his/her own sexual gratification; and
- the attacker exhibited control over the plaintiff.

Student Leaders Cannot Commit Institutional Sexual Assault

Months after the *Doe* decision, on Oct. 3, 2023, Brann issued another opinion in a school sports

hazing incident gone awry, pinpointing the court's position on whether a school defendant may shield themselves with sovereign immunity where a plaintiff sues based upon a sexual assault committed by a student where penetration is not alleged. In *Reed v. Mount Carmel Area School District*, no. 4:23-cv-0890, 2023 U.S. Dist. LEXIS 178523, *4-5 (M.D. Pa.), Mount Carmel Area School District (Mount Carmel) filed a motion to dismiss the state tort claims of a then-17-year-old high school football player, whose pants were forcibly removed and then physically restrained as his teammates burned his buttocks with sparklers and fireworks eight to 10 times at a team captain's home. Five to 10 other new starters on the football team were "initiated" in a similar hazing ritual one week earlier. Mount Carmel was allegedly alerted to "similar hazing-type assaults" by the team in the past but failed to intervene. Following criminal convictions to many of his attackers—and Mount Carmel cancelling its football season—the former high school athlete sued the school district and others under various theories of liability, including state tort claims, such as negligence, negligent infliction of emotional distress and negligent failure to rescue.

In an issue of first impression, the trial court held that students in extracurricular leadership positions, such as football captains, cannot perpetrate institutional sexual assault and, therefore, the PSTCA's sexual abuse exception was inapplicable. Given the nature of Reed's alleged abuse, institutional sexual assault, was the only criminal offense under 42 Pa.C.S. Section 5551(7) that may have given rise to an exception under the PSTCA. The court reasoned that the criminal statute applied only to "a person who

is a volunteer or an employee of a school or any other person who has direct contact with a student." While the litigants primarily sparred over their interpretations of "direct contact," Brann identified "any other person" as the critical phrase, constitutes a class of potential actors similar to volunteers or employees of a school, and unlike students, who are neither employed by or volunteers at a school. He further reasoned that "any person who has direct contact with a student" is not a student him/herself. Thus, the court held that "student leaders do not exert the same kind of 'care, supervision guidance or control' wielded by volunteers and employees, and are not considered "other persons under the statute." Without allegations of penetration and institutional sexual assault inapplicable, Brann found it futile to permit the plaintiff to amend his complaint, and dismissed the state tort claims, with prejudice.

In the *Reed* decision, Brann slammed the door shut on Reed's claims seeking to impose liability on school defendants based on theories of negligence where the student assaulter does not penetrate the plaintiff. This decision stands for the proposition that a plaintiff claiming damages from sexual abuse committed by a fellow student must allege that he/she was penetrated for a cognizable negligence claim to exist.

When Sovereign Immunity's Sexual Abuse Exception Will Not Apply

The plaintiff in *Doe*, discussed above, elected to file an amended complaint, which was permitted by Brann's April 27, 2023, opinion. In his original complaint, Doe, alleges that his principal attacker, B.M., "placed his penis on the plaintiff's face" and "placed his bare buttocks

on the plaintiff's face," which the court found did not constitute penetration. Seeking to cure this deficiency, in his amended complaint, Doe claims that "B.M. sat on the plaintiff and placed his penis on the plaintiff's face and on and in his mouth, making skin-to-skin contact with his face, lips and mouth."

Describing the new allegations in the amended complaint as "an obvious and apparent Hail Mary attempt" to survive dismissal, the school district, again, moved to dismiss the negligence claims. This time, however, they were unsuccessful. About two weeks after his decision in *Reed*, on Oct. 19, 2023, Brann denied the WAHS' attempt to strike the state tort claims in *Doe v. Williamsport Area School District*, no. 4:22-cv-0138, 2023 U.S. Dist. LEXIS 188445 (M.D. Pa.). The court found that in the amended complaint sufficiently alleges that B.M. engaged in "penetration, however slight" of his mouth, and validly pleads involuntary deviate sexual intercourse, which constitutes a waiver of PSTCA immunity for state law claims. After considering numerous state appellate cases where penetration was found—when an attacker forced a victim to kiss his penis; involuntary contact by the mouth, tongue, or lips with the sexual organ of another person; "oral contact;" the victim put her mouth on the abuser's penis; and the abuser licked the victim's vagina—the court found that contact between the attacker's genitalia and

the victim's lips constitutes "penetration" under Pennsylvania criminal law.

Takeaways

Although an appellate court has not yet ruled on the waiver of sovereign immunity where the assailant is not a government agent, these opinions from the Middle District of Pennsylvania provide practitioners insight into how trial courts throughout the commonwealth may view similar fact patterns.

Whether determining theories of liability in drafting a complaint as plaintiffs counsel or preparing a motion to dismiss or preliminary objections as a defense attorney, practitioners should be mindful of the following non-binding precedent: commonwealth parties will be shielded by sovereign immunity in cases where one student sexually assaults/abuses another unless there is penetration "however slight."

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