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# Caught on Video Strategies for Defending the Public Employee

## I. "And… *Action*!" – What happens when the film is shown.

This section shall discuss what goes into the actual defense of the public employee captured on video and what claims could arise from such a situation. Our discussion will include a litigation defense perspective of the potential causes of action and defenses. We will also discuss what a municipality should consider before the video is published to the media. In order to frame the discussion, we will present two different scenarios.

### A. The Teacher/Paraprofessional abusing her students

There are few worse dreads for parents then the thought of their child being abused. The situation is only made worse when that fear comes true, but is exacerbated when the abuser turns out to be someone to whom the parents entrusted their child. Cases involving teacher/student abuse raise a specter like few other and are amongst the toughest to defend. As parents, we entrust our children to the school system – who in turn takes on the role of "parent" for the child every day that child attends school. Those cases where a teacher abuses a student bring forth a certain primitive anger in jurors; a need to lash out at those who would hurt the most innocent among us; while at the same time makes those jurors want to care for the abused. This is a particularly dangerous combination from the defense perspective and not one to be underestimated. The idea of abusing a child is enough to make jurors immediately turn against the defense – whether it is the teacher who perpetrated the act, the administrator who placed that teacher in the classroom (or even worse, turned a blind eye to prior reports of nefarious activity), or the district for ever hiring this "monster" in the first place. However, if the jurors ever get to see video footage of the actual abuse taking place, the heat on the case only gets turned up and the waters of compensatory and punitive damages will quickly reach a rolling boil.

From a strategy perspective, it is best that these cases never see a jury. Whether through effective dispositive motions or aggressive (even pre-litigation) case resolution/mediation/negotiation, the best-case scenario for one of these claims rarely involves trial. However, sometimes it is inevitable. It is based on this inevitability that we begin our discussion.

For the purposes herein, the scenario involves a paraprofessional in a special-needs classroom. The children in the classroom all have some form of disability, and as such each has an Individualized Education Program ("IEP") to further the Free Appropriate Public Education to which they are entitled. The teacher in the classroom suspects something is wrong, but due to the limited speech ability of the students, she

is unable to get answers to her questions. One day, she sets up a hidden camera on her bookshelf in the hope that it will record the goings-on taking place when she leaves the classroom under the solo control of the paralegal. Unfortunately, the camera captures exactly what she suspects – that the paraprofessional is abusing the students; hitting them with a wooden pointer and inappropriately handling them in ways that are not consistent with any IEP.

It is here that our analysis begins.

B. Potential claims and causes of action

If the matter comes to the claims professional and/or defense counsel pre-litigation, the first questions that have to be asked are what are the potential causes of action? Without knowing those, then there is no way to determine what the potential for liability and exposure is. For purposes of this discussion, we assume that claims are made against the paraprofessional and the administrators. In this case, the parents recognized the uphill battle that would be a Monell claim and opted not to pursue same. For ease of discussion, we assume that only one set of parents is bringing the claim for the abuse of their child. Based on the scenario above, the following claims could exist:

1. Federal Claims

a. Fourteenth Amendment Substantive Due Process.

The validity of this claim will depend largely on the jurisdiction in which it is brought. The parents allege that defendants failed to protect their child from harm inflicted by private actors. Only "in certain limited circumstances," however, does "the Constitution impose[ ] upon the State affirmative duties of care and protection with respect to particular individuals." Davis v. Carter, 555 F.3d 979, 980 (11th Cir. 2009). "[T]he only relationships that automatically give rise to a governmental duty to protect individuals from harm by third parties under the substantive due process clause are custodial relationships, such as those which arise from the incarceration of prisoners or other forms of involuntary confinement through which the government deprives individuals of their liberty and thus of their ability to take care of themselves.'" Forrester v. Stanley, 394 F. App'x 673, 675 (11th Cir. 2010) (quoting White v. Lemacks, 183 F.3d 1253, 1257 (11th Cir. 1999)).

In Wyke v. Polk County School Bd., 129 F.3d 560, 569 (1997), the Eleventh Circuit held that mandatory attendance laws do not create a "'restraint of liberty' sufficient to give rise to an affirmative duty of protection" for public schools to protect students against privately inflicted harm. Wyke, 129 F.3d at 569; see also Worthington v. Elmore County Bd. of Educ., 160 F. App'x 877, 881 (11th Cir. 2005) (holding that student with "mental, emotional, and behavioral disabilities" does not have special relationship with public school). Like the Eleventh Circuit, "each circuit to have addressed the issue has concluded that public schools do not have a special relationship with their students, as public schools do not place the same restraints on students' liberty as do prisons and state mental health institutions." Doe ex. rel. Magee v. Covington County School Dist. ex. rel. Keys, 675 F.3d 849, 858 (5th Cir. 2012) (citing Hasenfus v. LaJeunesse, 175 F.3d 68, 69-72 (1st Cir. 1999) (fourteen-year-old student attempted suicide after being sent unsupervised to a locker room); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1366, 1370-73 (3d Cir. 1992) (en banc) (sixteen-year-old student was sexually assaulted by fellow students in unisex bathroom and darkroom, both of which were part of classroom where teacher was present during attacks); Stevenson ex rel. Stevenson v. Martin Cnty. Bd. of Educ., 3 F. App'x 25, 27, 30-31 (4th Cir. 2001) (ten-year-old student assaulted by his classmates); Doe v. Claiborne Cnty., Tenn., 103 F.3d 495, 500-

01, 509-10 (6th Cir. 1996) (fourteen-year-old student sexually assaulted by an athletic coach off school grounds); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 268, 272-73 (7th Cir. 1990) (teacher sexually molested two "school-age children"); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 731-34 (8th Cir.1993) (intellectually disabled high school boy was sexually assaulted by another intellectually disabled student); Patel v. Kent Sch. Dist., 648 F.3d 965, 968-69, 972-74 (9th Cir. 2011) (developmentally disabled high school student was sexually assaulted by classmate when she was permitted to use restroom alone even though her parents specifically requested that she be under adult supervision at all times due to her disability); Maldonado v. Josey, 975 F.2d 727, 728, 729-33 (10th Cir. 1992) (eleven-year-old boy died of accidental strangulation in an unsupervised cloakroom adjacent to his classroom during the school day).) Alternatively, the parents may argue that Defendants had a constitutional duty to protect their child under the state-created or "special danger" theory. This is where jurisdiction is important. While some jurisdictions still recognize this theory, in others, it is a non-starter. For example, in White, the Eleventh Circuit declared the "special danger" doctrine established in Cornelius v. Town of Highland Lake, 880 F.2d 348, (11th Cir. 1989) to be "dead and buried" after Collins v. City of Harker Heights, 503 U.S. 115, 127, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). White, 183 F.3d at 1259. The Eleventh Circuit found that, where noncustodial relationships are involved, "state and local government officials violate the substantive due process rights of individuals not in custody only when those officials cause harm by engaging in conduct that is 'arbitrary, or conscience shocking, in a constitutional sense,' and that standard is to be narrowly interpreted and applied." Id. at 1259. A court in that circuit, consequently, cannot find that Defendants had a constitutional duty to protect the child from harm. Courts of Appeals openly recognize there is a substantive circuit split, however. See Butera v. District of Columbia, 235 F.3d 637, 654 (D.C. Cir. 2001) (noting the “lack of clarity in the law of the circuits”, which are “inconsistent in their elaborations” of danger creation claims); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (“It is not clear, under DeShaney, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect.”); McClendon v. City of Columbia, 258 F.3d 432 (5th Cir. 2001) (noting the “variety of tests” in the circuits).

Absent a custodial relationship, allegations of deliberate indifference are insufficient to establish a substantive due process claim. Davis, 555 F.3d at 984; see also Nix v. Franklin County School Dist., 311 F.3d 1373, 1378 (11th Cir. 2002) ("[C]ourts have not allowed due-process liability for deliberate indifference, and, moreover, will only allow recovery for intentional conduct under limited circumstances."). Instead, Defendants' conduct will "rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience-shocking in a constitutional sense." Id. at 982 (citing Lewis, 523 U.S. at 846). "The concept of conscience-shocking conduct 'duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability.'" Id. (citing Lewis, 523 U.S. at 848). "The Supreme Court has made clear 'the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.'" Id. (quoting Lewis, 523 U.S. at 848. "Thus, 'the Fourteenth Amendment is not a 'font of tort law' that can be used, through section 1983, to convert state tort claims into federal causes of action.'" Id. (quoting Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1074 (11th Cir. 2000)). "To rise to the conscience-shocking level, conduct most likely must be "'intended to injure in some way unjustifiable by any government interest [.]'" Id. (citing Lewis, 523 U.S. at 849). The analysis of the viability of this particular claim, then, falls on the question of whether the actions at issue are “conscious-shocking” and whether any of the Defendants acted with “intent to injure.” While that may be easy to establish on the part of the paraprofessional, significant questions exist as to the viability of the claim against the other Defendants.

Of course, like any other Constitutional claim, the defense of qualified immunity is always available to the individual actors. The discussion of the two-prongs of qualified immunity is well-tread and will not be discussed within the contours of this particular paper.

b. Title II of the ADA and § 504 of the Rehabilitation Act.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act likewise provides that "[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

To establish a claim under either § 504 or the ADA against a school receiving federal assistance funding, a plaintiff must show that he or she: "(1) had, or was perceived to have, a 'disability'; (2) was a 'qualified' individual; and (3) was discriminated against because of her disability." Carruthers v. BSA Advertising, 357 F.3d 1213, 1215 (11th Cir. 2004). "The discrimination requirement 'is rooted in two parts of the statute's text: plaintiffs must prove that they have either been subjected to discrimination or excluded from a program or denied benefits solely by reason of their disability. To prove discrimination in the education context, something more than a mere failure to provide the free appropriate education required by [the IDEA] must be shown.'" S.S. v. Eastern Kentucky Univ., 532 F.3d 445, 453 (6th Cir. 2008) (quoting Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 528-29 (4th Cir.1998)). In our hypothetical, it is undisputed that Plaintiff suffered from a disability and was otherwise qualified for educational benefits.

The question, then, is under what standard or framework would a court evaluate the discrimination prong? Should it be under the analytical framework set forth in Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)? Although Davis addresses Title IX liability for peer-on-peer sexual harassment, courts have applied the case law and reasoning governing Title IX peer-on-peer sexual harassment claims to § 504 and ADA peer-on-peer disability harassment claims. Long v. Murray County School Dist., 522 Fed. Appx. 476 (2013); S.S., 532 F.3d at 453 (6th Cir. 2008); Doe v. Big Walnut Local School Dist. Bd. of Educ., No. 2:09-cv-0367, 837 F. Supp. 2d 742, 2011 U.S. Dist. LEXIS 81953, 2011 WL 3204686, at *13 (S.D. Oh. Jul 27, 2011); Werth v. Bd. of Dirs., 472 F. Supp. 2d 1113, 1127 (E.D. Wis.2007); K.M. v. Hyde Park Central School Dist., 381 F. Supp. 2d 343, 359 (S.D.N.Y. 2005); Biggs v. Bd. of Educ., 229 F. Supp. 2d 437, 445 (D. Md. 2002).

Federal courts have established a five-part test that a plaintiff must satisfy to state a claim under the ADA and § 504 [*84] for peer-on-peer disability harassment:

> (1) the plaintiff is an individual with a disability, (2) he or she was harassed based on that disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment, (4) the defendant knew about the harassment, and (5) the defendant was deliberately indifferent to the harassment.

S.S., 532 F.3d at 453. Each of those prongs needs to be analyzed individually, and that is left for the discussion among those attending CLM Annual.

2. State Law Claims

a. Assault and Battery

This is the most obvious of the claims and will be the one easiest to pursue against the paraprofessional. However, absent any actual abuse (or threat of abuse) by the administrators, the only way that the parents will be able to find liability against them would be based on some form of vicarious liability or ratification. Questions regarding the applicability of vicarious liability are, necessarily, state law dependent. Whether ratification exists will depend on the particular facts that are teased out of the investigation regarding what the administrators knew ahead of the particular incidents in question.

b. Negligent Hiring/Retention/Supervision/Training

What this claim is called is largely dependent on the jurisdiction at issue. Many jurisdictions combine all these claims into one under different names while others recognize each one (or combinations of each one) as separate and distinct claims. Regardless, the claim is based on the idea that the paraprofessional never should have been hired in the first place; or at some point during the paraprofessional's employment, it was (or should have been) determined that (s)he was not fit for the job, but nevertheless, was allowed continued employment despite this deficiency. This claim is directed only at the administrators as there is no basis of liability for the paraprofessional trucking under this claim. Again, the success of this claim is highly fact dependent (as to what was done in the process of hiring the paralegal and/or what was learned during his/her employment). The negligent training claim is slightly different in that is seeks to hold the administrator liable for what (s)he did not due in providing training for the paraprofessional. The latter is something for which expert testimony will inevitably be needed.

c. Immunity

In many cases, the defense of the public employee from state law claims rests largely on the concept of immunity. Whether is it State-level Constitutional or statutory, immunities typically provide the first line of defense for public employees. Like so many other aspects of analyzing state-level claims, the question of the application of immunity is jurisdiction-specific. While some states provide complete immunity for public actors (a rare minority), most others provided limited immunities based on either the actions taken, the dichotomy of the duty in question (discretionary v. ministerial), the level of supervision being applied, or simply the type of claim being raised. Like anything else, it is incumbent upon the defense to know and understand the existence and application of any immunity defenses that might exist to state-law based claims.

C. Police Officer – Dashcam Video

Dashcam and bodycam videos are becoming more and more widespread in the media. This may be attributable to more attention by the media to be the first to secure and publish such videos. It may also be based upon police departments increased use of dashcams and bodycams to provide an objective perspective of police encounters. Whenever an encounter is captured on video and has the potential for litigation, a claims professional and/or defense counsel must not only assess potential liability, but must also work with the police department to discuss a strategy for handling the media's request for the video and/or publication of the video by the municipality itself in an effort to present the entire encounter.
Often times, the ten second snippet of a video on the news does not provide the viewer with a full perspective of the entire encounter. That is why some municipalities consider publishing all video and/or

audio themselves to provide a better perspective of the encounter and events leading up to and after the encounter. In doing so, a municipality, while trying to control the narrative, must be sure to provide an objective perspective. The municipality must also ensure they comply with any applicable state laws regarding dissemination/publication of dashcam/bodycam video and personal identifiers of individuals.
Our scenario begins with a citizen observing what she believes is a suspect breaking into and stealing a car. The citizen observes the suspect drive away, decides to follow him in her vehicle and calls 911. The citizen identifies herself and provides a description of the height, weight, race and clothing of the suspect, the vehicle the suspect is driving and the street and direction the suspect is traveling to the 911 operator while continuing to follow the suspect.

The 911 operator broadcasts the call of a reported stolen vehicle, a description of the suspect and the purported stolen vehicle and the area the suspect is traveling. Multiple police units quickly locate the suspect, activate their emergency lights and pull him over to perform a felony stop of the vehicle. The suspect exits the vehicle and a physical encounter ensues. Multiple officer converge on the suspect and use force to detain and handcuff him. The officers later learn that the suspect was actually the owner of the vehicle and the citizen misinterpreted the suspects actions.

D. Publication of the Dashcam Video and 911 Audio

There was no initial media request for the dashcam video and 911 audio. The suspect, now the plaintiff, also made no effort to publish the dashcam video despite having possession of all video and audio related to the stop before filing a lawsuit. Once a lawsuit was filed, the media requested the video from the police department. The police department wanted to ensure an accurate account of the encounter was portrayed to the public. In doing so, the police department chose to publish the video and 911 audio on its website before disseminating it to the media. The police department also included a videotaped narrative account of the encounter performed by a police supervisor shown before the video and audio.
The plaintiff will later argue that the narrative account is a slanted perspective of the encounter and portrays him in a negative light thereby damaging his reputation. When the initial audio was published, the municipality did not redact the identity of the 911 caller, but instead included the full audio in which the 911 caller identified her full name. The police department quickly redacted the 911 caller's name, but by then, the public had already learned of her identity. The public located the 911 caller on social media and posted negative comments regarding her decision to call the police that day. The 911 caller also received negative feedback from friends and co-workers.

E. Plaintiff's Claims – Alleged Damages

1. Causes of Actions

In the above scenario, the plaintiff may allege several different federal and state law causes of action. Federal claims under 42 U.S.C. § 1983 for alleged violation of the plaintiff's Fourth Amendment rights may include causes of action for: false arrest, wrongful detention, excessive force, failure to intervene and perhaps a *Monell* claim. State law claims may include: false arrest, battery, intentional infliction of emotional distress and defamation. Defamation you ask? One may not expect a defamation claim based upon a typical false arrest/use of force police encounter. However, police departments must be mindful of such claims when choosing to publish their own video or otherwise communicating with the media.
Rather than discuss the common causes of action brought in these typical police encounters, we will focus on the plaintiff's claimed reputational damages and best practices for handling dissemination and/or publication of the video/audio.

2. Reputational Damages

For purposes of our hypothetical, we can assume that the plaintiff retained a media expert and an internet expert to testify why his reputation has been permanently damaged due to being portrayed in a negative light by the police department. The focus of the plaintiff's claimed reputational damage is not the publication of the dashcam video and/or 911 audio, as said video and audio would have likely been published regardless of the municipality's efforts due to a media request. Instead, the plaintiff claims the narrative video shown before the dashcam video and 911 audio portrayed him in a negative light because it was allegedly not objective and omitted certain facts. The plaintiff claims this portrayal of him has permanently damaged him both personally and professionally.

3. Best Practices

A municipality should work closely with its claim professional and defense counsel prior to making any public comment or disseminating/publishing video and/or audio footage. In our hypothetical, the police department attempted to control the message by creating a short narrative video wherein a commanding officer discussed the incident and why the police officers acted appropriately. However, the plaintiff claimed the narrative was not objective and omitted certain facts reflecting his innocence and, by doing so, portrayed him in a negative light. The narrative video was the foundation for his alleged reputational damages.

Defense counsels must consider all applicable state laws before disseminating any video. Some statutes require authorization by the subject and/or potential plaintiff. Statutes may also require redacting other individuals from the video who are not the subject and/or potential plaintiff. Applicable laws and/or statutes may also require the removal of certain personal identifiers of the subject and others depicted in the video. And do not forget to examine the audio. Defense counsel must carefully examine the audio transmission as well to remove certain personal identifiers and/or other information.

Defense counsels must be mindful of a possible claim for defamation should the municipality consider preparing its own narrative video to comment on the videos/audios of the incident in which it will publish. A plaintiff is not limited to asserting a defamation claim in an effort to allege reputational damages. Plaintiffs have been permitted to allege reputational damages based upon other causes of action as well. For instance, courts have allowed a plaintiff to claim reputational damages as a "special injury" under a malicious prosecution claim. Freidas v. Sani-Mode Mfg. Co., 33 Ill.2d 291 (S.Ct. 1965). Niebur v. Town of Cicero, 212 F. Supp.2d 790 (2002).

II. Investigation

When faced with a claim involving video, one must consider the facts as a whole to determine the circumstances of the incident.

Even before coverage is established, make sure you preserve ALL the video. Sometimes the first notice we have of bad video is after a claim has come in. But often we hear about an incident even before a claim is filed. Regardless of how we know about the claim, it is best to be proactive…not reactive. Many governmental agencies only keep video for a short amount of time. If you wait a year to ask for it, it will likely be gone. While there are times that might be a good thing, there are more times that it will not. You need to make sure you preserve all evidence as soon as possible.

Upon receipt of the video, make sure you watch it…sometimes more than once. It can be helpful to freeze a frame and do a timeline. Is there audio? Can you hear what they are saying? What is their body language? Does it help or hurt?

Scan the video into your claims or litigation system and attach. Therefore, if something happens to the disk or flash drive, you have what you need as part of your file.

III. Insurance Coverage:

When faced with litigation involving video, one must consider the facts as a whole to determine the circumstances of the incident. First, was the employee/officer acting within the scope of their employment? This will play an important role in determining whether a coverage issue exists. Are there any other exemptions or exclusions that might apply? Coverage counsel should be consulted to determine whether a viable reservation of rights exists.

1) Scope of employ
2) Guilty plea
3) Malicious exclusion
4) Assault and Battery Exclusion
5) Punitive damages

A. Assignment of Counsel

Counsel will be assigned as to their individual client(s) and instructions given accordingly. These directions are critical to equitable and fair provision of defense for multiple insured defendants. These are not one size fits all. We must consider:

1) Identify when separate counsel involved are for different parties and/or Insurer
2) The video may depict other entities responding to the incident. Insure no conflict for counsel among the defendant entities
3) Litigation may be brought against the involved officer(s), their superior officers, their department, and even against judicial entities.
4) Determination as to whether one defense attorney may represent all parties, or whether the known facts present a clear conflict, will determine separate counsel.
5) In some insurance instances, the coverage for different departments within the entity may be different. Coordination of defense allocation, and proper reporting, are very important.
6) Additionally, it may become necessary for separate claims handlers be assigned towards different components of the overall case. Example: one claim handler for coverage, one for the litigation.
7) Potential conflicts when officers can assert qualified immunity, and the entity is left in the litigation, or vice versa

IV. Evaluation

A. Case-by-Case

No two cases have exactly the same facts or potential exposures. Indeed, no two plaintiffs or their counsel will be the same when factoring for early settlement potential. Recognizing ultimate exposures early-on and prospects of prevailing at dispositive motions/trial.

As in the recognition of “bad facts,” the initial fact pattern—along with the venue/judges—will determine the likelihood of getting out on motion, especially with a video. Prospects for reasonable resolution given awareness of issues regarding the video. If the video is the Claimant’s we may want to challenge it.

If the initial facts from the initial investigation reveal the virtual certainty of adversity against an “insured”, the opening reserve—especially for indemnity—should be factored accordingly. Past cases of a similar nature may be used for this sort of evaluation. With social media, the inflammatory nature of a video must be considered.