

SCHOOLS: 1. A school board has no authority to purchase
INSURANCE: liability insurance to cover its own negligent
actions; 2. A school board is given authority to
purchase an individual liability insurance policy on an employee
to cover his negligence occurring during the normal activities of
the school district; 3. The purchase of liability insurance by a
school board to be paid as compensation to its employees does not
waive the sovereign immunity of a school board.

Op. No. 140-1976 should always be September 9, 1969
sent with this opinion.

OPINION NO. 93

Honorable William J. Cason
State Senator - 31st District
Capitol Building
Jefferson City, Missouri 65101



Dear Senator Cason:

This letter is in response to your request for an opinion of this office in which you ask whether a school board can purchase liability insurance, and assuming a purchase by a school board does this purchase waive sovereign immunity?

We consider this as a request which asks two questions, to wit:

"May a school board purchase liability insurance covering its own negligence?"

"May a school board purchase liability insurance for its employees to cover their negligence occurring during the normal activities of the school district?"

You also ask whether in the above two instances a purchase of insurance would work a waiver of sovereign immunity, or if the insurance carrier could successfully interpose the governmental immunity as a defense.

I.

The Supreme Court of Missouri has consistently stated the law to be that when suit is brought against a school board which relates to the board's negligent performance of a governmental

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function no cause of action is stated, Cochran v. Wilson (Mo. Sup. 1921), 229 S.W. 1050; Krueger v. Board of Education (Mo. Sup. 1925), 274 S.W. 811; Todd v. Curators of University of Missouri (Mo. Sup. 1941), 147 S.W.2d 1063; Smith v. Consolidated School District (Mo. Sup. 1966), 408 S.W.2d 50. Thus, because of the doctrine of sovereign immunity, no liability arises against a school board when it performs a governmental as opposed to a proprietary function.

As a practical matter then, a school board need not purchase liability insurance to protect itself from its negligent acts. Your question asks, however, whether a school board has the discretionary authority to purchase liability insurance to cover its negligent acts.

We feel this question has been answered negatively by the Missouri Supreme Court in Cochran v. Wilson, 229 S.W. 1050, where after a full discussion of the basis for sovereign immunity being applied to schools, the Court states, l.c. 1054-1055:

"Another equally cogent reason why the board of education cannot be required to respond to an action of the character of that at bar is the nature of the fund intrusted to its care and distribution. School funds are collected from the public to be held in trust by boards of education for a specific purpose. That purpose is education. An attempt, therefore, to otherwise apply or expend these funds is without legislative sanction and finds no favor with the courts. Cases in which hospitals have been held exempt from actions for damages for negligence on account of their character as charitable institutions may not inappropriately be cited in this connection * * * *

(citing cases)

"If it is against public policy as ruled in the foregoing cases to divert charitable funds, so called, from other than the purpose for which they have been collected how much stronger is the case where the funds are the fruit of taxation, belong to the people, and are to be used for the beneficent purpose of free education. Their immunity from the payment of damages for negligence need not rely, however, upon the analogous rule applicable to the funds of charitable

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institutions, but finds express approval in Freel v. School of Crawfordsville, supra, Ford v. School District, 121 PA 543, 15 Atl. 812, 1 L.R.A. 607, Wiest v. School District, 68 Or. 474, 137 Pac. 749, 49 L.R.A. (N.S.) 1026, Weddle v. School Com., 94 Md 334, 51 Atl. 289, and numerous other cases of like character." (Emphasis added)

We find no legislative enactments which have expanded the authority which a school board has over its trust funds in regard to such an expenditure since the Cochran case, and therefore conclude that a school board has no authority to purchase liability insurance to cover its own negligent acts.

II.

Because we have found that a school board may not purchase liability insurance to cover its negligent acts, your questions as to whether such a purchase would work a waiver of sovereign immunity and whether the insurance carrier could interpose the governmental immunity as an affirmative defense in a suit brought against the insurance policy become moot.

III.

A second question inherent in your letter was whether a school board may purchase liability insurance for its employees to cover their negligent acts occurring during the normal activities of the school.

By statute, school boards have the power generally to contract for the employment of teachers certified by the State Department of Education and also to contract for the employment of non-teaching personnel, to wit:

"168.101. Employment of teachers - contracts - nepotism prohibited - employment of superintendent. -- The school board, at a regular or special meeting called after the annual school meeting, may contract with and employ legally qualified teachers for and in the name of the district. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with him * * *"

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"168.191. Superintendent and teacher contracts in high school districts (class one counties). -- In all counties of the first class, any school board, other than boards in urban districts, in charge of a public school system maintaining a classified high school, previously approved by the state board of education, and employing a superintendent devoting his full time to supervisory and administrative work, may employ and enter into contract with a superintendent of schools for the school district for a period of not to exceed three years * * *

" * * * The school board of such high school districts may enter into contracts, for a period not to exceed two years, with school teachers, * * *"

"168.201. Superintendent and employee contracts in urban districts. -- The school board in urban districts may employ and contract with a superintendent for a term not to exceed four years from the time of making the contract, and may employ such other servants and agents as it deems necessary, and prescribe their powers, duties, compensation and term of office or employment which shall not exceed two years. It shall provide and keep a corporate seal."

"168.211 (3) * * * Subject to the approval of the board of education as to number and salaries, the superintendent may appoint as many employees as are necessary for the proper performance of his duties." (Emphasis ours)

These statutes then must form the basis from which a school board receives the authority to purchase liability insurance for its employees covering their negligence, or the reasoning implicit in Cochran will apply and deny such authority.

In each of the sections cited, it can be seen that a school board is given authority to contract for the payment of its employees' services; by Section 168.101, supra, a board is given authority to contract for a teacher's "wages"; by Section 168.191, supra, the statute merely says a school board may "contract" a superintendent, and said superintendent may "contract" teachers; by Section 168.201, supra, a school board may "contract" a superintendent and other servants and prescribe their "compensation"; by Section 168.211 (3)

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a school board may set the "salaries" of the employees which may be hired under this section.

It would appear then that the legislature has not attempted to limit the form the consideration for employee services is to take, but instead has given a school board the authority to contract for "wages", "salaries", and "compensation." The question then becomes, may a liability insurance policy purchased for an employee be legally considered as part of said employee's "wage", "salary", or "compensation"?

An initial question herein is whether the terms "wages", "salary", and "compensation" are interpreted under the statutes set out as being synonymous.

The Missouri courts have interpreted salary to mean compensation, State v. Farmer (Mo. Sup. 1917), 196 S.W. 1106, and also have included wages in the definition of compensation. Bovard v. Kansas City Ft. S. Ry. Co. (Mo. App. 1900), 83 Mo. App. Rep. 498, in construing statutes with wording similar to those involved herein. As the court specifically notes in Bovard, these words may by statute have different meaning:

" * * * Although wages and salary have at times a different meaning, we think that in this instance they have been used interchangeably and as meaning the same thing -- or rather that wages was intended to include salary."

We find, consistent with the foregoing authority, and from a contemporaneous reading of the statutes involved herein that the terms "wages", "salary", and "compensation" are synonymous.

Were the factual situation involved herein to arise in the private sector, it would not be unlike the payment by an employer for the premiums on an individual accident insurance policy for the benefit of his employee. In such an instance, the Internal Revenue Service considers such a payment as compensation for services under the Internal Revenue Code of 1954, 26 U.S.C.A. 61, Section 61, and thus as taxable income accruing to the employee, Rev. Rule 210, CB 1953-2, p. 114. Thus, it can be seen that the payment of insurance premiums is a common and accepted method of compensating an employee for services rendered.

It appears then that unlike the problem inherent in Cochran (lack of statutory authority to spend funds), we find that school boards have been given specific statutory authority to contract for employee services, and to tender compensation for said services; and it further appears that "compensation" is generally interpreted

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so as to include the purchasing of insurance for an employee. It is the conclusion of this office then that a school board is given authority to purchase an individual liability insurance policy on an employee to cover his negligence occurring during the normal activities of the school district.

IV.

Your next question was whether purchase of liability insurance by a school board paid to an individual employee as compensation for services would act as a waiver of a board's sovereign immunity?

It must be remembered here, however, that in our frame of reference a school board has not purchased liability insurance on itself but has as a form of compensation for services made payment to its employees in the form of a liability insurance policy which power a board has by statute. Thus, a board has not attempted to cover its negligent liability by insurance and no waiver or estoppel problems arise.

It is the conclusion of this office then that purchase of liability insurance by a school board to be paid as compensation to its employees raises no question of waiver of sovereign immunity in light of the fact that there is no attempt made to insure against a school board's liability.

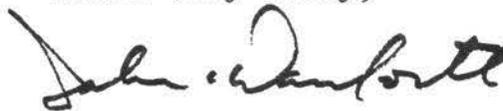
CONCLUSION

It is the conclusion of this office then that:

1. A school board has no authority to purchase liability insurance to cover its own negligent actions;
2. A school board is given authority to purchase an individual liability insurance policy on an employee to cover his negligence occurring during the normal activities of the school district;
3. The purchase of liability insurance by a school board to be paid as compensation to its employees does not waive the sovereign immunity of a school board.

The foregoing opinion, which I hereby approve, has been prepared by my assistant Kenneth M. Romines.

Yours very truly,



JOHN C. DANFORTH
Attorney General