Potential Legal Liability in Farm-to-School Programs

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Introduction

There is a big push for schools to engage in farm-to-school programs. Much of this push is over concern over the unhealthy nature of school lunches and child obesity. However, this article is not here to discuss the reasons for having a farm-to-school program, but rather discuss the legal liability a school district will expose itself to if it enters into a farm-to-school program. There are two main potential components to a farm-to-school program: 1) the school starting up a school-run farming program for educational purposes, and/or 2) the school incorporating fresh local produce into the food it serves in the cafeteria. These options are not dependant on one another and the school can decide to do one or both of these programs.

The main liability that could result from the operation of a school-run farming program is tort liability such as injury caused by negligence or nuisance claims based on the farm operation. While there is inherent danger involved in running a farming program, public school districts should not be too concerned with normal tort liability because the school board, school district, and agents of the school will be shielded from tort liability through the operation of Michigan’s government immunity statutes. While there are exceptions to this immunity, they are few, and through immunity and the implementation of a participation waiver, the school district should be almost totally shielded from all tort claims. Private schools should be more concerned, as they are not protected by government immunity, but through the observance of proper safety standards and participation waivers they should be protected.

While the school is shielded from tort liability through immunity or participation waivers, potential liability exists from the service of food in the school cafeteria through the incorporation of fresh produce into the school lunch program. The difference is that there are contract claims that can be made that are inherent in the sale and service of food, known as implied warranties, which cannot be waived. By selling food to it students, the school is guaranteeing that the food is merchantable and fit for its particular purpose. The school may be held liable for all actual damages stemming from injury caused by the food it serves if the food is tainted in some way.
However, this risk is low, given the rarity of, and difficulty in proving, food borne illness and any risk that is assumed by the school can be incorporated in the school's insurance package.

**Potential Torts Stemming From a School-Run Farm Program**

There are various potential tort liabilities that could stem from a school-run farm program. Farms are not always the safest of places, but with the right safety precautions, a farm program could be a safe educational environment for students. Below is a very basic discussion of the various tort claims that could stem from the operation of a school-run farm program. This discussion is intentionally limited to the most common potential tort claims a school will be faced with because government immunity statutes will shield school districts and its agents from most tort liability and private schools can greatly limit exposure to tort liability through the use of participation waivers.

**Negligence Liability**

Negligence is the most likely claim to arise from a school-run farming program. Negligence is a tort claim that is based upon the idea that people have the duty to exercise the care that a reasonable person would exercise in any given moment.1 This duty is imposed to protect other individuals from danger that stems from another person’s property or any inadvertent or omission.2 Essentially, to bring a successful negligence claim the plaintiff(s) must show that a duty existed, that duty was breached by the defendant(s), and that breach was the cause of the claimed injury.3

**Nuisance Liability**

Nuisance is also a likely claim stemming from a farming program. There are two main categories of nuisance claims recognized in Michigan: nuisance *per se* and nuisance in fact.4 Nuisance *per se* is established by proving a circumstance that is a nuisance that is a nuisance at all times under all conditions.5 While this is sometime called a “nuisance in law,” local authorities lack the power to deem violations of local ordinances as nuisances *per se*. Nuisance in fact, on the other hand, is a question of common law and may be found “where there is a natural tendency to create danger and inflict injury to a person or property.”6 A trier of fact will decide whether there was in fact a nuisance and what the remedy should be.

It should be noted that there are two different types of nuisance in fact: intentional and negligent nuisance. In an intentional nuisance claim, intent is concerned with the mindset of the individual or institution when the nuisance was created. Intentional nuisance litigation is the important thing for a school district to consider when implementing an educational farm program because, as discussed below, intentional nuisance is not covered by governmental immunity.7

While there are different types of nuisance, the differences are not in what remedies are available, but rather what proof is needed to show that a nuisance occurred.8 To avoid nuisance claims, a school should consult a licensed attorney to determine potential nuisances. Nuisances are typically location specific, so it is important to get individualized advice on how to avoid these claims.

**Government Qualified Immunity from Tort Claims (applies only to public schools)**
Michigan has a government immunity statute that protects all government institutions and actors from tort liability so long as the claim arose out of a government function. The operation of a public school district has been determined to be a government function under this statute. Essentially, this means that a school district and those qualified acting on behalf of the school will be immune from all tort claims with certain exceptions. This is important in the context of a farm-to-school program because injury may occur in the operation of the farm and/or neighboring properties may want to bring nuisance claims based on the farm operation.

What is a Government Function?

As stated above, the operation of a school district has been determined to be a government function. However, all activities a school district engages in are not automatically a government function. In determining a governmental function a court considers “whether the purpose, planning, and carrying out of that particular activity, due to its unique character or governmental mandate, can be effectively accomplished only by the government.” For instance, a function that is deemed a proprietary function – in other words, solely profit motivated - is not considered a government function.

Public Schools consistently qualify as a government function. This means that the operation and programs of a school will be protected from tort claims, with the below exceptions, as long as programs is not a proprietary for profit function. This could be an important factor to consider when designing farm education programs, as it may not be appropriate sell produce to the public. The school should design the program so any funds raised are only to benefit the program and further its interests. This should prevent a ruling that the sale of produce is a propriety function.

For added protection, some school may consider purchasing additional liability insurance for the program. In some states, the purchase of liability insurance waives government immunity. Michigan is not one of those states. The purchase of liability insurance by a school will not waive government immunity.

In addition, the government immunity will also generally extend to the school’s employees running the program. The employees must believe they are acting within the scope of the school’s government function, and are not protected for gross negligence. These concepts are explained in the following section.

Exceptions to Government Immunity

There are several exceptions to the Michigan government immunity statute. Below is a basic description of the exceptions that apply to the school context.

Outside of the scope of the government function

School employees are protected from tort claims if he or she was acting within the scope of his or her governmental function when the alleged tort occurred. So if a recess supervisor was negligent in supervising the activities at recess and a student was injured because of this negligence, this supervisor is still protected by government immunity because he or she was not acting outside the scope of his or her authority. Acting outside the scope of a governmental function would be something like abusing a child during recess because the abuse is outside the scope of the function of the school.
Public Building Defect

There is also an exception to governmental immunity if a public building is faulty and that defect caused an injury. However, for this exception to apply the injured would have to show that the school district knew or should have known the defect existed and after a reasonable time the actual or imputed knowledge was formed the school did nothing to fix the problem. The defect could be a result of disrepair, improper design, faulty construction, or the absence of safety devices. This exception deals exclusively with structural defects or an absence of necessary safety devices. For example, in a case where the school used a classroom that was not equipped with the required safety features for a chemistry classroom, the school was held liable for injuries caused by an exploding jug of alcohol because the room was not properly equipped.

Motor Vehicle Exception

Injuries that are caused by a motor vehicle that is owned by a governmental agency are not shielded by governmental immunity. For this exception to apply the injury must have been a direct result of negligent use of a motor vehicle and in the actual presence of the motor vehicle. This exception acknowledges the inherent danger involved with motor vehicles and mandates extra care and caution in their operation.

Gross Negligence

If an employee or agent of the school is found to have acted in gross negligence and that negligence caused injury to another, that employee or agent will not be protected by government immunity. Gross negligence is defined by the courts as “conduct so reckless to demonstrate a substantial lack of concern for whether an injury results.” To be held liable for an injury because of gross negligence, the individual’s gross negligence must be the proximate cause of the injuries. Proximate cause means “the one most immediate, efficient, and direct cause” of the plaintiff’s injuries. Whether or not an individual’s negligence is determined to be gross negligence is a question for the trier of fact. This is a very high standard and it is looked at on a case-by-case basis. It can be a very difficult case to prove; there were no cases found to provide an example. It should be noted that this gross negligence exception only applies to the individual actor and not the school district as a whole.

Intentional Nuisance In Fact

A government employee or agent’s nuisance is not covered by government immunity where the employee who caused the nuisance knew or should have known his or her acts would cause a nuisance. In other words, the school district is immune from an intentional nuisance claim, but the employee who effectuated the intentional nuisance is not protected. To establish intent a plaintiff must show that the individual or institution that created the nuisance knew or should have known that there was substantial certainty that the plaintiff would be harmed as a result of the actions that caused the nuisance. Because individuals who cause an intentional nuisance are not protected by government immunity, schools should be careful about where they operate potentially annoying activities, such as compost piles, spraying any chemicals, or disposal of waste.
Private School Tort Liability

Private Schools do not enjoy the shield that government immunity allows public schools and are theoretically fully liable for all tort claims that occur in the execution of their educational programs. This should be a concern for a private school interested in starting a school run farming program, but it should not foreclose the idea.

Some school activities have an inherent danger in participation. Schools allow students to strap on plastic padding and helmets and run into each other at full speed, some students are allowed to handle dangerous power tools, and students are allowed to throw other students into the air while cheering for the school sports team to name a few. Students engaging in these activities are hurt and/or injured at times, but schools none the less offer such activities. Schools should consult a lawyer for advice on their specific program if they are interested in adding gardening or farming to their extra-curricular offerings.

Conclusion to Tort Liability Stemming from Farm-to-School Program

Generally, schools and agents of the school will be shielded from tort liability through Michigan’s government immunity statutes. This will not keep the school entirely out of court, as government immunity is a defense to liability. The typical procedure for raising government immunity is in a motion for summary judgment in response to a law suit. Typically this involves arguing that the conduct in question does not fall within one of the exceptions of government immunity. Whatever the ruling, appeals may follow. In the end, farm-to-school programs should be considered a government function given the broad interpretation of what constitutes a government function and schools should be safe from typical tort liability. It is important to keep in mind the exceptions when designing a program. Caution should be exhibited with the implementation of motor vehicles, building design and maintenance (particularly if the school purchases an existing structure), and preventing nuisances stemming from the operation of the farm. Schools districts could further protect themselves and their agents by mandating the signing of a waiver of all liability claims as a prerequisite to a student’s participation in the program. Schools in Michigan that have farming programs have implemented such waivers.

Again, this is not legal advice, but rather a guide to facilitate a conversation with someone who can offer individualized legal advice. All schools should consult an attorney for specific advice tailored to their particular programs.

Contract Liability Schools May Encounter

Even though the school district and its agents will be shielded from tort liability, barring the above mentioned exceptions, the school district and employees can be held liable for breach of contract, specifically breach implied warranty. The main concern is food borne illness caused by food served in the cafeteria.

An implied warranty is not a formal contract in the generally recognized sense in that there is no written formalization, but they are contracts none-the-less. There are two distinct implied warranties that are relevant to the sale of food: 1) Implied Warranty of Merchantability and 2) Implied Warranty of Particular Use. While there is a technically legal difference in these implied warranties, in the school cafeteria context both of them ensure that food served is safe to eat and it an at least of average quality. In both cases, the implied warranty essentially promises that food is safe and fit to eat. If someone becomes ill from food served in the cafeteria, the victim...
can sue the school for breach of the implied warranty. This is considered a contract claim, not a tort claim, so the above discussion of government immunity does not apply here.

Schools are liable for injury caused by all food served in the cafeteria, from a farm-to-school program or not, because of these implied warranties. The obvious next question is what are they potentially liable for? The school will be liable for the actual damages caused by the food they serve. Actual damages can include medical bills, loss of income, etc. These damages are distinguished from exemplary damages, like pain and suffering. Exemplary damages are only available where tortuous conduct or bad faith influenced the breach. It should also be noted that the seller and producer are equally liable for a breach of implied warranty, so a plaintiff can sue the seller, the producer, or both.

Conclusion - Why Start a Farm-to-School Program with the Risk of Liability From Food Borne Illness?

The bad news is that a school district may be liable for food borne illness caused by the food incorporated into their school lunch program from a farm-to-school program. The good news is that the risk is very manageable through adequate food safety measures and insurance coverage. If properly managed, food from a farm-to-school program can be very safe and extremely nutritious. If the school is only the seller (where the school is outsourcing fresh local produce) who is cleaning the food and how the food is to be cleaned should be arranged in the agreement. If the school is the producer and seller (where the school is incorporating food from its own its school-run farming program) food safety should be implemented as a part of the farming program or in the cafeteria to ensure safety. The school should also consult with its insurance provider to incorporate any risks into its claim.

It should also be pointed out that there are very few cases where schools were held liable for food borne illness from the cafeteria. Michigan specifically has little, if any, instances where schools were liable for a food borne illness. It should be noted that a lengthy search of case law and news articles produced no instances where school districts were held liable for causing food borne illness. While there is risk, as there is with anything, it is a manageable risk that can be dealt with through proper food sanitation and insurance.

Overall Conclusion

Schools should not be overly concerned with liability from farm-to-school programs whether they are starting school-run farming programs or if they are outsourcing local produce to incorporate into the cafeteria. The tort claims that may arise through the operation of the school-run farming program are almost entirely shielded by government immunity. There are a few exceptions, but they are manageable exceptions when they apply to the school district, or they are exceptions that apply only to individual who act outside the scope of their employment.

When dealing with the contract liability that is inherent in the selling of food, the school can manage the risk through a well thought out food sanitation program and with insurance coverage. Farm-to-school programs are a great way to show the community that the school is concerned with the health of its students. While there are risks involved, those small risks are not outweighed by the great good of the programs.

MCL 619.1407(2). The Michigan Supreme Court has held that an individual government employee will be immune from tort liability only when he or she is:
in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
(b) The governmental agency is engaged in the exercise or discharge of a governmental function.
(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.


Id.

Id.


Nelson, 931 F. Supp. 1345


Id.

Id.


MCL 691.1405. Actual presence as opposed to being caused indirectly by the motor vehicle, i.e. if a tractor leaves a deep rut in a field and a student trips in the rut. The motor vehicle, presumably, would not apply because the injury was not a direct result of the vehicle and the vehicle was not present. Id.

MCL § 691.1407(2); Nelson, 931 F.Supp. at 1358.


MCL 691.1407(2)(c).


See Id.


Id.

