ELEMENTS OF LIABILITY AND RISK MANAGEMENT
II. Torts

1. A tort is a private or civil wrong or injury for which the law will provide a remedy in the form of an action for damages.

3. Differs from criminal actions.
   a. Civil actions are brought by individuals; criminal prosecutions by the state.
   b. The goal of civil actions is to compensate the injured; criminal prosecutions protect the public.
a. Common Law Torts:

(1) Negligence. Conduct which falls below a standard the law establishes for the protection of others against unreasonable risk of harm.

(2) Intentional Torts. Actor intends a particular consequence as a result of his actions.
B. Negligence (page 3)

1. Elements:

A. Duty

B. Breach

C. Proximate Cause

D. Damages
a. Duty

Legal obligation to conform to an applicable standard of care established for the protection of others against unreasonable risks of harm.

(1) The general duty of care requires every person to act as a reasonably careful person would under the same or similar circumstances.
(1) For children, the standard of care is what is reasonably expected of a child of like age, intelligence and experience.

(2) For a teacher, officer or employee the standard of care is generally that which a reasonable person in that position would exercise under like circumstances.
c. Proximate Cause

(1) An actor’s negligence is the legal cause of harm to another if: (a) his/her conduct is a substantial factor in bringing about the harm and (b) there is not a rule of law relieving the actor from liability because of the manner in which his/her negligence resulted in harm.
d. Injury (or damages)

- Property damage
  - repair/replace
  - loss of value
  - lost use
d. Injury (or damages)

- Personal injury
  - Past medical expenses
  - Future medical expenses
  - Loss of wages/earnings
  - Loss of future earning capacity
  - Loss of full mind and body – past
  - Loss of full mind and body – future
  - Physical and mental pain and suffering – past
  - Physical and mental pain and suffering - future
d. Injury (or damages)

- Death
  - Present worth of value of estate
  - Burial expenses
  - Spousal support
  - Children support
d. Injury (or damages)

- Consortium
- Spouse
- Children
2. Defenses (page 5)

a. Comparative Fault Act

(1) Generally, those parties in the suit are attributed a percentage of fault by the court, in accordance with the findings of the court or jury.

(2) Plaintiff is not barred from recovery unless his/her fault is over 50 percent. If Plaintiff’s fault is 50 percent or less, he recovers his/her damages proportionately reduced by the percentage of fault attributed to him/her.
b. Sovereign Immunity & Iowa’s Municipal Tort Claims Act (Chapter 670) (page 6)

(1) Sovereign immunity is the concept that the government can’t be sued without its permission or “The King Can Do No Wrong.”

(3) A school district is liable for the torts of its officers, agents and employees acting within the scope of their employment or duties.

(4) Employees generally include persons providing services for the district even if not compensated.
(5) The School Board shall defend its officers and employees and hold them harmless and indemnify them against any tort claim or demand occurring within the scope of their employment or duties.
c. Release

(2) In the tort context, releases are generally written contracts absolving a party of liability for injuries including injuries caused by that party’s negligence.
C. Intentional Torts (page 8)

1. b. Liability imposed when a person intends his/her act even if there was no intent to injury the person; the intended act even may have been a practical joke.
2. Examples of intentional torts (page 8):

a. Assault.

   (1) An assault exists when one intentionally puts another in immediate apprehension of harmful or offensive physical contact.

b. Battery.

   (1) A battery consist of contact with the person of the plaintiff, or something attached to him/her, which is harmful or offensive measured by the standards of a person of ordinary sensibilities.
c. Infliction of mental or emotional distress (page 9)

(1) (a) Outrageous conduct by the defendant;

(b) Defendant’s intent to cause or reckless disregard of the probability of mental distress;
(page 10)

(c) Severe emotional harm; and

(d) A causal relationship between the defendant’s conduct and the mental distress.
3. Defenses to intentional torts (page 11)

a. Consent.
b. Self-Defense.
c. Defense of others.
d. Defense of property.
E. Some specific torts
(page 12)

1. Educational Malpractice.

3. Defamation.
   a. Types:
      (1) Libel – written
      (2) Slander – oral
b. Elements:

(1) Declaratory statement (not an opinion);

(2) Published or communicated to someone other than the defamed person;

(3) False-Malice, “knowledge of falsity or reckless disregard for the truth” must be proven in some cases; and

(4) A resulting injury in some cases must be specifically proven.
c. Defenses:

(1) Truth.

(2) Privilege.

(3) May mitigate damages.

(4) May limit damages to actual damages by retraction.
4. Negligent Supervision

   (page 14)

   a) Duty
   b) Breach
   c) Proximate Cause
   d) Damages
5. b. Peer sexual harassment (page 15)

(1) Plaintiff is a member of a protected group;
(2) Plaintiff was subject to unwelcome sexual harassment;
(3) The harassment was based on sex.
(4) The harassment was sufficiently severe or pervasive so as to alter the conditions of the Plaintiff’s education and create an abusive educational environment; and
(5) Some basis for institutional liability has been established. If the school knew or should have known of the harassment in question and failed to take prompt remedial action, the fifth element could be met.
6. Other Civil Rights Torts

a. The Civil Rights Act, 42 U.S.C. § 1983, prohibits any state actor from “causing the deprivation of any rights, privileges or immunities secured by the constitution and laws.”

b. Relief may be by (1) injunction or (2) money damages.

c. When execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.”
f. Discipline and due process  (page 16)

(1) The premise of due process is to insure:

(a) Fundamental fairness; and

(b) Notice and opportunity to be heard.
(6) Substantive and procedural due process.

(7) Rules must not be vague and must be publicized to give students/parents notice.

(6) Rules must be fundamentally fair in their application.
(1) Notice

(2) Opportunity to be heard

The more that is at stake – the more process is due.
f. (13) Student Searches –
Iowa Code Chapter 808A

(a) i) Search rules must be reasonably related in scope to the circumstances which gave rise to the need for the search.

ii) Search rules must be based upon consideration of relevant factors, including the following:

a) Nature of the violations for which the search is being instituted;

b) Age and gender of the student;

c) Objectives to be accomplished by the search.
(d) A search may not be done if it is unreasonable in application as measured by the following, pursuant to Iowa Code § 808A.3:

(i) Age of the student;

(ii) Non-seriousness of the violation;

(iii) Sex of the student; and

(iv) Nature of the suspected violation.
(e) Prohibited searches include the following, pursuant to Iowa Code § 808A.2(3):

(i) Strip searches;

(ii) Body cavity searches;

(iii) Searches of a student’s body using a drug sniffing animal; and

(iv) Search of a student by a school official not of the same sex as the student.
g. Violations of Freedom of Speech (page 23)

(6) Iowa Code § 280.22 (2001) explicitly provides for students’ rights to exercise freedom of speech, including free expression in official school publications. However, it prohibits student expressions, publication, or distribution of:

(a) Obscene material;
(b) Defamatory materials;
(c) Materials which encourage students to:
   (i) Commit unlawful acts.
   (ii) Violate lawful school regulations.
   (iii) Cause the material and substantial disruption of the orderly operation of the school.
h. Religious Freedoms: Free Exercise v. Establishment
(page 26)

(1) “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”

(2) A natural tension exists between the two clauses. If you go too far in protecting against violating one clause, you risk violating the other clause or other First Amendment rights.
(3) Exercise Clause

If a law/regulation interferes with the ability of the student to follow a sincerely held belief, a court would balance the factors to determine whether the government should grant the person an exemption. The balance test evaluates:

(a) The gravity of the student’s interests.

(b) The strength of the state interest - i.e., whether it is a compelling interest.

(c) Alternative means available.
(4) Establishment Clause --
the Lemon Test (page 27)

(a) the law/rule must have a legitimate secular purpose (it need not be the only purpose);

(b) its primary effect must neither promote nor inhibit religion; and

(c) the statue/rule must not facilitate an excessive governmental entanglement with religion.
i. Vocational Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794, prohibits discrimination on the basis of handicap for programs or activities receiving federal funding assistance.

j. The Individuals With Disabilities Education Act.
F. Miscellaneous (page 32)

4. Workers’ Compensation Act
III. Practical Suggestions

A. Identify Risks
B. Board Policies
C. Claims Management
D. Records
E. Risk Management Audit
F. Insure