



Discretionary and Recreational Use Immunity

When representing schools in litigation, attorneys assert various defenses. This article breaks down two of those defenses: discretionary immunity and recreational use immunity.

Discretionary Immunity

School boards and employees make dozens of important decisions every day. Some decisions lead to lawsuits, and some decisions lead to defenses *against* lawsuits. Discretionary immunity is a defense that arises out of a public school's policy decision-making.¹ When used effectively, discretionary immunity can make lawsuits go away.

What is it?

Discretionary immunity is a defense against allegations that a public school engaged in wrongful conduct that can be connected to one of the school's policy decisions.²

When does this defense come into play?

Let's say someone sues a public school after they slip on an icy sidewalk on school property and break their ankle. The plaintiff alleges that the school was negligent because it incorrectly applied deicing agents to the sidewalk, and also because it used rock salt instead of a more effective "ice melt" product. The discretionary immunity defense becomes available when the school can show that it: (1) has a policy about deicing sidewalks; (2) considered various options for its deicing policy (rock salt vs. ice melt vs. sand), but ultimately selected rock salt because it is less expensive, easier to clean up, and provides better traction; and (3) implemented that policy.

This defense may be available in lawsuits involving policy decisions about student supervision,³ installation of fencing, barriers, warning signs, and other safety features,⁴ and inspection, maintenance, and repair of equipment or facilities.⁵

¹ Oregon Revised Statutes (ORS) § 30.265(6)(c).

² *Ramirez v. Hawaii T&S Enterprises*, 179 Or.App. 416, 419 (2002).

³ *Rush v. Corvallis Sch. Dist.*, 291 Or.App. 252 (2018).

⁴ *Garrison v. Deschutes Cty.*, 334 Or. 264 (2002).

⁵ *Ramirez*, 179 Or.App. 416 (2002).



It is important to note when the discretionary immunity defense is *not* available. Routine decisions made by employees in their day-to-day activities do not enjoy discretionary immunity.⁶ Let's say the school has a policy for deicing sidewalks, but not parking lots. After deicing the sidewalks, a school employee has some leftover rock salt in the bag, so they spread it over part of the parking lot. If the slip and fall occurs in the parking lot, the school employee decision to deice the parking lot with rock salt would not likely be subject to discretionary immunity.

Why does the discretionary immunity defense exist?

The defense exists because courts should not be “Monday morning quarterbacks,” second-guessing whether a public school made the correct policy decision, particularly when those decisions were made after careful consideration.

Who are these decision-makers?

Typically, discretionary immunity is available for decisions made by a supervisor or a school board.⁷

How can I take advantage of this defense?

- Ensure that policy decisions in your school are made by an appropriate authority;
- When making policy decisions about supervision, inspection, maintenance, warnings, etc., carefully consider and document concerns, factors, options, and alternatives;
- Inform and train school staff on policy decisions;
- Implement policy decisions consistently and with fidelity.

Recreational Use Immunity

Recreational use immunity is another defense available to school attorneys in litigation.

What is it?

Recreational use immunity limits liability for landowners who open their property up to the public, free of charge, for recreational purposes.⁸ This defense is available to both private and public schools.

⁶ *Lowrimore v. Dimmit*, 310 Or. 291 (1990).

⁷ *Mosley v. Portland School Dist.*, 315 Or. 85 (1992).

⁸ ORS §§ 105.682; 105.688.



When does this defense come into play?

Let's say a school opens up its fields and playgrounds to the public, free of charge, for recreational purposes on the weekends. If a member of the public injures themselves and later files a lawsuit, this defense may be available. What exactly the person was doing when they injured themselves will be an important issue, but "recreational purposes" is broadly defined, and includes hunting, fishing, swimming, camping, picnicking, hiking, nature study, and outdoor educational activities.⁹

Why does the recreational use immunity defense exist?

This defense exists to increase the amount of land available for outdoor activities. In exchange for providing free access to land, property owners are immunized from certain liability that might result from the use of their land. This defense traces back to nineteenth century Wisconsin, where landowners were concerned about deer destroying trees on their property. The landowners wanted to allow hunters onto their property to reduce the deer population, but feared getting dragged into lawsuits from accidents occurring on their land. To address the problem, the landowners convinced the Legislature to pass a recreational use immunity law—and the idea spread.¹⁰

Who can take advantage of this defense?

Public and private landowners who permit the public to enter their property, free of charge, for recreational purposes.

It is important to note who *cannot* take advantage of this defense. School employees are not covered by recreational use immunity, and thus are not immune from liability for their negligence.¹¹

How can I take advantage of this defense?

- Do not charge admission in exchange for permission to use school property for recreation;
- Ensure that staff properly maintain school grounds and equipment that are opened up for recreational use, and carry out other assigned responsibilities, such as inspection schedules and posting of signs warning of potential dangers.

⁹ ORS § 105.672(5).

¹⁰ *Conant v. Stroup*, 183 Or.App. 270, 277 (2002).

¹¹ *Johnson v. Gibson*, 358 Or. 624 (2018).