

# Was a Public High School's Lack of Communication Discretionary or Ministerial?

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## ***Appellate Division Sheds Light on how a Public Entity May be Exposed to Liability for Failing to Return Phone Calls from a Concerned Parent***

In a recently reported personal injury suit, a high school student was walking home from school on a busy road when he was struck by a distracted driver. He suffered many disabling injuries and brought a lawsuit against the driver as well as the school district's board for its role in setting policies about bussing transportation and hazardous routes to and from the school. The driver settled the claim with the student, but the school district pushed to dismiss the lawsuit based on a claim of immunity as a public entity. The case is *T.B. v. Novia*, No. A-1405-21, 2022 WL 1310257, (N.J. Super. Ct. App. Div. May 3, 2022). Upon appeal, the court ruled that immunity was a question to be determined by a jury's review of the facts; it was not an automatic way to avoid litigation.

## **A Mother's Concerns About Transportation, Courtesy Bussing and Hazardous Routes**

Prior to the accident, the boy's mother had contacted the school to discuss its policies for transportation which state that students who live more than 2.5 miles from the school, or who have IEP status, qualify for free transportation. The board also provided transportation services for students who do not qualify for free transportation but who must walk to and from school along hazardous routes. The board also had a system in place for designating roads as a hazardous route as well as procedures for parents to contest non-hazardous and hazardous route designations.

Although the family lived fewer than 2.5 miles from the school, the boy previously qualified for courtesy bussing services through his twin brother's IEP program, but the privilege was lost after the IEP was discharged. The route to walk home was busy, and consequently, the boy's mother contacted

the school to discuss the bussing policies. She tried to speak with the supervisor of transportation, but he never returned her calls. After leaving several voicemails and messages, she finally spoke with an employee from the supervisor's office who informed her that they were no longer eligible as they lived fewer than 2.5 miles from the school. However, the mother never received any information from the school regarding options for courtesy bussing or procedures for her to contest a non-hazardous route designation.

## The School Board's Response and Argument for Immunity

In the trial court, the supervisor testified that while he was responsible for replying to parents concerning hazardous route designations and bussing, and that a parent would have the opportunity to contest the route designation, he did not believe that the mother was contesting designation of the involved roadway as non-hazardous because her voicemails did not specifically use this terminology. Moreover, the board argued that they were entitled to immunity under New Jersey's Tort Claims Act because their actions constituted discretionary functions.

## How the Tort Claims Act Factors into the Case

The Tort Claims Act governs claims against a public entity or their employees and provides certain immunities and protections for this group. It states that immunity kicks in when an "injury results from the exercise of judgment or *discretion* vested in the entity." However, the Tort Claims Act also states that public employees are not entitled to immunity under the Tort Claims Act for negligence "arising out of . . . acts or omissions in carrying out . . . *ministerial* functions."

Here is the difference between discretionary acts and ministerial acts:

- Discretionary acts are those which call for deliberation and judgment, i.e., examining a set of facts and reaching conclusions.
- A ministerial act is one in which "a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority."

## The School Board's Burden of Proof

For a public entity or employee to successfully obtain immunity from claims against conduct, the public entity must present “proof of a nature and character that would exclude any genuine dispute of fact.” If the required facts are in dispute, the issues must be resolved by a jury.

In this case, the board argued that they were entitled to immunity because their actions constituted discretionary functions, but the trial court rejected that premise. The board appealed the decision, but the Appellate Division agreed with the trial court and reasoned that a jury must decide whether the supervisor’s failure to return the mother’s phone calls constituted an immune discretionary act or a ministerial act where immunity does not apply. Ultimately, this case was remanded to the trial court for a jury to resolve the factual issues surrounding the mother’s telephone calls to the school and the lack of informative responses.

## **The Takeaway: Lawsuits against Public Entities Require an Understanding of the Tort Claims Act**

Personal injury claims can sometimes involve defendants who are public entities. Claims against public entities and employees are complex due to the Tort Claims Act’s stringent requirements and available immunities. Beyond the difference between discretionary acts and ministerial acts, for example, the Tort Claims Act requires an injured party to act rather quickly and file a notice of claim within 90 days. There are exceptions to this 90-day timeframe, which is why it is extremely important to contact an attorney immediately following an accident to ensure that you are advised of any compliance requirements that impact the protection of your rights. The [personal injury attorneys](#) at Einhorn Barbarito have vast experience in handling cases involving public entities and employees. Contact us for a free consultation. *And*, we promise to return your call.